

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 64

Place: Washington, D.C.

Date: February 27, 2018

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

Washington, D.C.

Tuesday, February 27, 2018

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

APPEARANCES:

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

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

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

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

1 PROCEEDINGS

2 (11:23 a.m.)

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

6 Ms. Karlan.

7 ORAL ARGUMENT OF PAMELA S. KARLAN

8 ON BEHALF OF THE PETITIONER

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

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

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

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

1 didn't violate the Fourth Amendment as well.

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

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

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

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

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

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

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

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

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

4 MS. KARLAN: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. KARLAN: Yes. And there --

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

3 MS. KARLAN: Yes.

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

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

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

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

1 typical, sadly, of the cases that --

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

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

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

17 MS. KARLAN: Oh, no, no.

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

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

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

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

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

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

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

1 MS. KARLAN: Yes.

2 JUSTICE BREYER: Of course.

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

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

8 MS. KARLAN: Yeah.

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

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

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

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

25 And I think Justice Ginsburg's

1 concurrence which you join there is absolutely
2 right. Those officers under that circumstance
3 would have been required to stop Mr. Howards
4 regardless.

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

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

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

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

22 MS. KARLAN: I'm not saying it will
23 keep everything out. There are two kinds of
24 cases that will go forward. There are the ones
25 where the officer says things like -- and these

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

8 The first are these ones where
9 somebody can plead with specificity something
10 that the officer said or something that the
11 City Council member said that has animus.

12 The second are --

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

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

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

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

25 JUSTICE KENNEDY: -- it seems to me,

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

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

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

23 And the third thing that gets rid of
24 these cases is the Mt. Healthy standard, which
25 is, if it is a case where they would have

1 arrested regardless of the animus, that is a
2 case where the defendant will win.

3 If I could return to the second part
4 of what I wanted to say to the Chief Judge --

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

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

12 JUSTICE KAGAN: Why is that?

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

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

24 MS. KARLAN: Well, certainly, that
25 would require reversal in our case. The word

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

6 JUSTICE KAGAN: But serious crimes.

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

13 It could --

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

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

24 MS. KARLAN: I -- I think the main
25 thing to focus on here is, if you adopt an

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

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

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

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

23 Well, if the police chief there
24 instead of demoting the deputy had simply said,
25 wait until he steps off the curb, or wait until

1 he drives five miles over the speed limit,
2 arrest him, and make sure it's on a Friday so
3 we can spend --

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

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

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

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

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

24 Then we have seven more affidavits
25 which say, I saw the look on that policeman's

1 face as soon as we called him a pig. All
2 right? And I am certain that he would never
3 have arrested this person for -- who after all
4 was just lighting a match. He might have had a
5 cigarette.

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

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

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

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

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

3 MS. KARLAN: Yes, it --

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

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

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

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

1 officer will ever be able to get dismissal
2 based on qualified immunity.

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

7 JUSTICE ALITO: Right. So --

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

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

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

1 arrest the person who's committing a crime.

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

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

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

25 Indeed, eight days into the trial in

1 this case, our client was entitled to judgment
2 as a matter of law on his Fourth Amendment
3 probable cause claim and was entitled to go
4 forward on his First Amendment claim as well.

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

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

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

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

25 JUSTICE KENNEDY: Well, I --

1 JUSTICE SOTOMAYOR: The --

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

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

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

1 arrest you and they can hold you for two days
2 and they can strip-search you and then they can
3 say to you have a good day.

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

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

20 MS. KARLAN: I -- I think what's going
21 on there is that if you have to show a Fourth
22 Amendment violation in order to show a First
23 Amendment violation, we're kind of tied in by
24 Devenpeck because what this Court said there is
25 you don't need to have probable cause for the

1 -- for the offense of arrest in order to defeat
2 a Fourth Amendment claim. Any probable --

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

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

13 JUSTICE SOTOMAYOR: Do you recommend
14 that?

15 MS. KARLAN: I would -- I would love
16 that.

17 JUSTICE SOTOMAYOR: In your case.

18 MS. KARLAN: In our case, we would
19 love that.

20 JUSTICE SOTOMAYOR: But is it a good
21 rule? Meaning --

22 MS. KARLAN: We think the best rule is
23 the rule we advocated for, which is that
24 probable cause is relevant evidence but not
25 always dispositive. But, certainly, in our

1 case, if you applied Hartman as written, you
2 would say, well, in Hartman, it was the
3 offenses of prosecution; if you show no
4 probable cause on those, they can't come back
5 and say, oh, well, there was mail fraud as
6 well.

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

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

23 MS. KARLAN: Sure, which is why we
24 think the best rule is that probable cause is
25 relevant but not dispositive.

1 If I may reserve the remainder of my
2 time.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Dvoretzky.

6 ORAL ARGUMENT OF SHAY DVORETZKY

7 ON BEHALF OF THE RESPONDENT

8 MR. DVORETZKY: Mr. Chief Justice, and
9 -- and may it please the Court:

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

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

24 First, with respect to the pleading
25 standards, it's critical to understand that

1 police officers must concededly take account of
2 speech when deciding whether to arrest in many
3 situations. The bar example is one of those.

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

18 The problem with a pleading standard
19 rule, as the Ninth Circuit demonstrates, is
20 that there are many cases in which police
21 officers and arrestees simply have a different
22 view of what happened. And the Ninth Circuit
23 sends those cases to juries, and, regularly,
24 the juries ultimately find for the police
25 officers but only after they've been forced to

1 endure all of the burdens of litigation.

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

9 (Laughter.)

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

22 (Laughter.)

23 JUSTICE KAGAN: So you follow somebody
24 around and they commit a traffic violation of a
25 pretty minor kind, and all of a sudden you're

1 sitting in jail for 48 hours before they decide
2 to release you.

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

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

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

18 Second --

19 JUSTICE GINSBURG: Wasn't he told to
20 arrest -- didn't Wade say call the officer?

21 MR. DVORETZKY: Councilperson Wade
22 said call the officer, but Officer Aguirre made
23 the decision to arrest. Just because somebody
24 calls the police doesn't mean that the police
25 will actually act on that, especially where

1 here the testimony was that Officer Aguirre
2 made the independent decision and had to make
3 the independent decision.

4 He could not --

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

9 MR. DVORETZKY: So the city council,
10 first, we could discuss the transcript. The
11 transcript that Ms. Karlan relies on does not
12 support the notion of a scheme to get at Mr.
13 Lozman.

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

21 CHIEF JUSTICE ROBERTS: You're talking
22 about the closed -- the closed meeting?

23 MR. DVORETZKY: Correct.

24 CHIEF JUSTICE ROBERTS: Okay.

25 MR. DVORETZKY: And if, in fact, there

1 were some sort of a plan to get at Mr. Lozman,
2 why would the city council have let him speak
3 uninterrupted many times, both before and after
4 the particular incident that was at issue here?

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

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

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

22 Now the Council may not have liked
23 what he was talking about, but that doesn't
24 mean they get to cuff him and -- and lead him
25 out.

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

6 There was a finding by the district
7 court here that comments --

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

13 Why is that off topic?

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

20 JUSTICE GINSBURG: The city is within
21 the county?

22 MR. DVORETZKY: The city is within the
23 county, but that -- that is the line that the
24 policy drew. There's a city council meeting to
25 talk about city business and city officials,

1 not county officials.

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

10 JUSTICE SOTOMAYOR: I'm sorry, though,
11 that --

12 JUSTICE GINSBURG: But Hartman --
13 Hartman turned very much on the prosecutor and
14 the assurance that the prosecutor is going to
15 be checked against -- you know, you had the
16 postal inspectors and -- but it was the
17 prosecutor who made the decision to prosecute.

18 And here there's no one like the
19 prosecutor who has absolute immunity and is a
20 -- is a person that we generally think of as
21 upright. And here there's nothing like that.
22 The -- the arrest, at least it looked like from
23 the tape, was motivated by Wade, who was just
24 very annoyed at Mr. Lozman.

25 MR. DVORETZKY: Justice Ginsburg, I

1 respectfully disagree with that
2 characterization of Hartman. In Hartman, the
3 Court said that the prosecutorial immunity was
4 an added reason for the rule that the Court
5 adopted, but the heart of the Court's analysis
6 in Hartman was about causation. It was about
7 the complex causation problems that arose in
8 that case because you had multiple actors. You
9 had the police officer who allegedly induced
10 the prosecutor to act.

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

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

24 MR. DVORETZKY: Correct. And --

25 JUSTICE SOTOMAYOR: All right. Now,

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

11 But what you're doing is depriving
12 people who would not have been arrested, except
13 for their First Amendment speech from having
14 any remedy whatsoever.

15 MR. DVORETZKY: Justice Sotomayor --

16 JUSTICE SOTOMAYOR: Now I know you say
17 something else will take care of it, but the
18 reality is something else usually doesn't take
19 care of it.

