

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FANE LOZMAN,)
)
Petitioner,)
)
v.) No. 17-21
)
CITY OF RIVIERA BEACH, FLORIDA,)
)
Respondent.)

Pages: 1 through 65

Place: Washington, D.C.

Date: February 27, 2018

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3 FANE LOZMAN,)

4 Petitioner,)

5 v.) No. 17-21

6 CITY OF RIVIERA BEACH, FLORIDA,)

7 Respondent.)

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9

10 Washington, D.C.

11 Tuesday, February 27, 2018

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 11:23 a.m.

16

17 APPEARANCES:

18 PAMELA S. KARLAN, ESQ., Stanford, California; on
19 behalf of the Petitioner.

20 SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of
21 the Respondent.

22 JEFFREY B. WALL, ESQ., Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; on
24 behalf of the United States, as amicus curiae,
25 in support of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PAMELA S. KARLAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	SHAY DVORETZKY, ESQ.	
7	On behalf of the Respondent	29
8	ORAL ARGUMENT OF:	
9	JEFFREY B. WALL, ESQ.	
10	On behalf of the United States,	
11	as amicus curiae, in support of	
12	the Respondent	49
13	REBUTTAL ARGUMENT OF:	
14	PAMELA S. KARLAN, ESQ.	
15	On behalf of Petitioner	62
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:23 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-21, Lozman versus The
5 City of Riviera Beach.

6 Ms. Karlan.

7 ORAL ARGUMENT OF PAMELA S. KARLAN

8 ON BEHALF OF THE PETITIONER

9 MS. KARLAN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The government violates the First
12 Amendment whenever it retaliates against
13 someone because they exercise -- criticize
14 public policies or public officials. And this
15 is so even when the retaliation takes the form
16 of an arrest for which there's probable cause.

17 Section 1983, by its terms, provides
18 an action at law that is a damages action
19 anytime someone is deprived of a right secured
20 by the Constitution. And that statute should
21 apply here.

22 This Court should not adopt a
23 construction of Section 1983 that essentially
24 lets defendants escape liability for First
25 Amendment violations by claiming that they

1 didn't violate the Fourth Amendment as well.

2 Our case shows why an absolute bar
3 rule is an unacceptable reading of Section 1983
4 and of the First Amendment. The case involved
5 core First Amendment activity, a lawsuit
6 protected by the Petitions Clause and a series
7 of criticisms of public officials and public --
8 public --

9 JUSTICE GINSBURG: That was true of
10 Hartman too, but the Court made a distinction.

11 MS. KARLAN: The distinction in
12 Hartman, as I understand it, Justice Ginsburg,
13 comes and rests entirely on the fact that there
14 was absolute prosecutorial immunity for the
15 actor who actually imposed the injury there.
16 And I see three major distinctions between
17 Hartman and what's going on in this case.

18 The first of those is that, in
19 Hartman, there was absolute prosecutorial
20 immunity. And what that meant is you could not
21 sue the prosecutor; you had to sue somebody
22 upstream. But the reason why there's absolute
23 prosecutorial immunity, as this Court explained
24 in the decisions it cited in Hartman, in Reno,
25 and in Wayte, is because the Court wants to

1 avoid inquiry into prosecutorial
2 decision-making, and that's so because
3 prosecutors are both independent and
4 deliberative.

5 Absolutely none of those factors is
6 present in this case. You needn't look at
7 anything a prosecutor has done. The decisions
8 here were not made by independent actors. They
9 were made by a police officer and by a city
10 council member whose level of animus on the
11 record shows that this was not an arrest about
12 anything that occurred in the court -- in the
13 council chamber that day, and there was no --

14 JUSTICE KENNEDY: So your -- your --
15 your beginning -- I -- I couldn't quite --
16 can't quite recall your beginning sentence, but
17 it was hugely broad. Anytime there's an arrest
18 for First Amendment protected speech, there's a
19 violation of the Constitution, something to
20 that effect.

21 It -- it -- it seems to me that one of
22 the difficulties of this case is that there are
23 any number of hypotheticals you have. You have
24 people that are fighting in the bar and the --
25 the policeman has to get some order and the --

1 one of the more difficult suspects says
2 something bad to the policeman, and he arrests
3 him. Under your view, that's a violation?

4 MS. KARLAN: No.

5 JUSTICE KENNEDY: That -- that seems
6 -- I'm -- I'm very concerned about police
7 officers in -- in difficult situations where
8 they have to make quick -- and your -- and your
9 initial formulation just did not cover it, just
10 did not give any protection for that.

11 In this case, there's a very serious
12 contention that people in an elected office
13 deliberately wanted to intimidate this person,
14 and it seems to me that maybe in this case we
15 should cordon off, or box off, what happened
16 here from the ordinary conduct of police
17 officers. And your initial formulation was --
18 was so blanket that it didn't provide for that.

19 MS. KARLAN: I think maybe I -- I
20 didn't state it clearly enough.

21 Our position is that when an officer
22 retaliates against someone for his protected
23 speech, that is, when he has what this Court
24 called in Hartman retaliatory animus, and can't
25 show because of the Mt. Healthy standard that

1 he would have arrested the person anyway, then
2 there is a First Amendment violation.

3 And if I could point to the empirical
4 evidence here. The city cites six cases. The
5 State of Alaska, on page 17 of its brief, cites
6 seven -- it cites 27 cases in the Ninth
7 Circuit.

8 I have read all of those cases, and
9 not a single one of those cases involves the
10 kind of hypothetical that you're talking about.
11 So --

12 JUSTICE BREYER: That may be, but
13 that's -- that's exactly what I had as my
14 question too, that it's not that -- you start
15 -- you're down two tracks, it seemed to me.

16 If you say the police officer is
17 liable, if he really has animus, and the
18 probable cause was not, you know, going to
19 affect him, once you say that, you're into the
20 hypothetical of the bar and all you've done is
21 say the jury will decide all those questions.
22 You get to the jury and the jury has a factual
23 question. That's true of the bar case. That's
24 true of a real riot where people are out
25 insulting the police and they're breaking

1 windows and burning cars. And every one of
2 those cases goes to the jury.

3 Then you started down a different
4 track, which is absolutely true. That's not
5 this situation. This situation is someone
6 sitting calmly behind the desk in the middle of
7 the -- of the meeting, not somebody out there
8 in a bar or somebody worried about a real riot.
9 Okay?

10 Now do you want us to draw that line
11 or not? And if you want us to draw that line,
12 how? And if not, how do you deal with Justice
13 Kennedy's hypothetical?

14 MS. KARLAN: So I want to make it
15 clear that the hypothetical is extraordinarily
16 hypothetical because the cases that are brought
17 in the Ninth Circuit now, under the rule we're
18 talking about --

19 JUSTICE BREYER: I'm sure it is, but
20 unfortunately --

21 MS. KARLAN: Yes -- no, I --

22 JUSTICE BREYER: -- in my mind, back
23 of it, is the kind of hypothetical -- and it
24 might be extremely hypothetical --

25 MS. KARLAN: Yes. And there --

1 JUSTICE BREYER: -- but I would like
2 an answer to that question.

3 MS. KARLAN: Yes.

4 JUSTICE BREYER: Which route do you
5 want us to take?

6 MS. KARLAN: Those cases are not going
7 to a jury, and the reason those cases are not
8 going to a jury is twofold.

9 First, this Court's pleading rules in
10 Twombly and Iqbal will not let those cases get
11 past a motion to dismiss unless there's direct
12 evidence of the officer saying: I normally
13 don't arrest people under these circumstances,
14 but you I don't like because you're wearing a
15 Make America Great hat or a Black Lives Matter
16 T-shirt or a Choose Life bumper sticker. There
17 are a couple of cases like that with direct
18 evidence. Those are the ones that survive a
19 motion to dismiss.

20 Second, as this Court said in Malley
21 against Briggs and has reiterated repeatedly,
22 qualified immunity protects any officer who
23 could legitimately have thought that it was
24 appropriate under these circumstances to
25 arrest. This case, as I say, is far more

1 typical, sadly, of the cases that --

2 JUSTICE GINSBURG: So that -- would
3 that be the case for this police officer,
4 Aguirre, I mean, he -- the -- the animus is one
5 person, Wade, the councilmember, and she tells
6 the officer to make an arrest, but the -- the
7 suit is not against the officer, or if it was,
8 wouldn't the officer have qualified immunity?

9 MS. KARLAN: Yes, Your Honor, the
10 officer here was not a defendant. The only
11 defendant is the city. And as this Court's
12 decision in Owens holds, there is no qualified
13 immunity for a city. Therefore -- I'm sorry.
14 Did --

15 JUSTICE ALITO: No, I didn't want to
16 interrupt your -- your answer.

17 MS. KARLAN: Oh, no, no.

18 JUSTICE ALITO: Well, let's take this
19 particular case then. Suppose -- obviously,
20 there is no love lost between your client and
21 the City of Riviera Beach, but -- so suppose he
22 comes back to another meeting and he is
23 disruptive and he's arrested. Will he not be
24 able to file a -- a suit for retaliation and --
25 and get to the jury on that?

1 MS. KARLAN: It might be very
2 difficult for him to get to a jury if the level
3 of disruption is such that, under the way this
4 Court has treated plausible pleading in Twombly
5 and Iqbal, it's not plausible to believe that
6 it was the animus that caused the arrest.

7 JUSTICE ALITO: Do you really think a
8 suit like that could be dismissed under
9 Twombly?

10 MS. KARLAN: I'm seeing the cases from
11 the Ninth Circuit being dismissed all the time
12 on the grounds that it's just not plausible.

13 And if you have a serious crime, it
14 truly isn't plausible to claim that it's
15 animus. So you don't see, for example, any
16 cases where somebody is charged with mayhem and
17 argue -- argues successfully.

18 JUSTICE BREYER: But those are cases
19 that have been brought. What we're worried,
20 obviously, is some kind of rule that will
21 change what has been brought.

22 In the back of my mind, to put sort of
23 every card on the table, is I was thinking of
24 what Justice Ginsburg wrote in a concurrence in
25 Reichle. Do you know that case?

1 MS. KARLAN: Yes.

2 JUSTICE BREYER: Of course.

3 MS. KARLAN: Is that how it's
4 pronounced? I should have looked it up. I
5 thought it was Reichle.

6 JUSTICE BREYER: Reichle. I don't
7 know.

8 MS. KARLAN: Yeah.

9 JUSTICE BREYER: Sorry. I'm not very
10 good on pronunciation.

11 (Laughter.)

12 JUSTICE BREYER: But -- but in
13 Reichle, Justice Ginsburg wrote a concurrence
14 that I joined that tried to draw a separation
15 between cases like yours and the cases that
16 Justice Kennedy and -- and I had been most
17 concerned about, the riot cases, et cetera.

18 Now -- now what do you think of that?

19 MS. KARLAN: Can I suggest that you
20 look at page 12 of the Joint Appendix in
21 Reichle, because there you will see the
22 complaint, which was a pre-Twombly, pre-Iqbal
23 complaint. There are no facts alleged in that
24 complaint, not one from which you could infer
25 that there was animus.

1 And I think Justice Ginsburg's
2 concurrence which you join there is absolutely
3 right. Those officers under that circumstance
4 would have been required to stop Mr. Howards
5 regardless.

6 CHIEF JUSTICE ROBERTS: Do you really
7 think that --

8 JUSTICE KENNEDY: Well, if you're
9 telling me -- excuse me, Chief Justice.

10 CHIEF JUSTICE ROBERTS: Do you really
11 think that Twombly and Iqbal require the degree
12 of specificity that you postulated, that the
13 only cases that are going to be successfully
14 brought are when the person has a hat on that
15 says that he's a member of a particular group,
16 and the officer says: I don't normally arrest
17 people, but because of your hat with a
18 political message, I'm going to arrest you?

19 Do you really think -- is it a bit of
20 an exaggeration when you say Twombly and Iqbal
21 are going to keep everything but that case out
22 of court?

23 MS. KARLAN: I'm not saying it will
24 keep everything out. There are two kinds of
25 cases that will go forward. There are the ones

1 where the officer says things like -- and these
2 are the cases in the Ninth Circuit that have
3 been allowed to go forward -- I normally don't
4 arrest people, but I don't like your attitude,
5 or I normally don't arrest people, but we
6 should have arrested you a long time ago. So
7 there are two kinds of cases that I think will
8 go forward after Twombly and Iqbal.

9 The first are these ones where
10 somebody can plead with specificity something
11 that the officer said or something that the
12 city councilmember said that has animus.

13 The second are --

14 JUSTICE KENNEDY: Well, just -- just
15 so -- just so you know, and it's in line with
16 the Chief Justice, if you say that the only box
17 you're going to draw for me in this case
18 between the -- to distinguish between the class
19 of cases Justice Breyer and I were discussing
20 and this case is Twombly and Iqbal, you've lost
21 me.

22 MS. KARLAN: No, I didn't say that.

23 JUSTICE KENNEDY: Because there
24 Twombly and Iqbal are simply inadequate --

25 MS. KARLAN: I didn't say that.

1 JUSTICE KENNEDY: -- it seems to me,
2 to take care of the broad proposition that you
3 began with, and I was curious to know if you
4 have some fallback position so that when there
5 is an allegation, a strong allegation of -- of
6 a deliberate animus by elected officials, and
7 the police officer is a young police officer,
8 he just acts based on their -- on -- on their
9 orders, whether or not that is some special
10 kind of case? And you haven't been able to
11 show me that it is.

12 MS. KARLAN: I -- I -- I gave you
13 three answers to that. The first was at the
14 pleadings stage. The second is qualified
15 immunity. And this Court has a robust
16 qualified immunity doctrine that will get rid
17 of every case where the officer or the other
18 individual defendant isn't clearly violating
19 the law.

20 If you'll remember this Court's
21 formulation in Malley against Briggs of
22 qualified immunity, it's all but the willful
23 and the ignorant.

24 And the third thing that gets rid of
25 these cases is the Mt. Healthy standard, which

1 is, if it is a case where they would have
2 arrested regardless of the animus, that is a
3 case where the defendant will win.

4 If I could return to the second part
5 of what I wanted to say to the Chief Justice --

6 JUSTICE KAGAN: You -- you said, Ms.
7 Karlan, that this would not -- never apply.
8 You think that in serious crimes this would
9 never get to a jury. Did I -- did I mishear
10 you?

11 MS. KARLAN: I think that's -- that's
12 correct.

13 JUSTICE KAGAN: Why is that?

14 MS. KARLAN: Because it would not be
15 plausible to say, unless you had extraordinary
16 evidence of animus, that a police officer would
17 not arrest somebody for rape or burglary or
18 murder, things -- serious crimes like that.

19 JUSTICE KAGAN: Do you think it would
20 be appropriate for us to say something, if we
21 were to rule in your client's favor, that with
22 respect to felonies, this -- this should -- we
23 don't expect this to go to juries much, if at
24 all?

25 MS. KARLAN: Well, certainly, that

1 would require reversal in our case. The word
2 "felony," as you know, is an extraordinarily
3 broad word. And there may be some crimes that
4 are felonies that the Court would not view as
5 sufficiently serious to justify. But in this
6 case, it would require reversal.

7 JUSTICE KAGAN: But serious crimes.

8 MS. KARLAN: Serious crimes, yes. I
9 think in serious crimes cases, qualified
10 immunity should take care of every one of those
11 cases because it's just not plausible to
12 believe that the officer was clearly violating
13 the First Amendment.

14 Could I --

15 CHIEF JUSTICE ROBERTS: Well, we get a
16 lot of cases, particularly from where you've
17 said, the cases you've looked at, where
18 qualified immunity is applied in a case where
19 we found it necessary to -- to reverse.

20 I'm not sure that it's as solidly
21 established a doctrine as -- as you suggest to
22 protect -- to -- to leave -- we can allow this
23 action because qualified immunity will take
24 care of the -- the problems.

25 MS. KARLAN: I -- I think the main

1 thing to focus on here is, if you adopt an
2 absolute bar rule, which is the rule that the
3 Eleventh Circuit has, you're not just knocking
4 out close cases, you're knocking out cases
5 where courts have found that there is a
6 long-standing animus, that there was no
7 justification.

8 And in this case, the city is asking
9 for far more than Hartman, because in Hartman,
10 all he had to show was there was no probable
11 cause for the arrest of prosecution.

