

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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BEVERLY R. GILL, et al.,	)	
Appellants,	)	
v.	)	No. 16-1161
WILLIAM WHITFORD, et al.,	)	
Appellees.	)	

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Pages: 1 through 65  
 Place: Washington, D.C.  
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3       BEVERLY R. GILL, et al.,                           )  
4   Appellants,                               )  
5   v.   ) No. 16-1161  
6       WILLIAM WHITFORD, et al.,                           )  
7   Appellees.   )  
8       - - - - -  
9   Washington, D.C.

10   Tuesday, October 3, 2017

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12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 10:04 a.m.

15  
16 APPEARANCES:  
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18       on behalf of the Appellants.  
19 ERIN E. MURPHY, Washington, D.C., for Wisconsin State  
20       Senate, et al., as amici curiae.  
21 PAUL M. SMITH, Washington, D.C.;  
22       on behalf of the Appellees.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MISHA TSEYTLIN	
4	On behalf of the Appellants	3
5	ORAL ARGUMENT OF:	
6	ERIN E. MURPHY	
7	For Wisconsin State Senate,	
8	as amicus curiae	18
9	ORAL ARGUMENT OF:	
10	PAUL M. SMITH,	
11	On behalf of Appellees	29
12	REBUTTAL ARGUMENT OF:	
13	MISHA TSEYTLIN	
14	On behalf of the Appellants	63
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
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14  
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18  
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20  
21  
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23  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in case 16-1161, Gill versus Whitford.

Mr. Tseytlin?

ORAL ARGUMENT OF MISHA TSEYTLIN  
ON BEHALF OF APPELLANTS

MR. TSEYTLIN: Mr. Chief Justice, and may it please the Court.

This Court has never uncovered judicial and manageable standards for determining when politicians have acted too politically in drawing district lines. Plaintiff's social science metrics composed of statewide vote to seat ratios and hypothetical projections do not solve any of these problems.

Instead, they would merely shift districting from elected public officials to federal courts, who would decide the fate of maps based upon battles of the experts.

Now, on a threshold matter, this Court should hold that federal courts lack jurisdiction to entertain statewide political gerrymandering challenges, leaving for another

1 day the question of district-specific  
2 gerrymandering.

3 JUSTICE KENNEDY: I think it is true  
4 that there is no case that directly helps  
5 Respondents very strongly on this standing  
6 issue. You have a strong argument there.

7 But suppose the Court -- and you will  
8 just have to assume, we won't know the exactly  
9 the parameters of it -- decided that this is a  
10 First Amendment issue, not an equal protection  
11 issue.

12 Would that change the calculus so  
13 that, if you're in one part of the state, you  
14 have a First Amendment interest in having your  
15 party strong or the other party weak?

16 MR. TSEYTLIN: No, it wouldn't, Your  
17 Honor. I think the reason for that is, even if  
18 it is a First Amendment issue, it is still  
19 grounded in the right to vote.

20 And in our country's single district  
21 election system, folks only vote in their own  
22 district. For example, you might have some  
23 vague interest in the party you associated with  
24 having more members in Congress, for example,  
25 like a Wisconsin Republican might want more

1 Texas Republicans in Congress.

2 But no one would say that you have a  
3 First Amendment or first Fourteenth Amendment  
4 right in that sort of circumstance to challenge  
5 Texas law that you would, for example, argue  
6 led to less Republicans from Texas coming into  
7 the U.S. Congress.

8 CHIEF JUSTICE ROBERTS: Well, but I  
9 think the argument is pretty straightforward  
10 which you, in your district, have a right of  
11 association and you want to exercise that right  
12 of association with other people elsewhere in  
13 the state.

14 And if you can't challenge the  
15 districting throughout the state, then your  
16 claim seems to be -- there is no way for to you  
17 to raise your claim.

18 JUSTICE KENNEDY: This of course --  
19 and this of course confines it to the state and  
20 eliminates the problem of out of state, just  
21 the way the Chief Justice stated the  
22 hypothetical.

23 MR. TSEYTLIN: Well, Your Honor, I  
24 don't think it would solve the interstate  
25 problem because, of course, the structural

1 relationship of, for example, Mr. --

2 JUSTICE KENNEDY: Let's -- let's  
3 assume that it does.

4 (Laughter.)

5 MR. TSEYTLIN: Well -- well, Your  
6 Honor, I still think that this Court should be  
7 very careful about enacting that kind of  
8 doctrine.

9 As we know, race in politics are often  
10 correlated in this country, so political  
11 gerrymandering claims and racially  
12 gerrymandering claims, even if they are  
13 ultimately grounded in a different  
14 constitutional amendment, will often be raised  
15 together.

16 And it cannot be -- possibly be the  
17 case that, if there is a showing that the map  
18 drawer turned on the racial screen, the person  
19 is limited to a single district claim.

20 But if that same map drawer turned on  
21 the political screen, then the plaintiff would  
22 get access to the holy grail of a statewide  
23 claim --

24 JUSTICE GINSBURG: Regarding the  
25 question of race, some years ago, this Court

1 dealt with what the -- the so-called  
2 "max-Black" plan, said that it was a deliberate  
3 attempt by the legislature to make as many  
4 African-American districts as possible.

5           This bears a certain resemblance  
6 because the effort here, intentionally, was to  
7 create as many Republican districts. So is  
8 max-Republican, it doesn't -- doesn't it have  
9 the same problem that "max-Black" did?

10           MR. TSEYTLIN: Well, Your Honor, that  
11 turns to the issue of justiciability, and I do  
12 not think that raises the same problems  
13 because, of course, politics is not a suspect  
14 classification like race.

15           And I think the easiest way to see  
16 this is to take a look at a chart that  
17 plaintiff's own expert created, and that's  
18 available on Supplemental Appendix 235. This  
19 is plain -- plaintiff's expert studied maps  
20 from 30 years, and he identified the 17 worst  
21 of the worst maps. What is so striking about  
22 that list of 17 is that 10 were neutral draws.

23           There were court-drawn maps,  
24 commission-drawn maps, bipartisan drawn maps,  
25 including the immediately prior Wisconsin drawn



1 map. And I think the Court should learn two  
2 lessons from this list of 17, 10 of which were  
3 neutral.

4 The first lesson is that partisan  
5 symmetry is simply not a neutral districting  
6 criteria. It is not a neutral method of  
7 drawing districts. For if it were, all of  
8 these commissions would not be drawing partisan  
9 asymmetry maps.

10 The second lesson that this Court  
11 should learn from that -- from that list is  
12 that plaintiffs are asking this Court to launch  
13 a redistricting revolution based upon their  
14 social science metrics.

15 JUSTICE ALITO: Before you get too  
16 deeply into the merits, which I assume you will  
17 want to do in a minute, can I just ask you a  
18 question about standing along the lines of  
19 those asked by my colleagues?

20 Suppose that it was alleged that town  
21 officials in someplace in northern Wisconsin  
22 where the Republicans predominate were  
23 discriminating against the Democratic candidate  
24 for a legislative district by, let's say, not  
25 allowing that candidate's signs to be put up

1 along the roadsides, but allowing the  
2 Republican signs to be put up along the  
3 roadsides, or they were pressuring town --  
4 let's just leave it at that.

5           They're discriminating with respect to  
6 these signs. Now, who would have standing to  
7 raise a First Amendment challenge to that?  
8 Would it be just the candidate in that district  
9 or maybe voters in that district? Or could a  
10 -- a Democratic voter in, let's say, Milwaukee  
11 have standing to raise that First Amendment  
12 argument?

13           MR. TSEYTLIN: I would certainly  
14 think, Your Honor, the candidate would have  
15 standing, and I -- I'm not so sure about the  
16 voters in the district, but probably.

17           But certainly, voters in Milwaukee who  
18 don't vote for that candidate, they're not  
19 eligible to vote for that candidate any more  
20 than someone in California is eligible to vote  
21 for the candidate.

22           And I think we see this --

23           JUSTICE ALITO: Wait. I'm sorry.  
24 Certainly, voters in Milwaukee -- you left out  
25 -- would not have standing?

1 MR. TSEYTLIN: They would not have  
2 standing.

3 And I -- I think we see this from the  
4 testimony of -- of the lead plaintiff, who is  
5 the only plaintiff that testified in this case.

6 He was asked, during his testimony,  
7 what harm does Act 43 put on you, given that  
8 you live in a Democratic-dominated district in  
9 Madison under any possible map.

10 Well, he said, I want to be able to  
11 campaign for a majority in assembly, which  
12 shows that his injury has nothing to do with  
13 him as a voter. It's just a generalized  
14 interest in more Wisconsinites -- more  
15 Wisconsin Democrats being elected, which  
16 someone in Wisconsin can have or someone  
17 outside of Wisconsin can --

18 JUSTICE GINSBURG: May I --

19 JUSTICE KENNEDY: I think we're  
20 anxious to get to the merits, but one more  
21 thing on the sign. Suppose the sign in the  
22 southern part of the state had talked about an  
23 issue which was very important to the people in  
24 Milwaukee.

25 MR. TSEYTLIN: I think that one could

1 frame a hypothetical where, if it was some sort  
2 of a home rule thing, where Milwaukee's right  
3 to have certain height buildings was affected,  
4 you could have a no longer generalized  
5 interest, but we don't have anything like that  
6 here.

7 JUSTICE BREYER: All right. So can I  
8 do this? Because I think the hard issue in  
9 this case is are there standards manageable by  
10 a Court, not by some group of social science  
11 political ex -- you know, computer experts. I  
12 understand that, and I am quite sympathetic to  
13 that.

14 So let me spend exactly 30 seconds, if  
15 I can, giving you, as you've read all these  
16 briefs, I have too, this is -- this is where I  
17 am at the moment -- not that I'm for this,  
18 react to this as you wish, and if you wish to  
19 say nothing, say nothing, and it's for  
20 everybody because it's a little complicated.

21 When I read all that social science  
22 stuff and the computer stuff, I said, well,  
23 what -- is there a way of reducing it to  
24 something that's manageable?

25 So I'd have step one. The judge says,

1 Was there one party control of the  
2 redistricting? If the answer to that is no,  
3 say there was a bipartisan commission, end of  
4 case. Okay?

5 Step two, is there partisan asymmetry?  
6 In other words, does the map treat the  
7 political parties differently? And a good  
8 evidence of that is a party that got 48 percent  
9 of the vote got a majority of the legislature.

10 Other evidence of that is what they  
11 call the EG, which is not quite so complicated  
12 as the opposition makes it think. Okay? In  
13 other words, you look to see.

14 Question 3, is -- is there going to be  
15 persistent asymmetry over a range of votes?  
16 That is to say one party, A, gets 48 percent,  
17 49 percent, 50 percent, 51, that's sort of the  
18 S-curve shows you that, you know, whether there  
19 is or is not. And there has to be some.

20 And if there is, you say is this an  
21 extreme outlier in respect to asymmetry? And  
22 there we have Eric Lander's brief, okay? You  
23 know that one.

24 And -- and we look through thousands  
25 and thousands of maps, and somebody did it with

1 real maps and said how bad is this compared to,  
2 you know, the worst in the country.

3 And then, if all those -- the test  
4 flunks all those things, you say is there any  
5 justification, was there any other motive, was  
6 there any other justification?

7 Now, I suspect that that's manageable.  
8 I'm not positive. And so I throw it out there  
9 as my effort to take the technicalities and  
10 turn them into possibly manageable questions  
11 for a response from anyone insofar as you wish  
12 to respond, and if you wish to say, I wish to  
13 say nothing, that's okay with me.

14 (Laughter.)

15 MR. TSEYTLIN: Thank you, Your Honor.  
16 I'd like to talk about the third and fourth  
17 aspects of that because I think those are --  
18 I've already talked about the second a little  
19 bit.

20 But with regard to the third, which is  
21 persistence, that is exactly the kind of  
22 conjectural, hypothetical state of affairs  
23 inquiry that was submitted to this Court in  
24 LULAC in Professor King's amicus brief because,  
25 of course, as your suggestion -- suggested

1 steps recognize, a single election doesn't mean  
2 much. A single election, you could have an EG  
3 for any particular reason.

4 So you would have federal courts  
5 engaging in battles of the hypothetical experts  
6 deciding, well, what would it be under this map  
7 or that map? So I think that's a non-starter  
8 for that reason.

9 Now, with regard to extremity, this  
10 was an arg --

11 JUSTICE KAGAN: Well, if I could just  
12 stop you there for a second, because I was  
13 under the impression that legislators are  
14 capable of doing this actually pretty easily  
15 now.

16 You know, the world of voting  
17 technology has changed a great deal, and when  
18 legislatures think about drawing these maps,  
19 they're not only thinking about the next  
20 election, they're thinking often -- not  
21 always -- but often about the election after  
22 that and the election after that and the  
23 election after that, and they do sensitivity  
24 testing, and they use other methods in order to  
25 ensure that certain results will obtain not

1 only in the next one but eight years down the  
2 road.

3 And it seems to me that, just as  
4 legislatures do that, in order to entrench  
5 majorities -- or minorities, as the case may  
6 be -- in order to entrench a party in power,  
7 so, too, those same techniques, which have  
8 become extremely sophisticated, can be used to  
9 evaluate what they're doing.

10 MR. TSEYTLIN: Well, Your Honor,  
11 legislatures don't have to worry about judicial  
12 manageability standards. Legislatures don't  
13 have to worry about false positives, false  
14 negatives. Legislatures don't have to worry  
15 about conjecture. They can --

16 JUSTICE KAGAN: What -- what I'm  
17 suggesting is that this is not kind of  
18 hypothetical, airy-fairy, we guess, and then we  
19 guess again. I mean, this is pretty scientific  
20 by this point.

21 MR. TSEYTLIN: Well, Your Honor,  
22 they're just estimates. They're not all  
23 scientific. And let me give you one example  
24 from the record.

25 JUSTICE SOTOMAYOR: I'm sorry.



1 They're estimates where you haven't put any  
2 social scientist to say that the estimates are  
3 wrong. You've poked holes, but every single  
4 social science metric points in the same  
5 direction.

6 So there are five of them. Your map  
7 drawer is one of them, by the way, the person  
8 who actually drew these maps, and what we know  
9 is that they started out with the Court plan,  
10 they created three or four different maps, they  
11 weren't partisan enough. They created three or  
12 four more maps, they weren't partisan enough.

13 And they finally got to the final map,  
14 after maybe 10 different tries of making it  
15 more partisan, and they achieved a map that was  
16 the most partisan on the S-curve.

17 And it worked. It worked better than  
18 they even expected, so the estimate wasn't  
19 wrong. The estimate was pretty right.

20 So, if it's the most extreme map they  
21 could make, why isn't that enough to prove  
22 partisan asymmetry and unconstitutional  
23 gerrymandering?

24 MR. TSEYTLIN: Well -- well, Your  
25 Honor, I think the facts in this case, which is

1 what you were discussing, are significantly  
2 less troubling than the facts in the cases that  
3 this Court has previously faced, for example,  
4 Bandermer and Vieth, and that's for two  
5 reasons. One, the map drawers here complied  
6 fastidiously with traditional districting  
7 principles, which was not true in Bandemer and  
8 Vieth.

9 JUSTICE SOTOMAYOR: But they kept  
10 going back to fix the map to make it more  
11 gerrymandered. That's undisputed. People  
12 involved in the process had traditional maps  
13 that complied with traditional criteria and  
14 then went back and threw out those maps and  
15 created more -- some that were more partisan.

16 MR. TSEYTLIN: That's correct, Your  
17 Honor. And, of course, there were computers  
18 used --

19 JUSTICE SOTOMAYOR: So why didn't they  
20 take one of the earlier maps?

21 MR. TSEYTLIN: Because there was no  
22 constitutional requirement that they do so.  
23 They complied with all state law --

24 JUSTICE SOTOMAYOR: That's the point.

25 MR. TSEYTLIN: And they complied with

1 all traditional districting principles.

2 JUSTICE ALITO: Can I take you back to  
3 -- to Justice Kagan's question about the  
4 legislators' use of these techniques? Are all  
5 the techniques that are used by politicians in  
6 order to try to maximize their chances of  
7 electoral success scientific? I think they  
8 rely a lot on polls, don't they? How  
9 scientific have they proven to be?

10 MR. TSEYTLIN: Of course, Your Honor.  
11 Legislatures can very much rest on conjecture  
12 whereas courts cannot. If I could reserve the  
13 balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Ms. Murphy.

17 ORAL ARGUMENT OF ERIN E. MURPHY  
18 FOR WISCONSIN STATE SENATE, AS AMICUS CURIAE

19 MS. MURPHY: Mr. Chief Justice, and  
20 may it please the Court:

21 Plaintiffs have not identified a  
22 workable standard for determining when the  
23 inherently political task of districting  
24 becomes too political for the constitution to  
25 tolerate.

1           Indeed, the only thing plaintiffs have  
2     added to the mix since LULAC is a wasted votes  
3     test that identifies court-drawn maps as  
4     enduring partisan gerrymanders and conveniently  
5     favors their own political party.

6           JUSTICE KENNEDY:  You've probably  
7     considered the hypo many times.  Suppose a  
8     state constitution or state statute says all  
9     districts shall be designed as closely as  
10    possible to conform with traditional  
11    principles, but the overriding concern is to  
12    increase -- have a maximum number of votes for  
13    party X or party Y.  What result?

14          MS. MURPHY:  I think if -- if you have  
15    something that says the ultimate principle that  
16    we're going to follow is abandon all other  
17    criteria in favor of partisan advantage, at  
18    least you're closer at that point --

19          JUSTICE GINSBURG:  I don't think -- I  
20    don't think that was the question.  It was it  
21    satisfies all the traditional criteria,  
22    contiguous, but it was a deliberate attempt to  
23    maximize a number of seats that Republicans  
24    would hold.

25          JUSTICE KENNEDY:  This is mandated by

1 the state constitution.

2 MS. MURPHY: I don't think that in a  
3 world where the legislature is required to and  
4 is, in fact, complying with a number of other  
5 metrics and is as one of those things taking  
6 into account partisan advantage, that you've  
7 proven a constitutional violation.

8 JUSTICE ALITO: That's not a -- that's  
9 not a manageable standard. It's not a  
10 manageable standard that you cannot have a law  
11 that says draw maps to favor one party or the  
12 other.

13 MS. MURPHY: I think it's --

14 JUSTICE ALITO: That seems like a  
15 perfectly manageable standard.

16 MS. MURPHY: If it's on --

17 JUSTICE ALITO: You cannot have that.

18 MS. MURPHY: -- the face of the  
19 statute, I think you have a different scenario  
20 because at least at that point, you know the  
21 intent. You know there's no debate to have  
22 about the intent of what the legislature is  
23 doing and if they are intentionally drawing for  
24 one purpose or another.

25 JUSTICE KAGAN: But there are plenty

1 areas of law, Ms. Murphy, where we look at  
2 intent beyond the face of a statute. And, you  
3 know, sometimes that's harder than other times.  
4 We understand it can be difficult. We  
5 understand in other cases it can be easy. But  
6 we do it all over the place in our law. We  
7 don't -- we don't say, oh, if it's not on the  
8 face of the statute, we're never going to look  
9 at it.

10 So if your answer to Justice Alito is  
11 well on the face of the statute, that's  
12 certainly a manageable standard, I guess I  
13 would ask why not if it's not on the face of  
14 the statute? But you absolutely -- you know,  
15 but you have good evidence that there was the  
16 intent here, and you have good evidence that  
17 the intent led to a certain kind of effect,  
18 which was to entrench a party in power.

19 MS. MURPHY: I think what  
20 differentiates this from a lot of other  
21 contexts is that here we have opinion after  
22 opinion from this Court, dissenting opinions,  
23 concurring opinions, plurality opinions, what  
24 have you, saying that considering politics in  
25 districting is not in and of itself inherently

1 unconstitutional.

2 JUSTICE GORSUCH: Ms. Murphy --

3 MS. MURPHY: So just finding the  
4 intent isn't a problem.

5 JUSTICE KAGAN: But the --

6 JUSTICE GORSUCH: I'd like to go back  
7 to Justice Breyer's question, and it would be  
8 helpful to get an answer for me on that. What  
9 criteria would a state need to know in order to  
10 avoid having every district and every case and  
11 every election subject to litigation? Because  
12 the -- the standard that's given in -- in the  
13 lower court here was, well, a little bit of  
14 partisan symmetry problem, a little bit of an  
15 efficiency gap problem, not a real set of  
16 criteria.

