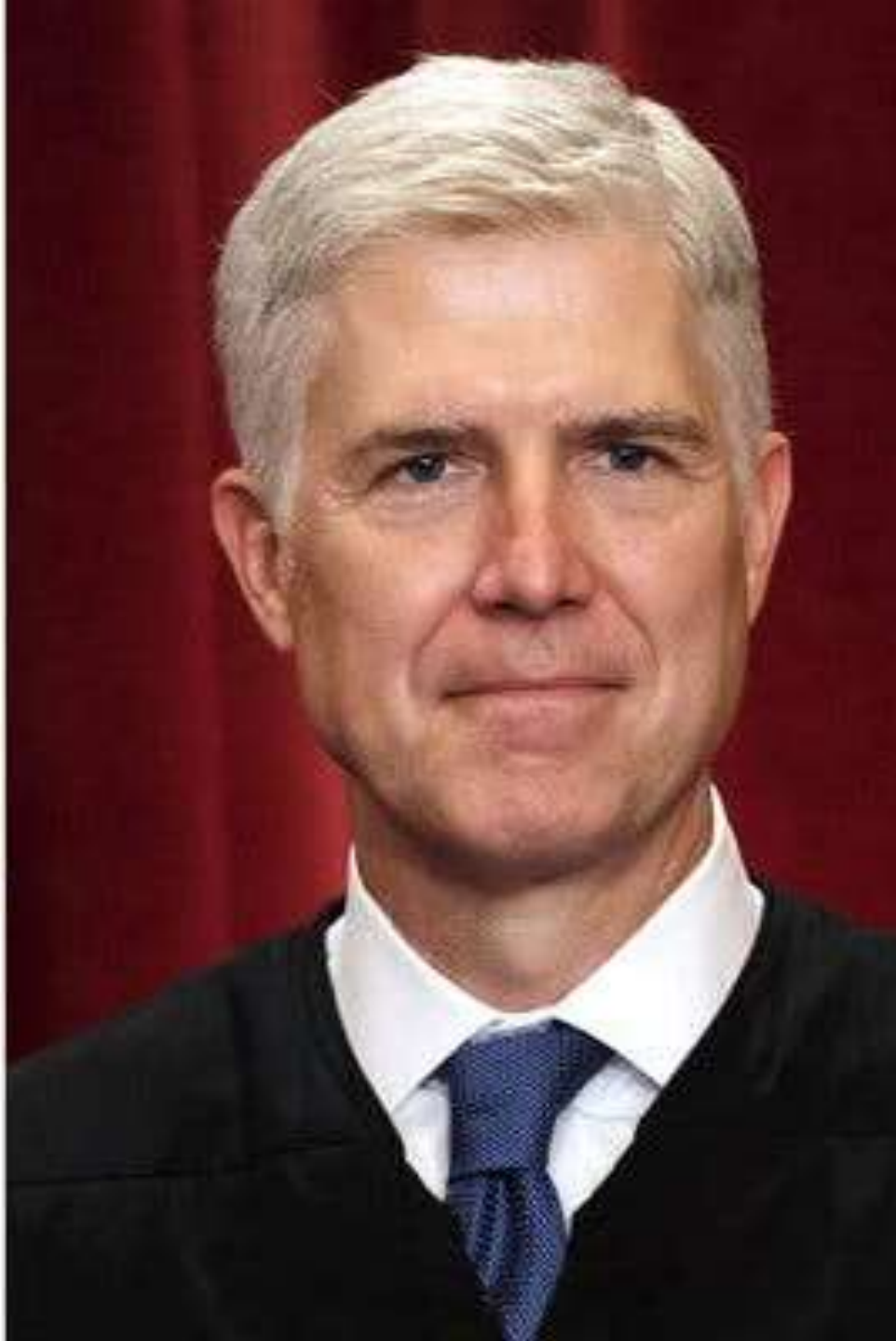
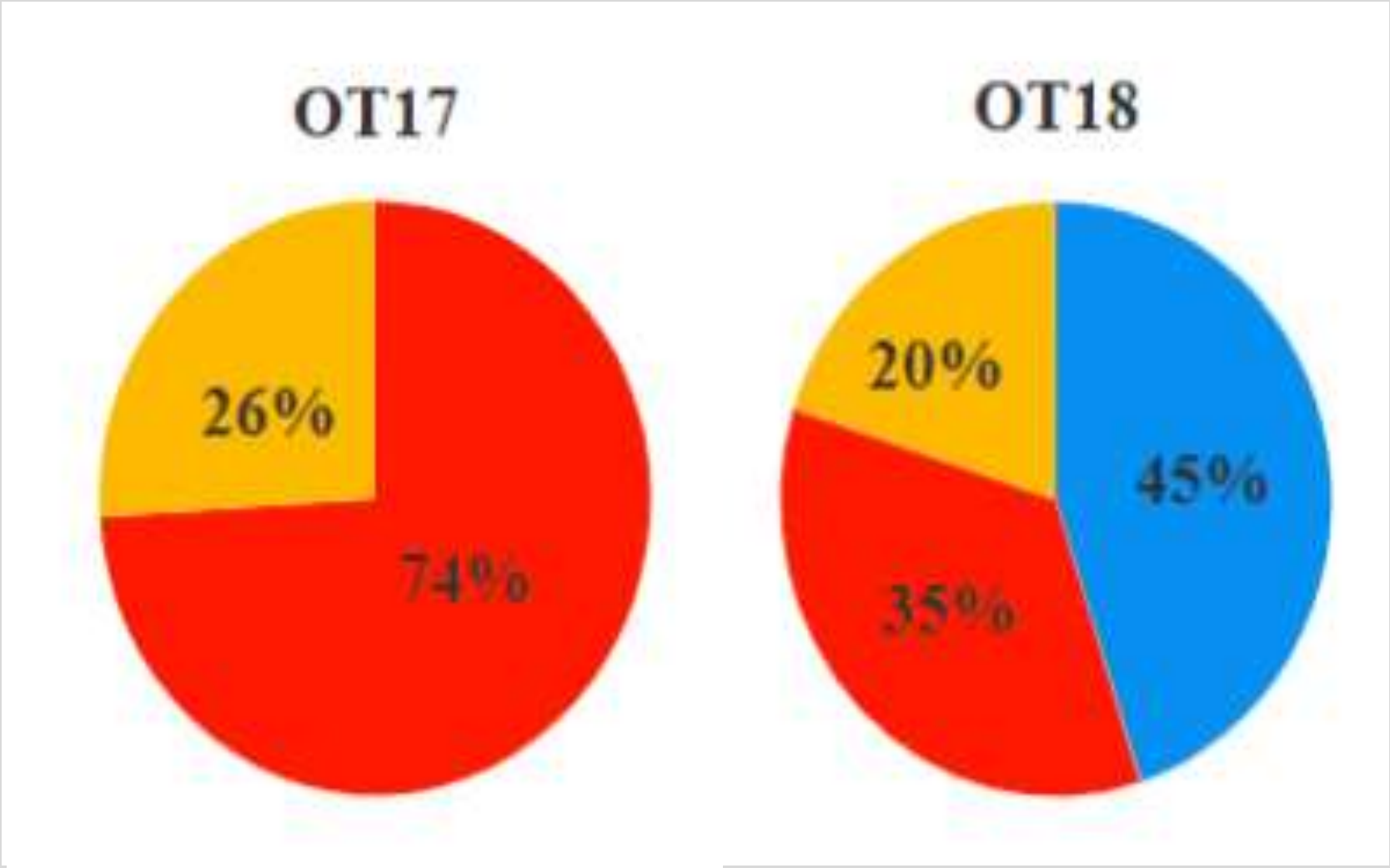
Supreme Court Review-Preview

Professors Jody Freeman & Richard Lazarus
Harvard Law School Environmental & Energy Law Program
Environmental Law Institute

