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IN THE SUPREME COURT OF THE UNITED STATES

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VIRGIL D. "GUS" REICHLER, JR., :
ET AL., :
Petitioners : No. 11-262
v. :
STEVEN HOWARDS :
- - - - - x

Washington, D.C.
Wednesday, March 21, 2012

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:31 a.m.

APPEARANCES:
SEAN R. GALLAGHER, ESQ., Denver, Colorado; on
behalf of Petitioners.
SRI SRINIVASAN, ESQ., Principal Deputy Solicitor
General, Department of Justice, Washington, D.C.;
for United States, as amicus curiae, supporting
Petitioners.
DAVID A. LANE, ESQ., Denver, Colorado; on behalf of
Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	SEAN R. GALLAGHER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	SRI SRINIVASAN, ESQ.	
7	For United States, as amicus curiae,	16
8	supporting Petitioners	
9	ORAL ARGUMENT OF	
10	DAVID A. LANE, ESQ.	
11	On behalf of the Respondent	31
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in case 11-262, Reichle v. Howards.

Mr. Gallagher.

ORAL ARGUMENT OF SEAN R. GALLAGHER

ON BEHALF OF THE PETITIONERS

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

The issue before the Court today is whether Secret Service agents who are prepared to take a bullet for the Vice President must also be prepared to take a retaliatory arrest lawsuit, even when they have probable cause to make an arrest. Respondent in this case seeks personal money damages against two U.S. Secret Service agents who arrested him, allegedly with a retaliatory motive, after he lied to them about whether he touched Vice President Cheney.

JUSTICE KENNEDY: There is just a little bit of noise in the courtroom and I am having a little bit of difficulty hearing your very opening statement.

MR. GALLAGHER: Sure.

The Respondent in this case seeks personal money damages against three -- against two U.S. Secret Service agents who arrested him, allegedly with a

1 retaliatory motive, after he lied to them about whether
2 he touched Vice President Cheney. There are three
3 reasons why these agents should not be held personally
4 liable.

5 First, the absence of probable cause should
6 be a required element of a retaliatory arrest claim.
7 Thus this Court is called upon to answer the question
8 that it left open in Hartman against Moore.

9 Second, U.S. Secret Service agents acting in
10 their protective capacity should be entitled to a
11 qualified immunity when they make an arrest with
12 probable cause. Indeed, to view it any other way would
13 be to subject Secret Service agents to the potential of
14 retaliatory arrest claims based upon a mere allegation
15 of retaliatory animus, something this Court has
16 steadfastly refused to do, and for good reason: Because
17 retaliatory animus is easy to allege and hard to
18 disprove.

19 And third, regardless of whether this Court
20 decides to extend the Hartman rule, the law in 2006, at
21 the time of the arrest was not clearly established, thus
22 entitling the agents to qualified immunity.

23 JUSTICE GINSBURG: Well, what was the --

24 CHIEF JUSTICE ROBERTS: I don't
25 understand --

1 JUSTICE GINSBURG: What was the probable
2 cause? What was the probable cause for the arrest?

3 MR. GALLAGHER: Justice Ginsburg, the Tenth
4 Circuit found that the probable cause that underlied
5 this opinion was a 1001 -- a 1001 violation, lying to a
6 Federal agent.

7 JUSTICE GINSBURG: Explain that to me.
8 That's a false statement to a government officer. But
9 that's not the reason -- 1001 wasn't the reason that
10 these officers had to arrest. There was a question of
11 assaulting the Vice President, and I think that the
12 charge that eventually was made in the State court was
13 harassment. So, there is no indication that these
14 officers had 1001 anywhere in their minds.

15 MR. GALLAGHER: Well, two points, Justice
16 Ginsburg. First of all, under Devenpeck officers are
17 not required to give all of the reasons behind an
18 arrest. But second, and I think perhaps more
19 importantly in this case, when Agent Reichle contacted
20 Mr. Howards and made the arrest, Mr. Howards had lied to
21 him. That was relevant to a Secret Service agent's
22 assessment of the risk of the situation.

23 JUSTICE SCALIA: Do they have to give -- at
24 least when you stop a car, the test is whether there was
25 probable cause, not whether that was the reason that the

1 officer stopped the car.

2 MR. GALLAGHER: That's correct,
3 Justice Scalia.

4 JUSTICE SCALIA: There was a broken tail
5 light, there existed probably cause, whether that was
6 the basis on which he acted or not. Now -- is it any
7 different when --

8 MR. GALLAGHER: I don't think it is --

9 JUSTICE SCALIA: -- with respect to an
10 arrest?

11 MR. GALLAGHER: Yes, with respect to an
12 arrest. This is -- this is --

13 JUSTICE SCALIA: So long as they have good
14 reason for an arrest, it doesn't matter.

15 MR. GALLAGHER: Absolutely. That's an
16 objective --

17 JUSTICE BREYER: We have never held that in
18 respect to a claim that the real reason the police
19 arrested was retaliation against, for example, a picket
20 sign having an unpopular point of view or a statement
21 having an unpopular point of view. That is, this Court
22 has never held that it overcomes an arrest where there's
23 a claim of retaliatory First Amendment action; is that
24 right?

25 MR. GALLAGHER: That's right.

1 JUSTICE BREYER: All right. And what you
2 are saying is your first reason is that we should say
3 that, and the -- the question I wanted to ask you there
4 is, you make a very strong case where the President and
5 Vice President are involved, the need to protect them,
6 but the rule that you there adopt is a rule that will
7 apply to every police officer, anyone who arrests anyone
8 anywhere in the country, and no matter how clear it is
9 that the motive was retaliation against a point of view,
10 that individual will be protected from a Bivens action.
11 So it sounds as if your first claim -- the remedy sweeps
12 well beyond the need that you sketch. And so I'd like
13 your response to that.

14 MR. GALLAGHER: Justice Breyer, I think it
15 has to do with the -- the determination in the -- in the
16 Tenth Circuit and the fact that the -- the Tenth
17 Circuit's decision to extend Devenpeck to these facts
18 was not the subject of a cross-appeal. So the issue
19 that you -- you posit is not an issue that is before the
20 Court.

21 JUSTICE BREYER: I understand that. I'm
22 just saying if I agree with you on your first that if
23 there is a probable cause for an arrest, then wouldn't I
24 have to say there is no retaliatory First Amendment
25 claim when a border officer chases into Arizona a person

1 with whom he politically disagrees, and there are 14
2 bishops who will say he cared about nothing but his
3 political disagreement?

4 And there is nothing to the contrary, and he
5 says: Oh, I happened to notice, at trial, that when he
6 left he reached out and snatched a five dollar bill that
7 was in the till and so I had probable cause to arrest
8 him. End of case. Now, that sounds very far-reaching
9 and I don't know that I'm prepared to do that. So
10 therefore, is there another way you might win your case,
11 or should I do that.

12 MR. GALLAGHER: Well, let me answer --
13 answer both of those questions. What you have outlined
14 is essentially footnote 10 from the Hartman case.
15 That's the footnote that says: What do you do if the --
16 if the person that initiated the prosecution says, I did
17 it for a -- a retaliatory reason? And the Court
18 side-stepped that issue.

19 JUSTICE BREYER: Yes.

20 MR. GALLAGHER: Yes.

21 JUSTICE BREYER: And of course, Hartman
22 dealt with prosecutions. But people all the time don't
23 arrest others. Policemen frequently don't arrest people
24 for everything they might arrest them for. I mean
25 jaywalking, to take an example. There are all kinds of

1 things where they just normally don't arrest somebody.
2 You might -- or I'm sure you didn't, but I might
3 sometimes have driven 60 miles an hour in a 55-mile
4 zone. And I shouldn't even admit this. I hope I get
5 away with it.

6 (Laughter.)

7 JUSTICE BREYER: But -- but -- but you see,
8 it's different arrests and prosecutions.

9 MR. GALLAGHER: Well, I -- certainly, it's
10 different, but the Devenpeck standard --

11 JUSTICE SCALIA: Is it different? You --
12 you acknowledge that prosecutors always prosecute, that
13 they never exercise discretion and say, oh, what the
14 heck, you know?

15 MR. GALLAGHER: Certainly, Your Honor.

16 JUSTICE SCALIA: All the time, all the time.
17 I don't know that it's any less frequent than -- than an
18 officer deciding not to arrest.

19 MR. GALLAGHER: And Justice --
20 Justice Breyer, I think that the difficulty with your --
21 your hypothetical is, especially with regards to Secret
22 Service agents, who perform, when they are engaging in
23 their protective functions, they're essentially --

24 JUSTICE SOTOMAYOR: Counsel, that -- that's
25 exactly what Justice Breyer is saying. Okay? Which is,

1 as I understand it, there is some literature that talks
2 about should we be treating misdemeanor arrests
3 different than felony arrests, because there is less
4 discretion that an officer would have with respect to
5 arresting someone for a felony than for misdemeanors or
6 criminal fines, because like jaywalking, policemen don't
7 arrest you for jaywalking unless they are either on a
8 ticket binge or because there's something about you that
9 they don't like.

10 MR. GALLAGHER: Sure.

11 JUSTICE SOTOMAYOR: So if that something
12 about you they don't like is that you are wearing an
13 antiwar armband, are we going to let that plaintiff not
14 recover, because somehow we need to protect police
15 officers so much, in the discretionary use of this vast
16 power they have to arrest that we are going to permit
17 them to trample the First Amendment, essentially?

18 Or are we going to say, in the normal
19 situation there is a First Amendment claim, even with
20 probable cause, if you can prove that it's the
21 motivating factor for the arrest; but we treat Secret
22 Service differently?

23 And I think that was the point
24 Justice Breyer's getting to, and the one I'm most
25 interested in.

1 MR. GALLAGHER: Okay.

2 JUSTICE KAGAN: If we don't extend Hartman,
3 how do we in a principled way deal with the unique needs
4 of the Secret Service?

5 MR. GALLAGHER: Let me -- let me briefly
6 address the first half of the question and then I will
7 address the second half. The first half, when -- when,
8 Justice Sotomayor, when you suggest that police officers
9 could trample on the First Amendment, it's important to
10 remember we still have probable cause as the -- as the
11 principal --

12 JUSTICE SOTOMAYOR: If you are jaywalking,
13 there is probable cause.

14 MR. GALLAGHER: But probable cause is the
15 Fourth Amendment standard specified by the framers of
16 the Constitution.

17 JUSTICE SOTOMAYOR: But -- but -- what does
18 it have to do with violating the First Amendment,
19 meaning if police officers have discretion and they
20 would not otherwise arrest you except for their dislike
21 of your speech, that's a violation of your right to free
22 speech, isn't it?

23 MR. GALLAGHER: Well, I'm -- I'm not sure
24 that that is exactly the case. Again it gets back to
25 this footnote 10 in Hartman, which -- which, there --

1 Hartman can be read two different ways. It can be read
2 as -- as saying that the elements of the constitutional
3 tort itself require the absence of probable cause, or it
4 can be read as saying the elements of the cause of
5 action. But let me -- let me address the second
6 question.

