

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD G. McDONOUGH,)
)
) Petitioner,)
)
) v.) No. 18-485
)
) YOUEL SMITH, INDIVIDUALLY AND AS)
)
) SPECIAL DISTRICT ATTORNEY FOR THE)
)
) COUNTY OF RENSSELAER, NEW YORK,)
)
) a/k/a TREY SMITH,)
)
) Respondent.)
)
- - - - -

Pages: 1 through 64
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9 a/k/a TREY SMITH,)
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11 - - - - -

Washington, D.C.

Wednesday, April 17, 2019

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States
18 at 11:07 a.m.
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2

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8 support of reversal.

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10 On behalf of the Respondent.

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	C O N T E N T S	
		PAGE:
1		
2	ORAL ARGUMENT OF:	
3	NEAL K. KATYAL, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	JEFFREY B. WALL, ESQ.	
7	For the United States, as amicus curiae,	
8	in support of reversal	23
9	ORAL ARGUMENT OF:	
10	THOMAS J. O'CONNOR, ESQ.	
11	On behalf of the Respondent	37
12	REBUTTAL ARGUMENT OF:	
13	NEAL K. KATYAL, ESQ.	
14	On behalf of the Petitioner	59
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 next this morning in Case 18-485, McDonough
5 versus Smith.

6 Mr. Katyal.

7 ORAL ARGUMENT OF NEAL K. KATYAL

8 ON BEHALF OF THE PETITIONER

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

11 McDonough's Section 1983 suit claimed
12 that Smith brought and maintained criminal
13 proceedings against him based on fabricated
14 evidence. The closest common law analogy to
15 that claim is malicious prosecution, which also
16 focuses on the wrongful initiation and
17 maintenance of criminal proceedings.

18 Smith has never pointed to a better or
19 any other analogy. And at common law, the
20 statute of limitations for malicious
21 prosecution is --

22 JUSTICE SOTOMAYOR: Mr. Katyal, is
23 your claim allege a -- require the finding of
24 probable cause?

25 MR. KATYAL: No. It --

1 JUSTICE SOTOMAYOR: Or the absence of
2 it?

3 MR. KATYAL: It doesn't. There's two
4 different constitutional violations, Justice
5 Sotomayor, we have identified both in our
6 complaint and in the courts below, as well as
7 here. The Fourth Amendment, which does have a
8 probable cause element. And the district court
9 at page 56a said McDonough's claim is the
10 absence of probable cause. And so with respect
11 to the Fourth Amendment.

12 With respect to the Fifth Amendment,
13 the elements don't actually talk about due --
14 don't talk about probable cause; instead, they
15 talk about is there a reasonable likelihood --

16 JUSTICE SOTOMAYOR: So why do you --

17 MR. KATYAL: -- that the indictment --

18 JUSTICE SOTOMAYOR: -- why do you need
19 an acquittal? That at least is the
20 government's position. Yours is not quite
21 that. But why -- if we're going to import,
22 malicious prosecution that waits for a
23 favorable termination, is it necessary for your
24 argument that we adopt something if it's the
25 closest analogy that we --

1 MR. KATYAL: It's not at all
2 necessary, Justice Sotomayor. It is
3 sufficient, and we'd certainly win under that.
4 That's part of -- that's our second theory.

5 But our first theory, you're
6 absolutely right, and it's a much more
7 straightforward way of deciding this case, and
8 it tracks Justice Kagan's opinion for the Court
9 in Manuel, decide narrowly and decide simply
10 that the favorable term -- that -- that common
11 law analogy here is malicious prosecution, and
12 you borrow the limitations rule of malicious
13 prosecution.

14 JUSTICE ALITO: Well, Mr. Katyal --

15 MR. KATYAL: And that's all you have
16 to do.

17 JUSTICE ALITO: -- this case -- this
18 case has my head spinning because --

19 MR. KATYAL: Mine too.

20 JUSTICE ALITO: -- you were asked to
21 determine when a claim accrues, but I don't
22 know what provision of the Constitution this is
23 based on, and, therefore, I don't know what the
24 elements of this claim are.

25 And depending on the elements, that --

1 they may point to different accrual rules, and,
2 certainly, they might point to different common
3 law analogies.

4 So can you clarify this? I mean, you
5 say it's based on the Fourth Amendment, the
6 Fifth -- the due process, I don't know whether
7 it's procedural or substantive or both, it's
8 based on the Sixth Amendment.

9 So what's it based on?

10 MR. KATYAL: So -- so, Justice Alito,
11 we agree with the Solicitor General that in
12 this case, you don't need to specify because
13 the Fourth and Fifth Amendments -- Fourth and
14 Fourteenth Amendment Due Process Clause swim to
15 exactly the same result.

16 That is, you can have a common law
17 analogy like malicious prosecution that covers
18 both Fourth Amendment and Fourteenth Amendment
19 purposes. Now here --

20 JUSTICE ALITO: Why -- why -- why do
21 they -- I'm not sure they swim to the same
22 result.

23 JUSTICE GORSUCH: I'm pretty sure they
24 don't swim at all.

25 (Laughter.)

1 JUSTICE ALITO: The -- the Fourth
2 Amendment usually is satisfied if there's
3 probable cause. So that would seem to suggest
4 that probable cause -- the absence of probable
5 cause is an element of your Fourth Amendment
6 claim.

7 Procedural due process requires a
8 deprivation. So that seems to require an
9 element of causation. Substantive due process
10 doesn't require any of that. Sixth Amendment,
11 I have no idea how that applies here. So --

12 MR. KATYAL: Right. So --

13 JUSTICE ALITO: -- you still can't
14 tell me what it's based on?

15 MR. KATYAL: No, we -- we have --

16 JUSTICE ALITO: Is this penumbras and
17 emanations from all kinds of things?

18 MR. KATYAL: -- Justice Alito, we have
19 identified the Fourth and Fourteenth Amendments
20 time and time again. The district court says
21 so. The -- the Second Circuit, at pages 2, 3,
22 4, 6, 7, 8, all talk about the due process
23 challenge we make here.

24 And you're absolutely right, there is
25 a little daylight between probable cause, as

1 Justice Sotomayor was saying, and the
2 reasonable probability that a prosecutor
3 wouldn't have done what he did but for the
4 fabricated evidence.

5 But, in a case like this, it doesn't
6 matter. We agree that, in some hypothetical
7 case, there might be a difference. It's just
8 not presented here.

9 JUSTICE GORSUCH: May I --

10 MR. KATYAL: And that's why they never
11 made these arguments below. They never made
12 them in the brief in opposition. The first
13 time you're hearing about this delineation is
14 in the red brief.

15 JUSTICE GORSUCH: May I -- may I try
16 --

17 JUSTICE GINSBURG: If we're not
18 talking about hypothetical cases, is the
19 argument that you're presenting -- is it in the
20 end academic because the defendant is the
21 prosecutor and the prosecutor would be immune?

22 MR. KATYAL: Absolutely not, for
23 reasons, again, the Solicitor General said
24 absolute immunity's not before this Court and
25 it hasn't been passed on below. But for two

1 reasons, Justice -- Justice Ginsburg, we think
2 that's wrong.

3 Number one, it's definitely not
4 academic because, even at best, absolute
5 immunity would only protect prosecutors, and as
6 the amici briefs before you talk about,
7 fabrication of evidence claims often inhere
8 against police. And the rule you set here is
9 not -- and investigators. The rule you set
10 here is not just about prosecutors and when
11 claims against them accrue but when any law
12 enforcement official does.

13 And then, second, if there were a
14 remand, we would obviously win because of the
15 Second Circuit's decision in Zahrey, which says
16 that if there's a reasonable probability that a
17 prosecutor, when they fabricate evidence, might
18 introduce that evidence later on, then there is
19 no absolute immunity. And Justice Thomas's
20 opinion in Michaels in 2001 said "that was very
21 likely correct."

22 And it follows from two different
23 opinions of this Court.

24 JUSTICE KAGAN: But -- but if I could,
25 it's a similar question to what exactly you're

1 claiming because you had a malicious
2 prosecution claim in the original complaint and
3 that was the one that the courts below
4 dismissed on these prosecutorial immunity
5 grounds.

6 So how is this claim different from
7 that claim? And I guess I had thought that one
8 way it would be different was that this claim
9 is just about the use of fabricated evidence.
10 Is that what you're claiming?

11 And, if not that, how is it different
12 from the original malicious prosecution claim?

13 MR. KATYAL: It's -- it's -- as I said
14 at the outset, it's the use and maintenance of
15 the criminal prosecution. And that's exactly
16 what the common law has always said. And
17 there's a bazillion cases on this in our brief
18 and the CAC amicus brief at pages 24 to 25.

19 JUSTICE KAGAN: But is -- is that to
20 say that the difference between your two claims
21 was one was about the initiation of proceedings
22 and the other was about the continuation of the
23 proceedings?

24 MR. KATYAL: No, they're -- they're
25 different. As our reply -- reply brief

1 explains, they're different elements. So, for
2 example, for a pure malicious prosecution
3 claim, you actually have to show malice.

4 And that's one reason why, Justice
5 Ginsburg, absolute immunity might exist for a
6 pure malicious prosecution claim.

7 For a fabrication-of-evidence claim
8 rooted in either the Fourth or Fourteenth
9 Amendment, malice is not actually an element.
10 Rather, you have to show there was a
11 fabrication of evidence that caused the result,
12 the deprivation of liberty. It's just those
13 two elements. That's cases in many different
14 circuits.

15 And so there is a difference between
16 the two, and it does have bite particularly
17 when we deal with something like absolute
18 immunity because absolute immunity, one of the
19 hearts of it since this Court's decision in
20 1871 is that this Court won't second-guess the
21 purity of motives of a government official.

22 And, obviously, malicious prosecution
23 qua malicious prosecution forces a court to do
24 that. So there's a stronger argument.

25 JUSTICE ALITO: When you allege the

1 fabrication of evidence, you're saying you're
2 not necessarily alleging malice?

3 MR. KATYAL: It's -- it's not
4 necessarily an element of the complaint -- of a
5 -- of a fabrication of evidence claim. That's
6 how every lower court, to my knowledge, has
7 interpreted it. There still would be some sort
8 of recklessness or some sort of mens rea, but
9 it wouldn't -- it wouldn't necessarily be the
10 actual malice that malicious prosecution
11 required.

12 JUSTICE ALITO: So you think that the
13 -- the reckless presentation of evidence that
14 turns out to be false constitutes the
15 fabrication of evidence? That would support
16 your claim?

17 MR. KATYAL: It certainly could, Your
18 Honor. Of course, that's an element of the
19 offense. That's not what's presented here.
20 You granted certiorari on the very limited
21 question of what is the limitations rule for
22 claims like this.

23 And there are all sorts of policy
24 reasons why we think you should adopt a
25 favorable termination requirement, at least as

1 a limitations rule, because it'll avoid
2 collateral proceedings --

3 JUSTICE GORSUCH: Well, how do we --

4 MR. KATYAL: -- and duplicative
5 proceedings.

6 JUSTICE GORSUCH: -- how do we adopt a
7 favorable termination requirement for purposes
8 of a limitations analysis only? It would seem
9 to me it's either part of the claim or it's not
10 part of the claim.

11 And I would have thought that
12 plaintiffs in -- in your client's position
13 normally would say it's not part of the claim
14 because that's a higher burden. And it's only
15 because of the happenstance here that we want a
16 longer limitations period that we want to tack
17 it in and create this rather bespoke tort that
18 we cannot identify where it swims from or to.

19 MR. KATYAL: Right.

20 JUSTICE GORSUCH: And it -- it -- I
21 just wonder whether we're kind of coming at
22 this one backwards, and before deciding how
23 long the limitations period is, we ought maybe
24 to take a case where we decide whether it
25 exists and what its elements are, without the

1 complication of addressing the limitations
2 period, where litigation interests may be
3 slightly different than they would be in the
4 ordinary case.

5 MR. KATYAL: So, Justice Gorsuch, this
6 Court has said several times that the -- there
7 is sometimes daylight between the limitations
8 period and when a cause accrues. Think of
9 Justice Scalia's opinion in Wallace.

10 JUSTICE GORSUCH: Pretty unusual --
11 pretty unusual, though, right?

12 MR. KATYAL: It -- it is unusual. But
13 Wallace is a very good example of that,
14 particularly Footnote 3. And, here, I think
15 that makes sense.

16 JUSTICE GORSUCH: We usually say,
17 though, the limitation period starts to run
18 when all of the elements are present. I mean,
19 we learn -- everyone learns that in the first
20 year of law school, right?

21 MR. KATYAL: Not where I went to law
22 school. That's not --

23 JUSTICE GORSUCH: Well, that may be
24 true. That may be true.

25 (Laughter.)

1 JUSTICE GORSUCH: And -- and -- and --
2 and I -- I -- I -- you know, maybe not where I
3 went to law school either, but -- but one
4 should learn that in the first year of law
5 school. Can we agree on that?

6 MR. KATYAL: We -- we -- well, we do
7 agree that is the standard rule, but for claims
8 like this, actually, it makes a lot of sense.
9 Think about Wallace because, in Wallace, the
10 Court said there is daylight and the reason for
11 that is it cited Section 187 of the Wood
12 treatise, and that very sentence it cited said,
13 yes, there's daylight not just for the false
14 imprisonment claim that was at issue in Wallace
15 but also for malicious prosecution.

16 It's the same sentence, and it makes
17 particular sense here because the reason for
18 malicious prosecution's favorable termination
19 requirement is not really that it an element of
20 the offense but, rather, that it voids all of
21 the policy concerns that -- that -- that we
22 talk about in our briefs.

23 So if you look at Keyton's treatise at
24 page -- this is cited in our reply brief at
25 page 8, it says the following. "The

1 requirement of termination is probably a matter
2 of ripeness, a belief that malicious
3 prosecution actions should not be tried at a
4 time when they try to chill testimony. It is
5 primarily important not as an independent
6 element."

7 And so, when you're dealing with this
8 unique thing, I think this is the right rule.
9 It allows the Court to do, I think, a very
10 narrow, straightforward thing, which is to just
11 say, look, the whole point of the favorable
12 termination requirement is to avoid collateral
13 duplicative litigation, to make sure that we're
14 not chilling defendants who now have to walk
15 out of their federal criminal trial while it's
16 ongoing and file a lawsuit and possibly risk
17 their Fifth Amendment incrimination rights and
18 resources and distraction and all of that.

19 I mean --

20 JUSTICE GINSBURG: What about just
21 staying the civil proceeding until the criminal
22 prosecution is over?

23 MR. KATYAL: So it's possible, I
24 think, sometimes to stay, but, as the
25 government points out, stays are discretionary

1 at the district court and there have been
2 example after example in which criminal and --
3 in which the civil litigation has not been
4 stayed.

5 And I think it's important to note
6 that the only policy argument they've been able
7 to come up with, Justice Ginsburg, for that
8 stay idea is the idea of faded memories or
9 something like that.

10 But, here, you've got the Government
11 of the United States representing most
12 prosecutors, the lion's share of prosecutors
13 saying no, we're not as concerned about that,
14 and those problems of faded memories occur just
15 as much under their rule because they adopt a
16 discovery -- they adopt a discovery rule. So
17 it can be years later.

18 And, also, this Court's decision in
19 Heck alone will delay many of these claims for
20 anyone who has been convicted. So weigh it
21 against whatever you have on faded memory,
22 you've got duplicative litigation, the fact
23 that people in the real world won't file these
24 lawsuits if they're facing criminal trials,
25 which is what their rule requires, and that'll

1 lead to less deterrence and undermine the
2 compensatory rationales of Section 1983.