September 26, 2019

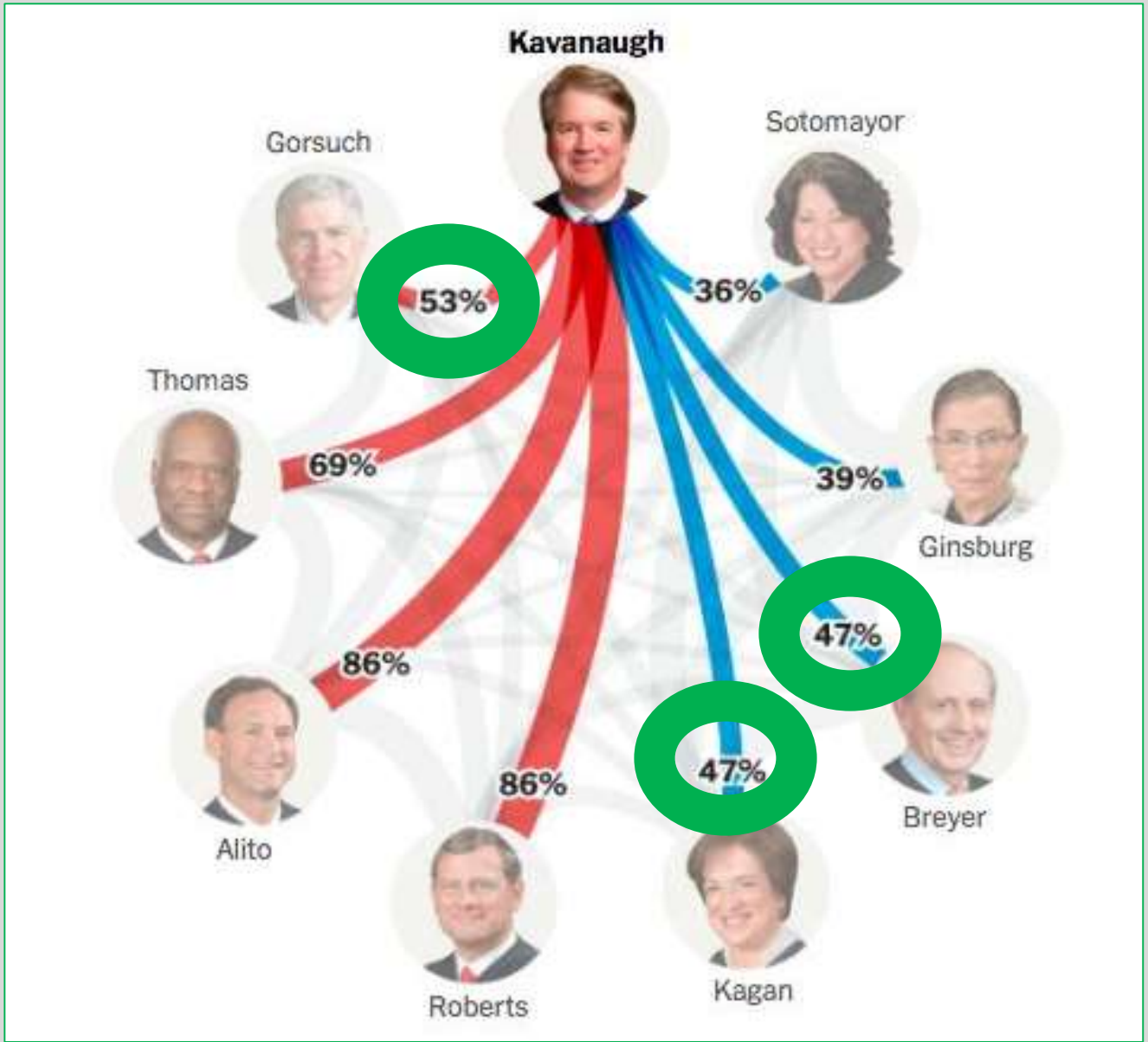




RED → Roberts, Thomas, Alito, Thomas Plus Kennedy/Kavanaugh
BLUE → Ginsburg, Breyer, Sotomayor, Kagan, Plus Another Justice
ORANGE → Another lineup

Source: SCOTUSBlog StatPack OT18

Kavanaugh Agreement in Non-Unanimous Cases



The Chief in a Kennedy/O'Connor-Less Court

The New York Times

NEWS ANALYSIS

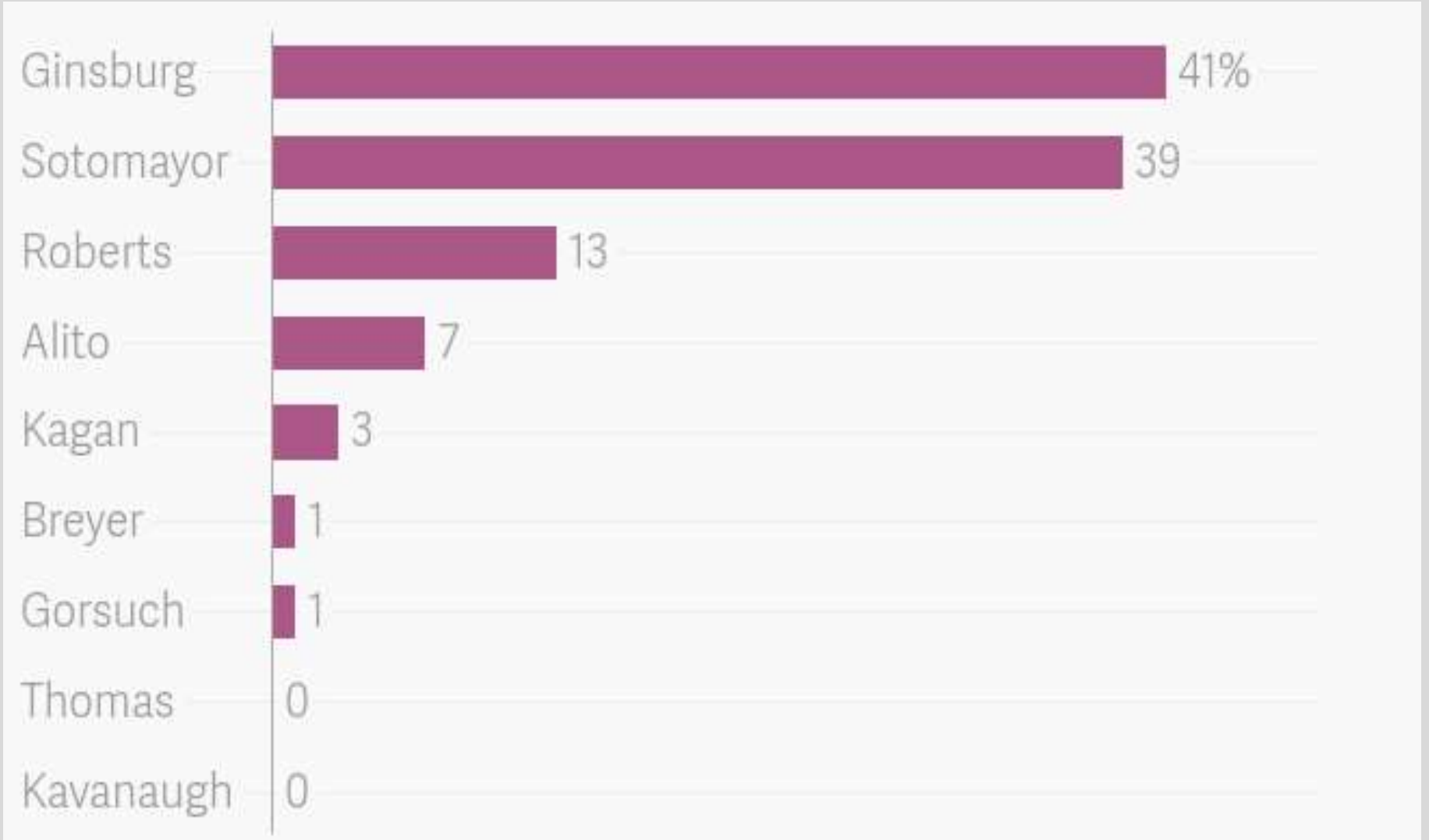
After 14 Years, Chief Justice Roberts Takes Charge

Donald J. Trump
@realDonaldTrump

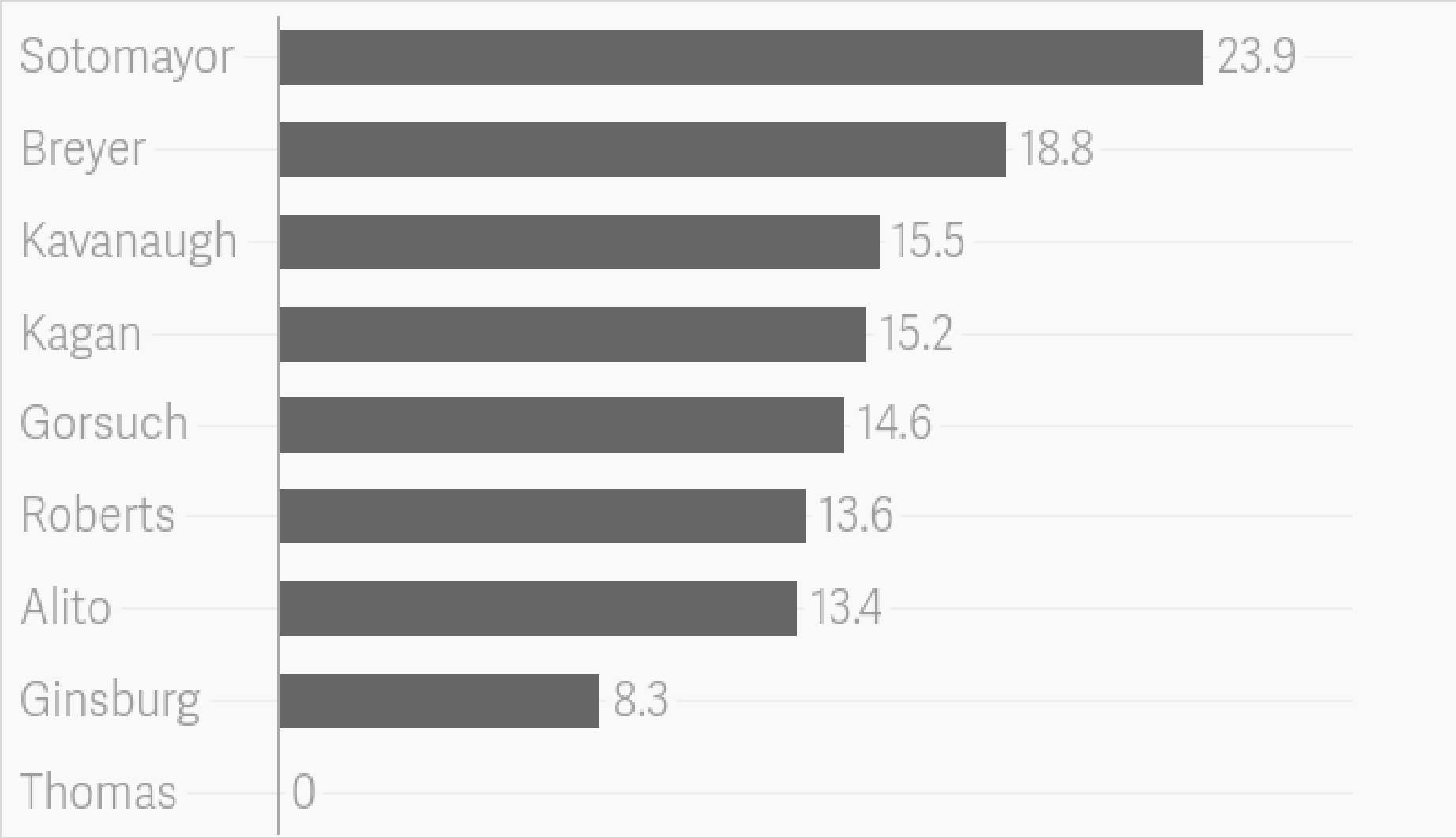
Sorry Chief Justice John Roberts, but you do indeed have "Obama judges," and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an "independent judiciary," but if it is why.....