20 MR. DVORETZKY: So, Justice Sotomayor,
21 I think the premise of your question is that
22 there is an epidemic of retaliatory arrests out
23 there that --

24 JUSTICE SOTOMAYOR: No. I'm not even
25 talking about an epidemic. I'm talking about a

1 constitutional wrong, because either way you're
2 saying we shouldn't create a system for this
3 kind of violation, but why should I create a
4 system to exempt this from our regular First
5 Amendment process, because there might be one
6 or a few cases that fall through the protective
7 barriers that Ms. Karlan pointed to?

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

11 Second, because there are other
12 remedies besides damages actions in individual
13 cases.

14 And, third, because having surveyed --

15 JUSTICE SOTOMAYOR: No, there's no
16 remedy --

17 JUSTICE KENNEDY: If that -- if that
18 is so, then the First Amendment is in trouble.
19 In -- in this case, it seems to me, you might
20 argue with the evidence, but that there is
21 evidence that there was a pre-determined plan
22 to arrest somebody on account of his political
23 speech in a political forum.

24 And it seems to me that that is a very
25 serious First Amendment problem. And it seems

1 to me you can cabin that off somehow from the
2 bar institute. The Petitioners didn't give us
3 any specific way to do that, other than
4 Twombly, but it seems to me that -- that the
5 court in order to protect speech in the
6 political forum can make that distinction, at
7 least in this case, maybe wait for other cases
8 to see if it should be expanded.

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

15 If you look at the instances that in
16 the Ninth Circuit have gone to trial, many of
17 those involve political speech as well.
18 Consider, for example, the Ballentine case
19 cited -- cited in our brief. That was the case
20 where protestors were repeatedly chalking the
21 sidewalk with anti-police messages -- messages,
22 a form of political speech. The police
23 repeatedly tried to work with them and to
24 suggest instead of chalking, use this other
25 form of protest.

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

11 Why might that not be different and
12 that raise an inference of retaliation?

13 MR. DVORETZKY: Because, Justice
14 Gorsuch, of the teaching of Devenpeck that --

15 JUSTICE GORSUCH: Well, that's the --
16 that's the Fourth Amendment context. Here,
17 we're trying to secure First Amendment values.
18 And --- and why isn't it a different
19 consideration?

20 MR. DVORETZKY: It is in the Fourth
21 Amendment, but the core teaching of it is -- is
22 that police officers are not lawyers. What
23 they are trained to do is to identify a course
24 of conduct and determine whether there's
25 probable cause that some unlawful -- that some

1 law was broken during that time, but they are
2 not trained and they are not required to
3 specifically identify at the time of the arrest
4 precisely what section of the code was
5 violated.

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

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

20 JUSTICE GORSUCH: Fair enough. You
21 didn't get it at the moment, and maybe you give
22 him a couple of chances even at the apple. But
23 do you wait until trial and -- and in the
24 middle of trial and sending lawyers to do
25 homework to find more charges? Does -- does

1 that -- is that different in any meaningful
2 way?

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

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

17 Justice Gorsuch added what he just
18 said to that. And I would add and the officer,
19 it's a special situation, which either we don't
20 reach or it's okay or you use the Fourth
21 Amendment or whatever, where the officer must
22 make singularly swift on-the-spot decisions and
23 the safety of persons or property is at issue.
24 Okay?

25 Now suppose -- I don't see anything

1 too terrible about writing those. And what
2 harm would be done? You would, of course, lose
3 your case, which I consider perhaps you would
4 consider a serious harm, but --

5 (Laughter.)

6 JUSTICE BREYER: -- but -- but none --
7 none -- none -- nonetheless, what -- what harm
8 would happen to the interests that you've heard
9 articulated?

10 MR. DVORETZKY: The harm that would
11 happen is that this Court has repeatedly
12 recognized that police officers need objective
13 bright-line rules, not five- or six- or
14 seven-factor tests that they then need to apply
15 on the ground.

16 JUSTICE BREYER: I didn't mean it as a
17 five- or six- or seven-factor test. What I
18 really meant you to focus on was the last one
19 because I've heard discussion on the others,
20 and that is the police officer does have the
21 immunity that they search in the situation
22 where -- and I could repeat it, but maybe you
23 wrote it down -- but it's -- it's that -- well,
24 I'll repeat it if you want. Where there is a
25 singular need for a swift on-the-spot decision

1 and where there is involved the safety of
2 persons or property.

3 MR. DVORETZKY: Justice Breyer, the
4 Ninth Circuit has tried to apply exactly that
5 approach. Those cases go to trial and those --
6 and those cases are found in favor of the --
7 the police officer.

8 Nor does qualified immunity, which I
9 think you also suggested, do any work here if
10 Mr. Lozman's rule were to prevail. If
11 Mr. Lozman's rule were to --

12 JUSTICE SOTOMAYOR: Sorry. I did go
13 through the list that the Alaska brief formed
14 and the six that you -- that you listed. It
15 seems to me that having read those cases, that
16 they went to trial not because those
17 limitations failed but because there was other
18 evidence of things that -- that -- that didn't
19 fail but made this triable cases. Many of them
20 involved excessive force claims, which can
21 often be reflective of animus in a different
22 way than a mere arrest is.

23 And as was pointed out by your
24 adversary, of the 26 the Alaska brief pointed
25 to, 12 of them were dismissed at the motion to

1 dismiss stage. So people bring things, but it
2 doesn't mean that they're viable.

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

7 And in many of these cases, the basis
8 for finding a triable question was simply that
9 the police officer was aware of the content of
10 some speech, and that was enough in order to
11 create an inference that maybe the real reason
12 for the arrest was not that the arrestee --

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

19 MR. DVORETZKY: I think if you look at
20 cases like Holland or the chalking case or
21 Mihailovici, those are cases where the reason
22 that there was a triable question was simply a
23 difference of opinion about what happened. And
24 that is also precisely why qualified immunity
25 will not do any work to protect police officers

1 if Mr. Lozman's rule becomes the law.

2 At that point in the typical case, the
3 only thing left to be tried, if there's an
4 allegation of a retaliatory motive, is what was
5 the real motive in the officer's head? That's
6 not something to which qualified immunity
7 attaches. That is going to be a fact question
8 for a jury.

9 With respect to the suggestion that
10 Justice Kagan raised earlier between major and
11 minor crimes, police officers can't have a
12 taxonomy in mind of what's a significant enough
13 crime to arrest for and what's not.

14 And, moreover, even some seemingly
15 minor crimes, as the amicus brief for the
16 District of Columbia and numerous states points
17 out, even some seemingly minor crimes can be
18 very important to enforce for community
19 policing concerns. And so the idea of having a
20 test where only -- where major crimes, the
21 police officer somehow gets more deference than
22 for minor -- minor crimes doesn't work in
23 practice.

24 I'd also like to point out that
25 Mr. Lozman and his amici have surveyed decades

1 of cases. They've not come up with a single
2 case, not even one, in which a police officer
3 has been held liable for a retaliatory arrest
4 that was supported by probable cause.

5 JUSTICE GINSBURG: I'm -- I'm confused
6 by -- you keep talking about the police
7 officer. As far as I know, no one charged the
8 police officer here with having any kind of
9 animus against Lozman. The charge was that the
10 City Council did, and particularly this
11 Councilmember Wade. The -- the animus here was
12 on the part of the City Council, not the
13 arresting officer.

14 MR. DVORETZKY: If I may briefly
15 respond. The alleged animus was on the part of
16 the City Council, but in order to have a
17 complete violation, it would need to be carried
18 out by the officer, which requires an inquiry
19 into the officer's state of mind and the
20 officer's intent.

21 More -- moreover, there's no basis for
22 distinguishing cases against police officers
23 versus those against municipalities in either
24 the text of 1983 or the history of these sorts
25 of actions.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 General Wall.

4 ORAL ARGUMENT OF JEFFREY B. WALL,
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
6 IN SUPPORT OF THE RESPONDENT

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

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

16 There are about 10 to 11 million
17 arrests every year in the country. Of those,
18 Petitioner and his amici have come forward with
19 20 cases in their briefs, and I'd encourage --
20 encourage the Court to look at them because I
21 -- I'm perfectly happy to rise or fall by them.

22 They divide down, I think, into three
23 basic buckets: protest cases, noise ordinance
24 cases, and other cases where there's a
25 confrontation between the arrestee and the

1 officer and there's a failure to follow a
2 lawful order, and the question is: What
3 motivated the arrest, the failure to follow the
4 order or the speech?

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

14 Qualified immunity isn't going to work
15 for the reasons Justice Alito gave. I don't
16 think the language in Reichle is going to work
17 because that was designed for protective
18 details. These are all on-the-spot decisions,
19 even the officer's decision on the City Council
20 here. And a lot of these cases don't involve
21 the safety of persons or property.

22 I mean, take a case like Galarnyk that
23 went all the way to the Eighth Circuit.
24 Somebody trespassed into a government trailer
25 in order to criticize the government. And the

1 question is -- no question he was
2 trespassing -- did they arrest him for that or
3 because, once he got inside the trailer, he was
4 criticizing people working in the trailer?

