1   IN THE SUPREME COURT OF THE UNITED STATES

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3   VIRGIL D. "GUS" REICHLE, JR.,   :

4   ET AL.,   :

5   Petitioners   :   No. 11-262

6   v.   :

7   STEVEN HOWARDS.   :

8   - - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, March 21, 2012

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 11:31 a.m.

15   APPEARANCES:

16   SEAN R. GALLAGHER, ESQ., Denver, Colorado; for

17   Petitioners.

18   SRI SRINIVASAN, ESQ., Principal Deputy Solicitor

19   General, Department of Justice, Washington, D.C.;

20   for the United States, as amicus curiae, supporting

21   Petitioners.

22   DAVID A. LANE, ESQ., Denver, Colorado; for

23   Respondent.

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1   C O N T E N T S

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

2   (11:31 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in Case 11-262, Reichle v. Howards.

5   Mr. Gallagher.

6   ORAL ARGUMENT OF SEAN R. GALLAGHER

7   ON BEHALF OF THE PETITIONERS

8   MR. GALLAGHER: Mr. Chief Justice, and may

9   it please the Court:

10   The issue before the Court today is whether

11 Secret Service agents who are prepared to take a bullet

12 for the Vice President must also be prepared to take a

13 retaliatory arrest lawsuit, even when they have probable

14 cause to make an arrest. Respondent in this case seeks

15 personal money damages against two U.S. Secret Service

16 agents who arrested him, allegedly with a retaliatory

17 motive, after he lied to them about whether he touched

18 Vice President Cheney.

19   JUSTICE KENNEDY: There's just a little bit

20 of noise in the courtroom, and I'm -- I have a little

21 bit of difficulty hearing your very opening statement.

22   MR. GALLAGHER: Sure.

23   The Respondent in this case seeks personal

24 money damages against three -- against two --

25   JUSTICE KENNEDY: Yes. Yes.

1   MR. GALLAGHER: -- U.S. Secret Service

2   agents who arrested him, allegedly with a retaliatory

3   motive, after he lied to them about whether he touched

4   Vice President Cheney. There are three reasons why

5   these agents should not be held personally liable.

6   First, the absence of probable cause should

7   be a required element of a retaliatory arrest claim.

8   Thus, this Court is called upon to answer the question

9   that it left open in Hartman v. Moore.

10   Second, U.S. Secret Service agents acting in

11   their protective capacity should be entitled to a

12   qualified immunity when they make an arrest with

13   probable cause. Indeed, to view it any other way would

14   be to subject Secret Service agents to the potential of

15   retaliatory arrest claims based upon a mere allegation

16   of retaliatory animus, something this Court has

17   steadfastly refused to do, and for good reason: Because

18   retaliatory animus is easy to allege and hard to

19   disprove.

20   And, third, regardless of whether this Court

21   decides to extend the Hartman rule, the law in 2006, at

22   the time of the arrest was not clearly established, thus

23   entitling the agents to qualified immunity.

24   JUSTICE GINSBURG: What was the probable --

25   CHIEF JUSTICE ROBERTS: I don't

1   understand --

2   JUSTICE GINSBURG: What was the probable

3   cause? What was the probable cause for the arrest?

4   MR. GALLAGHER: Justice Ginsburg, the Tenth

5   Circuit found that the probable cause that -- that

6   underlies its opinion was a 10001 -- a 1001 violation,

7   lying to a Federal agent.

8   JUSTICE GINSBURG: Explain that to me.

9   That's a false statement to a government officer, but

10   that's not the reason -- 1001 wasn't the reason that

11   these officers had to arrest. They -- there was a

12   question of assaulting the Vice President, and I think

13   that the charge that eventually was made in the State

14   court was harassment. So, there's no indication that

15   these officers had 1001 anywhere in their minds.

16   MR. GALLAGHER: Well, two points, Justice

17   Ginsburg: First of all, under Devenpeck, officers are

18   not required to give all of the reasons behind an

19   arrest. But, second, and I think perhaps more

20   importantly in this case, when Agent Reichle contacted

21   Mr. Howards and made the arrest, Mr. Howards had lied to

22   him. That was relevant to a Secret Service agent's

23   assessment of the risk of the situation.

24   JUSTICE SCALIA: Do they have to give -- at

25   least when you stop a car, the test is whether there was

1 probable cause, not whether that was the reason that the

2 officer stopped the car.

3   MR. GALLAGHER: That's correct,

4 Justice Scalia.

5   JUSTICE SCALIA: There was a broken

6 taillight. There existed probable cause, whether that

7 was the basis on which he acted or not. Now -- is it

8 any different when --

9   MR. GALLAGHER: I don't think it's any

10 different --

11   JUSTICE SCALIA: With respect to an arrest?

12   MR. GALLAGHER: Yes, with respect to an

13 arrest. This is –

14   JUSTICE SCALIA: So long as they have good

15 reason for an arrest, it doesn't matter.

16   MR. GALLAGHER: Absolutely. That's an

17 objective --

18   JUSTICE BREYER: That -- we've never held

19 that in respect to a claim that the real reason the

20 police arrested was retaliation against, for example, a

21 picket sign having an unpopular point of view or a

22 statement having an unpopular point of view. That is,

23 this Court has never held that it overcomes an arrest

24 where there's a claim of retaliatory First Amendment

25 action; is that right?

1   MR. GALLAGHER: That's right, and --

2   JUSTICE BREYER: All right. And what you're

3 saying is your first reason is that we should say that.

4 And the -- the question I wanted to ask you there is,

5 you make a very strong case where the President and Vice

6 President are involved, the need to protect them, but

7 the rule that you there adopt is a rule that will apply

8 to every police officer, anyone who arrests anyone

9 anywhere in the country, and no matter how clear it is

10 that the motive was retaliation against a point of view,

11 that individual will be protected from a Bivens action.

12   So, it sounds as if your first claim -- the

13 remedy sweeps well beyond the need that you sketch. And

14 so, I'd like your response to that.

15   MR. GALLAGHER: Justice Breyer, I think it

16 has to do with the determination in the Tenth Circuit

17 and the fact that the -- the Tenth Circuit's decision to

18 extend Devenpeck to these facts was not the subject of a

19 cross-appeal. So, the issue that you -- you posit is

20 not an issue that's before the Court. It was --

21   JUSTICE BREYER: I understand that. I'm

22 just saying if I agree with you on your first that if

23 there is a probable cause for an arrest, then wouldn't I

24 have to say there is no retaliatory First Amendment

25 claim when a border officer chases into Arizona a person

1   with whom he politically disagrees, and there are 14

2   bishops who will say he cared about nothing but his

3   political disagreement? And there's nothing to the

4   contrary, and he says: Oh, I happened to notice -- at

5   trial -- that when he left he reached out and snatched a

6    $5 bill that was in the till. And so, I had probable

7   cause to arrest him.

8   End of case. Now, that sounds very

9   far-reaching, and I don't know that I'm prepared to do

10   that. So, therefore, is there another way you might win

11   your case, or should I do that?

12   MR. GALLAGHER: Well, let me answer both of

13   those questions. What you've outlined is essentially

14   footnote 10 from the Hartman case. That's the footnote

15   that says what do you do if the -- if the person that

16   initiated the prosecution says, I did it for a -- a

17   retaliatory reason? And the Court side-stepped that

18   issue.

19   JUSTICE BREYER: Yes.

20   MR. GALLAGHER: Yes.

21   JUSTICE BREYER: And, of course, Hartman

22   dealt with prosecutions. But people all the time don't

23   arrest others. Policemen frequently don't arrest people

24   for everything they might arrest them for. I mean

25   jaywalking, to take an example. Or all kinds of

1   things where they just normally don't arrest somebody.

2   You might -- or I'm sure you didn't, but I might

3   sometimes have driven 60 miles an hour in a 55-mile

4   zone. And I shouldn't even admit this. I hope I get

5   away with it.

6   (Laughter.)

7   JUSTICE BREYER: But -- but you see, it's

8   different arrests and prosecutions.

9   MR. GALLAGHER: Well, I - it certainly,

10   it's different, but the Devenpeck standard --

11   JUSTICE SCALIA: Is it different? You --

12   you acknowledge that prosecutors always prosecute, that

13   they never exercise discretion and say, oh, what the

14   heck, you know?

15   MR. GALLAGHER: Certainly, Your Honor.

16   JUSTICE SCALIA: All the time. All the

17   time. I don't know that it's any less frequent than --

18   than an officer deciding not to arrest.

19   MR. GALLAGHER: And Justice --

20   Justice Breyer, I think that the difficulty with your

21   hypothetical is, especially with regard to Secret

22   Service agents, who perform -- when they're engaging in

23   their protective functions, they're essentially --

24   JUSTICE SOTOMAYOR: Counsel, that --

25   MR. GALLAGHER: -- in the public eye.

1   JUSTICE SOTOMAYOR: That's exactly what

2   Justice Breyer is saying. Okay? Which is, as I

3   understand it -- and there's some literature that talks

4   about should we be treating misdemeanor arrests

5   different than felony arrests, because there's less

6   discretion that an officer would have with respect to

7   arresting someone for a felony than for misdemeanors or

8   criminal fines, because like jaywalking, policemen don't

9   arrest you for jaywalking unless they're either on a

10   ticket binge or because there's something about you that

11   they don't like.

12   MR. GALLAGHER: Sure.

13   JUSTICE SOTOMAYOR: So, if that something

14   about you they don't like is that you're wearing an

15   antiwar armband, are we going to let that plaintiff not

16   recover, because somehow we need to protect police

17   officers so much, in the discretionary use of this vast

18   power they have to arrest that we're going to permit

19   them to trample the First Amendment, essentially?

20   Or are we going to say, in the normal

21   situation there is a First Amendment claim, even with

22   probable cause, if you can prove that it's the

23   motivating factor for the arrest; but we treat Secret

24   Service differently?

25   And I think that was the point

1   Justice Breyer's getting to, and the one I'm most

2   interested in.

3   MR. GALLAGHER: Okay.

4   JUSTICE SOTOMAYOR: If we don't extend.

5   Hartman, how do we in a principled way deal with the

6   unique needs of the Secret Service?

7   MR. GALLAGHER: Let me -- let me briefly

8   address the first half of the question, and then I'll

9   address the second half. The first half, when --

10   Justice Sotomayor, when you suggest that police officers

11   could trample on the First Amendment, it's important to

12   remember we still have probable cause as the -- as the

13   principal picture here.

14   JUSTICE SOTOMAYOR: If you're jaywalking,

15   there's probable cause.

16   MR. GALLAGHER: But probable cause is the

17   Fourth Amendment standard specified by the Framers of

18   the Constitution.

19   JUSTICE SOTOMAYOR: But -- but what does it

20   have to do with violating the First Amendment? Meaning,

21   if police officers have discretion and they would not

22   otherwise arrest you except for their dislike of your

23   speech, that's a violation of your right to free speech,

24   isn't it?

25   MR. GALLAGHER: Well, I'm not sure that that

1   is exactly the case. Again it gets back to this

2   footnote 10 in Hartman, which -- which, there -- Hartman

3   can be read two different ways. It can be read as

4   saying that the elements of the constitutional tort

5   itself require the absence of probable cause, or it can

6   be read as saying the elements of the cause of action.

7   But let me -- let me address the second question.

8   JUSTICE SOTOMAYOR: We can go to that

9   question later.

10   MR. GALLAGHER: Yes. And the second

11   question has to do with Secret Service agents, because

12   Secret Service agents, unlike police officers performing

13   law enforcement functions, when Secret Service agents are

14   acting in a protective capacity, they are protecting our

15   Nation's leaders and they are doing so in a very public

16   way, and they are also doing so in a way that is

17   essentially a free speech zone.

18   Virtually everyone that a Secret Service

19   agent encounters when he's protecting the President or

20   the Vice President can allege that they're engaged in

21   free speech. So, for Secret Service agents in

22   particular, they -- they can legitimately evaluate what

23   someone is saying in order to determine a particular

24   threat level. And because of that, Secret Service

25   agents have a similar sort of complexity of causation to

1   the -- the situation addressed in the Hartman case.

2   Now, in Hartman, clearly it was a one -- it

3   was a two-individual causation situation, but with

4   regard to Secret Service agents, the causation is

5   similarly complex because Secret Service agents can

6   legitimately take into account what someone is saying in

7   order to determine a threat level.

8   Regardless of whether the Court decides to

9   extend the Hartman case, it's absolutely clear that the

10 law in 2006, in June of 2006 when the agents made this

11 arrest, was not clearly established. The Hartman case

12 was handed down in early 2006. It had only been on the

13 books about 3 months when the arrest was made. For that

14 reason, Secret Service agents should be entitled to a

15 qualified immunity in this case because the law was not

16 clearly established.

17   With regard to the -- the formulation of

18 qualified immunity that we are asking for, we believe

19 that it is important for Secret Service agents acting in

20 this protective capacity to have the requisite breathing

21 room in order to make decisions in life-or-death or

22 imminent-threat situations. In fact, the qualified

23 immunity that we're advocating is particularly important

24 at the margins, particularly important in situations

25 where it's not clear what a Secret Service agent can do

1   or should do, where a Secret Service agent has to make a

2   snap decision in order to determine whether someone's a

3   threat and then act appropriately.

4   The Court in the Atwater case noted that the

5   object of -- of the Court's cases has been to draw

6   standards sufficiently clear and simple to be applied

7   with a fair prospect of surviving judicial

8   second-guessing, months and even years after the -- the

9   arrests are made.

