

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

BILLY RAYMOND COUNTERMAN,)
 Petitioner,)
 v.) No. 22-138
COLORADO,)
 Respondent.)

Pages: 1 through 111
Place: Washington, D.C.
Date: April 19, 2023

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrcourtreporters.com

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 BILLY RAYMOND COUNTERMAN,)
4 Petitioner,)
5 v.) No. 22-138
6 COLORADO,)
7 Respondent.)
8 - - - - -
9 Washington, D.C.
10 Wednesday, April 19, 2023
11
12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the
14 United States at 10:20 a.m.
15
16 APPEARANCES:
17 JOHN P. ELWOOD, ESQUIRE, Washington, D.C.; on behalf
18 of the Petitioner.
19 PHILIP J. WEISER, Attorney General, Denver, Colorado;
20 on behalf of the Respondent.
21 ERIC J. FEIGIN, Deputy Solicitor General, Department
22 of Justice, Washington, D.C.; for the United
23 States, as amicus curiae, supporting the
24 Respondent.
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE:
ORAL ARGUMENT OF:	
JOHN P. ELWOOD, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF:	
PHILIP J. WEISER, ESQ.	
On behalf of the Respondent	49
ORAL ARGUMENT OF:	
ERIC J. FEIGIN, ESQ.	
For the United States, as amicus	
curiae, supporting the Respondent	83
REBUTTAL ARGUMENT OF:	
JOHN P. ELWOOD, ESQ.	
On behalf of the Petitioner	107

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-138, Counterman versus Colorado.

Mr. Elwood.

ORAL ARGUMENT OF JOHN P. ELWOOD

ON BEHALF OF THE PETITIONER

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

This Court has long held that because of the importance of free speech in our country, categorical exceptions to the First Amendment's prohibition on content regulations must be well defined and narrowly limited, and speech cannot be exempted without proof of a long-settled tradition of subjecting that speech to regulation.

The State has not come close to meeting its burden of showing a long-settled tradition of punishing true threats without proof the speaker knew that his statement would cause fear. In the face of early cases and treatises showing the central importance intent played in speech prosecutions and threat

1 prosecutions specifically, Colorado cannot cite
2 even a single decision holding that subjective
3 intent is irrelevant. The best it can do is
4 cite cases that were silent about the required
5 intent in the face of unambiguous threats.

6 The State tries to conjure a tradition
7 of -- of punishing negligent threats by analogy
8 to other categorical exceptions. But,
9 generally, they require at least recklessness.
10 The closest analogue, incitement, requires
11 specific intent.

12 At bottom, any claim of a settled
13 tradition of criminalizing negligent threats is
14 impossible to square with *Virginia versus Black*,
15 where this Court reversed convictions for
16 cross-burning that would have easily satisfied a
17 negligence standard, and a series of opinions
18 emphasizing the central importance intent plays
19 in making threats constitutionally proscribable.

20 While the State predicts harm, it has
21 shown no difference in criminal enforcement or
22 the availability of civil protective orders in
23 the many jurisdictions that already require
24 subjective intent. There, prosecutors prove
25 *mens rea* the same way prosecutors always have

1 under countless criminal statutes, through
2 objective evidence of the defendant's words and
3 actions.

4 Criminalizing misunderstanding is
5 especially dangerous in an age when so much
6 communication occurs on social media, which
7 brings together strangers in an environment that
8 removes much of the context that gives words
9 meaning. And it chills expression by imposing
10 prison time on speakers who do not tailor their
11 views to suit their audience.

12 This Court should reverse. I welcome
13 the Court's questions.

14 JUSTICE THOMAS: Mr. Elwood, I don't
15 quite understand why you would cite Black when
16 Black did have an intent requirement. The
17 question was whether or not the presumption of
18 cross-burning in a field overcame that -- that
19 intent requirement or demonstrated that.

20 MR. ELWOOD: If intent wasn't
21 constitutionally required, there isn't any
22 reason why it couldn't be presumed away. Maybe
23 that would raise a due process issue, not a
24 First Amendment issue. And the Court -- it
25 focused the intent -- it focused the discussion

1 on -- on intent and the constitutionality of the
2 First Amendment issue. And it -- the plurality
3 specifically said that the -- the state had
4 presumed away the thing that makes threats
5 constitutionally proscribable. And, in
6 addition, Justice Scalia said that the
7 constitutional defect was in preventing the
8 consideration of the speaker's or -- or the --
9 the intent of the people who burn the crosses.

10 So I think, from that, you can at
11 least say it doesn't establish -- it's not
12 consistent with a clear tradition of
13 criminalizing negligent threats.

14 JUSTICE THOMAS: One other thing. The
15 -- why -- there are other categories, and just
16 take, for example, obscenity. You don't have a
17 subjective intent requirement there. So why
18 should this -- these true threats receive more
19 protection than obscenity?

20 MR. ELWOOD: I think especially under
21 *Elonis's* gloss of *Hamling*, *Hamling* said that you
22 had to know not only the contents but the
23 character of -- of -- of obscene materials,
24 which the Court described in *Hamling* as the
25 conscious purveyance of filth. And in *Elonis*,

1 the Court said that that was equivalent of
2 knowing that your statements would cause fear.

3 So I think that it is -- it is
4 entirely consistent with the idea that there is
5 a subjective intent requirement at least at the
6 knowledge level, which is all that we are asking
7 for here.

8 JUSTICE KAGAN: What about fighting
9 words?

10 MR. ELWOOD: I -- fighting words,
11 people always look to Chaplinsky, but I think
12 that's over-reading about a page and a half of
13 analysis in a case that didn't clearly present
14 it.

15 I think what Chaplinsky definitely
16 decided was that that statute wasn't vague and
17 that shouted epithets were not themselves
18 protected, but it didn't really address the
19 mental state element.

20 In addition, I think, if you look at
21 the tradition that it comes from, the common law
22 tradition, breach of peace, when it uses
23 threats, which is part of what is covered in
24 Chaplinsky, there is definitely a specific
25 intent requirement. Subsequent cases by this

1 Court have used language saying "calculated to
2 promote a fight" and things like that.

3 And regardless of all of that,
4 fighting words is a very vanishingly small
5 exception for basically nose-to-nose shouting of
6 epithets that are likely to cause a breach of
7 the peace and where police might need to step in
8 regardless of knowing the person's intent.

9 I don't think it's a -- you know, the
10 Court has declined to extend it under numerous
11 circumstances. It would be smaller steps than
12 extending it to, you know, online
13 communications.

14 JUSTICE SOTOMAYOR: That's why it took
15 --

16 CHIEF JUSTICE ROBERTS: You say --

17 JUSTICE SOTOMAYOR: I'm sorry.

18 CHIEF JUSTICE ROBERTS: You say that
19 even if you prevail, the courts will still be
20 able to freely impose civil restraining orders.
21 And Colorado takes issue with that.

22 Why wouldn't your same standard apply
23 in that context?

24 MR. ELWOOD: Well, a couple of things.
25 To begin with, a lot of -- I mean, especially in

1 the stalking context, you know, Colorado has a
2 statute that, you know, allows prosecutions that
3 don't require looking to the content of speech
4 but are, rather, based on conduct. And so, for
5 that, obviously, I don't think it would make any
6 difference at all.

7 But, even with it, the standard is
8 lower for getting a civil protective order.
9 Colorado's is relatively high at a preponderance
10 standard. But most states use a good cause
11 standard or a discretionary standard.

12 And, you know, that's -- that's below
13 probable cause. And people get -- you know, you
14 can get arrest warrants, you can arrest people
15 for specific intent crimes, you know, just based
16 on the objective words. And that is, you know,
17 plenty of -- of evidence of the intent of --
18 pretty -- plenty of evidence of the intent of
19 the actor, even at the higher standard of
20 probable cause. For good cause, I don't think
21 that it should be an issue.

22 And as we've said and as I said in my
23 opening, there are, you know, many states, over
24 20, that have -- for the threat statute, have a
25 subjective intent standard. For stalking, there

1 are, you know, 14 states that have a intent
2 standard and three more that have kind of a
3 recklessness standard. And, you know, there's
4 no indication that, even when it's baked into
5 the -- the stalking statute, that it presents an
6 issue for getting civil protective orders.

7 JUSTICE GORSUCH: Mr. Elwood, I just
8 want to follow up on that in two respects. One,
9 on -- on the civil protective order side, you're
10 not suggesting, I don't take it -- but I want to
11 make sure -- that the mens rea that we typically
12 require in criminal cases, you know, the vicious
13 will that Morissette talks about as being part
14 of our common law criminal tradition,
15 necessarily carries over into the civil context,
16 right?

17 MR. ELWOOD: Absolutely not.
18 Absolutely not. The only potential feedback is,
19 in states that require proof of a -- of a crime,
20 it might be baked in through that -- that --
21 through that route. But, as a direct measure,
22 the argument we're making is based on the
23 chilling effect of criminal liability.

24 JUSTICE GORSUCH: And, second, with
25 respect to the stalking possibility under

1 Colorado law, I mean, this statute's very broad.
2 I understand this particular prosecution had
3 something to do with speech, but I don't take
4 your argument -- I just want to make sure I've
5 got it right -- I don't take your argument to be
6 upsetting at all prosecutions based solely on
7 conduct so that conduct, stalking, is an
8 entirely separate matter than speech and that
9 what you're -- you're concerned about is the
10 mens rea with respect to speech?

11 MR. ELWOOD: I think that's exactly
12 right, that, essentially, only when, you know,
13 the focus of the prosecution is on the
14 threatening nature of the words, you even have
15 to get into the true threats exception.
16 Otherwise, if it's, you know, frequency and
17 repetitiveness of unwanted conduct, I don't
18 think that is -- presents even a First Amendment
19 question or at least not the First Amendment
20 question we have here.

21 JUSTICE KAGAN: Mr. Elwood, could I
22 take you back to the first part of Justice
23 Gorsuch's question? Because, if your basic
24 argument is one about First Amendment chill, I'm
25 not exactly sure why it should make a difference

1 that there's a criminal prosecution here as
2 opposed to civil action. And, indeed, when we
3 talk about libel, I think, you know, one of the
4 first cases after New York Times v. Sullivan
5 presented exactly that question, and the Court
6 said a sanction is a sanction. Whether it's
7 criminal or civil, it might have the same kind
8 of chilling consequences.

9 So, as far as I know, in past First
10 Amendment challenges of this kind, we have not
11 drawn that distinction, even though it might be
12 a quite natural one.

13 So how -- how -- how do you think we
14 should draw that distinction here?

15 MR. ELWOOD: Well, I -- I think that
16 the -- that that's consistent with the way the
17 Court has treated defamation, because defamation
18 in a civil context, for public figures, it has
19 the elevated kind of recklessness standard, and
20 it's also there in the criminal standard.

21 But, for private individuals, it can
22 be, you know, basically as long as it's not
23 strict liability, with the exception of punitive
24 damages, where they say, again, you need to have
25 the showing of recklessness.

1 And I think that is consistent with
2 the idea that -- that punishment is different
3 from just civil liability, making people whole,
4 that even though the Court in Gertz versus
5 Robert Welch didn't dismiss that that has some
6 chilling effect, civil liability, they said that
7 it wasn't enough of a chilling effect to offset
8 the state's legitimate interest in making people
9 whole in the civil context.

10 JUSTICE ALITO: Mr. Elwood, the briefs
11 are full of discussion of "general intent" and
12 "specific intent," which I find to be very
13 confusing terms because criminal statutes have
14 multiple elements and each element can have a
15 different mens rea.

16 So I would like you to talk about this
17 using the methodology of the Model Penal Code.
18 So, if we look at -- at the elements, do you
19 agree with me that the element that we're
20 talking about here is that, as applied to a
21 prosecution based on the content of
22 communication, the content must -- must be such
23 as to cause a reasonable person to suffer
24 serious emotional distress, and the question is,
25 what is the mens rea for that element? Are we

1 together up to that point?

2 MR. ELWOOD: I -- I think we are
3 together up to that point.

4 JUSTICE ALITO: Okay. So, if we
5 consider that using the mens rea variations set
6 out in the Model Penal Code, was -- is it
7 purposefulness, is it knowing, is it
8 recklessness, is it negligence? What do you
9 think it must be to satisfy the First Amendment?

10 MR. ELWOOD: I think that it -- it
11 should be knowledge of the thing that makes the
12 conduct wrongful. In most threat statutes,
13 that's knowledge that the words you use are
14 going to cause fear. I could see with the
15 Colorado statute that it would be knowledge that
16 it would cause a reasonable person to suffer
17 emotional distress.

18 JUSTICE ALITO: Okay. So you don't
19 think purpose is required, but knowledge is
20 required? It has to be knowing as to that?

21 MR. ELWOOD: Knowledge, yes.
22 That's --

23 JUSTICE ALITO: All right.

24 MR. ELWOOD: -- that is our argument,
25 is that it's kind of the minimum mens rea to

1 make the conduct wrongful.

2 JUSTICE ALITO: Why wouldn't
3 recklessness be sufficient? I mean, it's
4 culpable. Reckless conduct is morally culpable,
5 and a -- a threat causes damage regardless of
6 the intent of the speaker.

7 Why isn't that sufficient?

8 MR. ELWOOD: I think recklessness
9 would be a big improvement over a objective
10 standard because it at least is focusing on the
11 mental state of the speaker, which I think
12 presents less of a -- a -- a -- a chilling risk.

13 I -- I think where recklessness has a
14 problem is in doctrine and in history. I think
15 it has a problem in doctrine in terms of the
16 convictions in Virginia versus Black would have
17 been very easy to uphold on a recklessness
18 standard. One of them burned a neighbor --
19 burned a cross on a neighbor's yard, and I think
20 that that is at least reckless, that it's going
21 to cause somebody fear.

22 And it has a problem, I think, in
23 history just because the early cases -- and I'm
24 thinking here of Regina versus Hill, which is a
25 British threat statute case, and the American

1 case, which is a -- a -- a breach of the peace
2 but through threats of -- God -- Benedict versus
3 -- State versus Benedict spoke in terms of
4 specific intent, and I -- I think that that is,
5 you know, harder to square with recklessness,
6 because the statements at issue there were at
7 least reckless, that it would cause somebody
8 fear.

9 JUSTICE SOTOMAYOR: Counsel --

10 JUSTICE ALITO: I had --

11 JUSTICE SOTOMAYOR: Oh, I'm sorry. Go
12 ahead.

13 JUSTICE ALITO: No, it's -- well, I
14 have one other question. It's -- it's somewhat
15 different. In order for there to be a
16 conviction based on content, the
17 communication -- the communication must, in
18 fact, constitute a true threat, right?

19 MR. ELWOOD: I -- I believe so. I
20 mean, if it's -- I mean, at least as this case
21 comes to us, the threats were really central to
22 the prosecution, and I think that when,
23 essentially, the basis for the prosecution is
24 the content of the communication that it should
25 be a -- a true threat.

1 JUSTICE ALITO: Okay. So that depends
2 on the meaning of the communication. And my
3 question is whether speaker intent is not built
4 into that, because the meaning of a
5 communication, an utterance, is dependent
6 significantly on the intent of the speaker.

7 MR. ELWOOD: I -- I think that that's
8 true, but I think -- to begin with, there are a
9 lot of statements that are ambiguities, a lot of
10 statements that are ambiguous. And I don't
11 think that this would -- the rule we're asking
12 for would make a big difference in a lot of
13 cases.

14 But it means that, essentially, the
15 jury's going to start out with what do these
16 words normally mean. And in most cases, what
17 those words normally mean is going to be the --
18 the mental state of the defendant too. All that
19 we're asking for is that people should be able
20 to make their case to the jury, and unless they
21 have a persuasive argument for why those words
22 meant something different to them, I think that
23 the jury will say this is enough to that extent.

24 JUSTICE ALITO: Yeah. Well, this
25 isn't meant to be a hostile question for you.

1 It's one that I'd like the -- I'd like the State
2 and the SG to think about. But isn't it
3 inevitable that speaker intent is going to be
4 important, regardless of the mens rea that is
5 applied to the other element that we were
6 talking about earlier?

7 I mean, if somebody stood up here and
8 spoke as fast as an auctioneer and I couldn't
9 understand what they were saying and I kept
10 saying, would you please speak a little more
11 slowly, speak more slowly so I could understand
12 what you're saying, and the person just
13 continued to do it, and I said, you know, if you
14 continue to speak that fast, I'm going to have a
15 fit, nobody would think I was actually
16 threatening to have a fit. It depends on my
17 intent in the -- in the context of the --

18 (Laughter.)

19 JUSTICE ALITO: -- in the -- I mean,
20 maybe some people would.

21 (Laughter.)

22 JUSTICE ALITO: So it's built in.
23 Anyway, I just wanted to give you a chance to
24 talk about it, because I think it's -- it's a
25 problem for the State's position.

1 MR. ELWOOD: I think intent is
2 frequently kind of -- well, it can be inferred
3 from the way that the -- the statement is made,
4 but it -- it definitely -- when cases are tried
5 particular ways, they can definitely abstract it
6 out because, here --

7 JUSTICE SOTOMAYOR: Counsel, isn't
8 that the point that Justice Alito is trying to
9 make? Yes, he may well be right that a
10 speaker's intent, it would seem to me whenever
11 you're trying someone for a First Amendment
12 violation involving speech for any conduct,
13 criminal or civil, that the speaker's intent
14 should be part of the presentation the jury
15 gets, because that's part of the circumstances.

16 But, here, the court and the
17 prosecutor argued that the intent was
18 irrelevant, that he couldn't present any
19 evidence about his intent, correct?

20 MR. ELWOOD: That is exactly right.

21 JUSTICE SOTOMAYOR: About his mental
22 state, about what he thought. They precluded
23 him completely from doing that.

24 MR. ELWOOD: That is precisely
25 correct. They said it doesn't matter what he

1 thinks.

2 JUSTICE SOTOMAYOR: So how this was
3 charged was in the *Elonis* sense. In the *Elonis*
4 sense, you just have to know you said these
5 words, not what you thought they meant, but you
6 said these words, and that a reasonable person
7 would understand it that way, and *Elonis* said,
8 no, that's a negligence standard.

9 So the only issue before us is, I
10 think, are we going to approve of a pure
11 negligence standard that doesn't take into
12 account any of the intentions of the speaker
13 when we prosecute for speech. That's really the
14 bottom line, correct?

15 MR. ELWOOD: That -- that is the
16 bottom line, and this case isolates that because
17 it decided it doesn't matter what you meant.

18 JUSTICE SOTOMAYOR: All right. Now I
19 want to go one step further.

20 The SG, who's an amicus, is the only
21 one who raises at the end of their brief that if
22 we reject, as we did in *Elonis*, negligence, that
23 we should go on, even though it wasn't the basis
24 of the case before us, to decide that
25 recklessness would be enough. But that wasn't

1 what's at issue here, is it?

2 MR. ELWOOD: It's not how the case was
3 presented below, and the actual parties of the
4 case or the -- the -- the party to the case has
5 not ever attempted to affirm the conviction on a
6 basis of recklessness.

7 JUSTICE SOTOMAYOR: Exactly. And so
8 that issue, like in *Elonis*, just hasn't been
9 raised by this case.

10 MR. ELWOOD: I -- I -- I would agree
11 with you that it is under the principle of party
12 presentation that has not been raised. It's
13 only been raised by the Solicitor General.

14 JUSTICE SOTOMAYOR: All right.

15 JUSTICE BARRETT: Mr. Elwood --

16 JUSTICE SOTOMAYOR: Thank you.

17 JUSTICE BARRETT: -- Mr. Elwood, I
18 have -- I have a question about the civil/
19 criminal line that follows up on Justice Kagan.

20 It seems to me that what we're talking
21 about is defining the content -- or what it
22 means to be a threat, right, because, if the
23 First Amendment excludes threats because they're
24 not socially valuable speech, you know, we're
25 looking at how to define a threat.

1 So I guess I don't understand why --
2 and maybe I misunderstood you -- but it sounds
3 to me like you're defining it a little bit
4 differently in the civil context than the
5 criminal context, right?

6 MR. ELWOOD: I'm not entirely sure how
7 to answer the question because, in the civil
8 protective orders, many of them don't require
9 showing a crime. Some of them do require
10 showing a crime. And so I don't know that there
11 really is an issue about civil threats.

12 JUSTICE BARRETT: But let's imagine --
13 let's imagine this example: Let's say that, you
14 know, a teenager in a high school says something
15 like, you know, I'm going to shoot this place
16 down, and it's devoid of all context. So let's
17 say it's more like the statute in Virginia
18 versus Black, which instructed that just the
19 burning of the cross was sufficient for the jury
20 to infer intent. So let's say there's no
21 context at all.

22 But the school, taking the threat to
23 the school seriously, wants the kid to be barred
24 from the grounds or wants him to be suspended
25 for a few days so they can assess the threat.

1 But it's not a crime. It's just deciding
2 whether to keep him out. But it would be state
3 action. What about that? Could the school do
4 that just based on that one statement?

5 MR. ELWOOD: I believe so. Schools
6 have extra leeway, and schools are a whole ball
7 of wax.

8 JUSTICE BARRETT: Okay. Make it the
9 father.

10 MR. ELWOOD: Specific -- but --

11 JUSTICE BARRETT: Make it the father,
12 not the student. Or make it a teacher.

13 MR. ELWOOD: Well --

14 JUSTICE BARRETT: So Tinker's not
15 implicated.

16 MR. ELWOOD: -- well, if they can bar
17 the -- bar the parent from the school?

18 JUSTICE BARRETT: Or the teacher.
19 Just put the teacher -- the teacher says, I'm
20 going to shoot this place up. And they want to
21 just put the teacher on leave --

22 MR. ELWOOD: I think --

23 JUSTICE BARRETT: -- without pay for a
24 week.

25 MR. ELWOOD: I think, you know,

1 absolutely so. I mean, among other things, just
2 in terms of public safety, they can go forward
3 based on the evidence they have of what the
4 threat is, which is, you know, the words he
5 used. And, frequently, the -- the -- the best
6 evidence you have of intent is the words that
7 somebody used. And, in fact, unless they
8 produce something else, those are the things
9 that they -- as the evidence.

10 JUSTICE BARRETT: But, in a civil
11 context, let's say they plan no -- no criminal
12 action, let's just say that this is civil, and
13 the idea is you should know better as a teacher,
14 whether you in -- intended -- or, you know,
15 maybe the teacher is mentally ill. They don't
16 realize yet whether you understood that we would
17 take that to be a threat. I guess I just don't
18 understand why the standard would be different.

19 MR. ELWOOD: Well, the Court has drawn
20 a distinction between kind of civil penalties
21 and criminal penalties, and, I mean, I -- I
22 don't know that it's a penalty to have to miss
23 work for a couple of days while they, you know,
24 get to the bottom of it --

25 JUSTICE BARRETT: I know, but I guess

1 --

2 MR. ELWOOD: -- and decide whether
3 there is a public safety problem.

4 JUSTICE BARRETT: Well, it is if
5 you're suspended without pay because the school
6 says this is just something you don't joke
7 around.

8 MR. ELWOOD: Well, if -- if the idea
9 is we just want to make him suffer because this
10 is something you don't want to joke around,
11 maybe that is something more like punishment,
12 although, again, everything is kind of different
13 in -- in the educational context.

14 JUSTICE BARRETT: But why does it turn
15 on -- but I guess, again, assuming that it's --
16 because, when you were answering Justice Kagan,
17 you were kind of running to the criminal
18 context, like behind every civil restraining
19 order -- I kind of feel like that's what you're
20 doing with me too -- is the potential of a
21 crime, and maybe my example isn't effectively
22 communicating it because I'm trying to make it
23 solely civil.

24 But I guess I don't understand -- I
25 mean, in the New York Times versus Sullivan

1 context, intent does matter for the definition
2 of defamation, but it's a unique context, right?
3 So, here, I -- I understand why in the Elonis
4 sense we would say that what separates culpable
5 from not culpable conduct is the level of
6 intent, and so that mattered in interpreting the
7 mens rea requirements of that statute.

8 But I'm not sure why it changes the
9 definition of threat for purposes of the
10 definitional category of speech that falls
11 outside the First Amendment.

12 MR. ELWOOD: Well, I -- I -- I think
13 part of it is just because of the level of
14 protection you get. And in the civil context,
15 you know, losing a couple days of -- of salary
16 is -- you know, can be a significant penalty,
17 but it's nothing like being sentenced to four
18 and a half years in prison.

19 JUSTICE KAGAN: Do we have any place
20 in our First Amendment law where we've made that
21 distinction? Because I understand you're
22 saying, look, this is a criminal case, this was
23 a very heavy sentence, and -- and -- and really
24 forcing us to say we have this discomfort with
25 crimes that don't have mens rea.

1 But this is a different sort of
2 question. You're not saying, well, just because
3 a crime doesn't have a mens rea element it's
4 unconstitutional. Your argument is a First
5 Amendment argument. And I guess I -- I just
6 don't know of very many of our cases or any of
7 our cases that have made a real distinction
8 between criminal penalties and civil penalties
9 with respect to what's permitted or prohibited
10 under the First Amendment.

11 MR. ELWOOD: Well, the only thing I
12 can point to, again, is the defamation context,
13 where they draw distinctions between civil
14 liability and -- and treble damages or punitive
15 damages, which is -- and the cases like -- I
16 think it's Reno versus ACLU, where they've said
17 that criminal penalties pose special concerns.

18 And the place where this would
19 normally arise is in the civil protective order
20 context, which I think is reduced because, of
21 course, the person who is the -- the recipient
22 of the threats or the statements has a First
23 Amendment interest in not associating.

24 And this sorts itself out in other
25 areas because, like, in the -- in the tort of

1 negligent infliction of emotional distress, you
2 typically can't get that based on -- unless you
3 were physically injured, on a negligent -- on a
4 negligence standard. It requires at most kind
5 of an intentional statement.

6 But I -- I am not aware of kind of a
7 body of First Amendment case law that -- that
8 talks about the civil -- sort of the civil
9 implications of punishing threats. So the focus
10 is, you know, the case before us. And I think
11 defamation is enough of a basis for the Court to
12 say it makes a difference.

13 JUSTICE KAVANAUGH: You said earlier
14 that your position would not make a big
15 difference in a lot of cases. I think you said
16 that. Can you give us examples, not this case,
17 examples of other cases out there where you
18 think someone was criminally prosecuted and
19 should not have been?

20 MR. ELWOOD: Certainly. But I think,
21 you know, the -- the just versus unjust
22 prosecutions or just versus unjust convictions
23 is a very small part of the argument we're
24 making, because the chilling effect comes from
25 being told it doesn't matter -- a speaker being

1 told it doesn't matter what you think, you have
2 to think about the reaction of your audience.

