

1 And then Chief Judge Woods says, so you're
2 assuming that the constitutional tort would follow the
3 same pattern that State law does and require the
4 favorable termination, because if there's no favorable
5 termination for all the policy reasons the States have
6 considered, there's no injury.

7 And again, whoever the lawyer was said,
8 that's correct.

9 So am I misunderstanding this, or are you
10 saying that's not correct; that's wrong?

11 MR. SCODRO: I think that that is correct
12 insofar as what the lawyer was being asked, as I
13 understand it, having also listened to the argument,
14 Your Honor, is that --

15 JUSTICE KAGAN: Is there no transcript for
16 this?

17 MR. SCODRO: I am not aware of a transcript.
18 The Seventh Circuit may especially -- part of that quote
19 appeared in the reply brief in support of the cert
20 petition. And what that quote makes clear, it seems to
21 me what the lawyer is being asked is, if we are to
22 follow suit, what -- again, taking it back to what
23 was -- this was on a motion to dismiss on limitations
24 grounds. The -- if -- if they're not able to establish
25 that they have an accrued claim or a claim with a

1 delayed accrual sufficient to satisfy the limitations
2 period or under a traditional Fourth Amendment theory,
3 can we overcome this limitations period by virtue of
4 these common law elements. What the attorney was being
5 asked, as I -- as I heard that argument, what the
6 attorney was being asked is, isn't -- do you agree that
7 what they are trying to do here is join what every other
8 circuit has done. And if we join what every other
9 circuit has done, they would have a favorable
10 termination element. Or --

11 JUSTICE KAGAN: Oh, I don't think that
12 that's -- I mean, maybe, I guess. I mean, it seems to
13 me that the much more natural way of understanding this
14 is to say, look, if we do what every other circuit has
15 done in the sense that we acknowledge that there is a
16 Fourth Amendment claim here, post-legal process,
17 something which you yourself have now acknowledged
18 today, that if we acknowledge that, what would the
19 accrual date be? And then the lawyer says the accrual
20 date would be the date of termination.

21 MR. SCODRO: Sure.

22 JUSTICE KAGAN: And -- and now you're saying
23 it wouldn't be. And I actually don't know whether it
24 should be or it shouldn't be. I don't think the Seventh
25 Circuit for a moment considered that question. And I

1 guess it's -- it's another reason why I think we should
2 just send the whole thing back. The Seventh Circuit can
3 figure out whether you forfeited this claim. The
4 Seventh Circuit can figure out, if you didn't forfeit
5 this claim, what the right answer is. But to me, this
6 language -- and I have not listened to the tape myself,
7 so I have to admit that -- but to me, this language
8 suggests that you forfeited this.

9 MR. SCODRO: Yeah. Your Honor, as I --
10 again, in context, I think what the lawyer was being
11 asked is, if they get the benefit -- and I believe the
12 quote in the reply in support of the -- the part of the
13 quote that appears in the reply in support of the cert
14 petition includes a reference to, well, along with the
15 common law elements, the lawyer is saying, yes, if they
16 were to get the benefit -- this is what they're trying
17 to do. I mean, no one denied it. What they were saying
18 in the briefs was we want the benefit of the
19 four-element tort recognized in other circuits, most
20 because they're just adopting wholesale the tort; a few,
21 because they seem -- they cite Heck in lieu of the
22 common law element. And the question was, if we give
23 them what they're asking for, that is, if this Court
24 follows those other courts, would they have a May 4th
25 accrual date? And the answer is yes. Because that's

1 what they've been seeking all along.

2 JUSTICE BREYER: Why not?

3 Look, the person is being held because the
4 magistrate listening to the policeman detained him, and
5 the magistrate and everybody was very unreasonable, da,
6 da, da. Okay?

7 Now he's there. Day one. Can you bring a
8 case? Yes. Why not?

9 He's been under -- day two. Yes.

10 And he's been held for 90 days. And I can
11 say the same thing, but I won't, up to each of the 90
12 days. 90th day, he's released. It's now the 91st day.
13 Can he bring it? Yes. But now we only have two years.
14 Why only two years? Because we're looking for an
15 analogous statute of the State to give us a -- a limit,
16 and the analogous one, though not perfectly fitting, is
17 malicious prosecution, and that had two years, and
18 that's why. Two years after the release date is the
19 longest. You had better bring it before then, because
20 that's two years since you were unlawfully held.

21 Now, what's wrong with what I just said?

22 MR. SCODRO: Well, Your Honor, two points in
23 response to that.

24 The first would be Wallace says or holds
25 that if you have the claim on day one, then that -- it

1 is -- it's accruing on day one. We're not going to give
2 you -- there's no extant conviction.

3 JUSTICE GINSBURG: But it's a different
4 claim. One claim is for arrest, and the other is for
5 prolonged detention. Two different claims. That's why
6 I took issue with you when you said if you hold for this
7 Petitioner, then people who are falsely arrested but
8 properly convicted will have no claim. I don't -- I
9 don't see that. They have a false arrest claim. They
10 don't have a prolonged detention claim.

11 MR. SCODRO: Well, Your Honor, I think what
12 would happen, they wouldn't have a claim based on
13 misstatements at the Gerstein hearing if, in order to
14 make out that claim as Petitioners contend, they would
15 have to show that ultimately their criminal litigation
16 terminated in their favor. That's the request. If Heck
17 is extended or the common law element is extended -- and
18 this is why it's not the best analogue, Your Honor. And
19 if it -- if it would be helpful to have a common law
20 point of guidance on this, in Footnote 12 of our brief,
21 we provide a list of common law cases, an example of
22 common law cases in which the Court addressed a question
23 like this.

24 We have an ex parte proceeding in which a
25 magistrate has issued -- I'll take the Stewart case,

1 which is the third of the three cited. The person
2 serves six months in jail on the warrant, but there's
3 never a prosecution. It never blossoms. He's released,
4 and he sues for malicious prosecution. And the
5 defendant in the malicious prosecution contends that
6 they're not -- that they're unable to show successful
7 outcome --

8 JUSTICE BREYER: What's your -- what's the
9 best one? What's the best analogy?

10 MR. SCODRO: That it's -- this form of
11 malicious prosecution where you didn't have to prove
12 favorable termination, because all that was against you
13 at that point was an ex parte determination with State
14 law like that. This was --

15 JUSTICE BREYER: What is your opinion? What
16 is the State law that does apply the best analogy?

17 MR. SCODRO: I think the closest analogy
18 is -- is false arrest.

19 JUSTICE BREYER: False arrest. Okay.

20 So now, what is this -- what is the -- what
21 is the statute of limitations for false arrest?

22 MR. SCODRO: The State law, it's still the
23 personal injury limitations period of two years.

24 JUSTICE BREYER: Okay. Fine. So he was
25 being detained for up to, let's say, the 90th -- 90th

1 day. He's still being detained. So now we'll count the
2 90th day as the beginning of the two-year running. And
3 so now we run it for two years, and it's still May 12th
4 or whatever.

5 MR. SCODRO: But, Your Honor, a false arrest
6 claim under Wallace accrues once process begins. So
7 it's not running for that 90 days. It would include --

8 JUSTICE BREYER: Why not?

9 MR. SCODRO: Well, as we --

10 JUSTICE BREYER: Either he's being
11 held under -- isn't he being held unlawfully on the 41st
12 day?

13 And after all, we're not -- we're not
14 copying the State law. All we're doing is trying to
15 find an analogous period of time.

16 MR. SCODRO: But, Your Honor, by imposing
17 the favorable termination element of the common law
18 claim, it would run headlong into the Fourth Amendment
19 aims; what the Fourth Amendment is geared to vindicate.

20 The Fourth Amendment, this Court has held,
21 is there for the guilty and innocent alike. And in this
22 case, what -- what -- the cost of borrowing that
23 favorable termination element and importing it into a
24 claim based solely on lies and an ex parte proceeding,
25 which is what we're talking about with the Gerstein

1 hearing, doing so would mean that if you're the victim
2 of lies at a Gerstein hearing and you're detained, but
3 ultimately you are constitutionally convicted as
4 evidence amasses against you, the need to show favorable
5 termination, it will be impossible for that plaintiff.
6 And so the Fourth Amendment right will not be something
7 that that plaintiff can vindicate. That's the reason
8 that Wallace didn't allow Heck to expand to instances
9 like this where you're not challenging the wrongful
10 conviction itself.