17 And here, you know, is it 7 percent,  
18 how durable, how many elections would we need?  
19 How much data would we have to gather? Walk us  
20 through Justice Breyer's question and provide  
21 some answers, if you -- if you would.

22 MS. MURPHY: Sure. So I think some of  
23 the problems with the criteria that have been  
24 suggested, in particular with the test that's  
25 focus on these symmetry metrics, is that so far

1 the metrics that we have, I mean, they identify  
2 false positives roughly 50 percent of the time.

3 And I don't know how a legislature is  
4 supposed to comply with criteria that can't  
5 differentiate between a court-drawn map and a  
6 map drawn for partisan advantage. So, when you  
7 start with the partisan symmetry concept, you  
8 automatically have the basic problem that you  
9 have to have some way to decide what is the  
10 appropriate partisan asymmetry.

11 JUSTICE GORSUCH: Okay. But what are  
12 the questions -- you know, I need two years or  
13 two cycles worth of data. I need an S curve of  
14 a certain shape and size. I need an efficiency  
15 gap of something. What are the numbers, what  
16 are the criteria we'd have to fill in as a  
17 constitutional matter in order for a state to  
18 be able to administer this?

19 MS. MURPHY: Well, I mean with all due  
20 respect, I -- I -- I'm not convinced that there  
21 are manageable criteria for the courts to be  
22 putting on legislatures for how to go about  
23 this process. And I certainly don't think that  
24 anyone in this case has identified that.

25 JUSTICE GORSUCH: But if you could try



1 to answer --

2 MS. MURPHY: But I would suggest that,  
3 you know, one of the starting points for me  
4 would have to be that traditional districting  
5 criteria should matter in the analysis.

6 If you have a legislature that has  
7 started by saying we're going to comply with  
8 everything that we're supposed to do, not only  
9 as a legal matter, but also all of these  
10 practical constraints, we're going to draw  
11 districts that comply --

12 JUSTICE GINSBURG: Ms. Murphy, because  
13 your time is running out, I would like to ask  
14 you what's really behind all of this. The  
15 precious right to vote, if you can stack a  
16 legislature in this way, what incentive is  
17 there for a voter to exercise his vote?  
18 Whether it's a Democratic district or a  
19 Republican district, the result -- using this  
20 map, the result is preordained in most of the  
21 districts.

22 Isn't that -- what becomes of the  
23 precious right to vote? Would we have that  
24 result when the individual citizen says: I  
25 have no choice, I'm in this district, and we

1 know how this district is going to come out? I  
2 think that's something that this society should  
3 be concerned about.

4 MS. MURPHY: Well, a -- a couple of  
5 responses to that, Your Honor. First of all,  
6 it's inherent in our districting scheme that  
7 there are plenty of people who are always going  
8 to be voting in districts where they know what  
9 the result is going to be. And that has  
10 nothing to do with partisan gerrymandering; it  
11 has to do with the geography of politics and  
12 the fact that some of us just live in districts  
13 where --

14 JUSTICE GINSBURG: Some of us but --

15 MS. MURPHY: -- we know that our vote  
16 will come out one way or another.

17 JUSTICE GINSBURG: In Wisconsin,  
18 before this plan, was it the case that when it  
19 was something like 49 and 99 districts were  
20 uncontested, nobody -- the election was --  
21 wasn't contested because the one party or the  
22 other was going to win.

23 MS. MURPHY: Well, I don't think you  
24 can quite draw that conclusion from the fact  
25 there's uncontested races. I mean, the reality

1 is that political parties have to make  
2 decisions about where to put their resources,  
3 and they're going to have to do that for  
4 reasons that, again, have nothing to do with  
5 districting for partisan advantage. They have  
6 to do with the fact that drawing districts is  
7 always going to reflect political calculations  
8 and it's always going to be driven by  
9 communities of interest, and communities of  
10 interest sometimes feel very strongly about one  
11 political party rather than another.

12 JUSTICE KENNEDY: I have to say that I  
13 don't think you ever answered the question: If  
14 the state has a law or constitutional amendment  
15 that's saying all legitimate factors must be  
16 used in a way to favor party X or party Y, is  
17 that lawful?

18 MS. MURPHY: I think it's -- on the  
19 face of the constitution as a requirement the  
20 district must -- the legislature must comply  
21 with, then that could be your instance of a --  
22 a problem that can be actually solved by the  
23 constitution, but it's quite different to me  
24 when you have a facially neutral districting --

25 JUSTICE KENNEDY: Is there an equal

1 protection violation or First Amendment  
2 violation?

3 MS. MURPHY: Well, it's a little hard  
4 to say at this point because, you know, it  
5 really just hasn't been fully explored, this  
6 concept of how you would come at all this from  
7 a First Amendment perspective. I think this  
8 comes back to really the standing question --

9 JUSTICE KENNEDY: Well, you said  
10 there's a constitution -- there is equal  
11 protection?

12 MS. MURPHY: I think the question -- I  
13 mean, it would be who has standing to bring --

14 JUSTICE KENNEDY: Well, assume  
15 standing. I'd like the answer to the question.

16 MS. MURPHY: Yes. It would be an  
17 unconstitutional, if it was on the face of it,  
18 and I think that that would be better thought  
19 of probably as an equal protection violation,  
20 but you could think of it just as well, I  
21 think, as a First Amendment violation in the  
22 sense that it is viewpoint discrimination  
23 against the individuals who the legislation is  
24 saying you have to specifically draw the maps  
25 in a way to injure, but, again, I --

1 JUSTICE SOTOMAYOR: Could you tell me  
2 what the value is to democracy from political  
3 gerrymandering? How -- how does that help our  
4 system of government?

5 MS. MURPHY: Sure. Well, I would  
6 point to --

7 JUSTICE SOTOMAYOR: You -- you almost  
8 concede that it doesn't when you say if a state  
9 filed -- has a constitutional amendment or has  
10 a law that says you must comply with  
11 traditional criteria, but you must also  
12 politically gerrymander, you're saying that  
13 might be unconstitutional?

14 MS. MURPHY: It might be, but I don't  
15 think that necessarily means that districting  
16 for partisan advantage has no positive values.  
17 I would point you to, for instance, Justice  
18 Breyer's dissenting opinion in Vieth which has  
19 an extensive discussion of how it can actually  
20 do good things for our system to have districts  
21 drawn in a way that makes it easier for voters  
22 to understand who they are account -- who the  
23 legislature is. It produces values in terms of  
24 accountability that are valuable so that the  
25 people understand who isn't and who is in

1 power.

2 JUSTICE SOTOMAYOR: I really don't  
3 understand how any of that -- what that means.  
4 I mean, it -- it's okay to stack the decks so  
5 that for 10 years or an indefinite period of  
6 time one party, even though it gets a minority  
7 of votes, can't get a minor -- gets a minority  
8 of votes, can get the majority of seats?

9 MS. MURPHY: With all due respect, you  
10 know, I would certainly dispute the premise  
11 that the decks are stacked here. At the end of  
12 the day, what matters is how people vote in  
13 elections and that's what's going to determine  
14 the outcomes, as it has in Wisconsin where the  
15 Republicans have won majorities because they've  
16 actually won the majority of the vote in most  
17 of the elections over the past four years.  
18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 ORAL ARGUMENT OF PAUL M. SMITH

22 ON BEHALF OF APPELLEES

23 CHIEF JUSTICE ROBERTS: Mr. Smith?

24 MR. SMITH: Mr. Chief Justice, and may  
25 it please the Court. What the state is asking

1 for here is a free pass to continue using an  
2 assembly map that is so extreme that it  
3 effectively nullifies democracy.

4 As this case illustrates, it's now  
5 possible even in a 50/50 state like Wisconsin  
6 to draw a district map that is so reliably and  
7 extremely biased that it effectively decides in  
8 advance who's going to control the legislative  
9 body for the entire decade.

10 CHIEF JUSTICE ROBERTS: Maybe we can  
11 just talk briefly about the standing issue.

12 It is a little arresting to have a  
13 rule that we establish that when your claim is  
14 racial gerrymandering, it has to be limited to  
15 your district, you can't complain about racial  
16 gerrymandering elsewhere in the state, but  
17 here, if the claim is going to be political  
18 gerrymandering, you can raise claims about  
19 whole statewide issues even if there is no  
20 argument that you're gerrymandered, like the  
21 first plaintiff who votes in Madison, his vote  
22 isn't diluted in any way, and yet he is able to  
23 complain about voting anywhere in the state.

24 MR. SMITH: Well, Mr. Chief Justice, I  
25 think that standing has to follow from the

1 nature of the injury and that follows from the  
2 nature of the constitutional violation.

3 A racial gerrymandering claim, a Shaw  
4 v. Reno claim, is an attack on a particular  
5 district for being drawn with excessive focus  
6 on race. In that situation, the injury has to  
7 be localized to the place where that district  
8 is.

9 Partial-partisan gerrymandering has  
10 the same word in it, but it's an entirely  
11 different kind of injury because it involves  
12 dilution of votes. Racial gerrymandering is  
13 analytically distinct from any dilution case.

14 CHIEF JUSTICE ROBERTS: What about --  
15 what about the sign hypothetical? You know,  
16 you're up in far north of Wisconsin and  
17 somebody is taking down the signs for the one  
18 candidate in the far south.

19 That affects that individual's -- the  
20 strength of his vote for the state-wide  
21 purposes. Does he really have standing to  
22 complain about that?

23 MR. SMITH: Well, Your Honor, I think  
24 you could decide that while it might have some  
25 de minimis effect on the interest of any



1 Democrat attempting to carry out that group's  
2 political agenda, that it's sufficiently de  
3 minimis that you wouldn't want to give standing  
4 to people outside the directly affected area.

5 JUSTICE ALITO: Why -- why is it de  
6 minimis? It seems to me it's exactly the same  
7 thing. If you have the system, let's extend it  
8 to many towns that are controlled by the  
9 Republicans and they're taking down all the  
10 Democratic signs. And if that's an effective  
11 strategy, it will mean fewer members of the  
12 legislature are Democrats and, therefore, the  
13 interests of the Democratic voter in Milwaukee  
14 or Madison will be impaired. It seems like  
15 exactly the same thing.

16 MR. SMITH: Well, Your Honor, if you  
17 had a systematic effort in a lot of places by  
18 members of one party to prevent the other party  
19 from campaigning effectively, I think that  
20 anybody in the Democratic Party in the state  
21 would have standing.

22 JUSTICE ALITO: All right. Well,  
23 let's look at the race issue.

24 So you have a state where there you  
25 have an African American voter in -- in a -- in

1 one part of the state who wants to complain  
2 that districts in another part of the state are  
3 -- are packed or cracked and, as a result of  
4 that, there are going to be fewer African  
5 Americans in the legislature than there should  
6 be.

7 And that's going to impair that  
8 person's interests, including, I would suppose,  
9 their right of association. What is the  
10 difference between those two situations?

11 MR. SMITH: Well, Your Honor, that's a  
12 Section 2 vote dilution claim and I think that  
13 the law appropriately limits standing in that  
14 situation to people who live in the region of  
15 the state where there's an absence of an  
16 additional minority district.

17 You wouldn't want to assume that some  
18 African American from a different part of the  
19 state has a collective interest with people  
20 over here in this part of the state just  
21 because of race. That's just stereotyping.  
22 But with party, people join the party to -- to  
23 work together to achieve a collective end. So  
24 you're not --

25 CHIEF JUSTICE ROBERTS: Well, but

1 that's equally stereotyping. Sometimes people  
2 vote for a wide variety of reasons. Maybe the  
3 candidate, although he's of a different party,  
4 is a friend, is a neighbor. Maybe they think  
5 it's a good idea to have the representatives  
6 from their district to balance out what they  
7 view would be necessary -- likely candidates  
8 from other districts.

9 MR. SMITH: Maybe they do --

10 CHIEF JUSTICE ROBERTS: I don't think  
11 it's any more -- any less stereotypical to say  
12 that people are going to vote for parties  
13 because they support everything the party does  
14 statewide.

15 MR. SMITH: Well, but to have  
16 standing, I think you'd want to find plaintiffs  
17 who do that, Your Honor. And certainly the  
18 plaintiffs we have here are thorough going  
19 supporters of the disfavored party. Their  
20 party has been punished by the law of the State  
21 of Wisconsin. And I think that the -- the  
22 standing issue ought to be satisfied by the  
23 description of what our claim is, which comes  
24 right out of Justice Kennedy's concurrence in  
25 Vieth where -- this is on page 86-A of the

1 jurisdictional statement, The White Appendix.

2           It's just a two-sentence description  
3 of our claim: "First Amendment concerns arise  
4 where a state enacts a law that has the purpose  
5 and effect of subjecting a group of voters or  
6 their party to disfavored treatment by reason  
7 of their views. In the context of partisan  
8 gerrymandering, that means that First Amendment  
9 concerns arise where an apportionment has the  
10 purpose and effect of burdening a group of  
11 voters' representational rights."

12           So the group is -- is the targeted  
13 people, those are the people who have the  
14 injury, the injury to their First Amendment  
15 interests, and anybody in the group has --  
16 ought -- should be able to -- to bring a First  
17 Amendment argument saying --

18           JUSTICE KAGAN: Mr. Smith.

19           CHIEF JUSTICE ROBERTS: Mr. Smith --  
20 do you have standing? Well, Justice Kagan?

21           JUSTICE KAGAN: In a one-person  
22 one-vote case, does one person in an  
23 overpopulated district have standing to  
24 challenge not only that district, those  
25 district lines, but the entire state map?

1           MR. SMITH: That is true. That is the  
2 way that it's been handled ever since the  
3 Reynolds case.

4           JUSTICE KAGAN: And why is that, and  
5 does it -- is it an analogy to this case?

6           MR. SMITH: Well, it's certainly a  
7 helpful analogy. It's not exactly the same  
8 because they have to live in an overpopulated  
9 district rather than an underpopulated  
10 district.

11           But those are the people in -- who  
12 suffer vote dilution because they're living in  
13 the overpopulated districts. And the Court has  
14 said not only does that person have standing to  
15 challenge their own district but also to  
16 challenge the entire map and make all of the  
17 districts closer in population. That's just  
18 the way that's been handled since the '60s.

19           CHIEF JUSTICE ROBERTS: Mr. Smith, I'm  
20 going to follow an example of one of my  
21 colleagues and lay out for you as concisely as  
22 I can what -- what is the main problem for me  
23 and give you an opportunity to address it.

24           I would think if these -- if the claim  
25 is allowed to proceed, there will naturally be

1 a lot of these claims raised around the  
2 country. Politics is a very important driving  
3 force and those claims will be raised.

4 And every one of them will come here  
5 for a decision on the merits. These cases are  
6 not within our discretionary jurisdiction.  
7 They're the mandatory jurisdiction. We will  
8 have to decide in every case whether the  
9 Democrats win or the Republicans win. So it's  
10 going to be a problem here across the board.

11 And if you're the intelligent man on  
12 the street and the Court issues a decision, and  
13 let's say the Democrats win, and that person  
14 will say: Well, why did the Democrats win?  
15 And the answer is going to be because EG was  
16 greater than 7 percent, where EG is the sigma  
17 of party X wasted votes minus the sigma of  
18 party Y wasted votes over the sigma of party X  
19 votes plus party Y votes.

20 And the intelligent man on the street  
21 is going to say that's a bunch of baloney. It  
22 must be because the Supreme Court preferred the  
23 Democrats over the Republicans. And that's  
24 going to come out one case after another as  
25 these cases are brought in every state.

1           And that is going to cause very  
2           serious harm to the status and integrity of the  
3           decisions of this Court in the eyes of the  
4           country.

5           MR. SMITH: Your Honor --

6           CHIEF JUSTICE ROBERTS: It is just  
7           not, it seems, a palatable answer to say the  
8           ruling was based on the fact that EG was  
9           greater than 7 percent. That doesn't sound  
10          like language in the Constitution.

11          MR. SMITH: Your Honor, first thing I  
12          would say in response to that is that those  
13          challenges are already being brought. Partisan  
14          gerrymandered maps get challenged -- they get  
15          challenged in other ways, under the one person,  
16          one vote doctrine, under the racial  
17          gerrymandering doctrine, under Section 2. And  
18          -- and so you're getting those cases. Most of  
19          the -- the statewide redistricting maps in this  
20          country are challenged every 10 years in some  
21          way or another.

22          What -- what would make the system  
23          work better is if people could bring a  
24          challenge to what they actually think is wrong  
25          with the map, which is that it's

1     antidemocratic, it decides in advance that one  
2     party is going to control the state government  
3     for 10 years and maybe for 20 years because  
4     they can replicate it at the end of the 10  
5     years and do it again.

6             That is the real problem.  And I think  
7     what -- what the Court needs to know is it's --  
8     this is a cusp of a really serious, more  
9     serious problem as gerrymandering becomes more  
10    sophisticated with computers and data analytics  
11    and a -- and an electorate that's very  
12    polarized and more predictable than it's ever  
13    been before.  If you let this go, if you say  
14    this is -- we're not going to have a judicial  
15    remedy for this problem, in 2020, you're going  
16    to have a festival of copycat gerrymandering  
17    the likes of which this country has never seen.

18            And it may be that you can protect the  
19    Court from seeming political, but the country  
20    is going to lose faith in democracy big time  
21    because voters are going to be like --  
22    everywhere are going to be like the voters in  
23    Wisconsin and, no, it really doesn't matter  
24    whether I vote.

25            JUSTICE ALITO:  Well, Mr. Smith --



1 CHIEF JUSTICE ROBERTS: No, but you're  
2 going to take this -- the whole point is you're  
3 taking these issues away from democracy and  
4 you're throwing them into the courts pursuant  
5 to, and it may be simply my educational  
6 background, but I can only describe as  
7 sociological gobbledygook.

8 MR. SMITH: Your Honor, this is --  
9 this is not complicated. It is a measure of  
10 how unfair the map is. How much burden can the  
11 party --

12 JUSTICE BREYER: Can you say this?  
13 Look, don't agree with me just because it  
14 sounds favorable, because he won't in two  
15 minutes. Can you answer the Chief Justice's  
16 question and say the reason they lost is  
17 because if party A wins a majority of votes,  
18 party A controls the legislature. That seems  
19 fair.

20 And if party A loses a majority of  
21 votes, it still controls the legislature. That  
22 doesn't seem fair. And can we say that without  
23 going into what I agree is pretty good  
24 gobbledygook?

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: And if you  
2 need a convenient label for that approach, you  
3 can call it proportional representation, which  
4 has never been accepted as a political  
5 principle in the history of this country.

6 MR. SMITH: Your Honor, we are not  
7 arguing for proportional representation. We  
8 are arguing for partisan symmetry, a map which  
9 within rough bounds at least treats the two  
10 parties relatively equal in terms of their  
11 ability to translate votes into seats.  
12 That's --

13 CHIEF JUSTICE ROBERTS: That sounds  
14 exactly like proportional representation to me.

15 MR. SMITH: Proportional  
16 representation is when you give the same  
17 percentage of seats as they have in percentage  
18 of votes. That's what proportional  
19 representation means. And our -- our claim  
20 simply doesn't remotely do that. It says if  
21 party A at 54 percent gets 58 percent of the  
22 seats, party B when it gets 54 percent ought to  
23 get 58 percent of the seats. That's symmetry.

24 That's what the political scientists  
25 say is the right way to think about a map that

1 does not distort the outcome and put a thumb on  
2 the scale. Now what --

3 JUSTICE ALITO: Mr. Smith, can I just  
4 say something -- ask you a question about the  
5 political science? I mean, I -- gerrymandering  
6 is distasteful. But if we are going to impose  
7 a standard on the courts, it has to be  
8 something that's manageable and it has to be  
9 something that's sufficiently concrete so that  
10 the public reaction to decisions is not going  
11 to be the one that the Chief Justice mentioned,  
12 that this three-judge court decided this, that  
13 -- this way because two of the three were  
14 appointed by a Republican president or two of  
15 the three were appointed by a Democratic  
16 President.

17 Now, it's been 30 years since  
18 Bandemer, and before then and since then,  
19 judges, scholars, legal scholars, political  
20 scientists have been looking for a manageable  
21 standard. All right.

22 In 2014, a young researcher publishes  
23 a paper, Eric McGhee publishes a paper, in  
24 which he says that the measures that were  
25 previously -- the leading measures previously,

1 symmetry and responsiveness, are inadequate.  
2 But I have discovered the key. I have  
3 discovered the Rosetta stone and it's -- it is  
4 the efficiency gap.