3 And so that is -- you know, wholly
4 apart from whether there are unjust convictions,
5 I think that this is, you know, a -- a --

6 JUSTICE KAVANAUGH: Was that -- I'll
7 wait.

8 MR. ELWOOD: Yeah. But, in terms of
9 the convictions that made a difference, it might
10 have made a difference in the Fulmer case.
11 That's the "silver bullets are coming" case.
12 And I think there's another case -- I mean, one
13 of the broader points I'd like to make to the
14 Court is that these kind of prosecutions and
15 these kind of arrests are, I think,
16 substantially underreported because local media,
17 unless it just happens to catch the fancy of
18 local media, it's just not covered. And so some
19 of the best examples are ones that are simply
20 emailed to me by spouses or relatives of the
21 people who are prosecuted.

22 But one example is Glenn Schumacher in
23 Illinois, who is a 58-year-old married man who,
24 on the comments page of a local newspaper, The
25 Elmhurst Patch, responded to an article about,

1 you know, littering and crowds and so forth at
2 an annual event by saying perhaps a few placed
3 -- well -- pressure cooker pots. And the very
4 next commenter said, you know, we all appreciate
5 some cleverness and humor, but that's pretty
6 crass. So, clearly, the first person who saw it
7 immediately knew it was a joke. He was arrested
8 at 2 a.m. the next day and held for six weeks on
9 a bond that he could not afford until he pleaded
10 guilty to essentially disorderly conduct.

11 And I think that's an example of a
12 statement that they would say clearly he did not
13 intend that as a threat. He also had no
14 criminal record. But it -- it made a difference
15 in the outcome.

16 CHIEF JUSTICE ROBERTS: Counsel --

17 MR. ELWOOD: But, again, that's a very
18 small part of the argument we're making here,
19 which is more focused on chilling.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Elwood.

22 To what extent does your case -- or is
23 it affected by the fact that we're dealing with
24 text messages, where, you know, it seems to me
25 the most threatening message we've got is,

1 "You're not being good for human relations.
2 Die. Don't need you."

3 Now that's there in sort of cold
4 print, but you can convey that message in a
5 hostile way or in a way that's sort of like, you
6 know, you're dead to me kind of thing.

7 If this case didn't involve texts, how
8 -- how would this material get into the record?
9 Would there be testimony or --

10 MR. ELWOOD: I think that there would
11 be testimony. And even though it was by direct
12 messages, it came in through testimony as well,
13 as they described -- as they described that in
14 the trial.

15 CHIEF JUSTICE ROBERTS: By whose
16 testimony?

17 MR. ELWOOD: Through C.W.'s testimony.

18 CHIEF JUSTICE ROBERTS: Okay.
19 Justice Thomas?

20 JUSTICE THOMAS: Yes, just briefly,
21 Mr. Elwood. The -- Justice Alito asked you
22 whether or not intent could be baked into some
23 statements, and that was my problem, by the way,
24 with Virginia v. Black. The burning of a cross
25 in the middle of a field doesn't leave much room

1 to imagination.

2 But the -- what if someone said in a
3 text, "I will kill you"? What -- what -- what's
4 missing there as to the intent of that person?

5 MR. ELWOOD: Well, if it's said
6 between siblings, you know, talking about, you
7 know, you -- you ate the last brownie, it can
8 mean something entirely different than if it is
9 in the case of, I think, In the Interest of
10 R.D., where --

11 JUSTICE THOMAS: Let's just take your
12 client here. "I will kill you."

13 MR. ELWOOD: Well, I -- I think, in
14 that case, it could be open to a lot of
15 different meanings depending on what happens
16 around it.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE ALITO: Suppose someone writes
19 a story and posts it on the internet or
20 publishes it, and it's a story about -- it's a
21 mystery story about one spouse killing the other
22 spouse. Most people are going to read it and
23 think, okay, this is an interesting story or
24 it's not an interesting story.

25 But suppose that all of the details

1 match up with the situation of the author's
2 spouse, and when that spouse reads it, the
3 spouse takes it as a threat.

4 How do you analyze that?

5 MR. ELWOOD: I think, you know, in the
6 sort of law enforcement context, I think you can
7 stop -- I think the application of the test with
8 the objective test is about the same, because it
9 is what would the ordinary person think these
10 words mean given all of the circumstances.

11 And -- and so I think that you would
12 make the same law enforcement decision there,
13 whether you were applying a subjective test or
14 an objective test.

15 If you talk to the guy and you are
16 absolutely convinced that, you know, he didn't
17 mean it, he didn't mean to instill fear, he just
18 thought these are great facts for a story, that
19 makes the law enforcement decision easier.

20 If you have doubts, if you think maybe
21 he's doing this to instill fear, well, then, as
22 they used to say in the old '40s movies, tell it
23 to the judge. You know, you -- you treat it
24 just like you would under an objective standard.
25 You indict the guy, go to trial, and then he has

1 an opportunity to tell the jury. And if it's
2 a persuasive explanation, it's enough to
3 introduce reasonable doubt, then he might get
4 acquitted.

5 JUSTICE ALITO: Well, what about --

6 MR. ELWOOD: But, if not --

7 JUSTICE ALITO: Okay. What about the
8 converse? So the spouse reads it and it --
9 suppose it's written in the first person and
10 talks about what the author of the story is
11 going to do.

12 The spouse reads it and says, well,
13 you know, this is just my husband or my wife is
14 an author, this is that -- you know, this is --
15 he -- he or she is just trying to write a story.
16 But a neighbor reads it and says, wow, this
17 matches up exactly with their situation and I
18 interpret that as a threat to commit murder.

19 What about that? I mean, this -- this
20 is a problem in -- with internet communications,
21 because they go out to sometimes a vast and
22 unknown audience.

23 MR. ELWOOD: I think that this is an
24 argument in favor of looking to the speaker's
25 intent because it's the same outcome in both

1 cases, whereas, depending on the state that
2 would apply it, you know, sometimes there's a
3 reasonable person, sometimes there's like a
4 reasonable foreseeable audience, and the --
5 the -- the effect may differ depending on what
6 the person thinks a reasonable -- how a
7 reasonable person would view that.

8 I think that's one of the problems
9 with objective standards generally, is it is a
10 rough and tumble of factors and you don't
11 necessarily know how they would apply in any
12 given case. The Court has said time and again
13 how that yields unpredictability, which is bad
14 for speech.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: I think, in fact,
19 there's a raps -- rapper who sang a song doing
20 exactly what Justice Alito said, correct?

21 MR. ELWOOD: Yes, Eminem, as we may
22 remember, from 2014.

23 JUSTICE SOTOMAYOR: Exactly what he
24 said. And -- and I think you've made the point,
25 but I want to underscore it for myself, which

1 is, if you don't have some sort of subjective
2 intent in a -- in a circumstantial case, you're
3 baking in in the objective reasonable viewer a
4 societal -- a sort of bias to whatever that jury
5 thinks might be the community standard.

6 And what's okay for a video game
7 person, player, or a -- a rapper is a very
8 different thing than would be for a -- a
9 non-parent rapper.

10 MR. ELWOOD: I agree. Judge Floyd on
11 the Fourth Circuit has a very good separate
12 opinion on this in United States versus White,
13 where he talks about how, essentially, minority
14 viewpoints, minority religions, fringe speech,
15 fringe art tends to be viewed as threatening,
16 you know, to people who are unfamiliar with it,
17 which is, I think, the reason why Jehovah's
18 Witnesses are petitioners in about 30 percent of
19 free speech cases, because it's a minority
20 religion which is unfamiliar and seems weird and
21 threatening to, you know, the -- the residents
22 of New Haven, Connecticut.

23 JUSTICE SOTOMAYOR: So more of a
24 reason that you have to let in people to explain
25 the basis of their intent, correct, or their

1 knowledge?

2 MR. ELWOOD: I would agree, yes.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Mr. Elwood, the --
5 the -- the two areas where we've insisted that
6 states have buffer zones or breathing room,
7 which are, you know, libel cases, public figure
8 libel cases, and incitement cases, I mean, in
9 both those cases, there's a very thin line
10 between the no value speech and speech that is
11 of great value, so the advocacy/incitement line
12 is a very thin one.

13 And so too, when it comes to
14 defamation of public figures, it's just a --
15 it's just a step from extremely valuable
16 commentary about public figures.

17 And so, in those two areas, we've
18 insisted on this breathing room. But I wonder
19 looking at this case whether we can really say
20 that. And this goes a -- a little bit to
21 Justice Kavanaugh's question as well.

22 Like, what's the area of speech that
23 we think is really going to be chilled by
24 drawing the line in the place where this state
25 and many other states want to draw it?

1 I mean, there's nothing that's sort of
2 close to true threats but is super valuable that
3 we ought to be worried about, is there?

4 MR. ELWOOD: I disagree. I mean, one
5 of the reasons why we analogize to incitement is
6 the language is frequently exactly the same,
7 "we're going to break their damn necks" or, you
8 know, "we might need to take some revengeance."

9 It's -- a lot of it, it sounds an
10 awful lot like a threat, it's just going to be
11 delivered by somebody else, and so too here.

12 A lot of the examples you can come up
13 with from the Bible Believers case, which was an
14 incitement case, but "Turn or Burn," imagine a
15 protester speaking to a doctor going to an
16 abortion clinic, "Turn or Burn" might be warning
17 about damnation, might be, you know, "we're
18 going to bomb your clinic."

19 There's a lot of speech on the
20 internet that walks the line, you know, "burn it
21 all down," you know, "come and take it," Second
22 Amendment -- or Second Amendment remedies.

23 There's a lot of speech online that --
24 that kind of comes close to the line, and it's
25 not a matter of absolute clarity which way it

1 would fall, and I think it protects that kind of
2 speech, which, again, is virtually identical to
3 the stuff that comes up in incitement cases.
4 The only question is who's going to make good on
5 the threat.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: Along those lines,
9 the Solicitor General had -- one of its headings
10 says that a statement that based on its content
11 and context is threatening to a reasonable
12 person has minimal expressive value and is
13 inherently harmful.

14 I guess my question for you is, if --
15 if we were to rule the other way, what's at
16 stake in terms of what's left? How do we know
17 when a reasonable person is going to find
18 something of minimal value and inherently
19 harmful?

20 MR. ELWOOD: I would recommend the
21 amicus briefs filed by the Alliance Defending
22 Freedom, Reporters Committee, FIRE -- I hope I'm
23 not leaving anybody out there -- and ACLU,
24 because they do a very good job of talking about
25 how, when you tell speakers it doesn't matter

1 what you think, what matters is the audience
2 reaction, then instead of thinking about just
3 what do I view as the truth, what do I want to
4 communicate, they have to think about, well,
5 what's not going to -- what's going to get me in
6 trouble. And it automatically causes people to
7 kind of -- to chill, to -- to go back to the
8 area where they have safety.

9 And I think that is what you would
10 lose. You would lose some of the rough and
11 tumble of speech, which is especially important
12 on the internet, because, again, as I say, it
13 brings together strangers in an area where you
14 don't have a lot of context, and with strangers,
15 you know even less of that context.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: A couple things.
19 I think the State and the SG say there are
20 certain kinds of threats that they're concerned
21 about, in particular, presidential threats,
22 threats against the President, stalking, school
23 threats, domestic violence, and that it's a
24 defense like the one that would be present with
25 your mens rea would make it too easy for someone

1 to say, oh, I was just joking, I was just
2 kidding, and, therefore, threats that would be
3 really quite dangerous in terms of leading to
4 the next step of actually carrying through with
5 the threat will not be addressed.

6 How do you respond to that concern?

7 MR. ELWOOD: To begin with, I think
8 that presidential threats after Elonis are
9 already subject to an intent standard. But I --
10 I will give you an answer similar to the one I
11 gave earlier, which is that this is not going to
12 make a difference in the run of cases because,
13 ordinarily, the way a reasonable person would
14 view remarks is the way that the defendant
15 probably viewed the remarks, unless they can
16 present some sort of persuasive reason why it
17 meant something different to them.

18 JUSTICE KAVANAUGH: And what about the
19 "I was just joking," "I was kidding"?

20 MR. ELWOOD: Well, the question is
21 not --

22 JUSTICE KAVANAUGH: Isn't that a --
23 isn't that a constant concern?

24 MR. ELWOOD: -- a lot of times --

25 JUSTICE KAVANAUGH: You go to the

1 house and the -- and the guy says, I was just
2 joking around?

3 MR. ELWOOD: Well --

4 JUSTICE KAVANAUGH: And then the
5 police officer is really stuck.

6 MR. ELWOOD: -- you go beyond that and
7 say -- because, to some people, the joke is
8 causing people to scurry around. And if the --
9 if you're like, well, did you know there was
10 going to cause -- you were going to -- was it
11 going to alarm them, did you think that the
12 police might respond, and if the answer to that
13 is, you know, yes, that's very easy.

14 If the answer to that is no, it may
15 just not seem credible if the -- the -- the
16 threat was, "I'm going to kill you," or "I'm
17 going to come cut your throat."

18 So, I mean, I -- there -- there's
19 been -- you know, we've -- we've had many states
20 that have a mens rea statute. I -- there's over
21 20 that for the -- the general threat statute
22 require a showing of purpose or intent. You
23 know, there's more that -- you know, that
24 require something less. And, you know, there
25 just hasn't been showing that there's a big

1 problem or that it's -- it can't be solved
2 whether these people will be granted a license
3 to get away with things.

4 Again, you have to have some sort of
5 persuasive reason why the words meant something
6 different to you. It's not enough to say it's a
7 joke. You have to put together a persuasive
8 reason why you didn't know it would cause fear.

9 And if you adopt the -- the
10 government's recollection, it's even lower
11 because, under recklessness, you know, you --
12 you can't say, you know, I had no idea that
13 people would view that as a threat.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: Everything you're
18 saying I'm -- I'm comfortable with as a matter
19 of criminal liability, but I guess I'm still
20 stuck on the civil/criminal point.

21 And, you know, I think Virginia versus
22 Black is your best case because there is some
23 language in there sprinkled about intent, but I
24 also think the case can be understood as one in
25 which there was no context. The context was

1 stripped away. And so a reasonable person --
2 there was no way to judge, as that law was
3 written, whether a reasonable person in context
4 would have understood it as a threat. So I -- I
5 don't think it gets you all the way there.

6 I guess, to Justice Kagan's point
7 about the thin line between them, won't context
8 protect most often? And -- and a true threat
9 has to be one of physical harm, right?

10 MR. ELWOOD: Yes, a true threat has to
11 be one of physical harm.

12 JUSTICE BARRETT: So, I mean, a lot of
13 the examples, it seems to me, that were in some
14 of the amicus briefs and in your brief are ones
15 in which either context or a requirement that
16 something actually be for bodily harm wouldn't
17 be present. I mean, are we talking about a
18 narrow slice of cases in which someone is
19 mentally ill or, you know, for some reason, they
20 may be autistic, and just doesn't appreciate the
21 context? Is that the narrow band we're really
22 talking about?

23 MR. ELWOOD: There's a lot baked in
24 there. If I could first talk about Virginia
25 versus Black, I think it's important to remember

1 the default rule, which is whether there's a
2 clearly established tradition of allowing the
3 regulation of this speech. And, at minimum,
4 they can -- the best they can get out of
5 Virginia versus Black is ambiguity, not an
6 embracement of negligent free speech.

7 In addition, in all of the mentions of
8 context there, I say context is important
9 because it helps you determine intent. So,
10 again, there's nothing in there to suggest you
11 can have just a context-sensitive objective
12 test.

13 With respect to, you know, context and
14 whether context will sort all of this out,
15 it's -- it's -- you know, context makes a big
16 difference in a lot of cases, but part of the
17 problem is the foreseeability of that. We
18 already had a little discussion of the many ways
19 "I will kill you" could be meant. And when
20 you're talking about speech -- this is again why
21 I refer to the amici -- speakers have to have
22 some sort of confidence in advance about whether
23 they -- what they're saying is going to wind
24 them up in trouble.

25 In the past, intent has been a bulwark

1 because speakers know their intent, and so, if
2 their intent matters, that gives them some
3 comfort in -- that they can say what they were
4 going to say without criminal punishment.

5 But, when the standard is what a
6 reasonable person would think, then you're
7 thinking, well, what does that mean? And,
8 frequently, you don't know what the answer to
9 that is. We could have a conversation -- the
10 conversation about "I will kill you" could have
11 gone on another five minutes and we might not
12 have, you know, gone to ground.

13 JUSTICE BARRETT: Maybe you should be
14 careful if you're going to say something like "I
15 will kill you" or "I'm going to burn it all
16 down" or "I'm going to shoot up a school."

17 MR. ELWOOD: Well, again, you know, my
18 mother said to me virtually every day of my
19 childhood --

20 JUSTICE BARRETT: "I'm going to kill
21 you"?

22 MR. ELWOOD: -- "Drop dead." Yeah.

23 (Laughter.)

24 MR. ELWOOD: And yet, you know, I was
25 never in fear because of that, and so, you know,

1 context meant a lot.

2 JUSTICE BARRETT: Hopefully, context
3 gave you some reassurance.

4 (Laughter.)

5 MR. ELWOOD: It was about the only
6 thing that did, but, yes.

7 (Laughter.)

8 JUSTICE BARRETT: Thank you, Mr.
9 Elwood.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: Yes. So let me just
13 be clear, Mr. Elwood. I'm trying to understand
14 whether you're saying that in every other
15 category of unprotected speech we require some
16 subjective intent, with perhaps the exception of
17 fighting words. Is that right?

18 MR. ELWOOD: I think that that's
19 right, that it generally requires a recklessness
20 or sometimes knowledge in the case of obscenity.

21 JUSTICE JACKSON: Okay. And then just
22 to follow up on Justice Barrett and Justice
23 Kagan's questions about civil versus criminal,
24 I'm wondering -- you -- you say that you -- your
25 argument relies on the chilling effect, and I'm

1 wondering whether you're perceiving some
2 distinction in a criminal versus civil penalty
3 scheme with respect to the way in which or the
4 amount of chilling that would occur.

5 MR. ELWOOD: I think that there is a
6 difference in the amount that would occur. The
7 Gertz -- I'm sorry -- Gertz versus Robert Welch
8 suggests that the difference is constitutionally
9 significant. I do think there is, you know,
10 some chilling effect. I think that some of that
11 is baked into the -- the Gottshall decision,
12 which is this Court's case, and the negligent
13 infliction of emotional distress because, you
14 know, you can't generally get emotional damages
15 for negligent speech harms.

16 So I think that there is -- you know,
17 perhaps that reflects some sort of reflection
18 that there is a chilling effect to imposition of
19 penalties.

20 But, again, in the -- in the
21 defamation context, the Court has said that
22 states have a compelling enough interest in
23 making people whole that they would let those
24 cases proceed in the civil context.

25 JUSTICE SOTOMAYOR: Chief, I'm sorry,

1 may I ask just one question?

2 CHIEF JUSTICE ROBERTS: Sure.

3 JUSTICE SOTOMAYOR: Are you saying
4 that you have to always prove somebody intended
5 to commit the act, or do you have to just say
6 that they knew they were going to put someone
7 else in fear?

8 MR. ELWOOD: We are only arguing for a
9 knowledge standard, that they knew that the
10 words would cause fear.

11 JUSTICE SOTOMAYOR: Okay.

12 CHIEF JUSTICE ROBERTS: I don't know
13 if you were finished or not, Justice Jackson.

14 JUSTICE JACKSON: Yes, that's fine.
15 Thank you.

16 CHIEF JUSTICE ROBERTS: Okay. Thank
17 you, Mr. Elwood.

18 MR. ELWOOD: Thank you.

19 Mr. Weiser.

20 ORAL ARGUMENT OF PHILIP J. WEISER
21 ON BEHALF OF THE RESPONDENT

22 MR. WEISER: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 True threats have always been
25 prosecuted without protection by the First

1 Amendment. Petitioner now seeks to impose a
2 specific intent element onto this inquiry that's
3 required neither by history nor precedent.

4 Doing so would enable more harm and
5 less valuable discourse. That's because a
6 serious expression of an intent to cause
7 unlawful physical violence directly causes
8 life-changing harms and does not contribute to
9 the marketplace of ideas, regardless of what the
10 perpetrator was thinking.

11 Requiring specific intent in cases of
12 threatening stalkers would immunize stalkers who
13 are untethered from reality. It would also
14 allow devious stalkers to escape accountability
15 by insisting that they meant nothing by their
16 harmful statements.

17 This matters because threats made by
18 stalkers terrorize victims and for good reason.
19 Ninety percent of actual or attempted domestic
20 violence murder cases begin with stalking. The
21 court below followed this Court's teachings from
22 Watts and Black that context is critical in
23 evaluating what constitutes a true threat.

24 The robustness of an objective,
25 context-driven inquiry means that this test

1 won't criminalize a joke taken the wrong way,
2 political advocacy, or hyperbole. It thus
3 protects statements that contribute to the
4 marketplace of ideas.

5 In this case, C.W. reasonably
6 perceived that Counterman's threatening stalking
7 conveyed a serious expression of an intent to
8 cause unlawful physical violence. The First
9 Amendment does not protect threats like these in
10 either the criminal or the civil context. And
11 the standard is, indeed, the same by this
12 Court's precedents in both.

13 Imposing a specific intent requirement
14 would thwart the goals of the First Amendment,
15 enabling more harm and leading to less valuable
16 discourse.

17 I welcome your questions.

18 JUSTICE THOMAS: But Petitioner is
19 arguing, I think, a little -- I think a bit
20 more. Petitioner is also arguing that it has a
21 spillover effect of chilling protected speech,
22 not just that this is protected speech.

23 Now how would you respond to that?

24 MR. WEISER: Since Watts, the majority
25 rule in the overwhelming jurisdictions, 50

1 years, has been an objective standard. And
2 during that time, the only prosecutions they
3 point to, the case he mentions, "silver bullets
4 are coming," was actually a case that was under
5 a specific intent standard. We haven't seen in
6 the last 50 years with this objective rule the
7 types of harms. And, moreover, we point to the
8 time of the founding that threats were
9 prosecuted without regard to intent.

10 JUSTICE THOMAS: But he -- he also --
11 he also argues that you wouldn't see necessarily
12 the chilling effect because those cases would
13 not be before you. That's what I'd like you to
14 respond to.

15 MR. WEISER: Thank you, Justice
16 Thomas. Justice Kagan got to a critical point.
17 The type of the speech that remains after the
18 objective, context-driven inquiry is speech that
19 doesn't come close to contributing to the
20 marketplace of ideas. As was said by Justice
21 Barrett, when you're talking about a serious
22 expression of an intent to cause physical
23 violence and harm someone, that's a high
24 standard. Coming very close to that standard
25 isn't the sort of speech that this Court has

1 protected under the First Amendment.

2 CHIEF JUSTICE ROBERTS: Well, saying
3 doesn't come close to protected speech, here's
4 one of the statements for which he was
5 convicted: "Staying in cyber life is going to
6 kill you. Come out for coffee. You have my
7 number."

8 In what -- in what way is that
9 threatening, almost regardless of the tone?

10 MR. WEISER: When it's put into the
11 context, Mr. Chief Justice, what is being said
12 here is, if you don't come out for coffee with
13 me, bad things are going to happen to you.
14 There's others --

15 CHIEF JUSTICE ROBERTS: Well, this is
16 -- I'm sorry. This isn't remotely like that.
17 It says, "Staying in cyber life is going to kill
18 you." I can't promise I haven't said that.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: "Come out --
21 come -- come out -- come out for coffee. You
22 have my number."

23 MR. WEISER: The content --

24 CHIEF JUSTICE ROBERTS: I think that
25 might sound solicitous of the person's

1 development. I mean, if we're talking just
2 about what the statements are, how is that --
3 what tone would you use in saying that that
4 would make it threatening?

5 MR. WEISER: The threat in that is, if
6 you don't come out and meet me, your life's in
7 danger. And the stalking context here, like
8 many stalking situations, has someone who
9 believes they're entitled to the attention and
10 the affection of a victim.

11 Victims of stalking routinely face
12 scores and scores, hear hundreds and hundreds of
13 unwanted, invasive engagements from somebody,
14 and the consequence in stalking cases is, if you
15 don't give me what I want, I can turn violent,
16 and that, indeed, does happen a significant
17 amount of the time.

18 CHIEF JUSTICE ROBERTS: Okay. Say
19 this in a threatening way. One of the things he
20 was convicted of, it was an image of liquor
21 bottles, and there was a caption, "A guy's
22 version of edible arrangements."

23 (Laughter.)

24 MR. WEISER: So, again --

25 CHIEF JUSTICE ROBERTS: Say -- say

1 that in a threatening way.

2 MR. WEISER: So the threat here is
3 when you put them all together. When you take
4 one of these out of context or put it into a
5 different context, it means something different.

6 But, here, she cut him off on Facebook
7 Messenger four to eight times. She got
8 literally up to a thousand messages over a
9 couple of years. She was subject to this
10 torrent of activity that was objectively
11 terrifying to her and would be to any reasonable
12 person in that position, and she was helpless,
13 and she could have seen him at a concert and he
14 could have harmed her, and she was then afraid
15 to pursue her craft.

16 CHIEF JUSTICE ROBERTS: And under your
17 theory, the defendant couldn't say, right, the
18 first thing anybody would say, a child, an
19 adult, when someone is offended or even feels
20 threatened by their speech is, that's not what I
21 meant. What I meant was, if you stay on the
22 computer, you know, all -- all day long, it's --
23 it's -- well, I don't know if it's going to kill
24 you, but it's going to -- you know, it's not
25 good for you, and "come out for coffee" is an

1 invitation to get off the computer.

2 MR. WEISER: The Colorado standard
3 looks at the context, and the context here was
4 she had four to eight times cut off access. He
5 kept coming back, kept sending messages in the
6 face of what, again, was a clear sign, I don't
7 want to hear from you. She said at trial that's
8 the clearest sign you can offer on Facebook.

9 CHIEF JUSTICE ROBERTS: Okay. This
10 will be the last -- the last question.

11 Because you're putting it so much in
12 context, he had been doing this, this, and this,
13 could he be convicted for anything, saying
14 anything? "Good morning"? And, you know,
15 that's after however many months of doing this.

16 So, in other words, does the content
17 of the speech actually matter in the -- in the
18 way you're looking at it?

19 MR. WEISER: Yes. The content of the
20 speech that crossed the line was when it
21 escalated to a tone and to statements about her
22 life being at stake --

23 CHIEF JUSTICE ROBERTS: But --

24 MR. WEISER: -- "Die. Don't need
25 you," "You're not good for anybody."

1 CHIEF JUSTICE ROBERTS: Okay. I said
2 that was the last question, but I was wrong.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: Well, you said
5 when it escalates in tone?

