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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)

Petitioner,)

v.) No. 22-179

HELAMAN HANSEN,)

Respondent.)

- - - - -

Washington, D.C.

Monday, March 27, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:46 a.m.

APPEARANCES:

BRIAN H. FLETCHER, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

ESHA BHANDARI, ESQUIRE, New York, New York; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	BRIAN H. FLETCHER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ESHA BHANDARI, ESQ.	
7	On behalf of the Respondent	57
8	REBUTTAL ARGUMENT OF:	
9	BRIAN H. FLETCHER, ESQ.	
10	On behalf of the Petitioner	93
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(11:46 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-179, United States versus Hansen.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER

ON BEHALF OF THE PETITIONER

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

For more than a century, Congress has made it a crime to encourage or induce certain immigration offenses. Mr. Hansen violated that statute by inducing noncitizens to reside in the United States illegally so that he could take their money in a fraudulent citizenship scheme.

No one suggests that that conduct was protected by the First Amendment. But the Ninth Circuit invoked the overbreadth doctrine to facially invalidate this longstanding statute by giving the words "encourage" and "induce" their broadest possible meaning and sweeping in wide swaths of protected speech.

Now we haven't argued that the statute would be constitutional if it swept that

1 broadly. Our position here is that the statute
2 need not and should not be read that way.

3 Everyone agrees that in criminal law,
4 the terms "encourage" and "induce" are terms of
5 art that can refer narrowly to soliciting or
6 aiding and abetting unlawful activity. And as
7 nine dissenting judges explained below, text,
8 context, and history confirm that the words
9 carry that traditional meaning in the context of
10 Section 1324.

11 At the very least, that's a plausible
12 reading of the statute that ought to be adopted
13 under the canon of constitutional avoidance
14 because it would eliminate any overbreadth
15 concern.

16 Prohibitions on soliciting or
17 facilitating both criminal and civil violations
18 have long been common and have never been
19 thought to raise a First Amendment problem
20 because, as the Court held in *Williams*, the
21 First Amendment does not protect speech that is
22 intended to induce or commence specific illegal
23 activities.

24 Now I acknowledge that it will
25 sometimes be hard to draw the line between

1 protected advocacy and unprotected solicitation,
2 but that problem is not unique to Section 1324.
3 Exactly the same issue can arise under any
4 solicitation or aiding-and-abetting statute.

5 And, more importantly here, that is
6 not an overbreadth problem. As with other
7 solicitation and aiding-and-abetting statutes,
8 the possibility that some applications of
9 Section 1324 might raise First Amendment
10 questions may provide a basis for future
11 as-applied challenges, but it does not justify
12 facially invalidating the statute and preventing
13 its application to plainly unprotected schemes
14 like Mr. Hansen's.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Are you aware of any
17 instance in which the -- this section has been
18 applied in the way that the Ninth Circuit
19 hypothesized?

20 MR. FLETCHER: I'm not. And I really
21 do think that's significant, Justice Thomas. We
22 are, after all, here on an overbreadth case, and
23 this Court has emphasized, most recently, in the
24 last time it heard this issue in *Sineneng-Smith*,
25 that overbreadth is strong medicine that ought

1 to be applied only as a last resort, and it said
2 you have to vigorously enforce the limits on
3 that doctrine. One of the limits --

4 JUSTICE SOTOMAYOR: Sorry. There's a
5 district court case involving the woman who
6 encouraged her housekeeper that -- or told her,
7 if you leave, you can't come back, which is --
8 was an accurate statement of the law, and she
9 was prosecuted in that case.

10 MR. FLETCHER: Justice Sotomayor,
11 you're referring to the Henderson case --

12 JUSTICE SOTOMAYOR: Yes.

13 MR. FLETCHER: -- out of the District
14 of Massachusetts, which is the case that the
15 amicus briefs focus almost entirely on. And I
16 think, even if you were troubled by that case,
17 that would be one district court prosecution --

18 JUSTICE SOTOMAYOR: Well, I -- I -- I
19 --

20 MR. FLETCHER: -- I -- I don't think
21 found for --

22 JUSTICE SOTOMAYOR: -- what I find
23 interesting is that the government there also
24 hypothesized that a lawyer who told his client
25 that if he -- that -- it -- what the

1 consequences were of leaving, that you would
2 prosecute the lawyer too. And the lawyer there
3 is earning money for that statement. He's
4 giving advice.

5 MR. FLETCHER: I'm not sure whether
6 that's what the government said there. It's
7 certainly not what we're saying now, as we
8 explain --

9 JUSTICE SOTOMAYOR: Well, I know you
10 aren't. But could you tell me exactly how you
11 want us to rewrite the statute? I think, if
12 you're going to call it aiding and abetting or
13 soliciting, that you have to write in a specific
14 intent, don't you?

15 MR. FLETCHER: I -- I wouldn't -- I'd
16 just dispute the premise. I don't think we're
17 asking you to rewrite it. I think we're saying
18 these are words that connote aiding --

19 JUSTICE SOTOMAYOR: All right.

20 MR. FLETCHER: -- and abetting.
21 They're terms of art. They bring the old
22 soil with them.

23 JUSTICE SOTOMAYOR: With it, and
24 that's an intent requirement?

25 MR. FLETCHER: Correct, which is --

1 JUSTICE SOTOMAYOR: And, here, the
2 defendant asked for an intent statute to come
3 in.

4 MR. FLETCHER: Not quite. The intent
5 requirement that's required for aiding and
6 abetting and the one that we accept here is the
7 one the Court referred to in Rosemond. That's
8 the intent of facilitating, making the offense
9 succeed. What the defendant asked for here --

10 JUSTICE SOTOMAYOR: Well, with aiding
11 and abetting, you have to intend to make the --
12 it succeed. And I'm wondering what you're
13 making succeed, meaning nothing -- you haven't
14 proven that these aliens were going to leave
15 anyway.

16 MR. FLETCHER: I -- I actually think
17 we have here. There was testimony that -- that
18 there are two noncitizens at issue.

19 JUSTICE SOTOMAYOR: I -- well --

20 MR. FLETCHER: Both of them said their
21 visas were expiring, they would have left, but
22 Mr. Hansen said --

23 JUSTICE SOTOMAYOR: Hansen. That's --

24 MR. FLETCHER: -- you can stay because
25 I'm going to make you a citizen.

1 JUSTICE SOTOMAYOR: Right. But -- so
2 we have to write in an intent. We have to take
3 the words and define the words "encourage" or
4 "inducing" to mean aiding and abetting or
5 soliciting.

6 What do we do with our *Elonis* point,
7 where we said, if we're going to define a
8 statute, we shouldn't define it to put in words
9 that Congress took out? And Congress, previous
10 to this statute, had the words "aiding and
11 abetting" and "soliciting" and took them out.
12 So now we're putting back in what Congress took
13 out?

14 MR. FLETCHER: I disagree, Justice
15 Sotomayor. I think this is an area of the law
16 where commentators and the Court has long
17 recognized there are lots of different words
18 that have overlapping meanings that legislatures
19 and courts use to capture these -- these
20 concepts of "solicitation" and "aiding and
21 abetting."

22 The *LaFave* treatise cites about a
23 dozen of each species. "Induce" and "encourage"
24 are among them both. And I don't think that the
25 fact that Congress took out "assist" and

1 "solicit" in 1952 suggests that it intended to
2 change the meaning of this words. It was, in
3 fact, adopting the shorthand that this Court had
4 just five years earlier in the Hoy case given to
5 the predecessor statute. When the other words
6 were in there, this Court shorthanded it as
7 "encouraging or inducing."

8 JUSTICE KAVANAUGH: You agree --

9 JUSTICE SOTOMAYOR: And --

10 JUSTICE KAVANAUGH: Go -- go ahead.

11 JUSTICE SOTOMAYOR: Go ahead. No, no,
12 go ahead.

13 CHIEF JUSTICE ROBERTS: Justice --

14 JUSTICE KAVANAUGH: You agree, though,
15 that the intent requirement that's traditionally
16 associated with aiding and abetting and
17 solicitation should be part of the statute,
18 correct?

19 MR. FLETCHER: We do. And we just
20 don't think that's rewriting. You know, if you
21 look at 18 U.S.C. 2, the statute at issue in
22 Rosemond, the traditional aiding-and-abetting
23 statute, it doesn't have any explicit intent
24 requirement. Judge Hand and then this Court
25 found it implicit in words like "induce." And

1 we're saying the same old soil comes with those
2 same words where they appear here.

3 JUSTICE KAVANAUGH: And then I think
4 you probably do have a problem on the jury
5 instructions. Do you want us to remand and let
6 the Ninth Circuit sort that out, or what's --
7 what's your suggestion for how to deal with
8 that?

9 MR. FLETCHER: We do. We think that's
10 appropriate. You know, we don't think the jury
11 instructions are before you. What's before you
12 is an overbreadth challenge, and part of that,
13 of course, is figuring out what the statute
14 means. Once you do that, we don't have any
15 objection at all to sending it back to the Ninth
16 Circuit.

17 JUSTICE KAGAN: Mr. Fletcher, suppose
18 we take your view of what "encourage" and
19 "induce" means here and we take your view of the
20 correct mens rea requirement, and suppose we say
21 that's the statute. And is there a world of
22 cases where -- I mean, what happens to all the
23 cases where -- could be a lawyer, could be a
24 doctor, it could be a neighbor, it could be a
25 friend, it could be a teacher, it could be

1 anybody says to a noncitizen, I really think you
2 should stay? What happens to that world of
3 cases?

4 MR. FLETCHER: So I think our view is
5 those cases get analyzed the same way that you'd
6 analyze any other aiding-and-abetting question
7 or solicitation question under any other
8 statute. And I'll talk about how that -- we
9 think those principles cash out as applied to
10 all of the different hypotheticals that have
11 been bandied about.

12 But I think, at the end of the day,
13 the most important thing for this Court's
14 purposes is, once you go -- you take the two
15 steps that you just described of saying that the
16 words mean what we say they mean and that the
17 intent requirement applies, I think you've taken
18 care of any arguable overbreadth problem.

19 JUSTICE KAGAN: Well, maybe or maybe
20 not. I mean, I would think that there are a
21 world of communications that take place every
22 day which are something along those lines, with
23 somebody saying to a noncitizen, I know you're
24 thinking of what you should do now, I really
25 think you should stay.

1 MR. FLETCHER: So, just to fight the
2 premise and then I'll talk about how we think
3 the principles would apply in those
4 circumstances, you know, the traditional
5 aiding-and-abetting, solicitation statutes apply
6 to tax avoidance, to the use of marijuana, to
7 avoiding the draft back when that was an issue.
8 In all of those circumstances, you likewise have
9 to draw the line. There's a lot of abstract
10 advocacy on those things. People talk with
11 their friends and acquaintances and family about
12 those things.

13 JUSTICE KAGAN: So where -- where do
14 -- where do we draw the line? You're -- you're
15 not giving me much.

16 MR. FLETCHER: I -- I -- sorry. I --
17 I promised I would get there, and I will.

18 I think you -- you apply the
19 traditional principles of aiding and abetting.
20 So one of them is specific intent that the --
21 the -- the violation occur. We think that's
22 going to weed out a lot of the cases.

23 JUSTICE KAGAN: Yeah. I really think
24 you should stay, somebody says to a friend.

25 MR. FLETCHER: Right.

1 JUSTICE KAGAN: I mean, that's a
2 specific intent, I guess.

3 MR. FLETCHER: Right. Another one is
4 sort of full knowledge of the circumstances, and
5 that in this statute includes additionally some
6 knowledge of the law, knowledge or reckless
7 disregard of whether or not staying is going to
8 violate the law. We think that's going to take
9 care of another category of cases.

10 There's also a requirement that's
11 always been understood to be implicit in
12 solicitation and aiding and abetting that they
13 don't cover general advocacy, you know, a
14 newspaper editorial, general advocacy public
15 speeches. We're talking about specific conduct
16 with specific people. I think that takes care
17 of another slice of cases.

18 And then you're left with the cases
19 that, well, I'll candidly acknowledge are the
20 hardest hypotheticals where somebody says to a
21 family member, I know it would be unlawful for
22 you to stay, but I think you should stay.

23 Those are a hard problem under
24 aiding-and-abetting statutes. The -- there's
25 not a lot of law on how you end up cashing out

1 aiding-and-abetting principles there. The
2 closest we find is in Footnote 55 of Section
3 13.2 of the LaFare treatise which we cite in our
4 opening brief.

5 And, there, the Court has said, look,
6 when you're talking about aid and the form takes
7 -- of aiding and abetting takes material aid, as
8 you said for the Court in Rosemond, any amount
9 of aid is enough, you've associated with a
10 venture, you've sought to facilitate it, and
11 that's good enough.

12 When what you're talking about is just
13 sort of moral suasion or a request, that can
14 sometimes be aiding and abetting. Recruiting
15 someone to commit a murder is sort of a classic
16 case of aiding and abetting, but we want to
17 demand a little bit more to make sure that you
18 really did associate yourself with the venture,
19 you really did seek to facilitate it with your
20 request.

21 JUSTICE KAGAN: So and -- and do -- do
22 I understand you to be drawing a line between a
23 friend who says, I know exactly what the law is
24 on this and I really think you should stay,
25 which would be in violation of the law, that's

1 on one side of the line, and saying that exact
2 same thing and saying also, I'm going to provide
3 you support when you stay? Is that -- is that
4 the line you're drawing? And --

5 MR. FLETCHER: Not -- not precisely.
6 I think saying, you know, I'm going to provide
7 you support, I'm going to tell you how to do it,
8 you know, here's how to -- to work without being
9 on the books, I think those things start to move
10 you much more into assistance.

11 JUSTICE KAGAN: But -- but -- but, on
12 the first one, where there's not that, do I take
13 you to be saying, well, this is very hard, but,
14 in the end, we don't think that that's covered
15 by the statute --

16 MR. FLETCHER: So I think --

17 JUSTICE KAGAN: -- or we do think that
18 that's covered by the statute?

19 MR. FLETCHER: -- I think it's hard to
20 say that that's covered. I've read a lot of
21 aiding-and-abetting cases to get ready for this
22 argument. I haven't seen one that looks like
23 that, you know, the mother who says to the son,
24 gee, I don't want you to go to war.

25 JUSTICE GORSUCH: Mr. Fletcher, that's

1 because I think that in aiding and abetting, you
2 not only need a mens rea purpose, you know, we
3 talked about that, you conceded that, but you
4 also have to have an actus reus of some step to
5 associate yourself with a venture.

6 But "encourage" and "induce" or
7 "incite," whatever it is, "encourage" and
8 "induce," is that -- does that import that actus
9 reus requirement too?

10 MR. FLETCHER: I think it does. And
11 I -- I -- I think the actus reus for aiding and
12 abetting can be speech, it can be a request, you
13 know, would you rob this bank and I'll give
14 you -- we'll split the proceeds, or, you know, I
15 really would like you to kill this business
16 associate of mine and I'll pay you if you do it.
17 All of those things are speech in some sense.

18 JUSTICE GORSUCH: Well, but it's a
19 commitment to do something in the world, and --
20 and, you know, it's obviously an inchoate
21 offense, but it's still I'm going to take some
22 step to associate myself with the completion of
23 this venture.

24 MR. FLETCHER: Right.

25 JUSTICE GORSUCH: And are you saying

1 that comes along -- that soil comes along too?

2 MR. FLETCHER: We're saying the soil
3 of aiding and abetting comes along, Your Honor.

4 JUSTICE GORSUCH: The full soil, all
5 of it?

6 MR. FLETCHER: Yes.

7 JUSTICE JACKSON: And I'm sorry,
8 why -- why does the full soil come along? I --
9 I'd like to go back to Justice Sotomayor's
10 point. If we have evidence, or we think we do,
11 in the amendment history of the statute that
12 Congress actually took out of the statute
13 similar concepts, the idea of, you know, aiding,
14 the idea -- I -- I don't have the exact language
15 in front of me -- but soliciting.

16 MR. FLETCHER: Right.

17 JUSTICE JACKSON: Soliciting was
18 there.

19 MR. FLETCHER: Right.

20 JUSTICE JACKSON: And Congress took it
21 out. So I think you have -- are struggling at
22 least in my mind a little bit to have us read
23 what remains to include the kinds of things that
24 Congress actually excluded.

25 MR. FLETCHER: So let me give you two

1 answers, one that's about this area of law in
2 general and one that's specific to the 1952
3 amendment that you're talking about.

4 As to this area of the law in general,
5 this is a space where courts and legislatures
6 have often used different words as synonyms for
7 the same basic concept. In 18 U.S.C. 2, it's
8 not just aids and abets. It's aids, abets,
9 induces, commands. There's about seven
10 different words. No one parses them out and
11 asks which it -- exactly is it. We all
12 understand them to bring along the concept, the
13 general category.

14 JUSTICE JACKSON: Right, but what
15 about -- what about the fact that someone in
16 Congress thought that they needed to take out
17 those other words? So you might be right that
18 there are all kinds of synonyms floating out
19 there, and if this statute had all of them, I
20 might be persuaded, I think, to agree with you.

21 But I guess I'm worried about a
22 active, conscious effort on Congress's part to
23 exclude certain words that I now hear you
24 wanting us to read back into this statute.

25 MR. FLETCHER: So I think maybe if

1 there was any reason to think in the legislative
2 history in the context that Congress intended to
3 do that, that the reason why they wanted to do
4 that was that they wanted to not make it a
5 solicitation or aiding-and-abetting statute,
6 which I think we all basically agree it was
7 before, and they wanted to turn it into
8 something else --

9 JUSTICE JACKSON: So do you have a
10 theory of why they took out "solicits"?

11 MR. FLETCHER: Yeah, I do. I think
12 one of them is just economy. As I said earlier,
13 this Court just five years earlier in Hoy had
14 described the prior statute as "induces" or
15 "encourages." So Congress was just using a more
16 concise formulation that mirrored what this
17 Court had used for the prior statute.

18 And I guess the other thing I'd say
19 is, you know, I think the -- the context I think
20 matters here too. This is the -- the -- what
21 Respondents and the Ninth Circuit are positing
22 Congress did in 1952 was really something
23 extraordinary. They took this statute that had
24 always been focused on soliciting and -- and
25 aiding and abetting and transformed it into a

1 really very broad ban on speech that would be
2 obviously unconstitutional in many of its
3 applications.

4 And I don't think the Court should
5 lightly attribute that intent to Congress. And
6 I think also it's significant that after 1952 we
7 have decades more of history. Congress
8 revisited the statute again in 1986 and kept the
9 "induces" or "encourages" language but otherwise
10 tweaked the statute and then revisited it again
11 in 1996 and changed the penalty provisions.

12 JUSTICE JACKSON: What about the --

13 JUSTICE BARRETT: Mr. Fletcher --

14 JUSTICE JACKSON: Go ahead.

15 JUSTICE BARRETT: -- I have two
16 questions. One is kind of focusing on a
17 different part of the statutory language. Is
18 there a difference between "resides" and
19 "remains?" Because they appear in different
20 sections, and it seems to me like "resides"
21 could mean take up residence in, which might be
22 different than "remains."

23 MR. FLETCHER: So I think -- I puzzled
24 over this too. You know, I think I'm not sure
25 if there's any difference in them. I think, if

1 by "take up residence in" you're referring to
2 the interpretation that Judge Collins floated in
3 his dissent, where it suggested encouraging
4 someone to reside in might mean take up
5 residence for the first time and not continue
6 unlawful residence, the reason why I don't think
7 that works is because of the description the
8 statute has of the mens rea. It says knowing
9 that the person's coming to or remain --
10 residing in the United States is or will be
11 unlawful, and I think that suggests that
12 Congress understood that you could violate the
13 statute by encouraging someone to continue
14 residence that is already unlawful.

15 JUSTICE SOTOMAYOR: And that's the --

16 JUSTICE BARRETT: Okay.

17 JUSTICE SOTOMAYOR: I'm -- I'm sorry.

18 Go ahead. No, no, no. I'm sorry.

19 JUSTICE BARRETT: And my second
20 question is about the effect of the enhancement.
21 So a jury has to find the elements of the
22 enhancement.

23 MR. FLETCHER: Correct.

24 JUSTICE BARRETT: Okay. So, in
25 thinking about this as an overbreadth challenge,

1 I mean, obviously, the substance of offense
2 itself could, standing alone, in a situation
3 where the penalty or the enhancement wasn't
4 applicable, let's just posit that maybe that
5 violates the First Amendment and fails in an
6 overbreadth challenge.

7 You say there's no evidence for
8 someone bringing an overbreadth challenge in a
9 situation like this where you can combine it
10 with the enhancement that requires the financial
11 gain, so I just want to be sure that's right.

12 MR. FLETCHER: That's right.

13 JUSTICE BARRETT: That's right?

14 MR. FLETCHER: Right. We don't
15 have -- we haven't seen any precedent for an
16 overbreadth challenge like that, and we don't
17 think allowing the extension of overbreadth to
18 that sort of challenge is consistent with the
19 principles of overbreadth --

20 JUSTICE BARRETT: Yeah.

21 MR. FLETCHER: -- which include that
22 if there's a way to sever invalid parts of the
23 statute and leave the rest, courts ought to do
24 that.

25 And we think that's exactly what's

1 true here. Even if you thought, as your
2 question posits, that the general offense is
3 potentially overbroad, I don't think that would
4 mean that the enhanced offense is overbroad.
5 It's a severable class of offenses.

6 JUSTICE SOTOMAYOR: Wait a minute.
7 Here, the enhanced offense includes the first
8 part.

9 MR. FLETCHER: That's right.

10 JUSTICE SOTOMAYOR: How can you say
11 the first part is invalid and still keep a
12 second part? The second part says you did the
13 -- the second part says you did the first part
14 for money.

15 MR. FLETCHER: Correct.

16 JUSTICE SOTOMAYOR: So you have to
17 define what the first part permits or doesn't
18 permit, correct? You always have to go to the
19 first part and define it.

20 MR. FLETCHER: Correct. And what I'm
21 positing is that even if you thought -- and we
22 obviously disagree, but even if you thought that
23 the general offense is unconstitutionally
24 overbroad and therefore potentially invalid, the
25 subset of that offense that is defined by the

1 enhanced offense, you could invalidate other
2 applications of the general provision, but there
3 would be no reason to invalidate the subset of
4 applications of the general provision that also
5 carry this enhancement, which has to be found by
6 the jury.

7 JUSTICE SOTOMAYOR: Well, you -- you
8 still have to prove that what the lawyer did was
9 aiding and abetting or solicitation, correct?

10 MR. FLETCHER: That's our view of what
11 we would have to prove under any of the
12 provisions we have.

13 JUSTICE ALITO: Mr. Fletcher, an
14 unusual feature of this statute is that the
15 underlying conduct, remaining in the
16 United States, is not itself a crime.

17 And I can certainly understand that
18 there are situations in which urging someone to
19 engage in certain conduct is more blameworthy
20 than engaging in the conduct itself because the
21 person who engages in the conduct may be in a
22 particularly vulnerable position or may be less
23 blameworthy for some other purpose.

24 But is there some limitation on --
25 that provide -- does the First Amendment in any

1 way limit the ability of Congress to criminalize
2 the solicitation of conduct that is not itself
3 criminal? We could think of conduct that --
4 regulatory violations, for example, of speech
5 requirements, speech requirements -- regulatory
6 provisions that -- that limit speech in some
7 way. Would the First Amendment allow Congress
8 to make all of -- urging somebody to engage in
9 that conduct a crime under all circumstances?

10 MR. FLETCHER: I think there'd be a
11 couple of principles that would come into play.
12 I'll tell you first candidly I don't think the
13 Court has ever spoken to that. To the extent
14 the Court has spoken to this issue, it's done it
15 in cases like Williams and Pittsburgh Press,
16 where it said that offers to engage in or
17 attempts to solicit or induce illegal
18 transactions, even if they're only civilly
19 prohibited, are just outside the protection of
20 the First Amendment. And I think -- so to say
21 anything beyond that would be new.

22 I -- I think the things that --
23 principles that might come into play, you know,
24 I can conceive of, if you had a law that
25 targeted just speech that didn't target

1 assistive or soliciting conduct, there might be
2 different issues that would come into play.
3 That's not a concern here because everyone
4 agrees that this statute gets at encouraging and
5 inducing, whether that happens through speech or
6 conduct.

7 And I could imagine, although I'm not
8 so sure so much that this is in the First
9 Amendment that this limitation inheres, but you
10 can posit really absurd hypotheticals about
11 very, very draconian penalties for soliciting
12 things that aren't criminal or are perfectly
13 lawful. I think, if that happened, you'd have
14 some sort of rationality limit.

15 But I just want to underscore I don't
16 think that's what's going on here because this
17 is, as you said, a circumstance where
18 legislatures might decide that the people being
19 solicited to do the underlying conduct are less
20 blameworthy and more vulnerable, as I think this
21 case well illustrates.