11 And what they have asked, their claim is
12 narrow, and the way to resolve this case is -- is now
13 equally narrow. The way to resolve the case is to
14 conclude that whenever this -- your Fourth Amendment
15 claim could run through the arraignment after indictment
16 in this case, which still -- which was still out of the
17 two-year limitations period. But it doesn't -- it is
18 not entitled to that favorable termination element which
19 would have the effect of closing off the courthouse
20 doors to a universe of claims in order to buy extra time
21 in this case. And that is what we urge the Court not to
22 do. And that is the simplest way.

23 JUSTICE GINSBURG: What you're saying is if
24 you're falsely arrested, you have a good claim for false
25 arrest. It doesn't matter that you were properly

1 convicted. But if you are not only falsely arrested,
2 but if your detention continues, then you have a claim
3 for the continued detention.

4 MR. SCODRO: For violation of the Gerstein
5 hearing, Your Honor. And -- and I do -- for lies, under
6 Gerstein.

7 I do want to be clear in saying that the
8 closest analogous tort is false arrest, that is treating
9 it the way I think the Seventh Circuit has, which is
10 that it runs up until what we call the first appearance
11 where you have the initiation of adversarial process.
12 By no means does the limitations period, or is there a
13 tolling that runs from the period of the lie at the
14 Gerstein hearing through the pretrial period.

15 As I said at the outset, that is subject to
16 traditional tort common law principles of -- of
17 proximate cause. And there may well be damages
18 recoverable for that period, but it's based on the lie
19 at the Gerstein hearing. And as Wallace held, Heck
20 cannot be extended to apply to a claim that exists
21 before you have an extant conviction.

22 JUSTICE KENNEDY: Just one more time.

23 Suppose you have arrest; Gerstein hearing --

24 MR. SCODRO: Yes, Your Honor.

25 JUSTICE KENNEDY: -- filing of formal

1 charges, either information or indictment; pretrial
2 suppression hearing, at which both parties are
3 represented --

4 MR. SCODRO: Yes.

5 JUSTICE KENNEDY: -- and the false evidence
6 is -- is not -- its falsity has not been known and so
7 you're detained. And then trial.

8 When does the Fourth Amendment violation
9 end?

10 MR. SCODRO: Sure. You would have it --
11 this returns to Justice Ginsburg's point. You would
12 have a Fourth Amendment claim for the initial
13 warrantless arrest. You would have a Fourth Amendment
14 claim for misstatements at a Gerstein hearing that then
15 led to ongoing pretrial seizure. And the damages from
16 that claim may run throughout the period of pretrial
17 seizure.

18 But with regard to the nature of the
19 constitutional violation that occurs at subsequent
20 processes, be they grand jury, bail hearings,
21 preliminary hearings, those are traditional due process
22 claims consistent with this Court's holding in Mooney --
23 frankly, in Brady, which has applied due process to
24 prosecutorial duties and police duties during that
25 period.

1 So I -- I hope that answers Your Honor's
2 question. Whether or not those damages run throughout
3 that period, or whether they're reduced by virtue of an
4 intervening cause would be a question -- application of
5 traditional proximate cause.

6 JUSTICE KENNEDY: I understand. Opposing
7 counsel or defendant's counsel ever present in a
8 Gerstein hearing?

9 MR. SCODRO: Generally, in this case, yes.
10 Often they are because the Gerstein determination is
11 frequently made as part of the first appearance, which
12 is to say -- which is the moment in time which this
13 Court held you have a Sixth Amendment -- your Sixth
14 Amendment right attaches.

15 May I complete the answer, Your Honor?

16 CHIEF JUSTICE ROBERTS: I'm sorry?

17 MR. SCODRO: May I complete the answer?

18 CHIEF JUSTICE ROBERTS: You have more? Go
19 ahead.

20 MR. SCODRO: Thank you.

21 (Laughter.)

22 MR. SCODRO: Thank you.

23 So I want to return to the point I was
24 making, which now -- I apologize. I don't know if I've
25 answered Your Honor's --

1 CHIEF JUSTICE ROBERTS: You were talking
2 about that the --

3 MR. SCODRO: Yes.

4 CHIEF JUSTICE ROBERTS: -- Gerstein hearing
5 is often combined --

6 MR. SCODRO: Yeah. It's often combined with
7 the first appearance. And the reason -- actually, this
8 Court has contemplated that in Rothgery and Gerstein
9 itself. It's often a matter of convenience that at that
10 point, it's when the individual's informed of the
11 charges, their Sixth Amendment right attaches and bail
12 is set as well.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. SCODRO: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Eisenhammer, you
17 have three minutes remaining.

18 REBUTTAL ARGUMENT OF STANLEY B. EISENHAMMER

19 ON BEHALF OF THE PETITIONER,

20 AS APPOINTED BY THIS COURT

21 MR. EISENHAMMER: Thank you.

22 Just to answer Justice Kennedy's question
23 about reasonable error on a detention, in that
24 situation, the officer would have the qualified immunity
25 defense that would, assuming it was objectively

1 reasonable, he would -- he would be protected in that
2 situation.

3 With respect to the Seventh Circuit's
4 decision --

5 JUSTICE KENNEDY: But there's still a Fourth
6 Amendment violation?

7 MR. EISENHAMMER: There's still a Fourth
8 Amendment violation, but he would have qualified
9 immunity if it -- if he acted with objective
10 reasonableness. Because it's a Fourth -- Fourth
11 Amendment doesn't have any intent. You either violate
12 it or not violate it. There's either probable cause or
13 not. And then you could superimpose qualified immunity.

14 The Seventh Circuit would have said that
15 there is -- there's no Fourth Amendment right, whether
16 or not the Petitioner filed his claim three years, four
17 years, a million years ago, or the day after he was
18 released. That's -- that's their position. So that's
19 why we're here on the question, whether this is a Fourth
20 Amendment violation. We reject the -- the Seventh
21 Circuit's view that it's a due -- due process.

22 JUSTICE SOTOMAYOR: So you -- you don't care
23 that we don't reach the statute of limitations.

24 MR. EISENHAMMER: Correct. But I do want to
25 note that the Seventh Circuit, with respect to the

1 statute of limitations to the accrual point -- point,
2 uses favorable termination in their due process cases.

3 JUSTICE ALITO: What happens in this
4 situation? The person is -- is initially arrested and
5 held for a period of time based on fabricated evidence,
6 but then before trial, shortly before -- before trial,
7 other valid evidence is gathered and the person is
8 convicted at the trial. Now, does that person have the
9 kind of claim that you are asserting? And if so, when
10 would -- when would the claim accrue? Would the
11 favorable termination defeat the claim?

12 MR. EISENHAMMER: The -- he would -- at that
13 point, if you use Heck as the case that covers this
14 particular issue, he would not -- since he was convicted
15 under Heck, he would not be able to bring the claim if
16 that claim attacks the conviction.

17 If it doesn't attack the conviction, as the
18 Court sort of pointed out in, I think it was in Footnote
19 7 on suppression hearings or on evidence --

20 JUSTICE ALITO: I'll say it attacks -- it
21 attacks the unlawful detention.

22 MR. EISENHAMMER: So it wouldn't have the --

23 JUSTICE ALITO: It's not the conviction. It
24 would not be defeated by --

25 MR. EISENHAMMER: Then -- then I would say

1 under Heck, the Heck exception, they could bring -- they
2 could bring then suit.

3 JUSTICE ALITO: Then when would the claim
4 accrue?

5 MR. EISENHAMMER: I think it would accrue at
6 that point, at the conviction, as I read Heck. Because
7 I think it would be -- it would be -- in this particular
8 case, it would be unfair to the -- to the individual to
9 speculate on whether -- what evidence comes out at the
10 -- at the trial to determine whether or not that
11 really -- that probable cause determination may or may
12 not attack the -- the --

13 JUSTICE ALITO: Well, if the outcome of
14 the -- of the trial is irrelevant to the Fourth
15 Amendment claim, as it would seem to be in the case of
16 an unlawful detention, then why should the claim not --
17 why should the accrual of the claim be tied to the
18 termination of the prosecution?

19 MR. EISENHAMMER: Because at the -- at the
20 time it -- it has occurred, you -- well, two reasons.
21 You don't know at that time whether or not it does
22 attack the conviction.

23 And second, you don't -- you don't want --
24 because you don't know whether that evidence heard at
25 the -- at the -- at the -- at the Gerstein hearing may

1 or may not -- some of it may come in; some of it may
2 not.