7 JUSTICE SOTOMAYOR: We can go to that
8 question later.

9 MR. GALLAGHER: Yes. And the second
10 question had to do with Secret Service agents, because
11 Secret Service agents, unlike police officers providing
12 law enforcement functions, when Secret Service are
13 acting in a protective capacity, they are protecting our
14 Nation's leaders and they are doing so in a very public
15 way, and they are also doing so in a way that is
16 essentially a free speech zone.

17 Virtually everyone that a Secret Service
18 agent encounters when he is protecting the President or
19 the Vice President can allege that they are engaged in
20 free speech. So for Secret Service agents in
21 particular, they -- they can legitimately evaluate what
22 someone is saying in order to determine a particular
23 threat level.

24 And because of that, Secret Service agents
25 have a similar sort of complexity of causation to the --

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

2 Now, in Hartman clearly it was a one -- it
3 was a -- a two-individual causation situation, but --
4 but with -- with regard to Secret Service agents, the
5 causation is similarly complex, because Secret Service
6 agents can legitimately take into account what someone
7 is saying in order to determine a threat level.

8 Regardless of whether the Court decides to
9 extend the Hartman case, it's -- it's absolutely clear
10 that the law in 2006, in June of 2006 when the agents
11 made this arrest, was not clearly established. The
12 Hartman case was handed down in early 2006. It had only
13 been on the books about 3 months when the arrest was
14 made. For that reason, Secret Service agents should be
15 entitled to a qualified immunity in this case because
16 the law was not clearly established.

17 With regard to the -- the -- the formulation
18 of qualified immunity that we are asking for, we believe
19 that it is important for Secret Service agents acting in
20 this protective capacity to have the requisite breathing
21 room in order to make decisions in life-or-death or
22 imminent-threat situations. In fact, the qualified
23 immunity that we are advocating is particularly
24 important at the margins, particularly important in
25 situations where it's not clear what a Secret Service

1 agent can do or should do, where a Secret Service agent
2 has to make a snap decision in order to determine
3 whether someone's a threat and then act appropriately.

4 The Court in the Atwater case noted that the
5 object of -- of the Court's cases has been to draw
6 standards sufficiently clear and simple to be applied
7 with the fair prospect of surviving judicial
8 second-guessing months and even years after the -- the
9 arrests are made.

10 JUSTICE GINSBURG: You are not suggesting
11 absolute immunity?

12 MR. GALLAGHER: No, we are suggesting a
13 qualified immunity.

14 JUSTICE GINSBURG: But it's a different kind
15 of qualified immunity?

16 MR. GALLAGHER: It's certainly different
17 from the Harlow type of qualified immunity. It is an
18 immunity that is contingent upon having -- contingent
19 upon the Secret Service agent being -- acting in a
20 protective capacity and having probable cause to make
21 the arrest. But certainly, once the immunity attaches,
22 it would be, it would be full immunity from a claim.

23 The Court noted earlier this term in
24 *Ridner v. Hub* case, that judges should be cautious about
25 second-guessing a police officer's assessment made on

1 the scene of the danger presented by a particular
2 situation. We think that this case aptly demonstrates
3 the situation in which Secret Service agents made
4 very -- very difficult decisions on the spot, and they
5 should not be second-guessed by the Court.

6 Finally, with regard to the -- whether
7 qualified immunity is -- was clearly established in June
8 of 2006, the Ninth Circuit, the primary case relied upon
9 by the Tenth Circuit was the Skoog case. The Skoog case
10 was the case that the Tenth Circuit relied upon in
11 holding that Hartman should not be extended.

12 It's important, though, when you review the
13 Skoog case to -- to read the entire case, because the
14 Skoog court after concluding that -- that Hartman should
15 not be extended, still proceeded with the qualified
16 immunity analysis to determine whether the law was
17 clearly established at the time of the incident. And
18 what the Skoog case concluded was, it looked at -- it
19 looked at the nature of the right.

20 And, you know, we know from the
21 Anderson v. Creighton case that this Court has said it's
22 important when focusing on constitutional rights not to
23 look at the 30,000-foot level, not to look at the high
24 level, but to look at the contours of the right. And
25 that's what the Skoog case did.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. GALLAGHER: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Srinivasan.

4 ORAL ARGUMENT OF SRI SRINIVASAN,

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING PETITIONERS

7 MR. SRINIVASAN: Thank you,

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

9 I would like to start off addressing the
10 Secret Service in particular because that's the
11 principal focus, although I take the point that there
12 are questions about applying the rule in a broader
13 context. But I think understanding why the rule makes
14 sense in the context of Secret Service agents and law
15 enforcement officers who are performing similar
16 protective functions would help inform why it makes
17 sense to broaden the rule as well. What the Secret
18 Service --

19 I will pick up on the point that
20 Petitioner's counsel was making, which is that it's
21 legitimate in this context for Secret Service agents to
22 take into account expressive activity in determining
23 whether the circumstances warrant a discretionary
24 exercise of the power to arrest.

25 CHIEF JUSTICE ROBERTS: I assume you would

1 include U.S. marshals?

2 MR. SRINIVASAN: Yes.

3 CHIEF JUSTICE ROBERTS: F.B.I. agents? So
4 you are talking about protective details.

5 MR. SRINIVASAN: That's correct. And that's
6 why I wouldn't limit it to the Secret Service in
7 particular. I think what happens in a lot of these
8 contexts is that it's natural for these individuals to
9 encounter First Amendment activity by the public, and
10 it's legitimate for them to react to First Amendment
11 activity in deciding whether the circumstances warrant
12 an arrest.

13 And the problem arises because it's very
14 difficult to distinguish between on one hand a
15 legitimate consideration of expressive activity as
16 evidencing the sort of threat that warrants a response
17 from an illegitimate consideration of expressive
18 activity borne of a motive to suppress it --

19 JUSTICE KENNEDY: Does your rule apply
20 regardless of the degree of animus that the agent is
21 alleged to have had as to the particular view being
22 expressed?

23 MR. SRINIVASAN: I think it would,
24 Justice Kennedy, because we would have an
25 across-the-board, no-probable-cause requirement of the

1 kind that the Court applied in the retaliatory
2 prosecution context in Hartman.

3 Now, I think your -- the question of the
4 degree of animus asserted by the agent on the scene is
5 exactly why these are complicated factual questions.
6 Those kinds of allegations can be made, and then you are
7 going to have a trial where the agent is on the stand,
8 and the jury is going to have a very difficult time, and
9 the agent is going to have a difficult time explaining
10 why it is that he acted legitimately based on expressive
11 activity because he felt that there was a threat to the
12 person he was trying to protect, as opposed to
13 explaining that he didn't act in order to suppress the
14 viewpoint that was being asserted.

15 These kinds of allegations can often be
16 made. And in fact they can even be manufactured at the
17 scene by an intelligent person who is going to be the
18 subject of an arrest. And I think that complicated
19 question of causation is exactly why it makes sense to
20 apply in this context the same objective screening in
21 the form of a no-probable- cause requirement in Hartman
22 to this context of retaliatory arrest.

23 JUSTICE SCALIA: Why is there any difference
24 if -- when ordinary policemen are policing an authorized
25 demonstration --

1 MR. SRINIVASAN: Yes.

2 JUSTICE SCALIA: -- in front of this Court
3 or anywhere for that matter? The people making the
4 demonstration have -- have the same motivation and can
5 make the same assertion of: Oh, the only reason you
6 arrested me was because you didn't like what I was
7 talking about. So why should that situation be
8 different?

9 MR. SRINIVASAN: That's correct,
10 Justice Scalia, and that was going to be my next point.
11 Once we understand why it is that it makes sense to
12 apply this rule in the context of officers who engage in
13 this sort of critical public -- protective function of
14 the Secret Service, I think we understand why it also
15 makes sense to apply it in other situations, because law
16 enforcement can legitimately take into account
17 expressive activity when they are engaged in functions
18 such as crowd control.

19 And in those contexts as well, it's going to
20 be difficult to disaggregate the legitimate
21 consideration of expressive activity as evidencing a
22 threat from an illegitimate desire to suppress a
23 viewpoint.

24 JUSTICE BREYER: Illegitimate -- look, you
25 just used the word "crowd control." I take it in saying

1 the word "crowd control" you are making a distinction.

2 MR. SRINIVASAN: I --

3 JUSTICE BREYER: Do you want the same rule
4 of automatic, you know, immunity -- it's sort of
5 automatic immunity -- when crowd control isn't at issue,
6 where there is a history of persecution of an individual
7 by a particular officer, da, da, da. I mean, you know,
8 you can make up cases.

9 MR. SRINIVASAN: I think --

10 JUSTICE BREYER: Did you want it absolutely
11 across the board, or are you going to start making
12 distinctions?

13 MR. SRINIVASAN: I -- I would not draw a
14 distinction, Justice Breyer. Of course, there's going
15 to be factual situations --

16 JUSTICE BREYER: I mean, I agree with you
17 about the crowd control. I see that. I see that
18 problem. I see the problem of protecting people in
19 public life; I see the problem in protecting the
20 president.

21 MR. SRINIVASAN: Well, I think --

22 JUSTICE BREYER: Now how far --

23 Now given that that's a particular problem
24 where views are likely to be evidentiary, unpopular
25 views actually are, unfortunately. But how far do you

1 extend it? You say extend it to everything. To
2 jaywalking, to persecutions, to, you know, that's what's
3 making me a little nervous.

4 MR. SRINIVASAN: Right, and I can understand
5 the basis for the nervousness. I guess the question for
6 the Court is whether the benefits of having an
7 administrable across-the-board rule outweigh the costs
8 of trying to forge some sort exceptions to deal with
9 extreme hypotheticals.

10 JUSTICE SOTOMAYOR: Do you have a sense of
11 how many of these First Amendment retaliatory claims in
12 those jurisdictions that permit them -- I know they are
13 more limited -- how many of these cases arise?

14 MR. SRINIVASAN: We do. We have done an
15 unscientific search, but to use the same time frame of
16 reference that the Court used in Hartman, which is
17 looking back 25 years, if you look a do a sort of
18 standard Lex Law search, what you'll see is there is
19 roughly 100 Court of appeals cases and 450 or so
20 district court cases.

21 JUSTICE SOTOMAYOR: And how many arrests are
22 there a year?

23 MR. SRINIVASAN: I don't know.

24 JUSTICE SOTOMAYOR: I'm sure it's in the
25 millions.

1 MR. SRINIVASAN: I'm sure there are scores
2 and scores of arrests. That's correct. And, of course,
3 all we are talking about is the cases that get to the
4 point where you have an opinion that can be, that can be
5 found. And there is the obvious point that depending on
6 what the Court does here, you may see a proliferation of
7 those claims. And we certainly hope that wouldn't be
8 the case.

9 But I think -- on the question of whether it
10 makes sense to have an across-the-board rule, I guess I
11 would echo what Petitioners' counsel was suggesting,
12 which is, you can have the same set of considerations in
13 the retaliatory prosecution context because prosecutors
14 do act with, by hypothesis, with illicit motives in some
15 situations.

16 And the Court considered whether the
17 benefits of having an across- the-board rule outweigh
18 the costs of forging an exception to deal with extreme
19 circumstances. And what the Court said was: We want to
20 have a rule that is designed to deal with a mine run of
21 cases; we don't want to have a rule that has an
22 exceptional-circumstances exception because in that --
23 at that point there will be a great deal of litigation
24 concerning what cases fit within of the exception and
25 what cases don't.