10   JUSTICE GINSBURG: You're not suggesting

11   absolute immunity?

12   MR. GALLAGHER: No, we are suggesting a

13   qualified immunity that's --

14   JUSTICE GINSBURG: But it's a different kind

15   of qualified immunity?

16   MR. GALLAGHER: It's certainly different

17   from the Harlow type of qualified immunity. It is an

18   immunity that is contingent upon having -- contingent

19   upon the Secret Service agent being -- acting in a

20   protective capacity and having probable cause to make

21   the arrest. But, certainly, once the immunity attaches,

22   it would be -- it would be full immunity from a claim.

23   The Court noted earlier this term, in

24   Ryburn v. Huff case, that judges should be cautious

25   about second-guessing a police officer's assessment made

1   on the scene of the danger presented by a particular

2   situation. We think that this case aptly demonstrates a

3   situation in which Secret Service agents made very --

4   very difficult decisions on the spot, and they should

5   not be second-guessed by the Court.

6   Finally, with regard to the -- whether

7   qualified immunity is -- was clearly established in June

8   of 2006, the Ninth Circuit -- the primary case relied

9   upon by the Tenth Circuit was the Skoog case. The Skoog

10   case was the case that the Tenth Circuit relied upon in

11   holding that Hartman should not be extended.

12   It's important, though, when you review the

13   Skoog case to -- to read the entire case, because the

14   Skoog court, after concluding that -- that Hartman

15   should not be extended, still proceeded with the

16   qualified immunity analysis to determine whether the law

17   was clearly established at the time of the incident.

18   And what the Skoog case concluded was -- it looked at --

19   it looked at the nature of the right.

20   And, you know, we know from the

21   Anderson v. Creighton case that this Court has said it's

22   important when focusing on constitutional rights not to

23   look at the 30,000-foot level, not to look at the high

24   level, but to look at the contours of the right. And

25   that's what the Skoog case did.

 1   CHIEF JUSTICE ROBERTS: Thank you, counsel.

 2   MR. GALLAGHER: All right. Thank you.

 3   CHIEF JUSTICE ROBERTS: Mr. Srinivasan.

 4   ORAL ARGUMENT OF SRI SRINIVASAN

 5   ON BEHALF OF THE UNITED STATES,

 6   AS AMICUS CURIAE, SUPPORTING PETITIONERS

 7   MR. SRINIVASAN: Thank you,

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

 9   I'd like to start off addressing the Secret

10 Service in particular because that's the principal

11 focus, although I take the point that there are

12 questions about applying the rule in a broader context.

13 But I think understanding why the rule makes sense in

14 the context of Secret Service agents and law enforcement

15 officers who are performing similar protective functions

16 would help inform why it makes sense to broaden the rule

17 as well. What the Secret Service --

18   I'll pick up on the point that Petitioners'

19 counsel was making, which is that it's legitimate in

20 this context for Secret Service agents to take into

21 account expressive activity in determining whether the

22 circumstances warrant a discretionary exercise of the

23 power to arrest.

24   CHIEF JUSTICE ROBERTS: I assume you would

25 include U.S. marshals?

1   MR. SRINIVASAN: Yes.

2   CHIEF JUSTICE ROBERTS: F.B.I. agents? So,

3   you're talking about protective details.

4   MR. SRINIVASAN: That's correct. And that's

5   why I wouldn't limit it to the Secret Service in

6   particular. I think what happens in a lot of these

7   contexts is that it's natural for these individuals to

8   encounter First Amendment activity by the public, and

9   it's legitimate for them to react to First Amendment

10 activity in deciding whether the circumstances warrant

11 an arrest.

12   And the problem arises because it's very

13 difficult to distinguish between, on one hand, a

14 legitimate consideration of expressive activity as

15 evidencing the sort of threat that warrants a response

16 from an illegitimate consideration of expressive

17 activity borne of a motive to suppress a viewpoint.

18   JUSTICE KENNEDY: Does your rule apply

19 regardless of the degree of animus that the agent is

20 alleged to have had as to the particular view being

21 expressed?

22   MR. SRINIVASAN: I think it would,

23 Justice Kennedy, because we would have an

24 across-the-board, no-probable-cause requirement of the

25 kind that the Court applied in the retaliatory

1   prosecution context in Hartman.

2   Now, I think your -- the question of the

3   degree of animus asserted by the agent on the scene is

4   exactly why these are complicated factual questions.

5   Those kinds of allegations can be made, and then you're

6   going to have a trial where the agent is on the stand,

7   and the jury is going to have a very difficult time, and

8   the agent is going to have a difficult time explaining

9   why it is that he acted legitimately based on expressive

10   activity because he felt that there was a threat to the

11   person he was trying to protect, as opposed to

12   explaining that he didn't act in order to suppress the

13   viewpoint that was being asserted.

14   These kinds of allegations can often be

15   made. And, in fact, they can even be manufactured at

16   the scene by an intelligent person who's going to be the

17   subject of an arrest. And I think that complicated

18   question of causation is exactly why it makes sense to

19   apply in this context the same objective screening in

20   the form of a no-probable-cause requirement in Hartman

21   to this context of retaliatory arrest.

22   JUSTICE SCALIA: Why is there any difference

23   if -- when ordinary policemen are policing an authorized

24   demonstration --

25   MR. SRINIVASAN: Yes.

1   JUSTICE SCALIA: -- in front of this Court

2   or anywhere for that matter? The people making the

3   demonstration have -- have the same motivation and can

4   make the same assertion of, oh, the only reason you

5   arrested me was because you didn't like what I was --

6   what I was talking about. So, why should that situation

7   be different?

8   MR. SRINIVASAN: That's correct,

9   Justice Scalia, and that was going to be my next point.

10   Once we understand why it is that it makes sense to

11   apply this rule in the context of officers who engage in

12   this sort of critical public protective functions of the

13   Secret Service, I think we understand why it also makes

14   sense to apply it in other situations, because law

15   enforcement can legitimately take into account

16   expressive activity when they're engaged in functions

17   such as crowd control.

18   And in those contexts as well, it's going to

19   be difficult to disaggregate the legitimate

20   consideration of expressive activity as evidencing a

21   threat --

22   JUSTICE BREYER: Illegitimate? You just --

23   MR. SRINIVASAN: -- from an illegitimate

24   desire to suppress a viewpoint. Sorry.

25   JUSTICE BREYER: Look, you just used the

1   word "crowd control." And I take it, in saying the word

2   "crowd control," you are making a distinction.

3   MR. SRINIVASAN: I'm making a --

4   JUSTICE BREYER: Do you want -- do you want

5   the same rule of automatic, you know, immunity -- it's

6   sort of automatic immunity -- when crowd control isn't

7   at issue, where there's a history of persecution of an

8   individual by a particular officer, da, da, da? I mean,

9   you know, we can make up cases.

10   MR. SRINIVASAN: I think --

11   JUSTICE BREYER: Did you want it absolutely

12   across the board, or are you going to start making

13   distinctions?

14   MR. SRINIVASAN: I -- I would not draw a

15   distinction, Justice Breyer. Of course, there's going

16   to be factual situations --

17   JUSTICE BREYER: I mean, I agree with you

18   about the crowd control.

19   MR. SRINIVASAN: Yes.

20   JUSTICE BREYER: I see that. I see that

21   problem. I see the problem of protecting people in

22   public life; I see the problem in protecting the

23   President.

24   MR. SRINIVASAN: Well, I think --

25   JUSTICE BREYER: Now, how far -- now, given

1   that that's a particular problem where views are likely

2   to be evidentiary -- unpopular views actually are,

3   unfortunately, but how far do you extend it? You say

4   extend it to everything. To jaywalking, to

5   persecutions, to, you know -- that's what's making me a

6   little nervous.

7   MR. SRINIVASAN: Right, and I can understand

8   the basis for the nervousness. I guess the question for

9   the Court is whether the benefits of having an

10   administrable across-the-board rule outweigh the costs

11   of trying to forge some sort exceptions to deal with

12   extreme hypotheticals. And --

13   JUSTICE SOTOMAYOR: Do you have a sense of

14   how many of these First Amendment retaliatory claims in

15   those jurisdictions that permit them -- I know they're

16   more limited -- how many of these cases arise?

17   MR. SRINIVASAN: We do. We've done --

18   JUSTICE SOTOMAYOR: And with what frequency?

19   MR. SRINIVASAN: We've done an unscientific

20   search, but to use the same time frame of reference that

21   the Court used in Hartman, which is looking back

22   25 years, if you do a sort of standard Westlaw search,

23   what you'll see is there's roughly a hundred court of

24   appeals cases and 450 or so district court cases

25   where --

1   JUSTICE SOTOMAYOR: And how many arrests are

2   there a year?

3   MR. SRINIVASAN: I don't know.

4   JUSTICE SOTOMAYOR: It's -- a non-felony.

5   I'm sure it's in the millions.

6   MR. SRINIVASAN: It's -- the -- I'm sure

7   there are scores and scores of arrests. That's correct.

8   And, of course, all we're talking about is the cases

9   that get to the point where you have an opinion that can

10 be -- that can be found. And there's the obvious point

11 that, depending on what the Court does here, you may see

12 a proliferation of -- of those claims. And we certainly

13 hope that wouldn't be the case.

14   But I think on -- in -- on the question of

15 whether it makes sense to have an across-the-board rule,

16 I guess I would echo what Petitioners' counsel was

17 suggesting, which is you can have the same set of

18 considerations in the retaliatory prosecution context

19 because prosecutors do act with -- by hypothesis, with

20 illicit motives in some situations.

21   And the Court considered whether the

22 benefits of having an across-the-board rule outweigh the

23 costs of forging an exception to deal with extreme

24 circumstances. And what the Court said was: We want to

25 have a rule that's designed to deal with the mine run of

1   cases; we don't want to have a rule that has an

2   exceptional-circumstances exception because in that --

3   at that point, there will be a great deal of litigation

4   concerning what cases fit within of the exception and

5   what cases don't.

6   And what the Court said was that's rather

7   like designing a retirement plan to deal with the

8   possibility that someone might win the lottery. That's

9   in footnote 10 of Hartman. And I think similar

10   considerations would weigh -- counsel in favor of

11   applying an across-the-board objective,

12   no-probable-cause screen in this context as well. And I

13   think it's important to understand that --

14   JUSTICE GINSBURG: Even though this -- I

15   think in Hartman, Justice Souter gave two specific

16   reasons, neither of which apply in this context. I

17   mean, this is -- it's the prosecutor who institutes the

18   charges, but the suit is not against the prosecutor, who

19   would be absolutely immune. So, that is not in this

20   picture. Here we have one officer.

21   So, it would certainly be an extension of

22   Hartman because the reason that Hartman gave for the

23   rule was tied to -- very much tied to prosecution rather

24   than arrest.

25   MR. SRINIVASAN: Well, I -- with respect,

1   Justice Ginsburg, I think this case is of a piece with

2   Hartman in two relevant respects. Your Honor is quite

3   correct that Justice Souter's opinion focused on the

4   fact that you have two individuals in play. You can

5   have that situation here, but we don't base it on that.

6   What the opinion was getting to was that

7   that creates complex issues of causation in the

8   prosecution context. And I think it was the complex

9   causation that really drove the need to have an

10   objective across-the-board rule.

11   You have the same kind of complex causation

12   problem here, for the reasons that I've explained, which

13   is that it's extremely difficult to disentangle a

14   legitimate desire to act -- to suppress danger, of which

15   speech is evidence, from an illegitimate desire to

16   suppress a viewpoint.

17   JUSTICE KENNEDY: You might apply the same

18   immunity for selective enforcement based on race?

19   MR. SRINIVASAN: The same immunity?

20   JUSTICE KENNEDY: Yes.

21   MR. SRINIVASAN: No. The -- they -- I think

22   the Court's decision in Whren, for example, supposes

23   that even though you have probable cause, you can have

24   an equal protection claim if the proof could be made --

25   and this is very important. In the equal protection

1   context, including for race, there is a different

2   objective screen in place, and it's a stringent

3   objective screen that this Court announced in Armstrong,

4   which is that --

5   JUSTICE KENNEDY: Well, I'm aware of the

6   reservation in Whren. Why should there be a difference

7   in the Fourteenth Amendment equal protection and First

8   Amendment speech?

9   MR. SRINIVASAN: Well, I think part -- part

10   of the reason is this, that in -- with the First

11   Amendment, expressive activity can legitimately be taken

12   into account precisely because it can manifest a danger,

13   whereas with race in the ordinary case, I think the

14   reason why we have these principles in the race context

15   is it's ordinarily not a relevant consideration.

16   And the Armstrong rule is designed to

17   distinguish between circumstances in -- in which race

18   was the motivation and in which race wasn't the

19   motivation. And it serves that purpose well. But it

20   doesn't work so well in this context, because here First

21   Amendment activity can legitimately be taken into

22   account; when, as in this case, a Secret Service agent

23   overhears an individual say that he's going to ask the

24   Vice President how many babies he's killed, it makes all

25   the sense in the world for the Secret Service to focus

1 their attention on that person.

2   JUSTICE SCALIA: What -- what about for

3 crowd control? You want to extend it to crowd control

4 as well. What difference does the First Amendment make

5 there?