3 And then the other issue -- the other issue
4 is that you don't want parallel litigation going on,
5 or -- or collateral attack for many of the reasons
6 that -- that was stated in Kaley.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 2:03 p.m., the case in the
10 above-entitled matter was submitted.)

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ability 38:8	adopting 34:17 44:20	12:19 13:15,19 13:22,24 14:3	52:15,17 53:22	18:20 29:16,22
able 42:24 55:15	adopts 24:23	14:15 15:6,7	answered 11:14 52:25	32:1,4,7 36:3,4
above-entitled 1:12 57:10	adversarial 50:11	15:10,15 16:6	answers 52:1	37:21,22 38:14
absolute 21:2	advocate 25:6	16:8,10,25	anyway 33:12	40:22 46:4,9
absolutely 23:11 26:6 34:9	affidavit 34:1	17:9 18:4,5,7	apologize 52:24	47:18,19,21
accept 12:14 33:7,8	affirm 3:20	18:12,22,25	appeal 8:9 31:14	48:5 49:25
account 21:21	afford 20:3	19:3,12,20	appealed 28:17	50:8,23 51:13
accrual 4:8,13 4:19 7:1 13:21	afternoon 28:6	20:1,3,12,23	appearance 50:10 52:11	arrested 5:4 12:17 36:1
15:21 24:7,8	agent 21:4	22:20 23:1,20	53:7	46:7 49:24
24:25 25:23	agents 39:10	23:23,25 24:3	APPEARAN...	50:1 55:4
26:4 27:17,20	ago 54:17	26:5,8,11,17	1:15	arrests 31:22,23 35:15
30:6 33:5 35:2	agree 26:14 31:10,10 36:9	26:25 27:8,11	appeared 11:18 42:19	aside 39:15
35:12 36:13	43:6	28:10,24 29:2	appears 44:13	asked 42:12,21 43:5,6 44:11
37:2,4,11,18	agreement 14:6 14:8,9	29:5,6,8,18,23	application 52:4	49:11
40:16 41:21	agrees 31:21	30:2,3,8,12,17	applied 51:23	asking 9:20 16:19 29:4
43:1,19,19	ahead 52:19	31:1,8 32:7,13	applies 8:23 12:22 32:7	44:23
44:25 55:1	aims 48:19	32:14,20 33:14	35:2	asserting 55:9
56:17	AL 1:6	34:6 35:8,10	apply 18:5 21:22 26:15 34:25	Assistant 1:19
accrue 6:2 30:10 55:10 56:4,5	Albright 3:21 15:19	35:14,16,22	35:3,18 47:16	assume 41:11,13
accrued 29:2,3 42:25	alike 48:21	36:1,12 40:21	50:20	assuming 22:20 33:14 42:2
accrues 30:10 48:6	ALITO 14:17 15:2,9 20:13	41:10 43:2,16	appointed 1:17 2:4,15 3:8	53:25
accruing 46:1	21:3,8,16,23	48:18,19,20	53:20	attaches 52:14 53:11
accused 40:3	22:6 55:3,20	49:6,14 51:8	approach 25:19	attack 13:1,2,7,8 55:17 56:12,22
acknowledge 43:15,18	55:23 56:3,13	51:12,13 52:13	appropriate 26:7	57:5
acknowledged 43:17	Alito's 31:18	52:14 53:11	argued 16:2	attacks 55:16,20 55:21
acquitted 4:23	allegation 20:8	54:6,8,11,15	arguing 14:12 24:10 36:21	attorney 13:7 43:4,6
acted 54:9	allow 7:15 13:6 23:22 31:11	54:20 56:15	argument 1:13 2:2,6,10,13 3:3	authorities 40:5
action 3:22	49:8	amici 39:8	3:6 6:15 17:23	available 18:19 39:2
actionable 36:11	allowing 20:5	amicus 1:21 2:8 17:24 38:1	19:24 28:1	aware 42:17
acts 39:10	allows 20:6	39:7	33:8 36:17	
addressed 46:22	Alschuler 38:2	analogous 26:10 32:8 45:15,16	41:4,7 42:13	B
adjudicator 5:19	alternative 16:2	48:15 50:8	43:5 53:18	B 1:16 2:3,14 3:6 53:18
admission 27:7	amasses 49:4	analogue 27:16 46:18	arising 38:21	back 13:18,22 14:4 15:12
admit 44:7	amendment 3:13,17,17,22	analogy 24:9,13 25:2,24 32:25	Arlington 1:16	26:6 42:22 44:2
adopt 31:16	4:16,18,20 5:6	33:18,21,23	arraignment 29:23 30:2,9	
	7:13,16 8:12	34:8 47:9,16	49:15	
	8:15,16,23	47:17	arrest 8:1 17:1	
	9:18 10:18,24	announced 40:4 16:12 27:9		
	11:4,5,9,12,23	31:17 33:23,24		
		34:8 44:5,25		

<p>bad 33:11 35:15 39:10 bail 12:1 51:20 53:11 bar 29:7 barred 26:2 bars 20:23 27:13 based 5:20 7:15 8:15 23:23 24:25 29:1 36:5 46:12 48:24 50:18 55:5 bases 38:14 basic 30:5 basically 39:16 basis 10:17 29:19 battle 31:4 beginning 11:2 17:12 48:2 begins 4:19 26:9 37:14 48:6 behalf 1:17,23 2:4,12,15 3:7 28:2 53:19 believe 9:12,12 21:13 44:11 believed 39:24 benefit 36:19 44:11,16,18 best 46:18 47:9 47:9,16 better 38:22 45:19 beyond 7:14 12:8 23:22 27:1 Bivens 21:21 22:12,14 blossomed 30:25 blossoms 47:3 book 8:1 borrowing 48:22 Brady 51:23 breaking 6:11</p>	<p>breaks 37:23 breed 29:5 BREYER 22:16 31:20 32:3,6 32:10 33:7,17 45:2 47:8,15 47:19,24 48:8 48:10 brief 21:9,16,17 21:20 22:7 34:24 38:2 39:7 42:19 46:20 briefed 14:2 briefing 24:18 briefs 38:1 44:18 bring 3:13,23 9:21 18:16 20:21 27:12 45:7,13,19 55:15 56:1,2 bringing 20:19 38:7 brings 31:24 broadly 12:5 brought 15:19 33:9 39:3 buy 49:20</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 call 50:10 calling 34:19 care 54:22 careful 36:16 case 3:4,12,15 3:18 7:22,25 9:11 10:25 12:22 13:3,8,9 13:13 17:5 22:9,10,18 24:20 25:21 27:22 31:5 33:2 37:7,8 39:3,18 40:16 41:24 45:8</p>	<p>46:25 48:22 49:12,13,16,21 52:9 55:13 56:8,15 57:8,9 cases 5:13 8:15 37:3 39:20 40:2 46:21,22 55:2 causation 6:11 20:18 38:24 cause 3:22 5:3 5:17 7:5 9:5 13:8 16:23 18:9,15,18,21 20:6,11 24:13 25:6,8 26:24 28:9 34:3 35:20 39:5 50:17 52:4,5 54:12 56:11 cert 31:5,13 36:18 42:19 44:13 certainly 16:7 cetera 31:23 33:15 chain 6:11 challenge 24:10 challenging 29:20 49:9 characterize 4:2 characterized 16:5 charge 18:16 20:19,21 22:11 25:7 charges 8:11 18:13 20:9 51:1 53:11 cherry 25:15 Chicago 1:23 Chief 3:3,9,25 4:15 5:5 7:10 11:7,13 16:1 17:21 18:1 23:24 25:12 27:24 28:3</p>	<p>42:1 52:16,18 53:1,4,14,16 57:7 choosing 25:25 circuit 3:23,24 13:13,14,18,25 18:11 26:7,13 28:11,13,22,22 29:15 30:1,13 30:23 31:1,10 32:17 34:4 41:3 42:18 43:8,9,14,25 44:2,4 50:9 54:14,25 Circuit's 26:3 29:14 54:3,21 circuits 14:1 32:16,18,22 34:12,15 41:9 41:12 44:19 circumstance 35:18 circumstances 19:1 22:1,9 26:15 cite 44:21 cited 47:1 City 1:6 3:4 civil 35:20 38:6 claim 3:13 4:3 4:17,18,23 5:1 5:6 7:11,15 8:16,19 9:6,10 9:15,18,22 10:12,18 11:19 13:15,19,22,24 14:4 15:3,10 15:12,13,15,16 15:21,22,23 16:3,6,8,10,16 16:19 17:9,12 20:11,11,16 21:22 22:14 23:23 24:1,21 25:5,15 26:10 26:11,17,25</p>	<p>28:19,21,24,25 29:2,5,6,9 30:2 30:9,12 31:2 31:12,19 32:1 32:3,4 35:8,11 36:1 39:3 41:9 41:10,19 42:25 42:25 43:16 44:3,5 45:25 46:4,4,8,9,10 46:12,14 48:6 48:18,24 49:11 49:15,24 50:2 50:20 51:12,14 51:16 54:16 55:9,10,11,15 55:16 56:3,15 56:16,17 claimants 40:21 claimed 28:19 36:19 claiming 6:21 11:11 16:15 claims 7:20 17:1 20:9 21:1 27:12 28:16 30:17 35:22,25 38:7 46:5 49:20 51:22 clarification 38:20 clarify 21:14 clause 29:19 clear 31:6 35:1 36:9 39:1 42:20 50:7 clearly 30:1 clerk 41:4,7 close 7:25 18:17 19:3 35:21 closest 24:9,13 32:25 47:17 50:8 closing 40:20 49:19 co-counsel 26:17 coexist 16:3</p>
---	--	---	---	---