5 I don't know that you could say that
6 there was a real safety concern there. And
7 there's no property concern in any of the noise
8 ordinance cases or even a lot of the protest
9 cases.

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

19 So then I think you're really just
20 down to what Justice Kennedy was getting at,
21 which is, look, this looks like an official
22 policy of the municipality, and, indeed, the
23 parties seem to agree that's what the jury
24 found.

25 And I think you could rest it on that,

1 although for the reasons that the city's
2 council gave, there is no textual or historical
3 support for that in the statute or common law.
4 And I think Hartman's footnote 10 already says
5 we designed the constitutional tort for the
6 mine run of cases, not for the needle in the
7 haystack

8 And this case really is. I mean,
9 really, I agree, that the facts here are
10 troubling. I also just think that this was
11 almost a category of one. It just does not
12 look like the typical cases for which you
13 design the constitutional tort rule. And
14 that's what Hartman tells us.

15 JUSTICE KAGAN: Mr. Wall, we allow
16 people to sue under 1983 for discriminatory
17 arrests under the equal protection clause and
18 without showing anything about whether probable
19 cause exists or not.

20 What has been the experience with
21 respect to those cases? And why is this
22 area -- why should the rule be any different
23 than that one?

24 MR. WALL: So I think what we'd say is
25 different for a couple of reasons but one

1 similarity, and this was one of the legal
2 points I wanted to make.

3 Those cases are about race. Race, the
4 Court has said, is so rarely a proper
5 consideration for officers that the Court does
6 treat them differently.

7 Speech is the kind of thing that
8 officers often can and must in these situations
9 take account of. And even there, even though
10 it is more subjective than in virtually every
11 other context, even there you have got the
12 objective screen of Armstrong. So you've still
13 got to prove that similarly situated people
14 were treated differently.

15 And I think, setting aside the facts
16 of this case, the legal anomaly that Petitioner
17 wants us to say: Look, for every other
18 constitutional tort claim, retaliatory
19 prosecution claims under the First Amendment,
20 selective enforcement under the Fourteenth or
21 false arrests under the Fourth, you've got some
22 objective screen, whether it is the absence of
23 probable cause, whether it is Armstrong
24 similarly situated requirement.

25 And what they are really saying is for

1 this subcategory of claims under the First
2 Amendment, no objective screen.

3 Fact question. It is going to go to
4 the jury. And all of these cases are virtually
5 a he said/she said. The officer wasn't going
6 to arrest me until I called him names and I
7 said really ugly things. And the officer said:
8 No, I was going to arrest them for failing to
9 follow my -- my lawful order.

10 CHIEF JUSTICE ROBERTS: One of the
11 grounds, and I am not quite sure how you could
12 use it, we have talking about how bad the facts
13 are and yet how difficult it is to apply.

14 This is not a situation where the
15 police are out in the street and something's
16 happened and they're looking at the, you know,
17 what kind of slogans they have, what they are
18 shouting, a lot's going on.

19 This is, you know, in the city
20 council, during a time specifically set aside
21 for citizens to talk about whatever the council
22 is talking about and comment on it. Is there
23 any basis there for limiting it to the, it
24 seems to me, intensely free speech environment
25 that we're talking about?

1 MR. WALL: So maybe right there at the
2 tail end, Mr. Chief Justice. I mean, I
3 understand the impulse. I think the difficulty
4 with the on-the-spot language is that even here
5 the officer's making an on-the-spot decision.

6 You -- you could try to limit that to
7 -- I don't know that "in the field" would
8 capture it, because it -- I'm not sure there is
9 a difference between -- I'm not sure how the
10 Court would get into what's in the field and
11 what's not.

12 Whether you're in the field when
13 you're in the government trailer or when you
14 are out on the streets, but you're not in the
15 city council meeting. You could try to tie it
16 to the nature of the city council meeting, the
17 fact that you both had the official policy and
18 that it was in the context of a meeting where
19 people were designed to air grievances or talk
20 about what they wanted against a city.

21 Again, I don't think that's gotten
22 much textual historical support behind it. And
23 Hartman specifically said: Look, we're not
24 going to design this thing for the
25 one-in-a-thousand case. And I think even more

1 important here, because it is so much easier to
2 allege retaliatory arrests and there are so
3 many more arrests every year.

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

8 So the causal connection is, again, as
9 Justice Ginsburg said, and I said in *Reichle* is
10 -- is significant.

11 MR. WALL: I know -- I --

12 JUSTICE BREYER: And, therefore, since
13 you have to show the causal connection between
14 this decision and the other person who is the
15 policeman it doesn't really affect the police.

16 MR. WALL: Oh, Justice Breyer, if the
17 Court designs a rule in such a way that it
18 recognizes this is the one-in-a-thousand, and
19 it wants to pick up that one, though not the
20 others, that's not what the Court did in
21 *Hartman*, but I suppose it could do it here.

22 I think the easier way to analyze it
23 is to say, look -- and Petitioner doesn't
24 dispute that this is the basic question at page
25 9 of their reply. Are claims of retaliatory

1 arrest more like claims of retaliatory
2 prosecution in Hartman or more like claims of
3 retaliation by employees and government
4 contractors under Mt. Healthy?

5 And I think what you'd say is: Look,
6 arrest and prosecution are closely related
7 steps in the criminal process. They involve
8 the same body of valuable probable cause
9 evidence.

10 JUSTICE KAGAN: But one reason they --

11 MR. WALL: They both got a very hard
12 --

13 JUSTICE KAGAN: One reason they are
14 different is because in Hartman, you had an
15 indictment and you just looked at the
16 indictment and said: Is there probable cause
17 for that or not?

18 I mean, here we have this ridiculous
19 spectacle of going through the statute books
20 for a month, trying to find something that this
21 man may have violated. And there's just got to
22 be a big difference between those two
23 inquiries.

24 MR. WALL: Look, I completely agree.
25 Again, it's difficult and -- and we --

1 Petitioner hasn't challenged Devenpeck here, so
2 we haven't had the opportunity to brief it and
3 we would very much like to do so, because I --
4 I think it's too easy to just say discard the
5 Devenpeck rule.

6 Because what the court said in
7 Devenpeck is: Look, police arrest on the basis
8 of a course of conduct. You're waving a gun in
9 the air and they arrest you, they don't know
10 exactly which provision of the criminal code
11 that violates.

12 They go back and they talk to their
13 supervisor. They may have an exchange with
14 prosecutors. They may go before a grand jury.
15 It's very difficult to isolate the exact point
16 in that analysis where you should freeze-frame
17 it and say what were the offenses for which
18 there was probable cause?

19 I agree that here --

20 JUSTICE GORSUCH: How about before --

21 MR. WALL: -- you've gotten all the
22 way to trial.

23 JUSTICE GORSUCH: How about before
24 trial?

25 (Laughter.)

1 MR. WALL: So -- Justice Gorsuch, I
2 think a before-trial rule would be perfectly
3 fine. Again, as long -- because I think it
4 reflects the realities of policing, which is
5 that police aren't lawyers. They arrest based
6 on conduct.

7 And all the same reasons the Court
8 applied the Devenpeck rule are exactly why the
9 common law, I think on the best reading, had
10 the Devenpeck rule too. And it wasn't like the
11 common law didn't know about speech. The
12 restatement recognized it. You may be pulled
13 over for speeding, even though that you think
14 it is because you complained about the
15 department.

16 The common law took all of these
17 things into account too. And in its wisdom, I
18 don't think it created an epidemic that
19 requires a drastic cure that searches for the
20 needle in the haystack.

21 This is the rule in the majority of
22 circuits. And what's notable is that unlike in
23 a lot of these cases, it is not as if
24 Petitioner has amici have come in saying there
25 is some huge problem in the Second, Fourth,

1 Fifth, Eighth, and Eleventh circuits.

2 They really have sort of pointed to
3 the facts of their case, and I agree it is
4 troubling, but in the real world I think the
5 far more serious danger is subjecting police
6 departments across the country to claims that
7 are easy to allege and difficult to disprove.

8 And weighing virtually that exact same
9 balance on Hartman, what the Court said is the
10 game is not worth the candle. We're not going
11 to try to design the constitutional tort for
12 the one-in-a-thousand case. There are other
13 remedies that get at.

14 JUSTICE KAGAN: Mr. Wall, you keep on
15 saying one-in-a-thousand, but might there not
16 be a problem that now that we have this case
17 and we have to decide this case, and if we
18 decide it your way, you know, maybe it's a
19 green light to everybody to make it not the
20 one-in-a-thousand case and to start really
21 going -- and you know there are lots of small
22 towns in America and there are lots of cranks
23 in those small towns. And there are lots of
24 relationships that go sour between officials
25 and some members of the populous.

1 And, you know, what about that? What
2 about, you know, finding that guy every time he
3 doesn't quite stop when he makes a right on red
4 and putting them in jail for a while?