1 And what the Court said was that's rather
2 like designing a retirement plan to deal with the
3 possibility that someone might win the lottery. That's
4 in footnote 10 of Hartman. And I think similar
5 considerations would weigh -- counsel in favor of
6 applying an across-the-board objective,
7 no-probable-cause screening in this context as well.
8 And I think it's important to understand that --

9 JUSTICE GINSBURG: Even though -- I think in
10 Hartman, Justice Souter gave two specific reasons,
11 neither of which apply in this context. If the
12 prosecutor institutes the charges, but the suit is not
13 against the prosecutor, he would be absolutely immune.
14 So that is not in this picture.

15 Here we have one officer. So it would
16 certainly be an extension of Hartman because the reason
17 that Hartman gave for the rule was tied to -- very much
18 tied to prosecution rather than arrest.

19 MR. SRINIVASAN: Well, I -- with respect,
20 Justice Ginsburg, I think this case is of a piece with
21 Hartman in two relevant respects. Your Honor is quite
22 correct that Justice Souter's opinion focused on the
23 fact that you have two individuals in play. You can
24 have that situation here but we don't base it on that.

25 What the opinion was getting to was that

1 that creates complex issues of causation in the
2 prosecution context. And I think it was the complex
3 causation that really drove the need to have an
4 objective across-the-board rule.

5 You have the same kind of complex causation
6 problem here, for the reasons that I've explained, which
7 is that it's extremely difficult to disentangle a
8 legitimate desire to act to get -- to suppress danger,
9 of which speech is evidence, from an illegitimate desire
10 to suppress a viewpoint.

11 JUSTICE KENNEDY: You might apply the same
12 immunity for selective enforcement based on race?

13 MR. SRINIVASAN: The same immunity?

14 JUSTICE KENNEDY: Yes.

15 MR. SRINIVASAN: No.

16 The -- they -- I think the Court's decision
17 in Whren, for example, supposed that even though you
18 have probable cause, you can have an equal protection
19 claim if the proof could be made -- and this is very
20 important. In the equal protection context, including
21 for race, there is a different objective screen in place
22 and it's a stringent objective screen that this Court
23 announced in Armstrong, which is that --

24 JUSTICE KENNEDY: Well, I'm -- I'm aware of
25 the reservation in Whren. Why should there be a

1 difference in the Fourteenth Amendment equal protection
2 and First Amendment speech?

3 MR. SRINIVASAN: Well, I think part -- part
4 of the reason is this, that with the First Amendment
5 expressive activity can legitimately be taken into
6 account, precisely because it can manifest a danger,
7 whereas with race in the ordinary case I think the
8 reason why we have these principles in the race context
9 is it's ordinarily not a relevant consideration.

10 And the Armstrong rule is designed to
11 distinguish between circumstances in race -- in which
12 race was the motivation and in which race wasn't the
13 motivation. And it serves that purpose well. But it
14 doesn't work so well in this context, because here First
15 Amendment activity can legitimately be taken into
16 account. When, as in this case, a Secret Service agent
17 overhears an individual say that he's going to ask the
18 Vice President how many babies he's killed, it makes all
19 the sense in the world for the Secret Service to focus
20 their attention on that person.

21 JUSTICE SCALIA: What -- what about for
22 crowd control? You want to extend it to crowd control
23 as well. What difference does the First Amendment make
24 there?

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

1 the nature, intensity and vehemence with which the First
2 Amendment activity is being engaged in can inform an
3 officer on whether the circumstances present the kind of
4 danger that warrants a law enforcement response.

5 So that a -- and -- and when a law
6 enforcement officer does that, he's going to be subject
7 to potential liability if an individual says: Look, you
8 weren't reacting against me because of the way I was
9 expressing my views; you were acting -- reacting against
10 me because you disagreed with my views and you wanted to
11 suppress them. And that's a very hard thing to
12 disentangle.

13 And it not only has that problem at the back
14 end, but it results in the problem at the front end as
15 well, because what happens at the front end is that
16 officers at the very outer margins might have in the
17 back of their mind a concern that if they acted based on
18 their best intuitions about what kind of law enforcement
19 response is warranted, they might be later be subject to
20 suit based on a mistaken assumption and potentially an
21 ability to convince a jury that they were acting based
22 on an illegitimate desire to suppress a viewpoint rather
23 than on a legitimate desire --

24 JUSTICE BREYER: How -- how many cases --
25 you might know this; you might have information on how

1 many cases over 5 years or whatever period there
2 actually have been against Federal protective officials
3 of retaliatory First Amendment activity.

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

5 JUSTICE BREYER: It would be in the
6 Department, wouldn't it? They'd keep track?

7 MR. SRINIVASAN: It's potentially there, but
8 I -- I just don't have the answer at my disposal,
9 Justice Breyer.

10 JUSTICE BREYER: Do we know that this is not
11 unique, the one before us?

12 MR. SRINIVASAN: Well, these -- certainly,
13 we know that these kinds of interactions arise with some
14 frequency. I think there was some publicity surrounding
15 the --

16 JUSTICE BREYER: Well, when you looked up
17 your research for this, did you find any other case in
18 which anyone had ever asserted a First Amendment claim
19 of retaliation for arrest --

20 MR. SRINIVASAN: In --

21 JUSTICE BREYER: -- against a Federal
22 protective official?

23 MR. SRINIVASAN: Candidly, I didn't -- we
24 didn't conduct a search with that object in mind. So I
25 -- I can't give you an answer one way -- one way or the

1 other.

2 I did want to make one additional point,
3 Justice Ginsburg, in response to the question you posed
4 about the applicability of Hartman, which is that at one
5 level it applies, the rule should apply, because the
6 same concern with complex causation is at issue here at
7 well -- as well.

8 But the other way to think about the
9 applicability of Hartman is to -- is to put these cases
10 on a spectrum. On one end, you have what the Court in
11 Hartman identified as a standard retaliation case, of
12 which the Court identified public employment as the
13 archetypal example. And on the other end, you have
14 retaliatory prosecution, where the courts thought that
15 there were sufficient concerns about complicated
16 causation that it made sense to have an across-the-board
17 objective rule.

18 Now, the question could be where does
19 retaliatory arrest fit within that spectrum? Is it on
20 the retaliatory prosecution side or is it on the public
21 employment side? And for a couple of reasons, I think
22 it fits decidedly within the retaliatory prosecution
23 side.

24 One is the one I've given, which is that
25 speech can legitimately be taken into account and so it

1 creates complex causation. But the other one is in some
2 sense the flip side of that, which is that in -- in the
3 public employment context, the standard fact pattern is
4 going to involve a long-term relationship between an
5 employer and an employee, during which time there's been
6 no adverse action, the employee then engages in some
7 sort of expressive activity, in the aftermath of which
8 the employer undertakes some adverse action such as a
9 termination.

10 Now, in that context it makes sense to infer
11 that there may well be an illegitimate speech --
12 speech-suppressive motivation at work, because you have
13 in some sense a control period in the interactions
14 between the employer and the employee that predated the
15 expressive activity.

16 That's not the case when we're dealing with
17 law enforcement. In the law enforcement context in the
18 main, this is a one-time interaction between an officer
19 and a suspect, the arrestee. You don't have the prior
20 relationship that acts as a control.

21 And so you have to ask the question whether,
22 based on that one-time relationship, is there a basis
23 for inferring that a speech-suppressing motivation was
24 at work.

25 And here, because it can be legitimate for

1 an officer to take into account speech in deciding
2 whether this situation was the kind of one in which a
3 law enforcement response is warranted, it makes sense,
4 unlike in the public employment context, to apply the
5 same objective across-the-board screening in the form of
6 a no-probable-cause requirement that we have in
7 prosecutions.

8 JUSTICE GINSBURG: May I go back to the
9 probable cause, the question I asked before. It's not
10 like the taillight. 1001 came up in court. This --
11 this situation may well have warranted probable cause
12 for assault, probable cause for harassment. But where
13 did -- the 1001 was not the -- was in no one's mind. It
14 does seem quite strange.

15 MR. SRINIVASAN: It was not, Your Honor. Of
16 course, that's exactly what happens in the Fourth
17 Amendment context. That's -- that was the issue before
18 the Court in Devenpeck. And the Court explained in
19 Devenpeck why it makes sense to have an objective
20 probable cause inquiry rather than a subjective one --

21 JUSTICE GINSBURG: But doesn't it matter
22 that it's something that comes up only in court; it's
23 not something that -- why -- why wasn't the natural one
24 would expect probable cause to arrest because it was an
25 assault or harassment, the actual charges that were

1 made?

2 MR. SRINIVASAN: I don't know the reason
3 that a -- I don't know the -- the precise contours of
4 the harassment charges in State court that were made. I
5 think that they mapped on in some measure to the
6 assault, the assault that was suspected by the -- by
7 Officer Reichle, who effected the arrest.

8 I think the concern with importing some sort
9 of subjective probable cause dimension into the
10 inquiry -- if you asked, you know, what offense did the
11 officer in fact have in mind, it's the same concerns
12 that drove the Court to apply an objective rule in
13 Devenpeck, including, for example, that you would have
14 dis-uniformity, in that similarly situated individuals
15 would be treated differently based purely on what
16 happens to have been in an officer's mind.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Lane.

20 ORAL ARGUMENT OF DAVID A. LANE

21 ON BEHALF OF THE RESPONDENT

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

24 I think what we have here is a solution
25 being offered by the government, and now we have to go

1 find the problem. And I think that's what
2 Justice Breyer's question was directed at here.

3 I have done, not a scientific search, but I
4 can take credit for a little bit of science involved in
5 determining how many such cases arise. And at page 13
6 of our brief, we cite in footnote 8 that a search with
7 no time limitations whatsoever going back in LEXIS with
8 the words "Bivens" or "1983," "retaliatory arrest," not
9 limited to protective details, shows 15 reported Federal
10 appellate cases, with no time limitations whatsoever.

11 So we had a solution, but we really don't
12 have a problem. The only Secret Service case that this
13 Court has ever heard that I'm aware of involving
14 anything remotely like this is Hunter v. Bryant. So
15 this is not a significant problem.

16 This also factually is probably not the best
17 case for them to be making their argument that we need
18 some sort of special rules that apply to the Secret
19 Service, given the facts of this case, where Mr. Howards
20 by all accounts walked over to the Vice President,
21 looked at him and said: "I just want you to know I
22 think your policies in Iraq are disgusting."

23 There is a dispute at that point whether he
24 gently patted him on the arm -- not a crime -- or tapped
25 him on the shoulder -- again, not a crime -- or --

1 JUSTICE SCALIA: That's an assault, isn't
2 it?

3 MR. LANE: I'm sorry?

4 JUSTICE SCALIA: All it takes for an assault
5 is -- is an unwanted touching.

6 MR. LANE: Well, incidental contact is not
7 an assault, and everyone under law --

8 JUSTICE SCALIA: It's not incidental. If
9 you reach out and touch somebody on the shoulder or the
10 arm.

11 MR. LANE: Well, the problem is that the
12 Vice President was on the mall having contact with
13 numerous people, shaking their hands, letting them pat
14 him on the back, telling him what a great job he's
15 doing.