12 Here, the city wants us to show not
13 only that there was no probable cause for the
14 only crimes with which my client was ever
15 charged, but there was no probable cause for
16 anything anywhere in the Florida statutes.

17 And that is an extraordinarily broad
18 rule that says to city councilmembers and says
19 to cities -- if I could use a case, Justice
20 Breyer, in which you wrote the opinion last
21 year -- in Heffernan, you said it's a First
22 Amendment protected activity to have a sign on
23 your front lawn.

24 Well, if the police chief there
25 instead of demoting the deputy had simply said:

1 Wait until he steps off the curb, or wait until
2 he drives five miles over the speed limit,
3 arrest him, and make sure it's on a Friday so
4 he can spend the --

5 JUSTICE BREYER: You've got the facts.
6 Of course, your case is quite different from
7 what's worrying me and what's worrying me and I
8 think Justice Kennedy perhaps, and that is
9 imagine a serious riot situation. They exist.

10 And in that riot situation, where the
11 police have a problem because there's a
12 sub-gang and the sub-gang is going around
13 breaking windows and setting fire to things,
14 they can't arrest everybody in the sub-gang.
15 There are too many of them. Okay?

16 So it's not going to be true that the
17 Mt. Healthy, it would have happened anyway,
18 works because it doesn't work.

19 MS. KARLAN: It -- it -- it will.

20 JUSTICE BREYER: Well, it will because
21 they wouldn't have been arrested. There are
22 six members of the gang and four policemen with
23 affidavits saying we could only arrest four
24 people.

25 Then we have seven more affidavits

1 which say, I saw the look on that policeman's
2 face as soon as we called him a pig. All
3 right? And I am certain that he would never
4 have arrested this person for -- who after all
5 was just lighting a match. He might have had a
6 cigarette.

7 And -- and I'm certain he wouldn't
8 have arrested him had it not been for the words
9 that he heard. And the policeman had to make a
10 split-second decision, and I don't know.

11 Now that's a -- that's the subset that
12 he means, I think, by a bar. Okay? So is
13 there some words in this opinion that would
14 favor you hypothetically that would wall off
15 that case from decision now?

16 MS. KARLAN: I think the answer is
17 yes. This Court can hold that there should be
18 no absolute bar and that in cases where an
19 officer confronts serious -- serious conditions
20 that have to be addressed at the moment, he's
21 entitled to qualified immunity.

22 JUSTICE KAGAN: So I think, Ms.
23 Karlan, that the -- the reference in Reichle
24 that Justice Breyer was referring to talks
25 about swift on-the-spot decisions where the

1 safety of persons is in jeopardy.

2 Is that the sort of language that you
3 think would be appropriate to --

4 MS. KARLAN: Yes, it --

5 JUSTICE KAGAN: -- guard against the
6 kind of hypotheticals that Justice Breyer and
7 Justice Kennedy are talking about?

8 MS. KARLAN: Yes, I think you can say
9 there is no absolute bar, but we understand
10 that when there is a danger to people and when
11 an officer has to make split-second decisions,
12 he's entitled either to judgment on a 12(b)(6)
13 motion or he's entitled to qualified immunity
14 or he's entitled to summary judgment. But that
15 doesn't justify having an absolute bar in all
16 cases.

17 JUSTICE ALITO: I -- I need some help
18 with what you've said about qualified immunity
19 because I -- I legitimately don't understand
20 it.

21 I -- I don't think there's ever a
22 situation in which a reasonable officer could
23 think that it is lawful to retaliate based on
24 the exercise of First Amendment rights. So, if
25 there is in a case a genuine issue about the

1 officer's motivation, I don't see how the
2 officer will ever be able to get dismissal
3 based on qualified immunity.

4 MS. KARLAN: Well, in the case where
5 there is a legitimate dispute over whether the
6 officer acted with retaliatory animus, he will
7 not be able to get qualified immunity --

8 JUSTICE ALITO: Right. So --

9 MS. KARLAN: -- but that's different.

10 JUSTICE ALITO: -- qualified immunity
11 doesn't -- well -- yeah, qualified immunity
12 won't help in that situation. So it's only the
13 case where -- that you -- you can say there's
14 no genuine dispute on the issue of the
15 officer's motivation. And if there's any
16 evidence, circumstantial evidence, of -- of
17 retaliatory motive, such as the person who's
18 arrested saying something that's insulting to
19 the officer, you're going to be able to infer
20 that.

21 MS. KARLAN: I -- I don't think it's
22 fair to say you'll be able to infer it under
23 those circumstances. That is, I've seen police
24 officers under conditions of stress where
25 somebody says something inappropriate to them,

1 and they don't say anything back, and they
2 arrest the person who's committing a crime.

3 Under those circumstances, I honestly
4 believe that the point this Court makes in
5 Twombly and Iqbal is when the officer's actions
6 and all that the plaintiff can allege are
7 equally consistent with a lawful and an
8 unlawful behavior by the officer, Twombly and
9 Iqbal should require dismissal.

10 And I think if you look at what
11 district court judges in the Ninth Circuit are
12 doing, they are not allowing cases to go
13 forward. If you look -- I read all 27 cases
14 that the State of Alaska cites, and in 12 of
15 those cases -- I think it's either 10 or 12 --
16 the district court dismissed the case either on
17 a 12(b)(6) motion or on a summary judgment on
18 the grounds that there was not sufficient
19 evidence to go to a jury on retaliatory animus.

20 And in most of the cases -- it's
21 important for this Court to understand, in most
22 of the cases that go forward, as in our case,
23 there is a Fourth Amendment claim as well.
24 People are not just bringing the First
25 Amendment claim.

1 Indeed, eight days into the trial in
2 this case, our client was entitled to judgment
3 as a matter of law on his Fourth Amendment
4 probable cause claim and was entitled to go
5 forward on his First Amendment claim as well.

6 And the problem here is that the
7 absolute bar rule takes a lot of cases that are
8 quite like our case. What makes our case
9 extraordinary is you can watch the video and
10 you can read the transcript, but there are a
11 lot of other video cases out there now like
12 ours.

13 And if I could just suggest to the
14 Court that it read one example of what the
15 Ninth Circuit is doing now, it's the Beck case,
16 which is cited in Alaska's brief. This is a
17 case --

18 JUSTICE KENNEDY: Incidentally, let me
19 just -- a very small factual matter, was the
20 councilmember that presided at this hearing the
21 same one that had presided at earlier hearings?

22 MS. KARLAN: No. They -- they sort of
23 rotate because different councilmembers might
24 be there or not. She -- her animus was
25 expressed at the closed-door meeting. She was

1 presiding at this meeting.

2 JUSTICE KENNEDY: Well, I --

3 JUSTICE SOTOMAYOR: The --

4 JUSTICE KENNEDY: -- I guess I'll just
5 say it once again. I think you have a -- a
6 very strong case, but you haven't given us
7 anything other than Iqbal and Twombly and
8 qualified immunity to confine it in any way.

9 MS. KARLAN: No, I think all you have
10 to say here is there is no absolute bar rule.
11 That's all we're asking the Court to do, is to
12 say the Eleventh Circuit's rule is wrong.

13 The Ninth Circuit's rule, which is a
14 workable rule, says probable cause is a
15 relevant factor. And it's going to be in many
16 cases a dispositive factor. But where it's not
17 relevant and where it's not dispositive, a
18 strong First Amendment case should go forward
19 because, otherwise, what this Court is really
20 saying is: Sure, under Citizens United, make
21 an independent expenditure. Sure, under
22 Heffernan, put a sign on the lawn. Sure, under
23 McCullen, demonstrate outside an abortion
24 clinic. But if the government doesn't like
25 that, all they have to do is wait for you to

1 violate any one of the rules that each of us
2 probably violates every day, and they can
3 arrest you and they can hold you for two days
4 and they can strip-search you and then they can
5 say to you: Have a good day.

6 And if that's what the First Amendment
7 means, then all of the protections that this
8 Court is giving don't mean very much on the
9 ground when you're dealing with local
10 governments.

11 CHIEF JUSTICE ROBERTS: Counsel, I was
12 surprised you didn't make more of the fact that
13 the basis for probable cause that the city
14 eventually came up with, disturbing the
15 assembly, was not one that they -- the officer,
16 I don't know exactly where, listed or advanced
17 as their justification. You know, resisting
18 arrest or disorderly conduct. But then I
19 couldn't figure out what to make of it either.
20 It just seemed very -- it seemed very odd to me
21 that that was in the case.

22 MS. KARLAN: I -- I think what's going
23 on there is that if you have to show a Fourth
24 Amendment violation in order to show a First
25 Amendment violation, we're kind of tied in by

1 Devenpeck because what this Court said there is
2 you don't need to have probable cause for the
3 -- for the offense of arrest in order to defeat
4 a Fourth Amendment claim. Any probable --

5 JUSTICE GORSUCH: That's true in the
6 Fourth Amendment context, but would it
7 necessarily hold in the First Amendment
8 context, I believe is the Chief Justice's
9 question?

10 MS. KARLAN: Sure. And you could
11 reverse in this case on the grounds that you're
12 going to apply Hartman as written and not add a
13 kind of Devenpeck chaser to it, if you will.
14 And that would be a --

15 JUSTICE SOTOMAYOR: Do you recommend
16 that?

17 MS. KARLAN: I would -- I would love
18 that.

19 JUSTICE SOTOMAYOR: In your case.

20 MS. KARLAN: In our case, we would
21 love that.

22 JUSTICE SOTOMAYOR: But is it a good
23 rule? Meaning --

24 MS. KARLAN: We think the best rule is
25 the rule we advocated for, which is that

1 probable cause is relevant evidence but not
2 always dispositive. But, certainly, in our
3 case, if you applied Hartman as written, you
4 would say, well, in Hartman, it was the
5 offenses of prosecution; if you show no
6 probable cause on those, they can't come back
7 and say: Oh, well, there was mail fraud as
8 well.

9 I mean, it's starting to sound --

10 JUSTICE SOTOMAYOR: If we do away with
11 Devenpeck, though, as -- if I remember here,
12 the -- the sergeant, I think, or whomever
13 initially looked at the case said there is
14 grounds for probable cause, but we're not going
15 to get a conviction, so that's why we're not
16 going to proceed.

17 Now the judge said there's no probable
18 cause on the facts as they existed, but you can
19 well imagine that officers filled with animus
20 could scour the books at the booking station
21 and they could look for something that might
22 fit the day as well but still not have been
23 something they would have otherwise arrested
24 for.

25 MS. KARLAN: Sure, which is why we

1 think the best rule is that probable cause is
2 relevant but not dispositive.

3 If I may reserve the remainder of my
4 time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Dvoretzky.

8 ORAL ARGUMENT OF SHAY DVORETZKY
9 ON BEHALF OF THE RESPONDENT

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

12 During Ms. Karlan's argument, I wrote
13 -- wrote down four potential backstops to
14 address the hypothetical -- the hypothetical
15 that Justice Kennedy raised and that Justice
16 Breyer echoed about a police officer dealing
17 with a riot in a bar. I'd like to explain why
18 none of the four that I wrote down are
19 sufficient and why the long-standing common law
20 rule and the rule in Hartman ought to be the
21 one that applies here.

22 The four that I wrote down were
23 pleading standards, qualified immunity,
24 Mt. Healthy, and a distinction between felonies
25 or major crimes and other crimes.

1 First, with respect to the pleading
2 standards, it's critical to understand that
3 police officers must concededly take account of
4 speech when deciding whether to arrest in many
5 situations. The bar example is one of those.

6 And police officers need to have an
7 objective -- an objective basis on which their
8 conduct will be judged. It -- it is virtually
9 impossible for police officers themselves in
10 the bar kind of situation to disaggregate their
11 own thought processes and understand whether --
12 and re-create after the fact, certainly,
13 whether they carried out an arrest because of
14 the -- the content of somebody's speech and
15 their dislike for it, or because the content of
16 somebody's speech suggested belligerence and
17 suggested a likelihood to -- to continue to
18 incite violence and there was a need to arrest
19 in order to contain the situation.

20 The problem with a pleading standard
21 rule, as the Ninth Circuit demonstrates, is
22 that there are many cases in which police
23 officers and arrestees simply have a different
24 view of what happened. And the Ninth Circuit
25 sends those cases to juries, and, regularly,

1 the juries ultimately find for the police
2 officers but only after they've been forced to
3 endure all of the burdens of litigation.

4 JUSTICE KAGAN: Mr. Dvoretzky, I want
5 to give you an opportunity to address each of
6 your four if you want, but -- but if I may say,
7 I mean, Ms. Karlan was having some difficulty
8 with hypotheticals. But you might have some
9 difficulty with the facts of your case. So if
10 I could --

11 (Laughter.)

12 JUSTICE KAGAN: -- move you to the
13 facts of your case and suggest the kind of
14 dangers that it poses, which is that in a local
15 government, there are people who become real
16 sort of pains to local officials, and -- and
17 local officials want to retaliate against them,
18 for all the various things they say, charging
19 corruption, doing whatever Mr. Lozman did. I'm
20 sure that there's one in every town. And just
21 the nature of our lives and the nature of our
22 criminal statute books, there's a lot to be
23 arrested for.

24 (Laughter.)

25 JUSTICE KAGAN: So you follow somebody

1 around and they commit a traffic violation of a
2 pretty minor kind, and all of a sudden you're
3 sitting in jail for 48 hours before they decide
4 to release you.

5 So that's a pretty big problem, it
6 seems to me, and it's right here in kind of the
7 facts of this case. So I guess I'd like you to
8 respond to that.

9 MR. DVORETZKY: Justice Kagan, let me
10 respond to that, first, in terms of the facts
11 of this case and then more generally about the
12 legal rule that ought to be -- that ought to be
13 drawn here.

14 A couple of critical things about the
15 facts of this case. One, Officer Aguirre
16 testified that he made the independent decision
17 to arrest Mr. Lozman and that he had never
18 heard of Mr. Lozman before the incident in
19 which this arrest took place.

20 Second --

21 JUSTICE GINSBURG: Wasn't he told to
22 arrest? Didn't Wade say call -- call the
23 officer?

24 MR. DVORETZKY: Councilperson Wade
25 said call the officer, but Officer Aguirre made

1 the decision to arrest. Just because somebody
2 calls the police doesn't mean that the police
3 will actually act on that, especially where
4 here the testimony was that Officer Aguirre
5 made the independent decision and had to make
6 the independent decision.

7 He could not --

8 JUSTICE KENNEDY: Let's -- let's
9 assume that this officer has qualified immunity
10 and that perhaps he didn't even violate the law
11 anyway. What about the city council?

12 MR. DVORETZKY: So the city council --
13 first, we could discuss the transcript. I --
14 the transcript that Ms. Karlan relies on does
15 not support the notion of a -- a scheme to get
16 at Mr. Lozman.

17 There -- there was one comment by one
18 city councilperson expressing frustration,
19 followed by five or six pages of transcript
20 testimony in which the city councilmembers
21 agreed to put all of the resources they needed
22 into the litigation and to defeat the
23 litigation. That is what they agreed to do.

24 CHIEF JUSTICE ROBERTS: You're talking
25 about the closed -- the closed meeting?

1 MR. DVORETZKY: Correct.

2 CHIEF JUSTICE ROBERTS: Okay.

3 MR. DVORETZKY: And if, in fact, there
4 were some sort of a plan to get at Mr. Lozman,
5 why would the city council have let him speak
6 uninterrupted many times, both before and after
7 the particular incident that was at issue here?

8 And why would the jury have found in
9 the city's favor not only on this claim but
10 also on the other forms of Mr. -- of
11 retaliation that Mr. Lozman alleged?

12 So, on the facts of this case, first
13 of all, I dispute Ms. Karlan's characterization
14 of them. Second, and more importantly, the
15 Court, as in Hartman, should not make a general
16 rule for the facts of this case. As the court
17 --

18 CHIEF JUSTICE ROBERTS: Well,
19 regardless of what happened before or after, I
20 found the video pretty chilling. I mean, the
21 fellow is up there for about 15 seconds, and
22 the next thing he knows, he's being led off in
23 -- in -- in handcuffs, speaking in a very calm
24 voice the whole time.

25 Now the council may not have liked

1 what he was talking about, but that doesn't
2 mean they get to cuff him and -- and lead him
3 out.

