

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LANELL WILLIAMS-YULEE, :

4 Petitioner : No. 13-1499

5 v. :

6 THE FLORIDA BAR. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, January 20, 2015

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:15 a.m.

14 APPEARANCES:

15 ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of
16 Petitioner.

17 BARRY RICHARD, ESQ., Tallahassee, Fla.; on behalf of
18 Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ANDREW J. PINCUS, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	BARRY RICHARD, ESQ.	
7	On behalf of the Respondent	25
8	REBUTTAL ARGUMENT OF	
9	ANDREW J. PINCUS, ESQ.	
10	On behalf of the Petitioners	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in case 13-1499, Williams-Yulee v. the Florida Bar.
5 Mr. Pincus.

6 ORAL ARGUMENT OF ANDREW J. PINCUS

7 ON BEHALF OF THE PETITIONER

8 MR. PINCUS: Thank you, Mr. Chief Justice
9 and may it please the Court:

10 Florida punished the candidate seeking
11 election to judicial office because she signed form
12 letters and a Web posting soliciting contributions to
13 her campaign committee, contributions that were
14 completely lawful under Florida law. The First
15 Amendment bars Florida from prohibiting that speech.

16 The threshold question, of course, is what
17 standard of review. We submit that strict scrutiny
18 applies, the standard that was applied by the court
19 below, for several reasons. First of all, this is
20 obviously a content-based restriction. It turns on the
21 content of the speech, does it solicit a campaign
22 contribution.

23 My friend relies on this Court's decision in
24 McConnell to justify applying the closely drawn scrutiny
25 standard that has sometimes been applied to campaign

1 contribution limitations. That standard does not apply
2 for several reasons.

3 JUSTICE GINSBURG: Mr. Pincus, whatever the
4 standard, suppose the Florida rule was simply no
5 face-to-face solicitations. That's it.

6 Would you concede that that would be a valid
7 regulation or would that fall under the First Amendment
8 as well?

9 MR. PINCUS: Well, I certainly would concede
10 it in this case, Your Honor, because my client did not
11 engage in any face-to-face solicitation. So that would
12 eliminate the sanctions against her.

13 JUSTICE GINSBURG: I want to understand your
14 view of the scope of the First Amendment in relation to
15 the selection of -- the election of judges.

16 MR. PINCUS: I think a state could adopt a
17 prophylactic rule prohibiting face-to-face solicitation,
18 certainly one-on-one solicitation and perhaps as some
19 states have done solicitations in larger groups.

20 There might be some applications of that
21 rule that were -- that made that rule invalid as
22 applied, for example, a face-to-face solicitation of
23 one's relatives that have nothing to do with the
24 judicial system in the state at issue. But I think the
25 First Amendment would certainly allow the adoption of

1 that sort of rule.

2 JUSTICE GINSBURG: But the First Amendment
3 would not allow that for the candidate for political
4 office.

5 MR. PINCUS: Exactly.

6 JUSTICE GINSBURG: So you are making it --
7 you are recognizing that there's a difference between
8 judicial office -- that the First Amendment allows the
9 State to do things with respect to the election of
10 judges that it wouldn't allow them to do with respect to
11 the election of members of the legislature.

12 MR. PINCUS: Well, I guess I would amend my
13 answer to say that -- that the First Amendment might
14 allow a ban on some solicitations on a coercion theory.
15 Let me step back. There are three government interests
16 that have been advanced in this case to justify the
17 rule.

18 JUSTICE GINSBURG: Yeah, but I just asked
19 you -- you gave me an answer and now are you telling me
20 that that answer was ill considered? That is, a ban on
21 face-to-face solicitation by candidates for judicial
22 office, good or not? And it -- would it be judged by
23 the same standard as a ban on face-to-face solicitation
24 by political -- candidates

25 MR. PINCUS: I think it would be judged by

1 the same strict scrutiny standard, but I think the
2 interests that the government could advance in support
3 of that restriction in the judicial context, one of them
4 doesn't exist in the legislative context, the interest
5 in preventing bias or in preserving impartiality. And
6 one, the interest in preventing coercion of the person
7 solicited, I think, applies somewhat differently in the
8 legislative context than it does in the judicial
9 context. So I don't want to say that there's no ban on
10 solicitation that would be permissible in the
11 non-judicial context. There is a federal statute that
12 bans Congress from soliciting -- members of Congress
13 from soliciting Federal employees, for example.

14 JUSTICE KENNEDY: But if you had the statute
15 that you say would be valid barring face-to-face
16 discrimination, then you have all sorts of gradations.
17 What about a personal one-on-one letter? How is that
18 different? I can just see the Court having to say,
19 well, this is what, I guess, under -- under-inclusive.
20 And then if we say, well, the one-on-one letter, that's
21 almost like a personal solicitation, we can ban that,
22 then what about a letter to five people? And then we're
23 off to the races.

24 MR. PINCUS: I think --

25 JUSTICE KENNEDY: It seems to me when you

1 make the initial concession, you have a real problem in
2 determining how to make this not over- or
3 under-inclusive.

4 MR. PINCUS: I don't think so, Justice
5 Kennedy. I think the Court, in other contexts, has
6 certainly drawn a line between written communications
7 and oral communications. In the lawyer solicitation
8 context, for example, the Court has drawn that
9 distinction. So I think there is a reasonable
10 distinction that it says whatever the rule might be,
11 written communications are fundamentally different if
12 the interest that the government is asserting is
13 coercion. And I --

14 CHIEF JUSTICE ROBERTS: Well, which is it?
15 You know, if we meet somewhere and I take out a tablet
16 and write something down and hand it to you. Is that
17 written or oral? It's at least not oral.

18 MR. PINCUS: I guess I would say "in
19 person," Your Honor.

20 CHIEF JUSTICE ROBERTS: In person.

21 MR. PINCUS: I think the question here --
22 again, just to back up for a minute, is in -- I think in
23 all of the contexts that we're talking about here, the
24 interest is whether the person solicited is being
25 coerced.

1 JUSTICE SCALIA: Back all the way up --

2 MR. PINCUS: Sure.

3 JUSTICE SCALIA: -- and give us the three
4 interests that you started off saying were at issue
5 here. You never did get to that, did you?

6 MR. PINCUS: I didn't, sorry, Your Honor.

7 JUSTICE SCALIA: Oh, it's your fault.

8 (Laughter.)

9 MR. PINCUS: There are three interests.
10 One, the interest in preventing quid pro quo corruption.
11 One, the interest in promoting impartiality/preventing
12 bias. And third, the interest in protecting persons
13 solicited against coercion.

14 JUSTICE SCALIA: What about the interest in
15 judicial dignity?

16 MR. PINCUS: Well, that --

17 JUSTICE SCALIA: I mean, there's stuff we
18 don't let judges do that we let other people do. Such
19 as, it's at least a tradition -- I'm not sure whether
20 it's in any ethical rules, but let's assume it was in
21 ethical rules -- that judges do not respond in op ed
22 pieces to criticisms of their decisions. All right.
23 John Marshall did that but he did it anonymously.

24 (Laughter.)

25 JUSTICE SCALIA: Let's assume that that rule

1 is written into judicial ethics. Would that stand?

2 MR. PINCUS: Well, I -- I think there is
3 such an interest, we acknowledge that in our brief. I'm
4 not sure -- I don't believe that it suffices to support
5 the prohibition here for several reasons. First of
6 all --

7 JUSTICE SCALIA: No, no, but answer my
8 question. Would that be okay?

9 MR. PINCUS: Would it be okay to --

10 JUSTICE SCALIA: An interest in judicial
11 dignity. There are certain things that are infra
12 dignitatem, as we say.

13 MR. PINCUS: I think there is such an
14 interest, and I think it's executed principally through
15 the acts of judges as judges and maybe is best analyzed
16 under the government employee free speech rubric. So it
17 doesn't necessarily have to reach a compelling interest
18 in order for it to justify some restrictions on the
19 judge's speech.

20 I think, in this context, to the extent that
21 that interest doesn't apply for several reasons -- first
22 of all, we're talking about the campaign context, which
23 is different. Second of all, to the extent the interest
24 would apply, here a fundamental principle of -- of
25 Florida's regulatory scheme is that judges may write

1 thank you notes for contributions. So they can say,
2 thank you, but they can't say thank you --

3 JUSTICE GINSBURG: So if Florida law didn't
4 let them do that -- what I'm trying to find out is if
5 you think you can have different rules for judicial
6 elections than you can have for political elections. I
7 mean, we're told by the Florida judges who filed a
8 brief, that they had a horrendous problem with
9 corruption and they wanted to get a handle on it. So
10 they made this small step.

11 MR. PINCUS: Well --

12 JUSTICE GINSBURG: And they --

13 MR. PINCUS: To answer your question,
14 Justice Ginsburg, yes, there can be different rules.
15 Because two of the interests that I mentioned, the
16 interest in preventing impartiality and the interest in
17 preventing coercion, apply differently in the judicial
18 context. So I do think that in your hypothetical could
19 Florida prohibit in-person, one-to-one solicitations or
20 in-person solicitations to a group of some size as
21 states have done, yes, I think they could do that and I
22 don't think that could be done for legislative or
23 executive branch candidates.

24 JUSTICE GINSBURG: Suppose a state's view is
25 we want the -- our judiciary to be above the political

1 fray so we have this kind of restriction on putting
2 themselves forward as -- as the solicitor.

3 MR. PINCUS: Well, a couple of answers, Your
4 Honor. I think the problem with a state having that
5 interest is the state has adopted an election system
6 that puts judges in the political fray. So as the Court
7 said in its opinion in White, some things necessarily
8 come with the fact that a state has made the choice to
9 choose judges via election and that includes the fact of
10 an election and some First Amendment requirements that
11 apply to election-related speech. So I think that's the
12 problem with making that decision.

13 A second problem is the particular scheme
14 that Florida has adopted here, which as I said, does
15 allow the judge involvement in the contribution system.
16 The judge can know who solicited, can know who gives and
17 can write thank you notes. So once Florida makes those
18 decisions, the decision to prohibit --

19 JUSTICE KENNEDY: Well, how can the judge
20 not know? Especially if some states want disclosure, is
21 the judge supposed to not read the disclosure list?
22 Everybody else does, he doesn't?

23 MR. PINCUS: Well, there are some states
24 that prohibit the judge from finding out who -- who
25 knows; Minnesota, for example, has that prohibition.

1 JUSTICE KENNEDY: Well, that -- it seems
2 that -- that's just unworkable.

3 MR. PINCUS: I think there's a question
4 about how effective it is, but I do think that
5 undermine -- underlies what's really going on here.
6 That any incremental benefit that is served by a
7 prohibition on solicitation, given the reality that the
8 judge knows and especially given the fact that the judge
9 can write a thank you note --

10 JUSTICE KENNEDY: So you're suggesting that
11 there could be a mass mailing, but the judge somehow
12 could be prevented from knowing who responded?

13 MR. PINCUS: Well, that is the rule in some
14 states and I don't --

15 JUSTICE KENNEDY: I'm asking you whether or
16 not that is consistent with your theory of where we can
17 draw the constitutional line.

18 MR. PINCUS: Well, I don't -- I think the
19 Court could conclude, as -- as the Eighth Circuit did,
20 that in Minnesota, a state like that, where the judge
21 doesn't know, there is even less of a -- of a reason to
22 prohibit solicitations because the judge isn't going to
23 know who responded.

24 JUSTICE SCALIA: Good, honest, Midwestern
25 state, they're not going to tell it.

1 JUSTICE SOTOMAYOR: Can I go back to
2 judicial dignity coercion.

3 It's very, very, very rare that either by
4 letter or by personal call that I ask a lawyer to do
5 something, whether it's serve on a committee, help
6 organize something, do whatever it is that I'm asking,
7 that that lawyer will say no. Isn't it inherent in the
8 lawyer-judge context that people are going to say yes.

9 MR. PINCUS: Well, two, I don't think so,
10 Your Honor. In this -- in this solicitation, although
11 Petitioner was a candidate, there -- there was no
12 response.

13 JUSTICE SOTOMAYOR: Well, I --

14 MR. PINCUS: But I -- I think --

15 JUSTICE SOTOMAYOR: Because she was unknown.

16 MR. PINCUS: -- even when she --

17 JUSTICE SOTOMAYOR: But I'm talking about
18 this -- this is -- this prohibition is dealing with an
19 issue that does happen in the vast majority of cases.

20 MR. PINCUS: I guess, here's the contrast,
21 Your Honor, if I may. I guess the question is what's
22 the difference between that letter and the following
23 letter that's signed by the members of the committee,
24 which is totally permissible under Florida law: Dear
25 Joe, As an attorney frequently appearing before the

1 county court, we're sure you're concerned with the
2 quality of the judiciary. Judge Jones personally asked
3 us to serve on his campaign committee, and we're writing
4 to ask you to contribute to his reelection. As you
5 know, Florida law permits Judge Jones to thank
6 contributors.