5           And then a year later you bring this  
6 suit and you say: There it is, that is the  
7 constitutional standard. It's been finally --  
8 after 200 years, it's been finally discovered  
9 in this paper by a young researcher, who  
10 concludes in the end -- this is the end of his  
11 paper -- after saying symmetry and  
12 responsiveness have shown to be -- looked to be  
13 inappropriate, "The measure I have offered  
14 here, relative wasted votes, is arguably" --  
15 arguably -- "a more valid and flexible measure  
16 of -- of partisan -- of partisan  
17 gerrymandering."

18           Now, is this -- is this the time for  
19 us to jump into this? Has there been a great  
20 body of scholarship that has tested this  
21 efficiency gap? It's full of questions.  
22 Mr. McGhee's own amicus brief outlines numerous  
23 unanswered questions with -- with this theory.

24           What do you do in -- in elections that  
25 are not contested? Well, then you have to --

1 you have to make two guesses. How many people  
2 would have voted for the winning candidate if  
3 it had been a contested election? How many  
4 people would have voted for the losing  
5 candidate if it had been a contested election?

6 One of the judges in the court below  
7 asks: Why do you calculate EG by map, by  
8 subtracting from the votes obtained by the  
9 winner, 50 percent of the votes, instead of the  
10 votes obtained by the runner up? And  
11 Mr. McGhee says: Well, I have an answer to  
12 this, and I have a forthcoming paper and I'll  
13 answer it in the forthcoming paper.

14 (Laughter.)

15 JUSTICE ALITO: And there are all of  
16 these questions. This is -- 2017 is the time  
17 to jump into this? That's a question.

18 MR. SMITH: Is there a question there,  
19 Your Honor?

20 JUSTICE ALITO: Yes, there is a  
21 question there. There's about 10 of them.

22 (Laughter.)

23 MR. SMITH: I would say this if I  
24 might, Justice Alito. In Vieth, the Court  
25 appropriately laid down a challenge and said if

1 you want us to do this, you've got to give us a  
2 lot more than you've given us. You've got to  
3 give us two things, a substantive definition of  
4 fairness and a way to measure it so we can  
5 limit judicial intervention to the really  
6 serious cases, and so we won't have the Court  
7 entering into the political fray all the time,  
8 but we'll have standards that say you go this  
9 far, we're going to go -- we're going to go  
10 after you, but in the meantime, anything less  
11 serious than that, we're going to leave to the  
12 political branches.

13 And so the social scientists stepped  
14 up and said we have three different ways to  
15 calculate asymmetry, not just one. The  
16 median-mean measure; the partisan bias measure,  
17 where you're equalizing to 50/50; and the --  
18 the efficiency gap. And in this case, they all  
19 come to the exact same conclusion that this is  
20 one of the most extreme gerrymanders ever drawn  
21 in -- in living memory of the United States,  
22 one of the five worst out of the 230 maps that  
23 Professor Jackman studied.

24 And so there is no -- there's no  
25 question here about this being the --

1 maximizing one party control as far as they  
2 could go. As Justice Sotomayor was saying,  
3 they pushed the limits and pushed the limits  
4 and pushed the limits. And it --

5 JUSTICE KAGAN: Mr. Smith, may I --  
6 I'm sorry. Please.

7 MR. SMITH: Please go ahead, Your  
8 Honor.

9 JUSTICE KAGAN: I -- I think that this  
10 symmetry idea is both an intuitive and an  
11 attractive principle. So, if the first  
12 question was do you have a substantive  
13 principle, I actually think you do.

14 The second question is, is there  
15 ways -- are there ways to make sure that not  
16 every district is subject to challenge as  
17 violating that principle? And so I'd like to  
18 hear you talk about that.

19 How is it that we are not going to  
20 create a world in which in every district  
21 somebody can come in and say: A-ha, there's  
22 been a violation of partisan symmetry; we're  
23 entitled to a redrawn map?

24 What's the threshold? Where do you  
25 draw the line?

1 MR. SMITH: Well, the --

2 JUSTICE KAGAN: Because this -- this  
3 -- it seems to me that this map goes over  
4 pretty much every line you can name.

5 MR. SMITH: That's true.

6 JUSTICE KAGAN: But where do you draw  
7 the line in another case and another case?

8 MR. SMITH: Well, Justice Kagan, the  
9 great virtue of these three different measures,  
10 none of which were presented to the Court in  
11 Vieth when I argued the Vieth case -- and I  
12 didn't do a very good job -- is that they each  
13 allow you to assign a number to each  
14 gerrymander and that allows you to compare them  
15 across the country and back in history. And,  
16 therefore, it is possible to draw a line.

17 Now, in addition to just measuring the  
18 degree of asymmetry, the other thing that's  
19 important to do is to measure the likelihood of  
20 durability of that asymmetry. And you do that  
21 with the sensitivity testing so you make sure  
22 you don't have the kind of map that, with a  
23 small swing of voting over the next decade,  
24 it's going to flip over, as the map in  
25 Pennsylvania in Vieth actually did. That -- if



1 we had the right tests, the ones that I'm now  
2 presenting to you, we wouldn't have won that  
3 case in -- in 2004.

4 But this map is never going to flip  
5 over. The evidence is unequivocal that the  
6 Democrats would have to have an earthquake of  
7 unprecedented proportions to even have a chance  
8 to get up to 50 votes out of 99.

9 CHIEF JUSTICE ROBERTS: All of those  
10 predictions -- I mean, Bandemer predicted the  
11 Democrats would never be able to attain a  
12 majority. It was 50/50 the next election, and  
13 they got a majority the one after that. You  
14 already mentioned Vieth. It was five days,  
15 right, after the District Court said, oh, the  
16 -- I forget who it was -- Republicans are never  
17 going to get elected. And they won every  
18 single race. Predicting on the basis of the  
19 statistics that are before us has been a very  
20 hazardous enterprise.

21 MR. SMITH: The technique of  
22 sensitivity testing, which was done by the  
23 Defendants' expert in the -- in the process of  
24 drawing the map to make sure that they were  
25 drawing a permanent, non-flippable gerrymander,

1 and then done again by the experts for the  
2 Plaintiffs in this case in court and tested by  
3 the court, is a -- a method by which you  
4 identify one thing about the map: Does it have  
5 a lot of swing districts in it, a lot of  
6 competitive districts in it? Because if it  
7 does, you can have a map that looks very biased  
8 in one year when all those districts go one  
9 way, but it might flip over. That was  
10 Bandemer. That was Vieth.

11 That is not this case. They spent  
12 their entire time in that -- those four months  
13 in that locked room doing two things, trying to  
14 maximize the amount of bias and eliminating  
15 systematically competitive districts, reducing  
16 it down to something less than 10 when it had  
17 been up around 20, and then even though those  
18 10, they tinkered with it and tinkered with it  
19 to make sure that even of that 10, they thought  
20 they could get at least seven. They ended up  
21 getting eight and then eventually all 10.

22 JUSTICE KAGAN: Mr. Smith, are you  
23 suggesting that we should be looking for  
24 outliers or are you suggesting that we should  
25 be trying to filter out all manner of partisan

1 consideration, or is it someplace in between?

2 MR. SMITH: Your Honor, the word  
3 "outlier" is probably an appropriate one.  
4 Certainly, we don't think -- and we've followed  
5 the lead of this Court in Justice Kennedy's  
6 concurrence and other decisions of this Court  
7 -- that all partisanship is unconstitutional.

8 What you need is a method by which the  
9 extreme gerrymander, the one that is  
10 fundamentally antidemocratic and is going to  
11 last for the full decade, can be identified and  
12 held unconstitutional. And that -- that's the  
13 only thing we're asking you to do here.

14 JUSTICE GORSUCH: So, Mr. Smith, what  
15 is the formula that achieves that? Because the  
16 Court below didn't rely on efficiency gap  
17 entirely. It looked also at the partisan  
18 symmetry test. It reminds me a little bit of  
19 my steak rub. I like some turmeric, I like a  
20 few other little ingredients, but I'm not going  
21 to tell you how much of each.

22 And so what's this Court supposed to  
23 do, a pinch of this, a pinch of that? Or are  
24 we supposed to actually specify it's going to  
25 be the Chief Justice's formula of the

1 efficiency gap of 7 percent for the country?  
2 Is that what you're asking us to do? What is  
3 it that you want us to constitutionalize?

4 MR. SMITH: Well, Your Honor, the  
5 first thing I want to make clear is -- is that  
6 symmetry is what's being measured by the  
7 efficiency gap, by the other two tests that I  
8 mentioned. Symmetry is the underlying  
9 substantive --

10 JUSTICE GORSUCH: Well, but there are  
11 different tests for measuring symmetry --

12 MR. SMITH: Right.

13 JUSTICE GORSUCH: -- right?

14 MR. SMITH: Right. There are.

15 JUSTICE GORSUCH: There is the test  
16 you previously proposed. Now there is the  
17 efficiency gap test. And the Court relied on  
18 both and said a little bit -- a pinch this and  
19 a pinch of that --

20 MR. SMITH: Right.

21 JUSTICE GORSUCH: -- and we're not  
22 telling you how much of each. So --

23 MR. SMITH: Well, I think it's fair --

24 JUSTICE GORSUCH: -- so that doesn't  
25 seem very fair to the states to me, to -- to

1 know how to -- what they're supposed to do to  
2 avoid the kind of litigation we're talking  
3 about. As I understand the efficiency gap test  
4 itself, and tell me if I'm wrong, that it would  
5 yield about a third of all the districts in the  
6 country winding up in court.

7 MR. SMITH: Not true. Not true.

8 JUSTICE GORSUCH: Now, that's what the  
9 other side says. So tell me where that's wrong  
10 and tell me what test you'd have this Court  
11 adopt.

12 MR. SMITH: Well, first of all, I -- I  
13 would go with the -- the screens that Justice  
14 Breyer mentioned, the first one being it has to  
15 be a one-party state. That one-third figure  
16 they keep throwing around ignores the fact that  
17 a number of those maps were drawn either by  
18 commissions or by courts or by divided  
19 legislatures.

20 And so they get -- those all get taken  
21 off the table from the very beginning. If you  
22 have a one-party state, you then have to  
23 measure whether it's unusually asymmetrical,  
24 pretty extreme, and we --

25 JUSTICE GORSUCH: How? I am still

1 stuck on Justice Breyer's question.

2 MR. SMITH: You can use the -- you can  
3 use any of those three tests that were all  
4 applied here.

5 JUSTICE GORSUCH: Any of them?

6 MR. SMITH: Yes.

7 JUSTICE GORSUCH: Any -- any of the  
8 three?

9 MR. SMITH: And if they don't -- I --  
10 I would suggest you apply all of them, and --

11 JUSTICE GORSUCH: All of them?

12 MR. SMITH: -- if they disagree, that  
13 would -- that would tell you maybe this isn't  
14 the right case to be holding something  
15 unconstitutional. That might be a fly in the  
16 ointment. But the Court below did not set the  
17 --

18 JUSTICE ALITO: Excuse me. Isn't it  
19 true that --

20 MR. SMITH: -- the line -- I'm sorry.

21 JUSTICE ALITO: Just on that, isn't it  
22 true that you could -- you can get very high  
23 levels of -- very high EG based on factors that  
24 have nothing to do with gerrymandering? The  
25 political geography can lead to it; protection

1 of incumbents, which has been said to be a  
2 legitimate factor, can lead to a high EG;  
3 compliance with the Voting Rights Act can  
4 affect that?

5 MR. SMITH: Certainly, there are  
6 various factors that -- that -- other than  
7 partisan bias that can lead you to draw a map  
8 that does not have a zero EG.

9 In our test, with the intents  
10 requirement, the effects requirement, and the  
11 justification requirement, all of those  
12 problems are taken care of either at the intent  
13 stage or at the justification stage.

14 JUSTICE ALITO: How are they taken  
15 care of at the justification stage? The  
16 proposal is to run many -- you know, millions  
17 of -- of alternative maps to see whether using  
18 some traditional districting requirements, you  
19 can produce a map that has a lower -- a lower  
20 EG. But my understanding is that when that's  
21 done, those maps do not take into account  
22 either incumbent protection or compliance with  
23 the Voting Rights Act, both of which can have a  
24 very big effect. It's just one of the dozens  
25 of uncertainties about this whole process.

1           MR. SMITH:  Actually, they do -- they  
2 do take into account the Voting Rights Act.  
3 The Chen study that was discussed in one of the  
4 amicus briefs and is discussed somewhat in the  
5 merits briefs here, where they -- he produced  
6 200 randomly generated maps of Wisconsin using  
7 all the state's traditional criteria, he  
8 started with the minority districts that were  
9 already drawn by the state in Act 43 and kept  
10 those in place.

11           And so then he generated -- randomly  
12 generated maps, and he found that the degree of  
13 bias created by the political geography in  
14 Wisconsin is minute, modest, a little bit,  
15 something -- just like what the District Court  
16 found, maybe 1 or 2 percent, not even remotely  
17 like what they have in the map.  And so --

18           JUSTICE KAGAN:  Would it be fair to  
19 require plaintiffs to provide those maps, many,  
20 many of them, so that one can tell whether the  
21 actual map is an outlier?

22           MR. SMITH:  Well, I think in the cases  
23 going forward after this -- these technologies  
24 are there, they will be in the record in almost  
25 every case.  It has become the state of the



1 art.

2           Whether it ought to be something that  
3 the plaintiffs have to produce as part of their  
4 initial case, I'd have to think about it. It  
5 certainly could be done that way.

6           There are -- as the Lander brief and  
7 the -- and a couple of other briefs and -- and  
8 the -- the political geographers' brief all  
9 show, people who have developed a capacity for  
10 generating random maps that teach you a lot of  
11 lessons about the effects of neutral criteria  
12 -- of where people live and allow you to say  
13 that has nothing to do with the degree of bias  
14 that we have here. And I think it will become  
15 a part of how these cases are decided at the  
16 justification stage. It may also become  
17 evidence of intent or of -- of how severe the  
18 effects are.

19           It can be useful in a whole variety of  
20 ways. Now that, again, social science has  
21 stepped up to the challenge.

22           JUSTICE KAGAN: So, for an example,  
23 that becomes a way to filter out the effects of  
24 geography from the effects of partisan  
25 advantage?

1           MR. SMITH: Yes, Your Honor. I would  
2 say that at the remedy stage, if they -- if  
3 they come back with a remedy map that matches  
4 the sort of neutral geography, even if it's  
5 somewhat favorable to the -- the party that's  
6 in charge, that should be okay. They don't  
7 have to go to zero just to -- at the remedy  
8 stage, but they have to come up with something  
9 much less extreme than their intentional  
10 gerrymandering, one that basically makes  
11 democracy no longer function because,  
12 basically, gerrymanders now are not your  
13 father's gerrymander. These are going to be  
14 really serious incursions on democracy if this  
15 Court doesn't do something. And this is really  
16 the last opportunity before we see this huge  
17 festival of new extreme gerrymanders all done  
18 along the model of Wisconsin but probably even  
19 more serious.

20           I -- I would commend the political  
21 scientists' brief, which talk about the  
22 revolution in data analytics that has happened  
23 since this map was drawn. You're going to see  
24 people coming in and -- and slicing and dicing  
25 a very polarized electorate to the point where

1 one -- one-party control will be guaranteed.  
2 That's going to become the norm. Indeed, in  
3 any one-party state, if you don't do it that  
4 way, they're going to say, you know, that's  
5 malpractice. Why aren't you doing what  
6 Wisconsin did?

7 JUSTICE GINSBURG: Mr. Smith, will you  
8 clarify what you mean by one-party state?  
9 Here, we know that the maps were drawn by the  
10 Republicans and every -- everybody else was  
11 excluded, even some Republicans were excluded.

12 But suppose the legislature has a  
13 Republican majority, but there are Democrats,  
14 say it's 60/40, 40 percent Democrat, and the  
15 redistricting is done by the legislature. Does  
16 -- does that count? Would you count that as  
17 one party?

18 MR. SMITH: I do, Your Honor. I think  
19 if there's a majority, one party has a majority  
20 in both houses of the legislature and the  
21 governorship, the fact that there -- there are  
22 some representatives of the other party in a  
23 minority status would not negate the  
24 possibility that the thing was --

25 JUSTICE GORSUCH: Mr. Smith, is that a

1 -- is that a republican form of government  
2 claim?

3 MR. SMITH: I think it's a First  
4 Amendment claim and equal protection claim. I  
5 -- I'm not going to try to revive the  
6 republican form of government clause at this  
7 late stage.

8 JUSTICE GORSUCH: Isn't that -- isn't  
9 that exactly what you're trying to do, though?

10 MR. SMITH: No.

11 JUSTICE GORSUCH: You're saying it's a  
12 one-party rule and that would violate a  
13 republican form of government guarantee.  
14 Wouldn't that be the more specific  
15 constitutional provision to look to, rather  
16 than the generic equal protection clause?

17 MR. SMITH: Well, I --

18 JUSTICE GORSUCH: For that matter,  
19 maybe we can just for a second talk about the  
20 arcane matter, the Constitution.

21 And where exactly do we get authority  
22 to revise state legislative lines? When --  
23 when the Constitution authorizes the federal  
24 government to step in on state -- state  
25 legislative matters, it's pretty clear. If you

1 look at the Fifteenth Amendment, you look at  
2 the Nineteenth Amendment, the Twenty-Sixth  
3 Amendment, and even the Fourteenth Amendment,  
4 Section 2, says Congress has the power, when  
5 state legislators don't provide the right to  
6 vote equally, to dilute congressional  
7 representation. Aren't those all textual  
8 indications in the Constitution itself that  
9 maybe we ought to be cautious about stepping in  
10 here?

11 MR. SMITH: Well, I don't think  
12 there's anything unusual about using the First  
13 Amendment and the Fourteenth Amendment to  
14 regulate the abusive management of state  
15 elections by state government. That's what the  
16 Court has been doing.

17 JUSTICE GINSBURG: Where did  
18 one-person/one-vote come from?

19 MR. SMITH: That's what Reynolds vs.  
20 Sims, and Baker vs. Carr, did and a number of  
21 other cases that have followed along since.  
22 And the fact that Congress could conceivably  
23 regulate this problem under the Fourteenth  
24 Amendment does not mean that the Court should  
25 not.

1           There is a number of cases, the term  
2 limits case, Cook vs. Gralike, where Congress  
3 could have used the elections clause to fix a  
4 problem, but the Court said, well, in the  
5 absence of Congressional action we're going to  
6 regulate an abusive, a misuse of the power to  
7 run federal elections, and in this case it is  
8 state elections, you would have to rely,  
9 Congress would have to rely on Section 5 of the  
10 Fourteenth Amendment, and maybe they could in  
11 theory, but this is a problem which --

12           JUSTICE GORSUCH: Do you see any  
13 impediment to Congress acting in this this  
14 area?

15           MR. SMITH: Other than the facts that  
16 politicians are never going to fix  
17 gerrymandering. They like gerrymandering.

18           (Laughter.)

19           MR. SMITH: This is -- the problem in  
20 this area is if you don't do it, it is locked  
21 up. The voters of Wisconsin can't get it on  
22 the ballot without the legislature's consent.  
23 And that is true in both of the states that  
24 don't have commissions now.

25           And so you have -- we're here telling

1 you you are the only institution in the United  
2 States that can do -- that can solve this  
3 problem just as democracy is about to get worse  
4 because of the way gerrymandering is getting so  
5 much worse.

6 JUSTICE ALITO: You paint a very dire  
7 picture about gerrymandering and its effects,  
8 but I was struck by something in the seminal  
9 article by your expert, Mr. McGhee, and he says  
10 there, "I show that the effects of party  
11 control on bias are small and decay rapidly,  
12 suggesting that redistricting is at best a  
13 blunt tool for promoting partisan interests."

14 So he was wrong in that. He's right  
15 with the EG. That's the Rosetta Stone, but he  
16 is wrong in that.

17 MR. SMITH: Your Honor, I would have  
18 to see what that sentence is saying in context.  
19 I'm quite confident Mr. McGhee does not think  
20 that redistricting is not -- is a non-problem  
21 or that --

22 JUSTICE ALITO: Well, that's what he  
23 said.

24 MR. SMITH: -- or that gerrymandering  
25 is a non-problem. Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
2 Smith. Mr. Tseytlin, you have five minutes  
3 remaining.