22 And, also, this is a very special
23 circumstance. It's true that remaining in the
24 country unlawfully is only a civil violation,
25 absent sort of special circumstances. But it's

1 a civil violation that's subject to a very, very
2 serious civil penalty, deportation and removal.
3 And I think that indicates that this really is
4 conduct that Congress has taken seriously and
5 has made an appropriate determination --

6 JUSTICE KAVANAUGH: What do you --

7 MR. FLETCHER: -- that soliciting or
8 facilitating it is deserving of punishment.

9 JUSTICE KAVANAUGH: What do you --
10 what do --

11 JUSTICE SOTOMAYOR: It's -- sorry. Go
12 ahead.

13 JUSTICE KAVANAUGH: What do you say to
14 the charitable organizations that say, even
15 under your narrowing construction, there's still
16 going to be a chill or a threat of prosecution
17 for them for providing food and shelter and aid
18 and recommending people for scholarships and --
19 and all the rest? You're familiar with all the
20 hypotheticals. But they seem to have a sincere
21 concern about that and that it will deter their
22 kind of everyday activities. That's what a lot
23 of charities do as part of their day-to-day
24 activities with noncitizens who are not in the
25 country lawfully.

1 MR. FLETCHER: I think a couple
2 observations. You know, one is a lot of what
3 they talk about and you just recited isn't
4 speech at all. It's definitely conduct. So it
5 doesn't raise First Amendment questions at all.

6 You know, I understand the concern,
7 though, that goes to both about are these
8 activities being chilled, and I'd say that on
9 our view of the statute, you know, the vast --
10 that that activity is not going to be covered
11 because we think it has to meet the sort of very
12 high bar of aiding and abetting liability as
13 traditionally understood with all of the old
14 soil. And it's --

15 JUSTICE KAVANAUGH: And explain that.
16 Why wouldn't it be covered?

17 MR. FLETCHER: Yeah, because I think
18 there are -- there are a bunch of different
19 examples, and I think there are sort of
20 different requirements that would weed out
21 different versions of them. I think the one
22 that's most relevant to --

23 JUSTICE KAVANAUGH: Well, I gave you
24 the food and shelter one. You know, I want to
25 --

1 MR. FLETCHER: Yeah.

2 JUSTICE KAVANAUGH: -- I want you to
3 stay here and I'm going to help you, and
4 here's -- which I think is a pretty common part
5 of the conversations and -- and happens all the
6 time. So is that enough?

7 MR. FLETCHER: I don't think so. You
8 know, I think there's a difference between
9 assuming, taking for granted that people are
10 going to be in the country unlawfully and
11 providing some assistance to them while they are
12 here and taking steps that -- where you
13 associate yourself with the venture and seek by
14 your action to make it succeed. That's the
15 canonical formulation of aiding and abetting
16 liability.

17 And I just think it's hard to say that
18 a charity that provides assistance to people,
19 including people who are in the country
20 unlawfully, is meeting the requisites of aiding
21 and abetting liability.

22 JUSTICE JACKSON: But I don't know why
23 you say that. I mean, if the venture is -- if
24 the civil violation or the criminal violation is
25 to have the person stay here and remaining here

1 is unlawful, why wouldn't giving them food and
2 shelter that facilitates their ability to stay
3 here violate this statute?

4 MR. FLETCHER: Because, Justice
5 Jackson, I don't think -- a couple of different
6 reasons. You know, one is I don't think it's
7 going to have the requisite intent at least in
8 the vast majority of the cases. I think all of
9 these organizations are describing themselves as
10 wanting to provide food and shelter for people
11 who need -- who are in need, who need food and
12 shelter.

13 JUSTICE JACKSON: What if they -- what
14 if they limited their mission? If they limit --

15 MR. FLETCHER: To just people who are
16 here unlawfully?

17 JUSTICE JACKSON: Yes. Yes.

18 MR. FLETCHER: Yes.

19 JUSTICE JACKSON: We are limiting our
20 mission. We see a bunch of people in our
21 community who are here -- we know they're here
22 unlawfully, but they're also starving, and what
23 we've decided to do is make sure that they're
24 not on the streets, they're not exposed to the
25 elements. We're giving them food and shelter.

1 MR. FLETCHER: Yeah. I think I'd give
2 the -- the same -- a version of the same answer
3 but just to say that even then, I don't think
4 that's acting with the purpose of keeping those
5 people in the country when they would otherwise
6 leave.

7 CHIEF JUSTICE ROBERTS: Are there any
8 --

9 MR. FLETCHER: I think it would be
10 accepting --

11 CHIEF JUSTICE ROBERTS: -- any
12 examples of prosecutions in those cases?

13 MR. FLETCHER: No, absolutely not, Mr.
14 Chief Justice. And, you know, likewise, you
15 could imagine, I think, as I -- one of the
16 things I said earlier is that we would take
17 cases under this statute the same way you take
18 cases under other aiding-and-abetting statutes.
19 You know, you can imagine there are a lot of
20 social services organizations that provide
21 services and counseling to people who are
22 engaged in unlawful activity, and I'm not aware
23 of cases that suggest that the provision of
24 those services to someone who happens to be
25 engaged in unlawful activity aids and abets

1 those activities.

2 JUSTICE SOTOMAYOR: Well, we do know
3 that the Customs department made a list of all
4 of the people, religious entities, the lawyers,
5 and others who were providing services to
6 immigrants at the border and was saying that
7 they intended to rely on this statute to
8 prosecute them. You're saying to me it didn't
9 happen. Congress issued a subpoena to many of
10 these organizations, did a lot of investigation
11 as to what was said.

12 So how do we tell all those people not
13 to chill speech because the only thing being
14 punished under this statute, unless you want me
15 to add that it has to say that the statute
16 requires something more than just words, we're
17 criminalizing words related to immigration.

18 And I thought there were only certain
19 statutes that were immune to First Amendment
20 challenges, obscenity, fighting words.
21 Otherwise, everything else is subject to the
22 First Amendment and strict scrutiny.

23 So why should we uphold a statute that
24 criminalizes words, makes the punishment five
25 years, which is rather significant? I know of

1 no other statute where aiding-and-abetting
2 punishment or solicitation punishment is greater
3 than the punishment we're giving the person
4 who's going to commit the crime. But that's
5 what we're doing with this statute. It's a
6 first of a kind.

7 MR. FLETCHER: A couple thoughts,
8 Justice Sotomayor. I think one of the
9 traditional categories of speech that is outside
10 the First Amendment is speech that -- this is
11 straight from Williams -- is speech that seeks
12 to induce or commence illegal activities.

13 Our view is that that's what this --

14 JUSTICE SOTOMAYOR: If something -- if
15 something is going to be illegal, but people
16 enter the United States illegally all of the
17 time and they're here, they're remaining, but
18 you would have to prove that they're remaining
19 because of those words? Are you going to -- are
20 you willing to take that part of the element?
21 Because that would make sense to me.

22 MR. FLETCHER: We're willing to take
23 all of the soil that comes with the idea of --

24 JUSTICE SOTOMAYOR: So do you believe
25 --

1 MR. FLETCHER: -- aiding and abetting
2 and solicitation.

3 JUSTICE SOTOMAYOR: -- that the soil
4 includes that the government has to prove that
5 the words actually is what caused that person to
6 remain?

7 MR. FLETCHER: No, I -- I don't think
8 that's a requirement of traditional aiding and
9 abetting.

10 JUSTICE SOTOMAYOR: So why not?
11 Because that's what I think words that have to
12 do with inducing a crime is, that you want the
13 crime to succeed and that you have to make
14 yourself a part of the principle of succeeding
15 in that crime.

16 MR. FLETCHER: So, if -- if that's
17 what you think aiding and abetting connotes,
18 then we're -- that's actually a further reason
19 not to hold this statute invalid as overbroad.
20 It means the statute has an even narrower of a
21 reach.

22 JUSTICE SOTOMAYOR: Well, no, no, you
23 tell me because I think we're going to talk to
24 the grandmother who lives with her family who's
25 illegal or who are noncitizens. The grandmother

1 tells her son she's worried about the burden
2 she's putting on the family, and the son says,
3 Abuelita, you are never a burden to us. If you
4 want to live here -- continue living here with
5 us, your grandchildren love having you.

6 Are you -- can you prosecute this?
7 And, if not, why not? So what do you tell the
8 grandmother?

9 MR. FLETCHER: I think not, Justice
10 Sotomayor. I think it's very hard to make out
11 --

12 JUSTICE SOTOMAYOR: Don't -- stop
13 qualifying with "think," because the minute you
14 start qualifying with "think," then you're
15 rendering asunder the First Amendment.

16 MR. FLETCHER: Justice Sotomayor --

17 JUSTICE SOTOMAYOR: People have to
18 know what they can talk about.

19 MR. FLETCHER: Justice Sotomayor --

20 JUSTICE SOTOMAYOR: Once you create a
21 lack of clarity in the law, then we're not
22 writing to clarify it.

23 MR. FLETCHER: Justice Sotomayor, I
24 don't think it's possible for me or for this
25 Court to define how these principles will apply

1 in all of the different factual circumstances
2 that we can imagine, and I think the fact that
3 we're trying to engage in that exercise is one
4 of the problems with overbreadth analysis.

5 What we would do is have this Court
6 say, not the government say but this Court say,
7 and write into law --

8 JUSTICE SOTOMAYOR: No --

9 MR. FLETCHER: -- the idea --

10 JUSTICE SOTOMAYOR: -- you could
11 ask -- you could ask to criminalize actions, not
12 words. You've chosen to read a statute that
13 criminalizes words. Shouldn't we be careful
14 before we uphold that kind of statute?

15 MR. FLETCHER: We're asking you to go
16 only so far as every aiding-and-abetting and
17 solicitation statute goes and to criminalize
18 words --

19 JUSTICE SOTOMAYOR: Well, generally,
20 with aiding and abetting, the person has to do
21 something to make that act come about?

22 MR. FLETCHER: I think generally yes.
23 I think there are some circumstances where
24 soliciting someone to commit a crime with words
25 would count, and I'm not willing to give that up

1 here because our position is the same
2 aiding-and-abetting principles ought to apply in
3 both contexts.

4 But, if you have a narrower conception
5 of aiding and abetting, that is only all the
6 more reason to conclude that this is a narrow
7 statute that doesn't trench on the First
8 Amendment.

9 CHIEF JUSTICE ROBERTS: Justice --

10 JUSTICE SOTOMAYOR: Can I ask some --
11 I'm -- I'm sorry. Go ahead.

12 CHIEF JUSTICE ROBERTS: Go ahead.

13 JUSTICE SOTOMAYOR: There was an
14 intent requirement asked for here. You say it
15 was broader than you think it should have been
16 given, but we've had a number of cases this term
17 -- Ciminelli, Percoco, Dubin, now this case --
18 where the government is exceed -- conceding that
19 the statute read by its plain terms is too
20 broad. And they -- you come back to us and say
21 read it more narrowly. But you won at a jury
22 trial on a broader charge.

23 If we keep doing as you ask us to,
24 which is to rewriting statutes, are we
25 encouraging the government to continue this

1 practice?

2 MR. FLETCHER: I don't think so,
3 Justice Sotomayor. And, again, we're not asking
4 you to rewrite the statute. We're asking you to
5 give these words the same meaning they have --

6 JUSTICE SOTOMAYOR: Well, you said the
7 jury instruction wasn't consistent with this.

8 MR. FLETCHER: So that -- that's
9 right, Justice Sotomayor. This, in fairness --

10 JUSTICE SOTOMAYOR: And in those other
11 four cases, it wasn't consistent with this. We
12 -- we keep -- you keep coming here and admitting
13 that statutes have to be read in a different way
14 when you argue the opposite below.

15 MR. FLETCHER: So let me put this case
16 in context, Justice Sotomayor. This case was
17 tried in -- before Sineneng-Smith came up,
18 before the Ninth Circuit called for supplemental
19 briefing on overbreadth, and it really injected
20 this whole constellation of issues and concerns
21 about a broad reading of the statute that didn't
22 really exist before.

23 And at the time, I think it was
24 reasonable for the government to support the
25 model jury instruction, especially because no

1 one seriously argues that the speech at issue,
2 the conduct really at issue here was protected
3 by the First Amendment.

4 So I acknowledge we didn't write the
5 instructions at the time of the trial the way
6 that we would write them now with the benefit of
7 five or six years of experience and a lot more
8 airing out of the arguments --

9 JUSTICE SOTOMAYOR: Well --

10 MR. FLETCHER: -- and I acknowledge
11 you should send the case back to the Ninth
12 Circuit and let the Ninth Circuit decide what's
13 appropriate in light of that.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas, anything further?

16 Justice Alito, anything further?

17 Justice Kagan?

18 JUSTICE KAGAN: Mr. Fletcher, so,
19 again, I want to assume your version of the
20 statute as to "encourage" and as to the mens
21 rea. Now I want to make two further
22 assumptions, okay? One -- we can come back to
23 those assumptions, but I just want you to assume
24 them.

25 The first is that the statute, even as

1 interpreted by you, would, in fact, encompass
2 the wealth of examples of people of various
3 kinds, friends, neighbors, doctors, whatever,
4 saying to people, I really think you should
5 stay, and saying that knowing that they're in
6 the country unlawfully, having all the intent
7 that -- and so the -- my first assumption is
8 that all of those communications are within the
9 statute.

10 My second assumption is that for one
11 or another reason, maybe it's what Justice Alito
12 said about the fact that this is civil conduct,
13 maybe it's for another reason, my second
14 assumption is that this statute as applied to
15 those people would -- would be unconstitutional.

16 And now I want you to tell me how to
17 do the overbreadth analysis on this, because I
18 -- I think I might say to you, I can imagine
19 that there's, like, a whole -- a huge number of
20 such communications taking place every day
21 because, for every person who's in this country
22 unlawfully, there are probably some number of
23 people who want that person to stay, family
24 members, you know, whatever.

25 So how do we think about the

1 overbreadth on those two assumptions?

2 MR. FLETCHER: So taking those
3 assumptions, you know, the Court has -- never
4 has said explicitly you can't reduce overbreadth
5 to math. You know, it's -- has to be
6 substantial and it has to be substantial both
7 absolutely and in relation to the plain --
8 statute's plainly legitimate sweep.

9 I take it based on those assumptions
10 that you would say that's substantial. That's a
11 substantial number of --

12 JUSTICE KAGAN: Well, I'm -- I'm
13 asking you sort of.

14 MR. FLETCHER: No, no, it -- in --

15 JUSTICE KAGAN: You know, how do you
16 even go about thinking about that question?

17 MR. FLETCHER: So I guess I'd say
18 maybe that's substantial in the absolute sense.
19 I guess I would say, though, that the Court has
20 also emphasized the real costs of overbreadth in
21 terms of invalidating permissible applications
22 of the statute and that that's something that
23 has to be borne in line in the relative
24 analysis.

25 And at least I haven't -- I can't

1 purport to have read every one of the Court's
2 overbreadth cases, but in the vast majority of
3 them, the Court says either, you know, the vast
4 majority of the applications of the statute are
5 unconstitutional, or there's just no core of
6 constitutional applications.

7 I don't think either of those things
8 -- even granting your assumptions, I don't think
9 either of those things would be true here.

10 And the other thing that the Court has
11 said is it can't just be theoretical. We want
12 some realistic demonstration of chill because
13 this is ultimately -- overbreadth is sort of a
14 prudential judicial decision that we're
15 concerned about chilling in the real world,
16 understandably, and so we're going to depart
17 from traditional principles by letting people
18 whose conduct isn't protected assert the rights
19 of others, in essence, and there may be reason
20 to do that, but we should do it very carefully.

21 And I guess, I think, you have almost
22 a textbook case here for whether we know there
23 is not a chill because this statute was on the
24 books in basically the same form for 70 years,
25 and no -- it was only used --

1 JUSTICE KAGAN: And how is that
2 argument -- because it's a strong argument --
3 how is it different -- sometimes the government
4 comes in and says, -- says, essentially, don't
5 worry, we're never going to apply the statute in
6 these circumstances.

7 And we always say back, it's like,
8 well, that's very nice, you can stand up there
9 and say it, but we're not taking your word from
10 it.

11 MR. FLETCHER: Yeah.

12 JUSTICE KAGAN: How is this different
13 from that?

14 MR. FLETCHER: So in a couple ways. I
15 mean, one is that to the extent that we're
16 saying that here, mostly what we're saying, and
17 I guess maybe this is fighting your -- your
18 premises a little bit, but we're not just saying
19 take our word for it. We're asking you to write
20 into the statute -- into your decision that the
21 statute has the limits that we say it has in
22 ways that we won't be able to get around in the
23 future.

24 I understand you might think we're
25 assuming here that that doesn't fully solve the

1 problem and what to do --

2 JUSTICE KAGAN: Right.

3 MR. FLETCHER: -- about it then. And
4 then I guess I'd say then we're in this special
5 world of -- of overbreadth, right, which is a
6 departure from usual standards. You're not just
7 interpreting the statute. You're not just
8 asking is it constitutional as applied in a
9 particular case where you sometimes say we're
10 not willing to take the government's word for
11 it.

12 You're saying are we going to do this
13 extraordinary thing and depart from ordinary
14 principles of adjudication. And there I
15 actually do think it's fair to say, yeah, we're
16 going to demand a real showing of chill, and I
17 think, here, this is not some newly passed
18 statute where we're all just sort of guessing
19 about what might happen. We have a lot of
20 history.

21 And the thing that raised concerns,
22 the thing that got the amici to write the briefs
23 and to raise all the hypotheticals that we've
24 now spent all this time debating, was the Ninth
25 Circuit's invitation to imagine broad

1 interpretations of the statute in order to
2 strike it down. There really wasn't a concern
3 about it during all of the many decades it was
4 on the books before that.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: You've reassured
10 us with your narrowing construction just take
11 aiding-and-betting law, solicitation law, and
12 bring that old soil here. And that -- that is a
13 good answer, but I think it still raises
14 questions because the underlying offense is so
15 different from bank robbery or carjacking or
16 securities fraud. It's just existing here as
17 the underlying offense, and I don't know if that
18 should affect how we think about it and just
19 wanted to get your response to that because that
20 makes it seem a lot broader.

21 You wouldn't say providing food to the
22 bank robber necessarily is, you know, a meal, is
23 -- is aiding and assisting the -- the -- aiding
24 and abetting the bank robbery, but, if the
25 underlying offense is just being here, that --

1 that seems a little different.

2 Should that affect how we think about
3 it, or how do you just answer that concern?

4 MR. FLETCHER: Yeah, so it's -- it's a
5 fair concern. I -- I'd say a couple things.
6 You know, one is there are other offenses that
7 they -- may not get the -- the just being here
8 concept, but there are aiding-and-abetting
9 concerns about other relatively minor offenses,
10 you know, the tax things, the sort of draft
11 evasion, drug use, things like that.

12 The law is capable of dealing with
13 this, you know, aiding-and-abetting minor
14 offenses that happen a fair amount. So I think
15 that helps with one set of concerns.

16 The -- the being here concern, I guess
17 I do think you could take into account the
18 nature of the offense in deciding sort of are
19 the requisites of aiding and abetting liability
20 met. One part of that answer might be what I
21 said to Justice Jackson, that having the intent
22 to help someone, assuming they are going to be
23 here, isn't necessarily the intent that they
24 remain here.

25 Another thing might be, you know, the

1 -- the aiding-and-abetting doctrine demands that
2 you associate yourself with a venture and seek
3 by your action to make it succeed. And I
4 suppose you could take account of what the
5 venture here is in deciding sort of what level
6 of words or action are necessary to constitute
7 facilitation in -- in that context.

8 So I guess I do think that traditional
9 aiding-and-abetting principles would allow those
10 sorts of things to be taken into account.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: Mr. Fletcher, so
15 you've pointed out, and -- and I agree with you
16 that it's interesting, kind of odd, it strikes
17 me as unusual, but I haven't done a study to
18 see, to have an overbreadth challenge to a
19 statute that's older, because all of these
20 overbreadth challenges invite a string of
21 hypotheticals, but, as you say, we have a track
22 record.

23 Can you think -- have you looked at
24 it? Are there overbreadth challenges that have
25 succeeded in the past where we have this much

1 data?

2 MR. FLETCHER: So I don't know,
3 candidly. I can't -- I'm not aware of one of
4 the Court's recent cases where this has come up,
5 you know, Stevens, Alvarez, those sorts of cases
6 are relatively newer laws.

7 But the reason I don't want to say
8 definitively that there isn't one is that I
9 think some of the earlier laws involved state
10 statutes, and I just haven't traced back exactly
11 how old they are. But I -- I'm certainly not
12 aware of anything where you have sort of the
13 track record going the other way.

14 You know, not only is it old, but also
15 we have such a strong empirical track record
16 against the very broad interpretation. And, I
17 -- you know, I think that's relevant not just to
18 overbreadth but also to what the statute means
19 because Congress has been coming back and
20 amending the statute and revisiting it against
21 the backdrop of that narrow application of the
22 statute.

23 JUSTICE BARRETT: Well, and speaking
24 of state statutes, so we have some amicus briefs
25 saying that the -- lots of states have language

1 like this. It's possible that lots of statutes
2 would then succumb to First Amendment challenges
3 of this sort.

4 Have there been similar
5 overbreadth-type concerns litigated, especially
6 since Sineneng-Smith, about other solicitation
7 statutes or other induce-and-encourage statutes?

8 MR. FLETCHER: It -- it comes up
9 occasionally. They don't get a lot of traction.
10 You know, one example that we cite in our brief
11 is the Ford versus State case out of Nevada,
12 which is about solicitation of prostitution.

13 JUSTICE BARRETT: Prostitution.

14 MR. FLETCHER: Very similar statute.
15 You know, it's induce, encourage, or persuade,
16 coerce to -- to --

17 JUSTICE BARRETT: Yeah.

18 MR. FLETCHER: -- enter into
19 prostitution, and the defendant tried an
20 overbreadth challenge there. I think we also
21 cite a Minnesota case. So there are examples
22 out there, but, frankly, courts have not had
23 much difficulty dismissing them, either because
24 you can't imagine circumstances where the aiding
25 and abetting or solicitation would actually be

1 protected, or because, even if you could, that's
2 such a sort of edge case that it doesn't call
3 for the application of overbreadth.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I guess I'm
8 trying to figure out, looking at all the other
9 provisions in this statute, what -- what is the
10 core constitutional application of this? I
11 mean, you sort of responded to Justice Kagan's
12 question in saying that if we can identify that
13 and we understand that it's there, that would be
14 a reason not to strike it down.

15 But I am struggling, especially, for
16 example, with the part of 1324 here that is, you
17 know, small division (v)(II) that itself has an
18 aiding-or-abetting piece to it. So it sounds
19 like Congress was covering aiding and abetting
20 to some extent in another part of this same
21 statute. So, if we read this one to be aiding
22 and abetting too, what are we -- what is it
23 really covering?

24 MR. FLETCHER: It's a different kind
25 of aiding and abetting. So the Romanette (v) --

1 JUSTICE JACKSON: Yes.

2 MR. FLETCHER: -- aiding and abetting
3 is aiding and abetting violations of the
4 preceding clauses of 1324(a)(1)(A). So aiding
5 and abetting, bringing someone to the border in
6 violation of clause (i) or harboring or
7 transporting someone within the country in
8 violation of clauses (ii) or (iii), that sort of
9 aiding and abetting is covered by (v).

10 JUSTICE JACKSON: All right. And what
11 -- what is the aiding and abetting in (iv) that
12 could be aided and abetted per (v)?

13 MR. FLETCHER: So it -- the aiding and
14 abetting that is covered in (iv) is assisting
15 someone to enter in -- or remain in the country
16 unlawfully. That's the core constitutional
17 application of (iv). That's what it does. And
18 if you -- the way you would violate (v) is if
19 you aided and abetted someone who was soliciting
20 or facilitating people to enter into the country
21 unlawfully --

22 JUSTICE JACKSON: I see. So you're --
23 you're helping the person who's doing it --

24 MR. FLETCHER: Mr. Hansen's helpers --

25 JUSTICE JACKSON: -- in (v). Okay.

1 MR. FLETCHER: -- for instance. Yeah.

2 JUSTICE JACKSON: All right. So, in
3 the (iv), you say it's aiding and abetting or
4 soliciting is the -- is the constitutional
5 application of (iv), and we -- we're -- we're to
6 look at aiding and abetting and the old soil
7 that comes with it. And Justice Kavanaugh
8 raises an interesting point, which is, wouldn't
9 providing provisions to an -- a -- a bank robber
10 who you knew to have committed this crime and is
11 here, wouldn't that be considered aiding and
12 abetting? And, if so, why isn't the nonprofits
13 who are providing these kinds of provisions to
14 people who are remaining in this case -- in --
15 in the United States in violation of the law
16 also a violation of this?

