

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MARK JANUS,)
)
) Petitioner,)
)
) v.) No. 16-1466
)
) AMERICAN FEDERATION OF STATE,)
)
) COUNTY, AND MUNICIPAL EMPLOYEES,)
)
) COUNCIL 31, ET AL.,)
)
) Respondents.)

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 COUNTY, AND MUNICIPAL EMPLOYEES,)
 COUNCIL 31, ET AL.,)
 Respondents.)

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Washington, D.C.
 Monday, February 26, 2018

The above-entitled matter came on for oral
 argument before the Supreme Court of the United
 States at 10:06 a.m.

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2

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	WILLIAM L. MESSENGER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	GEN. NOEL J. FRANCISCO	
7	On behalf of the United States,	
8	as amicus curiae, in support of	
9	the Petitioner	22
10	ORAL ARGUMENT OF:	
11	DAVID L. FRANKLIN	
12	On behalf of the State Respondents	35
13	ORAL ARGUMENT OF:	
14	DAVID C. FREDERICK, ESQ.	
15	On behalf of Respondent	
16	AFSCME Council 31	52
17	REBUTTAL ARGUMENT OF:	
18	WILLIAM L. MESSENGER, ESQ.	
19	On behalf of the Petitioner	68
20		
21		
22		
23		
24		
25		

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1466,
5 Janus versus the American Federation of State,
6 County, and Municipal Employees.

7 Mr. Messenger.

8 ORAL ARGUMENT OF WILLIAM L. MESSENGER
9 ON BEHALF OF THE PETITIONER

10 MR. MESSENGER: Mr. Chief Justice, and
11 may it please the Court:

12 Abood should be overruled because it
13 failed to apply heightened First Amendment
14 scrutiny to a compulsory fee for speech to
15 influence governmental policies. Abood's
16 failure places it at odds with Harris, with
17 Knox, and a slew of other speech and
18 association precedents.

19 Now Respondents attempt to justify
20 Abood's results with rationales found nowhere
21 in that decision, which undercuts any stare
22 decisis value in retaining Abood.

23 JUSTICE GINSBURG: May I ask,
24 Mr. Messenger, if you are right about agency
25 fees, what about three things: One is student

1 activities fees. Are they different and, if
2 so, why? Another is mandatory bar association
3 payments. And the third is you have a public
4 sector case. What about the private sector,
5 agency fees compelled by state law in the
6 private sector?

7 MR. MESSENGER: Yes, Your Honor. With
8 respect to the first two instances, the student
9 association or student fees and the bar
10 association fees, those cases are
11 distinguishable for reasons stated in Harris.
12 They're justified by different interests.

13 The state bar associations are
14 justified by the state's compelling government
15 interest in regulating the practice of law
16 before its courts. The student association
17 fees are justified by the government's or what
18 -- a university's compelling interest in
19 setting up a viewpoint-neutral forum for
20 speech.

21 And then, with respect to the private
22 sector cases, they hinge on a question of state
23 action. So, in this case, only public sector
24 union fees are being challenged. In the
25 private sector, you'd have a question of

1 whether state action applied, and, therefore,
2 the rule of Janus would apply to that case.

3 JUSTICE SOTOMAYOR: I'm sorry, I
4 thought that we had always recognized that the
5 government as employer had a compelling
6 interest in regulating its employment
7 decisions.

8 We permit the government to fire
9 people, deprive them of all money, not just a
10 fair share fee, but deprive them of any income
11 if they speak outside of the government's
12 approved policy messages or messages generally.

13 So, if we can permit the government as
14 employer to have a compelling interest to do
15 something as dramatic as firing someone, why
16 can't that interest in having workplace peace,
17 workplace routine in which issues are decided
18 in a -- in a collective way, why isn't that a
19 compelling interest comparable to the others?

20 MR. MESSENGER: Well, the government's
21 interests in restricting speech don't apply to
22 compelling support for speech. In fact,
23 oftentimes they cut the opposite way.

24 So the government's interest in
25 restricting speech, for example, in the Hatch

1 Act, restricting political activities, was in
2 preventing the politicalization of the
3 workforce and preventing government employees
4 from being organized into a political machine.

5 Of course, those same interests don't
6 justify forcing individuals to support the
7 speech of an advocacy group.

8 JUSTICE SOTOMAYOR: But that's no
9 different than forcing student -- student
10 participation in fees to provide a public
11 forum, to have a bar association regulated.
12 These are all forcing the subsidization of
13 private interests for a government purpose.
14 And the government purpose here is labor
15 relations and labor peace. Why isn't -- you
16 still haven't told me why that's not a
17 compelling state interest.

18 MR. MESSENGER: Well, irrespective of
19 whether --

20 JUSTICE SOTOMAYOR: Or -- I shouldn't
21 say state. A compelling federal -- government
22 interest.

23 MR. MESSENGER: Yes, Your Honor.

24 The Court doesn't need to reach
25 whether or not labor peace into that -- such

1 interests are compelling because agency fees
2 are not a least restrictive means to satisfy
3 any labor peace interest the government may
4 have in listening to one union.

5 So the labor peace interest, as this
6 Court has explained in *Abood*, is the
7 government's interest in listening only to one
8 union so it doesn't have to listen to multiple
9 unions.

10 JUSTICE SOTOMAYOR: Well, there's
11 another way of doing student fees. You can
12 have students who don't pay not participate in
13 any student activity because the price of -- of
14 being permitted to participate. You can have
15 bar associations that the state runs. You can
16 have alternatives of all kinds, but the
17 question is, is the alternative that the state
18 has chosen one that is well-fitted to the -- to
19 its need? Is it well-tailored, narrowly
20 tailored?

21 I don't see how you can do that given
22 the interests of the government in ensuring
23 that unions represent everybody.

24 MR. MESSENGER: Well, an agency fee
25 isn't necessary for exclusive representation.

1 JUSTICE SOTOMAYOR: Why not? You have
2 free riding.

3 MR. MESSENGER: Well, the reason, Your
4 Honor, is exclusive representation in and of
5 itself is a valuable benefit for a union. It
6 provides unions with extraordinary powers to
7 compel the government to listen to it at the
8 bargaining table, to not listen to other
9 advocacy groups.

10 JUSTICE GINSBURG: But it drains it of
11 resources that make it an equal partner in the
12 marketing setting. If you are right, that it's
13 not only the people who are opposed to the
14 union but also union supporters who may think
15 I'd rather keep the money in my own pocket, and
16 then you'll have a union with diminished
17 resources, not able to investigate what it
18 should demand at the bargaining table, not
19 equal to the employer that it faces.

20 MR. MESSENGER: Well, I think there's
21 two things in that question, Your Honor.

22 The first, the question is, does the
23 duty to represent nonmembers raise union bar --
24 bargaining costs? And I submit that it does
25 not. The union -- there's no reason why

1 negotiating a contract for all employees in a
2 unit would be more expensive than negotiating a
3 contract just for the union members, because
4 the union's discretion in bargaining is
5 incredibly wide. And so the duty that the
6 union has to the nonmembers, which it assumes
7 over them by assuming exclusive representative
8 authority, doesn't necessarily add any costs
9 above and beyond what the union would already
10 confer.

11 JUSTICE GINSBURG: But you're not
12 taking into account what I --

13 JUSTICE KENNEDY: Have the unions --

14 JUSTICE GINSBURG: -- I suggested,
15 that it's not just the people who oppose the
16 union, but the people who support the union but
17 say we have a chance to get out of paying fees
18 to the union, and so, although not for
19 ideological reasons, we're going to pass and
20 we're not going to pay dues either.

21 MR. MESSENGER: Well, I submit, Your
22 Honor, it's immaterial why an individual does
23 not wish to support union advocacy. The First
24 Amendment prohibits the government from probing
25 into individuals' subjective beliefs.

1 JUSTICE GINSBURG: So you're saying
2 that you do then recognize that the unions can
3 be in a position where they will be -- that the
4 resources available to them could be
5 substantially diminished?

6 MR. MESSENGER: Well, to -- to the
7 degree to which the union resources are
8 diminished by individuals exercising their
9 First Amendment right not to subsidize that
10 union, I submit that's a perfectly acceptable
11 result. The --

12 JUSTICE ALITO: Does -- does the
13 Constitution require states to demand that
14 unions provide services for nonmembers?

15 For example, is there a constitutional
16 requirement for a union to handle the
17 grievances of nonmembers, or is that something
18 that's imposed by state law?

19 MR. MESSENGER: It varies, Your Honor.
20 In the federal law, this Court implied the duty
21 of --

22 JUSTICE ALITO: Well, no, we're
23 talking about state law.

24 MR. MESSENGER: Yes. In state law,
25 for example, in Illinois state law, there is a

1 provision in the Illinois Labor Relations Act
2 that expressly provides a duty of fair
3 representation.

4 JUSTICE ALITO: Yeah, I understand
5 that. Are they -- is that constitutionally
6 required?

7 MR. MESSENGER: No, Your Honor.

8 JUSTICE KENNEDY: With reference to
9 some of the other cases they've discussed, has
10 -- have the unions at any point in this
11 litigation or any point in their history ever
12 said that they're committed to the -- to the
13 idea of viewpoint neutrality?

14 MR. MESSENGER: No, Your Honor.

15 JUSTICE BREYER: I wonder, since your
16 time is limited, I -- let me say three -- three
17 quick questions.

18 What you're doing basically is trying
19 to apply a more modern framework to some older
20 cases. This has been the law for 50 years just
21 about. Okay?

22 Holmes and Brandeis didn't know about
23 these modern framework. How many cases should
24 we go back? Do you think we should apply
25 modern frameworks to all old cases, begin with

1 Marbury versus Madison? There are lots of very
2 good lawyers in this room. They will think of
3 all kinds of older cases where we haven't
4 applied modern frameworks.

5 So, one, what's your limiting
6 principle there? Two, what is your limiting
7 principle on the matter that we're talking
8 about?

9 I mean, Stewart, Justice Stewart, who
10 wrote Abood in the '70s, thought the case is
11 identical or near identical to the Railway
12 Labor Act cases. Railway Labor Act, that's a
13 railroad, they're regulated, government's
14 involved, just as your clients are involved,
15 you know, just as the unions here.

16 What's the distinction, if you're
17 going to try to make one?

18 And -- and -- and -- and really,
19 three, and this is for all of you, all the
20 lawyers here, what do you think of the -- what
21 I think of as a compromise put forth by
22 Justices Kennedy, Scalia, Souter, and O'Connor
23 in Lehnert, called to our attention
24 specifically by the brief of Professor Fried
25 and Professor Post? Does that solve most of

1 your problem for any side?

2 Those are the three. You see? Stare
3 decisis, even if it weren't there, how do you
4 distinguish all the other unions, particularly
5 those in regulated industries, and, three, what
6 about the compromise?

7 MR. MESSENGER: Yes. So, to address
8 your questions in order, Justice Breyer, on the
9 first point, Abood is not only inconsistent
10 with cases that came after it; it was
11 inconsistent with cases that came before it,
12 such as Elrod. Even the dissent in Elrod,
13 Justice Powell would have applied exacting
14 First Amendment scrutiny to patronage.

15 So Abood wasn't just a departure -- or
16 isn't just inconsistent with prior precedent or
17 -- sorry, subsequent precedents, but with the
18 precedents that came before it. So this would
19 not necessarily be solely applying a new
20 doctrine to Abood but applying what the law was
21 even prior to Abood.

22 With the Railway Labor Act, as this
23 Court explained in Harris, there you have the
24 private sector. You don't have the union
25 dealing with government, which, of course, is

1 political advocacy, and that political advocacy
2 is subject to heightened First Amendment
3 protection, which you don't necessarily have in
4 the private sector.

5 And then, with respect to the third
6 point, the test suggested in the dissent in
7 Lehnert, the problem with that is that it
8 allowed for charging of collective bargaining
9 and anything else that the government decided
10 that the union had a duty to bargain over.

11 So, in other words, that test, the
12 statutory duties test, allows the government to
13 decide what is constitutionally chargeable
14 under the First Amendment.

15 So that test would, of course, among
16 other things, allow for charging of collective
17 bargaining. But here collective bargaining is
18 the core political activity, which we submit
19 individuals cannot be compelled to support.

20 JUSTICE SOTOMAYOR: Is it just the
21 collective nature of the union? You're not
22 suggesting that if an employee goes to the
23 state and tries to negotiate his or her wages
24 that that's a First Amendment activity. We've
25 said it's not, right?

1 MR. MESSENGER: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: That
3 employment-related issues are not entitled to
4 First Amendment protection, correct?

5 MR. MESSENGER: Yes, Your Honor,
6 generally speaking.

7 JUSTICE SOTOMAYOR: So, if an employee
8 is disciplined by the state for some
9 malfeasance, that's an employment-related issue
10 not entitled to First Amendment protection?

11 MR. MESSENGER: Oftentimes.

12 JUSTICE SOTOMAYOR: Oftentimes. If
13 employees come to the union -- come to the
14 state and want greater training, employment
15 issue, correct?

16 MR. MESSENGER: Generally, yes.

17 JUSTICE SOTOMAYOR: So why does it
18 transform into some entitlement to First
19 Amendment protection merely because a
20 collective body of employees are coming to the
21 table at once? What -- what's the
22 transformative nature now of making these
23 substantive questions matters of public policy?

24 MR. MESSENGER: As this Court
25 recognized in Harris, it's the scale. So here

1 you have AFSCME bargaining over issues that
2 affect hundreds of millions of dollars and
3 affect thousands of employees across the board.
4 The scale of that is what makes it a political
5 --

6 JUSTICE SOTOMAYOR: It's not going to
7 change whether the union asks for it or the
8 employees come -- what you're now saying is if
9 the employees came into an auditorium at a
10 business site of the state and every one of
11 them got up and said, I want higher wages, the
12 scale of that demand makes it protected by the
13 First Amendment? It's still a work-related
14 demand.

15 MR. MESSENGER: Well, in that
16 hypothetical, it would arguably be a matter of
17 public concern if there was a stage-in, you
18 know, at a public auditorium in which employees
19 stood up.

20 JUSTICE SOTOMAYOR: Well, let's --
21 let's not -- don't put in facts. They have
22 permission to be in the auditorium. They walk
23 in as a group. Every one of them gets up and
24 says, I want higher wages.

25 Is that an employment issue, or does

1 that now become public policy because,
2 something that every employee wants, they've
3 now articulated?

4 MR. MESSENGER: I would submit that it
5 starts to move towards a matter of public
6 policy if it isn't entirely.

7 JUSTICE SOTOMAYOR: So it's now scale,
8 not subject?

9 MR. MESSENGER: Well, it's both scale
10 and subject. I mean, here the subject are
11 wages, health insurance, many ways in which the
12 government operates which are very important
13 both to the public fisc and to the operation
14 and delivery of services.

15 JUSTICE SOTOMAYOR: Scale --

16 JUSTICE KAGAN: Mr. Messenger, may I
17 ask you about reliance interests here? I don't
18 think that we have ever overruled a case where
19 reliance interests are remotely as strong as
20 they are here.

21 So just a few things to put on the
22 table. Twenty-three states, the District of
23 Columbia, Puerto Rico, all would have their
24 statutes declared unconstitutional at once.
25 Thousands of municipalities would have

1 contracts invalidated. Those contracts
2 probably cover millions, maybe up to over 10
3 million, workers.

4 So property and contract rights, the
5 -- the -- the -- the statutes of many states
6 and the livelihoods of millions of individuals
7 affected all at once.

8 When have we ever done something like
9 that? What would be the justification for
10 doing something like that?

11 MR. MESSENGER: Well, I'd say two
12 things, Justice Kagan.

13 The first is that the prevalence of
14 these compulsory unionism provisions isn't
15 reason for retaining Abood; it's reason for
16 reversing Abood. You have wide-scale First
17 Amendment violations, as you said, in 23 states
18 --

19 JUSTICE KAGAN: But that would be to
20 --

21 MR. MESSENGER: -- affected --

22 JUSTICE KAGAN: -- flip our usual
23 stare decisis doctrine. Our usual stare
24 decisis doctrine makes it quite clear that
25 reliance is an important consideration on the

1 scales.

2 MR. MESSENGER: Reliance on something
3 that's constitutional. Reliance on an illegal
4 practice, no. For example, in Arizona v. Gant,
5 which involved searches of cars under the
6 Fourth Amendment, the Court said the fact this
7 was occurring in many places across the board
8 is a reason for reversing it, and many
9 individuals' Fourth Amendment rights were being
10 violated.

11 And so, in that instance, the
12 prevalence of compulsory unionism in the states
13 is a reason for reversing it.

14 And then, in terms of contracts in
15 general, I submit the contracts will survive,
16 except for the excision of the compulsory
17 unionism provisions due to severability.

18 JUSTICE KAGAN: Well, why is that?
19 How many of these contracts have severability
20 clauses, do you know?

21 MR. MESSENGER: I couldn't find a
22 number for the public sector, Your Honor, but
23 the general -- most contracts, at least I have
24 seen for anecdotal, do have severability
25 clauses and the general rule under the

1 Restatement of Contracts, I think it's 184.

2 JUSTICE BREYER: California says the
3 opposite. I mean, California has a whole brief
4 there. You've read that.

5 MR. MESSENGER: Of course, yes, Your
6 Honor.

7 JUSTICE BREYER: So what's the answer
8 to that?

9 MR. MESSENGER: The answer, Your
10 Honor, is that I submit they're severable in
11 California because they're not an essential
12 provision of the contract that would require
13 the excision of anything more than the clause.

14 JUSTICE KAGAN: Of course, even if
15 that's true, presumably they're bargained-for
16 provisions. The contract would have been
17 different if the unions and the employers had
18 known that this was going to be declared
19 unconstitutional.

20 So to leave the contract as is, except
21 for one particular bargained-for provision, is
22 to do something that's inequitable for the
23 union.