6   MR. SRINIVASAN: Well, I think it's -- the

7 nature, intensity, and vehemence with which the First

8 Amendment activity is being engaged in can inform an

9 officer on whether the circumstances present the kind of

10 danger that warrants a law enforcement response.

11   So, I -- and when a law enforcement officer

12 does that, he's going to be subject to potential

13 liability if an individual says: Look, you weren't

14 reacting against me because of the way I was expressing

15 my views; you were acting -- reacting against me because

16 you disagree with my views and you wanted to suppress

17 them.

18   And that's a very hard thing to disentangle.

19 And it not only has that problem at the back end, but it

20 results in a problem at the front end as well, because

21 what happens at the front end is that officers at the

22 very outer margins might have in the back of their mind

23 a concern that if they acted based on their best

24 intuitions about what kind of law enforcement response

25 is warranted, they might later be subject to suit based

1   on a mistaken assumption and potentially an ability to

2   convince a jury that they were acting based on an

3   illegitimate desire to suppress a viewpoint rather than

4   on a legitimate desire --

5   JUSTICE BREYER: How many cases -- you might

6   know this; you might have information on how many cases

7   over 5 years or whatever period there actually have been

8   against Federal protective officials of retaliatory

9   First Amendment activity.

10   MR. SRINIVASAN: I -- I don't know --

11   JUSTICE BREYER: It would be in the

12   Department, wouldn't it? Do they keep track?

13   MR. SRINIVASAN: It's potentially there, but

14   I just -- I don't have the answer at my disposal,

15   Justice Breyer.

16   JUSTICE BREYER: Do we know that this is not

17   unique, the one before us?

18   MR. SRINIVASAN: Well, these -- certainly,

19   we know that these kinds of interactions arise with some

20   frequency. I think there was some publicity surrounding

21   the --

22   JUSTICE BREYER: But when you looked up your

23   research for this, did you find any other case in which

24   anyone had ever asserted a First Amendment claim of

25   retaliation for an arrest?

1   MR. SRINIVASAN: In --

2   JUSTICE BREYER: Yes, against a Federal --

3   MR. SRINIVASAN: In this --

4   JUSTICE BREYER: Against a Federal

5   protective official.

6   MR. SRINIVASAN: No, I -- candidly, I didn't

7   -- we didn't conduct a search with that object in mind.

8   So, I can't give you an answer one way -- one way or the

9   other.

10   I did want to make one additional point,

11   Justice Ginsburg, in response to the question you posed

12   about the applicability of Hartman, which is that at one

13   level it applies, the rule should apply, because the

14   same concern with complex causation is at issue here at

15   well -- as well.

16   But the other way to think about the

17   applicability of Hartman is to -- is to put these cases

18   on a spectrum. On one end, you have what the Court in

19   Hartman identified as a standard retaliation case, of

20   which the Court identified public employment as the

21   archetypal example. And on the other end, you have

22   retaliatory prosecution, where the Court thought that

23   there were sufficient concerns about complicated

24   causation that it made sense to have an across-the-board

25   objective rule.

1   Now, the question could be where does

2   retaliatory arrest fit within that spectrum? Is it on

3   the retaliatory prosecution side or is it on the public

4   employment side? And for a couple of reasons, I think

5   it fits decidedly within the retaliatory prosecution

6   side.

7   One is the one I've given, which is that

8   speech can legitimately be taken into account. And so,

9   it creates complex causation. But the other one is in

10   some sense the flip side of that, which is that in the

11   -- in public employment context, the standard fact

12   pattern is going to involve a long-term relationship

13   between an employer and an employee, during which time

14   there's been no adverse action; the employee then

15   engages in some sort of expressive activity, in the

16   aftermath of which the employer undertakes some adverse

17   action such as a termination.

18   Now, in that context it makes sense to infer

19   that there may well be an illegitimate speech --

20   speech-suppressive motivation at work, because you have

21   in some sense a control period in the interactions

22   between the employer and the employee that pre-dated the

23   expressive activity.

24   That's not the case when you're dealing with

25   law enforcement. In the law enforcement context in the

1   main, this is a one-time interaction between an officer

2   and a suspect, the arrestee. You don't have the prior

3   relationship that acts as a control. And so, you have

4   to ask the question whether, based on that one-time

5   relationship, is there a basis for inferring that a

6   speech-suppressive motivation was at work?

7   And here, because it can be legitimate for

8   an officer to take into account speech in deciding

9   whether this situation is the kind of one in which a law

10   enforcement response is warranted, it makes sense,

11   unlike in the public employment context, to apply the

12   same objective across-the-board screen in the form of a

13   no-probable-cause requirement that you have in

14   prosecutions.

15   JUSTICE GINSBURG: May I go back to the

16   probable cause, the question I asked before? It's not

17   like the taillight. 1001 came up in court. I -- this

18   situation may well have warranted probable cause for

19   assault, probable cause for harassment. But where did

20   -- but the 1001 was not the -- was in no one's mind. It

21   does seem quite strange.

22   MR. SRINIVASAN: It was not, Your Honor. Of

23   course, that's exactly what happens in the Fourth

24   Amendment context. That's -- that was the issue before

25   the Court in Devenpeck, and the Court explained in

1   Devenpeck why it makes sense to have an objective

2   probable cause inquiry rather than a subjective one.

3   JUSTICE GINSBURG: But doesn't it matter

4   that it's something that comes up only in court; it's

5   not something that -- I mean, why wasn't the natural --

6   well, one would expect probable cause to arrest because

7   it was an assault or harassment -- the actual charges

8   that were made?

9   MR. SRINIVASAN: I don't know the reason

10   that a -- I don't know the precise contours of the

11   harassment charges in State court that were made. I

12   think that they mapped on in some measure to the

13   assault, the assault that was suspected by the -- by

14   Officer Reichle, who effected the arrest.

15   Now, I think the concern with importing some

16   sort of subjective probable cause dimension into the

17   inquiry -- if you asked, you know, what offense did the

18   officer in fact have in mind, it's the same concerns

19   that drove the Court to apply an objective rule in

20   Devenpeck, including, for example, that you would have

21   dis-uniformity, in that similarly situated individuals

22   would be treated differently based purely on what

23   happens to have been in an officer's mind.

24   Thank you.

25   CHIEF JUSTICE ROBERTS: Thank you, counsel.

1   Mr. Lane.

2   ORAL ARGUMENT OF DAVID A. LANE

3   ON BEHALF OF THE RESPONDENT

4   MR. LANE: Thank you, Mr. Chief Justice, and

5   may it please the Court:

6   I think what we have here is a solution

7   being offered by the Government, and now we have to go

8   find the problem. And I think that's what

9   Justice Breyer's question was directed at here.

10   I have done, not a scientific search, but I

11   can take credit for a little bit of science involved in

12   determining how many such cases arise. And at page 13

13   of our brief, we cite in footnote 8 that a search with

14   no time limitations whatsoever going back in LEXIS with

15   the words "Bivens" or "1983," "retaliatory arrest," not

16   limited to protective details, shows 15 reported Federal

17   appellate cases, with no time limitations whatsoever.

18   So, we have a solution, but we really don't

19   have a problem. The only Secret Service case that this

20   Court has ever heard that I'm aware of involving

21   anything remotely like this is Hunter v. Bryant. So,

22   this is not a significant problem.

23   This also factually is probably not the best

24   case for them to be making their argument that we need

25   some sort of special rules that apply to the Secret

1 Service, given the facts of this case, where Mr. Howards

2 by all accounts walked over to the Vice President,

3 looked at him and said: "I just want you to know I

4 think your policies in Iraq are disgusting."

5   There is a dispute at that point whether he

6 gently patted him on the arm -- not a crime -- or tapped

7 him on the shoulder -- again, not a crime -- or --

8   JUSTICE BREYER: There's no --

9   JUSTICE SCALIA: That's an assault, isn't

10 it?

11   MR. LANE: I'm sorry.

12   JUSTICE SCALIA: All it takes for an assault

13 is an unwanted touching.

14   MR. LANE: Well, incidental contact is not

15 an assault, and everyone on the Mall --

16   JUSTICE SCALIA: It's not incidental if you

17 reach out and touch somebody on the shoulder or the arm.

18   MR. LANE: Well, the problem is that the

19 Vice President was on the Mall having contact with

20 numerous people, shaking their hands, letting them pat

21 him on the back, telling him what a great job he's

22 doing.

23   JUSTICE SCALIA: That's fine, and he didn't

24 -- he doubtless didn't consider those contacts hostile.

25 But when somebody tells you "I think your policies are

 1   disgusting" --

 2   MR. LANE: And then --

 3   JUSTICE SCALIA: I mean, just don't tell me

 4   that it's -- it's not a crime. It is an assault if it's

 5   an unwanted touching.

 6   MR. LANE: Well, under Colorado law, he was

 7   charged with harassment, and --

 8   CHIEF JUSTICE ROBERTS: Well, what you've

 9   described is not when the person was arrested, right?

10   MR. LANE: That's correct.

11   CHIEF JUSTICE ROBERTS: The person was

12   arrested later, when approached by the Secret Service

13   agent, lied about whether he touched the Vice President;

14   at that time, in a non-protected area, was carrying a

15   bag, right?

16   MR. LANE: Correct.

17   CHIEF JUSTICE ROBERTS: And wandering

18   around. Turns out that he was looking for his son. But

19   if you're the Secret Service agent, you see somebody who

20   said your policies are disgusting, that person touches

21   the Vice President, he -- he lies to you. He

22   comes back, he's carrying a bag and he's wondering --

23   wandering around, do you think it's reasonable at

24   that -- well, I guess you don't --

25   (Laughter.)

1   CHIEF JUSTICE ROBERTS: To arrest the

2   person?

3   MR. LANE: That's a multifaceted question.

4   I'll try my best to cut right to it.

5   CHIEF JUSTICE ROBERTS: The reason it's

6   multifaceted is because I'm trying to capture what might

7   have been going through the Secret Service agent's mind

8   at the time.

9   MR. LANE: Well, that's -- that is part of

10 the point I have to make here, all right? In this

11 Court's jurisprudence on Fourth Amendment issues, what

12 is going on in the agent's mind is irrelevant. The

13 issue is --

14   CHIEF JUSTICE ROBERTS: Well, what would be

15 going in a reasonable Secret Service's agent's mind at

16 the time.

17   MR. LANE: Right. First level of inquiry,

18 was there a Fourth Amendment violation? No, according

19 to the Tenth Circuit. We then have got to shift gears

20 if we're going to do a First Amendment analysis. And is

21 this a retaliatory arrest or not?

22   We have got to look into the subjective mind

23 of the agent. That's where Justice Ginsburg's questions

24 I think take on great import for this discussion,

25 because, as she correctly pointed out, the agents on

1   scene never said in deposition, they have never claimed

2   anywhere, that they arrested Mr. Howards on a 1001

3   violation.

4   The agents on scene in deposition said we

5   arrested him because of the way he approached the Vice

6   President -- not a crime -- and his demeanor. We

7   thought it might be an assault. That later morphed into

8   a State charge of harassment. Nobody ever said 1001

9   formed any basis whatsoever.

10   JUSTICE BREYER: Yes, but they did say --

11 and also you've left out that one of the agents

12 overheard him say he was going to ask the Vice President

13 how many babies he killed that day.

14   MR. LANE: Right.

15   JUSTICE BREYER: Okay. So, their job is to

16 protect the Vice President.

17   MR. LANE: Absolutely.

18   JUSTICE BREYER: That's their job.

19   MR. LANE: Correct.

20   JUSTICE BREYER: And it's a very emotional

21 subject.

22   MR. LANE: Absolutely.

23   JUSTICE BREYER: And if something happens to

24 the President, nobody's going to say, oh, you know, what

25 were you doing? And the whole country is in mourning.

1   MR. LANE: Correct.

2   JUSTICE BREYER: We understand that. And,

3   therefore, it's a matter of concern that the -- if you

4   have a rule of law that says to the agents, when you

5   hear someone who says how many babies are you going to

6   kill that day, I'm going to ask the Vice President, I'm

7   going to touch him, I am going to then tell them a lie

8   when they ask me if I touched him -- that's cause for

9   concern.

10   MR. LANE: Absolutely.

11   JUSTICE BREYER: Okay. Now, if there's a

12   lawsuit, the agency will say we just can't do it. We

13   can't do it. We can't use that as a basis for stopping

14   that individual.

15   MR. LANE: Well, that --

16   JUSTICE BREYER: All that poses a problem.

17   Now, you're -- and I -- I think -- I recognize it as

18   a problem. I'm not saying I have the solution.

19   MR. LANE: Well, I think you hit on the

20   solution as part of the problem you just expressed, and

21   that is, can they stop this individual? And the answer

22   is "absolutely yes." They have every arrow in their

23   quiver, under Terry v. Ohio. They can stop him if they

24   perceive a threat. They can force him to open up his

25   opaque bag. They can force him to show them what's in

1   the box inside the opaque bag. They can pat him down.

2   They can wand him with a metal-detecting wand. They can

3   assure themselves --

4   JUSTICE SCALIA: And it wouldn't be a

5   violation of the First Amendment if they only did that

6   because they didn't like the ideas he was expressing?

7   MR. LANE: They are allowed --

8   JUSTICE SCALIA: Wouldn't that be a

9   violation of the First Amendment?

10   MR. LANE: They are allowed to take

11   reasonable steps under Terry, under every conceivable

12   case that this Court's ever decided.

13   JUSTICE SCALIA: Even though they're doing

14   it for -- they do it for a racial reason, would that be

15   okay?