<p>collateral 13:1,2 57:5 collaterally 13:6 13:7 column 29:13 combined 53:5,6 come 40:2 57:1 comes 26:19 30:19,24 35:3 38:1 56:9 comment 37:15 common 4:11 24:9,24 25:2,4 25:10,24 26:1 34:11,18 38:23 39:4 40:18 43:4 44:15,22 46:17,19,21,22 48:17 50:16 common-law 7:7 complaining 16:4 complete 52:15 52:17 conclude 38:4 49:14 concluded 37:20 concludes 38:5 conclusion 38:3 conclusions 28:23 concurrence 11:18 12:10 conditions 12:9 conflicting 12:24 confused 7:10 consequence 11:8 consider 37:17 considered 42:6 43:25 consistent 30:22 51:22 consonance 23:25</p>	<p>Constitution 15:24 39:14 constitutional 3:19 7:1,2 16:23 17:6 18:4 23:14 24:5,23 27:3 32:4 42:2 51:19 constitutionally 49:3 construed 37:10 contemplated 53:8 contemplates 35:15 contend 46:14 contends 47:5 context 28:14 30:21 44:10 continue 27:8 continued 50:3 continues 7:14 12:15 23:21 30:9 36:7 50:2 continuing 36:5 36:6,17,22,24 37:24 38:3 convenience 53:9 convicted 4:22 8:8 23:3 26:18 27:17 35:8,10 40:23 46:8 49:3 50:1 55:8 55:14 conviction 8:16 8:21,24 9:3 10:15,22 23:6 35:4 39:25 46:2 49:10 50:21 55:16,17 55:23 56:6,22 convictions 23:8 35:16 copying 48:14 core 24:10</p>	<p>correct 5:23 6:3 6:4,8,8,12,13 6:13 15:25 24:4 32:2 33:4 42:8,10,11 54:24 correctly 6:15 corrupt 16:18 17:11 20:15 40:6 corrupted 5:11 5:18,24 14:25 17:10 cost 48:22 counsel 17:21 27:24 52:7,7 53:14 57:7 counselor 39:21 count 48:1 County 17:13 couple 36:14 course 19:5 36:20 41:12 court 1:1,13,18 2:5,16 3:8,10 3:20 4:9 7:18 10:7,21 12:7 12:25 15:14 16:19 17:16 18:2,3,6,13,21 22:14 25:6 27:6,14,15 28:4,6,18 30:15,16,21,24 31:13,15,15 33:5 35:6,14 37:3,10,16 39:15,17 44:23 46:22 48:20 49:21 52:13 53:8,20 55:18 Court's 12:11 25:1 34:22 39:17 51:22 courthouse 40:20 49:19 courts 25:5 33:6</p>	<p>36:23 44:24 cover 11:5 14:16 covers 11:23 55:13 credit 6:17 crime 40:3 criminal 12:25 13:9 18:12,16 22:11 25:7 26:9 46:15 curiae 1:21 2:8 17:24 custody 10:19 31:24 cut 38:13 cutoff 10:15 37:21</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 D.C 1:9,20 da 45:5,6,6 damage 10:3 damages 38:21 39:2 50:17 51:15 52:2 date 13:21 24:7 30:6 33:5 41:25 43:19,20 43:20 44:25 45:18 day 26:20 35:21 45:7,9,12,12 45:25 46:1 48:1,2,12 54:17 days 5:8 39:4 45:10,12 48:7 dealt 11:19 decide 13:19 14:5 15:23 16:10 deciding 16:7 decision 3:16 11:21,22 13:8 16:15 19:3 25:1 30:25</p>	<p>34:22 54:4 decisions 12:24 defeat 55:11 defeated 55:24 defendant 8:2 20:14 40:3,19 47:5 defendant's 52:7 defendants 38:8 39:19,23 defense 13:3 53:25 define 17:6 defined 24:18 defining 12:4 delayed 35:2,11 40:19 43:1 demands 25:21 denied 44:17 Department 1:20 depending 12:8 25:20 39:4 depends 20:18 23:14 describe 17:10 described 16:22 36:10 describes 37:13 describing 24:2 detain 11:21 detained 6:3 19:16 20:5,9 22:24 45:4 47:25 48:1 49:2 51:7 detention 3:14 5:2,7 6:2,7 7:3 7:22 8:13 10:1 12:5,8,15 15:17,24 16:5 16:17,17,21,23 16:24 17:12 18:8,10 20:11 24:3,12 29:20 29:22,22 36:2</p>
---	--	---	---	---

46:5,10 50:2,3 53:23 55:21 56:16 detentions 14:16 18:6 determination 5:16 18:8,15 20:7 25:7,8 47:13 52:10 56:11 determine 4:6 24:6 56:10 determines 18:21 detriment 13:2 13:10 diametrically 41:2 different 8:21 10:24 11:8 12:18 21:10 22:12,15 23:8 24:2 29:5 30:11 40:2 46:3,5 differently 24:18 29:11 difficult 31:21 direct 30:15 disagree 28:11 discovered 39:25 discrete 35:25 discuss 28:25 dismiss 28:15 42:23 dismissed 8:11 27:23 28:16 dispute 34:4,5 disputing 28:7 distinct 26:22 distinction 22:4 distinguish 7:22 district 28:18 doctrine 25:11 dog 17:15 doing 48:14 49:1	door 35:22 40:20 doors 49:20 doubt 27:2 drastic 34:22 draw 22:4 drug 20:9 due 3:16 8:18 9:5 10:22 11:9 11:18,19,23 16:2,5,10,16 27:2 29:19 51:21,23 54:21 54:21 55:2 duties 51:24,24 <hr/> E E 2:1 3:1,1 earlier 5:13 31:18 early 29:3 39:9 effect 49:19 Eisenhammer 1:16 2:3,14 3:5 3:6,9 4:5 5:1,7 5:22 6:4,8,13 6:16,23 7:5,17 8:14,18,25 9:12,17,24 10:2,5,11,20 11:3,11,16 12:3,6,20 13:11 14:6,9 14:13,20,24 15:5,14,18,25 16:9 17:7 53:16,18,21 54:7,24 55:12 55:22,25 56:5 56:19 Eisenstein 1:19 2:7 17:22,23 18:1,24 19:5 19:11,17,21 20:2,17 21:5 21:12,18 22:3 22:8 23:11	24:4,22 25:22 26:21 27:9,22 either 22:23 48:10 51:1 54:11,12 element 10:7 24:16 25:5 28:20 31:16 32:24 35:3 40:18 43:10 44:22 46:17 48:17,23 49:18 elements 13:20 24:6,17,20,24 31:19 33:19 35:9 37:6 43:4 44:15 ELIJAH 1:3 employer 39:10 ends 8:16 36:4,7 endure 37:16 enforcement 21:10,11 engaged 39:10 ensure 39:20 entire 8:12 entirely 20:10 entitled 35:11 49:18 environment 37:8,12,14 equally 49:13 erred 26:7 error 18:11 20:25 26:4,12 53:23 errors 20:7 40:12 especially 42:18 ESQ 1:16,19,23 2:3,7,11,14 essential 28:7 establish 42:24 et 1:6 31:23 33:14 events 39:1 eventually 4:22	everybody 45:5 evidence 8:1,3,4 8:6,7,10 9:10 9:22 18:19 20:10 22:10 23:3 27:7 33:11 38:9,11 39:20,24 49:4 51:5 55:5,7,19 56:9,24 ex 35:19 46:24 47:13 48:24 exactly 16:25 17:18 23:12 example 26:2 46:21 examples 25:13 exception 37:8 37:19 56:1 exceptions 37:10 exercise 35:6 exist 5:15 35:5 exists 13:24 15:4 50:20 expand 49:8 expanded 34:25 expanding 35:18 experience 40:1 experiences 37:5 explain 12:13 31:13 expressed 12:21 extant 35:4 46:2 50:21 extend 31:2 extended 17:14 17:15,19 36:3 46:17,17 50:20 extension 25:11 34:22,22 39:16 extent 20:24 extra 40:7 49:20 extraordinarily 39:11 <hr/> F	F.B.I 21:3 fabricated 8:3,3 8:6,8,10 9:10 9:22 18:18 20:10 22:10 38:11 55:5 fabricates 8:1 fabrication 17:20 38:15 40:9 fabulous 33:20 face 37:2 facially 36:18 fact 20:4,6 23:13 30:16 factors 21:20 facts 5:15 11:6 factual 20:7 falls 20:25 29:23 30:3 false 5:20 17:1,1 17:3 27:18 30:17 32:1,4,7 36:5 46:9 47:18,19,21 48:5 49:24 50:8 51:5 falsehoods 34:2 falsely 40:3 46:7 49:24 50:1 falsity 51:6 far 23:5,17 25:25 33:3 fashion 7:8 fate 31:14 favor 41:22 46:16 favorable 4:14 4:15,25 10:6 26:14 28:19 31:16 34:11,16 34:19 35:3 36:20 42:4,4 43:9 47:12 48:17,23 49:4 49:18 55:2,11 favorably 4:18
---	--	---	--	---