24 MR. MESSENGER: Well, I don't think
25 that's necessarily always true as a legal

1 matter. Foremost in some states, compulsory
2 unionism is mandated by the statute, for
3 example, in California. And in other states,
4 once the provision is there, it stays there, so
5 it's not even a subject of bargaining usually.
6 It's something that was always there from the
7 prior contract. It's taken as an assumption.

8 And even to the extent it was a
9 bargained-for issue in a recent contract, these
10 contracts will expire the next one to three
11 years and need to be renegotiated anyways. So
12 I don't think that really changes the reliance
13 interests.

14 Mr. Chief Justice, if I can reserve
15 the remainder of my time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Francisco.

19 ORAL ARGUMENT OF GENERAL NOEL J. FRANCISCO
20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
21 IN SUPPORT OF THE PETITIONER

22 GENERAL FRANCISCO: Mr. Chief Justice,
23 and may it please the Court:

24 I'd like to focus on three basic
25 issues. The first is the government's interest

1 in having a necessity of agency fees. The
2 second is the stare decisis question that we've
3 been talking about. And then the third is the
4 Lehnert issue.

5 In terms of whether agency fees are
6 necessary to further the compelling interest in
7 having an exclusive bargaining representative
8 on the other side of the table, I don't think
9 there's really any basis for concluding that.
10 For example, in the federal government, we
11 don't have agency fees either in the government
12 generally or under the --

13 JUSTICE SOTOMAYOR: We also have more
14 benefits that are given without unions.

15 GENERAL FRANCISCO: Not in the Postal
16 Service, Your Honor. The Postal Service --

17 JUSTICE SOTOMAYOR: Well, that may be
18 a different one, but doesn't that beg the
19 question, Mr. General, about not having a
20 record here? There's an awful lot of
21 assumptions that have been bandied back and
22 forth by both sides on the actual effects of
23 this. You're saying it's okay because the
24 federal government's the same, and the Postal
25 Service is like other jobs; that -- that's a

1 whole lot of allegations about the reality,
2 factual reality --

3 GENERAL FRANCISCO: Right.

4 JUSTICE SOTOMAYOR: -- of things that
5 have not been tested anywhere.

6 GENERAL FRANCISCO: Right. Well, two
7 responses, Your Honor. First, the Postal
8 Service does have the full range of
9 negotiation. And in the rest of the federal
10 government, I would submit that the more
11 limited bargaining range should make it harder
12 for them to recruit members into the union.

13 And, in fact, in the Postal Service,
14 according to Bureau of Labor Statistics data,
15 we find that about 94 percent of employees who
16 are subject to collective bargaining agreements
17 are members of the union even though you don't
18 have agency fees. In the federal government
19 generally, including the Postal Service, that
20 number is about 80 percent. And if you just
21 take the federal -- the Postal Service out and
22 look at the federal government, it's still
23 north of 80 percent.

24 JUSTICE SOTOMAYOR: How much of the
25 workplace --

1 GENERAL FRANCISCO: That's according
2 to Bureau of Labor Statistics data.

3 JUSTICE SOTOMAYOR: How much of the
4 workplace is unionized for the federal
5 government?

6 GENERAL FRANCISCO: I believe that in
7 the federal government generally, about a
8 quarter of the workplace, a quarter to a third
9 of the workplace is unionized.

10 JUSTICE SOTOMAYOR: And how much is
11 their unionization in the general corporate
12 sector?

13 GENERAL FRANCISCO: I think --

14 JUSTICE SOTOMAYOR: Or private sector?

15 GENERAL FRANCISCO: My -- I -- I don't
16 know for sure. I think it's on the order of --
17 I think it's less than that, but I'm not
18 exactly sure what the private sector rate is.

19 JUSTICE SOTOMAYOR: In the mechanical
20 industry, in the printing industry, in -- I
21 know a lot of industries --

22 GENERAL FRANCISCO: Yeah.

23 JUSTICE SOTOMAYOR: -- that are
24 controlled by unions.

25 GENERAL FRANCISCO: I don't have that

1 number.

2 JUSTICE SOTOMAYOR: I don't mean that
3 in a negative sense.

4 GENERAL FRANCISCO: No, no.

5 JUSTICE SOTOMAYOR: Meaning that
6 almost all work --

7 GENERAL FRANCISCO: And I -- and I
8 don't have that number at the top of my head,
9 Your Honor.

10 JUSTICE KENNEDY: You -- you were
11 trying to get to two other points.

12 GENERAL FRANCISCO: Yes. So my other
13 point was on the motion to dismiss issue, the
14 need for a record, this case came up on a
15 motion to dismiss. So I think the appropriate
16 course is, as in Harris, you reverse the motion
17 to dismiss and you send it back.

18 Turning to the stare decisis point and
19 particularly the reliance interests, collective
20 bargaining agreements are generally two- to
21 four-year contracts. So that means that almost
22 all of them were negotiated under the shadow of
23 Harris and Knox. So I don't think that there
24 was an enormous amount of reliance on the
25 continued vitality of Abood.

1 But even if there were some reliance,
2 I think it would be very short-lived, until the
3 next negotiating session, where any new
4 decisions from this Court would be factored in.
5 And I do agree that there also probably
6 wouldn't be much disruption at all since you
7 would simply invalidate individual agency fee
8 provisions. Now --

9 JUSTICE GINSBURG: General Francisco,
10 I would like to get your answer to the question
11 I asked Mr. Messenger and didn't have time to
12 ask him a follow-up.

13 Let's say you prevail in this case.
14 What happens in the private sector? We have a
15 doctrine you know well, Shelley against
16 Kraemer, that says if a contract is illegal,
17 the court can't enforce it.

18 GENERAL FRANCISCO: Uh-huh.
19 Respectfully, Your Honor, I don't think
20 anything would happen in the private sector for
21 largely the reasons that Justice Alito
22 identified in his Third Circuit opinion on the
23 issue and the D.C. Circuit identified in an
24 opinion that I -- I believe you were part of,
25 which held that in the private sector, there

1 simply is no state action when it comes to
2 collective bargaining agreements.

3 JUSTICE BREYER: Look, the --

4 GENERAL FRANCISCO: That's also what
5 the United States argued in its Beck amicus
6 brief here a few -- a few years ago.

7 JUSTICE BREYER: Labor peace, I once
8 heard Archie Cox, maybe it was in your position
9 right here, say the greatest instrument for
10 labor peace and prosperity from the years 1945
11 to 1970 was grievance arbitration in the
12 unions.

13 GENERAL FRANCISCO: Uh-huh.

14 JUSTICE BREYER: So suddenly we're
15 changing the method of financing that. You
16 say, well, it's just public unions.

17 But if I were in a regulated industry
18 and I read the Court's opinion siding with you,
19 I would wonder if it didn't apply to me.

20 GENERAL FRANCISCO: Uh-huh.

21 JUSTICE BREYER: And not all workers
22 are lawyers. And all they've seen is that this
23 Court has suddenly cut legs, at least one, out
24 of the financing of a system that at least in
25 some aspects, though it's debatable, some

1 people think it brought labor peace.

2 GENERAL FRANCISCO: Right.

3 JUSTICE BREYER: Now, you are the
4 government of the United States. What do you
5 think about that?

6 GENERAL FRANCISCO: Well, Your Honor,
7 I think that the core of this issue goes to --
8 and I'm reading from the agency brief -- the
9 agency fee provision itself, the cost of the
10 collective bargaining process.

11 And that's separate from the grievance
12 process. I actually think the grievance
13 process raises serious First Amendment concerns
14 as well. But for purposes of this case, the
15 focus is on the cost of collective bargaining,
16 and I don't think you necessarily have to go
17 any further than that to resolve this case,
18 since the whole --

19 JUSTICE KAGAN: Please.

20 GENERAL FRANCISCO: -- since the whole
21 idea of agency fees, their justification and
22 their purpose, has been predicated on the --
23 the need to compel support for the collective
24 bargaining process.

25 JUSTICE KAGAN: General, an important

1 part of Mr. Messenger's argument is the idea
2 that all speech about employment conditions,
3 about pay, about vacation, you know, about all
4 of the various employee benefits that -- that
5 are subjects of collective bargaining, that are
6 really the heart of collective bargaining, that
7 all speech about that is -- are matters of
8 public concern when it happens in the public
9 workplace because they all cost money and, as
10 taxpayers, we would be interested in things
11 that cost money. Is that the government's
12 position as well, that all of that speech is a
13 matter of public concern?

14 GENERAL FRANCISCO: Yes, Your Honor.
15 I think in the public bargaining context, all
16 of it goes to the size, structure, cost of
17 government, and the delivery of public
18 services, although I would agree that there are
19 some things that more vividly implicate public
20 policy than others.

21 JUSTICE KAGAN: Can I ask -- I -- it
22 strikes me as a very unusual position for the
23 government to be taking, looking after the
24 long-term interests of the United States
25 government, because essentially what that means

1 is that you will have to litigate all
2 employee/employer disputes under the --

3 GENERAL FRANCISCO: Yeah.

4 JUSTICE KAGAN: -- second step of
5 Pickering rather than under the first --

6 GENERAL FRANCISCO: Well --

7 JUSTICE KAGAN: -- which is quite a
8 striking thing for the government to be saying
9 that it agrees with.

10 GENERAL FRANCISCO: Yeah. Well, I --
11 I very much disagree with that, Your Honor. I
12 think the Pickering framework is an established
13 framework that works very well, and the nature
14 of individual wage disputes, the reason it
15 rises to the level of public interest when it
16 comes to collective bargaining agreements is
17 because it really does all go to the overall
18 size, structure, and the cost of the
19 government. Pickering is very different.

20 JUSTICE KAGAN: So you're saying that
21 when a union collectively bargains, it's a
22 matter of public concern but that if employees
23 in their workplace, 10 or 20 of them, get
24 together without the formal collective
25 bargaining that a union does, that that's not a

1 matter of public concern?

2 GENERAL FRANCISCO: Very much so, Your
3 Honor, because when an individual employee is
4 negotiating with his employer over his
5 particular wage, that's a negotiation that's
6 taking place between the employee and the
7 employer.

8 In the public sector collective
9 bargaining context, it's taking place between a
10 private third-party organization, a union, and
11 the government in order to set the overall
12 size, scope, and structure of government.

13 JUSTICE KAGAN: Well, that union is a
14 representative of the employees and has been
15 chosen to represent the employees so that the
16 employees can better wield their power --

17 GENERAL FRANCISCO: Right. And --

18 JUSTICE KAGAN: -- over terms and
19 conditions of employment. So why should it
20 matter -- I mean, that's -- I'm -- I'm trying
21 to understand this because it struck me as a
22 quite amazing thing --

23 GENERAL FRANCISCO: Yeah.

24 JUSTICE KAGAN: -- for the government
25 to be saying that these were matters of public

1 concern. Why should it matter if 50 employees
2 get together and say we want higher wages and
3 then, on the other hand, if employees get
4 together and say, you know what, we think it's
5 right to elect a union so that the union can
6 say that, it's the exact same subjects and the
7 exact same speech that's going to be involved.

8 GENERAL FRANCISCO: And I think it
9 matters for two reasons: One is the scope of
10 the issue. But, two, and more importantly,
11 it's the nature of Pickering.

12 Even in Pickering, the government is
13 allowed to prohibit core political speech when
14 it interferes with the employee's ability to do
15 their job.

16 JUSTICE SOTOMAYOR: I'm sorry --

17 GENERAL FRANCISCO: And that's the --

18 JUSTICE SOTOMAYOR: If we're going to
19 get into scope under the Pickering test, then
20 the employee who, contrary to the chain of
21 command, talks about rampant corruption in a
22 government agency, then we're not going to
23 permit, as we already have, that employee to be
24 fired because the scope of that affects the
25 public fisc in a huge way.

1 GENERAL FRANCISCO: I very much
2 disagree with that, Your Honor.

3 JUSTICE SOTOMAYOR: I -- I -- I don't
4 understand what you're arguing. This is such a
5 radical new position on your part.

6 GENERAL FRANCISCO: I don't -- I don't
7 think --

8 JUSTICE SOTOMAYOR: Mr. -- Mr.
9 General, by the way, how many times this term
10 already have you flipped positions from prior
11 administrations?

12 GENERAL FRANCISCO: Your Honor, I
13 believe --

14 JUSTICE SOTOMAYOR: This may be -- how
15 many?

16 GENERAL FRANCISCO: Your Honor, I
17 think that we have revised the position in, so
18 far, three cases.

19 JUSTICE BREYER: That's fair.
20 Regardless, what is --

21 CHIEF JUSTICE ROBERTS: How --

22 JUSTICE BREYER: -- what is the answer
23 to the -- Justice Kagan's question?

24 GENERAL FRANCISCO: Yeah. The answer
25 --

1 JUSTICE BREYER: Because she said --
2 what --

3 GENERAL FRANCISCO: -- to the question
4 goes to the nature of the Pickering inquiry
5 itself. Pickering reflects the government's
6 interest in controlling the words and actions
7 of its employees in order to make sure they're
8 doing their jobs.

9 And Pickering reflects the teaching
10 that heightened scrutiny is fundamentally
11 incompatible with that interest, since if you
12 apply heightened scrutiny to it, you basically
13 prohibit employee -- employers from controlling
14 their words and actions. But there's no
15 corresponding interest when it comes to
16 compelling employees to subsidize third-party
17 advocacy.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 General.

20 Mr. Franklin.

21 ORAL ARGUMENT OF DAVID L. FRANKLIN,
22 SOLICITOR GENERAL OF ILLINOIS,
23 ON BEHALF OF THE STATE RESPONDENTS

24 MR. FRANKLIN: Thank you, Mr. Chief
25 Justice, and may it please the Court:

1 This Court's cases uniformly recognize
2 that the state has a much freer hand when it
3 manages its personnel as an employer than when
4 it regulates its citizens as a sovereign, and
5 this has come up already today, that freer hand
6 includes broad authority to put conditions on
7 employees' speech.

8 Now my friends on the other side this
9 morning argue that that deference to the
10 employer's prerogatives somehow depends on the
11 scale or the scope of the speech in question.
12 That has never been the law.

13 The government is still acting as an
14 employer when it treats with its employees as a
15 group or as a whole. That's why this Court has
16 repeatedly used the Pickering framework and
17 other deferential public employee tests to
18 uphold generally applicable workplace policies.

19 You see that in the Letter Carriers
20 case, upholding the Hatch Act. You see that in
21 San Diego versus Roe, the rule in Garcetti
22 applies to millions of public employees around
23 the country.

24 JUSTICE KENNEDY: Garcetti involved
25 government speech. What we're talking about

1 here is compelled justification and compelled
2 subsidization of a private party, a private
3 party that expresses political views
4 constantly.

5 MR. FRANKLIN: I'm happy to speak to
6 that, Justice Kennedy. You're right. The
7 Garcetti case is an official duties case, and
8 we're not arguing this case as an official
9 duties case.

10 However, agency fees are a condition
11 of public employment because they pay for the
12 workplace services -- not just collective
13 bargaining -- but as Justice Breyer pointed out
14 referencing General Cox, day-to-day workplace
15 grievance resolution under an employment
16 contract. All of those activities involve
17 speech by an employee representative to an
18 employer in an employment --

19 JUSTICE KENNEDY: Suppose that --
20 suppose that 80 percent of the fees of the
21 union dues went to matters that were highly
22 political in nature and 20 percent to wage and
23 grievance -- wage hour -- wage negotiations and
24 grievances. Would that change your view?

25 MR. FRANKLIN: I -- I don't know that

1 it would, Your Honor. You know, the Abood
2 case, the Keller case, Beck, Ellis, all of them
3 --

4 JUSTICE KENNEDY: Then -- then it
5 seems -- then it seems to me your argument
6 doesn't have much weight.

7 MR. FRANKLIN: Well, first of all, we
8 don't know what percentage of the union's
9 activities are wrapped up with grievances. If
10 you -- you know, we don't have a record here.
11 We're on a motion to dismiss.

12 But if you look at publicly available
13 Hudson notices that do break out categories of
14 chargeable expenses in this way, which ours in
15 the record doesn't happen to do, you'll find
16 that in many cases, especially in the out-years
17 when the CBA is not being renegotiated, charges
18 for field representatives -- those are the
19 people in -- day in and day out who are doing
20 workplace grievance work, advising employees,
21 et cetera -- can be three times, six times,
22 seven times as much on the chargeable expenses
23 line than the line for collective bargaining.

24 So to -- to decide this case in an
25 evidentiary vacuum on the basis of assumptions

1 about how that speech breaks down or how those
2 expenses break down would, in our view, be
3 irresponsible, frankly, because what you've got
4 --

5 JUSTICE ALITO: There are -- there are
6 numerous differences between Pickering and the
7 situation here, but let me just ask you about
8 one. Do you think there are any limitations on
9 the authority of the State of Illinois to
10 compel its employees to say what the state
11 wants them to say? And if there are
12 limitations, what are they?

13 MR. FRANKLIN: If the -- if what the
14 state wants them to say is a function of their
15 official duties in the workplace, that's
16 Garcetti --

17 JUSTICE ALITO: No, if it's not a
18 function of their official duties. I
19 understand you could not -- you probably agree
20 with the position you're arguing, but if you
21 didn't, coming here representing the State of
22 Illinois, you couldn't just argue what you
23 like.

24 MR. FRANKLIN: No, my boss is right
25 behind me.

1 JUSTICE ALITO: That's right.

2 (Laughter.)

3 MR. FRANKLIN: I -- I -- I -- I'm
4 acting pursuant to official duties, Your Honor.

5 JUSTICE ALITO: I know. I understand
6 that and in that situation.

7 MR. FRANKLIN: Right. No, but, I
8 understand you're not --

9 JUSTICE ALITO: But aside from your
10 official duties, are there any limitations?

11 MR. FRANKLIN: Yes.

12 JUSTICE ALITO: What are they?

13 MR. FRANKLIN: What the Garcetti case
14 underlines is that when the state takes the
15 employment relationship and exploits or
16 leverage -- leverages that relationship in such
17 a way as to have an effect on the broader
18 marketplace of citizen speech, so that the
19 employer interest is really pretextual, then
20 we're --- we've got a different story.