4 REBUTTAL ARGUMENT BY MISHA TSEYTLIN  
5 ON BEHALF OF APPELLANTS

6 MR. TSEYTLIN: I would like to begin  
7 by answering Justice Kennedy's question.

8 A facially discriminatory law in a  
9 state would violate the First Amendment because  
10 it would stigmatize that party. This case --  
11 this Court's cases could not be clearer that  
12 when you have neutral lines -- neutrally,  
13 facially neutrally lines, the question is not  
14 of partisan intent, because there will always  
15 be partisan intent.

16 The question is have the plaintiffs  
17 presented a burden on representational rights  
18 based upon a limited, precise,  
19 judicially-amenable standard. There has been  
20 nothing new presented to this Court.

21 Basically what the plaintiffs have  
22 done here is they have taken Professor King's  
23 amicus brief from LULAC, they have taken the  
24 exact same central concept, partisan asymmetry,  
25 and they've recycled it here. There is nothing



1 new before this Court.

2 Second, we have heard something about  
3 the various tests that they are now proposing.  
4 There was only one test that was subjected to  
5 adversarial scrutiny in this case, in a  
6 four-day trial. That efficiency gap test  
7 proved so fatally flawed that the District  
8 Court rejected it as the test and plaintiffs  
9 abandoned it as the primary test on appeal.

10 And then my final point about the  
11 scare tactics, about what will happen next.  
12 Plaintiff's expert did a comprehensive study  
13 from 1972 at the -- when the Baker  
14 redistricting had happened, to 2014. And he --  
15 and you can look at that study. The chart on  
16 that study is on Supplemental Appendix 227.

17 It shows that the asymmetry was worse,  
18 was worse in 1972 than in 2014. You are always  
19 going to have scare tactics. You are always  
20 going to have partisan intent.

21 We have not had any advancement in  
22 terms of what has been presented to this Court  
23 since LULAC where this Court properly  
24 criticized partisan asymmetry as not a neutral  
25 standard that has uniform acceptance.

1                   And we have asked for those reasons  
2                   for this Court to reverse the District Court.  
3                   Thank you, Your Honors.

4                   CHIEF JUSTICE ROBERTS: Thank you,  
5                   counsel. The case is submitted.

6                   (Whereupon, at 11:03 a.m., the hearing  
7                   was concluded.)

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<b>1</b>	<b>absolutely</b> <sup>[1]</sup> 21:14 <b>abusive</b> <sup>[2]</sup> 60:14 <b>61</b> :6 <b>acceptance</b> <sup>[1]</sup> 64:25 <b>accepted</b> <sup>[1]</sup> 41:4 <b>access</b> <sup>[1]</sup> 6:22 <b>account</b> <sup>[4]</sup> 20:6 <b>28</b> :22 <b>54</b> :21 <b>55</b> :2 <b>accountability</b> <sup>[1]</sup> 28:24 <b>achieve</b> <sup>[1]</sup> 33:23 <b>achieved</b> <sup>[1]</sup> 16:15 <b>achieves</b> <sup>[1]</sup> 50:15 <b>across</b> <sup>[2]</sup> 37:10 <b>47</b> :15 <b>act</b> <sup>[5]</sup> 10:7 <b>54</b> :3,23 <b>55</b> :2,9 <b>acted</b> <sup>[1]</sup> 3:13 <b>acting</b> <sup>[1]</sup> 61:13 <b>action</b> <sup>[1]</sup> 61:5 <b>actual</b> <sup>[1]</sup> 55:21 <b>actually</b> <sup>[10]</sup> 14:14 <b>16</b> :8 <b>26</b> :22 <b>28</b> :19 <b>29</b> :16 <b>38</b> :24 <b>46</b> :13 <b>47</b> :25 <b>50</b> :24 <b>55</b> :1 <b>added</b> <sup>[1]</sup> 19:2 <b>addition</b> <sup>[1]</sup> 47:17 <b>additional</b> <sup>[1]</sup> 33:16 <b>address</b> <sup>[1]</sup> 36:23 <b>administer</b> <sup>[1]</sup> 23:18 <b>adopt</b> <sup>[1]</sup> 52:11 <b>advance</b> <sup>[2]</sup> 30:8 <b>39</b> :1 <b>advancement</b> <sup>[1]</sup> 64:21 <b>advantage</b> <sup>[6]</sup> 19:17 <b>20</b> :6 <b>23</b> :6 <b>26</b> :5 <b>28</b> :16 <b>56</b> :25 <b>adversarial</b> <sup>[1]</sup> 64:5 <b>affairs</b> <sup>[1]</sup> 13:22 <b>affect</b> <sup>[1]</sup> 54:4 <b>affected</b> <sup>[2]</sup> 11:3 <b>32</b> :4 <b>affects</b> <sup>[1]</sup> 31:19 <b>african</b> <sup>[3]</sup> 32:25 <b>33</b> :4,18 <b>african-american</b> <sup>[1]</sup> 7:4 <b>agenda</b> <sup>[1]</sup> 32:2 <b>ago</b> <sup>[1]</sup> 6:25 <b>agree</b> <sup>[2]</sup> 40:13,23 <b>ahead</b> <sup>[1]</sup> 46:7 <b>airy-fairy</b> <sup>[1]</sup> 15:18 <b>al</b> <sup>[3]</sup> 1:3,6,20 <b>alito</b> <sup>[19]</sup> 8:15 <b>9</b> :23 <b>18</b> :2 <b>20</b> :8,14,17 <b>21</b> :10 <b>32</b> :5,22 <b>39</b> :25 <b>42</b> :3 <b>44</b> :15,20,24 <b>53</b> :18,21 <b>54</b> :14 <b>62</b> :6,22 <b>alleged</b> <sup>[1]</sup> 8:20 <b>allow</b> <sup>[2]</sup> 47:13 <b>56</b> :12 <b>allowed</b> <sup>[1]</sup> 36:25 <b>allowing</b> <sup>[2]</sup> 8:25 <b>9</b> :1 <b>allows</b> <sup>[1]</sup> 47:14 <b>almost</b> <sup>[2]</sup> 28:7 <b>55</b> :24 <b>already</b> <sup>[4]</sup> 13:18 <b>38</b> :13 <b>48</b> :14 <b>55</b> :9 <b>alternative</b> <sup>[1]</sup> 54:17 <b>although</b> <sup>[1]</sup> 34:3 <b>amendment</b> <sup>[27]</sup> 4:10,14,18 <b>5</b> :3,3 <b>6</b> :14 <b>9</b> :7,11 <b>26</b> :14 <b>27</b> :1,7,21 <b>28</b> :9 <b>35</b> :3,8,14,17 <b>59</b> :4 <b>60</b> :1,2,3,3,13,13,24 <b>61</b> :10 <b>63</b> :9 <b>american</b> <sup>[2]</sup> 32:25 <b>33</b> :18 <b>americans</b> <sup>[1]</sup> 33:5 <b>amici</b> <sup>[1]</sup> 1:20 <b>amicus</b> <sup>[6]</sup> 2:8 <b>13</b> :24 <b>18</b> :18 <b>43</b> :22 <b>55</b> :4 <b>63</b> :23 <b>amount</b> <sup>[1]</sup> 49:14	<b>2</b>	<b>analogy</b> <sup>[2]</sup> 36:5,7 <b>analysis</b> <sup>[1]</sup> 24:5 <b>analytically</b> <sup>[1]</sup> 31:13 <b>analytics</b> <sup>[2]</sup> 39:10 <b>57</b> :22 <b>another</b> <sup>[9]</sup> 3:25 <b>20</b> :24 <b>25</b> :16 <b>26</b> :11 <b>33</b> :2 <b>37</b> :24 <b>38</b> :21 <b>47</b> :7,7 <b>answer</b> <sup>[10]</sup> 12:2 <b>21</b> :10 <b>22</b> :8 <b>24</b> :1 <b>27</b> :15 <b>37</b> :15 <b>38</b> :7 <b>40</b> :15 <b>44</b> :11,13 <b>answered</b> <sup>[1]</sup> 26:13 <b>answering</b> <sup>[1]</sup> 63:7 <b>answers</b> <sup>[1]</sup> 22:21 <b>antidemocratic</b> <sup>[2]</sup> 39:1 <b>50</b> :10 <b>anxious</b> <sup>[1]</sup> 10:20 <b>anybody</b> <sup>[2]</sup> 32:20 <b>35</b> :15 <b>appeal</b> <sup>[1]</sup> 64:9 <b>appearances</b> <sup>[1]</sup> 1:16 <b>appellants</b> <sup>[6]</sup> 1:4,18 <b>2</b> :4,14 <b>3</b> :8 <b>63</b> :5 <b>appellees</b> <sup>[4]</sup> 1:7,22 <b>2</b> :11 <b>29</b> :22 <b>appendix</b> <sup>[3]</sup> 7:18 <b>35</b> :1 <b>64</b> :16 <b>applied</b> <sup>[1]</sup> 53:4 <b>apply</b> <sup>[1]</sup> 53:10 <b>appointed</b> <sup>[2]</sup> 42:14,15 <b>apportionment</b> <sup>[1]</sup> 35:9 <b>approach</b> <sup>[1]</sup> 41:2 <b>appropriate</b> <sup>[2]</sup> 23:10 <b>50</b> :3 <b>appropriately</b> <sup>[2]</sup> 33:13 <b>44</b> :25 <b>arcane</b> <sup>[1]</sup> 59:20 <b>area</b> <sup>[3]</sup> 32:4 <b>61</b> :14,20 <b>areas</b> <sup>[1]</sup> 21:1 <b>aren't</b> <sup>[2]</sup> 58:5 <b>60</b> :7 <b>arg</b> <sup>[1]</sup> 14:10 <b>arguably</b> <sup>[2]</sup> 43:14,15 <b>argue</b> <sup>[1]</sup> 5:5 <b>argued</b> <sup>[1]</sup> 47:11 <b>arguing</b> <sup>[2]</sup> 41:7,8 <b>argument</b> <sup>[15]</sup> 1:13 <b>2</b> :2,5,9,12 <b>3</b> :4,7 <b>4</b> :6 <b>5</b> :9 <b>9</b> :12 <b>18</b> :17 <b>29</b> :21 <b>30</b> :20 <b>35</b> :17 <b>63</b> :4 <b>arise</b> <sup>[2]</sup> 35:3,9 <b>around</b> <sup>[3]</sup> 37:1 <b>49</b> :17 <b>52</b> :16 <b>arresting</b> <sup>[1]</sup> 30:12 <b>art</b> <sup>[1]</sup> 56:1 <b>article</b> <sup>[1]</sup> 62:9 <b>asks</b> <sup>[1]</sup> 44:7 <b>aspects</b> <sup>[1]</sup> 13:17 <b>assembly</b> <sup>[2]</sup> 10:11 <b>30</b> :2 <b>assign</b> <sup>[1]</sup> 47:13 <b>associated</b> <sup>[1]</sup> 4:23 <b>association</b> <sup>[3]</sup> 5:11,12 <b>33</b> :9 <b>assume</b> <sup>[5]</sup> 4:8 <b>6</b> :3 <b>8</b> :16 <b>27</b> :14 <b>33</b> :17 <b>asymmetrical</b> <sup>[1]</sup> 52:23 <b>asymmetry</b> <sup>[12]</sup> 8:9 <b>12</b> :5,15,21 <b>16</b> :22 <b>23</b> :10 <b>45</b> :15 <b>47</b> :18,20 <b>63</b> :24 <b>64</b> :17,24 <b>attack</b> <sup>[1]</sup> 31:4 <b>attain</b> <sup>[1]</sup> 48:11 <b>attempt</b> <sup>[2]</sup> 7:3 <b>19</b> :22 <b>attempting</b> <sup>[1]</sup> 32:1 <b>attractive</b> <sup>[1]</sup> 46:11 <b>authority</b> <sup>[1]</sup> 59:21 <b>authorizes</b> <sup>[1]</sup> 59:23 <b>automatically</b> <sup>[1]</sup> 23:8	<b>B</b>	<b>available</b> <sup>[1]</sup> 7:18 <b>avoid</b> <sup>[2]</sup> 22:10 <b>52</b> :2 <b>away</b> <sup>[1]</sup> 40:3
<b>3</b>	<b>back</b> <sup>[7]</sup> 17:10,14 <b>18</b> :2 <b>22</b> :6 <b>27</b> :8 <b>47</b> :15 <b>57</b> :3 <b>background</b> <sup>[1]</sup> 40:6 <b>bad</b> <sup>[1]</sup> 13:1 <b>baker</b> <sup>[2]</sup> 60:20 <b>64</b> :13 <b>balance</b> <sup>[2]</sup> 18:13 <b>34</b> :6 <b>ballot</b> <sup>[1]</sup> 61:22 <b>baloney</b> <sup>[1]</sup> 37:21 <b>bandemer</b> <sup>[4]</sup> 17:7 <b>42</b> :18 <b>48</b> :10 <b>49</b> :10 <b>bandermer</b> <sup>[1]</sup> 17:4 <b>based</b> <sup>[5]</sup> 3:21 <b>8</b> :13 <b>38</b> :8 <b>53</b> :23 <b>63</b> :18 <b>basic</b> <sup>[1]</sup> 23:8 <b>basically</b> <sup>[3]</sup> 57:10,12 <b>63</b> :21 <b>basis</b> <sup>[1]</sup> 48:18 <b>battles</b> <sup>[2]</sup> 3:21 <b>14</b> :5 <b>bears</b> <sup>[1]</sup> 7:5 <b>become</b> <sup>[5]</sup> 15:8 <b>55</b> :25 <b>56</b> :14,16 <b>58</b> :2 <b>becomes</b> <sup>[4]</sup> 18:24 <b>24</b> :22 <b>39</b> :9 <b>56</b> :23 <b>begin</b> <sup>[1]</sup> 63:6 <b>beginning</b> <sup>[1]</sup> 52:21 <b>behalf</b> <sup>[8]</sup> 1:18,22 <b>2</b> :4,11,14 <b>3</b> :8 <b>29</b> :22 <b>63</b> :5 <b>behind</b> <sup>[1]</sup> 24:14 <b>below</b> <sup>[3]</sup> 44:6 <b>50</b> :16 <b>53</b> :16 <b>best</b> <sup>[1]</sup> 62:12 <b>better</b> <sup>[3]</sup> 16:17 <b>27</b> :18 <b>38</b> :23 <b>between</b> <sup>[3]</sup> 23:5 <b>33</b> :10 <b>50</b> :1 <b>beverly</b> <sup>[1]</sup> 1:3 <b>beyond</b> <sup>[1]</sup> 21:2 <b>bias</b> <sup>[6]</sup> 45:16 <b>49</b> :14 <b>54</b> :7 <b>55</b> :13 <b>56</b> :13 <b>62</b> :11 <b>biased</b> <sup>[2]</sup> 30:7 <b>49</b> :7 <b>big</b> <sup>[2]</sup> 39:20 <b>54</b> :24 <b>bipartisan</b> <sup>[2]</sup> 7:24 <b>12</b> :3 <b>bit</b> <sup>[6]</sup> 13:19 <b>22</b> :13,14 <b>50</b> :18 <b>51</b> :18 <b>55</b> :14 <b>blunt</b> <sup>[1]</sup> 62:13 <b>board</b> <sup>[1]</sup> 37:10 <b>body</b> <sup>[2]</sup> 30:9 <b>43</b> :20 <b>both</b> <sup>[5]</sup> 46:10 <b>51</b> :18 <b>54</b> :23 <b>58</b> :20 <b>61</b> :23 <b>bounds</b> <sup>[1]</sup> 41:9 <b>branches</b> <sup>[1]</sup> 45:12 <b>breyer</b> <sup>[3]</sup> 11:7 <b>40</b> :12 <b>52</b> :14 <b>breyer's</b> <sup>[4]</sup> 22:7,20 <b>28</b> :18 <b>53</b> :1 <b>brief</b> <sup>[7]</sup> 12:22 <b>13</b> :24 <b>43</b> :22 <b>56</b> :6,8 <b>57</b> :21 <b>63</b> :23 <b>briefly</b> <sup>[1]</sup> 30:11 <b>briefs</b> <sup>[4]</sup> 11:16 <b>55</b> :4,5 <b>56</b> :7 <b>bring</b> <sup>[4]</sup> 27:13 <b>35</b> :16 <b>38</b> :23 <b>43</b> :5 <b>brought</b> <sup>[2]</sup> 37:25 <b>38</b> :13 <b>buildings</b> <sup>[1]</sup> 11:3 <b>bunch</b> <sup>[1]</sup> 37:21 <b>burden</b> <sup>[2]</sup> 40:10 <b>63</b> :17 <b>burdening</b> <sup>[1]</sup> 35:10	<b>3</b>	<b>1</b> <sup>[1]</sup> 55:16 <b>10</b> <sup>[12]</sup> 7:22 <b>8</b> :2 <b>16</b> :14 <b>29</b> :5 <b>38</b> :20 <b>39</b> :3,4 <b>44</b> :21 <b>49</b> :16,18,19,21 <b>10:04</b> <sup>[2]</sup> 1:14 <b>3</b> :2 <b>11:03</b> <sup>[1]</sup> 65:6 <b>16-1161</b> <sup>[1]</sup> 3:4 <b>17</b> <sup>[3]</sup> 7:20,22 <b>8</b> :2 <b>18</b> <sup>[1]</sup> 2:8 <b>1972</b> <sup>[2]</sup> 64:13,18		
<b>4</b>	<b>2</b> <sup>[4]</sup> 33:12 <b>38</b> :17 <b>55</b> :16 <b>60</b> :4 <b>20</b> <sup>[2]</sup> 39:3 <b>49</b> :17 <b>200</b> <sup>[2]</sup> 43:8 <b>55</b> :6 <b>2004</b> <sup>[1]</sup> 48:3 <b>2014</b> <sup>[3]</sup> 42:22 <b>64</b> :14,18 <b>2017</b> <sup>[2]</sup> 1:10 <b>44</b> :16 <b>2020</b> <sup>[1]</sup> 39:15 <b>227</b> <sup>[1]</sup> 64:16 <b>230</b> <sup>[1]</sup> 45:22 <b>235</b> <sup>[1]</sup> 7:18 <b>29</b> <sup>[1]</sup> 2:11	<b>4</b>	<b>5</b> <sup>[1]</sup> 61:9 <b>50</b> <sup>[4]</sup> 12:17 <b>23</b> :2 <b>44</b> :9 <b>48</b> :8 <b>50/50</b> <sup>[3]</sup> 30:5 <b>45</b> :17 <b>48</b> :12 <b>51</b> <sup>[1]</sup> 12:17 <b>54</b> <sup>[2]</sup> 41:21,22 <b>58</b> <sup>[2]</sup> 41:21,23		
<b>5</b>	<b>60/40</b> <sup>[1]</sup> 58:14 <b>60s</b> <sup>[1]</sup> 36:18 <b>63</b> <sup>[1]</sup> 2:14	<b>5</b>	<b>6</b> <sup>[1]</sup> 61:9 <b>50</b> <sup>[4]</sup> 12:17 <b>23</b> :2 <b>44</b> :9 <b>48</b> :8 <b>50/50</b> <sup>[3]</sup> 30:5 <b>45</b> :17 <b>48</b> :12 <b>51</b> <sup>[1]</sup> 12:17 <b>54</b> <sup>[2]</sup> 41:21,22 <b>58</b> <sup>[2]</sup> 41:21,23		
<b>6</b>	<b>7</b> <sup>[4]</sup> 22:17 <b>37</b> :16 <b>38</b> :9 <b>51</b> :1	<b>6</b>	<b>7</b> <sup>[4]</sup> 22:17 <b>37</b> :16 <b>38</b> :9 <b>51</b> :1		
<b>7</b>	<b>86-a</b> <sup>[1]</sup> 34:25	<b>7</b>	<b>7</b> <sup>[4]</sup> 22:17 <b>37</b> :16 <b>38</b> :9 <b>51</b> :1		
<b>8</b>	<b>99</b> <sup>[2]</sup> 25:19 <b>48</b> :8	<b>8</b>	<b>86-a</b> <sup>[1]</sup> 34:25		
<b>9</b>	<b>a-ha</b> <sup>[1]</sup> 46:21 <b>a.m</b> <sup>[3]</sup> 1:14 <b>3</b> :2 <b>65</b> :6 <b>abandon</b> <sup>[1]</sup> 19:16 <b>abandoned</b> <sup>[1]</sup> 64:9 <b>ability</b> <sup>[1]</sup> 41:11 <b>able</b> <sup>[5]</sup> 10:10 <b>23</b> :18 <b>30</b> :22 <b>35</b> :16 <b>48</b> :11 <b>above-entitled</b> <sup>[1]</sup> 1:12 <b>absence</b> <sup>[2]</sup> 33:15 <b>61</b> :5	<b>9</b>	<b>99</b> <sup>[2]</sup> 25:19 <b>48</b> :8		
<b>A</b>	<b>absolutely</b> <sup>[1]</sup> 21:14 <b>abusive</b> <sup>[2]</sup> 60:14 <b>61</b> :6 <b>acceptance</b> <sup>[1]</sup> 64:25 <b>accepted</b> <sup>[1]</sup> 41:4 <b>access</b> <sup>[1]</sup> 6:22 <b>account</b> <sup>[4]</sup> 20:6 <b>28</b> :22 <b>54</b> :21 <b>55</b> :2 <b>accountability</b> <sup>[1]</sup> 28:24 <b>achieve</b> <sup>[1]</sup> 33:23 <b>achieved</b> <sup>[1]</sup> 16:15 <b>achieves</b> <sup>[1]</sup> 50:15 <b>across</b> <sup>[2]</sup> 37:10 <b>47</b> :15 <b>act</b> <sup>[5]</sup> 10:7 <b>54</b> :3,23 <b>55</b> :2,9 <b>acted</b> <sup>[1]</sup> 3:13 <b>acting</b> <sup>[1]</sup> 61:13 <b>action</b> <sup>[1]</sup> 61:5 <b>actual</b> <sup>[1]</sup> 55:21 <b>actually</b> <sup>[10]</sup> 14:14 <b>16</b> :8 <b>26</b> :22 <b>28</b> :19 <b>29</b> :16 <b>38</b> :24 <b>46</b> :13 <b>47</b> :25 <b>50</b> :24 <b>55</b> :1 <b>added</b> <sup>[1]</sup> 19:2 <b>addition</b> <sup>[1]</sup> 47:17 <b>additional</b> <sup>[1]</sup> 33:16 <b>address</b> <sup>[1]</sup> 36:23 <b>administer</b> <sup>[1]</sup> 23:18 <b>adopt</b> <sup>[1]</sup> 52:11 <b>advance</b> <sup>[2]</sup> 30:8 <b>39</b> :1 <b>advancement</b> <sup>[1]</sup> 64:21 <b>advantage</b> <sup>[6]</sup> 19:17 <b>20</b> :6 <b>23</b> :6 <b>26</b> :5 <b>28</b> :16 <b>56</b> :25 <b>adversarial</b> <sup>[1]</sup> 64:5 <b>affairs</b> <sup>[1]</sup> 13:22 <b>affect</b> <sup>[1]</sup> 54:4 <b>affected</b> <sup>[2]</sup> 11:3 <b>32</b> :4 <b>affects</b> <sup>[1]</sup> 31:19 <b>african</b> <sup>[3]</sup> 32:25 <b>33</b> :4,18 <b>african-american</b> <sup>[1]</sup> 7:4 <b>agenda</b> <sup>[1]</sup> 32:2 <b>ago</b> <sup>[1]</sup> 6:25 <b>agree</b> <sup>[2]</sup> 40:13,23 <b>ahead</b> <sup>[1]</sup> 46:7 <b>airy-fairy</b> <sup>[1]</sup> 15:18 <b>al</b> <sup>[3]</sup> 1:3,6,20 <b>alito</b> <sup>[19]</sup> 8:15 <b>9</b> :23 <b>18</b> :2 <b>20</b> :8,14,17 <b>21</b> :10 <b>32</b> :5,22 <b>39</b> :25 <b>42</b> :3 <b>44</b> :15,20,24 <b>53</b> :18,21 <b>54</b> :14 <b>62</b> :6,22 <b>alleged</b> <sup>[1]</sup> 8:20 <b>allow</b> <sup>[2]</sup> 47:13 <b>56</b> :12 <b>allowed</b> <sup>[1]</sup> 36:25 <b>allowing</b> <sup>[2]</sup> 8:25 <b>9</b> :1 <b>allows</b> <sup>[1]</sup> 47:14 <b>almost</b> <sup>[2]</sup> 28:7 <b>55</b> :24 <b>already</b> <sup>[4]</sup> 13:18 <b>38</b> :13 <b>48</b> :14 <b>55</b> :9 <b>alternative</b> <sup>[1]</sup> 54:17 <b>although</b> <sup>[1]</sup> 34:3 <b>amendment</b> <sup>[27]</sup> 4:10,14,18 <b>5</b> :3,3 <b>6</b> :14 <b>9</b> :7,11 <b>26</b> :14 <b>27</b> :1,7,21 <b>28</b> :9 <b>35</b> :3,8,14,17 <b>59</b> :4 <b>60</b> :1,2,3,3,13,13,24 <b>61</b> :10 <b>63</b> :9 <b>american</b> <sup>[2]</sup> 32:25 <b>33</b> :18 <b>americans</b> <sup>[1]</sup> 33:5 <b>amici</b> <sup>[1]</sup> 1:20 <b>amicus</b> <sup>[6]</sup> 2:8 <b>13</b> :24 <b>18</b> :18 <b>43</b> :22 <b>55</b> :4 <b>63</b> :23 <b>amount</b> <sup>[1]</sup> 49:14	<b>A</b>	<b>available</b> <sup>[1]</sup> 7:18 <b>avoid</b> <sup>[2]</sup> 22:10 <b>52</b> :2 <b>away</b> <sup>[1]</sup> 40:3		