7 I think once all those things are
8 permissible, who makes the solicitation really doesn't
9 make that much of an incremental difference --

10 JUSTICE SOTOMAYOR: Well --

11 MR. PINCUS: -- in an area where we're
12 talking to about compelling interest.

13 JUSTICE SOTOMAYOR: -- that's -- that's what
14 you think, but I can actually see how receiving a signed
15 letter from the judge saying, give, and -- or a
16 telephone call or a personal meeting has an
17 incrementally greater impact than a letter. I get --
18 even today I get a whole lot of campaign committee
19 letters, and I just throw them out.

20 If -- if a candidate calls me or reaches out
21 to me, I tell them I can't talk to them and I can't
22 give, okay, but I have a reason and an excuse. A lawyer
23 doesn't have that reason or excuse.

24 MR. PINCUS: And I think that's why, at
25 least one line that -- that I think is permissible in my

1 response to Justice Ginsburg is a line between written
2 communications and oral communications, either
3 one-to-one or in-person communications one-to-one in a
4 small group. I think the coercive effect, to the extent
5 there is one, is clearly greater there.

6 And the question in -- in the First
7 Amendment context where we're talking about core
8 critical speech where the Court recognized, both in the
9 charitable contribution cases in Schaumburg and Riley,
10 as well as in McConnell, that it -- it is the
11 intertwining of substantive messages and requests for
12 contributions that make both effective. Where you're
13 severing that, there has to be a really good reason.
14 And in the written communication context at least, we
15 submit, as Judge Sutton for the Sixth Circuit, and as
16 the Eleventh Circuit and as the Ninth Circuit have
17 found, there isn't enough there.

18 JUSTICE ALITO: Is there anything in -- in
19 the Florida rules -- I couldn't find it -- that would
20 prohibit Judge Jones in your example from giving the
21 committee a list of people to contact?

22 MR. PINCUS: I -- there is a rule that says
23 that judges can't -- or candidates can't do indirectly
24 what they do directly. And I frankly don't know whether
25 the Florida bar would interpret the giving of a list

1 to -- to circumvent that rule.

2 JUSTICE BREYER: But your problem --
3 problem, in a way to decide this, and it's a sort of
4 joke but it's so true in the experience of the court of
5 appeals that I had, my brother in the district court,
6 district court judges I know, in State and Federal
7 systems, that the normal response to a lawyer -- by a
8 lawyer to a judge in any minor request or, you know,
9 something normal, the answer is yes. That's until they
10 get out the door. I don't know what they say when they
11 get out the door.

12 But that is such a common experience, that
13 when the judge says, can you please -- yes. That's the
14 answer. And you have to learn how to interpret when
15 they really want to do no. And -- and that's -- that's
16 almost universal. And I thought that's why they're --
17 they're writing the rule the way they do. When it says,
18 I ask for your support, an early contribution of 25, 50,
19 100, 250 or 500 made payable to me or the campaign will
20 help, sincerely -- sign my name.

21 That's -- that's -- the answer to that
22 question is yes. And if it's the campaign manager,
23 perhaps it's no. I mean, I don't know how to go beyond
24 that, and that's such instinctive and intuitive that I
25 don't know -- I'm asking it because I want it raised to

1 the surface and -- and I want to see what there is to
2 say. You can tell me just ignore it, but I want you to
3 know it's there.

4 MR. PINCUS: Well, I -- I think, a couple of
5 things, Your Honor. I think, first of all, there is
6 not -- I think you have to compare that letter to the --
7 to the text that I read, and it seems to me, the fact
8 that the candidate's or the judge's best friend is the
9 chairman of his committee, the full committee --

10 JUSTICE BREYER: No, that's if you're maybe
11 you're looking for something -- when -- when somebody
12 else writes the letter, somebody else makes the request.

13 MR. PINCUS: But --

14 JUSTICE BREYER: This is so instinctive but
15 my instinct is it's not the same thing.

16 MR. PINCUS: But they're making the request
17 on the behalf of the judge.

18 JUSTICE BREYER: Right.

19 MR. PINCUS: I think that's the critical
20 factor --

21 JUSTICE SOTOMAYOR: So why is --

22 JUSTICE SCALIA: I mean, it doesn't -- it
23 doesn't just go to a lawyer either. The -- the
24 limitation is not solicitation of lawyers, is it?

25 MR. PINCUS: It is --

1 JUSTICE SCALIA: It's anybody, which really
2 makes me think that it has more to do with judicial
3 dignity than -- than the corruption stuff we've been
4 talking about. You can't solicit anybody.

5 MR. PINCUS: Absolutely, Your Honor. And
6 I -- and I think that's one of the problems.

7 JUSTICE SOTOMAYOR: Isn't the proof of the
8 pudding in what Justice Breyer is saying in the
9 statistics? One of the briefs mentioned that those
10 candidates who can fund-raise personally do appreciably
11 better in collecting money than the candidates who have
12 to go through a committee. So what would be the
13 difference, other than the fact that there is some form
14 of personal coercion in the presence of the judge asking
15 for the money?

16 MR. PINCUS: I don't think so, Your Honor.
17 I think the difference can -- can -- I mean, obviously I
18 don't know about where the statistics come from, but
19 even assuming that the statistics are right, it seems to
20 me in a system where we vote for a person, a message
21 from that person that combines what they stand for with
22 the request for a contribution makes that request for a
23 contribution more effective, not because it's coercive,
24 but because it's tied to what the person stands for, and
25 those parts of the message are effective when they come

1 from the person themselves.

2 JUSTICE SCALIA: I think -- I think you'd
3 find the same statistics true with respect to political
4 candidates, that they do much better when they -- when
5 they put the arm on you personally, rather than having
6 somebody else contact you. I can't imagine that'd be
7 any different.

8 JUSTICE SOTOMAYOR: Well, that's the point,
9 isn't it?

10 MR. PINCUS: Well, I think it's only the
11 point to --

12 JUSTICE SOTOMAYOR: When you put the arm --

13 MR. PINCUS: I'm sorry. I think it's only
14 the point if that arises from coercion. And as I just
15 said, I'm not sure that that's right. I think we don't
16 know.

17 We also don't know whether those statistics
18 involve States that permit one-to-one, in-person
19 solicitation, which obviously is quite different from
20 the sending of a letter. And in those States -- and
21 there are ten of them -- obviously those -- that is
22 fully equivalent to the solicitation process in -- in a
23 legislative or executive race.

24 So I think we don't quite know, but I think
25 it would be drawing the wrong conclusion to say the only

1 possible explanation is coercion. I think there are a
2 number of other more likely explanations.

3 JUSTICE KAGAN: Mr. Pincus, I take it it
4 follows a fortiori, from what you're saying, that the
5 Federal canon that applies to us is unconstitutional, at
6 least as respects to written communications, so we're
7 not allowed to put our name on fund-raising materials
8 and things like that. I take it you're saying that,
9 too, that's got to go as well; is that right?

10 MR. PINCUS: No, I don't think so, Your
11 Honor. As I -- as I said in responding to -- to Justice
12 Scalia, I think the leeway that the Federal government
13 and the States have to regulate the judges and other
14 employees because of inconsistency with their duties
15 this Court has said is much broader than it is and
16 meets -- does not have to satisfy the compelling
17 interest test as this particular restriction does. So I
18 don't think it at all follows.

19 JUSTICE KAGAN: I'm sorry, I really didn't
20 get that. Why does it not -- why is -- why -- why is
21 the restriction on us constitutional whereas --

22 MR. PINCUS: You're Federal employees.
23 You're government employees. And so the Court has said
24 in Pickering and other cases that the government,
25 whoever the responsible rule-making authority is, has

1 much more authority to regulate the speech activities of
2 government employees.

3 JUSTICE GINSBURG: So Florida could regulate
4 the already elected judge when he's running for
5 reelection?

6 MR. PINCUS: Well, I think --

7 JUSTICE GINSBURG: And he could say, we have
8 a rule: Judges don't solicit, period, for charities,
9 for themselves. So we have a judge; he's a State
10 employee. I take it from your answer and in applying
11 Pickering to a government employee that the sitting judge
12 can be restricted.

13 MR. PINCUS: No, I don't think so, Your
14 Honor, because I think this is speech in a different
15 category any -- any more than the government can say,
16 we're going to use Pickering to respect the solicitation
17 speech of a sitting congressman or State legislature.

18 I think it is the election context and the
19 fact that the State has chosen to choose its judges via
20 election that triggers the protections --

21 JUSTICE KAGAN: But, you know, I would
22 think -- I would think it's -- it's just the opposite,
23 right, that in a case for Federal judges -- like you
24 say, there's not really much of an interest. Who cares
25 whether I solicit funds on behalf of my old law school.

1 It doesn't have anything to do with what rulings I'm
2 going to issue, who I'm going to favor, who I'm not
3 going to favor.

4 In this case, the State can really come in
5 and say, you know, the things that we're objecting to,
6 the solicitations that we're preventing are exactly the
7 ones that are going to go to whether this judge can be
8 an impartial judge rendering fair verdicts.

9 MR. PINCUS: I think that's wrong on two
10 counts, Your Honor. I think there is -- again, where
11 the judge can know who contributed and can write a thank
12 you note, the idea that prohibiting the judge to asking
13 contributes in any way --

14 JUSTICE KAGAN: Well, you're -- I'm sorry.
15 Please.

16 MR. PINCUS: I'm sorry -- contributes in any
17 way to the protection of that interest seems
18 inconceivable if the question is, is there bias?

19 What Florida has basically made -- made a
20 basic determination that a thousand dollar campaign
21 contribution limit is going to protect our interests
22 against bias.

23 And so the question, then, is: Are any of
24 these other activities going to create such an
25 appearance?

1 And where the State has said a thank you
2 note, which seems more --

3 JUSTICE KAGAN: Yes. You keep on going back
4 on that. But, I mean, do you think it would be
5 allowable for the State to say, no, that even the
6 chairman can't -- can't make those solicitations? So
7 you keep on falling back, well, they allowed the
8 chairman or they allowed the thank you notes.

9 So now let's say, you know, the State says,
10 look, we've been trying to do this because we've been
11 trying to narrow the law in order to accommodate First
12 Amendment interests; but if you're going to throw that
13 back in our face, we'll apply it to the campaign chair,
14 too. We'll apply it to thank you notes, too. Those
15 will also be impermissible.

16 Would that be constitutional?

17 MR. PINCUS: I think if the State wanted to
18 adopt a system of public financing for judicial
19 candidates, that it might well then be constitutional
20 for the State to ban solicitations on the McConnell
21 theory.

22 JUSTICE KENNEDY: What about the answer to
23 Justice Kagan's question?

24 Is it, oh, well --

25 MR. PINCUS: I don't think --

1 JUSTICE KENNEDY: Oh, well, I'm not going to
2 answer that question because we -- we can think about
3 something else?

4 MR. PINCUS: I think the answer to that
5 question is no, because the contributions are still
6 permissible. And the line that the Court drew in
7 McConnell, in terms of solicitation limitations, was
8 it's quite permissible to ban candidates from soliciting
9 contributions that cannot lawfully be made to their
10 committees when there are other avenues -- when they can
11 still solicit contributions for their committees.

12 I think it would be quite a different
13 situation to say, yes, we're going to have an election,
14 but no one can solicit any money for the campaign
15 committee because, as the Court has said, money is -- is
16 essential to get the candidate's message out.

17 JUSTICE GINSBURG: The whole -- but the
18 whole effort on Florida's part is to make the selection
19 of judges not like the political context.

20 And you -- what you're saying is that
21 they -- if they choose to elect their judges, they can
22 do it only one way and the same rules apply to the
23 judges that apply to candidates for the State
24 legislature.

25 MR. PINCUS: Well, respectfully, Your Honor,

1 I don't -- I don't think so. I think there are two
2 distinctions. One is, I do think once Florida says
3 thank you notes are okay, it can't ban solicitations.
4 There might -- it might have a better case to justify
5 its State interest if it didn't do that.

6 And I do think, as I said, the coercion
7 rationale applies differently with respect to judges and
8 would -- would permit limitations that don't apply.

9 If I may, Mr. Justice, I'd like to reserve
10 the balance of my time.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Richard.

13 ORAL ARGUMENT OF BARRY RICHARD
14 ON BEHALF OF THE RESPONDENT

15 MR. RICHARD: Mr. Chief Justice, and may it
16 please the Court:

17 I'd like to begin by responding to Justice
18 Alito's question. The answer is that there's nothing in
19 Florida law or in the canons that prohibits a candidate
20 from giving names to the committee for the purpose of
21 the committee soliciting from those individuals.

22 What the Florida canon is designed to do is
23 something that this Court has recognized previously in
24 Buckley and McConnell, which is to cut the direct link
25 that creates the quid pro quo relationship by keeping

1 the judge from communicating, with the judicial
2 candidate from communicating directly with the person
3 that he or she desires to receive the funds from.