4 MR. DVORETZKY: Well, the -- there was
5 probable cause in that situation to arrest him
6 for unlawful disturbance. He repeatedly failed
7 to heed Ms. Wade's and Officer Aguirre's
8 directions to stay on topic.

9 There -- there was a finding by the
10 district court here that comments --

11 JUSTICE SOTOMAYOR: He was on topic.
12 Assume that fact. He started by saying:
13 There's been arrest -- an arrest for
14 corruption, which was true. And then he tried
15 to say: And I've been telling you that other
16 people are corrupt.

17 Why is that off topic?

18 MR. DVORETZKY: Because the corruption
19 that he alleged related to Palm Beach County
20 corruption. And as the district court found,
21 the -- the topics to be addressed at these
22 meetings had to relate to topics related to the
23 city, not related to the county.

24 JUSTICE GINSBURG: The city is within
25 the county?

1 MR. DVORETZKY: The city is within the
2 county, but that -- that is the line that the
3 policy drew. It's a city council meeting to
4 talk about city business and city officials,
5 not county officials.

6 The -- the more fundamental point
7 here, though, is that, as in Hartman, the Court
8 in -- in Footnote 10 in Hartman put it rather
9 colorfully. You don't design a retirement
10 system because you might win the lottery, which
11 is to say you don't design the general rule for
12 the extremely rare one-off case, particularly
13 when --

14 JUSTICE SOTOMAYOR: I'm sorry, though,
15 that --

16 JUSTICE GINSBURG: But Hartman --
17 Hartman turned very much on the -- the
18 prosecutor and the assurance that the
19 prosecutor is going to be a check against --
20 you know, you had the postal inspectors and --
21 but it was the prosecutor who made the decision
22 to prosecute.

23 And here there's no one like the
24 prosecutor who has absolute immunity and is a
25 -- is a person that we generally think of as

1 upright. And here there's nothing like that.
2 The -- the arrest, at least it looked like from
3 the tape, was motivated by Wade, who was just
4 very annoyed at Mr. Lozman.

5 MR. DVORETZKY: Justice Ginsburg, I
6 respectfully disagree with that
7 characterization of Hartman. In Hartman, the
8 Court said that the prosecutorial immunity was
9 an added reason for the rule that the Court
10 adopted, but the heart of the Court's analysis
11 in Hartman was about causation. It was about
12 the complex causation problems that arose in
13 that case because you had multiple actors. You
14 had the police officer who allegedly induced
15 the prosecutor to act.

16 Here, you have at least as significant
17 a causation problem because of the ways in
18 which police officers concededly must account
19 for speech in an arrest. And police officers
20 should not be deterred from making legitimate
21 arrests, whether for major crimes or for minor
22 crimes, out of fear that later on there will be
23 an allegation that perhaps the real reason for
24 the arrest was the Black Lives Matter shirt or
25 the --

1 JUSTICE SOTOMAYOR: But I'm sorry, we
2 don't -- we don't disagree that police officers
3 shouldn't be arresting for retaliatory intent.

4 MR. DVORETZKY: Correct. And --

5 JUSTICE SOTOMAYOR: All right. Now,
6 if we accept that premise that the First
7 Amendment is valuable enough to us to protect
8 it from government abuse and -- and the facts
9 in this case, that's what they assumed or
10 that's what we're assuming from the facts as
11 alleged, shouldn't we have a remedy and
12 shouldn't we have a remedy that takes care of
13 those arrests that are motivated solely because
14 of animus, because Mt. Healthy says if you
15 would have arrested anyway, you're not liable.

16 But what you're doing is depriving
17 people who would not have been arrested except
18 for their First Amendment speech from having
19 any remedy whatsoever.

20 MR. DVORETZKY: Justice Sotomayor --

21 JUSTICE SOTOMAYOR: Now you -- I know
22 you say something else will take care of it,
23 but the reality is something else usually
24 doesn't take care of it.

25 MR. DVORETZKY: So, Justice Sotomayor,

1 I think the premise of your question is that
2 there is an epidemic of retaliatory arrests out
3 there that --

4 JUSTICE SOTOMAYOR: No. I'm not even
5 talking about an epidemic. I'm talking about a
6 constitutional wrong, because either way you're
7 saying we shouldn't create a system for this
8 kind of violation, but why should I create a
9 system to exempt this from our regular First
10 Amendment process, because there might be one
11 or a few cases that fall through the protective
12 barriers that Ms. Karlan pointed to?

13 MR. DVORETZKY: First, because there
14 is no workable system to carve off just this
15 case from the mine-run bar incident case.

16 Second, because there are other
17 remedies besides damages actions in individual
18 cases.

19 And, third, because having surveyed --

20 JUSTICE SOTOMAYOR: No, there's no
21 remedy --

22 JUSTICE KENNEDY: If that -- if that
23 is so, then the First Amendment is in trouble.
24 In -- in this case, it seems to me, you might
25 argue with the evidence, but that there is

1 evidence that there was a pre-determined plan
2 to arrest somebody on account of his political
3 speech in a political forum.

4 And it seems to me that that is a very
5 serious First Amendment problem. And it seems
6 to me you can cabin that off somehow from the
7 bar institute. The Petitioners didn't give us
8 any specific way to do that, other than
9 Twombly, but it seems to me that -- that the
10 court in order to protect speech in the
11 political forum can make that distinction, at
12 least in this case, maybe wait for other cases
13 to see if it should be expanded.

14 MR. DVORETZKY: Justice Kennedy, as in
15 Hartman, the Court said it was not possible to
16 create a workable system that would cabin off a
17 particular kind of speech or a particular kind
18 of violation. I don't believe there is here
19 either.

20 If you look at the instances that in
21 the Ninth Circuit have gone to trial, many of
22 those involve political speech as well.
23 Consider, for example, the Ballentine case
24 cited -- cited in our brief. That was the case
25 where protestors were repeatedly chalking the

1 sidewalk with anti-police messages -- messages,
2 a form of political speech. The police
3 repeatedly tried to work with them and to
4 suggest instead of chalking, use this other
5 form of protest.

6 JUSTICE GORSUCH: But, counsel, why
7 doesn't it account for your concerns what the
8 Chief Justice suggested, which is perhaps
9 probable cause to arrest for the charge made
10 would tend to defeat an inference of
11 retaliation, but to imagine probable cause for
12 an offense ginned up years later at trial after
13 scouring the books and the judge sending
14 everyone to do more homework to find more
15 statutes and more books.

16 Why might that not be different and
17 that raise an inference of retaliation?

18 MR. DVORETZKY: Because, Justice
19 Gorsuch, of the teaching of Devenpeck that --

20 JUSTICE GORSUCH: Well, that's the --
21 that's the Fourth Amendment context. Here,
22 we're trying to secure First Amendment values.
23 And --- and why isn't it a different
24 consideration?

25 MR. DVORETZKY: It is in the Fourth

1 Amendment, but the core teaching of it is -- is
2 that police officers are not lawyers. What
3 they are trained to do is to identify a course
4 of conduct and determine whether there's
5 probable cause that some unlawful -- that some
6 law was broken during that time, but they are
7 not trained and they are not required to
8 specifically identify at the time of the arrest
9 precisely what section of the code was
10 violated.

11 JUSTICE GORSUCH: For certain. And
12 I'm not suggesting that the failure to get it
13 right would itself invite liability, but why
14 wouldn't it at least raise the possible
15 inference of retaliation there in a way that it
16 wouldn't if it got it right for the arresting
17 charge?

18 MR. DVORETZKY: Again, because police
19 officers simply are not trained to think in
20 that particular mindset. If -- if a police
21 officer sees me have a car accident and
22 determines that I am at fault for it, the
23 police officer is not required at that moment
24 to be thinking --

25 JUSTICE GORSUCH: No, fair enough.

1 You didn't get it at the moment, and maybe you
2 give him a couple of chances even at the apple.
3 But do you -- do you wait until trial and --
4 and in the middle of trial and sending lawyers
5 to do homework to find more charges? Does --
6 does that -- is that different in any
7 meaningful way?

8 MR. DVORETZKY: Justice Gorsuch, the
9 only reason that this was all determined at
10 trial is that Mr. Lozman, before trial, did not
11 serve us with interrogatories and ask us
12 specifically what offenses we were claiming
13 probable cause for. He could have done that --

14 JUSTICE BREYER: If that doesn't -- if
15 that doesn't work, what you started out, and I
16 wanted to hear your answer, and this is just
17 one add to the mix, but the mix, it seems to
18 me, consists, for the bar and riot cases, et
19 cetera, one, they say start with the
20 Mt. Healthy framework. Two, you have Iqbal.
21 Three, you have qualified immunity.

22 Justice Gorsuch added what he just
23 said to that. And I would add and the officer,
24 it's a special situation, which either we don't
25 reach or it's okay or you use the Fourth

1 Amendment or whatever, where the officer must
2 make singularly swift on-the-spot decisions and
3 the safety of persons or property is at issue.
4 Okay?

5 Now suppose -- I don't see anything
6 too terrible about writing those. And what
7 harm would be done? You would, of course, lose
8 your case, which I consider perhaps you would
9 consider a serious harm, but --

10 (Laughter.)

11 JUSTICE BREYER: -- but -- but none --
12 none -- none -- nonetheless, what -- what harm
13 would happen to the interests that you've heard
14 articulated?

15 MR. DVORETZKY: The harm that would
16 happen is that this Court has repeatedly
17 recognized that police officers need objective
18 bright-line rules, not five- or six- or
19 seven-factor tests that they then need to apply
20 on the ground.

21 JUSTICE BREYER: I didn't mean it as a
22 five- or six- or seven-factor test. What I
23 really meant you to focus on was the last one
24 because I've heard discussion on the others,
25 and that is the police officer does have the

1 immunity that they search in the situation
2 where -- and I could repeat it, but maybe you
3 wrote it down -- but it's -- it's that -- well,
4 I'll repeat it if you want. Where there is a
5 singular need for a swift on-the-spot decision
6 and in there is involved the safety of persons
7 or property.

8 MR. DVORETZKY: Justice Breyer, the
9 Ninth Circuit has tried to apply exactly that
10 approach. Those cases go to trial and those --
11 and those cases are found in favor of the --
12 the police officer.

13 Nor does qualified immunity, which I
14 think you also suggested, do any work here if
15 Mr. Lozman's rule were to prevail. If
16 Mr. Lozman's rule were to --

17 JUSTICE SOTOMAYOR: Sorry. As -- I
18 did go through the list that the Alaska brief
19 formed and the six that you -- that you listed.
20 It seems to me that having read those cases,
21 that they went to trial not because those
22 limitations failed but because there was other
23 evidence of things that -- that -- that didn't
24 fail but made this triable cases. Many of them
25 involved excessive force claims, which can

1 often be reflective of animus in a different
2 way than a mere arrest is.

3 And as was pointed out by your
4 adversary, of the 26 the Alaska brief pointed
5 to, 12 of them were dismissed at the motion to
6 dismiss stage. So people bring things, but it
7 doesn't mean that they're viable.

8 MR. DVORETZKY: Sometimes they are and
9 sometimes they're not. Far too often, they are
10 viable through trial and only at that point
11 does a jury find in favor of the officers.

12 And in many of these cases, the basis
13 for finding a triable question was simply that
14 the police officer was aware of the content of
15 some speech, and that was enough in order to
16 create an inference that maybe the real reason
17 for the arrest was not that the arrestee --

18 JUSTICE SOTOMAYOR: I -- I'm sorry, we
19 have -- we have a difference of opinion and
20 perhaps -- I don't think I have to recite each
21 -- go through each case, but I don't think that
22 was merely the reason in most, if not all, of
23 them.

24 MR. DVORETZKY: I -- I think if you
25 look at cases like Holland or the chalking case

1 or Mihailovici, those are cases where the
2 reason that there was a triable question was
3 simply a difference of opinion about what
4 happened. And that is also precisely why
5 qualified immunity will not do any work to
6 protect police officers if Mr. Lozman's rule
7 becomes the law.

8 At that point in the typical case, the
9 only thing left to be tried, if there's an
10 allegation of a retaliatory motive, is what was
11 the real motive in the officer's head? That's
12 not something to which qualified immunity
13 attaches. That is going to be a fact question
14 for a jury.

15 With respect to the suggestion that
16 Justice Kagan raised earlier between major and
17 minor crimes, police officers can't have a
18 taxonomy in mind of what's a significant enough
19 crime to arrest for and what's not.

20 And, moreover, even some seemingly
21 minor crimes, as the amicus brief for the
22 District of Columbia and numerous states points
23 out, even some seemingly minor crimes can be
24 very important to enforce for community
25 policing concerns. And so the idea of having a

1 test where only -- where major crimes, the
2 police officer somehow gets more deference than
3 for minor -- minor crimes doesn't work in
4 practice.

5 I'd also like to point out that the --
6 Mr. Lozman and his amici have surveyed decades
7 of cases. They've not come up with a single
8 case, not even one, in which a police officer
9 has been held liable for a retaliatory arrest
10 that was supported by probable cause.

11 JUSTICE GINSBURG: I'm -- I'm confused
12 by -- you keep talking about the police
13 officer. As far as I know, no one charged the
14 police officer here with having any kind of
15 animus against Lozman. The charge was that the
16 city council did, and particularly this
17 Councilmember Wade. The -- the animus here was
18 on the part of the city council, not the
19 arresting officer.

20 MR. DVORETZKY: If I may briefly
21 respond. The alleged animus was on the part of
22 the city council, but in order to have a
23 complete violation, it would need to be carried
24 out by the officer, which requires an inquiry
25 into the officer's state of mind and the

1 officer's intent.

2 More -- moreover, there's no basis for
3 distinguishing cases against police officers
4 versus those against municipalities in either
5 the text of 1983 or the history of these sorts
6 of actions.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 General Wall.

10 ORAL ARGUMENT OF JEFFREY B. WALL,
11 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
12 IN SUPPORT OF THE RESPONDENT

13 MR. WALL: Mr. Chief Justice, and may
14 it please the Court:

15 I have three points. The latter two
16 are about law, and I hope I'll get to them, but
17 I want to start with what the world looks like
18 because I think there's a serious disagreement
19 here and this case arises on about the worst
20 possible facts, and I would hate to see that
21 drive the rule.

22 There are about 10 to 11 million
23 arrests every year in the country. Of those,
24 Petitioner and his amici have come forward with
25 20 cases in their briefs, and I'd encourage --

1 encourage the Court to look at them because I
2 -- I'm perfectly happy to rise or fall by them.

3 They divide down, I think, into three
4 basic buckets: protest cases, noise ordinance
5 cases, and other cases where there's a
6 confrontation between the arrestee and the
7 officer and there's a failure to follow a
8 lawful order, and the question is: What
9 motivated the arrest, the failure to follow the
10 order or the speech?

11 And I think what we're trying -- what
12 -- what -- what the United States would submit
13 is Twombly and Iqbal are not going to work for
14 the reasons they haven't worked in the lower
15 courts. The plaintiffs never just point to
16 their speech. They always point to other
17 things about the interaction with the officer,
18 and many courts have deemed that sufficient to
19 get past the pleadings stage.

20 Qualified immunity isn't going to work
21 for the reasons Justice Alito gave. I don't
22 think the language in Reichle is going to work
23 because that was designed for protective
24 details. These are all on-the-spot decisions,
25 even the officer's decision on the city council

1 here. And a lot of these cases don't involve
2 the safety of persons or property.

3 I mean, take a case like Galarnyk that
4 went all the way to the Eighth Circuit.
5 Somebody trespassed into a government trailer
6 in order to criticize the government. And the
7 question is -- no question he was
8 trespassing -- did they arrest him for that or
9 because, once he got inside the trailer, he was
10 criticizing people working in the trailer?

11 I -- I don't know that you could say
12 that there was a real safety concern there.
13 And there's no property concern in any of the
14 noise ordinance cases or even a lot of the
15 protest cases.

16 I'd really caution the Court away from
17 addressing the Devenpeck rule here. Petitioner
18 hasn't challenged it. It's a very difficult
19 question. It's a very different question from
20 whether you need to show an absence of probable
21 cause, what offenses you should have to show
22 that for. I think there are very good reasons
23 why the rationale of Devenpeck should apply
24 here regardless.