3 JUSTICE KAVANAUGH: What torts would
4 you bring -- tort suits would you bring under
5 state law under -- on these facts?

6 MR. KATYAL: Under state law, we'd
7 bring something like the tort of malicious
8 prosecution.

9 JUSTICE KAVANAUGH: There is no
10 separate tort?

11 MR. KATYAL: I -- I don't know that
12 there's a fabrication of evidence tort. There
13 may be some criminal remedies or something like
14 that, but one of the points of Section 1983, a
15 historic point, has been to provide a federal
16 remedy, a federal cause of action, in cases
17 like this.

18 So there's also -- we've been really
19 talking about two different theories led by
20 Justice Sotomayor's question: One, decide only
21 the limitations rule. Second, as Justice --
22 Justice Gorsuch said, adopt it as an element of
23 the offense. There's also a third theory, the
24 continuing violation theory.

25 We have to win just any one of these.

1 He's got to defeat them all. As Justice
2 Ginsburg said --

3 JUSTICE KAGAN: But before you -- you
4 go to that, Mr. Katyal, and maybe I'm just
5 being dense here, but I'm still trying to
6 figure out, you said it's a -- for a state
7 tort, it would be malicious prosecution. That
8 was true of your -- the other count in your
9 complaint as well, the one that was dismissed.

10 I mean, this fabrication of evidence
11 claim seems to be -- I mean, just a subset of
12 that, you know, there are lots of ways. You
13 can bring a malicious prosecution. One is by
14 fabricating evidence. One is by doing
15 something else.

16 How is it a different claim?

17 MR. KATYAL: Well, because I think,
18 for 1983 purposes, when this Court does the
19 analysis that you prescribed in Manuel, going
20 back to Carey versus Piphus, you use that as
21 the starting point. You look to the analog.
22 And you can have two different claims,
23 malicious prosecution, a pure one, or
24 fabrication of evidence, that both look back to
25 that and common law antecedent, but as

1 applied --

2 JUSTICE KAGAN: Right. I'm -- I'm --
3 I guess I'm struggling with how it's a
4 different constitutional claim. I -- I
5 understand how there might be two different
6 constitutional claims that would look to the
7 same common law precedent, but how is this a
8 different constitutional claim?

9 MR. KATYAL: Well, there -- there are
10 two different claims here, the Fourth Amendment
11 and the Fourteenth Amendment, as I was saying
12 to Justice Alito.

13 Here, I don't think it matters, but I
14 could imagine --

15 JUSTICE KAGAN: No. But as -- I'm --
16 I'm talking about -- you had a count that was
17 dismissed.

18 MR. KATYAL: Yeah.

19 JUSTICE KAGAN: How is this different
20 from the one that was dismissed?

21 MR. KATYAL: It's different because,
22 as I -- as I said earlier, the elements for a
23 fabrication claim, at least for 1983 purposes,
24 are different, because they involve -- they
25 don't involve malice and things like that. So

1 it's just -- that's the way the law works.

2 JUSTICE KAGAN: What are the things
3 like that? Because the malice, I don't know.
4 I mean, really?

5 MR. KATYAL: So -- so malicious
6 prosecution requires four things: the
7 initiation or continuation of a criminal
8 proceeding against a plaintiff; termination in
9 the plaintiff's favor; lack of probable cause;
10 and actual malice. And probable cause and
11 malice don't apply to all fabrication of
12 evidence claims. That's the way lower courts
13 have interpreted it.

14 May I reserve?

15 CHIEF JUSTICE ROBERTS: Thank you.

16 JUSTICE GINSBURG: Fabricating
17 evidence -- deliberately fabricating evidence
18 isn't malice?

19 MR. KATYAL: It -- it -- it often is.
20 It's just -- our only point is it's not always.
21 That's all, Justice Ginsburg.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Wall.

25

1 ORAL ARGUMENT OF JEFFREY B. WALL
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 IN SUPPORT OF REVERSAL

4 MR. WALL: Mr. Chief Justice, and may
5 it please the Court:

6 The parties' presentations may make
7 this case seem more difficult than it is. If
8 Petitioner were seeking damages for a
9 conviction based on fabricated evidence, it is
10 clear under Heck malicious prosecution would be
11 the most analogous common law tort, and
12 favorable termination would be an element of
13 the 1983 claim. That's Heck itself.

14 The same is a fortiori true when
15 Petitioner seeks damages for an indictment
16 based on fabricated evidence. That's not
17 simply akin to malicious prosecution. That's
18 the essence of malicious prosecution at common
19 law, being wrongfully subjected to the criminal
20 process in the first place.

21 Favorable termination is therefore an
22 element of the 1983 claim. The limitations
23 period began to run only upon Petitioner's
24 acquittal. That is, in the government's view,
25 the straightforward and correct way to resolve

1 the case.

2 JUSTICE GORSUCH: So it's always an
3 element now? Before, it was sometimes an
4 element. But now it's always an element?

5 MR. WALL: Oh, Petitioners on -- on --
6 I understand Petitioner's first theory to be
7 that it's sometimes an element or you can
8 borrow --

9 JUSTICE GORSUCH: It swims in and out?

10 MR. WALL: To be clear, that has never
11 been the United States' theory. We disagree
12 with Petitioners on his first and third
13 theories.

14 JUSTICE GORSUCH: Why wouldn't we be
15 better off, before trying to figure out what
16 the limitations period is, actually take a case
17 and figure out whether this tort exists and
18 what its elements actually are? Because even
19 you and the Petitioner cannot agree on the
20 elements of this claim.

21 MR. WALL: Well, I guess, Justice
22 Gorsuch --

23 JUSTICE GORSUCH: And we don't know
24 where it swims from.

25 MR. WALL: I don't want to speak for

1 Petitioner. I can tell you what the United
2 States' view is, which is that Petitioner had
3 two claims. He could have brought a Fourth
4 Amendment constitutional claim for a seizure
5 without probable cause. Doesn't have to do
6 with malicious prosecution, that's your
7 concurrence in Cordova, that claim's not before
8 you. He's got a common law malicious
9 prosecution claim under New York law if he
10 wants to bring that.

11 His second constitutional claim is a
12 procedural due process claim. It's akin to
13 Agers or Brady or Giglio. It's no different
14 than if there were perjured testimony. That's
15 not only a Fourth Amendment claim, that's a
16 Fourteenth Amendment claim, that short of a
17 seizure, I have otherwise been deprived of
18 liberty.

19 JUSTICE GORSUCH: Well, but -- but
20 that's a great argument for a case in which the
21 -- the matter's actually before us. And your
22 compatriot doesn't agree with you --

23 MR. WALL: Well, if --

24 JUSTICE GORSUCH: -- that it's just a
25 procedural process claim.

1 MR. WALL: Justice Gorsuch, if there
2 were a circuit split on that --

3 JUSTICE GORSUCH: So shouldn't we
4 maybe --

5 MR. WALL: -- or some reasonable
6 disagreement, but the Court has held that there
7 is a procedural due process claim with respect
8 to fabricating evidence to obtain a conviction.

9 The only question then is, well, what
10 if they deprive your liberty in other ways
11 short of a conviction? The courts of appeals
12 have said that's also a Fourteenth Amendment
13 claim. We agree with that. And since the
14 courts of appeals have been uniform on that and
15 there's just this timeliness question, I don't
16 know that the Court needs to get into that
17 merits question, but --

18 JUSTICE ALITO: Well, now you've
19 confused --

20 MR. WALL: -- I'm happy to talk about
21 it. I mean, we -- we think the elements are
22 you've got fabricated evidence, it's material
23 to a deprivation of liberty, no different than
24 if it were a Brady claim or a Giglio claim or
25 an Agurs-Mooney claim. I mean, all of them --

1 JUSTICE GORSUCH: Except you think
2 that the element also includes favorable
3 termination, and your compatriot doesn't. And
4 we haven't had much consideration of that
5 issue.

6 And, for one, I'm not sure I see why
7 it would be an element, I mean, just -- just to
8 put it out there. Pretty bad to use fabricated
9 evidence, whether you win or you lose, it seems
10 to me. No?

11 MR. WALL: So, Justice Gorsuch, two
12 things. Yes, there is disagreement with us on
13 whether -- with Petitioner on whether you
14 incorporate the element. But, if you look at
15 Justice Scalia's opinion in Heck, what he was
16 saying was, when you're attacking the state
17 judicial process and that doesn't end favorably
18 to you, your remedy for that is habeas; you've
19 got to go get that result set aside before you
20 can bring the damages claim.

21 JUSTICE GORSUCH: If you're attacking
22 collaterally the conviction, but maybe
23 sometimes you're not.

24 MR. WALL: Well, but I think all of
25 the reasons there why you're attacking the

1 state judicial process are why the common law
2 tort, the analogous tort of malicious
3 prosecution adopted this favorable termination
4 requirement out of respect for the ongoing
5 state criminal proceeding and out of a belief
6 that that was the proper role for habeas, not
7 for damages claims.

8 So I agree with you, favorable
9 termination is not an element of the
10 constitutional claim. We can prosecute a -- a
11 line attorney who fabricates evidence and puts
12 it in a trial --

13 JUSTICE KAVANAUGH: What -- what --

14 MR. WALL: -- no matter how the trial
15 ends, but it is an element of the damages claim
16 under 1983.

17 JUSTICE KAVANAUGH: Can I -- can I
18 pick up on Justice Kagan's question from
19 earlier? How is a fabricated evidence claim
20 different from a malicious prosecution claim?
21 It would seem every fabricated evidence claim
22 is a malicious prosecution claim, not the
23 reverse.

24 MR. WALL: Oh, I think there is
25 overlap in the sense that you'll often have a

1 constitutional claim and you'll have a common
2 law claim, but the -- the elements are
3 different.

4 So, as the Court's been exploring, at
5 common law --

6 JUSTICE KAVANAUGH: You don't -- you
7 think there's a fabricated evidence claim that
8 would not fall within the usual elements of
9 malicious prosecution?

10 MR. WALL: Well, in malicious
11 prosecution, you had to show a lack of probable
12 cause. That was the question, whether the
13 prosecutor was proceeding against you without
14 valid legal basis. Under Brady and Giglio and
15 Agurs, it doesn't matter if the government
16 could have proceeded against you on the basis
17 of the evidence before it.

18 Kyles says Brady's not a
19 sufficiency-of-the-evidence test. If you don't
20 turn over exculpatory evidence or you introduce
21 perjured testimony, it doesn't matter that a
22 jury could have found you guilty. The question
23 under those cases is materiality.

24 JUSTICE ALITO: But don't you have to
25 show causation if it's a procedural due process

1 claim?

2 MR. WALL: You have to show
3 materiality, Justice Alito. You've got to show
4 under Kyles a reasonable probability that it
5 affected the outcome.

6 JUSTICE ALITO: And what's the
7 difference between that and probable cause?

8 MR. WALL: I think that what Kyles
9 suggests is it's not just a question of whether
10 there was probable cause that a juror could
11 have found a grand juror to hold you over for
12 trial or a petit juror to -- to convict you on
13 the basis of the evidence. It's could it have
14 had an effect on the proceeding?

15 So imagine a case where the evidence
16 of guilt is not overwhelming and a reasonable
17 grand juror or petit juror could have gone
18 either way. A court could easily say, oh,
19 look, there was probable cause to send the
20 person to trial. But you still -- and the
21 Court's held in Kyles and later cases -- you've
22 still got the procedural due process claim if
23 there is a reasonable probability it affected
24 the outcome.

25 JUSTICE KAGAN: Do you think that

1 there's a possible claim which is just there
2 was a introduction of fabricated evidence that
3 was so awful, it's itself a violation of the
4 Constitution, kind of shocks the conscience?

5 MR. WALL: We -- we don't think for
6 two reasons, Justice Kagan. One, the Court
7 said it's very reluctant to expand substantive
8 due process because it doesn't have reliable
9 guideposts in the area. And, two, as early as
10 Mooney in 1934 looking at a claim of false
11 evidence at trial, the Court said it's
12 procedural due process.

13 And I do think that's the right way to
14 think about it. A prosecutor who does
15 something shocking --

16 JUSTICE KAGAN: If there were such a
17 claim, that would not have as an element
18 favorable termination, correct?

19 MR. WALL: No, I -- I think we would
20 -- even if you said, look, this sounds in
21 substantive due process rather than procedural
22 due process, I think we'd still say, look,
23 that's about something the prosecutor did to
24 you. The common law analogy is malicious
25 prosecution. And despite all your claims that

1 the prosecutor harmed you, if that ended in a
2 conviction, you've still got to go to habeas to
3 try to get that set aside before you can start
4 bringing damages claims against the state
5 officials who were involved in the prosecution.

6 But I do think the right way to think
7 about this is procedural due process. What the
8 prosecutor does is shocking. We could, should,
9 and would prosecute that person. But, if you,
10 the criminal defendant, haven't suffered a
11 deprivation of liberty as a result --

12 JUSTICE KAGAN: And what is the
13 deprivation of liberty for a person who is not
14 in detention and is going to -- and has been
15 acquitted?

16 MR. WALL: I think, here, the -- the
17 obvious one that the Respondent conceded below,
18 so I don't think it's before the Court, is the
19 travel restrictions, the surrendering of the
20 passport and all the rest. Petitioner also
21 points to the having to show up for trial. I'd
22 caution the Court away from relying on that in
23 light of the concession because there is a
24 circuit split on that, about whether, if you're
25 just required to show up to a hearing, that's a

1 deprivation of liberty for Fourteenth or Fifth
2 Amendment purposes.

3 So we'd point to the travel
4 restrictions, and I think Respondent conceded
5 it below, so you don't need to get into it.

6 Again, the merits of the claim aren't
7 before the -- the Court. I don't think there's
8 a split on this in the lower courts, but you
9 could take it up in another case.

10 As we understand it, the question here
11 is just --

12 JUSTICE SOTOMAYOR: Mr. Wall --

13 MR. WALL: -- assuming it's procedural
14 due process, how does the limitations period
15 run?

16 JUSTICE SOTOMAYOR: -- I -- I worry
17 about importing the favorable termination rule
18 for malicious prosecution because it has a lot
19 of history behind it, including what counts as
20 a favorable termination.

21 If there is proof that evidence has
22 been fabricated, that it was material in the
23 sense that it made a difference in the
24 proceedings, why should I, as we do in
25 malicious prosecution that has a totally

1 different set of policy principles underlying
2 it, why should we import all that history into
3 this false fabrication claim or tort?

4 MR. WALL: So two things, Justice --

5 JUSTICE SOTOMAYOR: I -- I understand
6 importing the statute of limitations on a
7 Heck-Preiser principle. I'm talking about, why
8 is it necessary to import the same concepts of
9 favorable termination?

10 MR. WALL: So I think that's my
11 problem, Justice Sotomayor, is because when
12 you're looking to the common law -- and Heck is
13 clear about this, if you look at pages 484 and
14 489-90 of Justice Scalia's opinion -- you're
15 not just kind of borrowing in some loose sense
16 what the common law did. You are looking at
17 the way it did it and asking yourself, should
18 we adopt that?

19 And the common law treated this as an
20 element, so Justice Scalia in Heck said -- and
21 the claims there were Brady claims and
22 unfavorable -- tainted lineup claims, and he
23 said, look, the -- the tort of malicious
24 prosecution in common law had as an element
25 favorable termination in order to prevent

1 ongoing attacks on the -- the state criminal
2 process.