4 JUSTICE SCALIA: Unless it's a thank you
5 note.

6 MR. RICHARD: That's correct, Your Honor. I
7 think that what we're --

8 JUSTICE SCALIA: I mean, once you say you
9 can send a thank you note, what -- what you've just said
10 is not true.

11 MR. RICHARD: Well, if -- if what we focus
12 on, which is what my colleague and opposing counsel
13 focused on, is the intimidation issue, I agree with you.
14 Either the intimidation issue or the effort to curry --
15 to -- to say you've curried favor, I agree with that.
16 But there's another factor here that this Court has
17 recognized is almost equally, if not equally important,
18 which is the appearance of the quid pro quo and the
19 appearance of corrupt influence that is inherent in the
20 quid pro quo that the -- that results in a public loss
21 of confidence in the judicial system.

22 CHIEF JUSTICE ROBERTS: Well, but there's
23 not always such an appearance. What if a judge calls,
24 you know, a college classmate, says, you know, believe
25 it or not I'm a judge and -- and I'm running for

1 election. Could you give me some money? Direct --
2 direct in person -- or direct solicitation. But nobody
3 would say there's any real risk of corruption because
4 he's calling up his old friends, let's say, who's not --
5 they're not lawyers.

6 MR. RICHARD: I think, Your Honor, that what
7 we deal with here, in response to your question, is
8 similar in kind to this issue of how many people are
9 being addressed.

10 This Court has said that in circumstances
11 like this, the Court has no scalpel, to use its words,
12 as to where to draw the line. The question is what's
13 judicially manageable?

14 And so the question then becomes where
15 there's going to be a line drawn, is it unreasonable for
16 the State to say, we're just going to prohibit it, we're
17 not going to try to micromanage who it is --

18 CHIEF JUSTICE ROBERTS: Well, there's a
19 difference between micromanaging and overinclusiveness
20 or under-inclusiveness. I mean, could -- this could be
21 easily limited to litigants or lawyers appearing before
22 the Court.

23 MR. RICHARD: It could be, Your Honor. But
24 then the question is what the appearance to the public
25 is; and the second question is, because it's always a

1 question in First Amendment cases, how does this weigh
2 against the imposition on the candidate's First
3 Amendment rights?

4 This Court has recognized -- it did in -- in
5 both Buckley and McConnell -- that one of the reasons
6 that it upheld it and one of the reasons that it applied
7 a lesser -- a lesser standard of review was because it
8 said that the imposition on -- on the -- on the
9 communicative value of the contributions was marginal.

10 In this case, it's even more marginal.

11 JUSTICE SOTOMAYOR: I -- I -- be careful
12 with that line because there's a number of Justices on
13 the Court that dissented from that --

14 MR. RICHARD: I - I --

15 JUSTICE SOTOMAYOR: -- and Citizens United
16 has brought that into question.

17 MR. RICHARD: I -- I --

18 JUSTICE SOTOMAYOR: So assuming that's not
19 the argument, what's the better response?

20 MR. RICHARD: No, I understand. I
21 understand, Your Honor. Perhaps it was -- it was not
22 the best way to lead into it. But my point here --

23 JUSTICE SCALIA: Well, you only need five
24 votes, and there were five votes there.

25 (Laughter.)

1 JUSTICE SCALIA: Don't be too intimidated.

2 MR. RICHARD: I'm getting to try to get your
3 vote as well, Justice Scalia. I haven't reached that
4 point yet. But -- and I understand it's a high mountain
5 to climb, but -- but the point here that I'm trying to
6 make is that this is an extremely minimal imposition of
7 the candidate's freedom of expression, if there's any
8 imposition at all.

9 JUSTICE GINSBURG: Could they -- could
10 Florida apply this canon to candidates for political
11 office?

12 MR. RICHARD: You're saying could it?

13 JUSTICE GINSBURG: Yes. If Florida says, we
14 think it's such a good idea for the judges, we want to
15 make it across the board, no candidate for political
16 office can make a direct appeal for money.

17 MR. RICHARD: I think it would be far more
18 difficult to convince the Court that that would be
19 constitutional, and here's the reason: It's because of
20 what Justice Kennedy has recognized as what he coined
21 the -- the good responsiveness and the bad
22 responsiveness.

23 In a democratic society, in a republican
24 form of government, candidates in the other two branches
25 are expected to commit themselves in advance to certain

1 positions and are expected to comply with that once
2 they're elected in order to do what their supporters
3 expected them to do when they supported them with
4 financial contributions and otherwise.

5 When we're talking about judges, there is no
6 good responsiveness to a supporter or a contributor.
7 Judges are expected to be impartial, regardless of
8 whether or not --

9 JUSTICE SCALIA: Really? A judge -- a judge
10 can't campaign, you know, I'm going to be tough on
11 crime?

12 MR. RICHARD: That's a -- that's a different
13 issue, Your Honor.

14 JUSTICE SCALIA: Why? That's good
15 responsiveness, I thought.

16 MR. RICHARD: Well, I think that's
17 responsiveness to an issue; and I think the judges do
18 have preconceived positions, but not responsive to an
19 individual.

20 JUSTICE SCALIA: Ah, okay.

21 MR. RICHARD: That's the difference, and
22 it's a big difference.

23 CHIEF JUSTICE ROBERTS: Is there really a --
24 the prospect of the appearance of partiality if you have
25 a radio ad that -- with the judge and says, you know,

1 these -- this is my philosophy, please send me a
2 contribution? Is anybody going to think, oh, that judge
3 is not -- is going to be partial to one side or another?

4 MR. RICHARD: Well, I -- I think that two
5 things are occurring there.

6 The answer to your question is, I don't -- I
7 can't presuppose who's going to think he's partial, who
8 isn't. I understand your point, Your Honor. I think
9 certainly, you don't think that he's partial to a given
10 individual at that stage, but that solicitation is a
11 solicitation of a quid.

12 JUSTICE BREYER: Well, go back for a second, to
13 me, because I actually think judges should try to keep
14 their preconceptions under control and decide the
15 individual case. And I think that is a widely shared
16 perception and I think that Florida has every right to
17 say we want to further that.

18 But what is your distinction between what I
19 took as an important argument on the other side, and
20 maybe you've said it already but I want to hear it
21 again. Florida lets judges write thank-you notes for
22 contributions so there is direct contact and the person
23 who has given the money knows that the judge knows that
24 he gave it.

25 MR. RICHARD: That's right.

1 JUSTICE BREYER: All right? What's the
2 difference between that and this rule, which says that
3 the judge cannot write to that individual in the first
4 place asking for the money.

5 MR. RICHARD: I have several answers to
6 that, Your Honor.

7 JUSTICE BREYER: One -- just one would be
8 enough, but I want to know what they are.

9 MR. RICHARD: I understand, but I want to use
10 every weapon I have in my arsenal.

11 So the first answer is that at the time that
12 the money is being solicited the contributor, if it is
13 solicited through a third person, doesn't know whether
14 the judge will ever find out. He can find out, but the
15 person making the contribution doesn't know whether the
16 judge will ever find out, whether he's ever going to
17 receive a thank-you note or not. He just doesn't --

18 JUSTICE BREYER: And is it unlawful under
19 Florida law to put in a letter written by the campaign
20 manager "and I will tell the judge"?

21 MR. RICHARD: To say what? I'm sorry.

22 JUSTICE BREYER: "And I will tell the
23 judge."

24 MR. RICHARD: It's not unlawful --

25 JUSTICE BREYER: All right. Very well,

1 then, he might know.

2 MR. RICHARD: But there is a difference --

3 JUSTICE BREYER: All right. So what's the
4 second one?

5 MR. RICHARD: My second argument?

6 JUSTICE SOTOMAYOR: What -- my --

7 JUSTICE BREYER: I want to know what the
8 differences are, which is a main point that was argued
9 that once you say they can write a thank-you note, and
10 indeed, as you've added, in the initial letter you can
11 say, "and I will tell the judge"? Once Florida permits
12 those things, what is it that Florida's current 7C
13 interpretation adds to that? And if it adds nothing of
14 significance, why is it constitutional? That's their
15 whole argument.

16 MR. RICHARD: Yes.

17 JUSTICE BREYER: I want to hear your
18 responses.

19 MR. RICHARD: Yes, Your Honor. That's the
20 underinclusiveness argument, and my response is that the
21 underinclusiveness argument has never been applied by
22 this Court to say that --

23 JUSTICE BREYER: You know, I would prefer --
24 maybe there is no answer.

25 MR. RICHARD: Well, I think there is.

1 JUSTICE BREYER: One answer is to say it
2 does exactly the same, it adds nothing but you don't
3 have to deal with every problem. I've got that answer.
4 Do you have any answer that says it does add something?
5 If so, what?

6 MR. RICHARD: I believe that Florida could
7 prohibit the thank you note as well, but it doesn't
8 change the fact -- by not prohibiting, it does not
9 undermine the fact that by telling judges that they
10 cannot personally, face-to-face or by buttonhole or by
11 telephone call solicit it, that it does reduce
12 significantly the public's impression of the fact that
13 there is a quid pro quo.

14 JUSTICE SCALIA: If you -- if you write a
15 thank- you note, you are not a mendicant. You are not
16 going around holding your hat out asking people for
17 money. But you're not relying on that, are you? You're
18 not relying on the judicial dignity --

19 MR. RICHARD: I am not.

20 JUSTICE SCALIA: -- the dignity of the
21 office that is held or sought? That -- that's -- that
22 has nothing to do with Florida's rule.

23 MR. RICHARD: I'm not relying on that, Your
24 Honor, I believe that if we're talking about
25 expressive conduct, that it's unlikely that this Court

1 would uphold it based upon the dignity of a given judge.
2 It's possible that if the action rose to the point where
3 it undermined the public's confidence in the judiciary
4 as a whole, it might be sustained. But I agree with you
5 that if all we're talking about is the dignity of a
6 judge who is going around with a hat, I think that
7 probably would not be sufficient for this Court to
8 uphold it. But --

9 JUSTICE SOTOMAYOR: First of all --

10 JUSTICE GINSBURG: I thought the whole idea
11 of the Florida Supreme Court when they adopted this rule
12 is just that, that they wanted to put judges above the
13 political fray, so they didn't want them to seek
14 contributions. Call it dignity, call it the integrity
15 of the judiciary, call it the public shouldn't perceive
16 of judges as being political officers, so we shouldn't
17 say an election for a judge is the same thing as an
18 election to the legislature. The whole idea is to put
19 the judiciary in a separate category. I thought that
20 was Florida's idea.

21 MR. RICHARD: Well, I think that's true,
22 Your Honor. It's not only Florida's idea. I think it
23 clearly reflects the culture of this Nation, because
24 virtually every State has adopted significantly higher
25 standards of ethics for their judicial branch than for

1 the other two branches. And I think that goes to
2 Justice Kennedy's distinction between the good and the
3 bad responsiveness which is --

4 JUSTICE SOTOMAYOR: Counsel, I think you
5 answered Justice Breyer a little too quickly.

6 If the letter ended with, "I'm going to tell
7 the judge you gave me money," then there might be a
8 violation of that other code that doesn't permit a
9 candidate to do -- to try to circumvent the personal
10 solicitation rule.

11 MR. RICHARD: Thank you, Your Honor. I
12 agree with you.

13 JUSTICE SOTOMAYOR: And, number two: You
14 had started, I think, in answering the question of the
15 quid pro quo difference between a thank-you and the
16 initial ask.

17 MR. RICHARD: Yes. And -- and of course the
18 one area where this Court has consistently recognized
19 that the State can validly regulate contributions and
20 solicitations is in its effort to break the direct quid
21 pro quo, the direct communication between the judge
22 requesting the money -- in this case a judge as opposed
23 to the -- even in the other two branches, the Court has
24 recognized that, but the judge requesting the money
25 directly from the person who would be contributing.

1 And when one envisions what does not exist
2 in Florida and most States at the current time, which is
3 a judge being able to pick up the telephone or visit any
4 lawyer who ever appears before him, or for that matter
5 any nonlawyer who might end up appearing before him or
6 before her, and ask for a contribution, and compare that
7 to a third person saying to a voter or a contributor,
8 "My friend, Joe Smith, is running for judge and I would
9 appreciate it if you would give me money," I think it
10 would be difficult for anyone who has lived in our
11 society for any significant period of time to say that
12 it is not a significant difference, and the public
13 recognizes that. And the effect of it --

14 JUSTICE ALITO: We have before us a case
15 involving a particular person. She did something and
16 she was disciplined for it. So don't we have to compare
17 what she did and some -- the thing which is regarded by
18 the Florida law as being unethical, and what she could
19 have done, and see whether there -- the incremental
20 difference has any significant relationship to any
21 interest that this rule is supposed to serve? Does
22 it -- was there a greater danger of quid pro quo
23 corruption or the appearance of corruption or bias or
24 coercion, the difference between what she did and what
25 she could have done?

1 And what she could have done as I understand
2 your answers is the following: She could have -- a
3 letter could have been sent by a committee and the
4 letter could have -- could have said that Petitioner
5 gave us your name and asked us to solicit a contribution
6 from you, and that's what we're doing. And the letter
7 could either say, "and we'll let the judge know if you
8 gave a contribution" and -- or the candidate know, and
9 she can write you a thank-you note, she will write you a
10 thank-you note if you contributed. Or, you speak for
11 the Florida bar, so you said it would be okay to put
12 that in the letter, but if that's not, at least you
13 could put in the letter and under Florida law the
14 candidate can see the list of people who contributed.