6 MR. WEISER: His messages over time
7 got more aggressive and started using language
8 that got to her physical safety.

9 CHIEF JUSTICE ROBERTS: But tone, to
10 me, that means how it's enunciated. We don't
11 have any of that here, right? It's cold emails.

12 MR. WEISER: The tone of the
13 statements were taken on by the language that
14 was used. When the language got scary and
15 violent and talking about her life, it was a
16 different matter.

17 Also, it's important to note there
18 were statements, "Nice display with your
19 partner, seeing you out and about," that also
20 gets to I'm being watched. For a victim in this
21 situation, it is entirely reasonable,
22 appropriate, to see this as terrifying, because
23 we know these stalking cases can and often do
24 turn violent.

25 JUSTICE ALITO: The statute talks

1 about the manner of the communication. So do
2 you say that the statute -- you interpret the
3 statute to mean that a person cannot be
4 convicted based on the manner of making
5 communications, the content of which is not in
6 themselves threatening?

7 Suppose someone follows a person like
8 C.W. around and is constantly popping up and has
9 a threatening look to the person and is
10 constantly saying, "Good morning, C.W.," "Good
11 afternoon, C.W.," "How are you now?"

12 The -- the content is benign, but the
13 manner is one that would cause a person to be
14 disturbed. Is that not prosecutable under this
15 statute?

16 MR. WEISER: There are two different
17 standards. There's the criminal statute, and
18 then there's the true threat First Amendment
19 requirement.

20 Under the statute, the individual has
21 to have intent in the general sense knowing what
22 the words mean, and there has to be significant
23 emotional distress to the individual, and a
24 reasonable person would have to experience
25 significant or serious emotional distress.

1 So, if the statements, as they were
2 said, would cause an individual to suffer
3 serious emotional distress and someone did
4 suffer that, that would be the standard under
5 the statute.

6 The First Amendment then says it has
7 to be a serious expression of an intent to cause
8 unlawful physical violence. It does strain my
9 imagination to plausibly imagine any
10 circumstance where "good morning" is enough to
11 constitute a serious expression of an intent to
12 cause physical violence.

13 JUSTICE ALITO: So a person could not
14 be -- is that an interpretation of the statute,
15 or is that a constitutional requirement?

16 A person cannot be convicted of
17 stalking based on communicating statements that
18 are not in themselves threatening in a manner
19 that is likely to be interpreted to be
20 threatening. That -- the First Amendment
21 doesn't allow that?

22 MR. WEISER: The First Amendment
23 requires, in order to prosecute a true threat,
24 that it be a serious expression of an intent to
25 cause harm.

1 JUSTICE SOTOMAYOR: I -- I'm sorry.
2 This -- this goes to the protective order issue.
3 You can engage in conduct, a
4 persistent following of someone, that would
5 violate a protective order. It wouldn't matter
6 what the person was saying or what they intended
7 to do when they were following them. They --
8 the conduct being proscribed is just the
9 stalking, the following that person.

10 And I think what Justice Alito is
11 saying, if there is a statute that says, if you
12 repeatedly follow someone or repeatedly reach
13 out to someone in a manner that causes them
14 fear, that that might be enough.

15 You're now putting a different overlay
16 on this, which is what the Virginia court did,
17 which is you -- your speech has to be
18 threatening. That's what Virginia is saying.

19 So I think we're dealing with a
20 different case when we're talking about pure
21 stalking from what Virginia is doing. And the
22 way it charged it was -- was to say it wasn't
23 just her serious emotional distress. She felt
24 in fear for her life, and so they took it as a
25 -- they said it was a true threat case, correct?

1 MR. WEISER: Correct, Justice
2 Sotomayor.

3 JUSTICE SOTOMAYOR: So, if all we say
4 is this is a true threat case, because that's
5 the way it was tried and that's the gloss that
6 Virginia -- that -- not Virginia, I'm sorry,
7 what state is this?

8 MR. WEISER: Colorado.

9 JUSTICE SOTOMAYOR: Colorado. I'm
10 thinking of --

11 MR. WEISER: We like Virginia.

12 JUSTICE SOTOMAYOR: No, I -- I was
13 just thinking of the flag-burning case. It --
14 it controlled the place in my mind.

15 We don't have to opine on what a true
16 stalking statute is about that is not concerned
17 with speech, correct?

18 MR. WEISER: Yes. If I could explain
19 one minute here. There are three types of
20 stalking cases. There's the pure conduct ones
21 that Justice Gorsuch referred to earlier.
22 There's ones where there are threats, and I
23 thought that was the nature discussion. There's
24 also a third category, stalking, which is dealt
25 with very ably in the Duick, Lakier, and Volick

1 brief. That is a different analysis.

2 If I could get back to the civil
3 protective order and just for two --

4 JUSTICE GORSUCH: Well, I just want to
5 follow up on this before we leave it.

6 So Colorado could have pursued the
7 defendant here for stalking and secured a
8 conviction for that. Conduct wouldn't involve
9 any expressive activity at all, and you'd be out
10 -- out of -- out of the woods, right?

11 MR. WEISER: Had the conduct been
12 being following somebody around, that would have
13 been a different form of stalking case.

14 Here, the conduct were the statements
15 sent over Facebook Messenger. Sometimes you
16 hear the phrase "cyber stalking." The Colorado
17 statute reaches such activity if it meets the
18 relevant criminal statute and First Amendment
19 requirements.

20 JUSTICE GORSUCH: And then, second,
21 kind of back to the Chief Justice's questions,
22 you emphasized that context is really important
23 here. Content and context will do the work.

24 Why isn't the defendant's intentions
25 part of the context? How could it not be part

1 of the context?

2 We've had so many examples here how
3 words mean different things in different
4 contexts, and part of it is how they're
5 received, surely, but part of it has to be how
6 they were intended. Isn't -- isn't that part of
7 the context?

8 MR. WEISER: The defendant's approach
9 and, indeed, even their testimony, is relevant
10 to who the intended and foreseeable audience
11 was. If it offended the --

12 JUSTICE GORSUCH: No, I'm talking
13 about the message, not -- not to whom it was
14 directed. We -- forget about that. Put that
15 aside.

16 The words, "I'm going to kill you," or
17 -- I've forgotten what Mr. Elwood's mother said
18 to him --

19 (Laughter.)

20 JUSTICE BARRETT: "Drop dead."

21 JUSTICE GORSUCH: "Drop dead." Thank
22 you.

23 (Laughter.)

24 JUSTICE GORSUCH: Those words have
25 very different contexts among friends, among

1 colleagues, among family members, even among
2 strangers sometimes. I'm sure, if we went
3 through the comments section of any daily
4 newspaper today, we'd find some of those words.

5 Are they -- I mean, I'm just a little
6 concerned that by ignoring one aspect -- you're
7 asking us to really ignore one aspect of context
8 while you're resting on context. How does that
9 work?

10 MR. WEISER: The defendant's
11 statements, the defendant's experience, if you
12 look at the test, the relationship, the
13 statements in a prior -- in a previous exchange,
14 that all comes in. That is all relevant for the
15 reasons you said.

16 JUSTICE GORSUCH: But not his -- his
17 subjective beliefs?

18 MR. WEISER: The subjective belief
19 gets to something else. Someone can be under --

20 JUSTICE GORSUCH: That's not part of
21 the context in your world, right? We have to
22 say that's not relevant context? That's not
23 context?

24 MR. WEISER: Because it doesn't get to
25 the nature of the harm. Statements can be

1 objectively terrorizing to somebody. Someone
2 can say, I had no idea, I thought we were in a
3 relationship --

4 JUSTICE GORSUCH: But I'm correct in
5 understanding that, in your view, context cuts
6 off there?

7 MR. WEISER: Yes.

8 JUSTICE GORSUCH: Okay. And then last
9 question, I hope. We live in a world in which
10 people are sensitive and -- and maybe
11 increasingly sensitive. As a professor, you
12 might have issued a trigger warning from time to
13 time when you had to discuss a bit of history
14 that's difficult or a case that's difficult.

15 What do we do in -- in -- in a world
16 in which reasonable people may deem things
17 harmful, hurtful, threatening? And we're going
18 to hold people liable willy-nilly for that? I
19 mean, again, the Solicitor General says a
20 statement that's based on its content and
21 context, putting aside its intentions, I
22 suppose, that's threatening to a reasonable
23 person is inherently harmful.

24 What do we -- how do we talk about
25 history?

1 MR. WEISER: The first point I would
2 emphasize -- Justice Barrett made the point
3 well -- it has to be a serious expression of an
4 intent to cause unlawful physical violence. So
5 someone feeling uncomfortable --

6 JUSTICE GORSUCH: But we have to put
7 intentions aside? You tell me.

8 MR. WEISER: Correct.

9 JUSTICE GORSUCH: So I'll put that
10 aside?

11 MR. WEISER: Yes.

12 JUSTICE GORSUCH: All right. But just
13 in its content and context, not looking at
14 intentions --

15 MR. WEISER: Right.

16 JUSTICE GORSUCH: -- is harmful, that
17 has no First Amendment protection under the test
18 that's being purveyed here. And I would just,
19 again, put to you, aren't -- aren't a lot of
20 things harmful that we talk about and have to
21 talk about difficult, offensive to reasonable
22 people? Some of our history could count as
23 that. Some of the Court's cases might even
24 count as that.

25 MR. WEISER: Offensive is not the

1 standard.

2 JUSTICE KAVANAUGH: You're saying
3 physically harmful, right?

4 MR. WEISER: It has to be physically
5 harmful.

6 JUSTICE GORSUCH: Okay.

7 MR. WEISER: And this is a crucial
8 point. It gets to the -- a lot of the points
9 made in that FIRE brief aren't talking about
10 points --

11 JUSTICE GORSUCH: So I say -- so I say
12 they're physically --

13 MR. WEISER: -- where someone fears
14 physical violence.

15 JUSTICE GORSUCH: -- they're
16 physically harmful to me. They put me in fear.
17 And there are people, reasonable people, who
18 will say that about difficult subjects. So I
19 take the friendly amendment from my friend
20 across the bench and still ask you the question.

21 MR. WEISER: The question is, would a
22 reasonable person in that position, not the
23 eggshell defendant, if you will, would a
24 reasonable person experience statements as a
25 serious expression of an intent to cause

1 unlawful physical violence? That's a high
2 standard, and we would say it doesn't allow for
3 the sorts of concerns that you just articulated.

4 JUSTICE KAGAN: So, General, I want to
5 take it as a given that this is a high standard,
6 and two and a half years of sending somebody
7 unwanted emails, when that person has
8 consistently tried to block them and tried to
9 stop them, some of those emails being pretty
10 violent, "Die. Don't need you. F off
11 permanently"; others of those emails suggesting
12 pretty strongly that he is watching the person,
13 "Only a couple of physical sightings," "Was that
14 you in the white Jeep?"

15 So I want to take it as a given that
16 this can be objectively terrifying. Here's my
17 question for you, though. Why -- what would you
18 lose -- I mean, I think that there's a question
19 for both of you. Like, to Mr. Elwood, it's,
20 like, you know, tell me about the -- the cases
21 that I should be concerned about.

22 But I think I have a flip side
23 question to you. Like, how could you not be
24 able to prove -- at least if it was a
25 recklessness standard, how could you not be able

1 to prove this case with a recklessness standard?

2 MR. WEISER: Three points. First, as
3 you picked up, whatever First Amendment standard
4 governs here governs in the civil context, which
5 includes the school threats that Justice Barrett
6 talked about; it includes domestic violence
7 cases, where a victim is afraid. And so the
8 loss here is not only in the criminal context.
9 The loss is in the civil context.

10 Second, as to what the loss is, it's
11 both delusional individuals and devious
12 individuals. A delusional individual who is a
13 stalker will often say, I believed we were in a
14 relationship, I thought what I was saying was
15 benign. And it's possible they could believe
16 that, and yet, once they're really rebuffed,
17 they can then turn violent, which means the
18 following: Do you have to wait until the person
19 actually engages in violence before you do
20 something about what is an objectively
21 terrorizing threat? And this is crucial for the
22 law to be able to protect.

23 JUSTICE BARRETT: Are you saying -- I
24 want to follow up on Justice Gorsuch's questions
25 to you about stalking. He was asking you about

1 physically following people, and you said
2 Colorado has such a statute -- can I finish,
3 Chief?

4 CHIEF JUSTICE ROBERTS: Yes.

5 JUSTICE BARRETT: Are you saying that
6 you could not have prosecuted this under any but
7 this statute because it was solely verbal?

8 MR. WEISER: The evidence of physical
9 stalking here are the statements. There were no
10 independent sightings. She didn't know what he
11 looked like, so she didn't have evidence that he
12 actually was following her around, other than
13 his statements suggesting that he was.

14 JUSTICE BARRETT: So there was no way
15 that you could prosecute this without provoking
16 this First Amendment question --

17 MR. WEISER: The --

18 JUSTICE BARRETT: -- posed by this
19 statute?

20 MR. WEISER: -- the prosecution was
21 under the stalking law. They invoked the First
22 Amendment, saying these were statements. The
23 defense was these were true threats, and that's
24 how it was decided by the court of appeals.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 JUSTICE THOMAS: One brief question.

4 The -- you rely on the reasonable recipient
5 standard, reasonable person standard. How would
6 you -- and you did mention that the sender could
7 have been delusional.

8 How would you monitor the distance
9 between a reasonable recipient and a delusional
10 recipient in -- in establishing your context?

11 MR. WEISER: The reasonable recipient
12 ensures -- I referenced earlier to Justice
13 Gorsuch -- it not be an eggshell defendant
14 having essentially idiosyncratic
15 characteristics. So it's, in the position that
16 someone was in, what would a reasonable person
17 perceive vis-à-vis it being an expression of
18 physical violence?

19 JUSTICE THOMAS: You're putting a lot
20 of weight on that, and I think that's why you're
21 getting so many questions about intent. Your --
22 it's as though that demonstrates the -- how the
23 recipient feels, whether or not it is to be
24 considered a threat.

25 And you said that you -- you -- the

1 recipient is not eggshell, but how would you
2 determine that?

3 MR. WEISER: The way you determine
4 that is, if someone said, I specifically, as the
5 person, have these particular characteristics
6 that are more idiosyncratic, they wouldn't
7 count. As to the use of the standard, this is
8 what this Court uses in the Fifth Amendment
9 case, is someone in custody? It is also what is
10 required in a self-defense case, what would a
11 reasonable person in that situation view as a
12 serious cause to use self-defense?

13 So the law uses these standards all
14 the time and generally doesn't allow the
15 eggshell defendant to define the category.

16 JUSTICE THOMAS: I mean, I think
17 you're -- the problem you're going to run into
18 is the same one that Justice Gorsuch mentioned,
19 and that is it doesn't have to be eggshell, that
20 we're more hypersensitive about different things
21 now, and people could feel threatened in
22 different ways.

23 So I don't know how you're monitoring
24 that as -- what if it's now that people are more
25 sensitive, that that is now considered the

1 reasonable person?

2 MR. WEISER: The sensitivity has to be
3 towards unlawful physical violence, and that is
4 something outside what might make someone
5 uncomfortable or even hurt their feelings. It's
6 a -- it's a --

7 JUSTICE THOMAS: I know, but some of
8 these statements the Chief Justice read to you
9 are not threatening in and of themselves, and
10 yet someone could be triggered by those
11 statements or hypersensitive about those
12 statements and feel threatened.

13 And I'm -- what we're trying -- what
14 I'm trying to figure out is, if we accept your
15 argument about context, how do we monitor that
16 reasonableness that seems to now be on a sliding
17 scale?

18 MR. WEISER: There is both the
19 requirement of a jury making determinations of
20 factfinder and independent plenary review, which
21 happened here, at the trial court and the court
22 of appeals. And I also would give you the lived
23 history we have of the last 50 years. Almost
24 every circuit uses an objective standard.

25 Now one could make a move, Justice

1 Thomas, don't judge it by the reasonable
2 listener; judge it by a reasonable speaker.
3 That would be an alternative objective standard
4 that would avoid the harms that I noted to
5 Justice Kagan.

6 CHIEF JUSTICE ROBERTS: Justice Alito?
7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: I -- I'm still a
9 bit confused by Justice Kagan's question and
10 your answer to her.

11 You accept that this man was
12 delusional. You said to her, I couldn't go
13 under recklessness. You couldn't prove -- the
14 prosecutor couldn't prove the case.

15 MR. WEISER: Let me respond to that.
16 I didn't get to that point. If you
17 wanted to apply a reckless standard, I think the
18 proper thing would be to remand it. To allow
19 the court of appeals that judgment and that
20 analysis wasn't under our standard. It wasn't
21 used. If that were the position to prevail, we
22 think remand to be appropriate.

23 JUSTICE SOTOMAYOR: I'm assuming he
24 was convicted and this -- one of the reasons for
25 his sentence for threatening his wife.

1 Obviously, the conviction was more
2 than enough to stop him from doing any more
3 threatening of his wife, and I'm assuming this
4 arrest was more than enough to stop him from
5 sending any more unwanted texts to this woman,
6 correct?

7 MR. WEISER: She -- she left the state
8 and --

9 JUSTICE SOTOMAYOR: No, I appreciate
10 --

11 MR. WEISER: Yeah, so she's --

12 JUSTICE SOTOMAYOR: -- that. No, no,
13 no, I know her emotional distress was great, and
14 whether there's a civil cause of action, I don't
15 know, but that's not my point.

16 My point is, at what point -- and I
17 think that's what Justice Thomas was saying --
18 do we, in not protecting the First Amendment,
19 say an objective standard alone is okay with
20 speech that relies always on context?

21 And, yes, I -- and I know there are
22 delusional people who kill individuals and we
23 want to protect people from that, but at what
24 point do we do it by defining crimes without
25 some sort of knowledge element by the person?

1 MR. WEISER: In Justice Thomas's
2 separate statement in *Elonis*, he said it would
3 be an odd result to put true threats in the most
4 protected First Amendment area.

5 Right now, private defamation cases
6 can proceed without any heightened scienter
7 requirement. The limitation on punitive damages
8 only applies on matters of public concern.

9 The fighting words context, those
10 prosecutions can proceed without a heightened
11 scienter requirement. Both of those situations
12 involve direct harm on individuals that happen
13 and can be life-changing.

14 JUSTICE SOTOMAYOR: But incitement
15 always required knowledge. Anyway, thank you,
16 counsel.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: No.

19 CHIEF JUSTICE ROBERTS: No?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: His sentence here,
23 how much did his sentence here rest on -- or
24 maybe not how much -- was it relevant at
25 sentencing, his prior convictions for making

1 threatening communications in 2003 and then in
2 2011 as activity of statements that would be
3 threatening to anyone? I won't read them here.

4 MR. WEISER: The stalking statute
5 prescribes a one- to three-year sentence that
6 was enhanced up to six years because of the
7 prior convictions. Other evidence was
8 presented, including his mental health. The
9 judge went for four and a half years.

10 JUSTICE KAVANAUGH: Okay. And then,
11 at the beginning of your brief, you start quite
12 helpfully by saying, a too broad definition here
13 will limit protected speech, a too narrow
14 approach will harm the individuals and
15 communities terrorized and silenced by threats.

16 I certainly agree with that, and I
17 think the questions have explored that. I just
18 want to get you again on a recklessness
19 standard, what's the problems with a
20 recklessness standard from your perspective?

21 That seems to capture some of the
22 concerns you've heard while leaving plenty of
23 room, one would hope, to make sure threats are
24 captured before someone's killed or -- or
25 physically hurt.

1 MR. WEISER: Two answers. The first
2 answer is recklessness does require some proof
3 of what a defendant knew. He then or she then
4 would disregard it. But proving knowledge in a
5 case of someone who can say, because they're
6 untethered from reality, I didn't mean it, could
7 still allow them to escape accountability. And,
8 again, this would apply in both the civil and
9 the criminal contexts, so it has broad
10 applicability.

11 A second point I would note is
12 recklessness is the standard for public figures
13 in defamation cases, but that's about the
14 reputation of a public figure. Here, it's about
15 safety.

16 And the problem that I would note
17 vis-à-vis that standard is counterspeech was one
18 of the justifications. We're going to raise the
19 standard for public figures to recklessness
20 because they can defend themselves in the
21 marketplace of ideas.

22 Now the problem here, if you try to
23 use counterspeech to a threatening stalker, you
24 make it more likely that it will escalate
25 ultimately into life-threatening violence.

1 So we don't believe the case, if you
2 compare it on all fours to public figures in the
3 recklessness for defamation, it isn't of the
4 same kind of harm. Counterspeech isn't a
5 justification.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: Who is the
10 reasonable person? I mean, would it be just,
11 you know, as we might say in the Fifth Amendment
12 context for custody? Is it kind of a general
13 reasonable person? Or say, if something happens
14 on a college campus, is it the reasonable
15 college student, which might be different?

16 MR. WEISER: Or, as in Elonis, the
17 reasonable teenager on the internet in a
18 Facebook gamer group, one of the cases that was
19 cited then and now, it is in the context that
20 the person is in, and it's important because the
21 norms may be different. People may talk
22 differently on a sub gamer Facebook group.

23 JUSTICE BARRETT: Well, that's not
24 quite what I'm asking because I can look at a
25 college classroom, say, or a law school

1 classroom and I can say, if Justice Gorsuch or I
2 were sitting in that context, let's imagine a
3 professor who wants people to understand just
4 how vicious it was to be in the Jim Crow South
5 and puts up behind them on a screen a picture of
6 a burning cross and reads aloud some threats of
7 lynching that were made at the time.

8 A purely educational purpose in the
9 teacher's mind, but students feel physically
10 threatened. They fear for their safety because
11 they don't understand it. Whereas, if Justice
12 Gorsuch and I are looking at that situation,
13 we'd say, well, a reasonable person would
14 understand the educational context of that, so
15 how could the student think of it.

16 So I -- I -- I think context doesn't
17 get you all the way there. I think it's who is
18 the reasonable person. So who is it?

19 MR. WEISER: It's a reasonable person
20 in the situation, but, in that situation, an
21 educational setting, where there really is no
22 threat of direct physical violence to a person,
23 it would be objectively unreasonable for anyone
24 to see that as a true threat.

25 JUSTICE BARRETT: Black students

1 sitting in the classroom.

2 MR. WEISER: If it's not a -- a threat
3 of violence that the person is worried about
4 their safety --

5 JUSTICE BARRETT: But the person is
6 reading in the first person an account of what
7 was said and threats of lynching, so they're
8 using the first person and saying it.

9 MR. WEISER: I understand how it makes
10 them uncomfortable, but unless that person can,
11 again, reasonably perceive it as a threat to
12 their safety in that situation, it wouldn't be a
13 true threat.

14 JUSTICE BARRETT: So I guess what I'm
15 getting at is there's no protection built in.
16 We might have differences about who we think are
17 the eggshell audience or not, and I -- I was
18 just trying to get you to -- to answer in a way,
19 apart from context, whether there's any way to
20 take account of who the reasonable person is.

21 I mean, you know, maybe it's the case
22 that Justice -- Justice Gorsuch and I or Justice
23 Sotomayor and I could sit in that classroom and
24 think that we're reasonable people understanding
25 everything you say.

1 But maybe it's the case -- Justice
2 Thomas talked about changing attitudes. Maybe
3 it's the case that nowadays people would be more
4 sensitive to that and -- and people would say a
5 reasonable, you know, black college student
6 sitting in that classroom would interpret that
7 as threats, you know, that might materialize
8 into actual physical harm.

9 MR. WEISER: The context of a college
10 classroom or, to get back to rap music, a
11 concert makes it unreasonable to view yourself
12 as being threatened given what is going on, and
13 that, I do believe, would control.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: Yes. Can I just --
18 I just want to clarify just so that I can be
19 sure I understand.

20 So you were talking about the
21 reasonable person with Justice Barrett, and is
22 your standard the reasonable person in that
23 situation would have perceived the statements as
24 a threat? Is that what you're saying about the
25 reasonable person?

1 MR. WEISER: I would say a reasonable
2 person in a classroom could not and would not
3 perceive general teaching as a true threat.

4 JUSTICE JACKSON: All right. But
5 there's no -- no element of this or no thought
6 about how the statement was meant. Your view is
7 that the subjective intent of the speaker is
8 irrelevant.

9 MR. WEISER: That's correct.

10 JUSTICE JACKSON: Okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Feigin?

14 ORAL ARGUMENT OF ERIC J. FEIGIN
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE RESPONDENT

17 MR. FEIGIN: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 Just to make clear what's on the
20 table, the question presented as framed by
21 Petitioner invokes only a specific intent and
22 knowledge question. The answer to the question
23 presented is, no, because, at a bare minimum,
24 recklessness suffices.

25 Everyone agrees there is a category of

1 unprotected speech known as true threats, and
2 everyone agrees that in order to fall in that
3 category, it has to be a statement that a
4 reasonable person not just could but would
5 interpret as a serious threat to do unlawful
6 violence.

7 And then we're basically just having a
8 policy debate about how much breathing room is
9 necessary. And I would urge this Court to allow
10 legislatures, many of which do adopt heightened
11 mens rea requirements because of precisely the
12 concerns that have been articulated, to have
13 that shake out on their own because there are a
14 number of interests on the other side.

15 I could take questions, or -- or do
16 you know what those are?

17 JUSTICE THOMAS: Just one quick
18 question, Mr. Feigin. Where does this
19 recklessness standard come from?

20 MR. FEIGIN: Well, to be clear, Your
21 Honor, our frontline position is that there
22 shouldn't be a recklessness standard at all.
23 It's not historical. It would just be a gloss
24 in the way that this Court, I think, has put a
25 gloss on obscenity and other doctrines because

1 of the essentially judicial policy assessment
2 that the First Amendment requires additional
3 breathing room.

4 But, here, we'd urge you that this
5 kind of inherently --

6 JUSTICE SOTOMAYOR: But you're saying
7 that the historical record supports, clearly
8 supports, that no mens rea is required?

9 MR. FEIGIN: Well, there --

10 JUSTICE SOTOMAYOR: That it's
11 negligence, an objective standard? What do I do
12 with the legion of English cases, American
13 cases, true threat cases, all of whom require
14 mens rea? Your --

15 MR. FEIGIN: Respectfully --

16 JUSTICE SOTOMAYOR: -- opposing
17 counsel was quite right that you take a few
18 stray statements from a few cases, but every
19 other case talks about a mens rea.

20 MR. FEIGIN: Well, respectfully, Your
21 Honor, we disagree about the history. He
22 basically relies on three buckets of history.

23 Number one are libel cases. Even
24 libel cases under modern doctrine don't have a
25 specific intent or knowledge requirement.