17 MR. FLETCHER: So, yes, providing
18 tools, you know, a gun, a mask to a bank robber
19 knowing that he's going to use them to rob the
20 bank and intending that he use them to rob the
21 bank, that's aiding and abetting the bank
22 robbery.

23 I think the reason why I don't think
24 the provision of food or something like that to
25 a noncitizen who happens to be here unlawfully

1 qualifies as aiding and abetting --

2 JUSTICE JACKSON: What about aiding
3 and abetting after the fact? He's bank -- he's
4 robbed the bank already and he comes and he
5 knocks on the door and you know he's a bank
6 robber and you let him in, you let him stay.
7 And I -- maybe that's harboring, I don't know,
8 but --

9 MR. FLETCHER: That -- that's not
10 aiding and abetting at all.

11 JUSTICE JACKSON: I see.

12 MR. FLETCHER: That's accessory after
13 the fact at best.

14 JUSTICE JACKSON: Okay.

15 MR. FLETCHER: And 18 U.S.C. 2 covers
16 only accessory before the fact and aid during
17 the crime but not aid after the crime.

18 JUSTICE JACKSON: Not aid after. All
19 right. One more.

20 The point that Justice Alito brought
21 up with the civil violation, are you asking us
22 to decide that here, or could the Ninth Circuit
23 be tasked with looking into that when we return
24 the case, if we return the case?

25 MR. FLETCHER: I guess I have

1 understood Respondent, Mr. Hansen, to be making
2 -- relying on the civil/criminal distinction in
3 service of his overbreadth argument and to
4 suggest that to the extent that section --
5 clause (iv) would reach aiding and abetting or
6 soliciting conduct that is only a civil
7 violation, that's a First Amendment problem and
8 that that is part of his overbreadth argument.

9 JUSTICE JACKSON: But the Ninth
10 Circuit didn't rule on that, right? The Ninth
11 Circuit didn't reach the question of how civil
12 liability interacts with any of this.

13 MR. FLETCHER: That's correct because
14 the Ninth Circuit held it overbroad, you know,
15 on a much broader theory. So I -- I suppose you
16 could -- if you didn't want to reach that
17 question, you know, you -- you could decline to
18 do it, say that the Ninth Circuit's reasoning
19 was wrong, that there may be alternative
20 arguments for overbreadth, and send it back for
21 that purpose. I guess I view this more as a
22 sub- issue of the overbreadth argument on which
23 the Court granted cert and not as the sort of
24 really distinct issue that the Court usually
25 remands for consideration of.

1 JUSTICE JACKSON: Well, we would have
2 to sort of sort it out. Isn't it complicated to
3 sort of determine the extent to which the speech
4 incident to criminal conduct scenario, which is
5 what I understand you to be relying on, reaches
6 civil conduct as well?

7 MR. FLETCHER: I don't think so. I
8 think the Court crossed that bridge in Gazzam
9 the year after Giboney, which we cite in our
10 reply brief. It did it again in Pittsburgh
11 Paper. And then, in Williams, it described,
12 relying on Pittsburgh Paper, a civil case, the
13 unprotected category of speech that seeks to
14 induce or commence illegal transactions. So we
15 -- we think you've crossed that bridge already.

16 Now I'm sensitive to the idea that
17 these are hard questions of aiding-and-abetting
18 law and First Amendment law, and this is an
19 awkward posture to try to nail all of them down
20 in. And so I do want to emphasize that all we
21 think you have to decide today is that the
22 statute is not overbroad. And if you want to
23 reserve questions that might arise in an
24 as-applied posture, I think it's perfectly fine
25 to do that.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Ms. Bhandari.

4 ORAL ARGUMENT OF ESHA BHANDARI
5 ON BEHALF OF THE RESPONDENT

6 MS. BHANDARI: Mr. Chief Justice, and
7 may it please the Court:

8 Mr. Hansen should prevail here for
9 three reasons. The government concedes that the
10 statute is unconstitutional under its plain
11 meaning. Instead, it asks this Court to rewrite
12 the statute to prohibit only solicitation and
13 aiding and abetting.

14 But that is Congress's job, and
15 Congress in 1952 took out the very words the
16 government now asks this Court to write in:
17 "solicit" and "assist." And in 1986, Congress
18 took out the required intent. The government
19 has cited no case in which Congress has used the
20 terms "encourage" and "induce" alone to stand
21 for solicitation or aiding and abetting.

22 Second, even if you construe the
23 statute as limited to solicitation or aiding and
24 abetting, this Court should not create a new
25 category of unprotected speech, namely, criminal

1 solicitation of civil law violations. The
2 historical roots of that exception are limited
3 to solicitation of crimes and for good reason.
4 If the justification for treating speech as
5 categorically unprotected is that it is integral
6 to conduct that the government can punish, then
7 the speech cannot be punished more harshly than
8 that conduct.

9 This Court has consistently resisted
10 prior invitations to expand categories of
11 unprotected speech and should do the same here.
12 Otherwise, Congress and the states will be free,
13 without any First Amendment scrutiny, to
14 criminalize speech soliciting violations of the
15 vast range of administrative and regulatory laws
16 that govern us today, from mask and vaccine
17 mandates to parking ordinances.

18 To deny the government's requested
19 expansion would only mean that it would have to
20 satisfy ordinary First Amendment scrutiny when
21 it regulates such speech.

22 And, finally, even if the Court were
23 to adopt the government's narrowing
24 construction, Mr. Hansen's convictions must be
25 vacated because the jury was not instructed to

1 apply the government's narrowing construction,
2 and the government argued that the plain meaning
3 of the statute should control.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Is speech the only
6 component of the First Amendment subject to
7 overbreadth?

8 MS. BHANDARI: Justice Thomas, I -- I
9 think that speech is the realm in which this
10 Court has applied overbreadth analysis. I --

11 JUSTICE THOMAS: Has it ever applied
12 it in any other aspect of -- of the First --
13 First Amendment?

14 MS. BHANDARI: I'm not aware of any
15 context in which it has applied overbreadth to
16 other aspects of the First Amendment, no,
17 Justice Thomas.

18 CHIEF JUSTICE ROBERTS: Counsel, you
19 focused on the amendment, what was it, '52 or
20 '56?

21 MS. BHANDARI: 1952.

22 CHIEF JUSTICE ROBERTS: '52.
23 Suggesting there was a purpose to take out the
24 two provisions that were -- the two words that
25 were taken out and the two left in.

1 What -- what was that purpose? What
2 is -- in other words, what is the distinction
3 you see between the words that were left in and
4 the words that were taken out?

5 MS. BHANDARI: I think we can go by
6 what Congress actually did. Congress removed
7 the narrower verbs, "solicit" and "assist," and
8 left in the broader verbs, "encourage" and
9 "induce." That was a deliberate choice. If
10 Congress wanted to write a solicitation law, it
11 could have left in the verb "solicit."

12 And I note that in 1984, which was two
13 years prior to the 1986 amendment to the
14 statute, Congress drafted 18 U.S.C. 373, which
15 is the general prohibition on soliciting a crime
16 of violence, and Congress took a very different
17 approach in writing that solicitation statute.
18 It required specific intent to solicit a
19 particular felony, and it required circumstances
20 strongly corroborative of that intent.

21 And the Senate committee report noted
22 that mere encouragement is not enough and that
23 the specific intent requirement was especially
24 important not to trench on First Amendment
25 concerns.

1 CHIEF JUSTICE ROBERTS: So we would
2 have to see a -- a distinction along the lines
3 you suggest between "solicit" and "assist" and
4 "encourage" and "induce" to the extent that the
5 -- the former are broader or narrower?

6 MS. BHANDARI: "Encourage" and
7 "induce" are narrower -- are -- are broader
8 terms. "Solicit" and "assist" are the narrower
9 terms.

10 And I also think that you can look at
11 the pattern of amendment to see that Congress
12 over time has broadened the statute from its
13 initial roots.

14 Initially, it was tied to prohibiting
15 the entry of -- of -- assisting the entry of
16 contract laborers. Then Congress took away the
17 limitation on contract labor. It was assisting
18 anyone's entry. But still, in 1952, it used the
19 verbs "solicit" and "assist" and it required the
20 willfully or knowingly standard.

21 Then Congress removed the mens rea
22 requirement and required only knowledge or
23 reckless disregard, again, an expansion. And
24 Congress removed the verbs "solicit" and
25 "assist" to leave only the broader terms,

1 "encourage" and "induce," and expanded to
2 remaining in the country unlawfully in 1986.
3 That was its final expansion.

4 So, over time, Congress has
5 consistently shown its intent as evidenced by
6 the plain text to cover much more than
7 solicitation or aiding and abetting.

8 JUSTICE BARRETT: Counsel,
9 let's assume --

10 JUSTICE ALITO: May I --

11 JUSTICE BARRETT: Oh, sorry.

12 JUSTICE ALITO: Go ahead.

13 JUSTICE BARRETT: I -- I -- I just
14 wanted to follow up on that quickly, and let's
15 just assume that you're wrong about Congress's
16 intent. Would you concede that if we accept the
17 government's narrowing construction, let's
18 assume the underlying offense is criminal, not
19 civil, would you concede that you would lose
20 your overbreadth challenge if the government is
21 right about the narrower solicitation?

22 MS. BHANDARI: If you were limiting it
23 just to crimes and only to solicitation and
24 aiding and abetting with the requisite intent,
25 then, yes. But I don't understand the

1 government to be limiting its argument only to
2 crimes. It --

3 JUSTICE ALITO: Well, what -- oh, go
4 ahead.

5 JUSTICE BARRETT: Yeah. No, my
6 hypothetical changed that.

7 MS. BHANDARI: Yes, yes.

8 JUSTICE BARRETT: Yes, thank you.

9 JUSTICE ALITO: Well, that's what I
10 wanted to ask you about. I understood your
11 second point to be that the First Amendment
12 prohibits the criminalization of the
13 solicitation of conduct that is unlawful but not
14 criminal. Is that your second point?

15 MS. BHANDARI: That is correct, that
16 --

17 JUSTICE ALITO: And -- and you think
18 that's true across the board in all
19 circumstances?

20 MS. BHANDARI: Yes, Justice Alito,
21 because we're talking about whether speech is
22 categorically beyond the protection of the First
23 Amendment. So anytime you have a law targeting
24 speech, which would cover a solicitation law,
25 the first step is, of course, it's a law

1 targeting speech, you, you know, trigger First
2 Amendment scrutiny.

3 Now, if the law fits within a narrow
4 category of historical exception, like obscenity
5 and so forth, then it doesn't have to
6 satisfy scrutiny.

7 JUSTICE ALITO: Yeah, okay. So
8 solicitation -- soliciting someone to engage in
9 prostitution, that's unconstitutional.
10 Criminalizing the solicitation of someone to
11 engage in prostitution, that's -- that's
12 unconstitutional.

13 MS. BHANDARI: No, Justice Alito.
14 That can be regulated as a transaction. And
15 this Court in Williams made clear that you
16 can -- you can render certain transactions
17 illegal. So speech that effectuates those
18 transactions, for example, if I say to you, I
19 want to buy drugs, that is proposing an illegal
20 transaction. That speech can be regulated. And
21 that was the case with Williams where it was
22 this speech about a transaction involving child
23 pornography.

24 JUSTICE ALITO: All right. Not
25 soliciting a prostitute but encouraging someone

1 to engage in prostitution, that cannot be
2 criminalized?

3 MS. BHANDARI: If prostitution is not
4 a crime --

5 JUSTICE ALITO: Yes.

6 MS. BHANDARI: -- then such speech is
7 not categorically unprotected. It would just be
8 subject to First Amendment scrutiny, which means
9 that if the government had a compelling interest
10 and narrowly tailored that law, they could do
11 so. But -- but that is the key difference,
12 Justice Alito, between solicitation as used in
13 the sense of transactions versus solicitation of
14 a third person to do something.

15 JUSTICE ALITO: So encouraging someone
16 to engage in prostitution is not necessarily --
17 criminalizing that is not necessarily
18 unconstitutional, it just has to satisfy strict
19 scrutiny, and you would apply the same thing
20 here?

21 MS. BHANDARI: That is correct,
22 Justice Alito. Any law burdening speech where
23 it makes the speech a crime and it's soliciting
24 underlying civil violations would be subject
25 to -- if it's content-based, it would be

1 subject to strict scrutiny.

2 JUSTICE ALITO: Encouraging someone to
3 commit suicide?

4 MS. BHANDARI: I think --

5 JUSTICE ALITO: Same thing?

6 MS. BHANDARI: Same thing. If it's
7 not a crime, you just subject it to ordinary
8 First Amendment scrutiny, which the Minnesota
9 Supreme Court did in Melchert-Dinkel. It
10 applied strict scrutiny to a law encouraging
11 suicide. In that case, the law did not satisfy
12 strict scrutiny, but a narrowly tailored law
13 very well might.

14 JUSTICE ALITO: What if the person who
15 is encouraged to commit suicide is
16 intellectually disabled, particularly vulnerable
17 to that encouragement?

18 MS. BHANDARI: Again, I think, if a
19 state or Congress passed a law that was directed
20 specifically at encouraging someone in that
21 vulnerable state and narrowly tailored it, it
22 very well might pass strict scrutiny, but on the
23 --

24 JUSTICE ALITO: And why would that be?
25 Because that's an important interest?

1 Protecting those people is an important
2 interest?

3 MS. BHANDARI: That's correct. I
4 think the strict scrutiny analysis builds into
5 it the interest that the government has in
6 criminalizing speech. And so --

7 JUSTICE GORSUCH: But isn't -- isn't
8 --

9 JUSTICE ALITO: Then why wouldn't that
10 be satisfied here?

11 JUSTICE GORSUCH: Yeah.

12 MS. BHANDARI: In this case, there
13 are --

14 JUSTICE ALITO: Government has a --
15 now people disagree about this, but the law
16 expresses a strong interest in regulating who is
17 allowed to remain in the United States.

18 MS. BHANDARI: I think that that
19 standard would not be satisfied here even if you
20 read this as a narrow solicitation law because
21 it would reach solicitation of civil law
22 violations that Congress itself has incentivized
23 people to engage in.

24 So, for example, when Congress has
25 provided under the Violence Against Women Act a

1 pathway to lawful status for women who have been
2 battered or a pathway to lawful status for
3 victims of trafficking or a pathway to lawful
4 status to people who overstayed their visas but
5 married a U.S. citizen, in all of those cases,
6 lawyers, community members who provide Know Your
7 Rights training and materials are entitled to
8 tell people about those paths to lawful status
9 if they remain even unlawfully. And I don't
10 think --

11 JUSTICE GORSUCH: Counsel, I'm --

12 MS. BHANDARI: -- the government could
13 claim a compelling interest. I apologize.

14 JUSTICE GORSUCH: -- I'm -- I'm sorry
15 to interrupt. Are -- are -- are you finished?

16 MS. BHANDARI: Yes.

17 JUSTICE GORSUCH: So I -- I just want
18 to follow up on Justice Alito's line of
19 questioning with you because I think I heard you
20 say there could be some examples where you could
21 criminalize the act of soliciting or aiding and
22 abetting an underlying civil offense, whether
23 it's prostitution or assisting a suicide of a
24 vulnerable person. And once -- once -- you said
25 there could be circumstances at least possibly

1 where such a law would be narrowly tailored and
2 would -- would survive.

3 And how does that affect the
4 overbreadth analysis? Because now we're saying
5 it -- the civil/criminal distinction isn't what
6 matters, there are some categories of cases,
7 even -- even with respect to underlying civil
8 offenses, where the government can regulate
9 aiding and abetting or soliciting more -- more
10 specifically and dramatically than the
11 underlying offense.

12 So now we're -- we're -- we've
13 narrowed the category of dispute. How does that
14 affect the overbreadth analysis?

15 MS. BHANDARI: I think, if you are
16 talking about a world in which you've narrowed
17 the statute to solicitation only, so leaving
18 aside the just pure encouragement and inducement
19 --

20 JUSTICE GORSUCH: Yeah.

21 MS. BHANDARI: -- and you've narrowed
22 it in that way, I think the statute would still
23 be substantially overbroad because it reaches
24 solicitation of civil violations that I don't
25 think even the government would claim an

1 interest in criminalizing.

2 And, again, I point to the example of
3 lawyers advising people about a pathway to
4 lawful status that Congress itself has
5 incentivized. And I think it would raise major
6 First Amendment concerns for the government to
7 be able to criminalize lawyers and others
8 providing truthful information about legal
9 options.

10 JUSTICE GORSUCH: I would -- I would
11 certainly imagine that there would be a -- a
12 very strong as-applied challenge in those kinds
13 of cases, but an overbreadth analysis, we're
14 supposed to ask -- I -- I don't know what we're
15 supposed to ask, but something like, is it
16 impossible to apply the statute constitutionally
17 or is it really, really almost unlikely it'll
18 ever be applied constitutionally.

19 And you're -- you're positing a narrow
20 set of cases in which it would be a good First
21 Amendment challenge might exist, but, again, how
22 does -- how do we -- how do we struggle with
23 this overbreadth? What -- when is enough
24 enough?

25 MS. BHANDARI: I -- I would point you

1 to the -- the approach the Court took in Free
2 Speech Coalition and in Stevens, where the
3 inquiry is simply does the statute -- even if
4 you narrowly construe it, does the statute reach
5 protected speech that people engage in? Is it
6 realistic speech that they engage in every day
7 frequently?

8 In Stevens, the Court didn't do an
9 empirical analysis. It looked at the fact that
10 many people engaged in hunting videos actually
11 as a strength of the overbreadth challenge,
12 because it said, you don't need to look at who's
13 not speaking. The fact that people do violate
14 the statute, as the government construes it, is
15 a reason for us to apply the overbreadth remedy.

16 Similarly, in Free Speech Coalition,
17 this Court looked at the fact that mainstream
18 movies such as "Romeo and Juliet" or "American
19 Beauty" might fall within the terms of the
20 statute, and it didn't attempt to quantify
21 examples of mainstream movies vis-à-vis actual
22 --

23 JUSTICE KAGAN: Mr. --

24 MS. BHANDARI: -- child pornography.

25 JUSTICE KAGAN: -- Mr. Fletcher points

1 out that this statute has been with us a long
2 time and we've just never seen such prosecutions
3 or, at most, just a handful of cases.

4 So, in that circumstance, isn't our
5 task made easier with respect to overbreadth if
6 you can just say look at the history?

7 MS. BHANDARI: Two responses, Justice
8 Kagan. First, prosecutions are not necessary.
9 In Stevens and in Free Speech Coalition, this
10 Court didn't require actual prosecutions of
11 protected speech.

12 And in Stevens, this Court invalidated
13 that law 11 years after it had been passed. So
14 that law had been on the books for a while. In
15 Free Speech Coalition, it had been at least five
16 years. In Virginia v. Black, the plurality
17 opinion holding that statute overbroad, that law
18 had been on the books for 35 years.

19 So the length of time and the lack of
20 prosecutions isn't the inquiry because, on a
21 facial challenge, the facial validity of a law
22 does not depend on the government's
23 prosecutorial choices.

24 JUSTICE KAGAN: Well, doesn't the
25 prosecutorial choice have something to do with

1 what kinds of activity the law chills?

2 MS. BHANDARI: Even if you look at the
3 prosecutorial activities relevant to that, I
4 think there's realistic danger of chill here
5 just from the fact that the government in recent
6 years has invoked Section 1324 in investigative
7 activities, as the amicus brief from the
8 Reporters Committee for Freedom of the Press
9 noted. The government doesn't treat Section
10 1324 as a dead letter. It's still available to
11 open investigations even if they never charge
12 someone. The City and States' amicus brief
13 notes that they have to certify compliance with
14 1324 to receive funding in certain instances.

15 But, finally, I would just point to
16 the government's ever-changing positions on what
17 the statute means as presenting a chilling
18 effect to the public.

19 JUSTICE BARRETT: But -- but, in
20 addition, just to follow up on Justice Kagan's
21 point, in addition to prosecutions, we also have
22 a record of activity not being chilled. I mean,
23 no one's pointed out there are charitable
24 organizations, to use Justice Kavanaugh's
25 hypothetical, that are not giving food and

1 shelter and resources or that lawyers are afraid
2 to give advice. I mean, the statute's been on
3 the books for a long time, and there might --
4 there's an absence of prosecutions. There is
5 also an absence of demonstrated chilling effect.

6 MS. BHANDARI: This Court has never
7 required a demonstrated chilling effect. Again,
8 in Stevens and Free Speech Coalition, this Court
9 didn't say the fact that mainstream movies were
10 out there, the fact that hunting videos were out
11 there was proof that nobody was chilled because
12 the -- the overbreadth doctrine is concerned
13 with two main things: one, the chill on people
14 who would conform their behavior to the letter
15 of the law, and that behavior isn't visible to
16 this Court, the people who are not speaking.

17 And, second, it gives an incentive to
18 Congress to craft narrow laws. So, for example,
19 if Congress made it a felony to criticize the
20 president and only ever prosecuted people who
21 engaged in constitutionally unprotected true
22 threats, that law could then be immunized from
23 challenge if -- if the government could come in
24 and say, no, no, no, this person engaged in true
25 threats, even though all the jury had to find

1 was did you criticize the president --

2 JUSTICE GORSUCH: Well --

3 MS. BHANDARI: -- yes or no.

4 JUSTICE GORSUCH: -- it is a little
5 awkward, though, that this case comes up at a
6 posture with Mr. Hansen, who I -- I don't think
7 anybody could say he's been chilled from
8 speaking. And I mean, he's had no problem
9 soliciting people here in this country and --
10 and defrauding them to the tune of lots and lots
11 of money.

12 I mean -- I mean, he is -- he has
13 victimized these people and it may be a poster
14 child for a situation in which the -- the
15 underlying offense might be modest, but you
16 might want to criminalize it because he's taking
17 advantage of very vulnerable people. And -- and
18 it just seems awkward that we're in -- in a
19 posture where we're asserting third-party rights
20 of -- of really hypothetical situations without
21 an example.

22 MS. BHANDARI: In this case, Mr.
23 Hansen is asserting his own legal rights. I --
24 I want to be very clear.

25 JUSTICE GORSUCH: Is he -- is -- how

1 is he being affected? How are his speech rights
2 being affected?

3 MS. BHANDARI: Mr. Hansen, he -- as a
4 defendant, he is entitled to have the government
5 prove facts or elements that would make out
6 speech that is constitutionally unprotected, and
7 that did not happen here.

8 So we -- we don't disagree that he
9 victimized many people and, for that, he was
10 convicted under fraud counts and -- and received
11 20 years, and none of those will be disturbed
12 here.

13 But, under the encouragement
14 provision, the government did not have to prove
15 that he lied to anyone, that he deceived anyone,
16 that he engaged in any false speech. All they
17 had to show was that he encouraged or induced
18 people. No mens rea requirement. No intent.

19 JUSTICE GORSUCH: Well, that's going
20 to be -- the -- the -- the -- the government
21 concedes that that has to be resolved on remand,
22 and it seems highly unlikely that he's going to
23 prevail under that standard on remand. I -- I
24 -- I -- I think we'd agree on that. I mean, he
25 -- he had every intent in the world to keep

1 these people here to -- to -- to -- to take
2 their money with no prospect they'd ever
3 actually seek -- obtain any kind of relief. And
4 that's what -- those are the facts.

5 And -- and I guess, again, it's just a
6 little awkward that we're worried about chilling
7 other people's speech and it has nothing to do
8 with the case before us.

9 MS. BHANDARI: I would argue that if
10 you were reconsidering overbreadth doctrine,
11 this wouldn't be the case in which to do this
12 because the government secures convictions under
13 the broad terms of the statute. That goes to
14 the chilling effect.

15 The broad terms of the statute that
16 are on the books, which the government uses to
17 secure convictions, that in and of itself is
18 enough to tell the public that if I engage in
19 any conduct that the government doesn't like,
20 even if it doesn't amount to solicitation or
21 aiding and abetting with all of the many
22 requirements that the government says should be
23 read in, it won't matter because I could be
24 convicted by this jury.

25 JUSTICE JACKSON: And, in fact, that

1 happened in this very case, right? I mean,
2 didn't the government object to narrow
3 instructions that would have tailored this to
4 the kinds of things the government is saying
5 right now?

6 MS. BHANDARI: The -- that is correct.
7 The government --

8 JUSTICE JACKSON: So, in open court,
9 with respect to this particular defendant, the
10 government said, no, no, the statute is really
11 broad and it covers all this kind of conduct,
12 did they not?