15 So those are the two situations. Now why
16 was there any greater damage done by what she did as
17 opposed to what you admit she could have done?

18 MR. RICHARD: Well, I would say the greater
19 damage again goes to the fact that she is personally and
20 publicly requesting a quid from people who can be
21 expected to appear before her. And it is Florida's
22 concern over the public's reaction to that, which I
23 would suggest is a fair concern and this Court has found
24 in the other two branches is a fair concern over the
25 public's confidence in the judicial system.

1 JUSTICE BREYER: It's not just confidence in
2 the judiciary, is it? I mean, to ask -- for a judge to
3 ask for a quid puts pressure on people to give it. And
4 that is a different evil than their simply knowing what
5 happens, and I would say probably worse. To send a
6 thank-you note is a form of politeness that creates
7 knowledge, but does not to the same degree put pressure
8 on the person to contribute.

9 Now, is that fair or not fair? And don't
10 just say yes because you think it's on your side,
11 because I'll have plenty of people pointing out to me
12 that it isn't necessarily a good argument, if it isn't.

13 MR. RICHARD: Your Honor, I -- I think it is
14 clearly a good argument because it's difficult for me to
15 give you another reason because you said it so
16 eloquently. But I do believe that there is a
17 significant difference between a judge requesting
18 specifically a contribution or later saying thank you
19 for the contribution.

20 Now when you add to it what if the letter
21 said the judge will know about this later, that murkies
22 the water a bit, although there's no evidence that's
23 ever -- ever been --

24 JUSTICE GINSBURG: Mr. Richard, there is
25 something that the other side has said about your

1 position and I'd like your answer to it, that is that
2 what you are advocating will help the people who are
3 already in the judiciary, the people who have lots of
4 money so they don't need contributions from others, the
5 people who will be hurt are like Ms. Yulee, who is
6 trying for the first time. In other words, the Florida
7 bar has set up a system that works in favor of
8 incumbents, yes, current officeholders and the rich.

9 MR. RICHARD: I disagree with that, Your
10 Honor, and I find it curious that the Petitioner would
11 suggest that if we take the restrictions off of
12 incumbent judges so that they're now free to call
13 lawyers who appear before them or litigants who might be
14 appearing before them and ask for money, that that
15 wouldn't give the incumbent an enormous advantage over
16 non-incumbent judges. It seems to me that it would.

17 But we're also dealing here in an area in
18 which there is no evidence either in the record or in
19 the literature to suggest that it makes any difference
20 and also --

21 CHIEF JUSTICE ROBERTS: Well, I'm sorry, but
22 you -- up to this point you've been saying what a
23 significant difference it makes whether someone can
24 solicit in person or not, and that's why you've drawn
25 the line there.

1 And now you're telling us, well, it doesn't
2 make much of a difference at all.

3 MR. RICHARD: No.

4 CHIEF JUSTICE ROBERTS: It seems to me that
5 it's -- it's self-evident, particularly in judicial
6 races, where that the -- prohibiting a form of raising
7 funds is to the great advantage of the incumbent because
8 the only way that, in most judicial raises, the judge --
9 incumbents are going to be challenged if you have
10 somebody who can get their own distinct message out.

11 MR. RICHARD: Well, I have two responses,
12 Your Honor, and excuse me if I didn't clearly express
13 myself in my response to Justice Ginsburg's question.

14 But what I'm saying is, clearly, when you
15 tell an incumbent judge that that judge can personally
16 solicit money, that's going to give an incumbent judge,
17 who has far more intimidation power, an advantage over a
18 non-incumbent. And as to weighing which is going to
19 give more or less advantage, it's difficult to answer
20 that question, and generally this Court doesn't find
21 itself in the business of equalizing the playing field
22 in any case. So I don't know that it makes any
23 difference.

24 But the other fact is that we have no
25 evidence in this record or in the literature or in the

1 case law to suggest that this is a factor. It -- under
2 any circumstances.

3 The other thing I'd like to comment, if I
4 might go back to the question that Justice Alito asked
5 me earlier, is I think that there is another linkage
6 here that's important, which is this: If you look at
7 the difference in the impact upon this Petitioner's free
8 speech between sending a letter to one person or
9 personally confronting one person and, on the other
10 hand, sending it to 5 or 10 or 50 people, if it would
11 even be manageable to make a distinction, it doesn't
12 move the free speech needle in this case one iota
13 because there's very little impact upon that candidate's
14 free speech. No matter how many people the candidate is
15 talking to, the candidate can still say anything he or
16 she wants to about qualifications, about issues, about
17 cases, about anything he or she wants to. This Court
18 said so in *White*, and the Florida canon doesn't attempt
19 to put any restriction on it.

20 The only thing it says is you can't say to
21 me, give me money. And this Court has recognized in
22 *Buckley* and in *McConnell* that the only communicative
23 value of saying, give me money, is that when you get
24 money, it enables you to broadcast your message more
25 widely. And the Court has said that that only rises to

1 constitutional level when the restriction is go great
2 that you can't broadcast your message reasonably.

3 Here, the committee can raise money, and we
4 have no evidence, again, in the record, the literature,
5 the case law, that --

6 JUSTICE KAGAN: And --

7 JUSTICE SCALIA: Where did we say that? I
8 don't -- I don't know the case that says that --

9 MR. RICHARD: That says --

10 JUSTICE SCALIA: That it's only bad if the
11 restriction is so great that you cannot broadcast your
12 message reasonably?

13 MR. RICHARD: No, that was --

14 JUSTICE SCALIA: What law? That's -- that's
15 the only test, you -- you can have all sorts of campaign
16 restrictions so long as they do not prevent and we're
17 going to sit in judgment about whether they prevent the
18 candidate from --

19 MR. RICHARD: No, what I referred to --

20 JUSTICE SCALIA: What -- what case are you
21 referring to?

22 MR. RICHARD: What I referred to, Your
23 Honor, is the discussion in Buckley and when it said
24 that -- that the restriction on campaign contributions
25 and the amount of a contribution, that it's -- it's

1 communicative value was in the ability to be able to
2 broadcast the message, and that it only became
3 constitutionally significant if it was so Draconian that
4 the person could not raise enough money to reasonably be
5 able to broadcast the message.

6 Now, that's not the wording that the Court
7 used, but that was the essence of what the Court said.

8 My only point here is there's no -- nothing
9 to suggest that Florida -- that Canon 7C(1)'s
10 methodology is such that a candidate cannot raise enough
11 money to be a viable candidate. And so what you're left
12 with is no imposition, appreciably, on a candidate's
13 expressive ability. And I think you fairly have to
14 connect that to what Florida, on the other hand, is
15 trying to avoid, which is this appearance of the -- this
16 quid pro quo and the appearance of corrupt influence
17 which is a significant --

18 JUSTICE SCALIA: All the First Amendment
19 requires is not that you have unlimited capacity to
20 speak, but that you -- you be able to speak a reasonable
21 amount. Is that -- that what the First Amendment
22 demands?

23 MR. RICHARD: Well, I think that you be able
24 to speak as much as you desire --

25 JUSTICE SCALIA: As much as we think is

1 reasonable -- we, the judges.

2 MR. RICHARD: I -- I think that that's more
3 broadly stated than you, the judges, have said in the
4 past.

5 JUSTICE SCALIA: Broadly stated as you
6 stated it, I think.

7 MR. RICHARD: No, I think it's as much as
8 you desire to speak until you reach the level where you
9 have -- you have interfered with another substantial
10 State interest. How substantial that has to be depends
11 upon the standard of review that the Court applies.

12 CHIEF JUSTICE ROBERTS: I -- I still don't
13 see how that's inconsistent with the rest of your
14 argument. What you've been saying before is it's just a
15 little bit that we prohibit, so don't worry about it.
16 And -- and I mean the -- the prohibition was limited to
17 the important area. It's face-to-face that is
18 important. And now you're saying it's no big deal
19 because they can do all these other things. How do you
20 reconcile those two positions?

21 MR. RICHARD: Well, I'm not saying that it's
22 no big deal. I don't think we can ever say that when
23 we're dealing with free speech.

24 What I'm saying is that this Court
25 historically has weighed the degree of imposition

1 against the substantial interests that the State is
2 attempting to serve. In this case the State is serving
3 an interest that this Court has recognized, at least in
4 the area of the quid pro quo, that the State that has
5 not only a substantial --

6 JUSTICE BREYER: Where does it come from,
7 justice shall not be sold nor shall it be denied? I
8 mean, that's at least 800 years old. And if that
9 defines the role of the judge, which I think it does,
10 you're saying that it isn't. It is a -- you do look to
11 the degree to which you are interfering with the free
12 speech, which is some degree, some, and it's not speech,
13 it's really how you solicit money; and on the other
14 side, how that interferes with that basic role of the
15 judge. So then is it not relevant?

16 But the interference, even with raising
17 money, which is at one degree from speech, is small.

18 MR. RICHARD: I believe it is relevant. I
19 believe that this Court, in almost all of its major
20 First Amendment cases, has asked that question.

21 CHIEF JUSTICE ROBERTS: Well, 800 years ago,
22 judges were not elected. I mean, I appreciate the
23 challenge you're -- you're under. You're kind of
24 backing and filling.

25 The fundamental choice was made by the State

1 when they said we're going to have judges elected, and I
2 mean, you're kind of, as I say, you're trying to patch
3 the problem there.

4 But, I mean, you have a situation where the
5 people in the State have said we're going to have judges
6 elected and we're going to recognize that you can
7 contribute to judges because of there are contribution
8 limits.

9 It seems to me you -- you're under a great
10 burden in trying to figure out how you're going to fix
11 that without contravening the First Amendment.

12 MR. RICHARD: It is a great burden, Your
13 Honor, and --

14 JUSTICE BREYER: Why is it a great burden?
15 Does it change because you elect the judge, that you're
16 changing the fundamental role of the judge?

17 MR. RICHARD: I don't mean that it's a
18 great -- a great burden to make that point. What I mean
19 is that we have election of judges, which many people
20 think is a burdensome system for selecting judges for a
21 lot of reasons.

22 But the fact is we have that, and Florida,
23 under the United States Constitution, is entitled to
24 have that. And what's more, in order to change the
25 Florida Constitution, 60 percent of the voters of

1 Florida would have to vote to change it, and a
2 substantial number of the voters in Florida have voted
3 to change it unsuccessfully, and so what we're faced
4 with is we're faced, as we said in the brief, with the
5 reality that Florida is trying to weigh two fundamental
6 constitutional interests and find a reasonable
7 compromise. One is the interest in free speech. The
8 other one is the undeniable interest, because it's
9 essential to a stable democracy, of having a judiciary
10 which avoids both the reality and the appearance of
11 corrupt influence.

12 JUSTICE ALITO: If we looked at -- if
13 somebody looked at the contributions to the candidates
14 in an election for a county court judge in Florida, what
15 percentage of the contributions would be found to have
16 come from practicing lawyers within the county who
17 appear in -- who appear before that court.

18 MR. RICHARD: That's not in the record, Your
19 Honor. However, studies have shown, I think, not only
20 in the county court but in all judicial elections that
21 the great -- the large percentage of the contributions
22 come from practicing lawyers. And I think that that's
23 where judges naturally seek the contributions. Thank
24 you Your Honor.

25 JUSTICE SCALIA: That could be either

1 because lawyers expect judges to respond by favoring
2 their cases or it could be that lawyers care more --

3 MR. RICHARD: I think --

4 JUSTICE SCALIA: -- about who the judges in
5 the courts are; isn't that quite natural?

6 MR. RICHARD: I think that's true, Your
7 Honor.

8 JUSTICE SCALIA: I'd be surprised if the
9 statistics were any different, but it doesn't show any
10 corruption whatever. It just shows that lawyers want
11 good judges and care more about it than the average
12 citizen does.

13 MR. RICHARD: I think that's absolutely
14 true, Your Honor. But I think that what we're concerned
15 about is the two things that this Court has identified
16 in the past, which is avoiding the potential for
17 corruption that the Court has found is inherent in the
18 quid pro quo relationship; and, as importantly, avoiding
19 the appearance of corruption that the public sees.

20 And if I can address one more thing, Your
21 Honor, because I am responding to your question, I
22 understand that Your Honor does not believe that Buckley
23 was decided correctly and the day may come when Your
24 Honor persuades this Court to recede from the parts that
25 are applicable here. But in the meantime, I think that

1 it is reasonable to urge the Court respectfully that the
2 same rules that apply or at least the minimum degree to
3 which the Court has applied these rules to the other two
4 branches, needs to be applied to the judicial branch.
5 But there's certainly no basis -- it would be totally
6 inappropriate to carve out a right that judges have that
7 the Court has not accorded to the other two branches, and
8 that this case is an example of where that consistency is
9 important.

10 Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Pincus, you have four minutes left.