21 Pickering accounts for this, Justice
22 Alito.

23 JUSTICE ALITO: Well, let me ask you,
24 I'll give you a concrete situation. In
25 Connick, an assistant district attorney -- the

1 -- the Court held that an assistant district
2 attorney could be fired for circulating a
3 writing that suggested that there was a lack of
4 confidence in the supervisors in the office.
5 Okay? It was a limitation on what she could
6 say.

7 Do you think the case would have been
8 the same if the district attorney required the
9 assistant district attorney to appear before a
10 meeting of everybody in the office and say: I
11 love my supervisors; they are the best
12 supervisors anybody could possibly want?

13 MR. FRANKLIN: It would -- I'll answer
14 your question. The preface to my answer has to
15 be, though, because I want to lay this marker
16 down, that would still be analyzed under
17 Pickering, step 2. Okay?

18 Under Pickering, step 2, we -- we'd
19 assess the strength of the state's --

20 JUSTICE ALITO: No, the Court said
21 that that was a matter of -- that was a -- that
22 was a subject of private concern.

23 MR. FRANKLIN: Well, it's possible
24 that if you've got an Orwellian scenario where
25 the employee is being required in the workplace

1 to speak about matters of public concern, we
2 would get to step 2.

3 JUSTICE ALITO: Private concern.
4 Private concern.

5 MR. FRANKLIN: What we wouldn't get to
6 is strict scrutiny then. The -- the -- the --
7 the Petitioner wants to vault over all of the
8 break points in this Court's First Amendment
9 law with respect to public employees and go
10 straight to strict scrutiny.

11 And the fact is this Court has never
12 applied strict scrutiny to a condition of
13 public employment that was backed by a bona
14 fide interest that the state has as an
15 employer. Never, not once.

16 And I'm happy to talk about the -- the
17 political affiliation cases, because I don't
18 think they are to the contrary.

19 So, you know, implicit, I think, in
20 your question, Justice Alito, was the
21 distinction that my friend tried to draw
22 between compulsion and restriction. But this
23 Court has said again and again in Wooley, in
24 Riley, and elsewhere, that compulsion and
25 restriction of speech are two sides of the same

1 coin.

2 JUSTICE ALITO: Well, then why won't
3 you answer my question about what the assistant
4 district attorney could be required to do?

5 Throughout history, many people have
6 drawn a line between a restriction on their
7 speech and compelled speech.

8 I'll give you an example that's only
9 -- that's quite different given the nature of
10 the -- of the subject from what's involved
11 here.

12 Do you remember the -- the -- the
13 movie and the play "A Man For All Seasons"? So
14 Thomas More didn't insist on saying that he
15 thought the act of supremacy was wrong, but he
16 drew a line and paid for it with his life when
17 -- because he would not affirmatively say that
18 it was wrong.

19 When you compel somebody to speak,
20 don't you infringe that person's dignity and
21 conscience in a way that you do not when you
22 restrict what the person says?

23 MR. FRANKLIN: You do, Your Honor, in
24 some circumstances. But what we're talking
25 about here is a compelled payment of a fee. So

1 it's one step removed from compelled speech.

2 And I don't want to disparage the
3 First Amendment interests that are at issue
4 here. Aboud recognized them. We take them
5 seriously. But it's important to recognize
6 that agency fees are not "A Man for All
7 Seasons" scenario by any stretch. They don't
8 --

9 JUSTICE ALITO: No, they're not a --
10 it's not "A Man for All Seasons" scenario.

11 MR. FRANKLIN: Right.

12 JUSTICE ALITO: But I'm just asking
13 you about the point whether you think that
14 compelling somebody to speak is exactly the
15 same thing as saying you may not speak?

16 MR. FRANKLIN: No, it's not exactly
17 the same, Your Honor.

18 JUSTICE ALITO: No.

19 MR. FRANKLIN: The Pickering balance
20 could come out differently in certain
21 instances. I would grant you that.

22 I do think, not to use Garcetti again,
23 but if Mr. Ceballos had been required to write
24 a disposition memo and had said I won't do it,
25 as opposed to what actually happened, which was

1 that he wrote one and was disciplined for what
2 was in it, nothing about the logic or the
3 outcome would change.

4 JUSTICE SOTOMAYOR: Counsel, what is
5 there -- what is there about compelled speech?
6 I mean, our line has drawn a big difference
7 between compelled speech and compelled subsidy.

8 MR. FRANKLIN: I agree with that,
9 Justice Sotomayor. I mean, if you look at the
10 cases --

11 JUSTICE SOTOMAYOR: And -- and we've
12 compelled people to pay bar associations so
13 long as you're not compelled or stopped from
14 speaking when you disagree. We've said that's
15 a compelled subsidy.

16 MR. FRANKLIN: And all --

17 JUSTICE SOTOMAYOR: Bar members can
18 come out any day they want and say they don't
19 take the same position on a policy question as
20 the bar association. Any union member is free
21 to get up publicly in any setting he or she
22 wants to say they don't agree with the position
23 the union is taking, correct?

24 MR. FRANKLIN: Correct. And all of
25 those cases, Keller, Southworth, Glickman, were

1 outside of the workplace context, where the
2 state has always been recognized to have
3 paramount interests in ensuring that its
4 managerial prerogatives can be carried out.

5 You know, the state's interest here,
6 if I can spend just a few moments talking about
7 that, is, first, we have an interest in dealing
8 with a single spokesman for the -- for the
9 employees. Second, we have an interest in
10 imposing on that spokesman a legal duty to
11 represent everyone.

12 But as -- as regards agency fees, they
13 are complementary to those first two interests.
14 They serve our managerial interests in two
15 ways. First, they allow us to avoid a
16 situation where some employees bear the cost of
17 representing others who contribute nothing.
18 That kind of two-tiered workplace would be
19 corrosive to our ability to cultivate
20 collaboration, cohesion, good working
21 relationships among our personnel.

22 Second, independent of that, we have
23 an interest at the end of the day in being able
24 to work with a stable, responsible, independent
25 counterparty that's well-resourced enough that

1 it can be a partner with us in the process of
2 not only contract negotiation --

3 JUSTICE KENNEDY: It can be a partner
4 with you in advocating for a greater size
5 workforce, against privatization, against merit
6 promotion, against -- for teacher tenure, for
7 higher wages, for massive government, for
8 increasing bonded indebtedness, for increasing
9 taxes? That's -- that's the interest the state
10 has?

11 MR. FRANKLIN: No. The -- the state
12 has no interest or no overriding interest --

13 JUSTICE KENNEDY: Doesn't it --
14 doesn't it -- doesn't it blink reality to deny
15 that that is what's happening here?

16 MR. FRANKLIN: We -- with all due
17 respect, Justice Kennedy, we've never denied
18 that many of the topics that come up at the
19 bargaining table with public employee unions
20 have serious fiscal and public policy
21 implications. We've never denied that.

22 JUSTICE BREYER: All right. So what
23 about the compromise?

24 MR. FRANKLIN: The -- the line that
25 Justice Scalia drew in his Lehnert separate

1 opinion was, in our view, superior to the one
2 that was drawn by the plurality.

3 We've offered a test for where to draw
4 the line between chargeable and non-chargeable
5 expenses that, in practice, would overlap with,
6 would coincide with, Justice Scalia's line in
7 most cases, but the reason that we think that
8 it's superior to the plurality's line is that
9 the germaneness test does have a vagueness
10 problem and in -- in some instances, it allows
11 what it shouldn't allow, which is, for
12 chargeability, for speech to the government as
13 a sovereign. And we think a very firm line can
14 be drawn there.

15 JUSTICE KAGAN: Mr. -- Mr. Franklin,
16 Mr. Messenger has suggested, and -- and -- and
17 General Francisco, that if we overruled Abood,
18 things would in a few years get back to normal.
19 The state would pass a new statute, and these
20 municipal contracts would all be renegotiated,
21 and it wouldn't be any real issue.

22 So could you -- what do you think
23 about that? What would the difficulties be, if
24 any, if the state -- if -- if the Court were to
25 overrule Abood?

1 MR. FRANKLIN: I'm happy to speak to
2 that, Justice Kagan. Here's what we know, and,
3 obviously, we're on a motion to dismiss, but
4 more broadly, what we know is that tangibly,
5 when these kinds of obligations of financial
6 support become voluntary, union membership goes
7 down, union density rates go down, union
8 resources go down. We've seen it again and
9 again. Mancur Olson spoke about it in the
10 foundational text of behavioral economics.

11 We also know that, intangibly, there
12 are plenty of studies that show that when
13 unions are deprived of agency fees, they tend
14 to become more militant, more confrontational,
15 they go out in search of short-term gains that
16 they can bring back to their members and say
17 stick with us.

18 CHIEF JUSTICE ROBERTS: Well, the
19 argument on the other side, of course, is that
20 the need to attract voluntary payments will
21 make the unions more efficient, more effective,
22 more attractive to a broader group of their
23 employees. What's wrong with that?

24 MR. FRANKLIN: Well, two things that
25 -- that I would say about that. First, the

1 studies that I've read indicate that, yes,
2 there can be an initial first flush of
3 mobilization and organizing when something like
4 this gets taken away, but that over the long
5 term, human nature and basic economics dictate
6 that the free-rider problem will become endemic
7 and, not only that, but contagious, because if
8 I'm an employee and I stick with the union and
9 others over time decide not to, my fees and my
10 dues are going to go up and up and up and the
11 pressure on me to make the same choice will
12 increase as well.

13 But the other point I'd make would be
14 a legal point. You know, this Court has said,
15 for example, in the Connick case that there
16 ought to be judicial deference to the
17 predictive judgments about workplace harm and
18 that in particular -- this is a quote from
19 Connick -- "we do not see the necessity for an
20 employer to allow events to unfold to the
21 extent" that the destruction of working
22 relationships has to be manifest before the
23 state can take prophylactic action to stop it.

24 This is an area, Your Honor, where not
25 only has this Court -- we're, of course, aware

1 this Court has addressed this topic three times
2 in the past, what, four years, but also the
3 people around the country are addressing this
4 issue in a very visible and sustained way.

5 JUSTICE KAGAN: Mr. -- Mr. Franklin, I
6 mean, you just addressed what you considered to
7 be the harmful effects of a different rule, but
8 I was trying to get at a slightly different
9 question. I was asking you, even beyond that,
10 what are the effects on -- given that this rule
11 has been in place for so long?

12 MR. FRANKLIN: Mr. Chief Justice --

13 CHIEF JUSTICE ROBERTS: Please.

14 MR. FRANKLIN: -- may I respond?

15 We do think the reliance interests are
16 serious here. Under state law, because of the
17 severability clause, there would be state law
18 contract issues. There might even be a duty to
19 bargain that kicks in under state law where we
20 would have to renegotiate not only this
21 provision but surrounding provisions. That's a
22 serious reliance interest in our view.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Frederick.

2 ORAL ARGUMENT OF DAVID C. FREDERICK
3 ON BEHALF OF RESPONDENT AFSCME COUNCIL 31

4 MR. FREDERICK: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 I would note at the beginning that all
7 of these arguments were before the Court 40
8 years ago in Abood. And when the Court
9 unanimously upheld the idea of agency fees, it
10 considered whether or not these issues would
11 constrain the constitutional prerogatives of
12 government to act under democratic impulses to
13 come up with a system that would fit the local
14 culture, history, private sector background of
15 what state governments were having to do to
16 recruit and attract the most willing and able
17 people to discharge the public services that
18 public employees are required to perform.

19 So, when this Court addressed in
20 Lehnert the question of how do you draw the
21 line between those fees that are deemed to be
22 ideological and those that are deemed to be
23 part of a statutorily mandated process, the
24 Court cleaved, and the question of whether or
25 not the statute mandated, as it does here,

1 exclusive representation and the union is
2 required to represent the minority members,
3 what Justice Scalia said was it is fair to
4 assign a fee for the services that the union by
5 statute is required to provide.

6 JUSTICE ALITO: And what if the
7 statute -- what if a state statute says that
8 lobbying is a man -- is a mandatory subject of
9 bargaining?

10 MR. FREDERICK: Well, I -- I think
11 that the question -- I guess, what do you mean
12 by lobbying, Justice Alito? I'm not sure
13 exactly what you mean.

14 JUSTICE ALITO: Well, there's no -- is
15 there any limit on what states can make a
16 mandatory subject of collective bargaining? So
17 if the test is whether it's -- whether the --
18 it's mandated by the -- by the state, the state
19 can make anything it wants a mandatory subject
20 of bargaining.

21 MR. FREDERICK: Justice Alito, I would
22 say that that hypothetical is so far outside of
23 what this case is really all about that if you
24 think that there's a problem, that if any state
25 ever in the union would come up with some

1 requirement like that as part of collective
2 bargaining, you have the opportunity to review
3 it at this time.

4 But what we're talking about here is a
5 system that is well-settled within the states
6 to allow for this kind of dynamic interchange
7 for the benefit of management.

8 JUSTICE KENNEDY: Well, do you think
9 that this case affects the political influence
10 of the unions?

11 MR. FREDERICK: No. The reason --

12 JUSTICE KENNEDY: So you've -- I can
13 try to find a union newsletter which says don't
14 worry about the Supreme Court, our political
15 influence will be exactly the same as it was
16 before, if this case comes out against us?

17 MR. FREDERICK: That's not a
18 chargeable expense, Justice Kennedy. We're
19 talking about --

20 JUSTICE KENNEDY: I'm asking --

21 MR. FREDERICK: -- chargeable --

22 JUSTICE KENNEDY: I'm asking you
23 whether or not in your view, if you do not
24 prevail in this case, the unions will have less
25 political influence; yes or no?

1 MR. FREDERICK: Yes, they will have
2 less political influence and --

3 JUSTICE KENNEDY: Isn't that the end
4 of this case?

5 MR. FREDERICK: It is not the end of
6 the case, Your Honor, because that is not the
7 question. The question is: Do states, as part
8 of our sovereign system, have the authority and
9 the prerogative to set up a collective
10 bargaining system in which they mandate that
11 the union is going to represent minority
12 interests on pain of being subject with -- to
13 any fair labor practice.

14 JUSTICE KENNEDY: And in which they
15 mandate people that object to certain union
16 policies to pay for the implementation of those
17 policies against their First Amendment
18 interests?

19 MR. FREDERICK: Justice Kennedy, I
20 would ask you to read Justice Harlan's opinion
21 in Lathrop where he addressed every single one
22 of those considerations.

23 JUSTICE KENNEDY: I -- I read it, I
24 think, last night between 7 and 8:30.

25 (Laughter.)

1 MR. FREDERICK: It's a wonderful --
2 it's a wonderful opinion, because what he says
3 is that the -- what he says is that the
4 subsidization goes to the purpose of the
5 organization, here that is state-mandated
6 collective bargaining, and in which the person
7 who doesn't agree with the positions basically
8 gets two cracks.

9 One is to try to persuade the group
10 that he's right and, if that doesn't fail, he
11 still has his conscience and his speech to
12 speak outside as a citizen to explain why that
13 position is wrong.

14 JUSTICE BREYER: Is -- is it possible
15 to --

16 JUSTICE ALITO: Mr. Frederick, I --
17 when I -- when I read your brief, I saw
18 something I thought I would never see in a
19 brief filed by a public employee union, and
20 that is the argument that the original meaning
21 of the Constitution is that public employees
22 have no free speech rights.

23 Where do you want us to go with that?

24 MR. FREDERICK: Well --

25 JUSTICE ALITO: Should -- should we

1 adopt that rule?

2 MR. FREDERICK: -- what I would say is
3 that what this Court, Justice White's opinion
4 in Connick, explains that if you look at this
5 from a question of what are the three choices
6 before you, at the origins, there were no
7 rights.

8 What they are asking for is basically
9 unfettered First Amendment for public servants,
10 and what Justice White explained was that, as
11 the First Amendment evolved, there were
12 limitations on what the government could do
13 with respect to certain expression, but the
14 core principle, from the founding to today, is
15 that government has a free rein in regulating
16 expressive rights in its workplace.

17 That principle from the founding to
18 today is at stake here because what they are
19 saying is that every grievance, every
20 employment issue, becomes a constitutional
21 issue. And Justice White's opinion in Connick
22 says, of course, you can't run government if
23 that becomes the principle --

24 JUSTICE ALITO: Do you think that's a
25 fair characterization of their argument?

1 MR. FREDERICK: I do think that it is
2 a fair characterization insofar as what they
3 say is the collective bargaining issues that
4 are in the contract are all raising matters of
5 public concern.

6 You could look at them. They are
7 talking about who gets assignments on holidays?
8 What are leave policies all about? Things that
9 do not affect the public fisc at all but go to
10 who can manage the workplace in an appropriate
11 way where there is buy-in by the employees.

12 JUSTICE KAGAN: If I understood --

13 JUSTICE BREYER: Can you do that? Can
14 you limit it to wages, hours, working
15 conditions, where mandated as subjects of
16 compulsory bargaining by the state, those three
17 terms have a hundred years of history written
18 around them. It shouldn't be hard to
19 administer and should keep the things like
20 lobbying and so forth out of it.

21 MR. FREDERICK: That's correct. And
22 even in this statute --

23 JUSTICE BREYER: Is that correct? Is
24 that what you would favor?

25 MR. FREDERICK: Yes, it is. It is.

1 JUSTICE BREYER: And can we get that
2 from the Connick -- from the Connick -- from
3 the Lehnert Kennedy-Scalia compromise there?

4 MR. FREDERICK: Yes, you can, Justice
5 Breyer. And I would point out that the state
6 here has carved out the questions about
7 managerial discretion. Those -- managerial
8 policy cannot be bargained for.

