

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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GERALD LYNN BOSTOCK, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 17-1618  
 )  
 CLAYTON COUNTY, GEORGIA, )  
 )  
 Respondent. )  
 )  
 and )  
 )  
 ALTITUDE EXPRESS, INC., ET AL., )  
 )  
 Petitioners, )  
 )  
 v. ) No. 17-1623  
 )  
 MELISSA ZARDA, AS EXECUTOR OF THE )  
 )  
 ESTATE OF DONALD ZARDA, ET AL., )  
 )  
 Respondents. )  
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Pages: 1 through 71

Place: Washington, D.C.

Date: October 8, 2019

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IN THE SUPREME COURT OF THE UNITED STATES

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GERALD LYNN BOSTOCK, )  
Petitioner, )

v. ) No. 17-1618

CLAYTON COUNTY, GEORGIA, )  
Respondent. )

and )

ALTITUDE EXPRESS, INC., ET AL., )  
Petitioners, )

v. ) No. 17-1623

MELISSA ZARDA, AS EXECUTOR OF THE )  
ESTATE OF DONALD ZARDA, ET AL., )  
Respondents. )

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Washington, D.C.

Tuesday, October 8, 2019

The above-entitled matter came on  
for oral argument before the Supreme Court of the  
United States at 10:05 a.m.

1 APPEARANCES:

2

3 PAMELA S. KARLAN, Stanford, California;

4 on behalf of the Petitioner in 17-1618

5 and the Respondents in 17-1623.

6 JEFFREY M. HARRIS, Arlington, Virginia;

7 on behalf of the Respondent in 17-1618

8 and the Petitioners in 17-1623.

9 GEN. NOEL J. FRANCISCO, Solicitor General,

10 Department of Justice, Washington, D.C.,

11 for the United States, as amicus curiae,

12 supporting affirmance in 17-1618 and

13 reversal in 17-1623.

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|----|------------------------------------------|-------|
| 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 in 17-1618   |       |
| 5  | and the Respondents in 17-1623           | 4     |
| 6  | ORAL ARGUMENT OF:                        |       |
| 7  | JEFFREY M. HARRIS, ESQ.                  |       |
| 8  | On behalf of the Respondent in 17-1618   |       |
| 9  | and the Petitioners in 17-1623           | 31    |
| 10 | ORAL ARGUMENT OF:                        |       |
| 11 | GEN. NOEL J. FRANCISCO, ESQ.             |       |
| 12 | For the United States, as amicus         |       |
| 13 | curiae, supporting affirmance in 17-1618 |       |
| 14 | and reversal in 17-1623                  | 53    |
| 15 | REBUTTAL ARGUMENT OF:                    |       |
| 16 | PAMELA S. KARLAN, ESQ.                   |       |
| 17 | On behalf of the Petitioner in 17-1618   |       |
| 18 | and the Respondents in 17-1623           | 65    |
| 19 |                                          |       |
| 20 |                                          |       |
| 21 |                                          |       |
| 22 |                                          |       |
| 23 |                                          |       |
| 24 |                                          |       |
| 25 |                                          |       |

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 17-1618,  
5 Bostock versus Clayton County, and the  
6 consolidated case.

7 Ms. Karlan.

8 ORAL ARGUMENT OF PAMELA S. KARLAN  
9 ON BEHALF OF THE PETITIONER IN 17-1618  
10 AND THE RESPONDENTS IN 17-1623

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

13 When a employer fires a male employee  
14 for dating men but does not fire female  
15 employees who date men, he violates Title VII.  
16 The employer has, in the words of Section  
17 703(a), discriminated against the man because he  
18 treats that man worse than women who want to do  
19 the same thing. And that discrimination is  
20 because of sex, again in the words of  
21 Section 703(a), because the adverse employment  
22 action is based on the male employee's failure  
23 to conform to a particular expectation about how  
24 men should behave; namely, that men should be  
25 attracted only to women and not to men.

1                   There is no analytic difference  
2           between this kind of discrimination and forms of  
3           discrimination that have been already recognized  
4           by every court to have addressed them. For  
5           example, discrimination against men who are  
6           effeminate rather than macho. Like the  
7           discrimination here, that discrimination is  
8           because of non-conformity with an expectation  
9           about how men should behave.

10                   The attempt to carve out  
11           discrimination against men for being gay from  
12           Title VII cannot be administered with either  
13           consistency or integrity. In the words of the  
14           en banc Second Circuit, it forces judges to  
15           result -- resort to lexical bean counting where  
16           they count up the frequency of epithets, such as  
17           "fag," "gay," "queer," "real man," and "fem," to  
18           determine whether or not discrimination is based  
19           on sex or sexual orientation.

20                   That attempt is futile because when a  
21           man is discriminated against for being gay, he  
22           is discriminated against for not conforming to  
23           an expectation about how men should behave.

24                   Finally, the possibility that some  
25           employers, but not the employers here, may have

1 policies of denying employment opportunities  
2 both to gay men and to lesbians does not change  
3 the unlawfulness of what was alleged by the  
4 employees here.

5 Labeling those policies under an  
6 umbrella phrase like "sexual orientation  
7 discrimination" cannot hide the fact that such  
8 an employer is a double discriminator. It  
9 discriminates against men who do not conform to  
10 a male stereotype, and it discriminates against  
11 women who do not conform to an expectation about  
12 female --

13 JUSTICE GINSBURG: Ms. Karlan --  
14 Ms. Karlan, how do you answer the argument that  
15 back in 1964, this could not have been in  
16 Congress's mind because in -- in many states  
17 male same-sex relations was a criminal offense;  
18 the American Psychiatric Association labeled  
19 homosexuality a -- a mental illness?

20 MS. KARLAN: Well, I think you read  
21 the words of the statute. And this Court has  
22 recognized again and again forms of sex  
23 discrimination that were not in Congress's  
24 contemplation in 1964.

25 In 1964, those were the days of Mad

1 Men, so the idea that sexual harassment would  
2 have been reached, most courts didn't find  
3 sexual harassment to be actionable until this  
4 Court did. In Price Waterhouse, this Court  
5 recognized that discrimination against a woman  
6 who cursed like a sailor, walked like a man, and  
7 didn't wear makeup was reachable under Title  
8 VII. If you had asked members of Congress then  
9 what they had thought, they would not have been  
10 thinking about women like Ann Hopkins. They --

11 CHIEF JUSTICE ROBERTS: How do you --  
12 do you agree or disagree with Judge Posner's  
13 statement that the statute should be read to  
14 encompass sexual orientation discrimination to  
15 "avoid placing the entire burden of updating old  
16 statutes on the legislative branch"?

17 MS. KARLAN: I disagree with Judge  
18 Posner. I don't think you need to do any  
19 updating here. I think you should read the  
20 words as they were understood then, which is men  
21 and women. Title VII was intended to make sure  
22 that men were not disadvantaged relative to  
23 women and women were not disadvantaged relative  
24 to men.

25 And when you tell two employees who



1     come in, both of whom tell you they married  
2     their partner Bill last weekend, when you fire  
3     the male employee who married Bill and you give  
4     the female employee who married Bill a couple of  
5     days off so she can celebrate the joyous event,  
6     that's discrimination because of sex.

7                 Well, if no one has any further  
8     questions, I'll reserve the remainder of my time  
9     for rebuttal.

10                (Laughter.)

11                CHIEF JUSTICE ROBERTS: Well, I think  
12     we'll have further questions.

13                (Laughter.)

14                CHIEF JUSTICE ROBERTS: What do you do  
15     with the argument that this is a  
16     non-discriminatory policy because it applies  
17     equally to relationships between women and  
18     relationships between men? In other words, your  
19     friends on the -- or -- or you emphasize that  
20     you need to know the sex of the individuals  
21     involved before you can determine whether or not  
22     there's a violation and that that brings it  
23     within Title VII.

24                But what about the response that you  
25     do not need to know the sex of the people

1 involved; you just can have a policy against  
2 same sex? So you don't care whether the  
3 participants are women or men. If they're the  
4 same, then that's covered by the policy.

5 MS. KARLAN: I think that's no  
6 different than having a policy that says  
7 everyone should comply with the stereotype  
8 applicable to their sex. And if I can use an  
9 example from the Court's prior cases, for  
10 example, in Dothard against Rawlinson, the  
11 policy on its face said you cannot guard someone  
12 of the opposite sex. So a woman who seeks to  
13 guard a man is barred from that job; a man who  
14 seeks to guard a woman is barred from that job.  
15 Just put in, instead of the word "guard," "date"  
16 and you get the same kind of rule here, which is  
17 a man who wants to date a man can't do it but a  
18 woman can, and a woman who wants to date a woman  
19 can't do it --

20 JUSTICE GINSBURG: But there's, Ms. --

21 MS. KARLAN: -- but a man can. They  
22 are two forms of discrimination.

23 JUSTICE GINSBURG: Ms. Karlan, there's  
24 quite a difference. In the Dothard case, it was  
25 the disparate impact. There are many more male

1 prisoners to guard than females. So that  
2 policy, even though it applied to men guarding  
3 women, it had a disproportionate effect on women  
4 who wanted to be guards because there were many  
5 more jobs guarding male prisoners than female  
6 prisoners.

7 MS. KARLAN: Justice Ginsburg, the  
8 part of Dothard against Rawlinson that rested on  
9 disparate impact was the height and weight  
10 requirements. The requirement about guarding  
11 the opposite sex was not a disparate impact. At  
12 most, the Court noted in a footnote along the  
13 way that there were more guard positions  
14 available to men, but it was not a disparate  
15 impact case. It was a disparate treatment case.

16 And so a male person who had wanted to  
17 guard someone at the Julia Tutwiler prison, the  
18 prison for women in Alabama, would have had a  
19 claim that he had been discriminated against  
20 because of sex. Now, he would have lost that  
21 claim but on BFOQ grounds, not on because of sex  
22 grounds.

23 JUSTICE GINSBURG: What do you do with  
24 the -- the example that was brought up that,  
25 unlike race, there are certain distinctions that

1 are not only permitted but maybe even required  
2 between males and females, like physical fitness  
3 tests?

4 MS. KARLAN: So those -- I want to  
5 answer that question in two parts. The first is  
6 to notice that in those cases, there is no  
7 question there's a differential be -- between  
8 men and women; that is, men and women are being  
9 treated differently.

10 What is at issue there is whether that  
11 differential treatment constitutes unlawful  
12 discrimination under Title VII. So, for  
13 example, in Johnson against Santa Clara County  
14 Transportation Agency, everyone recognized Paul  
15 Johnson was denied the job because of his sex,  
16 but because it was a permissible affirmative  
17 action program, that was okay. In Dothard  
18 against Rawlinson, this Court said Ms. Rawlinson  
19 is discriminated against because of sex, but  
20 there's a BFOQ.

21 So if Congress writes an exemption  
22 into the statute, that's one thing. But this  
23 Court really shouldn't be writing in an  
24 exemption for those purposes.

25 JUSTICE SOTOMAYOR: Do you think we

1 need exemptions for those BFOQs? It's not just  
2 the -- physical fitness standards for different  
3 sports, but big issue right now raging the  
4 country is bathroom usage. Same-sex bathroom  
5 usage.

6 How are those cases going to be dealt  
7 with absent a congressional exemption other than  
8 BFOQ?

9 MS. KARLAN: Well, I think the way  
10 that they get dealt with is everybody agrees if  
11 you have men's bathrooms and women's bathrooms,  
12 that's because of sex. It treats men one way,  
13 it says go to this bathroom. It treats women  
14 another way, it says go to this bathroom.

15 Then the question becomes is that  
16 permissible to do? And if I could just begin  
17 with an example that I think will show why this  
18 is so. When I got up, the Chief Justice said to  
19 me, "Ms." Karlan, I am willing to bet any amount  
20 of money I have that when Mr. Harris gets up, he  
21 is going to say "Mr." Harris.

22 He has treated us differently because  
23 of sex. But that's not discriminatory because  
24 neither of us has been subjected to a  
25 disadvantage. And as this Court said in

1 Burlington White against North -- Burlington  
2 Northern against White, what the statute means  
3 when it says "discriminate against" is to cause  
4 an injury and requiring people generally to use  
5 separate bathrooms is not an injury.

6 JUSTICE GORSUCH: Well, I'm -- I'm not  
7 sure that maybe how they would see it. And to  
8 what -- to what extent should we take that into  
9 account? And -- and same thing with a  
10 gender-specific uniform requirements.

11 MS. KARLAN: Sure.

12 JUSTICE GORSUCH: How would you deal  
13 with those, given that -- that at least those  
14 affected might think that they're suffering a  
15 harm?

16 MS. KARLAN: So there's no categorical  
17 rule about these. For example, the fact that  
18 all of the men sitting at counsel table knew  
19 that they had to wear ties today and I was free  
20 not to didn't cause an injury. On the other  
21 hand, even the dissenters in the Second Circuit  
22 said, if the Court said women who come to argue  
23 should argue in Hooters outfits and the men  
24 should wear --

25 JUSTICE GORSUCH: No --

1 MS. KARLAN: -- ties --

2 JUSTICE GORSUCH: -- we're not --  
3 we're not -- I mean --

4 MS. KARLAN: I know.

5 JUSTICE GORSUCH: -- we can talk  
6 absurd examples --

7 MS. KARLAN: No, but I can --

8 JUSTICE GORSUCH: -- or we can talk  
9 real world examples.

10 MS. KARLAN: I will give you a real  
11 world example, which is, it probably doesn't  
12 violate dress code to require men and women in  
13 business events for the women to wear skirts,  
14 but if you required a female telephone lineman  
15 to wear a skirt --

16 JUSTICE GORSUCH: No, no but are --  
17 are --

18 MS. KARLAN: -- while she's still --

19 JUSTICE GORSUCH: I understand that.  
20 That's not what I'm getting at. And you know  
21 what I'm getting at. The funeral homes  
22 example's not a bad -- the case that we're about  
23 to take up is -- is -- is more in the -- in the  
24 realm of my question.

25 MS. KARLAN: Okay. I --

1 JUSTICE GORSUCH: You can offer me  
2 help if you want to.

3 MS. KARLAN: Yes, yes. No, I'm trying  
4 to offer you help. What I'm trying to say --

5 JUSTICE GORSUCH: All right. All  
6 right. And what I'm -- what I'm suggesting,  
7 counsel, is that there are male and female  
8 bathrooms, there are dress codes that are  
9 otherwise innocuous, right, most -- most people  
10 would find them innocuous.

11 But the affected communities will not.  
12 And they will find harm. And how does your test  
13 deal with that one way or the other? That's  
14 what I'm asking you to address, if you'd like  
15 to.

16 MS. KARLAN: Yes. My test says that  
17 you have treated the people differently because  
18 of sex, which is what we are asking you to hold  
19 here. When you treat a gay man who wants to  
20 date a woman differently than a man -- woman who  
21 wants to date a woman, that -- that's  
22 discrimination.

23 Then you get to what I've said, which  
24 is you have to ask whether a reasonable person  
25 under these circumstances would be injured by



1 the imposition of the particular sex-specific  
2 world. So when the Chief Justice calls me Ms.,  
3 I am not injured. When I go to a -- when I --

4 JUSTICE GORSUCH: You -- you are not,  
5 but another --

6 MS. KARLAN: It -- it --

7 JUSTICE GORSUCH: -- person might be.

8 MS. KARLAN: Right. And the question  
9 --

10 JUSTICE GORSUCH: Are they reasonable  
11 or not? And -- and I'm -- I'm -- I'm just --  
12 I'm wondering, how do you decide those cases?

13 MS. KARLAN: An idiosyncratic  
14 preference does not void an otherwise valid  
15 dress code or bathroom rule.

16 JUSTICE GORSUCH: So is it --

17 JUSTICE SOTOMAYOR: Ms. Karlan --

18 JUSTICE GORSUCH: I'm sorry. I --  
19 I -- I -- and I apologize.

20 JUSTICE SOTOMAYOR: Go ahead and  
21 finish it.

22 JUSTICE GORSUCH: Is it idiosyncratic  
23 for a transgender person to prefer a bathroom  
24 that's different than the -- the one of their  
25 biological sex? Is it idiosyncratic for a

1 transsexual person to wish to dress in a  
2 different style of dress than his or her  
3 biological --

4 MS. KARLAN: No.

5 JUSTICE GORSUCH: Sex? Okay. So the  
6 answer to your question is -- the question then,  
7 at the end of the day, if I understand it, is  
8 that those are acts of discrimination under  
9 Title VII as you understand it?

10 MS. KARLAN: Yes, although I think  
11 you'd -- you'd be better advised to ask the  
12 question to someone who -- who is representing  
13 someone who is transgender. I am representing  
14 someone who is gay.

15 JUSTICE SOTOMAYOR: Ms. Karlan.

16 MS. KARLAN: And -- yeah.

17 JUSTICE SOTOMAYOR: But you're begging  
18 Justice Gorsuch's question. We were following  
19 up on the same thing --

20 MS. KARLAN: I truly am not trying  
21 to --

22 JUSTICE SOTOMAYOR: -- which is --

23 MS. KARLAN: -- beg the question.

24 JUSTICE SOTOMAYOR: -- how do we  
25 differentiate the two? What is the legal test

1 that you propose to say this is discrimination  
2 because of sex, as you said, calling you one  
3 thing and your friend another is discriminatory,  
4 but it's okay because there's no harm.

5 So what's the test we apply to, say,  
6 when it is harm and when it isn't?

7 MS. KARLAN: Let -- let me try to be  
8 clear.

9 JUSTICE SOTOMAYOR: Let's be --

10 MS. KARLAN: It's not discrimination  
11 to call me Ms. Karlan and to call Mr. Harris,  
12 Mr. Harris. It is -- it is because of sex that  
13 we were treated differently.

14 But as this Court has made it clear  
15 several times, discrimination consists in an  
16 injury that the law is prepared to recognize.  
17 And generally across all statutes, this isn't a  
18 Title VII, and this is why I'm really not  
19 begging the question here, the Court has said de  
20 minimis effects are exempted from statutes  
21 presumptively.

22 So if this Court thinks or if another  
23 court --

24 JUSTICE SOTOMAYOR: So why --

25 MS. KARLAN: -- thinks --

1 JUSTICE SOTOMAYOR: -- is a dress code  
2 for Hooters that requires all women to wear a  
3 scantily -- a scant dress, is that  
4 discriminatory?

5 MS. KARLAN: Yes, it is.

6 JUSTICE SOTOMAYOR: Is it  
7 discriminatory for the woman who just doesn't  
8 want to wear it because it's demeaning?

9 MS. KARLAN: Yes, it is.

10 JUSTICE SOTOMAYOR: So how about, is  
11 it discriminatory for the restaurant not to hire  
12 a transgender man who wants to wear the uniform?

13 MS. KARLAN: Well, you're going to get  
14 --

15 JUSTICE SOTOMAYOR: The scant uniform.

16 MS. KARLAN: I -- I mean, I do want to  
17 get to the question of sexual orientation --

18 JUSTICE SOTOMAYOR: No, no, no --

19 MS. KARLAN: -- here, but I understand  
20 -- I understand.

21 JUSTICE SOTOMAYOR: But I think what  
22 you're, what you're alluding is, and I still  
23 haven't heard --

24 MS. KARLAN: Yeah.

25 JUSTICE SOTOMAYOR: -- the

1 explanation, which is the question of how do we  
2 tell what's actionable and not?

3 MS. KARLAN: Well, if --

4 JUSTICE SOTOMAYOR: At what -- when  
5 does that discrimination become an issue?

6 MS. KARLAN: I'll -- I'll give an  
7 analogy from the race area that may be helpful  
8 to the Court, which is, for many years, there  
9 was an argument that separate but equal was  
10 acceptable. And ultimately this Court concluded  
11 that when it came to race, separate but equal  
12 was not permissible.

13 I don't think the Court has held  
14 anything like that with regard to sex, but  
15 you're going to have to answer that question  
16 about dress codes regardless of how you rule in  
17 either my case or in Ms. Stephens' case  
18 because --

19 JUSTICE ALITO: Can I ask --

20 JUSTICE GINSBURG: Would you say the  
21 test is is the person injured? Yes, it's a  
22 differential based on gender, but most people  
23 are not injured by having separate bathrooms.  
24 In fact, they -- most people would prefer it.

25 So are you saying that we have to wait

1 for the testing case for the person who might be  
2 injured by not being allowed to use the bathroom  
3 of the other sex?

4 MS. KARLAN: I think it highly  
5 unlikely you're going to see cases like that.  
6 The bathroom issue has been around since the  
7 beginning of Title VII. Title VII has a special  
8 provision in 703(a)(ii) that says, when you  
9 segregate people, the question is whether that  
10 segregation denies them employment  
11 opportunities.

12 And it is hard to see, quite honestly,  
13 how requiring men to use a men's room and women  
14 to use a women's room denies them employment  
15 opportunities.

16 JUSTICE ALITO: May I ask you to --

17 CHIEF JUSTICE ROBERTS: Are these --  
18 Justice Alito.

19 JUSTICE ALITO: May I ask you to  
20 respond to what some people will say about this  
21 Court if we rule in your favor?

22 And what they will say is that whether  
23 Title VII should prohibit discrimination on the  
24 basis of sexual orientation is a big policy  
25 issue, and it is a different policy issue from

1 the one that Congress thought it was addressing  
2 in 1964.

3 And Congress has been asked repeatedly  
4 in the years since 1964 to address this  
5 question. The Equality Act is before Congress  
6 right now. Congress has declined or failed to  
7 act on these requests. And if the Court takes  
8 this up and interprets this 1964 statute to  
9 prohibit discrimination based on sexual  
10 orientation, we will be acting exactly like a  
11 legislature.

12 We might as well just take the  
13 Equality Act and issue that as our opinion and  
14 say, as Judge Posner said, that the courts need  
15 to intervene on questions like this when the  
16 legislative branch simply will not do so.

17 What would we -- how would we respond  
18 to that question?

19 MS. KARLAN: Well, the fact that a  
20 loose cannon like Judge Posner says, "do  
21 whatever you feel like" is not what we're asking  
22 for. We're saying, if you read the words  
23 "because of sex" and you ask, in 1964, what did  
24 those words mean? They meant treating men  
25 differently from women.

1                   So if in 1964 it would be  
2     discrimination to fire a woman who wanted to --  
3     you know, a woman who enjoyed sewing, and  
4     there's a famous case, it's the foundational  
5     case on sexual orientation where they fired a  
6     man who said --

7                   JUSTICE ALITO: We will --

8                   MS. KARLAN: -- his body was --

9                   JUSTICE ALITO: We would not be  
10    deciding a major policy question that was not in  
11    Congress's mind in 1964, and then Congress has  
12    repeatedly failed to address in the years since  
13    then?

14                  MS. KARLAN: No more than what you did  
15    in Oncale. No more than what you did in Price  
16    Waterhouse. No more than what you did in --

17                  JUSTICE BREYER: All right.

18                  MS. KARLAN: -- Newport News.

19                  JUSTICE BREYER: Is there -- is there  
20    -- in my mind, there are three basic parts to  
21    this case on the other side, to language.  
22    You've dealt with that.

23                  The parade of horrors, you've dealt  
24    with that. And the third one is the one that  
25    Alito is bringing up in one form, as it comes



1 out of the -- out of the briefs, as I read it in  
2 your opponent's brief.