25 So then I think you're really just

1 down to what Justice Kennedy was getting at,
2 which is, look, this looks like an official
3 policy of the municipality, and, indeed, the
4 parties seem to agree that's what the jury
5 found.

6 And I think you could rest it on that,
7 although for the reasons that the city's
8 council gave, there's no textual or historical
9 support for that in the statute or at common
10 law. And I think Hartman's Footnote 10 already
11 says we designed the constitutional tort for
12 the mine-run of cases, not for the needle in
13 the haystack.

14 And this case really is. I mean, it
15 -- really, I agree, that the facts here are
16 troubling. I also just think that this is
17 almost a category of one. It just does not
18 look like the typical cases for which you
19 designed the constitutional tort rule. And
20 that's what Hartman tells us.

21 CHIEF JUSTICE ROBERTS: Well --

22 JUSTICE KAGAN: Mr. Wall, we allow
23 people to sue under 1983 for discriminatory
24 arrests under the equal protection clause and
25 without showing anything about whether probable

1 cause exists or not.

2 What has been the experience with
3 respect to those cases? And why is this
4 area -- why should the rule be any different
5 than that one?

6 MR. WALL: So I think what we'd say is
7 different for a couple of reasons but one
8 similarity, and this was one of the legal
9 points I wanted to make.

10 Those cases are about race. Race, the
11 Court has said, is so rarely a proper
12 consideration for officers that the Court does
13 treat them differently.

14 Speech is the kind of thing that
15 officers often can and must in these situations
16 take account of. And even there, even though
17 it's more subjective than in virtually every
18 other context, even there you've got the
19 objective screen of Armstrong. So you've still
20 got to prove that similarly situated people
21 were treated differently.

22 And I think, setting aside the facts
23 of this case, the legal anomaly that Petitioner
24 wants is to say: Look, for every other
25 constitutional tort claim, retaliatory

1 prosecution claims under the First Amendment,
2 selective enforcement under the Fourteenth, or
3 false arrests under the Fourth, you've got some
4 objective screen, whether it's the absence of
5 probable cause, whether it's Armstrong's
6 similarly situated requirement.

7 And what they're really saying is for
8 this subcategory of claims under the First
9 Amendment, no objective screen.

10 Fact question. It's going to go to
11 the jury. And all of these cases are virtually
12 a he said/she said. The officer wasn't going
13 to arrest me until I called him names and I
14 said really ugly things. And the officer said:
15 No, I was going to arrest them for failing to
16 follow my lawful -- lawful order.

17 CHIEF JUSTICE ROBERTS: One of the
18 grounds, and I don't -- I'm not quite sure how
19 you could use it, we've been talking about how
20 bad the facts are and yet how difficult it is
21 to apply.

22 This is not a situation where the
23 police are out in the street and something's
24 happened and they're looking at the, you know,
25 what kind of slogans they have, what they're

1 shouting, a lot's going on.

2 This is, you know, in the city
3 council, during a time specifically set aside
4 for citizens to talk about whatever the council
5 is talking about and comment on it. Is there
6 any basis there for limiting it to the, it
7 seems to me, intensely free speech environment
8 that we're talking about?

9 MR. WALL: So maybe right there at the
10 tail end, Mr. Chief Justice. I mean, I
11 understand the impulse. I think the difficulty
12 with the on-the-spot language is that even here
13 the officer's making an on-the-spot decision.

14 You -- you could try to limit that to
15 -- I don't know that "in the field" would
16 capture it because it -- I'm not sure there's a
17 difference between -- I'm not sure how the
18 Court would get into what's in the field and --
19 and what's not, whether you're in the field
20 when you're in the government trailer or when
21 you're out on the streets, but you're not in
22 the city council meeting.

23 You could try to tie it to the nature
24 of the city council meeting, the fact that you
25 both had the official policy and that it was in

1 the context of a meeting where people were
2 designed to air grievances or talk about what
3 they wanted against the city.

4 Again, I don't think that's gotten
5 much textual historical support behind it. And
6 Hartman specifically said: Look, we're --
7 we're not going to design this thing for the
8 one-in-a-thousand case. And I think even more
9 important here, because it's so much easier to
10 allege retaliatory arrests and there are so
11 many more arrests every year.

12 JUSTICE BREYER: But you say that, not
13 on-the-spot, and you also say here they're
14 suing a person who is not a policeman. And so
15 they have to show the causal connection.

16 So the causal connection is, as again,
17 as Justice Ginsburg said, and I said in Reichle
18 is -- is significant. It matters.

19 MR. WALL: No, I --

20 JUSTICE BREYER: And, therefore, since
21 you have to show the causal connection between
22 this decision and the other person who is the
23 policeman, it doesn't really affect the police.

24 MR. WALL: Oh, Justice Breyer, if the
25 Court designs a rule in such a way that it

1 recognizes this is the one-in-a-thousand, and
2 it wants to pick up that one, though not the
3 others, that's not what the Court did in
4 Hartman, but I suppose it could do it here.

5 I think the easier way to analyze it
6 is to say, look -- and Petitioner doesn't
7 dispute that this is the basic question at page
8 9 of their reply. Are claims of retaliatory
9 arrest more like claims of retaliatory
10 prosecution under Hartman or more like claims
11 of retaliation by employees and government
12 contractors under Mt. Healthy?

13 And I think what you'd say is: Look,
14 arrest and prosecution are closely related
15 steps in the criminal process. They involve
16 the same body of valuable probable cause
17 evidence.

18 JUSTICE KAGAN: But one reason they --

19 MR. WALL: They both got a very hard
20 --

21 JUSTICE KAGAN: One reason they are
22 different is because, in Hartman, you had an
23 indictment and you just looked at the
24 indictment and said: Is there probable cause
25 for that or not?

1 I mean, here we have this ridiculous
2 spectacle of going through the statute books
3 for a month, trying to find something that this
4 man may have violated. And there's just got to
5 be a big difference between those two
6 inquiries.

7 MR. WALL: Look, I completely agree.
8 Again, it's difficult and -- and we --
9 Petitioner hasn't challenge -- challenged
10 Devenpeck here, so we haven't had the
11 opportunity to brief it and -- and we would
12 very much like to do so, because I -- I -- I
13 think it's too easy to just say discard the
14 Devenpeck rule.

15 Because what the court said in
16 Devenpeck is: Look, police arrest on the basis
17 of a course of conduct. You're waving a gun in
18 the air and they arrest you, they don't know
19 exactly which provision of the criminal code
20 that violates.

21 They go back, they talk to their
22 supervisor. They may have an exchange with
23 prosecutors. They may go before a grand jury.
24 It's very difficult to isolate the exact point
25 in that analysis where you should freeze-frame

1 it and say, what were the offenses for which
2 there was probable cause?

3 I agree that here --

4 JUSTICE GORSUCH: How about before --

5 MR. WALL: -- you've gotten all the
6 way to trial.

7 JUSTICE GORSUCH: How about before
8 trial?

9 (Laughter.)

10 MR. WALL: So I -- Justice Gorsuch, I
11 think a before-trial rule would be perfectly
12 fine, again, as long -- because I think it
13 reflects the realities of policing, which is
14 that police aren't lawyers. They arrest based
15 on conduct.

16 And all the same reasons the Court
17 applied the Devenpeck rule are exactly why the
18 common law, I think on the best reading, had
19 the Devenpeck rule too. And it wasn't like the
20 common law didn't know about speech. The
21 restatement recognized it. You may be pulled
22 over for speeding, even though that you think
23 it's because you've complained about the
24 department.

25 The common law took all of these

1 things into account too. And in its wisdom, I
2 don't think it created an epidemic that
3 requires a drastic cure that searches for the
4 needle in the haystack.

5 This is the rule in the majority of
6 circuits. And what's notable is that, unlike
7 in a lot of these cases, it's not as if
8 Petitioner and his amici have come in saying
9 there is some huge problem in the Second,
10 Fourth, Fifth, Eighth, and Eleventh circuits.

11 They really have sort of pointed to
12 the facts of their case, and I agree it's
13 troubling, but in the real world, I think the
14 far more serious danger is subjecting police
15 departments across the country to claims that
16 are easy to allege and difficult to disprove.

17 And weighing virtually that exact same
18 balance in Hartman, what the Court said is the
19 game is not worth the candle. We're not going
20 to try to design the constitutional tort for
21 the one-in-a-thousand case. There are other
22 remedies that get at that.

23 JUSTICE KAGAN: Mr. Wall, you keep on
24 saying one-in-a-thousand, but might there not
25 be a problem that now that we have this case

1 and we have to decide this case, and if we
2 decide it your way, you know, maybe it's a
3 green light to everybody to make it not the
4 one-in-a-thousand case and to start really
5 going -- you know, there are lots of small
6 towns in America and there are lots of cranks
7 in those small towns, and there are lots of
8 relationships that go sour between officials
9 and some members of the populace.

10 And, you know, what about that? What
11 about, you know, finding that guy every time he
12 doesn't quite stop when he makes a right on red
13 and putting him in jail for a while?

14 MR. WALL: So a couple of things.
15 One, again, I -- I don't think we ought to
16 believe that the only bulwark against
17 backsliding on the First Amendment is damages
18 suits, but more importantly, what I'd say is if
19 that's the kind of rule they want you to put in
20 place, they ought to have to show that the
21 common law, which had this rule for hundreds of
22 years, was a problem.

23 They ought to have to show you that
24 Hartman has created an epidemic of retaliatory
25 prosecutions. They ought to at least have to

1 show there are more retaliatory arrests in the
2 Second, Fourth, Fifth, Eighth, and Eleventh
3 Circuits than the Ninth and Tenth, and they
4 haven't tried to do it, because what they'll
5 find, I -- I -- if you look through those cases
6 is there are a lot of claims in those circuits,
7 but they don't turn out to have a lot of merit.
8 They're difficult to defend against. And
9 that's why we think the rule makes sense.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Four minutes, Ms. Karlan.

13 REBUTTAL ARGUMENT OF PAMELA S. KARLAN
14 ON BEHALF OF THE PETITIONER

15 MS. KARLAN: Thank you. I'd just like
16 to begin with the common law and ask this Court
17 to read its own decision in Dinsman, which is
18 the only decision by this Court talking about
19 probable cause and false arrest that antedates
20 the passage of Section 1983.

21 And here's what the Court says on page
22 402: "Probable cause or not is of no further
23 importance than as evidence to be weighed by
24 the jury in connection with all the other
25 evidence." That's the rule we're asking for.

1 We're asking for the common law rule here.

2 And if you look at Prosser on Torts,
3 he says, people keep getting mistaken between
4 malicious prosecution, which has always had a
5 no probable cause requirement, and false
6 imprisonment, of which false arrest is a
7 subset, which has never had that requirement at
8 common law as part of the Plaintiff's
9 case-in-chief.

10 The second point I'd like to make is a
11 point that goes back to the Devenpeck issue,
12 which, as Justice Gorsuch pointed out, might be
13 perfectly sensible in the Fourth Amendment
14 context but not when you're talking about First
15 Amendment values, because First Amendment
16 values are -- the core of the First Amendment
17 is an anti-retaliation principle, and do not be
18 -- do not be fooled.

19 If you tell city councils that if they
20 deny somebody a permit they can be sued for
21 damages. If they fire him a -- from his job,
22 they can be sued for damages. If they don't
23 give him a zoning variance, they can be sued
24 for damages. If they don't give him a parade
25 permit, they can be sued for damages.

1 But if they arrest him and they can
2 come up with anything, even eight years after
3 the fact, that might be something for which
4 there's probable cause, not even a showing that
5 he actually committed the offense of -- of
6 disrupting a religious assembly or assembly for
7 other purposes, but just that an officer could
8 believe probable cause, you are giving a green
9 light to every vengeful city council in America
10 to go after people when they demonstrate
11 against abortion clinics, when they demonstrate
12 about police, when they protest zoning
13 decisions.

14 The First Amendment really requires
15 that there be some remedy. And the text of
16 Section 1983 gives that remedy. It says when
17 somebody "subjects or causes to be subjected"
18 to a violation. And that -- that makes it
19 clear that Section 1983 contemplates cases like
20 this one in which a city council caused someone
21 to be arrested.

22 All we ask is that this Court hold
23 that probable cause is not an absolute bar in
24 cases where retaliate -- retaliation is proven.
25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.

3 (Whereupon, at 12:23 p.m., the case
4 was submitted.)