9 The state's budget, that can't be
10 bargained for. So what we're talking about --

11 CHIEF JUSTICE ROBERTS: Well, how does
12 --

13 MR. FREDERICK: -- is how you manage
14 the workplace.

15 CHIEF JUSTICE ROBERTS: How do
16 negotiation over wages not affect the state
17 budget?

18 MR. FREDERICK: Your Honor, what
19 essentially happens, as I understand it, is
20 that either the budget is set and the
21 negotiation occurs within that parameter, or
22 the governor takes the collective bargaining
23 agreement to the state and the legislature
24 decides to either ratify it or not.

25 CHIEF JUSTICE ROBERTS: So the public

1 unions do not engage in advocacy with respect
2 to the state budget to the extent that impacts
3 the available wages?

4 MR. FREDERICK: I think -- I wouldn't
5 put it quite that way. What I would say is
6 that, of course, most public servants are
7 underpaid, and I will stipulate to that before
8 this body.

9 (Laughter.)

10 MR. FREDERICK: And the question is --
11 the question is, how do you come to the
12 appropriate compromises in order to achieve a
13 system that attracts the best workers?

14 CHIEF JUSTICE ROBERTS: Well, because
15 that's --

16 JUSTICE KENNEDY: I just want to make
17 sure that if I want to write something down to
18 get -- the amount of wages paid to government
19 employees, the size of the workforce, the
20 amount of overtime, and the existence of tenure
21 do not affect the amount of the state budget?
22 That's what I've got down.

23 MR. FREDERICK: No. What I'm saying,
24 Your Honor --

25 JUSTICE KENNEDY: Isn't that what you

1 just said?

2 MR. FREDERICK: What I said is that in
3 different states the system works differently.
4 Sometimes the budget is set first and then the
5 bargaining happens, and sometimes the
6 bargaining happens and, if the legislature
7 doesn't think it fits within the budget, they
8 say we're not going -- going to ratify this or
9 we're going to ratify the budget, you go back
10 and renegotiate this to make it fit.

11 JUSTICE KAGAN: Mr. Frederick, if I
12 understood General Francisco's argument, it's
13 that speech as to matters of pay and benefits
14 and employment conditions and so forth are
15 matters of public concern when they are
16 addressed in a collective bargaining framework
17 but are not matters of public concern when they
18 are addressed outside of a collective
19 bargaining framework by individual employees.

20 Tell -- tell me about that. What do
21 you think of that?

22 MR. FREDERICK: I -- I don't know any
23 case of this Court that hinges the First
24 Amendment prerogatives of the government on the
25 scope or manner of the speech with respect to

1 that.

2 And, in fact, as my colleague said,
3 when this Court upheld the Hatch Act, that
4 applied to all workers. And the -- and the
5 Court applied Pickering balancing to say that
6 the government interest was sufficient to
7 outweigh the restrictions on the employee's
8 speech.

9 And the Court also did the same thing.
10 It applied the same Pickering balance when it
11 decided that it was constitutional to have
12 exclusive representation. That quelled the
13 speech of the minority to the exclusion of the
14 majority.

15 So these are all broad-sweep,
16 broad-scope principles where this Court has
17 applied Pickering.

18 JUSTICE ALITO: Well, if one employee
19 says I deserve a 5 percent raise, is that a
20 matter of public concern or private concern?

21 MR. FREDERICK: Well, it depends on
22 whether it affects the morale of the workplace,
23 as Justice White's opinion in Connick said.
24 There may be a circumstance, you look at the
25 balancing, and you look at the content and the

1 context in which that speech arises.

2 So that, for instance, in Connick,
3 what the Court said, the only thing that was a
4 matter of public concern there was whether it
5 affected the morale of the workplace. And the
6 Court said on the basis of that, it could be a
7 matter of public concern, but an individual
8 worker's agitation ordinarily for pay would not
9 raise a matter of public concern. That would
10 be classic government workplace speech.

11 JUSTICE ALITO: All right. So, if
12 that's a matter of private concern, if the
13 union demands a 5 percent wage increase for all
14 of the -- the employees it represents, can that
15 be a matter of public concern?

16 MR. FREDERICK: I don't think so
17 because --

18 JUSTICE ALITO: It can't? No?

19 MR. FREDERICK: No, because what the
20 -- what is happening in a negotiation, of
21 course, this is a closed universe, your
22 hypothetical posits the opening bid by the
23 union.

24 And -- and it's important to keep in
25 mind the content and context of that speech.

1 All negotiations between workers and management
2 do not take place in a public forum.

3 JUSTICE ALITO: So what -- what if the
4 effect of the 5 percent wage increase across
5 the board would push a city to the brink and
6 perhaps over the brink into bankruptcy. Would
7 it then become a matter of public concern?

8 MR. FREDERICK: Well, I think that you
9 would look at that in terms of the context of
10 the particular scenario. I would say -- and
11 there are briefs on our side that make this
12 very clear -- that that particular
13 hypothetical, in fact, is an unfair smearing of
14 the -- of the collective bargaining process.

15 But what I would also point out is
16 that if management says we cannot pay for this,
17 and, therefore, there is no agreement, there
18 are state-mandated procedures to determine
19 whether one side is bargaining in good faith or
20 not. And if the union is taking a position
21 that is not a good-faith position, it can be
22 subject to a state penalty.

23 JUSTICE BREYER: So -- so I don't see
24 how you can say, if one person asks for more
25 money, that affects the budget. If one person

1 in the railroads asks for more money, that
2 affects the rates that a public body, the
3 Interstate Commerce Commission, used to have to
4 set. If one person in a public utility, an
5 electricity company, asks for money, that
6 affects the electricity rate.

7 So the line can't be, I would think,
8 whether or not you're asking for higher wages,
9 whether collectively or individually, because
10 they all affect the budget.

11 So then what is the line? I had
12 thought the line was wages, hours, working
13 conditions is okay, and if it's not okay, then
14 that goes way beyond just public employees,
15 doesn't it?

16 MR. FREDERICK: Yes. And I would note
17 that Justice Powell even had no problem in
18 Abood with the wages/hours formulation and he
19 was the one who disagreed with the basic
20 formulation.

21 CHIEF JUSTICE ROBERTS: Well,
22 hypotheticals are asked to address a principle
23 that can then be expanded. If one employee
24 doesn't affect wages, do -- does 20 percent of
25 the workforce affect wages -- I mean negotiate

1 or demands with respect to wages affect the
2 public policy concerns that go into how much of
3 a budget, as to which there are many competing
4 demands, is allocated to employees?

5 MR. FREDERICK: Your Honor, the
6 question -- I'll -- I'll concede you that there
7 are certain matters in collective bargaining
8 that might raise matters of public concern.
9 But what the Court's cases say is that, even if
10 there is a matter of public concern, the
11 government has the adequate power to restrict
12 that speech if it can show there's
13 justification.

14 And Justice Scalia's opinion in
15 Lehnert provides the compelling interest by
16 saying that the state is mandated that the
17 union be the exclusive represent --
18 representative and must conduct itself through
19 a duty of fair representation. And that's
20 where you get the compelling interest in agency
21 fees.

22 JUSTICE ALITO: Well, the germaneness
23 rule came out of Abood itself and it was
24 fleshed out in Lehnert. So do you -- are you
25 asking -- you're suggesting we should overrule

1 Abood in part?

2 MR. FREDERICK: No. What I'm
3 suggesting is that if you were to go to this
4 line, you should consider revisiting Lehnert.
5 That's not a question of Abood's basic
6 correctness.

7 Abood has been foundational precedent
8 --

9 JUSTICE ALITO: And didn't Abood talk
10 --

11 MR. FREDERICK: -- in a lot of
12 different areas.

13 JUSTICE ALITO: Didn't Abood draw --
14 talk about germaneness?

15 MR. FREDERICK: I think Abood used the
16 word germaneness. But what Lehnert did was to
17 give content to that because what Abood simply
18 said was it is constitutional for this to
19 happen.

20 Now I'd like to turn to the reliance
21 interest because, if the other side succeeds in
22 persuading a majority of you to overrule Abood,
23 it will affect thousands of contracts and, more
24 importantly, it is going to affect the work of
25 state legislatures, city councils, school

1 districts, who are going to have to go back to
2 the drawing board in deciding what are the
3 rules for negotiating and how that works.

4 And what that means is that the key
5 thing that has been bargained for in this
6 contract for agency fees is a -- a limitation
7 on striking. And that is true in many
8 collective bargaining agreements.

9 The fees are the tradeoff. Union
10 security is the tradeoff for no strikes. And
11 so, if you were to overrule Abood, you can
12 raise an untold specter of labor unrest
13 throughout the country.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Two minutes remaining, Mr. Messenger.

18 REBUTTAL ARGUMENT OF WILLIAM L. MESSENGER
19 ON BEHALF OF THE PETITIONERS

20 MR. MESSENGER: Mr. Chief Justice,
21 just to pick up on the last point made, the
22 proposition that agency fees are the costs that
23 employees have to pay to prevent unions from
24 striking, I submit is not only extremely
25 attenuated, but also would make agency fees

1 effectively a form of protection money, the
2 idea that the government needs to force its
3 employees to subsidize unions or otherwise the
4 unions will disrupt the government, and I
5 submit that's not an interest that this Court
6 can accept as a compelling one for infringing
7 on individuals' First Amendment rights.

8 I'd also like to make a brief point
9 about the grievance process. And we've talked
10 a lot about collective bargaining today. But
11 grievance processing is equally an expressive
12 activity and in the aggregate can have an
13 effect upon the public fisc.

14 Now, in terms of expressive activity,
15 a grievance is, by definition, the union is
16 trying to influence what the government is --
17 wants to do and, if it's a grievance, it's
18 something that the government is resistant to
19 actually doing.

20 And advocacy to enforce a policy is
21 tied into advocacy to adopt that process.

22 JUSTICE SOTOMAYOR: You're basically
23 arguing: Do away with unions. Because you're
24 really taking, in essence, and saying every
25 single employee decision is really a public

1 policy decision.

2 I have an individual person I want to
3 fire or discipline. You just said it's a
4 public policy question.

5 MR. MESSENGER: No, where I was going
6 with that, Your Honor, is that grievance as --
7 as a whole is a public -- a matter of public
8 concern.

9 JUSTICE SOTOMAYOR: But grievances
10 don't deal with one issue. Every grievance has
11 a different issue. Some people are disciplined
12 for being late. Some people are disciplined
13 for a workplace disruption. Some for --

14 MR. MESSENGER: Yes, Your Honor, but
15 nonmembers --

16 JUSTICE SOTOMAYOR: -- violating a
17 dozen other workplace rules.

18 MR. MESSENGER: But under the statute,
19 nonmembers are charged for contract
20 administration as a whole. They're charged for
21 an entire year's worth of AFSCME's grievance
22 processing, some of which are very significant,
23 like a grievance AFSCME recently filed to
24 compel the state to expend \$75 million to pay
25 for a 2 percent wage increase. That went to

1 the Illinois Supreme Court. Maybe some other
2 grievances are more minor matters, as you
3 mentioned, but as a whole, in the aggregate,
4 they affect matters of public concern.

5 JUSTICE SOTOMAYOR: As Justice --

6 MR. MESSENGER: That is what --

7 JUSTICE SOTOMAYOR: -- Breyer said,
8 every single decision affects the public fisc.
9 Every time you lose something, you -- the
10 public fisc is affected.

11 You're talking --

12 CHIEF JUSTICE ROBERTS: Care to
13 comment?

14 MR. MESSENGER: Again, to go back, I
15 think it's the scale that makes the
16 distinction, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. MESSENGER: Thank you.

20 CHIEF JUSTICE ROBERTS: The case is
21 submitted.

22 (Whereupon, at 11:08 a.m., the case
23 was submitted.)

24

25

Official

\$			
\$75 [1] 70:24	20 43:15 52:12 62:3	14:14 15:2,14,24 16:4,10,19 17:13 19:17 20:6,9 29:13 42:8 44:3 55:17 57:9,11 61:24 69:7	available [3] 11:4 38:12 60:3
1	acting [2] 36:13 40:4	AMERICAN [2] 1:6 4:5	avoid [1] 46:15
10 [2] 19:2 31:23	action [4] 5:23 6:1 28:1 50:23	amicus [4] 2:8 3:8 22:20 28:5	aware [1] 50:25
10:06 [2] 1:16 4:2	actions [2] 35:6,14	among [2] 15:15 46:21	away [2] 50:4 69:23
11:08 [1] 71:22	activities [4] 5:1 7:1 37:16 38:9	amount [4] 26:24 60:18,20,21	awful [1] 23:20
16-1466 [1] 4:4	activity [5] 8:13 15:18,24 69:12,14	analyzed [1] 41:16	B
184 [1] 21:1	actual [1] 23:22	anecdotal [1] 20:24	back [8] 12:24 23:21 26:17 48:18 49:16 61:9 68:1 71:14
1945 [1] 28:10	actually [3] 29:12 44:25 69:19	Another [2] 5:2 8:11	backed [1] 42:13
1970 [1] 28:11	add [1] 10:8	answer [8] 21:7,9 27:10 34:22,24 41:13,14 43:3	background [1] 52:14
2	address [2] 14:7 65:22	anybody [1] 41:12	balance [2] 44:19 62:10
2 [4] 41:17,18 42:2 70:25	addressed [6] 51:1,6 52:19 55:21 61:16,18	anyways [1] 22:11	balancing [2] 62:5,25
20 [3] 31:23 37:22 65:24	addressing [1] 51:3	appear [1] 41:9	banded [1] 23:21
2018 [1] 1:12	adequate [1] 66:11	APPEARANCES [1] 2:1	bankruptcy [1] 64:6
22 [1] 3:9	administer [1] 58:19	applicable [1] 36:18	bar [9] 5:2,9,13 7:11 8:15 9:23 45:12,17,20
23 [1] 19:17	administration [1] 70:20	applied [8] 6:1 13:4 14:13 42:12 62:4,5,10,17	bargain [2] 15:10 51:19
26 [1] 1:12	administrations [1] 34:11	applies [1] 36:22	bargained [3] 59:8,10 68:5
3	adopt [2] 57:1 69:21	apply [7] 4:13 6:2,21 12:19,24 28:19 35:12	bargained-for [3] 21:15,21 22:9
31 [4] 1:8 2:16 3:16 52:3	advising [1] 38:20	applying [2] 14:19,20	bargaining [44] 9:8,18,24 10:4 15:8,17,17 17:1 22:5 23:7 24:11,16 26:20 28:2 29:10,15,24 30:5,6,15 31:16,25 32:9 37:13 38:23 47:19 53:9,16,20 54:2 55:10 56:6 58:3,16 59:22 61:5,6,16,19 64:14,19 66:7 68:8 69:10
35 [1] 3:12	advocacy [9] 7:7 9:9 10:23 15:1,1 35:17 60:1 69:20,21	approved [1] 6:12	bargains [1] 31:21
4	advocating [1] 47:4	arbitration [1] 28:11	basic [4] 22:24 50:5 65:19 67:5
4 [1] 3:4	affect [12] 17:2,3 58:9 59:16 60:21 65:10,24,25 66:1 67:23,24 71:4	Archie [1] 28:8	basically [5] 12:18 35:12 56:7 57:8 69:22
40 [1] 52:7	affected [4] 19:7,21 63:5 71:10	area [1] 50:24	basis [3] 23:9 38:25 63:6
5	affects [7] 33:24 54:9 62:22 64:25 65:2,6 71:8	areas [1] 67:12	bear [1] 46:16
5 [3] 62:19 63:13 64:4	affiliation [1] 42:17	arguably [1] 17:16	Beck [2] 28:5 38:2
50 [2] 12:20 33:1	affirmatively [1] 43:17	argue [2] 36:9 39:22	become [5] 18:1 49:6,14 50:6 64:7
52 [1] 3:16	AFSCME [5] 2:16 3:16 17:1 52:3 70:23	argued [1] 28:5	becomes [2] 57:20,23
6	AFSCME's [1] 70:21	arguing [4] 34:4 37:8 39:20 69:23	beg [1] 23:18
68 [1] 3:19	agency [22] 4:24 5:5 8:1,24 23:1,5,11 24:18 27:7 29:8,9,21 33:22 37:10 44:6 46:12 49:13 52:9 66:20 68:6,22,25	argument [18] 1:15 3:2,5,10,13,17 4:4,8 22:19 30:1 35:21 38:5 49:19 52:2 56:20 57:25 61:12 68:18	begin [1] 12:25
7	aggregate [2] 69:12 71:3	arguments [1] 52:7	beginning [1] 52:6
7 [1] 55:24	agitation [1] 63:8	arises [1] 63:1	behalf [14] 2:4,8,12,15 3:4,7,12,15,19 4:9 22:20 35:23 52:3 68:19
70s [1] 13:10	ago [2] 28:6 52:8	Arizona [1] 20:4	behavioral [1] 49:10
8	agree [6] 27:5 30:18 39:19 45:8,22 56:7	around [3] 36:22 51:3 58:18	behind [1] 39:25
8:30 [1] 55:24	agreement [2] 59:23 64:17	articulated [1] 18:3	beliefs [1] 10:25
80 [3] 24:20,23 37:20	agreements [5] 24:16 26:20 28:2 31:16 68:8	aside [1] 40:9	believe [3] 25:6 27:24 34:13
9	agrees [1] 31:9	asks [4] 17:7 64:24 65:1,5	benefit [2] 9:5 54:7
94 [1] 24:15	AL [1] 1:8	aspects [1] 28:25	benefits [3] 23:14 30:4 61:13
A	ALITO [33] 11:12,22 12:4 27:21 39:5,17 40:1,5,9,12,22,23 41:20 42:3,20 43:2 44:9,12,18 53:6,12,14,21 56:16,25 57:24 62:18 63:11,18 64:3 66:22 67:9,13	assign [1] 53:4	best [2] 41:11 60:13
a.m [3] 1:16 4:2 71:22	allegations [1] 24:1	assignments [1] 58:7	better [1] 32:16
ability [2] 33:14 46:19	allocated [1] 66:4	assistant [4] 40:25 41:1,9 43:3	between [10] 32:6,9 39:6 42:22 43:6 45:7 48:4 52:21 55:24 64:1
able [3] 9:17 46:23 52:16	allow [5] 15:16 46:15 48:11 50:20 54:6	association [7] 4:18 5:2,9,10,16 7:11 45:20	beyond [3] 10:9 51:9 65:14
Abood [26] 4:12,22 8:6 13:10 14:9,15,20,21 19:15,16 26:25 38:1 44:4 48:17,25 52:8 65:18 66:23 67:1,7,9,13,15,17,22 68:11	allowed [2] 15:8 33:13	associations [3] 5:13 8:15 45:12	bid [1] 63:22
Abood's [3] 4:15,20 67:5	allows [2] 15:12 48:10	assumes [1] 10:6	big [1] 45:6
above [1] 10:9	almost [2] 26:6,21	assuming [1] 10:7	blink [1] 47:14
above-entitled [1] 1:14	already [4] 10:9 33:23 34:10 36:5	assumption [1] 22:7	board [4] 17:3 20:7 64:5 68:2
accept [1] 69:6	alternative [1] 8:17	assumptions [2] 23:21 38:25	body [3] 16:20 60:8 65:2
acceptable [1] 11:10	alternatives [1] 8:16	attempt [1] 4:19	bona [1] 42:13
according [2] 24:14 25:1	although [2] 10:18 30:18	attention [1] 13:23	bonded [1] 47:8
account [1] 10:12	amazing [1] 32:22	attenuated [1] 68:25	boss [1] 39:24
accounts [1] 40:21	Amendment [22] 4:13 10:24 11:9	attorney [5] 40:25 41:2,8,9 43:4	both [3] 18:9,13 23:22
accounts [1] 40:21		attract [2] 49:20 52:16	Brandeis [1] 12:22
achieve [1] 60:12		attractive [1] 49:22	break [3] 38:13 39:2 42:8
achieve [1] 60:12		attracts [1] 60:13	
across [3] 17:3 20:7 64:4		auditorium [3] 17:9,18,22	
act [9] 7:1 12:1 13:12,12 14:22 36:		authority [4] 10:8 36:6 39:9 55:8	