3 I would put it in these terms.  
4 Imagine a statute that says policemen, dah, dah,  
5 dah, must pay damages. Passed a long time ago.  
6 That doesn't apply to German policemen.

7 MS. KARLAN: Doesn't apply to what  
8 kind of --

9 JUSTICE BREYER: To German policemen.  
10 The meaning is the same. German policemen are  
11 policemen. But the statute doesn't apply to  
12 them.

13 How do we know? Well, we know through  
14 a lot of history, dah, dah, dah. Okay? Now,  
15 that's the -- that's the box in which I put the  
16 argument that Justice Alito made. It's a  
17 serious legal argument, and the argument is that  
18 at the time Congress wouldn't have dreamt of  
19 this. And, therefore, the words, though they  
20 apply, they meant to exclude the gays and  
21 transgender. Now, what I need to hear is a  
22 clear answer to that question.

23 MS. KARLAN: I think the way to think  
24 about this is to ask about the specific behavior  
25 that's at issue, which is a man dates a man, and

1 then ask: How does that fit within the  
2 language? And the best example I can give --

3 JUSTICE BREYER: It fits.

4 MS. KARLAN: No, I'm --

5 JUSTICE BREYER: I give you it fits.

6 MS. KARLAN: I'm -- I'm about to  
7 explain why --

8 JUSTICE BREYER: Yeah.

9 MS. KARLAN: -- it fits. Which is the  
10 idea was that people should not be denied jobs  
11 that they're qualified to do, award-winning  
12 advocates for child services like Gerald Bostock  
13 should not be denied a job, because they are a  
14 man who does something that if they were a  
15 woman, would cause no problems at all.

16 So just to give an example from the  
17 first sex discrimination case this Court had,  
18 which was the Phillips against Martin Marietta  
19 case, a woman who has children at home should  
20 not be denied a job that a man who has children  
21 at home.

22 Now, all you have to do is say those  
23 words apply also if it is a woman who has a wife  
24 at home --

25 CHIEF JUSTICE ROBERTS: Counsel, I --

1 MS. KARLAN: -- rather than children.

2 CHIEF JUSTICE ROBERTS: Several, I  
3 think about 23, states have been passing laws to  
4 address these -- these issues. And I -- I don't  
5 know how many of them, but I think it's a big  
6 part of them, when they do extend the coverage  
7 against discrimination on the basis of sex to  
8 sexual orientation, transgender, they also  
9 include an exemption for religious  
10 organizations.

11 Now, if we're going to be extending  
12 the -- the -- the understanding of what sex  
13 encompasses, and I know your argument --

14 MS. KARLAN: Yeah.

15 CHIEF JUSTICE ROBERTS: -- that that's  
16 not doing that, how do we address that other  
17 concern, that at least, I -- I think almost  
18 every state legislature that has extended it has  
19 felt compelled to address?

20 MS. KARLAN: Well, I -- I -- I would  
21 say three things about that:

22 The first is this Court has already  
23 created an exemption for sincere religious  
24 belief for a large category of employers through  
25 the ministerial exception.

1           The second is that Congress balanced  
2 these issues and has rebalanced them several  
3 times in the co-religionist exception.

4           The third thing I would say is to  
5 understand this in context, which is 85 percent  
6 of American employers are not covered by Title  
7 VII at all. So as to those employers, if they  
8 have religious objections to hiring someone who  
9 is gay, they're free to continue doing that.

10           And the fourth is to make it very  
11 clear that the question is not whether people  
12 have religious objections to homosexuality; it's  
13 whether they have religious objections to hiring  
14 someone who is gay or lesbian. And there are  
15 many employers whose own religious beliefs would  
16 tell them this would be immoral for them, who  
17 have no problem hiring gays and lesbians who are  
18 qualified to do a job.

19           If I could just ask the Court to do  
20 one thing in thinking back to 1964, it is to  
21 look at the two foundational opinions on which  
22 everybody has played a game of telephone ever  
23 since.

24           It's like your opinion last term in  
25 Argus Media, where you ask where did the idea

1 that homosexuality wasn't covered come from? It  
2 came from first a case where a gay black man  
3 said he was being treated worse than gay white  
4 men. It wasn't even a sexual discrimination  
5 case. The second one came from a straight man  
6 who was fired because -- who was denied a job  
7 because he said his hobby was sewing. And the  
8 employer said: That's an effeminate hobby, so I  
9 bet you're gay.

10 If you look at the reasoning in those  
11 cases, you will realize that it was not until  
12 Hively that any court did a careful reading of  
13 the statute using contemporaneous methods of  
14 textual interpretation --

15 JUSTICE ALITO: But you gave your --

16 MS. KARLAN: -- and since then a  
17 majority of justices -- I mean a majority of  
18 judges have held that sexual orientation is a  
19 subset of sex discrimination.

20 JUSTICE ALITO: Justice Breyer  
21 characterized what I said earlier as conceding  
22 that sexual orientation discrimination fits the  
23 words of Title VII, but that we should take a  
24 broader view of what Congress had in mind.

25 But that was not -- that was not the

1 premise of my argument. And your core -- the --  
2 the parties have in their briefs, have all of  
3 these comparisons, and they will make your head  
4 spin if you -- if you try to figure them all  
5 out.

6 But let me just go to your core one,  
7 which you began with today. A man is attracted  
8 to other men. He's fired, let's say. A woman  
9 is attracted to men; she is not fired. You say  
10 that's all you need to look at. That's  
11 discrimination on the basis of sex, right?

12 MS. KARLAN: Yes.

13 JUSTICE ALITO: Okay. That's not --  
14 that's not correct, because there are two  
15 possible explanations for what happened there.  
16 It could be based on sexual orientation, or it  
17 could just be based on the fact that the  
18 employer wants -- does not want to hire men.

19 Now, if you add in two other cases,  
20 that a man who is attracted to women, not fired,  
21 a woman who's attracted to women, is fired, then  
22 you have a much better idea the basis for the  
23 discrimination. And it's sexual orientation.  
24 It's not sex.

25 MS. KARLAN: But in a case like the

1 two cases before this Court where the employer  
2 had hired these men and they were already there,  
3 the supposition you made in your question  
4 doesn't apply, which is we know this is an  
5 employer who's willing to hire men.

6 Indeed, the employer in Gerald -- I  
7 mean the employer in Don Zarda's case had only  
8 men as skydiving instructors. So when he fires  
9 a man who wants to date a woman and he -- I mean  
10 a man who wants to date a man and he does not  
11 fire a woman who wants to date a man --

12 JUSTICE ALITO: The -- the point is  
13 that discrimination on the basis of sex in the  
14 sense that Congress understood it in 1964 is a  
15 different concept from discrimination on the  
16 basis of --

17 MS. KARLAN: Well, in --

18 JUSTICE ALITO: -- sexual orientation.

19 MS. KARLAN: -- in 19 --

20 JUSTICE ALITO: And that's what you're  
21 fighting. You're trying to change the meaning  
22 of what Congress understood sex to mean and what  
23 everybody understood --

24 MS. KARLAN: I -- I'm --

25 JUSTICE ALITO: -- sex to mean in

1 1964.

2 MS. KARLAN: -- not trying to change  
3 that at all. I'm simply saying that if a man  
4 and a woman both wanted to sew and you fire the  
5 man who loves sewing and you don't fire the  
6 woman who loves sewing, that's discrimination  
7 pure and simple, sex discrimination. If you  
8 fire a -- if you fire the man who -- thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Counsel.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: Sorry.

14 ORAL ARGUMENT OF JEFFREY M. HARRIS  
15 ON BEHALF OF THE RESPONDENT IN 17-1618  
16 AND THE PETITIONERS IN 17-1623

17 MR. HARRIS: Mr. Chief Justice, and  
18 may it please the Court:

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: Touche.

21 MR. HARRIS: In -- in 1982, Wisconsin  
22 became the first state in the country to pass a  
23 law banning discrimination because of sexual  
24 orientation in private employment. The  
25 proponents of that law celebrated its passage as



1 a landmark achievement for gay rights.

2           According to the plaintiffs here,  
3 however, Wisconsin's landmark law actually had  
4 little, if any, practical impact because  
5 Congress had already banned sexual orientation  
6 discrimination nationwide, 18 years earlier in  
7 the Civil Rights Act of 1964.

8           To quote Judge Lynch's dissent below,  
9 Congress did no such thing. Sex and sexual  
10 orientation are independent and distinct  
11 characteristics, and sexual orientation  
12 discrimination by itself does not constitute  
13 discrimination because of sex under Title VII.

14           That's just as true today as it was in  
15 1964.

16           The core error in the Second Circuit's  
17 holding is actually quite similar to the error  
18 that led this Court to reverse in *Oncale*. In  
19 *Oncale*, the Fifth Circuit had held that same-sex  
20 harassment claims were categorically excluded  
21 from Title VII. This Court correctly reversed  
22 and held that such claims may well be  
23 cognizable, as long as the plaintiff meets all  
24 requirements of the statute, especially what  
25 this Court called the "critical inquiry into

1 whether members of one sex were being treated  
2 worse than members of the other sex."

3           This case is just the mirror image of  
4 Oncale. Whereas the lower courts in Oncale  
5 adopted a categorical exclusion, the Second  
6 Circuit adopted a rule of per se inclusion in  
7 which plaintiffs alleging sexual orientation  
8 discrimination receive a free pass around the  
9 critical inquiry into whether men and women are  
10 being treated differently because of their sex.

11           In short, the Second Circuit simply  
12 changed the ultimate question from sex to sexual  
13 orientation. But because both men and women may  
14 have same sex attractions or partners, a  
15 stand-alone allegation of sexual orientation  
16 discrimination cannot, without more, show  
17 discriminatory treatment --

18           JUSTICE SOTOMAYOR: Excuse me. Can I  
19 understand your argument in context? Let's  
20 answer the question. Employer looks at a man  
21 who applies and says: One of my hobbies is  
22 sewing. And the employer says: That's an  
23 effeminate hobby. You may be gay. You're --  
24 I'm not hiring you.

25           So is that a mixed motive case? And

1 -- and are we going to be trying somehow to  
2 parse that there's some sort of substantial  
3 legal difference between the belief that you're  
4 too effeminate or that a lesbian is too macho,  
5 whichever, from you're attracted to the other  
6 sex? How do you tease that out?

7 MR. HARRIS: Justice Sotomayor, I  
8 don't disagree that there will be tough cases at  
9 the margins, but the problem with what the  
10 Second Circuit did is they glossed over those  
11 hard questions and said: We're just going to  
12 adopt --

13 JUSTICE SOTOMAYOR: Well, aren't you  
14 --

15 MR. HARRIS -- a per se rule that if  
16 you --

17 JUSTICE SOTOMAYOR: -- aren't you  
18 glossing over the BFOQ, meaning, what it seems  
19 like you're confusing is three concepts, Title  
20 VII has causation and injury. Not hiring, not  
21 firing, that's the injury.

22 Now the question is what caused that?  
23 Being too effeminate, that's a sexual trait;  
24 being attracted to, if you're a man, to another  
25 man, that's a sexual trait. It's caused by

1 those two things.

2           Aren't then we moving to the third  
3 question, which is: Is there a reason  
4 independent of your religious belief or your  
5 innate hatred and invidious discrimination for  
6 why you're treating this person differently?  
7 And if there is, you have a BFOQ. You don't  
8 have to hire them. You can fire them.

9           But if there isn't, they're doing  
10 their job, and they're not bothering you, and  
11 they are not bringing their boyfriend or  
12 girlfriend, if it's the opposite sex, to a  
13 function to your private home because you don't  
14 want them there or whatever else is offensive to  
15 you, they're just working.

16           So I don't understand why those are  
17 hard cases.

18           MR. HARRIS: Well --

19           JUSTICE SOTOMAYOR: Any harder than  
20 what the law applies for race discrimination,  
21 for religious discrimination, for any of the  
22 other forms, national origin discrimination.

23           MR. HARRIS: So, Your Honor, as this  
24 Court has emphasized in cases such as Johnson  
25 Controls, the BFOQ exception has been

1 interpreted extremely narrowly, and so I think  
2 it -- it -- it is important as this Court  
3 emphasized in Oncale, the Court emphasized  
4 several times the need to ensure strict  
5 compliance with all requirements of the statute,  
6 including the discrimination element, because  
7 once you find discrimination, it gets very hard  
8 to make out the BFOQ.

9 JUSTICE GINSBURG: Would Oncale --

10 MR. HARRIS: So I don't think --

11 JUSTICE GINSBURG: Would Oncale have  
12 come out differently if the employer said, I  
13 don't hire women to work on platforms, the only  
14 people I hire are men?

15 MR. HARRIS: Well, that -- that  
16 obviously would have been discriminatory against  
17 the women seeking --

18 JUSTICE GINSBURG: But it's not --

19 MR. HARRIS: -- the job.

20 JUSTICE GINSBURG: -- the woman who is  
21 suing --

22 MR. HARRIS: Right.

23 JUSTICE GINSBURG: -- it's the male  
24 who is being harassed by other men. And the  
25 employer's defense is, you can't compare what

1 I'm doing to someone who discriminates on the  
2 basis of sex between men and women because I  
3 don't hire women at all.

4 MR. HARRIS: So it's, of course --  
5 it's -- it's not a complete defense or even a  
6 defense to say, I treat it -- in cases like  
7 Martin -- like Martin Marietta, it was not a  
8 defense for that employer to say, because I  
9 hired other women, it excuses this.

10 So the answer to your question is that  
11 would not be a defense. But --

12 JUSTICE GINSBURG: That -- that was --  
13 Martin Marietta was different because it was the  
14 plus. The plus applied to women and didn't  
15 apply to men. So you had that distinction.

16 Well, take Price Waterhouse. Suppose  
17 the employer said, I don't want any men who are  
18 not sufficiently macho, and I don't want any  
19 women who are not sufficiently feminine.

20 If they -- the -- Price Waterhouse  
21 said we will treat a man who isn't sufficiently  
22 macho the same way we treated Ann Hopkins, there  
23 would be, as I understand your argument, no sex  
24 discrimination.

25 MR. HARRIS: I -- I disagree with

1 that, Justice Ginsburg. The way -- I think the  
2 best way to think of Price Waterhouse is, when  
3 an employer has certain traits or  
4 characteristics that it values in promotion and  
5 hiring and discharge decisions, there can't be a  
6 list of criteria for men and a list of criteria  
7 for women.

8 So the Solicitor General offered the  
9 hypothetical that Your Honor said. And -- and  
10 in that situation, there would be two sets of  
11 criteria. And so maybe both a man who doesn't  
12 meet the women's criteria and a woman who  
13 doesn't meet the men's criteria would have a  
14 claim there.

15 But -- but it wouldn't be -- it would  
16 not excuse it just to say that there are  
17 different criteria for each set.

18 JUSTICE GINSBURG: Well --

19 JUSTICE BREYER: Suppose -- suppose a  
20 Catholic, Jew, want to get married. Employer  
21 fires the Catholic. Why? He's not against  
22 Catholics. He's against intermarriage. And  
23 obviously I can use the same example with race,  
24 which is famous.

25 I take it from your argument that

1 there would be no claim?

2 MR. HARRIS: There would, in fact, be  
3 a claim, in both --

4 JUSTICE BREYER: Why?

5 MR. HARRIS: -- situations.

6 JUSTICE BREYER: Why? Why? All  
7 right.

8 If there is a claim there, why isn't  
9 there here?

10 MR. HARRIS: So in the race context,  
11 the only difference between --

12 JUSTICE BREYER: I didn't say race. I  
13 said religion.

14 MR. HARRIS: Right. In -- in the --  
15 in the context of religion, which first of all  
16 religion is defined -- is the only one other  
17 than pregnancy which has an expansive  
18 definition.

19 JUSTICE BREYER: No --

20 MR. HARRIS: Yes, it would be  
21 religious discrimination because between a  
22 couple that is Catholic and Jewish and two  
23 Catholics, the only difference between those  
24 couples is their religion.

25 JUSTICE BREYER: And the only



1 difference between the two couples here is that  
2 one is a man rather than the woman.

3 MR. HARRIS: Except that it also  
4 introduces an independent characteristic, which  
5 can be completely --

6 JUSTICE BREYER: All right.

7 MR. HARRIS: -- neutral to men --

8 JUSTICE BREYER: So does it there --  
9 why I'm not against Catholics, I am not against  
10 Jews, I am against inter-marriage?

11 MR. HARRIS: I -- if -- if that person  
12 or actor exists, I think it's foreign to our --

13 JUSTICE BREYER: Oh, it exists.

14 MR. HARRIS: -- case law.

15 JUSTICE BREYER: I promise you. There  
16 are many people, at least in the religious  
17 context, who are against inter-marriage and are  
18 not against Catholics or Jews. That's not an  
19 unrealistic example.

20 And all I find in that example is an  
21 identical case to this one.

22 MR. HARRIS: And I -- I think that --  
23 I do think that most of the -- most people who  
24 would oppose any sort of interreligious marriage  
25 would do so for religious reasons. And I would

1 also note in the --

2 JUSTICE KAGAN: Mr. Harris, I think --  
3 I think what all of these hypotheticals are  
4 about is that in many of our cases, what you  
5 find is what you said, what did you say,  
6 independent characteristics? They're all over  
7 our cases.

8 If you take Manhart, which is the  
9 seminal case, Manhart was all about an  
10 independent characteristic. It was about life  
11 expectancy. But we didn't say, oh, we're going  
12 into some different sort of analysis where we  
13 don't just say would the same thing have  
14 happened to you if you were a man or would the  
15 same thing have happened to you if you were a  
16 woman, because we had an independent  
17 characteristic, which was life expectancy.

18 MR. HARRIS: Right.

19 JUSTICE KAGAN: And -- and so the same  
20 thing here. So all of these hypotheticals are  
21 really about the same thing, which is that  
22 Manhart gave us a very simple test, and Manhart  
23 said, what you do when you look to see whether  
24 there is discrimination under Title VII is, you  
25 say, would the same thing have happened to you

1 if you were of a different sex?

2 And, Ms. Karlan made all the -- you  
3 know, went through all the ways in which,  
4 obviously, the -- the same thing would not have  
5 happened to you if you were a different sex, you  
6 being her client.

7 So, I mean, that's the question.  
8 There are independent characteristics in all  
9 these cases. We have insisted on this extremely  
10 simple test. If you apply that test, I guess it  
11 seems to come out against you.

12 MR. HARRIS: A couple things. First,  
13 let me address Manhart and then address --  
14 address the test more generally.

15 So in Manhart, this Court noted that  
16 the -- the policy wasn't just about longevity.  
17 That -- that employer made no attempt to do any  
18 sort of bona fide underwriting or life  
19 expectancy estimates. It simply charged the  
20 women more.

21 So even a woman and a man, if they  
22 each had a 75-year life expectancy, they would  
23 be charged different rates, even though they  
24 were totally, similarly situated with respect to  
25 that.

1                   JUSTICE KAGAN: Yes, but Manhart was  
2 very clear that women in the aggregate were  
3 probably going to be fine under this policy,  
4 because women in the aggregate do have a higher  
5 life expectancy. I mean, I think actually  
6 Manhart makes clear why another aspect of your  
7 argument is -- is wrong, because you say, well,  
8 we have to look at these big classes.

9                   Well, there was nothing wrong in  
10 Manhart when you looked at big classes. What  
11 became wrong in Manhart was when you looked at  
12 individuals. And when you look at individuals,  
13 which Manhart insisted one do, one should do,  
14 and when you apply the test that Manhart  
15 insisted you apply, would this woman have been  
16 treated differently if she were a man? The  
17 answer was yes.

18                   And, similarly, I guess I'm just going  
19 to ask you again, if you applied that test,  
20 don't you lose? And if you do lose, why should  
21 we not apply that test?

22                   MR. HARRIS: Here's the problem with  
23 the test. In Manhart, in Newport News, in  
24 Martin Marietta, the comparator test makes  
25 perfect sense because you know exactly what

1 you're testing for, so the comparator helps you  
2 draw inferences from the evidence.

3 The problem here is, unless the  
4 Plaintiffs can point to something outside the  
5 comparator to tell us why we need to hold sexual  
6 orientation -- to -- to tell us why that is  
7 irrelevant, they're -- they're just assuming  
8 their conclusion.

9 So their comparator would say, you  
10 would ask if a gay man has suffered sex  
11 discrimination by comparing him to a  
12 heterosexual woman, which that version of the  
13 comparator can't isolate if it's the sex or the  
14 sexual orientation.

15 And so I do think, unless they can  
16 point to something outside the comparator, to  
17 justify putting sexual orientation off limits --

18 JUSTICE GORSUCH: Well counselor --

19 MR. HARRIS: -- the comparator doesn't  
20 -- doesn't answer the ultimate question.

21 JUSTICE GORSUCH: Well, it certainly  
22 may not answer -- isolate the sole or proximate  
23 cause, but I -- I think the -- the argument on  
24 the other side is the language of the statute  
25 has a but-for causation standard, a more

1 generous causation standard.

2           So perhaps there are two causal  
3 factors at work here. But isn't one of them sex  
4 in the narrow sense of -- of -- of biological  
5 gender? What's -- what's your response to that?

6           MR. HARRIS: Yeah. So in the -- what  
7 I'm arguing is simply that sexual orientation  
8 standing alone is not, without more, sex  
9 discrimination. And so the -- I'm sorry, remind  
10 me of the question one more time?

11           JUSTICE GORSUCH: Sure. So the --

12           MR. HARRIS: Right.

13           JUSTICE GORSUCH: Your -- your  
14 response to Justice Kagan was, I need to focus  
15 on sexual orientation because that's the sole or  
16 primary causal factor here for the firing.

17           And I think the response from the  
18 other side is: But the statute has a more  
19 generous causal --

20           MR. HARRIS: Oh yes.

21           JUSTICE GORSUCH: -- formulation, a  
22 but-for causal formulation, so perhaps you're  
23 right that, at some level, sexual orientation is  
24 surely in -- in play here. But isn't sex also  
25 in play here because of the change of the first

1 variable?

2 MR. HARRIS: Right. So I think --

3 JUSTICE GORSUCH: And isn't that  
4 enough? It -- it you know, the statute talks  
5 about a material causal factor or some  
6 formulation like that, not the sole cause, not  
7 the proximate cause, but a cause.

8 And one -- one would -- in what -- in  
9 what linguistic formulation would one -- would  
10 one say that sex, biological gender, has nothing  
11 to do with what happened in this case?

12 MR. HARRIS: Yes, Your Honor. So what  
13 you're referring to, I believe, is the  
14 motivating factor language. And so, in what I  
15 just referred to as the sort of benchmark  
16 scenario, sex would not be a motivating factor  
17 there.

18 If you look at Mr. Bostock's  
19 complaint, for example, and you strip out any  
20 mention of his sex as being a man -- again, we  
21 -- we dispute the allegations, of course, but it  
22 -- it would still make perfect sense. But if  
23 you stripped out any reference to his sexual  
24 orientation, it would make little, if any,  
25 sense.

1                   And so in -- in Price Waterhouse, this  
2 Court helped give guidance about how to do the  
3 motivating factor analysis and said imagine you  
4 gave the employer truth serum and said what were  
5 your true reasons for doing this? Would one of  
6 them be the characteristic? And what I would  
7 call that -- that benchmark scenario --

8                   JUSTICE GORSUCH: All right, let's --

9                   MR. HARRIS: -- sex would not be --

10                  JUSTICE GORSUCH: Let's -- let's do  
11 truth serum, okay? Wouldn't -- wouldn't the  
12 employer maybe say it's because this was -- this  
13 person was a man who liked other men? And isn't  
14 that first part sex?