84.9K 4:51 PM - Nov 21, 2018

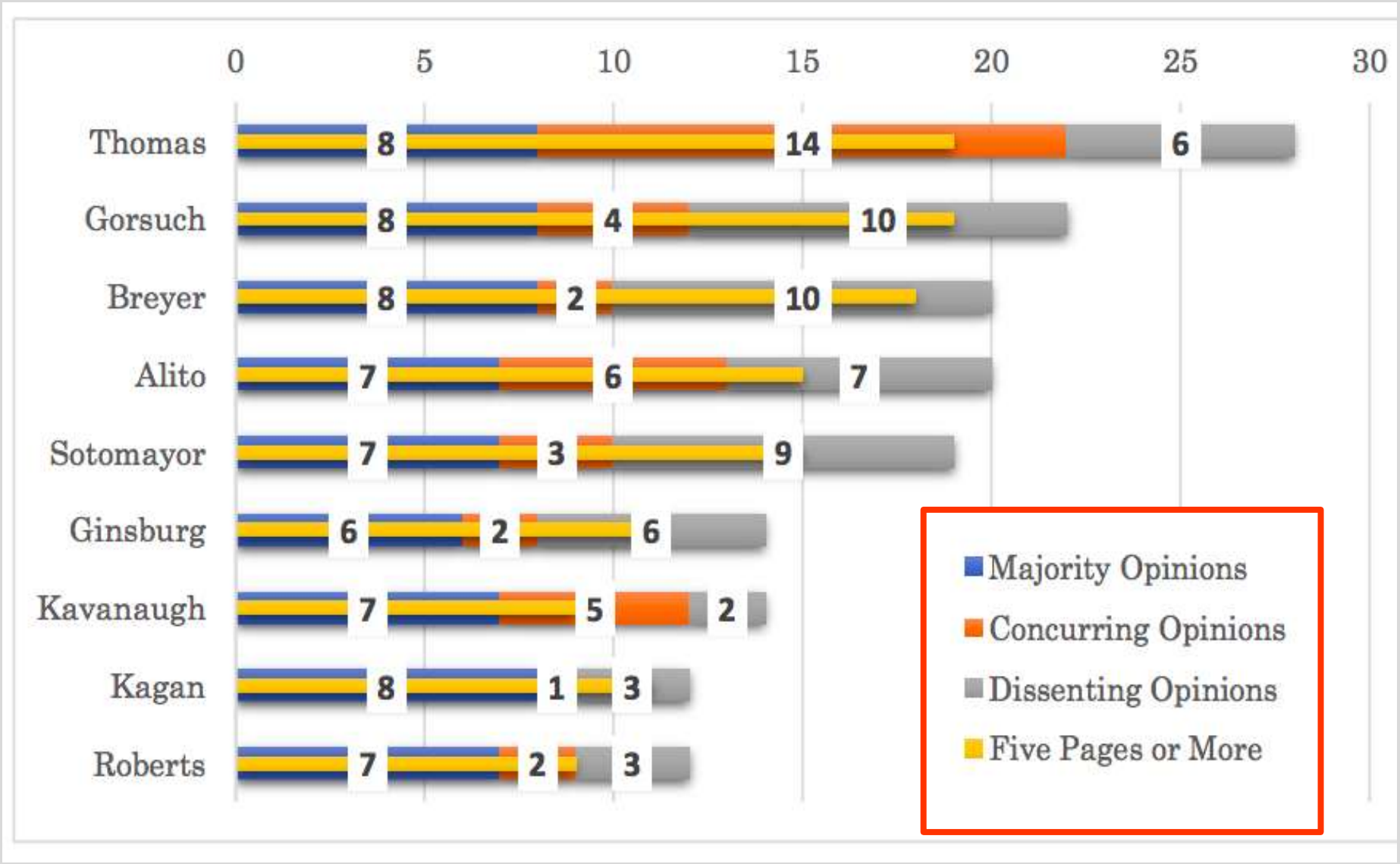
The First Question?



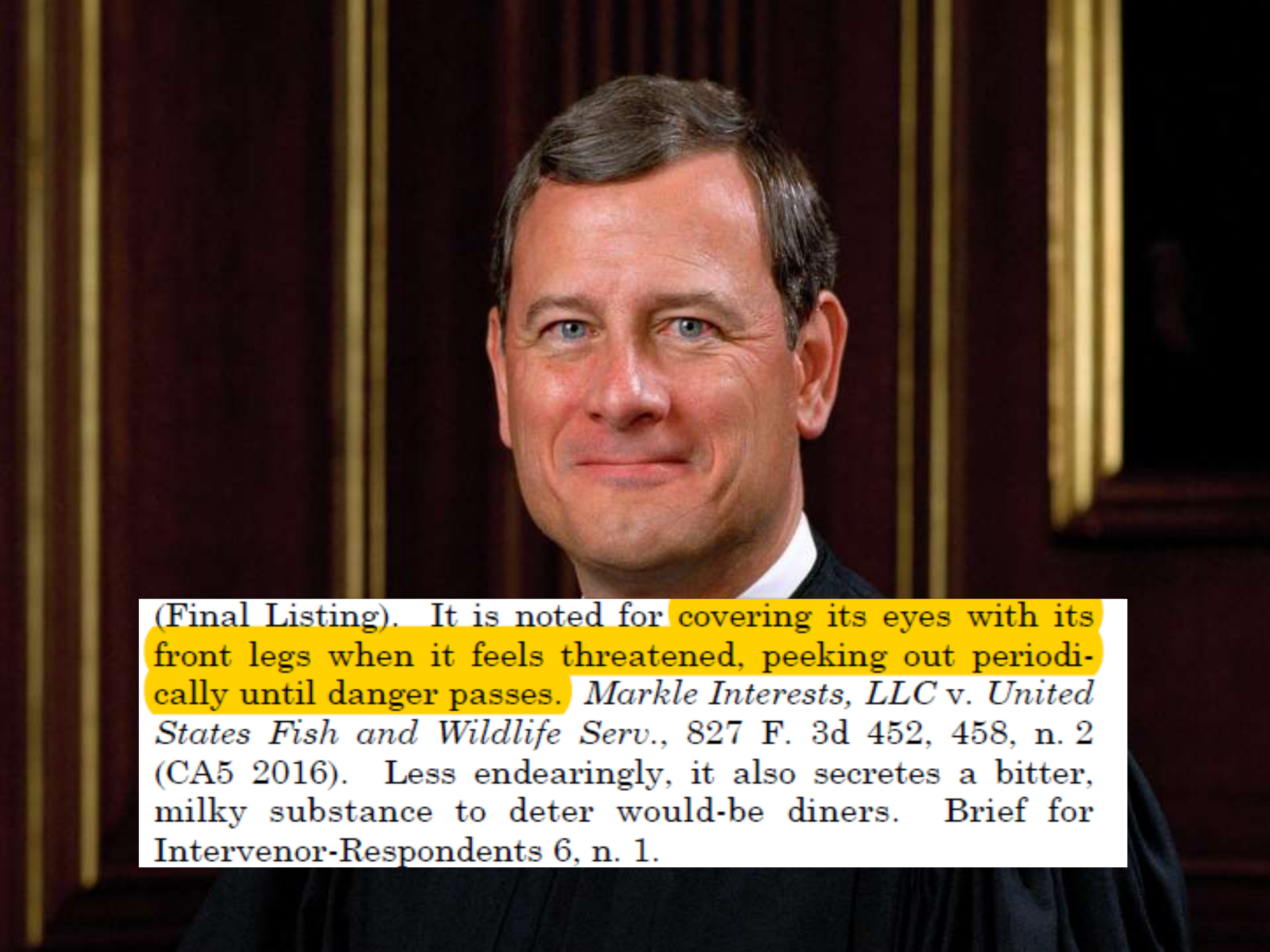
The Most Questions?