16 JUSTICE SCALIA: That's fine and he
17 doubtless didn't consider those contacts hostile. But
18 when somebody tells you "I think your policies are
19 disgusting" --

20 MR. LANE: And then --

21 JUSTICE SCALIA: I mean, just don't tell me
22 that it's -- it's not a crime. It -- it is an assault
23 if it's an unwanted touching.

24 MR. LANE: Well, under Colorado law, he was
25 charged with harassment, and --

1 CHIEF JUSTICE ROBERTS: Well, what you've
2 described is not when the person was arrested, right?

3 MR. LANE: That's correct.

4 CHIEF JUSTICE ROBERTS: He was arrested
5 later, when approached by the Secret Service agent, lied
6 about whether he touched the Vice President; at that
7 time, in a non-protected area, was carrying a bag,
8 right?

9 MR. LANE: Correct.

10 CHIEF JUSTICE ROBERTS: And wandering
11 around. Turns out that he was looking for his son. But
12 if you're the Secret Service agent, you see somebody who
13 said your policies are disgusting, that person touches
14 the Vice President, he comes -- he lies to you. He
15 comes back, he's carrying a bag and he's wondering --
16 wandering around, do you think it's reasonable at
17 that -- well, I guess you don't --

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: To arrest the
20 person?

21 MR. LANE: That's a multi-faceted question.
22 I'll try my best to cut right to it.

23 CHIEF JUSTICE ROBERTS: The reason it's
24 multi-faceted is because I'm trying to capture what
25 might have been going through the Secret Service agent's

1 mind at the time.

2 MR. LANE: Well, that is part of the point I
3 have to make here, all right. In this Court's
4 jurisprudence on Fourth Amendment issues, what is going
5 on in the agent's mind is irrelevant. The issue is --

6 CHIEF JUSTICE ROBERTS: Well, what was going
7 in a reasonable Secret Service's agent's mind at the
8 time.

9 MR. LANE: Right. First level of inquiry,
10 was there a Fourth Amendment violation, no, according to
11 the Tenth Circuit. We then have got to shift gears if
12 we are going to do a First Amendment analysis. And is
13 this a retaliatory arrest or not?

14 We have got to look into the subjective mind
15 of the agent. That's where Justice Ginsburg's questions
16 I think take on great import for this discussion.
17 Because as she correctly pointed out, the agents on
18 scene never said in deposition, they have never claimed
19 anywhere that they arrested Mr. Howards on a 1001
20 violation.

21 The agents on scene in deposition said we
22 arrested him because of the way he approached the Vice
23 President -- not a crime -- and his demeanor. We
24 thought it might be an assault. That later morphed into
25 a state charge of harassment. Nobody ever said 1001

1 formed any basis whatsoever.

2 JUSTICE BREYER: They didn't say -- and also
3 you left out that one of the agents overheard him say he
4 was going to ask the Vice President how many babies he
5 killed that day.

6 MR. LANE: Right.

7 JUSTICE BREYER: Okay. So their job is to
8 protect the Vice President.

9 MR. LANE: Absolutely.

10 JUSTICE BREYER: That's their job. And it's
11 a very emotional subject.

12 MR. LANE: Absolutely.

13 JUSTICE BREYER: And if something happens to
14 the President, nobody's going to say, oh, you know, what
15 were you doing? And the whole country is in mourning.

16 MR. LANE: Correct.

17 JUSTICE BREYER: We understand that. And
18 therefore it's a matter of concern that if you have a
19 rule of law that says to the agents, when you hear
20 someone who says, how many babies are you -- have you
21 killed that day, I'm going to ask the Vice President,
22 I'm going to touch him, I am going to then tell them a
23 lie when they ask me if I touched him -- that's cause
24 for concern.

25 MR. LANE: Absolutely.

1 JUSTICE BREYER: Okay. Now if there's a
2 lawsuit, the agency will say we just can't do it. We
3 can't do it. We can't use that as a basis for stopping
4 that individual. All that poses a problem.

5 MR. LANE: Well that --

6 JUSTICE BREYER: And I -- I think -- I
7 recognize that it's a problem. I'm not saying I have
8 the solution.

9 MR. LANE: Well, I think you hit on the
10 solution as part of the problem you just expressed, and
11 that is can they stop this individual. And the answer
12 is absolutely yes. They have every arrow in their
13 quiver, under Terry v. Ohio. They can stop him if they
14 perceive a threat. They can force him to open up his
15 opaque bag, they can force him to show them what's in
16 the box inside the opaque bag. They can pat him down,
17 they can wand him with a metal detecting wand. They can
18 assure themselves --

19 JUSTICE SCALIA: And it wouldn't be a
20 violation of the First Amendment if they only did that
21 because they didn't like the ideas he was expressing?

22 MR. LANE: They are allowed --

23 JUSTICE SCALIA: Wouldn't that be a
24 violation of the First Amendment?

25 MR. LANE: They are allowed to take

1 reasonable steps under Terry, under every conceivable
2 case that this Court's ever decided --

3 JUSTICE SCALIA: Even though they're doing
4 it for -- they do it for a racial reason, would that be
5 okay?

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

7 JUSTICE SCALIA: Of course not. I don't see
8 how your First Amendment exception doesn't apply to
9 those things for the arrest --

10 MR. LANE: It would. It would. If he could
11 prove that they did a Terry stop on him in retaliation
12 for his free speech and it was motivated -- and I know
13 this -- Your Honor's feelings about intent -- intent
14 motivated constitutional torts.

15 But if he could prove that the Terry stop
16 was motivated by -- in an effort to punish him for his
17 free speech, yes, that would be a cause of action as
18 well.

19 CHIEF JUSTICE ROBERTS: So what you have
20 under your theory, a person should put on his car a
21 bumper sticker that says "I hate the police" and every
22 time they are pulled over they will have certainly a
23 plausible case is you violated my First Amendment
24 rights. It's not because I was going 60 miles an hour,
25 it's because of my bumper sticker.

1 And the police officer at that point says,
2 you know, I can't give a ticket to this guy without
3 being hauled into court on personal liability because
4 he's got a credible case that was for First Amendment
5 grounds.

6 MR. LANE: Well, I think we can look at
7 the -- as I said the arrows in the quiver of the court,
8 to weed out those kinds of cases.

9 CHIEF JUSTICE ROBERTS: No, no. You already
10 got the officer in court. I mean you get a speeding
11 ticket and most times they don't show up because they
12 have got other things to do. Now he's got to show up in
13 district court, in state court to defend against this.

14 MR. LANE: Well, I mean, litigious
15 plaintiffs are a consistent problem across the board
16 under many contexts. And there is really -- there is
17 almost nothing that can be done. This Court has taken
18 steps to cut back prison litigation that is frivolous,
19 and things of that nature.

20 But, yes, if the heightened pleading
21 standard this Court enunciated in *Iqbal*. You can't just
22 come up with conclusory allegations, you have to have
23 facts in support that that's why they stopped me,
24 because of my bumper sticker.

25 CHIEF JUSTICE ROBERTS: Is that a case that

1 you could state. He pulled me over, he gave me a
2 speeding ticket, but the only reason he picked me out is
3 because I had a bumper sticker saying "I hate the
4 police."

5 MR. LANE: Well --

6 CHIEF JUSTICE ROBERTS: Does that go to
7 trial?

8 MR. LANE: No, that doesn't necessarily go
9 to trial. That's a conclusion, first of all --

10 CHIEF JUSTICE ROBERTS: Why doesn't it go to
11 trial? I mean, what, does it go -- do you have to
12 depose the police officer, why did you stop him? Did
13 you stop anybody else for going 65 miles per hour that
14 day?

15 MR. LANE: Well, I mean, these evidentiary
16 questions have to be first of all supported in a
17 pleading with heightened scrutiny under Iqbal.
18 Conclusions are not simply enough.

19 JUSTICE SCALIA: It's not a conclusion. I
20 mean, if -- if he didn't have the bumper sticker and you
21 asserted in the pleading he stopped me because he knows
22 I hate the police, that's a conclusion. But if you have
23 the bumper sticker, he says, you know, I had the bumper
24 sticker, and that's why he stopped me.

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

1 of that and say if the police officer did stop him
2 because of the bumper stick he should go to trial. He
3 should be held accountable for that --

4 CHIEF JUSTICE ROBERTS: So the only way you
5 could find out is you put in the evidence, here's the
6 bumper sticker and you put the police officer on the
7 stand and you say why did you do it. And all of a
8 sudden, I don't know why everybody doesn't have a bumper
9 sticker.

10 MR. LANE: Theoretically every single person
11 who has ever been arrested for any crime could raise a
12 first amendment retaliation lawsuit. Every convicted
13 murderer doing time throughout this country could do
14 that. They don't however. There is not a rush to the
15 courthouse of retaliatory arrest claims because the
16 pleading requirements are heightened, qualified immunity
17 for over 100 years has protected the Secret Service.
18 They have been protecting the executive branch --

19 JUSTICE BREYER: But in the case of the
20 President, if what you are hearing, as you well know,
21 that the combination of disparate political views and
22 risk is unlike other situations. And I don't know if
23 they can prove it or you could prove the contrary, but
24 that's -- that's a claim.

25 And I can't say there's nothing to it. So

1 let me suggest to you another arrow which -- and ask you
2 what do you think of this arrow and the answer's going
3 to be not much, but I'm interested in hearing your
4 reason.

5 MR. LANE: I'm ready.

6 JUSTICE BREYER: In Hartman, Justice
7 Ginsburg and I dissent.

8 MR. LANE: Yes.

9 JUSTICE BREYER: And we referred to a D.C.
10 circuit case. And in the D.C. circuit it said -- it
11 talked about rare cases where strong motive evidence
12 combined with weak probable cause to support a finding
13 that the prosecution would not have occurred but for the
14 animus. So far you think, fine.

15 But suppose you were to say because of the
16 factors that have just been mentioned where the
17 President's at stake, the courts -- where his life is at
18 stake, the President's -- the courts will not infer once
19 probable cause exists that it's weak. And the courts
20 will not infer from the simple presence of political
21 disagreement that the motive or retaliation is strong,
22 which in fact would produce a very limited extension of
23 Hartman to the case of protecting the President of the
24 United States.

25 And now I know you are not going to agree

1 with that, and I'm trying it out and I'm not saying that
2 I agree with it, but I want to see how you react.

3 MR. LANE: Well, let's take a look at the
4 facts of this case. The Tenth Circuit found there was
5 probable cause for a 1001 violation. But was there
6 probable cause -- is there a great body of
7 circumstantial evidence surrounding this case that would
8 point to probable cause which should be considered in
9 deciding how this case proceeds? We have the agent in
10 charge of the protective detail, Agent Lee, standing
11 eight inches away from Vice President Cheney when this
12 entire encounter occurs. Agent Lee testified he saw no
13 crime committed. We had numerous agents --

14 JUSTICE SOTOMAYOR: Excuse me. Let's go
15 past this for a second. What was it that the arresting
16 agent said or did that showed the animus -- meaning that
17 because that another officer actually saw it and
18 understood himself what he thought, doesn't mean that
19 this agent who was told that there had been a touching
20 had that information.