<p>breaks ^[1] 39:1 BREYER ^[21] 12:15 14:8 21:2,7 28:3,7,14,21 29:3 34:19,22 35:1 37:13 47:22 56:14 58:13,23 59:1, 5 64:23 71:7 brief ^[7] 13:24 21:3 28:6 29:8 56: 17,19 69:8 briefs ^[1] 64:11 bring ^[1] 49:16 brink ^[2] 64:5,6 broad ^[1] 36:6 broad-scope ^[1] 62:16 broad-sweep ^[1] 62:15 broader ^[2] 40:17 49:22 broadly ^[1] 49:4 brought ^[1] 29:1 budget ^[11] 59:9,17,20 60:2,21 61: 4,7,9 64:25 65:10 66:3 Bureau ^[2] 24:14 25:2 business ^[1] 17:10 buy-in ^[1] 58:11</p>	<p>choice ^[1] 50:11 choices ^[1] 57:5 chosen ^[2] 8:18 32:15 Circuit ^[2] 27:22,23 circulating ^[1] 41:2 circumstance ^[1] 62:24 circumstances ^[1] 43:24 citizen ^[2] 40:18 56:12 citizens ^[1] 36:4 city ^[2] 64:5 67:25 classic ^[1] 63:10 clause ^[2] 21:13 51:17 clauses ^[2] 20:20,25 clear ^[2] 19:24 64:12 cleaved ^[1] 52:24 clients ^[1] 13:14 closed ^[1] 63:21 cohesion ^[1] 46:20 coin ^[1] 43:1 coincide ^[1] 48:6 collaboration ^[1] 46:20 colleague ^[1] 62:2 collective ^[31] 6:18 15:8,16,17,21 16:20 24:16 26:19 28:2 29:10,15, 23 30:5,6 31:16,24 32:8 37:12 38: 23 53:16 54:1 55:9 56:6 58:3 59: 22 61:16,18 64:14 66:7 68:8 69: 10 collectively ^[2] 31:21 65:9 Columbia ^[1] 18:23 come ^[10] 16:13,13 17:8 36:5 44: 20 45:18 47:18 52:13 53:25 60:11 comes ^[4] 28:1 31:16 35:15 54:16 coming ^[2] 16:20 39:21 command ^[1] 33:21 comment ^[1] 71:13 Commerce ^[1] 65:3 Commission ^[1] 65:3 committed ^[1] 12:12 company ^[1] 65:5 comparable ^[1] 6:19 compel ^[5] 9:7 29:23 39:10 43:19 70:24 compelled ^[13] 5:5 15:19 37:1,1 43:7,25 44:1 45:5,7,7,12,13,15 compelling ^[15] 5:14,18 6:5,14,19, 22 7:17,21 8:1 23:6 35:16 44:14 66:15,20 69:6 competing ^[1] 66:3 complementary ^[1] 46:13 compromise ^[4] 13:21 14:6 47:23 59:3 compromises ^[1] 60:12 concern ^[25] 17:17 30:8,13 31:22 32:1 33:1 41:22 42:1,3,4 58:5 61: 15,17 62:20,20 63:4,7,9,12,15 64: 7 66:8,10 70:8 71:4 concerns ^[2] 29:13 66:2 concluding ^[1] 23:9 concrete ^[1] 40:24</p>	<p>condition ^[2] 37:10 42:12 conditions ^[6] 30:2 32:19 36:6 58: 15 61:14 65:13 conduct ^[1] 66:18 confer ^[1] 10:10 confidence ^[1] 41:4 confrontational ^[1] 49:14 Connick ^[9] 40:25 50:15,19 57:4, 21 59:2,2 62:23 63:2 conscience ^[2] 43:21 56:11 consider ^[1] 67:4 consideration ^[1] 19:25 considerations ^[1] 55:22 considered ^[2] 51:6 52:10 constantly ^[1] 37:4 Constitution ^[2] 11:13 56:21 Constitutional ^[6] 11:15 20:3 52: 11 57:20 62:11 67:18 constitutionally ^[2] 12:5 15:13 constrain ^[1] 52:11 contagious ^[1] 50:7 content ^[3] 62:25 63:25 67:17 context ^[6] 30:15 32:9 46:1 63:1, 25 64:9 continued ^[1] 26:25 contract ^[15] 10:1,3 19:4 21:12,16, 20 22:7,9 27:16 37:16 47:2 51:18 58:4 68:6 70:19 contracts ^[11] 19:1,1 20:14,15,19, 23 21:1 22:10 26:21 48:20 67:23 contrary ^[2] 33:20 42:18 contribute ^[1] 46:17 controlled ^[1] 25:24 controlling ^[2] 35:6,13 core ^[4] 15:18 29:7 33:13 57:14 corporate ^[1] 25:11 correct ^[6] 16:4,15 45:23,24 58:21, 23 correctness ^[1] 67:6 corresponding ^[1] 35:15 corrosive ^[1] 46:19 corruption ^[1] 33:21 cost ^[7] 29:9,15 30:9,11,16 31:18 46:16 costs ^[3] 9:24 10:8 68:22 couldn't ^[2] 20:21 39:22 COUNCIL ^[4] 1:8 2:16 3:16 52:3 councils ^[1] 67:25 counsel ^[5] 22:17 45:4 51:25 68: 16 71:18 counterparty ^[1] 46:25 country ^[3] 36:23 51:3 68:13 COUNTY ^[2] 1:7 4:6 course ^[11] 7:5 14:25 15:15 21:5, 14 26:16 49:19 50:25 57:22 60:6 63:21 COURT ^[39] 1:1,15 4:11 7:24 8:6 11:20 14:23 16:24 20:6 22:23 27: 4,17 28:23 35:25 36:15 41:1,20 42:11,23 48:24 50:14,25 51:1 52: 5,7,8,19,24 54:14 57:3 61:23 62:3, 5,9,16 63:3,6 69:5 71:1 Court's ^[4] 28:18 36:1 42:8 66:9 courts ^[1] 5:16</p>	<p>cover ^[1] 19:2 Cox ^[2] 28:8 37:14 cracks ^[1] 56:8 cultivate ^[1] 46:19 culture ^[1] 52:14 curiae ^[3] 2:8 3:8 22:20 cut ^[2] 6:23 28:23</p> <hr/> <p style="text-align: center;">D</p> <p>D.C. ^[4] 1:11 2:7,15 27:23 data ^[2] 24:14 25:2 DAVID ^[6] 2:11,15 3:11,14 35:21 52:2 day ^[4] 38:19,19 45:18 46:23 day-to-day ^[1] 37:14 deal ^[1] 70:10 dealing ^[2] 14:25 46:7 debatable ^[1] 28:25 decide ^[3] 15:13 38:24 50:9 decided ^[3] 6:17 15:9 62:11 decides ^[1] 59:24 deciding ^[1] 68:2 decision ^[4] 4:21 69:25 70:1 71:8 decisions ^[2] 6:7 27:4 decisis ^[6] 4:22 14:3 19:23,24 23: 2 26:18 declared ^[2] 18:24 21:18 deemed ^[2] 52:21,22 deference ^[2] 36:9 50:16 deferential ^[1] 36:17 definition ^[1] 69:15 degree ^[1] 11:7 delivery ^[2] 18:14 30:17 demand ^[4] 9:18 11:13 17:12,14 demands ^[3] 63:13 66:1,4 democratic ^[1] 52:12 denied ^[2] 47:17,21 density ^[1] 49:7 deny ^[1] 47:14 Department ^[1] 2:7 departure ^[1] 14:15 depends ^[2] 36:10 62:21 deprive ^[2] 6:9,10 deprived ^[1] 49:13 deserve ^[1] 62:19 destruction ^[1] 50:21 determine ^[1] 64:18 dictate ^[1] 50:5 Diego ^[1] 36:21 difference ^[1] 45:6 differences ^[1] 39:6 different ^[13] 5:1,12 7:9 21:17 23: 18 31:19 40:20 43:9 51:7,8 61:3 67:12 70:11 differently ^[2] 44:20 61:3 difficulties ^[1] 48:23 dignity ^[1] 43:20 diminished ^[3] 9:16 11:5,8 disagree ^[3] 31:11 34:2 45:14 disagreed ^[1] 65:19 discharge ^[1] 52:17 discipline ^[1] 70:3 disciplined ^[4] 16:8 45:1 70:11,12 discretion ^[2] 10:4 59:7</p>
---	--	---	--

Official

<p>discussed ^[1] 12:9</p> <p>dismiss ^[5] 26:13,15,17 38:11 49:3</p> <p>disparage ^[1] 44:2</p> <p>disposition ^[1] 44:24</p> <p>disputes ^[2] 31:2,14</p> <p>disrupt ^[1] 69:4</p> <p>disruption ^[2] 27:6 70:13</p> <p>dissent ^[2] 14:12 15:6</p> <p>distinction ^[3] 13:16 42:21 71:16</p> <p>distinguish ^[1] 14:4</p> <p>distinguishable ^[1] 5:11</p> <p>District ^[6] 18:22 40:25 41:1,8,9 43:4</p> <p>districts ^[1] 68:1</p> <p>doctrine ^[4] 14:20 19:23,24 27:15</p> <p>doing ^[6] 8:11 12:18 19:10 35:8 38:19 69:19</p> <p>dollars ^[1] 17:2</p> <p>done ^[1] 19:8</p> <p>down ^[8] 39:1,2 41:16 49:7,7,8 60:17,22</p> <p>dozen ^[1] 70:17</p> <p>drains ^[1] 9:10</p> <p>dramatic ^[1] 6:15</p> <p>draw ^[4] 42:21 48:3 52:20 67:13</p> <p>drawing ^[1] 68:2</p> <p>drawn ^[4] 43:6 45:6 48:2,14</p> <p>drew ^[2] 43:16 47:25</p> <p>due ^[2] 20:17 47:16</p> <p>dues ^[3] 10:20 37:21 50:10</p> <p>duties ^[7] 15:12 37:7,9 39:15,18 40:4,10</p> <p>duty ^[8] 9:23 10:5 11:20 12:2 15:10 46:10 51:18 66:19</p> <p>dynamic ^[1] 54:6</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>economics ^[2] 49:10 50:5</p> <p>effect ^[3] 40:17 64:4 69:13</p> <p>effective ^[1] 49:21</p> <p>effectively ^[1] 69:1</p> <p>effects ^[3] 23:22 51:7,10</p> <p>efficient ^[1] 49:21</p> <p>either ^[4] 10:20 23:11 59:20,24</p> <p>elect ^[1] 33:5</p> <p>electricity ^[2] 65:5,6</p> <p>Ellis ^[1] 38:2</p> <p>Elrod ^[2] 14:12,12</p> <p>elsewhere ^[1] 42:24</p> <p>employee ^[18] 15:22 16:7 18:2 30:4 32:3,6 33:20,23 35:13 36:17 37:17 41:25 47:19 50:8 56:19 62:18 65:23 69:25</p> <p>employee's ^[2] 33:14 62:7</p> <p>employee/employer ^[1] 31:2</p> <p>EMPLOYEES ^[37] 1:7 4:6 7:3 10:1 16:13,20 17:3,8,9,18 24:15 31:22 32:14,15,16 33:1,3 35:7,16 36:14,22 38:20 39:10 42:9 46:9,16 49:23 52:18 56:21 58:11 60:19 61:19 63:14 65:14 66:4 68:23 69:3</p> <p>employees' ^[1] 36:7</p> <p>employer ^[11] 6:5,14 9:19 32:4,7</p>	<p>36:3,14 37:18 40:19 42:15 50:20</p> <p>employer's ^[1] 36:10</p> <p>employers ^[2] 21:17 35:13</p> <p>employment ^[12] 6:6 16:14 17:25 30:2 32:19 37:11,15,18 40:15 42:13 57:20 61:14</p> <p>employment-related ^[2] 16:3,9</p> <p>end ^[3] 46:23 55:3,5</p> <p>endemic ^[1] 50:6</p> <p>enforce ^[2] 27:17 69:20</p> <p>engage ^[1] 60:1</p> <p>enormous ^[1] 26:24</p> <p>enough ^[1] 46:25</p> <p>ensuring ^[2] 8:22 46:3</p> <p>entire ^[1] 70:21</p> <p>entirely ^[1] 18:6</p> <p>entitled ^[2] 16:3,10</p> <p>entitlement ^[1] 16:18</p> <p>equal ^[2] 9:11,19</p> <p>equally ^[1] 69:11</p> <p>especially ^[1] 38:16</p> <p>ESQ ^[5] 2:3,15 3:3,14,18</p> <p>essence ^[1] 69:24</p> <p>essential ^[1] 21:11</p> <p>essentially ^[2] 30:25 59:19</p> <p>established ^[1] 31:12</p> <p>ET ^[2] 1:8 38:21</p> <p>even ^[14] 14:3,12,21 21:14 22:5,8 24:17 27:1 33:12 51:9,18 58:22 65:17 66:9</p> <p>events ^[1] 50:20</p> <p>everybody ^[2] 8:23 41:10</p> <p>everyone ^[1] 46:11</p> <p>evidentiary ^[1] 38:25</p> <p>evolved ^[1] 57:11</p> <p>exact ^[2] 33:6,7</p> <p>exacting ^[1] 14:13</p> <p>exactly ^[5] 25:18 44:14,16 53:13 54:15</p> <p>example ^[8] 6:25 11:15,25 20:4 22:3 23:10 43:8 50:15</p> <p>except ^[2] 20:16 21:20</p> <p>excision ^[2] 20:16 21:13</p> <p>exclusion ^[1] 62:13</p> <p>exclusive ^[7] 8:25 9:4 10:7 23:7 53:1 62:12 66:17</p> <p>exercising ^[1] 11:8</p> <p>existence ^[1] 60:20</p> <p>expanded ^[1] 65:23</p> <p>expand ^[1] 70:24</p> <p>expense ^[1] 54:18</p> <p>expenses ^[4] 38:14,22 39:2 48:5</p> <p>expensive ^[1] 10:2</p> <p>expire ^[1] 22:10</p> <p>explain ^[1] 56:12</p> <p>explained ^[3] 8:6 14:23 57:10</p> <p>explains ^[1] 57:4</p> <p>exploits ^[1] 40:15</p> <p>expresses ^[1] 37:3</p> <p>expression ^[1] 57:13</p> <p>expressive ^[3] 57:16 69:11,14</p> <p>expressly ^[1] 12:2</p> <p>extent ^[2] 22:8 50:21 60:2</p> <p>extraordinary ^[1] 9:6</p>	<p>extremely ^[1] 68:24</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faces ^[1] 9:19</p> <p>fact ^[6] 6:22 20:6 24:13 42:11 62:2 64:13</p> <p>factored ^[1] 27:4</p> <p>facts ^[1] 17:21</p> <p>factual ^[1] 24:2</p> <p>fail ^[1] 56:10</p> <p>failed ^[1] 4:13</p> <p>failure ^[1] 4:16</p> <p>fair ^[8] 6:10 12:2 34:19 53:3 55:13 57:25 58:2 66:19</p> <p>faith ^[1] 64:19</p> <p>far ^[2] 34:18 53:22</p> <p>favor ^[1] 58:24</p> <p>February ^[1] 1:12</p> <p>federal ^[10] 7:21 11:20 23:10,24 24:9,18,21,22 25:4,7</p> <p>FEDERATION ^[2] 1:6 4:5</p> <p>fee ^[7] 4:14 6:10 8:24 27:7 29:9 43:25 53:4</p> <p>fees ^[29] 4:25 5:1,5,9,10,17,24 7:10 8:1,11 10:17 23:1,5,11 24:18 29:21 37:10,20 44:6 46:12 49:13 50:9 52:9,21 66:21 68:6,9,22,25</p> <p>few ^[5] 18:21 28:6,6 46:6 48:18</p> <p>fide ^[1] 42:14</p> <p>field ^[1] 38:18</p> <p>filed ^[2] 56:19 70:23</p> <p>financial ^[1] 49:5</p> <p>financing ^[2] 28:15,24</p> <p>find ^[4] 20:21 24:15 38:15 54:13</p> <p>fire ^[2] 6:8 70:3</p> <p>fired ^[2] 33:24 41:2</p> <p>firing ^[1] 6:15</p> <p>firm ^[1] 48:13</p> <p>first ^[35] 4:4,13 5:8 9:22 10:23 11:9 14:9,14 15:2,14,24 16:4,10,18 17:13 19:13,16 22:25 24:7 29:13 31:5 38:7 42:8 44:3 46:7,13,15 49:25 50:2 55:17 57:9,11 61:4,23 69:7</p> <p>fisc ^[6] 18:13 33:25 58:9 69:13 71:8,10</p> <p>fiscal ^[1] 47:20</p> <p>fit ^[2] 52:13 61:10</p> <p>fits ^[1] 61:7</p> <p>fleshed ^[1] 66:24</p> <p>flip ^[1] 19:22</p> <p>flipped ^[1] 34:10</p> <p>flush ^[1] 50:2</p> <p>focus ^[2] 22:24 29:15</p> <p>follow-up ^[1] 27:12</p> <p>force ^[1] 69:2</p> <p>forcing ^[3] 7:6,9,12</p> <p>Foremost ^[1] 22:1</p> <p>form ^[1] 69:1</p> <p>formal ^[1] 31:24</p> <p>formulation ^[2] 65:18,20</p> <p>forth ^[4] 13:21 23:22 58:20 61:14</p> <p>forum ^[3] 5:19 7:11 64:2</p> <p>found ^[1] 4:20</p>	<p>foundational ^[2] 49:10 67:7</p> <p>founding ^[2] 57:14,17</p> <p>four ^[1] 51:2</p> <p>four-year ^[1] 26:21</p> <p>Fourth ^[2] 20:6,9</p> <p>framework ^[7] 12:19,23 31:12,13 36:16 61:16,19</p> <p>frameworks ^[2] 12:25 13:4</p> <p>FRANCISCO ^[41] 2:6 3:6 22:18,19,22 23:15 24:3,6 25:1,6,13,15,22,25 26:4,7,12 27:9,18 28:4,13,20 29:2,6,20 30:14 31:3,6,10 32:2,17,23 33:8,17 34:1,6,12,16,24 35:3 48:17</p> <p>Francisco's ^[1] 61:12</p> <p>FRANKLIN ^[33] 2:11 3:11 35:20,21,24 37:5,25 38:7 39:13,24 40:3,7,11,13 41:13,23 42:5 43:23 44:11,16,19 45:8,16,24 47:11,16,24 48:15 49:1,24 51:5,12,14</p> <p>frankly ^[1] 39:3</p> <p>FREDERICK ^[38] 2:15 3:14 52:1,2,4 53:10,21 54:11,17,21 55:1,5,19 56:1,16,24 57:2 58:1,21,25 59:4,13,18 60:4,10,23 61:2,11,22 62:2:21 63:16,19 64:8 65:16 66:5 67:2,11,15</p> <p>free ^[4] 9:2 45:20 56:22 57:15</p> <p>free-rider ^[1] 50:6</p> <p>freer ^[2] 36:2,5</p> <p>Fried ^[1] 13:24</p> <p>friend ^[1] 42:21</p> <p>friends ^[1] 36:8</p> <p>full ^[1] 24:8</p> <p>function ^[2] 39:14,18</p> <p>fundamentally ^[1] 35:10</p> <p>further ^[2] 23:6 29:17</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gains ^[1] 49:15</p> <p>Gant ^[1] 20:4</p> <p>Garcetti ^[6] 36:21,24 37:7 39:16 40:13 44:22</p> <p>GEN ^[2] 2:6 3:6</p> <p>General ^[52] 2:6,11 20:15,23,25 22:18,19,22 23:15,19 24:3,6 25:1,6,11,13,15,22,25 26:4,7,12 27:9,18 28:4,13,20 29:2,6,20,25 30:14 31:3,6,10 32:2,17,23 33:8,17 34:1,6,9,12,16,24 35:3,19,22 37:14 48:17 61:12</p> <p>generally ^[8] 6:12 16:6,16 23:12 24:19 25:7 26:20 36:18</p> <p>germaneness ^[4] 48:9 66:22 67:14,16</p> <p>gets ^[4] 17:23 50:4 56:8 58:7</p> <p>GINSBURG ^[6] 4:23 9:10 10:11,14 11:1 27:9</p> <p>give ^[3] 40:24 43:8 67:17</p> <p>given ^[4] 8:21 23:14 43:9 51:10</p> <p>Glickman ^[1] 45:25</p> <p>good-faith ^[1] 64:21</p> <p>got ^[5] 17:11 39:3 40:20 41:24 60:22</p>
---	--	--	--