3 We're adopting that element. And so
4 we're saying that the 1983 claim doesn't
5 accrue. And we understand that to be the right
6 way to do this. And then the only question is
7 we know -- if the fabricated evidence had been
8 used at trial and there had been a conviction,
9 we know favorable termination would be an
10 element. That is Heck. You could not -- and
11 no one disputes that, I think.

12 And then the only question is, well,
13 if you're trying to challenge the front end of
14 the criminal process rather than the back end,
15 should you have a different rule? And we would
16 say no, it's still malicious prosecution is the
17 most analogous tort --

18 JUSTICE SOTOMAYOR: It's not quite --

19 MR. WALL: -- and we know from Heck
20 the way to do that.

21 JUSTICE SOTOMAYOR: -- because you
22 just said to me that the use of fabricated
23 evidence, whether someone's convicted or not,
24 is, standing alone, wrong.

25 MR. WALL: Oh, it is wrongful for a

1 prosecutor to do it. You have a constitutional
2 claim, though, only if it results in the
3 deprivation of your liberty. And you have a
4 damages claim only once you can show that the
5 state criminal process that you are attacking
6 has been terminated favorably to you. And that
7 is Heck itself.

8 JUSTICE SOTOMAYOR: But why does that
9 matter, is what I'm saying to you. If -- if
10 the ill is keep -- using this evidence -- and
11 for some people, using it will result in
12 charges being dismissed before a jury is sworn,
13 but being in the criminal system for a long
14 period of time, why should those people have to
15 show a favorable termination in the same way
16 that malicious prosecution has been defined?

17 MR. WALL: Oh --

18 CHIEF JUSTICE ROBERTS: Very briefly,
19 Mr. Wall.

20 MR. WALL: For all the same reasons
21 they have to show it when they are attacking
22 any other part of the state judicial process,
23 which is to say the policy reasons that Justice
24 Scalia gave in Heck and that we set forward in
25 our brief.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. O'Connor.

4 ORAL ARGUMENT OF THOMAS J. O'CONNOR
5 ON BEHALF OF THE RESPONDENT

6 MR. O'CONNOR: Mr. Chief Justice, and
7 may it please the Court:

8 Let me tell you my head has been
9 spinning from this case for a lot longer than
10 yours. What we've heard in parts of these
11 arguments are rather incomprehensible
12 statements.

13 First, we have a pure malicious
14 prosecution as opposed to, I assume, an impure
15 malicious prosecution.

16 JUSTICE GINSBURG: It's what common
17 law --

18 MR. O'CONNOR: We have --

19 JUSTICE GINSBURG: -- what common law
20 crime was most analogous. It's not a malicious
21 prosecution claim, but if we're looking at the
22 question as what -- how would you type it?
23 What is the closest common law claim?

24 MR. O'CONNOR: There is none.

25 JUSTICE GINSBURG: There is no claim

1 at common law when a prosecutor deliberately
2 falsifies evidence in order to convict an
3 innocent person?

4 MR. O'CONNOR: I think -- I'm not sure
5 there is one, and I think that this type of
6 conduct is so stunning and so in contradiction
7 of our basic fundamental policies that it
8 stands alone --

9 JUSTICE GINSBURG: Then --

10 MR. O'CONNOR: -- as a constitutional
11 violation.

12 JUSTICE GINSBURG: Then --

13 MR. O'CONNOR: Now there are, of
14 course, those criminal cases where, after a
15 conviction, as a result of perjured testimony,
16 that, of course, is a preeminent due process
17 violation.

18 However, in those cases, and I hark
19 back to Justice Alito's exchange, the word
20 "materiality" used in those cases is not used
21 in the evidentiary sense. It is used in the
22 proximate cause sense, and that is an element
23 of -- of the analysis in those cases.

24 JUSTICE GINSBURG: Well, you say that,
25 if there's a -- if there's a due process claim,

1 it's substantive, and I find that very hard to
2 fathom, because isn't it -- fundamental
3 fairness -- a fundamentally fair trial is what
4 you're entitled to as a matter of procedural
5 due process, and how can your trial be
6 fundamentally fair if the prosecutor has just
7 made up evidence to convict you?

8 MR. O'CONNOR: Well, I understand your
9 point. I -- I follow the root of shocking the
10 conscience when it comes to categorizing this
11 type of a claim. But I think reasonable people
12 can disagree on -- on where it actually falls.
13 It certainly falls under the due process
14 umbrella.

15 The determination of the court of
16 appeals was correct in this case for two
17 reasons. One, the Petitioner has failed to
18 state a discrete constitutional claim based
19 upon fabricated evidence.

20 This Court has been clear that where a
21 1983 claim alleges an absence of probable
22 cause, including where fabricated evidence is
23 used, all of the pretrial deprivations of
24 liberty that go hand in hand with the criminal
25 prosecution are encompassed in the Fourth

1 Amendment.

2 CHIEF JUSTICE ROBERTS: I -- I'm not
3 sure I understand your point, that you -- maybe
4 this is repetitious, but you think there is no
5 cause of action in a situation like this?

6 Let's put the prosecutorial immunity
7 to one side if we're dealing with police
8 fabrication.

9 MR. O'CONNOR: If -- what we have
10 heard and what we have read in the briefs is
11 the mischief that has caused where the parties
12 do not identify, pinpoint the constitutional
13 right involved, even after decades of urging by
14 --

15 CHIEF JUSTICE ROBERTS: Do you think
16 there is one? If you were representing the
17 other side, what -- what would you say is
18 the -- is the claim? Is there -- is there a
19 claim in a case of this sort?

20 MR. O'CONNOR: There may be a claim
21 under what I perceive to be the substantive due
22 process clause.

23 JUSTICE GINSBURG: Then, well, let's
24 go back to my question. Why is it substantive
25 due process when the plaintiff is saying, I was

1 deprived of the most fundamental procedural
2 right; that is, to have a fair trial
3 proceeding? Why isn't that evidently
4 procedural due process?

5 MR. O'CONNOR: Well, of course, you're
6 right. The trial wasn't fair because this
7 atrocious -- allegedly atrocious perjury was
8 committed. But, in terms of procedural due
9 process, I -- I think the procedures have not
10 been challenged.

11 It is the dramatic allegation that
12 there was perjury throughout, and --

13 JUSTICE GINSBURG: But it was --
14 that's what made it a corrupt process.

15 MR. O'CONNOR: Okay. I'm not -- I'm
16 not going to dispute that with you, Judge
17 Ginsburg.

18 JUSTICE SOTOMAYOR: So what remains of
19 your argument if that's true?

20 MR. O'CONNOR: Pardon me, Judge?

21 JUSTICE SOTOMAYOR: If it's a
22 procedural due process violation, what remains
23 of your argument? If you accept Justice
24 Ginsburg's view --

25 MR. O'CONNOR: It -- it still falls

1 under the Fourteenth Amendment, exclusive of
2 any claims or injuries or deprivations that
3 fall within the Fourth Amendment.

4 JUSTICE SOTOMAYOR: All right. So
5 we're there. So how does that affect or not
6 affect the statute of limitations?

7 MR. O'CONNOR: In the --

8 JUSTICE SOTOMAYOR: So it's a
9 procedural due process violation. If it's
10 being used throughout the trial, this
11 fabricated evidence, why doesn't each use and
12 until there's an acquittal constitute either a
13 continuing violation or a finishing of the
14 accrual time?

15 MR. O'CONNOR: Well, first -- first of
16 all, my view is that it is not a procedural due
17 process violation.

18 JUSTICE SOTOMAYOR: I -- I accepted
19 that. But you said that Justice Ginsburg's
20 view, you weren't going to argue with.

21 MR. O'CONNOR: In that -- in that
22 scenario, each use would be a -- a violation of
23 the due process clause. And you would -- and
24 since it's a isolated, distinctive use, it
25 would accrue when it was used and when the

1 defendant had knowledge of it.

2 JUSTICE KAGAN: Mr. O'Connor, is what
3 you're saying -- and -- and tell me if I'm
4 wrong about what you're saying, because I might
5 very well be wrong about what you're saying,
6 but I'll just hazard this theory of it, which
7 is, when the claim has as one of its components
8 that there's a deprivation of liberty, then it
9 makes some sense to have a favorable
10 termination date as part -- as an element of
11 that claim.

12 But you're suggesting -- as I hear
13 you, you're suggesting that there's a claim
14 that doesn't have anything to do with a
15 deprivation of liberty. It arises even without
16 and irrespective of any deprivation of liberty,
17 just because of -- of the fabrication itself.

18 And if you had such a claim, that
19 wouldn't really suggest that a favorable
20 termination date is part of the claim
21 because -- because it has nothing to do with
22 the claim.

23 MR. O'CONNOR: That's right.

24 JUSTICE KAGAN: The claim is only
25 about the use. It has nothing to do with the

1 deprivation of liberty.

2 Is that what you're saying?

3 MR. O'CONNOR: That's correct. That
4 claim is indifferent to either probable cause
5 or any termination.

6 JUSTICE KAGAN: So -- but the --
7 what -- the problem is that the Petitioner says
8 it's not making that claim.

9 MR. O'CONNOR: It's hard to say what
10 claim the Petitioner is making. It -- it
11 started out with -- with two claims, a
12 malicious prosecution claim and a fabrication
13 of evidence claim.

14 The malicious prosecution claim was
15 dismissed. The Second Circuit affirmed the
16 dismissal and it -- the dismissal remains
17 unchallenged.

18 So the plaintiff comes along with
19 its -- with -- with the claim that it labels
20 fabrication of evidence, but it describes its
21 nature, both in its main brief in the court of
22 appeals and its reply, it's a quick --

23 JUSTICE GINSBURG: Go back to our
24 original -- our original colloquy is not
25 whether this is a malicious prosecution claim.

1 This is a fabrication of evidence in order to
2 convict.

3 What is the closest analogy at common
4 law? And you -- you said there is none in
5 answer to my prior question. If -- if it isn't
6 -- if malicious prosecution isn't the closest
7 analogy, what is?

8 MR. O'CONNOR: I'm not sure there is a
9 closest analogy. But what I was --

10 JUSTICE GINSBURG: Does that mean
11 there is no such claim?

12 MR. O'CONNOR: Pardon me, Judge?

13 JUSTICE GINSBURG: Then -- then
14 there's no -- no -- there's no claim at --

15 MR. O'CONNOR: There doesn't have to
16 be a common law analogue for there to be a
17 constitutional claim, particularly in this
18 instance, where the claim is committing perjury
19 either during the grand jury presentation or
20 during trial.

21 JUSTICE GINSBURG: But don't we have
22 to analogize it to something in order to
23 determine what limitation period will apply?

24 MR. O'CONNOR: I don't think that's
25 necessary, no, because if -- if it is a

1 self-standing claim that is indifferent to
2 probable cause or favorable termination or any
3 termination, then the presumption is that the
4 standard accrual rule would apply.

5 But, as I --

6 JUSTICE BREYER: It's a presumption,
7 but in this case, if you let people to bring
8 lawsuits while a criminal trial is going on at
9 the same time, they're bringing a civil lawsuit
10 against some of the people who are heavily
11 involved in the case, and you're -- you're
12 going to mix up many cases, and people will
13 watch what they say or -- who knows.

14 But there's a pure policy reason for
15 saying, however you characterize this suit,
16 wait 'til the case is over until you bring it.
17 And, therefore, the statute of -- you can't
18 bring it while the case is still going on. I
19 mean, that's basically the argument I got out
20 of these briefs, if I'm right.

21 Okay. What's the answer to that --

22 MR. O'CONNOR: The --

23 JUSTICE BREYER: -- in your opinion?

24 MR. O'CONNOR: -- the Second Circuit
25 acknowledges this type of a claim --

1 JUSTICE BREYER: Uh-huh.

2 MR. O'CONNOR: -- in limited
3 circumstances, for example, where, although
4 there is sufficient evidence to satisfy
5 probable cause, the 1983 plaintiff alleges that
6 there is unrelated independent evidence that is
7 fabricated.

8 JUSTICE BREYER: And I'm not asking
9 something complicated. I'm just saying,
10 whatever you call it, whatever evidence, I
11 don't care, I'm interested in the policy
12 argument that you shouldn't allow a person to
13 bring this claim until the criminal trial is
14 over. And the reason is a contrary rule risks
15 getting everything mixed up in the criminal
16 trial. That's the -- I take it -- am I -- that
17 seems to be an important argument against what
18 the Second Circuit did.

19 Now I'm just repeating myself, but I
20 just would like you to deal directly with that
21 kind of question.

22 MR. O'CONNOR: In both Heck --

23 JUSTICE BREYER: Whatever you want to
24 call it in terms of characterizing the action.
25 I'm not interested in that for the moment. I'm

1 interested in the words that I used, "mixed
2 up."

3 MR. O'CONNOR: In -- in Heck and
4 Wallace, this Court envisioned the criminal
5 case and the civil case being pursued at the
6 same time. And in Wallace, the Court stated
7 that, under these circumstances, the district
8 court is in the best position to sift through
9 things and see whether a prudential stay is
10 appropriate.

11 CHIEF JUSTICE ROBERTS: Well, but, I
12 mean, it's still problematic even with a stay.
13 You have a -- a complaint.

14 I mean, I think it's -- it is a
15 serious concern while the criminal prosecution
16 is going on to say, well, let's file a lawsuit
17 against, you know, the -- the assistant
18 district attorney, and, you know, that might --
19 see if that makes him a little less inclined,
20 you know, to -- to enter into a plea agreement
21 or -- or other situations.

22 It does complicate all that's going on
23 in what, for a criminal defendant falsely
24 accused, as it turns out, is also -- is already
25 in a pretty dire place. And I can certainly

1 see that suing the people who are trying to
2 prosecute you may not be the best strategy.

3 MR. O'CONNOR: Well, in -- in the
4 Second Circuit, the prudential stay has been in
5 use for decades with no -- no untoward results.
6 And --

7 CHIEF JUSTICE ROBERTS: Well, how do
8 you know that? I mean -- I mean -- by a
9 prudential stay, you mean -- presumably, you
10 have to file a complaint before you can get a
11 stay, right?

12 MR. O'CONNOR: Yes.

13 CHIEF JUSTICE ROBERTS: Well, then
14 that seems to present most of the problems that
15 are -- are at issue. Sure, you have a stay so
16 you're not taking the depositions of people who
17 are also being -- testifying in the criminal
18 case, but you do have to spell out your
19 allegations, and that can certainly be very
20 prejudicial.

21 MR. O'CONNOR: Well, I think there are
22 -- requiring the case -- requiring -- using the
23 traditional accrual rule provides a prompt
24 appraisal of what possible misconduct may be
25 going on. It enables the municipal employers

1 and officials to review it, to investigate, and
2 to preserve records. And it -- it is also fair
3 to the plaintiff to be able to pursue this
4 claim, these claims, some of which have nothing
5 to do with the outcome. And therein lies the
6 -- the valuable role of -- of the district
7 court.

8 So I think that it wouldn't -- I'd be
9 disappointed if the Court sacrificed the
10 correct to the convenient. And there's
11 something to be said for maintaining --
12 particularly in this area, where there's a lot
13 of confusion, maintaining an orderly approach
14 to accrual.