15                  MR. HARRIS: Your Honor, I think in  
16 common parlance, we would call that a same-sex  
17 attraction. And I want to be clear, if there is  
18 some reason to think that employer -- and some  
19 of the amicus briefs say that much  
20 discrimination against gay and lesbian people is  
21 -- is based on sort of animus against gay men or  
22 lesbian women.

23                  If there's some reason to believe that  
24 in that scenario, then that may well be a  
25 motivating factor, but when you simply have an



1 employee saying I was fired because of my sexual  
2 orientation, that alone does not show that --  
3 what -- what this Court called in Oncale the  
4 critical -- critical issue of distinguishing  
5 between men and women.

6 JUSTICE KAVANAUGH: Are you drawing a  
7 distinction between the literal meaning of  
8 "because of sex" and the ordinary meaning of  
9 "because of sex"? And, if so, how are we  
10 supposed to think about ordinary meaning in this  
11 case?

12 MR. HARRIS: I don't see a difference  
13 between the two as far as -- and -- and the last  
14 point, running out of time, I think to go back  
15 to some of the questions about bathrooms and  
16 fitness standards, I want to be clear, under the  
17 Plaintiff's simple but-for test, if you truly  
18 simply apply the Manhart test or -- in the way  
19 they want to do it, I don't see any way that  
20 single-sex bathrooms or showering facilities --

21 JUSTICE GINSBURG: You have to have  
22 someone who's injured. You have to have someone  
23 who's injured. And the response to the  
24 bathrooms is who is the complaining plaintiff?  
25 And for most people, they would not be

1 complaining plaintiff. They would not be  
2 eligible because they're not injured by the  
3 separate bathrooms. In fact, they like it.

4 MR. HARRIS: Yes, Your Honor,  
5 although, of course, if someone, for example, is  
6 fired, imagine a factory with hazardous  
7 materials where people shower after work and to  
8 -- to clean up, and a -- a man used the women's  
9 bathroom and is fired. That person would  
10 certainly be injured. And I think, under my  
11 friend's test, they would say just change the  
12 sex and that person wouldn't have been fired.

13 But here's the problem: That's not a  
14 similarly situated person. The proper analysis  
15 would say that a neutral policy, such as use the  
16 showering facility that corresponds to your  
17 biological sex, the man who uses the women's  
18 shower, the -- the comparator is not a woman who  
19 uses the woman's shower. It's a woman who uses  
20 the men's shower, because otherwise you're not  
21 -- otherwise you're -- you're loading the dice  
22 or you're not looking at similarly situated  
23 people.

24 And the last thing I'd like to get  
25 into is this Court, in Espinoza, Footnote 2 -- I

1 think there was some discussion of the states  
2 early on. In Espinoza, in interpreting national  
3 origin discrimination, this Court said the state  
4 practice interpreting parallel laws is highly  
5 instructive. And so I -- I think the fact that  
6 22 or 23 states have done this by legislation  
7 and zero have done it by judicial  
8 interpretation, just shows that this isn't belt  
9 and suspenders. It's not redundancy, that sex  
10 and sexual orientation both in 1964 and today  
11 are different concepts that mean different  
12 things, and common users of -- of language both  
13 today and in 1964 would have recognized that.

14 JUSTICE SOTOMAYOR: Can they ever be?

15 MR. HARRIS: I'm sorry?

16 JUSTICE SOTOMAYOR: I know -- can they  
17 ever be? Justice -- justice -- Judge Lynch  
18 below said that homophobic stereotypes are  
19 unrelated to sexual orientation. The very first  
20 case before us shows that that's just not true,  
21 that homosexual orientation is highly correlated  
22 to people's stereotypes.

23 If you're too effeminate a man, you're  
24 a homosexual. If you're too macho a woman,  
25 you're a lesbian. Happens all the time. So I

1 find it somewhat difficult to unwind the two.

2 If not difficult, nearly impossible.

3 MR. HARRIS: It often is, Your Honor,  
4 and it's a sad reality that homophobic slurs are  
5 often directed at heterosexual or homosexual  
6 people to -- to criticize --

7 JUSTICE SOTOMAYOR: And that's okay  
8 under your theory?

9 MR. HARRIS: It is absolutely not,  
10 Your Honor, if that person can show  
11 discrimination because of sex, but what -- what  
12 the courts can't do is what the Second Circuit  
13 did and the Seventh Circuit did in Hively.  
14 Footnote 11 of the Zarda opinion is very candid  
15 about this where it talks about operationalizing  
16 its holding. The Second Circuit is just going  
17 to change the jury instructions to tell juries  
18 that if they find sexual orientation  
19 discrimination, they've now found sex  
20 discrimination.

21 So, Justice Sotomayor, I don't  
22 disagree that there will be difficult cases at  
23 the margins, but the answer is not to change the  
24 ultimate inquiry and replace it with something  
25 that Congress never could have intended.

1 JUSTICE ALITO: Well, if you have a  
2 minute, let me ask you this: Let's imagine that  
3 the decision maker in a particular case is  
4 behind the veil of ignorance and the subordinate  
5 who has reviewed the candidates for a position  
6 says: I'm going to tell you two things about  
7 this candidate. This is the very best candidate  
8 for the job, and this candidate is attracted to  
9 members of the same sex.

10 And the employer says: Okay, I'm  
11 going -- I'm not going to hire this person for  
12 that reason.

13 Is that discrimination on the basis of  
14 sex, where the employer doesn't even know the  
15 sex of the individual involved?

16 MR. HARRIS: May I?

17 CHIEF JUSTICE ROBERTS: Please.

18 MR. HARRIS: That would not be  
19 discrimination on the basis of sex. And I think  
20 that's exactly right. If you get a resume that  
21 -- that has a name that could be male or female,  
22 and there's something on there suggesting that  
23 the person is gay and they're not hired for that  
24 reason, that would be sexual orientation  
25 discrimination. That has absolutely nothing

1       whatsoever to do with sex discrimination.

2                   CHIEF JUSTICE ROBERTS:  Thank you,  
3       counsel.

4                   General Francisco.

5                   ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO  
6       FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING  
7       AFFIRMANCE IN 17-1618 AND REVERSAL IN 17-1623

8                   GENERAL FRANCISCO:  Mr. Chief Justice,  
9       and may it please the Court:

10                   The issue is not whether Congress can  
11       or should prohibit employment discrimination  
12       because of sexual orientation.  The issue,  
13       rather, is whether it did so when it prohibited  
14       discrimination because of sex.

15                   It did not for two reasons.  First,  
16       sex means whether you're male or female, not  
17       whether you're gay or straight.  So if you treat  
18       all gay and men -- gay men and women exactly the  
19       same regardless of their sex, you're not  
20       discriminating against them because of their  
21       sex.

22                   Second, any doubt is removed by the  
23       history of Title VII and related statutes since,  
24       in the face of unanimous interpretation by the  
25       courts and the executive branch that persisted

1 for decades, Congress has repeatedly extended  
2 other statutes to specifically cover sexual  
3 orientation, yet has refused to do so with  
4 respect to Title VII.

5 The employee's position would nullify  
6 that conscious choice.

7 And Justice Gorsuch, if I could first  
8 address your question about our -- my friend on  
9 the other side's argument about the literal  
10 meaning of the statute, well, there are  
11 essentially two responses to that argument. And  
12 they're related.

13 The first is that under that  
14 interpretation, you actually couldn't fire a man  
15 for using the woman's restroom because in some  
16 metaphysical sense, that man's sex is a but-for  
17 cause for his firing.

18 JUSTICE GINSBURG: But he's not --

19 GENERAL FRANCISCO: The reason --

20 JUSTICE GINSBURG: -- injured. He's  
21 not injured.

22 GENERAL FRANCISCO: Well, he's fired,  
23 Your Honor, in my hypothetical. And the reason  
24 why that is permitted --

25 JUSTICE GORSUCH: I think counsel

1 acknowledged all of that.

2 GENERAL FRANCISCO: Yeah. And the  
3 reason why that's permitted, though, to do that,  
4 is because you're treating -- and this is my  
5 second point -- you're treating him the -- the  
6 same as a similarly situated woman; that is, a  
7 woman who uses the men's room.

8 And that's always the critical  
9 analysis when you're trying to determine if  
10 somebody is being --

11 JUSTICE GINSBURG: Is it --

12 GENERAL FRANCISCO: -- discriminated  
13 against because --

14 JUSTICE GINSBURG: Is it --

15 GENERAL FRANCISCO: -- of their sex.

16 JUSTICE GINSBURG: Is it -- let me  
17 give you a not-hypothetical case. An airline  
18 hires only women as cabin attendants, but it  
19 fires them if they marry. The airline's defense  
20 is whatever we're doing, it's not sex  
21 discrimination against women because we don't  
22 hire any men at all, married or unmarried.

23 That case, I take it from your brief,  
24 you would say there's no sex -- no violation of  
25 Title VII?



1           GENERAL FRANCISCO: Well -- well, no,  
2 Your Honor, because I think the problem is that  
3 the prohibition on hiring any male flight  
4 attendants would in and of itself violate --

5           JUSTICE GINSBURG: That -- but --

6           GENERAL FRANCISCO: -- Title VII.

7           JUSTICE GINSBURG: But the male is not  
8 complaining. The complainant is the woman who  
9 was fired because she married.

10          GENERAL FRANCISCO: Okay. So then --

11          JUSTICE GINSBURG: The male  
12 complainant might have a very good case, but my  
13 case --

14          GENERAL FRANCISCO: Right, and my --

15          JUSTICE GINSBURG: -- is the woman.

16          GENERAL FRANCISCO: And my problem  
17 with the hypothetical is that the way it is  
18 constructed, there is, you know, presumably no  
19 men that have the job in the first place. Now,  
20 if you say that in theory men should be able to  
21 have the job, then the question would be would  
22 you also have fired men who were married?

23                 And if you only fired women who were  
24 married but not men who married, that would  
25 plainly be a violation of Title VII because

1 you're treating similarly situated people  
2 differently. But to finish --

3 JUSTICE SOTOMAYOR: General, that --  
4 that's an --

5 GENERAL FRANCISCO: -- my answer to  
6 Justice --

7 JUSTICE SOTOMAYOR: -- an impossible  
8 idea to -- to put into practice by taking out  
9 the sex.

10 JUSTICE GINSBURG: May -- may I just  
11 continue with it?

12 GENERAL FRANCISCO: Yes, Your Honor.

13 JUSTICE GINSBURG: The hypothetical is  
14 not a hypothetical. Its Sprogis against United  
15 Airlines. And it was given, and not challenged,  
16 that they didn't hire men as cabin attendants.

17 GENERAL FRANCISCO: Right.

18 JUSTICE GINSBURG: But they fired this  
19 woman because she married, she didn't look like  
20 Cheryl "Fly Me."

21 GENERAL FRANCISCO: Right.

22 JUSTICE GINSBURG: Once she married,  
23 she wouldn't be attracted to the male  
24 passengers.

25 The court of appeals said, Title VII

1 was meant to strike out the entire spectrum of  
2 sex stereotyping, so if this woman was fired  
3 because she wasn't -- she would no longer be so  
4 attractive to men if she is married, that's sex  
5 discrimination.

6 And we don't have to have a -- a -- a  
7 male involved. This is a woman who was treated  
8 in a very stereotypical way. She is no longer  
9 young and attractive when she married.

10 GENERAL FRANCISCO: Your Honor, I --  
11 I -- I do think that the question is always, are  
12 you treating similarly situated men and women  
13 differently. There are times where issues of  
14 proof are very difficult.

15 For example, in the Price Waterhouse  
16 case, Ann Hopkins was fired because she was  
17 aggressive --

18 JUSTICE GINSBURG: But this was --

19 GENERAL FRANCISCO: -- because she was  
20 rude to staff --

21 JUSTICE GINSBURG: -- this was an  
22 actual case. This was an actual case and it was  
23 given that no males are hiring and no male is  
24 complaining.

25 GENERAL FRANCISCO: But, Your Honor,

1 the way that actual case was resolved was  
2 because the woman had not brought her claim in a  
3 timely fashion on the sex discrimination piece.  
4 And so the way this Court resolved that decision  
5 was it said, all right --

6 JUSTICE GINSBURG: The -- no. This  
7 case --

8 GENERAL FRANCISCO: -- she is being  
9 treated the same --

10 JUSTICE GINSBURG: -- never came to  
11 this case, never came to this Court.

12 GENERAL FRANCISCO: Oh all right, so I  
13 guess I'm thinking of the wrong case.

14 JUSTICE GINSBURG: Sprogis against  
15 United Airlines, Seventh Circuit.

16 JUSTICE KAGAN: General, could I go  
17 back to your opening statement and particularly  
18 to the second part of it?

19 You talked about the history of -- of  
20 Title VII and some of the subsequent legislative  
21 history, and I guess what strikes me, and I was  
22 struck in reading your briefs too, is that the  
23 arguments you're making, I would say, are not  
24 ones we typically would accept.

25 For many years, the lodestar of this

1 Court's statutory interpretation has been the  
2 text of a statute, not the legislative history,  
3 and certainly not the subsequent legislative  
4 history.

5 And the text of the statute appears to  
6 be pretty firmly in Ms. Karlan's corner. Did  
7 you discriminate against somebody, against her  
8 client, because of sex? Yes, you did. Because  
9 you fired the person because this was a man who  
10 loved other men.

11 And part of that -- and it only has to  
12 be part, we've made very clear there's no search  
13 for sole cause in Title VII -- part of that is  
14 you fired the person because he was a man. If  
15 he were a woman, he wouldn't have been fired.

16 This is the usual kind of way in which  
17 we interpret statutes now. We look to laws. We  
18 don't look --

19 GENERAL FRANCISCO: Right.

20 JUSTICE SOTOMAYOR: -- to predictions.  
21 We don't look to desires. We don't look to  
22 wishes. We look to laws.

23 Why doesn't that mean your argument  
24 failed?

25 GENERAL FRANCISCO: Because, Your

1 Honor, I think that what our brief attempts to  
2 do, at least, is make a straightforward textual  
3 argument. The law distinguishes between sex and  
4 sexual orientation.

5 Those are two different traits. And  
6 that's precisely why when Congress wants to  
7 prohibit discrimination based on sexual  
8 orientation, it doesn't define sex as including  
9 sexual orientation. It lists it as a different  
10 trait.

11 JUSTICE GORSUCH: What -- what is --

12 GENERAL FRANCISCO: And so under Title  
13 --

14 JUSTICE GORSUCH: What is your  
15 response to the two-comparator problem we've  
16 been discussing and the fact that at least one  
17 contributing cause appears to be sex?

18 GENERAL FRANCISCO: Well, Your Honor,  
19 a couple of responses. First, I don't think  
20 that one contributing cause is sex. I think  
21 that as long as you're treating gay men and  
22 women exactly the same regardless of their sex,  
23 the contributing cause is sexual orientation,  
24 not sex.

25 And, two, I think it reflects the fact

1 that sex and sexual orientation are different  
2 traits. And if you do the analysis the way my  
3 friends on the other side suggested, you've  
4 completely eliminated the distinction between  
5 two very different traits and you've -- and  
6 you've essentially rendered -- you nullified  
7 Congress's careful -- very careful decisions in  
8 numerous other statutes to specifically protect  
9 sexual orientation and gender identities, we'll  
10 --

11 JUSTICE SOTOMAYOR: Is there --

12 JUSTICE GINSBURG: Is there anything  
13 --

14 GENERAL FRANCISCO: -- get to in the  
15 next case.

16 JUSTICE GINSBURG: -- in this record  
17 showing that the employers would not employ  
18 lesbian women?

19 GENERAL FRANCISCO: You know, Your  
20 Honor, in these cases, and this may have been a  
21 better question for my colleague, but I think in  
22 these cases, the employers have -- in the  
23 cases -- the sexual orientation cases, the  
24 employers have generally denied that they  
25 discriminate based on --

1 JUSTICE GINSBURG: But all we know on

2 --

3 GENERAL FRANCISCO: -- their sexual  
4 orientation.

5 JUSTICE GINSBURG: Did this go --  
6 the -- the -- the allegation is that the person  
7 was discharged when he announced that he was  
8 gay. There's nothing in the record as far as I  
9 can see that there was a policy on the  
10 employer's part of discharging or not --

11 GENERAL FRANCISCO: Right.

12 JUSTICE GINSBURG: -- discharging  
13 lesbian women.

14 GENERAL FRANCISCO: I think that's  
15 right. I think basically the employer's  
16 defenses here were, one, I didn't fire him  
17 because he was gay, but, two, if you think I  
18 did, Title VII doesn't prohibit discrimination  
19 based on sexual orientation.

20 And if I could address lastly the  
21 point that the Chief Justice and Justice Alito  
22 were raising about so-called legislative  
23 updating that Judge Posner suggested, here I  
24 think that a judicial ruling would be  
25 particularly pernicious because when Congress



1 seeks to expand the scope of Title VII's  
2 liability provisions, it typically couples that  
3 itself with an expansion of the religious  
4 employers exemption to Title VII, precisely  
5 because issues of sexual orientation like issues  
6 of gender identity raise different issues from a  
7 religious liberty perspective.

8           The employee's position here would  
9 only do half of that work. It would expand the  
10 scope of liability without giving any  
11 consideration to those religious liberty  
12 interests on the other side of the balance, and  
13 that is precisely why this is the type of issue  
14 that is better left to Congress than the courts.

15           Justice Gorsuch, I want to make sure  
16 that I fully addressed your -- your textual  
17 considerations, though, because I really do  
18 think it boils down to the fact that sex and  
19 sexual orientation are different traits.

20           May I finish my answer?

21           CHIEF JUSTICE ROBERTS: Sure.

22           GENERAL FRANCISCO: Title VII  
23 prohibits discrimination based on one of those  
24 traits, as long as you treat men and women who  
25 are similarly situated with respect to the other

1 trait exactly the same, you're not  
2 "discriminating" under -- within the meaning of  
3 Title VII.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 GENERAL FRANCISCO: Thank you.

7 CHIEF JUSTICE ROBERTS: Five minutes,  
8 Ms. Karlan.

9 REBUTTAL ARGUMENT OF PAMELA S. KARLAN  
10 ON BEHALF OF THE PETITIONER IN 17-1618 AND THE  
11 RESPONDENTS IN 17-1623

12 MS. KARLAN: Thank you.

13 Let me start with the question that  
14 Justice Ginsburg asked because I think it's  
15 illustrative of contemporary sexual orientation  
16 discrimination cases.

17 Virtually none of them involve an  
18 employer, and neither of the cases before you  
19 does, who claims to have an across-the-board  
20 policy of firing both all gay men and all  
21 lesbians.

22 What tends to happen, and this case is  
23 illustrative of this, is a man who also doesn't  
24 conform with some other gender-based stereotypes  
25 and who is gay gets fired, which puts them in

1 exactly the position that Justice Sotomayor  
2 mentioned, which is really devilishly hard to  
3 figure out what's going on here.

4 The second point I just want to leave  
5 the Court with is, the entire argument on the  
6 other side depends on the idea that men who are  
7 gay and women who are lesbians are being treated  
8 the same. And that's just not so.

9 Because if you look at what actually  
10 causes the problem, it's the man who says, I  
11 married my partner, Bill. If any woman who  
12 worked there had married Bill, he wouldn't --  
13 she would not have been fired. And he is.

14 And you have to look, because the  
15 textual language tells you to, at such  
16 individual and not at the overall class.

17 JUSTICE SOTOMAYOR: Ms. Karlan, would  
18 you address these -- General's statement at the  
19 end? He -- he goes back to the comparator  
20 should be a woman who -- a -- a man who likes a  
21 man and a woman who likes a woman. You're  
22 trying to get to that.

23 MS. KARLAN: I -- I -- yes. I think  
24 he -- he is varying two things there. One, he  
25 is varying the sex of the employee and, second,

1 he's varying the sex of the person to whom the  
2 employee is interested.

3 And if two things that --

4 JUSTICE SOTOMAYOR: So give us an  
5 example from a case how you can't do that.

6 MS. KARLAN: I'm not sure -- of course  
7 you can do it but you don't have to. Because  
8 all you need to do is show that sex played a  
9 role here.

10 And if the answer is if a man had --  
11 if a woman had come in and said, I like to date  
12 men, you wouldn't have fired her, and when a man  
13 says, I like to date men, you did, that's enough  
14 to show sex discrimination.

15 JUSTICE ALITO: But what if the  
16 decision maker makes a decision based on sexual  
17 orientation but does not know the biological sex  
18 of the person involved?

19 MS. KARLAN: Well, there is no  
20 reported case that does that. And I --

21 JUSTICE ALITO: All right.

22 MS. KARLAN: -- think the Court --

23 JUSTICE ALITO: But what if it -- what  
24 if it --

25 MS. KARLAN: -- can wrestle with --

1 JUSTICE ALITO: What if it happened?  
2 We have had a lot of hypotheticals of things  
3 that may or may not have happened.

4 What if that happens? Is that  
5 discrimination on the basis of sex where the  
6 decision maker doesn't even know the person's  
7 sex?

8 MS. KARLAN: And -- and how do they  
9 know the person's sexual orientation?

10 JUSTICE ALITO: Because somebody who  
11 interviewed the candidates tells them that.

12 MS. KARLAN: And they are unable to  
13 tell anything about the person's sex?

14 JUSTICE ALITO: No.

15 MS. KARLAN: So this is Saturday Night  
16 Live Pat, as -- as an example, right?

17 (Laughter.)

18 JUSTICE ALITO: Well, I'm not familiar  
19 with that.

20 MS. KARLAN: Okay.

21 JUSTICE ALITO: But --

22 MS. KARLAN: Which is the person named  
23 Pat, and you can never tell whether Pat is a man  
24 or a woman.

25 I mean, theoretically that person

1 might be out there. But here is the key --

2 JUSTICE ALITO: Theoretically what?

3 MS. KARLAN: Theoretically that person  
4 might be out there. But here is the key: The  
5 -- the cases that are brought are almost all  
6 brought by somebody who says my employer knew  
7 who I was and fired me because I was a man or  
8 fired me because I was a woman.

9 Somebody who comes in and says I'm not  
10 going to tell you what my sex is, but, believe  
11 me, I was fired for my sexual orientation, that  
12 person will lose.

13 JUSTICE ALITO: Well, if that's the  
14 case, then I think your whole argument collapses  
15 because sexual orientation then is a different  
16 thing from sex.

17 MS. KARLAN: Of course it is. No one  
18 has claimed that sexual orientation is the same  
19 thing as sex. What we are saying is when  
20 somebody is fired who --

21 JUSTICE ALITO: Well, let me amend it.  
22 Your argument is that sex -- discrimination  
23 based on sexual orientation necessarily entails  
24 discrimination based on sex.

25 But if it's the case that there would

1 be no liability in the situation where the  
2 decision maker has no knowledge of sex, then  
3 that can't possibly be true.

4 MS. KARLAN: If there was that case,  
5 it might be the rare case in which sexual  
6 orientation discrimination is not a subset of  
7 sex.

8 But in the case where the person knows  
9 the sex of the person that they're firing or  
10 refusing to hire, and knows the sex of the  
11 people to whom that person is attracted, that is  
12 sex discrimination, pure and simple.