<p>government ^[5] 5:14 6:5,8,13 7:3,13,14,21 8:3,22 9:7 10:24 14:25 15:9,12 18:12 23:10,11 24:10,18,22 25:5,7 29:4 30:17,23,25 31:8,19 32:11,12,24 33:12,22 36:13,25 47:7 48:12 52:12 57:12,15,22 60:18 61:24 62:6 63:10 66:11 69:2,4,16,18</p> <p>government's ^[10] 5:17 6:11,20,24 8:7 13:13 22:25 23:24 30:11 35:5</p> <p>governmental ^[1] 4:15</p> <p>governments ^[1] 52:15</p> <p>governor ^[1] 59:22</p> <p>grant ^[1] 44:21</p> <p>greater ^[2] 16:14 47:4</p> <p>greatest ^[1] 28:9</p> <p>grievance ^[15] 28:11 29:11,12 37:15,23 38:20 57:19 69:9,11,15,17 70:6,10,21,23</p> <p>grievances ^[5] 11:17 37:24 38:9 70:9 71:2</p> <p>group ^[5] 7:7 17:23 36:15 49:22 56:9</p> <p>groups ^[1] 9:9</p> <p>guess ^[1] 53:11</p>	<p>60:24 66:5 70:6,14 71:16</p> <p>hour ^[1] 37:23</p> <p>hours ^[2] 58:14 65:12</p> <p>However ^[1] 37:10</p> <p>Hudson ^[1] 38:13</p> <p>huge ^[1] 33:25</p> <p>human ^[1] 50:5</p> <p>hundred ^[1] 58:17</p> <p>hundreds ^[1] 17:2</p> <p>hypothetical ^[4] 17:16 53:22 63:22 64:13</p> <p>hypotheticals ^[1] 65:22</p>	<p>instance ^[2] 20:11 63:2</p> <p>instances ^[3] 5:8 44:21 48:10</p> <p>instrument ^[1] 28:9</p> <p>insurance ^[1] 18:11</p> <p>intangibly ^[1] 49:11</p> <p>interchange ^[1] 54:6</p> <p>interest ^[33] 5:15,18 6:6,14,16,19,24 7:17,22 8:3,5,7 22:25 23:6 31:15 35:6,11,15 40:19 42:14 46:5,7,9,23 47:9,12,12 51:22 62:6 66:15,20 67:21 69:5</p> <p>interested ^[1] 30:10</p> <p>interests ^[18] 5:12 6:21 7:5,13 8:1,22 18:17,19 22:13 26:19 30:24 44:3 46:3,13,14 51:15 55:12,18</p> <p>interferes ^[1] 33:14</p> <p>Interstate ^[1] 65:3</p> <p>invalidate ^[1] 27:7</p> <p>invalidated ^[1] 19:1</p> <p>investigate ^[1] 9:17</p> <p>involve ^[1] 37:16</p> <p>involved ^[6] 13:14,14 20:5 33:7 36:24 43:10</p> <p>irrespective ^[1] 7:18</p> <p>irresponsible ^[1] 39:3</p> <p>isn't ^[8] 6:18 7:15 8:25 14:16 18:6 19:14 55:3 60:25</p> <p>issue ^[16] 16:9,15 17:25 22:9 23:4 26:13 27:23 29:7 33:10 44:3 48:21 51:4 57:20,21 70:10,11</p> <p>issues ^[7] 6:17 16:3 17:1 22:25 51:18 52:10 58:3</p> <p>itself ^[5] 9:5 29:9 35:5 66:18,23</p>	<p>justified ^[3] 5:12,14,17</p> <p>justify ^[2] 4:19 7:6</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN ^[20] 18:16 19:12,19,22 20:18 21:14 29:19,25 30:21 31:4,7,20 32:13,18,24 48:15 49:2 51:5 58:12 61:11</p> <p>Kagan's ^[1] 34:23</p> <p>keep ^[3] 9:15 58:19 63:24</p> <p>Keller ^[2] 38:2 45:25</p> <p>KENNEDY ^[22] 10:13 12:8 13:22 26:10 36:24 37:6,19 38:4 47:3,13,17 54:8,12,18,20,22 55:3,14,19,23 60:16,25</p> <p>Kennedy-Scalia ^[1] 59:3</p> <p>key ^[1] 68:4</p> <p>kicks ^[1] 51:19</p> <p>kind ^[2] 46:18 54:6</p> <p>kinds ^[3] 8:16 13:3 49:5</p> <p>known ^[1] 21:18</p> <p>Knox ^[2] 4:17 26:23</p> <p>Kraemer ^[1] 27:16</p>
<hr/> <p style="text-align: center;">H</p> <p>hand ^[3] 33:3 36:2,5</p> <p>handle ^[1] 11:16</p> <p>happen ^[3] 27:20 38:15 67:19</p> <p>happened ^[1] 44:25</p> <p>happening ^[2] 47:15 63:20</p> <p>happens ^[5] 27:14 30:8 59:19 61:5,6</p> <p>happy ^[3] 37:5 42:16 49:1</p> <p>hard ^[1] 58:18</p> <p>harder ^[1] 24:11</p> <p>Harlan's ^[1] 55:20</p> <p>harm ^[1] 50:17</p> <p>harmful ^[1] 51:7</p> <p>Harris ^[6] 4:16 5:11 14:23 16:25 26:16,23</p> <p>Hatch ^[3] 6:25 36:20 62:3</p> <p>head ^[1] 26:8</p> <p>health ^[1] 18:11</p> <p>hear ^[1] 4:3</p> <p>heard ^[1] 28:8</p> <p>heart ^[1] 30:6</p> <p>heightened ^[4] 4:13 15:2 35:10,12</p> <p>held ^[2] 27:25 41:1</p> <p>higher ^[5] 17:11,24 33:2 47:7 65:8</p> <p>highly ^[1] 37:21</p> <p>hinge ^[1] 5:22</p> <p>hinges ^[1] 61:23</p> <p>history ^[4] 12:11 43:5 52:14 58:17</p> <p>holidays ^[1] 58:7</p> <p>Holmes ^[1] 12:22</p> <p>Honor ^[36] 5:7 7:23 9:4,21 10:22 11:19 12:7,14 16:1,5 20:22 21:6,10 23:16 24:7 26:9 27:19 29:6 30:14 31:11 32:3 34:2,12,16 38:1 40:4 43:23 44:17 50:24 55:6 59:18</p>	<hr/> <p style="text-align: center;">I</p> <p>idea ^[5] 12:13 29:21 30:1 52:9 69:2</p> <p>identical ^[2] 13:11,11</p> <p>identified ^[2] 27:22,23</p> <p>ideological ^[2] 10:19 52:22</p> <p>illegal ^[2] 20:3 27:16</p> <p>Illinois ^[8] 2:11,12 11:25 12:1 35:22 39:9,22 71:1</p> <p>immaterial ^[1] 10:22</p> <p>impacts ^[1] 60:2</p> <p>implementation ^[1] 55:16</p> <p>implicate ^[1] 30:19</p> <p>implications ^[1] 47:21</p> <p>implicit ^[1] 42:19</p> <p>implied ^[1] 11:20</p> <p>important ^[5] 18:12 19:25 29:25 44:5 63:24</p> <p>importantly ^[2] 33:10 67:24</p> <p>imposed ^[1] 11:18</p> <p>imposing ^[1] 46:10</p> <p>impulses ^[1] 52:12</p> <p>includes ^[1] 36:6</p> <p>including ^[1] 24:19</p> <p>income ^[1] 6:10</p> <p>incompatible ^[1] 35:11</p> <p>inconsistent ^[3] 14:9,11,16</p> <p>increase ^[4] 50:12 63:13 64:4 70:25</p> <p>increasing ^[2] 47:8,8</p> <p>incredibly ^[1] 10:5</p> <p>indebtedness ^[1] 47:8</p> <p>independent ^[2] 46:22,24</p> <p>indicate ^[1] 50:1</p> <p>individual ^[7] 10:22 27:7 31:14 32:3 61:19 63:7 70:2</p> <p>individually ^[1] 65:9</p> <p>individuals ^[4] 7:6 11:8 15:19 19:6</p> <p>individuals' ^[3] 10:25 20:9 69:7</p> <p>industries ^[2] 14:5 25:21</p> <p>industry ^[3] 25:20,20 28:17</p> <p>inequitable ^[1] 21:22</p> <p>influence ^[6] 4:15 54:9,15,25 55:2 69:16</p> <p>infringe ^[1] 43:20</p> <p>infringing ^[1] 69:6</p> <p>initial ^[1] 50:2</p> <p>inquiry ^[1] 35:4</p> <p>insist ^[1] 43:14</p> <p>insofar ^[1] 58:2</p>	<hr/> <p style="text-align: center;">J</p> <p>JANUS ^[3] 1:3 4:5 6:2</p> <p>job ^[1] 33:15</p> <p>jobs ^[2] 23:25 35:8</p> <p>judgments ^[1] 50:17</p> <p>judicial ^[1] 50:16</p> <p>Justice ^[177] 2:7 4:3,10,23 6:3 7:8,20 8:10 9:1,10 10:11,13,14 11:1,12,22 12:4,8,15 13:9 14:8,13 15:20 16:2,7,12,17 17:6,20 18:7,15,16 19:12,19,22 20:18 21:2,7,14 22:14,16,22 23:13,17 24:4,24 25:3,10,14,19,23 26:2,5,10 27:9,21 28:3,7,14,21 29:3,19,25 30:21 31:4,7,20 32:13,18,24 33:16,18 34:3,8,14,19,21,22,23 35:1,18,25 36:24 37:6,13,19 38:4 39:5,17 40:1,5,9,12,21,23 41:20 42:3,20 43:2 44:9,12,18 45:4,9,11,17 47:3,13,17,22,25 48:6,15 49:2,18 51:5,12,13,24 52:5 53:3,6,12,14,21 54:8,12,18,20,22 55:3,14,19,20,23 56:14,16,25 57:3,10,21,24 58:12,13,23 59:1,4,11,15,25 60:14,16,25 61:11 62:18,23 63:11,18 64:3,23 65:17,21 66:14,22 67:9,13 68:15,20 69:22 70:9,16 71:5,5,7,12,17,20</p> <p>Justices ^[1] 13:22</p> <p>justification ^[4] 19:9 29:21 37:1 66:13</p>	<hr/> <p style="text-align: center;">L</p> <p>labor ^[16] 7:14,15,25 8:3,5 12:1 13:12,12 14:22 24:14 25:2 28:7,10 29:1 55:13 68:12</p> <p>lack ^[1] 41:3</p> <p>largely ^[1] 27:21</p> <p>last ^[2] 55:24 68:21</p> <p>late ^[1] 70:12</p> <p>Lathrop ^[1] 55:21</p> <p>Laughter ^[3] 40:2 55:25 60:9</p> <p>law ^[14] 5:5,15 11:18,20,23,24,25 12:20 14:20 36:12 42:9 51:16,17,19</p> <p>lawyers ^[3] 13:2,20 28:22</p> <p>lay ^[1] 41:15</p> <p>least ^[4] 8:2 20:23 28:23,24</p> <p>leave ^[2] 21:20 58:8</p> <p>legal ^[3] 21:25 46:10 50:14</p> <p>legislature ^[2] 59:23 61:6</p> <p>legislatures ^[1] 67:25</p> <p>legs ^[1] 28:23</p> <p>Lehnert ^[10] 13:23 15:7 23:4 47:25 52:20 59:3 66:15,24 67:4,16</p> <p>less ^[3] 25:17 54:24 55:2</p> <p>Letter ^[1] 36:19</p> <p>level ^[1] 31:15</p> <p>leverage ^[1] 40:16</p> <p>leverages ^[1] 40:16</p> <p>life ^[1] 43:16</p> <p>limit ^[2] 53:15 58:14</p> <p>limitation ^[2] 41:5 68:6</p> <p>limitations ^[4] 39:8,12 40:10 57:12</p> <p>limited ^[2] 12:16 24:11</p> <p>limiting ^[2] 13:5,6</p> <p>line ^[15] 38:23,23 43:6,16 45:6 47:24 48:4,6,8,13 52:21 65:7,11,12 67:4</p> <p>listen ^[3] 8:8 9:7,8</p> <p>listening ^[2] 8:4,7</p>