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Official

1	adopted [1] 37:10 advanced [1] 26:16 adversary [1] 46:4 advocated [1] 27:25 affect [2] 7:19 56:23 affidavits [2] 19:23,25 ago [1] 14:6 agree [5] 52:4,15 58:7 59:3 60:12 agreed [2] 33:21,23 Aguirre [4] 10:4 32:15,25 33:4 Aguirre's [1] 35:7 air [2] 56:2 58:18 Alaska [4] 7:5 23:14 45:18 46:4 Alaska's [1] 24:16 ALITO [7] 10:15,18 11:7 21:17 22:8,10 50:21 allegation [4] 15:5,5 37:23 47:10 allege [3] 23:6 56:10 60:16 alleged [5] 12:23 34:11 35:19 38:11 48:21 allegedly [1] 37:14 allow [2] 17:22 52:22 allowed [1] 14:3 allowing [1] 23:12 almost [1] 52:17 already [1] 52:10 although [1] 52:7 Amendment [38] 3:12,25 4:1,4,5 5:18 7:2 17:13 18:22 21:24 23:23, 25 24:3,5 25:18 26:6,24,25 27:4,6, 7 38:7,18 39:10,23 40:5 41:21,22 42:1 44:1 54:1,9 61:17 63:13,15, 15,16 64:14 America [3] 9:15 61:6 64:9 amici [3] 48:6 49:24 60:8 amicus [4] 1:24 2:11 47:21 49:11 analysis [2] 37:10 58:25 analyze [1] 57:5 animus [21] 5:10 6:24 7:17 10:4 11:6,15 12:25 14:12 15:6 16:2,16 18:6 22:6 23:19 24:24 28:19 38:14 46:1 48:15,17,21 annoyed [1] 37:4 anomaly [1] 53:23 another [1] 10:22 answer [4] 9:2 10:16 20:16 43:16 answers [1] 15:13 antedates [1] 62:19 anti-police [1] 41:1 anti-retaliation [1] 63:17 anytime [2] 3:19 5:17 anyway [4] 7:1 19:17 33:11 38:15 APPEARANCES [1] 1:17 Appendix [1] 12:20 apple [1] 43:2 applied [3] 17:18 28:3 59:17 applies [1] 29:21 apply [7] 3:21 16:7 27:12 44:19 45:9 51:23 54:21 approach [1] 45:10 appropriate [3] 9:24 16:20 21:3 area [1] 53:4 aren't [1] 59:14 argue [2] 11:17 39:25	argues [1] 11:17 argument [11] 1:14 2:2,5,8,13 3:4, 7 29:8,12 49:10 62:13 arises [1] 49:19 Armstrong [1] 53:19 Armstrong's [1] 54:5 arose [1] 37:12 around [2] 19:12 32:1 arrest [52] 3:16 5:11,17 9:13,25 10:6 11:6 13:16,18 14:4,5 16:17 18:11 19:3,14,23 23:2 26:3,18 27:3 30:4,13,18 32:17,19,22 33:1 35:5, 13,13 37:2,19,24 40:2 41:9 42:8 46:2,17 47:19 48:9 50:9 51:8 54:13,15 57:9,14 58:16,18 59:14 62:19 63:6 64:1 arrested [13] 7:1 10:23 14:6 16:2 19:21 20:4,8 22:18 28:23 31:23 38:15,17 64:21 arrestee [2] 46:17 50:6 arrestees [1] 30:23 arresting [3] 38:3 42:16 48:19 arrests [10] 6:2 37:21 38:13 39:2 49:23 52:24 54:3 56:10,11 62:1 articulated [1] 44:14 aside [2] 53:22 55:3 assembly [3] 26:15 64:6,6 assume [2] 33:9 35:12 assumed [1] 38:9 assuming [1] 38:10 assurance [1] 36:18 attaches [1] 47:13 attitude [1] 14:4 avoid [1] 5:1 aware [1] 46:14 away [2] 28:10 51:16	behavior [1] 23:8 behind [2] 8:6 56:5 believe [7] 11:5 17:12 23:4 27:8 40:18 61:16 64:8 belligerence [1] 30:16 besides [1] 39:17 best [3] 27:24 29:1 59:18 between [13] 4:16 10:20 12:15 14:18,18 29:24 47:16 50:6 55:17 56:21 58:5 61:8 63:3 big [2] 32:5 58:5 bit [1] 13:19 Black [2] 9:15 37:24 blanket [1] 6:18 body [1] 57:16 booking [1] 28:20 books [5] 28:20 31:22 41:13,15 58:2 both [4] 5:3 34:6 55:25 57:19 box [2] 6:15 14:16 breaking [2] 7:25 19:13 BREYER [24] 7:12 8:19,22 9:1,4 11:18 12:2,6,9,12 14:19 18:20 19:5,20 20:24 21:6 29:16 43:14 44:11,21 45:8 56:12,20,24 brief [7] 7:5 24:16 40:24 45:18 46:4 47:21 58:11 briefly [1] 48:20 briefs [1] 49:25 Briggs [2] 9:21 15:21 bright-line [1] 44:18 bring [1] 46:6 bringing [1] 23:24 broad [4] 5:17 15:2 17:3 18:17 broken [1] 42:6 brought [4] 8:16 11:19,21 13:14 buckets [1] 50:4 bulwark [1] 61:16 bumper [1] 9:16 burdens [1] 31:3 burglary [1] 16:17 burning [1] 8:1 business [1] 36:4
2	20 [1] 49:25 2018 [1] 1:11 26 [1] 46:4 27 [3] 1:11 7:6 23:13 29 [1] 2:7	back [7] 8:22 10:22 11:22 23:1 28:6 58:21 63:11 backsliding [1] 61:17 backstops [1] 29:13 bad [2] 6:2 54:20 balance [1] 60:18 Ballentine [1] 40:23 bar [19] 4:2 5:24 7:20,23 8:8 18:2 20:12,18 21:9,15 24:7 25:10 29:17 30:5,10 39:15 40:7 43:18 64:23 barriers [1] 39:12 based [4] 15:8 21:23 22:3 59:14 basic [2] 50:4 57:7 basis [6] 26:13 30:7 46:12 49:2 55:6 58:16 BEACH [4] 1:6 3:5 10:21 35:19 Beck [1] 24:15 become [1] 31:15 becomes [1] 47:7 before-trial [1] 59:11 began [1] 15:3 begin [1] 62:16 beginning [2] 5:15,16 behalf [11] 1:19,20,24 2:4,7,10,15 3:8 29:9 49:11 62:14	C
3	3 [1] 2:4	cabin [2] 40:6,16 California [1] 1:18 call [3] 32:22,22,25 called [3] 6:24 20:2 54:13 calls [1] 33:2 calm [1] 34:23 calmly [1] 8:6 came [2] 1:13 26:14 candle [1] 60:19 capture [1] 55:16 car [1] 42:21 card [1] 11:23 care [6] 15:2 17:10,24 38:12,22,24 carried [2] 30:13 48:23 cars [1] 8:1 carve [1] 39:14 Case [78] 3:4 4:2,4,17 5:6,22 6:11, 14 7:23 9:25 10:3,19 11:25 13:21 14:17,20 15:10,17 16:1,3 17:1,6,	
4	402 [1] 62:22 48 [1] 32:3 49 [1] 2:12		
6	62 [1] 2:15		
9	9 [1] 57:8		
A	a.m [2] 1:15 3:2 able [6] 10:24 15:10 22:2,7,19,22 abortion [2] 25:23 64:11 above-entitled [1] 1:13 absence [2] 51:20 54:4 absolute [12] 4:2,14,19,22 18:2 20:18 21:9,15 24:7 25:10 36:24 64:23 Absolutely [3] 5:5 8:4 13:2 abuse [1] 38:8 accept [1] 38:6 accident [1] 42:21 account [6] 30:3 37:18 40:2 41:7 53:16 60:1 across [1] 60:15 act [2] 33:3 37:15 acted [1] 22:6 action [3] 3:18,18 17:23 actions [3] 23:5 39:17 49:6 activity [2] 4:5 18:22 actor [1] 4:15 actors [2] 5:8 37:13 acts [1] 15:8 actually [3] 4:15 33:3 64:5 add [3] 27:12 43:17,23 added [2] 37:9 43:22 address [2] 29:14 31:5 addressed [2] 20:20 35:21 addressing [1] 51:17 adopt [2] 3:22 18:1		

Official

<p>18 18:8,19 19:6 20:15 21:25 22:4, 13 23:16,22 24:2,8,8,15,17 25:6, 18 26:21 27:11,19,20 28:3,13 31: 9,13 32:7,11,15 34:12,16 36:12 37:13 38:9 39:15,15,24 40:12,23, 24 44:8 46:21,25 47:8 48:8 49:19 51:3 52:14 53:23 56:8 60:12,21, 25 61:1,4 65:2,3</p> <p>case-in-chief [1] 63:9</p> <p>cases [70] 7:4,6,8,9 8:2,16 9:6,7, 10,17 10:1 11:10,16,18 12:15,15, 17 13:13,25 14:2,7,19 15:25 17:9, 11,16,17 18:4,4 20:18 21:16 23: 12,13,15,20,22 24:7,11 25:16 30: 22,25 39:11,18 40:12 43:18 45:10, 11,20,24 46:12,25 47:1 48:7 49:3, 25 50:4,5,5 51:1,14,15 52:12,18 53:3,10 54:11 60:7 62:5 64:19,24</p> <p>category [1] 52:17</p> <p>causal [3] 56:15,16,21</p> <p>causation [3] 37:11,12,17</p> <p>cause [32] 3:16 7:18 18:11,13,15 24:4 25:14 26:13 27:2 28:1,6,14, 18 29:1 35:5 41:9,11 42:5 43:13 48:10 51:21 53:1 54:5 57:16,24 59:2 62:19,22 63:5 64:4,8,23</p> <p>caused [2] 11:6 64:20</p> <p>causes [1] 64:17</p> <p>caution [1] 51:16</p> <p>certain [3] 20:3,7 42:11</p> <p>certainly [3] 16:25 28:2 30:12</p> <p>cetera [2] 12:17 43:19</p> <p>chalking [3] 40:25 41:4 46:25</p> <p>challenge [1] 58:9</p> <p>challenged [2] 51:18 58:9</p> <p>chamber [1] 5:13</p> <p>chances [1] 43:2</p> <p>change [1] 11:21</p> <p>characterization [2] 34:13 37:7</p> <p>charge [3] 41:9 42:17 48:15</p> <p>charged [3] 11:16 18:15 48:13</p> <p>charges [1] 43:5</p> <p>charging [1] 31:18</p> <p>chaser [1] 27:13</p> <p>check [1] 36:19</p> <p>CHIEF [24] 3:3,9 13:6,9,10 14:16 16:5 17:15 18:24 26:11 27:8 29:5, 10 33:24 34:2,18 41:8 49:7,13 52: 21 54:17 55:10 62:10 65:1</p> <p>chilling [1] 34:20</p> <p>Choose [1] 9:16</p> <p>cigarette [1] 20:6</p> <p>Circuit [12] 7:7 8:17 11:11 14:2 18: 3 23:11 24:15 30:21,24 40:21 45: 9 51:4</p> <p>Circuit's [2] 25:12,13</p> <p>circuits [4] 60:6,10 62:3,6</p> <p>circumstance [1] 13:3</p> <p>circumstances [4] 9:13,24 22:23 23:3</p> <p>circumstantial [1] 22:16</p> <p>cited [4] 4:24 24:16 40:24,24</p> <p>cites [4] 7:4,5,6 23:14</p> <p>cities [1] 18:19</p>	<p>Citizens [2] 25:20 55:4</p> <p>CITY [34] 1:6 3:5 5:9 7:4 10:11,13, 21 14:12 18:8,12,18 26:13 33:11, 12,18,20 34:5 35:23,24 36:1,3,4,4 48:16,18,22 50:25 55:2,22,24 56: 3 63:19 64:9,20</p> <p>city's [2] 34:9 52:7</p> <p>claim [8] 11:14 23:23,25 24:4,5 27: 4 34:9 53:25</p> <p>claiming [2] 3:25 43:12</p> <p>claims [8] 45:25 54:1,8 57:8,9,10 60:15 62:6</p> <p>class [1] 14:18</p> <p>Clause [2] 4:6 52:24</p> <p>clear [2] 8:15 64:19</p> <p>clearly [3] 6:20 15:18 17:12</p> <p>client [3] 10:20 18:14 24:2</p> <p>client's [1] 16:21</p> <p>clinic [1] 25:24</p> <p>clinics [1] 64:11</p> <p>close [1] 18:4</p> <p>closed [2] 33:25,25</p> <p>closed-door [1] 24:25</p> <p>closely [1] 57:14</p> <p>code [2] 42:9 58:19</p> <p>colorfully [1] 36:9</p> <p>Columbia [1] 47:22</p> <p>come [5] 28:6 48:7 49:24 60:8 64: 2</p> <p>comes [2] 4:13 10:22</p> <p>comment [2] 33:17 55:5</p> <p>comments [1] 35:10</p> <p>commit [1] 32:1</p> <p>committed [1] 64:5</p> <p>committing [1] 23:2</p> <p>common [9] 29:19 52:9 59:18,20, 25 61:21 62:16 63:1,8</p> <p>community [1] 47:24</p> <p>complained [1] 59:23</p> <p>complaint [3] 12:22,23,24</p> <p>complete [1] 48:23</p> <p>completely [1] 58:7</p> <p>complex [1] 37:12</p> <p>concededly [2] 30:3 37:18</p> <p>concern [2] 51:12,13</p> <p>concerned [2] 6:6 12:17</p> <p>concerns [2] 41:7 47:25</p> <p>concurrence [3] 11:24 12:13 13:2</p> <p>conditions [2] 20:19 22:24</p> <p>conduct [6] 6:16 26:18 30:8 42:4 58:17 59:15</p> <p>confine [1] 25:8</p> <p>confrontation [1] 50:6</p> <p>confronts [1] 20:19</p> <p>confused [1] 48:11</p> <p>connection [4] 56:15,16,21 62:24</p> <p>Consider [3] 40:23 44:8,9</p> <p>consideration [2] 41:24 53:12</p> <p>consistent [1] 23:7</p> <p>consists [1] 43:18</p> <p>Constitution [2] 3:20 5:19</p> <p>constitutional [5] 39:6 52:11,19 53:25 60:20</p> <p>construction [1] 3:23</p>	<p>contain [1] 30:19</p> <p>contemplates [1] 64:19</p> <p>content [3] 30:14,15 46:14</p> <p>contention [1] 6:12</p> <p>context [6] 27:6,8 41:21 53:18 56: 1 63:14</p> <p>continue [1] 30:17</p> <p>contractors [1] 57:12</p> <p>conviction [1] 28:15</p> <p>cordon [1] 6:15</p> <p>core [3] 4:5 42:1 63:16</p> <p>correct [3] 16:12 34:1 38:4</p> <p>corrupt [1] 35:16</p> <p>corruption [4] 31:19 35:14,18,20</p> <p>couldn't [2] 5:15 26:19</p> <p>Council [18] 5:10,13 33:11,12 34:5, 25 36:3 48:16,18,22 50:25 52:8 55:3,4,22,24 64:9,20</p> <p>councilmember [4] 10:5 14:12 24:20 48:17</p> <p>councilmembers [3] 18:18 24:23 33:20</p> <p>Councilperson [2] 32:24 33:18</p> <p>councils [1] 63:19</p> <p>Counsel [6] 26:11 29:6 41:6 49:8 62:11 65:2</p> <p>country [2] 49:23 60:15</p> <p>County [5] 35:19,23,25 36:2,5</p> <p>couple [5] 9:17 32:14 43:2 53:7 61:14</p> <p>course [5] 12:2 19:6 42:3 44:7 58: 17</p> <p>COURT [50] 1:1,14 3:10,22 4:10, 23,25 5:12 6:23 9:20 11:4 13:22 15:15 17:4 20:17 23:4,11,16,21 24:14 25:11,19 26:8 27:1 29:11 34:15,16 35:10,20 36:7 37:8,9 40: 10,15 44:16 49:14 50:1 51:16 53: 11,12 55:18 56:25 57:3 58:15 59: 16 60:18 62:16,18,21 64:22</p> <p>Court's [4] 9:9 10:11 15:20 37:10</p> <p>courts [3] 18:5 50:15,18</p> <p>cover [1] 6:9</p> <p>cranks [1] 61:6</p> <p>create [4] 39:7,8 40:16 46:16</p> <p>created [2] 60:2 61:24</p> <p>crime [3] 11:13 23:2 47:19</p> <p>crimes [16] 16:8,18 17:3,7,8,9 18: 14 29:25,25 37:21,22 47:17,21,23 48:1,3</p> <p>criminal [3] 31:22 57:15 58:19</p> <p>critical [2] 30:2 32:14</p> <p>criticisms [1] 4:7</p> <p>criticize [2] 3:13 51:6</p> <p>criticizing [1] 51:10</p> <p>cuff [1] 35:2</p> <p>curb [1] 19:1</p> <p>cure [1] 60:3</p> <p>curiae [3] 1:24 2:11 49:11</p> <p>curious [1] 15:3</p>	<p>21,22,24,25</p> <p>danger [2] 21:10 60:14</p> <p>dangers [1] 31:14</p> <p>day [4] 5:13 26:2,5 28:22</p> <p>days [2] 24:1 26:3</p> <p>deal [1] 8:12</p> <p>dealing [2] 26:9 29:16</p> <p>decades [1] 48:6</p> <p>decide [4] 7:21 32:3 61:1,2</p> <p>deciding [1] 30:4</p> <p>decision [14] 10:12 20:10,15 32: 16 33:1,5,6 36:21 45:5 50:25 55: 13 56:22 62:17,18</p> <p>decision-making [1] 5:2</p> <p>decisions [7] 4:24 5:7 20:25 21: 11 44:2 50:24 60:13</p> <p>deemed [1] 50:18</p> <p>defeat [3] 27:3 33:22 41:10</p> <p>defend [1] 62:8</p> <p>defendant [4] 10:10,11 15:18 16:3</p> <p>defendants [1] 3:24</p> <p>deference [1] 48:2</p> <p>degree [1] 13:11</p> <p>deliberate [1] 15:6</p> <p>deliberately [1] 6:13</p> <p>deliberative [1] 5:4</p> <p>demonstrate [3] 25:23 64:10,11</p> <p>demonstrates [1] 30:21</p> <p>demoting [1] 18:25</p> <p>deny [1] 63:20</p> <p>Department [2] 1:23 59:24</p> <p>departments [1] 60:15</p> <p>deprived [1] 3:19</p> <p>depriving [1] 38:16</p> <p>Deputy [2] 1:22 18:25</p> <p>design [4] 36:9,11 56:7 60:20</p> <p>designed [4] 50:23 52:11,19 56:2</p> <p>designs [1] 56:25</p> <p>desk [1] 8:6</p> <p>details [1] 50:24</p> <p>determine [1] 42:4</p> <p>determined [1] 43:9</p> <p>determines [1] 42:22</p> <p>deterred [1] 37:20</p> <p>Devenpeck [12] 27:1,13 28:11 41: 19 51:17,23 58:10,14,16 59:17,19 63:11</p> <p>difference [4] 46:19 47:3 55:17 58:5</p> <p>different [13] 8:3 19:6 22:9 24:23 30:23 41:16,23 43:6 46:1 51:19 53:4,7 57:22</p> <p>differently [2] 53:13,21</p> <p>difficult [9] 6:1,7 11:2 51:18 54:20 58:8,24 60:16 62:8</p> <p>difficulties [1] 5:22</p> <p>difficulty [3] 31:7,9 55:11</p> <p>Dinsman [1] 62:17</p> <p>direct [2] 9:11,17</p> <p>directions [1] 35:8</p> <p>disaggregate [1] 30:10</p> <p>disagree [2] 37:6 38:2</p> <p>disagreement [1] 49:18</p> <p>discard [1] 58:13</p>
D			
<p>D.C [3] 1:10,20,23</p> <p>damages [7] 3:18 39:17 61:17 63:</p>			