13 And it's important to understand that  
14 -- and -- and this goes back to something that  
15 Justice Ginsburg asked during the opening  
16 argument, that discrimination against gay men  
17 and discrimination against lesbians is not one  
18 thing.

19 And in 1964, if you look at the  
20 members of Congress's brief, they will tell you  
21 if you looked in the dictionary there was no  
22 phrase "sexual orientation."

23 That is a modern way of combining two  
24 kinds of discrimination: Discrimination against  
25 gay men, which goes back to Leviticus and the

1 common law, and discrimination against lesbians,  
2 which was not part of Leviticus and was not part  
3 of the common law.

4 Indeed, in 1964, there were only 16  
5 states in the United States that clearly forbid  
6 some act in which lesbians could engage.

7 So the idea that this is one large  
8 idea about sexual orientation discrimination in  
9 the abstract, without reference to sex, simply  
10 burkes the history and burkes the understanding.  
11 And if you look at the harassment cases, you  
12 will see why this is true. Gay men are harassed  
13 in a different way than lesbians.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. The case is submitted.

17 (Whereupon, at 11:07 a.m., the case  
18 was submitted.)

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## Official

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| <b>1</b> | <b>actually</b> <sup>[5]</sup> 32:3,17 43:5 54:14 66:9<br><b>add</b> <sup>[1]</sup> 29:19<br><b>address</b> <sup>[12]</sup> 15:14 22:4 23:12 26:4,16,19 42:13,13,14 54:8 63:20 66:18<br><b>addressed</b> <sup>[2]</sup> 5:4 64:16<br><b>addressing</b> <sup>[1]</sup> 22:1<br><b>administered</b> <sup>[1]</sup> 5:12<br><b>adopt</b> <sup>[1]</sup> 34:12<br><b>adopted</b> <sup>[2]</sup> 33:5,6<br><b>adverse</b> <sup>[1]</sup> 4:21<br><b>advised</b> <sup>[1]</sup> 17:11<br><b>advocates</b> <sup>[1]</sup> 25:12<br><b>affected</b> <sup>[2]</sup> 13:14 15:11<br><b>affirmance</b> <sup>[3]</sup> 2:12 3:13 53:7<br><b>affirmative</b> <sup>[1]</sup> 11:16<br><b>Agency</b> <sup>[1]</sup> 11:14<br><b>aggregate</b> <sup>[2]</sup> 43:2,4<br><b>aggressive</b> <sup>[1]</sup> 58:17<br><b>ago</b> <sup>[1]</sup> 24:5<br><b>agree</b> <sup>[1]</sup> 7:12<br><b>agrees</b> <sup>[1]</sup> 12:10<br><b>ahead</b> <sup>[1]</sup> 16:20<br><b>airline</b> <sup>[1]</sup> 55:17<br><b>airline's</b> <sup>[1]</sup> 55:19<br><b>Airlines</b> <sup>[2]</sup> 57:15 59:15<br><b>AL</b> <sup>[2]</sup> 1:9,13<br><b>Alabama</b> <sup>[1]</sup> 10:18<br><b>ALITO</b> <sup>[28]</sup> 20:19 21:16,18,19 23:7,9,25 24:16 28:15,20 29:13 30:12,18,20,25 52:1 63:21 67:15,21,23 68:1,10,14,18,21 69:2,13,21<br><b>allegation</b> <sup>[2]</sup> 33:15 63:6<br><b>allegations</b> <sup>[1]</sup> 46:21<br><b>alleged</b> <sup>[1]</sup> 6:3<br><b>alleging</b> <sup>[1]</sup> 33:7<br><b>allowed</b> <sup>[1]</sup> 21:2<br><b>alluding</b> <sup>[1]</sup> 19:22<br><b>almost</b> <sup>[2]</sup> 26:17 69:5<br><b>alone</b> <sup>[2]</sup> 45:8 48:2<br><b>already</b> <sup>[4]</sup> 5:3 26:22 30:2 32:5<br><b>although</b> <sup>[2]</sup> 17:10 49:5<br><b>ALTITUDE</b> <sup>[1]</sup> 1:9<br><b>amend</b> <sup>[1]</sup> 69:21<br><b>American</b> <sup>[2]</sup> 6:18 27:6<br><b>amicus</b> <sup>[4]</sup> 2:11 3:12 47:19 53:6<br><b>amount</b> <sup>[1]</sup> 12:19<br><b>analogy</b> <sup>[1]</sup> 20:7<br><b>analysis</b> <sup>[5]</sup> 41:12 47:3 49:14 55:9 62:2<br><b>analytic</b> <sup>[1]</sup> 5:1<br><b>animus</b> <sup>[1]</sup> 47:21<br><b>Ann</b> <sup>[3]</sup> 7:10 37:22 58:16<br><b>announced</b> <sup>[1]</sup> 63:7<br><b>another</b> <sup>[6]</sup> 12:14 16:5 18:3,22 34:24 43:6<br><b>answer</b> <sup>[14]</sup> 6:14 11:5 17:6 20:15 24:22 33:20 37:10 43:17 44:20,22 51:23 57:5 64:20 67:10<br><b>apologize</b> <sup>[1]</sup> 16:19<br><b>appeals</b> <sup>[1]</sup> 57:25<br><b>APPEARANCES</b> <sup>[1]</sup> 2:1<br><b>appears</b> <sup>[2]</sup> 60:5 61:17 | <b>applicable</b> <sup>[1]</sup> 9:8<br><b>applied</b> <sup>[3]</sup> 10:2 37:14 43:19<br><b>applies</b> <sup>[3]</sup> 8:16 33:21 35:20<br><b>apply</b> <sup>[13]</sup> 18:5 24:6,7,11,20 25:23 30:4 37:15 42:10 43:14,15,21 48:18<br><b>area</b> <sup>[1]</sup> 20:7<br><b>aren't</b> <sup>[3]</sup> 34:13,17 35:2<br><b>argue</b> <sup>[2]</sup> 13:22,23<br><b>arguing</b> <sup>[1]</sup> 45:7<br><b>argument</b> <sup>[3]</sup> 1:20 3:2,6,10,15 4:4,8 6:14 8:15 20:9 24:16,17,17 26:13 29:1 31:14 33:19 37:23 38:25 43:7 44:23 53:5 54:9,11 60:23 61:3 65:9 66:5 69:14,22 70:16<br><b>arguments</b> <sup>[1]</sup> 59:23<br><b>Argus</b> <sup>[1]</sup> 27:25<br><b>Arlington</b> <sup>[1]</sup> 2:6<br><b>around</b> <sup>[2]</sup> 21:6 33:8<br><b>aspect</b> <sup>[1]</sup> 43:6<br><b>Association</b> <sup>[1]</sup> 6:18<br><b>assuming</b> <sup>[1]</sup> 44:7<br><b>attempt</b> <sup>[3]</sup> 5:10,20 42:17<br><b>attempts</b> <sup>[1]</sup> 61:1<br><b>attendants</b> <sup>[3]</sup> 55:18 56:4 57:16<br><b>attracted</b> <sup>[10]</sup> 4:25 29:7,9,20,21 34:5,24 52:8 57:23 70:11<br><b>attraction</b> <sup>[1]</sup> 47:17<br><b>attractions</b> <sup>[1]</sup> 33:14<br><b>attractive</b> <sup>[2]</sup> 58:4,9<br><b>available</b> <sup>[1]</sup> 10:14<br><b>avoid</b> <sup>[1]</sup> 7:15<br><b>award-winning</b> <sup>[1]</sup> 25:11 | <b>behalf</b> <sup>[8]</sup> 2:4,7 3:4,8,17 4:9 31:15 65:10<br><b>behave</b> <sup>[3]</sup> 4:24 5:9,23<br><b>behavior</b> <sup>[1]</sup> 24:24<br><b>behind</b> <sup>[1]</sup> 52:4<br><b>belief</b> <sup>[3]</sup> 26:24 34:3 35:4<br><b>beliefs</b> <sup>[1]</sup> 27:15<br><b>believe</b> <sup>[3]</sup> 46:13 47:23 69:10<br><b>below</b> <sup>[2]</sup> 32:8 50:18<br><b>belt</b> <sup>[1]</sup> 50:8<br><b>benchmark</b> <sup>[2]</sup> 46:15 47:7<br><b>best</b> <sup>[3]</sup> 25:2 38:2 52:7<br><b>bet</b> <sup>[2]</sup> 12:19 28:9<br><b>better</b> <sup>[4]</sup> 17:11 29:22 62:21 64:14<br><b>between</b> <sup>[16]</sup> 5:2 8:17,18 11:2,7 34:3 37:2 39:11,21,23 40:1 48:5,7,13 61:3 62:4<br><b>BFOQ</b> <sup>[7]</sup> 10:21 11:20 12:8 34:18 35:7,25 36:8<br><b>BFOQs</b> <sup>[1]</sup> 12:1<br><b>big</b> <sup>[5]</sup> 12:3 21:24 26:5 43:8,10<br><b>Bill</b> <sup>[5]</sup> 8:2,3,4 66:11,12<br><b>biological</b> <sup>[6]</sup> 16:25 17:3 45:4 46:10 49:17 67:17<br><b>black</b> <sup>[1]</sup> 28:2<br><b>body</b> <sup>[1]</sup> 23:8<br><b>boils</b> <sup>[1]</sup> 64:18<br><b>bona</b> <sup>[1]</sup> 42:18<br><b>BOSTOCK</b> <sup>[3]</sup> 1:3 4:5 25:12<br><b>Bostock's</b> <sup>[1]</sup> 46:18<br><b>both</b> <sup>[9]</sup> 6:2 8:1 31:4 33:13 38:11 39:3 50:10,12 65:20<br><b>bothering</b> <sup>[1]</sup> 35:10<br><b>box</b> <sup>[1]</sup> 24:15<br><b>boyfriend</b> <sup>[1]</sup> 35:11<br><b>branch</b> <sup>[3]</sup> 7:16 22:16 53:25<br><b>BREYER</b> <sup>[17]</sup> 23:17,19 24:9 25:3,5,8 28:20 38:19 39:4,6,12,19,25 40:6,8,13,15<br><b>brief</b> <sup>[4]</sup> 24:2 55:23 61:1 70:20<br><b>briefs</b> <sup>[4]</sup> 24:1 29:2 47:19 59:22<br><b>bringing</b> <sup>[2]</sup> 23:25 35:11<br><b>brings</b> <sup>[1]</sup> 8:22<br><b>broader</b> <sup>[1]</sup> 28:24<br><b>brought</b> <sup>[4]</sup> 10:24 59:2 69:5,6<br><b>burden</b> <sup>[1]</sup> 7:15<br><b>burkes</b> <sup>[2]</sup> 71:10,10<br><b>Burlington</b> <sup>[2]</sup> 13:1,1<br><b>business</b> <sup>[1]</sup> 14:13<br><b>but-for</b> <sup>[4]</sup> 44:25 45:22 48:17 54:16 |
| <b>2</b> | <b>2</b> <sup>[1]</sup> 49:25<br><b>2019</b> <sup>[1]</sup> 1:17<br><b>22</b> <sup>[1]</sup> 50:6<br><b>23</b> <sup>[2]</sup> 26:3 50:6                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>3</b> | <b>31</b> <sup>[1]</sup> 3:9                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                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| <b>4</b> | <b>4</b> <sup>[1]</sup> 3:5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>5</b> | <b>53</b> <sup>[1]</sup> 3:14                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               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| <b>6</b> | <b>65</b> <sup>[1]</sup> 3:18                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>7</b> | <b>703(a)</b> <sup>[2]</sup> 4:17,21<br><b>703(a)(ii)</b> <sup>[1]</sup> 21:8<br><b>75-year</b> <sup>[1]</sup> 42:22                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 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| <b>8</b> | <b>8</b> <sup>[1]</sup> 1:17<br><b>85</b> <sup>[1]</sup> 27:5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>A</b> | <b>a.m</b> <sup>[3]</sup> 1:21 4:2 71:17<br><b>able</b> <sup>[1]</sup> 56:20<br><b>above-entitled</b> <sup>[1]</sup> 1:19<br><b>absent</b> <sup>[1]</sup> 12:7<br><b>absolutely</b> <sup>[2]</sup> 51:9 52:25<br><b>abstract</b> <sup>[1]</sup> 71:9<br><b>absurd</b> <sup>[1]</sup> 14:6<br><b>accept</b> <sup>[1]</sup> 59:24<br><b>acceptable</b> <sup>[1]</sup> 20:10<br><b>According</b> <sup>[1]</sup> 32:2<br><b>account</b> <sup>[1]</sup> 13:9<br><b>achievement</b> <sup>[1]</sup> 32:1<br><b>acknowledged</b> <sup>[1]</sup> 55:1<br><b>across</b> <sup>[1]</sup> 18:17<br><b>across-the-board</b> <sup>[1]</sup> 65:19<br><b>Act</b> <sup>[5]</sup> 22:5,7,13 32:7 71:6<br><b>acting</b> <sup>[1]</sup> 22:10<br><b>action</b> <sup>[2]</sup> 4:22 11:17<br><b>actionable</b> <sup>[2]</sup> 7:3 20:2<br><b>actor</b> <sup>[1]</sup> 40:12<br><b>acts</b> <sup>[1]</sup> 17:8<br><b>actual</b> <sup>[3]</sup> 58:22,22 59:1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <b>back</b> <sup>[7]</sup> 6:15 27:20 48:14 59:17 66:19 70:14,25<br><b>bad</b> <sup>[1]</sup> 14:22<br><b>balance</b> <sup>[1]</sup> 64:12<br><b>balanced</b> <sup>[1]</sup> 27:1<br><b>banc</b> <sup>[1]</sup> 5:14<br><b>banned</b> <sup>[1]</sup> 32:5<br><b>banning</b> <sup>[1]</sup> 31:23<br><b>barred</b> <sup>[2]</sup> 9:13,14<br><b>based</b> <sup>[14]</sup> 4:22 5:18 20:22 22:9 29:16,17 47:21 61:7 62:25 63:19 64:23 67:16 69:23,24<br><b>basic</b> <sup>[1]</sup> 23:20<br><b>basically</b> <sup>[1]</sup> 63:15<br><b>basis</b> <sup>[10]</sup> 21:24 26:7 29:11,22 30:13,16 37:2 52:13,19 68:5<br><b>bathroom</b> <sup>[9]</sup> 12:4,4,13,14 16:15,23 21:2,6 49:9<br><b>bathrooms</b> <sup>[9]</sup> 12:11,11 13:5 15:8 20:23 48:15,20,24 49:3<br><b>bean</b> <sup>[1]</sup> 5:15<br><b>became</b> <sup>[2]</sup> 31:22 43:11<br><b>become</b> <sup>[1]</sup> 20:5<br><b>becomes</b> <sup>[1]</sup> 12:15<br><b>beg</b> <sup>[1]</sup> 17:23<br><b>began</b> <sup>[1]</sup> 29:7<br><b>begging</b> <sup>[2]</sup> 17:17 18:19<br><b>begin</b> <sup>[1]</sup> 12:16<br><b>beginning</b> <sup>[1]</sup> 21:7                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              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| <b>B</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>C</b> | <b>cabin</b> <sup>[2]</sup> 55:18 57:16<br><b>California</b> <sup>[1]</sup> 2:3<br><b>call</b> <sup>[4]</sup> 18:11,11 47:7,16<br><b>called</b> <sup>[2]</sup> 32:25 48:3<br><b>calling</b> <sup>[1]</sup> 18:2<br><b>calls</b> <sup>[1]</sup> 16:2<br><b>came</b> <sup>[6]</sup> 1:19 20:11 28:2,5 59:10,11<br><b>candid</b> <sup>[1]</sup> 51:14<br><b>candidate</b> <sup>[3]</sup> 52:7,7,8<br><b>candidates</b> <sup>[2]</sup> 52:5 68:11                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        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| <p><b>cannon</b> <sup>[1]</sup> 22:20<br/> <b>cannot</b> <sup>[4]</sup> 5:12 6:7 9:11 33:16<br/> <b>care</b> <sup>[1]</sup> 9:2<br/> <b>careful</b> <sup>[3]</sup> 28:12 62:7,7<br/> <b>carve</b> <sup>[1]</sup> 5:10<br/> <b>Case</b> <sup>[49]</sup> 4:4,6 9:24 10:15,15 14:22 20:17,17 21:1 23:4,5,21 25:17,19 28:2,5 29:25 30:7 33:3,25 40:14,21 41:9 46:11 48:11 50:20 52:3 55:17,23 56:12,13 58:16,22,22 59:1,7,11,13 62:15 65:22 67:5,20 69:14,25 70:4,5,8 71:16,17<br/> <b>cases</b> <sup>[24]</sup> 9:9 11:6 12:6 16:12 21:5 28:11 29:19 30:1 34:8 35:17,24 37:6 41:4,7 42:9 51:22 62:20,22,23,23 65:16,18 69:5 71:11<br/> <b>categorical</b> <sup>[2]</sup> 13:16 33:5<br/> <b>categorically</b> <sup>[1]</sup> 32:20<br/> <b>category</b> <sup>[1]</sup> 26:24<br/> <b>Catholic</b> <sup>[3]</sup> 38:20,21 39:22<br/> <b>Catholics</b> <sup>[4]</sup> 38:22 39:23 40:9,18<br/> <b>causal</b> <sup>[5]</sup> 45:2,16,19,22 46:5<br/> <b>causation</b> <sup>[3]</sup> 34:20 44:25 45:1<br/> <b>cause</b> <sup>[12]</sup> 13:3,20 25:15 44:23 46:6,7,7 54:17 60:13 61:17,20,23<br/> <b>caused</b> <sup>[2]</sup> 34:22,25<br/> <b>causes</b> <sup>[1]</sup> 66:10<br/> <b>celebrate</b> <sup>[1]</sup> 8:5<br/> <b>celebrated</b> <sup>[1]</sup> 31:25<br/> <b>certain</b> <sup>[2]</sup> 10:25 38:3<br/> <b>certainly</b> <sup>[3]</sup> 44:21 49:10 60:3<br/> <b>challenged</b> <sup>[1]</sup> 57:15<br/> <b>change</b> <sup>[7]</sup> 6:2 30:21 31:2 45:25 49:11 51:17,23<br/> <b>changed</b> <sup>[1]</sup> 33:12<br/> <b>characteristic</b> <sup>[4]</sup> 40:4 41:10,17 47:6<br/> <b>characteristics</b> <sup>[4]</sup> 32:11 38:4 41:6 42:8<br/> <b>characterized</b> <sup>[1]</sup> 28:21<br/> <b>charged</b> <sup>[2]</sup> 42:19,23<br/> <b>Cheryl</b> <sup>[1]</sup> 57:20<br/> <b>CHIEF</b> <sup>[23]</sup> 4:3,11 7:11 8:11,14 12:18 16:2 21:17 25:25 26:2,15 31:9,13,17,20 52:17 53:2,8 63:21 64:21 65:4,7 71:15<br/> <b>child</b> <sup>[1]</sup> 25:12<br/> <b>children</b> <sup>[3]</sup> 25:19,20 26:1<br/> <b>choice</b> <sup>[1]</sup> 54:6<br/> <b>Circuit</b> <sup>[10]</sup> 5:14 13:21 32:19 33:6,11 34:10 51:12,13,16 59:15<br/> <b>Circuit's</b> <sup>[1]</sup> 32:16<br/> <b>circumstances</b> <sup>[1]</sup> 15:25<br/> <b>Civil</b> <sup>[1]</sup> 32:7<br/> <b>claim</b> <sup>[7]</sup> 10:19,21 38:14 39:1,3,8 59:2<br/> <b>claimed</b> <sup>[1]</sup> 69:18<br/> <b>claims</b> <sup>[3]</sup> 32:20,22 65:19<br/> <b>Clara</b> <sup>[1]</sup> 11:13<br/> <b>class</b> <sup>[1]</sup> 66:16<br/> <b>classes</b> <sup>[2]</sup> 43:8,10<br/> <b>CLAYTON</b> <sup>[2]</sup> 1:6 4:5<br/> <b>clean</b> <sup>[1]</sup> 49:8<br/> <b>clear</b> <sup>[9]</sup> 18:8,14 24:22 27:11 43:2,</p> | <p>6 47:17 48:16 60:12<br/> <b>clearly</b> <sup>[1]</sup> 71:5<br/> <b>client</b> <sup>[2]</sup> 42:6 60:8<br/> <b>co-religionist</b> <sup>[1]</sup> 27:3<br/> <b>code</b> <sup>[3]</sup> 14:12 16:15 19:1<br/> <b>codes</b> <sup>[2]</sup> 15:8 20:16<br/> <b>cognizable</b> <sup>[1]</sup> 32:23<br/> <b>collapses</b> <sup>[1]</sup> 69:14<br/> <b>colleague</b> <sup>[1]</sup> 62:21<br/> <b>combining</b> <sup>[1]</sup> 70:23<br/> <b>come</b> <sup>[6]</sup> 8:1 13:22 28:1 36:12 42:11 67:11<br/> <b>comes</b> <sup>[2]</sup> 23:25 69:9<br/> <b>common</b> <sup>[4]</sup> 47:16 50:12 71:1,3<br/> <b>communities</b> <sup>[1]</sup> 15:11<br/> <b>comparator</b> <sup>[9]</sup> 43:24 44:1,5,9,13,16,19 49:18 66:19<br/> <b>compare</b> <sup>[1]</sup> 36:25<br/> <b>comparing</b> <sup>[1]</sup> 44:11<br/> <b>comparisons</b> <sup>[1]</sup> 29:3<br/> <b>compelled</b> <sup>[1]</sup> 26:19<br/> <b>complainant</b> <sup>[2]</sup> 56:8,12<br/> <b>complaining</b> <sup>[4]</sup> 48:24 49:1 56:8 58:24<br/> <b>complaint</b> <sup>[1]</sup> 46:19<br/> <b>complete</b> <sup>[1]</sup> 37:5<br/> <b>completely</b> <sup>[2]</sup> 40:5 62:4<br/> <b>compliance</b> <sup>[1]</sup> 36:5<br/> <b>comply</b> <sup>[1]</sup> 9:7<br/> <b>conceding</b> <sup>[1]</sup> 28:21<br/> <b>concept</b> <sup>[1]</sup> 30:15<br/> <b>concepts</b> <sup>[2]</sup> 34:19 50:11<br/> <b>concern</b> <sup>[1]</sup> 26:17<br/> <b>concluded</b> <sup>[1]</sup> 20:10<br/> <b>conclusion</b> <sup>[1]</sup> 44:8<br/> <b>conform</b> <sup>[4]</sup> 4:23 6:9,11 65:24<br/> <b>conforming</b> <sup>[1]</sup> 5:22<br/> <b>confusing</b> <sup>[1]</sup> 34:19<br/> <b>Congress</b> <sup>[20]</sup> 7:8 11:21 22:1,3,5,6 23:11 24:18 27:1 28:24 30:14,22 32:5,9 51:25 53:10 54:1 61:6 63:25 64:14<br/> <b>Congress's</b> <sup>[5]</sup> 6:16,23 23:11 62:7 70:20<br/> <b>congressional</b> <sup>[1]</sup> 12:7<br/> <b>conscious</b> <sup>[1]</sup> 54:6<br/> <b>consideration</b> <sup>[1]</sup> 64:11<br/> <b>considerations</b> <sup>[1]</sup> 64:17<br/> <b>consistency</b> <sup>[1]</sup> 5:13<br/> <b>consists</b> <sup>[1]</sup> 18:15<br/> <b>consolidated</b> <sup>[1]</sup> 4:6<br/> <b>constitute</b> <sup>[1]</sup> 32:12<br/> <b>constitutes</b> <sup>[1]</sup> 11:11<br/> <b>constructed</b> <sup>[1]</sup> 56:18<br/> <b>contemplation</b> <sup>[1]</sup> 6:24<br/> <b>contemporaneous</b> <sup>[1]</sup> 28:13<br/> <b>contemporary</b> <sup>[1]</sup> 65:15<br/> <b>context</b> <sup>[5]</sup> 27:5 33:19 39:10,15 40:17<br/> <b>continue</b> <sup>[2]</sup> 27:9 57:11<br/> <b>contributing</b> <sup>[3]</sup> 61:17,20,23<br/> <b>Controls</b> <sup>[1]</sup> 35:25<br/> <b>core</b> <sup>[3]</sup> 29:1,6 32:16<br/> <b>corner</b> <sup>[1]</sup> 60:6</p> | <p><b>correct</b> <sup>[1]</sup> 29:14<br/> <b>correctly</b> <sup>[1]</sup> 32:21<br/> <b>correlated</b> <sup>[1]</sup> 50:21<br/> <b>corresponds</b> <sup>[1]</sup> 49:16<br/> <b>couldn't</b> <sup>[1]</sup> 54:14<br/> <b>counsel</b> <sup>[9]</sup> 13:18 15:7 25:25 31:10,11 53:3 54:25 65:5 71:16<br/> <b>counselor</b> <sup>[1]</sup> 44:18<br/> <b>count</b> <sup>[1]</sup> 5:16<br/> <b>counting</b> <sup>[1]</sup> 5:15<br/> <b>country</b> <sup>[2]</sup> 12:4 31:22<br/> <b>COUNTY</b> <sup>[3]</sup> 1:6 4:5 11:13<br/> <b>couple</b> <sup>[4]</sup> 8:4 39:22 42:12 61:19<br/> <b>couples</b> <sup>[3]</sup> 39:24 40:1 64:2<br/> <b>course</b> <sup>[5]</sup> 37:4 46:21 49:5 67:6 69:17<br/> <b>COURT</b> <sup>[44]</sup> 1:1,20 4:12 5:4 6:21 7:4,4 10:12 11:18,23 12:25 13:22 18:14,19,22,23 20:8,10,13 21:21 22:7 25:17 26:22 27:19 28:12 30:1 31:18 32:18,21,25 35:24 36:2,3 42:15 47:2 48:3 49:25 50:3 53:9 57:25 59:4,11 66:5 67:22<br/> <b>Court's</b> <sup>[2]</sup> 9:9 60:1<br/> <b>courts</b> <sup>[6]</sup> 7:2 22:14 33:4 51:12 53:25 64:14<br/> <b>cover</b> <sup>[1]</sup> 54:2<br/> <b>coverage</b> <sup>[1]</sup> 26:6<br/> <b>covered</b> <sup>[3]</sup> 9:4 27:6 28:1<br/> <b>created</b> <sup>[1]</sup> 26:23<br/> <b>criminal</b> <sup>[1]</sup> 6:17<br/> <b>criteria</b> <sup>[6]</sup> 38:6,6,11,12,13,17<br/> <b>critical</b> <sup>[6]</sup> 32:25 33:9 48:4,4 55:8<br/> <b>criticize</b> <sup>[1]</sup> 51:6<br/> <b>curiae</b> <sup>[3]</sup> 2:11 3:13 53:6<br/> <b>cursed</b> <sup>[1]</sup> 7:6</p> | <p><b>denied</b> <sup>[6]</sup> 11:15 25:10,13,20 28:6 62:24<br/> <b>denies</b> <sup>[2]</sup> 21:10,14<br/> <b>denying</b> <sup>[1]</sup> 6:1<br/> <b>Department</b> <sup>[1]</sup> 2:10<br/> <b>depends</b> <sup>[1]</sup> 66:6<br/> <b>desires</b> <sup>[1]</sup> 60:21<br/> <b>determine</b> <sup>[3]</sup> 5:18 8:21 55:9<br/> <b>devilishly</b> <sup>[1]</sup> 66:2<br/> <b>dice</b> <sup>[1]</sup> 49:21<br/> <b>dictionary</b> <sup>[1]</sup> 70:21<br/> <b>difference</b> <sup>[7]</sup> 5:1 9:24 34:3 39:11,23 40:1 48:12<br/> <b>different</b> <sup>[22]</sup> 9:6 12:2 16:24 17:2 21:25 30:15 37:13 38:17 41:12 42:1,5,23 50:11,11 61:5,9 62:1,5 64:6,19 69:15 71:13<br/> <b>differential</b> <sup>[3]</sup> 11:7,11 20:22<br/> <b>differentiate</b> <sup>[1]</sup> 17:25<br/> <b>differently</b> <sup>[12]</sup> 11:9 12:22 15:17,20 18:13 22:25 33:10 35:6 36:12 43:16 57:2 58:13<br/> <b>difficult</b> <sup>[4]</sup> 51:1,2,22 58:14<br/> <b>directed</b> <sup>[1]</sup> 51:5<br/> <b>disadvantage</b> <sup>[1]</sup> 12:25<br/> <b>disadvantaged</b> <sup>[2]</sup> 7:22,23<br/> <b>disagree</b> <sup>[5]</sup> 7:12,17 34:8 37:25 51:22<br/> <b>discharge</b> <sup>[1]</sup> 38:5<br/> <b>discharged</b> <sup>[1]</sup> 63:7<br/> <b>discharging</b> <sup>[2]</sup> 63:10,12<br/> <b>discriminate</b> <sup>[3]</sup> 13:3 60:7 62:25<br/> <b>discriminated</b> <sup>[6]</sup> 4:17 5:21,22 10:19 11:19 55:12<br/> <b>discriminates</b> <sup>[3]</sup> 6:9,10 37:1<br/> <b>discriminating</b> <sup>[2]</sup> 53:20 65:2<br/> <b>discrimination</b> <sup>[82]</sup> 4:19 5:2,3,5,7,7,11,18 6:7,23 7:5,14 8:6 9:22 11:12 15:22 17:8 18:1,10,15 20:5 21:23 22:9 23:2 25:17 26:7 28:4,19,22 29:11,23 30:13,15 31:6,7,23 32:6,12,13 33:8,16 35:5,20,21,22 36:6,7 37:24 39:21 41:24 44:11 45:9 47:20 50:3 51:11,19,20 52:13,19,25 53:1,11,14 55:21 58:5 59:3 61:7 63:18 64:23 65:16 67:14 68:5 69:22,24 70:6,12,16,17,24,24 71:1,8<br/> <b>discriminator</b> <sup>[1]</sup> 6:8<br/> <b>discriminatory</b> <sup>[7]</sup> 12:23 18:3 19:4,7,11 33:17 36:16<br/> <b>discussing</b> <sup>[1]</sup> 61:16<br/> <b>discussion</b> <sup>[1]</sup> 50:1<br/> <b>disparate</b> <sup>[5]</sup> 9:25 10:9,11,14,15<br/> <b>disproportionate</b> <sup>[1]</sup> 10:3<br/> <b>dispute</b> <sup>[1]</sup> 46:21<br/> <b>dissent</b> <sup>[1]</sup> 32:8<br/> <b>dissenters</b> <sup>[1]</sup> 13:21<br/> <b>distinct</b> <sup>[1]</sup> 32:10<br/> <b>distinction</b> <sup>[3]</sup> 37:15 48:7 62:4<br/> <b>distinctions</b> <sup>[1]</sup> 10:25<br/> <b>distinguishes</b> <sup>[1]</sup> 61:3<br/> <b>distinguishing</b> <sup>[1]</sup> 48:4<br/> <b>doing</b> <sup>[6]</sup> 26:16 27:9 35:9 37:1 47:</p> |
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**D**