13 MS. BHANDARI: That is correct. The
14 government objected to those very elements in
15 this case, in Sineneng-Smith in the district
16 court, and in the Tenth Circuit case of
17 Fernandez --

18 JUSTICE GORSUCH: And if --

19 CHIEF JUSTICE ROBERTS: Do you
20 disagree --

21 JUSTICE GORSUCH: And if --

22 CHIEF JUSTICE ROBERTS: -- do you
23 disagree with Mr. Fletcher that they've never
24 brought such a prosecution?

25 MS. BHANDARI: I -- I don't disagree

1 that they haven't brought such a prosecution.
2 What I submit is that that's not relevant to the
3 overbreadth analysis because the government, you
4 know, has many other tools to threaten
5 invocation of Section 1324 as it has done, as
6 the amici have pointed out, and -- and mainly
7 because in a facial challenge, the government's
8 choice not to prosecute to the full extent is
9 not relevant, just as in Stevens it was not
10 relevant that the -- the government essentially
11 had promised never use -- to use the statute
12 that way.

13 I -- I do want to go back to, Justice
14 Gorsuch, your question about this particular
15 defendant and his conduct.

16 In *R.A.V. v. St. Paul*, the -- the
17 opinion for the Court noted that just because
18 someone engages in conduct that could be
19 regulated in one way doesn't mean that the
20 government can regulate it in another way that
21 violates the First Amendment.

22 So there you had a defendant who
23 burned a cross in a family's yard, and Justice
24 Scalia's opinion for the Court noted that arson
25 laws, property damage laws could have gotten

1 that defendant's behavior, but that didn't mean
2 the application of a viewpoint discriminatory
3 law was permissible with respect to him.

4 JUSTICE GORSUCH: I -- I -- I totally
5 accept that, and I totally accept as well your
6 -- your point, your good point, that -- that if
7 -- even under the government's view a remand is
8 going to be required, and you'll have an
9 opportunity to make arguments. How successful
10 they will be is an interesting question.

11 But, what -- in an overbreadth
12 challenge, isn't it surely relevant that your
13 client's not likely to benefit from whatever we
14 do? And, -- and as the Chief Justice just
15 pointed out, there's never been a prosecution of
16 some of these hypotheticals we've been
17 discussing, and the book -- the -- the law has
18 been on the books for 70 years.

19 I mean, it is an extraordinary thing
20 for this Court to grant third-party standing,
21 which is effectively what we're being asked to
22 do here. Why would we do it in this -- under
23 the -- under those circumstances, when an
24 as-applied challenge would always be available
25 should the government -- because I don't take

1 them at their word either, okay? But should
2 they ever go after somebody who actually meets
3 one of these hypotheticals that have been very
4 interesting this morning, they would have a good
5 First Amendment defense.

6 MS. BHANDARI: Justice Gorsuch, I -- I
7 would note the law in its current form has only
8 been on the books since 1986, absent the mens
9 rea requirement. And the government secures
10 convictions, as it did in this case, without
11 showing any of the elements that would make
12 someone's speech unprotected.

13 So I understand that, you know, Mr.
14 Hansen's behavior was not commendable here, but
15 the government didn't have to prove any of the
16 narrowing elements that would make this statute
17 permissible. And so I think that is one reason
18 that this Court should make sure that this law
19 doesn't in the future chill those, you know, who
20 have engaged in the type of speech that Justice
21 Kagan mentioned.

22 JUSTICE JACKSON: And isn't it
23 impossible to really figure out how many people
24 have been chilled? I mean, I guess I'm trying
25 to understand how it would work if we didn't

1 have some sort of an overbreadth argument,
2 because, on the one hand, you can look at the
3 situation and you can say the government has
4 never charged any of these people who are
5 actually doing this, but we don't know -- by
6 "this," I mean, for example, Justice Kavanaugh's
7 example of, you know, helping -- helping
8 noncitizens by giving them food and water.
9 Fine. The government has never charged any, but
10 we don't know how many other people would have
11 engaged in that kind of, you know, speech and --
12 and action if it weren't for this law.

13 So it's really hard to know, I think,
14 by looking only at what the government has done,
15 who is being prevented from engaging in First
16 Amendment activity.

17 MS. BHANDARI: That is correct. And
18 that is one of the overriding concerns of
19 overbreadth doctrine, again, is the concern with
20 people who are silent and whose silence is not
21 visible to the Court. But --

22 JUSTICE GORSUCH: And we --

23 MS. BHANDARI: -- I'll --

24 JUSTICE GORSUCH: -- and we have no
25 record of that here either. We're just -- we're

1 -- we're just coming up with hypotheticals,
2 right?

3 MS. BHANDARI: Well, what we have
4 is --

5 JUSTICE GORSUCH: There's no record of
6 of -- of people coming into court and a factual
7 finding of district court on -- on who has been
8 chilled and how. I mean, that could have
9 happened, but we don't have that here.

10 MS. BHANDARI: Justice Gorsuch, I
11 don't think that would be likely to happen in a
12 criminal case like this. Perhaps in a
13 pre-enforcement challenge. But I also note that
14 the amici -- the AL amicus brief noting lawyers
15 have said that lawyers, immigration lawyers, are
16 watching this case very closely and already
17 starting to advise each other on how they may
18 have to curtail the advice that they give to
19 their clients.

20 I -- I also want to emphasize that the
21 government hasn't made very clear the
22 distinction between solicitation and aiding and
23 abetting. It seemed to conflate those points.

24 Aiding and abetting requires that the
25 principle complete the underlying act. I -- I'm

1 not sure if the government is saying that that
2 is required here, because solicitation does not
3 require that.

4 The government's also not explained
5 whether "encourage" means solicitation and
6 "induce" means aiding and abetting or vice
7 versa, which of these words apply to which
8 concept.

9 "Solicitation" and "aiding and
10 abetting" aren't the same. They have different
11 elements. And the government hasn't explained
12 how this Court could clearly write in those
13 elements in a way that would tell the lawyer or
14 the community activists advising people what
15 their rights are under the law, whether they can
16 remain in the country.

17 And when the stakes of getting it
18 wrong are felony prosecution and five years'
19 imprisonment, people are not going to go
20 anywhere close to the line --

21 JUSTICE KAVANAUGH: I thought the --

22 MS. BHANDARI: -- if they can help it.

23 JUSTICE KAVANAUGH: -- I thought the
24 government was saying that both solicitation and
25 aiding and abetting were coming in and that the

1 elements of the two offenses would be the
2 traditional elements, both of which require
3 intent.

4 MS. BHANDARI: I agree that both of
5 them require intent, but the government has at
6 various times suggested that you need an act,
7 which I agree is true for aiding and abetting
8 but for solicitation isn't necessarily true.

9 So you're reaching pure speech on the
10 hypothetical of someone simply saying come to my
11 food pantry. Not engaging in the conduct of
12 actually giving food, just saying come to my
13 food pantry, it's open to anyone who's
14 undocumented, would that constitute solicitation
15 to remain in the country, or someone who runs a
16 domestic violence shelter, for example, telling
17 people who come, knowing that they're
18 undocumented, stay here, it's a safe place,
19 you'll -- you're welcome here, and we don't want
20 you to leave here where you're safe.

21 It -- it's critical that a statute
22 that hits on speech draw clear lines when felony
23 prosecution is at stake. Congress did not do
24 that here. And Congress could do so if this
25 Court were to hold that this law simply doesn't

1 say what the government says, and Congress then
2 remains free to draft the narrow
3 aiding-and-abetting or solicitation law if it
4 wishes to.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito, anything further?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: Yes. I -- I think
11 you maybe gave up a little bit too much when you
12 were talking about answering Justice Alito's
13 questions and Justice Gorsuch, that there might
14 be cases where Congress could criminalize a
15 civil violation.

16 Did I understand you to say, once you
17 give that up, then this is okay because they can
18 criminalize all civil violations?

19 MS. BHANDARI: Not at all. In the
20 circumstances in which there is a --

21 JUSTICE SOTOMAYOR: I -- I would like
22 to know where to draw that line.

23 MS. BHANDARI: If --

24 JUSTICE SOTOMAYOR: I -- I find it
25 hard to borrow concepts of "aiding and abetting"

1 or "solicitation" because, by definition, both
2 of those concepts, as we have traditionally had
3 them in the criminal law, require a criminal act
4 by the perpetrator. There has to be an act done
5 by the perpetrator. You have to solicit a
6 crime.

7 We've never had a crime defining
8 solicitation of a civil violation, correct?

9 MS. BHANDARI: That is correct. This
10 Court has never upheld a criminal solicitation
11 law directed at a civil convict.

12 JUSTICE SOTOMAYOR: Now too much,
13 never done it, and, in fact, all of the
14 solicitation and aiding-and-abetting crimes,
15 generally, the punishment is less than the
16 completed act, correct?

17 MS. BHANDARI: That's correct.

18 JUSTICE SOTOMAYOR: Perpetrators are
19 treated more -- the perpetrators of the crime
20 are treated more harshly, and solicitation, it's
21 still not -- the punishment has never been as
22 great as the completed crime. You don't get
23 punished for soliciting -- soliciting arson
24 and get treated as harshly as the arsonist.

25 MS. BHANDARI: I -- I think -- yes. I

1 want to be very clear about our position, which
2 is that solicitation, criminal solicitation
3 laws, when they are directed at civil conduct,
4 are not categorically unprotected under the
5 First Amendment.

6 JUSTICE SOTOMAYOR: All right. That
7 -- the -- so let's go, because -- let's go
8 there, because when are they not -- protected?
9 When are they categorically protected? I want
10 to know what the difference is, why this one is
11 not protected and others might be.

12 MS. BHANDARI: I think that if you had
13 a law criminalizing solicitation of certain
14 civil violations, you would subject it to strict
15 scrutiny and it would then be a case-by-case
16 analysis.

17 I don't think the government has even
18 attempted to argue in this case that this law
19 would satisfy strict scrutiny with respect to
20 civil violations. That -- that argument has not
21 been on the table.

22 But I -- I say that only to show that
23 when it comes --

24 JUSTICE SOTOMAYOR: But what would
25 qualify? What would -- you -- you admitted that

1 a -- inducing a person of lesser mental ability
2 to prostitution would probably fall into it.

3 MS. BHANDARI: Yes. I think you could
4 see a spectrum of laws. Again, it's the normal
5 First Amendment scrutiny. So where the
6 government has a compelling interest and, of
7 course, narrowly tailors its law and has no
8 alternative to get at that conduct other than
9 criminalizing speech, it might satisfy it.

10 But, on the other end of the spectrum,
11 if a municipality decided to make it a crime to
12 solicit parking violations because everyone in
13 town is just violating the parking violations
14 and paying the fee and so it's decided to make
15 it a crime to solicit that, I don't think that
16 that speech is categorically unprotected under
17 the First Amendment and probably wouldn't
18 satisfy heightened First Amendment scrutiny.

19 JUSTICE SOTOMAYOR: So now let's go to
20 why not having an example of a generalized -- of
21 more examples of prosecutions, the Henderson
22 everybody keeps forgetting, but there's at least
23 one prosecute -- prosecution in -- under the
24 1986 statute.

25 Why do you think the history from '86

1 to currently shouldn't be viewed as important?

2 MS. BHANDARI: It's not relevant that
3 the government has chosen not to file actual
4 prosecutions of protected speech. That's never
5 been required by this Court for First Amendment
6 overbreadth analysis, again, for good reason,
7 because a law, if it's facially reaching
8 protected speech, does not become more or less
9 constitutional depending on the government's
10 prosecutorial choices.

11 It's also relevant, however, that the
12 government has ways of chilling speech simply by
13 having the law on the books without filing
14 actual prosecutions.

15 So, for example, when it opens
16 investigations into people and invokes Section
17 1324, as has happened with journalists, perhaps
18 it might be --

19 JUSTICE SOTOMAYOR: What happened in
20 -- with Customs patrol.

21 MS. BHANDARI: With -- with the U.S.
22 Customs and Border Protection, yes. And --

23 JUSTICE SOTOMAYOR: And Congress did
24 subpoenas too of --

25 MS. BHANDARI: That is correct. And

1 also when it asks cities and states to certify
2 compliance with Section 1324 to receive federal
3 funding, which, of course, could chill those
4 city and state officials from even coming close
5 to the line of violating the encouragement
6 provision for fear of losing that funding.

7 So there are many aspects beyond
8 simple prosecutions that can chill speech, and
9 -- and the government has certainly used some of
10 those tools in the last five years even.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 Justice Gorsuch?

14 Justice Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: Can I can just ask
17 you, one thing you said was curious to me, that
18 "aid and abet" and "solicitation" have different
19 elements, and so what is then the implication of
20 the government saying, we look at the statute,
21 it says "encourage" or "induce," you should read
22 that to mean "aid or abet" -- "aid and abet" or
23 "solicitation," I guess that carries with it the
24 elements, but is your point that the person who
25 is being convicted or prosecuted under this

1 statute is not going to really know what it is
2 that the government needs to prove in order to
3 establish their liability?

4 MS. BHANDARI: That is correct,
5 Justice Jackson. The government hasn't
6 specifically delineated which one would apply in
7 any particular case. It simply says both. But
8 there are different elements to them.

9 That's why Congress has two separate
10 provisions, 18 U.S.C. 373, which is a
11 solicitation provision, and 18 U.S.C.,
12 subsection 2, which is an aiding-and-abetting
13 provision.

14 In this --

15 JUSTICE JACKSON: This is not a First
16 Amendment argument, but it still could -- it's
17 something problematic, I think, perhaps about
18 the government's intention of importing both of
19 those concepts wordlessly, silently, into this
20 statute.

21 MS. BHANDARI: It goes to
22 congressional intent and what the text says.

23 So Congress has at various times used
24 "induce" along with "solicit," as it did in 373.
25 At other times, it used "induce" along with "aid

1 and abet," as it did in subsection 2.

2 Now the government doesn't explain
3 here why Congress would not have used "aiding
4 and abetting" and "solicitation" along with
5 "induce" when it previously has used "induce"
6 with those other verbs, and it also doesn't
7 explain why Congress would have mashed up both
8 concepts of "solicitation" and "aiding and
9 abetting" in one statute when they have
10 different elements.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Rebuttal, Mr. Fletcher?

15 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

16 ON BEHALF OF THE PETITIONER

17 MR. FLETCHER: Thank you, Mr. Chief
18 Justice.

19 I'd just like to say a word about what
20 the statute means, a word about this
21 criminal/civil distinction, and then close with
22 a word or two about overbreadth.

23 So, first of all, about what the
24 statute means. I understand their position to
25 be that until 1952, this was a permissible

1 statute because it had other words in it, but in
2 1952, Congress turned it into a prohibition on
3 speech. And I think that's a pretty
4 extraordinary thing for Congress to have done,
5 and the Court should demand a pretty
6 extraordinary showing before assuming that
7 Congress did it, and I just haven't heard such a
8 showing made.

9 What I've heard is Congress took out
10 some words. And that's true, but the words it
11 left in had the same meaning and the words it
12 left in were the words this Court had just used
13 to summarize the previous statute.

14 I heard that it took out the mens rea
15 requirement in 1986. But that's not quite
16 right. It tailored the mens rea that the
17 offender has to know about the noncitizen's
18 status, knowing or in reckless disregard, but it
19 left in the words "induce" or "encourage." And
20 those are words that we think inherently carry a
21 mens rea requirement.

22 That's what Judge Hand said in Peoni
23 when he was interpreting the words of 18 U.S.C.
24 2, words like "induce," "aid and abet" carry an
25 implication of purpose. We think they still

1 carry that implication here.

2 And, finally, I heard that there's no
3 other statute that looks like this. And that's
4 just not quite right. You know, the -- the
5 provision of the National Labor Relations Act
6 that was at issue in the electrical workers case
7 that we cite at page 32 of our brief prohibited
8 inducing and encouraging a secondary boycott.
9 And this Court upheld that against a
10 constitutional challenge.

11 The Mann Act, 18 U.S.C. 2422(a)
12 prohibits persuading, inducing, enticing --
13 enticing or coercing an individual to travel in
14 interstate commerce to engage in prostitution.
15 These are -- this is not an unusual way to
16 convey these ideas.

17 Now I'd like to turn to the civil or
18 criminal distinction, which I understand to be
19 their fallback argument, essentially, to say
20 that even if you construe the statute the way we
21 construe it, they still think it's overbroad
22 because it covers soliciting or facilitating
23 civil violations.

24 As Justice Gorsuch said, I think
25 there's a real question whether even if they're

1 right that there's constitutional questions
2 about soliciting or facilitating civil conduct,
3 whether that meets the high threshold for
4 overbreadth.

5 But I think more fundamentally they're
6 not right about that. This Court has said in
7 cases like Pittsburgh Press and Gazzam and
8 Williams that soliciting or inducing illegal
9 activities, even if they're only civilly
10 illegal, are not protected by the First
11 Amendment.

12 And I don't really hear them to be
13 contesting that. Instead, they're -- they want
14 a special rule. They want to say it's okay to
15 civilly regulate that kind of solicitation and
16 facilitation, but you can't criminally punish
17 it.

18 And that sort of mismatch is just not
19 something that I know of any analog in this
20 Court's First Amendment jurisprudence. What
21 this Court has always said before is that there
22 are certain categories of speech that are
23 unprotected, and we think this is one of them.

24 Now I take the point that it's unusual
25 to punish the speech or the conduct that

1 solicits or facilitates underlying activity more
2 stiffly than the activity, but that's not a
3 First Amendment rule. That's a legislative
4 judgment about culpability.

5 Usually, we think that people who
6 solicit or facilitate unlawful activity share
7 the same culpability as the person who commits
8 that activity, but not always, as Justice Alito
9 and I discussed, and not here.

10 And the judgment that Congress made
11 here is that when someone solicits or
12 facilitates immigration violations, they are
13 deserving of more punishment than the
14 noncitizens, who are already subject to removal.

15 We think that's a reasonable judgment.
16 And within the contours of that judgment, I
17 think it's important to emphasize that Congress
18 treated speech and conduct exactly the same.
19 Whether solicitation or facilitation takes the
20 form of speech or takes the form of conduct,
21 this statute treats it identically, and so I
22 don't think it has the effect of treating speech
23 worse than conduct that my colleague describes.

24 Finally, just to say a word about
25 overbreadth. You know, we've talked about the

1 difficulties of overbreadth analysis, what an
2 extraordinary thing it is, how cautious the
3 Court has been about it. And I think it's just
4 worth underscoring all of the different ways in
5 which Respondent and the Ninth Circuit are
6 trying to stretch overbreadth doctrine.

7 This Court has said that limiting
8 instructions are especially important in
9 overbreadth cases, but they ask you to bypass a
10 limiting instruction.

11 The Court has said that we are in
12 realistic danger of prosecution, but they're
13 asking you to find the statute overbroad, even
14 though we don't have any history of either
15 prosecution or of chilling.

16 And the Court said in Hicks that
17 rarely if ever will a statute be overbroad when
18 it aims at conduct and not primarily at speech
19 or at inherently expressive conduct. But this
20 is a statute that we know from 70 years aims
21 primarily at conduct, even if you thought it
22 also may sweep in some speech.

23 It would really be extraordinary, I
24 think, to say that the statute can't be used to
25 prosecute schemes like Mr. Hansen's and all of

1 the other schemes that it has been used to
2 prosecute over the last 70 years.

3 We'd ask the Court to reverse.

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

6 (Whereupon, at 1:08 p.m., the case was
7 submitted.)