<p>Federal 4:10 21:6,11 22:2 25:23 27:19 fifth 32:17 37:15 figure 44:3,4 filed 8:9 18:13 54:16 filing 50:25 final 37:25 find 8:10 18:11 26:20 27:17 48:15 finding 26:24 27:1 28:9 35:19 finds 34:3 Fine 47:24 finish 6:7 first 3:12 29:15 36:16 37:1,5 38:20 45:24 50:10 52:11 53:7 fitting 45:16 flesh 25:13 33:24 flowed 26:4 follow 32:24 42:2,22 follows 21:7 44:24 Footnote 46:20 55:18 force 6:10 foreclosed 21:1 forfeit 44:4 forfeited 44:3,8 form 47:10 formal 50:25 forth 20:20 38:9 forward 23:13 found 17:16 30:16 four 54:16 four-element 34:18 44:19 Fourth 3:13,17</p>	<p>3:22 4:16,18 4:19 5:6 7:13 7:16 8:12,15 8:16,16,23 9:18,18 10:18 11:4,9,12,23 12:19 13:15,19 13:22,23 14:3 14:15 15:6,7 15:10,15 16:6 16:8,10,25 17:9 18:4,5,7 18:12,22,25 19:2,12,19,25 20:3,12,22 22:19,25 23:20 23:23,25 24:2 26:5,8,11,16 26:25 27:8,11 28:10,24 29:2 29:5,6,8,18,23 30:1,3,8,11,17 31:1,7 32:6,13 32:14,19 33:14 34:5 35:8,10 35:14,16,22 36:1,11 40:21 41:10 43:2,16 48:18,19,20 49:6,14 51:8 51:12,13 54:5 54:7,10,10,15 54:19 56:14 frame 28:5 framework 23:9 23:12 frankly 51:23 Franks 25:9,11 40:10 free 7:13 23:21 frequently 52:11 front 32:11 full 13:16 39:4 fundamental 30:23 further 33:2</p>	<hr/> <p>G</p> <hr/> <p>G 3:1 gathered 55:7 geared 48:19 general 1:20 9:9 generally 5:14 9:8,21 10:21 52:9 Gerstein 7:20 8:2,21,24 9:1,1 9:11,15,23 12:6,7,11 17:11 28:9 29:1 31:9 34:2 35:14 38:22 46:13 48:25 49:2 50:4,6,14 50:19,23 51:14 52:8,10 53:4,8 56:25 Ginsburg 10:14 11:1 12:5,13 26:16 35:24 46:3 49:23 Ginsburg's 12:10 51:11 give 7:24 38:10 44:22 45:15 46:1 gives 29:19 go 12:8 15:12 26:6 29:16,18 33:2,10 52:18 goes 25:25 31:11 34:13 going 32:23 34:19 46:1 57:4 good 12:21 19:24 33:21,23 35:15 49:24 governed 3:16 24:9 25:24 27:12 government 23:12 39:11</p>	<p>grand 5:14 9:2 26:25 51:20 great 33:19 grounds 42:24 guess 5:9 23:7 43:12 44:1 guidance 46:20 guilty 6:3 35:17 48:21</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>H 1:19 2:7 17:23 habeas 10:15 26:19 27:18 halfway 31:6 happen 13:5 46:12 happened 5:17 17:18 41:5,7 happens 11:25 55:3 harm 13:5 37:4 37:5 headlong 48:18 hear 3:3 heard 43:5 56:24 hearing 8:2,5,21 8:24 9:1,2,16 9:23 17:11 27:5 28:9 29:1 30:19 31:9 34:2 38:22 46:13 49:1,2 50:5,14,19,23 51:2,14 52:8 53:4 56:25 hearings 51:20 51:21 55:19 Heck 12:22 25:1 34:23,24 35:1 35:12,18 39:16 40:17 44:21 46:16 49:8 50:19 55:13,15 56:1,1,6 Heights 1:16</p>	<p>held 8:4,6,8 9:4 18:6,22 23:13 26:22,23 27:1 36:5 45:3,10 45:20 48:11,11 48:20 50:19 52:13 55:5 helpful 46:19 hesitation 21:21 Higginbotham 32:17 hold 11:21 46:6 holding 10:17 25:19 26:8 51:22 holds 45:24 Honor 18:24 19:6,11,17,21 20:2,17 21:5 21:12,18 22:4 23:11 24:4,22 25:3,22 26:21 27:9,10,23 30:14 32:9 33:16,22 36:8 36:10 37:12 38:19 40:15 42:14 44:9 45:22 46:11,18 48:5,16 50:5 50:24 52:15 Honor's 34:14 36:15 52:1,25 hope 52:1 horrible 38:15 hostile 37:7,11 37:14 hours 8:3 house 23:25 hurdles 22:21 hypothetical 7:25 19:6</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 36:18 ideal 31:17 identical 22:1</p>
---	---	---	--	---