Official

<p>discriminatory ^[1] 52:23 discuss ^[1] 33:13 discussing ^[1] 14:19 discussion ^[1] 44:24 dislike ^[1] 30:15 dismiss ^[3] 9:11,19 46:6 dismissal ^[2] 22:2 23:9 dismissed ^[4] 11:8,11 23:16 46:5 disorderly ^[1] 26:18 dispositive ^[4] 25:16,17 28:2 29:2 disprove ^[1] 60:16 dispute ^[4] 22:5,14 34:13 57:7 disrupting ^[1] 64:6 disruption ^[1] 11:3 disruptive ^[1] 10:23 distinction ^[4] 4:10,11 29:24 40:11 distinctions ^[1] 4:16 distinguish ^[1] 14:18 distinguishing ^[1] 49:3 district ^[5] 23:11,16 35:10,20 47:22 disturbance ^[1] 35:6 disturbing ^[1] 26:14 divide ^[1] 50:3 doctrine ^[2] 15:16 17:21 doing ^[4] 23:12 24:15 31:19 38:16 done ^[4] 5:7 7:20 43:13 44:7 down ^[8] 7:15 8:3 29:13,18,22 45:3 50:3 52:1 drastic ^[1] 60:3 draw ^[4] 8:10,11 12:14 14:17 drawn ^[1] 32:13 drew ^[1] 36:3 drive ^[1] 49:21 drives ^[1] 19:2 During ^[3] 29:12 42:6 55:3 DVORETZKY ^[29] 1:20 2:6 29:7,8,10 31:4 32:9,24 33:12 34:1,3 35:4,18 36:1 37:5 38:4,20,25 39:13 40:14 41:18,25 42:18 43:8 44:15 45:8 46:8,24 48:20</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[4] 26:1 31:5 46:20,21 earlier ^[2] 24:21 47:16 easier ^[2] 56:9 57:5 easy ^[2] 58:13 60:16 echoed ^[1] 29:16 effect ^[1] 5:20 eight ^[2] 24:1 64:2 Eighth ^[3] 51:4 60:10 62:2 either ^[8] 21:12 23:15,16 26:19 39:6 40:19 43:24 49:4 elected ^[2] 6:12 15:6 Eleventh ^[4] 18:3 25:12 60:10 62:2 empirical ^[1] 7:3 employees ^[1] 57:11 encourage ^[2] 49:25 50:1 end ^[1] 55:10 endure ^[1] 31:3 enforce ^[1] 47:24 enforcement ^[1] 54:2</p>	<p>enough ^[5] 6:20 38:7 42:25 46:15 47:18 entirely ^[1] 4:13 entitled ^[6] 20:21 21:12,13,14 24:2,4 environment ^[1] 55:7 epidemic ^[4] 39:2,5 60:2 61:24 equal ^[1] 52:24 equally ^[1] 23:7 escape ^[1] 3:24 especially ^[1] 33:3 ESQ ^[7] 1:18,20,22 2:3,6,9,14 essentially ^[1] 3:23 established ^[1] 17:21 et ^[2] 12:17 43:18 even ^[17] 3:15 33:10 39:4 43:2 47:20,23 48:8 50:25 51:14 53:16,16,18 55:12 56:8 59:22 64:2,4 eventually ^[1] 26:14 everybody ^[2] 19:14 61:3 everyone ^[1] 41:14 everything ^[2] 13:21,24 evidence ^[14] 7:4 9:12,18 16:16 22:16,16 23:19 28:1 39:25 40:1 45:23 57:17 62:23,25 exact ^[2] 58:24 60:17 exactly ^[5] 7:13 26:16 45:9 58:19 59:17 exaggeration ^[1] 13:20 example ^[4] 11:15 24:14 30:5 40:23 except ^[1] 38:17 excessive ^[1] 45:25 exchange ^[1] 58:22 excuse ^[1] 13:9 exempt ^[1] 39:9 exercise ^[2] 3:13 21:24 exist ^[1] 19:9 existed ^[1] 28:18 exists ^[1] 53:1 expanded ^[1] 40:13 expect ^[1] 16:23 expenditure ^[1] 25:21 experience ^[1] 53:2 explain ^[1] 29:17 explained ^[1] 4:23 expressed ^[1] 24:25 expressing ^[1] 33:18 extraordinarily ^[3] 8:15 17:2 18:17 extraordinary ^[2] 16:15 24:9 extremely ^[2] 8:24 36:12</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face ^[1] 20:2 fact ^[9] 4:13 26:12 30:12 34:3 35:12 47:13 54:10 55:24 64:3 factor ^[2] 25:15,16 factors ^[1] 5:5 facts ^[17] 12:23 19:5 28:18 31:9,13 32:7,10,15 34:12,16 38:8,10 49:20 52:15 53:22 54:20 60:12 factual ^[2] 7:22 24:19 fail ^[1] 45:24</p>	<p>failed ^[2] 35:6 45:22 failing ^[1] 54:15 failure ^[3] 42:12 50:7,9 fair ^[2] 22:22 42:25 fall ^[2] 39:11 50:2 fallback ^[1] 15:4 false ^[4] 54:3 62:19 63:5,6 FANE ^[1] 1:3 far ^[5] 9:25 18:9 46:9 48:13 60:14 fault ^[1] 42:22 favor ^[5] 16:21 20:14 34:9 45:11 46:11 fear ^[1] 37:22 February ^[1] 1:11 fellow ^[1] 34:21 felonies ^[3] 16:22 17:4 29:24 felony ^[1] 17:2 few ^[1] 39:11 field ^[3] 55:15,18,19 Fifth ^[2] 60:10 62:2 fighting ^[1] 5:24 figure ^[1] 26:19 file ^[1] 10:24 filled ^[1] 28:19 find ^[6] 31:1 41:14 43:5 46:11 58:3 62:5 finding ^[3] 35:9 46:13 61:11 fine ^[1] 59:12 fire ^[2] 19:13 63:21 First ^[37] 3:11,24 4:4,5,18 5:18 7:2 9:9 14:9 15:13 17:13 18:21 21:24 23:24 24:5 25:18 26:6,24 27:7 30:1 32:10 33:13 34:12 38:6,18 39:9,13,23 40:5 41:22 54:1,8 61:17 63:14,15,16 64:14 fit ^[1] 28:22 five ^[4] 19:2 33:19 44:18,22 FLORIDA ^[2] 1:6 18:16 focus ^[2] 18:1 44:23 follow ^[4] 31:25 50:7,9 54:16 followed ^[1] 33:19 fooled ^[1] 63:18 Footnote ^[2] 36:8 52:10 force ^[1] 45:25 forced ^[1] 31:2 form ^[3] 3:15 41:2,5 formed ^[1] 45:19 forms ^[1] 34:10 formulation ^[3] 6:9,17 15:21 forum ^[2] 40:3,11 forward ^[8] 13:25 14:3,8 23:13,22 24:5 25:18 49:24 found ^[7] 17:19 18:5 34:8,20 35:20 45:11 52:5 four ^[7] 19:22,23 29:13,18,22 31:6 62:12 Fourteenth ^[1] 54:2 Fourth ^[13] 4:1 23:23 24:3 26:23 27:4,6 41:21,25 43:25 54:3 60:10 62:2 63:13 framework ^[1] 43:20 fraud ^[1] 28:7 free ^[1] 55:7 freeze-frame ^[1] 58:25</p>	<p>Friday ^[1] 19:3 front ^[1] 18:23 frustration ^[1] 33:18 fundamental ^[1] 36:6 further ^[1] 62:22</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>Galarnyk ^[1] 51:3 game ^[1] 60:19 gang ^[1] 19:22 gave ^[3] 15:12 50:21 52:8 General ^[4] 1:22 34:15 36:11 49:9 generally ^[2] 32:11 36:25 genuine ^[2] 21:25 22:14 gets ^[2] 15:24 48:2 getting ^[2] 52:1 63:3 ginned ^[1] 41:12 GINSBURG ^[11] 4:9,12 10:2 11:24 12:13 32:21 35:24 36:16 37:5 48:11 56:17 Ginsburg's ^[1] 13:1 give ^[6] 6:10 31:5 40:7 43:2 63:23,24 given ^[1] 25:6 gives ^[1] 64:16 giving ^[2] 26:8 64:8 GORSUCH ^[12] 27:5 41:6,19,20 42:11,25 43:8,22 59:4,7,10 63:12 got ^[8] 19:5 42:16 51:9 53:18,20 54:3 57:19 58:4 gotten ^[2] 56:4 59:5 government ^[8] 3:11 25:24 31:15 38:8 51:5,6 55:20 57:11 governments ^[1] 26:10 grand ^[1] 58:23 Great ^[1] 9:15 green ^[2] 61:3 64:8 grievances ^[1] 56:2 ground ^[2] 26:9 44:20 grounds ^[5] 11:12 23:18 27:11 28:14 54:18 group ^[1] 13:15 guard ^[1] 21:5 guess ^[2] 25:4 32:7 gun ^[1] 58:17 guy ^[1] 61:11</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>handcuffs ^[1] 34:23 happen ^[2] 44:13,16 happened ^[6] 6:15 19:17 30:24 34:19 47:4 54:24 happy ^[1] 50:2 hard ^[1] 57:19 harm ^[4] 44:7,9,12,15 Hartman ^[28] 4:10,12,17,19,24 6:24 18:9,9 27:12 28:3,4 29:20 34:15 36:7,8,16,17 37:7,7,11 40:15 52:20 56:6 57:4,10,22 60:18 61:24 Hartman's ^[1] 52:10 hat ^[3] 9:15 13:14,17 hate ^[1] 49:20 haystack ^[2] 52:13 60:4</p>
--	--	--	--

<p>head ^[1] 47:11 Healthy ^[7] 6:25 15:25 19:17 29:24 38:14 43:20 57:12 hear ^[2] 3:3 43:16 heard ^[4] 20:9 32:18 44:13,24 hearing ^[1] 24:20 hearings ^[1] 24:21 heart ^[1] 37:10 heed ^[1] 35:7 Heffernan ^[2] 18:21 25:22 held ^[1] 48:9 help ^[2] 21:17 22:12 historical ^[2] 52:8 56:5 history ^[1] 49:5 hold ^[4] 20:17 26:3 27:7 64:22 holds ^[1] 10:12 Holland ^[1] 46:25 homework ^[2] 41:14 43:5 honestly ^[1] 23:3 Honor ^[1] 10:9 hope ^[1] 49:16 hours ^[1] 32:3 Howards ^[1] 13:4 huge ^[1] 60:9 hugely ^[1] 5:17 hundreds ^[1] 61:21 hypothetical ^[9] 7:10,20 8:13,15,16,23,24 29:14,14 hypothetically ^[1] 20:14 hypotheticals ^[3] 5:23 21:6 31:8</p>	<p>injury ^[1] 4:15 inquiries ^[1] 58:6 inquiry ^[2] 5:1 48:24 inside ^[1] 51:9 inspectors ^[1] 36:20 instances ^[1] 40:20 instead ^[2] 18:25 41:4 institute ^[1] 40:7 insulting ^[2] 7:25 22:18 intensely ^[1] 55:7 intent ^[2] 38:3 49:1 interaction ^[1] 50:17 interests ^[1] 44:13 interrogatories ^[1] 43:11 interrupt ^[1] 10:16 intimidate ^[1] 6:13 invite ^[1] 42:13 involve ^[3] 40:22 51:1 57:15 involved ^[3] 4:4 45:6,25 involves ^[1] 7:9 Iqbal ^[12] 9:10 11:5 13:11,20 14:8,20,24 23:5,9 25:7 43:20 50:13 isn't ^[4] 11:14 15:18 41:23 50:20 isolate ^[1] 58:24 issue ^[5] 21:25 22:14 34:7 44:3 63:11 itself ^[1] 42:13</p>	<p style="text-align: center;">K</p> <p>KAGAN ^[15] 16:6,13,19 17:7 20:22 21:5 31:4,12,25 32:9 47:16 52:22 57:18,21 60:23 KARLAN ^[54] 1:18 2:3,14 3:6,7,9 4:11 6:4,19 8:14,21,25 9:3,6 10:9,17 11:1,10 12:1,3,8,19 13:23 14:22,25 15:12 16:7,11,14,25 17:8,25 19:19 20:16,23 21:4,8 22:4,9,21 24:22 25:9 26:22 27:10,17,20,24 28:25 31:7 33:14 39:12 62:12,13,15 Karlan's ^[2] 29:12 34:13 keep ^[5] 13:21,24 48:12 60:23 63:3 KENNEDY ^[17] 5:14 6:5 12:16 13:8 14:14,23 15:1 19:8 21:7 24:18 25:2,4 29:15 33:8 39:22 40:14 52:1 Kennedy's ^[1] 8:13 kind ^[18] 7:10 8:23 11:20 15:10 21:6 26:25 27:13 30:10 31:13 32:2,6 39:8 40:17,17 48:14 53:14 54:25 61:19 kinds ^[2] 13:24 14:7 knocking ^[2] 18:3,4 knows ^[1] 34:22</p>	<p>litigation ^[3] 31:3 33:22,23 Lives ^[3] 9:15 31:21 37:24 local ^[4] 26:9 31:14,16,17 long ^[2] 14:6 59:12 long-standing ^[2] 18:6 29:19 look ^[19] 5:6 12:20 20:1 23:10,13 28:21 40:20 46:25 50:1 52:2,18 53:24 56:6 57:6,13 58:7,16 62:5 63:2 looked ^[5] 12:4 17:17 28:13 37:2 57:23 looking ^[1] 54:24 looks ^[2] 49:17 52:2 lose ^[1] 44:7 lost ^[2] 10:20 14:20 lot ^[9] 17:16 24:7,11 31:22 51:1,14 60:7 62:6,7 lot's ^[1] 55:1 lots ^[3] 61:5,6,7 lottery ^[1] 36:10 love ^[3] 10:20 27:17,21 lower ^[1] 50:14 LOZMAN ^[12] 1:3 3:4 31:19 32:17,18 33:16 34:4,11 37:4 43:10 48:6,15 Lozman's ^[3] 45:15,16 47:6</p>
<p style="text-align: center;">I</p> <p>idea ^[1] 47:25 identify ^[2] 42:3,8 ignorant ^[1] 15:23 imagine ^[3] 19:9 28:19 41:11 immunity ^[30] 4:14,20,23 9:22 10:8,13 15:15,16,22 17:10,18,23 20:21 21:13,18 22:3,7,10,11 25:8 29:23 33:9 36:24 37:8 43:21 45:1,13 47:5,12 50:20 importance ^[1] 62:23 important ^[3] 23:21 47:24 56:9 importantly ^[2] 34:14 61:18 imposed ^[1] 4:15 impossible ^[1] 30:9 imprisonment ^[1] 63:6 impulse ^[1] 55:11 inadequate ^[1] 14:24 inappropriate ^[1] 22:25 incident ^[3] 32:18 34:7 39:15 Incidentally ^[1] 24:18 incite ^[1] 30:18 Indeed ^[2] 24:1 52:3 independent ^[6] 5:3,8 25:21 32:16 33:5,6 indictment ^[2] 57:23,24 individual ^[2] 15:18 39:17 induced ^[1] 37:14 infer ^[3] 12:24 22:19,22 inference ^[4] 41:10,17 42:15 46:16 initial ^[2] 6:9,17 initially ^[1] 28:13</p>	<p style="text-align: center;">J</p> <p>jail ^[2] 32:3 61:13 JEFFREY ^[3] 1:22 2:9 49:10 jeopardy ^[1] 21:1 job ^[1] 63:21 join ^[1] 13:2 joined ^[1] 12:14 Joint ^[1] 12:20 judge ^[2] 28:17 41:13 judged ^[1] 30:8 judges ^[1] 23:11 judgment ^[4] 21:12,14 23:17 24:2 juries ^[3] 16:23 30:25 31:1 jury ^[17] 7:21,22,22 8:2 9:7,8 10:25 11:2 16:9 23:19 34:8 46:11 47:14 52:4 54:11 58:23 62:24 Justice ^[127] 1:23 3:3,10 4:9,12 5:14 6:5 7:12 8:12,19,22 9:1,4 10:2,15,18 11:7,18,24 12:2,6,9,12,13,16 13:1,6,8,9,10 14:14,16,19,23 15:1 16:5,6,13,19 17:7,15 18:19 19:5,8,20 20:22,24 21:5,6,7,17 22:8,10 24:18 25:2,3,4 26:11 27:5,15,19,22 28:10 29:5,10,15,15 31:4,12,25 32:9,21 33:8,24 34:2,18 35:11,24 36:14,16 37:5 38:1,5,20,21,25 39:4,20,22 40:14 41:6,8,18,20 42:11,25 43:8,14,22 44:11,21 45:8,17 46:18 47:16 48:11 49:7,13 50:21 52:1,21,22 54:17 55:10 56:12,17,20,24 57:18,21 59:4,7,10 60:23 62:10 63:12 65:1 Justice's ^[1] 27:8 justification ^[2] 18:7 26:17 justify ^[2] 17:5 21:15</p>	<p style="text-align: center;">L</p> <p>language ^[3] 21:2 50:22 55:12 last ^[2] 18:20 44:23 later ^[2] 37:22 41:12 latter ^[1] 49:15 Laughter ^[5] 12:11 31:11,24 44:10 59:9 law ^[16] 3:18 15:19 24:3 29:19 33:10 42:6 47:7 49:16 52:10 59:18,20,25 61:21 62:16 63:1,8 lawful ^[5] 21:23 23:7 50:8 54:16,16 lawn ^[2] 18:23 25:22 lawsuit ^[1] 4:5 lawyers ^[3] 42:2 43:4 59:14 lead ^[1] 35:2 least ^[5] 37:2,16 40:12 42:14 61:25 leave ^[1] 17:22 led ^[1] 34:22 left ^[1] 47:9 legal ^[3] 32:12 53:8,23 legitimate ^[2] 22:5 37:20 legitimately ^[2] 9:23 21:19 level ^[2] 5:10 11:2 liability ^[2] 3:24 42:13 liable ^[3] 7:17 38:15 48:9 Life ^[1] 9:16 light ^[2] 61:3 64:9 lighting ^[1] 20:5 likelihood ^[1] 30:17 limit ^[2] 19:2 55:14 limitations ^[1] 45:22 limiting ^[1] 55:6 line ^[4] 8:10,11 14:15 36:2 list ^[1] 45:18 listed ^[2] 26:16 45:19</p>	<p style="text-align: center;">M</p> <p>made ^[9] 4:10 5:8,9 32:16,25 33:5 36:21 41:9 45:24 mail ^[1] 28:7 main ^[1] 17:25 major ^[5] 4:16 29:25 37:21 47:16 48:1 majority ^[1] 60:5 malicious ^[1] 63:4 Malley ^[2] 9:20 15:21 man ^[1] 58:4 many ^[10] 19:15 25:15 30:4,22 34:6 40:21 45:24 46:12 50:18 56:11 match ^[1] 20:5 matter ^[5] 1:13 9:15 24:3,19 37:24 matters ^[1] 56:18 mayhem ^[1] 11:16 McCullen ^[1] 25:23 mean ^[13] 10:4 26:8 28:9 31:7 33:2 34:20 35:2 44:21 46:7 51:3 52:14 55:10 58:1 Meaning ^[1] 27:23 meaningful ^[1] 43:7 means ^[2] 20:12 26:7 meant ^[2] 4:20 44:23 meeting ^[9] 8:7 10:22 24:25 25:1 33:25 36:3 55:22,24 56:1 meetings ^[1] 35:22 member ^[2] 5:10 13:15 members ^[2] 19:22 61:9 mere ^[1] 46:2 merely ^[1] 46:22 merit ^[1] 62:7 message ^[1] 13:18 messages ^[2] 41:1,1 middle ^[2] 8:6 43:4 might ^[13] 8:24 11:1 20:5 24:23 28:</p>