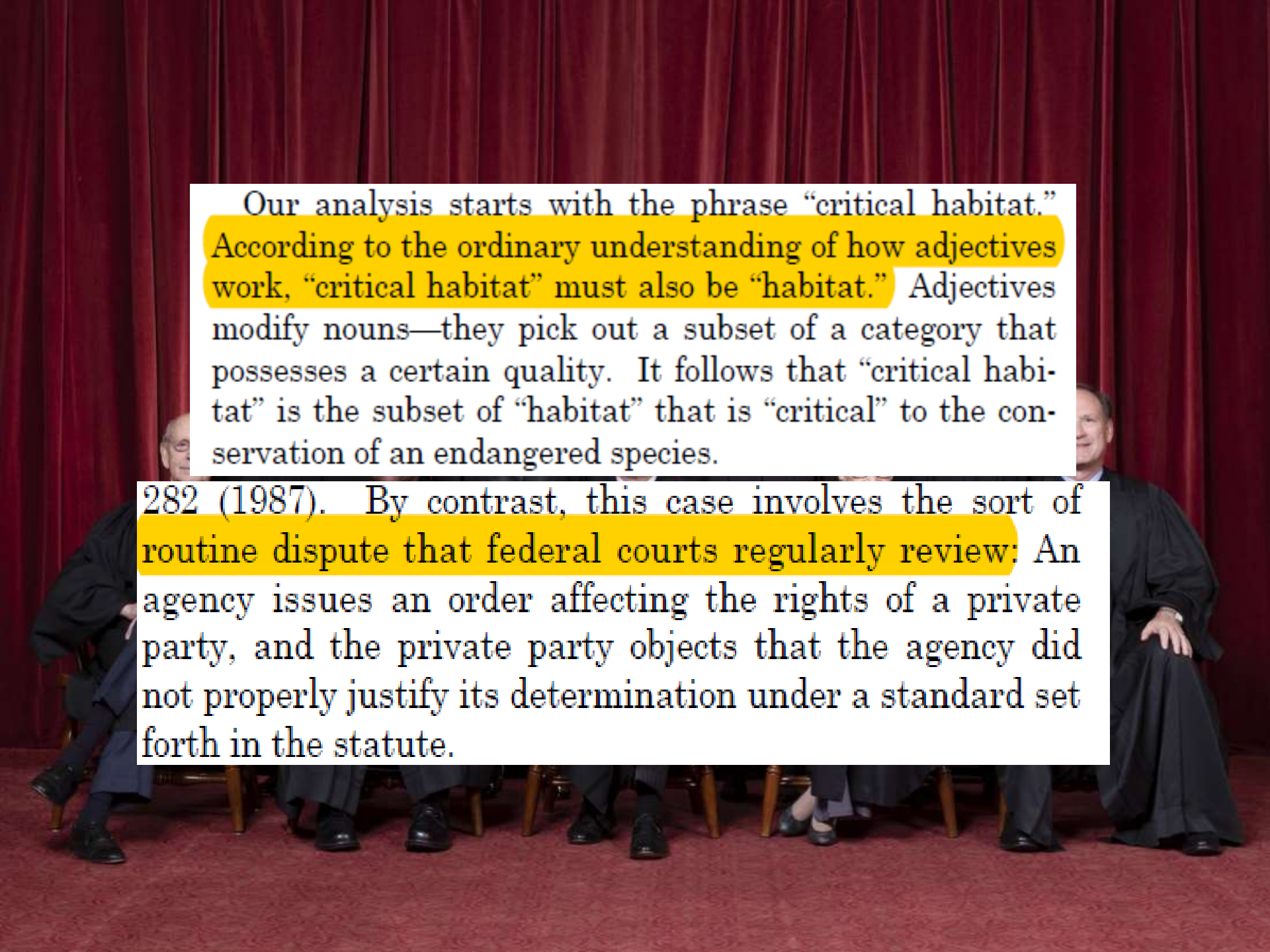
Opinion Authorship (Majority, Concurring, Dissenting)



Weyerhaeuser v. U.S. FWS



(Final Listing). It is noted for covering its eyes with its front legs when it feels threatened, peeking out periodically until danger passes. *Markle Interests, LLC* v. *United States Fish and Wildlife Serv.*, 827 F. 3d 452, 458, n. 2 (CA5 2016). Less endearingly, it also secretes a bitter, milky substance to deter would-be diners. Brief for Intervenor-Respondents 6, n. 1.



Our analysis starts with the phrase "critical habitat." According to the ordinary understanding of how adjectives work, "critical habitat" must also be "habitat." Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that "critical habitat" is the subset of "habitat" that is "critical" to the conservation of an endangered species.

282 (1987). By contrast, this case involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute.

SUPREME COURT OF THE UNITED STATES

Syllabus

STURGEON *v.* FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–949. Argued November 5, 2018—Decided March 26, 2019

John Sturgeon

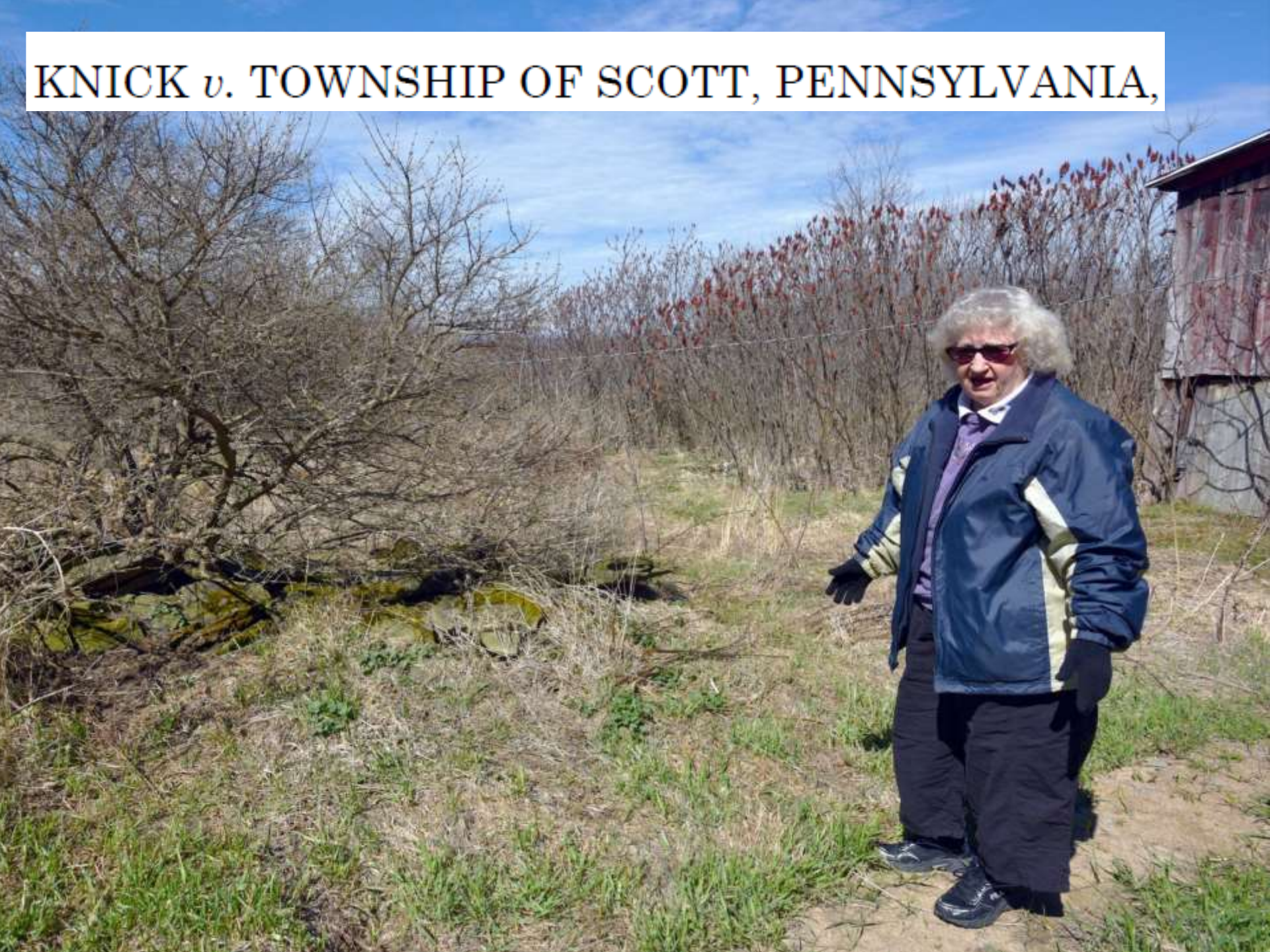
CFR §§2.17(e), 1.2(a)(3); see *supra*, at 10–11. And no one disputes that Sturgeon was driving his hovercraft on a stretch of the Nation River (a navigable water) inside the borders of the Yukon-Charley (a national park). So case closed. Except that Sturgeon lives in Alaska. And as we have said before, "Alaska is often the exception, not the rule." *Sturgeon I*, 577 U. S., at ___ (slip op., at 14). Here, Section 103(c) of ANILCA makes it so. As explained below, that section provides that even when non-public lands—again, including waters—are geographically within a national park's boundaries, they may not be regulated as part of the park. And that means the Park Service's hovercraft regulation cannot apply there.[3]

case, is that "reserved water rights are not the type of property interests to which title can be held"; rather, "the term 'title' applies" to "fee ownership of property" and