16   MR. LANE: No. No. What I'm saying --

17   JUSTICE SCALIA: Of course not. I don't see

18   how your -- your First Amendment exception doesn't apply

19   to those things as well as to --

20   MR. LANE: It would.

21   JUSTICE SCALIA: -- to the arrest.

22   MR. LANE: It would. If he could prove that

23   they did a Terry stop on him in retaliation for his free

24   speech and it was motivated -- and I know this -- Your

25   Honor's feelings about intent -- intent-motivated

1   constitutional torts.

2   But if he could prove that the Terry stop

3   was motivated by -- in an effort to punish him for his

4   free speech, yes, that would be a cause of action as

5   well.

6   CHIEF JUSTICE ROBERTS: So, what you have,

7   under your theory, a person should put on his car a

8   bumper sticker that says "I hate the police" and then

9   every time they're pulled over, they will have --

10 certainly a plausible case is you violated my First

11 Amendment rights. It's not because I was going 60 miles

12 an hour; it's because of my bumper sticker.

13   MR. LANE: Well --

14   CHIEF JUSTICE ROBERTS: And the police

15 officer -- at that point, he says, you know, I can't

16 give a ticket to this guy without being hauled into

17 court on personal liability because he's got a credible

18 case that it was for First Amendment grounds.

19   MR. LANE: Well, I think we can look at

20 the -- as I've said, the arrows in the quiver of the

21 Court to weed out those kinds of cases.

22   CHIEF JUSTICE ROBERTS: No, no. You've

23 already got the officer in court. I mean, you get a

24 speeding ticket, and most times they don't show up

25 because they have got other things to do. Now he's got

1   to show up in district court, in State court, to defend

2   against this.

3   MR. LANE: Well, I mean, litigious

4   plaintiffs are a consistent problem across the board

5   under many contexts. And there's really -- you know,

6   there's almost nothing that can be done. This Court has

7   taken steps to cut back prison litigation that's

8   frivolous, things of that nature.

9   But, yes, if -- the heightened pleading

10 standard this Court enunciated in Iqbal: You can't just

11 come up with conclusory allegations.

12   CHIEF JUSTICE ROBERTS: Right. Well,

13 this --

14   MR. LANE: You have to have facts in support

15 that that's why they stopped me, because of my bumper

16 sticker.

17   CHIEF JUSTICE ROBERTS: Is that -- is that a

18 case that you could state?

19   MR. LANE: That would be --

20   CHIEF JUSTICE ROBERTS: He pulled me over,

21 he gave me a speeding ticket, but the only reason he

22 picked me out is because I had a bumper sticker saying

23 "I hate the police."

24   MR. LANE: Well --

25   CHIEF JUSTICE ROBERTS: Does that go to

1   trial?

2   MR. LANE: No, that doesn't necessarily go

3   to trial. That's a conclusion, first of all --

4   CHIEF JUSTICE ROBERTS: Why doesn't it go to

5   trial? And -- well, does it go -- I mean, do you get

6   depose the police officer? You know, why did you stop

7   him? Did you stop anybody else for going 65 miles an

8   hour that day?

9   MR. LANE: Well, I mean, these evidentiary

10   questions have to be first of all supported in a

11   pleading with heightened scrutiny under Iqbal.

12   Conclusions are not simply enough. You have --

13   JUSTICE SCALIA: It's not a conclusion. I

14   mean, if -- if he didn't have the bumper sticker and you

15   asserted in the pleading he stopped me because he knows

16   I hate the police, that's a conclusion. But if you have

17   the bumper sticker, he says, you know, I had the bumper

18   sticker, and that's why he stopped me.

19   MR. LANE: Well, let me give the flip side

20   of that and say if the police officer did stop him

21   because of the bumper sticker, he should go to trial.

22   He should be held accountable for that.

23   CHIEF JUSTICE ROBERTS: So, the only way you

24   can find out is you put in the evidence -- here's the

25   bumper sticker -- and you put the police officer on the

1   stand --

2   MR. LANE: Well --

3   CHIEF JUSTICE ROBERTS: -- and you say, why

4   did you do it?

5   MR. LANE: Under --

6   CHIEF JUSTICE ROBERTS: And then all of a

7   sudden -- I don't know why everybody doesn't have a

8   bumper sticker.

9   MR. LANE: Theoretically, every single

10   person who has ever been arrested for any crime could

11   raise a first amendment retaliation lawsuit. Every

12   convicted murderer doing time throughout this country

13   could do that. They don't, however. There is -- there

14   is not a rush to the courthouse of retaliatory arrest

15   claims because the pleading requirements are heightened.

16   Qualified immunity for over a hundred years has

17   protected the Secret Service. They've been protecting

18   the executive branch --

19   JUSTICE BREYER: Well, say, though, that in

20   the case of the President, what you're hearing is, as

21   you well know, that the combination of disparate

22   political views and risk is unlike other situations.

23   And I don't know if they can prove it or you could prove

24   the contrary, but that's -- that's a claim. And I can't

25   say there's nothing to it.

1   So, let me suggest to you another arrow

2   which - I'll ask you what you think of this arrow, and

3   the answer's going to be not much, but I'm interested

4   in hearing --

5   MR. LANE: Go ahead.

6   JUSTICE BREYER: -- your reason.

7   MR. LANE: I'm ready.

8   JUSTICE BREYER: In -- in Hartman, Justice

9   Ginsburg and I dissent.

10   MR. LANE: Yes.

11   JUSTICE BREYER: And we referred to a D.C.

12   Circuit case. And in the D.C. Circuit, it said -- it

13   talked about rare cases "where strong motive evidence

14   combines with weak probable cause to support a finding

15   that the prosecution would not have occurred but for

16   the ... animus." Now, so far, you think "fine."

17   But suppose you were to say because of the

18   factors that have just been mentioned where the

19   President's at stake, the courts -- where his life is at

20   stake, the President's -- the courts will not infer once

21   probable cause exists that it's weak. And the courts

22   will not infer from the simple presence of political

23   disagreement that the motive of retaliation is strong,

24   which in fact would produce a very limited extension of

25   Hartman to the case of protecting the President of the

1 United States.

2   And now, I know you're not going to agree

3 with that, and I'm trying it out and I'm not saying I

4 agree with it, but I want to see what you -- how you

5 react.

6   MR. LANE: Well, let's take a look at the

7 facts of this case. The Tenth Circuit found there was

8 probable cause for a 1001 violation. But was there

9 probable cause -- is there a great body of

10 circumstantial evidence surrounding this case that would

11 point to probable cause which should be considered in

12 deciding how this case proceeds? We have the agent in

13 charge of the protective detail, Agent Lee, standing 8

14 inches away from Vice President Cheney when this entire

15 encounter occurs. Agent Lee testified he saw no crime

16 committed. We had numerous agents --

17   JUSTICE SOTOMAYOR: Excuse me.

18   MR. LANE: Yes, Your Honor.

19   JUSTICE SOTOMAYOR: Let's go past that for a

20 second. What was it that the arresting agent said or

21 did that showed the animus? Meaning, because that

22 another officer actually saw it and understood himself

23 what he thought doesn't mean that this agent who was

24 told that there had been a touching had that

25 information.

1   MR. LANE: The evidence --

2   JUSTICE SOTOMAYOR: So, I know collective

3   knowledge is a theory in a lot of cases, but let's deal

4   with the facts of this case. What's the animus?

5   MR. LANE: Well, there were discrete First

6   Amendment episodes that occurred in the context of this

7   case. One was testified to by Mr. Howards in his

8   deposition, that when he first of all was approached by

9   Agent Reichle, Agent Reichle said, "I want to talk to

10   you," and flashed his badge, and Mr. Howards declined

11   the invitation to talk to Agent Reichle. That,

12   according to Mr. Howards, angered Agent Reichle. That

13   is a First Amendment significant event in and of itself.

14   Steve Howards testified that he then was

15   asked by Agent Reichle: We want to talk to you about

16   assaulting the Vice President. And his response was: I

17   didn't assault the Vice President; I merely criticized

18   his policies in Iraq, and if you don't want him

19   criticized publicly he should stay in his undisclosed

20   location. Or words to that effect.

21   Again, Mr. Howards testified that angered

22   Agent Reichle. At that point, the cuffs went on. And I

23   think that is circumstantial evidence in support of the

24   animus for what -- what was going on. Agent Reichle was

25   on notice as to what Howards had said to the Vice

1 President --

2   JUSTICE SOTOMAYOR: How does all of that

3 prove your point of animus in light of the undisputed

4 fact that he lied about touching the Vice President?

5   MR. LANE: Well, again --

6   JUSTICE SOTOMAYOR: And that's the --

7   MR. LANE: -- lying to the Vice President is

8 what we look at on a Fourth Amendment analysis, because

9 what's in Reichle's actual mind under Devenpeck is

10 irrelevant. So, yes, there was probable cause, but was

11 Reichle himself directing his animus at Mr. Howards and

12 arrested him? We have to look into what was actually in

13 his mind, and that was not in his mind. A 1001

14 violation was not in his mind. We looked -- what was in

15 his mind? And we've already said what was in his mind

16 is he approached the Vice President, he criticized him

17 publicly --

18   JUSTICE SOTOMAYOR: You do understand that

19 this case is inviting the questions the Chief Justice

20 asked, which -- and which -- as Justice Breyer and some

21 of us are concerned about, which is what your adversary

22 has described as First Amendment voicing is going to be

23 a part of many, many arrests.

24   MR. LANE: Absolutely.

25   JUSTICE SOTOMAYOR: How do we draw a line

1   outside of the one that you proposed by your

2   adversaries, that probable cause is the line?

3   MR. LANE: Well, that line --

4   JUSTICE SOTOMAYOR: That doesn't enmesh the

5   police in a constant barrage of claims that just because

6   they angered a police officer, that's why they were

7   arrested.

8   MR. LANE: Well, first of all, there has not

9   been this constant barrage. Hartman has only applied

10   until -- I mean, this Court decided Hartman in 2006 for

11   retaliatory prosecutions. There has not been a run on

12   the courthouse on retaliatory arrests --

13   JUSTICE ALITO: Would you --

14   MR. LANE: -- either before Hartman or

15   after.

16   JUSTICE ALITO: Would you acknowledge that

17   the Secret Service faces a different situation from

18   ordinary police officers in conducting their daily

19   activities, in that Secret Service agents may

20   legitimately take into account First Amendment activity

21   by someone who is in the vicinity of the President or

22   the Vice President in assessing the degree of danger the

23   person presents?

24   MR. LANE: This may not help my case, but

25   I'll go further than that and I'll say any police

1   officer has an absolute right to listen to what any

2   protester is saying and consider what is being said in

3   terms of assessing the level of threat that that

4   protester poses.

5   But as I said in this case, they had every

6   right to stop Mr. Howards, to do a Terry stop on him,

7   because they were concerned about him. And reasonable

8   cause for concern under Terry is the standard. You

9   don't need probable cause to pat someone down under

10   Terry. It's simply if a reasonable officer would be

11   concerned.

12   JUSTICE SCALIA: Again, I don't understand

13   why you -- why you say that they're immune from the

14   charge of First Amendment retaliation for that but not

15   immune from the charge of First Amendment -- I mean --

16   MR. LANE: I'm not --

17   JUSTICE SCALIA: If you say they're doing it

18   on First Amendment grounds for the one, they're doing it

19   on the First Amendment grounds for the other. Why is

20   either one okay?

21   MR. LANE: I'm not saying that they're

22   immune on a Terry pat down if it's done in retaliation

23   for free speech. I'm simply saying that would make it a

24   much more difficult case for any protester to go to a --

25   to go to court and say the only reason he patted me down

1   is in retaliation for my free speech.

2   JUSTICE BREYER: Okay. So, then putting it

3   in their point of view, I just what he actually said.

4   He was very angry, your client. I mean, judging what he

5   said -- there were a lot of swear words and so forth --

6   he was pretty angry at this whole situation.

7   So, you're a Secret Service agent, and you

8   hear him say -- speak like this -- he has every right to

9   speak like that. I mean people do. I understand that.

10 But now he's also thinking that -- I'm nervous about

11 this. The President is here, the Vice President,

12 whatever --

13   MR. LANE: Sure.

14   JUSTICE BREYER: -- same thing -- and I've

15 got to do my job. So -- and nobody's going to say, ho,

16 ho, First -- whatever if is -- if somebody is hurt.

17   MR. LANE: I agree with that.

18   JUSTICE BREYER: Now, he has also lied about

19 whether he touched the President.

20   MR. LANE: So --

21   JUSTICE BREYER: And he has also been

22 talking about the President killing people.

23   MR. LANE: First order of business --

24   JUSTICE BREYER: Killing babies and so forth

25 and --

1   MR. LANE: Let's see if he's a threat.

2   JUSTICE BREYER: All right. So, what is he

3   supposed to do in your view?

4   MR. LANE: He's supposed to -- if he -- if

5   he has reasonable cause to believe Steve Howards is a

6   threat --

7   JUSTICE BREYER: Well, it is in this

8   situation --

9   MR. LANE: Okay.

10   JUSTICE BREYER: But this situation, I've --

11   I'm pretty --

12   MR. LANE: Right. Then he pats him down.

13   He opens the bag --

14   JUSTICE BREYER: Nothing there.

15   MR. LANE: Nothing there.

16   JUSTICE BREYER: He says, okay --

17   MR. LANE: Then they monitor him, and they

18   watch him, and -- and that's all.