Official

<p>21 31:8 36:10 39:10,24 41:16 60:24 63:12 64:3 Mihailovici ^[1] 47:1 miles ^[1] 19:2 million ^[1] 49:22 mind ^[4] 8:22 11:22 47:18 48:25 mindset ^[1] 42:20 mine-run ^[2] 39:15 52:12 minor ^[7] 32:2 37:21 47:17,21,23 48:3,3 minutes ^[1] 62:12 mishear ^[1] 16:9 mistaken ^[1] 63:3 mix ^[2] 43:17,17 moment ^[3] 20:20 42:23 43:1 month ^[1] 58:3 moreover ^[2] 47:20 49:2 most ^[4] 12:16 23:20,21 46:22 motion ^[5] 9:11,19 21:13 23:17 46:5 motivated ^[3] 37:3 38:13 50:9 motivation ^[2] 22:1,15 motive ^[3] 22:17 47:10,11 move ^[1] 31:12 Ms ^[52] 3:6,9 4:11 6:4,19 8:14,21, 25 9:3,6 10:9,17 11:1,10 12:1,3,8, 19 13:23 14:22,25 15:12 16:6,11, 14,25 17:8,25 19:19 20:16,22 21:4,8 22:4,9,21 24:22 25:9 26:22 27:10,17,20,24 28:25 29:12 31:7 33:14 34:13 35:7 39:12 62:12,15 Mt ^[7] 6:25 15:25 19:17 29:24 38:14 43:20 57:12 much ^[6] 16:23 26:8 36:17 56:5,9 58:12 multiple ^[1] 37:13 municipalities ^[1] 49:4 municipality ^[1] 52:3 murder ^[1] 16:18 must ^[4] 30:3 37:18 44:1 53:15</p>	<p>notion ^[1] 33:15 number ^[1] 5:23 numerous ^[1] 47:22</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective ^[6] 30:7,7 44:17 53:19 54:4,9 obviously ^[2] 10:19 11:20 occurred ^[1] 5:12 odd ^[1] 26:20 offense ^[3] 27:3 41:12 64:5 offenses ^[4] 28:5 43:12 51:21 59:1 office ^[1] 6:12 officer ^[53] 5:9 6:21 7:16 9:12,22 10:3,6,7,8,10 13:16 14:1,11 15:7, 7,17 16:16 17:12 20:19 21:11,22 22:2,6,19 23:8 26:15 29:16 32:15, 23,25,25 33:4,9 35:7 37:14 42:21, 23 43:23 44:1,25 45:12 46:14 48:2,8,13,14,19,24 50:7,17 54:12,14 64:7 officer's ^[8] 22:1,15 23:5 47:11 48:25 49:1 50:25 55:13 officers ^[22] 6:7,17 13:3 22:24 28:19 30:3,6,9,23 31:2 37:18,19 38:2 42:2,19 44:17 46:11 47:6,17 49:3 53:12,15 official ^[2] 52:2 55:25 officials ^[8] 3:14 4:7 15:6 31:16, 17 36:4,5 61:8 often ^[3] 46:1,9 53:15 Okay ^[6] 8:9 19:15 20:12 34:2 43:25 44:4 on-the-spot ^[7] 20:25 44:2 45:5 50:24 55:12,13 56:13 once ^[3] 7:19 25:5 51:9 one ^[34] 5:21 6:1 7:9 8:1 10:4 12:24 17:10 24:14,21 26:1,15 29:21 30:5 31:20 32:15 33:17,17 36:23 39:10 43:17,19 44:23 48:8,13 52:17 53:5,7,8 54:17 57:2,18,21 61:15 64:20 one-in-a-thousand ^[5] 56:8 57:1 60:21,24 61:4 one-off ^[1] 36:12 ones ^[3] 9:18 13:25 14:9 only ^[15] 10:10 13:13 14:16 18:13, 14 19:23 22:12 31:2 34:9 43:9 46:10 47:9 48:1 61:16 62:18 opinion ^[4] 18:20 20:13 46:19 47:3 opportunity ^[2] 31:5 58:11 oral ^[7] 1:13 2:2,5,8 3:7 29:8 49:10 order ^[11] 5:25 26:24 27:3 30:19 40:10 46:15 48:22 50:8,10 51:6 54:16 orders ^[1] 15:9 ordinance ^[2] 50:4 51:14 ordinary ^[1] 6:16 other ^[19] 15:17 24:11 25:7 29:25 34:10 35:15 39:16 40:8,12 41:4 45:22 50:5,16 53:18,24 56:22 60:21 62:24 64:7</p>	<p>others ^[2] 44:24 57:3 otherwise ^[2] 25:19 28:23 ought ^[7] 29:20 32:12,12 61:15,20, 23,25 out ^[21] 7:24 8:7 13:21,24 18:4,4 24:11 26:19 30:13 35:3 37:22 39:2 43:15 46:3 47:23 48:5,24 54:23 55:21 62:7 63:12 outside ^[1] 25:23 over ^[3] 19:2 22:5 59:22 Owens ^[1] 10:12 own ^[2] 30:11 62:17</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m ^[1] 65:3 PAGE ^[5] 2:2 7:5 12:20 57:7 62:21 pages ^[1] 33:19 pains ^[1] 31:16 Palm ^[1] 35:19 PAMELA ^[5] 1:18 2:3,14 3:7 62:13 parade ^[1] 63:24 part ^[4] 16:4 48:18,21 63:8 particular ^[6] 10:19 13:15 34:7 40:17,17 42:20 particularly ^[3] 17:16 36:12 48:16 parties ^[1] 52:4 passage ^[1] 62:20 past ^[2] 9:11 50:19 people ^[20] 5:24 6:12 7:24 9:13 13:17 14:4,5 19:24 21:10 23:24 31:15 35:16 38:17 46:6 51:10 52:23 53:20 56:1 63:3 64:10 perfectly ^[3] 50:2 59:11 63:13 perhaps ^[6] 19:8 33:10 37:23 41:8 44:8 46:20 permit ^[2] 63:20,25 person ^[10] 6:13 7:1 10:5 13:14 20:4 22:17 23:2 36:25 56:14,22 persons ^[4] 21:1 44:3 45:6 51:2 Petitioner ^[12] 1:4,19 2:4,15 3:8 49:24 51:17 53:23 57:6 58:9 60:8 62:14 Petitioners ^[1] 40:7 Petitions ^[1] 4:6 pick ^[1] 57:2 pig ^[1] 20:2 place ^[2] 32:19 61:20 plaintiff ^[1] 23:6 Plaintiff's ^[1] 63:8 plaintiffs ^[1] 50:15 plan ^[2] 34:4 40:1 plausible ^[6] 11:4,5,12,14 16:15 17:11 plead ^[1] 14:10 pleading ^[5] 9:9 11:4 29:23 30:1, 20 pleadings ^[2] 15:14 50:19 please ^[3] 3:10 29:11 49:14 point ^[11] 7:3 23:4 36:6 46:10 47:8 48:5 50:15,16 58:24 63:10,11 pointed ^[5] 39:12 46:3,4 60:11 63:12 points ^[3] 47:22 49:15 53:9 police ^[46] 5:9 6:6,16 7:16,25 10:3</p>	<p>15:7,7 16:16 18:24 19:11 22:23 29:16 30:3,6,9,22 31:1 33:2,2 37:14,18,19 38:2 41:2 42:2,18,20,23 44:17,25 45:12 46:14 47:6,17 48:2,8,12,14 49:3 54:23 56:23 58:16 59:14 60:14 64:12 policeman ^[5] 5:25 6:2 20:9 56:14, 23 policeman's ^[1] 20:1 policemen ^[1] 19:22 policies ^[1] 3:14 policing ^[2] 47:25 59:13 policy ^[3] 36:3 52:3 55:25 political ^[6] 13:18 40:2,3,11,22 41:2 populace ^[1] 61:9 poses ^[1] 31:14 position ^[2] 6:21 15:4 possible ^[3] 40:15 42:14 49:20 postal ^[1] 36:20 postulated ^[1] 13:12 potential ^[1] 29:13 practice ^[1] 48:4 pre-determined ^[1] 40:1 pre-lqbal ^[1] 12:22 pre-Twombly ^[1] 12:22 precisely ^[2] 42:9 47:4 premise ^[2] 38:6 39:1 present ^[1] 5:6 presided ^[2] 24:20,21 presiding ^[1] 25:1 pretty ^[3] 32:2,5 34:20 prevail ^[1] 45:15 principle ^[1] 63:17 probable ^[33] 3:16 7:18 18:10,13, 15 24:4 25:14 26:13 27:2,4 28:1,6, 14,17 29:1 35:5 41:9,11 42:5 43:13 48:10 51:20 52:25 54:5 57:16, 24 59:2 62:19,22 63:5 64:4,8,23 probably ^[1] 26:2 problem ^[9] 19:11 24:6 30:20 32:5 37:17 40:5 60:9,25 61:22 problems ^[2] 17:24 37:12 proceed ^[1] 28:16 process ^[2] 39:10 57:15 processes ^[1] 30:11 pronounced ^[1] 12:4 pronunciation ^[1] 12:10 proper ^[1] 53:11 property ^[4] 44:3 45:7 51:2,13 proposition ^[1] 15:2 prosecute ^[1] 36:22 prosecution ^[6] 18:11 28:5 54:1 57:10,14 63:4 prosecutions ^[1] 61:25 prosecutor ^[7] 4:21 5:7 36:18,19, 21,24 37:15 prosecutorial ^[5] 4:14,19,23 5:1 37:8 prosecutors ^[2] 5:3 58:23 Prosser ^[1] 63:2 protect ^[4] 17:22 38:7 40:10 47:6 protected ^[4] 4:6 5:18 6:22 18:22 protection ^[2] 6:10 52:24</p>
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Official