15 JUSTICE SOTOMAYOR: I'm sorry, if this
16 behavior, if it's true -- I'm not assuming
17 anything -- if a prosecutor fabricates
18 evidence -- and you said it's stunning and
19 shocks the conscience, that's how you described
20 it --

21 MR. O'CONNOR: Yes.

22 JUSTICE SOTOMAYOR: -- why would we
23 care about how long it would take to seek
24 redress from that prosecutor? Something that
25 shocks the conscience appears to me to be so

1 egregious that we should ensure, even with
2 delayed time, that the victim of that conduct
3 would not be deprived of a day in court because
4 of a hastily imposed statute of limitations.

5 MR. O'CONNOR: Well, first of all,
6 that would be just an allegation, which is why
7 a prompt investigation would be needed. And it
8 would be only fair to apprise the particular
9 defendants with the new --

10 JUSTICE SOTOMAYOR: Well, it seems to
11 me that most prosecutors in a contested trial
12 know that the defendant is still claiming his
13 or her innocence and, by implication, is still
14 claiming that the evidence at the trial -- that
15 there's something wrong with it.

16 So it's not as if speed is in the
17 essence in notifying the prosecutor that
18 there's a potential claim there.

19 MR. O'CONNOR: Well, let me -- in this
20 case, after the -- after the defendant was
21 acquitted in this case, he had two years and
22 three months to file this action in a timely
23 manner, embracing both of the claims.

24 So the idea that because you're using
25 the traditional accrual rule, that you're --

1 you're putting the defendant's back against the
2 wall as a practical matter is not true.

3 CHIEF JUSTICE ROBERTS: Well, it may
4 not be true in this case, but it depends in
5 other cases when the accrual would occur. I
6 don't think we can establish a rule based on
7 the fact that the individual in this case had
8 two years and three months when other
9 individuals may not have anywhere near that
10 time.

11 MR. O'CONNOR: Granted. But,
12 Mr. Chief Justice, in any statute of
13 limitations case or issue, you're going to have
14 examples that appear to be unfair.

15 So I -- I -- on -- on the other side
16 of that question, if a defendant feels that
17 there is improper conduct, that there is
18 perjury, that there is manufactured evidence,
19 he chooses his remedies and he is really bound
20 by what the -- what the law provides for -- for
21 get --

22 CHIEF JUSTICE ROBERTS: Well, we're
23 trying to figure that out. In -- in a
24 situation like this, you know, it may take a
25 little -- a little bit of time to get the

1 pieces of your shattered life, because of
2 fabricated evidence, pulled together before you
3 can suddenly decide, okay, now -- now we're
4 going to sue the people who did this to me.

5 MR. O'CONNOR: Well, I -- I
6 understand.

7 JUSTICE GINSBURG: You do say
8 something in your brief, I think, that was
9 puzzling. You say that an acquittal at trial
10 means that the use of false testimony at that
11 trial didn't deprive him of liberty. You say
12 he's been acquitted, so he's at liberty.

13 But what about his liberty from the
14 time he was indicted through to the end of that
15 trial? Wasn't he deprived of liberty in that
16 interval?

17 MR. O'CONNOR: Yes, but, again, I -- I
18 think that falls for the most part within his
19 Fourth -- Fourth Amendment claim, which was
20 dismissed.

21 So, to continue with my argument --

22 JUSTICE GINSBURG: So -- but -- but
23 now -- now you're saying he -- he was deprived
24 of liberty, but not for due process purposes,
25 only for Fourth Amendment purposes?

1 MR. O'CONNOR: I'm sorry, Judge. I
2 couldn't understand.

3 JUSTICE GINSBURG: You said -- you
4 said he was deprived of liberty. By having to
5 undergo a trial, he was deprived of liberty.
6 But you say --

7 MR. O'CONNOR: I'm not sure that just
8 being compelled to undergo a trial constitutes
9 a deprivation of liberty.

10 JUSTICE GINSBURG: What about all the
11 time that he lost? Let's say, he's a
12 contractor and he can't take a long-term
13 contract because he might be in prison while
14 the contract would still be running its course.

15 MR. O'CONNOR: Sure. These are --
16 these are -- these complaints fall under the
17 rubric of custody. Custody is a Fourth
18 Amendment concept, and that would -- that type
19 of a claim, that type of damage, would come
20 under the Fourth Amendment umbrella under the
21 constitutional division of labor that this
22 Court set forth in footnote 8 of Manuel.

23 JUSTICE KAGAN: I thought that that
24 division of labor was about things that
25 happened prior to judicial process starting and

1 things that happened afterward.

2 MR. O'CONNOR: No. That, in fact,
3 involved pretrial deprivations -- deprivations
4 of right up to the time of trial. And, you
5 know, when you read -- when you read Albright
6 and you read Manuel, I mean, the Court is
7 basically saying to the due process people:
8 Stay the heck out of this area. This is
9 occupied by the Fourth Amendment.

10 So the problem that the Petitioner has
11 is most, if not all of his claim has been
12 dismissed. Look at how he has described the
13 nature of his fabrication of evidence claim in
14 his -- in his brief before the -- before the
15 court of appeals.

16 His brief, page 4, it is a
17 quintessential malicious prosecution claim.
18 And he says the same thing in his reply at page
19 2, and then subsequently he says it's based on
20 the initiation of a criminal proceeding based
21 upon fabricated evidence.

22 JUSTICE KAVANAUGH: Your --

23 MR. O'CONNOR: Now --

24 JUSTICE KAVANAUGH: Your rule could
25 encourage -- correct me if I am wrong, could

1 encourage the filing of 1983 suits while the
2 criminal process is ongoing?

3 MR. O'CONNOR: I didn't hear the
4 beginning of your question, Judge. I'm sorry.

5 JUSTICE KAVANAUGH: Your proposed rule
6 for this case could encourage the filing, the
7 routine filing, even, of 1983 suits during the
8 midst of the criminal proceedings; isn't that
9 correct?

10 MR. O'CONNOR: That is correct. I
11 don't discount that, yes.

12 JUSTICE KAVANAUGH: And that's not a
13 problem, you don't think, to -- in the orderly
14 division of how this should proceed, to have
15 the criminal process come to a conclusion and
16 then, if there's going to be a tort suit, to
17 have that follow on? Why isn't that not a more
18 orderly --

19 MR. O'CONNOR: It may be more orderly
20 but it's incorrect. If there's not a legal
21 reason to do it, I would discourage the Court
22 from doing it.

23 If the claim has accrued, if all of
24 its elements are --

25 JUSTICE KAVANAUGH: Well, just if

1 the -- if the law is mirky, and we're -- we can
2 choose one path or another reasonably as a
3 matter of law, wouldn't we choose the more
4 orderly, practical approach which would
5 suggest, I think, let's not encourage the
6 filing routinely of 1983 suits in the midst of
7 the criminal process?

8 MR. O'CONNOR: It's kind of a loaded
9 question, Judge, I think. Perhaps. Perhaps.
10 I'll grant you that. But I -- I just don't
11 think it's the right way to go.

12 This is an area that could use some
13 rigor. It is kind of a thick. And -- and I
14 think we --

15 JUSTICE KAVANAUGH: Well, on the
16 rigor, you say that a stay is routinely granted
17 in the Second Circuit, I believe you said.

18 MR. O'CONNOR: It -- it is used in --
19 in the appropriate cases.

20 JUSTICE KAVANAUGH: And doesn't the
21 stay reflect the concept or the idea that it
22 would not be orderly to have these two things
23 going on simultaneously?

24 MR. O'CONNOR: I think it's more based
25 upon a review of the claims in the specific

1 case. And if the judge feels that, well, you
2 know, we better hold things up here because
3 there is a direct conflict and one party may be
4 prejudiced if they continue at the same time.
5 I -- I think that's really where the analysis
6 is.

7 So basically the -- the Petitioner is
8 asking the Court, I know my malicious
9 prosecution case has been dismissed, but I want
10 you to review this claim as though it was a
11 malicious prosecution claim.

12 And in doing so, he is importing
13 elements from a malicious prosecution claim
14 into the analysis of the fabricated evidence
15 claim.

16 Now, two years ago, this Court in
17 County of Los Angeles versus Mendez warned that
18 you shouldn't do this. You shouldn't use
19 elements from from a discrete 1983 case to
20 assess the validity of an independent and
21 discrete 1983 case.

22 So I think that because of this
23 tortured argument importing unrelated elements,
24 merely to salvage a time-barred case, it
25 defaces the -- the Petitioner's claim,

1 transforming it into something else. And
2 that's why I conclude that he -- that the
3 Petitioner hasn't really set forth a discrete
4 constitutional claim.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Four minutes,
7 Mr. Katyal.

8 REBUTTAL ARGUMENT OF NEAL K. KATYAL
9 ON BEHALF OF THE PETITIONER

10 MR. KATYAL: Thank you, Mr. Chief
11 Justice.

12 I -- I just have one point. Justice
13 Gorsuch, you asked Mr. Wall why decide this
14 case when there's daylight between the
15 government and the petitioner about whether the
16 termination requirement is a necessary element.

17 And we think this Court should resolve
18 this because of the massive circuit split
19 that's outlined in the petition and leave open
20 the question of whether it's a mandatory
21 element.

22 And we think so for two reasons. One
23 of the policy concerns that the Chief Justice
24 pointed to, Justice Sotomayor, Justice Breyer,
25 and Justice Kavanaugh about not wanting to

1 force people to file during their criminal
2 trial, and this is really important, as the
3 amici say, there is a rampant problem of
4 fabrication of evidence.

5 And as Justice Ginsburg said, that's
6 the kind of quintessential due process
7 violation this Court has recognized since
8 Mooney.

9 And the second point, most notably,
10 contrary, Justice Gorsuch, to the premise of
11 your question, it's quite remarkable to
12 actually have the federal government agreeing
13 with this former criminal defendant on this
14 issue and saying the policy concerns -- as
15 Justice Kavanaugh says, the orderly and
16 practical policy concerns are ones that say
17 that a favorable termination rule, at least at
18 a minimum, should be imported as a limitations
19 rule.

20 That would safeguard the policy
21 concerns, all the different policy concerns
22 that the favorable termination requirement has
23 had at common law, and you then leave for
24 another day the further question, is it an
25 absolutely mandatory element on the merits?

1 We think that's the simplest way to
2 resolve this case. There are other theories
3 like continuing violation and the like and I'm
4 happy to answer any questions on -- on that.

5 Otherwise --

6 JUSTICE GORSUCH: Is what you're
7 arguing for really a form of equitable tolling?

8 MR. KATYAL: Well, I think equitable
9 tolling is a different for reasons -- it's a
10 different strand as this Court recognized in
11 that 1985 case, Wilson versus Garcia, but I
12 guess we wouldn't have an objection if the
13 Court wanted to fashion an equitable tolling
14 rule.

15 We don't think you have to here. We
16 think instead you can do what Judge Boggs did
17 in the Sixth Circuit, what Judge Motz did in
18 the Fourth Circuit, and what the Ninth Circuit
19 did as well and say this first theory that
20 favorable termination is a limitations rule,
21 just import that, it tracks Justice Scalia's
22 opinion in Wallace and leave it at that.

23 JUSTICE ALITO: Just -- just to
24 clarify for my own thinking, what are the
25 elements of your claim?

1 MR. KATYAL: The elements of the claim
2 are the -- are -- are -- are the four that I
3 read to you earlier, so it's initiation or
4 continuation of a criminal proceeding;
5 termination of the proceeding; lack of probable
6 cause -- oh, excuse me, sorry, that's the
7 malicious prosecution.

8 For -- for fabrication evidence, it's
9 fabrication evidence caused a deprivation of
10 liberty. It tracks very much what Mr. Wall
11 had -- had said in his presentation to you.

12 And we agree very much that there is a
13 difference between probable cause and the Fifth
14 Amendment standard.

15 JUSTICE ALITO: So in -- in every case
16 in which someone is prosecuted, will there not
17 be the deprivation of liberty under your
18 understanding?

19 MR. KATYAL: Well -- well, there --
20 there -- there could be some deprivations of
21 liberty but often not. They could not -- they
22 may not have the travel restrictions we point
23 to here. So here that's --

24 JUSTICE ALITO: So if they're just --
25 if they're just released on their own

1 recognizance, then there would be no
2 deprivation of liberty, but if there are any
3 other restrictions, every other case where
4 there are any restrictions imposed, there would
5 be the deprivation of liberty?

6 MR. KATYAL: Well, I -- I -- I think
7 there might or might not. As this case comes
8 to the Court, Petition Appendix 10(a) says they
9 conceded a deprivation of liberty here.

10 JUSTICE ALITO: No, I'm just trying to
11 understand --

12 MR. KATYAL: Yeah.

13 JUSTICE ALITO: -- the elements.
14 So really the only important element is the
15 fabrication of evidence.

16 MR. KATYAL: And causation, which
17 turns out to be crucial in a lot of these
18 cases.

19 JUSTICE ALITO: Causation of what?

20 MR. KATYAL: So -- cause -- you have
21 to show the fabrication itself caused a
22 deprivation of liberty. So if, for example,
23 there's a massive amount of other evidence or
24 something like that, then that doesn't cause
25 the deprivation of liberty.

1 If there are no further questions.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:06 p.m., the case
5 was submitted.)