If Sturgeon lived in any other State, his suit would not have a prayer of success. As noted earlier, the Park Ser-

Senator Dan Sullivan (R-AK)

KNICK *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA,



ROSE MARY KNICK, PETITIONER *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean

SUPREME COURT OF THE UNITED STATES

Syllabus

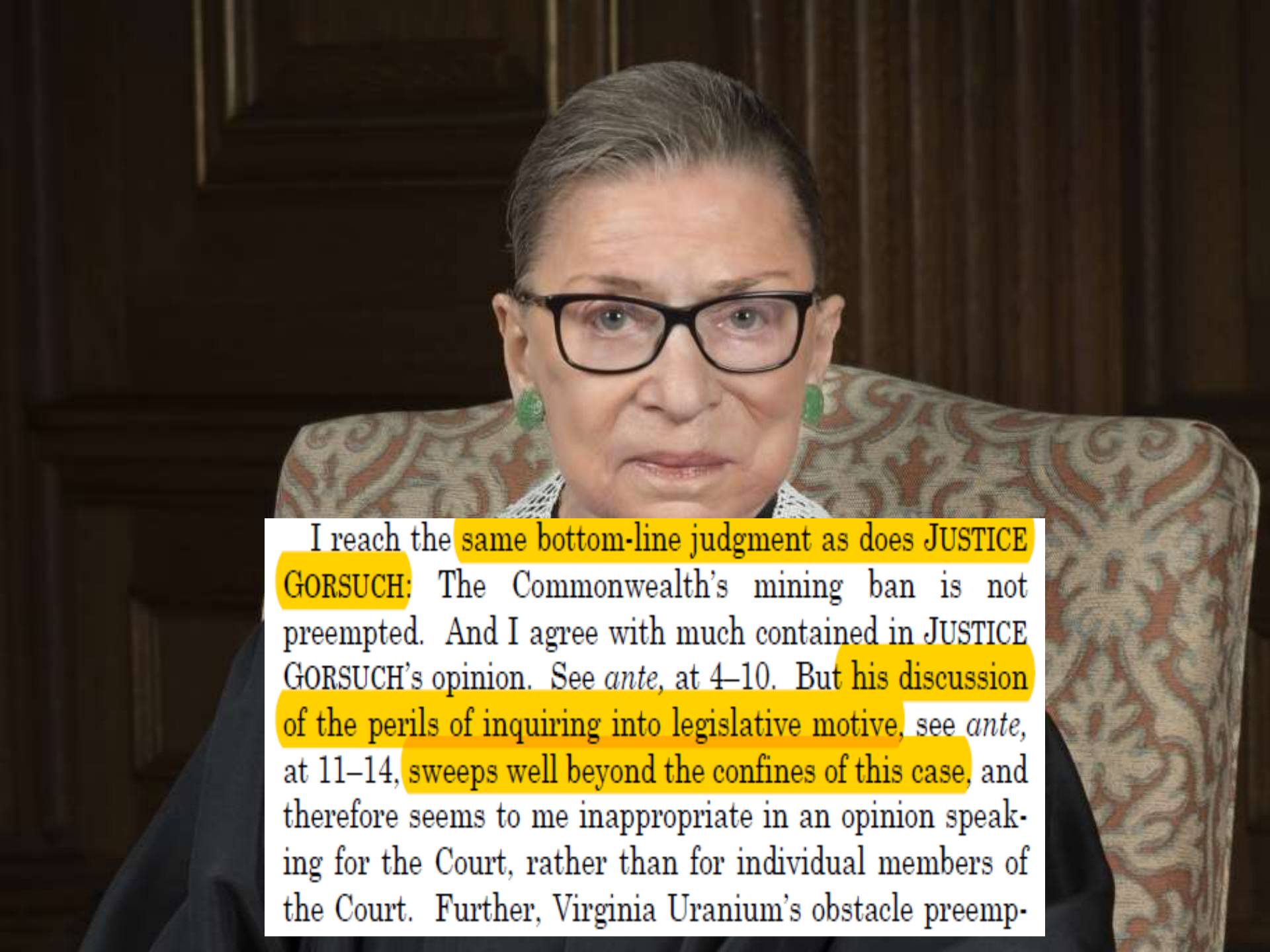
VIRGINIA URANIUM, INC., ET AL. *v.* WARREN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16–1275. Argued November 5, 2018—Decided June 17, 2019

Petitioner Virginia Uranium, Inc., wants to mine raw uranium ore from a site near Coles Hill, Virginia, but Virginia law flatly prohibits uranium mining in the Commonwealth. The company filed suit, alleging that, under the Constitution's Supremacy Clause, the Atomic Energy Act (AEA) preempts state uranium mining laws like Virginia's and ensconces the Nuclear Regulatory Commission (NRC) as the lone regulator in the field. Both the District Court and the Fourth Circuit rejected the company's argument, finding that while the AEA affords the NRC considerable authority over the nuclear fuel life cycle, it offers no hint that Congress sought to strip States of their traditional power to regulate mining on private lands within their borders.

Held: The judgment is affirmed.



I reach the same bottom-line judgment as does JUSTICE GORSUCH: The Commonwealth's mining ban is not preempted. And I agree with much contained in JUSTICE GORSUCH's opinion. See *ante*, at 4–10. But his discussion of the perils of inquiring into legislative motive, see *ante*, at 11–14, sweeps well beyond the confines of this case, and therefore seems to me inappropriate in an opinion speaking for the Court, rather than for individual members of the Court. Further, Virginia Uranium's obstacle preemp-

Juliana v. United States

MONDAY, JULY 30, 2018

ORDER IN PENDING CASE

18A65 UNITED STATES, ET AL. V. USDC OR

The application for stay presented to Justice Kennedy and by him referred to the Court is denied.

The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.

Supreme Court of the United States

No. 18A410

IN RE UNITED STATES, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that discovery and trial in the United States District Court for the District of Oregon, in case No. 6:15-cv-01517, are stayed pending receipt of a response, due on or before Wednesday, October 24, 2018, by 3 p.m., and further order of the undersigned or of the Court.

/s/ John G. Roberts, Jr.
Chief Justice of the United States

Dated this 19th
day of October 2018.

FRIDAY, NOVEMBER 2, 2018

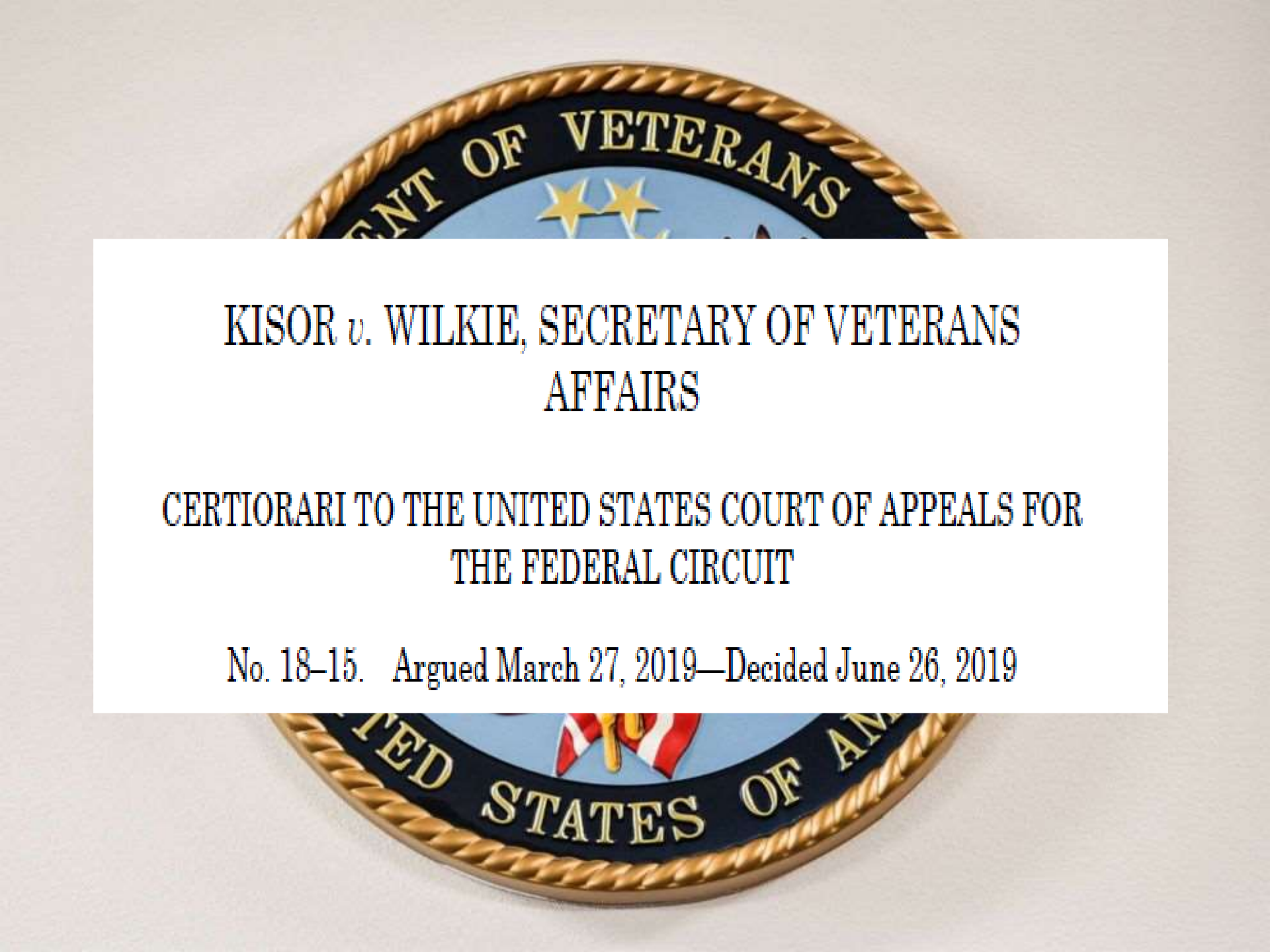
ORDER IN PENDING CASE

18A410 IN RE UNITED STATES, ET AL.