<p>protections ^[1] 26:7 protective ^[2] 39:11 50:23 protects ^[1] 9:22 protest ^[4] 41:5 50:4 51:15 64:12 protestors ^[1] 40:25 prove ^[1] 53:20 proven ^[1] 64:24 provide ^[1] 6:18 provides ^[1] 3:17 provision ^[1] 58:19 public ^[5] 3:14,14 4:7,7,8 pulled ^[1] 59:21 purposes ^[1] 64:7 put ^[5] 11:22 25:22 33:21 36:8 61:19 putting ^[1] 61:13</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified ^[24] 9:22 10:8,12 15:14,16,22 17:9,18,23 20:21 21:13,18 22:3,7,10,11 25:8 29:23 33:9 43:21 45:13 47:5,12 50:20 question ^[15] 7:14,23 9:2 27:9 39:1 46:13 47:2,13 50:8 51:7,7,19,19 54:10 57:7 questions ^[1] 7:21 quick ^[1] 6:8 quite ^[6] 5:15,16 19:6 24:8 54:18 61:12</p> <hr/> <p style="text-align: center;">R</p> <p>race ^[2] 53:10,10 raise ^[2] 41:17 42:14 raised ^[2] 29:15 47:16 rape ^[1] 16:17 rare ^[1] 36:12 rarely ^[1] 53:11 rather ^[1] 36:8 rationale ^[1] 51:23 re-create ^[1] 30:12 reach ^[1] 43:25 read ^[6] 7:8 23:13 24:10,14 45:20 62:17 reading ^[2] 4:3 59:18 real ^[8] 7:24 8:8 31:15 37:23 46:16 47:11 51:12 60:13 realities ^[1] 59:13 reality ^[1] 38:23 really ^[17] 7:17 11:7 13:6,10,19 25:19 44:23 51:16,25 52:14,15 54:7,14 56:23 60:11 61:4 64:14 reason ^[10] 4:22 9:7 37:9,23 43:9 46:16,22 47:2 57:18,21 reasonable ^[1] 21:22 reasons ^[6] 50:14,21 51:22 52:7 53:7 59:16 REBUTTAL ^[2] 2:13 62:13 recall ^[1] 5:16 recite ^[1] 46:20 recognized ^[2] 44:17 59:21 recognizes ^[1] 57:1 recommend ^[1] 27:15 record ^[1] 5:11 red ^[1] 61:12</p>	<p>reference ^[1] 20:23 referring ^[1] 20:24 reflective ^[1] 46:1 reflects ^[1] 59:13 regardless ^[4] 13:5 16:2 34:19 51:24 regular ^[1] 39:9 regularly ^[1] 30:25 Reichle ^[8] 11:25 12:5,6,13,21 20:23 50:22 56:17 reiterated ^[1] 9:21 relate ^[1] 35:22 related ^[4] 35:19,22,23 57:14 relationships ^[1] 61:8 release ^[1] 32:4 relevant ^[4] 25:15,17 28:1 29:2 relies ^[1] 33:14 religious ^[1] 64:6 remainder ^[1] 29:3 remedies ^[2] 39:17 60:22 remedy ^[6] 38:11,12,19 39:21 64:15,16 remember ^[2] 15:20 28:11 Reno ^[1] 4:24 repeat ^[2] 45:2,4 repeatedly ^[5] 9:21 35:6 40:25 41:3 44:16 reply ^[1] 57:8 require ^[4] 13:11 17:1,6 23:9 required ^[3] 13:4 42:7,23 requirement ^[3] 54:6 63:5,7 requires ^[3] 48:24 60:3 64:14 reserve ^[1] 29:3 resisting ^[1] 26:17 resources ^[1] 33:21 respect ^[4] 16:22 30:1 47:15 53:3 respectfully ^[1] 37:6 respond ^[3] 32:8,10 48:21 Respondent ^[7] 1:7,21,25 2:7,12 29:9 49:12 rest ^[1] 52:6 restatement ^[1] 59:21 rests ^[1] 4:13 retaliate ^[3] 21:23 31:17 64:24 retaliates ^[2] 3:12 6:22 retaliation ^[8] 3:15 10:24 34:11 41:11,17 42:15 57:11 64:24 retaliatory ^[14] 6:24 22:6,17 23:19 38:3 39:2 47:10 48:9 53:25 56:10 57:8,9 61:24 62:1 retirement ^[1] 36:9 return ^[1] 16:4 reversal ^[2] 17:1,6 reverse ^[2] 17:19 27:11 rid ^[2] 15:16,24 ridiculous ^[1] 58:1 rights ^[1] 21:24 riot ^[7] 7:24 8:8 12:17 19:9,10 29:17 43:18 rise ^[1] 50:2 RIVIERA ^[3] 1:6 3:5 10:21 ROBERTS ^[14] 3:3 13:6,10 17:15 26:11 29:5 33:24 34:2,18 49:7 52:21 54:17 62:10 65:1</p>	<p>robust ^[1] 15:15 rotate ^[1] 24:23 route ^[1] 9:4 rule ^[41] 4:3 8:17 11:20 16:21 18:2,2,18 24:7 25:10,12,13,14 27:23,24,25 29:1,20,20 30:21 32:12 34:16 36:11 37:9 45:15,16 47:6 49:21 51:17 52:19 53:4 56:25 58:14 59:11,17,19 60:5 61:19,21 62:9,25 63:1 rules ^[3] 9:9 26:1 44:18</p> <hr/> <p style="text-align: center;">S</p> <p>sadly ^[1] 10:1 safety ^[5] 21:1 44:3 45:6 51:2,12 said/she ^[1] 54:12 same ^[4] 24:21 57:16 59:16 60:17 saw ^[1] 20:1 saying ^[10] 9:12 13:23 19:23 22:18 25:20 35:12 39:7 54:7 60:8,24 says ^[13] 6:1 13:15,16 14:1 18:18,18 22:25 25:14 38:14 52:11 62:21 63:3 64:16 scheme ^[1] 33:15 scour ^[1] 28:20 scouring ^[1] 41:13 screen ^[3] 53:19 54:4,9 search ^[1] 45:1 searches ^[1] 60:3 Second ^[10] 9:20 14:13 15:14 16:4 32:20 34:14 39:16 60:9 62:2 63:10 seconds ^[1] 34:21 Section ^[7] 3:17,23 4:3 42:9 62:20 64:16,19 secure ^[1] 41:22 secured ^[1] 3:19 see ^[7] 4:16 11:15 12:21 22:1 40:13 44:5 49:20 seeing ^[1] 11:10 seem ^[1] 52:4 seemed ^[3] 7:15 26:20,20 seemingly ^[2] 47:20,23 seems ^[12] 5:21 6:5,14 15:1 32:6 39:24 40:4,5,9 43:17 45:20 55:7 seen ^[1] 22:23 sees ^[1] 42:21 selective ^[1] 54:2 sending ^[2] 41:13 43:4 sends ^[1] 30:25 sense ^[1] 62:9 sensible ^[1] 63:13 sentence ^[1] 5:16 separation ^[1] 12:14 sergeant ^[1] 28:12 series ^[1] 4:6 serious ^[15] 6:11 11:13 16:8,18 17:5,7,8,9 19:9 20:19,19 40:5 44:9 49:18 60:14 serve ^[1] 43:11 set ^[1] 55:3 setting ^[2] 19:13 53:22 seven ^[2] 7:6 19:25 seven-factor ^[2] 44:19,22</p>	<p>SHAY ^[3] 1:20 2:6 29:8 shirt ^[1] 37:24 shouldn't ^[4] 38:3,11,12 39:7 shouting ^[1] 55:1 show ^[14] 6:25 15:11 18:10,12 26:23,24 28:5 51:20,21 56:15,21 61:20,23 62:1 showing ^[2] 52:25 64:4 shows ^[2] 4:2 5:11 sidewalk ^[1] 41:1 sign ^[2] 18:22 25:22 significant ^[3] 37:16 47:18 56:18 similarity ^[1] 53:8 similarly ^[2] 53:20 54:6 simply ^[6] 14:24 18:25 30:23 42:19 46:13 47:3 since ^[1] 56:20 single ^[2] 7:9 48:7 singular ^[1] 45:5 singularly ^[1] 44:2 sitting ^[2] 8:6 32:3 situated ^[2] 53:20 54:6 situation ^[12] 8:5,5 19:9,10 21:22 22:12 30:10,19 35:5 43:24 45:1 54:22 situations ^[3] 6:7 30:5 53:15 six ^[6] 7:4 19:22 33:19 44:18,22 45:19 slogans ^[1] 54:25 small ^[3] 24:19 61:5,7 solely ^[1] 38:13 Solicitor ^[1] 1:22 solidly ^[1] 17:20 somebody ^[13] 4:21 8:7,8 11:16 14:10 16:17 22:25 31:25 33:1 40:2 51:5 63:20 64:17 somebody's ^[2] 30:14,16 somehow ^[2] 40:6 48:2 someone ^[5] 3:13,19 6:22 8:5 64:20 something's ^[1] 54:23 Sometimes ^[2] 46:8,9 soon ^[1] 20:2 sorry ^[6] 10:13 12:9 36:14 38:1 45:17 46:18 sort ^[6] 11:22 21:2 24:22 31:16 34:4 60:11 sorts ^[1] 49:5 SOTOMAYOR ^[16] 25:3 27:15,19,22 28:10 35:11 36:14 38:1,5,20,21,25 39:4,20 45:17 46:18 sound ^[1] 28:9 sour ^[1] 61:8 speaking ^[1] 34:23 special ^[2] 15:9 43:24 specific ^[1] 40:8 specifically ^[4] 42:8 43:12 55:3 56:6 specificity ^[2] 13:12 14:10 spectacle ^[1] 58:2 speech ^[18] 5:18 6:23 30:4,14,16 37:19 38:18 40:3,10,17,22 41:2 46:15 50:10,16 53:14 55:7 59:20 speed ^[1] 19:2</p>
--	--	--	--

Official

<p>speeding ^[1] 59:22 spend ^[1] 19:4 split-second ^[2] 20:10 21:11 stage ^[3] 15:14 46:6 50:19 standard ^[3] 6:25 15:25 30:20 standards ^[2] 29:23 30:2 Stanford ^[1] 1:18 start ^[4] 7:14 43:19 49:17 61:4 started ^[3] 8:3 35:12 43:15 starting ^[1] 28:9 state ^[4] 6:20 7:5 23:14 48:25 STATES ^[7] 1:1,15,24 2:10 47:22 49:11 50:12 station ^[1] 28:20 statute ^[4] 3:20 31:22 52:9 58:2 statutes ^[2] 18:16 41:15 stay ^[1] 35:8 steps ^[2] 19:1 57:15 sticker ^[1] 9:16 still ^[2] 28:22 53:19 stop ^[2] 13:4 61:12 street ^[1] 54:23 streets ^[1] 55:21 stress ^[1] 22:24 strip-search ^[1] 26:4 strong ^[3] 15:5 25:6,18 sub-gang ^[3] 19:12,12,14 subcategory ^[1] 54:8 subjected ^[1] 64:17 subjecting ^[1] 60:14 subjective ^[1] 53:17 subjects ^[1] 64:17 submit ^[1] 50:12 submitted ^[2] 65:2,4 subset ^[2] 20:11 63:7 successfully ^[2] 11:17 13:13 sudden ^[1] 32:2 sue ^[3] 4:21,21 52:23 sued ^[4] 63:20,22,23,25 sufficient ^[3] 23:18 29:19 50:18 sufficiently ^[1] 17:5 suggest ^[5] 12:19 17:21 24:13 31:13 41:4 suggested ^[4] 30:16,17 41:8 45:14 suggesting ^[1] 42:12 suggestion ^[1] 47:15 suing ^[1] 56:14 suit ^[3] 10:7,24 11:8 suits ^[1] 61:18 summary ^[2] 21:14 23:17 supervisor ^[1] 58:22 support ^[6] 1:25 2:11 33:15 49:12 52:9 56:5 supported ^[1] 48:10 Suppose ^[4] 10:19,21 44:5 57:4 SUPREME ^[2] 1:1,14 surprised ^[1] 26:12 surveyed ^[2] 39:19 48:6 survive ^[1] 9:18 suspects ^[1] 6:1 swift ^[3] 20:25 44:2 45:5 system ^[5] 36:10 39:7,9,14 40:16</p>	<p style="text-align: center;">T</p> <p>T-shirt ^[1] 9:16 table ^[1] 11:23 tail ^[1] 55:10 talks ^[1] 20:24 tape ^[1] 37:3 taxonomy ^[1] 47:18 teaching ^[2] 41:19 42:1 tells ^[2] 10:5 52:20 tend ^[1] 41:10 Tenth ^[1] 62:3 terms ^[2] 3:17 32:10 terrible ^[1] 44:6 test ^[2] 44:22 48:1 testified ^[1] 32:16 testimony ^[2] 33:4,20 tests ^[1] 44:19 text ^[2] 49:5 64:15 textual ^[2] 52:8 56:5 themselves ^[1] 30:9 there's ^[28] 3:16 4:22 5:17,18 6:11 9:11 19:11 21:21 22:13,15 28:17 31:20,22 35:13 36:23 37:1 39:20 42:4 47:9 49:2,18 50:5,7 51:13 52:8 55:16 58:4 64:4 Therefore ^[2] 10:13 56:20 they'll ^[1] 62:4 they've ^[2] 31:2 48:7 thinking ^[2] 11:23 42:24 third ^[2] 15:24 39:19 though ^[6] 28:11 36:7,14 53:16 57:2 59:22 three ^[5] 4:16 15:13 43:21 49:15 50:3 tie ^[1] 55:23 tied ^[1] 26:25 took ^[2] 32:19 59:25 topic ^[3] 35:8,11,17 topics ^[2] 35:21,22 tort ^[4] 52:11,19 53:25 60:20 Torts ^[1] 63:2 town ^[1] 31:20 towns ^[2] 61:6,7 track ^[1] 8:4 tracks ^[1] 7:15 traffic ^[1] 32:1 trailer ^[4] 51:5,9,10 55:20 trained ^[3] 42:3,7,19 transcript ^[4] 24:10 33:13,14,19 treat ^[1] 53:13 treated ^[2] 11:4 53:21 trespassed ^[1] 51:5 trespassing ^[1] 51:8 triable ^[3] 45:24 46:13 47:2 trial ^[12] 24:1 40:21 41:12 43:3,4,10,10 45:10,21 46:10 59:6,8 tried ^[6] 12:14 35:14 41:3 45:9 47:9 62:4 trouble ^[1] 39:23 troubling ^[2] 52:16 60:13 true ^[7] 4:9 7:23,24 8:4 19:16 27:5 35:14 truly ^[1] 11:14</p>	<p>try ^[3] 55:14,23 60:20 trying ^[3] 41:22 50:11 58:3 Tuesday ^[1] 1:11 turn ^[1] 62:7 turned ^[1] 36:17 two ^[7] 7:15 13:24 14:7 26:3 43:20 49:15 58:5 twofold ^[1] 9:8 Twombly ^[13] 9:10 11:4,9 13:11,20 14:8,20,24 23:5,8 25:7 40:9 50:13 typical ^[3] 10:1 47:8 52:18</p> <p style="text-align: center;">U</p> <p>ugly ^[1] 54:14 ultimately ^[1] 31:1 unacceptable ^[1] 4:3 Under ^[21] 6:3 8:17 9:13,24 11:3,8 13:3 22:22,24 23:3 25:20,21,22 52:23,24 54:1,2,3,8 57:10,12 understand ^[7] 4:12 21:9,19 23:21 30:2,11 55:11 unfortunately ^[1] 8:20 uninterrupted ^[1] 34:6 UNITED ^[7] 1:1,14,24 2:10 25:20 49:11 50:12 unlawful ^[3] 23:8 35:6 42:5 unless ^[2] 9:11 16:15 unlike ^[1] 60:6 until ^[4] 19:1,1 43:3 54:13 up ^[7] 12:4 26:14 34:21 41:12 48:7 57:2 64:2 upright ^[1] 37:1 upstream ^[1] 4:22</p> <p style="text-align: center;">V</p> <p>valuable ^[2] 38:7 57:16 values ^[3] 41:22 63:15,16 variance ^[1] 63:23 various ^[1] 31:18 vengeful ^[1] 64:9 versus ^[2] 3:4 49:4 viable ^[2] 46:7,10 video ^[3] 24:9,11 34:20 view ^[3] 6:3 17:4 30:24 violate ^[3] 4:1 26:1 33:10 violated ^[2] 42:10 58:4 violates ^[3] 3:11 26:2 58:20 violating ^[2] 15:18 17:12 violation ^[10] 5:19 6:3 7:2 26:24,25 32:1 39:8 40:18 48:23 64:18 violations ^[1] 3:25 violence ^[1] 30:18 virtually ^[4] 30:8 53:17 54:11 60:17 voice ^[1] 34:24</p> <p style="text-align: center;">W</p> <p>Wade ^[5] 10:5 32:22,24 37:3 48:17 Wade's ^[1] 35:7 Wait ^[5] 19:1,1 25:25 40:12 43:3 WALL ^[17] 1:22 2:9 20:14 49:9,10,13 52:22 53:6 55:9 56:19,24 57:19 58:7 59:5,10 60:23 61:14 wanted ^[5] 6:13 16:5 43:16 53:9</p>	<p>56:3 wants ^[4] 4:25 18:12 53:24 57:2 Washington ^[3] 1:10,20,23 watch ^[1] 24:9 waving ^[1] 58:17 way ^[12] 11:3 25:8 39:6 40:8 42:15 43:7 46:2 51:4 56:25 57:5 59:6 61:2 ways ^[1] 37:17 Wayte ^[1] 4:25 wearing ^[1] 9:14 weighed ^[1] 62:23 weighing ^[1] 60:17 whatever ^[3] 31:19 44:1 55:4 whatsoever ^[1] 38:19 whereupon ^[1] 3:12 Whereupon ^[1] 65:3 whether ^[12] 15:9 22:5 30:4,11,13 37:21 42:4 51:20 52:25 54:4,5 55:19 who's ^[2] 22:17 23:2 whole ^[1] 34:24 whomever ^[1] 28:12 will ^[21] 7:21 9:10 10:23 11:20 12:21 13:23,25 14:7 15:16 16:3 17:23 19:19,20 22:2,6 27:13 30:8 33:3 37:22 38:22 47:5 willful ^[1] 15:22 win ^[2] 16:3 36:10 windows ^[2] 8:1 19:13 wisdom ^[1] 60:1 within ^[2] 35:24 36:1 without ^[1] 52:25 word ^[2] 17:1,3 words ^[2] 20:8,13 work ^[9] 19:18 41:3 43:15 45:14 47:5 48:3 50:13,20,22 workable ^[3] 25:14 39:14 40:16 worked ^[1] 50:14 working ^[1] 51:10 works ^[1] 19:18 world ^[2] 49:17 60:13 worried ^[2] 8:8 11:19 worrying ^[2] 19:7,7 worst ^[1] 49:19 worth ^[1] 60:19 writing ^[1] 44:6 written ^[2] 27:12 28:3 wrote ^[8] 11:24 12:13 18:20 29:12,13,18,22 45:3</p> <p style="text-align: center;">Y</p> <p>year ^[3] 18:21 49:23 56:11 years ^[3] 41:12 61:22 64:2 young ^[1] 15:7</p> <p style="text-align: center;">Z</p> <p>zoning ^[2] 63:23 64:12</p>
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