21 MR. LANE: The evidence?

22 JUSTICE SOTOMAYOR: So I know collective
23 knowledge is a theory in a lot of cases, but let's deal
24 with the facts of this case. What's -- what's the
25 animus?

1 MR. LANE: Well, there were discreet First
2 Amendment episodes that occurred in the context of this
3 case. One was testified to by Mr. Howards in his
4 deposition, that when he first of all was approached by
5 Agent Reichle, Agent Reichle said, "I want to talk to
6 you," and flashed his badge, and Mr. Howards declined
7 the invitation to talk to Agent Reichle. That,
8 according to Mr. Howards, angered Agent Reichle. That
9 is a First Amendment significant event in and of itself.

10 Steve Howards testified that he then was
11 asked by Agent Reichle we want to talk to you about
12 assaulting the Vice President, and his response was I
13 didn't assault the Vice President; I merely criticized
14 his policies in Iraq, and if you don't want him
15 criticized publicly he should stay in his undisclosed
16 location, or words to that effect.

17 Again, Mr. Howards testified that angered
18 Agent Reichle. At that point, the cuffs went on. And I
19 think that is circumstantial evidence in support of the
20 animus for what -- what was going on. Agent Reichle was
21 on notice as to what Howards had said to the Vice
22 President --

23 JUSTICE SOTOMAYOR: How does all of that
24 prove your point of animus in light of the undisputed
25 fact that he lied about touching the Vice President?

1 MR. LANE: Well, again --

2 JUSTICE SOTOMAYOR: And that's the --

3 MR. LANE: -- lying to the Vice President is
4 what we look at on a Fourth Amendment analysis, because
5 what's in Reichle's actual mind under Devenpeck is
6 irrelevant. So yes, there was probable cause, but was
7 Reichle himself directing his animus at Mr. Howards and
8 arrested him? We have to look into what was actually in
9 his mind, and that was not in his mind. A 1001
10 violation was not in his mind. We looked -- what was in
11 his mind, and we've -- we have already said what was in
12 his mind is he approached the Vice President, he
13 criticized him publicly --

14 JUSTICE SOTOMAYOR: You do understand that
15 this case is inviting the questions the Chief Justice
16 asked, which, and which has -- Justice Breyer and some
17 of us are concerned about, which is what your adversary
18 has described as First Amendment voicing is going to be
19 a part of many, many arrests.

20 MR. LANE: Absolutely.

21 JUSTICE SOTOMAYOR: How do we draw a line
22 outside of the one that you proposed by your
23 adversaries, that probable cause is the line.

24 MR. LANE: Well, that line --

25 JUSTICE SOTOMAYOR: That doesn't enmesh the

1 police in a constant barrage of claims that just because
2 they angered a police officer, that's why they were
3 arrested.

4 MR. LANE: Well, first of all there has not
5 been this constant barrage. Hartman has only applied
6 until -- I mean, this Court decided Hartman in 2006 for
7 retaliatory prosecutions. There has not been a run on
8 the courthouse on retaliatory arrests. Either before
9 Hartman or after --

10 JUSTICE ALITO: Would you acknowledge that
11 the Secret Service faces a different situation from
12 ordinary police officers in conducting their daily
13 activities, in that Secret Service agents may
14 legitimately take into account First Amendment activity
15 by someone who is in the vicinity of the President or
16 the Vice President in assessing the degree of danger the
17 person presents?

18 MR. LANE: This may not help my case, but I
19 will go further than that and I'll say any police
20 officer has an absolute right to listen to what any
21 protester is saying and consider what is being said in
22 terms of assessing the level of threat that that
23 protester poses.

24 But as I said in this case, they had every
25 right to stop Mr. Howards, to do a Terry stop on him,

1 because they were concerned about him. And reasonable
2 cause for concern under Terry is the standard. You
3 don't need probable cause to pat someone down under
4 Terry. It's simply if a reasonable officer would be
5 concerned.

6 JUSTICE SCALIA: Again, I -- I don't
7 understand why you -- why you say that they are immune
8 from the charge of First Amendment retaliation for that,
9 but not immune from the charge of First Amendment -- I
10 mean if you say they are doing it on First Amendment
11 grounds for the one, they are doing it on the First
12 Amendment grounds for the other. Why is either one
13 okay?

14 MR. LANE: I'm not saying that they are
15 immune on a Terry patdown if it is done in retaliation
16 for free speech. I'm simply saying that would make it a
17 much more difficult case for any protester to go to a --
18 to go to court and say the only reason he patted me down
19 was in retaliation for free speech.

20 JUSTICE BREYER: Okay. So then putting it
21 in their point of view, I just what he actually said.
22 He was very angry, your client. I mean, judging what he
23 said, there were a lot of swear words and so forth, he
24 was pretty angry at this whole situation.

25 So you are a Secret Service agent, and you

1 hear him say -- speak like this, he has every right to
2 speak like that, I mean people do, I understand that --
3 but now he's also thinking that -- that I'm nervous
4 about this. The -- the President is here, the Vice
5 President, whatever --

6 MR. LANE: Sure.

7 JUSTICE BREYER: -- the same thing, and --
8 and I've got to do my job. So -- so -- and nobody's
9 going to say, oh, oh, whatever it is, First, whatever if
10 is, if somebody is hurt.

11 MR. LANE: I agree with that.

12 JUSTICE BREYER: And he also lied about
13 whether he touched the President.

14 MR. LANE: So --

15 JUSTICE BREYER: And he has also been
16 talking about the President killing people --

17 MR. LANE: First order of business --

18 JUSTICE BREYER: -- killing babies and so
19 forth.

20 MR. LANE: -- let's see if he's a threat.

21 JUSTICE BREYER: All right. So what is he
22 supposed to do?

23 MR. LANE: He's supposed to -- if he -- if
24 he has reasonable cause to believe Steve Howards is a
25 threat --

1 JUSTICE BREYER: Well, it isn't this
2 situation -- but this situation, I --

3 MR. LANE: Okay. Right. Then he pats him
4 down, he opens the bag --

5 JUSTICE BREYER: Nothing there.

6 MR. LANE: -- nothing there.

7 JUSTICE BREYER: He says, okay.

8 MR. LANE: Then they monitor him and they
9 watch him, and -- and that's all.

10 JUSTICE BREYER: There's a lot of people in
11 that place.

12 MR. LANE: There is no probable cause to
13 believe he has committed a crime at that point.

14 JUSTICE BREYER: Well, he lied.

15 MR. LANE: But they didn't know that. That
16 was not in their minds. That's -- we are doing a First
17 Amendment analysis and not the Fourth Amendment analysis
18 at this point. First Amendment analysis --

19 CHIEF JUSTICE ROBERTS: They didn't arrest
20 him until after he lied, right?

21 MR. LANE: But it was never in their minds.
22 They've testified. That didn't have anything to do.
23 That is the Tenth Circuit's post hoc rationale under
24 Devenpeck which -- Devenpeck -- which says if you --
25 there's any objective probable cause that the Tenth

1 Circuit or this Court or any other court can concoct,
2 post hoc, even though it wasn't in the officer's mind,
3 that's good enough to arrest somebody. That's -- that
4 probable cause. All right?

5 But in First Amendment analysis it can't be
6 an objective standard. You -- there -- objective
7 standards are clean, they are nice, they -- they create
8 bright lines. But when we are looking at a First
9 Amendment violation, we have to get to be able to get
10 into subjective intent of the officer at -- on the
11 scene.

12 JUSTICE ALITO: When you say that that means
13 that almost all of these cases have to go to trial --

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

15 JUSTICE ALITO: -- if front of a jury.
16 Well, how are -- how can they be stopped before they go
17 to trial?

18 MR. LANE: Because if, first of all, as I've
19 said, Iqbal requires heightened pleading, not just
20 conclusions. We have the summary judgment standard.

21 JUSTICE ALITO: I engaged in First Amendment
22 -- I engaged in First Amendment activity.

23 MR. LANE: We have a summary judgment
24 standard, where -- and in fact in Butz, this Court held
25 that a firm application of rules of civil procedure will

1 always prevent frivolous claims and meritless litigation
2 from occurring in situations exactly like this. And
3 that's true. A firm application of the rules of civil
4 procedure, a summary judgment standard which is --

5 CHIEF JUSTICE ROBERTS: Well, summary
6 judgment, that's -- you're already been in court a long
7 time when you are talking about summary judgment.

8 MR. LANE: There is no easy way out of this,
9 unfortunately. Frequently, when you're talking about --

10 CHIEF JUSTICE ROBERTS: Well, there is an
11 easy way out of it. We could agree with the --

12 (Laughter.)

13 MR. LANE: Well, that unfortunately is an
14 easy way out of the First Amendment as well. I mean
15 this Court has decided some incredibly difficulty cases.
16 Snyder v. Phelps, authored by Your Honor, very difficult
17 case. Could it be side-stepped, by -- you know,
18 somebody steps off a curb and is thereby jaywalking
19 walking. Are we limiting --

20 CHIEF JUSTICE ROBERTS: One thing about your
21 analysis that concerns me is that you seem to have a
22 very black and white view of what is going on in the
23 officer's mind: did you stop -- did you arrest him
24 because of retaliation or was it legitimate security?
25 And I suspect that the people engaged in this type of

1 thing have intuition.

2 I mean, they don't sit there and say, well,
3 let's see; is it because he says he didn't like the war
4 in Iraq, or is because he is wandering around, looks
5 like he is looking for something with a -- with a bag?
6 I mean I assume they sort have experience and they
7 calculate all this in and say I've got to do something.
8 And how do you parse those different motivations.

9 MR. LANE: Well, what I say about that
10 is that -- and again, I know this is not an answer that
11 you are probably going to like, because this means a
12 trial is involved, but this is what juries do on a daily
13 basis throughout this country, in every criminal case.
14 What is the subjective intent of the defendant? In
15 every civil case, is this an intentional act, a knowing
16 act, a reckless act, a negligent act? That's what
17 juries do.

18 And if there is enough evidence to get this
19 case to trial -- and I -- I would posit it that in this
20 case, where you have agent after agent after agent who
21 saw the encounter up close and personal with the Vice
22 President and Mr. Howards, none of whom saw any evidence
23 of any criminal activity by Mr. Howards, all of whom let
24 Mr. Howards walk away from the scene, that's good
25 evidence that --

1 CHIEF JUSTICE ROBERTS: One reason that I in
2 fact don't like the answer is be -- because what the
3 agent is now going to have to factor, in addition to the
4 hostility of the -- the views, the touching of the Vice
5 President, the lying about it, the wandering around with
6 the bag -- is in the back of his mind -- you know, if
7 I'm wrong, I may be held personally liable in damages
8 for taking some action that some jury somewhere is going
9 to say is based on retaliation rather than my obligation
10 to protect the Vice President.

11 MR. LANE: Well, I mean, theoretically yes,
12 that -- that could be a problem. And -- and I am quite
13 certain that certain civil litigants, just as in
14 criminal cases, people are wrongly accused of things
15 that they didn't do, they end up in a trial, and
16 sometimes juries get the wrong results and an injustice
17 occurs.