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Official - Subject to Final Review

1	action ^[4] 19:16 40:5 47:24 51:22 actions ^[1] 17:3 actual ^[2] 13:10 22:10 actually ^[9] 5:13 12:3,9 16:8 24:16, 18 25:21 39:12 60:12 addressing ^[1] 15:1 adopt ^[7] 5:24 13:24 14:6 18:15,16 19:22 34:18 adopted ^[1] 28:3 adopting ^[1] 35:3 affect ^[2] 42:5,6 affected ^[2] 30:5,23 affirmed ^[1] 44:15 afterward ^[1] 55:1 Agers ^[1] 25:13 ago ^[1] 58:16 agree ^[9] 7:11 9:6 16:5,7 24:19 25: 22 26:13 28:8 62:12 agreeing ^[1] 60:12 agreement ^[1] 48:20 Agurs ^[1] 29:15 Agurs-Mooney ^[1] 26:25 akin ^[2] 23:17 25:12 Albany ^[1] 2:9 Albright ^[1] 55:5 ALITO ^[22] 6:14,17,20 7:10,20 8:1, 13,16,18 12:25 13:12 21:12 26:18 29:24 30:3,6 61:23 62:15,24 63: 10,13,19 Alito's ^[1] 38:19 allegation ^[2] 41:11 51:6 allegations ^[1] 49:19 allege ^[2] 4:23 12:25 allegedly ^[1] 41:7 alleges ^[2] 39:21 47:5 alleging ^[1] 13:2 allow ^[1] 47:12 allows ^[1] 17:9 alone ^[3] 18:19 35:24 38:8 already ^[1] 48:24 although ^[1] 47:3 Amendment ^[29] 5:7,11,12 7:5,8, 14,18,18 8:2,5,10 12:9 17:17 21: 10,11 25:4,15,16 26:12 33:2 40:1 42:1,3 53:19,25 54:18,20 55:9 62: 14 Amendments ^[2] 7:13 8:19 amici ^[2] 10:6 60:3 amicus ^[4] 2:7 3:7 11:18 23:2 amount ^[1] 63:23 analog ^[1] 20:21 analogies ^[1] 7:3 analogize ^[1] 45:22 analogous ^[4] 23:11 28:2 35:17 37:20 analogue ^[1] 45:16 analogy ^[9] 4:14,19 5:25 6:11 7:17 31:24 45:3,7,9 analysis ^[5] 14:8 20:19 38:23 58:5, 14 Angeles ^[1] 58:17 another ^[3] 33:9 57:2 60:24 answer ^[3] 45:5 46:21 61:4 antecedent ^[1] 20:25	appeals ^[5] 26:11,14 39:16 44:22 55:15 appear ^[1] 52:14 APPEARANCES ^[1] 2:1 appears ^[1] 50:25 Appendix ^[1] 63:8 applied ^[1] 21:1 applies ^[1] 8:11 apply ^[3] 22:11 45:23 46:4 appraisal ^[1] 49:24 apprise ^[1] 51:8 approach ^[2] 50:13 57:4 appropriate ^[2] 48:10 57:19 April ^[1] 1:14 area ^[4] 31:9 50:12 55:8 57:12 aren't ^[1] 33:6 argue ^[1] 42:20 arguing ^[1] 61:7 argument ^[21] 1:17 3:2,5,9,12 4:7 5:24 9:19 12:24 18:6 23:1 25:20 37:4 41:19,23 46:19 47:12,17 53: 21 58:23 59:8 arguments ^[2] 9:11 37:11 arises ^[1] 43:15 aside ^[2] 27:19 32:3 assess ^[1] 58:20 assistant ^[1] 48:17 assume ^[1] 37:14 assuming ^[2] 33:13 50:16 atrocious ^[2] 41:7,7 attacking ^[5] 27:16,21,25 36:5,21 attacks ^[1] 35:1 ATTORNEY ^[3] 1:7 28:11 48:18 avoid ^[2] 14:1 17:12 away ^[1] 32:22 awful ^[1] 31:3	bit ^[1] 52:25 bite ^[1] 12:16 Boggs ^[1] 61:16 borrow ^[2] 6:12 24:8 borrowing ^[1] 34:15 both ^[7] 5:5 7:7,18 20:24 44:21 47: 22 51:23 bound ^[1] 52:19 Brady ^[4] 25:13 26:24 29:14 34:21 Brady's ^[1] 29:18 BREYER ^[6] 46:6,23 47:1,8,23 59: 24 brief ^[11] 9:12,14 11:17,18,25 16: 24 36:25 44:21 53:8 55:14,16 briefly ^[1] 36:18 briefs ^[4] 10:6 16:22 40:10 46:20 bring ^[10] 19:4,4,7 20:13 25:10 27: 20 46:7,16,18 47:13 bringing ^[2] 32:4 46:9 brought ^[2] 4:12 25:3 burden ^[1] 14:14
2	2 ^[2] 8:21 55:19 2001 ^[1] 10:20 2019 ^[1] 1:14 23 ^[1] 3:8 24 ^[1] 11:18 25 ^[1] 11:18	back ^[7] 20:20,24 35:14 38:19 40: 24 44:23 52:1 backwards ^[1] 14:22 bad ^[1] 27:8 based ^[13] 4:13 6:23 7:5,8,9 8:14 23:9,16 39:18 52:6 55:19,20 57: 24 basic ^[1] 38:7 basically ^[3] 46:19 55:7 58:7 basis ^[3] 29:14,16 30:13 bazillion ^[1] 11:17 began ^[1] 23:23 beginning ^[1] 56:4 behalf ^[8] 2:4,10 3:4,11,14 4:8 37: 5 59:9 behavior ^[1] 50:16 behind ^[1] 33:19 belief ^[2] 17:2 28:5 believe ^[1] 57:17 below ^[6] 5:6 9:11,25 11:3 32:17 33:5 bespoke ^[1] 14:17 best ^[3] 10:4 48:8 49:2 better ^[3] 4:18 24:15 58:2 between ^[7] 8:25 11:20 12:15 15: 7 30:7 59:14 62:13	C
3	B	CAC ^[1] 11:18 call ^[2] 47:10,24 came ^[1] 1:16 cannot ^[2] 14:18 24:19 care ^[2] 47:11 50:23 Carey ^[1] 20:20 Case ^[45] 4:4 6:7,17,18 7:12 9:5,7 14:24 15:4 23:7 24:1,16 25:20 30: 15 33:9 37:9 39:16 40:19 46:7,11, 16,18 48:5,5 49:18,22 51:20,21 52:4,7,13 56:6 58:1,9,19,21,24 59: 14 61:2,11 62:15 63:3,7 64:3,4 cases ^[14] 9:18 11:17 12:13 19:16 29:23 30:21 38:14,18,20,23 46:12 52:5 57:19 63:18 categorizing ^[1] 39:10 causation ^[4] 8:9 29:25 63:16,19 cause ^[27] 4:24 5:8,10,14 8:3,4,5, 25 15:8 19:16 22:9,10 25:5 29:12 30:7,10,19 38:22 39:22 40:5 44:4 46:2 47:5 62:6,13 63:20,24 caused ^[4] 12:11 40:11 62:9 63:21 caution ^[1] 32:22 certainly ^[6] 6:3 7:2 13:17 39:13 48:25 49:19 certiorari ^[1] 13:20 challenge ^[2] 8:23 35:13 challenged ^[1] 41:10 characterize ^[1] 46:15 characterizing ^[1] 47:24 charges ^[1] 36:12 CHIEF ^[20] 4:3,9 22:15,22 23:4 36: 18 37:1,6 40:2,15 48:11 49:7,13 52:3,12,22 59:6,10,23 64:2 chill ^[1] 17:4 chilling ^[1] 17:14 choose ^[2] 57:2,3 chooses ^[1] 52:19 Circuit ^[12] 8:21 26:2 32:24 44:15 46:24 47:18 49:4 57:17 59:18 61: 17,18,18	
4			
4 ^[3] 3:4 8:22 55:16 484 ^[1] 34:13 489-90 ^[1] 34:14			
5			
56a ^[1] 5:9 59 ^[1] 3:14			
6			
6 ^[1] 8:22			
7			
7 ^[1] 8:22			
8			
8 ^[3] 8:22 16:25 54:22			
A			
a.m ^[2] 1:18 4:2 a/k/a ^[1] 1:9 able ^[2] 18:6 50:3 above-entitled ^[1] 1:16 absence ^[4] 5:1,10 8:4 39:21 absolute ^[6] 9:24 10:4,19 12:5,17, 18 absolutely ^[4] 6:6 8:24 9:22 60:25 academic ^[2] 9:20 10:4 accept ^[1] 41:23 accepted ^[1] 42:18 accrual ^[7] 7:1 42:14 46:4 49:23 50:14 51:25 52:5 accrue ^[3] 10:11 35:5 42:25 accrued ^[1] 56:23 accrued ^[2] 6:21 15:8 accused ^[1] 48:24 acknowledges ^[1] 46:25 acquittal ^[4] 5:19 23:24 42:12 53: 9 acquitted ^[3] 32:15 51:21 53:12			

Official - Subject to Final Review

<p>Circuit's ^[1] 10:15 circuits ^[1] 12:14 circumstances ^[2] 47:3 48:7 cited ^[3] 16:11,12,24 civil ^[4] 17:21 18:3 46:9 48:5 claim ^[108] 4:15,23 5:9 6:21,24 8:6 11:2,6,7,8,12 12:3,6,7 13:5,16 14:9,10,13 16:14 20:11,16 21:4,8,23 23:13,22 24:20 25:4,9,11,12,15,16,25 26:7,13,24,24,25 27:20 28:10,15,19,20,21,22 29:1,2,7 30:1,22 31:1,10,17 33:6 34:3 35:4 36:2,4 37:21,23,25 38:25 39:11,18,21 40:18,19,20 43:7,11,13,18,20,22,24 44:4,8,10,12,13,14,19,25 45:11,14,17,18 46:1,25 47:13 50:4 51:18 53:19 54:19 55:11,13,17 56:23 58:10,11,13,15,25 59:4 61:25 62:1 claim's ^[1] 25:7 claimed ^[1] 4:11 claiming ^[4] 11:1,10 51:12,14 claims ^[22] 10:7,11 11:20 13:22 16:7 18:19 20:22 21:6,10 22:12 25:3 27:31 31:25 32:4 34:21,22 42:2 44:11 50:4 51:23 57:25 clarify ^[2] 7:4 61:24 Clause ^[3] 7:14 40:22 42:23 clear ^[4] 23:10 24:10 34:13 39:20 client's ^[1] 14:12 closest ^[6] 4:14 5:25 37:23 45:3,6,9 collateral ^[2] 14:2 17:12 collaterally ^[1] 27:22 colloquy ^[1] 44:24 come ^[3] 18:7 54:19 56:15 comes ^[3] 39:10 44:18 63:7 coming ^[1] 14:21 committed ^[1] 41:8 committing ^[1] 45:18 common ^[26] 4:14,19 6:10 7:2,16 11:16 20:25 21:7 23:11,18 25:8 28:1 29:1,5 31:24 34:12,16,19,24 37:16,19,23 38:1 45:3,16 60:23 compatriot ^[2] 25:22 27:3 compelled ^[1] 54:8 compensatory ^[1] 19:2 complaint ^[6] 5:6 11:2 13:4 20:9 48:13 49:10 complaints ^[1] 54:16 complicate ^[1] 48:22 complicated ^[1] 47:9 complication ^[1] 15:1 components ^[1] 43:7 conceded ^[3] 32:17 33:4 63:9 concept ^[2] 54:18 57:21 concepts ^[1] 34:8 concern ^[1] 48:15 concerned ^[1] 18:13 concerns ^[6] 16:21 59:23 60:14,16,21,21 concession ^[1] 32:23 conclude ^[1] 59:2 conclusion ^[1] 56:15 concurrence ^[1] 25:7</p>	<p>conduct ^[3] 38:6 51:2 52:17 conflict ^[1] 58:3 confused ^[1] 26:19 confusion ^[1] 50:13 conscience ^[4] 31:4 39:10 50:19,25 consideration ^[1] 27:4 constitute ^[1] 42:12 constitutes ^[2] 13:14 54:8 Constitution ^[2] 6:22 31:4 constitutional ^[15] 5:4 21:4,6,8 25:4,11 28:10 29:1 36:1 38:10 39:18 40:12 45:17 54:21 59:4 contested ^[1] 51:11 continuation ^[3] 11:22 22:7 62:4 continue ^[2] 53:21 58:4 continuing ^[3] 19:24 42:13 61:3 contract ^[2] 54:13,14 contractor ^[1] 54:12 contradiction ^[1] 38:6 contrary ^[2] 47:14 60:10 convenient ^[1] 50:10 convict ^[4] 30:12 38:2 39:7 45:2 convicted ^[2] 18:20 35:23 conviction ^[7] 23:9 26:8,11 27:22 32:2 35:8 38:15 Cordova ^[1] 25:7 correct ^[9] 10:21 23:25 31:18 39:16 44:3 50:10 55:25 56:9,10 corrupt ^[1] 41:14 couldn't ^[1] 54:2 counsel ^[3] 22:23 37:2 64:3 count ^[2] 20:8 21:16 counts ^[1] 33:19 COUNTY ^[2] 1:8 58:17 course ^[5] 13:18 38:14,16 41:5 54:14 COURT ^[46] 1:1,17 4:10 5:8 6:8 8:20 9:24 10:23 12:20,23 13:6 15:6 16:10 17:9 18:1 20:18 23:5 26:6,16 30:18 31:6,11 32:18,22 33:7 37:39 39:15,20 44:21 48:4,6,8 50:7,9 51:3 54:22 55:6,15 56:21 58:8,16 59:17 60:7 61:10,13 63:8 Court's ^[4] 12:19 18:18 29:4 30:21 courts ^[6] 5:6 11:3 22:12 26:11,14 33:8 covers ^[1] 7:17 create ^[1] 14:17 crime ^[1] 37:20 criminal ^[33] 4:12,17 11:15 17:15,21 18:2,24 19:13 22:7 23:19 28:5 32:10 35:1,14 36:5,13 38:14 39:24 46:8 47:13,15 48:4,15,23 49:17 55:20 56:2,8,15 57:7 60:1,13 62:4 crucial ^[1] 63:17 curiae ^[3] 2:7 3:7 23:2 custody ^[2] 54:17,17</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. ^[3] 1:13 2:3,6 damage ^[1] 54:19 damages ^[7] 23:8,15 27:20 28:7,</p>	<p>15 32:4 36:4 date ^[2] 43:10,20 day ^[2] 51:3 60:24 daylight ^[5] 8:25 15:7 16:10,13 59:14 deal ^[2] 12:17 47:20 dealing ^[2] 17:7 40:7 decades ^[2] 40:13 49:5 decide ^[6] 6:9,9 14:24 19:20 53:3 59:13 deciding ^[2] 6:7 14:22 decision ^[3] 10:15 12:19 18:18 defaces ^[1] 58:25 defeat ^[1] 20:1 defendant ^[8] 9:20 32:10 43:1 48:23 51:12,20 52:16 60:13 defendant's ^[1] 52:1 defendants ^[2] 17:14 51:9 defined ^[1] 36:16 definitely ^[1] 10:3 delay ^[1] 18:19 delayed ^[1] 51:2 deliberately ^[2] 22:17 38:1 delineation ^[1] 9:13 dense ^[1] 20:5 Department ^[1] 2:6 depending ^[1] 6:25 depends ^[1] 52:4 depositions ^[1] 49:16 deprivation ^[19] 8:8 12:12 26:23 32:11,13 33:1 36:3 43:8,15,16 44:1 54:9 62:9,17 63:2,5,9,22,25 deprivations ^[5] 39:23 42:2 55:3,3 62:20 deprive ^[2] 26:10 53:11 deprived ^[7] 25:17 41:1 51:3 53:15,23 54:4,5 Deputy ^[1] 2:5 described ^[2] 50:19 55:12 describes ^[1] 44:20 despite ^[1] 31:25 detection ^[1] 32:14 determination ^[1] 39:15 determine ^[2] 6:21 45:23 deterrence ^[1] 19:1 difference ^[6] 9:7 11:20 12:15 30:7 33:23 62:13 different ^[30] 5:4 7:1,2 10:22 11:6,8,11,25 12:1,13 15:3 19:19 20:16,22 21:4,5,8,10,19,21,24 25:13 26:23 28:20 29:3 34:1 35:15 60:21 61:9,10 difficult ^[1] 23:7 dire ^[1] 48:25 direct ^[1] 58:3 directly ^[1] 47:20 disagree ^[2] 24:11 39:12 disagreement ^[2] 26:6 27:12 disappointed ^[1] 50:9 discount ^[1] 56:11 discourage ^[1] 56:21 discovery ^[2] 18:16,16 discrete ^[4] 39:18 58:19,21 59:3 discretionary ^[1] 17:25</p>	<p>dismissal ^[2] 44:16,16 dismissed ^[9] 11:4 20:9 21:17,20 36:12 44:15 53:20 55:12 58:9 dispute ^[1] 41:16 disputes ^[1] 35:11 distinctive ^[1] 42:24 distraction ^[1] 17:18 DISTRICT ^[7] 1:7 5:8 8:20 18:1 48:7,18 50:6 division ^[3] 54:21,24 56:14 doing ^[3] 20:14 56:22 58:12 done ^[1] 9:3 dramatic ^[1] 41:11 due ^[31] 5:13 7:6,14 8:7,9,22 25:12 26:7 29:25 30:22 31:8,12,21,22 32:7 33:14 38:16,25 39:5,13 40:21,25 41:4,8,22 42:9,16,23 53:24 55:7 60:6 duplicative ^[3] 14:4 17:13 18:22 during ^[4] 45:19,20 56:7 60:1</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[2] 42:11,22 earlier ^[3] 21:22 28:19 62:3 early ^[1] 31:9 easily ^[1] 30:18 EDWARD ^[1] 1:3 effect ^[1] 30:14 egregious ^[1] 51:1 either ^[7] 12:8 14:9 16:3 30:18 42:12 44:4 45:19 element ^[31] 5:8 8:5,9 12:9 13:4,18 16:19 17:6 19:22 23:12,22 24:3,4,4,7 27:2,7,14 28:9,15 31:17 34:20,24 35:3,10 38:22 43:10 59:16,21 60:25 63:14 elements ^[20] 5:13 6:24,25 12:1,13 14:25 15:18 21:22 24:18,20 26:21 29:2,8 56:24 58:13,19,23 61:25 62:1 63:13 emanations ^[1] 8:17 embracing ^[1] 51:23 employers ^[1] 49:25 enables ^[1] 49:25 encompassed ^[1] 39:25 encourage ^[4] 55:25 56:1,6 57:5 end ^[5] 9:20 27:17 35:13,14 53:14 ended ^[1] 32:1 ends ^[1] 28:15 enforcement ^[1] 10:12 ensure ^[1] 51:1 enter ^[1] 48:20 entitled ^[1] 39:4 envisioned ^[1] 48:4 equitable ^[3] 61:7,8,13 ESQ ^[6] 2:3,9 3:3,6,10,13 essence ^[2] 23:18 51:17 establish ^[1] 52:6 even ^[8] 10:4 24:18 31:20 40:13 43:15 48:12 51:1 56:7 everyone ^[1] 15:19 everything ^[1] 47:15 evidence ^[60] 4:14 9:4 10:7,17,18 11:9 12:11 13:1,5,13,15 19:12 20:</p>
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Official - Subject to Final Review