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**D.C** <sup>[2]</sup> 1:16 2:10  
**dah** <sup>[6]</sup> 24:4,4,5,14,14,14  
**damages** <sup>[1]</sup> 24:5  
**date** <sup>[11]</sup> 4:15 9:15,17,18 15:20,21 30:9,10,11 67:11,13  
**dates** <sup>[1]</sup> 24:25  
**dating** <sup>[1]</sup> 4:14  
**day** <sup>[1]</sup> 17:7  
**days** <sup>[2]</sup> 6:25 8:5  
**de** <sup>[1]</sup> 18:19  
**deal** <sup>[2]</sup> 13:12 15:13  
**dealt** <sup>[4]</sup> 12:6,10 23:22,23  
**decades** <sup>[1]</sup> 54:1  
**decide** <sup>[1]</sup> 16:12  
**deciding** <sup>[1]</sup> 23:10  
**decision** <sup>[6]</sup> 52:3 59:4 67:16,16 68:6 70:2  
**decisions** <sup>[2]</sup> 38:5 62:7  
**declined** <sup>[1]</sup> 22:6  
**defense** <sup>[6]</sup> 36:25 37:5,6,8,11 55:19  
**defenses** <sup>[1]</sup> 63:16  
**define** <sup>[1]</sup> 61:8  
**defined** <sup>[1]</sup> 39:16  
**definition** <sup>[1]</sup> 39:18  
**demeaning** <sup>[1]</sup> 19:8