13 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

14 ON BEHALF OF THE PETITIONER

15 MR. PINCUS: Thank you, Mr. Chief Justice.

16 I want to start out by pointing out, because
17 I think it's important, that all of the examples that my
18 colleague used about buttonholing people in the hall and
19 calling people one on one are one-to-one, in-person or
20 in-person over the phone solicitations, not the kind of
21 written communications that are at issue in this case.
22 And I think that's because it is very difficult to say
23 that a written communication fits either of their two
24 interests, and I think it's important to keep them
25 separate --

1 JUSTICE KAGAN: Well is it Mr. Pincus?
2 Suppose I'm a judge and I say Dear Joe, you've been in
3 my courtroom many times and I hope I've always been
4 fair and I know you're going to be here some more times
5 in the future, and I hope I always will be fair; and
6 you know I'm running for judge and I'd really like a
7 contribution of a thousand dollars, signed Judge Smith.

8 MR. PINCUS: And I think the -- the issue,
9 Your Honor, is the campaign committee under Florida law
10 can write that exact same letter and can start by
11 saying: Joe, as you know --

12 JUSTICE KAGAN: It can't say "I." It's a
13 very different letter.

14 MR. PINCUS: It can say, I'm writing on
15 behalf -- I'm one of the people who Judge Smith
16 personally selected to solicit funds for his campaign
17 and then say the rest. And I think the -- the
18 difference in coercion there is really immeasurable and
19 doesn't rise to the level of a compelling interest.

20 I think it's important to make another
21 point, which is my colleague said a reasonable
22 compromise and maybe if rational basis applied here,
23 this would be a --

24 JUSTICE BREYER: A rational basis but I
25 think until Citizens United in one opinion, which wasn't

1 the majority in the more recent case, the Court had
2 never used the words "strict scrutiny" in respect to
3 campaign contributions periods. And I don't think it's
4 used the words "strict scrutiny" either, ever, in
5 respect to First Amendment limitations in respect to
6 what judges say. Am I right about that or wrong? I'm
7 not positive.

8 MR. PINCUS: I think it did use "strict
9 scrutiny" in White, Your Honor, and I think that was a
10 case about what judges say.

11 JUSTICE BREYER: In White.

12 MR. PINCUS: But it also has used the strict
13 scrutiny standard with respect to charitable
14 solicitations, and I think it will be an odd state of
15 affairs if charitable solicitations got less protection
16 under the First Amendment than election-related
17 solicitations, given that election stands at the core.

18 JUSTICE SOTOMAYOR: Did you say that right?

19 MR. PINCUS: Yes, that it should get more
20 protection, I'm sorry.

21 And just to go back to Justice Breyer, your
22 question about coercion, I think it's important to
23 separate coercion and quid pro quo because they get
24 mixed up. Quid pro quo and preventing the appearance of
25 quid pro quo corruption is an interest the Court has

1 found compelling with respect to all elected officials.

2 So I think if you expect -- accept my
3 colleague's argument that preventing the appearance of
4 quid pro quo corruption is sufficient to ban
5 solicitation, then there's no reason why Florida
6 couldn't say, such a great idea, we're going to apply it
7 with respect to legislators I think you -- the focus
8 here, I think, really ends up being on coercion.

9 JUSTICE SOTOMAYOR: That's not --

10 MR. PINCUS: Not on the preventing of
11 corruption.

12 JUSTICE SOTOMAYOR: I'm sorry, your -- your
13 opposite party did make the point that the legislative
14 process presumes influence and presumes coercion,
15 putting the arm on people to help you get into office to
16 maintain a position that you've promised you'd maintain.
17 But that's not the focus of a judicial election.

18 MR. PINCUS: Well, I want somewhere --

19 JUSTICE SOTOMAYOR: Can you point to --

20 MR. PINCUS: I think corruption --

21 JUSTICE SOTOMAYOR: I hope you don't want
22 someone who keeps to a position merely because you gave
23 money.

24 MR. PINCUS: That goes to a different
25 question, Your Honor, I think, which is bias. And I

1 think there's a difference between quid pro quo
2 corruption, which is a quid pro quo deal, a corrupt
3 deal, and judges being unbiased. So I think my
4 colleague refers to quid pro quo corruption because I
5 think he wants to use the Court's analysis in McConnell,
6 which I think is inapplicable anyway, but I don't think
7 it's possible to say that quid pro quo corruption should
8 be the basis here.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 12:14 p.m., the case in the
13 above-entitled matter was submitted.)
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ability 44:1,13 able 37:3 44:1,5,20 44:23 aboveentitled 1:11 54:13 absolutely 18:5 49:13 accept 53:2 accommodate 23:11 accorded 50:7 acknowledge 9:3 action 35:2 activities 21:1 22:24 acts 9:15 ad 30:25 add 34:4 39:20 added 33:10 address 49:20 addressed 27:9 adds 33:13,13 34:2 admit 38:17 adopt 4:16 23:18 adopted 11:5,14 35:11,24 adoption 4:25 advance 6:2 29:25 advanced 5:16 advantage 40:15 41:7,17,19 advocating 40:2 affairs 52:15 ago 46:21 agree 26:13,15 35:4 36:12 ah 30:20 alito 15:18 37:14 42:4 48:12 alitos 25:18 allow 4:25 5:3,10 5:14 11:15 allowable 23:5 allowed 20:7 23:7,8 allows 5:8	amend 5:12 amendment 3:15 4:7,14,25 5:2,8,13 11:10 15:7 23:12 28:1,3 44:18,21 46:20 47:11 52:5 52:16 amount 43:25 44:21 analysis 54:5 analyzed 9:15 andrew 1:15 2:3,9 3:6 50:13 anonymously 8:23 answer 5:13,19,20 9:7 10:13 16:9,14 16:21 21:10 23:22 24:2,4 25:18 31:6 32:11 33:24 34:1 34:3,4 40:1 41:19 answered 36:5 answering 36:14 answers 11:3 32:5 38:2 anybody 18:1,4 31:2 anyway 54:6 appeal 29:16 appeals 16:5 appear 38:21 40:13 48:17,17 appearance 22:25 26:18,19,23 27:24 30:24 37:23 44:15 44:16 48:10 49:19 52:24 53:3 appearances 1:14 appearing 13:25 27:21 37:5 40:14 appears 37:4 applicable 49:25 applications 4:20 applied 3:18,25 4:22 28:6 33:21 50:3,4 51:22 applies 3:18 6:7	20:5 25:7 45:11 apply 4:1 9:21,24 10:17 11:11 23:13 23:14 24:22,23 25:8 29:10 50:2 53:6 applying 3:24 21:10 appreciably 18:10 44:12 appreciate 37:9 46:22 area 14:11 36:18 40:17 45:17 46:4 argued 33:8 argument 1:12 2:2 2:5,8 3:3,6 25:13 28:19 31:19 33:5 33:15,20,21 39:12 39:14 45:14 50:13 53:3 arises 19:14 arm 19:5,12 53:15 arsenal 32:10 asked 5:18 14:2 38:5 42:4 46:20 asking 12:15 13:6 16:25 18:14 22:12 32:4 34:16 asserting 7:12 assume 8:20,25 assuming 18:19 28:18 attempt 42:18 attempting 46:2 attorney 13:25 authority 20:25 21:1 avenues 24:10 average 49:11 avoid 44:15 avoiding 49:16,18 avoids 48:10	13:1 23:3,7,13 31:12 42:4 52:21 backing 46:24 bad 29:21 36:3 43:10 balance 25:10 ban 5:14,20,23 6:9 6:21 23:20 24:8 25:3 53:4 bans 6:12 bar 1:6 3:4 15:25 38:11 40:7 barring 6:15 barry 1:17 2:6 25:13 bars 3:15 based 35:1 basic 22:20 46:14 basically 22:19 basis 50:5 51:22,24 54:8 behalf 1:15,17 2:4 2:7,10 3:7 17:17 21:25 25:14 50:14 51:15 believe 9:4 26:24 34:6,24 39:16 46:18,19 49:22 benefit 12:6 best 9:15 17:8 28:22 better 18:11 19:4 25:4 28:19 beyond 16:23 bias 6:5 8:12 22:18 22:22 37:23 53:25 big 30:22 45:18,22 bit 39:22 45:15 board 29:15 branch 10:23 35:25 50:4 branches 29:24 36:1,23 38:24 50:4,7 break 36:20 breyer 16:2 17:10	17:14,18 18:8 31:12 32:1,7,18 32:22,25 33:3,7 33:17,23 34:1 36:5 39:1 46:6 47:14 51:24 52:11 52:21 brief 9:3 10:8 48:4 briefs 18:9 broadcast 42:24 43:2,11 44:2,5 broader 20:15 broadly 45:3,5 brother 16:5 brought 28:16 buckley 25:24 28:5 42:22 43:23 49:22 burden 47:10,12,14 47:18 burdensome 47:20 business 41:21 buttonhole 34:10 buttonholing 50:18
				C
		B back 5:15 7:22 8:1		c 1:8,15 2:1 3:1 call 13:4 14:16 34:11 35:14,14,15 40:12 calling 27:4 50:19 calls 14:20 26:23 campaign 3:13,21 3:25 9:22 14:3,18 16:19,22 22:20 23:13 24:14 30:10 32:19 43:15,24 51:9,16 52:3 candidate 3:10 5:3 13:11 14:20 25:19 26:2 29:15 36:9 38:8,14 42:14,15 43:18 44:10,11 candidates 5:21,24 10:23 15:23 17:8 18:10,11 19:4 23:19 24:8,16,23

28:2 29:7,10,24 42:13 44:12 48:13 canon 20:5 25:22 29:10 42:18 44:9 canons 25:19 cant 10:2 14:21,21 15:23,23 18:4 19:6 23:6,6 25:3 30:10 31:7 42:20 43:2 51:12 capacity 44:19 care 49:2,11 careful 28:11 cares 21:24 carve 50:6 case 3:4 4:10 5:16 21:23 22:4 25:4 28:10 31:15 36:22 37:14 41:22 42:1 42:12 43:5,8,20 46:2 50:8,21 52:1 52:10 54:11,12 cases 13:19 15:9 20:24 28:1 42:17 46:20 49:2 category 21:15 35:19 certain 9:11 29:25 certainly 4:9,18,25 7:6 31:9 50:5 chair 23:13 chairman 17:9 23:6 23:8 challenge 46:23 challenged 41:9 change 34:8 47:15 47:24 48:1,3 changing 47:16 charitable 15:9 52:13,15 charities 21:8 chief 3:3,8 7:14,20 25:11,15 26:22 27:18 30:23 40:21 41:4 45:12 46:21 50:11,15 54:9	choice 11:8 46:25 choose 11:9 21:19 24:21 chosen 21:19 circuit 12:19 15:15 15:16,16 circumstances 27:10 42:2 circumvent 16:1 36:9 citizen 49:12 citizens 28:15 51:25 classmate 26:24 clearly 15:5 35:23 39:14 41:12,14 client 4:10 climb 29:5 closely 3:24 code 36:8 coerced 7:25 coercion 5:14 6:6 7:13 8:13 10:17 13:2 18:14 19:14 20:1 25:6 37:24 51:18 52:22,23 53:8,14 coercive 15:4 18:23 coined 29:20 colleague 26:12 50:18 51:21 54:4 colleagues 53:3 collecting 18:11 college 26:24 combines 18:21 come 11:8 18:18,25 22:4 46:6 48:16 48:22 49:23 comment 42:3 commit 29:25 committee 3:13 13:5,23 14:3,18 15:21 17:9,9 18:12 24:15 25:20 25:21 38:3 43:3 51:9	committees 24:10 24:11 common 16:12 communicating 26:1,2 communication 15:14 36:21 50:23 communications 7:6,7,11 15:2,2,3 20:6 50:21 communicative 28:9 42:22 44:1 compare 17:6 37:6 37:16 compelling 9:17 14:12 20:16 51:19 53:1 completely 3:14 comply 30:1 compromise 48:7 51:22 concede 4:6,9 concern 38:22,23 38:24 concerned 14:1 49:14 concession 7:1 conclude 12:19 conclusion 19:25 conduct 34:25 confidence 26:21 35:3 38:25 39:1 confronting 42:9 congress 6:12,12 congressman 21:17 connect 44:14 considered 5:20 consistency 50:8 consistent 12:16 consistently 36:18 constitution 47:23 47:25 constitutional 12:17 20:21 23:16 23:19 29:19 33:14 43:1 48:6	constitutionally 44:3 contact 15:21 19:6 31:22 content 3:21 contentbased 3:20 context 6:3,4,8,9,11 7:8 9:20,22 10:18 13:8 15:7,14 21:18 24:19 contexts 7:5,23 contrast 13:20 contravening 47:11 contribute 14:4 39:8 47:7 contributed 22:11 38:10,14 contributes 22:13 22:16 contributing 36:25 contribution 3:22 4:1 11:15 15:9 16:18 18:22,23 22:21 31:2 32:15 37:6 38:5,8 39:18 39:19 43:25 47:7 51:7 contributions 3:12 3:13 10:1 15:12 24:5,9,11 28:9 30:4 31:22 35:14 36:19 40:4 43:24 48:13,15,21,23 52:3 contributor 30:6 32:12 37:7 contributors 14:6 control 31:14 convince 29:18 core 15:7 52:17 correct 26:6 correctly 49:23 corrupt 26:19 44:16 48:11 54:2 corruption 8:10 10:9 18:3 27:3	37:23,23 49:10,17 49:19 52:25 53:4 53:11,20 54:2,4,7 couldnt 15:19 53:6 counsel 25:11 26:12 36:4 50:11 54:9,10 counts 22:10 county 14:1 48:14 48:16,20 couple 11:3 17:4 course 3:16 36:17 court 1:1,12 3:9,18 6:18 7:5,8 11:6 12:19 14:1 15:8 16:4,5,6 20:15,23 24:6,15 25:16,23 26:16 27:10,11,22 28:4,13 29:18 33:22 34:25 35:7 35:11 36:18,23 38:23 41:20 42:17 42:21,25 44:6,7 45:11,24 46:3,19 48:14,17,20 49:15 49:17,24 50:1,3,7 52:1,25 courtroom 51:3 courts 3:23 49:5 54:5 create 22:24 creates 25:25 39:6 crime 30:11 critical 15:8 17:19 criticisms 8:22 culture 35:23 curious 40:10 current 33:12 37:2 40:8 curried 26:15 curry 26:14 cut 25:24
D				
d 1:8,15 3:1 damage 38:16,19				