Official

<p>litigate ^[1] 31:1 litigation ^[1] 12:11 livelihoods ^[1] 19:6 lobbying ^[3] 53:8, 12 58:20 local ^[1] 52:13 logic ^[1] 45:2 long ^[3] 45:13 50:4 51:11 long-term ^[1] 30:24 look ^[9] 24:22 28:3 38:12 45:9 57:4 58:6 62:24,25 64:9 looking ^[1] 30:23 lose ^[1] 71:9 lot ^[5] 23:20 24:1 25:21 67:11 69:10 lots ^[1] 13:1 love ^[1] 41:11</p>	<p>merit ^[1] 47:5 messages ^[2] 6:12,12 MESENTER ^[48] 2:3 3:3, 18 4:7, 8, 10, 24 5:7 6:20 7:18, 23 8:24 9:3, 20 10:21 11:6, 19, 24 12:7, 14 14:7 16:1, 5, 11, 16, 24 17:15 18:4, 9, 16 19:11, 21 20:2, 21 21:5, 9, 24 27:11 48:16 68:17, 18, 20 70:5, 14, 18 71:6, 14, 19 Messenger's ^[1] 30:1 method ^[1] 28:15 might ^[2] 51:18 66:8 militant ^[1] 49:14 million ^[2] 19:3 70:24 millions ^[4] 17:2 19:2, 6 36:22 mind ^[1] 63:25 minor ^[1] 71:2 minority ^[3] 53:2 55:11 62:13 minutes ^[1] 68:17 mobilization ^[1] 50:3 modern ^[4] 12:19, 23, 25 13:4 moments ^[1] 46:6 Monday ^[1] 1:12 money ^[8] 6:9 9:15 30:9, 11 64:25 65:1, 5 69:1 morale ^[2] 62:22 63:5 morning ^[2] 4:4 36:9 most ^[5] 13:25 20:23 48:7 52:16 60:6 motion ^[5] 26:13, 15, 16 38:11 49:3 move ^[1] 18:5 movie ^[1] 43:13 much ^[1] 24:24 25:3, 10 27:6 31:11 32:2 34:1 36:2 38:6, 22 66:2 multiple ^[1] 8:8 MUNICIPAL ^[3] 1:7 4:6 48:20 municipalities ^[1] 18:25 must ^[1] 66:18</p>	<p>next ^[2] 22:10 27:3 night ^[1] 55:24 NOEL ^[3] 2:6 3:6 22:19 non-chargeable ^[1] 48:4 nonmembers ^[6] 9:23 10:6 11:14, 17 70:15, 19 normal ^[1] 48:18 north ^[1] 24:23 note ^[2] 52:6 65:16 nothing ^[2] 45:2 46:17 notices ^[1] 38:13 nowhere ^[1] 4:20 number ^[4] 20:22 24:20 26:1, 8 numerous ^[1] 39:6</p>	<p>1 others ^[4] 6:19 30:20 46:17 50:9 otherwise ^[1] 69:3 ought ^[1] 50:16 out ^[17] 10:17 24:21 28:23 37:13 38:13, 19 44:20 45:18 46:4 49:15 54:16 58:20 59:5, 6 64:15 66:23, 24 out-years ^[1] 38:16 outcome ^[1] 45:3 outside ^[5] 6:11 46:1 53:22 56:12 61:18 outweigh ^[1] 62:7 over ^[11] 10:7 15:10 17:1 19:2 32:4, 18 42:7 50:4, 9 59:16 64:6 overall ^[2] 31:17 32:11 overlap ^[1] 48:5 overriding ^[1] 47:12 overrule ^[4] 48:25 66:25 67:22 68:11 overruled ^[3] 4:12 18:18 48:17 overtime ^[1] 60:20 own ^[1] 9:15</p>
M			
<p>machine ^[1] 7:4 made ^[1] 68:21 Madison ^[1] 13:1 majority ^[2] 62:14 67:22 malfeasance ^[1] 16:9 Man ^[4] 43:13 44:6, 10 53:8 manage ^[2] 58:10 59:13 management ^[3] 54:7 64:1, 16 managerial ^[4] 46:4, 14 59:7, 7 manages ^[1] 36:3 Mancur ^[1] 49:9 mandate ^[2] 55:10, 15 mandated ^[6] 22:2 52:23, 25 53:18 58:15 66:16 mandatory ^[4] 5:2 53:8, 16, 19 manifest ^[1] 50:22 manner ^[1] 61:25 many ^[13] 12:23 18:11 19:5 20:7, 8, 19 34:9, 15 38:16 43:5 47:18 66:3 68:7 Marbury ^[1] 13:1 MARK ^[1] 1:3 marker ^[1] 41:15 marketing ^[1] 9:12 marketplace ^[1] 40:18 massive ^[1] 47:7 matter ^[20] 1:14 13:7 17:16 18:5 22:1 30:13 31:22 32:1, 20 33:1 41:21 62:20 63:4, 7, 9, 12, 15 64:7 66:10 70:7 matters ^[14] 16:23 30:7 32:25 33:9 37:21 42:1 58:4 61:13, 15, 17 66:7, 8 71:2, 4 mean ^[11] 13:9 18:10 21:3 26:2 32:20 45:6, 9 51:6 53:11, 13 65:25 Meaning ^[2] 26:5 56:20 means ^[4] 8:2 26:21 30:25 68:4 mechanical ^[1] 25:19 meeting ^[1] 41:10 member ^[1] 45:20 members ^[6] 10:3 24:12, 17 45:17 49:16 53:2 membership ^[1] 49:6 memo ^[1] 44:24 mentioned ^[1] 71:3 merely ^[1] 16:19</p>	<p>move ^[1] 18:5 movie ^[1] 43:13 much ^[1] 24:24 25:3, 10 27:6 31:11 32:2 34:1 36:2 38:6, 22 66:2 multiple ^[1] 8:8 MUNICIPAL ^[3] 1:7 4:6 48:20 municipalities ^[1] 18:25 must ^[1] 66:18</p>	<p>next ^[2] 22:10 27:3 night ^[1] 55:24 NOEL ^[3] 2:6 3:6 22:19 non-chargeable ^[1] 48:4 nonmembers ^[6] 9:23 10:6 11:14, 17 70:15, 19 normal ^[1] 48:18 north ^[1] 24:23 note ^[2] 52:6 65:16 nothing ^[2] 45:2 46:17 notices ^[1] 38:13 nowhere ^[1] 4:20 number ^[4] 20:22 24:20 26:1, 8 numerous ^[1] 39:6</p>	<p>1 others ^[4] 6:19 30:20 46:17 50:9 otherwise ^[1] 69:3 ought ^[1] 50:16 out ^[17] 10:17 24:21 28:23 37:13 38:13, 19 44:20 45:18 46:4 49:15 54:16 58:20 59:5, 6 64:15 66:23, 24 out-years ^[1] 38:16 outcome ^[1] 45:3 outside ^[5] 6:11 46:1 53:22 56:12 61:18 outweigh ^[1] 62:7 over ^[11] 10:7 15:10 17:1 19:2 32:4, 18 42:7 50:4, 9 59:16 64:6 overall ^[2] 31:17 32:11 overlap ^[1] 48:5 overriding ^[1] 47:12 overrule ^[4] 48:25 66:25 67:22 68:11 overruled ^[3] 4:12 18:18 48:17 overtime ^[1] 60:20 own ^[1] 9:15</p>
N			
<p>machine ^[1] 7:4 made ^[1] 68:21 Madison ^[1] 13:1 majority ^[2] 62:14 67:22 malfeasance ^[1] 16:9 Man ^[4] 43:13 44:6, 10 53:8 manage ^[2] 58:10 59:13 management ^[3] 54:7 64:1, 16 managerial ^[4] 46:4, 14 59:7, 7 manages ^[1] 36:3 Mancur ^[1] 49:9 mandate ^[2] 55:10, 15 mandated ^[6] 22:2 52:23, 25 53:18 58:15 66:16 mandatory ^[4] 5:2 53:8, 16, 19 manifest ^[1] 50:22 manner ^[1] 61:25 many ^[13] 12:23 18:11 19:5 20:7, 8, 19 34:9, 15 38:16 43:5 47:18 66:3 68:7 Marbury ^[1] 13:1 MARK ^[1] 1:3 marker ^[1] 41:15 marketing ^[1] 9:12 marketplace ^[1] 40:18 massive ^[1] 47:7 matter ^[20] 1:14 13:7 17:16 18:5 22:1 30:13 31:22 32:1, 20 33:1 41:21 62:20 63:4, 7, 9, 12, 15 64:7 66:10 70:7 matters ^[14] 16:23 30:7 32:25 33:9 37:21 42:1 58:4 61:13, 15, 17 66:7, 8 71:2, 4 mean ^[11] 13:9 18:10 21:3 26:2 32:20 45:6, 9 51:6 53:11, 13 65:25 Meaning ^[2] 26:5 56:20 means ^[4] 8:2 26:21 30:25 68:4 mechanical ^[1] 25:19 meeting ^[1] 41:10 member ^[1] 45:20 members ^[6] 10:3 24:12, 17 45:17 49:16 53:2 membership ^[1] 49:6 memo ^[1] 44:24 mentioned ^[1] 71:3 merely ^[1] 16:19</p>	<p>move ^[1] 18:5 movie ^[1] 43:13 much ^[1] 24:24 25:3, 10 27:6 31:11 32:2 34:1 36:2 38:6, 22 66:2 multiple ^[1] 8:8 MUNICIPAL ^[3] 1:7 4:6 48:20 municipalities ^[1] 18:25 must ^[1] 66:18</p>	<p>next ^[2] 22:10 27:3 night ^[1] 55:24 NOEL ^[3] 2:6 3:6 22:19 non-chargeable ^[1] 48:4 nonmembers ^[6] 9:23 10:6 11:14, 17 70:15, 19 normal ^[1] 48:18 north ^[1] 24:23 note ^[2] 52:6 65:16 nothing ^[2] 45:2 46:17 notices ^[1] 38:13 nowhere ^[1] 4:20 number ^[4] 20:22 24:20 26:1, 8 numerous ^[1] 39:6</p>	<p>1 others ^[4] 6:19 30:20 46:17 50:9 otherwise ^[1] 69:3 ought ^[1] 50:16 out ^[17] 10:17 24:21 28:23 37:13 38:13, 19 44:20 45:18 46:4 49:15 54:16 58:20 59:5, 6 64:15 66:23, 24 out-years ^[1] 38:16 outcome ^[1] 45:3 outside ^[5] 6:11 46:1 53:22 56:12 61:18 outweigh ^[1] 62:7 over ^[11] 10:7 15:10 17:1 19:2 32:4, 18 42:7 50:4, 9 59:16 64:6 overall ^[2] 31:17 32:11 overlap ^[1] 48:5 overriding ^[1] 47:12 overrule ^[4] 48:25 66:25 67:22 68:11 overruled ^[3] 4:12 18:18 48:17 overtime ^[1] 60:20 own ^[1] 9:15</p>

<p>4 70:2 person's ^[1] 43:20 personnel ^[2] 36:3 46:21 persuade ^[1] 56:9 persuading ^[1] 67:22 Petitioner ^[9] 1:4 2:4,9 3:4,9,19 4:9 22:21 42:7 PETITIONERS ^[1] 68:19 pick ^[1] 68:21 Pickering ^[18] 31:5,12,19 33:11,12,19 35:4,5,9 36:16 39:6 40:21 41:17,18 44:19 62:5,10,17 place ^[4] 32:6,9 51:11 64:2 places ^[2] 4:16 20:7 play ^[1] 43:13 please ^[6] 4:11 22:23 29:19 35:25 51:13 52:5 plenty ^[1] 49:12 plurality ^[1] 48:2 plurality's ^[1] 48:8 pocket ^[1] 9:15 point ^[13] 12:10,11 14:9 15:6 26:13,18 44:13 50:13,14 59:5 64:15 68:21 69:8 pointed ^[1] 37:13 points ^[2] 26:11 42:8 policies ^[5] 4:15 36:18 55:16,17 58:8 policy ^[12] 6:12 16:23 18:1,6 30:20 45:19 47:20 59:8 66:2 69:20 70:1,4 political ^[14] 7:1,4 15:1,1,18 17:4 33:13 37:3,22 42:17 54:9,14,25 55:2 politicalization ^[1] 7:2 position ^[12] 11:3 28:8 30:12,22 34:5,17 39:20 45:19,22 56:13 64:20,21 positions ^[2] 34:10 56:7 posits ^[1] 63:22 possible ^[2] 41:23 56:14 possibly ^[1] 41:12 Post ^[1] 13:25 Postal ^[7] 23:15,16,24 24:7,13,19,21 Powell ^[2] 14:13 65:17 power ^[2] 32:16 66:11 powers ^[1] 9:6 practice ^[4] 5:15 20:4 48:5 55:13 precedent ^[2] 14:16 67:7 precedents ^[3] 4:18 14:17,18 predicated ^[1] 29:22 predictive ^[1] 50:17 preface ^[1] 41:14 prerogative ^[1] 55:9 prerogatives ^[4] 36:10 46:4 52:11 61:24 pressure ^[1] 50:11 presumably ^[1] 21:15 pretextual ^[1] 40:19 prevail ^[2] 27:13 54:24 prevalence ^[2] 19:13 20:12 prevent ^[1] 68:23 preventing ^[2] 7:2,3</p>	<p>price ^[1] 8:13 principle ^[6] 13:6,7 57:14,17,23 65:22 principles ^[1] 62:16 printing ^[1] 25:20 prior ^[4] 14:16,21 22:7 34:10 private ^[21] 5:4,6,21,25 7:13 14:24 15:4 25:14,18 27:14,20,25 32:10 37:2,2 41:22 42:3,4 52:14 62:20 63:12 privatization ^[1] 47:5 probably ^[3] 19:2 27:5 39:19 probing ^[1] 10:24 problem ^[6] 14:1 15:7 48:10 50:6 53:24 65:17 procedures ^[1] 64:18 process ^[9] 29:10,12,13,24 47:1 52:23 64:14 69:9,21 processing ^[2] 69:11 70:22 Professor ^[2] 13:24,25 prohibit ^[2] 33:13 35:13 prohibits ^[1] 10:24 promotion ^[1] 47:6 property ^[1] 19:4 prophylactic ^[1] 50:23 proposition ^[1] 68:22 prosperity ^[1] 28:10 protected ^[1] 17:12 protection ^[5] 15:3 16:4,10,19 69:1 provide ^[3] 7:10 11:14 53:5 provides ^[3] 9:6 12:2 66:15 provision ^[6] 12:1 21:12,21 22:4 29:9 51:21 provisions ^[5] 19:14 20:17 21:16 27:8 51:21 public ^[63] 5:3,23 7:10 16:23 17:17,18 18:1,5,13 20:22 28:16 30:8,8,13,15,17,19 31:15,22 32:1,8,25 33:25 36:17,22 37:11 42:1,9,13 47:19,20 52:17,18 56:19,21 57:9 58:5,9 59:25 60:6 61:15,17 62:20 63:4,7,9,15 64:2,7 65:2,4,14 66:2,8,10 69:13,25 70:4,7,7 71:4,8,10 publicly ^[2] 38:12 45:21 Puerto ^[1] 18:23 purpose ^[4] 7:13,14 29:22 56:4 purposes ^[1] 29:14 pursuant ^[1] 40:4 push ^[1] 64:5 put ^[5] 13:21 17:21 18:21 36:6 60:5</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quarter ^[2] 25:8,8 quelled ^[1] 62:12 question ^[27] 5:22,25 8:17 9:21,22 23:2,19 27:10 34:23 35:3 36:11 41:14 42:20 43:3 45:19 51:9 52:20,24 53:11 55:7,7 57:5 60:10,11 66:6 67:5 70:4 questions ^[4] 12:17 14:8 16:23 59:6 quick ^[1] 12:17</p>	<p>quite ^[5] 19:24 31:7 32:22 43:9 60:5 quote ^[1] 50:18</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>radical ^[1] 34:5 railroad ^[1] 13:13 railroads ^[1] 65:1 Railway ^[3] 13:11,12 14:22 raise ^[5] 9:23 62:19 63:9 66:8 68:12 raises ^[1] 29:13 raising ^[1] 58:4 rampant ^[1] 33:21 range ^[2] 24:8,11 rate ^[2] 25:18 65:6 rates ^[2] 49:7 65:2 rather ^[2] 9:15 31:5 ratify ^[3] 59:24 61:8,9 rationales ^[1] 4:20 reach ^[1] 7:24 read ^[6] 21:4 28:18 50:1 55:20,23 56:17 reading ^[1] 29:8 real ^[1] 48:21 reality ^[3] 24:1,2 47:14 really ^[9] 13:18 22:12 23:9 30:6 31:17 40:19 53:23 69:24,25 reason ^[9] 9:3,25 19:15,15 20:8,13 31:14 48:7 54:11 reasons ^[4] 5:11 10:19 27:21 33:9 REBUTTAL ^[2] 3:17 68:18 recent ^[1] 22:9 recently ^[1] 70:23 recognize ^[3] 11:2 36:1 44:5 recognized ^[4] 6:4 16:25 44:4 46:2 record ^[4] 23:20 26:14 38:10,15 recruit ^[2] 24:12 52:16 reference ^[1] 12:8 referencing ^[1] 37:14 reflects ^[2] 35:5,9 Regardless ^[1] 34:20 regards ^[1] 46:12 regulated ^[4] 7:11 13:13 14:5 28:17 regulates ^[1] 36:4 regulating ^[3] 5:15 6:6 57:15 rein ^[1] 57:15 relations ^[2] 7:15 12:1 relationship ^[2] 40:15,16 relationships ^[2] 46:21 50:22 reliance ^[12] 18:17,19 19:25 20:2,3 22:12 26:19,24 27:1 51:15,22 67:20 remainder ^[1] 22:15 remaining ^[1] 68:17 remember ^[1] 43:12 remotely ^[1] 18:19 removed ^[1] 44:1 renegotiate ^[2] 51:20 61:10 renegotiated ^[3] 22:11 38:17 48:20 repeatedly ^[1] 36:16</p>	<p>represent ^[7] 8:23 9:23 32:15 46:11 53:2 55:11 66:17 representation ^[6] 8:25 9:4 12:3 53:1 62:12 66:19 representative ^[5] 10:7 23:7 32:14 37:17 66:18 representatives ^[1] 38:18 representing ^[2] 39:21 46:17 represents ^[1] 63:14 require ^[2] 11:13 21:12 required ^[8] 12:6 41:8,25 43:4 44:23 52:18 53:2,5 requirement ^[2] 11:16 54:1 reserve ^[1] 22:14 resistant ^[1] 69:18 resolution ^[1] 37:15 resolve ^[1] 29:17 resources ^[5] 9:11,17 11:4,7 49:8 respect ^[9] 5:8,21 15:5 42:9 47:17 57:13 60:1 61:25 66:1 Respectfully ^[1] 27:19 respond ^[1] 51:14 Respondent ^[3] 2:16 3:15 52:3 Respondents ^[5] 1:9 2:13 3:12 4:19 35:23 responses ^[1] 24:7 responsible ^[1] 46:24 rest ^[1] 24:9 Restatement ^[1] 21:1 restrict ^[2] 43:22 66:11 restricting ^[3] 6:21,25 7:1 restriction ^[3] 42:22,25 43:6 restrictions ^[1] 62:7 restrictive ^[1] 8:2 result ^[1] 11:11 results ^[1] 4:20 retaining ^[2] 4:22 19:15 reverse ^[1] 26:16 reversing ^[3] 19:16 20:8,13 review ^[1] 54:2 revised ^[1] 34:17 revisiting ^[1] 67:4 Rico ^[1] 18:23 riding ^[1] 9:2 rights ^[6] 19:4 20:9 56:22 57:7,16 69:7 Riley ^[1] 42:24 rises ^[1] 31:15 ROBERTS ^[16] 4:3 22:16 34:21 35:18 49:18 51:13,24 59:11,15,25 60:14 65:21 68:15 71:12,17,20 Roe ^[1] 36:21 room ^[1] 13:2 routine ^[1] 6:17 rule ^[7] 6:2 20:25 36:21 51:7,10 57:1 66:23 rules ^[2] 68:3 70:17 run ^[1] 57:22 runs ^[1] 8:15</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same ^[13] 7:5 23:24 33:6,7 41:8 42:25 44:15,17 45:19 50:11 54:15 62:9,10</p>
---	---	---	---