5 MR. WALL: So, a couple of things.
6 One, again, I don't think we ought to believe
7 that the only bulwark against backsliding on
8 the First Amendment is damages suits, but more
9 importantly what I'd say is if that's the kind
10 of rule they want you to put in place, they
11 ought to have to show that the common law,
12 which had this rule for hundreds of years, was
13 a problem.

14 They ought to have to show you that
15 Hartman has created an epidemic of retaliatory
16 prosecutions. And they ought to at least have
17 to show there are more retaliatory arrests in
18 the Second, Fourth, Fifth, Eighth, and Eleventh
19 Circuits, than the Ninth and Tenth, and they
20 haven't tried to do it.

21 Because what they'll find, I -- I --
22 if you look through those cases is there are a
23 lot of claims in those circuits, but they don't
24 turn out to have a lot of merit. They are
25 difficult to defend against. And that's why we

1 think the rule makes sense.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Four minutes, Ms. Karlan.

5 REBUTTAL ARGUMENT OF PAMELA S. KARLAN
6 ON BEHALF OF THE PETITIONER

7 MS. KARLAN: Thank you. I would just
8 like to begin with the common law and ask this
9 Court to read its own decision in Dinsman,
10 which is the only decision by this Court
11 talking about probable cause and false arrest
12 that antedates the passage of Section 1983.

13 And here's what the Court says on page
14 402: "Probable cause or not is of no further
15 importance than as evidence to be weighed by
16 the jury in connection with all the other
17 evidence." That's the rule we're asking for.
18 We're asking for the common law rule here.

19 And if you look at Prosser on Torts,
20 he says, people keep get mistaken between
21 malicious prosecution, which has always had a
22 no probable cause requirement, and false
23 imprisonment, of which false arrest is a
24 subset, which has never had that requirement at
25 common law as part of the Plaintiff's

1 case-in-chief.

2 The second point I'd like to make is a
3 point that goes back to the Devenpeck issue,
4 which as Justice Gorsuch pointed out, might be
5 perfectly sensible in the Fourth Amendment
6 context, but not when you're talking about
7 First Amendment values because First Amendment
8 values are -- the core of the First Amendment
9 is an anti-retaliation principle and do not be
10 -- do not be fooled.

11 If you tell city councils that if they
12 deny somebody a permit they can be sued for
13 damages. If they fire him a -- from his job,
14 they can be sued for damages. If they don't
15 give him a zoning variance, they can be sued
16 for damages. If they don't give him a parade
17 permit, they can be sued for damages.

18 But if they arrest him, and they can
19 come up with anything, even eight years after
20 the fact, that might be something for which
21 there's probable cause, not even a showing that
22 he actually committed the offense of disrupting
23 a religious assembly or assembly for other
24 purposes, but just that an officer could
25 believe probable cause, you are giving a green

1 light to every vengeful city council in America
2 to go after people when they demonstrate
3 against abortion clinics, when they demonstrate
4 about police, when they protest zoning
5 decisions.

6 The First Amendment really requires
7 that there be some remedy. And the text of
8 Section 1983 gives that remedy. It says when
9 somebody "subjects, or causes to be subjected,"
10 to a violation.

11 And that -- that makes it clear that
12 Section 1983 contemplates cases like this one
13 in which a city council caused someone to be
14 arrested.

15 All we ask is that this Court hold
16 that probable cause is not an absolute bar in
17 cases where retaliate -- retaliation is proven.
18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 12:23 p.m., the case
22 was submitted.)