**C**

**calculate** [2] 44:7 45:15  
**calculations** [1] 26:7  
**calculus** [1] 4:12  
**california** [1] 9:20  
**call** [2] 12:11 41:3  
**came** [1] 1:12  
**campaign** [1] 10:11  
**campaigning** [1] 32:19  
**candidate** [10] 8:23 9:8,14,18,19, 21 31:18 34:3 44:2,5  
**candidate's** [1] 8:25  
**candidates** [1] 34:7  
**cannot** [4] 6:16 18:12 20:10,17  
**capable** [1] 14:14  
**capacity** [1] 56:9  
**care** [2] 54:12,15  
**careful** [1] 6:7  
**carr** [1] 60:20  
**carry** [1] 32:1  
**case** [33] 3:4 4:4 6:17 10:5 11:9 12: 4 15:5 16:25 22:10 23:24 25:18 30:4 31:13 35:22 36:3,5 37:8,24 45:18 47:7,11 48:3 49:2,11 53: 14 55:25 56:4 61:2,7 63:10 64:5 65:5  
**cases** [11] 17:2 21:5 37:5,25 38:18 45:6 55:22 56:15 60:21 61:1 63: 11  
**cause** [1] 38:1  
**cautious** [1] 60:9  
**central** [1] 63:24  
**certain** [5] 7:5 11:3 14:25 21:17 23:14  
**certainly** [11] 9:13,17,24 21:12 23: 23 29:10 34:17 36:6 50:4 54:5 56: 5  
**challenge** [10] 5:4,14 9:7 35:24 36: 15,16 38:24 44:25 46:16 56:21  
**challenged** [3] 38:14,15,20  
**challenges** [2] 3:25 38:13  
**chance** [1] 48:7  
**chances** [1] 18:6  
**change** [1] 4:12  
**changed** [1] 14:17  
**charge** [1] 57:6  
**chart** [2] 7:16 64:15  
**chen** [1] 55:3  
**chief** [26] 3:3,9 5:8,21 18:14,19 29: 19,23,24 30:10,24 31:14 33:25 34: 10 35:19 36:19 38:6 40:1,15 41:1, 13 42:11 48:9 50:25 63:1 65:4  
**choice** [1] 24:25  
**circumstance** [1] 5:4  
**citizen** [1] 24:24  
**claim** [16] 5:16,17 6:19,23 30:13, 17 31:3,4 33:12 34:23 35:3 36:24 41:19 59:2,4,4  
**claims** [5] 6:11,12 30:18 37:1,3  
**clarify** [1] 58:8  
**classification** [1] 7:14  
**clause** [3] 59:6,16 61:3  
**clear** [2] 51:5 59:25

**clearer** [1] 63:11  
**closely** [1] 19:9  
**closer** [2] 19:18 36:17  
**colleagues** [2] 8:19 36:21  
**collective** [2] 33:19,23  
**come** [10] 25:1,16 27:6 37:4,24 45: 19 46:21 57:3,8 60:18  
**comes** [2] 27:8 34:23  
**coming** [2] 5:6 57:24  
**commend** [1] 57:20  
**commission** [1] 12:3  
**commission-drawn** [1] 7:24  
**commissions** [3] 8:8 52:18 61:24  
**communities** [2] 26:9,9  
**compare** [1] 47:14  
**compared** [1] 13:1  
**competitive** [2] 49:6,15  
**complain** [4] 30:15,23 31:22 33:1  
**compliance** [2] 54:3,22  
**complicated** [3] 11:20 12:11 40:9  
**complicated** [3] 11:20 12:11 40:9  
**complied** [4] 17:5,13,23,25  
**comply** [5] 23:4 24:7,11 26:20 28: 10  
**complying** [1] 20:4  
**composed** [1] 3:15  
**comprehensive** [1] 64:12  
**computer** [2] 11:11,22  
**computers** [2] 17:17 39:10  
**concede** [1] 28:8  
**conceivably** [1] 60:22  
**concept** [3] 23:7 27:6 63:24  
**concern** [1] 19:11  
**concerned** [1] 25:3  
**concerns** [2] 35:3,9  
**concisely** [1] 36:21  
**concluded** [1] 65:7  
**concludes** [1] 43:10  
**conclusion** [2] 25:24 45:19  
**concrete** [1] 42:9  
**concurrency** [2] 34:24 50:6  
**concurring** [1] 21:23  
**confident** [1] 62:19  
**confines** [1] 5:19  
**conform** [1] 19:10  
**congress** [8] 4:24 5:1,7 60:4,22 61:2,9,13  
**congressional** [2] 60:6 61:5  
**conjunctural** [1] 13:22  
**conjecture** [2] 15:15 18:11  
**consent** [1] 61:22  
**consideration** [1] 50:1  
**considered** [1] 19:7  
**considering** [1] 21:24  
**constitution** [10] 18:24 19:8 20:1 26:19,23 27:10 38:10 59:20,23 60: 8  
**constitutional** [9] 6:14 17:22 20: 7 23:17 26:14 28:9 31:2 43:7 59: 15  
**constitutionalize** [1] 51:3  
**constraints** [1] 24:10  
**contested** [4] 25:21 43:25 44:3,5  
**context** [2] 35:7 62:18  
**contexts** [1] 21:21

**contiguous** [1] 19:22  
**continue** [1] 30:1  
**control** [6] 12:1 30:8 39:2 46:1 58: 1 62:11  
**controlled** [1] 32:8  
**controls** [2] 40:18,21  
**convenient** [1] 41:2  
**conveniently** [1] 19:4  
**convinced** [1] 23:20  
**cook** [1] 61:2  
**copycat** [1] 39:16  
**correct** [1] 17:16  
**correlated** [1] 6:10  
**counsel** [3] 18:15 29:20 65:5  
**count** [2] 58:16,16  
**country** [11] 6:10 13:2 37:2 38:4, 20 39:17,19 41:5 47:15 51:1 52:6  
**country's** [1] 4:20  
**couple** [2] 25:4 56:7  
**course** [7] 5:18,19,25 7:13 13:25 17:17 18:10  
**court** [53] 1:1,13 3:10,11,22 4:7 6: 6,25 8:1,10,12 11:10 13:23 16:9 17:3 18:20 21:22 22:13 29:25 36: 13 37:12,22 38:3 39:7,19 42:12 44:6,24 45:6 47:10 48:15 49:2,3 50:5,6,16,22 51:17 52:6,10 53:16 55:15 57:15 60:16,24 61:4 63:20 64:1,8,22,23 65:2,2  
**court's** [1] 63:11  
**court-drawn** [3] 7:23 19:3 23:5  
**courts** [8] 3:20,23 14:4 18:12 23: 21 40:4 42:7 52:18  
**cracked** [1] 33:3  
**create** [2] 7:7 46:20  
**created** [5] 7:17 16:10,11 17:15 55:13  
**criteria** [14] 8:6 17:13 19:17,21 22: 9,16,23 23:4,16,21 24:5 28:11 55: 7 56:11  
**criticized** [1] 64:24  
**curiae** [3] 1:20 2:8 18:18  
**curve** [1] 23:13  
**cusps** [1] 39:8  
**cycles** [1] 23:13

**D**

**d.c** [3] 1:9,19,21  
**data** [4] 22:19 23:13 39:10 57:22  
**day** [2] 4:1 29:12  
**days** [1] 48:14  
**de** [3] 31:25 32:2,5  
**deal** [1] 14:17  
**dealt** [1] 7:1  
**debate** [1] 20:21  
**decade** [3] 30:9 47:23 50:11  
**decay** [1] 62:11  
**decide** [4] 3:20 23:9 31:24 37:8  
**decided** [3] 4:9 42:12 56:15  
**decides** [2] 30:7 39:1  
**deciding** [1] 14:6  
**decision** [2] 37:5,12  
**decisions** [4] 26:2 38:3 42:10 50: 6

**decks** [2] 29:4,11  
**deeply** [1] 8:16  
**defendants'** [1] 48:23  
**definition** [1] 45:3  
**degree** [3] 47:18 55:12 56:13  
**deliberate** [2] 7:2 19:22  
**democracy** [7] 28:2 30:3 39:20 40: 3 57:11,14 62:3  
**democrat** [2] 32:1 58:14  
**democratic** [7] 8:23 9:10 24:18 32:10,13,20 42:15  
**democratic-dominated** [1] 10:8  
**democrats** [9] 10:15 32:12 37:9, 13,14,23 48:6,11 58:13  
**describe** [1] 40:6  
**description** [2] 34:23 35:2  
**designed** [1] 19:9  
**determine** [1] 29:13  
**determining** [2] 3:13 18:22  
**developed** [1] 56:9  
**dicing** [1] 57:24  
**difference** [1] 33:10  
**different** [11] 6:13 16:10,14 20:19 26:23 31:11 33:18 34:3 45:14 47: 9 51:11  
**differentiate** [1] 23:5  
**differentiates** [1] 21:20  
**differently** [1] 12:7  
**difficult** [1] 21:4  
**dilute** [1] 60:6  
**diluted** [1] 30:22  
**dilution** [4] 31:12,13 33:12 36:12  
**dire** [1] 62:6  
**direction** [1] 16:5  
**directly** [2] 4:4 32:4  
**disagree** [1] 53:12  
**discovered** [3] 43:2,3,8  
**discretionary** [1] 37:6  
**discriminating** [2] 8:23 9:5  
**discrimination** [1] 27:22  
**discriminatory** [1] 63:8  
**discussed** [2] 55:3,4  
**discussing** [1] 17:1  
**discussion** [1] 28:19  
**disfavored** [2] 34:19 35:6  
**dispute** [1] 29:10  
**dissenting** [2] 21:22 28:18  
**distasteful** [1] 42:6  
**distinct** [1] 31:13  
**distort** [1] 42:1  
**district** [34] 3:14 4:20,22 5:10 6:19 8:24 9:8,9,16 10:8 22:10 24:18,19, 25 25:1 26:20 30:6,15 31:5,7 33: 16 34:6 35:23,24,25 36:9,10,15 46:16,20 48:15 55:15 64:7 65:2  
**district-specific** [1] 4:1  
**districting** [13] 3:19 5:15 8:5 17:6 18:1,23 21:25 24:4 25:6 26:5,24 28:15 54:18  
**districts** [21] 7:4,7 8:7 19:9 24:11, 21 25:8,12,19 26:6 28:20 33:2 34: 8 36:13,17 49:5,6,8,15 52:5 55:8  
**divided** [1] 52:18  
**doctrine** [3] 6:8 38:16,17

doing <sup>[6]</sup> 14:14 15:9 20:23 49:13  
58:5 60:16  
done <sup>[7]</sup> 48:22 49:1 54:21 56:5 57:  
17 58:15 63:22  
down <sup>[5]</sup> 15:1 31:17 32:9 44:25 49:  
16  
dozens <sup>[1]</sup> 54:24  
draw <sup>[9]</sup> 20:11 24:10 25:24 27:24  
30:6 46:25 47:6,16 54:7  
drawer <sup>[3]</sup> 6:18,20 16:7  
drawers <sup>[1]</sup> 17:5  
drawing <sup>[8]</sup> 3:14 8:7,8 14:18 20:  
23 26:6 48:24,25  
drawn <sup>[10]</sup> 7:24,25 23:6 28:21 31:  
5 45:20 52:17 55:9 57:23 58:9  
draws <sup>[1]</sup> 7:22  
drew <sup>[1]</sup> 16:8  
driven <sup>[1]</sup> 26:8  
driving <sup>[1]</sup> 37:2  
due <sup>[2]</sup> 23:19 29:9  
durability <sup>[1]</sup> 47:20  
durable <sup>[1]</sup> 22:18  
during <sup>[1]</sup> 10:6

**E**

each <sup>[4]</sup> 47:12,13 50:21 51:22  
earlier <sup>[1]</sup> 17:20  
earthquake <sup>[1]</sup> 48:6  
easier <sup>[1]</sup> 28:21  
easiest <sup>[1]</sup> 7:15  
easily <sup>[1]</sup> 14:14  
easy <sup>[1]</sup> 21:5  
educational <sup>[1]</sup> 40:5  
effect <sup>[5]</sup> 21:17 31:25 35:5,10 54:  
24  
effective <sup>[1]</sup> 32:10  
effectively <sup>[3]</sup> 30:3,7 32:19  
effects <sup>[7]</sup> 54:10 56:11,18,23,24  
62:7,10  
efficiency <sup>[11]</sup> 22:15 23:14 43:4,  
21 45:18 50:16 51:1,7,17 52:3 64:  
6  
effort <sup>[3]</sup> 7:6 13:9 32:17  
eg <sup>[11]</sup> 12:11 14:2 37:15,16 38:8  
44:7 53:23 54:2,8,20 62:15  
eight <sup>[2]</sup> 15:1 49:21  
either <sup>[3]</sup> 52:17 54:12,22  
elected <sup>[3]</sup> 3:19 10:15 48:17  
election <sup>[12]</sup> 4:21 14:1,2,20,21,22,  
23 22:11 25:20 44:3,5 48:12  
elections <sup>[8]</sup> 22:18 29:13,17 43:  
24 60:15 61:3,7,8  
electoral <sup>[1]</sup> 18:7  
electorate <sup>[2]</sup> 39:11 57:25  
eligible <sup>[2]</sup> 9:19,20  
eliminates <sup>[1]</sup> 5:20  
eliminating <sup>[1]</sup> 49:14  
elsewhere <sup>[2]</sup> 5:12 30:16  
enacting <sup>[1]</sup> 6:7  
enacts <sup>[1]</sup> 35:4  
end <sup>[6]</sup> 12:3 29:11 33:23 39:4 43:  
10,10  
ended <sup>[1]</sup> 49:20  
enduring <sup>[1]</sup> 19:4

engaging <sup>[1]</sup> 14:5  
enough <sup>[3]</sup> 16:11,12,21  
ensure <sup>[1]</sup> 14:25  
entering <sup>[1]</sup> 45:7  
enterprise <sup>[1]</sup> 48:20  
entertain <sup>[1]</sup> 3:24  
entire <sup>[4]</sup> 30:9 35:25 36:16 49:12  
entirely <sup>[2]</sup> 31:10 50:17  
entitled <sup>[1]</sup> 46:23  
entrench <sup>[3]</sup> 15:4,6 21:18  
equal <sup>[7]</sup> 4:10 26:25 27:10,19 41:  
10 59:4,16  
equalizing <sup>[1]</sup> 45:17  
equally <sup>[2]</sup> 34:1 60:6  
eric <sup>[2]</sup> 12:22 42:23  
erin <sup>[3]</sup> 1:19 2:6 18:17  
establish <sup>[1]</sup> 30:13  
estimate <sup>[2]</sup> 16:18,19  
estimates <sup>[3]</sup> 15:22 16:1,2  
et <sup>[3]</sup> 1:3,6,20  
evaluate <sup>[1]</sup> 15:9  
even <sup>[14]</sup> 4:17 6:12 16:18 29:6 30:  
5,19 48:7 49:17,19 55:16 57:4,18  
58:11 60:3  
eventually <sup>[1]</sup> 49:21  
everybody <sup>[2]</sup> 11:20 58:10  
everything <sup>[2]</sup> 24:8 34:13  
everywhere <sup>[1]</sup> 39:22  
evidence <sup>[6]</sup> 12:8,10 21:15,16 48:  
5 56:17  
ex <sup>[1]</sup> 11:11  
exact <sup>[2]</sup> 45:19 63:24  
exactly <sup>[9]</sup> 4:8 11:14 13:21 32:6,  
15 36:7 41:14 59:9,21  
example <sup>[8]</sup> 4:22,24 5:5 6:1 15:23  
17:3 36:20 56:22  
excessive <sup>[1]</sup> 31:5  
excluded <sup>[2]</sup> 58:11,11  
excuse <sup>[1]</sup> 53:18  
exercise <sup>[2]</sup> 5:11 24:17  
expected <sup>[1]</sup> 16:18  
expert <sup>[5]</sup> 7:17,19 48:23 62:9 64:  
12  
experts <sup>[4]</sup> 3:21 11:11 14:5 49:1  
explored <sup>[1]</sup> 27:5  
extend <sup>[1]</sup> 32:7  
extensive <sup>[1]</sup> 28:19  
extreme <sup>[8]</sup> 12:21 16:20 30:2 45:  
20 50:9 52:24 57:9,17  
extremely <sup>[2]</sup> 15:8 30:7  
extremity <sup>[1]</sup> 14:9  
eyes <sup>[1]</sup> 38:3