The Government seeks a stay of proceedings in the District Court pending disposition of a petition for a writ of mandamus,

Although the Ninth Circuit has twice denied the Government's request for mandamus relief, it did so without prejudice. And the court's basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions. Those reasons are, to a large extent, no longer pertinent. The 50-day trial was scheduled to begin on October

Justice Thomas and Justice Gorsuch would grant the application.



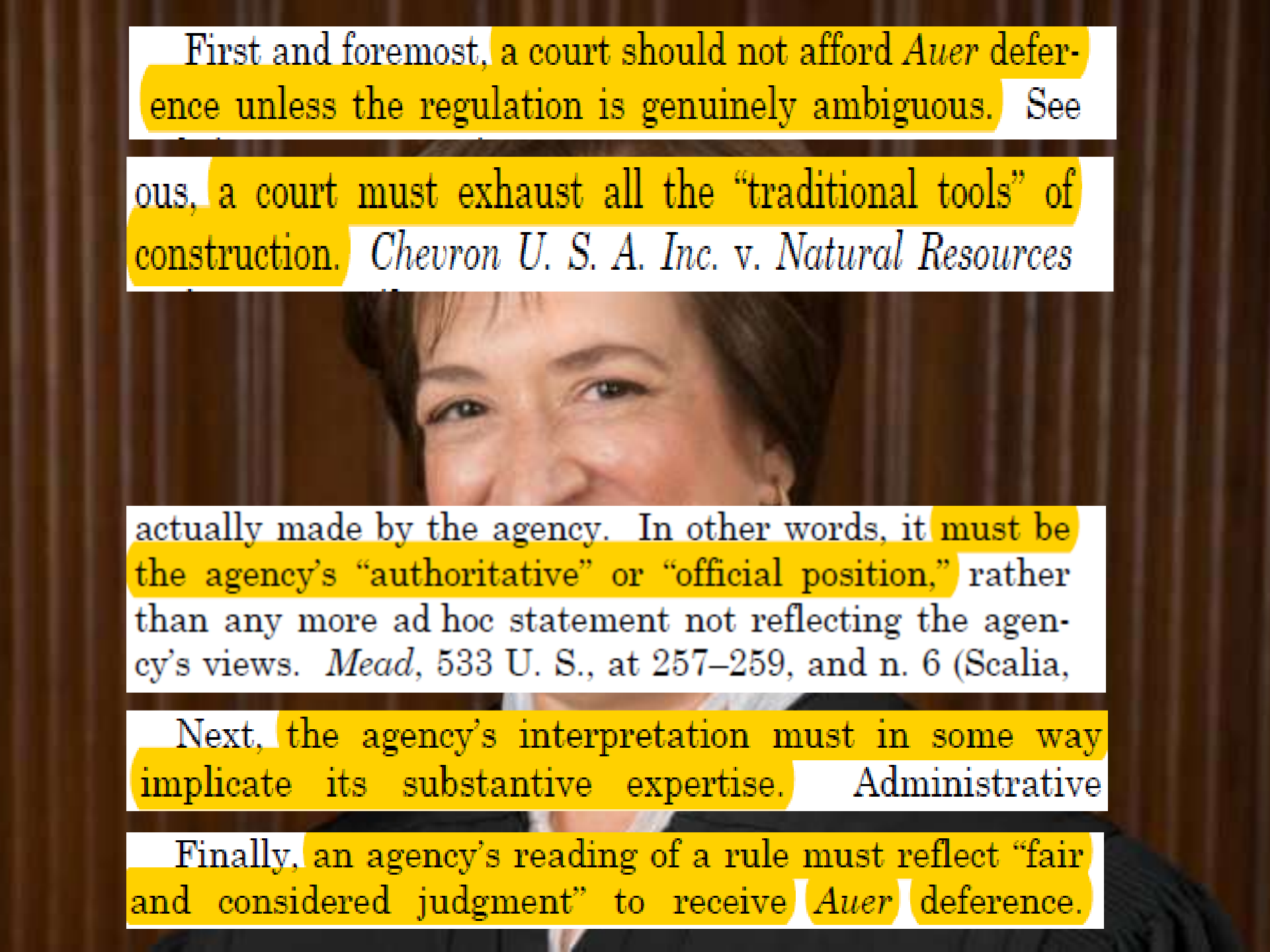
KISOR *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 18–15. Argued March 27, 2019—Decided June 26, 2019

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. See

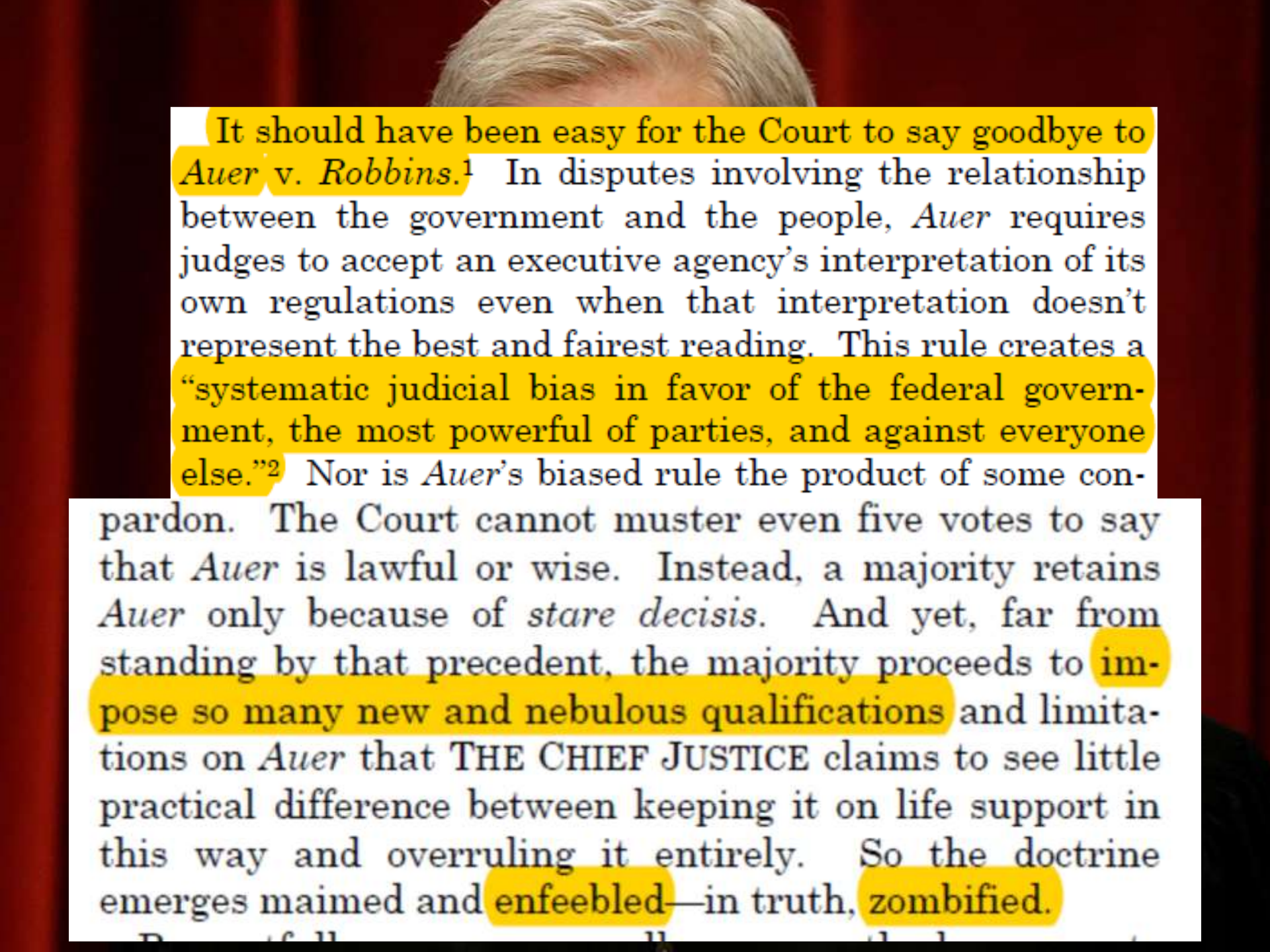
ous, a court must exhaust all the "traditional tools" of construction. *Chevron U. S. A. Inc.* v. *Natural Resources*



actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. *Mead*, 533 U. S., at 257–259, and n. 6 (Scalia,