23

24

25

<p>1</p> <p>10 [4] 23:14 36:4 49:16 52:4 11 [1] 49:16 11:23 [2] 1:15 3:2 12 [4] 12:19 23:13,14 45:25 12(b)(6) [2] 21:11 23:16 12:23 [1] 64:21 15 [1] 34:18 17 [1] 7:5 17-21 [1] 3:4 1983 [8] 3:17,23 4:3 48:24 52:16 62:12 64:8,12</p> <hr/> <p>2</p> <p>20 [1] 49:19 2018 [1] 1:11 26 [1] 45:24 27 [3] 1:11 7:6 23:12 29 [1] 2:7</p> <hr/> <p>3</p> <p>3 [1] 2:4</p> <hr/> <p>4</p> <p>402 [1] 62:14 48 [1] 32:1 49 [1] 2:12</p> <hr/> <p>6</p> <p>62 [1] 2:15</p> <hr/> <p>9</p> <p>9 [1] 56:25</p> <hr/> <p>A</p> <p>a.m [2] 1:15 3:2 able [6] 10:24 15:9 22:1,6,18,21 abortion [2] 25:21 64:3 above-entitled [1] 1:13 absence [2] 51:14 53:22 absolute [12] 4:2,14,19,22 18:1 20:17 21:8,14 24:6 25:8 36:19 64:16 Absolutely [3] 5:5 8:4 13:1 abuse [1] 38:3 accept [1] 38:1 accident [1] 42:16 account [6] 30:1 37:13 39:22 41:2 53:9 59:17 across [1] 60:6 act [2] 32:25 37:10 acted [1] 22:5 action [3] 3:18,18 17:22 actions [3] 23:4 39:12 48:25 activity [2] 4:5 18:21 actor [1] 4:15 actors [2] 5:8 37:8 acts [1] 15:7 actually [3] 4:15 32:25 63:22 add [3] 27:10 43:12,18 added [2] 37:4 43:17 address [2] 29:12 31:3 addressed [2] 20:19 35:17 addressing [1] 51:11 adopt [2] 3:22 17:25 adopted [1] 37:5</p>	<p>advanced [1] 26:14 adversary [1] 45:24 advocated [1] 27:23 affect [2] 7:19 56:15 affidavits [2] 19:22,24 ago [1] 14:5 agree [5] 51:23 52:9 57:24 58:19 60:3 agreed [2] 33:18,20 Aguirre [3] 32:13,22 33:1 Aguirre's [1] 35:4 air [2] 55:19 58:9 Alaska [4] 7:5 23:13 45:13,24 Alaska's [1] 24:15 ALITO [7] 10:15,18 11:7 21:16 22:7,9 50:15 allegation [4] 15:4,4 37:18 47:4 allege [3] 23:5 56:2 60:7 alleged [5] 12:22 34:8 35:15 38:6 48:15 allegedly [1] 37:9 allow [2] 17:21 52:15 allowed [1] 14:2 allowing [1] 23:11 almost [1] 52:11 already [1] 52:4 although [1] 52:1 Amendment [38] 3:12,25 4:1,4,5 5:18 7:2 17:12 18:21 21:23 23:22,24 24:2,4 25:16 26:4,22,23 27:2,4,5 38:2,13 39:5,18,25 41:16,17,21 43:21 53:19 54:2 61:8 63:5,7,7,8 64:6 America [3] 9:15 60:22 64:1 amici [3] 47:25 49:18 59:24 amicus [4] 1:24 2:11 47:15 49:5 analysis [2] 37:5 58:16 analyze [1] 56:22 animus [21] 5:10 6:24 7:17 10:4 11:6,15 12:24 14:11 15:5 16:1,15 18:5 22:5 23:18 24:22 28:17 38:9 45:21 48:9,11,15 annoyed [1] 36:24 anomaly [1] 53:16 another [1] 10:22 answer [4] 9:2 10:16 20:15 43:11 answers [1] 15:12 antedates [1] 62:12 anti-police [1] 40:21 anti-retaliation [1] 63:9 anytime [2] 3:19 5:17 anyway [4] 7:1 19:16 33:8 38:10 APPEARANCES [1] 1:17 Appendix [1] 12:19 apple [1] 42:22 applied [3] 17:17 28:1 59:8 applies [1] 29:19 apply [7] 3:21 16:6 27:10 44:14 45:4 51:17 54:13 approach [1] 45:5 appropriate [3] 9:24 16:19 21:2 area [1] 52:22 aren't [1] 59:5 argue [1] 39:20</p>	<p>argues [1] 11:17 argument [11] 1:14 2:2,5,8,13 3:4,7 29:6,10 49:4 62:5 arises [1] 49:13 Armstrong [2] 53:12,23 arose [1] 37:7 around [2] 19:11 31:24 arrest [51] 3:16 5:11,17 9:13,25 10:6 11:6 13:15,17 14:3,4 16:16 18:10 19:2,13,22 23:1 26:1,16 27:1 30:2,11,16 32:15,17,20,23 35:2,10 36:22 37:14,19 39:22 41:4 42:3 45:22 46:12 47:13 48:3 50:3 51:2 54:6,8 57:1,6 58:7,9 59:5 62:11,23 63:18 arrested [13] 7:1 10:23 14:5 16:1 19:20 20:3,7 22:17 28:21 31:21 38:10,12 64:14 arrestee [2] 46:12 49:25 arrestees [1] 30:21 arresting [3] 37:23 42:11 48:13 arrests [10] 6:2 37:16 38:8,22 49:17 52:17 53:21 56:2,3 61:17 articulated [1] 44:9 aside [2] 53:15 54:20 assembly [3] 26:13 63:23,23 assume [2] 33:6 35:9 assumed [1] 38:4 assuming [1] 38:5 assurance [1] 36:14 attaches [1] 47:7 attitude [1] 14:3 avoid [1] 5:1 aware [1] 46:9 away [2] 28:8 51:10</p> <hr/> <p>B</p> <p>back [7] 8:22 10:22 11:22 22:25 28:4 58:12 63:3 backsliding [1] 61:7 backstops [1] 29:11 bad [2] 6:2 54:12 balance [1] 60:9 Ballentine [1] 40:18 bar [19] 4:2 5:24 7:20,23 8:8 18:1 20:11,17 21:8,14 24:6 25:8 29:15 30:3,8 39:10 40:2 43:13 64:16 barriers [1] 39:7 based [4] 15:7 21:22 22:2 59:5 basic [2] 49:23 56:24 basis [6] 26:11 30:5 46:7 48:21 54:23 58:7 BEACH [4] 1:6 3:5 10:21 35:15 Beck [1] 24:14 become [1] 31:13 becomes [1] 47:1 before-trial [1] 59:2 began [1] 15:2 begin [1] 62:8 beginning [2] 5:15,16 behalf [11] 1:19,20,23 2:4,7,10,15 3:8 29:7 49:5 62:6 behavior [1] 23:7 behind [2] 8:6 55:22</p>	<p>believe [7] 11:5 17:11 23:3 27:6 40:13 61:6 63:25 belligerence [1] 30:14 besides [1] 39:12 best [3] 27:22 28:24 59:9 between [13] 4:16 10:20 12:13 14:16,17 29:22 47:10 49:25 55:9 56:13 57:22 60:24 62:20 big [2] 32:3 57:22 bit [1] 13:18 Black [2] 9:15 37:19 blanket [1] 6:18 body [1] 57:8 booking [1] 28:18 books [5] 28:18 31:20 41:8,10 57:19 both [4] 5:3 34:3 55:17 57:11 box [2] 6:15 14:15 breaking [2] 7:25 19:12 BREYER [23] 7:12 8:19,22 9:1,4 11:18 12:2,6,9 14:18 18:19 19:4,19 20:23 21:5 29:14 43:9 44:6,16 45:3 56:4,12,16 brief [7] 7:5 24:15 40:19 45:13,24 47:15 58:2 briefly [1] 48:14 briefs [1] 49:19 Briggs [2] 9:21 15:20 bright-line [1] 44:13 bring [1] 46:1 bringing [1] 23:23 broad [4] 5:17 15:1 17:2 18:16 broken [1] 42:1 brought [4] 8:16 11:19,21 13:13 buckets [1] 49:23 bulwark [1] 61:7 bumper [1] 9:16 burdens [1] 31:1 burglary [1] 16:16 burning [1] 8:1 business [1] 35:25</p> <hr/> <p>C</p> <p>cabin [2] 40:1,11 California [1] 1:18 call [2] 32:20,22 called [3] 6:24 20:1 54:6 calls [1] 32:24 calm [1] 34:20 calmly [1] 8:6 came [2] 1:13 26:12 candle [1] 60:10 capture [1] 55:8 car [1] 42:16 card [1] 11:23 care [6] 15:1 17:9,23 38:7,17,19 carried [2] 30:11 48:17 cars [1] 8:1 carve [1] 39:9 Case [7] 3:4 4:2,4,17 5:6,22 6:11,14 7:23 9:25 10:3,19 11:25 13:20 14:16,19 15:9,16,25 16:2,25 17:5,17 18:7,18 19:5 20:14 21:24 22:3,12 23:15,21 24:1,7,7,14 25:4,16</p>