1 Number two are breach of --

2 JUSTICE SOTOMAYOR: You -- you hit --
3 you hit the nail on the head, modern cases. Go
4 on.

5 MR. FEIGIN: Well, the Court has not
6 deemed those to be controlling. I could address
7 the cases individually --

8 JUSTICE SOTOMAYOR: I don't think it's
9 worth it, Mr. Feigin.

10 MR. FEIGIN: -- but we'd be here a
11 while.

12 JUSTICE SOTOMAYOR: You're making --
13 you're making quite a broad statement that the
14 historical record supports your position --

15 MR. FEIGIN: Well, Your Honor --

16 JUSTICE SOTOMAYOR: -- when you
17 haven't pointed --

18 MR. FEIGIN: -- let me jump right to
19 it. The -- the only way in which he engages
20 in -- you know, putting aside breach-of-peace
21 cases that inform the objective fighting words
22 doctrine and the statutes that expressly
23 required intent to extort, if we just look at
24 the pure threatening letters, I'd commend to the
25 Court King against Girdwood, a 1776 case that's

1 about jury instructions that includes no jury
2 requirement of intent. Or let's take counsel's
3 --

4 JUSTICE SOTOMAYOR: Intent is
5 different than knowledge, and he's saying -- I
6 look a lot at the indictments on the cases that
7 you cited to, and all of them talked about a
8 willful purpose or a knowing purpose.

9 MR. FEIGIN: Your Honor, the only
10 things that were submitted to the jury in
11 Girdwood were knowledge of the contents of the
12 letter and whether those contents in themselves
13 conveyed a threat.

14 But let's look at another case, their
15 favorite case, the only case they really have on
16 threatening letters, Regina against Hill, which
17 is a later English case. In that case, there
18 was some dispute as to what the defendant
19 intended. Did he intend to burn standing corn,
20 corn in the field, or stacked corn, corn that
21 had already been cut and put in the barn and was
22 personal property?

23 And as to that question, the
24 defendant's intent was not -- the defendant
25 stated what he intended, which we do think can

1 relevantly inform the context, and -- but the
2 Court didn't treat it as dispositive. The Court
3 said, we'll see if we can --

4 JUSTICE SOTOMAYOR: Intent is never --
5 what a defendant --

6 MR. FEIGIN: -- interpret the letter
7 that way.

8 JUSTICE SOTOMAYOR: -- says is never
9 dispositive. It's always contextual. The issue
10 is that an objective standard keeps out, as it
11 happened in the trial here, the defendant's
12 understanding.

13 MR. FEIGIN: Well, Your Honor, we
14 don't think that a defendant's intent in sending
15 a communication --

16 JUSTICE SOTOMAYOR: Not intent.

17 MR. FEIGIN: -- is categorically
18 irrelevant.

19 JUSTICE SOTOMAYOR: Knowledge.
20 Knowledge.

21 MR. FEIGIN: We don't think that the
22 defendant's intent or knowledge is necessarily
23 irrelevant. Elonis got on the stand and
24 testified as to what he was thinking.

25 JUSTICE GORSUCH: Hold on.

1 MR. FEIGIN: What he said was --

2 JUSTICE GORSUCH: You just said it's
3 not necessarily irrelevant?

4 MR. FEIGIN: Well, Your Honor, I want
5 to distinguish between a couple of things.

6 JUSTICE GORSUCH: Well, so it's not
7 necessarily irrelevant, is that fair?

8 MR. FEIGIN: If I could expand on that
9 point, I would like to --

10 JUSTICE GORSUCH: Briefly.

11 MR. FEIGIN: -- just sort of not leave
12 it abstractly hanging.

13 JUSTICE GORSUCH: Yeah.

14 MR. FEIGIN: Let me -- let me just
15 talk about two different things. One is what a
16 speaker is thinking at the time the speaker
17 makes the statement is relevant in the same way
18 an objective inquiry into, like, reasonable
19 suspicion or probable cause, you might take into
20 account what the officer was thinking when he
21 stopped the car because that would just inform
22 what a reasonable person might think.

23 Then we've got the, I think --

24 JUSTICE GORSUCH: Okay. I -- I -- I
25 take that point.

1 MR. FEIGIN: Okay.

2 JUSTICE GORSUCH: But even that wasn't
3 permitted here, right? I mean, no evidence of
4 his knowledge was permitted.

5 MR. FEIGIN: Well, Your Honor, what I
6 think he wanted to introduce was evidence that
7 might go to something like mental delusions he
8 was suffering that he was having a
9 conversation --

10 JUSTICE GORSUCH: Whatever. He wasn't
11 allowed to produce any evidence about his mens
12 rea. And I think you just admitted that, even
13 under your version of the objective standard,
14 that's relevant contextual evidence, I think.

15 MR. FEIGIN: It can be, and to the
16 extent he was forbidden from raising the
17 statement by --

18 JUSTICE GORSUCH: That -- that was
19 error.

20 MR. FEIGIN: The -- I -- Your Honor,
21 I'm not going to defend a particular evidentiary
22 ruling --

23 JUSTICE GORSUCH: All right.

24 MR. FEIGIN: -- in this particular
25 prosecution.

1 JUSTICE GORSUCH: Okay. All right.
2 Let me -- let me back up and just ask you
3 another question about the history, because I
4 read it a little bit differently than you do, I
5 think.

6 I look at -- you said Girdwood, but,
7 even there, the jury was asked whether he knew
8 the contents of what he wrote and whether the
9 terms of the letter conveyed an actual threat.
10 So there is knowledge there, I think.

11 Boucher was heavily relied on by you
12 and your friends. But the next sentence you
13 don't quote is: "No one who received the letter
14 could have any doubt as to what the writer meant
15 to threaten."

16 And I guess I just put the question to
17 you this way: Criminal law, vicious will has
18 been an essential part of it. This Court's made
19 that clear since Morissette. And I'm just not
20 aware of many circumstances in which someone can
21 be sent to jail for four years, found guilty of
22 a felony, without any evidence of mens rea
23 coming before the jury.

24 MR. FEIGIN: So, Your Honor, I think
25 that the Morissette presumption is a presumption

1 about legislative intent. And legislatures, to
2 be clear, don't have to adopt an objective
3 standard. This Court's opinion in *Elonis*
4 suggests that the --

5 JUSTICE GORSUCH: I understand that.

6 MR. FEIGIN: -- that Congress could
7 embrace that.

8 JUSTICE GORSUCH: I appreciate that.
9 But you'd -- you'd agree it would be a very
10 unusual law in -- in -- in -- in this country
11 for a felony not to involve any question of mens
12 rea, highly unusual?

13 MR. FEIGIN: It's -- it's not unknown
14 to the law. It is uncommon. But let me list a
15 few reasons if I could of why legislatures might
16 have the calculus in favor of criminalizing the
17 speech under an objective standard.

18 Number one, you know, just -- number
19 one is that it enables very devious defendants
20 -- again, when *Elonis* did get in on the -- did
21 get on the stand, he said, I didn't care what
22 other people thought. And his actual posts
23 invoked the First Amendment and true threats
24 doctrine.

25 Number two -- and this applies to any

1 standard, Justice Kavanaugh, including
2 recklessness, but it's obviously much worse with
3 specific intent. It impedes law enforcement
4 from actually arresting and bringing charges at
5 an early stage. They have to wait a lot longer
6 for the objective evidence to build up.

7 Elonis isn't uncommon in his fact
8 pattern. We're currently sitting on matters
9 that we do not feel comfortable charging at the
10 moment, where you have things framed in wish and
11 hypothetical and "I" -- "I wish someone would
12 kill you." "Oh, if only I could come do it, I
13 -- I would walk right up to 19 Elm Street." You
14 know, that -- that sort of thing is -- is a kind
15 of thing that a clever threatener is going to
16 use. And we simply cannot intervene because we
17 need to be very, very, very sure we're going to
18 get a conviction. And the reason --

19 CHIEF JUSTICE ROBERTS: Just to make
20 sure --

21 MR. FEIGIN: Yeah.

22 CHIEF JUSTICE ROBERTS: -- I
23 understand, you think someone can be convicted
24 for saying, "I wish someone would kill you"?

25 MR. FEIGIN: Your Honor, repeated

1 statements of that sort -- for example, the
2 Court might look at Elonis, who was reconvicted
3 on -- who was just recently reconvicted for
4 convict -- for --

5 CHIEF JUSTICE ROBERTS: Okay. But --

6 MR. FEIGIN: -- threatening a
7 Assistant U.S. Attorney, his ex-wife, and his
8 ex-girlfriend.

9 CHIEF JUSTICE ROBERTS: Okay. So, if
10 it's, "I wish someone would kill you," and the
11 person who said that doesn't get to testify and
12 say what he meant, he can say, well, of course,
13 I didn't mean it, and here's why I didn't mean
14 it, or something like that.

15 MR. FEIGIN: Oh, he -- he can testify
16 to that, and a jury can see what -- what they
17 think of it. I -- I assume it's okay if I
18 answer your question.

19 CHIEF JUSTICE ROBERTS: Well, I think
20 I'll let myself go on.

21 (Laughter.)

22 MR. FEIGIN: Of course, he can -- of
23 course, he can, Your Honor, but my point is they
24 have to -- the -- first of all, we're never
25 doing these things in isolation. Context always

1 matters. And the prosecution needs to build up
2 enough circumstantial evidence because, if we
3 don't actually manage to convict, we have put
4 the victim not only through the rigors of a
5 trial, the lesson the victim draws is even the
6 law can't protect me.

7 And in these cases, that is very
8 important and should at least allow legislatures
9 to have a mens rea of recklessness, which is
10 something that, if you answer the question
11 presented yes, which would be the only basis for
12 reversing the judgment below, legislatures would
13 no longer be empowered to do.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 Justice Sotomayor?

19 Justice Kagan?

20 JUSTICE KAGAN: Would I be right, Mr.
21 Feigin, that there's a large difference between
22 saying that in most cases, a person should be
23 allowed to take the stand and testify as to his
24 state of mind and, on the other hand, saying
25 that a prosecutor has to prove something about

1 his state of mind, in other words, the first
2 just going to a general sense of context about
3 what a reasonable observer might think about
4 the -- the conduct or the speech and the second
5 being an element of the offense? There's a big
6 difference between those two?

7 MR. FEIGIN: That's absolutely right,
8 Justice Kagan, and that, I think, informs the
9 discussion I was having with Justice Gorsuch,
10 which is, I mean, the speakers there, the
11 speaker intends to convey something that may not
12 only say something about how a reasonable
13 observer would perceive it but may give you some
14 additional context as to, for example, if it's a
15 spoken threat, tone, or whatever.

16 JUSTICE KAGAN: I'm wondering what you
17 think of this criminal/civil dichotomy in this
18 context because I think, although you say --
19 there's no independent constitutional rule that
20 there can't be a -- a crime without knowledge or
21 even recklessness, yet we are uncomfortable with
22 the thought, uncomfortable enough that we say,
23 you know, we have to be really convinced that
24 the legislature wanted that. That's a separate
25 issue, it seems to me, from this First Amendment

1 issue, or is it?

2 I mean, is there something to the fact
3 that these two things are coming at us at the
4 same time and we can kind of connect them in the
5 way that Mr. Elwood suggests and come up with a
6 rule of the kind he wants?

7 MR. FEIGIN: Well, I -- I agree that
8 they're separate inquiries, Your Honor. For a
9 category of unprotected speech, it's just
10 unprotected, and the legislature can either
11 provide for civil or criminal liability.

12 The instinct that I think you're
13 channeling that we're uncomfortable with in
14 criminal law finds its way into other doctrines.
15 Number one would be the presumption of mens rea
16 that I was discussing a little bit earlier that
17 the Court applied in *Elonis* and made clear in
18 *Elonis* was not deciding the separate
19 constitutional issues.

20 And another one would be -- and you
21 can really see this if you look back at the old
22 cases like -- older cases like *New York Times*
23 *against Sullivan*, that the criminal law comes
24 with additional constitutional protections.

25 In the Fifth and Sixth Amendment, you

1 need a unanimous jury, you need proof beyond a
2 reasonable doubt. And precisely for that reason
3 is why New York Times against Sullivan was
4 actually more concerned about civil liability
5 than criminal liability.

6 As far as the broader distinction
7 where I think counsel for the other side is
8 suggesting this isn't going to affect civil
9 protection orders, I don't really understand
10 why.

11 I mean, I suppose the Court could just
12 say that in its opinion and that would be
13 helpful. But there's no logical basis for
14 distinguishing between a civil protection order
15 that depends for its definition on some modicum
16 of proof that somebody committed an actual
17 criminal offense which must be defined by
18 specific intent or knowledge and -- and the --
19 the actual criminal law question that we're
20 debating here.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: It seems like, in

1 figuring out the mens rea issue, we're making
2 quasi-policy judgments about where to draw the
3 line, and, in thinking about that, you alluded
4 to this, but I'd be interested in you just
5 telling us, from the federal government's
6 perspective, what are the problems that you see
7 that would be caused by adopting Petitioner's
8 rule? Like real concrete kinds of cases that
9 would go unarrested, unprosecuted.

10 MR. FEIGIN: Well, I tried to jam this
11 in a little bit earlier --

12 JUSTICE KAVANAUGH: Yeah. Well, take
13 --

14 MR. FEIGIN: -- Your Honor, but to --

15 JUSTICE KAVANAUGH: -- take a minute
16 or two.

17 MR. FEIGIN: -- to expand on it a bit
18 more, you know, number one, we -- there are
19 delusional stalkers -- or not just stalkers,
20 like delusional threateners, and we have to
21 accept their harms. There are also devious
22 ones, like Elonis. I'd commend to the Court
23 looking back at some of the statements he made
24 that are recounted in the Court's opinion in
25 that case. We clearly see someone trying to toe

1 the line, and that's exactly what these people
2 do, and we're not prosecuting them on the basis
3 of one statement in isolation, like "I'm
4 going" -- you know, "I" -- "I hope that someone
5 kills you."

6 It's that combined with knowledge of
7 someone's address, et cetera, that just walk
8 right up to the line and then they hope that
9 they can get off scot-free because of some
10 heightened intent requirement.

11 Number two is that, as I was
12 suggesting earlier -- and this is true of both
13 recklessness and knowledge and specific intent
14 but obviously more true the higher you get up
15 the mens rea chain -- because we're going to
16 have to prove subjective mindset through
17 circumstantial evidence, which we're allowed to
18 do, but that's really all we're going to have.
19 We're going to have the statements themselves,
20 and if we're talking about an online threats
21 case, then that's going to be about it.

22 So we have to wait quite a while
23 before the statements rise to the level where we
24 are comfortable bringing the prosecution and
25 sure that we're going to get a guilty verdict.

1 And we need to be more sure in this context than
2 we feel like we need to be necessarily in other
3 contexts because --

4 JUSTICE KAVANAUGH: Do you consult
5 with the victims on that?

6 MR. FEIGIN: Your Honor --

7 JUSTICE KAVANAUGH: You said you were
8 worried about the victims. Do you consult with
9 the victims, like, no, go ahead?

10 MR. FEIGIN: Your Honor, in some
11 cases, we might, and in other cases, we might
12 have a reluctant victim, but I think the -- the
13 critical point is, no matter what, we're going
14 to need the victim to testify, and that's going
15 to be an ordeal.

16 We're going to need the victim -- you
17 know, the victim will be aware that the trial is
18 ongoing. There -- there's a brief from the
19 victim in this case that details some of these
20 harms. And if we're unable to get a conviction,
21 that's going to send a message to the victim
22 that I'm on my own, the law can't protect me,
23 notwithstanding whatever Band-Aid they want to
24 put on civil protection orders, which themselves
25 aren't going to last forever and raise

1 substantial due process concerns and would be
2 called into question by the rule that Petitioner
3 is urging, unless we're going to draw some kind
4 of illogical line that's inconsistent with this
5 Court's precedent, as Justice Kagan has -- I
6 think her questions have -- have gotten at
7 today.

8 JUSTICE KAVANAUGH: Okay. One -- one
9 last question, which is, are you aware of
10 statistics or studies -- and this would be hard
11 -- but of murders, school shootings, domestic
12 violence incidents that perhaps could have been
13 prevented if threats had been taken more
14 seriously beforehand?

15 MR. FEIGIN: I'm not sure, Your Honor.
16 I mean, I -- I don't have any numbers for you.
17 I can tell you -- and I -- I think this probably
18 reflects the experience from which your question
19 draws -- is that there is frequently after one
20 of these horrific incidents some question of,
21 why didn't you -- you know, why didn't you
22 intervene, why didn't you respond earlier?

23 And I imagine Petitioner's counsel is
24 about to get up and say, well, you can
25 intervene. You can send an agent over to check

1 out what's going on.

2 And we did exactly that in Elonis.
3 And what happened? He sent another threat, the
4 threat against little agent lady, and we had to
5 charge that -- that threat too. It did not
6 deter him. It did not stop him. We recently
7 reconvicted him for another series of threats,
8 including threats to an Assistant U.S. Attorney.

9 So these -- it is very important that
10 the prosecution have some ability to intervene
11 at an earlier stage. And legislatures shouldn't
12 be precluded from making the judgment that those
13 kinds of harms are more important, particularly
14 in the case of reckless defendants who decide
15 that they will inspire fear in others to further
16 their own selfish ends.

17 We successfully ran the Boston
18 Marathon on Monday, thankfully. If someone had
19 called up to the police station and said, you
20 know, I am -- on the tenth anniversary, I am
21 Tsarnaev Part II, I don't think that the person
22 should be able to get off for making a threat
23 simply by saying that he thought the Boston
24 police department had a better sense of humor.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: Yes, but let me just
5 ask you, I perceive a difference between your
6 position and the government's -- excuse me --
7 and Colorado's position as to whether or not the
8 defendant can bring in that evidence, so I just
9 want to be clear on that. This is a point that
10 Justice Gorsuch made and Justice Kagan made.

11 In your very last hypothetical, would
12 that defendant be allowed to at least testify to
13 his state of mind in making those threats?

14 MR. FEIGIN: Yes, Your Honor, but I do
15 want to clearly differentiate between two forms
16 of subjective mens rea the -- the type things
17 that might come in.

18 One is just evidence of what the
19 defendant was thinking when the defendant sent
20 the statement. That sort of thing could come
21 in.

22 But evidence about delusions and
23 illnesses and just the statement that "I have
24 some sort of mental deficiency that impairs me
25 from understanding what a reasonable person" --

1 "how a reasonable person would interpret my
2 statements," the Court made clear in Clark
3 against Arizona that a defense of mental illness
4 or mental incapacity doesn't have to negate
5 criminal liability in the first instance. It
6 could be channeled into some kind of insanity
7 defense.

8 And what the defendants in -- the
9 defendant in this case and defendants generally
10 are trying to do is have their cake and eat it
11 too. They don't want to claim that they're
12 insane, so -- and then they claim that they
13 should be able to defend against mens rea based
14 on asserted mental infirmities --

15 JUSTICE JACKSON: But your --

16 MR. FEIGIN: -- of the sort I just
17 described.

18 JUSTICE JACKSON: -- your view, you
19 stand with Colorado in -- insofar as you're
20 saying the government would only have to prove
21 the objective reasonableness -- reasonable
22 person standard and that the government would
23 not have to show anything about subjective
24 intent even if evidence related to subjective
25 intent was admitted.

1 MR. FEIGIN: As a constitutional
2 matter, we think that, you know, back to what I
3 was saying to Justice Kagan, the element -- as a
4 constitutional matter, under the First
5 Amendment, we think the only thing that the
6 elements would require is that a reasonable
7 person would, not just that some person could,
8 but a -- a reasonable person necessarily would
9 interpret the statement -- a reasonable person
10 would -- beyond a reasonable doubt is what I
11 mean by "necessarily" -- interpret the
12 statements as a threat of unlawful violence.

13 That's the constitutional floor. Many
14 legislatures go above it, but they don't
15 absolutely have to for all of the reasons I was
16 expanding on with Justice Kavanaugh. Society
17 doesn't need to accept that these harms are
18 necessarily going to occur and allow people to
19 inflict them --

20 JUSTICE JACKSON: Thank you.

21 MR. FEIGIN: -- and they can cause --
22 yeah.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Elwood?

1 REBUTTAL ARGUMENT OF JOHN P. ELWOOD
2 ON BEHALF OF THE PETITIONER

3 MR. ELWOOD: Just a few points. The
4 burden is on the proponents of restrictions on
5 speech to justify it both as a legal matter, as
6 a constitutional matter, and as a -- as the
7 practicalities of bringing it. I think the
8 burden is on them to show that it would cause a
9 problem.

10 On the constitutional end, I would say
11 that, you know, to the extent that you think
12 that the sides are in equipoise about tradition
13 and history and doctrine, the tie goes to
14 speech. And I think that they aren't.

15 I think that when you have on one hand
16 Virginia versus Black and when you have in other
17 cases, like Regina versus Hill, where the
18 government admitted that they considered the
19 subjective intent, they didn't just look at the
20 reasonable meaning of the words, they looked to
21 see what he meant by them in order to determine
22 whether it was a threat, and if I remember
23 correctly, they directed a directed verdict of
24 acquittal as a result.

25 In terms of practical implementations,

1 when Colorado argues that the majority rule is
2 an objective one, that's talking about the
3 federal constitutional rule. If you look at the
4 majority of courts of appeals, they say that's
5 the constitutional rule.

6 But the most common mens rea for
7 threat statutes is purpose or intent. More than
8 20 states, their main threat statute uses
9 purpose or intent. I'm sure more have
10 recklessness. And, again, they haven't shown
11 it's a problem in any -- in any of those states.

12 The federal government has been living
13 under this rule since *Elonis*, and the examples
14 that the government gives are devious
15 defendants, you know, people couching things as
16 wishes and so forth.

17 I would say that the difference should
18 not be that difference between an objective
19 standard and a subjective intent because, after
20 all, you have to prove under an objective
21 standard when somebody says, I wish you would
22 die, that they -- that, you know, you would have
23 to say, well, he means that to mean I'm going to
24 kill you.

25 And the only difference, ordinarily,

1 when you were talking about how you prove to the
2 jury, you prove it the same way either way. The
3 only difference is whether or not the defendant
4 gets to put forward their explanation of what
5 those words mean.

6 And Justice Scalia, writing for the
7 Court in United States versus Williams, said, in
8 a speech case, child pornography, courts and
9 juries every day pass upon knowledge, belief,
10 and intent having before them no more than
11 evidence of the defendant's words and conduct
12 from which an ordinary human experience mental
13 condition may be inferred.

14 And, again, for somebody saying, I
15 wish you would die, he might get up there and
16 say, oh, you know, I -- I thought it in the most
17 benign way possible, but the question is, did
18 you think that that would cause that person
19 fear.

20 And if they -- if they can say, oh,
21 well, I emailed this person 20 times saying I
22 wish that they would die, but I didn't mean for
23 them to feel fear about it, the jury can draw
24 the conclusion that most people would conclude
25 -- that most people would draw that the guy is

1 guilty as sin.

2 Similarly, the favorite excuse of --
3 of regulators is that people could just get up
4 and say, it's a joke, but if you emailed the
5 Boston Marathon and say, I'm going to be
6 Tsarnaev Part II, and then you don't get to just
7 say, it was a joke, the question is, did he
8 think you would cause harm or, in the
9 government's standard, you know, did they
10 disregard, consciously disregard, the risk that
11 it would -- it would put people in fear.

12 There's only one way to answer that
13 question. So, again, this is a rule that isn't
14 going to affect a lot of convictions -- I think
15 most convictions will come out the same way --
16 but it will affect speech beneficially in much
17 more ways. It will have an outsize impact
18 because, again, the focus is on the thing that
19 matters, it has been a bulwark in speech cases,
20 the thing that speakers know, their intent.
21 They don't know, you know, what a reasonable
22 person standard means.

23 We could talk about it for another
24 hour and still not know who a reasonable person
25 is in this case or how a reasonable person would

1 interpret that, whereas the subjective intent,
2 as the Williams opinion put it, that's a
3 true-or-false matter. That's something juries
4 decide every day.