**F**

face <sup>[7]</sup> 20:18 21:2,8,11,13 26:19  
27:17  
faced <sup>[1]</sup> 17:3  
facially <sup>[3]</sup> 26:24 63:8,13  
fact <sup>[8]</sup> 20:4 25:12,24 26:6 38:8 52:  
16 58:21 60:22  
factor <sup>[1]</sup> 54:2  
factors <sup>[3]</sup> 26:15 53:23 54:6  
facts <sup>[3]</sup> 16:25 17:2 61:15  
fair <sup>[5]</sup> 40:19,22 51:23,25 55:18

fairness <sup>[1]</sup> 45:4  
faith <sup>[1]</sup> 39:20  
false <sup>[3]</sup> 15:13,13 23:2  
far <sup>[5]</sup> 22:25 31:16,18 45:9 46:1  
fastidiously <sup>[1]</sup> 17:6  
fatally <sup>[1]</sup> 64:7  
fate <sup>[1]</sup> 3:20  
father's <sup>[1]</sup> 57:13  
favor <sup>[3]</sup> 19:17 20:11 26:16  
favorable <sup>[2]</sup> 40:14 57:5  
favors <sup>[1]</sup> 19:5  
federal <sup>[5]</sup> 3:20,23 14:4 59:23 61:  
7  
feel <sup>[1]</sup> 26:10  
festival <sup>[2]</sup> 39:16 57:17  
few <sup>[1]</sup> 50:20  
fewer <sup>[2]</sup> 32:11 33:4  
fifteenth <sup>[1]</sup> 60:1  
figure <sup>[1]</sup> 52:15  
filed <sup>[1]</sup> 28:9  
fill <sup>[1]</sup> 23:16  
filter <sup>[2]</sup> 49:25 56:23  
final <sup>[2]</sup> 16:13 64:10  
finally <sup>[3]</sup> 16:13 43:7,8  
find <sup>[1]</sup> 34:16  
finding <sup>[1]</sup> 22:3  
first <sup>[26]</sup> 3:4 4:10,14,18 5:3,3 8:4 9:  
7,11 25:5 27:1,7,21 30:21 35:3,8,  
14,16 38:11 46:11 51:5 52:12,14  
59:3 60:12 63:9  
five <sup>[4]</sup> 16:6 45:22 48:14 63:2  
fix <sup>[3]</sup> 17:10 61:3,16  
flawed <sup>[1]</sup> 64:7  
flexible <sup>[1]</sup> 43:15  
flip <sup>[3]</sup> 47:24 48:4 49:9  
flunks <sup>[1]</sup> 13:4  
fly <sup>[1]</sup> 53:15  
focus <sup>[2]</sup> 22:25 31:5  
folks <sup>[1]</sup> 4:21  
follow <sup>[3]</sup> 19:16 30:25 36:20  
followed <sup>[2]</sup> 50:4 60:21  
follows <sup>[1]</sup> 31:1  
force <sup>[1]</sup> 37:3  
forget <sup>[1]</sup> 48:16  
form <sup>[3]</sup> 59:1,6,13  
formula <sup>[2]</sup> 50:15,25  
forthcoming <sup>[2]</sup> 44:12,13  
forward <sup>[1]</sup> 55:23  
found <sup>[2]</sup> 55:12,16  
four <sup>[4]</sup> 16:10,12 29:17 49:12  
four-day <sup>[1]</sup> 64:6  
fourteenth <sup>[5]</sup> 5:3 60:3,13,23 61:  
10  
fourth <sup>[1]</sup> 13:16  
frame <sup>[1]</sup> 11:1  
fray <sup>[1]</sup> 45:7  
free <sup>[1]</sup> 30:1  
friend <sup>[1]</sup> 34:4  
full <sup>[2]</sup> 43:21 50:11  
fully <sup>[1]</sup> 27:5  
function <sup>[1]</sup> 57:11  
fundamentally <sup>[1]</sup> 50:10

**G**

gap <sup>[11]</sup> 22:15 23:15 43:4,21 45:18  
50:16 51:1,7,17 52:3 64:6  
gather <sup>[1]</sup> 22:19  
general <sup>[1]</sup> 1:17  
generalized <sup>[2]</sup> 10:13 11:4  
generated <sup>[3]</sup> 55:6,11,12  
generating <sup>[1]</sup> 56:10  
generic <sup>[1]</sup> 59:16  
geographers' <sup>[1]</sup> 56:8  
geography <sup>[5]</sup> 25:11 53:25 55:13  
56:24 57:4  
gerrymander <sup>[5]</sup> 28:12 47:14 48:  
25 50:9 57:13  
gerrymandered <sup>[3]</sup> 17:11 30:20  
38:14  
gerrymandering <sup>[26]</sup> 3:25 4:2 6:  
11,12 16:23 25:10 28:3 30:14,16,  
18 31:3,9,12 35:8 38:17 39:9,16  
42:5 43:17 53:24 57:10 61:17,17  
62:4,7,24  
gerrymanders <sup>[4]</sup> 19:4 45:20 57:  
12,17  
gets <sup>[5]</sup> 12:16 29:6,7 41:21,22  
getting <sup>[3]</sup> 38:18 49:21 62:4  
gill <sup>[2]</sup> 1:3 3:5  
ginsburg <sup>[8]</sup> 6:24 10:18 19:19 24:  
12 25:14,17 58:7 60:17  
give <sup>[6]</sup> 15:23 32:3 36:23 41:16 45:  
1,3  
given <sup>[3]</sup> 10:7 22:12 45:2  
giving <sup>[1]</sup> 11:15  
gobbledygook <sup>[2]</sup> 40:7,24  
gorsuch <sup>[20]</sup> 22:2,6 23:11,25 50:  
14 51:10,13,15,21,24 52:8,25 53:5,  
7,11 58:25 59:8,11,18 61:12  
got <sup>[6]</sup> 12:8,9 16:13 45:1,2 48:13  
government <sup>[7]</sup> 28:4 39:2 59:1,6,  
13,24 60:15  
governorship <sup>[1]</sup> 58:21  
grail <sup>[1]</sup> 6:22  
gralike <sup>[1]</sup> 61:2  
great <sup>[3]</sup> 14:17 43:19 47:9  
greater <sup>[2]</sup> 37:16 38:9  
grounded <sup>[2]</sup> 4:19 6:13  
group <sup>[5]</sup> 11:10 35:5,10,12,15  
group's <sup>[1]</sup> 32:1  
guarantee <sup>[1]</sup> 59:13  
guaranteed <sup>[1]</sup> 58:1  
guess <sup>[3]</sup> 15:18,19 21:12  
guesses <sup>[1]</sup> 44:1

**H**

handled <sup>[2]</sup> 36:2,18  
happen <sup>[1]</sup> 64:11  
happened <sup>[2]</sup> 57:22 64:14  
hard <sup>[2]</sup> 11:8 27:3  
harder <sup>[1]</sup> 21:3  
harm <sup>[2]</sup> 10:7 38:2  
hazardous <sup>[1]</sup> 48:20  
hear <sup>[2]</sup> 3:3 46:18  
heard <sup>[1]</sup> 64:2  
hearing <sup>[1]</sup> 65:6  
height <sup>[1]</sup> 11:3  
held <sup>[1]</sup> 50:12

<p><b>help</b> <sup>[1]</sup> 28:3  <b>helpful</b> <sup>[2]</sup> 22:8 36:7  <b>helps</b> <sup>[1]</sup> 4:4  <b>high</b> <sup>[3]</sup> 53:22,23 54:2  <b>history</b> <sup>[2]</sup> 41:5 47:15  <b>hold</b> <sup>[2]</sup> 3:23 19:24  <b>holding</b> <sup>[1]</sup> 53:14  <b>holes</b> <sup>[1]</sup> 16:3  <b>holy</b> <sup>[1]</sup> 6:22  <b>home</b> <sup>[1]</sup> 11:2  <b>honor</b> <sup>[28]</sup> 4:17 5:23 6:6 7:10 9:14  13:15 15:10,21 16:25 17:17 18:10  25:5 31:23 32:16 33:11 34:17 38:  5,11 40:8 41:6 44:19 46:8 50:2 51:  4 57:1 58:18 62:17,25  <b>honors</b> <sup>[1]</sup> 65:3  <b>houses</b> <sup>[1]</sup> 58:20  <b>huge</b> <sup>[1]</sup> 57:16  <b>hypo</b> <sup>[1]</sup> 19:7  <b>hypothetical</b> <sup>[7]</sup> 3:16 5:22 11:1  13:22 14:5 15:18 31:15</p>	<p><b>intent</b> <sup>[11]</sup> 20:21,22 21:2,16,17 22:  4 54:12 56:17 63:14,15 64:20  <b>intentional</b> <sup>[1]</sup> 57:9  <b>intentionally</b> <sup>[2]</sup> 7:6 20:23  <b>intents</b> <sup>[1]</sup> 54:9  <b>interest</b> <sup>[8]</sup> 4:14,23 10:14 11:5 26:  9,10 31:25 33:19  <b>interests</b> <sup>[4]</sup> 32:13 33:8 35:15 62:  13  <b>interstate</b> <sup>[1]</sup> 5:24  <b>intervention</b> <sup>[1]</sup> 45:5  <b>intuitive</b> <sup>[1]</sup> 46:10  <b>involved</b> <sup>[1]</sup> 17:12  <b>involves</b> <sup>[1]</sup> 31:11  <b>isn't</b> <sup>[10]</sup> 16:21 22:4 24:22 28:25  30:22 53:13,18,21 59:8,8  <b>issue</b> <sup>[10]</sup> 4:6,10,11,18 7:11 10:23  11:8 30:11 32:23 34:22  <b>issues</b> <sup>[3]</sup> 30:19 37:12 40:3  <b>itself</b> <sup>[3]</sup> 21:25 52:4 60:8</p>	<p>11 47:22 52:2  <b>king's</b> <sup>[2]</sup> 13:24 63:22</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>label</b> <sup>[1]</sup> 41:2  <b>lack</b> <sup>[1]</sup> 3:23  <b>laid</b> <sup>[1]</sup> 44:25  <b>lander</b> <sup>[1]</sup> 56:6  <b>lander's</b> <sup>[1]</sup> 12:22  <b>language</b> <sup>[1]</sup> 38:10  <b>last</b> <sup>[2]</sup> 50:11 57:16  <b>late</b> <sup>[1]</sup> 59:7  <b>later</b> <sup>[1]</sup> 43:5  <b>laughter</b> <sup>[6]</sup> 6:4 13:14 40:25 44:14,  22 61:18  <b>launch</b> <sup>[1]</sup> 8:12  <b>law</b> <sup>[11]</sup> 5:5 17:23 20:10 21:1,6 26:  14 28:10 33:13 34:20 35:4 63:8  <b>lawful</b> <sup>[1]</sup> 26:17  <b>lay</b> <sup>[1]</sup> 36:21  <b>lead</b> <sup>[5]</sup> 10:4 50:5 53:25 54:2,7  <b>leading</b> <sup>[1]</sup> 42:25  <b>learn</b> <sup>[2]</sup> 8:1,11  <b>least</b> <sup>[4]</sup> 19:18 20:20 41:9 49:20  <b>leave</b> <sup>[2]</sup> 9:4 45:11  <b>leaving</b> <sup>[1]</sup> 3:25  <b>led</b> <sup>[2]</sup> 5:6 21:17  <b>left</b> <sup>[1]</sup> 9:24  <b>legal</b> <sup>[2]</sup> 24:9 42:19  <b>legislation</b> <sup>[1]</sup> 27:23  <b>legislative</b> <sup>[4]</sup> 8:24 30:8 59:22,25  <b>legislators</b> <sup>[2]</sup> 14:13 60:5  <b>legislators'</b> <sup>[1]</sup> 18:4  <b>legislature</b> <sup>[16]</sup> 7:3 12:9 20:3,22  23:3 24:6,16 26:20 28:23 32:12  33:5 40:18,21 58:12,15,20  <b>legislature's</b> <sup>[1]</sup> 61:22  <b>legislatures</b> <sup>[8]</sup> 14:18 15:4,11,12,  14 18:11 23:22 52:19  <b>legitimate</b> <sup>[2]</sup> 26:15 54:2  <b>less</b> <sup>[6]</sup> 5:6 17:2 34:11 45:10 49:16  57:9  <b>lesson</b> <sup>[2]</sup> 8:4,10  <b>lessons</b> <sup>[2]</sup> 8:2 56:11  <b>levels</b> <sup>[1]</sup> 53:23  <b>likelihood</b> <sup>[1]</sup> 47:19  <b>likely</b> <sup>[1]</sup> 34:7  <b>likes</b> <sup>[1]</sup> 39:17  <b>limit</b> <sup>[1]</sup> 45:5  <b>limited</b> <sup>[3]</sup> 6:19 30:14 63:18  <b>limits</b> <sup>[5]</sup> 33:13 46:3,3,4 61:2  <b>line</b> <sup>[5]</sup> 46:25 47:4,7,16 53:20  <b>lines</b> <sup>[6]</sup> 3:14 8:18 35:25 59:22 63:  12,13  <b>list</b> <sup>[3]</sup> 7:22 8:2,11  <b>litigation</b> <sup>[2]</sup> 22:11 52:2  <b>little</b> <sup>[10]</sup> 11:20 13:18 22:13,14 27:  3 30:12 50:18,20 51:18 55:14  <b>live</b> <sup>[5]</sup> 10:8 25:12 33:14 36:8 56:  12  <b>living</b> <sup>[2]</sup> 36:12 45:21  <b>localized</b> <sup>[1]</sup> 31:7  <b>locked</b> <sup>[2]</sup> 49:13 61:20  <b>longer</b> <sup>[2]</sup> 11:4 57:11</p>	<p><b>look</b> <sup>[11]</sup> 7:16 12:13,24 21:1,8 32:  23 40:13 59:15 60:1,1 64:15  <b>looked</b> <sup>[2]</sup> 43:12 50:17  <b>looking</b> <sup>[2]</sup> 42:20 49:23  <b>looks</b> <sup>[1]</sup> 49:7  <b>lose</b> <sup>[1]</sup> 39:20  <b>loses</b> <sup>[1]</sup> 40:20  <b>losing</b> <sup>[1]</sup> 44:4  <b>lost</b> <sup>[1]</sup> 40:16  <b>lot</b> <sup>[8]</sup> 18:8 21:20 32:17 37:1 45:2  49:5,5 56:10  <b>lower</b> <sup>[3]</sup> 22:13 54:19,19  <b>lulac</b> <sup>[4]</sup> 13:24 19:2 63:23 64:23</p>
<hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> <sup>[2]</sup> 34:5 46:10  <b>identified</b> <sup>[4]</sup> 7:20 18:21 23:24 50:  11  <b>identifies</b> <sup>[1]</sup> 19:3  <b>identify</b> <sup>[2]</sup> 23:1 49:4  <b>ignores</b> <sup>[1]</sup> 52:16  <b>illustrates</b> <sup>[1]</sup> 30:4  <b>immediately</b> <sup>[1]</sup> 7:25  <b>impair</b> <sup>[1]</sup> 33:7  <b>impaired</b> <sup>[1]</sup> 32:14  <b>impediment</b> <sup>[1]</sup> 61:13  <b>important</b> <sup>[3]</sup> 10:23 37:2 47:19  <b>impose</b> <sup>[1]</sup> 42:6  <b>impression</b> <sup>[1]</sup> 14:13  <b>inadequate</b> <sup>[1]</sup> 43:1  <b>inappropriate</b> <sup>[1]</sup> 43:13  <b>incentive</b> <sup>[1]</sup> 24:16  <b>including</b> <sup>[2]</sup> 7:25 33:8  <b>increase</b> <sup>[1]</sup> 19:12  <b>incumbent</b> <sup>[1]</sup> 54:22  <b>incumbents</b> <sup>[1]</sup> 54:1  <b>incursions</b> <sup>[1]</sup> 57:14  <b>indeed</b> <sup>[2]</sup> 19:1 58:2  <b>indefinite</b> <sup>[1]</sup> 29:5  <b>indications</b> <sup>[1]</sup> 60:8  <b>individual</b> <sup>[1]</sup> 24:24  <b>individual's</b> <sup>[1]</sup> 31:19  <b>individuals</b> <sup>[1]</sup> 27:23  <b>ingredients</b> <sup>[1]</sup> 50:20  <b>inherent</b> <sup>[1]</sup> 25:6  <b>inherently</b> <sup>[2]</sup> 18:23 21:25  <b>initial</b> <sup>[1]</sup> 56:4  <b>injure</b> <sup>[1]</sup> 27:25  <b>injury</b> <sup>[6]</sup> 10:12 31:1,6,11 35:14,14  <b>inquiry</b> <sup>[1]</sup> 13:23  <b>insofar</b> <sup>[1]</sup> 13:11  <b>instance</b> <sup>[2]</sup> 26:21 28:17  <b>instead</b> <sup>[2]</sup> 3:18 44:9  <b>institution</b> <sup>[1]</sup> 62:1  <b>integrity</b> <sup>[1]</sup> 38:2  <b>intelligent</b> <sup>[2]</sup> 37:11,20</p>	<hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>jackman</b> <sup>[1]</sup> 45:23  <b>job</b> <sup>[1]</sup> 47:12  <b>join</b> <sup>[1]</sup> 33:22  <b>judge</b> <sup>[1]</sup> 11:25  <b>judges</b> <sup>[2]</sup> 42:19 44:6  <b>judicial</b> <sup>[4]</sup> 3:12 15:11 39:14 45:5  <b>judicially-amenable</b> <sup>[1]</sup> 63:19  <b>jump</b> <sup>[2]</sup> 43:19 44:17  <b>jurisdiction</b> <sup>[3]</sup> 3:24 37:6,7  <b>jurisdictional</b> <sup>[1]</sup> 35:1  <b>justice</b> <sup>[116]</sup> 3:3,9 4:3 5:8,18,21 6:  2,24 8:15 9:23 10:18,19 11:7 14:  11 15:16,25 17:9,19,24 18:2,3,14,  19 19:6,19,25 20:8,14,17,25 21:10  22:2,5,6,7,20 23:11,25 24:12 25:  14,17 26:12,25 27:9,14 28:1,7,17  29:2,19,23,24 30:10,24 31:14 32:  5,22 33:25 34:10,24 35:18,19,20,  21 36:4,19 38:6 39:25 40:1,12 41:  1,13 42:3,11 44:15,20,24 46:2,5,9  47:2,6,8 48:9 49:22 50:5,14 51:10,  13,15,21,24 52:8,13,25 53:1,5,7,  11,18,21 54:14 55:18 56:22 58:7,  25 59:8,11,18 60:17 61:12 62:6,  22 63:1,7 65:4  <b>justice's</b> <sup>[2]</sup> 40:15 50:25  <b>justiciability</b> <sup>[1]</sup> 7:11  <b>justification</b> <sup>[6]</sup> 13:5,6 54:11,13,  15 56:16</p>	<hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>kagan</b> <sup>[16]</sup> 14:11 15:16 20:25 22:5  35:18,20,21 36:4 46:5,9 47:2,6,8  49:22 55:18 56:22  <b>kagan's</b> <sup>[1]</sup> 18:3  <b>keep</b> <sup>[1]</sup> 52:16  <b>kennedy</b> <sup>[10]</sup> 4:3 5:18 6:2 10:19  19:6,25 26:12,25 27:9,14  <b>kennedy's</b> <sup>[3]</sup> 34:24 50:5 63:7  <b>kept</b> <sup>[2]</sup> 17:9 55:9  <b>key</b> <sup>[1]</sup> 43:2  <b>kind</b> <sup>[7]</sup> 6:7 13:21 15:17 21:17 31:</p>	<hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>madison</b> <sup>[4]</sup> 1:17 10:9 30:21 32:  14  <b>main</b> <sup>[1]</sup> 36:22  <b>majorities</b> <sup>[2]</sup> 15:5 29:15  <b>majority</b> <sup>[11]</sup> 10:11 12:9 29:8,16  40:17,20 48:12,13 58:13,19,19  <b>malpractice</b> <sup>[1]</sup> 58:5  <b>man</b> <sup>[2]</sup> 37:11,20  <b>manageability</b> <sup>[1]</sup> 15:12  <b>manageable</b> <sup>[12]</sup> 3:12 11:9,24 13:  7,10 20:9,10,15 21:12 23:21 42:8,  20  <b>management</b> <sup>[1]</sup> 60:14  <b>mandated</b> <sup>[1]</sup> 19:25  <b>mandatory</b> <sup>[1]</sup> 37:7  <b>manner</b> <sup>[1]</sup> 49:25  <b>many</b> <sup>[10]</sup> 7:3,7 19:7 22:18 32:8 44:  1,3 54:16 55:19,20  <b>map</b> <sup>[39]</sup> 6:17,20 8:1 10:9 12:6 14:  6,7 16:6,13,15,20 17:5,10 23:5,6  24:20 30:2,6 35:25 36:16 38:25  40:10 41:8,25 44:7 46:23 47:3,22,  24 48:4,24 49:4,7 54:7,19 55:17,  21 57:3,23  <b>maps</b> <sup>[30]</sup> 3:21 7:19,21,23,24,24 8:  9 12:25 13:1 14:18 16:8,10,12 17:  12,14,20 19:3 20:11 27:24 38:14,  19 45:22 52:17 54:17,21 55:6,12,  19 56:10 58:9  <b>matches</b> <sup>[1]</sup> 57:3  <b>matter</b> <sup>[8]</sup> 1:12 3:22 23:17 24:5,9  39:23 59:18,20  <b>matters</b> <sup>[2]</sup> 29:12 59:25  <b>max-black</b> <sup>[2]</sup> 7:2,9  <b>max-republican</b> <sup>[1]</sup> 7:8  <b>maximize</b> <sup>[3]</sup> 18:6 19:23 49:14  <b>maximizing</b> <sup>[1]</sup> 46:1  <b>maximum</b> <sup>[1]</sup> 19:12  <b>mcghee</b> <sup>[4]</sup> 42:23 44:11 62:9,19  <b>mcghee's</b> <sup>[1]</sup> 43:22  <b>mean</b> <sup>[12]</sup> 14:1 15:19 23:1,19 25:  25 27:13 29:4 32:11 42:5 48:10  58:8 60:24  <b>means</b> <sup>[4]</sup> 28:15 29:3 35:8 41:19  <b>meantime</b> <sup>[1]</sup> 45:10  <b>measure</b> <sup>[8]</sup> 40:9 43:13,15 45:4,  16,16 47:19 52:23  <b>measured</b> <sup>[1]</sup> 51:6  <b>measures</b> <sup>[3]</sup> 42:24,25 47:9</p>