## Official

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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         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------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>5 55:20<br/> <b>Don</b> <sup>[1]</sup> 30:7<br/> <b>DONALD</b> <sup>[1]</sup> 1:13<br/> <b>done</b> <sup>[2]</sup> 50:6,7<br/> <b>Dothard</b> <sup>[4]</sup> 9:10,24 10:8 11:17<br/> <b>double</b> <sup>[1]</sup> 6:8<br/> <b>doubt</b> <sup>[1]</sup> 53:22<br/> <b>down</b> <sup>[1]</sup> 64:18<br/> <b>draw</b> <sup>[1]</sup> 44:2<br/> <b>drawing</b> <sup>[1]</sup> 48:6<br/> <b>dreamt</b> <sup>[1]</sup> 24:18<br/> <b>dress</b> <sup>[8]</sup> 14:12 15:8 16:15 17:1,2<br/> 19:1,3 20:16<br/> <b>during</b> <sup>[1]</sup> 70:15</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> <sup>[2]</sup> 38:17 42:22<br/> <b>earlier</b> <sup>[2]</sup> 28:21 32:6<br/> <b>early</b> <sup>[1]</sup> 50:2<br/> <b>effect</b> <sup>[1]</sup> 10:3<br/> <b>effects</b> <sup>[1]</sup> 18:20<br/> <b>effeminate</b> <sup>[6]</sup> 5:6 28:8 33:23 34:<br/> 4,23 50:23<br/> <b>either</b> <sup>[2]</sup> 5:12 20:17<br/> <b>element</b> <sup>[1]</sup> 36:6<br/> <b>eligible</b> <sup>[1]</sup> 49:2<br/> <b>eliminated</b> <sup>[1]</sup> 62:4<br/> <b>emphasize</b> <sup>[1]</sup> 8:19<br/> <b>emphasized</b> <sup>[3]</sup> 35:24 36:3,3<br/> <b>employ</b> <sup>[1]</sup> 62:17<br/> <b>employee</b> <sup>[6]</sup> 4:13 8:3,4 48:1 66:<br/> 25 67:2<br/> <b>employee's</b> <sup>[3]</sup> 4:22 54:5 64:8<br/> <b>employees</b> <sup>[3]</sup> 4:15 6:4 7:25<br/> <b>employer</b> <sup>[24]</sup> 4:13,16 6:8 28:8 29:<br/> 18 30:1,5,6,7 33:20,22 36:12 37:8,<br/> 17 38:3,20 42:17 47:4,12,18 52:<br/> 10,14 65:18 69:6<br/> <b>employer's</b> <sup>[3]</sup> 36:25 63:10,15<br/> <b>employers</b> <sup>[10]</sup> 5:25,25 26:24 27:<br/> 6,7,15 62:17,22,24 64:4<br/> <b>employment</b> <sup>[6]</sup> 4:21 6:1 21:10,<br/> 14 31:24 53:11<br/> <b>en</b> <sup>[1]</sup> 5:14<br/> <b>encompass</b> <sup>[1]</sup> 7:14<br/> <b>encompasses</b> <sup>[1]</sup> 26:13<br/> <b>end</b> <sup>[2]</sup> 17:7 66:19<br/> <b>engage</b> <sup>[1]</sup> 71:6<br/> <b>enjoyed</b> <sup>[1]</sup> 23:3<br/> <b>enough</b> <sup>[2]</sup> 46:4 67:13<br/> <b>ensure</b> <sup>[1]</sup> 36:4<br/> <b>entails</b> <sup>[1]</sup> 69:23<br/> <b>entire</b> <sup>[3]</sup> 7:15 58:1 66:5<br/> <b>epithets</b> <sup>[1]</sup> 5:16<br/> <b>equal</b> <sup>[2]</sup> 20:9,11<br/> <b>Equality</b> <sup>[2]</sup> 22:5,13<br/> <b>equally</b> <sup>[1]</sup> 8:17<br/> <b>error</b> <sup>[2]</sup> 32:16,17<br/> <b>especially</b> <sup>[1]</sup> 32:24<br/> <b>Espinoza</b> <sup>[2]</sup> 49:25 50:2<br/> <b>ESQ</b> <sup>[4]</sup> 3:3,7,11,16<br/> <b>essentially</b> <sup>[2]</sup> 54:11 62:6<br/> <b>ESTATE</b> <sup>[1]</sup> 1:13<br/> <b>estimates</b> <sup>[1]</sup> 42:19</p> | <p><b>ET</b> <sup>[2]</sup> 1:9,13<br/> <b>even</b> <sup>[9]</sup> 10:2 11:1 13:21 28:4 37:5<br/> 42:21,23 52:14 68:6<br/> <b>event</b> <sup>[1]</sup> 8:5<br/> <b>events</b> <sup>[1]</sup> 14:13<br/> <b>everybody</b> <sup>[3]</sup> 12:10 27:22 30:23<br/> <b>everyone</b> <sup>[2]</sup> 9:7 11:14<br/> <b>evidence</b> <sup>[1]</sup> 44:2<br/> <b>exactly</b> <sup>[7]</sup> 22:10 43:25 52:20 53:<br/> 18 61:22 65:1 66:1<br/> <b>example</b> <sup>[18]</sup> 5:5 9:9,10 10:24 11:<br/> 13 12:17 13:17 14:11 25:2,16 38:<br/> 23 40:19,20 46:19 49:5 58:15 67:<br/> 5 68:16<br/> <b>example's</b> <sup>[1]</sup> 14:22<br/> <b>examples</b> <sup>[2]</sup> 14:6,9<br/> <b>Except</b> <sup>[1]</sup> 40:3<br/> <b>exception</b> <sup>[3]</sup> 26:25 27:3 35:25<br/> <b>exclude</b> <sup>[1]</sup> 24:20<br/> <b>excluded</b> <sup>[1]</sup> 32:20<br/> <b>exclusion</b> <sup>[1]</sup> 33:5<br/> <b>Excuse</b> <sup>[2]</sup> 33:18 38:16<br/> <b>excuses</b> <sup>[1]</sup> 37:9<br/> <b>executive</b> <sup>[1]</sup> 53:25<br/> <b>EXECUTOR</b> <sup>[1]</sup> 1:12<br/> <b>exempted</b> <sup>[1]</sup> 18:20<br/> <b>exemption</b> <sup>[6]</sup> 11:21,24 12:7 26:9,<br/> 23 64:4<br/> <b>exemptions</b> <sup>[1]</sup> 12:1<br/> <b>exists</b> <sup>[2]</sup> 40:12,13<br/> <b>expand</b> <sup>[2]</sup> 64:1,9<br/> <b>expansion</b> <sup>[1]</sup> 64:3<br/> <b>expansive</b> <sup>[1]</sup> 39:17<br/> <b>expectancy</b> <sup>[5]</sup> 41:11,17 42:19,22<br/> 43:5<br/> <b>expectation</b> <sup>[4]</sup> 4:23 5:8,23 6:11<br/> <b>explain</b> <sup>[1]</sup> 25:7<br/> <b>explanation</b> <sup>[1]</sup> 20:1<br/> <b>explanations</b> <sup>[1]</sup> 29:15<br/> <b>EXPRESS</b> <sup>[1]</sup> 1:9<br/> <b>extend</b> <sup>[1]</sup> 26:6<br/> <b>extended</b> <sup>[2]</sup> 26:18 54:1<br/> <b>extending</b> <sup>[1]</sup> 26:11<br/> <b>extent</b> <sup>[1]</sup> 13:8<br/> <b>extremely</b> <sup>[2]</sup> 36:1 42:9</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>face</b> <sup>[2]</sup> 9:11 53:24<br/> <b>facilities</b> <sup>[1]</sup> 48:20<br/> <b>facility</b> <sup>[1]</sup> 49:16<br/> <b>fact</b> <sup>[11]</sup> 6:7 13:17 20:24 22:19 29:<br/> 17 39:2 49:3 50:5 61:16,25 64:18<br/> <b>factor</b> <sup>[6]</sup> 45:16 46:5,14,16 47:3,25<br/> <b>factors</b> <sup>[1]</sup> 45:3<br/> <b>factory</b> <sup>[1]</sup> 49:6<br/> <b>fag</b> <sup>[1]</sup> 5:17<br/> <b>failed</b> <sup>[3]</sup> 22:6 23:12 60:24<br/> <b>failure</b> <sup>[1]</sup> 4:22<br/> <b>familiar</b> <sup>[1]</sup> 68:18<br/> <b>famous</b> <sup>[2]</sup> 23:4 38:24<br/> <b>far</b> <sup>[2]</sup> 48:13 63:8<br/> <b>fashion</b> <sup>[1]</sup> 59:3<br/> <b>favor</b> <sup>[1]</sup> 21:21<br/> <b>feel</b> <sup>[1]</sup> 22:21</p> | <p><b>felt</b> <sup>[1]</sup> 26:19<br/> <b>fem</b> <sup>[1]</sup> 5:17<br/> <b>female</b> <sup>[8]</sup> 4:14 6:12 8:4 10:5 14:<br/> 14 15:7 52:21 53:16<br/> <b>females</b> <sup>[2]</sup> 10:1 11:2<br/> <b>feminine</b> <sup>[1]</sup> 37:19<br/> <b>fide</b> <sup>[1]</sup> 42:18<br/> <b>Fifth</b> <sup>[1]</sup> 32:19<br/> <b>fighting</b> <sup>[1]</sup> 30:21<br/> <b>figure</b> <sup>[2]</sup> 29:4 66:3<br/> <b>Finally</b> <sup>[1]</sup> 5:24<br/> <b>find</b> <sup>[8]</sup> 7:2 15:10,12 36:7 40:20 41:<br/> 5 51:1,18<br/> <b>fine</b> <sup>[1]</sup> 43:3<br/> <b>finish</b> <sup>[3]</sup> 16:21 57:2 64:20<br/> <b>fire</b> <sup>[11]</sup> 4:14 8:2 23:2 30:11 31:4,5,<br/> 8,8 35:8 54:14 63:16<br/> <b>fired</b> <sup>[27]</sup> 23:5 28:6 29:8,9,20,21<br/> 48:1 49:6,9,12 54:22 56:9,22,23<br/> 57:18 58:2,16 60:9,14,15 65:25<br/> 66:13 67:12 69:7,8,11,20<br/> <b>fires</b> <sup>[4]</sup> 4:13 30:8 38:21 55:19<br/> <b>firing</b> <sup>[5]</sup> 34:21 45:16 54:17 65:20<br/> 70:9<br/> <b>firmly</b> <sup>[1]</sup> 60:6<br/> <b>first</b> <sup>[16]</sup> 4:4 11:5 25:17 26:22 28:2<br/> 31:22 39:15 42:12 45:25 47:14 50:<br/> 19 53:15 54:7,13 56:19 61:19<br/> <b>fit</b> <sup>[1]</sup> 25:1<br/> <b>fitness</b> <sup>[3]</sup> 11:2 12:2 48:16<br/> <b>fits</b> <sup>[4]</sup> 25:3,5,9 28:22<br/> <b>Five</b> <sup>[1]</sup> 65:7<br/> <b>flight</b> <sup>[1]</sup> 56:3<br/> <b>Fly</b> <sup>[1]</sup> 57:20<br/> <b>focus</b> <sup>[1]</sup> 45:14<br/> <b>following</b> <sup>[1]</sup> 17:18<br/> <b>footnote</b> <sup>[3]</sup> 10:12 49:25 51:14<br/> <b>forbid</b> <sup>[1]</sup> 71:5<br/> <b>forces</b> <sup>[1]</sup> 5:14<br/> <b>foreign</b> <sup>[1]</sup> 40:12<br/> <b>form</b> <sup>[1]</sup> 23:25<br/> <b>forms</b> <sup>[4]</sup> 5:2 6:22 9:22 35:22<br/> <b>formulation</b> <sup>[4]</sup> 45:21,22 46:6,9<br/> <b>found</b> <sup>[1]</sup> 51:19<br/> <b>foundational</b> <sup>[2]</sup> 23:4 27:21<br/> <b>fourth</b> <sup>[1]</sup> 27:10<br/> <b>FRANCISCO</b> <sup>[35]</sup> 2:9 3:11 53:4,5,<br/> 8 54:19,22 55:2,12,15 56:1,6,10,<br/> 14,16 57:5,12,17,21 58:10,19,25<br/> 59:8,12 60:19,25 61:12,18 62:14,<br/> 19 63:3,11,14 64:22 65:6<br/> <b>free</b> <sup>[3]</sup> 13:19 27:9 33:8<br/> <b>frequency</b> <sup>[1]</sup> 5:16<br/> <b>friend</b> <sup>[2]</sup> 18:3 54:8<br/> <b>friend's</b> <sup>[1]</sup> 49:11<br/> <b>friends</b> <sup>[2]</sup> 8:19 62:3<br/> <b>fully</b> <sup>[1]</sup> 64:16<br/> <b>function</b> <sup>[1]</sup> 35:13<br/> <b>funeral</b> <sup>[1]</sup> 14:21<br/> <b>further</b> <sup>[2]</sup> 8:7,12<br/> <b>futile</b> <sup>[1]</sup> 5:20</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>game</b> <sup>[1]</sup> 27:22</p> | <p><b>gave</b> <sup>[3]</sup> 28:15 41:22 47:4<br/> <b>gay</b> <sup>[29]</sup> 5:11,17,21 6:2 15:19 17:<br/> 14 27:9,14 28:2,3,9 32:1 33:23 44:<br/> 10 47:20,21 52:23 53:17,18,18 61:<br/> 21 63:8,17 65:20,25 66:7 70:16,<br/> 25 71:12<br/> <b>gays</b> <sup>[2]</sup> 24:20 27:17<br/> <b>GEN</b> <sup>[3]</sup> 2:9 3:11 53:5<br/> <b>gender</b> <sup>[5]</sup> 20:22 45:5 46:10 62:9<br/> 64:6<br/> <b>gender-based</b> <sup>[1]</sup> 65:24<br/> <b>gender-specific</b> <sup>[1]</sup> 13:10<br/> <b>General</b> <sup>[36]</sup> 2:9 38:8 53:4,8 54:19,<br/> 22 55:2,12,15 56:1,6,10,14,16 57:<br/> 3,5,12,17,21 58:10,19,25 59:8,12,<br/> 16 60:19,25 61:12,18 62:14,19 63:<br/> 3,11,14 64:22 65:6<br/> <b>General's</b> <sup>[1]</sup> 66:18<br/> <b>generally</b> <sup>[4]</sup> 13:4 18:17 42:14 62:<br/> 24<br/> <b>generous</b> <sup>[2]</sup> 45:1,19<br/> <b>GEORGIA</b> <sup>[1]</sup> 1:6<br/> <b>GERALD</b> <sup>[3]</sup> 1:3 25:12 30:6<br/> <b>German</b> <sup>[3]</sup> 24:6,9,10<br/> <b>gets</b> <sup>[3]</sup> 12:20 36:7 65:25<br/> <b>getting</b> <sup>[2]</sup> 14:20,21<br/> <b>GINSBURG</b> <sup>[40]</sup> 6:13 9:20,23 10:7,<br/> 23 20:20 36:9,11,18,20,23 37:12<br/> 38:1,18 48:21 54:18,20 55:11,14,<br/> 16 56:5,7,11,15 57:10,13,18,22 58:<br/> 18,21 59:6,10,14 62:12,16 63:1,5,<br/> 12 65:14 70:15<br/> <b>girlfriend</b> <sup>[1]</sup> 35:12<br/> <b>give</b> <sup>[9]</sup> 8:3 14:10 20:6 25:2,5,16<br/> 47:2 55:17 67:4<br/> <b>given</b> <sup>[3]</sup> 13:13 57:15 58:23<br/> <b>giving</b> <sup>[1]</sup> 64:10<br/> <b>glossed</b> <sup>[1]</sup> 34:10<br/> <b>glossing</b> <sup>[1]</sup> 34:18<br/> <b>GORSUCH</b> <sup>[30]</sup> 13:6,12,25 14:2,5,<br/> 8,16,19 15:1,5 16:4,7,10,16,18,22<br/> 17:5 44:18,21 45:11,13,21 46:3<br/> 47:8,10 54:7,25 61:11,14 64:15<br/> <b>Gorsuch's</b> <sup>[1]</sup> 17:18<br/> <b>got</b> <sup>[1]</sup> 12:18<br/> <b>grounds</b> <sup>[2]</sup> 10:21,22<br/> <b>guard</b> <sup>[7]</sup> 9:11,13,14,15 10:1,13,17<br/> <b>guarding</b> <sup>[3]</sup> 10:2,5,10<br/> <b>guards</b> <sup>[1]</sup> 10:4<br/> <b>guess</b> <sup>[4]</sup> 42:10 43:18 59:13,21<br/> <b>guidance</b> <sup>[1]</sup> 47:2</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>half</b> <sup>[1]</sup> 64:9<br/> <b>hand</b> <sup>[1]</sup> 13:21<br/> <b>happen</b> <sup>[1]</sup> 65:22<br/> <b>happened</b> <sup>[8]</sup> 29:15 41:14,15,25<br/> 42:5 46:11 68:1,3<br/> <b>Happens</b> <sup>[2]</sup> 50:25 68:4<br/> <b>harassed</b> <sup>[2]</sup> 36:24 71:12<br/> <b>harassment</b> <sup>[4]</sup> 7:1,3 32:20 71:11<br/> <b>hard</b> <sup>[5]</sup> 21:12 34:11 35:17 36:7 66:<br/> 2<br/> <b>harder</b> <sup>[1]</sup> 35:19</p> |
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| <p><b>harm</b> <sup>[4]</sup> 13:15 15:12 18:4,6<br/> <b>HARRIS</b> <sup>[48]</sup> 2:6 3:7 12:20,21 18:11,12 31:14,17,21 34:7,15 35:18,23 36:10,15,19,22 37:4,25 39:2,5,10,14,20 40:3,7,11,14,22 41:2,18 42:12 43:22 44:19 45:6,12,20 46:2,12 47:9,15 48:12 49:4 50:15 51:3,9 52:16,18<br/> <b>hatred</b> <sup>[1]</sup> 35:5<br/> <b>hazardous</b> <sup>[1]</sup> 49:6<br/> <b>head</b> <sup>[1]</sup> 29:3<br/> <b>hear</b> <sup>[2]</sup> 4:3 24:21<br/> <b>heard</b> <sup>[1]</sup> 19:23<br/> <b>height</b> <sup>[1]</sup> 10:9<br/> <b>held</b> <sup>[4]</sup> 20:13 28:18 32:19,22<br/> <b>help</b> <sup>[2]</sup> 15:2,4<br/> <b>helped</b> <sup>[1]</sup> 47:2<br/> <b>helpful</b> <sup>[1]</sup> 20:7<br/> <b>helps</b> <sup>[1]</sup> 44:1<br/> <b>heterosexual</b> <sup>[2]</sup> 44:12 51:5<br/> <b>hide</b> <sup>[1]</sup> 6:7<br/> <b>higher</b> <sup>[1]</sup> 43:4<br/> <b>highly</b> <sup>[3]</sup> 21:4 50:4,21<br/> <b>hire</b> <sup>[1]</sup> 19:11 29:18 30:5 35:8 36:13,14 37:3 52:11 55:22 57:16 70:10<br/> <b>hired</b> <sup>[3]</sup> 30:2 37:9 52:23<br/> <b>hires</b> <sup>[1]</sup> 55:18<br/> <b>hiring</b> <sup>[8]</sup> 27:8,13,17 33:24 34:20 38:5 56:3 58:23<br/> <b>history</b> <sup>[7]</sup> 24:14 53:23 59:19,21 60:2,4 71:10<br/> <b>Hively</b> <sup>[2]</sup> 28:12 51:13<br/> <b>hobbies</b> <sup>[1]</sup> 33:21<br/> <b>hobby</b> <sup>[3]</sup> 28:7,8 33:23<br/> <b>hold</b> <sup>[2]</sup> 15:18 44:5<br/> <b>holding</b> <sup>[2]</sup> 32:17 51:16<br/> <b>home</b> <sup>[4]</sup> 25:19,21,24 35:13<br/> <b>homes</b> <sup>[1]</sup> 14:21<br/> <b>homophobic</b> <sup>[2]</sup> 50:18 51:4<br/> <b>homosexual</b> <sup>[3]</sup> 50:21,24 51:5<br/> <b>homosexuality</b> <sup>[3]</sup> 6:19 27:12 28:1<br/> <b>honestly</b> <sup>[1]</sup> 21:12<br/> <b>Honor</b> <sup>[15]</sup> 35:23 38:9 46:12 47:15 49:4 51:3,10 54:23 56:2 57:12 58:10,25 61:1,18 62:20<br/> <b>Hooters</b> <sup>[2]</sup> 13:23 19:2<br/> <b>Hopkins</b> <sup>[3]</sup> 7:10 37:22 58:16<br/> <b>horribles</b> <sup>[1]</sup> 23:23<br/> <b>however</b> <sup>[1]</sup> 32:3<br/> <b>hypothetical</b> <sup>[5]</sup> 38:9 54:23 56:17 57:13,14<br/> <b>hypotheticals</b> <sup>[3]</sup> 41:3,20 68:2</p> | <p><b>illustrative</b> <sup>[2]</sup> 65:15,23<br/> <b>image</b> <sup>[1]</sup> 33:3<br/> <b>Imagine</b> <sup>[4]</sup> 24:4 47:3 49:6 52:2<br/> <b>immoral</b> <sup>[1]</sup> 27:16<br/> <b>impact</b> <sup>[5]</sup> 9:25 10:9,11,15 32:4<br/> <b>important</b> <sup>[2]</sup> 36:2 70:13<br/> <b>imposition</b> <sup>[1]</sup> 16:1<br/> <b>impossible</b> <sup>[2]</sup> 51:2 57:7<br/> <b>INC</b> <sup>[1]</sup> 1:9<br/> <b>include</b> <sup>[1]</sup> 26:9<br/> <b>including</b> <sup>[2]</sup> 36:6 61:8<br/> <b>inclusion</b> <sup>[1]</sup> 33:6<br/> <b>Indeed</b> <sup>[2]</sup> 30:6 71:4<br/> <b>independent</b> <sup>[7]</sup> 32:10 35:4 40:4 41:6,10,16 42:8<br/> <b>individual</b> <sup>[2]</sup> 52:15 66:16<br/> <b>individuals</b> <sup>[3]</sup> 8:20 43:12,12<br/> <b>inferences</b> <sup>[1]</sup> 44:2<br/> <b>injured</b> <sup>[11]</sup> 15:25 16:3 20:21,23 21:2 48:22,23 49:2,10 54:20,21<br/> <b>injury</b> <sup>[6]</sup> 13:4,5,20 18:16 34:20,21<br/> <b>innate</b> <sup>[1]</sup> 35:5<br/> <b>innocuous</b> <sup>[2]</sup> 15:9,10<br/> <b>inquiry</b> <sup>[3]</sup> 32:25 33:9 51:24<br/> <b>insisted</b> <sup>[3]</sup> 42:9 43:13,15<br/> <b>instead</b> <sup>[1]</sup> 9:15<br/> <b>instructions</b> <sup>[1]</sup> 51:17<br/> <b>instructive</b> <sup>[1]</sup> 50:5<br/> <b>instructors</b> <sup>[1]</sup> 30:8<br/> <b>integrity</b> <sup>[1]</sup> 5:13<br/> <b>intended</b> <sup>[2]</sup> 7:21 51:25<br/> <b>inter-marriage</b> <sup>[2]</sup> 40:10,17<br/> <b>interested</b> <sup>[1]</sup> 67:2<br/> <b>interests</b> <sup>[1]</sup> 64:12<br/> <b>intermarriage</b> <sup>[1]</sup> 38:22<br/> <b>interpret</b> <sup>[1]</sup> 60:17<br/> <b>interpretation</b> <sup>[5]</sup> 28:14 50:8 53:24 54:14 60:1<br/> <b>interpreted</b> <sup>[1]</sup> 36:1<br/> <b>interpreting</b> <sup>[2]</sup> 50:2,4<br/> <b>interprets</b> <sup>[1]</sup> 22:8<br/> <b>interreligious</b> <sup>[1]</sup> 40:24<br/> <b>intervene</b> <sup>[1]</sup> 22:15<br/> <b>interviewed</b> <sup>[1]</sup> 68:11<br/> <b>introduces</b> <sup>[1]</sup> 40:4<br/> <b>invidious</b> <sup>[1]</sup> 35:5<br/> <b>involve</b> <sup>[1]</sup> 65:17<br/> <b>involved</b> <sup>[5]</sup> 8:21 9:1 52:15 58:7 67:18<br/> <b>irrelevant</b> <sup>[1]</sup> 44:7<br/> <b>isn't</b> <sup>[10]</sup> 18:6,17 35:9 37:21 39:8 45:3,24 46:3 47:13 50:8<br/> <b>isolate</b> <sup>[2]</sup> 44:13,22<br/> <b>issue</b> <sup>[12]</sup> 11:10 12:3 20:5 21:6,25,25 22:13 24:25 48:4 53:10,12 64:13<br/> <b>issues</b> <sup>[6]</sup> 26:4 27:2 58:13 64:5,5,6<br/> <b>itself</b> <sup>[3]</sup> 32:12 56:4 64:3</p> | <p><b>Jews</b> <sup>[2]</sup> 40:10,18<br/> <b>job</b> <sup>[12]</sup> 9:13,14 11:15 25:13,20 27:18 28:6 35:10 36:19 52:8 56:19,21<br/> <b>jobs</b> <sup>[2]</sup> 10:5 25:10<br/> <b>Johnson</b> <sup>[3]</sup> 11:13,15 35:24<br/> <b>joyous</b> <sup>[1]</sup> 8:5<br/> <b>Judge</b> <sup>[7]</sup> 7:12,17 22:14,20 32:8 50:17 63:23<br/> <b>judges</b> <sup>[2]</sup> 5:14 28:18<br/> <b>judicial</b> <sup>[2]</sup> 50:7 63:24<br/> <b>Julia</b> <sup>[1]</sup> 10:17<br/> <b>juries</b> <sup>[1]</sup> 51:17<br/> <b>jury</b> <sup>[1]</sup> 51:17<br/> <b>Justice</b> <sup>[181]</sup> 2:10 4:3,12 6:13 7:11 8:11,14 9:20,23 10:7,23 11:25 12:18 13:6,12,25 14:2,5,8,16,19 15:1,5 16:2,4,7,10,16,17,18,20,22 17:5,15,17,18,22,24 18:9,24 19:1,6,10,15,18,21,25 20:4,19,20 21:16,17,18,19 23:7,9,17,19 24:9,16 25:3,5,8,25 26:2,15 28:15,20,20 29:13 30:12,18,20,25 31:9,13,17,20 33:18 34:7,13,17 35:19 36:9,11,18,20,23 37:12 38:1,18,19 39:4,6,12,19,25 40:6,8,13,15 41:2,19 43:1 44:18,21 45:11,13,14,21 46:3 47:8,10 48:6,21 50:14,16,17,17 51:7,21 52:1,17 53:2,8 54:7,18,20,25 55:11,14,16 56:5,7,11,15 57:3,6,7,10,13,18,22 58:18,21 59:6,10,14,16 60:20 61:11,14 62:11,12,16 63:1,5,12,21,21 64:15,21 65:4,7,14 66:1,17 67:4,15,21,23 68:1,10,14,18,21 69:2,13,21 70:15 71:15<br/> <b>justices</b> <sup>[1]</sup> 28:17<br/> <b>justify</b> <sup>[1]</sup> 44:17</p> | <p><b>language</b> <sup>[6]</sup> 23:21 25:2 44:24 46:14 50:12 66:15<br/> <b>large</b> <sup>[2]</sup> 26:24 71:7<br/> <b>last</b> <sup>[4]</sup> 8:2 27:24 48:13 49:24<br/> <b>lastly</b> <sup>[1]</sup> 63:20<br/> <b>Laughter</b> <sup>[5]</sup> 8:10,13 31:12,19 68:17<br/> <b>law</b> <sup>[9]</sup> 18:16 31:23,25 32:3 35:20 40:14 61:3 71:1,3<br/> <b>laws</b> <sup>[4]</sup> 26:3 50:4 60:17,22<br/> <b>least</b> <sup>[5]</sup> 13:13 26:17 40:16 61:2,16<br/> <b>leave</b> <sup>[1]</sup> 66:4<br/> <b>led</b> <sup>[1]</sup> 32:18<br/> <b>left</b> <sup>[1]</sup> 64:14<br/> <b>legal</b> <sup>[3]</sup> 17:25 24:17 34:3<br/> <b>legislation</b> <sup>[1]</sup> 50:6<br/> <b>legislative</b> <sup>[6]</sup> 7:16 22:16 59:20 60:2,3 63:22<br/> <b>legislature</b> <sup>[2]</sup> 22:11 26:18<br/> <b>lesbian</b> <sup>[7]</sup> 27:14 34:4 47:20,22 50:25 62:18 63:13<br/> <b>lesbians</b> <sup>[8]</sup> 6:2 27:17 65:21 66:7 70:17 71:1,6,13<br/> <b>level</b> <sup>[1]</sup> 45:23<br/> <b>Leviticus</b> <sup>[2]</sup> 70:25 71:2<br/> <b>lexical</b> <sup>[1]</sup> 5:15<br/> <b>liability</b> <sup>[3]</sup> 64:2,10 70:1<br/> <b>liberty</b> <sup>[2]</sup> 64:7,11<br/> <b>life</b> <sup>[5]</sup> 41:10,17 42:18,22 43:5<br/> <b>likes</b> <sup>[2]</sup> 66:20,21<br/> <b>limits</b> <sup>[1]</sup> 44:17<br/> <b>lineman</b> <sup>[1]</sup> 14:14<br/> <b>linguistic</b> <sup>[1]</sup> 46:9<br/> <b>list</b> <sup>[2]</sup> 38:6,6<br/> <b>lists</b> <sup>[1]</sup> 61:9<br/> <b>literal</b> <sup>[2]</sup> 48:7 54:9<br/> <b>little</b> <sup>[2]</sup> 32:4 46:24<br/> <b>Live</b> <sup>[1]</sup> 68:16<br/> <b>loading</b> <sup>[1]</sup> 49:21<br/> <b>lodestar</b> <sup>[1]</sup> 59:25<br/> <b>long</b> <sup>[4]</sup> 24:5 32:23 61:21 64:24<br/> <b>longer</b> <sup>[2]</sup> 58:3,8<br/> <b>longevity</b> <sup>[1]</sup> 42:16<br/> <b>look</b> <sup>[17]</sup> 27:21 28:10 29:10 41:23 43:8,12 46:18 57:19 60:17,18,21,21,22 66:9,14 70:19 71:11<br/> <b>looked</b> <sup>[3]</sup> 43:10,11 70:21<br/> <b>looking</b> <sup>[1]</sup> 49:22<br/> <b>looks</b> <sup>[1]</sup> 33:20<br/> <b>loose</b> <sup>[1]</sup> 22:20<br/> <b>lose</b> <sup>[3]</sup> 43:20,20 69:12<br/> <b>lost</b> <sup>[1]</sup> 10:20<br/> <b>lot</b> <sup>[2]</sup> 24:14 68:2<br/> <b>loved</b> <sup>[1]</sup> 60:10<br/> <b>loves</b> <sup>[2]</sup> 31:5,6<br/> <b>lower</b> <sup>[1]</sup> 33:4<br/> <b>Lynch</b> <sup>[1]</sup> 50:17<br/> <b>Lynch's</b> <sup>[1]</sup> 32:8<br/> <b>LYNN</b> <sup>[1]</sup> 1:3</p> |          |  |
| <b>I</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>K</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <b>M</b> |  |
| <p><b>idea</b> <sup>[8]</sup> 7:1 25:10 27:25 29:22 57:8 66:6 71:7,8<br/> <b>identical</b> <sup>[1]</sup> 40:21<br/> <b>identities</b> <sup>[1]</sup> 62:9<br/> <b>identity</b> <sup>[1]</sup> 64:6<br/> <b>idiosyncratic</b> <sup>[3]</sup> 16:13,22,25<br/> <b>ignorance</b> <sup>[1]</sup> 52:4<br/> <b>illness</b> <sup>[1]</sup> 6:19</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <b>J</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <b>L</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><b>labeled</b> <sup>[1]</sup> 6:18<br/> <b>Labeling</b> <sup>[1]</sup> 6:5<br/> <b>landmark</b> <sup>[2]</sup> 32:1,3</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |          |  |
| <p><b>JEFFREY</b> <sup>[3]</sup> 2:6 3:7 31:14<br/> <b>Jew</b> <sup>[1]</sup> 38:20<br/> <b>Jewish</b> <sup>[1]</sup> 39:22</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <p><b>Jeffrey</b> <sup>[3]</sup> 2:6 3:7 31:14<br/> <b>Jew</b> <sup>[1]</sup> 38:20<br/> <b>Jewish</b> <sup>[1]</sup> 39:22</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <p><b>karlan's</b> <sup>[1]</sup> 60:6<br/> <b>KAVANAUGH</b> <sup>[1]</sup> 48:6<br/> <b>key</b> <sup>[2]</sup> 69:1,4<br/> <b>kind</b> <sup>[4]</sup> 5:2 9:16 24:8 60:16<br/> <b>kinds</b> <sup>[1]</sup> 70:24<br/> <b>knowledge</b> <sup>[1]</sup> 70:2<br/> <b>knows</b> <sup>[2]</sup> 70:8,10</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><b>made</b> <sup>[6]</sup> 18:14 24:16 30:3 42:2,17</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               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| <p><b>60:</b>12<br/> <b>major</b> <sup>[1]</sup> 23:10<br/> <b>majority</b> <sup>[2]</sup> 28:17,17<br/> <b>maker</b> <sup>[4]</sup> 52:3 67:16 68:6 70:2<br/> <b>makeup</b> <sup>[1]</sup> 7:7<br/> <b>male</b> <sup>[18]</sup> 4:13,22 6:10,17 8:3 9:25<br/> 10:5,16 15:7 36:23 52:21 53:16<br/> 56:3,7,11 57:23 58:7,23<br/> <b>males</b> <sup>[2]</sup> 11:2 58:23<br/> <b>man</b> <sup>[55]</sup> 4:17,18 5:17,21 7:6 9:13,<br/> 13,17,17,21 15:19,20 19:12 23:6<br/> 24:25,25 25:14,20 28:2,5 29:7,20<br/> 30:9,10,10,11 31:3,5,8 33:20 34:<br/> 24,25 37:21 38:11 40:2 41:14 42:<br/> 21 43:16 44:10 46:20 47:13 49:8,<br/> 17 50:23 54:14 60:9,14 65:23 66:<br/> 10,20,21 67:10,12 68:23 69:7<br/> <b>man's</b> <sup>[1]</sup> 54:16<br/> <b>Manhart</b> <sup>[14]</sup> 41:8,9,22,22 42:13,<br/> 15 43:1,6,10,11,13,14,23 48:18<br/> <b>many</b> <sup>[9]</sup> 6:16 9:25 10:4 20:8 26:5<br/> 27:15 40:16 41:4 59:25<br/> <b>margins</b> <sup>[2]</sup> 34:9 51:23<br/> <b>Marietta</b> <sup>[4]</sup> 25:18 37:7,13 43:24<br/> <b>marriage</b> <sup>[1]</sup> 40:24<br/> <b>married</b> <sup>[15]</sup> 8:1,3,4 38:20 55:22<br/> 56:9,22,24,24 57:19,22 58:4,9 66:<br/> 11,12<br/> <b>marry</b> <sup>[1]</sup> 55:19<br/> <b>Martin</b> <sup>[5]</sup> 25:18 37:7,7,13 43:24<br/> <b>material</b> <sup>[1]</sup> 46:5<br/> <b>materials</b> <sup>[1]</sup> 49:7<br/> <b>matter</b> <sup>[1]</sup> 1:19<br/> <b>mean</b> <sup>[13]</sup> 14:3 19:16 22:24 28:17<br/> 30:7,9,22,25 42:7 43:5 50:11 60:<br/> 23 68:25<br/> <b>meaning</b> <sup>[8]</sup> 24:10 30:21 34:18 48:<br/> 7,8,10 54:10 65:2<br/> <b>means</b> <sup>[2]</sup> 13:2 53:16<br/> <b>meant</b> <sup>[3]</sup> 22:24 24:20 58:1<br/> <b>Media</b> <sup>[1]</sup> 27:25<br/> <b>meet</b> <sup>[2]</sup> 38:12,13<br/> <b>meets</b> <sup>[1]</sup> 32:23<br/> <b>MELISSA</b> <sup>[1]</sup> 1:12<br/> <b>members</b> <sup>[5]</sup> 7:8 33:1,2 52:9 70:<br/> 20<br/> <b>men</b> <sup>[66]</sup> 4:14,15,24,24,25 5:5,9,11,<br/> 23 6:2,9 7:1,20,22,24 8:18 9:3 10:<br/> 2,14 11:8,8 12:12 13:18,23 14:12<br/> 21:13 22:24 28:4 29:8,9,18 30:2,5,<br/> 8 33:9,13 36:14,24 37:2,15,17 38:<br/> 6 40:7 47:13,21 48:5 53:18,18 55:<br/> 22 56:19,20,22,24 57:16 58:4,12<br/> 60:10 61:21 64:24 65:20 66:6 67:<br/> 12,13 70:16,25 71:12<br/> <b>men's</b> <sup>[5]</sup> 12:11 21:13 38:13 49:20<br/> 55:7<br/> <b>mental</b> <sup>[1]</sup> 6:19<br/> <b>mention</b> <sup>[1]</sup> 46:20<br/> <b>mentioned</b> <sup>[1]</sup> 66:2<br/> <b>metaphysical</b> <sup>[1]</sup> 54:16<br/> <b>methods</b> <sup>[1]</sup> 28:13<br/> <b>might</b> <sup>[8]</sup> 13:14 16:7 21:1 22:12 56:<br/> 12 69:1,4 70:5</p> | <p><b>mind</b> <sup>[4]</sup> 6:16 23:11,20 28:24<br/> <b>minimis</b> <sup>[1]</sup> 18:20<br/> <b>ministerial</b> <sup>[1]</sup> 26:25<br/> <b>minute</b> <sup>[1]</sup> 52:2<br/> <b>minutes</b> <sup>[1]</sup> 65:7<br/> <b>mirror</b> <sup>[1]</sup> 33:3<br/> <b>mixed</b> <sup>[1]</sup> 33:25<br/> <b>modern</b> <sup>[1]</sup> 70:23<br/> <b>money</b> <sup>[1]</sup> 12:20<br/> <b>morning</b> <sup>[1]</sup> 4:4<br/> <b>most</b> <sup>[9]</sup> 7:2 10:12 15:9,9 20:22,24<br/> 40:23,23 48:25<br/> <b>motivating</b> <sup>[4]</sup> 46:14,16 47:3,25<br/> <b>motive</b> <sup>[1]</sup> 33:25<br/> <b>moving</b> <sup>[1]</sup> 35:2<br/> <b>Ms</b> <sup>[87]</sup> 4:7,11 6:13,14,20 7:17 9:5,<br/> 20,21,23 10:7 11:4,18 12:9,19 13:<br/> 11,16 14:1,4,7,10,18,25 15:3,16<br/> 16:2,6,8,13,17 17:4,10,15,16,20,<br/> 23 18:7,10,11,25 19:5,9,13,16,19,<br/> 24 20:3,6,17 21:4 22:19 23:8,14,<br/> 18 24:7,23 25:4,6,9 26:1,14,20 28:<br/> 16 29:12,25 30:17,19,24 31:2 42:<br/> 2 60:6 65:8,12 66:17,23 67:6,19,<br/> 22,25 68:8,12,15,20,22 69:3,17 70:<br/> 4<br/> <b>much</b> <sup>[2]</sup> 29:22 47:19<br/> <b>must</b> <sup>[1]</sup> 24:5</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>name</b> <sup>[1]</sup> 52:21<br/> <b>named</b> <sup>[1]</sup> 68:22<br/> <b>namely</b> <sup>[1]</sup> 4:24<br/> <b>narrow</b> <sup>[1]</sup> 45:4<br/> <b>narrowly</b> <sup>[1]</sup> 36:1<br/> <b>national</b> <sup>[2]</sup> 35:22 50:2<br/> <b>nationwide</b> <sup>[1]</sup> 32:6<br/> <b>nearly</b> <sup>[1]</sup> 51:2<br/> <b>necessarily</b> <sup>[1]</sup> 69:23<br/> <b>need</b> <sup>[11]</sup> 7:18 8:20,25 12:1 22:14<br/> 24:21 29:10 36:4 44:5 45:14 67:8<br/> <b>neither</b> <sup>[2]</sup> 12:24 65:18<br/> <b>neutral</b> <sup>[2]</sup> 40:7 