10,14,24 22:12,17,17 23:9,16 26:8, 22 27:9 28:11,19,21 29:7,17,20 30:13,15 31:2,11 33:21 35:7,23 36:10 38:2 39:7,19,22 42:11 44: 13,20 45:1 47:4,6,10 50:18 51:14 52:18 53:2 55:13,21 58:14 60:4 62:8,9 63:15,23 evidentiary [1] 38:21 evidently [1] 41:3 exactly [3] 7:15 10:25 11:15 example [6] 12:2 15:13 18:2,2 47: 3 63:22 examples [1] 52:14 Except [1] 27:1 exchange [1] 38:19 exclusive [1] 42:1 exculpatory [1] 29:20 excuse [1] 62:6 exist [1] 12:5 exists [2] 14:25 24:17 expand [1] 31:7 explains [1] 12:1 exploring [1] 29:4	file [6] 17:16 18:23 48:16 49:10 51: 22 60:1 filing [4] 56:1,6,7 57:6 find [1] 39:1 finding [1] 4:23 finishing [1] 42:13 first [12] 6:5 9:12 15:19 16:4 23:20 24:6,12 37:13 42:15,15 51:5 61: 19 focuses [1] 4:16 follow [2] 39:9 56:17 following [1] 16:25 follows [1] 10:22 Footnote [2] 15:14 54:22 force [1] 60:1 forces [1] 12:23 form [1] 61:7 former [1] 60:13 forth [2] 54:22 59:3 fortiori [1] 23:14 forward [1] 36:24 found [2] 29:22 30:11 four [3] 22:6 59:6 62:2 Fourteenth [9] 7:14,18 8:19 12:8 21:11 25:16 26:12 33:1 42:1 Fourth [22] 5:7,11 7:5,13,13,18 8:1, 5,19 12:8 21:10 25:3,15 39:25 42: 3 53:19,19,25 54:17,20 55:9 61: 18 front [1] 35:13 fundamental [3] 38:7 39:2 41:1 fundamentally [2] 39:3,6 further [2] 60:24 64:1	H habeas [3] 27:18 28:6 32:2 hand [2] 39:24,24 happened [2] 54:25 55:1 happstance [1] 14:15 happy [2] 26:20 61:4 hard [2] 39:1 44:9 hark [1] 38:18 harmed [1] 32:1 hastily [1] 51:4 hazard [1] 43:6 head [2] 6:18 37:8 hear [3] 4:3 43:12 56:3 heard [2] 37:10 40:10 hearing [2] 9:13 32:25 hearts [1] 12:19 heavily [1] 46:10 Heck [13] 18:19 23:10,13 27:15 34: 12,20 35:10,19 36:7,24 47:22 48: 3 55:8 Heck-Preiser [1] 34:7 held [2] 26:6 30:21 higher [1] 14:14 historic [1] 19:15 history [2] 33:19 34:2 hold [2] 30:11 58:2 Honor [1] 13:18 However [2] 38:18 46:15 hypothetical [2] 9:6,18	individuals [1] 52:9 inhere [1] 10:7 initiation [5] 4:16 11:21 22:7 55: 20 62:3 injuries [1] 42:2 innocence [1] 51:13 innocent [1] 38:3 innocent [1] 45:18 instead [2] 5:14 61:16 interested [3] 47:11,25 48:1 interests [1] 15:2 interpreted [2] 13:7 22:13 interval [1] 53:16 introduce [2] 10:18 29:20 introduction [1] 31:2 investigate [1] 50:1 investigation [1] 51:7 investigators [1] 10:9 involve [2] 21:24,25 involved [4] 32:5 40:13 46:11 55: 3 irrespective [1] 43:16 isn't [7] 22:18 39:2 41:3 45:5,6 56: 8,17 isolated [1] 42:24 issue [5] 16:14 27:5 49:15 52:13 60:14 it'll [1] 14:1 itself [5] 23:13 31:3 36:7 43:17 63: 21
F fabricate [1] 10:17 fabricated [21] 4:13 9:4 11:9 23:9, 16 26:22 27:8 28:19,21 29:7 31:2 33:22 35:7,22 39:19,22 42:11 47: 7 53:2 55:21 58:14 fabricates [2] 28:11 50:17 fabricating [4] 20:14 22:16,17 26: 8 fabrication [22] 10:7 12:11 13:1,5, 15 19:12 20:10,24 21:23 22:11 34: 3 40:8 43:17 44:12,20 45:1 55:13 60:4 62:8,9 63:15,21 fabrication-of-evidence [1] 12:7 facing [1] 18:24 fact [3] 18:22 52:7 55:2 facts [1] 19:5 faded [3] 18:8,14,21 failed [1] 39:17 fair [6] 39:3,6 41:2,6 50:2 51:8 fairness [1] 39:3 fall [3] 29:8 42:3 54:16 falls [4] 39:12,13 41:25 53:18 false [5] 13:14 16:13 31:10 34:3 53:10 falsely [1] 48:23 falsifies [1] 38:2 fashion [1] 61:13 fathom [1] 39:2 favor [1] 22:9 favorable [24] 5:23 6:10 13:25 14: 7 16:18 17:11 23:12,21 27:2 28:3, 8 31:18 33:17,20 34:9,25 35:9 36: 15 43:9,19 46:2 60:17,22 61:20 favorably [2] 27:17 36:6 federal [4] 17:15 19:15,16 60:12 feels [2] 52:16 58:1 Fifth [6] 5:12 7:6,13 17:17 33:1 62: 13 figure [4] 20:6 24:15,17 52:23	G Garcia [1] 61:11 gave [1] 36:24 General [3] 2:6 7:11 9:23 getting [1] 47:15 Giglio [3] 25:13 26:24 29:14 GINSBURG [26] 9:17 10:1 12:5 17: 20 18:7 20:2 22:16,21 37:16,19, 25 38:9,12,24 40:23 41:13,17 44: 23 45:10,13,21 53:7,22 54:3,10 60:5 Ginsburg's [2] 41:24 42:19 GORSUCH [27] 7:23 9:9,15 14:3,6, 20 15:5,10,16,23 16:1 19:22 24:2, 9,14,22,23 25:19,24 26:1,3 27:1, 11,21 59:13 60:10 61:6 got [10] 18:10,22 20:1 25:8 26:22 27:19 30:3,22 32:2 46:19 government [6] 12:21 17:25 18: 10 29:15 59:15 60:12 government's [2] 5:20 23:24 grand [3] 30:11,17 45:19 grant [1] 57:10 granted [3] 13:20 52:11 57:16 great [1] 25:20 grounds [1] 11:5 guess [4] 11:7 21:3 24:21 61:12 guideposts [1] 31:9 guilt [1] 30:16 guilty [1] 29:22	I idea [5] 8:11 18:8,8 51:24 57:21 identified [2] 5:5 8:19 identify [2] 14:18 40:12 ill [1] 36:10 imagine [2] 21:14 30:15 immune [1] 9:21 immunity [7] 10:5,19 11:4 12:5,18, 18 40:6 immunity's [1] 9:24 implication [1] 51:13 import [4] 5:21 34:2,8 61:21 important [5] 17:5 18:5 47:17 60: 2 63:14 imported [1] 60:18 importing [4] 33:17 34:6 58:12,23 imposed [2] 51:4 63:4 imprisonment [1] 16:14 improper [1] 52:17 impure [1] 37:14 inclined [1] 48:19 includes [1] 27:2 including [2] 33:19 39:22 incomprehensible [1] 37:11 incorporate [1] 27:14 incorrect [1] 56:20 incrimination [1] 17:17 independent [3] 17:5 47:6 58:20 indicted [1] 53:14 indictment [2] 5:17 23:15 indifferent [2] 44:4 46:1 individual [1] 52:7 INDIVIDUALLY [1] 1:6	J JEFFREY [3] 2:5 3:6 23:1 Judge [9] 41:16,20 45:12 54:1 56: 4 57:9 58:1 61:16,17 judicial [4] 27:17 28:1 36:22 54:25 juror [5] 30:10,11,12,17,17 jury [3] 29:22 36:12 45:19 Justice [169] 2:6 4:3,10,22 5:1,4, 16,18 6:2,8,14,17,20 7:10,20,23 8: 1,13,16,18 9:1,9,15,17 10:1,1,19, 24 11:19 12:4,25 13:12 14:3,6,20 15:5,9,10,16,23 16:1 17:20 18:7 19:3,9,20,21,22 20:1,3 21:2,12,15, 19 22:2,15,16,21,22 23:4 24:2,9, 14,21,23 25:19,24 26:1,3,18 27:1, 11,15,21 28:13,17,18 29:6,24 30:3, 6,25 31:6,16 32:12 33:12,16 34:4, 5,11,14,20 35:18,21 36:8,18,23 37: 1,6,16,19,25 38:9,12,19,24 40:2, 15,23 41:13,18,21,23 42:4,8,18,19 43:2,24 44:6,23 45:10,13,21 46:6, 23 47:1,8,23 48:11 49:7,13 50:15, 22 51:10 52:3,12,22 53:7,22 54:3, 10,23 55:22,24 56:5,12,25 57:15, 20 59:6,11,12,23,24,24,25 60:5,10, 15 61:6,21,23 62:15,24 63:10,13, 19 64:2
		K KAGAN [15] 10:24 11:19 20:3 21:2, 15,19 22:2 30:25 31:6,16 32:12 43:2,24 44:6 54:23 Kagan's [2] 6:8 28:18	