18 We can't fix all those problems when it's
19 not really a significant problem. There are no run on
20 the courtrooms around the land of these kinds of cases
21 arising. We don't need to have any rules that
22 specifically pertain to the Secret Service when to my
23 knowledge, this Court has had one Secret Service case in
24 its entire history, and there are 15 appellate-reported
25 Federal decisions regarding retaliatory arrests, period

1 --

2 JUSTICE ALITO: Which -- is there a record
3 of retaliatory arrests by Secret Service agents against
4 people who say things that are critical of the President
5 and the Vice President?

6 MR. LANE: The -- the only way I know to
7 look for that is on Westlaw or LEXIS. And -- And
8 Mr. Srinivasan indicated that they found 100 or
9 400 cases. We did a search like that, we came up with
10 the same number. We dug down into those cases. And in
11 terms of actual litigated retaliatory arrest cases, we
12 found 15 total. That's not scientific, but that's the
13 best I've got for you at this point.

14 And I don't know if there's a repository of
15 -- of where we can find that or not. But this -- and I
16 started this argument by saying "this is a solution in
17 search of a problem." The Secret Service has adequately
18 done their jobs beautifully over -- for over a century.
19 And -- and there is no reason to put some different rule
20 down on the Secret Service.

21 JUSTICE SCALIA: Well, we've lost a couple
22 of Presidents.

23 (Laughter.)

24 MR. LANE: Well, they're doing the best they
25 can. I mean, that's -- I understand that. But it is --

1 it is a serious, serious issue to curtail the First
2 Amendment.

3 Consider the -- the situation where you
4 actually do -- and I believe this is that case -- you
5 have Secret Service agents who deserve to be taken to a
6 trial, because they have gone out of their way to punish
7 someone for their free speech.

8 What do you do about those guys?

9 JUSTICE GINSBURG: But it's ambivalent.
10 Suppose it turns out you have this trial, we know what
11 words were spoken. Get to the trial, it turns out
12 Reichle is a strong opponent of the war in Vietnam.
13 Then, end of trial, right?

14 MR. LANE: You know, that would be a fact to
15 be considered by the jury. I could lose this trial when
16 we go back. If we get a trial. That's what jury trials
17 are all about, Justice Ginsburg.

18 And I'm -- I'm not saying that -- I have to
19 show evidence to this Court that I'm going to win the
20 trial before I win this case. The issue simply is can
21 we sacrifice the First Amendment. You know, does a
22 litterbug lose their right to have First Amendment free
23 speech?

24 Does a jaywalker lose their right to have
25 First Amendment free speech because probable cause

1 exists to believe they've committed some offense? And
2 you'll have officers ostensibly enforcing litter laws
3 and jaywalking laws and blocking the sidewalk laws, and
4 the First Amendment is essentially evaded.

5 100 years of jurisprudence, courageous
6 jurisprudence, many times by this Court, goes by the
7 boards because somebody is a litterbug. I -- I just
8 don't see that as the solution to this problem. And I
9 also don't see that the Secret Service needs some
10 enhanced protection from this Court when this has never
11 been and is not now any kind of a serious problem.

12 The status quo is not healthy. It has
13 worked for decades and it should continue to work. And
14 if these agents get tagged in this case, maybe they
15 deserved to get tagged in this case, because the First
16 Amendment is extremely important. And I don't denigrate
17 the -- the job of law enforcement or -- or these agents
18 in any way. I'm simply saying that when the First
19 Amendment is at stake, I think -- and the law has been
20 working just fine throughout decades to extend the no
21 probable cause in Hartman to on-street encounters where
22 there is no complex causation chain -- where the main
23 actor in Hartman was immune completely from lawsuit, the
24 prosecutor in Hartman could not be sued under any
25 circumstances, nor could the prosecutor in Hartman be

1 questioned in deposition under our traditions.

2 We don't question prosecutors in depositions
3 about why they made decisions to go ahead and prosecute.
4 So this Court stepped back in Hartman and said, that's a
5 different story.

6 But on-street encounters -- if you extend
7 the no-probable-cause requirement to on-street
8 encounters, any road the police officer or Secret
9 Service agent who wants to can -- can ostensibly enforce
10 any number of legal violations -- 1 mile an hour over
11 the speed limit; you're going to jail, allegedly for
12 going 1 mile an hour over the speed limit. Or under
13 Atwater, for not wearing a seat belt -- when the real
14 reason is your bumper sticker.

15 If you can prove that, they should go to
16 trial.

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

18 Thank you very much.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 12:30 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

A	52:23	agent's 5:21 34:25 35:5,7	angry 47:22,24	arises 17:13
ability 26:21	actor 56:23	agree 7:22 20:16 42:25 43:2 48:11 51:11	animus 4:15,17 17:20 18:4 42:14 43:16,25 44:20,24 45:7	arising 53:21
able 50:9	acts 29:20	AL 1:4	announced 24:23	Arizona 7:25
above-entitled 1:12 57:22	actual 30:25 45:5 54:11	ALITO 46:10 50:12,15,21 54:2	answer 4:7 8:12 8:13 27:8,25 37:11 52:10 53:2	arm 32:24 33:10
absence 4:5 12:3	addition 53:3	allegation 4:14	answer's 42:2	armband 10:13
Absent 57:17	additional 28:2	allegations 18:6 18:15 39:22	antiwar 10:13	Armstrong 24:23 25:10
absolute 14:11 46:20	address 11:6,7 12:5	allege 4:17 12:19	anybody 40:13	arrest 3:13,14 4:6,11,14,21 5:2,10,18,20 6:10,12,14,22 7:23 8:7,23,23 8:24 9:1,18 10:7,16,21 11:20 13:11,13 14:21 16:24 17:12 18:18,22 23:18 27:19 28:19 30:24 31:7 32:8 34:19 35:13 38:9 41:15 49:19 50:3 51:23 54:11
absolutely 6:15 13:9 20:10 23:13 36:9,12 36:25 37:12 45:20	addressed 13:1	allegedly 3:16,25 57:11	appeals 21:19	APPEARANC... 1:15
account 13:6 16:22 19:16 25:6,16 28:25 30:1 46:14	addressing 16:9	alleged 17:21	APPEARANC... 1:15	appellate 32:10
accountable 41:3	adequately 54:17	allegedly 3:16,25 57:11	appellate-repo... 53:24	appellate-repo... 53:24
accounts 32:20	administrable 21:7	alleged 17:21	applicability 28:4 28:9	application 50:25 51:3
accused 53:14	admit 9:4	allegedly 3:16,25 57:11	applied 14:6 18:1 46:5	application 50:25 51:3
acknowledge 9:12 46:10	adopt 7:6	allowed 37:22,25	applied 14:6 18:1 46:5	applied 14:6 18:1 46:5
across-the-boa... 17:25 21:7 22:10 23:6 24:4 28:16 30:5	adversaries 45:23	ambivalent 55:9	applies 28:5	applies 28:5
act 14:3 18:13 22:14 24:8 52:15,16,16,16	adversary 45:17	amendment 6:23 7:24 10:17,19 11:9,15,18 17:9 17:10 21:11 25:1,2,4,15,23 26:2 27:3,18 30:17 35:4,10 35:12 37:20,24 38:8,23 39:4 41:12 44:2,9 45:4,18 46:14 47:8,9,10,12 49:17,17,18 50:5,9,21,22 51:14 55:2,21 55:22,25 56:4 56:16,19	apply 7:7 17:19 18:20 19:12,15 23:11 24:11 28:5 30:4 31:12 32:18 38:8	applied 14:6 18:1 46:5
acted 6:6 18:10 26:17	adverse 29:6,8	amicus 1:20 2:7 16:6	applying 16:12 23:6	applied 14:6 18:1 46:5
acting 4:9 12:13 13:19 14:19 26:9,21	advocating 13:23	analysis 15:16 35:12 45:4 49:17,17,18 50:5 51:21	approached 34:5 35:22 44:4 45:12	applied 14:6 18:1 46:5
action 6:23 7:10 12:5 29:6,8 38:17 53:8	aftermath 29:7	Anderson 15:21	approached 34:5 35:22 44:4 45:12	applied 14:6 18:1 46:5
activities 46:13	agency 37:2	angered 44:8,17 46:2	appropriately 14:3	applied 14:6 18:1 46:5
activity 16:22 17:9,11,15,18 18:11 19:17,21 25:5,15 26:2 27:3 29:7,15 46:14 50:22	agent 5:6,19 12:18 14:1,1,19 17:20 18:4,7,9 25:16 34:5,12 35:15 43:9,10 43:12,16,19 44:5,5,7,8,11 44:18,20 47:25 52:20,20,20 53:3 57:9		appropriately 14:3	applied 14:6 18:1 46:5

<p>44:13 assaulting 5:11 44:12 asserted 18:4,14 27:18 40:21 assertion 19:5 assessing 46:16 46:22 assessment 5:22 14:25 assume 16:25 52:6 assumption 26:20 assure 37:18 attaches 14:21 attention 25:20 Atwater 14:4 57:13 authored 51:16 authorized 18:24 automatic 20:4,5 aware 24:24 32:13 a.m 1:14 3:2</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>babies 25:18 36:4,20 48:18 back 11:24 21:17 26:13,17 30:8 32:7 33:14 34:15 39:18 53:6 55:16 57:4 badge 44:6 bag 34:7,15 37:15,16 49:4 52:5 53:6 barrage 46:1,5 base 23:24 based 4:14 18:10 24:12 26:17,20 26:21 29:22 31:15 53:9 basis 6:6 21:5</p>	<p>29:22 36:1 37:3 52:13 beautifully 54:18 behalf 1:17,22 2:4,11 3:7 16:5 31:21 believe 13:18 48:24 49:13 55:4 56:1 belt 57:13 benefits 21:6 22:17 best 26:18 32:16 34:22 54:13,24 beyond 7:12 bill 8:6 binge 10:8 bishops 8:2 bit 3:19,20 32:4 Bivens 7:10 32:8 black 51:22 blocking 56:3 board 20:11 39:15 boards 56:7 body 43:6 books 13:13 border 7:25 borne 17:18 box 37:16 branch 41:18 breathing 13:20 Breyer 6:17 7:1 7:14,21 8:19,21 9:7,20,25 19:24 20:3,10,14,16 20:22 26:24 27:5,9,10,16 27:21 36:2,7,10 36:13,17 37:1,6 41:19 42:6,9 45:16 47:20 48:7,12,15,18 48:21 49:1,5,7 49:10,14</p>	<p>Breyer's 10:24 32:2 brief 32:6 briefly 11:5 bright 50:8 broaden 16:17 broader 16:12 broken 6:4 Bryant 32:14 bullet 3:11 bumper 38:21,25 39:24 40:3,20 40:23,23 41:2,6 41:8 57:14 business 48:17 Butz 50:24</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calculate 52:7 called 4:7 Candidly 27:23 capacity 4:10 12:13 13:20 14:20 capture 34:24 car 5:24 6:1 38:20 cared 8:2 carrying 34:7,15 case 3:4,14,23 5:19 7:4 8:8,10 8:14 11:24 13:1 13:9,12,15 14:4 14:24 15:2,8,9 15:9,10,13,13 15:18,21,25 22:8 23:20 25:7 25:16 27:17 28:11 29:16 32:12,17,19 38:2,23 39:4,25 41:19 42:10,23 43:4,7,9,24 44:3 45:15</p>	<p>46:18,24 47:17 51:17 52:13,15 52:19,20 53:23 55:4,20 56:14 56:15 57:20,21 cases 14:5 20:8 21:13,19,20 22:3,21,24,25 26:24 27:1 28:9 32:5,10 39:8 42:11 43:23 50:13 51:15 53:14,20 54:9 54:10,11 causation 12:25 13:3,5 18:19 24:1,3,5 28:6 28:16 29:1 56:22 cause 3:14 4:5 4:12 5:2,2,4,25 6:5 7:23 8:7 10:20 11:10,13 11:14 12:3,4 14:20 18:21 24:18 30:9,11 30:12,20,24 31:9 36:23 38:17 42:12,19 43:5,6,8 45:6 45:23 47:2,3 48:24 49:12,25 50:4 55:25 56:21 cautious 14:24 century 54:18 certain 53:13,13 certainly 9:9,15 14:16,21 22:7 23:16 27:12 38:22 chain 56:22 charge 5:12 35:25 43:10 47:8,9</p>	<p>charged 33:25 charges 23:12 30:25 31:4 chases 7:25 Cheney 3:18 4:2 43:11 Chief 3:3,8 4:24 16:1,3,8,25 17:3 31:18,22 34:1,4,10,19 34:23 35:6 38:19 39:9,25 40:6,10 41:4 45:15 49:19 51:5,10,20 53:1 57:19 circuit 5:4 7:16 15:8,9,10 35:11 42:10,10 43:4 50:1 Circuit's 7:17 49:23 circumstances 16:23 17:11 22:19 25:11 26:3 56:25 circumstantial 43:7 44:19 cite 32:6 civil 50:25 51:3 52:15 53:13 claim 4:6 6:18,23 7:11,25 10:19 14:22 24:19 27:18 41:24 claimed 35:18 claims 4:14 21:11 22:7 41:15 46:1 51:1 clean 50:7 clear 7:8 13:9,25 14:6 clearly 4:21 13:2 13:11,16 15:7 15:17</p>
--	---	--	--	--