19   JUSTICE BREYER: A lot of people in

20   that place.

21   MR. LANE: There is no probable cause to

22   believe he has committed a crime at that point.

23   JUSTICE BREYER: Well, he lied. He --

24   MR. LANE: But they didn't know that. That

25   was not in their minds. That's -- we're doing a First

1 Amendment analysis and not the Fourth Amendment analysis

2 at this point. First Amendment analysis --

3   CHIEF JUSTICE ROBERTS: But they didn't

4 arrest him -- they didn't arrest until after he lied,

5 right?

6   MR. LANE: But it was never in their minds.

7 They testified. That didn't have anything to do -- that

8 is the Tenth Circuit's post hoc rationale under

9 Devenbeck, which -- Devenpeck -- which says you -- if

10 there's any objective probable cause that the Tenth

11 Circuit or this Court or any other court can concoct,

12 post hoc, even though it wasn't in the officer's mind,

13 that's good enough to arrest somebody. That's -- that

14 probable cause. All right?

15   But in First Amendment analysis, it can't be

16 an objective standard. There -- objective standards are

17 clean, they are nice, they -- they create bright lines.

18 But when we are looking at a First Amendment violation,

19 we have to got to be able to get into subjective intent

20 of the officer at -- on the scene.

21   JUSTICE ALITO: And when you say that, that

22 means that almost all of these cases have to go to

23 trial --

24   MR. LANE: No, they don't.

25   JUSTICE ALITO: -- before a jury.

1 Well, how are -- how can they be stopped before they go

2 to trial?

3   MR. LANE: Because if -- first of all, as

4 I've said, Iqbal requires heightened pleading, not just

5 conclusions. We have the summary judgment standard.

6   JUSTICE ALITO: I engaged in First Amendment

7 -- I engaged in First Amendment activity.

8   MR. LANE: We have a summary judgment

9 standard, where -- and, in fact, in Butz, this Court

10 held that a firm application of rules of civil procedure

11 will always prevent frivolous claims and meritless

12 litigation from occurring in situations exactly like

13 this. And that's true. A firm application of the rules

14 of civil procedure, a summary judgment standard, which

15 is --

16   CHIEF JUSTICE ROBERTS: Well, summary

17 judgment, that's -- you've already been in court for a

18 long time when you're talking about summary judgment.

19   MR. LANE: There's no easy way out of this,

20 unfortunately. Frequently, when you're talking about --

21   CHIEF JUSTICE ROBERTS: Well, there is an

22 easy way out of it. We could agree with the --

23   (Laughter.)

24   MR. LANE: Well, that, unfortunately, is an

25 easy way out of the First Amendment as well. I mean,

1   this Court has decided some incredibly difficulty cases.

2   Snyder v. Phelps, authored by Your Honor, very difficult

3   case. Could it be side-stepped, by -- you know,

4   somebody steps off a curb and is thereby jaywalking?

5   Are we limiting --

6   CHIEF JUSTICE ROBERTS: One thing about your

7   analysis that concerns me is that you seem to have a

8   very black-and-white view of what's going on in the

9   officer's mind: Did you stop -- did you arrest him

10   because of retaliation or was it because of legitimate

11   security?

12   And I suspect that the people engaged in

13   this type of thing have intuition. I mean, they don't

14   sit there and say, well, let's see; is it because he

15   says he didn't like the war in Iraq, or is because he's

16   wandering around, looks like he's looking for something,

17   with a -- with a bag? I mean, I assume they sort have

18   experience and they calculate all this in and say I've

19   got to do something. And how do you parse those

20   different motivations?

21   MR. LANE: Well, what I say about that

22   is that -- and, again, I know this is not an answer that

23   you're probably going to like, because this means a

24   trial is involved, but this is what juries do on a daily

25   basis throughout this country, in every criminal case.

1   What is the subjective intent of the defendant? In

2   every civil case, is this an intentional act, a knowing

3   act, a reckless act, a negligent act? That's what

4   juries do.

5   And if there's enough evidence to get this

6   case to trial -- and I would posit it that in this case,

7   where you have agent after agent after agent who saw the

8   encounter up close and personal with the Vice President

9   and Mr. Howards, none of whom saw any evidence of any

10   criminal activity by Mr. Howards, all of whom let Mr.

11   Howards walk away from the scene, that's good evidence

12   that --

13   CHIEF JUSTICE ROBERTS: One reason that I,

14   in fact, don't like the answer is because what the agent

15   is now going to have to factor -- in addition to the

16   hostility of the views, the touching of the Vice

17   President, the lying about it, the wandering around with

18   the bag -- is in the back of his mind, you know, if I'm

19   wrong, I may be held personally liable in damages for

20   taking some action that some jury somewhere is going to

21   say was based on retaliation rather than my obligation

22   to protect the Vice President.

23   MR. LANE: Well, I mean, theoretically yes,

24   that could be a problem. And I am quite certain that

25   certain civil litigants -- just as in criminal cases,

1 people are wrongly accused of things that they didn't

2 do, they end up in a trial, and sometimes juries get the

3 wrong results and an injustice occurs.

4   We can't fix all those problems when it's

5 not really a significant problem. There are no run on

6 the courtrooms around the land of these kinds of cases

7 arising. We don't need to have any rules that

8 specifically pertain to the Secret Service when, to my

9 knowledge, this Court has had one Secret Service case in

10 its entire history, and there are 15 appellate reported

11 Federal decisions regarding retaliatory arrests,

12 period --

13   JUSTICE ALITO: Which -- is there a record

14 of retaliatory arrests by Secret Service agents against

15 people who say things that are critical of the President

16 and the Vice President?

17   MR. LANE: The only way I know to look for

18 that is on Westlaw or LEXIS. And Mr. Srinivasan

19 indicated that they found 100 or 400 cases. We did a

20 search like that. We came up with the same number. We

21 dug down into those cases. And in terms of actual

22 litigated retaliatory arrest cases, we found 15 total.

23 That's not scientific, but that's the best I've got for

24 you at this point.

25   And I don't know if there is a repository of

1   where we can find that or not. But this -- and I

2   started this argument by saying this is a solution in

3   search of a problem. The Secret Service has adequately

4   done their jobs beautifully over -- for over a century.

5   And there is no reason to put some different rule down

6   on the Secret Service.

7   JUSTICE SCALIA: Well, we lost a couple of

8   Presidents, didn't we?

9   (Laughter.)

10   MR. LANE: Well, they're doing the best they

11   can. I mean, that's -- I understand that. But it is --

12   it is a serious, serious issue to curtail the First

13   Amendment.

14   Consider the situation where you actually

15   do -- and I believe this is that case -- you have Secret

16   Service agents who deserve to be taken to a trial

17   because they have gone out of their way to punish

18   someone for their free speech.

19   What do you do about those guys?

20   JUSTICE GINSBURG: But it's ambivalent. I

21   mean, suppose it turns out you have this trial. We know

22   what words were spoken. Get to the trial; it turns out

23   Reichle is a strong opponent of the war in Vietnam.

24   Then, end of trial, right?

25   MR. LANE: You know, that would be a fact to

1   be considered by the jury. I could lose this trial when

2   we go back, if we get a trial. That's what -- that's

3   what jury trials are all about, Justice Ginsburg.

4   And I'm not saying that I have to show

5   evidence to this Court that I'm going to win the trial

6   before I win this case. The issue simply is, can we

7   sacrifice the First Amendment? You know, does a

8   litterbug lose their right to have First Amendment free

9   speech, does a jaywalker lose their right to have First

10   Amendment free speech because probable cause exists to

11   believe they've committed some offense? And you'll have

12   officers ostensibly enforcing litter laws and jaywalking

13   laws and blocking-the-sidewalk laws, and First Amendment

14   is essentially evaded.

15   A hundred years of jurisprudence, courageous

16   jurisprudence, many times by this Court, goes by the

17   boards because somebody is a litterbug. I just don't

18   see that as the solution to this problem, and I also

19   don't see that the Secret Service needs some enhanced

20   protection from this Court when this has never been and

21   is not now any kind of a serious problem.

22   The status quo is Mount Healthy. It has

23   worked for decades, and it should continue to work. And

24   if these agents get tagged in this case, maybe they

25   deserved to get tagged in this case, because the First

1   Amendment is extremely important. And I don't denigrate

2   the job of law enforcement or these agents in any way.

3   I'm simply saying that when the First

4   Amendment is at stake, I think -- and the law has been

5   working just fine throughout decades, to extend the no

6   probable cause in Hartman to on-street encounters where

7   there is no complex causation chain, where the main

8   actor in Hartman was immune completely from lawsuit --

9   the prosecutor in Hartman could not be sued under any

10   circumstances, nor could the prosecutor in Hartman be

11   questioned in deposition under our traditions. We don't

12   question prosecutors in depositions about why they made

13   decisions to go ahead and prosecute. So, this Court

14   stepped back in Hartman and said that's a different

15   story.

16   But on-street encounters -- if you extend

17   the no-probable-cause requirement to on-street

18   encounters, any rogue police officer, or Secret Service

19   agent, who wants to can ostensibly enforce any number of

20   legal violations -- 1 mile an hour over the speed limit,

21   you're going to jail allegedly for going 1 mile an hour

22   over the speed limit; or under Atwater, for not wearing

23   a seat belt -- when the real reason is your bumper

24   sticker.

25   If you can prove that, they should go to

1   trial.

2   Absent any further questions, I'll sit down.

3   Thank you very much.

4   CHIEF JUSTICE ROBERTS: Thank you, counsel.

5   The case is submitted.

6   (Whereupon, at 12:30 p.m., the case in the

7   above-entitled matter was submitted.)

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clean 51:17
clear 7:9 13:9,25
  14:6
clearly 4:22 13:2
  13:11,16 15:7
  15:17
client 49:4
close 54:8
collective 45:2
Colorado 1:16
  1:22 34:6
combination
  42:21
combines 43:14
come 40:11
comes 31:4
  34:22
committed
  44:16 50:22
  57:11
completely 58:8
complex 13:5
  24:7,8,11
  28:14 29:9
  58:7
complexity
  12:25
complicated
  18:4,17 28:23
conceivable
  38:11
concern 26:23
  28:14 31:15
  37:3,9 48:8
concerned 46:21
  48:7,11
concerning 23:4
concerns 28:23
  31:18 53:7
concluded 15:18
concluding
  15:14
conclusion 41:3
  41:13,16
conclusions
  41:12 52:5
conclusory

40:11
concoct 51:11
conduct 28:7
conducting
  47:18
consider 33:24
  48:2 56:14
consideration
  17:14,16 19:20
  25:15
considerations
  22:18 23:10
considered
  22:21 44:11
  57:1
consistent 40:4
constant 47:5,9
Constitution
  11:18
constitutional
  12:4 15:22
  39:1
contact 33:14,19
contacted 5:20
contacts 33:24
context 16:12,14
  16:20 18:1,19
  18:21 19:11
  22:18 23:12,16
  24:8 25:1,14
  25:20 29:11,18
  29:25 30:11,24
  45:6
contexts 17:7
  19:18 40:5
contingent
  14:18,18
continue 57:23
contours 15:24
  31:10
contrary 8:4
  42:24
control 19:17
  20:1,2,6,18
  26:3,3 29:21
  30:3
convicted 42:12

convince 27:2
correct 6:3 17:4
  19:8 22:7 24:3
  34:10,16 36:19
  37:1
correctly 35:25
costs 21:10
  22:23
counsel 9:24
  16:1,19 22:16
  23:10 31:25
  59:4
country 7:9
  36:25 42:12
  53:25
couple 29:4 56:7
courageous
  57:15
course 8:21
  20:15 22:8
  30:23 38:17
court 1:1,13 3:9
  3:10 4:8,16,20
  5:14 6:23 7:20
  8:17 13:8 14:4
  14:23 15:5,14
  15:21 16:8
  17:25 19:1
  21:9,21,23,24
  22:11,21,24
  23:6 25:3
  28:18,20,22
  30:17,25,25
  31:4,11,19
  32:5,20 39:17
  39:21,23 40:1
  40:1,6,10
  47:10 48:25
  51:11,11 52:9
  52:17 53:1
  55:9 57:5,16
  57:20 58:13
courthouse
  42:14 47:12
courtroom 3:20
courtrooms
  55:6

courts 43:19,20
  43:21
Court's 14:5
  24:22 35:11
  38:12
create 51:17
creates 24:7
  29:9
credible 39:17
credit 32:11
Creighton 15:21
crime 33:6,7
  34:4 36:6
  42:10 44:15
  50:22
criminal 10:8
  53:25 54:10,25
critical 19:12
  55:15
criticized 45:17
  45:19 46:16
cross-appeal
  7:19
crowd 19:17
  20:1,2,6,18
  26:3,3
cuffs 45:22
curb 53:4
curiae 1:20 2:8
  16:6
curtail 56:12
cut 35:4 40:7