danger 37:22 day 49:23 deal 27:7 34:3 45:18,22 54:2,3 dealing 13:18 40:17 45:23 dear 13:24 51:2 decide 16:3 31:14 decided 49:23 decision 3:23 11:12 11:18 decisions 8:22 11:18 defines 46:9 degree 39:7 45:25 46:11,12,17 50:2 demands 44:22 democracy 48:9 democratic 29:23 denied 46:7 depends 45:10 designed 25:22 desire 44:24 45:8 desires 26:3 determination 22:20 determining 7:2 didnt 8:6 10:3 20:19 25:5 35:13 41:12 difference 5:7 13:22 14:9 18:13 18:17 27:19 30:21 30:22 32:2 33:2 36:15 37:12,20,24 39:17 40:19,23 41:2,23 42:7 51:18 54:1 differences 33:8 different 6:18 7:11 9:23 10:5,14 19:7 19:19 21:14 24:12 30:12 39:4 49:9 51:13 53:24 differently 6:7 10:17 25:7	difficult 29:18 37:10 39:14 41:19 50:22 dignitatem 9:12 dignity 8:15 9:11 13:2 18:3 34:18 34:20 35:1,5,14 direct 25:24 27:1,2 27:2 29:16 31:22 36:20,21 directly 15:24 26:2 36:25 disagree 40:9 disciplined 37:16 disclosure 11:20,21 discrimination 6:16 discussion 43:23 dissented 28:13 distinct 41:10 distinction 7:9,10 31:18 36:2 42:11 distinctions 25:2 district 16:5,6 doesnt 6:4 9:17,21 11:22 12:21 14:8 14:23 17:22,23 22:1 32:13,15,17 34:7 36:8 41:1,20 42:11,18 49:9 51:19 doing 38:6 dollar 22:20 dollars 51:7 dont 6:9 7:4 8:18 9:4 10:22 12:14 12:18 13:9 15:24 16:10,23,25 18:16 18:18 19:15,17,24 20:10,18 21:8,13 23:25 25:1,1,8 29:1 31:6,9 34:2 37:16 39:9 40:4 41:22 43:8,8 45:12,15,22 47:17 52:3 53:21 54:6	door 16:10,11 draconian 44:3 draw 12:17 27:12 drawing 19:25 drawn 3:24 7:6,8 27:15 40:24 drew 24:6 duties 20:14 <hr/> E <hr/> e 2:1 3:1,1 earlier 42:5 early 16:18 easily 27:21 ed 8:21 effect 15:4 37:13 effective 12:4 15:12 18:23,25 effort 24:18 26:14 36:20 eighth 12:19 either 13:3 15:2 17:23 26:14 38:7 40:18 48:25 50:23 52:4 elect 24:21 47:15 elected 21:4 30:2 46:22 47:1,6 53:1 election 3:11 4:15 5:9,11 11:5,9,10 21:18,20 24:13 27:1 35:17,18 47:19 48:14 52:17 53:17 electionrelated 11:11 52:16 elections 10:6,6 48:20 eleventh 15:16 eliminate 4:12 eloquently 39:16 employee 9:16 21:10,11 employees 6:13 20:14,22,23 21:2 enables 42:24	ended 36:6 ends 53:8 engage 4:11 enormous 40:15 entitled 47:23 envisions 37:1 equalizing 41:21 equally 26:17,17 equivalent 19:22 especially 11:20 12:8 esq 1:15,17 2:3,6,9 essence 44:7 essential 24:16 48:9 ethical 8:20,21 ethics 9:1 35:25 everybody 11:22 evidence 39:22 40:18 41:25 43:4 evil 39:4 exact 51:10 exactly 5:5 22:6 34:2 example 4:22 6:13 7:8 11:25 15:20 50:8 examples 50:17 excuse 14:22,23 41:12 executed 9:14 executive 10:23 19:23 exist 6:4 37:1 expect 49:1 53:2 expected 29:25 30:1,3,7 38:21 experience 16:4,12 explanation 20:1 explanations 20:2 express 41:12 expression 29:7 expressive 34:25 44:13 extent 9:20,23 15:4 extremely 29:6	F <hr/> face 23:13 faced 48:3,4 facetoface 4:5,11 4:17,22 5:21,23 6:15 34:10 45:17 fact 11:8,9 12:8 17:7 18:13 21:19 34:8,9,12 38:19 41:24 47:22 factor 17:20 26:16 42:1 fair 22:8 38:23,24 39:9,9 51:4,5 fairly 44:13 fall 4:7 falling 23:7 far 29:17 41:17 fault 8:7 favor 22:2,3 26:15 40:7 favoring 49:1 federal 6:11,13 16:6 20:5,12,22 21:23 field 41:21 figure 47:10 filed 10:7 filling 46:24 financial 30:4 financing 23:18 find 10:4 15:19 19:3 32:14,14,16 40:10 41:20 48:6 finding 11:24 first 3:14,19 4:7,14 4:25 5:2,8,13 9:5 9:21 11:10 15:6 17:5 23:11 28:1,2 32:3,11 35:9 40:6 44:18,21 46:20 47:11 52:5,16 fits 50:23 five 6:22 28:23,24 fix 47:10 fla 1:17
--	--	---	---	--

florida 1:6 3:4,10 3:14,15 4:4 10:3,7 10:19 11:14,17 13:24 14:5 15:19 15:25 21:3 22:19 25:2,19,22 29:10 29:13 31:16,21 32:19 33:11 34:6 35:11 37:2,18 38:11,13 40:6 42:18 44:9,14 47:22,25 48:1,2,5 48:14 51:9 53:5 floridas 9:25 24:18 33:12 34:22 35:20 35:22 38:21 focus 26:11 53:7,17 focused 26:13 following 13:22 38:2 follows 20:4,18 form 3:11 18:13 29:24 39:6 41:6 fortiori 20:4 forward 11:2 found 15:17 38:23 48:15 49:17 53:1 four 50:12 frankly 15:24 fray 11:1,6 35:13 free 9:16 40:12 42:7,12,14 45:23 46:11 48:7 freedom 29:7 frequently 13:25 friend 3:23 17:8 37:8 friends 27:4 full 17:9 fully 19:22 fundamental 9:24 46:25 47:16 48:5 fundamentally 7:11 fundraise 18:10 fundraising 20:7	funds 21:25 26:3 41:7 51:16 further 31:17 future 51:5 <hr/> G <hr/> g 3:1 generally 41:20 getting 29:2 ginsburg 4:3,13 5:2 5:6,18 10:3,12,14 10:24 15:1 21:3,7 24:17 29:9,13 35:10 39:24 ginsburgs 41:13 give 8:3 14:15,22 27:1 37:9 39:3,15 40:15 41:16,19 42:21,23 given 12:7,8 31:9 31:23 35:1 52:17 gives 11:16 giving 15:20,25 25:20 go 13:1 16:23 17:23 18:12 20:9 22:7 31:12 42:4 43:1 52:21 goes 36:1 38:19 53:24 going 12:5,22,25 13:8 21:16 22:2,2 22:3,7,21,24 23:3 23:12 24:1,13 27:15,16,17 30:10 31:2,3,7 32:16 34:16 35:6 36:6 41:9,16,18 43:17 47:1,5,6,10 51:4 53:6 good 5:22 12:24 15:13 29:14,21 30:6,14 36:2 39:12,14 49:11 government 5:15 6:2 7:12 9:16	20:12,23,24 21:2 21:11,15 29:24 gradations 6:16 great 41:7 43:1,11 47:9,12,14,18,18 48:21 53:6 greater 14:17 15:5 37:22 38:16,18 group 10:20 15:4 groups 4:19 guess 5:12 6:19 7:18 13:20,21 <hr/> H <hr/> hall 50:18 hand 7:16 42:10 44:14 handle 10:9 happen 13:19 happens 39:5 hat 34:16 35:6 havent 29:3 hear 3:3 31:20 33:17 held 34:21 help 13:5 16:20 40:2 53:15 heres 13:20 29:19 hes 21:4,9 27:4 31:7,9 32:16 high 29:4 higher 35:24 historically 45:25 holding 34:16 honest 12:24 honor 4:10 7:19 8:6 11:4 13:10,21 17:5 18:5,16 20:11 21:14 22:10 24:25 26:6 27:6 27:23 28:21 30:13 31:8 32:6 33:19 34:24 35:22 36:11 39:13 40:10 41:12 43:23 47:13 48:19 48:24 49:7,14,21	49:22,24 50:10 51:9 52:9 53:25 hope 51:3,5 53:21 horrendous 10:8 hurt 40:5 hypothetical 10:18 <hr/> I <hr/> id 25:9,17 40:1 42:3 49:8 51:6 idea 22:12 29:14 35:10,18,20,22 53:6 identified 49:15 ignore 17:2 ill 5:20 39:11 im 8:19 9:3 10:4 12:15 13:6,17 16:25 19:13,15 20:19 22:1,2,2,14 22:16 24:1 26:25 26:25 29:2,5 30:10 32:21 34:23 36:6 40:21 41:14 45:21,24 51:2,6 51:14,15 52:6,20 53:12 imagine 19:6 immeasurable 51:18 impact 14:17 42:7 42:13 impartial 22:8 30:7 impartiality 6:5 8:11 10:16 impermissible 23:15 important 26:17 31:19 42:6 45:17 45:18 50:9,17,24 51:20 52:22 importantly 49:18 imposition 28:2,8 29:6,8 44:12 45:25 impression 34:12	inapplicable 54:6 inappropriate 50:6 includes 11:9 inconceivable 22:18 inconsistency 20:14 inconsistent 45:13 incremental 12:6 14:9 37:19 incrementally 14:17 incumbent 40:12 40:15 41:7,15,16 incumbents 40:8 41:9 indirectly 15:23 individual 30:19 31:10,15 32:3 individuals 25:21 influence 26:19 44:16 48:11 53:14 infra 9:11 inherent 13:7 26:19 49:17 initial 7:1 33:10 36:16 inperson 10:19,20 15:3 19:18 50:19 50:20 instinct 17:15 instinctive 16:24 17:14 integrity 35:14 interest 6:4,6 7:12 7:24 8:10,11,12 8:14 9:3,10,14,17 9:21,23 10:16,16 11:5 14:12 20:17 21:24 22:17 25:5 37:21 45:10 46:3 48:7,8 51:19 52:25 interests 5:15 6:2 8:4,9 10:15 22:21 23:12 46:1 48:6
---	---	---	--	--