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<p>26:19 27:9,17,18 28:1,11 31:7,11 32:5,9,13 34:9,13 36:8 37:8 38:4 39:10,10,19 40:7,18,19 44:3 46:16,20 47:2 48:2 49:13 50:22 52:8 53:16 55:25 60:3,12,16,17,20 64:20,21</p> <p>case-in-chief [1] 63:1</p> <p>cases [69] 7:4,6,8,9 8:2,16 9:6,7,10,17 10:1 11:10,16,18 12:13,14,15 13:12,24 14:1,6 15:24 17:8,10,15,16 18:3,3 20:17 21:15 23:11,12,14,19,21 24:6,10 25:14 30:20,23 39:6,13 40:7 43:13 45:5,6,15,19 46:7,20,21 48:1,22 49:19,23,24,24 50:20 51:8,9 52:6,12,21 53:3 54:4 59:23 61:22 64:12,17</p> <p>category [1] 52:11</p> <p>causal [3] 56:7,8,13</p> <p>causation [3] 37:6,7,12</p> <p>cause [32] 3:16 7:18 18:10,12,14 24:3 25:12 26:11,25 27:24 28:4,12,16,24 35:2 41:4,6,25 43:8 48:4 51:15 52:19 53:23 57:8,16 58:18 62:11,14,22 63:21,25 64:16</p> <p>caused [2] 11:6 64:13</p> <p>causes [1] 64:9</p> <p>caution [1] 51:10</p> <p>certain [3] 20:2,6 42:6</p> <p>certainly [3] 16:24 27:25 30:10</p> <p>cetera [2] 12:16 43:14</p> <p>chalking [3] 40:20,24 46:20</p> <p>challenged [2] 51:12 58:1</p> <p>chamber [1] 5:13</p> <p>chances [1] 42:22</p> <p>change [1] 11:21</p> <p>characterization [2] 34:10 37:2</p> <p>charge [3] 41:4 42:12 48:9</p> <p>charged [3] 11:16 18:14 48:7</p> <p>charges [1] 42:25</p> <p>charging [1] 31:16</p> <p>chaser [1] 27:11</p> <p>checked [1] 36:15</p> <p>CHIEF [23] 3:3,9 13:5,8,9 14:15 16:4 17:14 18:23 26:9 27:6 29:3,8 33:21,24 34:15 41:3 49:1,7 54:10 55:2 62:2 64:19</p> <p>chilling [1] 34:17</p> <p>Choose [1] 9:16</p> <p>cigarette [1] 20:5</p> <p>Circuit [12] 7:7 8:17 11:11 14:1 18:2 23:10 24:14 30:19,22 40:16 45:4 50:23</p> <p>Circuit's [2] 25:10,11</p> <p>circuits [4] 59:22 60:1 61:19,23</p> <p>circumstance [1] 13:2</p> <p>circumstances [4] 9:13,24 22:22 23:2</p> <p>circumstantial [1] 22:15</p> <p>cited [4] 4:24 24:15 40:19,19</p> <p>cites [4] 7:4,5,6 23:13</p> <p>cities [1] 18:18</p> <p>Citizens [2] 25:18 54:21</p> <p>CITY [34] 1:6 3:5 5:9 7:4 10:11,13,21 14:11 18:7,11,17 26:11 33:8,9,</p>	<p>15,17 34:2 35:19,20,22,24,25,25 48:10,12,16 50:19 54:19 55:15,16,20 63:11 64:1,13</p> <p>city's [2] 34:6 52:1</p> <p>claim [8] 11:14 23:22,24 24:3,4 27:2 34:6 53:18</p> <p>claiming [2] 3:25 43:7</p> <p>claims [8] 45:20 53:19 54:1 56:25 57:1,2 60:6 61:23</p> <p>classifications [1] 14:18</p> <p>Clause [2] 4:6 52:17</p> <p>clear [2] 8:15 64:11</p> <p>clearly [3] 6:20 15:17 17:11</p> <p>client [3] 10:20 18:13 24:1</p> <p>client's [1] 16:20</p> <p>clinic [1] 25:22</p> <p>clinics [1] 64:3</p> <p>close [1] 18:3</p> <p>closed [2] 33:22,22</p> <p>closed-door [1] 24:23</p> <p>closely [1] 57:6</p> <p>code [2] 42:4 58:10</p> <p>Columbia [1] 47:16</p> <p>come [5] 28:4 48:1 49:18 59:24 63:19</p> <p>comes [2] 4:13 10:22</p> <p>comment [2] 33:14 54:22</p> <p>comments [1] 35:7</p> <p>commit [1] 31:24</p> <p>committed [1] 63:22</p> <p>committing [1] 23:1</p> <p>common [9] 29:17 52:3 59:9,11,16 61:11 62:8,18,25</p> <p>community [1] 47:18</p> <p>complained [1] 59:14</p> <p>complaint [3] 12:21,22,23</p> <p>complete [1] 48:17</p> <p>completely [1] 57:24</p> <p>complex [1] 37:7</p> <p>concededly [2] 30:1 37:13</p> <p>concern [2] 51:6,7</p> <p>concerned [2] 6:6 12:15</p> <p>concerns [2] 41:2 47:19</p> <p>concurrence [3] 11:24 12:12 13:1</p> <p>conditions [2] 20:18 22:23</p> <p>conduct [6] 6:16 26:16 30:6 41:24 58:8 59:6</p> <p>confine [1] 25:6</p> <p>confrontation [1] 49:25</p> <p>confronts [1] 20:18</p> <p>confused [1] 48:5</p> <p>connection [4] 56:7,8,13 62:16</p> <p>Consider [3] 40:18 44:3,4</p> <p>consideration [2] 41:19 53:5</p> <p>consistent [1] 23:6</p> <p>consists [1] 43:13</p> <p>Constitution [2] 3:20 5:19</p> <p>constitutional [5] 39:1 52:5,13 53:18 60:11</p> <p>construction [1] 3:23</p> <p>contain [1] 30:17</p> <p>contemplates [1] 64:12</p> <p>content [3] 30:12,13 46:9</p> <p>contention [1] 6:12</p>	<p>context [6] 27:4,6 41:16 53:11 55:18 63:6</p> <p>continue [1] 30:15</p> <p>contractors [1] 57:4</p> <p>conviction [1] 28:13</p> <p>cordon [1] 6:15</p> <p>core [3] 4:5 41:21 63:8</p> <p>correct [3] 16:11 33:23 37:24</p> <p>corrupt [1] 35:12</p> <p>corruption [4] 31:17 35:10,14,16</p> <p>couldn't [2] 5:15 26:17</p> <p>council [2] 5:10,12 10:5 14:11 18:17 33:8,9 34:2,22 35:24 48:10,12,16 50:19 52:2 54:20,21 55:15,16 64:1,13</p> <p>councilmember [2] 24:18 48:11</p> <p>councilmembers [2] 24:21 33:17</p> <p>Councilperson [2] 32:21 33:15</p> <p>councils [1] 63:11</p> <p>Counsel [6] 26:9 29:4 41:1 49:2 62:3 64:20</p> <p>country [2] 49:17 60:6</p> <p>County [5] 35:15,19,21,23 36:1</p> <p>couple [5] 9:17 32:12 42:22 52:25 61:5</p> <p>course [5] 12:2 19:5 41:23 44:2 58:8</p> <p>COURT [49] 1:1,14 3:10,22 4:10,23,25 6:23 9:20 11:4 13:21 15:14 17:3 20:16 23:3,10,15,20 24:13 25:9,17 26:6,24 29:9 34:12,13 35:7,16 36:3 37:3,4 40:5,10 44:11 49:8,20 51:10 53:4,5 55:10 56:17,20 58:6 59:7 60:9 62:9,10,13 64:15</p> <p>Court's [4] 9:9 10:11 15:19 37:5</p> <p>courts [3] 18:4 50:9,12</p> <p>cover [1] 6:9</p> <p>cranks [1] 60:22</p> <p>create [4] 39:2,3 40:11 46:11</p> <p>created [2] 59:18 61:15</p> <p>crime [3] 11:13 23:1 47:13</p> <p>crimes [16] 16:7,17 17:2,6,7,8 18:13 29:23,23 37:16,17 47:11,15,17,20,22</p> <p>criminal [3] 31:20 57:7 58:10</p> <p>critical [2] 29:25 32:12</p> <p>criticisms [1] 4:7</p> <p>criticize [2] 3:13 50:25</p> <p>criticizing [1] 51:4</p> <p>cuff [1] 34:24</p> <p>curb [1] 18:25</p> <p>cure [1] 59:19</p> <p>curiae [3] 1:24 2:11 49:5</p> <p>curious [1] 15:2</p>	<p>dealing [2] 26:7 29:14</p> <p>decades [1] 47:25</p> <p>decide [4] 7:21 32:1 60:17,18</p> <p>deciding [1] 30:2</p> <p>decision [14] 10:12 20:9,14 32:14,23 33:2,3 36:17 44:25 50:19 55:5 56:14 62:9,10</p> <p>decision-making [1] 5:2</p> <p>decisions [7] 4:24 5:7 20:24 21:10 43:22 50:18 64:5</p> <p>deemed [1] 50:12</p> <p>defeat [3] 27:1 33:19 41:5</p> <p>defend [1] 61:25</p> <p>defendant [4] 10:10,11 15:17 16:2</p> <p>defendants [1] 3:24</p> <p>defence [1] 47:21</p> <p>degree [1] 13:10</p> <p>deliberate [1] 15:5</p> <p>deliberately [1] 6:13</p> <p>deliberative [1] 5:4</p> <p>demonstrate [3] 25:21 64:2,3</p> <p>demonstrates [1] 30:19</p> <p>demoting [1] 18:24</p> <p>deny [1] 63:12</p> <p>Department [2] 1:22 59:15</p> <p>Departments [1] 60:6</p> <p>deprived [1] 3:19</p> <p>depriving [1] 38:11</p> <p>Deputy [2] 1:22 18:24</p> <p>design [5] 36:5,7 52:13 55:24 60:11</p> <p>designed [3] 50:17 52:5 55:19</p> <p>designs [1] 56:17</p> <p>desk [1] 8:6</p> <p>details [1] 50:18</p> <p>determine [1] 41:24</p> <p>determined [1] 43:4</p> <p>determines [1] 42:17</p> <p>deterred [1] 37:15</p> <p>Devenpeck [12] 26:24 27:11 28:9 41:14 51:11,17 58:1,5,7 59:8,10 63:3</p> <p>difference [4] 46:14,23 55:9 57:22</p> <p>different [13] 8:3 19:5 22:8 24:21 30:21 41:11,18 43:1 45:21 51:13 52:22,25 57:14</p> <p>differently [2] 53:6,14</p> <p>difficult [9] 6:1,7 11:2 51:12 54:13 57:25 58:15 60:7 61:25</p> <p>difficulties [1] 5:22</p> <p>difficulty [3] 31:5,7 55:3</p> <p>Dinsman [1] 62:9</p> <p>direct [2] 9:11,17</p> <p>directions [1] 35:5</p> <p>disaggregate [1] 30:8</p> <p>disagree [2] 37:1,22</p> <p>disagreement [1] 49:12</p> <p>discard [1] 58:4</p> <p>discriminatory [1] 52:16</p> <p>discuss [1] 33:10</p> <p>discussing [1] 14:19</p> <p>discussion [1] 44:19</p> <p>dislike [1] 30:13</p> <p>dismiss [3] 9:11,19 46:1</p>
D			
	<p>D.C [3] 1:10,20,23</p> <p>damages [7] 3:18 39:12 61:8 63:13,14,16,17</p> <p>danger [2] 21:9 60:5</p> <p>dangers [1] 31:12</p> <p>day [4] 5:13 25:25 26:3 28:20</p> <p>days [2] 23:25 26:1</p> <p>deal [1] 8:12</p>		