Official

<p>San ^[1] 36:21 satisfy ^[1] 8:2 saw ^[1] 56:17 saying ^[12] 11:1 17:8 23:23 31:8, 20 32:25 43:14 44:15 57:19 60:23 66:16 69:24 says ^[11] 17:24 21:2 27:16 43:22 53:7 54:13 56:2,3 57:22 62:19 64:16 scale ^[8] 16:25 17:4,12 18:7,9,15 36:11 71:15 scales ^[1] 20:1 Scalia ^[3] 13:22 47:25 53:3 Scalia's ^[2] 48:6 66:14 scenario ^[4] 41:24 44:7,10 64:10 school ^[1] 67:25 scope ^[6] 32:12 33:9,19,24 36:11 61:25 scrutiny ^[7] 4:14 14:14 35:10,12 42:6,10,12 search ^[1] 49:15 searches ^[1] 20:5 Seasons ^[3] 43:13 44:7,10 second ^[4] 23:2 31:4 46:9,22 sector ^[17] 5:4,4,6,22,23,25 14:24 15:4 20:22 25:12,14,18 27:14,20, 25 32:8 52:14 security ^[1] 68:10 see ^[7] 8:21 14:2 36:19,20 50:19 56:18 64:23 seems ^[2] 38:5,5 seen ^[3] 20:24 28:22 49:8 send ^[1] 26:17 sense ^[1] 26:3 separate ^[2] 29:11 47:25 serious ^[4] 29:13 47:20 51:16,22 seriously ^[1] 44:5 servants ^[2] 57:9 60:6 serve ^[1] 46:14 Service ^[7] 23:16,16,25 24:8,13,19, 21 services ^[6] 11:14 18:14 30:18 37:12 52:17 53:4 session ^[1] 27:3 set ^[5] 32:11 55:9 59:20 61:4 65:4 setting ^[3] 5:19 9:12 45:21 seven ^[1] 38:22 severability ^[4] 20:17,19,24 51:17 severable ^[1] 21:10 shadow ^[1] 26:22 share ^[1] 6:10 Shelley ^[1] 27:15 short-lived ^[1] 27:2 short-term ^[1] 49:15 shouldn't ^[3] 7:20 48:11 58:18 show ^[2] 49:12 66:12 side ^[7] 14:1 23:8 36:8 49:19 64:11,19 67:21 sides ^[2] 23:22 42:25 siding ^[1] 28:18 significant ^[1] 70:22 simply ^[3] 27:7 28:1 67:17 since ^[5] 12:15 27:6 29:18,20 35:11</p>	<p>single ^[4] 46:8 55:21 69:25 71:8 site ^[1] 17:10 situation ^[4] 39:7 40:6,24 46:16 six ^[1] 38:21 size ^[5] 30:16 31:18 32:12 47:4 60:19 slew ^[1] 4:17 slightly ^[1] 51:8 smearing ^[1] 64:13 solely ^[1] 14:19 Solicitor ^[3] 2:6,11 35:22 solve ^[1] 13:25 somebody ^[2] 43:19 44:14 somehow ^[1] 36:10 someone ^[1] 6:15 Sometimes ^[2] 61:4,5 sorry ^[3] 6:3 14:17 33:16 SOTOMAYOR ^[39] 6:3 7:8,20 8:10 9:1 15:20 16:2,7,12,17 17:6,20 18:7,15 23:13,17 24:4,24 25:3,10, 14,19,23 26:2,5 33:16,18 34:3,8, 14 45:4,9,11,17 69:22 70:9,16 71:5,7 Souter ^[1] 13:22 Southworth ^[1] 45:25 sovereign ^[3] 36:4 48:13 55:8 speaking ^[2] 16:6 45:14 specifically ^[1] 13:24 specter ^[1] 68:12 speech ^[35] 4:14,17 5:20 6:21,22, 25 7:7 30:2,7,12 33:7,13 36:7,11, 25 37:17 39:1 40:18 42:25 43:7,7 44:1 45:5,7 48:12 56:11,22 61:3,13, 25 62:8,13 63:1,10,25 66:12 spend ^[1] 46:6 spoke ^[1] 49:9 spokesman ^[2] 46:8,10 Springfield ^[1] 2:3 stable ^[1] 46:24 stage-in ^[1] 17:17 stake ^[1] 57:18 stare ^[6] 4:21 14:2 19:23,23 23:2 26:18 starts ^[1] 18:5 STATE ^[53] 1:6 2:12 3:12 4:5 5:5, 13,22 6:1 7:17,21 8:15,17 11:18, 23,24,25 15:23 16:8,14 17:10 28:1 35:23 36:2 39:9,10,14,21 40:14 42:14 46:2 47:9,11 48:19,24 50:23 51:16,17,19 52:15 53:7,18,18, 24 58:16 59:5,16,23 60:2,21 64:22 66:16 67:25 70:24 state's ^[4] 5:14 41:19 46:5 59:9 state-mandated ^[2] 56:5 64:18 stated ^[1] 5:11 STATES ^[19] 1:1,16 2:8 3:7 11:13 18:22 19:5,17 20:12 22:1,3,20 28:5 29:4 30:24 53:15 54:5 55:7 61:3 Statistics ^[2] 24:14 25:2 statute ^[8] 22:2 48:19 52:25 53:5, 7,7 58:22 70:18 statutes ^[2] 18:24 19:5 statutorily ^[1] 52:23 statutory ^[1] 15:12</p>	<p>stays ^[1] 22:4 step ^[5] 31:4 41:17,18 42:2 44:1 Stewart ^[2] 13:9,9 stick ^[2] 49:17 50:8 still ^[6] 7:16 17:13 24:22 36:13 41:16 56:11 stipulate ^[1] 60:7 stood ^[1] 17:19 stop ^[1] 50:23 stopped ^[1] 45:13 story ^[1] 40:20 straight ^[1] 42:10 strength ^[1] 41:19 stretch ^[1] 44:7 strict ^[3] 42:6,10,12 strikes ^[2] 30:22 68:10 striking ^[3] 31:8 68:7,24 strong ^[1] 18:19 struck ^[1] 32:21 structure ^[3] 30:16 31:18 32:12 student ^[8] 4:25 5:8,9,16 7:9,9 8:11,13 students ^[1] 8:12 studies ^[2] 49:12 50:1 subject ^[13] 15:2 18:8,10,10 22:5 24:16 41:22 43:10 53:8,16,19 55:12 64:22 subjective ^[1] 10:25 subjects ^[3] 30:5 33:6 58:15 submit ^[10] 9:24 10:21 11:10 15:18 18:4 20:15 21:10 24:10 68:24 69:5 submitted ^[2] 71:21,23 subsequent ^[1] 14:17 subsidization ^[3] 7:12 37:2 56:4 subsidize ^[3] 11:9 35:16 69:3 subsidy ^[2] 45:7,15 substantially ^[1] 11:5 substantive ^[1] 16:23 succeeds ^[1] 67:21 suddenly ^[2] 28:14,23 sufficient ^[1] 62:6 suggested ^[4] 10:14 15:6 41:3 48:16 suggesting ^[3] 15:22 66:25 67:3 superior ^[2] 48:1,8 supervisors ^[3] 41:4,11,12 support ^[10] 2:9 3:8 6:22 7:6 10:16,23 15:19 22:21 29:23 49:6 supporters ^[1] 9:14 Suppose ^[2] 37:19,20 supremacy ^[1] 43:15 SUPREME ^[4] 1:1,15 54:14 71:1 surrounding ^[1] 51:21 survive ^[1] 20:15 sustained ^[1] 51:4 system ^[7] 28:24 52:13 54:5 55:8, 10 60:13 61:3</p>	<p>talks ^[1] 33:21 tangibly ^[1] 49:4 taxes ^[1] 47:9 taxpayers ^[1] 30:10 teacher ^[1] 47:6 teaching ^[1] 35:9 tend ^[1] 49:13 tenure ^[2] 47:6 60:20 term ^[2] 34:9 50:5 terms ^[6] 20:14 23:5 32:18 58:17 64:9 69:14 test ^[8] 15:6,11,12,15 33:19 48:3,9 53:17 tested ^[1] 24:5 tests ^[1] 36:17 text ^[1] 49:10 there's ^[9] 8:10 9:20,25 23:9,20 35:14 53:14,24 66:12 therefore ^[2] 6:1 64:17 they've ^[3] 12:9 18:2 28:22 third ^[5] 5:3 15:5 23:3 25:8 27:22 third-party ^[2] 32:10 35:16 Thomas ^[1] 43:14 though ^[3] 24:17 28:25 41:15 thousands ^[3] 17:3 18:25 67:23 three ^[13] 4:25 12:16,16 13:19 14:2,5 22:10,24 34:18 38:21 51:1 57:5 58:16 Throughout ^[2] 43:5 68:13 tied ^[1] 69:21 today ^[4] 36:5 57:14,18 69:10 together ^[3] 31:24 33:2,4 top ^[1] 26:8 topic ^[1] 51:1 topics ^[1] 47:18 towards ^[1] 18:5 tradeoff ^[2] 68:9,10 training ^[1] 16:14 transform ^[1] 16:18 transformative ^[1] 16:22 treats ^[1] 36:14 tried ^[1] 42:21 tries ^[1] 15:23 true ^[3] 21:15,25 68:7 try ^[3] 13:17 54:13 56:9 trying ^[5] 12:18 26:11 32:20 51:8 69:16 turn ^[1] 67:20 Turning ^[1] 26:18 Twenty-three ^[1] 18:22 two ^[15] 5:8 9:21 13:6 19:11 24:6 26:11,20 33:9,10 42:25 46:13,14 49:24 56:8 68:17 two-tiered ^[1] 46:18</p>
U			
<p>unanimously ^[1] 52:9 unconstitutional ^[2] 18:24 21:19 under ^[15] 15:14 20:5,25 23:12 26:22 31:2,5 33:19 37:15 41:16,18 51:16,19 52:12 70:18 undercuts ^[1] 4:21 underlines ^[1] 40:14 underpaid ^[1] 60:7</p>			

Official

<p>understand ^[7] 12:4 32:21 34:4 39:19 40:5,8 59:19</p> <p>understood ^[2] 58:12 61:12</p> <p>unfair ^[1] 64:13</p> <p>unfettered ^[1] 57:9</p> <p>unfold ^[1] 50:20</p> <p>uniformly ^[1] 36:1</p> <p>union ^[53] 5:24 8:4,8 9:5,14,14,16,23,25 10:3,6,9,16,16,18,23 11:7,10,16 14:24 15:10,21 16:13 17:7 21:23 24:12,17 31:21,25 32:10,13 33:5,5 37:21 45:20,23 49:6,7,7 50:8 53:1,4,25 54:13 55:11,15 56:19 63:13,23 64:20 66:17 68:9 69:15</p> <p>union's ^[2] 10:4 38:8</p> <p>unionism ^[4] 19:14 20:12,17 22:2</p> <p>unionization ^[1] 25:11</p> <p>unionized ^[2] 25:4,9</p> <p>unions ^[24] 8:9,23 9:6 10:13 11:2,14 12:10 13:15 14:4 21:17 23:14 25:24 28:12,16 47:19 49:13,21 54:10,24 60:1 68:23 69:3,4,23</p> <p>unit ^[1] 10:2</p> <p>UNITED ^[8] 1:1,15 2:8 3:7 22:20 28:5 29:4 30:24</p> <p>universe ^[1] 63:21</p> <p>university's ^[1] 5:18</p> <p>unrest ^[1] 68:12</p> <p>until ^[1] 27:2</p> <p>untold ^[1] 68:12</p> <p>unusual ^[1] 30:22</p> <p>up ^[17] 5:19 17:11,19,23 19:2 26:14 36:5 38:9 45:21 47:18 50:10,10,10 52:13 53:25 55:9 68:21</p> <p>upheld ^[2] 52:9 62:3</p> <p>uphold ^[1] 36:18</p> <p>upholding ^[1] 36:20</p> <p>usual ^[2] 19:22,23</p> <p>utility ^[1] 65:4</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacation ^[1] 30:3</p> <p>vacuum ^[1] 38:25</p> <p>vagueness ^[1] 48:9</p> <p>valuable ^[1] 9:5</p> <p>value ^[1] 4:22</p> <p>varies ^[1] 11:19</p> <p>various ^[1] 30:4</p> <p>vault ^[1] 42:7</p> <p>versus ^[3] 4:5 13:1 36:21</p> <p>view ^[5] 37:24 39:2 48:1 51:22 54:23</p> <p>viewpoint ^[1] 12:13</p> <p>viewpoint-neutral ^[1] 5:19</p> <p>views ^[1] 37:3</p> <p>violated ^[1] 20:10</p> <p>violating ^[1] 70:16</p> <p>violations ^[1] 19:17</p> <p>Virginia ^[1] 2:3</p> <p>visible ^[1] 51:4</p> <p>vitality ^[1] 26:25</p> <p>vividly ^[1] 30:19</p> <p>voluntary ^[2] 49:6,20</p>	<p style="text-align: center;">W</p> <hr/> <p>wage ^[8] 31:14 32:5 37:22,23,23 63:13 64:4 70:25</p> <p>wages ^[15] 15:23 17:11,24 18:11 33:2 47:7 58:14 59:16 60:3,18 65:8,12,24,25 66:1</p> <p>wages/hours ^[1] 65:18</p> <p>walk ^[1] 17:22</p> <p>wants ^[7] 18:2 39:11,14 42:7 45:22 53:19 69:17</p> <p>Washington ^[3] 1:11 2:7,15</p> <p>way ^[12] 6:18,23 8:11 33:25 34:9 38:14 40:17 43:21 51:4 58:11 60:5 65:14</p> <p>ways ^[2] 18:11 46:15</p> <p>weight ^[1] 38:6</p> <p>well-fitted ^[1] 8:18</p> <p>well-resourced ^[1] 46:25</p> <p>well-settled ^[1] 54:5</p> <p>well-tailored ^[1] 8:19</p> <p>Whereupon ^[1] 71:22</p> <p>whether ^[16] 6:1 7:19,25 17:7 23:5 44:13 52:10,24 53:17,17 54:23 62:22 63:4 64:19 65:8,9</p> <p>White ^[1] 57:10</p> <p>White's ^[3] 57:3,21 62:23</p> <p>whole ^[8] 21:3 24:1 29:18,20 36:15 70:7,20 71:3</p> <p>wide ^[1] 10:5</p> <p>wide-scale ^[1] 19:16</p> <p>wield ^[1] 32:16</p> <p>will ^[14] 11:3 13:2 20:15 22:10 31:1 49:20 50:6,11 54:15,24 55:1 60:7 67:23 69:4</p> <p>WILLIAM ^[5] 2:3 3:3,18 4:8 68:18</p> <p>willing ^[1] 52:16</p> <p>wish ^[1] 10:23</p> <p>within ^[3] 54:5 59:21 61:7</p> <p>without ^[2] 23:14 31:24</p> <p>wonder ^[2] 12:15 28:19</p> <p>wonderful ^[2] 56:1,2</p> <p>Wooley ^[1] 42:23</p> <p>word ^[1] 67:16</p> <p>words ^[3] 15:11 35:6,14</p> <p>work ^[4] 26:6 38:20 46:24 67:24</p> <p>work-related ^[1] 17:13</p> <p>worker's ^[1] 63:8</p> <p>workers ^[5] 19:3 28:21 60:13 62:4 64:1</p> <p>workforce ^[4] 7:3 47:5 60:19 65:25</p> <p>working ^[4] 46:20 50:21 58:14 65:12</p> <p>workplace ^[25] 6:16,17 24:25 25:4,8,9 30:9 31:23 36:18 37:12,14 38:20 39:15 41:25 46:1,18 50:17 57:16 58:10 59:14 62:22 63:5,10 70:13,17</p> <p>works ^[3] 31:13 61:3 68:3</p> <p>worry ^[1] 54:14</p> <p>worth ^[1] 70:21</p> <p>wrapped ^[1] 38:9</p> <p>write ^[2] 44:23 60:17</p>	<p>writing ^[1] 41:3</p> <p>written ^[1] 58:17</p> <p>wrote ^[2] 13:10 45:1</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year's ^[1] 70:21</p> <p>years ^[8] 12:20 22:11 28:6,10 48:18 51:2 52:8 58:17</p>
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