**measuring** [2] 47:17 51:11  
**median-mean** [1] 45:16  
**members** [3] 4:24 32:11,18  
**memory** [1] 45:21  
**mentioned** [4] 42:11 48:14 51:8 52:14  
**merely** [1] 3:18  
**merits** [4] 8:16 10:20 37:5 55:5  
**method** [3] 8:6 49:3 50:8  
**methods** [1] 14:24  
**metric** [1] 16:4  
**metrics** [5] 3:15 8:14 20:5 22:25 23:1  
**might** [8] 4:22,25 28:13,14 31:24 44:24 49:9 53:15  
**millions** [1] 54:16  
**milwaukee** [5] 9:10,17,24 10:24 32:13  
**milwaukee's** [1] 11:2  
**minimis** [3] 31:25 32:3,6  
**minor** [1] 29:7  
**minorities** [1] 15:5  
**minority** [5] 29:6,7 33:16 55:8 58:23  
**minus** [1] 37:17  
**minute** [2] 8:17 55:14  
**minutes** [2] 40:15 63:2  
**misha** [5] 1:17 2:3,13 3:7 63:4  
**misuse** [1] 61:6  
**mix** [1] 19:2  
**model** [1] 57:18  
**modest** [1] 55:14  
**moment** [1] 11:17  
**months** [1] 49:12  
**morning** [1] 3:4  
**most** [6] 16:16,20 24:20 29:16 38:18 45:20  
**motive** [1] 13:5  
**ms** [25] 18:16,19 19:14 20:2,13,16,18 21:1,19 22:2,3,22 23:19 24:2,12 25:4,15,23 26:18 27:3,12,16 28:5,14 29:9  
**much** [9] 14:2 18:11 22:19 40:10 47:4 50:21 51:22 57:9 62:5  
**murphy** [28] 1:19 2:6 18:16,17,19 19:14 20:2,13,16,18 21:1,19 22:2,3,22 23:19 24:2,12 25:4,15,23 26:18 27:3,12,16 28:5,14 29:9  
**must** [6] 26:15,20,28 28:10,11 37:22

## N

**name** [1] 47:4  
**naturally** [1] 36:25  
**nature** [2] 31:1,2  
**necessarily** [1] 28:15  
**necessary** [1] 34:7  
**need** [7] 22:9,18 23:12,13,14 41:2 50:8  
**needs** [1] 39:7  
**negate** [1] 58:23  
**negatives** [1] 15:14  
**neighbor** [1] 34:4  
**neutral** [9] 7:22 8:3,5,6 26:24 56:

11 57:4 63:12 64:24  
**neutrally** [2] 63:12,13  
**never** [8] 3:11 21:8 39:17 41:4 48:4,11,16 61:16  
**new** [3] 57:17 63:20 64:1  
**next** [5] 14:19 15:1 47:23 48:12 64:11  
**nineteenth** [1] 60:2  
**nobody** [1] 25:20  
**non-flippable** [1] 48:25  
**non-problem** [2] 62:20,25  
**non-starter** [1] 14:7  
**none** [1] 47:10  
**norm** [1] 58:2  
**north** [1] 31:16  
**northern** [1] 8:21  
**nothing** [10] 10:12 11:19,19 13:13 25:10 26:4 53:24 56:13 63:20,25  
**nullifies** [1] 30:3  
**number** [7] 19:12,23 20:4 47:13 52:17 60:20 61:1  
**numbers** [1] 23:15  
**numerous** [1] 43:22

## O

**obtain** [1] 14:25  
**obtained** [2] 44:8,10  
**october** [1] 1:10  
**offered** [1] 43:13  
**officials** [2] 3:19 8:21  
**often** [4] 6:9,14 14:20,21  
**ointment** [1] 53:16  
**okay** [7] 12:4,12,22 13:13 23:11 29:4 57:6  
**one** [52] 4:13 5:2 10:20,25 11:25 12:1,16,23 15:1,23 16:7 17:5,20 20:5,11,24 24:3 25:16,21 26:10 29:6 31:17 32:18 33:1 35:22 36:20 37:4,24 38:15,16 39:1 42:11 44:6 45:15,20,22 46:1 48:13 49:4,8,8 50:3,9 52:14 54:24 55:3,20 57:10 58:1,17,19 64:4  
**one-party** [6] 52:15,22 58:1,3,8 59:12  
**one-person** [1] 35:21  
**one-person/one-vote** [1] 60:18  
**one-third** [1] 52:15  
**one-vote** [1] 35:22  
**ones** [1] 48:1  
**only** [12] 4:21 10:5 14:19 15:1 19:1 24:8 35:24 36:14 40:6 50:13 62:1 64:4  
**opinion** [3] 21:21,22 28:18  
**opinions** [3] 21:22,23,23  
**opportunity** [2] 36:23 57:16  
**opposition** [1] 12:12  
**oral** [7] 1:12 2:2,5,9 3:7 18:17 29:21  
**order** [6] 14:24 15:4,6 18:6 22:9 23:17  
**other** [28] 4:15 5:12 12:6,10,13 13:5,6 14:24 19:16 20:4,12 21:3,5,20 25:22 32:18 34:8 38:15 47:18 50:6,20 51:7 52:9 54:6 56:7 58:22 60:

21 61:15  
**ought** [5] 34:22 35:16 41:22 56:2 60:9  
**out** [17] 5:20 9:24 13:8 16:9 17:14 24:13 25:1,16 32:1 34:6,24 36:21 37:24 45:22 48:8 49:25 56:23  
**outcome** [1] 42:1  
**outcomes** [1] 29:14  
**outlier** [3] 12:21 50:3 55:21  
**outliers** [1] 49:24  
**outlines** [1] 43:22  
**outside** [2] 10:17 32:4  
**over** [11] 12:15 21:6 29:17 33:20 37:18,23 47:3,23,24 48:5 49:9  
**overpopulated** [3] 35:23 36:8,13  
**overriding** [1] 19:11  
**own** [5] 4:21 7:17 19:5 36:15 43:22

## P

**packed** [1] 33:3  
**page** [2] 2:2 34:25  
**paint** [1] 62:6  
**palatable** [1] 38:7  
**paper** [6] 42:23,23 43:9,11 44:12,13  
**parameters** [1] 4:9  
**part** [8] 4:13 10:22 33:1,2,18,20 56:3,15  
**partial-partisan** [1] 31:9  
**particular** [3] 14:3 22:24 31:4  
**parties** [4] 12:7 26:1 34:12 41:10  
**partisan** [36] 8:4,8 12:5 16:11,12,15,16,22 17:15 19:4,17 20:6 22:14 23:6,7,10 25:10 26:5 28:16 35:7 38:13 41:8 43:16,16 45:16 46:22 49:25 50:17 54:7 56:24 62:13 63:14,15,24 64:20,24  
**partisanship** [1] 50:7  
**party** [45] 4:15,15,23 12:1,8,16 15:6 19:5,13,13 20:11 21:18 25:21 26:11,16,16 29:6 32:18,18,20 33:22,22 34:3,13,19,20 35:6 37:17,18,18,19 39:2 40:11,17,18,20 41:21,22 46:1 57:5 58:17,19,22 62:10 63:10  
**pass** [1] 30:1  
**past** [1] 29:17  
**paul** [3] 1:21 2:10 29:21  
**pennsylvania** [1] 47:25  
**people** [21] 5:12 10:23 17:11 25:7 28:25 29:12 32:4 33:14,19,22 34:1,12 35:13,13 36:11 38:23 44:1,4 56:9,12 57:24  
**percent** [16] 12:8,16,17,17 22:17 23:2 37:16 38:9 41:21,21,22,23 44:9 51:1 55:16 58:14  
**percentage** [2] 41:17,17  
**perfectly** [1] 20:15  
**period** [1] 29:5  
**permanent** [1] 48:25  
**persistence** [1] 13:21  
**persistent** [1] 12:15  
**person** [6] 6:18 16:7 35:22 36:14

37:13 38:15  
**person's** [1] 33:8  
**perspective** [1] 27:7  
**picture** [1] 62:7  
**pinch** [4] 50:23,23 51:18,19  
**place** [3] 21:6 31:7 55:10  
**places** [1] 32:17  
**plain** [1] 7:19  
**plaintiff** [4] 6:21 10:4,5 30:21  
**plaintiff's** [4] 3:15 7:17,19 64:12  
**plaintiffs** [11] 8:12 18:21 19:1 34:16,18 49:2 55:19 56:3 63:16,21 64:8  
**plan** [3] 7:2 16:9 25:18  
**please** [5] 3:10 18:20 29:25 46:6,7  
**plenty** [2] 20:25 25:7  
**plurality** [1] 21:23  
**plus** [1] 37:19  
**point** [10] 15:20 17:24 19:18 20:20 27:4 28:6,17 40:2 57:25 64:10  
**points** [2] 16:4 24:3  
**poked** [1] 16:3  
**polarized** [2] 39:12 57:25  
**political** [25] 3:24 6:10,21 11:11 12:7 18:23,24 19:5 26:1,7,11 28:2 30:17 32:2 39:19 41:4,24 42:5,19 45:7,12 53:25 55:13 56:8 57:20  
**politically** [2] 3:14 28:12  
**politicians** [3] 3:13 18:5 61:16  
**politics** [5] 6:9 7:13 21:24 25:11 37:2  
**polls** [1] 18:8  
**population** [1] 36:17  
**positive** [2] 13:8 28:16  
**positives** [2] 15:13 23:2  
**possibility** [1] 58:24  
**possible** [5] 7:4 10:9 19:10 30:5 47:16  
**possibly** [2] 6:16 13:10  
**power** [5] 15:6 21:18 29:1 60:4 61:6  
**practical** [1] 24:10  
**precious** [2] 24:15,23  
**precise** [1] 63:18  
**predictable** [1] 39:12  
**predicted** [1] 48:10  
**predicting** [1] 48:18  
**predictions** [1] 48:10  
**predominate** [1] 8:22  
**preferred** [1] 37:22  
**premise** [1] 29:10  
**preordained** [1] 24:20  
**presented** [4] 47:10 63:17,20 64:22  
**presenting** [1] 48:2  
**present** [2] 42:14,16  
**pressuring** [1] 9:3  
**pretty** [8] 5:9 14:14 15:19 16:19 40:23 47:4 52:24 59:25  
**prevent** [1] 32:18  
**previously** [4] 17:3 42:25,25 51:16  
**primary** [1] 64:9  
**principle** [5] 19:15 41:5 46:11,13,

<p>17  <b>principles</b> [3] 17:7 18:1 19:11  <b>prior</b> [1] 7:25  <b>probably</b> [5] 9:16 19:6 27:19 50:3 57:18  <b>problem</b> [18] 5:20,25 7:9 22:4,14, 15 23:8 26:22 36:22 37:10 39:6,9, 15 60:23 61:4,11,19 62:3  <b>problems</b> [4] 3:17 7:12 22:23 54: 12  <b>proceed</b> [1] 36:25  <b>process</b> [4] 17:12 23:23 48:23 54: 25  <b>produce</b> [2] 54:19 56:3  <b>produced</b> [1] 55:5  <b>produces</b> [1] 28:23  <b>professor</b> [3] 13:24 45:23 63:22  <b>projections</b> [1] 3:17  <b>promoting</b> [1] 62:13  <b>properly</b> [1] 64:23  <b>proportional</b> [5] 41:3,7,14,15,18  <b>proportions</b> [1] 48:7  <b>proposal</b> [1] 54:16  <b>proposed</b> [1] 51:16  <b>proposing</b> [1] 64:3  <b>protect</b> [1] 39:18  <b>protection</b> [8] 4:10 27:1,11,19 53: 25 54:22 59:4,16  <b>prove</b> [1] 16:21  <b>proved</b> [1] 64:7  <b>proven</b> [2] 18:9 20:7  <b>provide</b> [3] 22:20 55:19 60:5  <b>provision</b> [1] 59:15  <b>public</b> [2] 3:19 42:10  <b>publishes</b> [2] 42:22,23  <b>punished</b> [1] 34:20  <b>purpose</b> [3] 20:24 35:4,10  <b>purposes</b> [1] 31:21  <b>pursuant</b> [1] 40:4  <b>pushed</b> [3] 46:3,3,4  <b>put</b> [8] 8:25 9:2 10:7 16:1 26:2 42: 1  <b>putting</b> [1] 23:22</p>	<p><b>random</b> [1] 56:10  <b>randomly</b> [2] 55:6,11  <b>range</b> [1] 12:15  <b>rapidly</b> [1] 62:11  <b>rather</b> [3] 26:11 36:9 59:15  <b>ratios</b> [1] 3:16  <b>react</b> [1] 11:18  <b>reaction</b> [1] 42:10  <b>read</b> [2] 11:15,21  <b>real</b> [3] 13:1 22:15 39:6  <b>reality</b> [1] 25:25  <b>really</b> [10] 24:14 27:5,8 29:2 31:21 39:8,23 45:5 57:14,15  <b>reason</b> [5] 4:17 14:3,8 35:6 40:16  <b>reasons</b> [4] 17:5 26:4 34:2 65:1  <b>rebuttal</b> [2] 2:12 63:4  <b>recognize</b> [1] 14:1  <b>record</b> [2] 15:24 55:24  <b>recycled</b> [1] 63:25  <b>redistricting</b> [7] 8:13 12:2 38:19 58:15 62:12,20 64:14  <b>redrawn</b> [1] 46:23  <b>reducing</b> [2] 11:23 49:15  <b>reflect</b> [1] 26:7  <b>regard</b> [2] 13:20 14:9  <b>regarding</b> [1] 6:24  <b>region</b> [1] 33:14  <b>regulate</b> [3] 60:14,23 61:6  <b>rejected</b> [1] 64:8  <b>relationship</b> [1] 6:1  <b>relative</b> [1] 43:14  <b>relatively</b> [1] 41:10  <b>reliably</b> [1] 30:6  <b>relied</b> [1] 51:17  <b>rely</b> [4] 18:8 50:16 61:8,9  <b>remaining</b> [1] 63:3  <b>remedy</b> [4] 39:15 57:2,3,7  <b>reminds</b> [1] 50:18  <b>remotely</b> [2] 41:20 55:16  <b>reno</b> [1] 31:4  <b>replicate</b> [1] 39:4  <b>representation</b> [6] 41:3,7,14,16, 19 60:7  <b>representational</b> [2] 35:11 63:17  <b>representatives</b> [2] 34:5 58:22  <b>republican</b> [9] 4:25 7:7 9:2 24:19 42:14 58:13 59:1,6,13  <b>republicans</b> [11] 5:1,6 8:22 19:23 29:15 32:9 37:9,23 48:16 58:10, 11  <b>require</b> [1] 55:19  <b>required</b> [1] 20:3  <b>requirement</b> [5] 17:22 26:19 54: 10,10,11  <b>requirements</b> [1] 54:18  <b>researcher</b> [2] 42:22 43:9  <b>resemblance</b> [1] 7:5  <b>reserve</b> [1] 18:12  <b>resources</b> [1] 26:2  <b>respect</b> [4] 9:5 12:21 23:20 29:9  <b>respond</b> [1] 13:12  <b>respondents</b> [1] 4:5  <b>response</b> [2] 13:11 38:12  <b>responses</b> [1] 25:5</p>	<p><b>responsiveness</b> [2] 43:1,12  <b>rest</b> [1] 18:11  <b>result</b> [6] 19:13 24:19,20,24 25:9 33:3  <b>results</b> [1] 14:25  <b>reverse</b> [1] 65:2  <b>revise</b> [1] 59:22  <b>revive</b> [1] 59:5  <b>revolution</b> [2] 8:13 57:22  <b>reynolds</b> [2] 36:3 60:19  <b>rights</b> [5] 35:11 54:3,23 55:2 63:17  <b>road</b> [1] 15:2  <b>roadsides</b> [2] 9:1,3  <b>roberts</b> [18] 3:3 5:8 18:14 29:19, 23 30:10 31:14 33:25 34:10 35:19 36:19 38:6 40:1 41:1,13 48:9 63:1 65:4  <b>room</b> [1] 49:13  <b>rosetta</b> [2] 43:3 62:15  <b>rough</b> [1] 41:9  <b>roughly</b> [1] 23:2  <b>rub</b> [1] 50:19  <b>rule</b> [3] 11:2 30:13 59:12  <b>ruling</b> [1] 38:8  <b>run</b> [2] 54:16 61:7  <b>runner</b> [1] 44:10  <b>running</b> [1] 24:13</p>	<p>57:16,23 61:12 62:18  <b>seem</b> [2] 40:22 51:25  <b>seeming</b> [1] 39:19  <b>seems</b> [8] 5:16 15:3 20:14 32:6,14 38:7 40:18 47:3  <b>seen</b> [1] 39:17  <b>seminal</b> [1] 62:8  <b>senate</b> [3] 1:20 2:7 18:18  <b>sense</b> [1] 27:22  <b>sensitivity</b> [3] 14:23 47:21 48:22  <b>sentence</b> [1] 62:18  <b>serious</b> [7] 38:2 39:8,9 45:6,11 57: 14,19  <b>set</b> [2] 22:15 53:16  <b>seven</b> [1] 49:20  <b>severe</b> [1] 56:17  <b>shall</b> [1] 19:9  <b>shape</b> [1] 23:14  <b>shaw</b> [1] 31:3  <b>shift</b> [1] 3:18  <b>show</b> [2] 56:9 62:10  <b>showing</b> [1] 6:17  <b>shown</b> [1] 43:12  <b>shows</b> [3] 10:12 12:18 64:17  <b>side</b> [1] 52:9  <b>sigma</b> [3] 37:16,17,18  <b>sign</b> [3] 10:21,21 31:15  <b>significantly</b> [1] 17:1  <b>signs</b> [5] 8:25 9:2,6 31:17 32:10  <b>simply</b> [3] 8:5 40:5 41:20  <b>sims</b> [1] 60:20  <b>since</b> [8] 19:2 36:2,18 42:17,18 57: 23 60:21 64:23  <b>single</b> [6] 4:20 6:19 14:1,2 16:3 48: 18  <b>situation</b> [2] 31:6 33:14  <b>situations</b> [1] 33:10  <b>size</b> [1] 23:14  <b>slicing</b> [1] 57:24  <b>small</b> [2] 47:23 62:11  <b>smith</b> [63] 1:21 2:10 29:21,23,24 30:24 31:23 32:16 33:11 34:9,15 35:18,19 36:1,6,19 38:5,11 39:25 40:8 41:6,15 42:3 44:18,23 46:5,7 47:1,5,8 48:21 49:22 50:2,14 51:4, 12,14,20,23 52:7,12 53:2,6,9,12, 20 54:5 55:1,22 57:1 58:7,18,25 59:3,10,17 60:11,19 61:15,19 62: 17,24 63:2  <b>so-called</b> [1] 7:1  <b>social</b> [8] 3:15 8:14 11:10,21 16:2, 4 45:13 56:20  <b>society</b> [1] 25:2  <b>sociological</b> [1] 40:7  <b>solicitor</b> [1] 1:17  <b>solve</b> [3] 3:17 5:24 62:2  <b>solved</b> [1] 26:22  <b>somebody</b> [3] 12:25 31:17 46:21  <b>someone</b> [3] 9:20 10:16,16  <b>someplace</b> [2] 8:21 50:1  <b>sometimes</b> [3] 21:3 26:10 34:1  <b>somewhat</b> [2] 55:4 57:5  <b>sophisticated</b> [2] 15:8 39:10  <b>sorry</b> [4] 9:23 15:25 46:6 53:20</p>
<b>Q</b>			
<p><b>question</b> [24] 4:1 6:25 8:18 12:14 18:3 19:20 22:7,20 26:13 27:8,12, 15 40:16 42:4 44:17,18,21 45:25 46:12,14 53:1 63:7,13,16  <b>questions</b> [5] 13:10 23:12 43:21, 23 44:16  <b>quite</b> [5] 11:12 12:11 25:24 26:23 62:19</p>			
<b>R</b>			
<p><b>race</b> [7] 6:9,25 7:14 31:6 32:23 33: 21 48:18  <b>races</b> [1] 25:25  <b>racial</b> [6] 6:18 30:14,15 31:3,12 38: 16  <b>racially</b> [1] 6:11  <b>raise</b> [4] 5:17 9:7,11 30:18  <b>raised</b> [3] 6:14 37:1,3  <b>raises</b> [1] 7:12</p>			