5 If there are no further questions?

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 12:06 p.m. the case was
9 submitted.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Official - Subject to Final Review

<p style="text-align: center;">1</p> <p>10:20 [2] 1:14 3:2 107 [1] 2:15 12:06 [1] 111:8 14 [1] 10:1 1776 [1] 86:25 19 [2] 1:10 93:13</p> <hr/> <p style="text-align: center;">2</p> <p>2 [1] 30:8 20 [4] 9:24 42:21 108:8 109:21 2003 [1] 77:1 2011 [1] 77:2 2014 [1] 35:22 2023 [1] 1:10 22-138 [1] 3:4</p> <hr/> <p style="text-align: center;">3</p> <p>3 [1] 2:5 30 [1] 36:18</p> <hr/> <p style="text-align: center;">4</p> <p>40s [1] 33:22 49 [1] 2:8</p> <hr/> <p style="text-align: center;">5</p> <p>50 [3] 51:25 52:6 73:23 58-year-old [1] 29:23</p> <hr/> <p style="text-align: center;">8</p> <p>83 [1] 2:12</p> <hr/> <p style="text-align: center;">A</p> <p>a.m [3] 1:14 3:2 30:8 ability [1] 103:10 able [7] 8:20 17:19 68:24, 25 69:22 103:22 105:13 ably [1] 61:25 abortion [1] 38:16 above [1] 106:14 above-entitled [1] 1:12 absolute [1] 38:25 Absolutely [6] 10:17,18 24:1 33:16 96:7 106:15 abstract [1] 19:5 abstractly [1] 89:12 accept [4] 73:14 74:11 99:21 106:17 access [1] 56:4 account [4] 20:12 81:6,20 89:20 accountability [2] 50:14 78:7 ACLU [2] 27:16 39:23 acquittal [1] 107:24 acquitted [1] 34:4 across [1] 67:20 act [1] 49:5 action [4] 12:2 23:3 24:12 75:14 actions [1] 5:3 activity [4] 55:10 62:9,17 77:2 actor [1] 9:19</p>	<p>actual [7] 21:3 50:19 82:8 91:9 92:22 98:16,19 actually [10] 18:15 41:4 44:16 52:4 56:17 69:19 70:12 93:4 95:3 98:4 addition [3] 6:6 7:20 45:7 additional [3] 85:2 96:14 97:24 address [3] 7:18 86:6 100:7 addressed [1] 41:5 admitted [3] 90:12 105:25 107:18 adopt [3] 43:9 84:10 92:2 adopting [1] 99:7 adult [1] 55:19 advance [1] 45:22 advocacy [1] 51:2 advocacy/incitement [1] 37:11 affect [3] 98:8 110:14,16 affected [1] 30:23 affection [1] 54:10 affirm [1] 21:5 afford [1] 30:9 afraid [2] 55:14 69:7 afternoon [1] 58:11 age [1] 5:5 agent [2] 102:25 103:4 aggressive [1] 57:7 agree [7] 13:19 21:10 36:10 37:2 77:16 92:9 97:7 agrees [2] 83:25 84:2 ahead [2] 16:12 101:9 alarm [1] 42:11 ALITO [24] 13:10 14:4,18, 23 15:2 16:10,13 17:1,24 18:19,22 19:8 31:21 32:17, 18 34:5,7 35:15,20 57:25 59:13 60:10 74:6 95:17 Alliance [1] 39:21 allow [9] 50:14 59:21 68:2 72:14 74:18 78:7 84:9 95:8 106:18 allowed [4] 90:11 95:23 100:17 104:12 allowing [1] 45:2 allows [1] 9:2 alluded [1] 99:3 almost [2] 53:9 73:23 alone [1] 75:19 aloud [1] 80:6 already [4] 4:23 41:9 45:18 87:21 alternative [1] 74:3 although [2] 25:12 96:18 ambiguities [1] 17:9 ambiguity [1] 45:5 ambiguous [1] 17:10 Amendment [40] 5:24 6:2 11:18,19,24 12:10 14:9 19:11 21:23 26:11,20 27:5,10, 23 28:7 38:22,22 50:1 51:9,14 53:1 58:18 59:6,20,22</p>	<p>62:18 66:17 67:19 69:3 70:16,22 72:8 75:18 76:4 79:11 85:2 92:23 96:25 97:25 106:5 Amendment's [1] 3:13 American [2] 15:25 85:12 amici [1] 45:21 amicus [6] 1:23 2:11 20:20 39:21 44:14 83:15 among [5] 24:1 63:25,25 64:1,1 amount [3] 48:4,6 54:17 analogize [1] 38:5 analogue [1] 4:10 analogy [1] 4:7 analysis [3] 7:13 62:1 74:20 analyze [1] 33:4 anniversary [1] 103:20 annual [1] 30:2 another [8] 29:12 46:11 87:14 91:3 97:20 103:3,7 110:23 answer [12] 22:7 41:10 42:12,14 46:8 74:10 78:2 81:18 83:22 94:18 95:10 110:12 answering [1] 25:16 answers [1] 78:1 anybody [3] 39:23 55:18 56:25 Anyway [2] 18:23 76:15 apart [2] 29:4 81:19 appeals [4] 70:24 73:22 74:19 108:4 APPEARANCES [1] 1:16 applicability [1] 78:10 application [1] 33:7 applied [3] 13:20 18:5 97:17 applies [2] 76:8 92:25 apply [5] 8:22 35:2,11 74:17 78:8 applying [1] 33:13 appreciate [4] 30:4 44:20 75:9 92:8 approach [2] 63:8 77:14 appropriate [2] 57:22 74:22 approve [1] 20:10 April [1] 1:10 area [4] 37:22 40:8,13 76:4 areas [3] 27:25 37:5,17 aren't [5] 66:19,19 67:9 101:25 107:14 argued [1] 19:17 argues [2] 52:11 108:1 arguing [3] 49:8 51:19,20 argument [23] 1:13 2:3,6,9, 13 3:4,7 10:22 11:4,5,24 14:24 17:21 27:4,5 28:23 30:18 34:24 47:25 49:20 73:15 83:14 107:1 arise [1] 27:19</p>	<p>Arizona [1] 105:3 around [8] 25:7,10 32:16 42:2,8 58:8 62:12 70:12 arrangements [1] 54:22 arrest [3] 9:14,14 75:4 arrested [1] 30:7 arresting [1] 93:4 arrests [1] 29:15 art [1] 36:15 article [1] 29:25 articulated [2] 68:3 84:12 aside [5] 63:15 65:21 66:7, 10 86:20 aspect [2] 64:6,7 asserted [1] 105:14 assess [1] 22:25 assessment [1] 85:1 Assistant [2] 94:7 103:8 associating [1] 27:23 assume [1] 94:17 assuming [3] 25:15 74:23 75:3 ate [1] 32:7 attempted [2] 21:5 50:19 attention [1] 54:9 attitudes [1] 82:2 Attorney [3] 1:19 94:7 103:8 auctioneer [1] 18:8 audience [7] 5:11 29:2 34:22 35:4 40:1 63:10 81:17 author [2] 34:10,14 author's [1] 33:1 autistic [1] 44:20 automatically [1] 40:6 availability [1] 4:22 avoid [1] 74:4 aware [4] 28:6 91:20 101:17 102:9 away [4] 5:22 6:4 43:3 44:1 awful [1] 38:10</p> <hr/> <p style="text-align: center;">B</p> <p>back [10] 11:22 40:7 56:5 62:2,21 82:10 91:2 97:21 99:23 106:2 bad [2] 35:13 53:13 baked [5] 10:4,20 31:22 44:23 48:11 baking [1] 36:3 ball [1] 23:6 band [1] 44:21 Band-Aid [1] 101:23 bar [2] 23:16,17 bare [1] 83:23 barn [1] 87:21 barred [1] 22:23 BARRETT [37] 21:15,17 22:12 23:8,11,14,18,23 24:10,25 25:4,14 43:16,17 44:12 46:13,20 47:2,8,22 52:21 63:20 66:2 69:5,23 70:5,14,18 79:8,9,23 80:25 81:5,14 82:14,21 104:2</p>	<p>based [14] 9:4,15 10:22 11:6 13:21 16:16 23:4 24:3 28:2 39:10 58:4 59:17 65:20 105:13 basic [1] 11:23 basically [4] 8:5 12:22 84:7 85:22 basis [8] 16:23 20:23 21:6 28:11 36:25 95:11 98:13 100:2 beforehand [1] 102:14 begin [4] 8:25 17:8 41:7 50:20 beginning [1] 77:11 behalf [8] 1:17,20 2:5,8,15 3:8 49:21 107:2 behind [2] 25:18 80:5 belief [2] 64:18 109:9 beliefs [1] 64:17 believe [5] 16:19 23:5 69:15 79:1 82:13 believed [1] 69:13 Believers [1] 38:13 believes [1] 54:9 below [4] 9:12 21:3 50:21 95:12 bench [1] 67:20 Benedict [2] 16:2,3 beneficially [1] 110:16 benign [3] 58:12 69:15 109:17 best [5] 4:3 24:5 29:19 43:22 45:4 better [2] 24:13 103:24 between [14] 24:20 27:8, 13 32:6 37:10 44:7 71:9 89:5 95:21 96:6 98:14 104:5,15 108:18 beyond [3] 42:6 98:1 106:10 bias [1] 36:4 Bible [1] 38:13 big [6] 15:9 17:12 28:14 42:25 45:15 96:5 BILLY [1] 1:3 bit [9] 22:3 37:20 51:19 65:13 74:9 91:4 97:16 99:11, 17 Black [13] 4:14 5:15,16 15:16 22:18 31:24 43:22 44:25 45:5 50:22 80:25 82:5 107:16 block [1] 68:8 bodily [1] 44:16 body [1] 28:7 bomb [1] 38:18 bond [1] 30:9 Boston [3] 103:17,23 110:5 both [10] 34:25 37:9 51:12 68:19 69:11 73:18 76:11 78:8 100:12 107:5 bottles [1] 54:21 bottom [4] 4:12 20:14,16</p>
--	---	---	---	--

Official - Subject to Final Review

<p>24:24 Boucher ^[1] 91:11 breach ^[4] 7:22 8:6 16:1 86:1 breach-of-peace ^[1] 86:20 break ^[1] 38:7 breathing ^[4] 37:6,18 84:8 85:3 brief ^[7] 20:21 44:14 62:1 67:9 71:3 77:11 101:18 briefly ^[2] 31:20 89:10 briefs ^[3] 13:10 39:21 44:14 bring ^[1] 104:8 bringing ^[3] 93:4 100:24 107:7 brings ^[2] 5:7 40:13 British ^[1] 15:25 broad ^[4] 11:1 77:12 78:9 86:13 broader ^[2] 29:13 98:6 brownie ^[1] 32:7 buckets ^[1] 85:22 buffer ^[1] 37:6 build ^[2] 93:6 95:1 built ^[3] 17:3 18:22 81:15 bullets ^[2] 29:11 52:3 bulwark ^[2] 45:25 110:19 burden ^[3] 3:20 107:4,8 burn ^[6] 6:9 38:14,16,20 46:15 87:19 burned ^[2] 15:18,19 burning ^[3] 22:19 31:24 80:6</p> <hr/> <p style="text-align: center;">C</p> <p>C.W. ^[4] 51:5 58:8,10,11 C.W.'s ^[1] 31:17 cake ^[1] 105:10 calculated ^[1] 8:1 calculus ^[1] 92:16 called ^[2] 102:2 103:19 came ^[2] 1:12 31:12 campus ^[1] 79:14 cannot ^[5] 3:15 4:1 58:3 59:16 93:16 caption ^[1] 54:21 capture ^[1] 77:21 captured ^[1] 77:24 car ^[1] 89:21 care ^[1] 92:21 careful ^[1] 46:14 carries ^[1] 10:15 carrying ^[1] 41:4 Case ^[66] 3:4 7:13 15:25 16:1,20 17:20 20:16,24 21:2,4,4,9 26:22 28:7,10,16 29:10,11,12 30:22 31:7 32:9,14 35:12 36:2 37:19 38:13,14 43:22,24 47:20 48:12 51:5 52:3,4 60:20,25 61:4,13 62:13 65:14 69:1 72:9,10 74:14 78:5 79:1 81:21 82:</p>	<p>1,3 85:19 86:25 87:14,15,15,17,17 99:25 100:21 101:19 103:14 105:9 109:8 110:25 111:7,8 cases ^[56] 3:23 4:4 7:25 10:12 12:4 15:23 17:13,16 19:4 27:6,7,15 28:15,17 35:1 36:19 37:7,8,8,9 39:3 41:12 44:18 45:16 48:24 50:11,20 52:12 54:14 57:23 61:20 66:23 68:20 69:7 76:5 78:13 79:18 85:12,13,13,18,23,24 86:3,7,21 87:6 95:7,22 97:22,22 99:8 101:11,11 107:17 110:19 catch ^[1] 29:17 categorical ^[2] 3:13 4:8 categorically ^[1] 88:17 categories ^[1] 6:15 category ^[7] 26:10 47:15 61:24 72:15 83:25 84:3 97:9 cause ^[32] 3:23 7:2 8:6 9:10,13,20,20 13:23 14:14,16 15:21 16:7 42:10 43:8 49:10 50:6 51:8 52:22 58:13 59:2,7,12,25 66:4 67:25 72:12 75:14 89:19 106:21 107:8 109:18 110:8 caused ^[1] 99:7 causes ^[4] 15:5 40:6 50:7 60:13 causing ^[1] 42:8 central ^[3] 3:24 4:18 16:21 certain ^[1] 40:20 Certainly ^[2] 28:20 77:16 cetera ^[1] 100:7 chain ^[1] 100:15 challenges ^[1] 12:10 chance ^[1] 18:23 changes ^[1] 26:8 changing ^[1] 82:2 channeled ^[1] 105:6 channeling ^[1] 97:13 Chaplinsky ^[3] 7:11,15,24 character ^[1] 6:23 characteristics ^[2] 71:15 72:5 charge ^[1] 103:5 charged ^[2] 20:3 60:22 charges ^[1] 93:4 charging ^[1] 93:9 check ^[1] 102:25 CHIEF ^[56] 3:3,9 8:16,18 30:16,20 31:15,18 32:17 35:16 37:3 39:6 40:16 43:15 47:10 48:25 49:2,12,16,22 53:2,11,15,20,24 54:18,25 55:16 56:9,23 57:1,4,9 62:21 70:3,4,25 73:8 74:6 76:17,19 79:7 82:15 83:11,17 93:19,22 94:5,9,19 95:14 98:22 104:1 106:23 111:6</p>	<p>child ^[2] 55:18 109:8 childhood ^[1] 46:19 chill ^[2] 11:24 40:7 chilled ^[1] 37:23 chilling ^[13] 10:23 12:8 13:6,7 15:12 28:24 30:19 47:25 48:4,10,18 51:21 52:12 chills ^[1] 5:9 Circuit ^[2] 36:11 73:24 circumstance ^[1] 59:10 circumstances ^[4] 8:11 19:15 33:10 91:20 circumstantial ^[3] 36:2 95:2 100:17 cite ^[3] 4:1,4 5:15 cited ^[2] 79:19 87:7 civil ^[41] 4:22 8:20 9:8 10:6,9,15 12:2,7,18 13:3,6,9 19:13 22:4,7,11 24:10,12,20 25:18,23 26:14 27:8,13,19 28:8,8 47:23 48:2,24 51:10 62:2 69:4,9 75:14 78:8 97:11 98:4,8,14 101:24 civil/criminal ^[1] 43:20 claim ^[3] 4:12 105:11,12 clarify ^[1] 82:18 clarity ^[1] 38:25 Clark ^[1] 105:2 classroom ^[7] 79:25 80:1 81:1,23 82:6,10 83:2 clear ^[10] 6:12 47:13 56:6 83:19 84:20 91:19 92:2 97:17 104:9 105:2 clearest ^[1] 56:8 clearly ^[7] 7:13 30:6,12 45:2 85:7 99:25 104:15 clever ^[1] 93:15 cleverness ^[1] 30:5 client ^[1] 32:12 clinic ^[1] 38:16,18 close ^[6] 3:19 38:2,24 52:19,24 53:3 closest ^[1] 4:10 Code ^[2] 13:17 14:6 coffee ^[4] 53:6,12,21 55:25 cold ^[2] 31:3 57:11 colleagues ^[1] 64:1 college ^[5] 79:14,15,25 82:5,9 COLORADO ^[16] 1:6,19 3:5 4:1 8:21 9:1 11:1 14:15 56:2 61:8,9 62:6,16 70:2 105:19 108:1 Colorado's ^[2] 9:9 104:7 combined ^[1] 100:6 come ^[20] 3:19 38:12,21 42:17 52:19 53:3,6,12,20,21,21,21 54:6 55:25 84:19 93:12 97:5 104:17,20 110:15 comes ^[8] 7:21 16:21 28:24 37:13 38:24 39:3 64:14 97:23 comfort ^[1] 46:3</p>	<p>comfortable ^[3] 43:18 93:9 100:24 coming ^[6] 29:11 52:4,24 56:5 91:23 97:3 commend ^[2] 86:24 99:22 commentary ^[1] 37:16 commenter ^[1] 30:4 comments ^[2] 29:24 64:3 commit ^[2] 34:18 49:5 committed ^[1] 98:16 Committee ^[1] 39:22 common ^[3] 7:21 10:14 108:6 communicate ^[1] 40:4 communicating ^[2] 25:22 59:17 communication ^[9] 5:6 13:22 16:17,17,24 17:2,5 58:1 88:15 communications ^[4] 8:13 34:20 58:5 77:1 communities ^[1] 77:15 community ^[1] 36:5 compare ^[1] 79:2 compelling ^[1] 48:22 completely ^[1] 19:23 computer ^[2] 55:22 56:1 concern ^[3] 41:6,23 76:8 concerned ^[6] 11:9 40:20 61:16 64:6 68:21 98:4 concerns ^[5] 27:17 68:3 77:22 84:12 102:1 concert ^[2] 55:13 82:11 conclude ^[1] 109:24 conclusion ^[1] 109:24 concrete ^[1] 99:8 condition ^[1] 109:13 conduct ^[18] 9:4 11:7,7,17 14:12 15:1,4 19:12 26:5 30:10 60:3,8 61:20 62:8,11,14 96:4 109:11 confidence ^[1] 45:22 confused ^[1] 74:9 confusing ^[1] 13:13 Congress ^[1] 92:6 conjure ^[1] 4:6 connect ^[1] 97:4 Connecticut ^[1] 36:22 conscious ^[1] 6:25 consciously ^[1] 110:10 consequence ^[1] 54:14 consequences ^[1] 12:8 consider ^[1] 14:5 consideration ^[1] 6:8 considered ^[3] 71:24 72:25 107:18 consistent ^[4] 6:12 7:4 12:16 13:1 consistently ^[1] 68:8 constant ^[1] 41:23 constantly ^[2] 58:8,10 constitute ^[2] 16:18 59:11 constitutes ^[1] 50:23 constitutional ^[12] 6:7 59:</p>	<p>15 96:19 97:19,24 106:1,4,13 107:6,10 108:3,5 constitutionality ^[1] 6:1 constitutionally ^[4] 4:19 5:21 6:5 48:8 consult ^[2] 101:4,8 content ^[16] 3:14 9:3 13:21,22 16:16,24 21:21 39:10 53:23 56:16,19 58:5,12 62:23 65:20 66:13 contents ^[4] 6:22 87:11,12 91:8 context ^[80] 5:8 8:23 9:1 10:15 12:18 13:9 18:17 22:4,5,16,21 24:11 25:13,18 26:1,2,14 27:12,20 33:6 39:11 40:14,15 43:25,25 44:3,7,15,21 45:8,8,13,14,15 47:1,2 48:21,24 50:22 51:10 53:11 54:7 55:4,5 56:3,3,12 62:22,23,25 63:1,7 64:7,8,21,22,23 65:5,21 66:13 69:4,8,9 71:10 73:15 75:20 76:9 79:12,19 80:2,14,16 81:19 82:9 88:1 94:25 96:2,14,18 101:1 context-driven ^[2] 50:25 52:18 context-sensitive ^[1] 45:11 contexts ^[4] 63:4,25 78:9 101:3 Contextual ^[2] 88:9 90:14 continue ^[1] 18:14 continued ^[1] 18:13 contribute ^[2] 50:8 51:3 contributing ^[1] 52:19 control ^[1] 82:13 controlled ^[1] 61:14 controlling ^[1] 86:6 conversation ^[3] 46:9,10 90:9 converse ^[1] 34:8 convey ^[2] 31:4 96:11 conveyed ^[3] 51:7 87:13 91:9 convict ^[2] 94:4 95:3 convicted ^[7] 53:5 54:20 56:13 58:4 59:16 74:24 93:23 conviction ^[6] 16:16 21:5 62:8 75:1 93:18 101:20 convictions ^[9] 4:15 15:16 28:22 29:4,9 76:25 77:7 110:14,15 convinced ^[2] 33:16 96:23 cooker ^[1] 30:3 corn ^[4] 87:19,20,20,20 correct ^[12] 19:19,25 20:14 35:20 36:25 60:25 61:1,17 65:4 66:8 75:6 83:9 correctly ^[1] 107:23 couching ^[1] 108:15 couldn't ^[7] 5:22 18:8 19:</p>
--	--	---	---	--

Official - Subject to Final Review

<p>18 55:17 74:12,13,14 Counsel [12] 16:9 19:7 30:16 71:1 76:16 83:12 85:17 95:15 98:7 102:23 106:24 111:7 counsel's [1] 87:2 count [3] 66:22,24 72:7 COUNTERMAN [2] 1:3 3:4 Counterman's [1] 51:6 counterspeech [3] 78:17, 23 79:4 countless [1] 5:1 country [2] 3:12 92:10 couple [7] 8:24 24:23 26:15 40:18 55:9 68:13 89:5 course [4] 27:21 94:12,22, 23 COURT [42] 1:1,13 3:10,11 4:15 5:12,24 6:24 7:1 8:1, 10 12:5,17 13:4 19:16 24:19 28:11 29:14 35:12 48:21 49:23 50:21 52:25 60:16 70:24 72:8 73:21,21 74:19 83:18 84:9,24 86:5,25 88:2,2 94:2 97:17 98:11 99:22 105:2 109:7 Court's [9] 5:13 48:12 50:21 51:12 66:23 91:18 92:3 99:24 102:5 courts [3] 8:19 108:4 109:8 covered [2] 7:23 29:18 craft [1] 55:15 crass [1] 30:6 credible [1] 42:15 crime [7] 10:19 22:9,10 23:1 25:21 27:3 96:20 crimes [3] 9:15 26:25 75:24 criminal [36] 4:21 5:1 10:12,14,23 12:1,7,20 13:13 19:13 21:19 22:5 24:11,21 25:17 26:22 27:8,17 30:14 43:19 46:4 47:23 48:2 51:10 58:17 62:18 69:8 78:9 91:17 97:11,14,23 98:5,17, 19 105:5 criminal/civil [1] 96:17 criminalize [1] 51:1 criminalizing [4] 4:13 5:4 6:13 92:16 criminally [1] 28:18 critical [3] 50:22 52:16 101:13 cross [4] 15:19 22:19 31:24 80:6 cross-burning [2] 4:16 5:18 crossed [1] 56:20 crosses [1] 6:9 Crow [1] 80:4 crowds [1] 30:1 crucial [2] 67:7 69:21 culpable [4] 15:4,4 26:4,5</p>	<p>curiae [3] 1:23 2:12 83:15 currently [1] 93:8 custody [2] 72:9 79:12 cut [4] 42:17 55:6 56:4 87:21 cuts [1] 65:5 cyber [3] 53:5,17 62:16</p> <hr/> <p style="text-align: center;">D</p> <p>D.C [3] 1:9,17,22 daily [1] 64:3 damage [1] 15:5 damages [5] 12:24 27:14, 15 48:14 76:7 damn [1] 38:7 damnation [1] 38:17 danger [1] 54:7 dangerous [2] 5:5 41:3 day [5] 30:8 46:18 55:22 109:9 111:4 days [3] 22:25 24:23 26:15 dead [4] 31:6 46:22 63:20, 21 dealing [2] 30:23 60:19 dealt [1] 61:24 debate [1] 84:8 debating [1] 98:20 decide [4] 20:24 25:2 103:14 111:4 decided [3] 7:16 20:17 70:24 deciding [2] 23:1 97:18 decision [4] 4:2 33:12,19 48:11 declined [1] 8:10 deem [1] 65:16 deemed [1] 86:6 defamation [10] 12:17,17 26:2 27:12 28:11 37:14 48:21 76:5 78:13 79:3 default [1] 45:1 defect [1] 6:7 defend [3] 78:20 90:21 105:13 defendant [17] 17:18 41:14 55:17 62:7 67:23 71:13 72:15 78:3 87:18,24 88:5 104:8,12,19,19 105:9 109:3 defendant's [10] 5:2 62:24 63:8 64:10,11 87:24 88:11, 14,22 109:11 defendants [5] 92:19 103:14 105:8,9 108:15 Defending [1] 39:21 defense [4] 40:24 70:23 105:3,7 deficiency [1] 104:24 define [2] 21:25 72:15 defined [2] 3:15 98:17 defining [3] 21:21 22:3 75:24 definitely [4] 7:15,24 19:4, 5</p>	<p>definition [4] 26:1,9 77:12 98:15 definitional [1] 26:10 delivered [1] 38:11 delusional [8] 69:11,12 71:7,9 74:12 75:22 99:19,20 delusions [2] 90:7 104:22 demonstrated [1] 5:19 demonstrates [1] 71:22 Denver [1] 1:19 Department [2] 1:21 103:24 dependent [1] 17:5 depending [3] 32:15 35:1, 5 depends [3] 17:1 18:16 98:15 Deputy [1] 1:21 described [4] 6:24 31:13, 13 105:17 details [2] 32:25 101:19 deter [1] 103:6 determinations [1] 73:19 determine [4] 45:9 72:2,3 107:21 development [1] 54:1 devious [5] 50:14 69:11 92:19 99:21 108:14 devoid [1] 22:16 dichotomy [1] 96:17 Die [6] 31:2 56:24 68:10 108:22 109:15,22 differ [1] 35:5 difference [20] 4:21 9:6 11:25 17:12 28:12,15 29:9,10 30:14 41:12 45:16 48:6,8 95:21 96:6 104:5 108:17, 18,25 109:3 differences [1] 81:16 different [29] 13:2,15 16:15 17:22 24:18 25:12 27:1 32:8,15 36:8 41:17 43:6 55:5,5 57:16 58:16 60:15, 20 62:1,13 63:3,3,25 72:20, 22 79:15,21 87:5 89:15 differentiate [1] 104:15 differently [3] 22:4 79:22 91:4 difficult [4] 65:14,14 66:21 67:18 direct [4] 10:21 31:11 76:12 80:22 directed [3] 63:14 107:23, 23 directly [1] 50:7 disagree [2] 38:4 85:21 discomfort [1] 26:24 discourse [2] 50:5 51:16 discretionary [1] 9:11 discuss [1] 65:13 discussing [1] 97:16 discussion [5] 5:25 13:11 45:18 61:23 96:9 dismiss [1] 13:5</p>	<p>disorderly [1] 30:10 display [1] 57:18 dispositive [2] 88:2,9 dispute [1] 87:18 disregard [3] 78:4 110:10, 10 distance [1] 71:8 distinction [7] 12:11,14 24:20 26:21 27:7 48:2 98:6 distinctions [1] 27:13 distinguish [1] 89:5 distinguishing [1] 98:14 distress [9] 13:24 14:17 28:1 48:13 58:23,25 59:3 60:23 75:13 disturbed [1] 58:14 doctor [1] 38:15 doctrine [6] 15:14,15 85:24 86:22 92:24 107:13 doctrines [2] 84:25 97:14 doing [10] 19:23 25:20 33:21 35:19 50:4 56:12,15 60:21 75:2 94:25 domestic [4] 40:23 50:19 69:6 102:11 doubt [4] 34:3 91:14 98:2 106:10 doubts [1] 33:20 down [3] 22:16 38:21 46:16 draw [7] 12:14 27:13 37:25 99:2 102:3 109:23,25 drawing [1] 37:24 drawn [2] 12:11 24:19 draws [2] 95:5 102:19 Drop [3] 46:22 63:20,21 due [2] 5:23 102:1 Duick [1] 61:25 during [1] 52:2</p> <hr/> <p style="text-align: center;">E</p> <p>each [1] 13:14 earlier [10] 18:6 28:13 41:11 61:21 71:12 97:16 99:11 100:12 102:22 103:11 early [3] 3:23 15:23 93:5 easier [1] 33:19 easily [1] 4:16 easy [3] 15:17 40:25 42:13 eat [1] 105:10 edible [1] 54:22 educational [4] 25:13 80:8, 14,21 effect [10] 10:23 13:6,7 28:24 35:5 47:25 48:10,18 51:21 52:12 effectively [1] 25:21 eggshell [6] 67:23 71:13 72:1,15,19 81:17 eight [2] 55:7 56:4 either [4] 44:15 51:10 97:10 109:2 element [11] 7:19 13:14,19, 25 18:5 27:3 50:2 75:25</p>	<p>83:5 96:5 106:3 elements [3] 13:14,18 106:6 elevated [1] 12:19 Elm [1] 93:13 Elmhurst [1] 29:25 Elonis [20] 6:25 20:3,3,7, 22 21:8 26:3 41:8 76:2 79:16 88:23 92:3,20 93:7 94:2 97:17,18 99:22 103:2 108:13 Elonis's [1] 6:21 ELWOOD [85] 1:17 2:4,14 3:6,7,9 5:14,20 6:20 7:10 8:24 10:7,17 11:11,21 12:15 13:10 14:2,10,21,24 15:8 16:19 17:7 19:1,20,24 20:15 21:2,10,15,17 22:6 23:5,10,13,16,22,25 24:19 25:2,8 26:12 27:11 28:20 29:8 30:17,21 31:10,17,21 32:5,13 33:5 34:6,23 35:21 36:10 37:2,4 38:4 39:20 41:7,20,24 42:3,6 44:10, 23 46:17,22,24 47:5,9,13, 18 48:5 49:8,17,18 68:19 97:5 106:25 107:1,3 Elwood's [1] 63:17 emailed [3] 29:20 109:21 110:4 emails [4] 57:11 68:7,9,11 embrace [1] 92:7 embracement [1] 45:6 Eminem [1] 35:21 emotional [10] 13:24 14:17 28:1 48:13,14 58:23,25 59:3 60:23 75:13 emphasize [1] 66:2 emphasized [1] 62:22 emphasizing [1] 4:18 empowered [1] 95:13 enable [1] 50:4 enables [1] 92:19 enabling [1] 51:15 end [2] 20:21 107:10 ends [1] 103:16 enforcement [5] 4:21 33:6, 12,19 93:3 engage [1] 60:3 engagements [1] 54:13 engages [2] 69:19 86:19 English [2] 85:12 87:17 enhanced [1] 77:6 enough [13] 13:7 17:23 20:25 28:11 34:2 43:6 48:22 59:10 60:14 75:2,4 95:2 96:22 ensures [1] 71:12 entirely [5] 7:4 11:8 22:6 32:8 57:21 entitled [1] 54:9 enunciated [1] 57:10 environment [1] 5:7 epithets [2] 7:17 8:6</p>
---	--	--	---	--