ILANA 1:19 2:7 17:23	individual 26:23 33:9 40:12	invited 39:17	29:10 31:17,20	35:9 37:13
Ill 1:16,23	41:23 56:8	irrelevant 56:14	32:3,6,10 33:7	38:12 39:21
illegal 4:20,23 4:24 6:7	individual's 7:13 23:20	issue 6:25 11:19 11:20 14:15	33:17 35:24	40:7 43:23
ILLINOIS 1:6	53:10	16:12 18:4	38:10 39:21	52:24 56:21,24
illustrates 13:5	individuals 21:2 39:13	27:14 33:4	40:24 41:18,21	known 25:4 51:6
immediately 38:16	information 5:20 18:19	46:6 55:14	42:15 43:11,22	
immunities 21:7	30:18 36:6	57:3,3	45:2 46:3 47:8	L
immunity 20:14 20:23 21:2,15	51:1	issued 46:25	47:15,19,24	label 7:18,19,21 12:19
40:10 53:24	informed 53:10	J	48:8,10 49:23	lack 38:22
54:9,13	infringed 23:15	JA 30:15	50:22,25 51:5	language 44:6,7
important 28:5	initial 3:11 15:8 29:17 37:21	jail 23:6,14 31:24,25 32:12	51:11 52:6,16	larger 6:25
28:13 38:13	51:12	33:9,11 38:12	52:18 53:1,4	Laughter 6:18 19:14 41:17
39:11	initially 12:17 55:4	47:2	53:14,16,22	52:21
importing 48:23	initiation 30:19 31:8 50:11	join 43:7,8	54:5,22 55:3	law 4:10,11 9:8 9:21 10:13
imposed 37:21	injury 42:6 47:23	Joliet 1:6 3:4	55:20,23 56:3	20:4 21:9,11
imposing 48:16	innocence 40:4	judge 5:14 32:17 41:8 42:1	56:13 57:7	23:5 24:9,24
impossible 37:13 49:5	innocent 35:17 48:21	jurisdiction 6:25	K	25:2,4,10,24
imprisoned 17:4	inquiry 8:23 24:5	jurisprudence 26:13 30:25	KAGAN 13:11 14:8,11 15:16	26:1,2 32:24
imprisonment 17:1,3	insofar 42:12	jury 5:14 9:2 26:25 51:20	15:20 29:10	34:11,18 38:23
improper 6:2 14:23 15:24	inspired 25:13	justice 1:20 3:3 3:9,25 4:15 5:5	40:24 41:18,21	39:4 40:18
17:17,17	instance 22:3 24:8	5:10,25 6:5,9	42:15 43:11,22	42:3 43:4
improperly 17:19	instances 21:19 35:23 49:8	6:14,19 7:3,8,9	Kagan's 13:4 26:5	44:15,22 46:17
incarceration 38:5	institutional 24:12	7:10,24 8:17	Kaley 13:4 57:6	46:19,21,22
incident 30:18	intent 39:11 54:11	8:20 9:7,13,20	KENNEDY 7:24 8:17,20	47:14,16,22
include 24:21 48:7	intermediary 5:14 6:10	9:25 10:3,9,14	9:7,13,20,25	48:14,17 50:16
includes 25:9 44:14	intermediate 6:10	11:1,7,13,17	10:3,9 18:17	laws 9:21
including 18:15	interrupting 38:25	11:25 12:4,5	19:2,9,15,19	lawyer 42:7,12 42:21 43:19
inconsistent 36:18	intervening 17:3 52:4	12:10,13 13:4	19:23 27:4	44:10,15
independent 5:13,19 39:24	introduced 8:4	13:11 14:8,11	50:22,25 51:5	lead 22:12 38:3
independently 5:16		14:17,19,22	52:6 54:5	learning 39:12
indicated 16:20		15:2,9,16,20	Kennedy's 11:17 19:6	led 24:12 51:15
indictment 49:15 51:1		16:1,21 17:21	53:22	legal 3:14 5:9,11 5:11,12,18,21
		18:1,17 19:2,6	kept 36:2	5:21,23 7:14
		19:9,15,19,23	kind 15:3,10,11 15:12 25:5	7:22 8:22 9:14
		20:13 21:3,8	39:22 41:9,10	14:16,19,21,23
		21:16,23 22:6	55:9	14:25,25 16:18
		22:16 23:16,24	kinds 21:1 27:12	16:18,24 17:2
		24:15 25:12	know 6:23,25 11:13 14:17	17:13 23:22
		26:5,16 27:4	15:2,11 17:11	24:3 30:2,9
		27:15,24 28:3	25:18 31:22	let's 23:16 41:11 41:13 47:25
				level 30:5

liability 21:6 40:10	luck 12:1	merely 31:7	needed 37:6	48:6
liable 20:24	lying 33:14	MICHAEL 1:23	never 6:1 10:16	ongoing 51:15
lie 29:1 34:1	<hr/> M <hr/>	2:11 28:1	35:25 40:2	operation 18:12
36:10,10,10	magistrate	million 54:17	47:3,3	opinion 12:11
50:13,18	20:25 22:23,23	mind 23:9 35:9	nevertheless	13:4 29:14
lied 10:16 26:20	26:24 31:25	minutes 17:15	35:16	47:15
lies 38:21 48:24	32:11,12 33:10	53:17	Newsome 30:24	opposed 11:20
49:2 50:5	33:10 34:2,3	missing 22:17	non-adversarial	16:6 41:2
lieu 44:21	36:11 45:4,5	misstatements	9:1	Opposing 52:6
limit 32:7,8	46:25	28:8 46:13	normally 4:9,11	oral 1:12 2:2,6
45:15	maintain 38:9	51:14	note 28:7 54:25	2:10 3:6 17:23
limitations 4:1,7	making 52:24	mistakes 20:4	notes 30:16	28:1 41:4,7
12:16,18 15:21	malice 24:21	misunderstan...	notice 30:16	order 8:1 10:6
16:11 25:16	25:3,4,10,18	40:25 42:9	38:8 39:9,19	15:23 46:13
26:1 28:16	malicious 3:19	moment 33:25	39:23 40:7,14	49:20
31:3 32:21	4:3,13 6:21,24	43:25 52:12	40:19	ought 34:24
33:5 41:15	7:11,15 9:7,9	momentarily	notion 36:23	oughtn't 13:17
42:23 43:1,3	9:15,21 10:8	28:18	37:23	outcome 47:7
47:21,23 49:17	10:11,12 19:25	monolithic	number 34:21	56:13
50:12 54:23	20:15 23:22	37:17	40:21	outset 18:9
55:1	24:1,14,18,24	months 8:4,7,9	numerous 3:21	50:15
line 3:23	26:10 28:20	10:10 32:12	3:21	overcome 22:20
list 46:21	29:6,8 31:2,12	47:2	<hr/> O <hr/>	29:7 43:3
listened 42:13	32:13,23 33:18	Mooney 51:22	O 2:1 3:1	overturned
44:6	34:8 45:17	Morgan 37:7	objective 54:9	27:23
listening 45:4	47:4,5,11	motion 28:14	objectively	<hr/> P <hr/>
litigated 27:14	maliciously	42:23	20:22 53:25	P 3:1
litigation 12:23	31:23	municipalities	occur 6:2 27:21	p.m 1:14 3:2
28:8 46:15	Manuel 1:3 3:4	39:8	occurred 5:3	57:9
57:4	20:8	<hr/> N <hr/>	56:20	page 2:2 21:16
local 21:9,25	matter 1:12 20:4	N 2:1,1 3:1	occurs 51:19	31:5,12
locate 18:3	38:18 40:17	named 3:19	October 1:10	paragraph
logic 38:3	49:25 53:9	narrow 49:12,13	officer 8:1 20:20	29:21
logical 38:2	57:10	narrower 33:20	21:6 22:2	parallel 12:23
long 18:6,13	matters 37:4	narrowly 37:10	38:14 40:5	12:23 57:4
30:19 39:25	mean 5:5 13:24	natural 43:13	53:24	Parratt 11:10
longer 6:3	16:1 21:14	nature 31:4	officer's 20:19	part 25:16 34:17
longest 45:19	22:16 25:18	51:18	officers 21:10,11	38:24 42:18
look 4:9,11 23:7	31:9,13 43:12	nearly 25:12	21:25 34:1	44:12 52:11
35:7 43:14	43:12 44:17	necessarily	40:12	parte 35:19
45:3	49:1	21:22	Oh 43:11	46:24 47:13
looking 5:19	means 38:6	need 3:25 4:2,5	Okay 8:17 10:9	48:24
45:14	50:12	4:6 10:8 36:19	45:6 47:19,24	particular 7:7
looks 5:15 13:20	measure 21:6	36:21 38:10	once 18:12	12:22 16:4
lot 32:18	mental 35:6	39:19 40:8	25:15 27:1,13	21:19 25:21,24
Lower 36:23	mere 23:13	49:4	29:22 33:8	29:16 55:14