<p>client 47:22 close 52:21 collective 43:22 Colorado 1:16 1:22 33:24 combination 41:21 combined42:12 come 39:22 comes 30:22 34:14,15 committed43:13 49:13 56:1 completely 56:23 complex 13:5 24:1,2,5 28:6 29:1 56:22 complexity 12:25 complicated18:5 18:18 28:15 conceivable 38:1 concern 26:17 28:6 31:8 36:18 36:24 47:2 concerned45:17 47:1,5 concerning 22:24 concerns 28:15 31:11 51:21 concluded15:18 concluding 15:14 conclusion40:9 40:19,22 conclusions 40:18 50:20 conclusory 39:22 concoct 50:1 conduct 27:24 conducting 46:12 consider33:17 46:21 55:3 consideration 17:15,17 19:21 25:9 considerations</p>	<p> 22:12 23:5 considered22:16 43:8 55:15 consistent 39:15 constant 46:1,5 Constitution 11:16 constitutional 12:2 15:22 38:14 contact 33:6,12 contacted5:19 contacts 33:17 context 16:13,14 16:21 18:2,20 18:22 19:12 22:13 23:7,11 24:2,20 25:8,14 29:3,10,17 30:4 30:17 44:2 contexts 17:8 19:19 39:16 contingent 14:18 14:18 continue 56:13 contours 15:24 31:3 contrary 8:4 41:23 control 19:18,25 20:1,5,17 25:22 25:22 29:13,20 convicted41:12 convince 26:21 correct 6:2 17:5 19:9 22:2 23:22 34:3,9 36:16 correctly 35:17 costs 21:7 22:18 counsel9:24 16:1,20 22:11 23:5 31:18 57:19 country 7:8 36:15 41:13</p>	<p> 52:13 couple 28:21 54:21 courageous 56:5 course 8:21 20:14 22:2 30:16 38:7 court 1:1,13 3:9 3:10 4:7,15,19 5:12 6:21 7:20 8:17 13:8 14:4 14:23 15:5,14 15:21 16:8 18:1 19:2 21:6,16,19 21:20 22:6,16 22:19 23:1 24:22 28:10,12 30:10,18,18,22 31:4,12,23 32:13 39:3,7,10 39:13,13,17,21 46:6 47:18 50:1 50:1,24 51:6,15 53:23 55:19 56:6,10 57:4 courthouse 41:15 46:8 courtroom3:20 courtrooms 53:20 courts 28:14 42:17,18,19 Court's 14:5 24:16 35:3 38:2 create 50:7 creates 24:1 29:1 credible 39:4 credit 32:4 Creighton 15:21 crime 32:24,25 33:22 35:23 41:11 43:13 49:13 criminal 10:6 52:13,23 53:14</p>	<p>critical 19:13 54:4 criticized44:13 44:15 45:13 cross-appeal 7:18 crowd 19:18,25 20:1,5,17 25:22 25:22 cuffs 44:18 curb 51:18 curiae 1:20 2:7 16:6 curtail 55:1 cut 34:22 39:18</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 1:3 3:1 da 20:7,7,7 daily 46:12 52:12 damages 3:15,24 53:7 danger 15:1 24:8 25:6 26:4 46:16 DAVID 1:22 2:10 31:20 day 36:5,21 40:14 deal 11:3 21:8 22:18,20,23 23:2 43:23 dealing 29:16 dealt 8:22 decades 56:13 56:20 decided38:2 46:6 51:15 decidedly 28:22 decides 4:20 13:8 deciding 9:18 17:11 30:1 43:9 decision 7:17 14:2 24:16 decisions 13:21</p>	<p> 15:4 53:25 57:3 declined44:6 defend 39:13 defendant 52:14 degree 17:20 18:4 46:16 demeanor 35:23 demonstrates 15:2 demonstration 18:25 19:4 denigrate 56:16 Denver 1:16,22 Department 1:19 27:6 depending 22:5 depose 40:12 deposition 35:18 35:21 44:4 57:1 depositions 57:2 Deputy 1:18 described34:2 45:18 deserve 55:5 deserved56:15 designed22:20 25:10 designing 23:2 desire 19:22 24:8 24:9 26:22,23 detail 43:10 details 17:4 32:9 detecting 37:17 determination 7:15 determine 12:22 13:7 14:2 15:16 determining 16:22 32:5 Devenpeck 5:16 7:17 9:10 30:18 30:19 31:13 45:5 49:24,24 difference 18:23 25:1,23</p>
---	--	--	---	--

<p>different 6:7 9:8 9:10,11 10:3 12:1 14:14,16 19:8 24:21 46:11 52:8 54:19 57:5 differently 10:22 31:15 difficult 15:4 17:14 18:8,9 19:20 24:7 47:17 51:16 difficulty 3:21 9:20 51:15 dimension 31:9 directed 32:2 directing 45:7 disaggregate 19:20 disagreed 26:10 disagreement 8:3 42:21 disagrees 8:1 discreet 44:1 discretion 9:13 10:4 11:19 discretionary 10:15 16:23 discussion 35:16 disentangle 24:7 26:12 disgusting 32:22 33:19 34:13 dislike 11:20 disparate 41:21 disposal 27:8 disprove 4:18 dispute 32:23 dissent 42:7 distinction 20:1 20:14 distinctions 20:12 distinguish 17:14 25:11</p>	<p>district 21:20 39:13 dis-uniformity 31:14 doing 12:14,15 33:15 36:15 38:3 41:13 47:10,11 49:16 54:24 dollar 8:6 doubtless 33:17 draw 14:5 20:13 45:21 driven 9:3 drove 24:3 31:12 dug 54:10 D.C 1:9,19 42:9 42:10</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 14:23 early 13:12 easy 4:17 51:8 51:11,14 echo 22:11 effect 44:16 effected 31:7 effort 38:16 eight 43:11 either 10:7 46:8 47:12 element 4:6 elements 12:2,4 emotional 36:11 employee 29:5,6 29:14 employer 29:5,8 29:14 employment 28:12,21 29:3 30:4 encounter 17:9 43:12 52:21 encounters</p>	<p>12:18 56:21 57:6,8 enforce 57:9 enforcement 12:12 16:15 19:16 24:12 26:4,6,18 29:17 29:17 30:3 56:17 enforcing 56:2 engage 19:12 engaged 12:19 19:17 26:2 50:21,22 51:25 engages 29:6 engaging 9:22 enhanced 56:10 enmesh 45:25 entire 15:13 43:12 53:24 entitled 4:10 13:15 entitling 4:22 enunciated 39:21 episodes 44:2 equal 24:18,20 25:1 especially 9:21 ESQ 1:16,18,22 2:3,6,10 essentially 8:14 9:23 10:17 12:16 56:4 established 4:21 13:11,16 15:7 15:17 ET 1:4 evaded 56:4 evaluate 12:21 event 44:9 eventually 5:12 everybody 41:8 evidence 24:9 41:5 42:11 43:7 43:21 44:19</p>	<p>52:18,22,25 55:19 evidencing 17:16 19:21 evidentiary 20:24 40:15 exactly 9:25 11:24 18:5,19 30:16 51:2 example 6:19 8:25 24:17 28:13 31:13 exception 22:18 22:22,24 38:8 exceptional-cir... 22:22 exceptions 21:8 Excuse 43:14 executive 41:18 exercise 9:13 16:24 existed 6:5 exists 42:19 56:1 expect 30:24 experience 52:6 Explain 5:7 explained 24:6 30:18 explaining 18:9 18:13 expressed 17:22 37:10 expressing 26:9 37:21 expressive 16:22 17:15,17 18:10 19:17,21 25:5 29:7,15 extend 4:20 7:17 11:2 13:9 21:1 21:1 25:22 56:20 57:6 extended 15:11 15:15 extension 23:16</p>	<p>42:22 extreme 21:9 22:18 extremely 24:7 56:16</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faces 46:11 fact 7:16 13:22 18:16 23:23 29:3 31:11 42:22 44:25 50:24 53:2 55:14 factor 10:21 53:3 factors 42:16 facts 7:17 32:19 39:23 43:4,24 factual 18:5 20:15 factually 32:16 fair 14:7 false 5:8 far 20:22,25 42:14 far-reaching 8:8 favor 23:5 Federal 5:6 27:2 27:21 32:9 53:25 feelings 38:13 felony 10:3,5 felt 18:11 Finally 15:6 find 27:17 32:1 41:5 54:15 finding 42:12 fine 33:16 42:14 56:20 finer 10:6 firm 50:25 51:3 first 4:5 5:16 6:23 7:2,11,22 7:24 10:17,19 11:6,7,9,18</p>
---	---	---	---	---