Official - Subject to Final Review

<p>equipoise [1] 107:12 equivalent [1] 7:1 ERIC [3] 1:21 2:10 83:14 error [1] 90:19 escalate [1] 78:24 escalated [1] 56:21 escalates [1] 57:5 escape [2] 50:14 78:7 especially [4] 5:5 6:20 8:25 40:11 ESQ [4] 2:4,7,10,14 ESQUIRE [1] 1:17 essential [1] 91:18 essentially [7] 11:12 16:23 17:14 30:10 36:13 71:14 85:1 establish [1] 6:11 established [1] 45:2 establishing [1] 71:10 et [1] 100:7 evaluating [1] 50:23 even [25] 4:2 8:19 9:7,19 10:4 11:14,18 12:11 13:4 20:23 31:11 40:15 43:10 55:19 63:9 64:1 66:23 73:5 85:23 90:2,12 91:7 95:5 96:21 105:24 event [1] 30:2 Everyone [2] 83:25 84:2 everything [3] 25:12 43:17 81:25 evidence [23] 5:2 9:17,18 19:19 24:3,6,9 70:8,11 77:7 90:3,6,11,14 91:22 93:6 95:2 100:17 104:8,18,22 105:24 109:11 evidentiary [1] 90:21 ex-girlfriend [1] 94:8 ex-wife [1] 94:7 exactly [11] 11:11,25 12:5 19:20 21:7 34:17 35:20,23 38:6 100:1 103:2 example [7] 6:16 22:13 25:21 29:22 30:11 94:1 96:14 examples [7] 28:16,17 29:19 38:12 44:13 63:2 108:13 exception [4] 8:5 11:15 12:23 47:16 exceptions [2] 3:13 4:8 exchange [1] 64:13 excludes [1] 21:23 excuse [2] 104:6 110:2 exempted [1] 3:16 expand [2] 89:8 99:17 expanding [1] 106:16 experience [5] 58:24 64:11 67:24 102:18 109:12 explain [2] 36:24 61:18 explanation [2] 34:2 109:4 explored [1] 77:17 expression [10] 5:9 50:6 51:7 52:22 59:7,11,24 66:3 67:25 71:17</p>	<p>expressive [2] 39:12 62:9 expressly [1] 86:22 extend [1] 8:10 extending [1] 8:12 extent [4] 17:23 30:22 90:16 107:11 extort [1] 86:23 extra [1] 23:6 extremely [1] 37:15</p> <hr/> <p style="text-align: center;">F</p> <p>face [4] 3:23 4:5 54:11 56:6 Facebook [5] 55:6 56:8 62:15 79:18,22 fact [6] 16:18 24:7 30:23 35:18 93:7 97:2 factfinder [1] 73:20 factors [1] 35:10 facts [1] 33:18 fair [1] 89:7 fall [2] 39:1 84:2 falls [1] 26:10 family [1] 64:1 fancy [1] 29:17 far [2] 12:9 98:6 fast [2] 18:8,14 father [2] 23:9,11 favor [2] 34:24 92:16 favorite [2] 87:15 110:2 fear [19] 3:23 7:2 14:14 15:21 16:8 33:17,21 43:8 46:25 49:7,10 60:14,24 67:16 80:10 103:15 109:19,23 110:11 fears [1] 67:13 federal [3] 99:5 108:3,12 feedback [1] 10:18 feel [7] 25:19 72:21 73:12 80:9 93:9 101:2 109:23 feeling [1] 66:5 feelings [1] 73:5 feels [2] 55:19 71:23 FEIGIN [5] 1:21 2:10 83:13,14,17 84:18,20 85:9,15,20 86:5,9,10,15,18 87:9 88:6,13,17,21 89:1,4,8,11,14 90:1,5,15,20,24 91:24 92:6,13 93:21,25 94:6,15,22 95:21 96:7 97:7 99:10,14,17 101:6,10 102:15 104:14 105:16 106:1,21 felony [2] 91:22 92:11 felt [1] 60:23 few [6] 22:25 30:2 85:17,18 92:15 107:3 field [3] 5:18 31:25 87:20 Fifth [3] 72:8 79:11 97:25 fight [1] 8:2 fighting [6] 7:8,10 8:4 47:17 76:9 86:21 figure [3] 37:7 73:14 78:14 figures [6] 12:18 37:14,16 78:12,19 79:2 figuring [1] 99:1</p>	<p>filed [1] 39:21 filth [1] 6:25 find [3] 13:12 39:17 64:4 finds [1] 97:14 fine [1] 49:14 finish [1] 70:2 finished [1] 49:13 FIRE [2] 39:22 67:9 First [49] 3:13 5:24 6:2 11:18,19,22,24 12:4,9 14:9 19:11 21:23 26:11,20 27:4,10,22 28:7 30:6 34:9 44:24 49:25 51:8,14 53:1 55:18 58:18 59:6,20,22 62:18 66:1,17 69:2,3 70:16,21 75:18 76:4 78:1 81:6,8 85:2 92:23 94:24 96:1,25 105:5 106:4 fit [2] 18:15,16 five [1] 46:11 flag-burning [1] 61:13 flip [1] 68:22 floor [1] 106:13 Floyd [1] 36:10 focus [3] 11:13 28:9 110:18 focused [3] 5:25,25 30:19 focusing [1] 15:10 follow [5] 10:8 47:22 60:12 62:5 69:24 followed [1] 50:21 following [7] 60:4,7,9 62:12 69:18 70:1,12 follows [2] 21:19 58:7 forbidden [1] 90:16 forcing [1] 26:24 foreseeability [1] 45:17 foreseeable [2] 35:4 63:10 forever [1] 101:25 forget [1] 63:14 forgotten [1] 63:17 form [1] 62:13 forms [1] 104:15 forth [2] 30:1 108:16 forward [2] 24:2 109:4 found [1] 91:21 founding [1] 52:8 four [5] 26:17 55:7 56:4 77:9 91:21 fours [1] 79:2 Fourth [1] 36:11 framed [2] 83:20 93:10 free [3] 3:12 36:19 45:6 Freedom [1] 39:22 freely [1] 8:20 frequency [1] 11:16 frequently [5] 19:2 24:5 38:6 46:8 102:19 friend [1] 67:19 friendly [1] 67:19 friends [2] 63:25 91:12 fringe [2] 36:14,15 frontline [1] 84:21 full [1] 13:11</p>	<p>Fulmer [1] 29:10 further [3] 20:19 103:15 111:5</p> <hr/> <p style="text-align: center;">G</p> <p>game [1] 36:6 gamer [2] 79:18,22 gave [2] 41:11 47:3 General [12] 1:19,21 13:11 21:13 39:9 42:21 58:21 65:19 68:4 79:12 83:3 96:2 generally [6] 4:9 35:9 47:19 48:14 72:14 105:9 Gertz [3] 13:4 48:7,7 gets [6] 19:15 44:5 57:20 64:19 67:8 109:4 getting [4] 9:8 10:6 71:21 81:15 Girdwood [3] 86:25 87:11 91:6 give [6] 18:23 28:16 41:10 54:15 73:22 96:13 given [5] 33:10 35:12 68:5,15 82:12 gives [3] 5:8 46:2 108:14 Glenn [1] 29:22 gloss [4] 6:21 61:5 84:23,25 goals [1] 51:14 God [1] 16:2 GORSUCH [43] 10:7,24 39:7,8 61:21 62:4,20 63:12,21,24 64:16,20 65:4,8 66:6,9,12,16 67:6,11,15 71:13 72:18 76:20 80:1,12 81:22 88:25 89:2,6,10,13,24 90:2,10,18,23 91:1 92:5,8 96:9 98:23 104:10 Gorsuch's [2] 11:23 69:24 got [9] 11:5 30:25 52:16 55:7 57:7,8,14 88:23 89:23 gotten [1] 102:6 Gottshall [1] 48:11 government [5] 105:20,22 107:18 108:12,14 government's [4] 43:10 99:5 104:6 110:9 governs [2] 69:4,4 granted [1] 43:2 great [3] 33:18 37:11 75:13 ground [1] 46:12 grounds [1] 22:24 group [2] 79:18,22 guess [11] 22:1 24:17,25 25:15,24 27:5 39:14 43:19 44:6 81:14 91:16 guilty [4] 30:10 91:21 100:25 110:1 guy [4] 33:15,25 42:1 109:25 guy's [1] 54:21</p> <hr/> <p style="text-align: center;">H</p> <p>half [4] 7:12 26:18 68:6 77:9</p>	<p>Hamling [3] 6:21,21,24 hand [2] 95:24 107:15 hanging [1] 89:12 happen [3] 53:13 54:16 76:12 happened [3] 73:21 88:11 103:3 happens [3] 29:17 32:15 79:13 hard [1] 102:10 harder [1] 16:5 harm [14] 4:20 44:9,11,16 50:4 51:15 52:23 59:25 64:25 76:12 77:14 79:4 82:8 110:8 harmed [1] 55:14 harmful [10] 39:13,19 50:16 65:17,23 66:16,20 67:3,5,16 harms [8] 48:15 50:8 52:7 74:4 99:21 101:20 103:13 106:17 Haven [1] 36:22 head [1] 86:3 headings [1] 39:9 health [1] 77:8 hear [4] 3:3 54:12 56:7 62:16 heard [1] 77:22 heavily [1] 91:11 heavy [1] 26:23 heightened [4] 76:6,10 84:10 100:10 held [2] 3:11 30:8 helpful [1] 98:13 helpfully [1] 77:12 helpless [1] 55:12 helps [1] 45:9 high [5] 9:9 22:14 52:23 68:1,5 higher [2] 9:19 100:14 highly [1] 92:12 Hill [3] 15:24 87:16 107:17 historical [3] 84:23 85:7 86:14 history [11] 15:14,23 50:3 65:13,25 66:22 73:23 85:21,22 91:3 107:13 hit [2] 86:2,3 hold [2] 65:18 88:25 holding [1] 4:2 Honor [17] 84:21 85:21 86:15 87:9 88:13 89:4 90:5,20 91:24 93:25 94:23 97:8 99:14 101:6,10 102:15 104:14 hope [5] 39:22 65:9 77:23 100:4,8 Hopefully [1] 47:2 horrific [1] 102:20 hostile [2] 17:25 31:5 hour [1] 110:24 house [1] 42:1</p>
--	---	---	---	--

Official - Subject to Final Review

<p>however ^[1] 56:15</p> <p>human ^[2] 31:1 109:12</p> <p>humor ^[2] 30:5 103:24</p> <p>hundreds ^[2] 54:12,12</p> <p>hurt ^[2] 73:5 77:25</p> <p>hurtful ^[1] 65:17</p> <p>husband ^[1] 34:13</p> <p>hyperbole ^[1] 51:2</p> <p>hypersensitive ^[2] 72:20 73:11</p> <p>hypothetical ^[2] 93:11 104:11</p> <hr/> <p>I</p> <p>idea ^[6] 7:4 13:2 24:13 25:8 43:12 65:2</p> <p>ideas ^[4] 50:9 51:4 52:20 78:21</p> <p>identical ^[1] 39:2</p> <p>idiosyncratic ^[2] 71:14 72:6</p> <p>ignore ^[1] 64:7</p> <p>ignoring ^[1] 64:6</p> <p>Il ^[2] 103:21 110:6</p> <p>ill ^[2] 24:15 44:19</p> <p>Illinois ^[1] 29:23</p> <p>illness ^[1] 105:3</p> <p>illnesses ^[1] 104:23</p> <p>illogical ^[1] 102:4</p> <p>image ^[1] 54:20</p> <p>imagination ^[2] 32:1 59:9</p> <p>imagine ^[6] 22:12,13 38:14 59:9 80:2 102:23</p> <p>immediately ^[1] 30:7</p> <p>immunize ^[1] 50:12</p> <p>impact ^[1] 110:17</p> <p>impairs ^[1] 104:24</p> <p>impedes ^[1] 93:3</p> <p>implementations ^[1] 107:25</p> <p>implicated ^[1] 23:15</p> <p>implications ^[1] 28:9</p> <p>importance ^[3] 3:12,24 4:18</p> <p>important ^[10] 18:4 40:11 44:25 45:8 57:17 62:22 79:20 95:8 103:9,13</p> <p>impose ^[2] 8:20 50:1</p> <p>imposing ^[2] 5:9 51:13</p> <p>imposition ^[1] 48:18</p> <p>impossible ^[1] 4:14</p> <p>improvement ^[1] 15:9</p> <p>incapacity ^[1] 105:4</p> <p>incidents ^[2] 102:12,20</p> <p>incitement ^[6] 4:10 37:8 38:5,14 39:3 76:14</p> <p>includes ^[3] 69:5,6 87:1</p> <p>including ^[3] 77:8 93:1 103:8</p> <p>inconsistent ^[1] 102:4</p> <p>increasingly ^[1] 65:11</p> <p>indeed ^[4] 12:2 51:11 54:16 63:9</p> <p>independent ^[3] 70:10 73:</p>	<p>20 96:19</p> <p>indication ^[1] 10:4</p> <p>indict ^[1] 33:25</p> <p>indictments ^[1] 87:6</p> <p>individual ^[4] 58:20,23 59:2 69:12</p> <p>individually ^[1] 86:7</p> <p>individuals ^[6] 12:21 69:11,12 75:22 76:12 77:14</p> <p>inevitable ^[1] 18:3</p> <p>infer ^[1] 22:20</p> <p>inferred ^[2] 19:2 109:13</p> <p>infirmities ^[1] 105:14</p> <p>inflict ^[1] 106:19</p> <p>infliction ^[2] 28:1 48:13</p> <p>inform ^[3] 86:21 88:1 89:21</p> <p>informs ^[1] 96:8</p> <p>inherently ^[4] 39:13,18 65:23 85:5</p> <p>injured ^[1] 28:3</p> <p>inquiries ^[1] 97:8</p> <p>inquiry ^[4] 50:2,25 52:18 89:18</p> <p>insane ^[1] 105:12</p> <p>insanity ^[1] 105:6</p> <p>insisted ^[2] 37:5,18</p> <p>insisting ^[1] 50:15</p> <p>insofar ^[1] 105:19</p> <p>inspire ^[1] 103:15</p> <p>instance ^[1] 105:5</p> <p>instead ^[1] 40:2</p> <p>instill ^[2] 33:17,21</p> <p>instinct ^[1] 97:12</p> <p>instructed ^[1] 22:18</p> <p>instructions ^[1] 87:1</p> <p>intend ^[2] 30:13 87:19</p> <p>intended ^[7] 24:14 49:4 60:6 63:6,10 87:19,25</p> <p>intends ^[1] 96:11</p> <p>intent ^[9] 3:24 4:3,5,11,18, 24 5:16,19,20,25 6:1,9,17 7:5,25 8:8 9:15,17,18,25 10:1 13:11,12 15:6 16:4 17:3,6 18:3,17 19:1,10,13, 17,19 22:20 24:6 26:1,6 31:22 32:4 34:25 36:2,25 41:9 42:22 43:23 45:9,25 46:1,2 47:16 50:2,6,11 51: 7,13 52:5,9,22 58:21 59:7, 11,24 66:4 67:25 71:21 83: 7,21 85:25 86:23 87:2,4,24 88:4,14,16,22 92:1 93:3 98:18 100:10,13 105:24,25 107:19 108:7,9,19 109:10 110:20 111:1</p> <p>intentional ^[1] 28:5</p> <p>intentions ^[5] 20:12 62:24 65:21 66:7,14</p> <p>interest ^[4] 13:8 27:23 32:9 48:22</p> <p>interested ^[1] 99:4</p> <p>interesting ^[2] 32:23,24</p> <p>interests ^[1] 84:14</p>	<p>internet ^[5] 32:19 34:20 38:20 40:12 79:17</p> <p>interpret ^[9] 34:18 58:2 82:6 84:5 88:6 105:1 106:9, 11 111:1</p> <p>interpretation ^[1] 59:14</p> <p>interpreted ^[1] 59:19</p> <p>interpreting ^[1] 26:6</p> <p>intervene ^[4] 93:16 102:22, 25 103:10</p> <p>introduce ^[2] 34:3 90:6</p> <p>invasive ^[1] 54:13</p> <p>invitation ^[1] 56:1</p> <p>invoked ^[2] 70:21 92:23</p> <p>invokes ^[1] 83:21</p> <p>involve ^[4] 31:7 62:8 76:12 92:11</p> <p>involving ^[1] 19:12</p> <p>irrelevant ^[7] 4:3 19:18 83:8 88:18,23 89:3,7</p> <p>isn't ^[18] 5:21 15:7 17:25 18:2 19:7 25:21 41:22,23 52:25 53:16 62:24 63:6,6 79:3,4 93:7 98:8 110:13</p> <p>isolates ^[1] 20:16</p> <p>isolation ^[2] 94:25 100:3</p> <p>issue ^[16] 5:23,24 6:2 8:21 9:21 10:6 16:6 20:9 21:1,8 22:11 60:2 88:9 96:25 97:1 99:1</p> <p>issued ^[1] 65:12</p> <p>issues ^[1] 97:19</p> <p>itself ^[1] 27:24</p> <hr/> <p>J</p> <p>Jackson ^[14] 47:11,12,21 49:13,14 82:16,17 83:4,10 104:3,4 105:15,18 106:20</p> <p>jail ^[1] 91:21</p> <p>jam ^[1] 99:10</p> <p>Jeep ^[1] 68:14</p> <p>Jehovah's ^[1] 36:17</p> <p>Jim ^[1] 80:4</p> <p>job ^[1] 39:24</p> <p>JOHN ^[5] 1:17 2:4,14 3:7 107:1</p> <p>joke ^[8] 25:6,10 30:7 42:7 43:7 51:1 110:4,7</p> <p>joking ^[3] 41:1,19 42:2</p> <p>judge ^[6] 33:23 36:10 44:2 74:1,2 77:9</p> <p>judgment ^[3] 74:19 95:12 103:12</p> <p>judgments ^[1] 99:2</p> <p>judicial ^[1] 85:1</p> <p>jump ^[1] 86:18</p> <p>juries ^[2] 109:9 111:3</p> <p>jurisdictions ^[2] 4:23 51:25</p> <p>jury ^[16] 17:20,23 19:14 22:19 34:1 36:4 73:19 87:1,1, 10 91:7,23 94:16 98:1 109:2,23 jury's ^[1] 17:15</p>	<p>Justice ^[286] 1:22 3:3,9 5:14 6:6,14 7:8 8:14,16,17, 18 10:7,24 11:21,22 13:10 14:4,18,23 15:2 16:9,10,11, 13 17:1,24 18:19,22 19:7,8, 21 20:2,18 21:7,14,15,16, 17,19 22:12 23:8,11,14,18, 23 24:10,25 25:4,14,16 26:19 28:13 29:6 30:16,20 31:15, 18,19,20,21 32:11,17, 17,18 34:5,7 35:15,16,16, 18,20,23 36:23 37:3,3,4,21 39:6,6,8 40:16,16,18 41:18, 22,25 42:4 43:14,15,15,17 44:6,12 46:13,20 47:2,8,10, 10,12,21,22,22 48:25 49:2, 3,11,12,13,14,16,23 51:18 52:10,15,16,20 53:2,11,15, 20,24 54:18,25 55:16 56:9, 23 57:1,4,9,25 59:13 60:1, 10 61:1,3,9,12,21 62:4,20 63:12,20,21,24 64:16,20 65:4,8 66:2,6,9,12,16 67:2, 6,11,15 68:4 69:5,23,24 70:4, 5,14,18,25 71:2,3,12,19 72:16,18 73:7,8,25 74:5,6, 6,7,8,9,23 75:9,12,17 76:1, 14,17,17,18,19,20,21,22 77:10 79:6,7,7,9,23 80:1, 11,25 81:5,14,22,22,22 82: 1,14,15,15,17,21 83:4,10, 11,18 84:17 85:6,10,16 86: 2,8,12,16 87:4 88:4,8,16, 19,25 89:2,6,10,13,24 90:2, 10,18,23 91:1 92:5,8 93:1, 19,22 94:5,9,19 95:14,16, 17,18,19,20 96:8,9,16 98: 21,22,22,24,25 99:12,15 101:4,7 102:5,8 103:25 104:1,1,3,4,10,10 105:15, 18 106:3,16,20,23 109:6 111:6</p> <p>Justice's ^[1] 62:21</p> <p>justification ^[1] 79:5</p> <p>justifications ^[1] 78:18</p> <p>justify ^[1] 107:5</p> <hr/> <p>K</p> <p>KAGAN ^[20] 7:8 11:21 21:19 25:16 26:19 37:3,4 52:16 68:4 74:5 76:17,18 95:19, 20 96:8,16 98:21 102:5 104:10 106:3</p> <p>Kagan's ^[3] 44:6 47:23 74:9</p> <p>KAVANAUGH ^[24] 28:13 29:6 40:17,18 41:18,22,25 42:4 43:14 67:2 76:21,22 77:10 79:6 93:1 98:24,25 99:12,15 101:4,7 102:8 103:25 106:16</p> <p>Kavanaugh's ^[1] 37:21</p> <p>keep ^[1] 23:2</p> <p>keeps ^[1] 88:10</p>	<p>kept ^[3] 18:9 56:5,5</p> <p>kid ^[1] 22:23</p> <p>kidding ^[2] 41:2,19</p> <p>kill ^[16] 32:3,12 42:16 45:19 46:10,15,20 53:6,17 55:23 63:16 75:22 93:12,24 94: 10 108:24</p> <p>killed ^[1] 77:24</p> <p>killing ^[1] 32:21</p> <p>kills ^[1] 100:5</p> <p>kind ^[27] 10:2 12:7,10,19 14:25 19:2 24:20 25:12,17, 19 28:4,6 29:14,15 31:6 38:24 39:1 40:7 62:21 79: 4,12 85:5 93:14 97:4,6 103:3 105:6</p> <p>kinds ^[3] 40:20 99:8 103:13</p> <p>King ^[1] 86:25</p> <p>knowing ^[6] 7:2 8:8 14:7, 20 58:21 87:8</p> <p>knowledge ^[26] 7:6 14:11, 13,15,19,21 37:1 47:20 49: 9 75:25 76:15 78:4 83:22 85:25 87:5,11 88:19,20,22 90:4 91:10 96:20 98:18 100:6,13 109:9</p> <p>known ^[1] 84:1</p> <hr/> <p>L</p> <p>lady ^[1] 103:4</p> <p>Lakier ^[1] 61:25</p> <p>language ^[6] 8:1 38:6 43:23 57:7,13,14</p> <p>large ^[1] 95:21</p> <p>last ^[10] 32:7 52:6 56:10,10 57:2 65:8 73:23 101:25 102:9 104:11</p> <p>later ^[1] 87:17</p> <p>Laughter ^[11] 18:18,21 46:23 47:4,7 53:19 54:23 57:3 63:19,23 94:21</p> <p>law ^[22] 7:21 10:14 11:1 26:20 28:7 33:6,12,19 44:2 69:22 70:21 72:13 79:25 91:17 92:10,14 93:3 95:6 97:14,23 98:19 101:22</p> <p>leading ^[2] 41:3 51:15</p> <p>least ^[11] 4:9 6:11 7:5 11:19 15:10,20 16:7,20 68:24 95:8 104:12</p> <p>leave ^[4] 23:21 31:25 62:5 89:11</p> <p>leaving ^[2] 39:23 77:22</p> <p>leeway ^[1] 23:6</p> <p>left ^[2] 39:16 75:7</p> <p>legal ^[1] 107:5</p> <p>legion ^[1] 85:12</p> <p>legislative ^[1] 92:1</p> <p>legislature ^[2] 96:24 97:10</p> <p>legislatures ^[7] 84:10 92:1, 15 95:8,12 103:11 106:14</p> <p>legitimate ^[1] 13:8</p> <p>less ^[5] 15:12 40:15 42:24</p>
---	---	--	---	--