<p>56:7 parties 27:5 51:2 pattern 42:3 peel 26:12 pending 11:22 13:9 people 46:7 perfectly 6:16 45:16 period 4:8,14 7:1 15:21 16:4 18:7,10 33:13 36:13,22 37:4 38:5,25 43:2,3 47:23 48:15 49:17 50:12,13 50:14,18 51:16 51:25 52:3 55:5 periods 33:6 person 10:17 12:1 27:1 29:16,18 45:3 47:1 55:4,7,8 personal 47:23 pertinent 16:7 petition 31:5,13 36:19 42:20 44:14 Petitioner 1:4,17 1:22 2:4,9,15 3:7,13 17:25 28:18 30:8 31:5 34:10,24 36:16 40:17 46:7 53:19 54:16 Petitioners 46:14 phases 26:22 picked 32:18,22 picking 25:15,20 picture 29:24 30:4 piece 21:20 plaintiff 27:11</p>	<p>35:20 49:5,7 plaintiffs 38:6 please 3:10 18:2 28:4 point 10:19 15:6 28:7 31:25 34:14 37:25 38:20 39:6,9 40:1 41:14 46:20 47:13 51:11 52:23 53:10 55:1,1 55:13 56:6 pointed 55:18 points 3:11 36:14 38:19 45:22 police 10:16 17:20 18:20 21:25 26:20 33:25 38:14 40:5 51:24 policeman 22:18 31:22 33:9 45:4 policy 42:5 position 41:1,2 54:18 possibility 12:12 possibly 22:1 post-legal 43:16 post-process 37:22 potential 35:22 38:6 40:21 potentially 21:21 practical 23:7 precisely 37:12 37:13 preclusion 27:13 preliminary 30:18 51:21 prerequisites 24:7 present 52:7 presented 7:12</p>	<p>22:9,10 23:18 23:25 31:6 preserve 39:20 pressing 20:21 presumes 9:3 pretrial 8:5 9:11 18:6 27:5 38:25 50:14 51:1,15,16 pretty 25:14 prevail 36:20 price 40:18,20 principal 14:2 principle 9:9 35:2,12 37:11 40:16 principles 27:13 37:2 38:24 39:5 50:16 prior 38:8 prison 22:22 probable 5:2,16 7:4 9:5 13:8 16:23 18:9,15 18:18,21 20:6 20:11 24:13 25:6,8 26:24 28:9 34:3 35:20 54:12 56:11 problem 4:1 32:20 procedure 18:16 proceed 37:6 proceeding 9:2 27:16 46:24 48:24 proceedings 41:22 process 3:14,16 5:9,11,11,12 5:18,21,21,23 7:14,23 8:18 8:22 9:5 10:22 11:9,18,19,24 14:16,19,23,25 16:3,6,11,16</p>	<p>16:18,24 17:2 17:13 23:15,22 24:3,12 26:9 27:2 29:19 30:2,10,20 31:8,9 43:16 48:6 50:11 51:21,23 54:21 55:2 processes 51:20 produced 9:23 Professor 38:2 prolonged 17:12 18:7 46:5,10 proper 5:10,21 5:23 7:1 16:24 34:8 properly 16:5 46:8 49:25 proposal 26:5 prosecute 3:16 11:20,22 16:15 prosecution 3:20 4:3,13,17 6:22,24 7:11 7:15 9:8,10,15 9:22 10:8,12 13:3,6,10 19:25 23:23 24:1,11,14,18 24:25 26:10 28:20 29:6,8 31:2,12 32:14 32:23 33:18 34:8 45:17 47:3,4,5,11 56:18 prosecutor 20:25 prosecutorial 51:24 protected 54:1 protections 27:3 40:11 protects 35:17 prove 35:21 47:11</p>	<p>proves 37:9,19 provide 46:21 provides 32:25 provision 7:7 11:19 proximate 38:24 39:5 50:17 52:5 purchased 40:18 40:20 purposes 33:8 37:5,18 pursuant 3:14 14:16 22:25 26:23,23 27:1 pursue 19:7 pursuit 22:11 puts 20:20 22:22 23:12 31:24</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualified 20:14 20:23 21:15 40:10 53:24 54:8,13 question 4:10 6:5,6 7:12 11:14 14:3,14 14:14 15:7,8 18:18 23:18,24 26:19 30:11 31:6,18,21 33:17,19,20 34:7,14 36:12 36:15 43:25 44:22 46:22 52:2,4 53:22 54:19 questions 13:12 17:8 30:6 quite 22:17 quote 42:18,20 44:12,13</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raised 14:15</p>
--	---	---	---	---

<p>raising 9:19 36:24 ramifications 22:15 ranks 39:13 reach 54:23 reached 28:22 reaches 27:6 read 29:11 30:21 41:3 56:6 reading 11:17 realize 35:7 really 4:23 9:5 9:17 11:23 14:2 37:8 56:11 reason 8:25 18:5 23:4,7 28:12 29:22,23 32:15 35:13 36:25 40:15 44:1 49:7 53:7 reasonable 19:4 19:10 20:3,22 27:2 53:23 54:1 reasonableness 54:10 reasons 12:21 38:11 39:19 42:5 56:20 57:5 REBUTTAL 2:13 53:18 receive 39:22 received 5:21,22 6:1 receiving 40:14 recognition 9:14 12:7 recognize 29:4,8 41:19 recognized 18:13 41:9 44:19 recommended</p>	<p>39:16 recoverable 50:18 recovery 38:13 reduced 52:3 reference 4:11 27:7 44:14 referencing 16:11 referring 21:13 regard 4:24 37:23 51:18 regardless 5:6 reiterated 28:21 reject 54:20 rejected 30:13 36:23 relabeling 31:1 relates 21:19,20 release 9:24 12:9 45:18 released 10:19 12:8,15 36:13 45:12 47:3 54:18 reliance 34:11 relied 20:9 34:21 remaining 53:17 remains 17:5 33:25 remedy 21:24 reply 34:24 42:19 44:12,13 report 30:18 represented 27:6 51:3 request 34:23 46:16 requests 40:17 require 37:12 42:3 requirement 26:14 35:19 requires 18:7 requiring 35:20 reserve 17:7</p>	<p>resolve 49:12,13 respect 54:3,25 Respondents 1:7 1:24 2:12 28:2 response 11:14 14:14 26:18 36:14 45:23 result 22:12 23:6 27:6 28:8 result-oriented 25:14 results 9:23,25 return 52:23 returns 51:11 Ricks 37:3 right 4:17 5:5,7 6:23,23 7:5,8 7:13 10:5 11:1 11:2,4,9,9,12 17:7 18:4 22:16 23:10,14 23:16,21,24 31:8 33:3 44:5 49:6 52:14 53:11 54:15 rights 4:20 10:23 Riverside 17:13 road 38:7 ROBERTS 3:3 3:25 4:15 5:5 7:10 11:7,13 16:1 17:21 25:12 27:24 52:16,18 53:1 53:4,14,16 57:7 Rodriguez 17:14 role 20:19 Rothgery 53:8 rotten 23:3 Rovner 41:8 rule 24:25 27:16 37:9,20 ruled 10:21,21 rules 21:7 25:23 ruling 3:24</p>	<p>run 36:13 38:23 41:15 48:3,18 49:15 51:16 52:2 running 48:2,7 runs 37:1,1 50:10,13</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 satisfy 43:1 saying 14:22 15:14 21:24 22:7 30:8 32:18 42:10 43:22 44:15,17 49:23 50:7 says 7:12 13:13 29:15,15,21 30:1 32:12 33:11 41:8,13 42:1 43:19 45:24 Scodro 1:23 2:11 27:25 28:1,3 29:10 30:14 32:2,5,9 33:4,16,22 36:8 38:19 40:15,24 41:20 42:11,17 43:21 44:9 45:22 46:11 47:10,17 47:22 48:5,9 48:16 50:4,24 51:4,10 52:9 52:17,20,22 53:3,6,15 scope 26:4 search 4:21,24 4:24 5:3 17:16 22:19 25:9 search/seizure 22:25 second 3:15 36:10 37:14 56:23</p>	<p>Section 13:15 19:1 21:22 24:8 see 24:21 26:21 31:25 36:3 46:9 seeking 45:1 seizure 7:14 17:17,17,19 23:21 24:3 29:17 36:17,22 36:24 37:24 38:3,4 51:15 51:17 send 13:18,22 14:4 44:2 sense 7:21 9:3 16:12 19:7 43:15 serves 47:2 set 4:7 11:5 53:12 seven 17:15 Seventh 3:23 13:13,18,25 18:11 26:3,7 26:13 28:10,12 28:21,22 29:13 29:14,25 30:13 30:23 31:1,10 34:4 41:3 42:18 43:24 44:2,4 50:9 54:3,14,20,25 shake 39:5 shifted 34:10 shortly 55:6 show 25:17 46:15 47:6 49:4 side 34:13,15 similar 27:13 simple 22:18 35:13 simplest 49:22 simply 24:23 situation 27:20</p>
--	---	--	--	---