Official - Subject to Final Review

<p>KATYAL ^[50] 2:3 3:3,13 4:6,7,9,22, 25 5:3,17 6:1,14,15,19 7:10 8:12, 15,18 9:10,22 11:13,24 13:3,17 14:4,19 15:5,12,21 16:6 17:23 19: 6,11 20:4,17 21:9,18,21 22:5,19 59:7,8,10 61:8 62:1,19 63:6,12,16, 20</p> <p>KAVANAUGH ^[14] 19:3,9 28:13, 17 29:6 55:22,24 56:5,12,25 57: 15,20 59:25 60:15</p> <p>keep ^[1] 36:10</p> <p>Keyton's ^[1] 16:23</p> <p>kind ^[7] 14:21 31:4 34:15 47:21 57: 8,13 60:6</p> <p>kinds ^[1] 8:17</p> <p>knowledge ^[2] 13:6 43:1</p> <p>knows ^[1] 46:13</p> <p>Kyles ^[4] 29:18 30:4,8,21</p>	<p>longer ^[2] 14:16 37:9</p> <p>look ^[12] 16:23 17:11 20:21,24 21: 6 27:14 30:19 31:20,22 34:13,23 55:12</p> <p>looking ^[4] 31:10 34:12,16 37:21</p> <p>loose ^[1] 34:15</p> <p>Los ^[1] 58:17</p> <p>lose ^[1] 27:9</p> <p>lost ^[1] 54:11</p> <p>lot ^[5] 16:8 33:18 37:9 50:12 63:17</p> <p>lots ^[1] 20:12</p> <p>lower ^[3] 13:6 22:12 33:8</p>	<p>moment ^[1] 47:25</p> <p>months ^[2] 51:22 52:8</p> <p>Mooney ^[2] 31:10 60:8</p> <p>morning ^[1] 4:4</p> <p>most ^[10] 18:11 23:11 35:17 37:20 41:1 49:14 51:11 53:18 55:11 60: 9</p> <p>motives ^[1] 12:21</p> <p>Motz ^[1] 61:17</p> <p>much ^[5] 6:6 18:15 27:4 62:10,12</p> <p>municipal ^[1] 49:25</p> <p>myself ^[1] 47:19</p>	<p>only ^[17] 10:5 14:8,14 18:6 19:20 22:20 23:23 25:15 26:9 35:6,12 36:2,4 43:24 51:8 53:25 63:14</p> <p>open ^[1] 59:19</p> <p>opinion ^[7] 6:8 10:20 15:9 27:15 34:14 46:23 61:22</p> <p>opinions ^[1] 10:23</p> <p>opposed ^[1] 37:14</p> <p>opposition ^[1] 9:12</p> <p>oral ^[7] 1:16 3:2,5,9 4:7 23:1 37:4</p> <p>order ^[4] 34:25 38:2 45:1,22</p> <p>orderly ^[7] 50:13 56:13,18,19 57:4, 22 60:15</p> <p>ordinary ^[1] 15:4</p> <p>original ^[4] 11:2,12 44:24,24</p> <p>other ^[14] 4:19 11:22 20:8 26:10 36:22 40:17 48:21 52:5,8,15 61:2 63:3,3,23</p> <p>otherwise ^[2] 25:17 61:5</p> <p>ought ^[1] 14:23</p> <p>out ^[17] 13:14 17:15,25 20:6 24:9, 15,17 27:8 28:4,5 44:11 46:19 48: 24 49:18 52:23 55:8 63:17</p> <p>outcome ^[3] 30:5,24 50:5</p> <p>outlined ^[1] 59:19</p> <p>outset ^[1] 11:14</p> <p>over ^[5] 17:22 29:20 30:11 46:16 47:14</p> <p>overlap ^[1] 28:25</p> <p>overwhelming ^[1] 30:16</p> <p>own ^[2] 61:24 62:25</p>
<p style="text-align: center;">L</p> <p>labels ^[1] 44:19</p> <p>labor ^[2] 54:21,24</p> <p>lack ^[3] 22:9 29:11 62:5</p> <p>later ^[3] 10:18 18:17 30:21</p> <p>Laughter ^[2] 7:25 15:25</p> <p>law ^[38] 4:14,19 6:11 7:3,16 10:11 11:16 15:20,21 16:3,4 19:5,6 20: 25 21:7 22:1 23:11,19 25:8,9 28:1 29:2,5 31:24 34:12,16,19,24 37: 17,19,23 38:1 45:4,16 52:20 57:1, 3 60:23</p> <p>lawsuit ^[3] 17:16 46:9 48:16</p> <p>lawsuits ^[2] 18:24 46:8</p> <p>lead ^[1] 19:1</p> <p>learn ^[2] 15:19 16:4</p> <p>learns ^[1] 15:19</p> <p>least ^[4] 5:19 13:25 21:23 60:17</p> <p>leave ^[3] 59:19 60:23 61:22</p> <p>led ^[1] 19:19</p> <p>legal ^[2] 29:14 56:20</p> <p>less ^[2] 19:1 48:19</p> <p>liberty ^[29] 12:12 25:18 26:10,23 32:11,13 33:1 36:3 39:24 43:8,15, 16 44:1 53:11,12,13,15,24 54:4,5, 9 62:10,17,21 63:2,5,9,22,25</p> <p>lies ^[1] 50:5</p> <p>life ^[1] 53:1</p> <p>light ^[1] 32:23</p> <p>likelihood ^[1] 5:15</p> <p>likely ^[1] 10:21</p> <p>limitation ^[2] 15:17 45:23</p> <p>limitations ^[19] 4:20 6:12 13:21 14:1,8,16,23 15:1,7 19:21 23:22 24:16 33:14 34:6 42:6 51:4 52:13 60:18 61:20</p> <p>limited ^[2] 13:20 47:2</p> <p>line ^[1] 28:11</p> <p>lineup ^[1] 34:22</p> <p>lion's ^[1] 18:12</p> <p>litigation ^[4] 15:2 17:13 18:3,22</p> <p>little ^[4] 8:25 48:19 52:25,25</p> <p>loaded ^[1] 57:8</p> <p>long ^[3] 14:23 36:13 50:23</p> <p>long-term ^[1] 54:12</p>	<p style="text-align: center;">M</p> <p>made ^[5] 9:11,11 33:23 39:7 41:14</p> <p>main ^[1] 44:21</p> <p>maintained ^[1] 4:12</p> <p>maintaining ^[2] 50:11,13</p> <p>maintenance ^[2] 4:17 11:14</p> <p>malice ^[9] 12:3,9 13:2,10 21:25 22: 3,10,11,18</p> <p>malicious ^[49] 4:15,20 5:22 6:11, 12 7:17 11:1,12 12:2,6,22,23 13: 10 16:15,18 17:2 19:7 20:7,13,23 22:5 23:10,17,18 25:6,8 28:2,20, 22 29:9,10 31:24 33:18,25 34:23 35:16 36:16 37:13,15,20 44:12,14, 25 45:6 55:17 58:8,11,13 62:7</p> <p>mandatory ^[2] 59:20 60:25</p> <p>manner ^[1] 51:23</p> <p>Manuel ^[4] 6:9 20:19 54:22 55:6</p> <p>manufactured ^[1] 52:18</p> <p>many ^[3] 12:13 18:19 46:12</p> <p>massive ^[2] 59:18 63:23</p> <p>material ^[2] 26:22 33:22</p> <p>materiality ^[3] 29:23 30:3 38:20</p> <p>matter ^[10] 1:16 9:6 17:1 28:14 29: 15,21 36:9 39:4 52:2 57:3</p> <p>matter's ^[1] 25:21</p> <p>matters ^[1] 21:13</p> <p>McDONOUGH ^[2] 1:3 4:4</p> <p>McDonough's ^[2] 4:11 5:9</p> <p>mean ^[17] 7:4 15:18 17:19 20:10, 11 22:4 26:21,25 27:7 45:10 46: 19 48:12,14 49:8,8,9 55:6</p> <p>means ^[1] 53:10</p> <p>memories ^[2] 18:8,14</p> <p>memory ^[1] 18:21</p> <p>Mendez ^[1] 58:17</p> <p>mens ^[1] 13:8</p> <p>merely ^[1] 58:24</p> <p>merits ^[3] 26:17 33:6 60:25</p> <p>Michaels ^[1] 10:20</p> <p>midst ^[2] 56:8 57:6</p> <p>might ^[10] 7:2 9:7 10:17 12:5 21:5 43:4 48:18 54:13 63:7,7</p> <p>Mine ^[1] 6:19</p> <p>minimum ^[1] 60:18</p> <p>minutes ^[1] 59:6</p> <p>mirky ^[1] 57:1</p> <p>mischiefs ^[1] 40:11</p> <p>misconduct ^[1] 49:24</p> <p>mix ^[1] 46:12</p> <p>mixed ^[2] 47:15 48:1</p>	<p style="text-align: center;">N</p> <p>narrow ^[1] 17:10</p> <p>narrowly ^[1] 6:9</p> <p>nature ^[2] 44:21 55:13</p> <p>NEAL ^[5] 2:3 3:3,13 4:7 59:8</p> <p>near ^[1] 52:9</p> <p>necessarily ^[3] 13:2,4,9</p> <p>necessary ^[5] 5:23 6:2 34:8 45:25 59:16</p> <p>need ^[3] 5:18 7:12 33:5</p> <p>needed ^[1] 51:7</p> <p>needs ^[1] 26:16</p> <p>never ^[4] 4:18 9:10,11 24:10</p> <p>NEW ^[4] 1:8 2:9 25:9 51:9</p> <p>next ^[1] 4:4</p> <p>Ninth ^[1] 61:18</p> <p>none ^[2] 37:24 45:4</p> <p>normally ^[1] 14:13</p> <p>notably ^[1] 60:9</p> <p>note ^[1] 18:5</p> <p>nothing ^[3] 43:21,25 50:4</p> <p>notifying ^[1] 51:17</p> <p>Number ^[1] 10:3</p> <p style="text-align: center;">O</p> <p>O'CONNOR ^[53] 2:9 3:10 37:3,4,6, 18,24 38:4,10,13 39:8 40:9,20 41: 5,15,20,25 42:7,15,21 43:2,23 44: 3,9 45:8,12,15,24 46:22,24 47:2, 22 48:3 49:3,12,21 50:21 51:5,19 52:11 53:5,17 54:1,7,15 55:2,23 56:3,10,19 57:8,18,24</p> <p>objection ^[1] 61:12</p> <p>obtain ^[1] 26:8</p> <p>obvious ^[1] 32:17</p> <p>obviously ^[2] 10:14 12:22</p> <p>occupied ^[1] 55:9</p> <p>occur ^[2] 18:14 52:5</p> <p>offense ^[3] 13:19 16:20 19:23</p> <p>official ^[2] 10:12 12:21</p> <p>officials ^[2] 32:5 50:1</p> <p>often ^[4] 10:7 22:19 28:25 62:21</p> <p>Okay ^[3] 41:15 46:21 53:3</p> <p>once ^[1] 36:4</p> <p>one ^[29] 10:3 11:3,7,21 12:4,18 14: 22 16:3 19:14,20,25 20:9,13,14,23 21:20 27:6 31:6 32:17 35:11 38:5 39:17 40:7,16 43:7 57:2 58:3 59: 12,22</p> <p>ones ^[1] 60:16</p> <p>ongoing ^[4] 17:16 28:4 35:1 56:2</p>	<p style="text-align: center;">P</p> <p>p.m ^[1] 64:4</p> <p>PAGE ^[6] 3:2 5:9 16:24,25 55:16, 18</p> <p>pages ^[3] 8:21 11:18 34:13</p> <p>Pardon ^[2] 41:20 45:12</p> <p>part ^[8] 6:4 14:9,10,13 36:22 43:10, 20 53:18</p> <p>particular ^[2] 16:17 51:8</p> <p>particularly ^[4] 12:16 15:14 45:17 50:12</p> <p>parties ^[1] 40:11</p> <p>parties' ^[1] 23:6</p> <p>parts ^[1] 37:10</p> <p>party ^[1] 58:3</p> <p>passed ^[1] 9:25</p> <p>passport ^[1] 32:20</p> <p>path ^[1] 57:2</p> <p>penumbras ^[1] 8:16</p> <p>people ^[12] 18:23 36:11,14 39:11 46:7,10,12 49:1,16 53:4 55:7 60:1</p> <p>perceive ^[1] 40:21</p> <p>Perhaps ^[2] 57:9,9</p> <p>period ^[10] 14:16,23 15:2,8,17 23: 23 24:16 33:14 36:14 45:23</p> <p>perjured ^[3] 25:14 29:21 38:15</p> <p>perjury ^[4] 41:7,12 45:18 52:18</p> <p>person ^[5] 30:20 32:9,13 38:3 47: 12</p> <p>petit ^[2] 30:12,17</p> <p>petition ^[2] 59:19 63:8</p> <p>Petitioner ^[20] 1:4 2:4 3:4,14 4:8</p>

Official - Subject to Final Review

<p>23:8,15 24:19 25:1,2 27:13 32:20 39:17 44:7,10 55:10 58:7 59:3,9, 15 Petitioner's [3] 23:23 24:6 58:25 Petitioners [2] 24:5,12 pick [1] 28:18 pieces [1] 53:1 pinpoint [1] 40:12 Piphus [1] 20:20 place [2] 23:20 48:25 plaintiff [5] 22:8 40:25 44:18 47:5 50:3 plaintiffs [1] 22:9 plaintiffs [1] 14:12 plea [1] 48:20 please [3] 4:10 23:5 37:7 point [12] 7:1,2 17:11 19:15 20:21 22:20 33:3 39:9 40:3 59:12 60:9 62:22 pointed [2] 4:18 59:24 points [3] 17:25 19:14 32:21 police [2] 10:8 40:7 policies [1] 38:7 policy [12] 13:23 16:21 18:6 34:1 36:23 46:14 47:11 59:23 60:14,16, 20,21 position [3] 5:20 14:12 48:8 possible [3] 17:23 31:1 49:24 possibly [1] 17:16 potential [1] 51:18 practical [3] 52:2 57:4 60:16 precedent [1] 21:7 preeminent [1] 38:16 prejudiced [1] 58:4 prejudicial [1] 49:20 premise [1] 60:10 prescribed [1] 20:19 present [2] 15:18 49:14 presentation [3] 13:13 45:19 62: 11 presentations [1] 23:6 presented [2] 9:8 13:19 presenting [1] 9:19 preserve [1] 50:2 presumably [1] 49:9 presumption [2] 46:3,6 pretrial [2] 39:23 55:3 pretty [5] 7:23 15:10,11 27:8 48:25 prevent [1] 34:25 primarily [1] 17:5 Principal [1] 2:5 principle [1] 34:7 principles [1] 34:1 prior [2] 45:5 54:25 prison [1] 54:13 probability [4] 9:2 10:16 30:4,23 probable [2] 4:24 5:8,10,14 8:3,4, 4,25 22:9,10 25:5 29:11 30:7,10, 19 39:21 44:4 46:2 47:5 62:5,13 probably [1] 17:1 problem [5] 34:11 44:7 55:10 56: 13 60:3 problematic [1] 48:12 problems [2] 18:14 49:14</p>	<p>procedural [18] 7:7 8:7 25:12,25 26:7 29:25 30:22 31:12,21 32:7 33:13 39:4 41:1,4,8,22 42:9,16 procedures [1] 41:9 proceed [1] 56:14 proceeded [1] 29:16 proceeding [9] 17:21 22:8 28:5 29:13 30:14 41:3 55:20 62:4,5 proceedings [8] 4:13,17 11:21,23 14:2,5 33:24 56:8 process [43] 7:6,14 8:7,9,22 23:20 25:12,25 26:7 27:17 28:1 29:25 30:22 31:8,12,21,22 32:7 33:14 35:2,14 36:5,22 38:16,25 39:5,13 40:22,25 41:4,9,14,22 42:9,17,23 53:24 54:25 55:7 56:2,15 57:7 60: 6 prompt [2] 49:23 51:7 proof [1] 33:21 proper [1] 28:6 proposed [1] 56:5 prosecute [3] 28:10 32:9 49:2 prosecuted [1] 62:16 prosecution [53] 4:15,21 5:22 6: 11,13 7:17 11:2,12,15 12:2,6,22, 23 13:10 16:15 17:3,22 19:8 20:7, 13,23 22:6 23:10,17,18 25:6,9 28: 3,20,22 29:9,11 31:25 32:5 33:18, 25 34:24 35:16 36:16 37:14,15,21 39:25 44:12,14,25 45:6 48:15 55: 17 58:9,11,13 62:7 prosecution's [1] 16:18 prosecutor [15] 9:2,21,21 10:17 29:13 31:14,23 32:1,8 36:1 38:1 39:6 50:17,24 51:17 prosecutorial [2] 11:4 40:6 prosecutors [5] 10:5,10 18:12,12 51:11 protect [1] 10:5 provide [1] 19:15 provides [2] 49:23 52:20 provision [1] 6:22 proximate [1] 38:22 prudential [3] 48:9 49:4,9 pulled [1] 53:2 pure [5] 12:2,6 20:23 37:13 46:14 purity [1] 12:21 purposes [7] 7:19 14:7 20:18 21: 23 33:2 53:24,25 pursue [1] 50:3 pursued [1] 48:5 put [2] 27:8 40:6 puts [1] 28:11 putting [1] 52:1 puzzling [1] 53:9</p>	<p>quick [1] 44:22 quintessential [2] 55:17 60:6 quite [3] 5:20 35:18 60:11</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rampant [1] 60:3 Rather [6] 12:10 14:17 16:20 31: 21 35:14 37:11 rationales [1] 19:2 rea [1] 13:8 read [5] 40:10 55:5,5,6 62:3 real [1] 18:23 really [10] 16:19 19:18 22:4 43:19 52:19 58:5 59:3 60:2 61:7 63:14 reason [6] 12:4 16:10,17 46:14 47: 14 56:21 reasonable [8] 5:15 9:2 10:16 26: 5 30:4,16,23 39:11 reasonably [1] 57:2 reasons [10] 9:23 10:1 13:24 27: 25 31:6 36:20,23 39:17 59:22 61: 9 REBUTTAL [2] 3:12 59:8 reckless [1] 13:13 recklessness [1] 13:8 recognizance [1] 63:1 recognized [2] 60:7 61:10 records [1] 50:2 red [1] 9:14 redress [1] 50:24 reflect [1] 57:21 released [1] 62:25 reliable [1] 31:8 reluctant [1] 31:7 relying [1] 32:22 remains [3] 41:18,22 44:16 remand [1] 10:14 remarkable [1] 60:11 remedies [2] 19:13 52:19 remedy [2] 19:16 27:18 RENSELAER [1] 1:8 repeating [1] 47:19 repetitious [1] 40:4 reply [5] 11:25,25 16:24 44:22 55: 18 representing [2] 18:11 40:16 require [3] 4:23 8:8,10 required [2] 13:11 32:25 requirement [8] 13:25 14:7 16:19 17:1,12 28:4 59:16 60:22 requires [3] 8:7 18:25 22:6 requiring [2] 49:22,22 reserve [1] 22:14 resolve [3] 23:25 59:17 61:2 resources [1] 17:18 respect [4] 5:10,12 26:7 28:4 Respondent [6] 1:10 2:10 3:11 32:17 33:4 37:5 rest [1] 32:20 restrictions [5] 32:19 33:4 62:22 63:3,4 result [7] 7:15,22 12:11 27:19 32: 11 36:11 38:15 results [2] 36:2 49:5</p>	<p>reversal [3] 2:8 3:8 23:3 reverse [1] 28:23 review [3] 50:1 57:25 58:10 rights [1] 17:17 rigor [2] 57:13,16 ripeness [1] 17:2 risk [1] 17:16 risks [1] 47:14 ROBERTS [14] 4:3 22:15,22 36:18 37:1 40:2,15 48:11 49:7,13 52:3, 22 59:6 64:2 role [2] 28:6 50:6 root [1] 39:9 rooted [1] 12:8 routine [1] 56:7 routinely [2] 57:6,16 rubric [1] 54:17 rule [24] 6:12 10:8,9 13:21 14:1 16: 7 17:8 18:15,16,25 19:21 33:17 35:15 46:4 47:14 49:23 51:25 52: 6 55:24 56:5 60:17,19 61:14,20 rules [1] 7:1 run [3] 15:17 23:23 33:15 running [1] 54:14</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>sacrificed [1] 50:9 safeguard [1] 60:20 salvage [1] 58:24 same [12] 7:15,21 16:16 21:7 23: 14 34:8 36:15,20 46:9 48:6 55:18 58:4 satisfied [1] 8:2 satisfy [1] 47:4 saying [17] 9:1 13:1 18:13 21:11 27:16 35:4 36:9 40:25 43:3,4,5 44: 2 46:15 47:9 53:23 55:7 60:14 says [9] 8:20 10:15 16:25 29:18 44: 7 55:18,19 60:15 63:8 Scalia [2] 34:20 36:24 Scalia's [4] 15:9 27:15 34:14 61: 21 scenario [1] 42:22 school [4] 15:20,22 16:3,5 second [12] 6:4 8:21 10:13,15 19: 21 25:11 44:15 46:24 47:18 49:4 57:17 60:9 second-guess [1] 12:20 Section [4] 4:11 16:11 19:2,14 see [4] 27:6 48:9,19 49:1 seek [1] 50:23 seeking [1] 23:8 seeks [1] 23:15 seem [4] 8:3 14:8 23:7 28:21 seems [6] 8:8 20:11 27:9 47:17 49: 14 51:10 seizure [2] 25:4,17 self-standing [1] 46:1 send [1] 30:19 sense [9] 15:15 16:8,17 28:25 33: 23 34:15 38:21,22 43:9 sentence [2] 16:12,16 separate [1] 19:10 serious [1] 48:15</p>
	<p style="text-align: center;">Q</p> <hr/> <p>qua [1] 12:23 question [23] 10:25 13:21 19:20 26:9,15,17 28:18 29:12,22 30:9 33:10 35:6,12 37:22 40:24 45:5 47:21 52:16 56:4 57:9 59:20 60: 11,24 questions [2] 61:4 64:1</p>		