Official - Subject to Final Review

<p>50:5 51:15 lesson [1] 95:5 letter [4] 87:12 88:6 91:9, 13 letters [2] 86:24 87:16 level [4] 7:6 26:5,13 100:23 liability [10] 10:23 12:23 13:3,6 27:14 43:19 97:11 98:4,5 105:5 liable [1] 65:18 libel [5] 12:3 37:7,8 85:23, 24 license [1] 43:2 life [5] 53:5,17 56:22 57:15 60:24 life's [1] 54:6 life-changing [2] 50:8 76:13 life-threatening [1] 78:25 likely [3] 8:6 59:19 78:24 limit [1] 77:13 limitation [1] 76:7 limited [1] 3:15 line [14] 20:14,16 21:19 37:9,11,24 38:20,24 44:7 56:20 99:3 100:1,8 102:4 lines [1] 39:8 liquor [1] 54:20 list [1] 92:14 listener [1] 74:2 literally [1] 55:8 littering [1] 30:1 little [10] 18:10 22:3 37:20 45:18 51:19 64:5 91:4 97:16 99:11 103:4 live [1] 65:9 lived [1] 73:22 living [1] 108:12 local [3] 29:16,18,24 logical [1] 98:13 long [3] 3:11 12:22 55:22 long-settled [2] 3:16,20 longer [2] 93:5 95:13 look [15] 7:11,20 13:18 26:22 58:9 64:12 79:24 86:23 87:6,14 91:6 94:2 97:21 107:19 108:3 looked [2] 70:11 107:20 looking [8] 9:3 21:25 34:24 37:19 56:18 66:13 80:12 99:23 looks [1] 56:3 lose [3] 40:10,10 68:18 losing [1] 26:15 loss [3] 69:8,9,10 lot [23] 8:25 17:9,9,12 28:15 32:14 38:9,10,12,19,23 40:14 41:24 44:12,23 45:16 47:1 66:19 67:8 71:19 87:6 93:5 110:14 lower [2] 9:8 43:10 lynching [2] 80:7 81:7</p> <hr/> <p style="text-align: center;">M</p>	<p>made [17] 19:3 26:20 27:7 29:9,10 30:14 35:24 50:17 66:2 67:9 80:7 91:18 97:17 99:23 104:10,10 105:2 main [1] 108:8 majority [3] 51:24 108:1,4 man [2] 29:23 74:11 manage [1] 95:3 manner [5] 58:1,4,13 59:18 60:13 many [14] 4:23 9:23 22:8 27:6 37:25 42:19 45:18 54:8 56:15 63:2 71:21 84:10 91:20 106:13 Marathon [2] 103:18 110:5 marketplace [4] 50:9 51:4 52:20 78:21 married [1] 29:23 match [1] 33:1 matches [1] 34:17 material [1] 31:8 materialize [1] 82:7 materials [1] 6:23 matter [19] 1:12 11:8 19:25 20:17 26:1 28:25 29:1 38:25 39:25 43:18 56:17 57:16 60:5 101:13 106:2,4 107:5,6 111:3 mattered [1] 26:6 matters [7] 40:1 46:2 50:17 76:8 93:8 95:1 110:19 mean [47] 8:25 11:1 15:3 16:20,20 17:16,17 18:7,19 24:1,21 25:25 29:12 32:8 33:10,17,17 34:19 37:8 38:1,4 42:18 44:12,17 46:7 54:1 58:3,22 63:3 64:5 65:19 68:18 72:16 78:6 79:10 81:21 90:3 94:13,13 96:10 97:2 98:11 102:16 106:11 108:23 109:5,22 meaning [4] 5:9 17:2,4 107:20 meanings [1] 32:15 means [8] 17:14 21:22 50:25 55:5 57:10 69:17 108:23 110:22 meant [15] 17:22,25 20:5, 17 41:17 43:5 45:19 47:1 50:15 55:21,21 83:6 91:14 94:12 107:21 measure [1] 10:21 media [3] 5:6 29:16,18 meet [1] 54:6 meeting [1] 3:20 meets [1] 62:17 members [1] 64:1 mens [27] 4:25 10:11 11:10 13:15,25 14:5,25 18:4 26:7,25 27:3 40:25 42:20 84:11 85:8,14,19 90:11 91:22 92:11 95:9 97:15 99:1 100:15 104:16 105:13 108:6 mental [11] 7:19 15:11 17:</p>	<p>18 19:21 77:8 90:7 104:24 105:3,4,14 109:12 mentally [2] 24:15 44:19 mention [1] 71:6 mentioned [1] 72:18 mentions [2] 45:7 52:3 message [4] 30:25 31:4 63:13 101:21 messages [5] 30:24 31:12 55:8 56:5 57:6 Messenger [2] 55:7 62:15 methodology [1] 13:17 middle [1] 31:25 might [31] 8:7 10:20 12:7, 11 29:9 34:3 36:5 38:8,16, 17 42:12 46:11 53:25 60:14 65:12 66:23 73:4 79:11, 15 81:16 82:7 89:19,22 90:7 92:15 94:2 96:3 101:11, 11 104:17 109:15 mind [5] 61:14 80:9 95:24 96:1 104:13 mindset [1] 100:16 minimal [2] 39:12,18 minimum [3] 14:25 45:3 83:23 minority [3] 36:13,14,19 minute [2] 61:19 99:15 minutes [1] 46:11 miss [1] 24:22 missing [1] 32:4 misunderstanding [1] 5:4 misunderstood [1] 22:2 Model [2] 13:17 14:6 modern [2] 85:24 86:3 modicum [1] 98:15 moment [1] 93:10 Monday [1] 103:18 monitor [2] 71:8 73:15 monitoring [1] 72:23 months [1] 56:15 morally [1] 15:4 moreover [1] 52:7 Morissette [3] 10:13 91:19, 25 morning [4] 3:4 56:14 58:10 59:10 most [14] 9:10 14:12 17:16 28:4 30:25 32:22 44:8 76:3 95:22 108:6 109:16,24, 25 110:15 mother [2] 46:18 63:17 move [1] 73:25 movies [1] 33:22 much [9] 5:5,8 31:25 56:11 76:23,24 84:8 93:2 110:16 multiple [1] 13:14 murder [2] 34:18 50:20 murders [1] 102:11 music [1] 82:10 must [6] 3:14 13:22,22 14:9 16:17 98:17 myself [2] 35:25 94:20</p>	<p>mystery [1] 32:21</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nail [1] 86:3 narrow [3] 44:18,21 77:13 narrowly [1] 3:15 natural [1] 12:12 nature [3] 11:14 61:23 64:25 necessarily [10] 10:15 35:11 52:11 88:22 89:3,7 101:2 106:8,11,18 necessary [1] 84:9 necks [1] 38:7 need [14] 8:7 12:24 31:2 38:8 56:24 68:10 93:17 98:1, 1 101:1,2,14,16 106:17 needs [1] 95:1 negate [1] 105:4 negligence [7] 4:17 14:8 20:8,11,22 28:4 85:11 negligent [8] 4:7,13 6:13 28:1,3 45:6 48:12,15 neighbor [2] 15:18 34:16 neighbor's [1] 15:19 neither [1] 50:3 never [4] 46:25 88:4,8 94:24 New [5] 12:4 25:25 36:22 97:22 98:3 newspaper [2] 29:24 64:4 next [4] 30:4,8 41:4 91:12 Nice [1] 57:18 Ninety [1] 50:19 nobody [1] 18:15 non-parent [1] 36:9 nor [1] 50:3 normally [3] 17:16,17 27:19 norms [1] 79:21 nose-to-nose [1] 8:5 note [3] 57:17 78:11,16 noted [1] 74:4 nothing [4] 26:17 38:1 45:10 50:15 notwithstanding [1] 101:23 nowadays [1] 82:3 number [11] 53:7,22 84:14 85:23 86:1 92:18,18,25 97:15 99:18 100:11 numbers [1] 102:16 numerous [1] 8:10</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective [28] 5:2 9:16 15:9 33:8,14,24 35:9 36:3 45:11 50:24 52:1,6,18 73:24 74:3 75:19 85:11 86:21 88:10 89:18 90:13 92:2,17 93:6 105:21 108:2,18,20 objectively [5] 55:10 65:1 68:16 69:20 80:23 obscene [1] 6:23</p>	<p>obscenity [4] 6:16,19 47:20 84:25 observer [2] 96:3,13 obviously [4] 9:5 75:1 93:2 100:14 occur [3] 48:4,6 106:18 occurs [1] 5:6 odd [1] 76:3 offended [2] 55:19 63:11 offense [2] 96:5 98:17 offensive [2] 66:21,25 offer [1] 56:8 officer [2] 42:5 89:20 offset [1] 13:7 often [3] 44:8 57:23 69:13 Okay [26] 14:4,18 17:1 23:8 31:18 32:23 34:7 36:6 47:21 49:11,16 54:18 56:9 57:1 65:8 67:6 75:19 77:10 83:10 89:24 90:1 91:1 94:5,9,17 102:8 old [2] 33:22 97:21 older [1] 97:22 once [1] 69:16 One [56] 6:14 10:8 11:24 12:3,12 15:18 16:14 18:1 20:19,21 23:4 29:12,22 32:21 35:8 37:12 38:4 39:9 40:24 41:10 43:24 44:9,11 49:1 53:4 54:19 55:4 58:13 61:19 64:6,7 71:3 72:18 73:25 74:17 75:23 78:17 79:18 84:24 85:23 89:15 91:13 92:18,19 97:15, 20 99:18 100:3 102:8,8,19 104:18 107:15 108:2 110:12 ones [5] 29:19 44:14 61:20, 22 99:22 ongoing [1] 101:18 online [3] 8:12 38:23 100:20 only [27] 6:22 10:18 11:12 20:9,20 21:13 27:11 39:4 47:5 49:8 52:2 68:13 69:8 76:8 83:21 86:19 87:9,15 93:12 95:4,11 96:12 105:20 106:5 108:25 109:3 110:12 open [1] 32:14 opening [1] 9:23 opine [1] 61:15 opinion [5] 36:12 92:3 98:12 99:24 111:2 opinions [1] 4:17 opportunity [1] 34:1 opposed [1] 12:2 opposing [1] 85:16 oral [7] 1:13 2:3,6,9 3:7 49:20 83:14 ordeal [1] 101:15 order [12] 9:8 10:9 16:15 25:19 27:19 59:23 60:2,5 62:3 84:2 98:14 107:21</p>
--	--	--	---	--

Official - Subject to Final Review

<p>orders [6] 4:22 8:20 10:6 22:8 98:9 101:24</p> <p>ordinarily [2] 41:13 108:25</p> <p>ordinary [2] 33:9 109:12</p> <p>other [26] 4:8 6:14,15 16:14 18:5 24:1 27:24 28:17 32:21 37:25 39:15 47:14 56:16 70:12 77:7 84:14,25 85:19 92:22 95:24 96:1 97:14 98:7 101:2,11 107:16</p> <p>others [3] 53:14 68:11 103:15</p> <p>Otherwise [1] 11:16</p> <p>ought [1] 38:3</p> <p>out [29] 14:6 17:15 19:6 23:2 27:24 28:17 34:21 39:23 45:4,14 53:6,12,20,21,21 54:6 55:4,25 57:19 60:13 62:9,10,10 73:14 84:13 88:10 99:1 103:1 110:15</p> <p>outcome [2] 30:15 34:25</p> <p>outside [2] 26:11 73:4</p> <p>outside [1] 110:17</p> <p>over [8] 9:23 10:15 15:9 42:20 55:8 57:6 62:15 102:25</p> <p>over-reading [1] 7:12</p> <p>overcame [1] 5:18</p> <p>overlay [1] 60:15</p> <p>overwhelming [1] 51:25</p> <p>own [3] 84:13 101:22 103:16</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m [1] 111:8</p> <p>PAGE [3] 2:3 7:12 29:24</p> <p>parent [1] 23:17</p> <p>part [18] 7:23 10:13 11:22 19:14,15 26:13 28:23 30:18 45:16 62:25,25 63:4,5,6 64:20 91:18 103:21 110:6</p> <p>particular [6] 11:2 19:5 40:21 72:5 90:21,24</p> <p>particularly [1] 103:13</p> <p>parties [1] 21:3</p> <p>partner [1] 57:19</p> <p>party [2] 21:4,11</p> <p>pass [1] 109:9</p> <p>past [2] 12:9 45:25</p> <p>Patch [1] 29:25</p> <p>pattern [1] 93:8</p> <p>pay [2] 23:23 25:5</p> <p>peace [3] 7:22 8:7 16:1</p> <p>Penal [2] 13:17 14:6</p> <p>penalties [6] 24:20,21 27:8,8,17 48:19</p> <p>penalty [3] 24:22 26:16 48:2</p> <p>people [42] 6:9 7:11 9:13,14 13:3,8 17:19 18:20 29:21 32:22 36:16,24 40:6 42:7,8 43:2,13 48:23 65:10,16,18 66:22 67:17,17 70:1 72:21,24 75:22,23 79:21 80:3 81:24 82:3,4 92:22 100:1</p>	<p>106:18 108:15 109:24,25 110:3,11</p> <p>perceive [5] 71:17 81:11 83:3 96:13 104:5</p> <p>perceived [2] 51:6 82:23</p> <p>perceiving [1] 48:1</p> <p>percent [2] 36:18 50:19</p> <p>perhaps [4] 30:2 47:16 48:17 102:12</p> <p>permanently [1] 68:11</p> <p>permitted [3] 27:9 90:3,4</p> <p>perpetrator [1] 50:10</p> <p>persistent [1] 60:4</p> <p>person [75] 13:23 14:16 18:12 20:6 27:21 30:6 32:4 33:9 34:9 35:3,6,7 36:7 39:12,17 41:13 44:1,3 46:6 55:12 58:3,7,9,13,24 59:13,16 60:6,9 65:23 67:22,24 68:7,12 69:18 71:5,16 72:5,11 73:1 75:25 79:10,13,20 80:13,18,19,22 81:3,5,6,8,10,20 82:21,22,25 83:2 84:4 89:22 94:11 95:22 103:21 104:25 105:1,22 106:7,7,8,9 109:18,21 110:22,24,25</p> <p>person's [2] 8:8 53:25</p> <p>personal [1] 87:22</p> <p>perspective [2] 77:20 99:6</p> <p>persuasive [5] 17:21 34:2 41:16 43:5,7</p> <p>Petitioner [1] 1:4,18 2:5,15 3:8 50:1 51:18,20 83:21 102:2 107:2</p> <p>Petitioner's [2] 99:7 102:23</p> <p>petitioners [1] 36:18</p> <p>PHILIP [3] 1:19 2:7 49:20</p> <p>phrase [1] 62:16</p> <p>physical [17] 44:9,11 50:7 51:8 52:22 57:8 59:8,12 66:4 67:14 68:1,13 70:8 71:18 73:3 80:22 82:8</p> <p>physically [8] 28:3 67:3,4,12,16 70:1 77:25 80:9</p> <p>picked [1] 69:3</p> <p>picture [1] 80:5</p> <p>place [6] 22:15 23:20 26:19 27:18 37:24 61:14</p> <p>placed [1] 30:2</p> <p>plan [1] 24:11</p> <p>plausibly [1] 59:9</p> <p>played [1] 3:25</p> <p>player [1] 36:7</p> <p>plays [1] 4:18</p> <p>pleaded [1] 30:9</p> <p>please [4] 3:10 18:10 49:23 83:18</p> <p>plenary [1] 73:20</p> <p>plenty [3] 9:17,18 77:22</p> <p>plurality [1] 6:2</p> <p>point [24] 14:1,3 19:8 27:12 35:24 43:20 44:6 52:3,7,</p>	<p>16 66:1,2 67:8 74:16 75:15,16,16,24 78:11 89:9,25 94:23 101:13 104:9</p> <p>pointed [1] 86:17</p> <p>points [5] 29:13 67:8,10 69:2 107:3</p> <p>police [5] 8:7 42:5,12 103:19,24</p> <p>policy [2] 84:8 85:1</p> <p>political [1] 51:2</p> <p>popping [1] 58:8</p> <p>pornography [1] 109:8</p> <p>pose [1] 27:17</p> <p>posed [1] 70:18</p> <p>position [10] 18:25 28:14 55:12 67:22 71:15 74:21 84:21 86:14 104:6,7</p> <p>possibility [1] 10:25</p> <p>possible [2] 69:15 109:17</p> <p>posts [2] 32:19 92:22</p> <p>potential [2] 10:18 25:20</p> <p>pots [1] 30:3</p> <p>practical [1] 107:25</p> <p>practicalities [1] 107:7</p> <p>precedent [2] 50:3 102:5</p> <p>precedents [1] 51:12</p> <p>precisely [3] 19:24 84:11 98:2</p> <p>precluded [2] 19:22 103:12</p> <p>predicts [1] 4:20</p> <p>preponderance [1] 9:9</p> <p>prescribes [1] 77:5</p> <p>present [5] 7:13 19:18 40:24 41:16 44:17</p> <p>presentation [2] 19:14 21:12</p> <p>presented [6] 12:5 21:3 77:8 83:20,23 95:11</p> <p>presents [3] 10:5 11:18 15:12</p> <p>President [1] 40:22</p> <p>presidential [2] 40:21 41:8</p> <p>pressure [1] 30:3</p> <p>presumed [2] 5:22 6:4</p> <p>presumption [4] 5:17 91:25,25 97:15</p> <p>pretty [4] 9:18 30:5 68:9,12 8:19 74:21</p> <p>prevented [1] 102:13</p> <p>preventing [1] 6:7</p> <p>previous [1] 64:13</p> <p>principle [1] 21:11</p> <p>print [1] 31:4</p> <p>prior [3] 64:13 76:25 77:7</p> <p>prison [2] 5:10 26:18</p> <p>private [2] 12:21 76:5</p> <p>probable [3] 9:13,20 89:19</p> <p>probably [2] 41:15 102:17</p> <p>problem [14] 15:14,15,22 18:25 25:3 31:23 34:20 43:1 45:17 72:17 78:16,22 107:9 108:11</p>	<p>problems [3] 35:8 77:19 99:6</p> <p>proceed [3] 48:24 76:6,10</p> <p>process [2] 5:23 102:1</p> <p>produce [2] 24:8 90:11</p> <p>professor [2] 65:11 80:3</p> <p>prohibited [1] 27:9</p> <p>prohibition [1] 3:14</p> <p>promise [1] 53:18</p> <p>promote [1] 8:2</p> <p>proof [6] 3:16,22 10:19 78:2 98:1,16</p> <p>proper [1] 74:18</p> <p>property [1] 87:22</p> <p>proponents [1] 107:4</p> <p>proscribable [2] 4:19 6:5</p> <p>proscribed [1] 60:8</p> <p>prosecutable [1] 58:14</p> <p>prosecute [3] 20:13 59:23 70:15</p> <p>prosecuted [5] 28:18 29:21 49:25 52:9 70:6</p> <p>prosecuting [1] 100:2</p> <p>prosecution [11] 11:2,13 12:1 13:21 16:22,23 70:20 90:25 95:1 100:24 103:10</p> <p>prosecutions [8] 3:25 4:1 9:2 11:6 28:22 29:14 52:2 76:10</p> <p>prosecutor [3] 19:17 74:14 95:25</p> <p>prosecutors [2] 4:24,25</p> <p>protect [6] 44:8 51:9 69:22 75:23 95:6 101:22</p> <p>protected [7] 7:18 51:21,22 53:1,3 76:4 77:13</p> <p>protecting [1] 75:18</p> <p>protection [8] 6:19 26:14 49:25 66:17 81:15 98:9,14 101:24</p> <p>protections [1] 97:24</p> <p>protective [9] 4:22 9:8 10:6,9 22:8 27:19 60:2,5 62:3 8</p> <p>protects [2] 39:1 51:3</p> <p>protester [1] 38:15</p> <p>prove [12] 4:24 49:4 68:24 69:1 74:13,14 95:25 100:16 105:20 108:20 109:1,2</p> <p>provide [1] 97:11</p> <p>proving [1] 78:4</p> <p>provoking [1] 70:15</p> <p>public [11] 12:18 24:2 25:3 37:7,14,16 76:8 78:12,14,19 79:2</p> <p>publishes [1] 32:20</p> <p>punishing [3] 3:21 4:7 28:9</p> <p>punishment [3] 13:2 25:11 46:4</p> <p>punitive [3] 12:23 27:14 76:7</p> <p>pure [4] 20:10 60:20 61:20 86:24</p> <p>purely [1] 80:8</p>	<p>purpose [7] 14:19 42:22 80:8 87:8,8 108:7,9</p> <p>purposefulness [1] 14:7</p> <p>purposes [1] 26:9</p> <p>pursue [1] 55:15</p> <p>pursued [1] 62:6</p> <p>purveyance [1] 6:25</p> <p>purveyed [1] 66:18</p> <p>put [21] 23:19,21 43:7 49:6 53:10 55:3,4 63:14 66:6,9,19 67:16 76:3 84:24 87:21 91:16 95:3 101:24 109:4 110:11 111:2</p> <p>puts [1] 80:5</p> <p>putting [5] 56:11 60:15 65:21 71:19 86:20</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quasi-policy [1] 99:2</p> <p>question [46] 5:17 11:19,20,23 12:5 13:24 16:14 17:3,25 21:18 22:7 27:2 37:21 39:4,14 41:20 49:1 56:10 57:2 65:9 67:20,21 68:17,18,23 70:16 71:3 74:9 83:20,22,22 84:18 87:23 91:3,16 92:11 94:18 95:10 98:19 102:2,9,18,20 109:17 110:7,13</p> <p>questions [10] 5:13 47:23 51:17 62:21 69:24 71:21 77:17 84:15 102:6 111:5</p> <p>quick [1] 84:17</p> <p>quite [8] 5:15 12:12 41:3 77:11 79:24 85:17 86:13 100:22</p> <p>quote [1] 91:13</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R.D [1] 32:10</p> <p>raise [3] 5:23 78:18 101:25</p> <p>raised [3] 21:9,12,13</p> <p>raises [1] 20:21</p> <p>raising [1] 90:16</p> <p>ran [1] 103:17</p> <p>rap [1] 82:10</p> <p>raper [3] 35:19 36:7,9</p> <p>raps [1] 35:19</p> <p>rather [1] 9:4</p> <p>RAYMOND [1] 1:3</p> <p>rea [27] 4:25 10:11 11:10 13:15,25 14:5,25 18:4 26:7,25 27:3 40:25 42:20 84:11 85:8,14,19 90:12 91:22 92:12 95:9 97:15 99:1 100:15 104:16 105:13 108:6</p> <p>reach [1] 60:12</p> <p>reaches [1] 62:17</p> <p>reaction [2] 29:2 40:2</p> <p>read [4] 32:22 73:8 77:3 91:4</p> <p>reading [1] 81:6</p> <p>reads [5] 33:2 34:8,12,16 80:6</p>
--	--	--	--	---