50:24	26:23,25 30:9,9	15:1,18 16:2	know 7:15 11:16,16	21:17 24:24 35:18
interfered 45:9	30:25 31:2,23	17:10,14,18,21,22	11:20 12:21,23	lesser 28:7,7
interference 46:16	32:3,14,16,20,23	18:1,7,8 19:2,8,12	14:5 15:24 16:6,8	letter 6:17,20,22
interferes 46:14	33:11 35:1,6,17	20:3,11,19 21:3,7	16:10,23,25 17:3	13:4,22,23 14:15
interfering 46:11	36:7,21,22,24	21:21 22:14 23:3	18:18 19:16,17,24	14:17 17:6,12
interpret 15:25	37:3,8 38:7 39:2	23:22,23 24:1,17	21:21 22:5,11	19:20 32:19 33:10
16:14	39:17,21 41:8,15	25:9,11,15,17	23:9 26:24,24	36:6 38:3,4,6,12
interpretation	41:15,16 46:9,15	26:4,8,22 27:18	30:10,25 32:8,13	38:13 39:20 42:8
33:13	47:15,16 48:14	28:11,15,18,23	32:15 33:1,7,23	51:10,13
intertwining 15:11	51:2,6,7,15	29:1,3,9,13,20	38:7,8 39:21	letters 3:12 14:19
intimidated 29:1	judged 5:22,25	30:9,14,20,23	41:22 43:8 51:4,6	level 43:1 45:8
intimidation 26:13	judges 4:15 5:10	31:12 32:1,7,18	51:11	51:19
26:14 41:17	8:18,21 9:15,15	32:22,25 33:3,6,7	knowing 12:12	limit 22:21
intuitive 16:24	9:19,25 10:7 11:6	33:17,23 34:1,14	39:4	limitation 17:24
invalid 4:21	11:9 15:23 16:6	34:20 35:9,10	knowledge 39:7	limitations 4:1 24:7
involve 19:18	17:8 20:13 21:8	36:2,4,5,13 37:14	knows 11:25 12:8	25:8 52:5
involvement 11:15	21:19,23 24:19,21	39:1,24 40:21	31:23,23	limited 27:21 45:16
involving 37:15	24:23 25:7 29:14	41:4,13 42:4 43:6		limits 47:8
iota 42:12	30:5,7,17 31:13	43:7,10,14,20	L	line 7:6 12:17 14:25
isnt 12:22 13:7	31:21 34:9 35:12	44:18,25 45:5,12	lanell 1:3	15:1 24:6 27:12
15:17 18:7 19:9	35:16 40:12,16	46:6,7,21 47:14	large 48:21	27:15 28:12 40:25
31:8 39:12,12	45:1,3 46:22 47:1	48:12,25 49:4,8	larger 4:19	link 25:24
46:10 49:5	47:5,7,19,20	50:11,15 51:1,12	laughter 8:8,24	linkage 42:5
issue 4:24 8:4 13:19	48:23 49:1,4,11	51:24 52:11,18,21	28:25	list 11:21 15:21,25
22:2 26:13,14	50:6 52:6,10 54:3	53:9,12,19,21	law 3:14 10:3 13:24	38:14
27:8 30:13,17	judgment 43:17	54:9	14:5 21:25 23:11	literature 40:19
50:21 51:8	judicial 3:11 4:24	justices 28:12	25:19 32:19 37:18	41:25 43:4
issues 42:16	5:8,21 6:3,8 8:15	justify 3:24 5:16	38:13 42:1 43:5	litigants 27:21
ive 34:3 51:3	9:1,10 10:5,17	9:18 25:4	43:14 51:9	40:13
	13:2 18:2 23:18	K	lawful 3:14	little 36:5 42:13
J	26:1,21 34:18	kagan 20:3,19	lawfully 24:9	45:15
j 1:15 2:3,9 3:6	35:25 38:25 41:5	21:21 22:14 23:3	lawyer 7:7 13:4,7	lived 37:10
50:13	41:8 48:20 50:4	43:6 51:1,12	14:22 16:7,8	long 43:16
january 1:9	53:17	kagans 23:23	17:23 37:4	look 23:10 42:6
joe 13:25 37:8 51:2	judicially 27:13	keep 23:3,7 31:13	lawyerjudge 13:8	46:10
51:11	judiciary 10:25	50:24	lawyers 17:24 27:5	looked 48:12,13
john 8:23	14:2 35:3,15,19	keeping 25:25	27:21 40:13 48:16	looking 17:11
joke 16:4	39:2 40:3 48:9	keeps 53:22	48:22 49:1,2,10	loss 26:20
jones 14:2,5 15:20	justice 3:3,8 4:3,13	kennedy 6:14,25	lead 28:22	lot 14:18 47:21
judge 11:15,16,19	5:2,6,18 6:14,25	7:5 11:19 12:1,10	learn 16:14	lots 40:3
11:21,24 12:8,8	7:4,14,20 8:1,3,7	12:15 23:22 24:1	leeway 20:12	
12:11,20,22 14:2	8:14,17,25 9:7,10	29:20	left 44:11 50:12	M
14:5,15 15:15,20	10:3,12,14,24	kennedys 36:2	legislative 6:4,8	m 1:13 3:2 54:12
16:8,13 17:17	11:19 12:1,10,15	kind 11:1 27:8	10:22 19:23 53:13	mailing 12:11
18:14 21:4,9,11	12:24 13:1,13,15	46:23 47:2 50:20	legislators 53:7	main 33:8
22:7,8,11,12 26:1	13:17 14:10,13		legislature 5:11	maintain 53:16,16

major 46:19	minnesota 11:25	23:8,14 25:3	27:19	18:10 19:5 34:10
majority 13:19	12:20	31:21		38:19 41:15 42:9
52:1	minor 16:8	number 20:2 28:12	P	51:16
making 5:6 11:12	minute 7:22	36:13 48:2	p 3:1 54:12	persons 8:12
17:16 32:15	minutes 50:12		page 2:2	persuades 49:24
manageable 27:13	mixed 52:24	O	part 24:18	petitioner 1:4,16
42:11	money 18:11,15	o 2:1 3:1	partial 31:3,7,9	3:7 13:11 38:4
manager 16:22	24:14,15 27:1	objecting 22:5	partiality 30:24	40:10 50:14
32:20	29:16 31:23 32:4	obviously 3:20	particular 11:13	petitioners 2:4,10
marginal 28:9,10	32:12 34:17 36:7	18:17 19:19,21	20:17 37:15	42:7
marshall 8:23	36:22,24 37:9	occurring 31:5	particularly 41:5	philosophy 31:1
mass 12:11	40:4,14 41:16	odd 52:14	parts 18:25 49:24	phone 50:20
materials 20:7	42:21,23,24 43:3	office 3:11 5:4,8,22	party 53:13	pick 37:3
matter 1:11 37:4	44:4,11 46:13,17	29:11,16 34:21	patch 47:2	pickering 20:24
42:14 54:13	53:23	53:15	payable 16:19	21:11,16
mcconnell 3:24	mountain 29:4	officeholders 40:8	people 6:22 8:18	pieces 8:22
15:10 23:20 24:7	move 42:12	officers 35:16	13:8 15:21 27:8	pincus 1:15 2:3,9
25:24 28:5 42:22	murkies 39:21	officials 53:1	34:16 38:14,20	3:5,6,8 4:3,9,16
54:5		oh 8:7 23:24 24:1	39:3,11 40:2,3,5	5:5,12,25 6:24 7:4
mean 8:17 10:7	N	31:2	42:10,14 47:5,19	7:18,21 8:2,6,9,16
16:23 17:22 18:17	n 2:1,1 3:1	okay 9:8,9 14:22	50:18,19 51:15	9:2,9,13 10:11,13
23:4 26:8 27:20	name 16:20 20:7	25:3 30:20 38:11	53:15	11:3,23 12:3,13
39:2 45:16 46:8	38:5	old 21:25 27:4 46:8	perceive 35:15	12:18 13:9,14,16
46:22 47:2,4,17	names 25:20	once 11:17 14:7	percent 47:25	13:20 14:11,24
47:18	narrow 23:11	25:2 26:8 30:1	percentage 48:15	15:22 17:4,13,16
meet 7:15	nation 35:23	33:9,11	48:21	17:19,25 18:5,16
meeting 14:16	natural 49:5	oneonone 4:18 6:17	perception 31:16	19:10,13 20:3,10
meets 20:16	naturally 48:23	6:20	period 21:8 37:11	20:22 21:6,13
members 5:11 6:12	necessarily 9:17	ones 4:23 22:7	periods 52:3	22:9,16 23:17,25
13:23	11:7 39:12	onetoone 10:19	permissible 6:10	24:4,25 50:12,13
mendicant 34:15	need 28:23 40:4	15:3,3 19:18	13:24 14:8,25	50:15 51:1,8,14
mentioned 10:15	needle 42:12	50:19	24:6,8	52:8,12,19 53:10
18:9	needs 50:4	op 8:21	permit 19:18 25:8	53:18,20,24
merely 53:22	never 8:5 33:21	opinion 11:7 51:25	36:8	place 32:4
message 18:20,25	52:2	opposed 36:22	permits 14:5 33:11	playing 41:21
24:16 41:10 42:24	ninth 15:16	38:17	person 6:6 7:19,20	please 3:9 16:13
43:2,12 44:2,5	nonincumbent	opposing 26:12	7:24 18:20,21,24	22:15 25:16 31:1
messages 15:11	40:16 41:18	opposite 21:22	19:1 26:2 27:2	plenty 39:11
methodology 44:10	nonjudicial 6:11	53:13	31:22 32:13,15	point 19:8,11,14
micromanage	nonlawyer 37:5	oral 1:11 2:2,5 3:6	36:25 37:7,15	28:22 29:4,5 31:8
27:17	normal 16:7,9	7:7,17,17 15:2	39:8 40:24 42:8,9	33:8 35:2 40:22
micromanaging	note 12:9 22:12	25:13	44:4	44:8 47:18 51:21
27:19	23:2 26:5,9 32:17	order 9:18 23:11	personal 6:17,21	53:13,19
midwestern 12:24	33:9 34:7,15 38:9	30:2 47:24	13:4 14:16 18:14	pointing 39:11
minimal 29:6	38:10 39:6	organize 13:6	36:9	50:16
minimum 50:2	notes 10:1 11:17	overinclusiveness	personally 14:2	politeness 39:6

<p>political 5:3,24 10:6,25 11:6 19:3 24:19 29:10,15 35:13,16 position 40:1 53:16 53:22 positions 30:1,18 45:20 positive 52:7 possible 20:1 35:2 54:7 posting 3:12 potential 49:16 power 41:17 practicing 48:16,22 preconceived 30:18 preconceptions 31:14 prefer 33:23 presence 18:14 preserving 6:5 pressure 39:3,7 presumes 53:14,14 presuppose 31:7 prevent 43:16,17 prevented 12:12 preventing 6:5,6 8:10,11 10:16,17 22:6 52:24 53:3 53:10 previously 25:23 principally 9:14 principle 9:24 pro 8:10 25:25 26:18,20 34:13 36:15,21 37:22 44:16 46:4 49:18 52:23,24,25 53:4 54:1,2,4,7 probably 35:7 39:5 problem 7:1 10:8 11:4,12,13 16:2,3 34:3 47:3 problems 18:6 process 19:22 53:14</p>	<p>prohibit 10:19 11:18,24 12:22 15:20 27:16 34:7 45:15 prohibiting 3:15 4:17 22:12 34:8 41:6 prohibition 9:5 11:25 12:7 13:18 45:16 prohibits 25:19 promised 53:16 promoting 8:11 proof 18:7 prophylactic 4:17 prospect 30:24 protect 22:21 protecting 8:12 protection 22:17 52:15,20 protections 21:20 public 23:18 26:20 27:24 35:15 37:12 49:19 publicly 38:20 publics 34:12 35:3 38:22,25 pudding 18:8 punished 3:10 purpose 25:20 put 19:5,12 20:7 32:19 35:12,18 38:11,13 39:7 42:19 puts 11:6 39:3 putting 11:1 53:15</p>	<p>27:12,14,24,25 28:1,16 31:6 36:14 41:13,20 42:4 46:20 49:21 52:22 53:25 quickly 36:5 quid 8:10 25:25 26:18,20 31:11 34:13 36:15,20 37:22 38:20 39:3 44:16 46:4 49:18 52:23,24,25 53:4 54:1,2,4,7 quite 19:19,24 24:8 24:12 49:5 quo 8:10 25:25 26:18,20 34:13 36:15,21 37:22 44:16 46:4 49:18 52:23,24,25 53:4 54:1,2,4,7</p>	<p>reason 12:21 14:22 14:23 15:13 29:19 39:15 53:5 reasonable 7:9 44:20 45:1 48:6 50:1 51:21 reasonably 43:2,12 44:4 reasons 3:19 4:2 9:5,21 28:5,6 47:21 rebuttal 2:8 50:13 recede 49:24 receive 26:3 32:17 receiving 14:14 recognize 47:6 recognized 15:8 25:23 26:17 28:4 29:20 36:18,24 42:21 46:3 recognizes 37:13 recognizing 5:7 reconcile 45:20 record 40:18 41:25 43:4 48:18 reduce 34:11 reelection 14:4 21:5 referred 43:19,22 referring 43:21 refers 54:4 reflects 35:23 regarded 37:17 regardless 30:7 regulate 20:13 21:1 21:3 36:19 regulation 4:7 regulatory 9:25 relation 4:14 relationship 25:25 37:20 49:18 relatives 4:23 relevant 46:15,18 relies 3:23 relying 34:17,18,23 rendering 22:8</p>	<p>republican 29:23 request 16:8 17:12 17:16 18:22,22 requesting 36:22 36:24 38:20 39:17 requests 15:11 requirements 11:10 requires 44:19 reserve 25:9 respect 5:9,10 19:3 21:16 25:7 52:2,5 52:5,13 53:1,7 respectfully 24:25 50:1 respects 20:6 respond 8:21 49:1 responded 12:12 12:23 respondent 1:18 2:7 25:14 responding 20:11 25:17 49:21 response 13:12 15:1 16:7 27:7 28:19 33:20 41:13 responses 33:18 41:11 responsible 20:25 responsive 30:18 responsiveness 29:21,22 30:6,15 30:17 36:3 rest 45:13 51:17 restricted 21:12 restriction 3:20 6:3 11:1 20:17,21 42:19 43:1,11,24 restrictions 9:18 40:11 43:16 results 26:20 review 3:17 28:7 45:11 rich 40:8 richard 1:17 2:6 25:12,13,15 26:6</p>
---	---	--	--	--