——————
D
——————

D 1:3 3:1
da 20:8,8,8
daily 47:18
  53:24
damages 3:15
  3:24 54:19
danger 15:1
  24:14 25:12
  26:10 47:22
DAVID 1:22
  2:10 32:2
day 36:13 37:6
  41:8

deal 11:5 21:11
  22:23,25 23:3
  23:7 45:3
dealing 29:24
dealt 8:22
decades 57:23
  58:5
decided 38:12
  47:10 53:1
decidedly 29:5
decides 4:21
  13:8
deciding 9:18
  17:10 30:8
  44:12
decision 7:17
  14:2 24:22
decisions 13:21
  15:4 55:11
  58:13
declined 45:10
defend 40:1
defendant 54:1
degree 17:19
  18:3 47:22
demeanor 36:6
demonstrates
  15:2
demonstration
  18:24 19:3
denigrate 58:1
Denver 1:16,22
Department
  1:19 27:12
depending
  22:11
depose 41:6
deposition 36:1
  36:4 45:8
  58:11
depositions
  58:12
Deputy 1:18
described 34:9
  46:22
deserve 56:16
deserved 57:25

designed 22:25
25:16
designing 23:7
desire 19:24
24:14,15 27:3
27:4
detail 44:13
details 17:3
32:16
determination
7:16
determine 12:23
13:7 14:2
15:16
determining
16:21 32:12
Devenbeck 51:9
Devenpeck 5:17
7:18 9:10
30:25 31:1,20
46:9 51:9
difference 18:22
25:6 26:4
different 6:8,10
9:8,10,11 10:5
12:3 14:14,16
19:7 25:1
47:17 53:20
56:5 58:14
differently
10:24 31:22
difficult 15:4
17:13 18:7,8
19:19 24:13
48:24 53:2
difficulty 3:21
9:20 53:1
dimension 31:16
directed 32:9
directing 46:11
disaggregate
19:19
disagree 26:16
disagreement
8:3 43:23
disagrees 8:1
discrete 45:5

discretion 9:13
10:6 11:21
discretionary
10:17 16:22
discussion 35:24
disentangle
24:13 26:18
disgusting 33:4
34:1,20
dislike 11:22
disparate 42:21
disposal 27:14
disprove 4:19
dispute 33:5
dissent 43:9
distinction 20:2
20:15
distinctions
20:13
distinguish
17:13 25:17
district 21:24
40:1
dis-uniformity
31:21
doing 12:15,16
33:22 36:25
38:13 42:12
48:17,18 50:25
56:10
doubtless 33:24
draw 14:5 20:14
46:25
driven 9:3
drove 24:9
31:19
dug 55:21
D.C 1:9,19
43:11,12

E

E 2:1 3:1,1
earlier 14:23
early 13:12
easy 4:18 52:19
52:22,25
echo 22:16

effect 45:20
effected 31:14
effort 39:3
either 10:9
47:14 48:20
element 4:7
elements 12:4,6
emotional 36:20
employee 29:13
29:14,22
employer 29:13
29:16,22
employment
28:20 29:4,11
30:11
encounter 17:8
44:15 54:8
encounters
12:19 58:6,16
58:18
enforce 58:19
enforcement
12:13 16:14
19:15 24:18
26:10,11,24
29:25,25 30:10
58:2
enforcing 57:12
engage 19:11
engaged 12:20
19:16 26:8
52:6,7 53:12
engages 29:15
engaging 9:22
enhanced 57:19
enmesh 47:4
entire 15:13
44:14 55:10
entitled 4:11
13:14
entitling 4:23
enunciated
40:10
episodes 45:6
equal 24:24,25
25:7
especially 9:21

ESQ 1:16,18,22
2:3,6,10
essentially 8:13
9:23 10:19
12:17 57:14
established 4:22
13:11,16 15:7
15:17
ET 1:4
evaded 57:14
evaluate 12:22
event 45:13
eventually 5:13
everybody 42:7
evidence 24:15
41:24 43:13
44:10 45:1,23
54:5,9,11 57:5
evidencing
17:15 19:20
evidentiary 21:2
41:9
exactly 10:1
12:1 18:4,18
30:23 52:12
example 6:20
8:25 24:22
28:21 31:20
exception 22:23
23:2,4 38:18
exceptional-ci...
23:2
exceptions
21:11
Excuse 44:17
executive 42:18
exercise 9:13
16:22
existed 6:6
exists 43:21
57:10
expect 31:6
experience
53:18
Explain 5:8
explained 24:12
30:25

explaining 18:8
18:12
expressed 17:21
37:20
expressing
26:14 38:6
expressive 16:21
17:14,16 18:9
19:16,20 25:11
29:15,23
extend 4:21 7:18
11:4 13:9 21:3
21:4 26:3 58:5
58:16
extended 15:11
15:15
extension 23:21
43:24
extreme 21:12
22:23
extremely 24:13
58:1
eye 9:25

F

faces 47:17
fact 7:17 13:22
18:15 24:4
29:11 31:18
43:24 46:4
52:9 54:14
56:25
factor 10:23
54:15
factors 43:18
facts 7:18 33:1
40:14 44:7
45:4
factual 18:4
20:16
factually 32:23
fair 14:7
false 5:9
far 20:25 21:3
43:16
far-reaching 8:9
favor 23:10

Federal 5:7 27:8 28:2,4 32:16 55:11
feelings 38:25
felony 10:5,7
felt 18:10
Finally 15:6
find 27:23 32:8 41:24 56:1
finding 43:14
fine 33:23 43:16 58:5
fines 10:8
firm 52:10,13
first 4:6 5:17 6:24 7:3,12,22 7:24 10:19,21 11:8,9,11,20 17:8,9 21:14 25:7,10,20 26:4,7 27:9,24 35:17,20 38:5 38:9,18 39:10 39:18 41:3,10 42:11 45:5,8 45:13 46:22 47:8,20 48:14 48:15,18,19 49:16,23 50:25 51:2,15,18 52:3,6,7,25 56:12 57:7,8,9 57:13,25 58:3
fit 23:4 29:2
fits 29:5
fix 55:4
flashed 45:10
flip 29:10 41:19
focus 16:11 25:25
focused 24:3
focusing 15:22
footnote 8:14,14 12:2 23:9 32:13
force 37:24,25
forge 21:11

forging 22:23
form 18:20 30:12
formed 36:9
formulation 13:17
forth 49:5,24
found 5:5 22:10 44:7 55:19,22
Fourteenth 25:7
Fourth 11:17 30:23 35:11,18 46:8 51:1
frame 21:20
Framers 11:17
free 11:23 12:17 12:21 38:23 39:4 48:23 49:1 56:18 57:8,10
frequency 21:18 27:20
frequent 9:17
frequently 8:23 52:20
frivolous 40:8 52:11
front 19:1 26:20 26:21
full 14:22
functions 9:23 12:13 16:15 19:12,16
further 47:25 59:2
F.B.I 17:2

_____

G

G 3:1
Gallagher 1:16 2:3 3:5,6,8,22 4:1 5:4,16 6:3 6:9,12,16 7:1 7:15 8:12,20 9:9,15,19,25 10:12 11:3,7 11:16,25 12:10

14:12,16 16:2
gears 35:19
General 1:19
gently 33:6
getting 11:1 24:6
Ginsburg 4:24 5:2,4,8,17 14:10,14 23:14 24:1 28:11 30:15 31:3 43:9 56:20 57:3
Ginsburg's 35:23
give 5:18,24 28:8 39:16 41:19
given 20:25 29:7 33:1
go 12:8 30:15 32:7 40:25 41:2,4,5,21 43:5 44:19 47:25 48:24,25 51:22 52:1 57:2 58:13,25
goes 57:16
going 10:15,18 10:20 18:6,7,8 18:16 19:9,18 20:12,15 25:23 26:12 29:12 32:14 35:7,12 35:15,20 36:12 36:24 37:5,6,7 37:7 39:11 41:7 43:3 44:2 45:24 46:22 49:15 53:8,23 54:15,20 57:5 58:21,21
good 4:17 6:14 51:13 54:11
government 5:9 32:7
great 23:3 33:21

35:24 44:9
grounds 39:18 48:18,19
guess 21:8 22:16 34:24
GUS 1:3
guy 39:16
guys 56:19

_____

H

half 11:8,9,9
hand 17:13
handed 13:12
hands 33:20
happened 8:4
happens 17:6 26:21 30:23 31:23 36:23
harassment 5:14 30:19 31:7,11 34:7 36:8
hard 4:18 26:18
Harlow 14:17
Hartman 4:9,21 8:14,21 11:5 12:2,2 13:1,2,9 13:11 15:11,14 18:1,20 21:21 23:9,15,22,22 24:2 28:12,17 28:19 43:8,25 47:9,10,14 58:6,8,9,10,14
hate 39:8 40:23 41:16
hauled 39:16
Healthy 57:22
hear 3:3 37:5 49:8
heard 32:20
hearing 3:21 42:20 43:4
heck 9:14
heightened 40:9 41:11 42:15 52:4

held 4:5 6:18,23 41:22 52:10 54:19
help 16:16 47:24
high 15:23
history 20:7 55:10
hit 37:19
ho 49:15,16
hoc 51:8,12
holding 15:11
Honor 9:15 24:2 30:22 44:18 53:2
Honor's 38:25
hope 9:4 22:13
hostile 33:24
hostility 54:16
hour 9:3 39:12 41:8 58:20,21
Howards 1:7 3:4 5:21,21 33:1 36:2 45:7,10 45:12,14,21,25 46:11 48:6 50:5 54:9,10 54:11
Huff 14:24
hundred 21:23 42:16 57:15
Hunter 32:21
hurt 49:16
hypothesis 22:19
hypothetical 9:21
hypotheticals 21:12

_____

I

ideas 38:6
identified 28:19 28:20
illegitimate 17:16 19:22,23 24:15 27:3 29:19

illicit 22:20
imminent-thr...
13:22
immune 23:19
48:13,15,22
58:8
immunity 4:12
4:23 13:15,18
13:23 14:11,13
14:15,17,18,21
14:22 15:7,16
20:5,6 24:18
24:19 42:16
import 35:24
important 11:11
13:19,23,24
15:12,22 23:13
24:25 58:1
importantly
5:20
importing 31:15
inches 44:14
incident 15:17
incidental 33:14
33:16
include 16:25
including 25:1
31:20
incredibly 53:1
indicated 55:19
indication 5:14
individual 7:11
20:8 25:23
26:13 37:14,21
individuals 17:7
24:4 31:21
infer 29:18
43:20,22
inferring 30:5
inform 16:16
26:8
information
27:6 44:25
initiated 8:16
injustice 55:3
inquiry 31:2,17
35:17

inside 38:1
institutes 23:17
intelligent 18:16
intensity 26:7
intent 38:25
51:19 54:1
intentional 54:2
intent-motivat...
38:25
interaction 30:1
interactions
27:19 29:21
interested 11:2
43:3
intuition 53:13
intuitions 26:24
invitation 45:11
inviting 46:19
involve 29:12
involved 7:6
32:11 53:24
involving 32:20
Iqbal 40:10
41:11 52:4
Iraq 33:4 45:18
53:15
irrelevant 35:12
46:10
issue 3:10 7:19
7:20 8:18 20:7
28:14 30:24
35:13 56:12
57:6
issues 24:7
35:11
I'll 43:2

J
jail 58:21
jaywalker 57:9
jaywalking 8:25
10:8,9 11:14
21:4 53:4
57:12
job 33:21 36:15
36:18 49:15
58:2

jobs 56:4
JR 1:3
judges 14:24
judging 49:4
judgment 52:5,8
52:14,17,18
judicial 14:7
June 13:10 15:7
juries 53:24
54:4 55:2
jurisdictions
21:15
jurisprudence
35:11 57:15,16
jury 18:7 27:2
51:25 54:20
57:1,3
Justice 1:19 3:3
3:8,19,25 4:24
4:25 5:2,4,8,16
5:24 6:4,5,11
6:14,18 7:2,15
7:21 8:19,21
9:7,11,16,19
9:20,24 10:1,2
10:13 11:1,4
11:10,14,19
12:8 14:10,14
16:1,3,8,24
17:2,18,23
18:22 19:1,9
19:22,25 20:4
20:11,15,17,20
20:25 21:13,18
22:1,4 23:14
23:15 24:1,3
24:17,20 25:5
26:2 27:5,11
27:15,16,22
28:2,4,11
30:15 31:3,25
32:4,9 33:8,9
33:12,16,23
34:3,8,11,17
35:1,5,14,23
36:10,15,18,20
36:23 37:2,11

37:16 38:4,8
38:13,17,21
39:6,14,22
40:12,17,20,25
41:4,13,23
42:3,6,19 43:6
43:8,8,11
44:17,19 45:2
46:2,6,18,19
46:20,25 47:4
47:13,16 48:12
48:17 49:2,14
49:18,21,24
50:2,7,10,14
50:16,19,23
51:3,21,25
52:6,16,21
53:6 54:13
55:13 56:7,20
57:3 59:4

K
keep 27:12
Kennedy 3:19
3:25 17:18,23
24:17,20 25:5
kill 37:6
killed 25:24
36:13
killing 49:22,24
kind 14:14
17:25 24:11
26:9,24 30:9
57:21
kinds 8:25 18:5
18:14 27:19
39:21 55:6
know 8:9 9:14
9:17 15:20,20
20:5,9 21:5,15
22:3 27:6,10
27:16,19 31:9
31:10,17 33:3
36:24 38:24
39:15 40:5
41:6,17 42:7
42:21,23 44:2

45:2 50:24
53:3,22 54:18
55:17,25 56:21
56:25 57:7
knowing 54:2
knowledge 45:3
55:9
knows 41:15