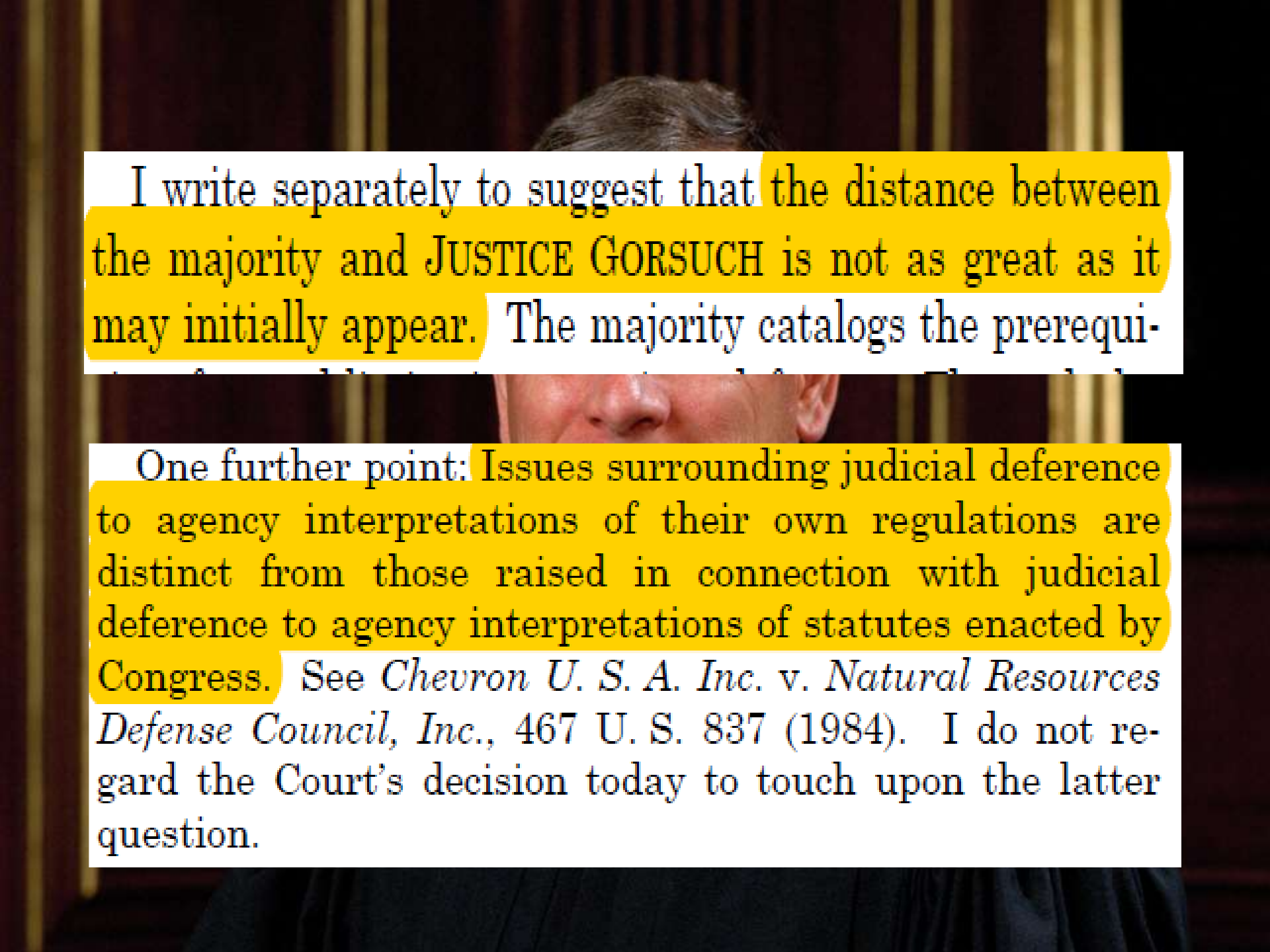
Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference.



It should have been easy for the Court to say goodbye to *Auer* v. *Robbins*.[1] In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else."[2] Nor is *Auer*'s biased rule the product of some con-

pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.



I write separately to suggest that the distance between the majority and JUSTICE GORSUCH is not as great as it may initially appear. The majority catalogs the prerequi-

One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). I do not regard the Court's decision today to touch upon the latter question.

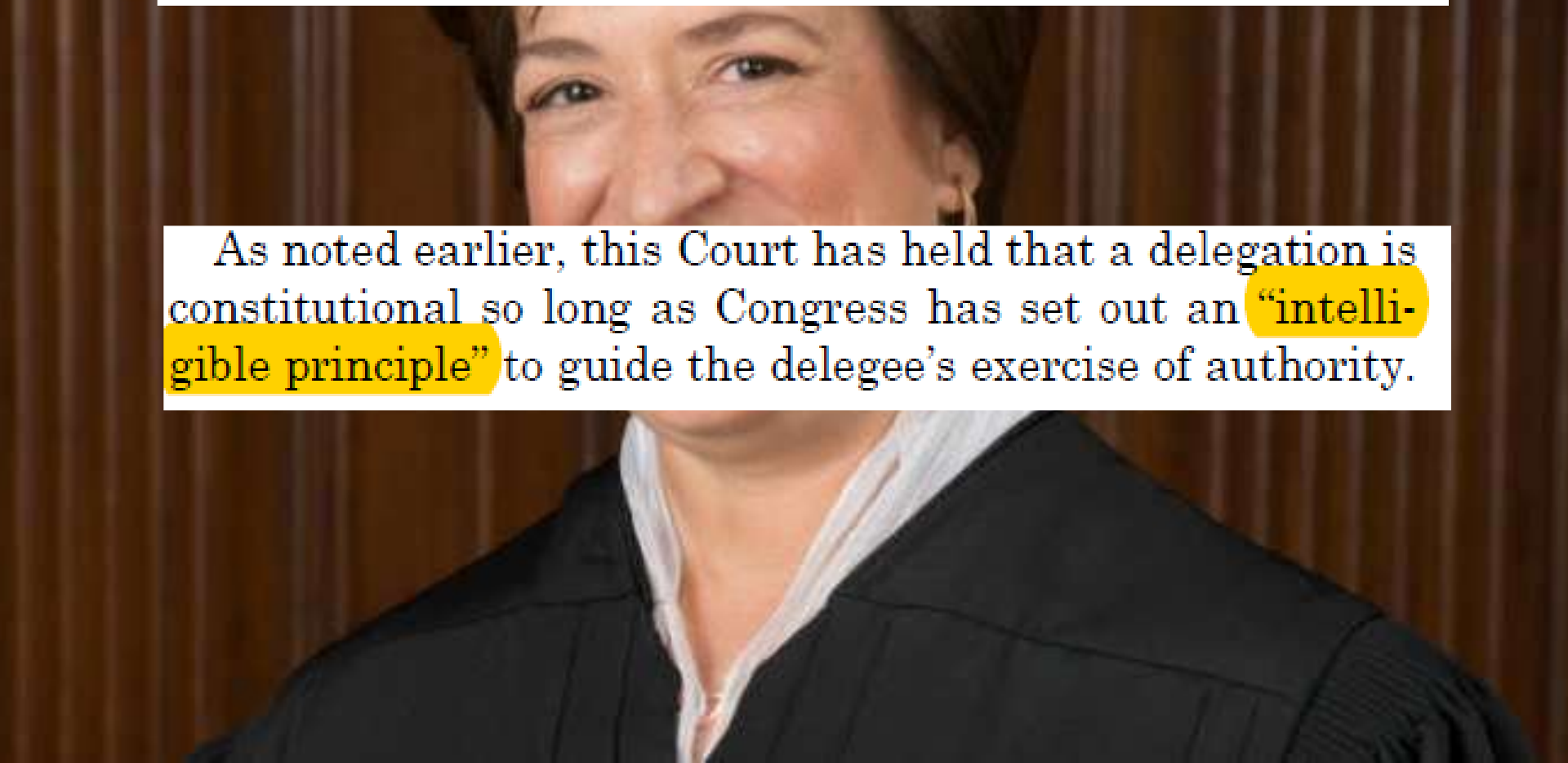
GUNDY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