26:11 27:6,23 28:14,17,20 29:2 29:12,17 30:12,16 30:21 31:4,25 32:5,9,21,24 33:2 33:5,16,19,25 34:6,19,23 35:21 36:11,17 38:18 39:13,24 40:9 41:3,11 43:9,13 43:19,22 44:23 45:2,7,21 46:18 47:12,17 48:18 49:3,6,13 right 8:22 17:18 18:19 19:15 20:9 21:23 31:16,25 32:1,25 33:3 50:6 52:6,18 rights 28:3 riley 15:9 rise 51:19 rises 42:25 risk 27:3 roberts 3:3 7:14,20 25:11 26:22 27:18 30:23 40:21 41:4 45:12 46:21 50:11 54:9 role 46:9,14 47:16 rose 35:2 rubric 9:16 rule 4:4,17,21,21 5:1,17 7:10 8:25 12:13 15:22 16:1 16:17 21:8 32:2 34:22 35:11 36:10 37:21 rulemaking 20:25 rules 8:20,21 10:5 10:14 15:19 24:22 50:2,3 rulings 22:1 running 21:4 26:25 37:8 51:6	S s 2:1 3:1 44:9 sanctions 4:12 satisfy 20:16 saying 8:4 14:15 18:8 20:4,8 24:20 29:12 37:7 39:18 40:22 41:14 42:23 45:14,18,21,24 46:10 51:11 says 7:10 15:22 16:13,17 23:9 25:2 26:24 29:13 30:25 32:2 34:4 42:20 43:8,9 scalia 8:1,3,7,14,17 8:25 9:7,10 12:24 17:22 18:1 19:2 20:12 26:4,8 28:23 29:1,3 30:9 30:14,20 34:14,20 43:7,10,14,20 44:18,25 45:5 48:25 49:4,8 scalpel 27:11 schaumburg 15:9 scheme 9:25 11:13 school 21:25 scope 4:14 scrutiny 3:17,24 6:1 52:2,4,9,13 second 9:23 11:13 27:25 31:12 33:4 33:5 see 6:18 14:14 17:1 37:19 38:14 45:13 seek 35:13 48:23 seeking 3:10 sees 49:19 selected 51:16 selecting 47:20 selection 4:15 24:18 selfevident 41:5 send 26:9 31:1 39:5 sending 19:20 42:8	42:10 sent 38:3 separate 35:19 50:25 52:23 serve 13:5 14:3 37:21 46:2 served 12:6 serving 46:2 set 40:7 severing 15:13 shared 31:15 shouldnt 35:15,16 show 49:9 shown 48:19 shows 49:10 side 31:3,19 39:10 39:25 46:14 sign 16:20 signed 3:11 13:23 14:14 51:7 significance 33:14 significant 37:11 37:12,20 39:17 40:23 44:3,17 significantly 34:12 35:24 similar 27:8 simply 4:4 39:4 sincerely 16:20 sit 43:17 sitting 21:11,17 situation 24:13 47:4 situations 38:15 sixth 15:15 size 10:20 small 10:10 15:4 46:17 smith 37:8 51:7,15 society 29:23 37:11 sold 46:7 solicit 3:21 18:4 21:8,25 24:11,14 34:11 38:5 40:24 41:16 46:13 51:16 solicitation 4:11,17	4:18,22 5:21,23 6:10,21 7:7 12:7 13:10 14:8 17:24 19:19,22 21:16 24:7 27:2 31:10 31:11 36:10 53:5 solicitations 4:5,19 5:14 10:19,20 12:22 22:6 23:6 23:20 25:3 36:20 50:20 52:14,15,17 solicited 6:7 7:24 8:13 11:16 32:12 32:13 soliciting 3:12 6:12 6:13 24:8 25:21 solicitor 11:2 somebody 17:11,12 19:6 41:10 48:13 somewhat 6:7 sorry 8:6 19:13 20:19 22:14,16 32:21 40:21 52:20 53:12 sort 5:1 16:3 sorts 6:16 43:15 sotomayor 13:1,13 13:15,17 14:10,13 17:21 18:7 19:8 19:12 28:11,15,18 33:6 35:9 36:4,13 52:18 53:9,12,19 53:21 sought 34:21 speak 38:10 44:20 44:20,24 45:8 specifically 39:18 speech 3:15,21 9:16 9:19 11:11 15:8 21:1,14,17 42:8 42:12,14 45:23 46:12,12,17 48:7 stable 48:9 stage 31:10 stand 9:1 18:21 standard 3:17,18	3:25 4:1,4 5:23 6:1 28:7 45:11 52:13 standards 35:25 stands 18:24 52:17 start 50:16 51:10 started 8:4 36:14 state 4:16,24 5:9 11:4,5,8 12:20,25 16:6 21:9,17,19 22:4 23:1,5,9,17 23:20 24:23 25:5 27:16 35:24 36:19 45:10 46:1,2,4,25 47:5 52:14 stated 45:3,5,6 states 1:1,12 4:19 10:21,24 11:20,23 12:14 19:18,20 20:13 37:2 47:23 statistics 18:9,18 18:19 19:3,17 49:9 statute 6:11,14 step 5:15 10:10 strict 3:17 6:1 52:2 52:4,8,12 studies 48:19 stuff 8:17 18:3 submit 3:17 15:15 submitted 54:11,13 substantial 45:9,10 46:1,5 48:2 substantive 15:11 suffices 9:4 sufficient 35:7 53:4 suggest 38:23 40:11 40:19 42:1 44:9 suggesting 12:10 support 6:2 9:4 16:18 supported 30:3 supporter 30:6 supporters 30:2 suppose 4:4 10:24 51:2
--	---	--	--	--

supposed 11:21 37:21 supreme 1:1,12 35:11 sure 8:2,19 9:4 14:1 19:15 surface 17:1 surprised 49:8 sustained 35:4 sutton 15:15 system 4:24 11:5,15 18:20 23:18 26:21 38:25 40:7 47:20 systems 16:7	38:9,10 39:6 thatd 19:6 thats 4:5 6:20 11:11 12:2 13:23 14:13,13,24 16:9 16:13,15,15,16,21 16:21,24 17:10,19 18:6 19:8,15 20:9 22:9 26:6 28:18 30:12,12,14,16,21 31:25 33:14,19 34:21 35:21 38:6 38:12 39:22 40:24 41:16 42:6 43:14 43:14 44:6 45:2 45:13 46:8 48:18 48:22 49:6,13 50:22 53:9,17 theory 5:14 12:16 23:21 theres 5:7 6:9 8:17 12:3 21:24 25:18 26:16,22 27:3,15 27:18 28:12 29:7 39:22 42:13 44:8 50:5 53:5 54:1 theyre 12:25 16:16 16:17 17:16 27:5 30:2 40:12 thing 17:15 35:17 37:17 42:3,20 49:20 things 5:9 9:11 11:7 14:7 17:5 20:8 22:5 31:5 33:12 45:19 49:15 think 4:16,24 5:25 6:1,7,24 7:4,5,9 7:21,22 9:2,13,14 9:20 10:5,18,21 10:22 11:4,11 12:3,4,18 13:9,14 14:7,14,24,25 15:4 17:4,5,6,19 18:2,6,16,17 19:2 19:2,10,13,15,24	19:24 20:1,10,12 20:18 21:6,13,14 21:18,22,22 22:9 22:10 23:4,17,25 24:2,4,12 25:1,1,2 25:6 26:7 27:6 29:14,17 30:16,17 31:2,4,7,8,9,13,15 31:16 33:25 35:6 35:21,22 36:1,4 36:14 37:9 39:10 39:13 42:5 44:13 44:23,25 45:2,6,7 45:22 46:9 47:20 48:19,22 49:3,6 49:13,14,25 50:17 50:22,24 51:8,17 51:20,25 52:3,8,9 52:14,22 53:2,7,8 53:20,25 54:1,3,5 54:6,6 third 8:12 32:13 37:7 thought 16:16 30:15 35:10,19 thousand 22:20 51:7 three 5:15 8:3,9 threshold 3:16 throw 14:19 23:12 tied 18:24 time 25:10 32:11 37:2,11 40:6 times 51:3,4 today 14:18 told 10:7 totally 13:24 50:5 tough 30:10 tradition 8:19 triggers 21:20 true 16:4 19:3 26:10 35:21 49:6 49:14 try 27:17 29:2 31:13 36:9 trying 10:4 23:10	23:11 29:5 40:6 44:15 47:2,10 48:5 tuesday 1:9 turns 3:20 two 10:15 13:9 22:9 25:1 29:24 31:4 36:1,13,23 38:15 38:24 41:11 45:20 48:5 49:15 50:3,7 50:23	V v 1:5 3:4 valid 4:6 6:15 validly 36:19 value 28:9 42:23 44:1 vast 13:19 verdicts 22:8 viable 44:11 view 4:14 10:24 violation 36:8 virtually 35:24 visit 37:3 vote 18:20 29:3 48:1 voted 48:2 voter 37:7 voters 47:25 48:2 votes 28:24,24
T t 2:1,1 tablet 7:15 take 7:15 20:3,8 21:10 40:11 talk 14:21 talking 7:23 9:22 13:17 14:12 15:7 18:4 30:5 34:24 35:5 42:15 tallahassee 1:17 telephone 14:16 34:11 37:3 tell 12:25 14:21 17:2 32:20,22 33:11 36:6 41:15 telling 5:19 34:9 41:1 ten 19:21 terms 24:7 test 20:17 43:15 text 17:7 thank 3:8 10:1,2,2 11:17 12:9 14:5 22:11 23:1,8,14 25:3,11 26:4,9 34:7,15 36:11 39:18 48:23 50:10 50:11,15 54:9 thankyou 31:21 32:17 33:9 36:15			U unbiased 54:3 unconstitutional 20:5 undeniable 48:8 underinclusive 6:19 7:3 underinclusiveness 27:20 33:20,21 underlies 12:5 undermine 12:5 34:9 undermined 35:3 understand 4:13 28:20,21 29:4 31:8 32:9 38:1 49:22 unethical 37:18 united 1:1,12 28:15 47:23 51:25 universal 16:16 unknown 13:15 unlawful 32:18,24 unlimited 44:19 unreasonable 27:15 unsuccessfully 48:3 unworkable 12:2 upheld 28:6 uphold 35:1,8 urge 50:1 use 21:16 27:11 32:9 52:8 54:5	W want 4:13 6:9 10:25 11:20 16:15 16:25 17:1,2 29:14 31:17,20 32:8,9 33:7,17 35:13 49:10 50:16 53:18,21 wanted 10:9 23:17 35:12 wants 42:16,17 54:5 washington 1:8,15 wasnt 51:25 water 39:22 way 8:1 16:3,17 22:13,17 24:22 28:22 41:8 weapon 32:10 web 3:12 weigh 28:1 48:5 weighed 45:25 weighing 41:18 weve 18:3 23:10,10 whats 12:5 13:21 27:12 28:19 32:1

33:3 47:24	40:24 45:14 51:2			
white 11:7 42:18	53:16			
52:9,11	yulee 40:5			
whos 27:4 31:7				
widely 31:15 42:25	Z			
williamsyulee 1:3				
3:4	0			
wording 44:6	1			
words 27:11 40:6	1 44:9			
52:2,4	10 42:10			
works 40:7	100 16:19			
worry 45:15	11 1:13 3:2			
worse 39:5	12 54:12			
wouldnt 5:10 40:15	131499 1:4 3:4			
write 7:16 9:25	14 54:12			
11:17 12:9 22:11	15 1:13 3:2			
31:21 32:3 33:9				
34:14 38:9,9	2			
51:10	20 1:9			
writes 17:12	2015 1:9			
writing 14:3 16:17	25 2:7 16:18			
51:14	250 16:19			
written 7:6,11,17				
9:1 15:1,14 20:6	3			
32:19 50:21,23	3 2:4			
wrong 19:25 22:9				
52:6	4			
	5			
X	5 42:10			
x 1:2,7	50 2:10 16:18 42:10			
	500 16:19			
Y				
yeah 5:18	6			
years 46:8,21	60 47:25			
youd 19:2 53:16				
youre 12:10 14:1	7			
15:12 17:10,11	7c 33:12 44:9			
20:4,8,22,23				
22:14 23:12 24:20	8			
29:12 34:17,17	800 46:8,21			
41:1 44:11 45:18				
46:10,23,23,23	9			
47:2,2,9,10,15				
51:4				
youve 26:9,15				
31:20 33:10 40:22				