49:15<br/> <b>never</b> <sup>[4]</sup> 51:25 59:10,11 68:23<br/> <b>Newport</b> <sup>[2]</sup> 23:18 43:23<br/> <b>News</b> <sup>[2]</sup> 23:18 43:23<br/> <b>next</b> <sup>[1]</sup> 62:15<br/> <b>Night</b> <sup>[1]</sup> 68:15<br/> <b>NOEL</b> <sup>[3]</sup> 2:9 3:11 53:5<br/> <b>non-conformity</b> <sup>[1]</sup> 5:8<br/> <b>non-discriminatory</b> <sup>[1]</sup> 8:16<br/> <b>none</b> <sup>[1]</sup> 65:17<br/> <b>North</b> <sup>[1]</sup> 13:1<br/> <b>Northern</b> <sup>[1]</sup> 13:2<br/> <b>not-hypothetical</b> <sup>[1]</sup> 55:17<br/> <b>note</b> <sup>[1]</sup> 41:1<br/> <b>noted</b> <sup>[2]</sup> 10:12 42:15<br/> <b>nothing</b> <sup>[4]</sup> 43:9 46:10 52:25 63:8<br/> <b>notice</b> <sup>[1]</sup> 11:6<br/> <b>nullified</b> <sup>[1]</sup> 62:6<br/> <b>nullify</b> <sup>[1]</sup> 54:5<br/> <b>numerous</b> <sup>[1]</sup> 62:8</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>objections</b> <sup>[3]</sup> 27:8,12,13<br/> <b>obviously</b> <sup>[3]</sup> 36:16 38:23 42:4<br/> <b>October</b> <sup>[1]</sup> 1:17<br/> <b>offense</b> <sup>[1]</sup> 6:17<br/> <b>offensive</b> <sup>[1]</sup> 35:14<br/> <b>offer</b> <sup>[2]</sup> 15:1,4<br/> <b>offered</b> <sup>[1]</sup> 38:8<br/> <b>often</b> <sup>[2]</sup> 51:3,5<br/> <b>okay</b> <sup>[11]</sup> 11:17 14:25 17:5 18:4 24:<br/> 14 29:13 47:11 51:7 52:10 56:10<br/> 68:20<br/> <b>old</b> <sup>[1]</sup> 7:15<br/> <b>Oncale</b> <sup>[9]</sup> 23:15 32:18,19 33:4,4<br/> 36:3,9,11 48:3<br/> <b>once</b> <sup>[2]</sup> 36:7 57:22<br/> <b>one</b> <sup>[35]</sup> 8:7 11:22 12:12 15:13 16:<br/> 24 18:2 22:1 23:24,24,25 27:20<br/> 28:5 29:6 33:1,21 39:16 40:2,21<br/> 43:13,13 45:3,10 46:8,8,9,10 47:5<br/> 61:16,20 63:16 64:23 66:24 69:17<br/> 70:17 71:7<br/> <b>ones</b> <sup>[1]</sup> 59:24<br/> <b>only</b> <sup>[13]</sup> 4:25 11:1 30:7 36:13 39:<br/> 11,16,23,25 55:18 56:23 60:11 64:<br/> 9 71:4<br/> <b>opening</b> <sup>[2]</sup> 59:17 70:15<br/> <b>operationalizing</b> <sup>[1]</sup> 51:15<br/> <b>opinion</b> <sup>[3]</sup> 22:13 27:24 51:14<br/> <b>opinions</b> <sup>[1]</sup> 27:21<br/> <b>opponent's</b> <sup>[1]</sup> 24:2<br/> <b>opportunities</b> <sup>[3]</sup> 6:1 21:11,15<br/> <b>oppose</b> <sup>[1]</sup> 40:24<br/> <b>opposite</b> <sup>[3]</sup> 9:12 10:11 35:12<br/> <b>oral</b> <sup>[7]</sup> 1:20 3:2,6,10 4:8 31:14 53:<br/> 5<br/> <b>ordinary</b> <sup>[2]</sup> 48:8,10<br/> <b>organizations</b> <sup>[1]</sup> 26:10<br/> <b>orientation</b> <sup>[56]</sup> 5:19 6:6 7:14 19:<br/> 17 21:24 22:10 23:5 26:8 28:18,<br/> 22 29:16,23 30:18 31:24 32:5,10,<br/> 11 33:7,13,15 44:6,14,17 45:7,15,<br/> 23 46:24 48:2 50:10,19,21 51:18<br/> 52:24 53:12 54:3 61:4,8,9,23 62:1,<br/> 9,23 63:4,19 64:5,19 65:15 67:17<br/> 68:9 69:11,15,18,23 70:6,22 71:8<br/> <b>origin</b> <sup>[2]</sup> 35:22 50:3<br/> <b>other</b> <sup>[27]</sup> 8:18 12:7 13:20 15:13<br/> 21:3 23:21 26:16 29:8,19 33:2 34:<br/> 5 35:22 36:24 37:9 39:16 44:24<br/> 45:18 47:13 54:2,9 60:10 62:3,8<br/> 64:12,25 65:24 66:6<br/> <b>otherwise</b> <sup>[4]</sup> 15:9 16:14 49:20,21<br/> <b>out</b> <sup>[16]</sup> 5:10 24:1,1 29:5 34:6 36:8,<br/> 12 42:11 46:19,23 48:14 57:8 58:<br/> 1 66:3 69:1,4<br/> <b>outfits</b> <sup>[1]</sup> 13:23<br/> <b>outside</b> <sup>[2]</sup> 44:4,16<br/> <b>over</b> <sup>[3]</sup> 34:10,18 41:6<br/> <b>overall</b> <sup>[1]</sup> 66:16<br/> <b>own</b> <sup>[1]</sup> 27:15</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>PAGE</b> <sup>[1]</sup> 3:2<br/> <b>PAMELA</b> <sup>[5]</sup> 2:3 3:3,16 4:8 65:9</p> | <p><b>parade</b> <sup>[1]</sup> 23:23<br/> <b>parallel</b> <sup>[1]</sup> 50:4<br/> <b>parlance</b> <sup>[1]</sup> 47:16<br/> <b>parse</b> <sup>[1]</sup> 34:2<br/> <b>part</b> <sup>[10]</sup> 10:8 26:6 47:14 59:18 60:<br/> 11,12,13 63:10 71:2,2<br/> <b>participants</b> <sup>[1]</sup> 9:3<br/> <b>particular</b> <sup>[3]</sup> 4:23 16:1 52:3<br/> <b>particularly</b> <sup>[2]</sup> 59:17 63:25<br/> <b>parties</b> <sup>[1]</sup> 29:2<br/> <b>partner</b> <sup>[2]</sup> 8:2 66:11<br/> <b>partners</b> <sup>[1]</sup> 33:14<br/> <b>parts</b> <sup>[2]</sup> 11:5 23:20<br/> <b>pass</b> <sup>[2]</sup> 31:22 33:8<br/> <b>passage</b> <sup>[1]</sup> 31:25<br/> <b>Passed</b> <sup>[1]</sup> 24:5<br/> <b>passengers</b> <sup>[1]</sup> 57:24<br/> <b>passing</b> <sup>[1]</sup> 26:3<br/> <b>Pat</b> <sup>[3]</sup> 68:16,23,23<br/> <b>Paul</b> <sup>[1]</sup> 11:14<br/> <b>pay</b> <sup>[1]</sup> 24:5<br/> <b>people</b> <sup>[20]</sup> 8:25 13:4 15:9,17 20:<br/> 22,24 21:20 25:10 27:11 36:14<br/> 40:16,23 47:20 48:25 49:7,23 51:<br/> 6 57:1 70:11<br/> <b>people's</b> <sup>[1]</sup> 50:22<br/> <b>per</b> <sup>[2]</sup> 33:6 34:15<br/> <b>percent</b> <sup>[1]</sup> 27:5<br/> <b>perfect</b> <sup>[2]</sup> 43:25 46:22<br/> <b>perhaps</b> <sup>[2]</sup> 45:2,22<br/> <b>permissible</b> <sup>[3]</sup> 11:16 12:16 20:<br/> 12<br/> <b>permitted</b> <sup>[3]</sup> 11:1 54:24 55:3<br/> <b>pernicious</b> <sup>[1]</sup> 63:25<br/> <b>persisted</b> <sup>[1]</sup> 53:25<br/> <b>person</b> <sup>[28]</sup> 10:16 15:24 16:7,23<br/> 17:1 20:21 21:1 35:6 40:11 47:13<br/> 49:9,12,14 51:10 52:11,23 60:9,<br/> 14 63:6 67:1,18 68:22,25 69:3,12<br/> 70:8,9,11<br/> <b>person's</b> <sup>[3]</sup> 68:6,9,13<br/> <b>perspective</b> <sup>[1]</sup> 64:7<br/> <b>Petitioner</b> <sup>[6]</sup> 1:4 2:4 3:4,17 4:9<br/> 65:10<br/> <b>Petitioners</b> <sup>[4]</sup> 1:10 2:8 3:9 31:16<br/> <b>Phillips</b> <sup>[1]</sup> 25:18<br/> <b>phrase</b> <sup>[2]</sup> 6:6 70:22<br/> <b>physical</b> <sup>[2]</sup> 11:2 12:2<br/> <b>piece</b> <sup>[1]</sup> 59:3<br/> <b>place</b> <sup>[1]</sup> 56:19<br/> <b>placing</b> <sup>[1]</sup> 7:15<br/> <b>plainly</b> <sup>[1]</sup> 56:25<br/> <b>plaintiff</b> <sup>[3]</sup> 32:23 48:24 49:1<br/> <b>Plaintiff's</b> <sup>[1]</sup> 48:17<br/> <b>plaintiffs</b> <sup>[3]</sup> 32:2 33:7 44:4<br/> <b>platforms</b> <sup>[1]</sup> 36:13<br/> <b>play</b> <sup>[2]</sup> 45:24,25<br/> <b>played</b> <sup>[2]</sup> 27:22 67:8<br/> <b>please</b> <sup>[4]</sup> 4:12 31:18 52:17 53:9<br/> <b>plus</b> <sup>[2]</sup> 37:14,14<br/> <b>point</b> <sup>[7]</sup> 30:12 44:4,16 48:14 55:5<br/> 63:21 66:4<br/> <b>policemen</b> <sup>[5]</sup> 24:4,6,9,10,11<br/> <b>policies</b> <sup>[2]</sup> 6:1,5</p> |
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| <p><b>policy</b> <sup>[14]</sup> 8:16 9:1,4,6,11 10:2 21:24,25 23:10 42:16 43:3 49:15 63:9 65:20</p> <p><b>position</b> <sup>[4]</sup> 52:5 54:5 64:8 66:1</p> <p><b>positions</b> <sup>[1]</sup> 10:13</p> <p><b>Posner</b> <sup>[4]</sup> 7:18 22:14,20 63:23</p> <p><b>Posner's</b> <sup>[1]</sup> 7:12</p> <p><b>possibility</b> <sup>[1]</sup> 5:24</p> <p><b>possible</b> <sup>[1]</sup> 29:15</p> <p><b>possibly</b> <sup>[1]</sup> 70:3</p> <p><b>practical</b> <sup>[1]</sup> 32:4</p> <p><b>practice</b> <sup>[2]</sup> 50:4 57:8</p> <p><b>precisely</b> <sup>[3]</sup> 61:6 64:4,13</p> <p><b>predictions</b> <sup>[1]</sup> 60:20</p> <p><b>prefer</b> <sup>[2]</sup> 16:23 20:24</p> <p><b>preference</b> <sup>[1]</sup> 16:14</p> <p><b>pregnancy</b> <sup>[1]</sup> 39:17</p> <p><b>premise</b> <sup>[1]</sup> 29:1</p> <p><b>prepared</b> <sup>[1]</sup> 18:16</p> <p><b>presumably</b> <sup>[1]</sup> 56:18</p> <p><b>presumptively</b> <sup>[1]</sup> 18:21</p> <p><b>pretty</b> <sup>[1]</sup> 60:6</p> <p><b>Price</b> <sup>[7]</sup> 7:4 23:15 37:16,20 38:2 47:1 58:15</p> <p><b>primary</b> <sup>[1]</sup> 45:16</p> <p><b>prior</b> <sup>[1]</sup> 9:9</p> <p><b>prison</b> <sup>[2]</sup> 10:17,18</p> <p><b>prisoners</b> <sup>[3]</sup> 10:1,5,6</p> <p><b>private</b> <sup>[2]</sup> 31:24 35:13</p> <p><b>probably</b> <sup>[2]</sup> 14:11 43:3</p> <p><b>problem</b> <sup>[9]</sup> 27:17 34:9 43:22 44:3 49:13 56:2,16 61:15 66:10</p> <p><b>problems</b> <sup>[1]</sup> 25:15</p> <p><b>program</b> <sup>[1]</sup> 11:17</p> <p><b>prohibit</b> <sup>[5]</sup> 21:23 22:9 53:11 61:7 63:18</p> <p><b>prohibited</b> <sup>[1]</sup> 53:13</p> <p><b>prohibition</b> <sup>[1]</sup> 56:3</p> <p><b>prohibits</b> <sup>[1]</sup> 64:23</p> <p><b>promise</b> <sup>[1]</sup> 40:15</p> <p><b>promotion</b> <sup>[1]</sup> 38:4</p> <p><b>proof</b> <sup>[1]</sup> 58:14</p> <p><b>proper</b> <sup>[1]</sup> 49:14</p> <p><b>proponents</b> <sup>[1]</sup> 31:25</p> <p><b>propose</b> <sup>[1]</sup> 18:1</p> <p><b>protect</b> <sup>[1]</sup> 62:8</p> <p><b>provision</b> <sup>[1]</sup> 21:8</p> <p><b>provisions</b> <sup>[1]</sup> 64:2</p> <p><b>proximate</b> <sup>[2]</sup> 44:22 46:7</p> <p><b>Psychiatric</b> <sup>[1]</sup> 6:18</p> <p><b>pure</b> <sup>[2]</sup> 31:7 70:12</p> <p><b>purposes</b> <sup>[1]</sup> 11:24</p> <p><b>put</b> <sup>[4]</sup> 9:15 24:3,15 57:8</p> <p><b>puts</b> <sup>[1]</sup> 65:25</p> <p><b>putting</b> <sup>[1]</sup> 44:17</p> | <p>21 58:11 62:21 65:13</p> <p><b>questions</b> <sup>[5]</sup> 8:8,12 22:15 34:11 48:15</p> <p><b>quite</b> <sup>[3]</sup> 9:24 21:12 32:17</p> <p><b>quote</b> <sup>[1]</sup> 32:8</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>race</b> <sup>[7]</sup> 10:25 20:7,11 35:20 38:23 39:10,12</p> <p><b>raging</b> <sup>[1]</sup> 12:3</p> <p><b>raise</b> <sup>[1]</sup> 64:6</p> <p><b>raising</b> <sup>[1]</sup> 63:22</p> <p><b>rare</b> <sup>[1]</sup> 70:5</p> <p><b>rates</b> <sup>[1]</sup> 42:23</p> <p><b>rather</b> <sup>[4]</sup> 5:6 26:1 40:2 53:13</p> <p><b>Rawlinson</b> <sup>[4]</sup> 9:10 10:8 11:18,18</p> <p><b>reachable</b> <sup>[1]</sup> 7:7</p> <p><b>reached</b> <sup>[1]</sup> 7:2</p> <p><b>read</b> <sup>[5]</sup> 6:20 7:13,19 22:22 24:1</p> <p><b>reading</b> <sup>[2]</sup> 28:12 59:22</p> <p><b>real</b> <sup>[3]</sup> 5:17 14:9,10</p> <p><b>reality</b> <sup>[1]</sup> 51:4</p> <p><b>realize</b> <sup>[1]</sup> 28:11</p> <p><b>really</b> <sup>[5]</sup> 11:23 18:18 41:21 64:17 66:2</p> <p><b>realm</b> <sup>[1]</sup> 14:24</p> <p><b>reason</b> <sup>[8]</sup> 35:3 47:18,23 52:12,24 54:19,23 55:3</p> <p><b>reasonable</b> <sup>[2]</sup> 15:24 16:10</p> <p><b>reasoning</b> <sup>[1]</sup> 28:10</p> <p><b>reasons</b> <sup>[3]</sup> 40:25 47:5 53:15</p> <p><b>rebalanced</b> <sup>[1]</sup> 27:2</p> <p><b>REBUTTAL</b> <sup>[3]</sup> 3:15 8:9 65:9</p> <p><b>receive</b> <sup>[1]</sup> 33:8</p> <p><b>recognize</b> <sup>[1]</sup> 18:16</p> <p><b>recognized</b> <sup>[5]</sup> 5:3 6:22 7:5 11:14 50:13</p> <p><b>record</b> <sup>[2]</sup> 62:16 63:8</p> <p><b>redundancy</b> <sup>[1]</sup> 50:9</p> <p><b>reference</b> <sup>[2]</sup> 46:23 71:9</p> <p><b>referred</b> <sup>[1]</sup> 46:15</p> <p><b>referring</b> <sup>[1]</sup> 46:13</p> <p><b>reflects</b> <sup>[1]</sup> 61:25</p> <p><b>refused</b> <sup>[1]</sup> 54:3</p> <p><b>refusing</b> <sup>[1]</sup> 70:10</p> <p><b>regard</b> <sup>[1]</sup> 20:14</p> <p><b>regardless</b> <sup>[3]</sup> 20:16 53:19 61:22</p> <p><b>related</b> <sup>[2]</sup> 53:23 54:12</p> <p><b>relations</b> <sup>[1]</sup> 6:17</p> <p><b>relationships</b> <sup>[2]</sup> 8:17,18</p> <p><b>relative</b> <sup>[2]</sup> 7:22,23</p> <p><b>religion</b> <sup>[4]</sup> 39:13,15,16,24</p> <p><b>religious</b> <sup>[14]</sup> 26:9,23 27:8,12,13,15 35:4,21 39:21 40:16,25 64:3,7,11</p> <p><b>remainder</b> <sup>[1]</sup> 8:8</p> <p><b>remind</b> <sup>[1]</sup> 45:9</p> <p><b>removed</b> <sup>[1]</sup> 53:22</p> <p><b>rendered</b> <sup>[1]</sup> 62:6</p> <p><b>repeatedly</b> <sup>[3]</sup> 22:3 23:12 54:1</p> <p><b>replace</b> <sup>[1]</sup> 51:24</p> <p><b>reported</b> <sup>[1]</sup> 67:20</p> <p><b>representing</b> <sup>[2]</sup> 17:12,13</p> <p><b>requests</b> <sup>[1]</sup> 22:7</p> | <p><b>require</b> <sup>[1]</sup> 14:12</p> <p><b>required</b> <sup>[2]</sup> 11:1 14:14</p> <p><b>requirement</b> <sup>[1]</sup> 10:10</p> <p><b>requirements</b> <sup>[4]</sup> 10:10 13:10 32:24 36:5</p> <p><b>requires</b> <sup>[1]</sup> 19:2</p> <p><b>requiring</b> <sup>[2]</sup> 13:4 21:13</p> <p><b>reserve</b> <sup>[1]</sup> 8:8</p> <p><b>resolved</b> <sup>[2]</sup> 59:1,4</p> <p><b>resort</b> <sup>[1]</sup> 5:15</p> <p><b>respect</b> <sup>[3]</sup> 42:24 54:4 64:25</p> <p><b>respond</b> <sup>[2]</sup> 21:20 22:17</p> <p><b>Respondent</b> <sup>[4]</sup> 1:7 2:7 3:8 31:15</p> <p><b>Respondents</b> <sup>[6]</sup> 1:14 2:5 3:5,18 4:10 65:11</p> <p><b>response</b> <sup>[6]</sup> 8:24 45:5,14,17 48:23 61:15</p> <p><b>responses</b> <sup>[2]</sup> 54:11 61:19</p> <p><b>restaurant</b> <sup>[1]</sup> 19:11</p> <p><b>rested</b> <sup>[1]</sup> 10:8</p> <p><b>restroom</b> <sup>[1]</sup> 54:15</p> <p><b>result</b> <sup>[1]</sup> 5:15</p> <p><b>resume</b> <sup>[1]</sup> 52:20</p> <p><b>reversal</b> <sup>[3]</sup> 2:13 3:14 53:7</p> <p><b>reverse</b> <sup>[1]</sup> 32:18</p> <p><b>reversed</b> <sup>[1]</sup> 32:21</p> <p><b>reviewed</b> <sup>[1]</sup> 52:5</p> <p><b>rights</b> <sup>[2]</sup> 32:1,7</p> <p><b>ROBERTS</b> <sup>[17]</sup> 4:3 7:11 8:11,14 21:17 25:25 26:2,15 31:9,13,20 52:17 53:2 64:21 65:4,7 71:15</p> <p><b>role</b> <sup>[1]</sup> 67:9</p> <p><b>room</b> <sup>[3]</sup> 21:13,14 55:7</p> <p><b>rude</b> <sup>[1]</sup> 58:20</p> <p><b>rule</b> <sup>[7]</sup> 9:16 13:17 16:15 20:16 21:21 33:6 34:15</p> <p><b>ruling</b> <sup>[1]</sup> 63:24</p> <p><b>running</b> <sup>[1]</sup> 48:14</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>sad</b> <sup>[1]</sup> 51:4</p> <p><b>sailor</b> <sup>[1]</sup> 7:6</p> <p><b>same</b> <sup>[24]</sup> 4:19 9:2,4,16 13:9 17:19 24:10 33:14 37:22 38:23 41:13,15,19,21,25 42:4 52:9 53:19 55:6 59:9 61:22 65:1 66:8 69:18</p> <p><b>same-sex</b> <sup>[4]</sup> 6:17 12:4 32:19 47:16</p> <p><b>Santa</b> <sup>[1]</sup> 11:13</p> <p><b>Saturday</b> <sup>[1]</sup> 68:15</p> <p><b>saying</b> <sup>[5]</sup> 20:25 22:22 31:3 48:1 69:19</p> <p><b>says</b> <sup>[16]</sup> 9:6 12:13,14 13:3 15:16 21:8 22:20 24:4 33:21,22 52:6,10 66:10 67:13 69:6,9</p> <p><b>scant</b> <sup>[2]</sup> 19:3,15</p> <p><b>scantily</b> <sup>[1]</sup> 19:3</p> <p><b>scenario</b> <sup>[3]</sup> 46:16 47:7,24</p> <p><b>scope</b> <sup>[2]</sup> 64:1,10</p> <p><b>se</b> <sup>[2]</sup> 33:6 34:15</p> <p><b>search</b> <sup>[1]</sup> 60:12</p> <p><b>Second</b> <sup>[15]</sup> 5:14 13:21 27:1 28:5 32:16 33:5,11 34:10 51:12,16 53:22 55:5 59:18 66:4,25</p> | <p><b>Section</b> <sup>[2]</sup> 4:16,21</p> <p><b>see</b> <sup>[8]</sup> 13:7 21:5,12 41:23 48:12,19 63:9 71:12</p> <p><b>seeking</b> <sup>[1]</sup> 36:17</p> <p><b>seeks</b> <sup>[3]</sup> 9:12,14 64:1</p> <p><b>seems</b> <sup>[2]</sup> 34:18 42:11</p> <p><b>segregate</b> <sup>[1]</sup> 21:9</p> <p><b>segregation</b> <sup>[1]</sup> 21:10</p> <p><b>seminal</b> <sup>[1]</sup> 41:9</p> <p><b>sense</b> <sup>[6]</sup> 30:14 43:25 45:4 46:22,25 54:16</p> <p><b>separate</b> <sup>[5]</sup> 13:5 20:9,11,23 49:3</p> <p><b>serious</b> <sup>[1]</sup> 24:17</p> <p><b>serum</b> <sup>[2]</sup> 47:4,11</p> <p><b>services</b> <sup>[1]</sup> 25:12</p> <p><b>set</b> <sup>[1]</sup> 38:17</p> <p><b>sets</b> <sup>[1]</sup> 38:10</p> <p><b>Seventh</b> <sup>[2]</sup> 51:13 59:15</p> <p><b>several</b> <sup>[4]</sup> 18:15 26:2 27:2 36:4</p> <p><b>sew</b> <sup>[1]</sup> 31:4</p> <p><b>sewing</b> <sup>[5]</sup> 23:3 28:7 31:5,6 33:22</p> <p><b>sex</b> <sup>[109]</sup> 4:20 5:19 6:22 8:6,20,25 9:2,8,12 10:11,20,21 11:15,19 12:12,23 15:18 16:25 17:5 18:2,12 20:14 21:3 22:23 25:17 26:7,12 28:19 29:11,24 30:13,22,25 31:7 32:9,13 33:1,2,10,12,14 34:6 35:12 37:2,23 42:1,5 44:10,13 45:3,8,24 46:10,16,20 47:9,14 48:8,9 49:12,17 50:9 51:11,19 52:9,14,15,19 53:1,14,16,19,21 54:16 55:15,20,24 57:9 58:2,4 59:3 60:8 61:3,8,17,20,22,24 62:1 64:18 66:25 67:1,8,14,17 68:5,7,13 69:10,16,19,22,24 70:2,7,9,10,12 71:9</p> <p><b>sex-specific</b> <sup>[1]</sup> 16:1</p> <p><b>sexual</b> <sup>[60]</sup> 5:19 6:6 7:1,3,14 19:17 21:24 22:9 23:5 26:8 28:4,18,22 29:16,23 30:18 31:23 32:5,9,11 33:7,12,15 34:23,25 44:5,14,17 45:7,15,23 46:23 48:1 50:10,19 51:18 52:24 53:12 54:2 61:4,7,9,23 62:1,9,23 63:3,19 64:5,19 65:15 67:16 68:9 69:11,15,18,23 70:5,22 71:8</p> <p><b>she's</b> <sup>[1]</sup> 14:18</p> <p><b>short</b> <sup>[1]</sup> 33:11</p> <p><b>shouldn't</b> <sup>[1]</sup> 11:23</p> <p><b>show</b> <sup>[6]</sup> 12:17 33:16 48:2 51:10 67:8,14</p> <p><b>shower</b> <sup>[4]</sup> 49:7,18,19,20</p> <p><b>showering</b> <sup>[2]</sup> 48:20 49:16</p> <p><b>showing</b> <sup>[1]</sup> 62:17</p> <p><b>shows</b> <sup>[2]</sup> 50:8,20</p> <p><b>side</b> <sup>[6]</sup> 23:21 44:24 45:18 62:3 64:12 66:6</p> <p><b>side's</b> <sup>[1]</sup> 54:9</p> <p><b>similar</b> <sup>[1]</sup> 32:17</p> <p><b>similarly</b> <sup>[8]</sup> 42:24 43:18 49:14,22 55:6 57:1 58:12 64:25</p> <p><b>simple</b> <sup>[5]</sup> 31:7 41:22 42:10 48:17 70:12</p> <p><b>simply</b> <sup>[8]</sup> 22:16 31:3 33:11 42:19 45:7 47:25 48:18 71:9</p> |
| <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qualified</b> <sup>[2]</sup> 25:11 27:18</p> <p><b>queer</b> <sup>[1]</sup> 5:17</p> <p><b>question</b> <sup>[34]</sup> 11:5,7 12:15 14:24 16:8 17:6,6,12,18,23 18:19 19:17 20:1,15 21:9 22:5,18 23:10 24:22 27:11 30:3 33:12,20 34:22 35:3 37:10 42:7 44:20 45:10 54:8 56:</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         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| <p><b>since</b> [6] 21:6 22:4 23:12 27:23 28:16 53:23<br/> <b>sincere</b> [1] 26:23<br/> <b>single-sex</b> [1] 48:20<br/> <b>sitting</b> [1] 13:18<br/> <b>situated</b> [7] 42:24 49:14,22 55:6 57:1 58:12 64:25<br/> <b>situation</b> [2] 38:10 70:1<br/> <b>situations</b> [1] 39:5<br/> <b>skirt</b> [1] 14:15<br/> <b>skirts</b> [1] 14:13<br/> <b>skydiving</b> [1] 30:8<br/> <b>slurs</b> [1] 51:4<br/> <b>so-called</b> [1] 63:22<br/> <b>sole</b> [4] 44:22 45:15 46:6 60:13<br/> <b>Solicitor</b> [2] 2:9 38:8<br/> <b>somebody</b> [6] 55:10 60:7 68:10 69:6,9,20<br/> <b>somehow</b> [1] 34:1<br/> <b>someone</b> [11] 9:11 10:17 17:12,13, 14 27:8,14 37:1 48:22,22 49:5<br/> <b>somewhat</b> [1] 51:1<br/> <b>sorry</b> [4] 16:18 31:13 45:9 50:15<br/> <b>sort</b> [6] 34:2 40:24 41:12 42:18 46:15 47:21<br/> <b>SOTOMAYOR</b> [33] 11:25 16:17, 20 17:15,17,22,24 18:9,24 19:1,6, 10,15,18,21,25 20:4 33:18 34:7,13, 17 35:19 50:14,16 51:7,21 57:3,7 60:20 62:11 66:1,17 67:4<br/> <b>special</b> [1] 21:7<br/> <b>specific</b> [1] 24:24<br/> <b>specifically</b> [2] 54:2 62:8<br/> <b>spectrum</b> [1] 58:1<br/> <b>spin</b> [1] 29:4<br/> <b>sports</b> [1] 12:3<br/> <b>Sprogis</b> [2] 57:14 59:14<br/> <b>staff</b> [1] 58:20<br/> <b>stand-alone</b> [1] 33:15<br/> <b>standard</b> [2] 44:25 45:1<br/> <b>standards</b> [2] 12:2 48:16<br/> <b>standing</b> [1] 45:8<br/> <b>Stanford</b> [1] 2:3<br/> <b>start</b> [1] 65:13<br/> <b>state</b> [3] 26:18 31:22 50:3<br/> <b>statement</b> [3] 7:13 59:17 66:18<br/> <b>STATES</b> [11] 1:1,21 2:11 3:12 6:16 26:3 50:1,6 53:6 71:5,5<br/> <b>statute</b> [16] 6:21 7:13 11:22 13:2 22:8 24:4,11 28:13 32:24 36:5 44:24 45:18 46:4 54:10 60:2,5<br/> <b>statutes</b> [7] 7:16 18:17,20 53:23 54:2 60:17 62:8<br/> <b>statutory</b> [1] 60:1<br/> <b>Stephens'</b> [1] 20:17<br/> <b>stereotype</b> [2] 6:10 9:7<br/> <b>stereotypes</b> [3] 50:18,22 65:24<br/> <b>stereotypical</b> [1] 58:8<br/> <b>stereotyping</b> [1] 58:2<br/> <b>still</b> [3] 14:18 19:22 46:22<br/> <b>straight</b> [2] 28:5 53:17<br/> <b>straightforward</b> [1] 61:2<br/> <b>strict</b> [1] 36:4<br/> <b>strike</b> [1] 58:1</p> | <p><b>strikes</b> [1] 59:21<br/> <b>strip</b> [1] 46:19<br/> <b>stripped</b> [1] 46:23<br/> <b>struck</b> [1] 59:22<br/> <b>style</b> [1] 17:2<br/> <b>subjected</b> [1] 12:24<br/> <b>submitted</b> [2] 71:16,18<br/> <b>subordinate</b> [1] 52:4<br/> <b>subsequent</b> [2] 59:20 60:3<br/> <b>subset</b> [2] 28:19 70:6<br/> <b>substantial</b> [1] 34:2<br/> <b>suffered</b> [1] 44:10<br/> <b>suffering</b> [1] 13:14<br/> <b>sufficiently</b> [3] 37:18,19,21<br/> <b>suggested</b> [2] 62:3 63:23<br/> <b>suggesting</b> [2] 15:6 52:22<br/> <b>suing</b> [1] 36:21<br/> <b>supporting</b> [3] 2:12 3:13 53:6<br/> <b>Suppose</b> [3] 37:16 38:19,19<br/> <b>supposed</b> [1] 48:10<br/> <b>supposition</b> [1] 30:3<br/> <b>SUPREME</b> [2] 1:1,20<br/> <b>surely</b> [1] 45:24<br/> <b>suspenders</b> [1] 50:9</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>table</b> [1] 13:18<br/> <b>talked</b> [1] 59:19<br/> <b>talks</b> [2] 46:4 51:15<br/> <b>tease</b> [1] 34:6<br/> <b>telephone</b> [2] 14:14 27:22<br/> <b>tells</b> [2] 66:15 68:11<br/> <b>tends</b> [1] 65:22<br/> <b>term</b> [1] 27:24<br/> <b>terms</b> [1] 24:3<br/> <b>test</b> [17] 15:12,16 17:25 18:5 20:21 41:22 42:10,10,14 43:14,19,21,23, 24 48:17,18 49:11<br/> <b>testing</b> [2] 21:1 44:1<br/> <b>tests</b> [1] 11:3<br/> <b>text</b> [2] 60:2,5<br/> <b>textual</b> [4] 28:14 61:2 64:16 66:15<br/> <b>theoretically</b> [3] 68:25 69:2,3<br/> <b>theory</b> [2] 51:8 56:20<br/> <b>there's</b> [14] 8:22 9:20,23 11:7,20 13:16 18:4 23:4 34:2 47:23 52:22 55:24 60:12 63:8<br/> <b>therefore</b> [1] 24:19<br/> <b>they've</b> [1] 51:19<br/> <b>thinking</b> [3] 7:10 27:20 59:13<br/> <b>thinks</b> [2] 18:22,25<br/> <b>third</b> [3] 23:24 27:4 35:2<br/> <b>though</b> [5] 10:2 24:19 42:23 55:3 64:17<br/> <b>three</b> [3] 23:20 26:21 34:19<br/> <b>ties</b> [2] 13:19 14:1<br/> <b>timely</b> [1] 59:3<br/> <b>Title</b> [31] 4:15 5:12 7:7,21 8:23 11:12 17:9 18:18 21:7,7,23 27:6 28:23 32:13,21 34:19 41:24 53:23 54:4 55:25 56:6,25 57:25 59:20 60:13 61:12 63:18 64:1,4,22 65:3<br/> <b>today</b> [5] 13:19 29:7 32:14 50:10, 13</p> | <p><b>totally</b> [1] 42:24<br/> <b>Touche</b> [1] 31:20<br/> <b>tough</b> [1] 34:8<br/> <b>trait</b> [4] 34:23,25 61:10 65:1<br/> <b>traits</b> [6] 38:3 61:5 62:2,5 64:19,24<br/> <b>transgender</b> [5] 16:23 17:13 19:12 24:21 26:8<br/> <b>Transportation</b> [1] 11:14<br/> <b>transsexual</b> [1] 17:1<br/> <b>treat</b> [5] 15:19 37:6,21 53:17 64:24<br/> <b>treated</b> [12] 11:9 12:22 15:17 18:13 28:3 33:1,10 37:22 43:16 58:7 59:9 66:7<br/> <b>treating</b> [7] 22:24 35:6 55:4,5 57:1 58:12 61:21<br/> <b>treatment</b> [3] 10:15 11:11 33:17<br/> <b>treats</b> [3] 4:18 12:12,13<br/> <b>true</b> [5] 32:14 47:5 50:20 70:3 71:12<br/> <b>truly</b> [2] 17:20 48:17<br/> <b>truth</b> [2] 47:4, 11<br/> <b>try</b> [2] 18:7 29:4<br/> <b>trying</b> [8] 15:3,4 17:20 30:21 31:2 34:1 55:9 66:22<br/> <b>Tuesday</b> [1] 1:17<br/> <b>Tutwiler</b> [1] 10:17<br/> <b>two</b> [25] 7:25 9:22 11:5 17:25 27:21 29:14,19 30:1 35:1 38:10 39:22 40:1 45:2 48:13 51:1 52:6 53:15 54:11 61:5,25 62:5 63:17 66:24 67:3 70:23<br/> <b>two-comparator</b> [1] 61:15<br/> <b>type</b> [1] 64:13<br/> <b>typically</b> [2] 59:24 64:2</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimate</b> [3] 33:12 44:20 51:24<br/> <b>ultimately</b> [1] 20:10<br/> <b>umbrella</b> [1] 6:6<br/> <b>unable</b> [1] 68:12<br/> <b>unanimous</b> [1] 53:24<br/> <b>under</b> [14] 6:5 7:7 11:12 15:25 17:8 32:13 41:24 43:3 48:16 49:10 51:8 54:13 61:12 65:2<br/> <b>understand</b> [10] 14:19 17:7,9 19:19,20 27:5 33:19 35:16 37:23 70:13<br/> <b>understanding</b> [2] 26:12 71:10<br/> <b>understood</b> [4] 7:20 30:14,22,23<br/> <b>underwriting</b> [1] 42:18<br/> <b>uniform</b> [3] 13:10 19:12,15<br/> <b>UNITED</b> [8] 1:1,21 2:11 3:12 53:6 57:14 59:15 71:5<br/> <b>unlawful</b> [1] 11:11<br/> <b>unlawfulness</b> [1] 6:3<br/> <b>unless</b> [2] 44:3,15<br/> <b>unlike</b> [1] 10:25<br/> <b>unlikely</b> [1] 21:5<br/> <b>unmarried</b> [1] 55:22<br/> <b>unrealistic</b> [1] 40:19<br/> <b>unrelated</b> [1] 50:19<br/> <b>until</b> [2] 7:3 28:11<br/> <b>unwind</b> [1] 51:1<br/> <b>up</b> [9] 5:16 10:24 12:18,20 14:23</p> | <p>17:19 22:8 23:25 49:8<br/> <b>updating</b> [3] 7:15,19 63:23<br/> <b>usage</b> [2] 12:4,5<br/> <b>users</b> [1] 50:12<br/> <b>uses</b> [4] 49:17,19,19 55:7<br/> <b>using</b> [2] 28:13 54:15<br/> <b>usual</b> [1] 60:16</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>valid</b> [1] 16:14<br/> <b>values</b> [1] 38:4<br/> <b>variable</b> [1] 46:1<br/> <b>varying</b> [3] 66:24,25 67:1<br/> <b>veil</b> [1] 52:4<br/> <b>version</b> [1] 44:12<br/> <b>versus</b> [1] 4:5<br/> <b>view</b> [1] 28:24<br/> <b>VII</b> [29] 4:15 5:12 7:8,21 8:23 11:12 17:9 18:18 21:7,7,23 27:7 28:23 32:13,21 34:20 41:24 53:23 54:4 55:25 56:6,25 57:25 59:20 60:13 63:18 64:4,22 65:3<br/> <b>VII's</b> [1] 64:1<br/> <b>violate</b> [2] 14:12 56:4<br/> <b>violates</b> [1] 4:15<br/> <b>violation</b> [3] 8:22 55:24 56:25<br/> <b>Virginia</b> [1] 2:6<br/> <b>Virtually</b> [1] 65:17<br/> <b>void</b> [1] 16:14</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> [1] 20:25<br/> <b>walked</b> [1] 7:6<br/> <b>wanted</b> [4] 10:4,16 23:2 31:4<br/> <b>wants</b> [10] 9:17,18 15:19,21 19:12 29:18 30:9,10,11 61:6<br/> <b>Washington</b> [2] 1:16 2:10<br/> <b>Waterhouse</b> [7] 7:4 23:16 37:16, 20 38:2 47:1 58:15<br/> <b>way</b> [19] 10:13 12:9,12,14 15:13 24:23 37:22 38:1,2 48:18,19 56:17 58:8 59:1,4 60:16 62:2 70:23 71:13<br/> <b>ways</b> [1] 42:3<br/> <b>wear</b> [8] 7:7 13:19,24 14:13,15 19:2,8,12<br/> <b>weekend</b> [1] 8:2<br/> <b>weight</b> [1] 10:9<br/> <b>whatever</b> [3] 22:21 35:14 55:20<br/> <b>whatsoever</b> [1] 53:1<br/> <b>Whereas</b> [1] 33:4<br/> <b>Whereupon</b> [1] 71:17<br/> <b>whether</b> [17] 5:18 8:21 9:2 11:10 15:24 21:9,22 27:11,13 33:1,9 41:23 53:10,13,16,17 68:23<br/> <b>whichever</b> [1] 34:5<br/> <b>White</b> [3] 13:1,2 28:3<br/> <b>who's</b> [4] 29:21 30:5 48:22,23<br/> <b>whole</b> [1] 69:14<br/> <b>whom</b> [3] 8:1 67:1 70:11<br/> <b>wife</b> [1] 25:23<br/> <b>will</b> [17] 12:17 14:10 15:11,12 21:20,22 22:10,16 23:7 28:11 29:3 34:8 37:21 51:22 69:12 70:20 71:</p> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------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12