Official - Subject to Final Review

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

Official - Subject to Final Review

<p>heard [4] 20:8 32:16 44:8,19 hearing [1] 24:18 hearings [1] 24:19 heart [1] 37:5 heed [1] 35:4 Heffernan [2] 18:20 25:20 held [1] 48:3 help [2] 21:16 22:11 historical [2] 52:2 55:22 history [1] 48:24 hold [4] 20:16 26:1 27:5 64:15 holds [1] 10:12 Holland [1] 46:20 homework [2] 41:9 42:25 honestly [1] 23:2 Honor [1] 10:9 hope [1] 49:10 hours [1] 32:1 Howards [1] 13:3 huge [1] 59:25 hugely [1] 5:17 hundreds [1] 61:12 hypothetical [9] 7:10,20 8:13,15,16,23,24 29:12,12 hypothetically [1] 20:13 hypotheticals [3] 5:23 21:5 31:6</p> <hr/> <p>I</p> <p>idea [1] 47:19 identify [2] 41:23 42:3 ignorant [1] 15:22 imagine [3] 19:8 28:17 41:6 immunity [30] 4:14,20,23 9:22 10:8,13 15:14,15,21 17:9,17,22 20:20 21:12,17 22:2,6,9,10 25:6 29:21 33:6 36:19 37:3 43:16 44:21 45:8 46:24 47:6 50:14 importance [1] 62:15 important [3] 23:20 47:18 56:1 importantly [2] 34:11 61:9 imposed [1] 4:15 impossible [1] 30:7 imprisonment [1] 62:23 impulse [1] 55:3 inadequate [1] 14:23 inappropriate [1] 22:24 incident [3] 32:16 34:4 39:10 Incidentally [1] 24:16 incite [1] 30:15 Indeed [2] 23:25 51:22 independent [6] 5:3,8 25:19 32:14 33:2,3 indictment [2] 57:15,16 individual [2] 15:17 39:12 induced [1] 37:9 infer [3] 12:23 22:18,21 inference [4] 41:5,12 42:10 46:11 initial [2] 6:9,17 initially [1] 28:10 injury [1] 4:15 inquiries [1] 57:23 inquiry [2] 5:1 48:18 inside [1] 51:3 inspectors [1] 36:16</p>	<p>instances [1] 40:15 instead [2] 18:24 40:24 institute [1] 40:2 insulting [2] 7:25 22:17 intensely [1] 54:24 intent [2] 37:23 48:20 interaction [1] 50:11 interests [1] 44:8 interrogatories [1] 43:6 interrupt [1] 10:16 intimidate [1] 6:13 invite [1] 42:8 involve [3] 40:17 50:20 57:7 involved [3] 4:4 45:1,20 involves [1] 7:9 Iqbal [12] 9:10 11:5 13:10,19 14:7,19,23 23:4,8 25:5 43:15 50:7 isn't [4] 11:14 15:17 41:18 50:14 isolate [1] 58:15 issue [5] 21:24 22:13 34:4 43:23 63:3 itself [1] 42:8</p> <hr/> <p>J</p> <p>jail [2] 32:1 61:4 JEFFREY [3] 1:22 2:9 49:4 jeopardy [1] 20:25 job [1] 63:13 join [1] 13:1 joined [1] 12:12 Joint [1] 12:19 Judge [3] 16:4 28:15 41:8 judged [1] 30:6 judges [1] 23:10 judgment [4] 21:11,13 23:16 24:1 juries [3] 16:22 30:23,24 jury [17] 7:21,22,22 8:2 9:7,8 10:25 11:2 16:8 23:18 34:5 46:6 47:8 51:23 54:4 58:14 62:16 Justice [123] 1:23 3:3,10 4:9,12 5:14 6:5 7:12 8:12,19,22 9:1,4 10:2,15,18 11:7,18,24 12:2,6,9,11,14,25 13:5,7,8,9 14:13,18,22,25 16:5,12,18 17:6,14 18:18 19:4,7,19 20:21,23 21:4,5,6,16 22:7,9 24:16,25 25:1,2 26:9 27:3,13,17,20 28:8 29:3,8,13,13 31:2,10,23 32:7,19 33:5,21,24 34:15 35:8,20 36:10,12,25 37:21,25 38:15,16,20,24 39:15,17 40:9 41:1,3,13,15 42:6,20 43:3,9,17 44:6,16 45:3,12 46:13 47:10 48:5 49:1,7 50:15 51:20 52:15 54:10 55:2 56:4,9,12,16 57:10,13 58:20,23 59:1 60:14 62:2 63:4 64:19 Justice's [1] 27:6 justification [2] 18:6 26:15 justify [2] 17:4 21:14</p> <hr/> <p>K</p> <p>KAGAN [15] 16:5,12,18 17:6 20:21 21:4 31:2,10,23 32:7 47:10 52:15 57:10,13 60:14 KARLAN [54] 1:18 2:3,14 3:6,7,9 4:11 6:4,19 8:14,21,25 9:3,6 10:9,</p>	<p>17 11:1,10 12:1,3,8,18 13:22 14:21,24 15:11 16:6,10,13,24 17:7,24 19:18 20:15,22 21:3,7 22:3,8,20 24:20 25:7 26:20 27:8,15,18,22 28:23 31:5 33:11 39:7 62:4,5,7 Karlan's [2] 29:10 34:10 keep [5] 13:20,23 48:6 60:14 62:20 KENNEDY [17] 5:14 6:5 12:14 13:7 14:13,22,25 19:7 21:6 24:16,25 25:2 29:13 33:5 39:17 40:9 51:20 Kennedy's [1] 8:13 kind [18] 7:10 8:23 11:20 15:9 21:5 26:23 27:11 30:8 31:11,25 32:4 39:3 40:12,12 48:8 53:7 54:17 61:9 kinds [2] 13:23 14:6 knocking [2] 18:2,3 knows [1] 34:19</p> <hr/> <p>L</p> <p>language [3] 21:1 50:16 55:4 last [2] 18:19 44:18 later [2] 37:17 41:7 latter [1] 49:9 Laughter [4] 31:9,22 44:5 58:25 law [16] 3:18 15:18 24:2 29:17 33:7 42:1 47:1 49:10 52:3 59:9,11,16 61:11 62:8,18,25 lawful [4] 21:22 23:6 50:2 54:9 lawn [2] 18:22 25:20 lawsuit [1] 4:5 lawyers [3] 41:22 42:24 59:5 lead [1] 34:24 least [5] 36:22 37:11 40:7 42:9 61:16 leave [1] 17:21 led [1] 34:19 left [1] 47:3 legal [3] 32:10 53:1,16 legitimate [2] 22:4 37:15 legitimately [2] 9:23 21:18 level [2] 5:10 11:2 liability [2] 3:24 42:8 liable [3] 7:17 38:10 48:3 Life [1] 9:16 light [2] 60:19 64:1 lighting [1] 20:4 likelihood [1] 30:15 limit [2] 19:1 55:6 limitations [1] 45:17 limiting [1] 54:23 line [4] 8:10,11 14:14 35:23 list [1] 45:13 listed [2] 26:14 45:14 litigation [3] 31:1 33:19,20 Lives [3] 9:15 31:19 37:19 local [4] 26:7 31:12,14,15 long [2] 14:5 59:3 long-standing [2] 18:5 29:17 look [19] 5:6 12:19 19:25 23:9,12 28:19 40:15 46:19 49:20 51:21 52:12 53:17 55:23 56:23 57:5,24 58:7 61:22 62:19 looked [5] 12:4 17:16 28:11 36:22</p>	<p>57:15 looking [1] 54:16 looks [2] 49:11 51:21 lose [1] 44:2 lost [2] 10:20 14:20 lot [9] 17:15 24:6,10 31:20 50:20 51:8 59:23 61:23,24 lot's [1] 54:18 lots [3] 60:21,22,23 lottery [1] 36:6 love [3] 10:20 27:15,19 lower [1] 50:8 LOZMAN [12] 1:3 3:4 31:17 32:15,16 33:13 34:1,8 36:24 43:5 47:25 48:9 Lozman's [3] 45:10,11 47:1</p> <hr/> <p>M</p> <p>made [9] 4:10 5:8,9 32:14,22 33:2 36:17 41:4 45:19 mail [1] 28:5 main [1] 17:24 major [5] 4:16 29:23 37:16 47:10,20 majority [1] 59:21 malicious [1] 62:21 Malley [2] 9:20 15:20 man [1] 57:21 many [10] 19:14 25:13 30:2,20 34:3 40:16 45:19 46:7 50:12 56:3 match [1] 20:4 matter [5] 1:13 9:15 24:2,17 37:19 mayhem [1] 11:16 McCullough [1] 25:21 mean [13] 10:4 26:6 28:7 31:5 32:24 34:17,24 44:16 46:2 50:22 52:8 55:2 57:18 Meaning [1] 27:21 meaningful [1] 43:1 means [2] 20:11 26:5 meant [2] 4:20 44:18 meeting [9] 8:7 10:22 24:23,24 33:22 35:24 55:15,16,18 meetings [1] 35:18 member [4] 5:10 10:5 13:14 14:11 members [3] 18:17 19:21 60:25 mere [1] 45:22 merely [1] 46:17 merit [1] 61:24 message [1] 13:17 messages [2] 40:21,21 middle [2] 8:6 42:24 might [13] 8:24 11:1 20:4 24:21 28:19 31:6 36:6 39:5,19 41:11 60:15 63:4,20 Mihailovici [1] 46:21 miles [1] 19:1 million [1] 49:16 mind [4] 8:22 11:22 47:12 48:19 mindset [1] 42:15 mine [1] 52:6 mine-run [1] 39:10 minor [7] 31:25 37:16 47:11,15,17,22,22</p>
--	--	---	---