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Official

<p>1</p> <p>1:08 [1] 99:6 11 [1] 72:13 11:46 [2] 1:15 3:2 13.2 [1] 15:3 1324 [10] 4:10 5:2,9 51:16 73:6,10,14 79:5 90:17 91:2 1324(a)(1)(A) [1] 52:4 18 [8] 10:21 19:7 54:15 60:14 92:10,11 94:23 95:11 1952 [9] 10:1 19:2 20:22 21:6 57:15 59:21 61:18 93:25 94:2 1984 [1] 60:12 1986 [7] 21:8 57:17 60:13 62:2 81:8 89:24 94:15 1996 [1] 21:11</p>	<p>69:9 77:21 83:23,24 84:6,10,25 85:7 86:25 93:4,9 ability [3] 26:1 31:2 89:1 able [2] 44:22 70:7 above-entitled [1] 1:13 absence [2] 74:4,5 absent [2] 27:25 81:8 absolute [1] 42:18 absolutely [2] 32:13 42:7 abstract [1] 13:9 absurd [1] 27:10 Abuelita [1] 36:3 accept [4] 8:6 62:16 80:5,5 accepting [1] 32:10 accessory [2] 54:12,16 account [3] 47:17 48:4,10 accurate [1] 6:8 acknowledge [4] 4:24 14:19 40:4,10 acquaintances [1] 13:11 across [1] 63:18 act [10] 37:21 67:25 68:21 83:25 85:6 87:3,4,16 95:5,11 acting [1] 32:4 action [4] 30:14 48:3,6 82:12 actions [1] 37:11 active [1] 19:22 activists [1] 84:14 activities [9] 4:23 28:22,24 29:8 33:1 34:12 73:3,7 96:9 activity [11] 4:6 29:10 32:22,25 73:1,22 82:16 97:1,2,6,8 actual [4] 71:21 72:10 90:3,14 actually [13] 8:16 18:12,24 35:5,18 45:15 50:25 60:6 71:10 77:3 81:2 82:5 85:12 actus [3] 17:4,8,11 add [1] 33:15 addition [2] 73:20,21 additionally [1] 14:5 adjudication [1] 45:14 administrative [1] 58:15 admitted [1] 88:25 admitting [1] 39:12 adopt [1] 58:23 adopted [1] 4:12 adopting [1] 10:3 advantage [1] 75:17 advice [3] 7:4 74:2 83:18 advise [1] 83:17 advising [2] 70:3 84:14 advocacy [4] 5:1 13:10 14:13,14 affect [4] 46:18 47:2 69:3,14 affected [2] 76:1,2 afraid [1] 74:1 agree [8] 10:8,14 19:20 20:</p>	<p>6 48:15 76:24 85:4,7 agrees [2] 4:3 27:4 ahead [10] 10:10,11,12 21:14 22:18 28:12 38:11,12 62:12 63:4 aid [12] 15:6,7,9 28:17 54:16,17,18 91:18,22,22 92:25 94:24 aided [2] 52:12,19 aiding [66] 4:6 7:12,18 8:5,10 9:4,10,20 10:16 13:19 14:12 15:7,14,16 17:1,11 18:3,13 20:25 25:9 29:12 30:15,20 35:1,8,17 37:20 38:5 46:23,23 47:19 50:24 51:19,21,25 52:2,3,4,9,11,13 53:3,6,11,21 54:1,2,10 55:5 57:13,21,23 62:7,24 68:21 69:9 77:21 83:22,24 84:6,9,25 85:7 86:25 93:3,8 aiding-and-abetting [21] 5:4,7 10:22 12:6 13:5 14:24 15:1 16:21 20:5 32:18 34:1 37:16 38:2 47:8,13 48:1,9 56:17 86:3 87:14 92:12 aiding-and-betting [1] 46:11 aiding-or-abetting [1] 51:18 aids [3] 19:8,8 32:25 aims [2] 98:18,20 airing [1] 40:8 AL [1] 83:14 aliens [1] 8:14 ALITO [25] 25:13 40:16 41:11 54:20 62:10,12 63:3,9,17,20 64:7,13,24 65:5,12,15,22 66:2,5,14,24 67:9,14 86:8 97:8 Alito's [2] 68:18 86:12 allow [2] 26:7 48:9 allowed [1] 67:17 allowing [1] 23:17 almost [3] 6:15 43:21 70:17 alone [2] 23:2 57:20 already [5] 22:14 54:4 56:15 83:16 97:14 alternative [2] 55:19 89:8 although [1] 27:7 Alvarez [1] 49:5 amending [1] 49:20 Amendment [49] 3:18 4:19,21 5:9 18:11 19:3 23:5 25:25 26:7,20 27:9 29:5 33:19,22 34:10 36:15 38:8 40:3 50:2 55:7 56:18 58:13,20 59:6,13,16,19 60:13,24 61:11 63:11,23 64:2 65:8 66:8 70:6,21 79:21 81:5 82:16 88:5 89:5,17,18 90:5 92:16 96:11,20 97:3</p>	<p>American [1] 71:18 amici [3] 45:22 79:6 83:14 amicus [5] 6:15 49:24 73:7,12 83:14 among [1] 9:24 amount [3] 15:8 47:14 77:20 analog [1] 96:19 analysis [13] 37:4 41:17 42:24 59:10 67:4 69:4,14 70:13 71:9 79:3 88:16 90:6 98:1 analyze [1] 12:6 analyzed [1] 12:5 Another [8] 14:3,9,17 41:11,13 47:25 51:20 79:20 answer [4] 32:2 46:13 47:3,20 answering [1] 86:12 answers [1] 19:1 anybody [2] 12:1 75:7 anyone's [1] 61:18 anytime [1] 63:23 anyway [1] 8:15 apologize [1] 68:13 appear [2] 11:2 21:19 APPEARANCES [1] 1:17 applicable [1] 23:4 application [7] 5:13 49:21 51:3,10 52:17 53:5 80:2 25:2,4 42:21 43:4,6 applied [10] 5:18 6:1 12:9 41:14 45:8 59:10,11,15 66:10 70:18 applies [1] 12:17 apply [12] 13:3,5,18 36:25 38:2 44:5 59:1 65:19 70:16 71:15 84:7 92:6 approach [2] 60:17 71:1 appropriate [3] 11:10 28:5 40:13 area [3] 9:15 19:1,4 aren't [3] 7:10 27:12 84:10 arguable [1] 12:18 argue [3] 39:14 77:9 88:18 argued [2] 3:24 59:2 argues [1] 40:1 argument [19] 1:14 2:2,5,8 3:4,7 16:22 44:2,2 55:3,8,22 57:4 63:1 82:1 88:20 92:16 93:15 95:19 arguments [3] 40:8 55:20 80:9 arise [2] 5:3 56:23 around [1] 44:22 arson [2] 79:24 87:23 arsonist [1] 87:24 art [2] 4:5 7:21 as-applied [4] 5:11 56:24 70:12 80:24 aside [1] 69:18 asks [4] 19:11 57:11,16 91:1</p>	<p>aspect [1] 59:12 aspects [2] 59:16 91:7 assert [1] 43:18 asserting [2] 75:19,23 assist [7] 9:25 57:17 60:7 61:3,8,19,25 assistance [3] 16:10 30:11,18 assisting [5] 46:23 52:14 61:15,17 68:23 assistive [1] 27:1 associate [6] 15:18 17:5,16,22 30:13 48:2 associated [2] 10:16 15:9 assume [5] 40:19,23 62:9,15,18 assuming [4] 30:9 44:25 47:22 94:6 assumption [3] 41:7,10,14 assumptions [6] 40:22,23 42:1,3,9 43:8 asunder [1] 36:15 attempt [1] 71:20 attempted [1] 88:18 apologized [1] 26:17 attribute [1] 21:5 available [2] 73:10 80:24 avoidance [2] 4:13 13:6 avoiding [1] 13:7 aware [5] 5:16 32:22 49:3,12 59:14 away [1] 61:16 awkward [4] 56:19 75:5,18 77:6</p>
<p>2</p> <p>2 [6] 10:21 19:7 54:15 92:12 93:1 94:24 20 [1] 76:11 2023 [1] 1:11 22-179 [1] 3:4 2422(a) [1] 95:11 27 [1] 1:11</p>	<p>across [1] 63:18 act [10] 37:21 67:25 68:21 83:25 85:6 87:3,4,16 95:5,11 acting [1] 32:4 action [4] 30:14 48:3,6 82:12 actions [1] 37:11 active [1] 19:22 activists [1] 84:14 activities [9] 4:23 28:22,24 29:8 33:1 34:12 73:3,7 96:9 activity [11] 4:6 29:10 32:22,25 73:1,22 82:16 97:1,2,6,8 actual [4] 71:21 72:10 90:3,14 actually [13] 8:16 18:12,24 35:5,18 45:15 50:25 60:6 71:10 77:3 81:2 82:5 85:12 actus [3] 17:4,8,11 add [1] 33:15 addition [2] 73:20,21 additionally [1] 14:5 adjudication [1] 45:14 administrative [1] 58:15 admitted [1] 88:25 admitting [1] 39:12 adopt [1] 58:23 adopted [1] 4:12 adopting [1] 10:3 advantage [1] 75:17 advice [3] 7:4 74:2 83:18 advise [1] 83:17 advising [2] 70:3 84:14 advocacy [4] 5:1 13:10 14:13,14 affect [4] 46:18 47:2 69:3,14 affected [2] 76:1,2 afraid [1] 74:1 agree [8] 10:8,14 19:20 20:</p>	<p>6 48:15 76:24 85:4,7 agrees [2] 4:3 27:4 ahead [10] 10:10,11,12 21:14 22:18 28:12 38:11,12 62:12 63:4 aid [12] 15:6,7,9 28:17 54:16,17,18 91:18,22,22 92:25 94:24 aided [2] 52:12,19 aiding [66] 4:6 7:12,18 8:5,10 9:4,10,20 10:16 13:19 14:12 15:7,14,16 17:1,11 18:3,13 20:25 25:9 29:12 30:15,20 35:1,8,17 37:20 38:5 46:23,23 47:19 50:24 51:19,21,25 52:2,3,4,9,11,13 53:3,6,11,21 54:1,2,10 55:5 57:13,21,23 62:7,24 68:21 69:9 77:21 83:22,24 84:6,9,25 85:7 86:25 93:3,8 aiding-and-abetting [21] 5:4,7 10:22 12:6 13:5 14:24 15:1 16:21 20:5 32:18 34:1 37:16 38:2 47:8,13 48:1,9 56:17 86:3 87:14 92:12 aiding-and-betting [1] 46:11 aiding-or-abetting [1] 51:18 aids [3] 19:8,8 32:25 aims [2] 98:18,20 airing [1] 40:8 AL [1] 83:14 aliens [1] 8:14 ALITO [25] 25:13 40:16 41:11 54:20 62:10,12 63:3,9,17,20 64:7,13,24 65:5,12,15,22 66:2,5,14,24 67:9,14 86:8 97:8 Alito's [2] 68:18 86:12 allow [2] 26:7 48:9 allowed [1] 67:17 allowing [1] 23:17 almost [3] 6:15 43:21 70:17 alone [2] 23:2 57:20 already [5] 22:14 54:4 56:15 83:16 97:14 alternative [2] 55:19 89:8 although [1] 27:7 Alvarez [1] 49:5 amending [1] 49:20 Amendment [49] 3:18 4:19,21 5:9 18:11 19:3 23:5 25:25 26:7,20 27:9 29:5 33:19,22 34:10 36:15 38:8 40:3 50:2 55:7 56:18 58:13,20 59:6,13,16,19 60:13,24 61:11 63:11,23 64:2 65:8 66:8 70:6,21 79:21 81:5 82:16 88:5 89:5,17,18 90:5 92:16 96:11,20 97:3</p>	<p>American [1] 71:18 amici [3] 45:22 79:6 83:14 amicus [5] 6:15 49:24 73:7,12 83:14 among [1] 9:24 amount [3] 15:8 47:14 77:20 analog [1] 96:19 analysis [13] 37:4 41:17 42:24 59:10 67:4 69:4,14 70:13 71:9 79:3 88:16 90:6 98:1 analyze [1] 12:6 analyzed [1] 12:5 Another [8] 14:3,9,17 41:11,13 47:25 51:20 79:20 answer [4] 32:2 46:13 47:3,20 answering [1] 86:12 answers [1] 19:1 anybody [2] 12:1 75:7 anyone's [1] 61:18 anytime [1] 63:23 anyway [1] 8:15 apologize [1] 68:13 appear [2] 11:2 21:19 APPEARANCES [1] 1:17 applicable [1] 23:4 application [7] 5:13 49:21 51:3,10 52:17 53:5 80:2 25:2,4 42:21 43:4,6 applied [10] 5:18 6:1 12:9 41:14 45:8 59:10,11,15 66:10 70:18 applies [1] 12:17 apply [12] 13:3,5,18 36:25 38:2 44:5 59:1 65:19 70:16 71:15 84:7 92:6 approach [2] 60:17 71:1 appropriate [3] 11:10 28:5 40:13 area [3] 9:15 19:1,4 aren't [3] 7:10 27:12 84:10 arguable [1] 12:18 argue [3] 39:14 77:9 88:18 argued [2] 3:24 59:2 argues [1] 40:1 argument [19] 1:14 2:2,5,8 3:4,7 16:22 44:2,2 55:3,8,22 57:4 63:1 82:1 88:20 92:16 93:15 95:19 arguments [3] 40:8 55:20 80:9 arise [2] 5:3 56:23 around [1] 44:22 arson [2] 79:24 87:23 arsonist [1] 87:24 art [2] 4:5 7:21 as-applied [4] 5:11 56:24 70:12 80:24 aside [1] 69:18 asks [4] 19:11 57:11,16 91:1</p>	<p>aspect [1] 59:12 aspects [2] 59:16 91:7 assert [1] 43:18 asserting [2] 75:19,23 assist [7] 9:25 57:17 60:7 61:3,8,19,25 assistance [3] 16:10 30:11,18 assisting [5] 46:23 52:14 61:15,17 68:23 assistive [1] 27:1 associate [6] 15:18 17:5,16,22 30:13 48:2 associated [2] 10:16 15:9 assume [5] 40:19,23 62:9,15,18 assuming [4] 30:9 44:25 47:22 94:6 assumption [3] 41:7,10,14 assumptions [6] 40:22,23 42:1,3,9 43:8 asunder [1] 36:15 attempt [1] 71:20 attempted [1] 88:18 apologized [1] 26:17 attribute [1] 21:5 available [2] 73:10 80:24 avoidance [2] 4:13 13:6 avoiding [1] 13:7 aware [5] 5:16 32:22 49:3,12 59:14 away [1] 61:16 awkward [4] 56:19 75:5,18 77:6</p>
<p>3</p> <p>3 [1] 2:4 32 [1] 95:7 35 [1] 72:18 373 [3] 60:14 92:10,24</p>	<p>across [1] 63:18 act [10] 37:21 67:25 68:21 83:25 85:6 87:3,4,16 95:5,11 acting [1] 32:4 action [4] 30:14 48:3,6 82:12 actions [1] 37:11 active [1] 19:22 activists [1] 84:14 activities [9] 4:23 28:22,24 29:8 33:1 34:12 73:3,7 96:9 activity [11] 4:6 29:10 32:22,25 73:1,22 82:16 97:1,2,6,8 actual [4] 71:21 72:10 90:3,14 actually [13] 8:16 18:12,24 35:5,18 45:15 50:25 60:6 71:10 77:3 81:2 82:5 85:12 actus [3] 17:4,8,11 add [1] 33:15 addition [2] 73:20,21 additionally [1] 14:5 adjudication [1] 45:14 administrative [1] 58:15 admitted [1] 88:25 admitting [1] 39:12 adopt [1] 58:23 adopted [1] 4:12 adopting [1] 10:3 advantage [1] 75:17 advice [3] 7:4 74:2 83:18 advise [1] 83:17 advising [2] 70:3 84:14 advocacy [4] 5:1 13:10 14:13,14 affect [4] 46:18 47:2 69:3,14 affected [2] 76:1,2 afraid [1] 74:1 agree [8] 10:8,14 19:20 20:</p>	<p>6 48:15 76:24 85:4,7 agrees [2] 4:3 27:4 ahead [10] 10:10,11,12 21:14 22:18 28:12 38:11,12 62:12 63:4 aid [12] 15:6,7,9 28:17 54:16,17,18 91:18,22,22 92:25 94:24 aided [2] 52:12,19 aiding [66] 4:6 7:12,18 8:5,10 9:4,10,20 10:16 13:19 14:12 15:7,14,16 17:1,11 18:3,13 20:25 25:9 29:12 30:15,20 35:1,8,17 37:20 38:5 46:23,23 47:19 50:24 51:19,21,25 52:2,3,4,9,11,13 53:3,6,11,21 54:1,2,10 55:5 57:13,21,23 62:7,24 68:21 69:9 77:21 83:22,24 84:6,9,25 85:7 86:25 93:3,8 aiding-and-abetting [21] 5:4,7 10:22 12:6 13:5 14:24 15:1 16:21 20:5 32:18 34:1 37:16 38:2 47:8,13 48:1,9 56:17 86:3 87:14 92:12 aiding-and-betting [1] 46:11 aiding-or-abetting [1] 51:18 aids [3] 19:8,8 32:25 aims [2] 98:18,20 airing [1] 40:8 AL [1] 83:14 aliens [1] 8:14 ALITO [25] 25:13 40:16 41:11 54:20 62:10,12 63:3,9,17,20 64:7,13,24 65:5,12,15,22 66:2,5,14,24 67:9,14 86:8 97:8 Alito's [2] 68:18 86:12 allow [2] 26:7 48:9 allowed [1] 67:17 allowing [1] 23:17 almost [3] 6:15 43:21 70:17 alone [2] 23:2 57:20 already [5] 22:14 54:4 56:15 83:16 97:14 alternative [2] 55:19 89:8 although [1] 27:7 Alvarez [1] 49:5 amending [1] 49:20 Amendment [49] 3:18 4:19,21 5:9 18:11 19:3 23:5 25:25 26:7,20 27:9 29:5 33:19,22 34:10 36:15 38:8 40:3 50:2 55:7 56:18 58:13,20 59:6,13,16,19 60:13,24 61:11 63:11,23 64:2 65:8 66:8 70:6,21 79:21 81:5 82:16 88:5 89:5,17,18 90:5 92:16 96:11,20 97:3</p>	<p>American [1] 71:18 amici [3] 45:22 79:6 83:14 amicus [5] 6:15 49:24 73:7,12 83:14 among [1] 9:24 amount [3] 15:8 47:14 77:20 analog [1] 96:19 analysis [13] 37:4 41:17 42:24 59:10 67:4 69:4,14 70:13 71:9 79:3 88:16 90:6 98:1 analyze [1] 12:6 analyzed [1] 12:5 Another [8] 14:3,9,17 41:11,13 47:25 51:20 79:20 answer [4] 32:2 46</p>	

Official

<p>below [2] 4:7 39:14 benefit [2] 40:6 80:13 best [1] 54:13 between [8] 4:25 15:22 21:18 30:8 60:3 61:3 65:12 83:22 beyond [3] 26:21 63:22 91:7 BHANDARI [59] 1:21 2:6 57:3,4,6 59:8,14,21 60:5 61:6 62:22 63:7,15,20 64:13 65:3,6,21 66:4,6,18 67:3,12,18 68:12,16 69:15,21 70:25 71:24 72:7 73:2 74:6 75:3,22 76:3 77:9 78:6,13,25 81:6 82:17,23 83:3,10 84:22 85:4 86:19,23 87:9,17,25 88:12 89:3 90:2,21,25 92:4,21 bit [4] 15:17 18:22 44:18 86:11 Black [1] 72:16 blameworthy [3] 25:19,23 27:20 board [1] 63:18 book [1] 80:17 books [10] 16:9 43:24 46:4 72:14,18 74:3 77:16 80:18 81:8 90:13 border [3] 33:6 52:5 90:22 borne [1] 42:23 borrow [1] 86:25 both [13] 4:17 8:20 9:24 29:7 38:3 42:6 84:24 85:2,4 87:1 92:7,18 93:7 boycott [1] 95:8 BRIAN [5] 1:18 2:3,9 3:7 93:15 bridge [2] 56:8,15 brief [7] 15:4 50:10 56:10 73:7,12 83:14 95:7 briefing [1] 39:19 briefs [3] 6:15 45:22 49:24 bring [3] 7:21 19:12 46:12 bringing [2] 23:8 52:5 broad [8] 21:1 38:20 39:21 45:25 49:16 77:13,15 78:11 broadened [1] 61:12 broader [8] 38:15,22 46:20 55:15 60:8 61:5,7,25 broadest [1] 3:22 broadly [1] 4:1 brought [3] 54:20 78:24 79:1 builds [1] 67:4 bunch [2] 29:18 31:20 burden [2] 36:1,3 burdening [1] 65:22 burned [1] 79:23 business [1] 17:15 buy [1] 64:19 bypass [1] 98:9</p>	<p style="text-align: center;">C</p> <p>call [2] 7:12 51:2 called [1] 39:18 came [2] 1:13 39:17 candidly [3] 14:19 26:12 49:3 cannot [2] 58:7 65:1 canon [1] 4:13 canonical [1] 30:15 capable [1] 47:12 capture [1] 9:19 care [3] 12:18 14:9,16 careful [1] 37:13 carefully [1] 43:20 carjacking [1] 46:15 carries [1] 91:23 carry [5] 4:9 25:5 94:20,24 95:1 Case [42] 3:4 5:22 6:5,9,11,14,16 10:4 15:16 27:21 38:17 39:15,16 40:11 43:22 45:9 50:11,21 51:2 53:14 54:24,24 56:12 57:19 64:21 66:11 67:12 75:5,22 77:8,11 78:1,15,16 81:10 83:12,16 88:18 92:7 95:6 99:5,6 case-by-case [1] 88:15 cases [28] 11:22,23 12:3,5 13:22 14:9,17,18 16:21 26:15 31:8 32:12,17,18,23 38:16 39:11 43:2 49:4,5 68:5 69:6 70:13,20 72:3 86:14 96:7 98:9 cash [1] 12:9 cashing [1] 14:25 categorically [6] 58:5 63:22 65:7 88:4,9 89:16 categories [4] 34:9 58:10 69:6 96:22 category [6] 14:9 19:13 56:13 57:25 64:4 69:13 caused [1] 35:5 cautious [1] 98:2 century [1] 3:11 cert [1] 55:23 certain [8] 3:12 19:23 25:19 33:18 64:16 73:14 88:13 96:22 certainly [5] 7:7 25:17 49:11 70:11 91:9 certify [2] 73:13 91:1 challenge [19] 11:12 22:25 23:6,8,16,18 48:18 50:20 62:20 70:12,21 71:11 72:21 74:23 79:7 80:12,24 83:13 95:10 challenges [5] 5:11 33:20 48:20,24 50:2 change [1] 10:2 changed [2] 21:11 63:6 charge [2] 38:22 73:11 charged [2] 82:4,9</p>	<p>charitable [2] 28:14 73:23 charities [1] 28:23 charity [1] 30:18 CHIEF [25] 3:3,9 10:13 32:7,11,14 38:9,12 40:14 46:6 48:12 51:5 57:1,6 59:18,22 61:1 78:19,22 80:14 86:5 91:12 93:12,17 99:4 child [3] 64:22 71:24 75:14 chill [10] 28:16 33:13 43:12,23 45:16 73:4 74:13 81:19 91:3,8 chilled [6] 29:8 73:22 74:11 75:7 81:24 83:8 chilling [8] 43:15 73:17 74:5,7 77:6,14 90:12 98:15 chills [1] 73:1 choice [3] 60:9 72:25 79:8 choices [2] 72:23 90:10 chosen [2] 37:12 90:3 Ciminelli [1] 38:17 Circuit [14] 3:19 5:18 11:6,16 20:21 39:18 40:12,12 54:22 55:10,11,14 78:16 98:5 Circuit's [2] 45:25 55:18 circumstance [3] 27:17,23 72:4 circumstances [14] 13:4,8 14:4 26:9 27:25 37:1,23 44:6 50:24 60:19 63:19 68:25 80:23 86:20 cite [5] 15:3 50:10,21 56:9 95:7 cited [1] 57:19 cites [1] 9:22 cities [1] 91:1 citizen [2] 8:25 68:5 citizenship [1] 3:16 City [2] 73:12 91:4 civil [28] 4:17 27:24 28:1,2 30:24 41:12 54:21 55:6,11 56:6,12 58:1 62:19 65:24 67:21 68:22 69:7,24 86:15,18 87:8,11 88:3,14,20 95:17,23 96:2 civil/criminal [2] 55:2 69:5 civilly [3] 26:18 96:9,15 claim [2] 68:13 69:25 clarify [1] 36:22 clarity [1] 36:21 class [1] 24:5 classic [1] 15:15 clause [2] 52:6 55:5 clauses [2] 52:4,8 clear [5] 64:15 75:24 83:21 85:22 88:1 clearly [1] 84:12 client [1] 6:24 client's [1] 80:13 clients [1] 83:19 close [3] 84:20 91:4 93:21 closely [1] 83:16 closest [1] 15:2</p>	<p>Coalition [5] 71:2,16 72:9,15 74:8 coerce [1] 50:16 coercing [1] 95:13 colleague [1] 97:23 Collins [1] 22:2 combine [1] 23:9 come [14] 6:7 8:2 18:8 26:11,23 27:2 37:21 38:20 40:22 49:4 74:23 85:10,12,17 comes [11] 11:1 18:1,1,3 34:23 44:4 50:8 53:7 54:4 75:5 88:23 coming [7] 22:9 39:12 49:19 83:1,6 84:25 91:4 commands [1] 19:9 commence [3] 4:22 34:12 56:14 commendable [1] 81:14 commentators [1] 9:16 commerce [1] 95:14 commit [5] 15:15 34:4 37:24 66:3,15 commitment [1] 17:19 commits [1] 97:7 committed [1] 53:10 committee [2] 60:21 73:8 common [2] 4:18 30:4 communications [3] 12:21 41:8,20 community [3] 31:21 68:6 84:14 compelling [3] 65:9 68:13 89:6 complete [1] 83:25 completed [2] 87:16,22 completion [1] 17:22 compliance [2] 73:13 91:2 complicated [1] 56:2 component [1] 59:6 concede [2] 62:16,19 conceded [1] 17:3 concedes [2] 57:9 76:21 conceding [1] 38:18 conceive [1] 26:24 concept [4] 19:7,12 47:8 84:8 conception [1] 38:4 concepts [6] 9:20 18:13 86:25 87:2 92:19 93:8 concern [9] 4:15 27:3 28:21 29:6 46:2 47:3,5,16 82:19 concerned [2] 43:15 74:12 concerns [8] 39:20 45:21 47:9,15 50:5 60:25 70:6 82:18 conclude [1] 20:16 conclude [1] 38:6 conduct [38] 3:17 14:15 25:15,19,20,21 26:2,3,9 27:1,6,19 28:4 29:4 40:2 41:12 43:18 55:6 56:4,6 58:6,8 63:13 77:19 78:11 79:15,</p>	<p>18 85:11 88:3 89:8 96:2,25 97:18,20,23 98:18,19,21 confirm [1] 4:8 conflate [1] 83:23 conform [1] 74:14 Congress [56] 3:11 9:9,9,12,25 18:12,20,24 19:16 20:2,15,22 21:5,7 22:12 26:1,7 28:4 33:9 49:19 51:19 57:15,17,19 58:12 60:6,6,10,14,16 61:11,16,21,24 62:4 66:19 67:22,24 70:4 74:18,19 85:23,24 86:1,14 90:23 92:9,23 93:3,7 94:2,4,7,9 97:10,17 Congress's [3] 19:22 57:14 62:15 congressional [1] 92:22 connote [1] 7:18 connotes [1] 35:17 conscious [1] 19:22 consequences [1] 7:1 consideration [1] 55:25 considered [1] 53:11 consistent [3] 23:18 39:7,11 consistently [2] 58:9 62:5 constellation [1] 39:20 constitute [2] 48:6 85:14 constitutional [10] 3:25 4:13 43:6 45:8 51:10 52:16 53:4 90:9 95:10 96:1 constitutionally [4] 70:16,18 74:21 76:6 construction [5] 28:15 46:10 58:24 59:1 62:17 construe [4] 57:22 71:4 95:20,21 construes [1] 71:14 content-based [1] 65:25 contesting [1] 96:13 context [7] 4:8,9 20:2,19 39:16 48:7 59:15 contexts [1] 38:3 continue [4] 22:5,13 36:4 38:25 contours [1] 97:16 contract [2] 61:16,17 control [1] 59:3 conversations [1] 30:5 convey [1] 95:16 convict [1] 87:11 convicted [3] 76:10 77:24 91:25 convictions [4] 58:24 77:12,17 81:10 core [3] 43:5 51:10 52:16 Correct [2] 7:25 10:18 11:20 22:23 24:15,18,20 25:9 55:13 63:15 65:21 67:3 78:6,13 82:17 87:8,9,16,17 90:25 92:4 corroborative [1] 60:20</p>
---	---	---	--	---