L
land 55:6
Lane 1:22 2:10
32:1,2,4 33:11
33:14,18 34:2
34:6,10,16
35:3,9,17
36:14,17,19,22
37:1,10,15,19
38:7,10,16,20
38:22 39:13,19
40:3,14,19,24
41:2,9,19 42:2
42:5,9 43:5,7
43:10 44:6,18
45:1,5 46:5,7
46:24 47:3,8
47:14,24 48:16
48:21 49:13,17
49:20,23 50:1
50:4,9,12,15
50:17,21,24
51:6,24 52:3,8
52:19,24 53:21
54:23 55:17
56:10,25
Laughter 9:6
34:25 52:23
56:9
law 4:21 12:13
13:10,15 15:16
16:14 19:14
26:10,11,24
29:25,25 30:9
34:6 37:4 58:2
58:4
laws 57:12,13,13
lawsuit 3:13

37:12 42:11
58:8
leaders 12:15
Lee 44:13,15
left 4:9 8:5
36:11
legal 58:20
legitimate 16:19
17:9,14 19:19
24:14 27:4
30:7 53:10
legitimately
12:22 13:6
18:9 19:15
25:11,21 29:8
47:20
letting 33:20
let's 44:6,19
45:3 50:1
53:14
level 12:24 13:7
15:23,24 28:13
35:17 48:3
LEXIS 32:14
55:18
liability 26:13
39:17
liable 4:5 54:19
lie 37:7
lied 3:17 4:3
5:21 34:13
46:4 49:18
50:23 51:4
lies 34:21
life 20:22 43:19
life-or-death
13:21
light 46:3
limit 17:5 58:20
58:22
limitations
32:14,17
limited 21:16
32:16 43:24
limiting 53:5
line 46:25 47:2,3
lines 51:17

listen 48:1
literature 10:3
litigants 54:25
litigated 55:22
litigation 23:3
40:7 52:12
litigious 40:3
litter 57:12
litterbug 57:8
57:17
little 3:19,20
21:6 32:11
location 45:20
long 6:14 52:18
long-term 29:12
look 15:23,23,24
19:25 26:13
35:22 39:19
44:6 46:8,12
55:17
looked 15:18,19
27:22 33:3
46:14
looking 21:21
34:18 51:18
53:16
looks 53:16
lose 57:1,8,9
lost 56:7
lot 17:6 45:3
49:5 50:19
lottery 23:8
lying 5:7 46:7
54:17

M

main 30:1 58:7
making 16:19
19:2 20:2,3,12
21:5 32:24
Mall 33:15,19
manifest 25:12
manufactured
18:15
mapped 31:12
March 1:10
margins 13:24

26:22
marshals 16:25
matter 1:12 6:15
7:9 19:2 31:3
37:3 59:7
mean 8:24 20:8
20:17 23:17
31:5 34:3
39:23 40:3
41:5,9,14
44:23 47:10
48:15 49:4,9
52:25 53:13,17
54:23 56:11,21
Meaning 11:20
44:21
means 51:22
53:23
measure 31:12
mentioned
43:18
mere 4:15
merely 45:17
meritless 52:11
metal-detecting
38:2
mile 58:20,21
miles 9:3 39:11
41:7
millions 22:5
mind 26:22 28:7
30:20 31:18,23
35:7,12,15,22
46:9,13,13,14
46:15,15 51:12
53:9 54:18
minds 5:15
50:25 51:6
mine 22:25
misdemeanor
10:4
misdemeanors
10:7
mistaken 27:1
money 3:15,24
monitor 50:17
months 13:13

14:8
Moore 4:9
morphed 36:7
motivated 38:24
39:3
motivating
10:23
motivation 19:3
25:18,19 29:20
30:6
motivations
53:20
motive 3:17 4:3
7:10 17:17
43:13,23
motives 22:20
Mount 57:22
mourning 36:25
multifaceted
35:3,6
murderer 42:12

N

N 2:1,1 3:1
Nation's 12:15
natural 17:7
31:5
nature 15:19
26:7 40:8
necessarily 41:2
need 7:6,13
10:16 24:9
32:24 48:9
55:7
needs 11:6 57:19
negligent 54:3
neither 23:16
nervous 21:6
49:10
nervousness
21:8
never 6:18,23
9:13 36:1,1
51:6 57:20
nice 51:17
Ninth 15:8
nobody's 36:24

49:15
noise 3:20
non-felony 22:4
non-protected
34:14
normal 10:20
normally 9:1
noted 14:4,23
notice 8:4 45:25
no-probable-c...
17:24 18:20
23:12 30:13
58:17
number 55:20
58:19
numerous 33:20
44:16

O

O 2:1 3:1
object 14:5 28:7
objective 6:17
18:19 23:11
24:10 25:2,3
28:25 30:12
31:1,19 51:10
51:16,16
obligation 54:21
obvious 22:10
occurred 43:15
45:6
occurring 52:12
occurs 44:15
55:3
offense 31:17
57:11
offered 32:7
officer 5:9 6:2
7:8,25 9:18
10:6 20:8
23:20 26:9,11
30:1,8 31:14
31:18 39:15,23
41:6,20,25
44:22 47:6
48:1,10 51:20
58:18

officers 5:11,15
  5:17 10:17
  11:10,21 12:12
  16:15 19:11
  26:21 47:18
  57:12
officer's 14:25
  31:23 51:12
  53:9
official 28:5
officials 27:8
oh 8:4 9:13 19:4
  36:24
Ohio 37:23
okay 10:2 11:3
  36:15 37:11
  38:15 48:20
  49:2 50:9,16
once 14:21
  19:10 43:20
one's 30:20
one-time 30:1,4
on-street 58:6
  58:16,17
opaque 37:25
  38:1
open 4:9 37:24
opening 3:21
opens 50:13
opinion 5:6 22:9
  24:3,6
opponent 56:23
opposed 18:11
oral 1:12 2:2,5,9
  3:6 16:4 32:2
order 12:23 13:7
  13:21 14:2
  18:12 49:23
ordinarily 25:15
ordinary 18:23
  25:13 47:18
ostensibly 57:12
  58:19
outer 26:22
outlined 8:13
outside 47:1
outweigh 21:10

22:22
overcomes 6:23
overheard 36:12
overhears 25:23

———————
P
———————

P 3:1
page 2:2 32:12
parse 53:19
part 25:9,9 35:9
  37:20 46:23
particular 12:22
  12:23 15:1
  16:10 17:6,20
  20:8 21:1
particularly
  13:23,24
pat 33:20 38:1
  48:9,22
pats 50:12
patted 33:6
  48:25
pattern 29:12
people 8:22,23
  19:2 20:21
  33:20 49:9,22
  50:19 53:12
  55:1,15
perceive 37:24
perform 9:22
performing
  12:12 16:15
period 27:7
  29:21 55:12
permit 10:18
  21:15
persecution
  20:7
persecutions
  21:5
person 7:25 8:15
  18:11,16 26:1
  34:9,11,20
  35:2 39:7
  42:10 47:23
personal 3:15,23
  39:17 54:8

personally 4:5
  54:19
pertain 55:8
Petitioners 1:5
  1:17,21 2:4,8
  3:7 16:6,18
  22:16
Phelps 53:2
pick 16:18
picked 40:22
picket 6:21
picture 11:13
  23:20
piece 24:1
place 25:2 50:20
plaintiff 10:15
plaintiffs 40:4
plan 23:7
plausible 39:10
play 24:4
pleading 40:9
  41:11,15 42:15
  52:4
please 3:9 16:8
  32:5
point 6:21,22
  7:10 10:25
  16:11,18 19:9
  22:9,10 23:3
  28:10 33:5
  35:10 39:15
  44:11 45:22
  46:3 49:3
  50:22 51:2
  55:24
pointed 35:25
points 5:16
police 6:20 7:8
  10:16 11:10,21
  12:12 14:25
  39:8,14 40:23
  41:6,16,20,25
  47:5,6,18,25
  58:18
policemen 8:23
  10:8 18:23
policies 33:4,25

34:20 45:18
policing 18:23
political 8:3
  42:22 43:22
politically 8:1
posed 28:11
poses 37:16 48:4
posit 7:19 54:6
possibility 23:8
post 51:8,12
potential 4:14
  26:12
potentially 27:1
  27:13
power 10:18
  16:23
precise 31:10
precisely 25:12
prepared 3:11
  3:12 8:9
presence 43:22
present 26:9
presented 15:1
presents 47:23
President 3:12
  3:18 4:4 5:12
  7:5,6 12:19,20
  20:23 25:24
  33:2,19 34:13
  34:21 36:6,12
  36:16,24 37:6
  42:20 43:25
  44:14 45:16,17
  46:1,4,7,16
  47:21,22 49:11
  49:11,19,22
  54:8,17,22
  55:15,16
Presidents 56:8
President's
  43:19,20
pretty 49:6
  50:11
prevent 52:11
pre-dated 29:22
primary 15:8
principal 1:18

11:13 16:10
principled 11:5
principles 25:14
prior 30:2
prison 40:7
probable 3:13
  4:6,13,24 5:2,3
  5:5 6:1,6 7:23
  8:6 10:22
  11:12,15,16
  12:5 14:20
  24:23 30:16,18
  30:19 31:2,6
  31:16 43:14,21
  44:8,9,11
  46:10 47:2
  48:9 50:21
  51:10,14 57:10
  58:6
probably 32:23
  53:23
problem 17:12
  20:21,21,22
  21:1 24:12
  26:19,20 32:8
  32:19,22 33:18
  37:16,18,20
  40:4 54:24
  55:5 56:3
  57:18,21
problems 55:4
procedure 52:10
  52:14
proceeded 15:15
proceeds 44:12
produce 43:24
proliferation
  22:12
proof 24:24
proposed 47:1
prosecute 9:12
  58:13
prosecution
  8:16 18:1
  22:18 23:23
  24:8 28:22
  29:3,5 43:15

prosecutions
8:22 9:8 30:14
47:11
prosecutor
23:17,18 58:9
58:10
prosecutors
9:12 22:19
58:12
prospect 14:7
protect 7:6
10:16 18:11
36:16 54:22
protected 7:11
42:17
protecting 12:14
12:19 20:21,22
42:17 43:25
protection 24:24
24:25 25:7
57:20
protective 4:11
9:23 12:14
13:20 14:20
16:15 17:3
19:12 27:8
28:5 32:16
44:13
protester 48:2,4
48:24
prove 10:22
38:22 39:2
42:23,23 46:3
58:25
public 9:25
12:15 17:8
19:12 20:22
28:20 29:3,11
30:11
publicity 27:20
publicly 45:19
46:17
pulled 39:9
40:20
punish 39:3
56:17
purely 31:22

purpose 25:19
put 28:17 39:7
41:24,25 56:5
putting 49:2
p.m 59:6

————————
Q

qualified 4:12
4:23 13:15,18
13:22 14:13,15
14:17 15:7,16
42:16
question 4:8
5:12 7:4 11:8
12:7,9,11 18:2
18:18 21:8
22:14 28:11
29:1 30:4,16
32:9 35:3
58:12
questioned
58:11
questions 8:13
16:12 18:4
35:23 41:10
46:19 59:2
quite 24:2 30:21
54:24
quiver 37:23
39:20
quo 57:22

————————
R

R 1:16 2:3 3:1,6
race 24:18 25:1
25:13,14,17,18
racial 38:14
raise 42:11
rare 43:13
rationale 51:8
reach 33:17
reached 8:5
react 17:9 44:5
reacting 26:14
26:15
read 12:3,3,6
15:13

ready 43:7
real 6:19 58:23
really 24:9
32:18 40:5
55:5
reason 4:17 5:10
5:10 6:1,15,19
7:3 8:17 13:14
19:4 23:22
25:10,14 31:9
35:5 38:14
40:21 43:6
48:25 54:13
56:5 58:23
reasonable
34:23 35:15
38:11 48:7,10
50:5
reasons 4:4 5:18
23:16 24:12
29:4
reckless 54:3
recognize 37:17
record 55:13
recover 10:16
reference 21:20
referred 43:11
refused 4:17
regard 9:21 13:4
13:17 15:6
regarding 55:11
regardless 4:20
13:8 17:19
Reichle 1:3 3:4
5:20 31:14
45:9,9,11,12
45:15,22,24
46:11 56:23
Reichle's 46:9
relationship
29:12 30:3,5
relevant 5:22
24:2 25:15
relied 15:8,10
remedy 7:13
remember
11:12

remotely 32:21
reported 32:16
55:10
repository 55:25
require 12:5
required 4:7
5:18
requirement
17:24 18:20
30:13 58:17
requirements
42:15
requires 52:4
requisite 13:20
research 27:23
reservation 25:6
respect 6:11,12
6:19 10:6
23:25
respects 24:2
Respondent
1:23 2:11 3:14
3:23 32:3
response 7:14
17:15 26:10,24
28:11 30:10
45:16
results 26:20
55:3
retaliation 6:20
7:10 27:25
28:19 38:23
42:11 43:23
48:14,22 49:1
53:10 54:21
retaliatory 3:13
3:16 4:2,7,15
4:16,18 6:24
7:24 8:17
17:25 18:21
21:14 22:18
27:8 28:22
29:2,3,5 32:15
35:21 42:14
47:11,12 55:11
55:14,22
retirement 23:7

review 15:12
right 6:25 7:1,2
11:23 15:19,24
16:2 21:7 34:9
34:15 35:4,10
35:17 36:14
40:12 48:1,6
49:8 50:2,12
51:5,14 56:24
57:8,9
rights 15:22
39:11
risk 5:23 42:22
ROBERTS 3:3
4:25 16:1,3,24
17:2 31:25
34:8,11,17
35:1,5,14 39:6
39:14,22 40:12
40:17,20,25
41:4,23 42:3,6
51:3 52:16,21
53:6 54:13
59:4
rogue 58:18
room 13:21
roughly 21:23
rule 4:21 7:7,7
16:12,13,16
17:18 19:11
20:5 21:10
22:15,22,25
23:1,23 24:10
25:16 28:13,25
31:19 37:4
56:5
rules 32:25
52:10,13 55:7
run 22:25 47:11
55:5
rush 42:14
Ryburn 14:24