40:8 53:24 54:2 55:4 situations 39:23 six 8:9 10:9,10 18:22 47:2 Sixth 52:13,13 53:11 slightly 33:24 34:11 smaller 34:21 solely 14:15 38:14 48:24 Solicitor 1:19 somebody 11:21 11:21 38:11 soon 17:2 sooner 39:12 sophisticated 13:7 sorry 14:18,20 52:16 sort 21:7 55:18 SOTOMAYOR 5:10,25 6:5,9 6:14,19 7:3 11:25 12:4 14:19,22 16:21 23:16 24:15 27:15 38:10 39:21 54:22 special 21:20 speculate 56:9 split 14:1 34:13 34:16 stage 32:11 standard 20:6 21:9,11,14,14 25:9,10 standards 23:9 STANLEY 1:16 2:3,14 3:6 53:18 start 25:20 started 15:1 starting 15:5 starts 6:6 State 4:7,8,8,10	9:20 10:7,12 12:25 21:9,25 24:19,19,24 25:4 26:2 27:14,15,16,18 32:24 39:9 40:11 42:3 45:15 47:13,16 47:22 48:14 stated 57:6 statement 30:23 statements 30:22 States 1:1,13,21 2:8 9:8 17:24 39:7,22 42:5 statue 25:16 26:1 28:15 31:3 41:14 47:21 statute 4:1,6 12:16,18 15:20 16:11 28:15 32:21 45:15 54:23 55:1 stay 32:12 33:11 step 24:5,6 stepping 6:11 Stewart 46:25 stop 13:16 17:15 22:18 23:17 26:17 stops 18:12 26:8 26:18 straightjacket... 7:6 stuff 13:25 subject 5:9,10 16:18 20:23 38:23 40:22 50:15 submit 34:1 submitted 57:8 57:10 subsequent 51:19 successful 47:6	suddenly 8:10 sue 19:1 22:20 sues 47:4 sufficient 18:20 43:1 suggesting 24:15 38:21 39:2 suggestions 3:21 suggests 44:8 suing 10:4 suit 20:24 24:7 24:14 42:22 56:2 superimpose 54:13 support 42:19 44:12,13 supported 18:8 supporting 1:21 2:8 17:25 supports 3:22 suppose 18:17 26:19 27:4 50:23 suppression 8:5 9:11 27:5 51:2 55:19 Supreme 1:1,13 sure 14:11 22:14 36:9 43:21 51:10 survived 28:17 survives 31:8	tape 44:6 Taylor 11:10 technically 5:2 tell 15:12 29:11 40:5,25 tells 34:9,10 37:9 41:5,7 ten 41:8,11 tend 32:15 tenth 3:24 37:15 term 38:22 terminate 11:8 terminated 4:18 10:9 41:22 46:16 termination 4:14,16,25 10:6 26:14 28:19 31:16 34:12,16,20 35:3 36:20 42:4,5 43:10 43:20 47:12 48:17,23 49:5 49:18 55:2,11 56:18 terms 20:18 25:3 25:25 30:17 testimony 27:18 Thank 17:21 27:24 52:20,22 53:13,14,15,21 57:7 theory 12:2,14 43:2 thing 30:7 44:2 45:11 things 25:20 think 6:20 12:20 13:4,17,19,21 14:1,14 16:9 17:9 18:3 19:6 19:8,12,18,22 20:2,10,17 21:5,18,24 22:8,13 23:18 24:22 25:4,10	25:22,25 26:6 26:12,17 27:10 28:5,6 30:14 31:10,20 32:15 33:24 34:4,13 34:18 35:24 36:25 37:23,25 38:13 41:5,14 41:24 42:11 43:11,24 44:1 44:10 46:11 47:17 50:9 55:18 56:5,7 thinking 6:20 thinks 29:15 third 3:18 47:1 thought 5:25 7:11 14:11 21:8 26:9 31:21 three 3:11 8:4 47:1 53:17 54:16 tied 56:17 time 6:1 17:8 26:9 29:7,15 32:7,8 33:25 41:21 48:15 49:20 50:22 52:12 55:5 56:20,21 time-barred 4:4 timely 39:3 today 43:18 told 13:23,25 tolling 50:13 top 30:15 tort 3:19 9:21 24:8,23,24 34:18 36:6 42:2 44:19,20 50:8,16 total 40:9 traditional 37:2 38:23 43:2 50:16 51:21 52:5
T				
		T 2:1,1 take 6:17 24:16 25:13,17,18 27:3 39:17 46:25 taken 25:1 38:2 takes 22:22 talked 6:24 talking 7:19 16:14,17 19:25 40:9 48:25 53:1		

traffic 17:14	13:12 22:7	vigorously 40:4	1:20	42:10 45:21
transcript 41:6	23:17 24:17	40:4	wasn't 14:11	wronged 35:9
42:15,17	42:13 52:6	vindicate 48:19	way 6:20,21	wrongful 22:11
treat 25:6 37:17	understanding	49:7	10:21 17:13	24:11,11 49:9
treating 50:8	6:14 28:14	vindication	25:7 29:19	wrongly 18:21
treats 25:8	43:13	35:21	30:22 35:10	31:22
trial 8:7,20	understood 5:12	violate 32:13,14	37:18 43:13	
10:23 11:22	22:14	54:11,12	49:12,13,22	X
23:2 26:23	unfair 56:8	violated 4:20	50:9	x 1:2,8
27:2 33:13	unique 40:8	10:23 16:16	ways 16:22	
51:7 55:6,6,8	United 1:1,13,21	violates 32:6,19	18:14 26:6	Y
56:10,14	2:8 17:24	violating 22:19	37:9 40:10	yeah 15:18
tried 40:5	universe 35:22	39:13	we'll 3:3 48:1	21:23 44:9
trigger 12:16,17	49:20	violation 7:2	we're 7:2 9:19	53:6
true 5:20 25:19	unlawful 3:14	8:12 16:25	9:19 11:11	years 4:7 38:7
trumped-up	10:19 12:14	17:6 18:23,25	15:10 16:14,15	38:15 45:13,14
36:5	40:22 55:21	19:3,12,19	16:17,19 25:18	45:17,18,20
trying 43:7	56:16	23:1 27:8,11	34:19 38:20	47:23 48:3
44:16 48:14	unlawfully	28:10,15 33:13	39:1 40:9	54:16,17,17
turned 39:18	45:20 48:11	34:5 50:4 51:8	45:14 46:1	
turning 39:15	unreasonable	51:19 54:6,8	48:13,13,14,25	Z
turns 10:15	7:14 19:8	54:20	54:19	0
29:22 31:15	20:13,22 22:11	violations 21:25	we've 14:14	
twice 29:14,25	22:18,19,25	virtue 43:3 52:3	Wednesday 1:10	1
two 4:7 8:7 24:6	23:21 45:5		week 33:12	1:00 1:14 3:2
28:22 32:12	unreasonably	W	weeks 10:10	10 38:7
38:19 45:9,13	22:24	Wallace 4:9,12	18:22	103 30:15
45:14,17,18,20	untimely 29:3	5:13 6:24 7:19	went 5:8 35:6	12 46:20
45:22 46:5	untoward 38:17	17:2 25:1,19	wholesale 44:20	12th 48:3
47:23 48:3	urge 49:21	25:23 34:9,10	willing 37:17	14-9496 1:4 3:4
56:20	use 13:7 32:21	35:1 37:20,21	wish 6:17	15 38:7
two-year 48:2	33:18 55:13	37:22 39:7,15	Woods 42:1	17 2:9
49:17	uses 55:2	45:24 48:6	words 13:20	1983 6:25 13:16
twofold 36:25	Usually 11:17	49:8 50:19	work 37:8,11,14	19:1 21:22
type 7:20		want 12:23,24	workplace 37:16	22:12 24:8,21
typical 37:11	V	12:25 13:1	works 13:2,9	24:23
	v 1:5 3:4 11:10	15:9 23:7	worry 40:13	
U	valid 18:8 55:7	25:17 39:1	would-be 38:8	2
ultimate 38:5	validly 40:23	44:18 50:7	39:19 40:19	2:03 57:9
ultimately 36:13	variety 18:14	52:23 54:24	wouldn't 20:14	20 38:7
46:15 49:3	various 16:22	56:23 57:4	22:4 36:21	2001 30:24
unable 47:6	vehicle 31:17	wanted 22:13	43:23 46:12	2011 41:25
unconstitutio...	victim 49:1	warrant 25:9	55:22	2016 1:10
15:16 38:17	view 24:5,13	47:2	wrong 13:17,23	21 31:5,12
underlying 25:7	26:3 27:22	warrantless	19:7,7,8,9 27:6	28 2:12
25:8 34:17	54:21	51:13	29:12 30:8	
understand 4:2	viewed 23:5	Washington 1:9	35:25 36:2,4	3

3 2:5 30 21:16,17 31 21:17 <hr/> 4 <hr/> 4 41:25 41st 48:11 48 5:8 8:3 39:4 4th 44:24 <hr/> 5 <hr/> 5 1:10 53 2:16 <hr/> 6 <hr/> 7 <hr/> 7 55:19 <hr/> 8 <hr/> 9 <hr/> 90 45:10,11 48:7 90th 45:12 47:25 47:25 48:2 91st 45:12				
--	--	--	--	--