Official

<p>costs ^[1] 42:20</p> <p>counsel ^[7] 57:2 59:18 62:8 68:11 86:6 93:13 99:5</p> <p>counseling ^[1] 32:21</p> <p>count ^[1] 37:25</p> <p>country ^[14] 27:24 28:25 30:10,19 32:5 41:6,21 52:7,15,20 62:2 75:9 84:16 85:15</p> <p>counts ^[1] 76:10</p> <p>couple ^[6] 26:11 29:1 31:5 34:7 44:14 47:5</p> <p>course ^[4] 11:13 63:25 89:7 91:3</p> <p>COURT ^[69] 1:1,14 3:10 4:20 5:23 6:5,17 8:7 9:16 10:3,6,24 15:5,8 20:13,17 21:4 26:13,14 36:25 37:5,6 42:3,19 43:3,10 55:23,24 56:8 57:7,11,16,24 58:9,22 59:10 64:15 66:9 71:1,8,17 72:10,12 74:6,8,16 78:8,16 79:17,24 80:20 81:18 82:21 83:6,7 84:12 85:25 87:10 90:5 94:5,12 95:9 96:6,21 98:3,7,11,16 99:3</p> <p>Court's ^[6] 5:15 12:13 43:1 49:4 59:4 96:20</p> <p>courts ^[4] 9:19 19:5 23:23 50:22</p> <p>cover ^[3] 14:13 62:6 63:24</p> <p>covered ^[7] 16:14,18,20 29:10,16 52:9,14</p> <p>covering ^[2] 51:19,23</p> <p>covers ^[3] 54:15 78:11 95:22</p> <p>craft ^[1] 74:18</p> <p>create ^[2] 36:20 57:24</p> <p>crime ^[21] 3:12 25:16 26:9 34:4 35:12,13,15 37:24 53:10 54:17,17 60:15 65:4,23 66:7 87:6,7,19,22 89:11,15</p> <p>crimes ^[4] 58:3 62:23 63:2 87:14</p> <p>criminal ^[15] 4:3,17 26:3 27:12 30:24 56:4 57:25 62:18 63:14 83:12 87:3,3,10 88:2 95:18</p> <p>criminal/civil ^[1] 93:21</p> <p>criminalization ^[1] 63:12</p> <p>criminalize ^[9] 26:1 37:11,17 58:14 68:21 70:7 75:16 86:14,18</p> <p>criminalized ^[1] 65:2</p> <p>criminalizes ^[2] 33:24 37:13</p> <p>criminalizing ^[7] 33:17 64:10 65:17 67:6 70:1 88:13 89:9</p> <p>criminally ^[1] 96:16</p> <p>critical ^[1] 85:21</p> <p>criticize ^[2] 74:19 75:1</p> <p>cross ^[1] 79:23</p> <p>crossed ^[2] 56:8,15</p>	<p>culpability ^[2] 97:4,7</p> <p>curious ^[1] 91:17</p> <p>current ^[1] 81:7</p> <p>currently ^[1] 90:1</p> <p>curtail ^[1] 83:18</p> <p>Customs ^[3] 33:3 90:20,22</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[2] 1:10,19</p> <p>damage ^[1] 79:25</p> <p>danger ^[2] 73:4 98:12</p> <p>data ^[1] 49:1</p> <p>day ^[4] 12:12,22 41:20 71:6</p> <p>day-to-day ^[1] 28:23</p> <p>dead ^[1] 73:10</p> <p>deal ^[1] 11:7</p> <p>dealing ^[1] 47:12</p> <p>debating ^[1] 45:24</p> <p>decades ^[2] 21:7 46:3</p> <p>deceived ^[1] 76:15</p> <p>decide ^[4] 27:18 40:12 54:22 56:21</p> <p>decided ^[3] 31:23 89:11,14</p> <p>deciding ^[2] 47:18 48:5</p> <p>decision ^[2] 43:14 44:20</p> <p>decline ^[1] 55:17</p> <p>defendant ^[7] 8:2,9 50:19 76:4 78:9 79:15,22</p> <p>defendant's ^[1] 80:1</p> <p>defense ^[1] 81:5</p> <p>define ^[6] 9:3,7,8 24:17,19 36:25</p> <p>defined ^[1] 24:25</p> <p>defining ^[1] 87:7</p> <p>definitely ^[1] 29:4</p> <p>definition ^[1] 87:1</p> <p>definitively ^[1] 49:8</p> <p>defrauding ^[1] 75:10</p> <p>deliberate ^[1] 60:9</p> <p>delineated ^[1] 92:6</p> <p>demand ^[3] 15:17 45:16 94:5</p> <p>demands ^[1] 48:1</p> <p>demonstrated ^[2] 74:5,7</p> <p>demonstration ^[1] 43:12</p> <p>deny ^[1] 58:18</p> <p>depart ^[2] 43:16 45:13</p> <p>Department ^[2] 1:19 33:3</p> <p>departure ^[1] 45:6</p> <p>depend ^[1] 72:22</p> <p>depending ^[1] 90:9</p> <p>deportation ^[1] 28:2</p> <p>Deputy ^[1] 1:18</p> <p>described ^[3] 12:15 20:14 56:11</p> <p>describes ^[1] 97:23</p> <p>describing ^[1] 31:9</p> <p>description ^[1] 22:7</p> <p>deserving ^[2] 28:8 97:13</p> <p>deter ^[1] 28:21</p> <p>determination ^[1] 28:5</p> <p>determine ^[1] 56:3</p> <p>difference ^[5] 21:18,25 30:8 65:11 88:10</p>	<p>different ^[25] 9:17 12:10 19:6,10 21:17,19,22 27:2 29:18,20,21 31:5 37:1 39:13 44:3,12 46:15 47:1 51:24 60:16 84:10 91:18 92:8 93:10 98:4</p> <p>difficulties ^[1] 98:1</p> <p>difficulty ^[1] 50:23</p> <p>directed ^[3] 66:19 87:11 88:3</p> <p>disabled ^[1] 66:16</p> <p>disagree ^[7] 9:14 24:22 67:15 76:8 78:20,23,25</p> <p>discriminatory ^[1] 80:2</p> <p>discussed ^[1] 97:9</p> <p>discussing ^[1] 80:17</p> <p>dismissing ^[1] 50:23</p> <p>dispute ^[2] 7:16 69:13</p> <p>disregard ^[3] 14:7 61:23 94:18</p> <p>dissent ^[1] 22:3</p> <p>dissenting ^[1] 4:7</p> <p>distinct ^[1] 55:24</p> <p>distinction ^[7] 55:2 60:2 61:2 69:5 83:22 93:21 95:18</p> <p>district ^[5] 6:5,13,17 78:15 83:7</p> <p>disturbed ^[1] 76:11</p> <p>division ^[1] 51:17</p> <p>doctor ^[1] 11:24</p> <p>doctors ^[1] 41:3</p> <p>doctrine ^[7] 3:19 6:3 48:1 74:12 77:10 82:19 98:6</p> <p>doing ^[4] 34:5 38:23 52:23 82:5</p> <p>domestic ^[1] 85:16</p> <p>done ^[7] 26:14 48:17 79:5 82:14 87:4,13 94:4</p> <p>door ^[1] 54:5</p> <p>down ^[3] 46:2 51:14 56:19</p> <p>dozen ^[1] 9:23</p> <p>draconian ^[1] 27:11</p> <p>draft ^[3] 13:7 47:10 86:2</p> <p>drafted ^[1] 60:14</p> <p>dramatically ^[1] 69:10</p> <p>draw ^[5] 4:25 13:9,14 85:22 86:22</p> <p>drawing ^[2] 15:22 16:4</p> <p>drug ^[1] 47:11</p> <p>drugs ^[1] 64:19</p> <p>Dubin ^[1] 38:17</p> <p>during ^[2] 46:3 54:16</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[2] 9:23 83:17</p> <p>earlier ^[5] 10:4 20:12,13 32:16 49:9</p> <p>earning ^[1] 7:3</p> <p>easier ^[1] 72:5</p> <p>economy ^[1] 20:12</p> <p>edge ^[1] 51:2</p> <p>editorial ^[1] 14:14</p> <p>effect ^[6] 22:20 73:18 74:5,</p>	<p>7 77:14 97:22</p> <p>effectively ^[1] 80:21</p> <p>effectuates ^[1] 64:17</p> <p>effort ^[1] 19:22</p> <p>either ^[7] 43:3,7,9 50:23 81:1 82:25 98:14</p> <p>electrical ^[1] 95:6</p> <p>element ^[1] 34:20</p> <p>elements ^[14] 22:21 31:25 76:5 78:14 81:11,16 84:11,13 85:1,2 91:19,24 92:8 93:10</p> <p>eliminate ^[1] 4:14</p> <p>Elonis ^[1] 9:6</p> <p>emphasize ^[3] 56:20 83:20 97:17</p> <p>emphasized ^[2] 5:23 42:20</p> <p>empirical ^[2] 49:15 71:9</p> <p>encompass ^[1] 41:1</p> <p>encourage ^[18] 3:12,21 4:4 9:3,23 11:18 17:6,7 40:20 50:15 57:20 60:8 61:4,6 62:1 84:5 91:21 94:19</p> <p>encouraged ^[3] 6:6 66:15 76:17</p> <p>encouragement ^[5] 60:22 66:17 69:18 76:13 91:5</p> <p>encourages ^[2] 20:15 21:9</p> <p>encouraging ^[11] 10:7 22:3,13 27:4 38:25 64:25 65:15 66:2,10,20 95:8</p> <p>end ^[4] 12:12 14:25 16:14 89:10</p> <p>ending ^[1] 95:12</p> <p>enforce ^[1] 6:2</p> <p>engage ^[13] 25:19 26:8,16 37:3 64:8,11 65:1,16 67:23 71:5,6 77:18 95:14</p> <p>engaged ^[8] 32:22,25 71:10 74:21,24 76:16 81:20 82:11</p> <p>engages ^[2] 25:21 79:18</p> <p>engaging ^[3] 25:20 82:15 85:11</p> <p>enhanced ^[3] 24:4,7 25:1 22 23:3,10 25:5</p> <p>enough ^[7] 15:9,11 30:6 60:22 70:23,24 77:18</p> <p>enter ^[4] 34:16 50:18 52:15,20</p> <p>enticing ^[1] 95:13</p> <p>entirely ^[1] 6:15</p> <p>entities ^[1] 33:4</p> <p>entitled ^[2] 68:7 76:4</p> <p>entry ^[3] 61:15,15,18</p> <p>ESHA ^[3] 1:21 2:6 57:4</p> <p>especially ^[5] 39:25 50:5 51:15 60:23 98:8</p> <p>ESQ ^[3] 2:3,6,9</p> <p>ESQUIRE ^[1] 1:21</p> <p>essence ^[1] 43:19</p>	<p>essentially ^[3] 44:4 79:10 95:19</p> <p>establish ^[1] 92:3</p> <p>evasion ^[1] 47:11</p> <p>even ^[33] 6:16 24:1,21,22 26:18 28:14 32:3 35:20 40:25 42:16 43:8 51:1 57:22 58:22 67:19 68:9 69:7,7,20 80:7 88:17 91:4,10 95:20,25 96:9 98:13,21</p> <p>ever-changing ^[1] 73:16</p> <p>everybody ^[1] 89:22</p> <p>everyday ^[1] 28:22</p> <p>Everyone ^[3] 4:3 27:3 89:12</p> <p>everything ^[1] 33:21</p> <p>evidence ^[2] 18:10 23:7</p> <p>evidenced ^[1] 62:5</p> <p>exact ^[2] 16:1 18:14</p> <p>Exactly ^[7] 5:3 7:10 15:23 19:11 23:25 49:10 97:18</p> <p>example ^[13] 26:4 50:10 51:16 64:18 67:24 70:2 74:18 75:21 82:6,7 85:16 89:20 90:15</p> <p>examples ^[7] 29:19 32:12 41:2 50:21 68:20 71:21 89:21</p> <p>exceed ^[1] 38:18</p> <p>exception ^[2] 58:2 64:4</p> <p>exclude ^[1] 19:23</p> <p>excluded ^[1] 48:24</p> <p>exercise ^[1] 37:3</p> <p>exist ^[2] 39:22 70:21</p> <p>existing ^[1] 46:16</p> <p>expand ^[1] 58:10</p> <p>expanded ^[1] 62:1</p> <p>expansion ^[3] 58:19 61:23 62:3</p> <p>experience ^[1] 40:7</p> <p>expiring ^[1] 8:21</p> <p>explain ^[4] 7:8 29:15 93:2,7</p> <p>explained ^[3] 4:7 84:4,11</p> <p>explicit ^[1] 10:23</p> <p>explicitly ^[1] 42:4</p> <p>exposed ^[1] 31:24</p> <p>expresses ^[1] 67:16</p> <p>expressive ^[1] 98:19</p> <p>extension ^[1] 23:17</p> <p>extent ^[7] 26:13 44:15 51:20 55:4 56:3 61:4 79:8</p> <p>extraordinary ^[7] 20:23 45:13 80:19 94:4,6 98:2,23</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facial ^[3] 72:21,21 79:7</p> <p>facially ^[3] 3:20 5:12 90:7</p> <p>facilitate ^[3] 15:10,19 97:6</p> <p>facilitates ^[3] 31:2 97:1,12</p> <p>facilitating ^[6] 4:17 8:8 28:8 52:20 95:22 96:2</p> <p>facilitation ^[3] 48:7 96:16</p>
--	---	---	--	--

Official

<p>97:19 fact [17] 9:25 10:3 19:15 37:2 41:1,12 54:3,13,16 71:9,13,17 73:5 74:9,10 77:25 87:13 facts [2] 76:5 77:4 factual [2] 37:1 83:6 fails [1] 23:5 fair [3] 45:15 47:5,14 fairness [1] 39:9 fall [2] 71:19 89:2 fallback [1] 95:19 false [1] 76:16 familiar [1] 28:19 family [5] 13:11 14:21 35:24 36:2 41:23 family's [1] 79:23 far [1] 37:16 fear [1] 91:6 feature [1] 25:14 federal [1] 91:2 fee [1] 89:14 felony [4] 60:19 74:19 84:18 85:22 Fernandez [1] 78:17 fight [1] 13:1 fighting [2] 33:20 44:17 figure [2] 51:8 81:23 figuring [1] 11:13 file [1] 90:3 filing [1] 90:13 final [1] 62:3 finally [4] 58:22 73:15 95:2 97:24 financial [1] 23:10 find [6] 6:22 15:2 22:21 74:25 86:24 98:13 finding [1] 83:7 fine [2] 56:24 82:9 finished [1] 68:15 First [59] 3:18 4:19,21 5:9 16:12 22:5 23:5 24:7,11,13,17,19 25:25 26:7,12,20 27:8 29:5 33:19,22 34:6,10 36:15 38:7 40:3,25 41:7 50:2 55:7 56:18 58:13,20 59:6,12,13,16 60:24 63:11,22,25 64:1 65:8 66:8 70:6,20 72:8 79:21 81:5 82:15 88:5 89:5,17,18 90:5 92:15 93:23 96:10,20 97:3 fits [1] 64:3 five [7] 10:4 20:13 33:24 40:7 72:15 84:18 91:10 FLETCHER [109] 1:18 2:3,9 3:6,7,9 5:20 6:10,13,20 7:5,15,20,25 8:4,16,20,24 9:14 10:19 11:9,17 12:4 13:1,16,25 14:3 16:5,16,19,25 17:10,24 18:2,6,16,19,25 19:25 20:11 21:13,23 22:23 23:12,14,21 24:9,15,20 25:10,13 26:10 28:7 29:</p>	<p>1,17 30:1,7 31:4,15,18 32:1,9,13 34:7,22 35:1,7,16 36:9,16,19,23 37:9,15,22 39:2,8,15 40:10,18 42:2,14,17 44:11,14 45:3 47:4 48:14 49:2 50:8,14,18 51:24 52:2,13,24 53:1,17 54:9,12,15,25 55:13 56:7 71:25 78:23 93:14,15,17 floated [1] 22:2 floating [1] 19:18 focus [1] 6:15 focused [2] 20:24 59:19 focusing [1] 21:16 follow [3] 62:14 68:18 73:20 food [13] 28:17 29:24 31:1,10,11,25 46:21 53:24 73:25 82:8 85:11,12,13 Footnote [1] 15:2 Ford [1] 50:11 forgetting [1] 89:22 form [5] 15:6 43:24 81:7 97:20,20 former [1] 61:5 formulation [2] 20:16 30:15 forth [1] 64:5 found [3] 6:21 10:25 25:5 four [1] 39:11 frankly [1] 50:22 fraud [2] 46:16 76:10 fraudulent [1] 3:16 free [7] 58:12 71:1,16 72:9,15 74:8 86:2 Freedom [1] 73:8 frequently [1] 71:7 friend [3] 11:25 13:24 15:23 friends [2] 13:11 41:3 front [1] 18:15 full [4] 14:4 18:4,8 79:8 fully [1] 44:25 fundamentally [1] 96:5 funding [3] 73:14 91:3,6 further [5] 35:18 40:15,16,21 86:8 future [3] 5:10 44:23 81:19</p>	<p>37:25 39:5 74:2 83:18 86:17 given [2] 10:4 38:16 gives [1] 74:17 giving [9] 3:21 7:4 13:15 31:1,25 34:3 73:25 82:8 85:12 GORSUCH [28] 16:25 17:18,25 18:4 46:7 67:7,11 68:11,14,17 69:20 70:10 75:2,4,25 76:19 78:18,21 79:14 80:4 81:6 82:22,24 83:5,10 86:13 91:13 95:24 got [1] 45:22 gotten [1] 79:25 govern [1] 58:16 government [62] 6:23 7:6 35:4 37:6 38:18,25 39:24 44:3 57:9,16,18 58:6 59:2 62:20 63:1 65:9 67:5,14 68:12 69:8,25 70:6 71:14 73:5,9 74:23 76:4,14,20 77:12,16,19,22 78:2,4,7,10,14 79:3,10,20 80:25 81:9,15 82:3,9,14 83:21 84:1,11,24 85:5 86:1 88:17 89:6 90:3,12 91:9,20 92:2,5 93:2 government's [12] 45:10 58:18,23 59:1 62:17 72:22 73:16 79:7 80:7 84:4 90:9 92:18 grandchildren [1] 36:5 grandmother [3] 35:24,25 36:8 grant [1] 80:20 granted [2] 30:9 55:23 granting [1] 43:8 great [1] 87:22 greater [1] 34:2 guess [16] 14:2 19:21 20:18 42:17,19 43:21 44:17 45:4 47:16 48:8 51:7 54:25 55:21 77:5 81:24 91:23 guessing [1] 45:18 gun [1] 53:18</p>	<p>13 86:25 hardest [1] 14:20 harshly [3] 58:7 87:20,24 hear [3] 3:3 19:23 96:12 heard [6] 5:24 68:19 94:7,9,14 95:2 heightened [1] 89:18 HELAMAN [1] 1:6 held [2] 4:20 55:14 help [3] 30:3 47:22 84:22 helpers [1] 52:24 helping [3] 52:23 82:7,7 helps [1] 47:15 Henderson [2] 6:11 89:21 Hicks [1] 98:16 high [2] 29:12 96:3 highly [1] 76:22 historical [2] 58:2 64:4 history [8] 4:8 18:11 20:2 21:7 45:20 72:6 89:25 98:14 hits [1] 85:22 hold [2] 35:19 85:25 holding [1] 72:17 Honor [1] 18:3 housekeeper [1] 6:6 however [1] 90:11 Hoy [2] 10:4 20:13 huge [1] 41:19 hunting [2] 71:10 74:10 hypothesized [2] 5:19 6:24 hypothetical [4] 63:6 73:25 75:20 85:10 hypotheticals [9] 12:10 14:20 27:10 28:20 45:23 48:21 80:16 81:3 83:1</p>	<p>66:25 67:1 90:1 97:17 98:8 importantly [1] 5:5 importing [1] 92:18 impossible [2] 70:16 81:23 imprisonment [1] 84:19 incentive [1] 74:17 incentivized [2] 67:22 70:5 inchoate [1] 17:20 incident [1] 56:4 incite [1] 17:7 include [2] 18:23 23:21 includes [3] 14:5 24:7 35:4 including [1] 30:19 indicates [1] 28:3 individual [1] 95:13 induce [26] 3:12,21 4:4,22 9:23 10:25 11:19 17:6,8 26:17 34:12 50:15 56:14 57:20 60:9 61:4,7 62:1 84:6 91:21 92:24,25 93:5,5 94:19,24 induce-and-encourage [1] 50:7 induced [1] 76:17 inducement [1] 69:18 induces [3] 19:9 20:14 21:9 inducing [9] 3:14 9:4 10:7 27:5 35:12 89:1 95:8,12 96:8 information [1] 70:8 inherently [2] 94:20 98:19 inheres [1] 27:9 initial [1] 61:13 Initially [1] 61:14 injected [1] 39:19 inquiry [2] 71:3 72:20 instance [2] 5:17 53:1 instances [1] 73:14 Instead [2] 57:11 96:13 instructed [1] 58:25 instruction [3] 39:7,25 98:10 instructions [5] 11:5,11 40:5 78:3 98:8 integral [1] 58:5 intellectually [1] 66:16 intend [1] 8:11 intended [4] 4:22 10:1 20:2 33:7 intending [1] 53:20 intent [29] 7:14,24 8:2,4,8 9:2 10:15,23 12:17 13:20 14:2 21:5 31:7 38:14 41:6 47:21,23 57:18 60:18,20,23 62:5,16,24 76:18,25 85:3,5 92:22 intention [1] 92:18 interacts [1] 55:12 interest [8] 65:9 66:25 67:</p>	
G					
<p>gain [1] 23:11 gave [2] 29:23 86:11 Gazzam [2] 56:8 96:7 gee [1] 16:24 General [11] 1:18 14:13,14 19:2,4,13 24:2,23 25:2,4 60:15 generalized [1] 89:20 generally [3] 37:19,22 87:15 gets [1] 27:4 getting [1] 84:17 Giboney [1] 56:9 give [8] 17:13 18:25 32:1</p>	<p>Hand [3] 10:24 82:2 94:22 handful [1] 72:3 HANSEN [10] 1:6 3:5,13 8:22,23 55:1 57:8 75:6,23 76:3 Hansen's [5] 5:14 52:24 58:24 81:14 98:25 happen [5] 33:9 45:19 47:14 76:7 83:11 happened [5] 27:13 78:1 83:9 90:17,19 happens [6] 11:22 12:2 27:5 30:5 32:24 53:25 harboring [2] 52:6 54:7 hard [9] 4:25 14:23 16:13,19 30:17 36:10 56:17 82:</p>	<p>Hand [3] 10:24 82:2 94:22 handful [1] 72:3 HANSEN [10] 1:6 3:5,13 8:22,23 55:1 57:8 75:6,23 76:3 Hansen's [5] 5:14 52:24 58:24 81:14 98:25 happen [5] 33:9 45:19 47:14 76:7 83:11 happened [5] 27:13 78:1 83:9 90:17,19 happens [6] 11:22 12:2 27:5 30:5 32:24 53:25 harboring [2] 52:6 54:7 hard [9] 4:25 14:23 16:13,19 30:17 36:10 56:17 82:</p>	<p>idea [5] 18:13,14 34:23 37:9 56:16 ideas [1] 95:16 identically [1] 97:21 identify [1] 51:12 ii [1] 52:8 iii [1] 52:8 illegal [10] 4:22 26:17 34:12,15 35:25 56:14 64:17,19 96:8,10 illegally [2] 3:15 34:16 illustrates [1] 27:21 imagine [8] 27:7 32:15,19 37:2 41:18 45:25 50:24 70:11 immigrants [1] 33:6 immigration [4] 3:13 33:17 83:15 97:12 immune [1] 33:19 immunized [1] 74:22 implication [3] 91:19 94:25 95:1 implicit [2] 10:25 14:11 import [1] 17:8 important [7] 12:13 60:24</p>	<p>idea [5] 18:13,14 34:23 37:9 56:16 ideas [1] 95:16 identically [1] 97:21 identify [1] 51:12 ii [1] 52:8 iii [1] 52:8 illegal [10] 4:22 26:17 34:12,15 35:25 56:14 64:17,19 96:8,10 illegally [2] 3:15 34:16 illustrates [1] 27:21 imagine [8] 27:7 32:15,19 37:2 41:18 45:25 50:24 70:11 immigrants [1] 33:6 immigration [4] 3:13 33:17 83:15 97:12 immune [1] 33:19 immunized [1] 74:22 implication [3] 91:19 94:25 95:1 implicit [2] 10:25 14:11 import [1] 17:8 important [7] 12:13 60:24</p>	<p>idea [5] 18:13,14 34:23 37:9 56:16 ideas [1] 95:16 identically [1] 97:21 identify [1] 51:12 ii [1] 52:8 iii [1] 52:8 illegal [10] 4:22 26:17 34:12,15 35:25 56:14 64:17,19 96:8,10 illegally [2] 3:15 34:16 illustrates [1] 27:21 imagine [8] 27:7 32:15,19 37:2 41:18 45:25 50:24 70:11 immigrants [1] 33:6 immigration [4] 3:13 33:17 83:15 97:12 immune [1] 33:19 immunized [1] 74:22 implication [3] 91:19 94:25 95:1 implicit [2] 10:25 14:11 import [1] 17:8 important [7] 12:13 60:24</p>
H					