————————
S

S 2:1 3:1
sacrifice 57:7
saw 44:15,22

54:7,9
saying 7:3,22
  10:2 12:4,6,23
  13:6 20:1
  37:18 38:16
  40:22 44:3
  48:2,21,23
  56:2 57:4 58:3
says 8:4,15,16
  26:13 37:4,5
  39:8,15 41:17
  50:16 51:9
  53:15
Scalia 5:24 6:4,5
  6:11,14 9:11
  9:16 18:22
  19:1,9 26:2
  33:9,12,16,23
  34:3 38:4,8,13
  38:17,21 41:13
  48:12,17 56:7
scene 15:1 18:3
  18:16 36:1,4
  51:20 54:11
science 32:11
scientific 32:10
  55:23
scores 22:7,7
screen 23:12
  25:2,3 30:12
screening 18:19
scrutiny 41:11
SEAN 1:16 2:3
  3:6
search 21:20,22
  28:7 32:10,13
  55:20 56:3
seat 58:23
second 4:10 5:19
  11:9 12:7,10
  44:20
second-guessed
  15:5
second-guessing
  14:8,25
Secret 3:11,15
  4:1,10,14 5:22

9:21 10:23
  11:6 12:11,12
  12:13,18,21,24
  13:4,5,14,19
  13:25 14:1,19
  15:3 16:9,14
  16:17,20 17:5
  19:13 25:22,25
  32:19,25 34:12
  34:19 35:7,15
  42:17 47:17,19
  49:7 55:8,9,14
  56:3,6,15
  57:19 58:18
security 53:11
see 9:7 20:20,20
  20:21,22 21:23
  22:11 34:19
  38:17 44:4
  50:1 53:14
  57:18,19
seeks 3:14,23
selective 24:18
sense 16:13,16
  18:18 19:10,14
  21:13 22:15
  25:25 28:24
  29:10,18,21
  30:10 31:1
serious 56:12,12
  57:21
serves 25:19
Service 3:11,15
  4:1,10,14 5:22
  9:22 10:24
  11:6 12:11,12
  12:13,18,21,24
  13:4,5,14,19
  13:25 14:1,19
  15:3 16:10,14
  16:17,20 17:5
  19:13 25:22,25
  32:19 33:1
  34:12,19 35:7
  42:17 47:17,19
  49:7 55:8,9,14
  56:3,6,16

57:19 58:18
Service's 35:15
set 22:17
shaking 33:20
shift 35:19
shoulder 33:7
  33:17
show 37:25
  39:24 40:1
  57:4
showed 44:21
shows 32:16
side 29:3,4,6,10
  41:19
side-stepped
  8:17 53:3
sign 6:21
significant
  32:22 45:13
  55:5
similar 12:25
  16:15 23:9
similarly 13:5
  31:21
simple 14:6
  43:22
simply 41:12
  48:10,23 57:6
  58:3
single 42:9
sit 53:14 59:2
situated 31:21
situation 5:23
  10:21 13:1,3
  15:2,3 19:6
  24:5 30:9,18
  47:17 49:6
  50:8,10 56:14
situations 13:22
  13:24 19:14
  20:16 22:20
  42:22 52:12
sketch 7:13
Skoog 15:9,9,13
  15:14,18,25
snap 14:2
snatched 8:5

Snyder 53:2
Solicitor 1:18
solution 32:6,18
  37:18,20 56:2
  57:18
somebody 9:1
  33:17,25 34:19
  49:16 51:13
  53:4 57:17
someone's 14:2
son 34:18
sorry 19:24
  33:11
sort 12:25 17:15
  19:12 20:6
  21:11,22 29:15
  31:16 32:25
  53:17
Sotomayor 9:24
  10:1,13 11:4
  11:10,14,19
  12:8 21:13,18
  22:1,4 44:17
  44:19 45:2
  46:2,6,18,25
  47:4
sounds 7:12 8:8
Souter 23:15
Souter's 24:3
speak 49:8,9
special 32:25
specific 23:15
specifically 55:8
specified 11:17
spectrum 28:18
  29:2
speech 11:23,23
  12:17,21 24:15
  25:8 29:8,19
  30:8 38:24
  39:4 48:23
  49:1 56:18
  57:9,10
speech-suppre...
  29:20 30:6
speed 58:20,22
speeding 39:24

40:21
spoken 56:22
spot 15:4
SRI 1:18 2:6
  16:4
Srinivasan 1:18
  2:6 16:3,4,7
  17:1,4,22
  18:25 19:8,23
  20:3,10,14,19
  20:24 21:7,17
  21:19 22:3,6
  23:25 24:19,21
  25:9 26:6
  27:10,13,18
  28:1,3,6 30:22
  31:9 55:18
stake 43:19,20
  58:4
stand 18:6 42:1
standard 9:10
  11:17 21:22
  28:19 29:11
  40:10 48:8
  51:16 52:5,9
  52:14
standards 14:6
  51:16
standing 44:13
start 16:9 20:12
started 56:2
state 5:13 31:11
  36:8 40:1,18
statement 3:21
  5:9 6:22
States 1:1,13,20
  2:7 16:5 44:1
status 57:22
stay 45:19
steadfastly 4:17
stepped 58:14
steps 38:11 40:7
  53:4
Steve 45:14 50:5
STEVEN 1:7
sticker 39:8,12
  40:16,22 41:14

41:17,18,21,25
42:8 58:24
stop 5:25 37:21
37:23 38:23
39:2 41:6,7,20
48:6,6 53:9
stopped 6:2
40:15 41:15,18
52:1
stopping 37:13
story 58:15
strange 30:21
stringent 25:2
strong 7:5 43:13
43:23 56:23
subject 4:14
7:18 18:17
26:12,25 36:21
subjective 31:2
31:16 35:22
51:19 54:1
submitted 59:5
59:7
sudden 42:7
sued 58:9
sufficient 28:23
sufficiently 14:6
suggest 11:10
43:1
suggesting
14:10,12 22:17
suit 23:18 26:25
summary 52:5,8
52:14,16,18
support 40:14
43:14 45:23
supported 41:10
supporting 1:20
2:8 16:6
suppose 43:17
56:21
supposed 50:3,4
supposes 24:22
suppress 17:17
18:12 19:24
24:14,16 26:16
27:3

Supreme 1:1,13
sure 3:22 9:2
10:12 11:25
22:5,6 49:13
surrounding
27:20 44:10
surviving 14:7
suspect 30:2
53:12
suspected 31:13
swear 49:5
sweeps 7:13

_____
T

T 2:1,1
tagged 57:24,25
taillight 6:6
30:17
take 3:11,12
8:25 13:6
16:11,20 19:15
20:1 30:8
32:11 35:24
38:10 44:6
47:20
taken 25:11,21
29:8 40:7
56:16
takes 33:12
talk 45:9,11,15
talked 43:13
talking 17:3
19:6 22:8
49:22 52:18,20
talks 10:3
tapped 33:6
tell 34:3 37:7
telling 33:21
tells 33:25
Tenth 5:4 7:16
7:17 15:9,10
35:19 44:7
51:8,10
term 14:23
termination
29:17
terms 48:3

55:21
Terry 37:23
38:11,23 39:2
48:6,8,10,22
test 5:25
testified 44:15
45:7,14,21
51:7
Thank 16:1,2,7
31:24,25 32:4
59:3,4
theoretically
42:9 54:23
theory 39:7 45:3
thing 26:18
49:14 53:6,13
things 9:1 38:19
39:25 40:8
55:1,15
think 5:12,19
6:9 7:15 9:20
10:25 15:2
16:13 17:6,22
18:2,17 19:13
20:10,24 22:14
23:9,13,15
24:1,8,21 25:9
25:13 26:6
27:20 28:16
29:4 31:12,15
32:6,8 33:4,25
34:23 35:24
37:17,19 39:19
43:2,16 45:23
58:4
thinking 49:10
third 4:20
thought 28:22
36:7 44:23
threat 12:24
13:7 14:3
17:15 18:10
19:21 37:24
48:3 50:1,6
three 3:24 4:4
ticket 10:10
39:16,24 40:21

tied 23:23,23
till 8:6
time 4:22 8:22
9:16,17 15:17
18:7,8 21:20
29:13 32:14,17
34:14 35:8,16
39:9 42:12
52:18
times 39:24
57:16
today 3:10
told 44:24
tort 12:4
torts 39:1
total 55:22
touch 33:17 37:7
touched 3:17 4:3
34:13 37:8
49:19
touches 34:20
touching 33:13
34:5 44:24
46:4 54:16
track 27:12
traditions 58:11
trample 10:19
11:11
treat 10:23
treated 31:22
treating 10:4
trial 8:5 18:6
41:1,3,5,21
51:23 52:2
53:24 54:6
55:2 56:16,21
56:22,24 57:1
57:2,5 59:1
trials 57:3
true 52:13
try 35:4
trying 18:11
21:11 35:6
44:3
turns 34:18
56:21,22
two 3:15,24 5:16

12:3 23:15
24:2,4
two-individual
13:3
type 14:17 53:13

_____
U

underlies 5:6
understand 5:1
7:21 10:3
19:10,13 21:7
23:13 37:2
46:18 48:12
49:9 56:11
understanding
16:13
understood
44:22
undertakes
29:16
undisclosed
45:19
undisputed 46:3
unfortunately
21:3 52:20,24
unique 11:6
27:17
United 1:1,13,20
2:7 16:5 44:1
unpopular 6:21
6:22 21:2
unscientific
21:19
unwanted 33:13
34:5
use 10:17 21:20
37:13
U.S 3:15 4:1,10
16:25

_____
V

v 1:6 3:4 4:9
14:24 15:21
32:21 37:23
53:2
vast 10:17
vehemence 26:7

Vice 3:12,18 4:4
  5:12 7:5 12:20
  25:24 33:2,19
  34:13,21 36:5
  36:12,16 37:6
  44:14 45:16,17
  45:25 46:4,7
  46:16 47:22
  49:11 54:8,16
  54:22 55:16
vicinity 47:21
Vietnam 56:23
view 4:13 6:21
  6:22 7:10
  17:20 49:3
  50:3 53:8
viewpoint 17:17
  18:13 19:24
  24:16 27:3
views 21:1,2
  26:15,16 42:22
  54:16
violated 39:10
violating 11:20
violation 5:6
  11:23 35:18
  36:3 38:5,9
  44:8 46:14
  51:18
violations 58:20
VIRGIL 1:3
Virtually 12:18
voicing 46:22

W

walk 54:11
walked 33:2
wand 38:2,2
wandering
  34:17,23 53:16
  54:17
want 20:4,4,11
  22:24 23:1
  26:3 28:10
  33:3 44:4 45:9
  45:15,18
wanted 7:4

  26:16
wants 58:19
war 53:15 56:23
warrant 16:22
  17:10
warranted
  26:25 30:10,18
warrants 17:15
  26:10
Washington 1:9
  1:19
wasn't 5:10
  25:18 31:5
  51:12
watch 50:18
way 4:13 8:10
  11:5 12:16,16
  26:14 28:8,8
  28:16 36:5
  41:23 52:19,22
  52:25 55:17
  56:17 58:2
ways 12:3
weak 43:14,21
wearing 10:14
  58:22
Wednesday
  1:10
weed 39:21
weigh 23:10
went 45:22
weren't 26:13
Westlaw 21:22
  55:18
We'll 3:3
we're 10:18
  13:23 22:8
  35:20 50:25
we've 6:18 21:17
  21:19 46:15
whatsoever
  32:14,17 36:9
Whren 24:22
  25:6
win 8:10 23:8
  57:5,6
wondering

  34:22
word 20:1,1
words 32:15
  45:20 49:5
  56:22
work 25:20
  29:20 30:6
  57:23
worked 57:23
working 58:5
world 25:25
wouldn't 7:23
  17:5 22:13
  27:12 38:4,8
wrong 54:19
  55:3
wrongly 55:1

X

x 1:2,8

Y

year 22:2
years 14:8 21:22
  27:7 42:16
  57:15

Z

zone 9:4 12:17

$

$5 8:6

1

1 58:20,21
10 8:14 12:2
  23:9
100 55:19
10001 5:6
1001 5:6,10,15
  30:17,20 36:2
  36:8 44:8
  46:13
11-262 1:5 3:4
11:31 1:14 3:2
12:30 59:6
13 32:12
14 8:1

15 32:16 55:10
  55:22
16 2:8
1983 32:15

2

2006 4:21 13:10
  13:10,12 15:8
  47:10
2012 1:10
21 1:10
25 21:22

3

3 2:4 13:13
30,000-foot
  15:23
32 2:11

4

400 55:19
450 21:24

5

5 27:7
55-mile 9:3

6

60 9:3 39:11
65 41:7

8

8 32:13 44:13