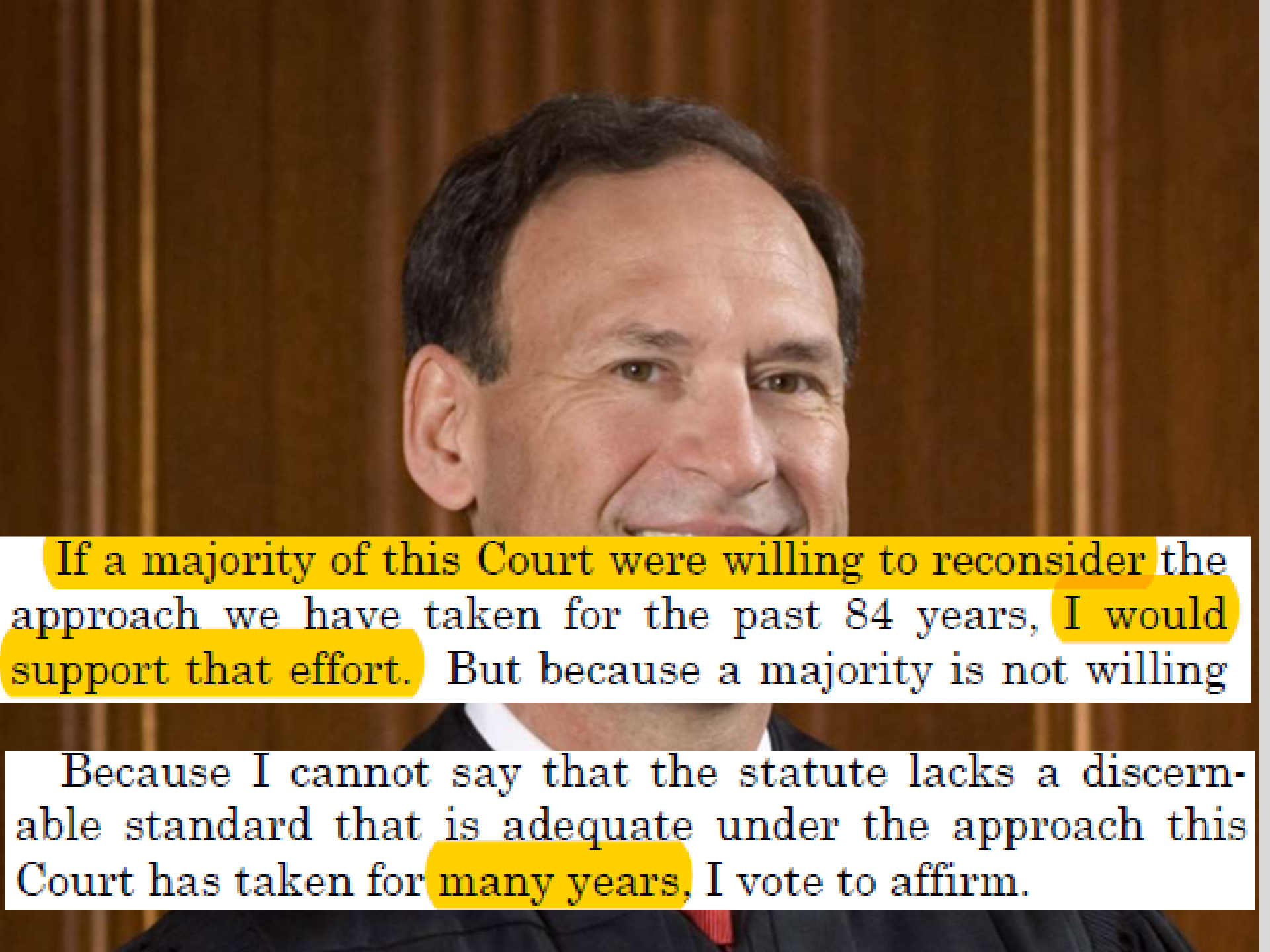
No. 17–6086. Argued October 2, 2018—Decided June 20, 2019

"The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

ment. This case requires us to decide whether 34 U. S. C. §20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under §20913(d), the Attorney General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster.

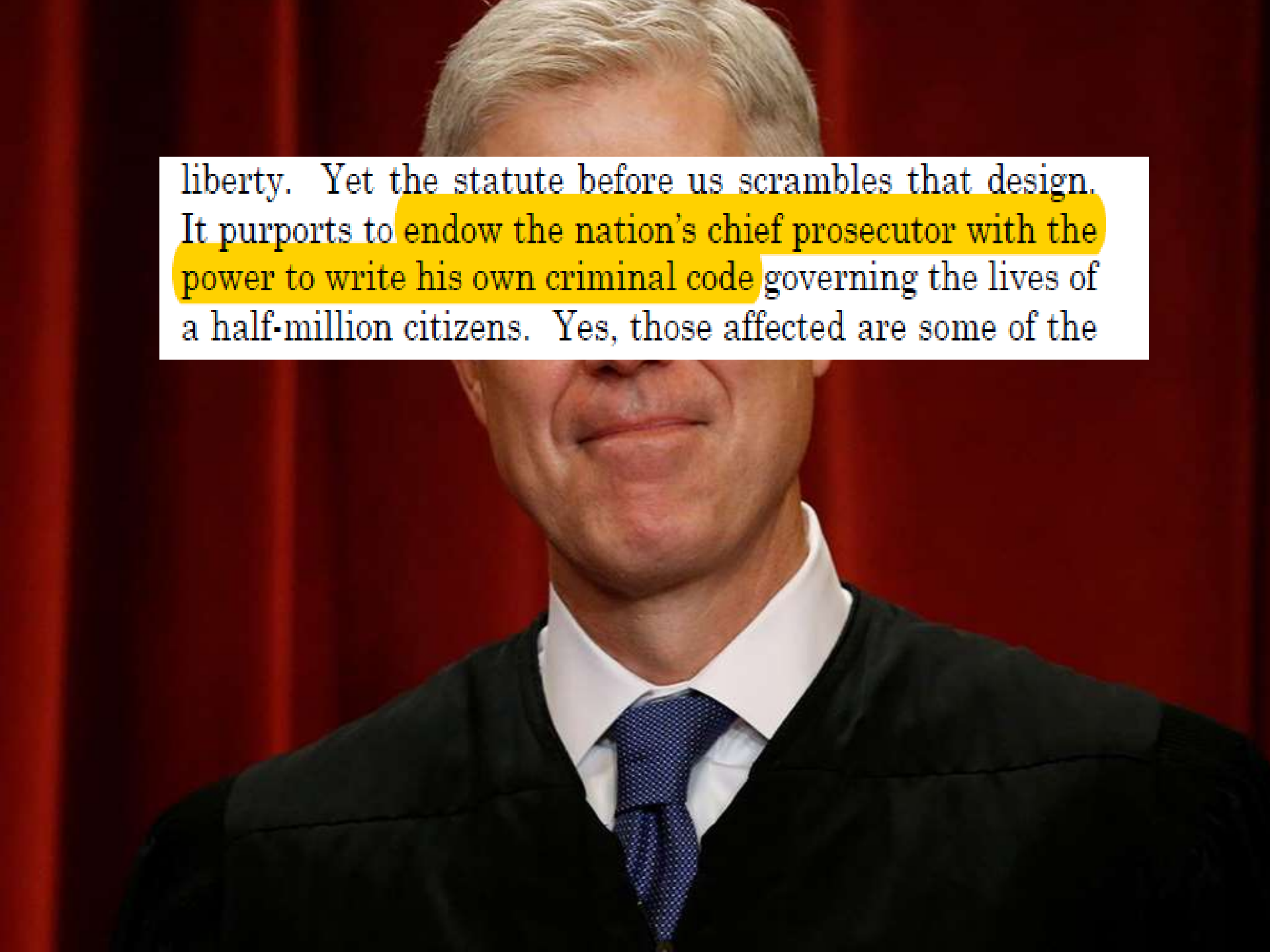


As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority.



If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.


liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the

October Term 2019

County of Maui v. Hawaii Wildlife Fund

< .5 miles from Pacific Ocean

Injects 3-5 million gallons sewage /day

QUESTION PRESENTED

In the Clean Water Act (CWA), Congress distinguished between the many ways that pollutants reach navigable waters. It defined some of those ways as "point sources"—namely, pipes, ditches, and other "discernible, confined and discrete conveyance[s] … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The remaining ways of moving pollutants, like runoff or groundwater, are "nonpoint sources."

The question presented is:

Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Clean Water Act

33 U.S.C. 1362 provides in pertinent part:

Definitions

Except as otherwise specifically provided, when used in this chapter:

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Wednesday, November 6

Settle?

(6)

18-1165 RETIREMENT PLANS
COMM. OF IBM V. JANDER

1884-1977 Anaconda Copper

- Refined tens of millions of copper ore
- Dug ten thousands miles of mines beneath City of Butte
- Including in middle of Butte, hole 1.5 miles across and 1800 feet deep

1977-1980 Atlantic Richfield

- Purchased for $700M
- Closed in 1980
- Spent $450M cleaning up pursuant to EPA orders 300-square mile site

ATLANTIC RICHFIELD COMPANY, PETITIONER,

v.

GREGORY A. CHRISTIAN, ET AL., RESPONDENTS.

Questions Presented

1. Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to EPA's cleanup jurisdictionally barred by § 113 of CERCLA.

2. Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup.

3. Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

CERCLA Section 113(h)

(h) TIMING OF REVIEW.—No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104, or to review any order issued under section 106(a), in any action except one of the following:

(1) An action under section 107 to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2).

(4) An action under section 310 (relating to citizens suits) alleging that the removal or remedial action taken under section 104 or secured under section 106 was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

CERCLA Section 114

RELATIONSHIP TO OTHER LAW

SEC. 114. (a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

(b) Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.

Advocacy is both an art and a war. Don't think about what the law should be or what the law is Don't be professorial. The only point is to win

This is gonna sound awful, but I do think of every case like this: One side is actually going to die, and I don't want it to be me

In Memoriam

THE MAKING OF A JUSTICE

Reflections on My First 94 Years

JUSTICE JOHN PAUL STEVENS

Author of *Five Chiefs*

Supreme Court Review-Preview

Professors Jody Freeman & Richard Lazarus
Harvard Law School Environmental & Energy Law Program
Environmental Law Institute

September 26, 2019

No.

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,
PETITIONERS

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION,
ET AL.

Whether the Forest Service has authority to grant rights-of-way under the Mineral Leasing Act through lands traversed by the Appalachian Trail within national forests.

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record