**sort** <sup>[4]</sup> 5:4 11:1 12:17 57:4  
**sotomayor** <sup>[8]</sup> 15:25 17:9,19,24  
 28:1,7 29:2 46:2  
**sound** <sup>[1]</sup> 38:9  
**sounds** <sup>[2]</sup> 40:14 41:13  
**south** <sup>[1]</sup> 31:18  
**southern** <sup>[1]</sup> 10:22  
**specific** <sup>[1]</sup> 59:14  
**specifically** <sup>[1]</sup> 27:24  
**specify** <sup>[1]</sup> 50:24  
**spend** <sup>[1]</sup> 11:14  
**spent** <sup>[1]</sup> 49:11  
**stack** <sup>[2]</sup> 24:15 29:4  
**stacked** <sup>[1]</sup> 29:11  
**stage** <sup>[7]</sup> 54:13,13,15 56:16 57:2,8  
 59:7  
**standard** <sup>[11]</sup> 18:22 20:9,10,15 21:  
 12 22:12 42:7,21 43:7 63:19 64:  
 25  
**standards** <sup>[4]</sup> 3:12 11:9 15:12 45:  
 8  
**standing** <sup>[21]</sup> 4:5 8:18 9:6,11,15,  
 25 10:2 27:8,13,15 30:11,25 31:  
 21 32:3,21 33:13 34:16,22 35:20,  
 23 36:14  
**start** <sup>[1]</sup> 23:7  
**started** <sup>[3]</sup> 16:9 24:7 55:8  
**starting** <sup>[1]</sup> 24:3  
**state** <sup>[48]</sup> 1:19 2:7 4:13 5:13,15,19,  
 20 10:22 13:22 17:23 18:18 19:8,  
 8 20:1 22:9 23:17 26:14 28:8 29:  
 25 30:5,16,23 32:20,24 33:1,2,15,  
 19,20 34:20 35:4,25 37:25 39:2  
 52:15,22 55:9,25 58:3,8 59:22,24,  
 24 60:5,14,15 61:8 63:9  
**state's** <sup>[1]</sup> 55:7  
**state-wide** <sup>[1]</sup> 31:20  
**stated** <sup>[1]</sup> 5:21  
**statement** <sup>[1]</sup> 35:1  
**states** <sup>[6]</sup> 1:1,13 45:21 51:25 61:  
 23 62:2  
**statewide** <sup>[6]</sup> 3:16,24 6:22 30:19  
 34:14 38:19  
**statistics** <sup>[1]</sup> 48:19  
**status** <sup>[2]</sup> 38:2 58:23  
**statute** <sup>[6]</sup> 19:8 20:19 21:2,8,11,14  
**steak** <sup>[1]</sup> 50:19  
**step** <sup>[3]</sup> 11:25 12:5 59:24  
**stepped** <sup>[2]</sup> 45:13 56:21  
**stepping** <sup>[1]</sup> 60:9  
**steps** <sup>[1]</sup> 14:1  
**stereotypical** <sup>[1]</sup> 34:11  
**stereotyping** <sup>[2]</sup> 33:21 34:1  
**stigmatize** <sup>[1]</sup> 63:10  
**still** <sup>[4]</sup> 4:18 6:6 40:21 52:25  
**stone** <sup>[2]</sup> 43:3 62:15  
**stop** <sup>[1]</sup> 14:12  
**straightforward** <sup>[1]</sup> 5:9  
**strategy** <sup>[1]</sup> 32:11  
**street** <sup>[2]</sup> 37:12,20  
**strength** <sup>[1]</sup> 31:20  
**striking** <sup>[1]</sup> 7:21  
**strong** <sup>[2]</sup> 4:6,15  
**strongly** <sup>[2]</sup> 4:5 26:10

**struck** <sup>[1]</sup> 62:8  
**structural** <sup>[1]</sup> 5:25  
**stuck** <sup>[1]</sup> 53:1  
**studied** <sup>[2]</sup> 7:19 45:23  
**study** <sup>[4]</sup> 55:3 64:12,15,16  
**stuff** <sup>[2]</sup> 11:22,22  
**subject** <sup>[2]</sup> 22:11 46:16  
**subjected** <sup>[1]</sup> 64:4  
**subjecting** <sup>[1]</sup> 35:5  
**submitted** <sup>[2]</sup> 13:23 65:5  
**substantive** <sup>[3]</sup> 45:3 46:12 51:9  
**subtracting** <sup>[1]</sup> 44:8  
**success** <sup>[1]</sup> 18:7  
**suffer** <sup>[1]</sup> 36:12  
**sufficiently** <sup>[2]</sup> 32:2 42:9  
**suggest** <sup>[2]</sup> 24:2 53:10  
**suggested** <sup>[2]</sup> 13:25 22:24  
**suggesting** <sup>[4]</sup> 15:17 49:23,24 62:  
 12  
**suggestion** <sup>[1]</sup> 13:25  
**suit** <sup>[1]</sup> 43:6  
**supplemental** <sup>[2]</sup> 7:18 64:16  
**support** <sup>[1]</sup> 34:13  
**supporters** <sup>[1]</sup> 34:19  
**suppose** <sup>[6]</sup> 4:7 8:20 10:21 19:7  
 33:8 58:12  
**supposed** <sup>[5]</sup> 23:4 24:8 50:22,24  
 52:1  
**supreme** <sup>[3]</sup> 1:1,13 37:22  
**suspect** <sup>[2]</sup> 7:13 13:7  
**swing** <sup>[2]</sup> 47:23 49:5  
**symmetry** <sup>[14]</sup> 8:5 22:14,25 23:7  
 41:8,23 43:1,11 46:10,22 50:18  
 51:6,8,11  
**sympathetic** <sup>[1]</sup> 11:12  
**system** <sup>[5]</sup> 4:21 28:4,20 32:7 38:  
 22  
**systematic** <sup>[1]</sup> 32:17  
**systematically** <sup>[1]</sup> 49:15

**T**

**table** <sup>[1]</sup> 52:21  
**tactics** <sup>[2]</sup> 64:11,19  
**talked** <sup>[2]</sup> 10:22 13:18  
**targeted** <sup>[1]</sup> 35:12  
**task** <sup>[1]</sup> 18:23  
**teach** <sup>[1]</sup> 56:10  
**technicalities** <sup>[1]</sup> 13:9  
**technique** <sup>[1]</sup> 48:21  
**techniques** <sup>[3]</sup> 15:7 18:4,5  
**technologies** <sup>[1]</sup> 55:23  
**technology** <sup>[1]</sup> 14:17  
**term** <sup>[1]</sup> 61:1  
**terms** <sup>[3]</sup> 28:23 41:10 64:22  
**test** <sup>[13]</sup> 13:3 19:3 22:24 50:18 51:  
 15,17 52:3,10 54:9 64:4,6,8,9  
**tested** <sup>[2]</sup> 43:20 49:2  
**testified** <sup>[1]</sup> 10:5  
**testimony** <sup>[2]</sup> 10:4,6  
**testing** <sup>[3]</sup> 14:24 47:21 48:22  
**tests** <sup>[5]</sup> 48:1 51:7,11 53:3 64:3  
**texas** <sup>[3]</sup> 5:1,5,6  
**textual** <sup>[1]</sup> 60:7  
**theory** <sup>[2]</sup> 43:23 61:11

**there's** <sup>[9]</sup> 20:21 25:25 27:10 33:  
 15 44:21 45:24 46:21 58:19 60:12  
**therefore** <sup>[2]</sup> 32:12 47:16  
**they've** <sup>[2]</sup> 29:15 63:25  
**thinking** <sup>[2]</sup> 14:19,20  
**third** <sup>[3]</sup> 13:16,20 52:5  
**thorough** <sup>[1]</sup> 34:18  
**though** <sup>[3]</sup> 29:6 49:17 59:9  
**thousands** <sup>[2]</sup> 12:24,25  
**three** <sup>[8]</sup> 16:10,11 42:13,15 45:14  
 47:9 53:3,8  
**three-judge** <sup>[1]</sup> 42:12  
**threshold** <sup>[2]</sup> 3:22 46:24  
**threw** <sup>[1]</sup> 17:14  
**throughout** <sup>[1]</sup> 5:15  
**throw** <sup>[1]</sup> 13:8  
**throwing** <sup>[2]</sup> 40:4 52:16  
**thumb** <sup>[1]</sup> 42:1  
**tinkered** <sup>[2]</sup> 49:18,18  
**together** <sup>[2]</sup> 6:15 33:23  
**tolerate** <sup>[1]</sup> 18:25  
**tool** <sup>[1]</sup> 62:13  
**town** <sup>[2]</sup> 8:20 9:3  
**towns** <sup>[1]</sup> 32:8  
**traditional** <sup>[10]</sup> 17:6,12,13 18:1 19:  
 10,21 24:4 28:11 54:18 55:7  
**translate** <sup>[1]</sup> 41:11  
**treat** <sup>[1]</sup> 12:6  
**treatment** <sup>[1]</sup> 35:6  
**treats** <sup>[1]</sup> 41:9  
**trial** <sup>[1]</sup> 64:6  
**tries** <sup>[1]</sup> 16:14  
**troubling** <sup>[1]</sup> 17:2  
**true** <sup>[9]</sup> 4:3 17:7 36:1 47:5 52:7,7  
 53:19,22 61:23  
**try** <sup>[3]</sup> 18:6 23:25 59:5  
**trying** <sup>[3]</sup> 49:13,25 59:9  
**tseytlin** <sup>[24]</sup> 1:17 2:3,13 3:6,7,9 4:  
 16 5:23 6:5 7:10 9:13 10:1,25 13:  
 15 15:10,21 16:24 17:16,21,25 18:  
 10 63:2,4,6  
**tuesday** <sup>[1]</sup> 1:10  
**turmeric** <sup>[1]</sup> 50:19  
**turn** <sup>[1]</sup> 13:10  
**turned** <sup>[2]</sup> 6:18,20  
**turns** <sup>[1]</sup> 7:11  
**twenty-sixth** <sup>[1]</sup> 60:2  
**two** <sup>[14]</sup> 8:1 12:5 17:4 23:12,13 33:  
 10 40:14 41:9 42:13,14 44:1 45:3  
 49:13 51:7  
**two-sentence** <sup>[1]</sup> 35:2

**U**

**u.s** <sup>[1]</sup> 5:7  
**ultimate** <sup>[1]</sup> 19:15  
**ultimately** <sup>[1]</sup> 6:13  
**unanswered** <sup>[1]</sup> 43:23  
**uncertainties** <sup>[1]</sup> 54:25  
**unconstitutional** <sup>[7]</sup> 16:22 22:1  
 27:17 28:13 50:7,12 53:15  
**uncontested** <sup>[2]</sup> 25:20,25  
**uncovered** <sup>[1]</sup> 3:11  
**under** <sup>[7]</sup> 10:9 14:6,13 38:15,16,17  
 60:23

**underlying** <sup>[1]</sup> 51:8  
**underpopulated** <sup>[1]</sup> 36:9  
**understand** <sup>[7]</sup> 11:12 21:4,5 28:  
 22,25 29:3 52:3  
**understanding** <sup>[1]</sup> 54:20  
**undisputed** <sup>[1]</sup> 17:11  
**unequivocal** <sup>[1]</sup> 48:5  
**unfair** <sup>[1]</sup> 40:10  
**uniform** <sup>[1]</sup> 64:25  
**united** <sup>[4]</sup> 1:1,13 45:21 62:1  
**unprecedented** <sup>[1]</sup> 48:7  
**unusual** <sup>[1]</sup> 60:12  
**unusually** <sup>[1]</sup> 52:23  
**up** <sup>[12]</sup> 8:25 9:2 31:16 44:10 45:14  
 48:8 49:17,20 52:6 56:21 57:8 61:  
 21  
**useful** <sup>[1]</sup> 56:19  
**using** <sup>[5]</sup> 24:19 30:1 54:17 55:6 60:  
 12

**V**

**vague** <sup>[1]</sup> 4:23  
**valid** <sup>[1]</sup> 43:15  
**valuable** <sup>[1]</sup> 28:24  
**value** <sup>[1]</sup> 28:2  
**values** <sup>[2]</sup> 28:16,23  
**variety** <sup>[2]</sup> 34:2 56:19  
**various** <sup>[2]</sup> 54:6 64:3  
**versus** <sup>[1]</sup> 3:5  
**vieth** <sup>[10]</sup> 17:4,8 28:18 34:25 44:24  
 47:11,11,25 48:14 49:10  
**view** <sup>[1]</sup> 34:7  
**viewpoint** <sup>[1]</sup> 27:22  
**views** <sup>[1]</sup> 35:7  
**violate** <sup>[2]</sup> 59:12 63:9  
**violating** <sup>[1]</sup> 46:17  
**violation** <sup>[7]</sup> 20:7 27:1,2,19,21 31:  
 2 46:22  
**virtue** <sup>[1]</sup> 47:9  
**vote** <sup>[22]</sup> 3:16 4:19,21 9:18,19,20  
 12:9 24:15,17,23 25:15 29:12,16  
 30:21 31:20 33:12 34:2,12 36:12  
 38:16 39:24 60:6  
**voted** <sup>[2]</sup> 44:2,4  
**voter** <sup>[5]</sup> 9:10 10:13 24:17 32:13,  
 25  
**voters** <sup>[9]</sup> 9:9,16,17,24 28:21 35:5  
 39:21,22 61:21  
**voters'** <sup>[1]</sup> 35:11  
**votes** <sup>[20]</sup> 12:15 19:2,12 29:7,8 30:  
 21 31:12 37:17,18,19,19 40:17,21  
 41:11,18 43:14 44:8,9,10 48:8  
**voting** <sup>[7]</sup> 14:16 25:8 30:23 47:23  
 54:3,23 55:2  
**vs** <sup>[3]</sup> 60:19,20 61:2

**W**

**wait** <sup>[1]</sup> 9:23  
**walk** <sup>[1]</sup> 22:19  
**wants** <sup>[1]</sup> 33:1  
**washington** <sup>[3]</sup> 1:9,19,21  
**wasted** <sup>[4]</sup> 19:2 37:17,18 43:14  
**way** <sup>[23]</sup> 5:16,21 7:15 11:23 16:7  
 23:9 24:16 25:16 26:16 27:25 28:

21 30:22 36:2,18 38:21 41:25 42:  
13 45:4 49:9 56:5,23 58:4 62:4  
**ways** <sup>[5]</sup> 38:15 45:14 46:15,15 56:  
20  
**weak** <sup>[1]</sup> 4:15  
**whereas** <sup>[1]</sup> 18:12  
**whereupon** <sup>[1]</sup> 65:6  
**whether** <sup>[8]</sup> 12:18 24:18 37:8 39:  
24 52:23 54:17 55:20 56:2  
**white** <sup>[1]</sup> 35:1  
**whitford** <sup>[2]</sup> 1:6 3:5  
**who's** <sup>[1]</sup> 30:8  
**whole** <sup>[4]</sup> 30:19 40:2 54:25 56:19  
**wide** <sup>[1]</sup> 34:2  
**will** <sup>[19]</sup> 3:3 4:7 6:14 8:16 14:25 25:  
16 32:11,14 36:25 37:3,4,7,14 55:  
24 56:14 58:1,7 63:14 64:11  
**william** <sup>[1]</sup> 1:6  
**win** <sup>[5]</sup> 25:22 37:9,9,13,14  
**winding** <sup>[1]</sup> 52:6  
**winner** <sup>[1]</sup> 44:9  
**winning** <sup>[1]</sup> 44:2  
**wins** <sup>[1]</sup> 40:17  
**wisconsin** <sup>[21]</sup> 1:17,19 2:7 4:25 7:  
25 8:21 10:15,16,17 18:18 25:17  
29:14 30:5 31:16 34:21 39:23 55:  
6,14 57:18 58:6 61:21  
**wisconsinites** <sup>[1]</sup> 10:14  
**wish** <sup>[5]</sup> 11:18,18 13:11,12,12  
**within** <sup>[2]</sup> 37:6 41:9  
**without** <sup>[2]</sup> 40:22 61:22  
**won** <sup>[4]</sup> 29:15,16 48:2,17  
**word** <sup>[2]</sup> 31:10 50:2  
**words** <sup>[2]</sup> 12:6,13  
**work** <sup>[2]</sup> 33:23 38:23  
**workable** <sup>[1]</sup> 18:22  
**worked** <sup>[2]</sup> 16:17,17  
**world** <sup>[3]</sup> 14:16 20:3 46:20  
**worry** <sup>[3]</sup> 15:11,13,14  
**worse** <sup>[4]</sup> 62:3,5 64:17,18  
**worst** <sup>[4]</sup> 7:20,21 13:2 45:22  
**worth** <sup>[1]</sup> 23:13

---

**Y**

---

**year** <sup>[2]</sup> 43:5 49:8  
**years** <sup>[12]</sup> 6:25 7:20 15:1 23:12 29:  
5,17 38:20 39:3,3,5 42:17 43:8  
**yield** <sup>[1]</sup> 52:5  
**young** <sup>[2]</sup> 42:22 43:9

---

**Z**

---

**zero** <sup>[2]</sup> 54:8 57:7