**willing** <sup>[2]</sup> 12:19 30:5  
**Wisconsin** <sup>[1]</sup> 31:21  
**Wisconsin's** <sup>[1]</sup> 32:3  
**wish** <sup>[1]</sup> 17:1  
**wishes** <sup>[1]</sup> 60:22  
**within** <sup>[3]</sup> 8:23 25:1 65:2  
**without** <sup>[4]</sup> 33:16 45:8 64:10 71:9  
**woman** <sup>[47]</sup> 7:5 9:12,14,18,18,18  
 15:20,20,21 19:7 23:2,3 25:15,19,  
 23 29:8,21 30:9,11 31:4,6 36:20  
 38:12 40:2 41:16 42:21 43:15 44:  
 12 49:18,19 50:24 55:6,7 56:8,15  
 57:19 58:2,7 59:2 60:15 66:11,20,  
 21,21 67:11 68:24 69:8  
**woman's** <sup>[2]</sup> 49:19 54:15  
**women** <sup>[48]</sup> 4:18,25 6:11 7:10,21,  
 23,23 8:17 9:3 10:3,3,18 11:8,8  
 12:13 13:22 14:12,13 19:2 21:13  
 22:25 29:20,21 33:9,13 36:13,17  
 37:2,3,9,14,19 38:7 42:20 43:2,4  
 47:22 48:5 53:18 55:18,21 56:23  
 58:12 61:22 62:18 63:13 64:24 66:  
 7  
**women's** <sup>[5]</sup> 12:11 21:14 38:12 49:  
 8,17  
**wondering** <sup>[1]</sup> 16:12  
**word** <sup>[1]</sup> 9:15  
**words** <sup>[11]</sup> 4:16,20 5:13 6:21 7:20  
 8:18 22:22,24 24:19 25:23 28:23  
**work** <sup>[4]</sup> 36:13 45:3 49:7 64:9  
**worked** <sup>[1]</sup> 66:12  
**working** <sup>[1]</sup> 35:15  
**world** <sup>[3]</sup> 14:9,11 16:2  
**worse** <sup>[3]</sup> 4:18 28:3 33:2  
**wrestle** <sup>[1]</sup> 67:25  
**writes** <sup>[1]</sup> 11:21  
**writing** <sup>[1]</sup> 11:23

---

**Y**


---

**years** <sup>[5]</sup> 20:8 22:4 23:12 32:6 59:  
 25  
**young** <sup>[1]</sup> 58:9

---

**Z**


---

**ZARDA** <sup>[3]</sup> 1:12,13 51:14  
**Zarda's** <sup>[1]</sup> 30:7  
**zero** <sup>[1]</sup> 50:7