Official - Subject to Final Review

<p>real [2] 27:7 99:8 reality [2] 50:13 78:6 realize [1] 24:16 really [19] 7:18 16:21 20:13 22:11 26:23 37:19,23 41:3 42:5 44:21 62:22 64:7 69:16 80:21 87:15 96:23 97:21 98:9 100:18 reason [10] 5:22 36:17,24 41:16 43:5,8 44:19 50:18 93:18 98:2 reasonable [64] 13:23 14:16 20:6 34:3 35:3,4,6,7 36:3 39:11,17 41:13 44:1,3 46:6 55:11 57:21 58:24 65:16,22 66:21 67:17,22,24 71:4,5,9,11,16 72:11 73:1 74:1,2 79:10,13,14,17 80:13,18,19 81:20,24 82:5,21,22,25 83:1 84:4 89:18,22 96:3,12 98:2 104:25 105:1,21 106:6,8,9,10 107:20 110:21,24,25 reasonableness [2] 73:16 105:21 reasonably [2] 51:5 81:11 reasons [5] 38:5 64:15 74:24 92:15 106:15 reassurance [1] 47:3 rebuffed [1] 69:16 REBUTTAL [3] 2:13 106:25 107:1 receive [1] 6:18 received [2] 63:5 91:13 recently [2] 94:3 103:6 recipient [7] 27:21 71:4,9,10,11,23 72:1 Reckless [5] 15:4,20 16:7 74:17 103:14 recklessness [31] 4:9 10:3 12:19,25 14:8 15:3,8,13,17 16:5 20:25 21:6 43:11 47:19 68:25 69:1 74:13 77:18,20 78:2,12,19 79:3 83:24 84:19,22 93:2 95:9 96:21 100:13 108:10 recollection [1] 43:10 recommend [1] 39:20 reconvicted [3] 94:2,3 103:7 record [4] 30:14 31:8 85:7 86:14 recounted [1] 99:24 reduced [1] 27:20 refer [1] 45:21 referenced [1] 71:12 referred [1] 61:21 reflection [1] 48:17 reflects [2] 48:17 102:18 regard [1] 52:9 regardless [6] 8:3,8 15:5 18:4 50:9 53:9 Regina [3] 15:24 87:16 107:17</p>	<p>regulation [2] 3:18 45:3 regulations [1] 3:14 regulators [1] 110:3 reject [1] 20:22 related [1] 105:24 relations [1] 31:1 relationship [3] 64:12 65:3 69:14 relatively [1] 9:9 relatives [1] 29:20 relevant [7] 62:18 63:9 64:14,22 76:24 89:17 90:14 relevantly [1] 88:1 relied [1] 91:11 relies [3] 47:25 75:20 85:22 religion [1] 36:20 religions [1] 36:14 reluctant [1] 101:12 rely [1] 71:4 remains [1] 52:17 remand [2] 74:18,22 remarks [2] 41:14,15 remedies [1] 38:22 remember [3] 35:22 44:25 107:22 remotely [1] 53:16 removes [1] 5:8 Reno [1] 27:16 repeated [1] 93:25 repeatedly [2] 60:12,12 repetitiveness [1] 11:17 Reporters [1] 39:22 reputation [1] 78:14 require [13] 4:9,23 9:3 10:12,19 22:8,9 42:22,24 47:15 78:2 85:13 106:6 required [9] 4:4 5:21 14:19,20 50:3 72:10 76:15 85:8 86:23 requirement [15] 5:16,19 6:17 7:5,25 44:15 51:13 58:19 59:15 73:19 76:7,11 85:25 87:2 100:10 requirements [3] 26:7 62:19 84:11 requires [5] 4:10 28:4 47:19 59:23 85:2 Requiring [1] 50:11 residents [1] 36:21 respect [5] 10:25 11:10 27:9 45:13 48:3 Respectfully [2] 85:15,20 respects [1] 10:8 respond [6] 41:6 42:12 51:23 52:14 74:15 102:22 responded [1] 29:25 Respondent [7] 1:7,20,24 2:8,12 49:21 83:16 rest [1] 76:23 resting [1] 64:8 restraining [2] 8:20 25:18 restrictions [1] 107:4 result [2] 76:3 107:24</p>	<p>revengeance [1] 38:8 reverse [1] 5:12 reversed [1] 4:15 reversing [1] 95:12 review [1] 73:20 rigors [1] 95:4 rise [1] 100:23 risk [2] 15:12 110:10 Robert [2] 13:5 48:7 ROBERTS [47] 3:3 8:16,18 30:16,20 31:15,18 32:17 35:16 37:3 39:6 40:16 43:15 47:10 49:2,12,16 53:2,15,20,24 54:18,25 55:16 56:9,23 57:1,4,9 70:4,25 74:6 76:17,19 79:7 82:15 83:11 93:19,22 94:5,9,19 95:14 98:22 104:1 106:23 111:6 robustness [1] 50:24 room [6] 31:25 37:6,18 77:23 84:8 85:3 rough [2] 35:10 40:10 route [1] 10:21 routinely [1] 54:11 rule [14] 17:11 39:15 45:1 51:25 52:6 96:19 97:6 99:8 102:2 108:1,3,5,13 110:13 ruling [1] 90:22 run [2] 41:12 72:17 running [1] 25:17</p> <hr/> <p style="text-align: center;">S</p> <p>safety [8] 24:2 25:3 40:8 57:8 78:15 80:10 81:4,12 salary [1] 26:15 same [14] 4:25 8:22 12:7 33:8,12 34:25 38:6 51:11 72:18 79:4 89:17 97:4 109:2 110:15 sanction [2] 12:6,6 sang [1] 35:19 satisfied [1] 4:16 satisfy [1] 14:9 saw [1] 30:6 saying [37] 8:1 18:9,10,12 26:22 27:2 30:2 43:18 45:23 47:14 49:3 53:2 54:3 56:13 58:10 60:6,11,18 67:2 69:14,23 70:5,22 75:17 77:12 81:8 82:24 85:6 87:5 93:24 95:22,24 103:23 105:20 106:3 109:14,21 says [13] 22:14 23:19 25:6 34:12,16 39:10 42:1 53:17 59:6 60:11 65:19 88:8 108:21 scale [1] 73:17 Scalia [2] 6:6 109:6 scary [1] 57:14 scheme [1] 48:3 school [11] 22:14,22,23 23:3,17 25:5 40:22 46:16 69:5 79:25 102:11 Schools [2] 23:5,6 Schumacher [1] 29:22 scienter [2] 76:6,11 scores [2] 54:12,12 scot-free [1] 100:9 screen [1] 80:5 scurry [1] 42:8 second [7] 10:24 38:21,22 62:20 69:10 78:11 96:4 section [1] 64:3 secured [1] 62:7 see [10] 14:14 52:11 57:22 80:24 88:3 94:16 97:21 99:6,25 107:21 seeing [1] 57:19 seeks [1] 50:1 seem [2] 19:10 42:15 seems [8] 21:20 30:24 36:20 44:13 73:16 77:21 96:25 98:25 seen [2] 52:5 55:13 self-defense [2] 72:10,12 selfish [1] 103:16 send [2] 101:21 102:25 sender [1] 71:6 sending [4] 56:5 68:6 75:5 88:14 sense [6] 20:3,4 26:4 58:21 96:2 103:24 sensitive [4] 65:10,11 72:25 82:4 sensitivity [1] 73:2 sent [4] 62:15 91:21 103:3 104:19 sentence [6] 26:23 74:25 76:22,23 77:5 91:12 sentenced [1] 26:17 sentencing [1] 76:25 separate [6] 11:8 36:11 76:2 96:24 97:8,18 separates [1] 26:4 series [2] 4:17 103:7 serious [14] 13:24 50:6 51:7 52:21 58:25 59:3,7,11,24 60:23 66:3 67:25 72:12 84:5 seriously [2] 22:23 102:14 set [1] 14:5 setting [1] 80:21 settled [1] 4:12 SG [3] 18:2 20:20 40:19 shake [1] 84:13 she's [1] 75:11 shoot [3] 22:15 23:20 46:16 shootings [1] 102:11 shouldn't [2] 84:22 103:11 shouted [1] 7:17 shouting [1] 8:5 show [2] 105:23 107:8 showing [7] 3:20,24 12:25 22:9,10 42:22,25 shown [2] 4:21 108:10</p>	<p>siblings [1] 32:6 side [4] 10:9 68:22 84:14 98:7 sides [1] 107:12 sightings [2] 68:13 70:10 sign [2] 56:6,8 significant [5] 26:16 48:9 54:16 58:22,25 significantly [1] 17:6 silenced [1] 77:15 silent [1] 4:4 silver [2] 29:11 52:3 similar [1] 41:10 Similarly [1] 110:2 simply [3] 29:19 93:16 103:23 sin [1] 110:1 Since [3] 51:24 91:19 108:13 single [1] 4:2 sit [1] 81:23 sitting [4] 80:2 81:1 82:6 93:8 situation [9] 33:1 34:17 57:21 72:11 80:12,20,20 81:12 82:23 situations [2] 54:8 76:11 six [2] 30:8 77:6 Sixth [1] 97:25 slice [1] 44:18 sliding [1] 73:16 slowly [2] 18:11,11 small [3] 8:4 28:23 30:18 smaller [1] 8:11 social [1] 5:6 socially [1] 21:24 societal [1] 36:4 Society [1] 106:16 solely [3] 11:6 25:23 70:7 Solicitor [4] 1:21 21:13 39:9 65:19 sollicitous [1] 53:25 solved [1] 43:1 somebody [13] 15:21 16:7 18:7 24:7 38:11 49:4 54:13 62:12 65:1 68:6 98:16 108:21 109:14 someone [33] 19:11 28:18 32:2,18 40:25 44:18 49:6 52:23 54:8 55:19 58:7 59:3 60:4,12,13 64:19 65:1 66:5 67:13 71:16 72:4,9 73:4,10 78:5 91:20 93:11,23,24 94:10 99:25 100:4 103:18 someone's [2] 77:24 100:7 sometimes [6] 34:21 35:2,3 47:20 62:15 64:2 somewhat [1] 16:14 song [1] 35:19 sorry [7] 8:17 16:11 48:7,25 53:16 60:1 61:6 sort [21] 27:1 28:8 31:3,5</p>
--	---	---	---

Official - Subject to Final Review

<p>33:6 36:1,4 38:1 41:16 43:4 45:14,22 48:17 52:25 75:25 89:11 93:14 94:1 104:20,24 105:16</p> <p>sorts [2] 27:24 68:3</p> <p>SOTOMAYOR [43] 8:14,17 16:9,11 19:7,21 20:2,18 21:7,14,16 35:17,18,23 36:23 48:25 49:3,11 60:1 61:2,3,9,12 74:7,8,23 75:9,12 76:14 81:23 85:6,10,16 86:2,8,12,16 87:4 88:4,8,16,19 95:18</p> <p>sound [1] 53:25</p> <p>sounds [2] 22:2 38:9</p> <p>South [1] 80:4</p> <p>speaker [13] 3:22 15:6,11 17:3,6 18:3 20:12 28:25 74:2 83:7 89:16,16 96:11</p> <p>speaker's [4] 6:8 19:10,13 34:24</p> <p>speakers [6] 5:10 39:25 45:21 46:1 96:10 110:20</p> <p>speaking [1] 38:15</p> <p>special [1] 27:17</p> <p>specific [15] 4:11 7:24 9:15 13:12 16:4 23:10 50:2,11 51:13 52:5 83:21 85:25 93:3 98:18 100:13</p> <p>specifically [3] 4:1 6:3 72:4</p> <p>speech [49] 3:12,15,17,25 9:3 11:3,8,10 19:12 20:13 21:24 26:10 35:14 36:14,19 37:10,10,22 38:19,23 39:2 40:11 45:3,6,20 47:15 48:15 51:21,22 52:17,18,25 53:3 55:20 56:17,20 60:17 61:17 75:20 77:13 84:1 92:17 96:4 97:9 107:5,14 109:8 110:16,19</p> <p>spillover [1] 51:21</p> <p>spoke [2] 16:3 18:8</p> <p>spoken [1] 96:15</p> <p>spouse [7] 32:21,22 33:2,2,3 34:8,12</p> <p>spouses [1] 29:20</p> <p>sprinkled [1] 43:23</p> <p>square [2] 4:14 16:5</p> <p>stacked [1] 87:20</p> <p>stage [2] 93:5 103:11</p> <p>stake [2] 39:16 56:22</p> <p>stalker [2] 69:13 78:23</p> <p>stalkers [6] 50:12,12,14,18 99:19,19</p> <p>stalking [26] 9:1,25 10:5,25 11:7 40:22 50:20 51:6 54:7,8,11,14 57:23 59:17 60:9,21 61:16,20,24 62:7,13,16 69:25 70:9,21 77:4</p> <p>stand [4] 88:23 92:21 95:23 105:19</p> <p>standard [63] 4:17 8:22 9:7,10,11,11,19,25 10:2,3 12:</p>	<p>19,20 15:10,18 20:8,11 24:18 28:4 33:24 36:5 41:9 46:5 49:9 51:11 52:1,5,24,24 56:2 59:4 67:1 68:2,5,25 69:1,3 71:5,5 72:7 73:24 74:3,17,20 75:19 77:19,20 78:12,17,19 82:22 84:19,22 85:11 88:10 90:13 92:3,17 93:1 105:22 108:19,21 110:9,22</p> <p>standards [3] 35:9 58:17 72:13</p> <p>standing [1] 87:19</p> <p>start [2] 17:15 77:11</p> <p>started [1] 57:7</p> <p>State [19] 3:19 4:6,20 6:3 7:19 15:11 16:3 17:18 18:1 19:22 23:2 35:1 37:24 40:19 61:7 75:7 95:24 96:1 104:13</p> <p>state's [2] 13:8 18:25</p> <p>stated [1] 87:25</p> <p>statement [17] 3:22 19:3 23:4 28:5 30:12 39:10 65:20 76:2 83:6 84:3 86:13 89:17 90:17 100:3 104:20,23 106:9</p> <p>statements [35] 7:2 16:6 17:9,10 27:22 31:23 50:16 51:3 53:4 54:2 56:21 57:13,18 59:1,17 62:14 64:11,13,25 67:24 70:9,13,22 73:8,11,12 77:2 82:23 85:18 94:1 99:23 100:19,23 105:2 106:12</p> <p>STATES [17] 1:1,14,23 2:11 9:10,23 10:1,19 36:12 37:6,25 42:19 48:22 83:15 108:8,11 109:7</p> <p>station [1] 103:19</p> <p>statistics [1] 102:10</p> <p>statute [27] 7:16 9:2,24 10:5 14:15 15:25 22:17 26:7 42:20,21 57:25 58:2,3,15,17,20 59:5,14 60:11 61:16 62:17,18 70:2,7,19 77:4 108:8</p> <p>statute's [1] 11:1</p> <p>statutes [5] 5:1 13:13 14:12 86:22 108:7</p> <p>stay [1] 55:21</p> <p>Staying [2] 53:5,17</p> <p>step [4] 8:7 20:19 37:15 41:4</p> <p>steps [1] 8:11</p> <p>still [6] 8:19 43:19 67:20 74:8 78:7 110:24</p> <p>stool [1] 18:7</p> <p>stop [5] 33:7 68:9 75:2,4 103:6</p> <p>stopped [1] 89:21</p> <p>story [8] 32:19,20,21,23,24 33:18 34:10,15</p> <p>strain [1] 59:8</p>	<p>strangers [4] 5:7 40:13,14 64:2</p> <p>stray [1] 85:18</p> <p>Street [1] 93:13</p> <p>strict [1] 12:23</p> <p>stripped [1] 44:1</p> <p>strongly [1] 68:12</p> <p>stuck [2] 42:5 43:20</p> <p>student [4] 23:12 79:15 80:15 82:5</p> <p>students [2] 80:9,25</p> <p>studies [1] 102:10</p> <p>stuff [1] 39:3</p> <p>sub [1] 79:22</p> <p>subject [2] 41:9 55:9</p> <p>subjecting [1] 3:17</p> <p>subjective [18] 4:2,24 6:17 7:5 9:25 33:13 36:1 47:16 64:17,18 83:7 100:16 104:16 105:23,24 107:19 108:19 111:1</p> <p>subjects [1] 67:18</p> <p>submitted [3] 87:10 111:7,9</p> <p>Subsequent [1] 7:25</p> <p>substantial [1] 102:1</p> <p>substantially [1] 29:16</p> <p>successfully [1] 103:17</p> <p>suffer [5] 13:23 14:16 25:9 59:2,4</p> <p>suffering [1] 90:8</p> <p>suffices [1] 83:24</p> <p>sufficient [3] 15:3,7 22:19</p> <p>suggest [1] 45:10</p> <p>suggesting [5] 10:10 68:11 70:13 98:8 100:12</p> <p>suggests [3] 48:8 92:4 97:5</p> <p>suit [1] 5:11</p> <p>Sullivan [4] 12:4 25:25 97:23 98:3</p> <p>super [1] 38:2</p> <p>supporting [3] 1:23 2:12 83:16</p> <p>supports [3] 85:7,8 86:14</p> <p>Suppose [6] 32:18,25 34:9 58:7 65:22 98:11</p> <p>SUPREME [2] 1:1,13</p> <p>surely [1] 63:5</p> <p>suspended [2] 22:24 25:5</p> <p>suspicion [1] 89:19</p>	<p>tends [1] 36:15</p> <p>tenth [1] 103:20</p> <p>terms [9] 13:13 15:15 16:3 24:2 29:8 39:16 41:3 91:9 107:25</p> <p>terrifying [3] 55:11 57:22 68:16</p> <p>terrorize [1] 50:18</p> <p>terrorized [1] 77:15</p> <p>terrorizing [2] 65:1 69:21</p> <p>test [8] 33:7,8,13,14 45:12 50:25 64:12 66:17</p> <p>testified [1] 88:24</p> <p>testify [5] 94:11,15 95:23 101:14 104:12</p> <p>testimony [6] 31:9,11,12,16,17 63:9</p> <p>text [2] 30:24 32:3</p> <p>texts [2] 31:7 75:5</p> <p>thankfully [1] 103:18</p> <p>themselves [8] 7:17 58:6 59:18 73:9 78:20 87:12 100:19 101:24</p> <p>theory [1] 55:17</p> <p>there's [35] 10:3 12:1 22:20 29:12 35:2,3,19 37:9 38:1,19,23 42:18,20,23,25 44:23 45:1,10 53:14 58:17,18 61:20,22,23 68:18 75:14 81:15,19 83:5 95:21 96:5,19 98:13 101:18 110:12</p> <p>therefore [1] 41:2</p> <p>they've [1] 27:16</p> <p>thin [3] 37:9,12 44:7</p> <p>thinking [11] 15:24 40:2 46:7 50:10 61:10,13 88:24 89:16,20 99:3 104:19</p> <p>thinks [3] 20:1 35:6 36:5</p> <p>third [1] 61:24</p> <p>THOMAS [18] 5:14 6:14 31:19,20 32:11 51:18 52:10,16 71:2,3,19 72:16 73:7 74:1 75:17 82:2 84:17 95:16</p> <p>Thomas's [1] 76:1</p> <p>though [6] 12:11 13:4 20:23 31:11 68:17 71:22</p> <p>thousand [1] 55:8</p> <p>threat [55] 3:25 9:24 14:12 15:5,25 16:18,25 21:22,25 22:22,25 24:4,17 26:9 30:13 33:3 34:18 38:10 39:5 41:5 42:16,21 43:13 44:4,8,10 50:23 54:5 55:2 58:18 59:23 60:25 61:4 69:21 71:24 80:22,24 81:2,11,13 82:24 83:3 84:5 85:13 87:13 91:9 96:15 103:3,4,5,22 106:12 107:22 108:7,8</p> <p>threaten [1] 91:15</p> <p>threatened [5] 55:20 72:21 73:12 80:10 82:12</p> <p>threatener [1] 93:15</p> <p>threateners [1] 99:20</p>	<p>threatening [28] 11:14 18:16 30:25 36:15,21 39:11 50:12 51:6 53:9 54:4,19 55:1 58:6,9 59:18,20 60:18 65:17,22 73:9 74:25 75:3 77:1,3 78:23 86:24 87:16 94:6</p> <p>threats [43] 3:21 4:5,7,13,19 6:4,13,18 7:23 11:15 16:2,21 21:23 22:11 27:22 28:9 38:2 40:20,21,22,23 41:2,8 49:24 50:17 51:9 52:8 61:22 69:5 70:23 76:3 77:15,23 80:6 81:7 82:7 84:1 92:23 100:20 102:13 103:7,8 104:13</p> <p>three [4] 10:2 61:19 69:2 85:22</p> <p>three-year [1] 77:5</p> <p>throat [1] 42:17</p> <p>thwart [1] 51:14</p> <p>tie [1] 107:13</p> <p>Tinker [1] 23:14</p> <p>today [2] 64:4 102:7</p> <p>toe [1] 99:25</p> <p>together [6] 5:7 14:1,3 40:13 43:7 55:3</p> <p>tone [7] 53:9 54:3 56:21 57:5,9,12 96:15</p> <p>took [2] 8:14 60:24</p> <p>torrent [1] 55:10</p> <p>tort [1] 27:25</p> <p>towards [1] 73:3</p> <p>tradition [10] 3:17,21 4:6,13 6:12 7:21,22 10:14 45:2 107:12</p> <p>treat [2] 33:23 88:2</p> <p>treated [1] 12:17</p> <p>treatises [1] 3:24</p> <p>treble [1] 27:14</p> <p>trial [7] 31:14 33:25 56:7 73:21 88:11 95:5 101:17</p> <p>tried [5] 19:4 61:5 68:8,8 99:10</p> <p>tries [1] 4:6</p> <p>trigger [1] 65:12</p> <p>triggered [1] 73:10</p> <p>trouble [2] 40:6 45:24</p> <p>true [26] 3:21 6:18 11:15 16:18,25 17:8 38:2 44:8,10 49:24 50:23 58:18 59:23 60:25 61:4,15 70:23 76:3 80:24 81:13 83:3 84:1 85:13 92:23 100:12,14</p> <p>true-or-false [1] 111:3</p> <p>truth [1] 40:3</p> <p>try [1] 78:22</p> <p>trying [10] 19:8,11 25:22 34:15 47:13 73:13,14 81:18 99:25 105:10</p> <p>Tsarnaev [2] 103:21 110:6</p> <p>tumble [2] 35:10 40:11</p> <p>turn [6] 25:14 38:14,16 54:15 57:24 69:17</p>
--	---	--	--	---

Official - Subject to Final Review

<p>two ^[15] 10:8 37:5,17 58:16 62:3 68:6 78:1 86:1 89:15 92:25 96:6 97:3 99:16 100: 11 104:15 type ^[2] 52:17 104:16 types ^[2] 52:7 61:19 typically ^[2] 10:11 28:2</p> <hr/> <p style="text-align: center;">U</p> <p>U.S ^[2] 94:7 103:8 ultimately ^[1] 78:25 unable ^[1] 101:20 unambiguous ^[1] 4:5 unanimous ^[1] 98:1 unarrested ^[1] 99:9 uncomfortable ^[6] 66:5 73:5 81:10 96:21,22 97:13 uncommon ^[2] 92:14 93:7 unconstitutional ^[1] 27:4 under ^[26] 5:1 6:20 8:10 10: 25 21:11 27:10 33:24 43: 11 52:4 53:1 55:16 58:14, 20 59:4 64:19 66:17 70:6, 21 74:13,20 85:24 90:13 92:17 106:4 108:13,20 underreported ^[1] 29:16 underscore ^[1] 35:25 understand ^[19] 5:15 11:2 18:9,11 20:7 22:1 24:18 25:24 26:3,21 47:13 80:3, 11,14 81:9 82:19 92:5 93: 23 98:9 understanding ^[4] 65:5 81:24 88:12 104:25 understood ^[3] 24:16 43: 24 44:4 unfamiliar ^[2] 36:16,20 unique ^[1] 26:2 UNITED ^[7] 1:1,14,22 2:11 36:12 83:15 109:7 unjust ^[3] 28:21,22 29:4 unknown ^[2] 34:22 92:13 unlawful ^[8] 50:7 51:8 59: 8 66:4 68:1 73:3 84:5 106: 12 unless ^[7] 17:20 24:7 28:2 29:17 41:15 81:10 102:3 unpredictability ^[1] 35:13 unprosecuted ^[1] 99:9 unprotected ^[4] 47:15 84: 1 97:9,10 unreasonable ^[2] 80:23 82:11 untethered ^[2] 50:13 78:6 until ^[2] 30:9 69:18 unusual ^[2] 92:10,12 unwanted ^[4] 11:17 54:13 68:7 75:5 up ^[31] 10:8 14:1,3 18:7 21: 19 23:20 33:1 34:17 38:12 39:3 45:24 46:16 47:22 55: 8 58:8 62:5 69:3,24 77:6 80:5 91:2 93:6,13 95:1 97: 5 100:8,14 102:24 103:19</p>	<p>109:15 110:3 uphold ^[1] 15:17 upsetting ^[1] 11:6 urge ^[2] 84:9 85:4 urging ^[1] 102:3 uses ^[5] 7:22 72:8,13 73:24 108:8 using ^[4] 13:17 14:5 57:7 81:8 utterance ^[1] 17:5</p> <hr/> <p style="text-align: center;">V</p> <p>vague ^[1] 7:16 valuable ^[5] 21:24 37:15 38:2 50:5 51:15 value ^[4] 37:10,11 39:12,18 vanishingly ^[1] 8:4 variations ^[1] 14:5 vast ^[1] 34:21 verbal ^[1] 70:7 verdict ^[2] 100:25 107:23 version ^[2] 54:22 90:13 versus ^[22] 3:5 4:14 13:4 15:16,24 16:2,3 22:18 25: 25 27:16 28:21,22 36:12 43:21 44:25 45:5 47:23 48: 2,7 107:16,17 109:7 vicious ^[3] 10:12 80:4 91: 17 victim ^[11] 54:10 57:20 69: 7 95:4,5 101:12,14,16,17, 19,21 victims ^[5] 50:18 54:11 101:5,8,9 video ^[1] 36:6 view ^[9] 35:7 40:3 41:14 43: 13 65:5 72:11 82:11 83:6 105:18 viewed ^[2] 36:15 41:15 viewer ^[1] 36:3 viewpoints ^[1] 36:14 views ^[1] 5:11 violate ^[1] 60:5 violation ^[1] 19:12 violence ^[20] 40:23 50:7, 20 51:8 52:23 59:8,12 66: 4 67:14 68:1 69:6,19 71: 18 73:3 78:25 80:22 81:3 84:6 102:12 106:12 violent ^[5] 54:15 57:15,24 68:10 69:17 Virginia ^[14] 4:14 15:16 22: 17 31:24 43:21 44:24 45:5 60:16,18,21 61:6,6,11 107: 16 virtually ^[2] 39:2 46:18 vis-à-vis ^[2] 71:17 78:17 Volick ^[1] 61:25</p> <hr/> <p style="text-align: center;">W</p> <p>wait ^[4] 29:7 69:18 93:5 100:22 walk ^[2] 93:13 100:7 walks ^[1] 38:20</p>	<p>wanted ^[4] 18:23 74:17 90: 6 96:24 wants ^[4] 22:23,24 80:3 97: 6 warning ^[2] 38:16 65:12 warrants ^[1] 9:14 Washington ^[3] 1:9,17,22 watched ^[1] 57:20 watching ^[1] 68:12 Watts ^[2] 50:22 51:24 wax ^[1] 23:7 way ^[38] 4:25 12:16 19:3 20: 7 31:5,5,23 38:25 39:15 41:13,14 44:2,5 48:3 51:1 53:8 54:19 55:1 56:18 60: 22 61:5 70:14 72:3 80:17 81:18,19 84:24 86:19 88:7 89:17 91:17 97:5,14 109:2, 2,17 110:12,15 ways ^[4] 19:5 45:18 72:22 110:17 Wednesday ^[1] 1:10 week ^[1] 23:24 weeks ^[1] 30:8 weight ^[1] 71:20 weird ^[1] 36:20 WEISER ^[59] 1:19 2:7 49: 19,20,22 51:24 52:15 53: 10,23 54:5,24 55:2 56:2,19, 24 57:6,12 58:16 59:22 61: 1,8,11,18 62:11 63:8 64:10, 18,24 65:7 66:1,8,11,15,25 67:4,7,13,21 69:2 70:8,17, 20 71:11 72:3 73:2,18 74: 15 75:7,11 76:1 77:4 78:1 79:16 80:19 81:2,9 82:9 83:1,9 Welch ^[2] 13:5 48:7 welcome ^[2] 5:12 51:17 whatever ^[5] 36:4 69:3 90: 10 96:15 101:23 whenever ^[1] 19:10 whereas ^[3] 35:1 80:11 111:1 Whereupon ^[1] 111:8 whether ^[27] 5:17 12:6 17: 3 23:2 24:14,16 25:2 29:4 31:22 33:13 37:19 43:2 44: 3 45:1,14,22 47:14 48:1 71:23 75:14 81:19 87:12 91:7,8 104:7 107:22 109:3 White ^[2] 36:12 68:14 who's ^[2] 20:20 39:4 whole ^[4] 13:3,9 23:6 48: 16 23 wholly ^[1] 29:3 whom ^[2] 63:13 85:13 wife ^[3] 34:13 74:25 75:3 will ^[26] 8:19 10:13 17:23 32:3,12 41:5,10 43:2 45: 14,19 46:10,15 56:10 62: 23 67:18,23 69:13 77:13, 14 78:24 91:17 101:17 103:15 110:15,16,17</p>	<p>willful ^[1] 87:8 Williams ^[2] 109:7 111:2 willy-nilly ^[1] 65:18 wind ^[1] 45:23 wish ^[7] 93:10,11,24 94:10 108:21 109:15,22 wishes ^[1] 108:16 without ^[13] 3:16,21 23:23 25:5 46:4 49:25 52:9 70: 15 75:24 76:6,10 91:22 96: 20 Witnesses ^[1] 36:18 woman ^[1] 75:5 wonder ^[1] 37:18 wondering ^[3] 47:24 48:1 96:16 woods ^[1] 62:10 words ^[31] 5:2,8 7:9,10 8:4 9:16 11:14 14:13 17:16,17, 21 20:5,6 24:4,6 33:10 43: 5 47:17 49:10 56:16 58:22 63:3,16,24 64:4 76:9 86: 21 96:1 107:20 109:5,11 work ^[3] 24:23 62:23 64:9 world ^[3] 64:21 65:9,15 worried ^[3] 38:3 81:3 101: 8 worse ^[1] 93:2 worth ^[1] 86:9 wow ^[1] 34:16 write ^[1] 34:15 writer ^[1] 91:14 writes ^[1] 32:18 writing ^[1] 109:6 written ^[2] 34:9 44:3 wrongful ^[2] 14:12 15:1 wrote ^[1] 91:8</p> <hr/> <p style="text-align: center;">Y</p> <p>yard ^[1] 15:19 years ^[9] 26:18 52:1,6 55:9 68:6 73:23 77:6,9 91:21 yields ^[1] 35:13 York ^[4] 12:4 25:25 97:22 98:3 yourself ^[1] 82:11</p> <hr/> <p style="text-align: center;">Z</p> <p>zones ^[1] 37:6</p>
---	---	---	--