Official - Subject to Final Review

<p>minutes ^[1] 62:4 mishear ^[1] 16:8 mistaken ^[1] 62:20 mix ^[2] 43:12,12 moment ^[3] 20:19 42:18,21 month ^[1] 57:20 moreover ^[2] 47:14 48:21 most ^[4] 12:15 23:19,20 46:17 motion ^[5] 9:11,19 21:12 23:16 45:25 motivated ^[3] 36:23 38:8 50:3 motivation ^[2] 21:25 22:14 motive ^[2] 47:4,5 motives ^[1] 22:16 move ^[1] 31:10 Ms ^[52] 3:6,9 4:11 6:4,19 8:14,21, 25 9:3,6 10:9,17 11:1,10 12:1,3,8, 18 13:22 14:21,24 15:11 16:5,10, 13,24 17:7,24 19:18 20:15,21 21:3,7 22:3,8,20 24:20 25:7 26:20 27:8,15,18,22 28:23 29:10 31:5 33:11 34:10 35:4 39:7 62:4,7 Mt ^[7] 6:25 15:24 19:16 29:22 38:9 43:15 57:4 much ^[6] 16:22 26:6 36:13 55:22 56:1 58:3 multiple ^[1] 37:8 municipalities ^[1] 48:23 municipality ^[1] 51:22 murder ^[1] 16:17 must ^[4] 30:1 37:13 43:21 53:8</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>names ^[1] 54:6 nature ^[3] 31:19,19 55:16 necessarily ^[1] 27:5 necessary ^[1] 17:18 need ^[9] 21:16 26:25 30:4,16 44:12,14,25 48:17 51:14 needed ^[1] 33:18 needle ^[2] 52:6 59:20 needn't ^[1] 5:6 never ^[6] 16:6,8 20:2 32:15 50:9 62:24 next ^[2] 3:4 34:19 Ninth ^[12] 7:6 8:17 11:11 14:1 23:10 24:14 25:11 30:19,22 40:16 45:4 61:19 noise ^[2] 49:23 51:7 none ^[5] 5:5 29:16 44:6,7,7 nonetheless ^[1] 44:7 Nor ^[1] 45:8 normally ^[4] 9:12 13:15 14:2,4 notable ^[1] 59:22 nothing ^[1] 36:21 notion ^[1] 33:12 number ^[1] 5:23 numerous ^[1] 47:16</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective ^[6] 30:5,5 44:12 53:12, 22 54:2 obviously ^[2] 10:19 11:20 occurred ^[1] 5:12</p>	<p>odd ^[1] 26:18 offense ^[3] 27:1 41:7 63:22 offenses ^[4] 28:3 43:7 51:15 58:17 office ^[1] 6:12 officer ^[53] 5:9 6:21 7:16 9:12,22 10:3,6,7,8,10 13:15,25 14:10 15:6, 6,16 16:15 17:11 20:18 21:10,21 22:1,5,18 23:7 26:13 29:14 32:13, 20,22,22 33:1,6 35:4 37:9 42:16, 18 43:18,21 44:20 45:7 46:9 47:21 48:2,7,8,13,18 50:1,11 54:5,7 63:24 officer's ^[8] 21:25 22:14 23:4 47:5 48:19,20 50:19 55:5 officers ^[22] 6:7,16 13:2 22:23 28:17 30:1,4,7,21,25 37:13,14,22 41:22 42:14 44:12 46:6,25 47:11 48:22 53:5,8 official ^[2] 51:21 55:17 officials ^[8] 3:14 4:7 15:5 31:14, 15 35:25 36:1 60:24 often ^[3] 45:21 46:4 53:8 Okay ^[6] 8:9 19:14 20:11 33:24 43:20,24 on-the-spot ^[7] 20:24 43:22 44:25 50:18 55:4,5 56:5 once ^[3] 7:19 25:3 51:3 one ^[34] 5:21 6:1 7:9 8:1 10:4 12:23 17:9 24:13,19 25:24 26:13 29:19 30:3 31:18 32:13 33:14,14 36:18 39:5 43:11,14 44:18 48:2,7 52:11,23,25 53:1 54:10 56:19 57:10, 13 61:6 64:12 one-in-a-thousand ^[5] 55:25 56:18 60:12,15,20 one-off ^[1] 36:8 ones ^[3] 9:18 13:24 14:8 only ^[15] 10:10 13:12 14:15 18:12, 13 19:22 22:11 30:25 34:6 43:4 46:5 47:3,20 61:7 62:10 opinion ^[4] 18:19 20:12 46:14,23 opportunity ^[2] 31:3 58:2 oral ^[7] 1:13 2:2,5,8 3:7 29:6 49:4 order ^[11] 5:25 26:22 27:1 30:17 40:5 46:10 48:16 50:2,4,25 54:9 orders ^[1] 15:8 ordinance ^[2] 49:23 51:8 ordinary ^[1] 6:16 other ^[19] 15:16 24:10 25:5 29:23 34:7 35:12 39:11 40:3,7,24 45:17 49:24 50:10 53:11,17 56:14 60:12 62:16 63:23 others ^[2] 44:19 56:20 otherwise ^[2] 25:17 28:21 ought ^[7] 29:18 32:10,10 61:6,11, 14,16 out ^[21] 7:24 8:7 13:20,23 18:3,3 24:10 26:17 30:11 34:25 37:17 38:22 43:10 45:23 47:17,24 48:18 54:15 55:14 61:24 63:4 outside ^[1] 25:21 over ^[3] 19:1 22:4 59:13 Owens ^[1] 10:12</p>	<p>own ^[2] 30:9 62:9</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m ^[1] 64:21 PAGE ^[5] 2:2 7:5 12:19 56:24 62:13 pages ^[1] 33:16 pains ^[1] 31:14 Palm ^[1] 35:15 PAMELA ^[5] 1:18 2:3,14 3:7 62:5 parade ^[1] 63:16 part ^[4] 16:3 48:12,15 62:25 particular ^[6] 10:19 13:14 34:4 40:12,12 42:15 particularly ^[3] 17:15 36:8 48:10 parties ^[1] 51:23 passage ^[1] 62:12 past ^[2] 9:11 50:13 people ^[20] 5:24 6:12 7:24 9:13 13:16 14:3,4 19:23 21:9 23:23 31:13 35:12 38:12 46:1 51:4 52:16 53:13 55:19 62:20 64:2 perfectly ^[3] 49:21 59:2 63:5 perhaps ^[6] 19:7 33:7 37:18 41:3 44:3 46:15 permit ^[2] 63:12,17 person ^[10] 6:13 7:1 10:5 13:13 20:3 22:16 23:1 36:20 56:6,14 persons ^[4] 20:25 43:23 45:2 50:21 Petitioner ^[12] 1:4,19 2:4,15 3:8 49:18 51:11 53:16 56:23 58:1 59:24 62:6 Petitioners ^[1] 40:2 Petitions ^[1] 4:6 pick ^[1] 56:19 pig ^[1] 20:1 place ^[2] 32:17 61:10 plaintiff ^[1] 23:5 Plaintiff's ^[1] 62:25 plaintiffs ^[1] 50:9 plan ^[2] 34:1 39:21 plausible ^[6] 11:4,5,12,14 16:14 17:10 plead ^[1] 14:9 pleading ^[6] 9:9 11:4 15:13 29:21, 24 30:18 pleadings ^[1] 50:13 please ^[3] 3:10 29:9 49:8 point ^[11] 7:3 23:3 36:2 46:5 47:2, 24 50:9,10 58:15 63:2,3 pointed ^[5] 39:7 45:23,24 60:2 63:4 points ^[3] 47:16 49:9 53:2 police ^[46] 5:9 6:6,16 7:16,25 10:3 15:6,6 16:15 18:23 19:10 22:22 29:14 30:1,4,7,20,24 32:24,24 37:9,13,14,22 40:22 41:22 42:13,15, 18 44:12,20 45:7 46:9,25 47:11, 21 48:2,6,8,22 54:15 56:15 58:7 59:5 60:5 64:4 policeman ^[5] 5:25 6:2 20:8 56:6, 15 policeman's ^[1] 19:25</p>	<p>policemen ^[1] 19:21 policies ^[1] 3:14 policing ^[2] 47:19 59:4 policy ^[3] 35:24 51:22 55:17 political ^[6] 13:17 39:22,23 40:6, 17,22 populous ^[1] 60:25 poses ^[1] 31:12 position ^[2] 6:21 15:3 possible ^[3] 40:10 42:9 49:14 postal ^[1] 36:16 postulated ^[1] 13:11 potential ^[1] 29:11 powerfully ^[1] 36:5 practice ^[1] 47:23 pre-determined ^[1] 39:21 pre-Iqbal ^[1] 12:21 pre-Twombly ^[1] 12:21 precisely ^[2] 42:4 46:24 premise ^[2] 38:1,21 present ^[1] 5:6 presided ^[2] 24:18,19 presiding ^[1] 24:24 pretty ^[3] 31:25 32:3 34:17 prevail ^[1] 45:10 principle ^[1] 63:9 probable ^[33] 3:16 7:18 18:9,12, 14 24:3 25:12 26:11,25 27:2,24 28:4,12,15,24 35:2 41:4,6,25 43:8 48:4 51:14 52:18 53:23 57:8,16 58:18 62:11,14,22 63:21,25 64:16 probably ^[1] 25:25 problem ^[9] 19:10 24:5 30:18 32:3 37:12 39:25 59:25 60:16 61:13 problems ^[2] 17:23 37:7 proceed ^[1] 28:14 process ^[2] 39:5 57:7 processes ^[1] 30:9 pronounced ^[1] 12:4 pronunciation ^[1] 12:10 proper ^[1] 53:4 property ^[4] 43:23 45:2 50:21 51:7 proposition ^[1] 15:1 prosecute ^[1] 36:17 prosecution ^[6] 18:10 28:3 53:19 57:2,6 62:21 prosecutions ^[1] 61:16 prosecutor ^[7] 4:21 5:7 36:13,14, 17,19 37:10 prosecutorial ^[5] 4:14,19,23 5:1 37:3 prosecutors ^[2] 5:3 58:14 Prosser ^[1] 62:19 protect ^[4] 17:21 38:2 40:5 46:25 protected ^[4] 4:6 5:18 6:22 18:21 protection ^[2] 6:10 52:17 protections ^[1] 26:5 protective ^[2] 39:6 50:17 protects ^[1] 9:22 protest ^[4] 40:25 49:23 51:8 64:4 protestors ^[1] 40:20 prove ^[1] 53:13 proven ^[1] 64:17 provide ^[1] 6:18</p>
--	---	---	---

Official - Subject to Final Review

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

Official - Subject to Final Review

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