Official

2,5,16 68 :13 70 :1 89 :6 interesting ^[5] 6 :23 48 :16 53 :8 80 :10 81 :4 interpretation ^[2] 22 :2 49 :16 interpretations ^[1] 46 :1 interpreted ^[1] 41 :1 interpreting ^[2] 45 :7 94 :23 interrupt ^[1] 68 :15 interstate ^[1] 95 :14 invalid ^[4] 23 :22 24 :11,24 35 :19 invalidate ^[3] 3 :20 25 :1,3 invalidated ^[1] 72 :12 invalidating ^[2] 5 :12 42 :21 investigation ^[1] 33 :10 investigations ^[2] 73 :11 90 :16 investigative ^[1] 73 :6 invitation ^[1] 45 :25 invitations ^[1] 58 :10 invite ^[1] 48 :20 invocation ^[1] 79 :5 invoked ^[2] 3 :19 73 :6 invokes ^[1] 90 :16 involved ^[1] 49 :9 involving ^[2] 6 :5 64 :22 isn't ^[15] 29 :3 43 :18 47 :23 49 :8 53 :12 56 :2 67 :7,7 69 :5 72 :4,20 74 :15 80 :12 81 :22 85 :8 issue ^[11] 5 :3,24 8 :18 10 :21 13 :7 26 :14 40 :1,2 55 :22,24 95 :6 issued ^[1] 33 :9 issues ^[2] 27 :2 39 :20 it'll ^[1] 70 :17 itself ^[8] 23 :2 25 :16,20 26 :2 51 :17 67 :22 70 :4 77 :17 iv ^[6] 52 :11,14,17 53 :3,5 55 :5	19,23 8 :1,10,19,23 9 :1,14 10 :8,9,10,11,13,14 11 :3,17 12 :19 13 :13,23 14 :1 15 :21 16 :11,17,25 17 :18,25 18 :4,7,9,17,20 19 :14 20 :9 21 :12,13,14,15 22 :15,16,17,19,24 23 :13,20 24 :6,10,16 25 :7,13 28 :6,9,11,13 29 :15,23 30 :2,22 31 :4,13,17,19 32 :7,11,14 33 :2 34 :8,14,24 35 :3,10,22 36 :9,12,16,17,19,20,23 37 :8,10,19 38 :9,9,10,12,13 39 :3,6,9,10,16 40 :9,14,14,16,17,18 41 :11 42 :12,15 44 :1,12 45 :2 46 :5,6,6,8,9 47 :21 48 :11,12,12,14 49 :23 50 :13,17,51 51 :4,5,5,7,11 52 :1,10,22,25 53 :2,7 54 :2,11,14,18,20 55 :9 56 :1 57 :1,6 59 :5,8,11,17,18,22 61 :1 62 :8,10,11,12,13 63 :3,5,8,9,17,20 64 :7,13,24 65 :5,12,15,22 66 :2,5,14,24 67 :7,9,11,14 68 :11,14,17,18 69 :20 70 :10 71 :23,25 72 :7,24 73 :19,20,24 75 :2,4,25 76 :19 77 :25 78 :8,18,19,21,22 79 :13,23 80 :4,14 81 :6,20,22 82 :6,22,24 83 :5,10 84 :21,23 86 :5,7,8,9,10,12,13,21,24 87 :12,18 88 :6,24 89 :19 90 :19,23 91 :11,12,12,13,14,15,16 92 :5,15 93 :11,12,18 95 :24 97 :8 99 :4 justification ^[1] 58 :4 justify ^[1] 5 :11	knowing ^[5] 22 :8 41 :5 53 :19 85 :17 94 :18 knowingly ^[1] 61 :20 knowledge ^[4] 14 :4,6,6 61 :22	limiting ^[5] 31 :19 62 :22 63 :1 98 :7,10 limits ^[3] 6 :2,3 44 :21 line ^[11] 4 :25 13 :9,14 15 :22 16 :1,4 42 :23 68 :18 84 :20 86 :22 91 :5 lines ^[3] 12 :22 61 :2 85 :22 list ^[1] 33 :3 litigated ^[1] 50 :5 little ^[7] 15 :17 18 :22 44 :18 47 :1 75 :4 77 :6 86 :11 live ^[1] 36 :4 lives ^[1] 35 :24 living ^[1] 36 :4 long ^[4] 4 :18 9 :16 72 :1 74 :3 longstanding ^[1] 3 :20 look ^[9] 10 :21 15 :5 53 :6 61 :10 71 :12 72 :6 73 :2 82 :2 91 :20 looked ^[3] 48 :23 71 :9,17 looking ^[3] 51 :8 54 :23 82 :14 looks ^[2] 16 :22 95 :3 lose ^[1] 62 :19 losing ^[1] 91 :6 lot ^[12] 13 :9,22 14 :25 16 :20 28 :22 29 :2 32 :19 33 :10 40 :7 45 :19 46 :20 50 :9 lots ^[5] 9 :17 49 :25 50 :1 75 :10,10 love ^[1] 36 :5	21 76 :24 78 :1 79 :19 80 :1,19 81 :24 82 :6 83 :8 91 :22 meaning ^[8] 3 :22 4 :9 8 :13 10 :2 39 :5 57 :11 59 :2 94 :11 meanings ^[1] 9 :18 means ^[10] 11 :14,19 35 :20 49 :18 65 :8 73 :17 84 :5,6 93 :20,24 medicine ^[1] 5 :25 meet ^[1] 29 :11 meeting ^[1] 30 :20 meets ^[2] 81 :2 96 :3 Melchert-Dinkel ^[1] 66 :9 member ^[1] 14 :21 members ^[2] 41 :24 68 :6 mens ^[10] 11 :20 17 :2 22 :8 40 :20 61 :21 76 :18 81 :8 94 :14,16,21 mental ^[1] 89 :1 mentioned ^[1] 81 :21 mere ^[1] 60 :22 met ^[1] 47 :20 might ^[25] 5 :9 19 :17,20 21 :21 22 :4 26 :23 27 :1,18 41 :18 44 :24 45 :19 47 :20,25 56 :23 66 :13,22 70 :21 71 :19 74 :3 75 :15,16 86 :13 88 :11 89 :9 90 :18 mind ^[1] 18 :22 mine ^[1] 17 :16 Minnesota ^[2] 50 :21 66 :8 minor ^[2] 47 :9,13 minute ^[2] 24 :6 36 :13 mirrored ^[1] 20 :16 mismatch ^[1] 96 :18 mission ^[2] 31 :14,20 model ^[1] 39 :25 modest ^[1] 75 :15 Monday ^[1] 1 :11 money ^[5] 3 :16 7 :3 24 :14 75 :11 77 :2 moral ^[1] 15 :13 morning ^[1] 81 :4 most ^[4] 5 :23 12 :13 29 :22 72 :3 mostly ^[1] 44 :16 mother ^[1] 16 :23 move ^[1] 16 :9 movies ^[3] 71 :18,21 74 :9 Ms ^[56] 57 :3,6 59 :8,14,21 60 :5 61 :6 62 :22 63 :7,15,20 64 :13 65 :3,6,21 66 :4,6,18 67 :3,12,18 68 :12,16 69 :15,21 70 :25 71 :24 72 :7 73 :2 74 :6 75 :3,22 76 :3 77 :9 78 :6,13,25 81 :6 82 :17,23 83 :3,10 84 :22 85 :4 86 :19,23 87 :9,17,25 88 :12 89 :3 90 :2,21,25 92 :4,21 much ^[9] 13 :15 16 :10 27 :8 48 :25 50 :23 55 :15 62 :6 86 :11 87 :12 municipality ^[1] 89 :11
JACKSON ^[34] 18 :7,17,20 19 :14 20 :9 21 :12,14 30 :22 31 :5,13,17,19 47 :21 51 :6,7 52 :1,10,22,25 53 :2 54 :2,11,14,18 55 :9 56 :1 77 :25 78 :8 81 :22 91 :15,16 92 :5,15 93 :11 job ^[1] 57 :14 journalists ^[1] 90 :17 Judge ^[3] 10 :24 22 :2 94 :22 judges ^[1] 4 :7 judgment ^[4] 97 :4,10,15,16 judicial ^[1] 43 :14 Juliet ^[1] 71 :18 jurisprudence ^[1] 96 :20 jury ^[10] 11 :4,10 22 :21 25 :6 38 :21 39 :7,25 58 :25 74 :25 77 :24 Justice ^[249] 1 :19 3 :3,10 5 :16,21 6 :4,10,12,18,22 7 :9,	K KAGAN ^[22] 11 :17 12 :19 13 :13,23 14 :1 15 :21 16 :11,17 40 :17,18 42 :12,15 44 :1,12 45 :2 46 :5 71 :23,25 72 :8,24 81 :21 91 :12 Kagan's ^[2] 51 :11 73 :20 KAVANAUGH ^[16] 10 :8,10, 14 11 :3 28 :6,9,13 29 :15,23 30 :2 46 :8,9 48 :11 53 :7 84 :21,23 Kavanaugh's ^[2] 73 :24 82 :6 keep ^[5] 24 :11 38 :23 39 :12, 12 76 :25 keeping ^[1] 32 :4 keeps ^[1] 89 :22 kept ^[1] 21 :8 key ^[1] 65 :11 kill ^[1] 17 :15 kind ^[10] 21 :16 28 :22 34 :6 37 :14 48 :16 51 :24 77 :3 78 :11 82 :11 96 :15 kinds ^[7] 18 :23 19 :18 41 :3 53 :13 70 :12 73 :1 78 :4 knocks ^[1] 54 :5	labor ^[2] 61 :17 95 :5 laborers ^[1] 61 :16 lack ^[2] 36 :21 72 :19 LaFave ^[2] 9 :22 15 :3 language ^[4] 18 :14 21 :9,17 49 :25 last ^[4] 5 :24 6 :1 91 :10 99 :2 law ^[57] 4 :3 6 :8 9 :15 14 :6,8,25 15 :23,25 19 :1,4 26 :24 36 :21 37 :7 46 :11,11 47 :12 53 :15 56 :18,18 58 :1 60 :10 63 :23,24,25 64 :3 65 :10,22 66 :10,11,12,19 67 :15,20,21 69 :1 72 :13,14,17,21 73 :1 74 :15,22 80 :3,17 81 :7,18 82 :12 84 :15 85 :25 86 :3 87 :3,11 88 :13,18 89 :7 90 :7,13 lawful ^[6] 27 :13 68 :1,2,3,8 70 :4 lawfully ^[1] 28 :25 laws ^[8] 49 :6,9 58 :15 74 :18 79 :25,25 88 :3 89 :4 lawyer ^[6] 6 :24 7 :2,2 11 :23 25 :8 84 :13 lawyers ^[8] 33 :4 68 :6 70 :3,7 74 :1 83 :14,15,15 least ^[7] 4 :11 18 :22 31 :7 42 :25 68 :25 72 :15 89 :22 leave ^[6] 6 :7 8 :14 23 :23 32 :6 61 :25 85 :20 leaving ^[2] 7 :1 69 :17 left ^[9] 8 :21 14 :18 59 :25 60 :3,8,11 94 :11,12,19 legal ^[2] 70 :8 75 :23 legislative ^[2] 20 :1 97 :3 legislatures ^[3] 9 :18 19 :5 27 :18 legitimate ^[1] 42 :8 length ^[1] 72 :19 less ^[4] 25 :22 27 :19 87 :15 90 :8 lesser ^[1] 89 :1 letter ^[2] 73 :10 74 :14 letting ^[1] 43 :17 level ^[1] 48 :5 liability ^[6] 29 :12 30 :16,21 47 :19 55 :12 92 :3 lied ^[1] 76 :15 light ^[1] 40 :13 lightly ^[1] 21 :5 likely ^[2] 80 :13 83 :11 likewise ^[2] 13 :8 32 :14 limit ^[4] 26 :1,6 27 :14 31 :14 limitation ^[3] 25 :24 27 :9 61 :17 limited ^[3] 31 :14 57 :23 58 :2	M made ^[9] 3 :12 28 :5 33 :3 64 :15 72 :5 74 :19 83 :21 94 :8 97 :10 main ^[1] 74 :13 mainly ^[1] 79 :6 mainstream ^[3] 71 :17,21 74 :9 major ^[1] 70 :5 majority ^[3] 31 :8 43 :2,4 mandates ^[1] 58 :17 Mann ^[1] 95 :11 many ^[10] 21 :2 33 :9 46 :3 71 :10 76 :9 77 :21 79 :4 81 :23 82 :10 91 :7 March ^[1] 1 :11 marijuana ^[1] 13 :6 married ^[1] 68 :5 mashed ^[1] 93 :7 mask ^[2] 53 :18 58 :16 Massachusetts ^[1] 6 :14 material ^[1] 15 :7 materials ^[1] 68 :7 math ^[1] 42 :5 matter ^[2] 1 :13 77 :23 matters ^[2] 20 :20 69 :6 meal ^[1] 46 :22 mean ^[28] 9 :4 11 :22 12 :16,16,20 14 :1 21 :21 22 :4 23 :1 24 :4 30 :23 44 :15 51 :11 58 :19 73 :22 74 :2 75 :8,12,	

Official

<p>murder ^[1] 15:15 must ^[1] 58:24 myself ^[1] 17:22</p> <hr/> <p style="text-align: center;">N</p> <p>nail ^[1] 56:19 namely ^[1] 57:25 narrow ^[8] 38:6 49:21 64:3 67:20 70:19 74:18 78:2 86:2 narrowed ^[3] 69:13,16,21 narrower ^[7] 35:20 38:4 60:7 61:5,7,8 62:21 narrowing ^[6] 28:15 46:10 58:23 59:1 62:17 81:16 narrowly ^[8] 4:5 38:21 65:10 66:12,21 69:1 71:4 89:7 National ^[1] 95:5 nature ^[1] 47:18 necessarily ^[5] 46:22 47:23 65:16,17 85:8 necessary ^[2] 48:6 72:8 need ^[7] 4:2 17:2 31:11,11,11 71:12 85:6 needed ^[1] 19:16 needs ^[1] 92:2 neighbor ^[1] 11:24 neighbors ^[1] 41:3 Nevada ^[1] 50:11 never ^[17] 4:18 36:3 42:3 44:5 72:2 73:11 74:6 78:23 79:11 80:15 82:4,9 87:7,10,13,21 90:4 New ^[4] 1:21,21 26:21 57:24 newer ^[1] 49:6 newly ^[1] 45:17 newspaper ^[1] 14:14 next ^[1] 3:4 nice ^[1] 44:8 nine ^[1] 4:7 Ninth ^[15] 3:18 5:18 11:6,15 20:21 39:18 40:11,12 45:24 54:22 55:9,10,14,18 98:5 nobody ^[1] 74:11 noncitizen ^[3] 12:1,23 53:25 noncitizen's ^[1] 94:17 noncitizens ^[6] 3:14 8:18 28:24 35:25 82:8 97:14 none ^[1] 76:11 nonprofits ^[1] 53:12 normal ^[1] 89:4 note ^[3] 60:12 81:7 83:13 noted ^[4] 60:21 73:9 79:17,24 notes ^[1] 73:13 nothing ^[2] 8:13 77:7 noting ^[1] 83:14 number ^[4] 38:16 41:19,22 42:11</p>	<p style="text-align: center;">O</p> <p>object ^[1] 78:2 objected ^[1] 78:14 objection ^[1] 11:15 obscurity ^[2] 33:20 64:4 observations ^[1] 29:2 obtain ^[1] 77:3 obviously ^[4] 17:20 21:2 23:1 24:22 occasionally ^[1] 50:9 occur ^[1] 13:21 odd ^[1] 48:16 offender ^[1] 94:17 offense ^[17] 8:8 17:21 23:1 24:2,4,7,23,25 25:1 46:14,17,25 47:18 62:18 68:22 69:11 75:15 offenses ^[7] 3:13 24:5 47:6,9,14 69:8 85:1 offers ^[1] 26:16 officials ^[1] 91:4 often ^[1] 19:6 Okay ^[9] 22:16,24 40:22 52:25 54:14 64:7 81:1 86:17 96:14 old ^[7] 7:21 11:1 29:13 46:12 49:11,14 53:6 older ^[1] 48:19 Once ^[6] 11:14 12:14 36:20 68:24,24 86:16 one ^[47] 3:17 6:3,17 8:6,7 13:20 14:3 16:1,12,22 19:1,2,10 20:12 21:16 29:2,21,24 31:6 32:15 34:8 37:3 40:1,22 41:10 43:1 44:15 47:6,15,20 49:3,8 50:10 51:21 54:19 74:13 79:19 81:3,17 82:2,18 88:10 89:23 91:17 92:6 93:9 96:23 one's ^[1] 73:23 only ^[25] 6:1 17:2 26:18 27:24 33:13,18 37:16 38:5 43:25 49:14 54:16 55:6 57:12 58:19 59:5 61:22,25 62:23 63:1 69:17 74:20 81:7 82:14 88:22 96:9 open ^[3] 73:11 78:8 85:13 opening ^[1] 15:4 opens ^[1] 90:15 opinion ^[3] 72:17 79:17,24 opportunity ^[1] 80:9 opposite ^[1] 39:14 options ^[1] 70:9 oral ^[5] 1:14 2:2,5 3:7 57:4 order ^[2] 46:1 92:2 ordinances ^[1] 58:17 ordinary ^[3] 45:13 58:20 66:7 organizations ^[5] 28:14 31:9 32:20 33:10 73:24 other ^[32] 5:6 10:5 12:6,7 19:17 20:18 25:1,23 32:18 34:1 39:10 43:10 47:6,9</p>	<p>49:13 50:6,7 51:8 59:12,16 60:2 77:7 79:4 82:10 83:17 89:8,10 92:25 93:6 94:1 95:3 99:1 others ^[4] 33:5 43:19 70:7 88:11 otherwise ^[4] 21:9 32:5 33:21 58:12 ought ^[4] 4:12 5:25 23:23 38:2 out ^[39] 6:13 9:9,11,13,25 11:6,13 12:9 13:22 14:25 18:12,21 19:10,16,18 20:10 29:20 36:10 40:8 48:15 50:11,22 51:8 56:2 57:15,18 59:23,25 60:4 72:1 73:23 74:10,10 76:5 79:6 80:15 81:23 94:9,14 outside ^[2] 26:19 34:9 over ^[4] 21:24 61:12 62:4 99:2 overbreadth ^[56] 3:19 4:14 5:6,22,25 11:12 12:18 22:25 23:6,8,16,17,19 37:4 39:19 41:17 42:1,4,20 43:2,13 45:5 48:18,20,24 49:18 50:20 51:3 55:3,8,20,22 59:7,10,15 62:20 69:4,14 70:13,23 71:11,15 72:5 74:12 77:10 79:3 80:11 82:1,19 90:6 93:22 96:4 97:25 98:1,6,9 overbreadth-type ^[1] 50:5 overbroad ^[11] 24:3,4,24 35:19 55:14 56:22 69:23 72:17 95:21 98:13,17 overlapping ^[1] 9:18 overriding ^[1] 82:18 overstayed ^[1] 68:4 own ^[1] 75:23</p> <hr/> <p style="text-align: center;">P</p> <p>p.m ^[1] 99:6 PAGE ^[2] 2:2 95:7 pantry ^[2] 85:11,13 Paper ^[2] 56:11,12 parking ^[3] 58:17 89:12,13 parsing ^[1] 19:10 part ^[20] 10:17 11:12 19:22 21:17 24:8,11,12,12,13,13,17,19 28:23 30:4 34:20 35:14 47:20 51:16,20 55:8 particular ^[5] 45:9 60:19 78:9 79:14 92:7 particularly ^[2] 25:22 66:16 parts ^[1] 23:22 pass ^[1] 66:22 passed ^[3] 45:17 66:19 72:13 past ^[1] 48:25 paths ^[1] 68:8 pathway ^[4] 68:1,2,3 70:3 patrol ^[1] 90:20</p>	<p>pattern ^[1] 61:11 Paul ^[1] 79:16 pay ^[1] 17:16 paying ^[1] 89:14 penalties ^[1] 27:11 penalty ^[3] 21:11 23:3 28:2 Peoni ^[1] 94:22 People ^[51] 13:10 14:16 27:18 28:18 30:9,18,19 31:10,15,20 32:5,21 33:4,12 34:15 36:17 41:2,4,15,23 43:17 52:20 53:14 67:1,15,23 68:4,8 70:3 71:5,10,13 74:13,16,20 75:9,13,17 76:9,18 77:1 81:23 82:4,10,20 83:6 84:14,19 85:17 90:16 97:5 people's ^[1] 77:7 per ^[1] 52:12 Percoco ^[1] 38:17 perfectly ^[2] 27:12 56:24 Perhaps ^[3] 83:12 90:17 92:17 permissible ^[4] 42:21 80:3 81:17 93:25 permit ^[1] 24:18 permits ^[1] 24:17 perpetrator ^[2] 87:4,5 Perpetrators ^[2] 87:18,19 person ^[15] 25:21 30:25 34:3 35:5 37:20 41:21,23 52:23 65:14 66:14 68:24 74:24 89:1 91:24 97:7 person's ^[1] 22:9 persuade ^[1] 50:15 persuaded ^[1] 19:20 persuading ^[1] 95:12 Petitioner ^[6] 1:4,20 2:4,10 3:8 93:16 piece ^[1] 51:18 Pittsburgh ^[4] 26:15 56:10,12 96:7 place ^[3] 12:21 41:20 85:18 plain ^[5] 38:19 42:7 57:10 59:2 62:6 plainly ^[2] 5:13 42:8 plausible ^[1] 4:11 play ^[3] 26:11,23 27:2 please ^[2] 3:10 57:7 plurality ^[1] 72:16 point ^[14] 9:6 18:10 53:8 54:20 63:11,14 70:2,25 73:15,21 80:6,6 91:24 96:24 pointed ^[4] 48:15 73:23 79:6 80:15 points ^[2] 71:25 83:23 pornography ^[2] 64:23 71:24 posit ^[2] 23:4 27:10 positing ^[3] 20:21 24:21 70:19 position ^[5] 4:1 25:22 38:1 88:1 93:24 positions ^[1] 73:16</p>	<p>posits ^[1] 24:2 possibility ^[1] 5:8 possible ^[3] 3:22 36:24 50:1 possibly ^[1] 68:25 poster ^[1] 75:13 posture ^[4] 56:19,24 75:6,19 potentially ^[2] 24:3,24 practice ^[1] 39:1 pre-enforcement ^[1] 83:13 precedent ^[1] 23:15 preceding ^[1] 52:4 precisely ^[1] 16:5 predecessor ^[1] 10:5 premise ^[2] 7:16 13:2 premises ^[1] 44:18 presenting ^[1] 73:17 president ^[2] 74:20 75:1 Press ^[3] 26:15 73:8 96:7 pretty ^[3] 30:4 94:3,5 prevail ^[2] 57:8 76:23 prevented ^[1] 82:15 preventing ^[1] 5:12 previous ^[2] 9:9 94:13 previously ^[1] 93:5 primarily ^[2] 98:18,21 Principal ^[1] 1:18 principle ^[2] 35:14 83:25 principles ^[12] 12:9 13:3,19 15:1 23:19 26:11,23 36:25 38:2 43:17 45:14 48:9 prior ^[4] 20:14,17 58:10 60:13 probably ^[4] 11:4 41:22 89:2,17 problem ^[9] 4:19 5:2,6 11:4 12:18 14:23 45:1 55:7 75:8 problematic ^[1] 92:17 problems ^[1] 37:4 proceeds ^[1] 17:14 prohibit ^[1] 57:12 prohibited ^[2] 26:19 95:7 prohibiting ^[1] 61:14 prohibition ^[2] 60:15 94:2 Prohibitions ^[1] 4:16 prohibits ^[2] 63:12 95:12 promised ^[2] 13:17 79:11 proof ^[1] 74:11 property ^[1] 79:25 proposing ^[1] 64:19 prosecute ^[7] 7:2 33:8 36:6 79:8 89:23 98:25 99:2 prosecuted ^[3] 6:9 74:20 91:25 prosecution ^[10] 6:17 28:16 78:24 79:1 80:15 84:18 85:23 89:23 98:12,15 prosecutions ^[11] 32:12 72:2,8,10,20 73:21 74:4 89:21 90:4,14 91:8 prosecutorial ^[4] 72:23,25</p>
---	--	--	--	--