Official - Subject to Final Review

<p>set ^[8] 10:8,9 27:19 32:3 34:1 36:24 54:22 59:3</p> <p>several ^[1] 15:6</p> <p>share ^[1] 18:12</p> <p>shattered ^[1] 53:1</p> <p>shocking ^[3] 31:15 32:8 39:9</p> <p>shocks ^[3] 31:4 50:19,25</p> <p>short ^[2] 25:16 26:11</p> <p>shouldn't ^[4] 26:3 47:12 58:18,18</p> <p>show ^[12] 12:3,10 29:11,25 30:2,3 32:21,25 36:4,15,21 63:21</p> <p>side ^[3] 40:7,17 52:15</p> <p>sift ^[1] 48:8</p> <p>similar ^[1] 10:25</p> <p>simplest ^[1] 61:1</p> <p>simply ^[2] 6:9 23:17</p> <p>simultaneously ^[1] 57:23</p> <p>since ^[4] 12:19 26:13 42:24 60:7</p> <p>situation ^[2] 40:5 52:24</p> <p>situations ^[1] 48:21</p> <p>Sixth ^[3] 7:8 8:10 61:17</p> <p>slightly ^[1] 15:3</p> <p>SMITH ^[5] 1:6,9 4:5,12,18</p> <p>Solicitor ^[3] 2:5 7:11 9:23</p> <p>someone ^[1] 62:16</p> <p>someone's ^[1] 35:23</p> <p>sometimes ^[5] 15:7 17:24 24:3,7 27:23</p> <p>sorry ^[4] 50:15 54:1 56:4 62:6</p> <p>sort ^[3] 13:7,8 40:19</p> <p>sorts ^[1] 13:23</p> <p>SOTOMAYOR ^[23] 4:22 5:1,5,16,18 6:2 9:1 33:12,16 34:5,11 35:18,21 36:8 41:18,21 42:4,8,18 50:15,22 51:10 59:24</p> <p>Sotomayor's ^[1] 19:20</p> <p>sounds ^[1] 31:20</p> <p>SPECIAL ^[1] 1:7</p> <p>specific ^[1] 57:25</p> <p>specify ^[1] 7:12</p> <p>speed ^[1] 51:16</p> <p>spell ^[1] 49:18</p> <p>spinning ^[2] 6:18 37:9</p> <p>split ^[4] 26:2 32:24 33:8 59:18</p> <p>standard ^[3] 16:7 46:4 62:14</p> <p>standing ^[1] 35:24</p> <p>stands ^[1] 38:8</p> <p>start ^[1] 32:3</p> <p>started ^[1] 44:11</p> <p>starting ^[2] 20:21 54:25</p> <p>starts ^[1] 15:17</p> <p>state ^[11] 19:5,6 20:6 27:16 28:1,5 32:4 35:1 36:5,22 39:18</p> <p>stated ^[1] 48:6</p> <p>statements ^[1] 37:12</p> <p>STATES ^[6] 1:1,17 2:7 3:7 18:11 23:2</p> <p>States' ^[2] 24:11 25:2</p> <p>statute ^[6] 4:20 34:6 42:6 46:17 51:4 52:12</p> <p>stay ^[11] 17:24 18:8 48:9,12 49:4,9,11,15 55:8 57:16,21</p> <p>stayed ^[1] 18:4</p> <p>staying ^[1] 17:21</p>	<p>stays ^[1] 17:25</p> <p>still ^[14] 8:13 13:7 20:5 30:20,22 31:22 32:2 35:16 41:25 46:18 48:12 51:12,13 54:14</p> <p>straightforward ^[3] 6:7 17:10 23:25</p> <p>strand ^[1] 61:10</p> <p>strategy ^[1] 49:2</p> <p>stronger ^[1] 12:24</p> <p>struggling ^[1] 21:3</p> <p>stunning ^[2] 38:6 50:18</p> <p>subjected ^[1] 23:19</p> <p>submitted ^[2] 64:3,5</p> <p>subsequently ^[1] 55:19</p> <p>subset ^[1] 20:11</p> <p>substantive ^[7] 7:7 8:9 31:7,21 39:1 40:21,24</p> <p>suddenly ^[1] 53:3</p> <p>sue ^[1] 53:4</p> <p>suffered ^[1] 32:10</p> <p>sufficiency-of-the-evidence ^[1] 29:19</p> <p>sufficient ^[2] 6:3 47:4</p> <p>suggest ^[3] 8:3 43:19 57:5</p> <p>suggesting ^[2] 43:12,13</p> <p>suggests ^[1] 30:9</p> <p>suing ^[1] 49:1</p> <p>suit ^[3] 4:11 46:15 56:16</p> <p>suits ^[4] 19:4 56:1,7 57:6</p> <p>support ^[4] 2:8 3:8 13:15 23:3</p> <p>SUPREME ^[2] 1:1,17</p> <p>surrendering ^[1] 32:19</p> <p>swim ^[3] 7:14,21,24</p> <p>swims ^[3] 14:18 24:9,24</p> <p>sworn ^[1] 36:12</p> <p>system ^[1] 36:13</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tack ^[1] 14:16</p> <p>tainted ^[1] 34:22</p> <p>term ^[1] 6:10</p> <p>terminated ^[1] 36:6</p> <p>termination ^[29] 5:23 13:25 14:7 16:18 17:1,12 22:8 23:12,21 27:3 28:3,9 31:18 33:17,20 34:9,25 35:9 36:15 43:10,20 44:5 46:2,3 59:16 60:17,22 61:20 62:5</p> <p>terms ^[2] 41:8 47:24</p> <p>test ^[1] 29:19</p> <p>testifying ^[1] 49:17</p> <p>testimony ^[5] 17:4 25:14 29:21 38:15 53:10</p> <p>that'll ^[1] 18:25</p> <p>theories ^[3] 19:19 24:13 61:2</p> <p>theory ^[8] 6:4,5 19:23,24 24:6,11 43:6 61:19</p> <p>There's ^[29] 5:3 8:2 10:16 11:17 12:24 16:13 19:12,18,23 26:15 29:7 31:1 33:7 38:25,25 42:12 43:8,13 45:14,14 46:14 50:10,12 51:15,18 56:16,20 59:14 63:23</p> <p>therefore ^[3] 6:23 23:21 46:17</p> <p>therein ^[1] 50:5</p> <p>they've ^[1] 18:6</p>	<p>thick ^[1] 57:13</p> <p>thinking ^[1] 61:24</p> <p>third ^[2] 19:23 24:12</p> <p>THOMAS ^[3] 2:9 3:10 37:4</p> <p>Thomas's ^[1] 10:19</p> <p>though ^[4] 15:11,17 36:2 58:10</p> <p>three ^[2] 51:22 52:8</p> <p>throughout ^[2] 41:12 42:10</p> <p>til ^[1] 46:16</p> <p>time-barred ^[1] 58:24</p> <p>timeliness ^[1] 26:15</p> <p>timely ^[1] 51:22</p> <p>together ^[1] 53:2</p> <p>tolling ^[3] 61:7,9,13</p> <p>tort ^[14] 14:17 19:4,7,10,12 20:7 23:11 24:17 28:2,2 34:3,23 35:17 56:16</p> <p>torts ^[1] 19:3</p> <p>tortured ^[1] 58:23</p> <p>totally ^[1] 33:25</p> <p>tracks ^[3] 6:8 61:21 62:10</p> <p>traditional ^[2] 49:23 51:25</p> <p>transforming ^[1] 59:1</p> <p>travel ^[3] 32:19 33:3 62:22</p> <p>treated ^[1] 34:19</p> <p>treatise ^[2] 16:12,23</p> <p>TREY ^[1] 1:9</p> <p>trial ^[26] 17:15 28:12,14 30:12,20 31:11 32:21 35:8 39:3,5 41:2,6 42:10 45:20 46:8 47:13,16 51:11,14 53:9,11,15 54:5,8 55:4 60:2</p> <p>trials ^[1] 18:24</p> <p>tried ^[1] 17:3</p> <p>true ^[8] 15:24,24 20:8 23:14 41:19 50:16 52:2,4</p> <p>try ^[3] 9:15 17:4 32:3</p> <p>trying ^[6] 20:5 24:15 35:13 49:1 52:23 63:10</p> <p>turn ^[1] 29:20</p> <p>turns ^[3] 13:14 48:24 63:17</p> <p>two ^[22] 5:3 9:25 10:22 11:20 12:13,16 19:19 20:22 21:5,10 25:3 27:11 31:6,9 34:4 39:16 44:11 51:21 52:8 57:22 58:16 59:22</p> <p>type ^[6] 37:22 38:5 39:11 46:25 54:18,19</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>umbrella ^[2] 39:14 54:20</p> <p>unchallenged ^[1] 44:17</p> <p>under ^[19] 6:3 18:15 19:4,5,6 23:10 25:9 28:16 29:14,23 30:4 39:13 40:21 42:1 48:7 54:16,20,20 62:17</p> <p>undergo ^[2] 54:5,8</p> <p>underlying ^[1] 34:1</p> <p>undermine ^[1] 19:1</p> <p>understand ^[10] 21:5 24:6 33:10 34:5 35:5 39:8 40:3 53:6 54:2 63:11</p> <p>understanding ^[1] 62:18</p> <p>unfair ^[1] 52:14</p> <p>unfavorable ^[1] 34:22</p> <p>uniform ^[1] 26:14</p>	<p>unique ^[1] 17:8</p> <p>UNITED ^[8] 1:1,17 2:7 3:7 18:11 23:2 24:11 25:1</p> <p>unrelated ^[2] 47:6 58:23</p> <p>until ^[4] 17:21 42:12 46:16 47:13</p> <p>untoward ^[1] 49:5</p> <p>unusual ^[3] 15:10,11,12</p> <p>up ^[11] 18:7 28:18 32:21,25 33:9 39:7 46:12 47:15 48:2 55:4 58:2</p> <p>urging ^[1] 40:13</p> <p>using ^[4] 36:10,11 49:22 51:24</p> <p>usual ^[1] 29:8</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>valid ^[1] 29:14</p> <p>validity ^[1] 58:20</p> <p>valuable ^[1] 50:6</p> <p>versus ^[4] 4:5 20:20 58:17 61:11</p> <p>victim ^[1] 51:2</p> <p>view ^[5] 23:24 25:2 41:24 42:16,20</p> <p>violation ^[11] 19:24 31:3 38:11,17 41:22 42:9,13,17,22 60:7 61:3</p> <p>violations ^[1] 5:1</p> <p>voids ^[1] 16:20</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[1] 46:16</p> <p>waits ^[1] 5:22</p> <p>walk ^[1] 17:14</p> <p>WALL ^[35] 2:5 3:6 22:24 23:1,4 24:5,10,21,25 25:23 26:1,5,20 27:11,24 28:14,24 29:10 30:2,8 31:5,19 32:16 33:12,13 34:4,10 35:19,25 36:17,19,20 52:2 59:13 62:10</p> <p>Wallace ^[8] 15:9,13 16:9,9,14 48:4,6 61:22</p> <p>wanted ^[1] 61:13</p> <p>wanting ^[1] 59:25</p> <p>wants ^[1] 25:10</p> <p>warned ^[1] 58:17</p> <p>Washington ^[3] 1:13 2:3,6</p> <p>watch ^[1] 46:13</p> <p>way ^[14] 6:7 11:8 22:1,12 23:25 30:18 31:13 32:6 34:17 35:6,20 36:15 57:11 61:1</p> <p>ways ^[2] 20:12 26:10</p> <p>Wednesday ^[1] 1:14</p> <p>weigh ^[1] 18:20</p> <p>whatever ^[4] 18:21 47:10,10,23</p> <p>Whereupon ^[1] 64:4</p> <p>whether ^[15] 7:6 14:21,24 24:17 27:9,13,13 29:12 30:9 32:24 35:23 44:25 48:9 59:15,20</p> <p>whole ^[1] 17:11</p> <p>will ^[5] 18:19 36:11 45:23 46:12 62:16</p> <p>Wilson ^[1] 61:11</p> <p>win ^[4] 6:3 10:14 19:25 27:9</p> <p>within ^[3] 29:8 42:3 53:18</p> <p>without ^[4] 14:25 25:5 29:13 43:15</p> <p>wonder ^[1] 14:21</p> <p>Wood ^[1] 16:11</p> <p>word ^[1] 38:19</p>
--	---	--	--

Official - Subject to Final Review

words ^[1] 48:1
works ^[1] 22:1
world ^[1] 18:23
worry ^[1] 33:16
wrongful ^[2] 4:16 35:25
wrongfully ^[1] 23:19

Y

year ^[2] 15:20 16:4
years ^[4] 18:17 51:21 52:8 58:16
YORK ^[3] 1:8 2:9 25:9
YOUEL ^[1] 1:6
yourself ^[1] 34:17

Z

Zahrey ^[1] 10:15