Official

<p>73:3 90:10 prospect [1] 77:2 prostitute [1] 64:25 prostitution [1] 50:12,13, 19 64:9,11 65:1,3,16 68:23 89:2 95:14 protect [1] 4:21 protected [14] 3:18,23 5:1 40:2 43:18 51:1 71:5 72:11 88:8,9,11 90:4,8 96:10 Protecting [1] 67:1 protection [3] 26:19 63:22 90:22 prove [8] 25:8,11 34:18 35:4 76:5,14 81:15 92:2 proven [1] 8:14 provide [7] 5:10 16:2,6 25:25 31:10 32:20 68:6 provided [1] 67:25 provides [1] 30:18 providing [8] 28:17 30:11 33:5 46:21 53:9,13,17 70:8 provision [9] 25:2,4 32:23 53:24 76:14 91:6 92:11,13 95:5 provisions [8] 21:11 25:12 26:6 51:9 53:9,13 59:24 92:10 prudential [1] 43:14 public [3] 14:14 73:18 77:18 punish [3] 58:6 96:16,25 punished [3] 33:14 58:7 87:23 punishment [8] 28:8 33:24 34:2,2,3 87:15,21 97:13 pure [2] 69:18 85:9 purport [1] 43:1 purpose [7] 17:2 25:23 32:4 55:21 59:23 60:1 94:25 purposes [1] 12:14 put [2] 9:8 39:15 putting [2] 9:12 36:2 puzzled [1] 21:23</p> <hr/> <p style="text-align: center;">Q</p> <p>qualifies [1] 54:1 qualify [1] 88:25 qualifying [2] 36:13,14 quantify [1] 71:20 question [11] 12:6,7 22:20 24:2 42:16 51:12 55:11,17 79:14 80:10 95:25 questioning [1] 68:19 questions [10] 5:10,15 21:16 29:5 46:14 56:17,23 59:4 86:13 96:1 quickly [1] 62:14 quite [3] 8:4 94:15 95:4</p> <hr/> <p style="text-align: center;">R</p> <p>R.A.V [1] 79:16 raise [5] 4:19 5:9 29:5 45:</p>	<p>23 70:5 raised [1] 45:21 raises [2] 46:13 53:8 range [1] 58:15 rarely [1] 98:17 rather [1] 33:25 rationality [1] 27:14 rea [10] 11:20 17:2 22:8 40:21 61:21 76:18 81:9 94:14, 16,21 reach [6] 35:21 55:5,11,16 67:21 71:4 reaches [2] 56:5 69:23 reaching [2] 85:9 90:7 read [13] 4:2 16:20 18:22 19:24 37:12 38:19,21 39:13 43:1 51:21 67:20 77:23 91:21 reading [2] 4:12 39:21 ready [1] 16:21 real [4] 42:20 43:15 45:16 95:25 realistic [4] 43:12 71:6 73:4 98:12 really [28] 5:20 12:1,24 13:23 15:18,19,24 17:15 20:22 21:1 27:10 28:3 39:19, 22 40:2 41:4 46:2 51:23 55:24 70:17,17 75:20 78:10 81:23 82:13 92:1 96:12 98:23 realm [1] 59:9 reason [16] 20:1,3 22:6 25:3 35:18 38:6 41:11,13 43:19 49:7 51:14 53:23 58:3 71:15 81:17 90:6 reasonable [2] 39:24 97:15 reasoning [1] 55:18 reasons [2] 31:6 57:9 reassured [1] 46:9 REBUTTAL [3] 2:8 93:14, 15 receive [2] 73:14 91:2 received [1] 76:10 recent [2] 49:4 73:5 recently [1] 5:23 recited [1] 29:3 reckless [3] 14:6 61:23 94:18 recognized [1] 9:17 recommending [1] 28:18 reconsidering [1] 77:10 record [6] 48:22 49:13,15 73:22 82:25 83:5 Recruiting [1] 15:14 reduce [1] 42:4 refer [1] 4:5 referred [1] 8:7 referring [2] 6:11 22:1 regulate [3] 69:8 79:20 96:15 regulated [3] 64:14,20 79:19</p>	<p>regulates [1] 58:21 regulating [1] 67:16 regulatory [3] 26:4,5 58:15 related [1] 33:17 relation [1] 42:7 Relations [1] 95:5 relative [1] 42:23 relatively [2] 47:9 49:6 relevant [9] 29:22 49:17 73:3 79:2,9,10 80:12 90:2, 11 relief [1] 77:3 religious [1] 33:4 rely [1] 33:7 relying [3] 55:2 56:5,12 remain [8] 22:9 35:6 47:24 52:15 67:17 68:9 84:16 85:15 remaining [7] 25:15 27:23 30:25 34:17,18 53:14 62:2 remains [4] 18:23 21:19,22 86:2 remand [4] 11:5 76:21,23 80:7 remands [1] 55:25 remedy [1] 71:15 removal [2] 28:2 97:14 removed [3] 60:6 61:21,24 render [1] 64:16 rendering [1] 36:15 reply [1] 56:10 report [1] 60:21 Reporters [1] 73:8 request [3] 15:13,20 17:12 requested [1] 58:18 require [5] 72:10 84:3 85:2, 5 87:3 required [10] 8:5 57:18 60:18,19 61:19,22 74:7 80:8 84:2 90:5 requirement [16] 7:24 8:5 10:15,24 11:20 12:17 14:10 17:9 35:8 38:14 60:23 61:22 76:18 81:9 94:15,21 requirements [4] 26:5,5 29:20 77:22 requires [3] 23:10 33:16 83:24 requisite [2] 31:7 62:24 requisites [2] 30:20 47:19 reserve [1] 56:23 reside [2] 3:14 22:4 residence [5] 21:21 22:1,5, 6,14 resides [2] 21:18,20 residing [1] 22:10 resisted [1] 58:9 resolved [1] 76:21 resort [1] 6:1 resources [1] 74:1 respect [5] 69:7 72:5 78:9 80:3 88:19 responded [1] 51:11 Respondent [6] 1:7,22 2:7</p>	<p>55:1 57:5 98:5 Respondents [1] 20:21 response [1] 46:19 responses [1] 72:7 rest [2] 23:23 28:19 return [2] 54:23,24 reus [3] 17:4,9,11 reverse [1] 99:3 revisited [2] 21:8,10 revisiting [1] 49:20 rewrite [4] 7:11,17 39:4 57:11 rewriting [2] 10:20 38:24 rights [6] 43:18 68:7 75:19, 23 76:1 84:15 rob [3] 17:13 53:19,20 robbed [1] 54:4 robber [4] 46:22 53:9,18 54:6 robbery [3] 46:15,24 53:22 ROBERTS [20] 3:3 10:13 32:7,11 38:9,12 40:14 46:6 48:12 51:5 57:1 59:18, 22 61:1 78:19,22 86:5 91:12 93:12 99:4 Romanette [1] 51:25 Romeo [1] 71:18 roots [2] 58:2 61:13 Rosemond [3] 8:7 10:22 15:8 rule [3] 55:10 96:14 97:3 runs [1] 85:15</p> <hr/> <p style="text-align: center;">S</p> <p>safe [2] 85:18,20 same [21] 5:3 11:1,2 12:5 16:2 19:7 32:2,2,17 38:1 39:5 43:24 51:20 58:11 65:19 66:5,6 84:10 94:11 97:7,18 satisfied [2] 67:10,19 satisfy [7] 58:20 64:6 65:18 66:11 88:19 89:9,18 saying [28] 7:7,17 11:1 12:15,23 16:1,2,6,13 17:25 18:2 33:6,8 41:4,5 44:16,16, 18 45:12 49:25 51:12 69:4 78:4 84:1,24 85:10,12 91:20 says [17] 12:1 13:24 14:20 15:23 16:23 22:8 24:12,13 36:2 43:3 44:4,4 77:22 86:1 91:21 92:7,22 Scalia's [1] 79:24 scenario [1] 56:4 scheme [1] 3:16 schemes [3] 5:13 98:25 99:1 scholarships [1] 28:18 scrutiny [17] 33:22 58:13, 20 64:2,6 65:8,19 66:1,8, 10,12,22 67:4 88:15,19 89:5,18 second [10] 22:19 24:12,</p>	<p>12,13 41:10,13 57:22 63:11,14 74:17 secondary [1] 95:8 Section [11] 4:10 5:2,9,17 15:2 55:4 73:6,9 79:5 90:16 91:2 sections [1] 21:20 secure [1] 77:17 secures [2] 77:12 81:9 securities [1] 46:16 see [8] 31:20 48:18 52:22 54:11 60:3 61:2,11 89:4 seek [4] 15:19 30:13 48:2 77:3 seeks [2] 34:11 56:13 seem [2] 28:20 46:20 seemed [1] 83:23 seems [4] 21:20 47:1 75:18 76:22 seen [3] 16:22 23:15 72:2 Senate [1] 60:21 send [2] 40:11 55:20 sending [1] 11:15 sense [4] 17:17 34:21 42:18 65:13 sensitive [1] 56:16 separate [1] 92:9 serious [1] 28:2 seriously [2] 28:4 40:1 service [1] 55:3 services [4] 32:20,21,24 33:5 set [2] 47:15 70:20 seven [1] 19:9 sever [1] 23:22 severable [1] 24:5 share [1] 97:6 she's [2] 36:1,2 shelter [8] 28:17 29:24 31:2,10,12,25 74:1 85:16 shorthand [1] 10:3 shorthanded [1] 10:6 shouldn't [3] 9:8 37:13 90:1 show [2] 76:17 88:22 showing [4] 45:16 81:11 94:6,8 shown [1] 62:5 side [1] 16:1 significant [3] 5:21 21:6 33:25 silence [1] 82:20 silent [1] 82:20 silently [1] 92:19 similar [3] 18:13 50:4,14 Similarly [1] 71:16 simple [1] 91:8 simply [5] 71:3 85:10,25 90:12 92:7 since [2] 50:6 81:8 sincere [1] 28:20 Sineneng-Smith [4] 5:24 39:17 50:6 78:15 situation [4] 23:2,9 75:14</p>
--	---	---	--	--

Official

<p>82:3 situations [2] 25:18 75:20 six [1] 40:7 slice [1] 14:17 small [1] 51:17 social [1] 32:20 soil [11] 7:22 11:1 18:1,2,4, 8 29:14 34:23 35:3 46:12 53:6 solicit [15] 10:1 26:17 57:17 60:7,11,18 61:3,8,19,24 87:5 89:12,15 92:24 97:6 soliciting [1] 87:23 solicitation [62] 5:1,4,7 9:20 10:17 12:7 13:5 14:12 20:15 25:9 26:2 34:2 35:2 37:17 46:11 50:6,12,25 57:12,21,23 58:1,3 60:10,17 62:7,21,23 63:13,24 64:8, 10 65:12,13 67:20,21 69:17,24 77:20 83:22 84:2,5,9, 24 85:8,14 86:3 87:1,8,10, 14,20 88:2,2,13 91:18,23 92:11 93:4,8 96:15 97:19 solicited [1] 27:19 soliciting [27] 4:5,16 7:13 9:5,11 18:15,17 20:24 27:1,11 28:7 37:24 52:19 53:4 55:6 58:14 60:15 64:8, 25 65:23 68:21 69:9 75:9 87:23 95:22 96:2,8 Solicitor [1] 1:18 solicitors [3] 20:10 97:1,11 solve [1] 44:25 somebody [5] 12:23 13:24 14:20 26:8 81:2 someone [24] 15:15 19:15 22:4,13 23:8 25:18 32:24 37:24 47:22 52:5,7,15,19 64:8,10,25 65:15 66:2,20 73:12 79:18 85:10,15 97:11 someone's [1] 81:12 sometimes [4] 4:25 15:14 44:3 45:9 son [3] 16:23 36:1,2 Sorry [9] 6:4 13:16 18:7 22:17,18 28:11 38:11 62:11 68:14 sort [26] 11:6 14:4 15:13,15 23:18 27:14,25 29:11,19 42:13 43:13 45:18 47:10, 18 48:5 49:12 50:3 51:2, 11 52:8 55:23 56:2,2,3 82:1 96:18 sorts [2] 48:10 49:5 SOTOMAYOR [60] 6:4,10, 12,18,22 7:9,19,23 8:1,10, 19,23 9:1,15 10:9,11 22:15, 17 24:6,10,16 25:7 28:11 33:2 34:8,14,24 35:3,10,22 36:10,12,16,17,19,20,23 37:8,10,19 38:10,13 39:3,6, 9,10,16 40:9 86:9,10,21,24</p>	<p>87:12,18 88:6,24 89:19 90:19,23 91:11 Sotomayor's [1] 18:9 sought [1] 15:10 sounds [1] 51:18 space [1] 19:5 speaking [4] 49:23 71:13 74:16 75:8 special [4] 27:22,25 45:4 96:14 species [1] 9:23 specific [9] 4:22 7:13 13:20 14:2,15,16 19:2 60:18, 23 specifically [3] 66:20 69:10 92:6 spectrum [2] 89:4,10 speech [67] 3:23 4:21 17:12,17 21:1 26:4,5,6,25 27:5 29:4 33:13 34:9,10,11 40:1 56:3,13 57:25 58:4,7, 11,14,21 59:5,9 63:21,24 64:1,17,20,22 65:6,22,23 67:6 71:2,5,6,16 72:9,11, 15 74:8 76:1,6,16 77:7 81:12,20 82:11 85:9,22 89:9, 16 90:4,8,12 91:8 94:3 96:22,25 97:18,20,22 98:18, 22 speeches [1] 14:15 spent [1] 45:24 split [1] 17:14 spoken [2] 26:13,14 St [1] 79:16 stake [1] 85:23 stakes [1] 84:17 stand [2] 44:8 57:20 standard [3] 61:20 67:19 76:23 standards [1] 45:6 standing [2] 23:2 80:20 start [2] 16:9 36:14 starting [1] 83:17 starving [1] 31:22 state [6] 49:9,24 50:11 66:19,21 91:4 statement [2] 6:8 7:3 STATES [13] 1:1,3,15 3:4, 15 22:10 25:16 34:16 49:25 53:15 58:12 67:17 91:1 States' [1] 73:12 status [6] 68:1,2,4,8 70:4 94:18 statute [114] 3:14,20,24 4:1, 12 5:4,12 7:11 8:2 9:8,10 10:5,17,21,23 11:13,21 12:8 14:5 16:15,18 18:11,12 19:19,24 20:5,14,17,23 21:8,10 22:8,13 23:23 25:14 27:4 29:9 31:3 32:17 33:7, 14,15,23 34:1,5 35:19,20 37:12,14,17 38:7,19 39:4, 21 40:20,25 41:9,14 42:22 43:4,23 44:5,20,21 45:7,18</p>	<p>46:1 48:19 49:18,20,22 50:14 51:9,21 56:22 57:10,12, 23 59:3 60:14,17 61:12 69:17,22 70:16 71:3,4,14,20 72:1,17 73:17 77:13,15 78:10 79:11 81:16 85:21 89:24 91:20 92:1,20 93:9,20, 24 94:1,13 95:3,20 97:21 98:13,17,20,24 statute's [2] 42:8 74:2 statutes [12] 5:7 13:5 14:24 32:18 33:19 38:24 39:13 49:10,24 50:1,7,7 statutory [1] 21:17 stay [15] 8:24 12:2,25 13:24 14:22,22 15:24 16:3 30:3, 25 31:2 41:5,23 54:6 85:18 staying [1] 14:7 step [3] 17:4,22 63:25 steps [2] 12:15 30:12 Stevens [7] 49:5 71:2,8 72:9,12 74:8 79:9 stiffly [1] 97:2 still [12] 17:21 24:11 25:8 28:15 46:13 61:18 69:22 73:10 87:21 92:16 94:25 95:21 stop [1] 36:12 straight [1] 34:11 streets [1] 31:24 strength [1] 71:11 stretch [1] 98:6 strict [9] 33:22 65:18 66:1, 10,12,22 67:4 88:14,19 strike [2] 46:2 51:14 strikes [1] 48:16 string [1] 48:20 strong [5] 5:25 44:2 49:15 67:16 70:12 strongly [1] 60:20 struggle [1] 70:22 struggling [2] 18:21 51:15 study [1] 48:17 suasion [1] 15:13 sub [1] 55:22 subject [9] 28:1 33:21 59:6 65:8,24 66:1,7 88:14 97:14 submit [1] 79:2 submitted [2] 99:5,7 subpoena [1] 33:9 subpoenas [1] 90:24 subsection [2] 92:12 93:1 subset [2] 24:25 25:3 substance [1] 23:1 substantial [5] 42:6,6,10, 11,18 substantially [1] 69:23 succeed [6] 8:9,12,13 30:14 35:13 48:3 succeeded [1] 48:25 succeeding [1] 35:14 successful [1] 80:9</p>	<p>succumb [1] 50:2 suggest [3] 32:23 55:4 61:3 suggested [2] 22:3 85:6 Suggesting [1] 59:23 suggestion [1] 11:7 suggests [3] 3:17 10:1 22:11 suicide [4] 66:3,11,15 68:23 summarize [1] 94:13 supplemental [1] 39:18 support [3] 16:3,7 39:24 suppose [4] 11:17,20 48:4 55:15 supposed [2] 70:14,15 SUPREME [3] 1:1,14 66:9 surely [1] 80:12 survive [1] 69:2 swaths [1] 3:23 sweep [2] 42:8 98:22 sweeping [1] 3:22 swept [1] 3:25 synonyms [2] 19:6,18</p>	<p>though [6] 10:14 29:7 42:19 74:25 75:5 98:14 thoughts [1] 34:7 threat [1] 28:16 threaten [1] 79:4 threats [2] 74:22,25 three [1] 57:9 threshold [1] 96:3 tied [1] 61:14 today [2] 56:21 58:16 took [15] 9:9,11,12,25 18:12,20 20:10,23 57:15,18 60:16 61:16 71:1 94:9,14 tools [3] 53:18 79:4 91:10 totally [2] 80:4,5 town [1] 89:13 traced [1] 49:10 track [3] 48:21 49:13,15 traction [1] 50:9 traditional [9] 4:9 10:22 13:4,19 34:9 35:8 43:17 48:8 85:2 traditionally [3] 10:15 29:13 87:2 trafficking [1] 68:3 training [1] 68:7 transaction [3] 64:14,20, 22 transactions [5] 26:18 56:14 64:16,18 65:13 transformed [1] 20:25 transporting [1] 52:7 travel [1] 95:13 treat [1] 73:9 treated [4] 87:19,20,24 97:18 treating [2] 58:4 97:22 treatise [2] 9:22 15:3 treats [1] 97:21 trench [2] 38:7 60:24 trial [2] 38:22 40:5 tried [2] 39:17 50:19 trigger [1] 64:1 troubled [1] 6:16 true [9] 24:1 27:23 43:9 63:18 74:21,24 85:7,8 94:10 truthful [1] 70:8 try [1] 56:19 trying [4] 37:3 51:8 81:24 98:6 tune [1] 75:10 turn [2] 20:7 95:17 turned [1] 94:2 tweaked [1] 21:10 two [15] 8:18 12:14 18:25 21:15 40:21 42:1 59:24,24, 25 60:12 72:7 74:13 85:1 92:9 93:22 type [1] 81:20</p>
---	--	---	--	--

U

U.S. [2] 68:5 90:21
U.S.C. [8] 10:21 19:7 54:15 60:14 92:10,11 94:23 95:

Official

<p>11 ultimately ^[1] 43:13 unconstitutional ^[7] 21:2 41:15 43:5 57:10 64:9,12 65:18 unconstitutionally ^[1] 24: 23 under ^[24] 4:13 5:3 12:7 14: 23 25:11 26:9 28:15 32:17, 18 33:14 57:10 67:25 76: 10,13,23 77:12 80:7,22,23 84:15 88:4 89:16,23 91:25 underlying ^[13] 25:15 27: 19 46:14,17,25 62:18 65: 24 68:22 69:7,11 75:15 83: 25 97:1 underscore ^[1] 27:15 underscoring ^[1] 98:4 understand ^[13] 15:22 19: 12 25:17 29:6 44:24 51:13 56:5 62:25 81:13,25 86:16 93:24 95:18 understandably ^[1] 43:16 understood ^[5] 14:11 22: 12 29:13 55:1 63:10 undocumented ^[2] 85:14, 18 unique ^[1] 5:2 UNITED ^[10] 1:1,3,15 3:4, 15 22:10 25:16 34:16 53: 15 67:17 unlawful ^[10] 4:6 14:21 22: 6,11,14 31:1 32:22,25 63: 13 97:6 unlawfully ^[12] 27:24 30: 10,20 31:16,22 41:6,22 52: 16,21 53:25 62:2 68:9 unless ^[1] 33:14 unlikely ^[2] 70:17 76:22 unprotected ^[13] 5:1,13 56:13 57:25 58:5,11 65:7 74:21 76:6 81:12 88:4 89: 16 96:23 until ^[1] 93:25 unusual ^[4] 25:14 48:17 95:15 96:24 up ^[18] 14:25 21:21 22:1,4 37:25 39:17 44:8 49:4 50: 8 54:21 62:14 68:18 73:20 75:5 83:1 86:11,17 93:7 upheld ^[2] 87:10 95:9 uphold ^[2] 33:23 37:14 urging ^[2] 25:18 26:8 uses ^[1] 77:16 using ^[1] 20:15 usual ^[1] 45:6</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v)(ll ^[1] 51:17 vacated ^[1] 58:25 vaccine ^[1] 58:16 validity ^[1] 72:21 various ^[3] 41:2 85:6 92:23 vast ^[5] 29:9 31:8 43:2,3 58:</p>	<p>15 venture ^[8] 15:10,18 17:5, 23 30:13,23 48:2,5 verb ^[1] 60:11 verbs ^[5] 60:7,8 61:19,24 93:6 versa ^[1] 84:7 version ^[2] 32:2 40:19 versions ^[1] 29:21 versus ^[3] 3:5 50:11 65:13 vice ^[1] 84:6 victimized ^[2] 75:13 76:9 victims ^[1] 68:3 videos ^[2] 71:10 74:10 view ^[8] 11:18,19 12:4 25: 10 29:9 34:13 55:21 80:7 viewed ^[1] 90:1 viewpoint ^[1] 80:2 vigorously ^[1] 6:2 violate ^[5] 14:8 22:12 31:3 52:18 71:13 violated ^[1] 3:13 violates ^[2] 23:5 79:21 violating ^[2] 89:13 91:5 violation ^[14] 13:21 15:25 27:24 28:1 30:24,24 52:6, 8 53:15,16 54:21 55:7 86: 15 87:8 violations ^[15] 4:17 26:4 52:3 58:1,14 65:24 67:22 69:24 86:18 88:14,20 89: 12,13 95:23 97:12 violence ^[3] 60:16 67:25 85:16 Virginia ^[1] 72:16 vis-à-vis ^[1] 71:21 visas ^[2] 8:21 68:4 visible ^[2] 74:15 82:21 vulnerable ^[6] 25:22 27:20 66:16,21 68:24 75:17</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wait ^[1] 24:6 wanted ^[7] 20:3,4,7 46:19 60:10 62:14 63:10 wanting ^[2] 19:24 31:10 war ^[1] 16:24 Washington ^[2] 1:10,19 watching ^[1] 83:16 water ^[1] 82:8 way ^[18] 4:2 5:18 12:5 23: 22 26:1,7 32:17 39:13 40: 5 49:13 52:18 69:22 79:12, 19,20 84:13 95:15,20 ways ^[4] 44:14,22 90:12 98: 4 wealth ^[1] 41:2 weed ^[2] 13:22 29:20 welcome ^[3] 5:15 59:4 85: 19 whatever ^[4] 17:7 41:3,24 80:13 Whereupon ^[1] 99:6 whether ^[11] 7:5 14:7 27:5</p>	<p>43:22 63:21 68:22 84:5,15 95:25 96:3 97:19 who's ^[6] 34:4 35:24 41:21 52:23 71:12 85:13 whole ^[2] 39:20 41:19 wide ^[1] 3:22 will ^[9] 4:24 13:17 22:10 28: 21 36:25 58:12 76:11 80: 10 98:17 willfully ^[1] 61:20 Williams ^[7] 4:20 26:15 34: 11 56:11 64:15,21 96:8 willing ^[4] 34:20,22 37:25 45:10 wishes ^[1] 86:4 within ^[5] 41:8 52:7 64:3 71:19 97:16 without ^[5] 16:8 58:13 75: 20 81:10 90:13 woman ^[1] 6:5 Women ^[2] 67:25 68:1 won ^[1] 38:21 wondering ^[1] 8:12 word ^[8] 44:9,19 45:10 81: 1 93:19,20,22 97:24 wordlessly ^[1] 92:19 words ^[45] 3:21 4:8 7:18 9: 3,3,8,10,17 10:2,5,25 11:2 12:16 19:6,10,17,23 33:16, 17,20,24 34:19 35:5,11 37: 12,13,18,24 39:5 48:6 57: 15 59:24 60:2,3,4 84:7 94: 1,10,10,11,12,19,20,23,24 work ^[2] 16:8 81:25 workers ^[1] 95:6 works ^[1] 22:7 world ^[8] 11:21 12:2,21 17: 19 43:15 45:5 69:16 76:25 worried ^[3] 19:21 36:1 77: 6 worry ^[1] 44:5 worse ^[1] 97:23 worth ^[1] 98:4 write ^[10] 7:13 9:2 37:7 40: 4,6 44:19 45:22 57:16 60: 10 84:12 writing ^[2] 36:22 60:17</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yard ^[1] 79:23 year ^[1] 56:9 years ^[15] 10:4 20:13 33:25 40:7 43:24 60:13 72:13,16, 18 73:6 76:11 80:18 91:10 98:20 99:2 years' ^[1] 84:18 York ^[2] 1:21,21 yourself ^[5] 15:18 17:5 30: 13 35:14 48:2</p>
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