<p>17:9,10 21:11 25:2,4,14,23 26:1 27:3,18 35:9,12 37:20 37:24 38:8,23 39:4 40:9,16 41:12 44:1,4,9 45:18 46:4,14 47:8,9,10,11 48:9,17 49:16 49:18 50:5,8,18 50:21,22 51:14 55:1,21,22,25 56:4,15,18 fit 22:24 28:19 fits 28:22 five 8:6 fix 53:18 flashed 44:6 flip 29:2 40:25 focus 16:11 25:19 focused 23:22 focusing 15:22 footnote 8:14,15 11:25 23:4 32:6 force 37:14,15 forge 21:8 forging 22:18 form 18:21 30:5 formed 36:1 formulation 13:17 forth 47:23 48:19 found 5:4 22:5 43:4 54:8,12 Fourteenth 25:1 Fourth 11:15 30:16 35:4,10 45:4 49:17 frame 21:15 framers 11:15 free 11:21 12:16 12:20 38:12,17 47:16,19 55:7</p>	<p>55:22,25 frequency 27:14 frequent 9:17 frequently 8:23 51:9 frivolous 39:18 51:1 front 19:2 26:14 26:15 50:15 full 14:22 function 19:13 functions 9:23 12:12 16:16 19:17 further 46:19 57:17 F.B.I 17:3</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 Gallagher 1:16 2:3 3:5,6,8,22 5:3,15 6:2,8,11 6:15,25 7:14 8:12,20 9:9,15 9:19 10:10 11:1 11:5,14,23 12:9 14:12,16 16:2 gears 35:11 General 1:19 gently 32:24 getting 10:24 23:25 Ginsburg 4:23 5:1,3,7,16 14:10,14 23:9 23:20 28:3 30:8 30:21 42:7 55:9 55:17 Ginsburg's 35:15 give 5:17,23 27:25 39:2 40:25 given 20:23 28:24 32:19</p>	<p>go 12:7 30:8 31:25 40:6,8,10 40:11 41:2 43:14 46:19 47:17,18 50:13 50:16 55:16 57:3,15 goes 56:6 going 10:13,16 10:18 18:7,8,9 18:17 19:10,19 20:11,14 25:17 26:6 29:4 32:7 34:25 35:4,6,12 36:4,14,21,22 36:22 38:24 40:13 42:2,25 44:20 45:18 48:9 51:22 52:11 53:3,8 55:19 57:11,12 good 4:16 6:13 50:3 52:24 government 5:8 31:25 great 22:23 33:14 35:16 43:6 grounds 39:5 47:11,12 guess 21:5 22:10 34:17 GUS 1:3 guy 39:2 guys 55:8</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 11:6,7,7 hand 17:14 handed 13:12 hands 33:13 happened 8:5 happens 17:7 26:15 30:16 31:16 36:13</p>	<p>harassment 5:13 30:12,25 31:4 33:25 35:25 hard 4:17 26:11 Harlow 14:17 Hartman 4:8,20 8:14,21 11:2,25 12:1 13:1,2,9 13:12 15:11,14 18:2,21 21:16 23:4,10,16,17 23:21 28:4,9,11 42:6,23 46:5,6 46:9 56:21,23 56:24,25 57:4 hate 38:21 40:3 40:22 hauled 39:3 healthy 56:12 hear 3:3 36:19 48:1 heard 32:13 hearing 3:21 41:20 42:3 heck 9:14 heightened 39:20 40:17 41:16 50:19 held 4:3 6:17,22 41:3 50:24 53:7 help 16:16 46:18 high 15:23 history 20:6 53:24 hit 37:9 hoc 49:23 50:2 holding 15:11 Honor 9:15 23:21 30:15 51:16 Honor's 38:13 hope 9:4 22:7 hostile 33:17 hostility 53:4 hour 9:3 38:24</p>	<p>40:13 57:10,12 Howards 1:7 3:4 5:20,20 32:19 35:19 44:3,6,8 44:10,17,21 45:7 46:25 48:24 52:22,23 52:24 Hub 14:24 Hunter 32:14 hurt 48:10 hypothesis 22:14 hypothetical 9:21 hypotheticals 21:9</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ideas 37:21 identified 28:11 28:12 illegitimate 17:17 19:22,24 24:9 26:22 29:11 illicit 22:14 imminent-threat 13:22 immune 23:13 47:7,9,15 56:23 immunity 4:11 4:22 13:15,18 13:23 14:11,13 14:15,17,18,21 14:22 15:7,16 20:4,5 24:12,13 41:16 import 35:16 important 11:9 13:19,24,24 15:12,22 23:8 24:20 56:16 importantly 5:19 importing 31:8 inches 43:11</p>
---	---	---	---	--

<p>incident 15:17 incidental 33:6,8 include 17:1 including 24:20 31:13 incredibly 51:15 indicated 54:8 indication 5:13 individual 7:10 20:6 25:17 26:7 37:4,11 individuals 17:8 23:23 31:14 infer 29:10 42:18 42:20 inferring 29:23 inform 16:16 26:2 information 26:25 43:20 initiated 8:16 injustice 53:16 inquiry 30:20 31:10 35:9 inside 37:16 institutes 23:12 intelligent 18:17 intensity 26:1 intent 38:13,13 50:10 52:14 intentional 52:15 interaction 29:18 interactions 27:13 29:13 interested 10:25 42:3 intuition 52:1 intuitions 26:18 invitation 44:7 inviting 45:15 involve 29:4 involved 7:5 32:4 52:12 involving 32:13 Iqbal 39:21</p>	<p>40:17 50:19 Iraq 32:22 44:14 52:4 irrelevant 35:5 45:6 issue 3:10 7:18 7:19 8:18 20:5 28:6 30:17 35:5 55:1,20 issues 24:1 35:4</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jail 57:11 jaywalker 55:24 jaywalking 8:25 10:6,7 11:12 21:2 51:18 56:3 job 33:14 36:7,10 48:8 56:17 jobs 54:18 JR 1:3 judges 14:24 judging 47:22 judgment 50:20 50:23 51:4,6,7 judicial 14:7 June 13:10 15:7 juries 52:12,17 53:16 jurisdictions 21:12 jurisprudence 35:4 56:5,6 jury 18:8 26:21 50:15 53:8 55:15,16 Justice 1:19 3:3 3:8,19 4:23,24 5:1,3,7,15,23 6:3,4,9,13,17 7:1,14,21 8:19 8:21 9:7,11,16 9:19,20,24,25 10:11,24 11:2,8 11:12,17 12:7</p>	<p>14:10,14 16:1,3 16:8,25 17:3,19 17:24 18:23 19:2,10,24 20:3 20:10,14,16,22 21:10,21,24 23:9,10,20,22 24:11,14,24 25:21 26:24 27:5,9,10,16 27:21 28:3 30:8 30:21 31:18,22 32:2 33:1,4,8 33:16,21 34:1,4 34:10,19,23 35:6,15 36:2,7 36:10,13,17 37:1,6,19,23 38:3,7,19 39:9 39:25 40:6,10 40:19 41:4,19 42:6,6,9 43:14 43:22 44:23 45:2,14,15,16 45:21,25 46:10 47:6,20 48:7,12 48:15,18,21 49:1,5,7,10,14 49:19 50:12,15 50:21 51:5,10 51:20 53:1 54:2 54:21 55:9,17 57:19</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN 11:2 keep 27:6 Kennedy 3:19 17:19,24 24:11 24:14,24 killed 25:18 36:5 36:21 killing 48:16,18 kind 14:14 18:1 24:5 26:3,18</p>	<p>30:2 56:11 kinds 8:25 18:6 18:15 27:13 39:8 53:20 know 8:9 9:14,17 15:20,20 20:4,7 21:2,12,23 26:25 27:4,10 27:13 31:2,3,10 32:21 36:14 38:12 39:2 40:23 41:8,20 41:22 42:25 43:22 49:15 51:17 52:10 53:6 54:6,14 55:10,14,21 knowing 52:15 knowledge 43:23 53:23 knows 40:21</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>land 53:20 Lane 1:22 2:10 31:19,20,22 33:3,6,11,20 33:24 34:3,9,21 35:2,9 36:6,9 36:12,16,25 37:5,9,22,25 38:6,10 39:6,14 40:5,8,15,25 41:10 42:5,8 43:3,21 44:1 45:1,3,20,24 46:4,18 47:14 48:6,11,14,17 48:20,23 49:3,6 49:8,12,15,21 50:14,18,23 51:8,13 52:9 53:11 54:6,24 55:14 Laughter 9:6</p>	<p>34:18 51:12 54:23 law 4:20 12:12 13:10,16 15:16 16:14 19:15 21:18 26:4,5,18 29:17,17 30:3 33:7,24 36:19 56:17,19 laws 56:2,3,3 lawsuit 3:13 37:2 41:12 56:23 leaders 12:14 Lee 43:10,12 left 4:8 8:6 36:3 legal 57:10 legitimate 16:21 17:10,15 19:20 24:8 26:23 29:25 51:24 legitimately 12:21 13:6 18:10 19:16 25:5,15 28:25 46:14 letting 33:13 let's 43:3,14,23 48:20 52:3 level 12:23 13:7 15:23,24 28:5 35:9 46:22 Lex 21:18 LEXIS 32:7 54:7 liability 26:7 39:3 liable 4:4 53:7 lie 36:23 lied 3:17 4:1 5:20 34:5 44:25 48:12 49:14,20 lies 34:14 life 20:19 42:17 life-or-death 13:21 light 6:5 44:24 limit 17:6 57:11</p>
--	---	--	--	--

<p>57:12 limitations 32:7 32:10 limited 21:13 32:9 42:22 limiting 51:19 line 45:21,23,24 lines 50:8 listen 46:20 literature 10:1 litigants 53:13 litigated 54:11 litigation 22:23 39:18 51:1 litigious 39:14 litter 56:2 litterbug 55:22 56:7 little 3:19,20 21:3 32:4 location 44:16 long 6:13 51:6 long-term 29:4 look 15:23,23,24 19:24 21:17 26:7 35:14 39:6 43:3 45:4,8 54:7 looked 15:18,19 27:16 32:21 45:10 looking 21:17 34:11 50:8 52:5 looks 52:4 lose 55:15,22,24 lost 54:21 lot 17:7 43:23 47:23 49:10 lottery 23:3 lying 5:5 45:3 53:5</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>main 29:18 56:22 making 16:20</p>	<p>19:3 20:1,11 21:3 32:17 mall 33:12 manifest 25:6 manufactured 18:16 mapped 31:5 March 1:10 margins 13:24 26:16 marshals 17:1 matter 1:12 6:14 7:8 19:3 30:21 36:18 57:22 mean 8:24 20:7 20:16 33:21 39:10,14 40:11 40:15,20 43:18 46:6 47:10,22 48:2 51:14 52:2 52:6 53:11 54:25 meaning 11:19 43:16 means 50:12 52:11 measure 31:5 mentioned 42:16 mere 4:14 merely 44:13 meritless 51:1 metal 37:17 mile 57:10,12 miles 9:3 38:24 40:13 millions 21:25 mind 26:17 27:24 30:13 31:11,16 35:1,5,7,14 45:5,9,9,10,11 45:12 50:2 51:23 53:6 minds 5:14 49:16 49:21 mine 22:20</p>	<p>misdemeanor 10:2 misdemeanors 10:5 mistaken 26:20 money 3:15,24 monitor 49:8 months 13:13 14:8 Moore 4:8 morphed 35:24 motivated 38:12 38:14,16 motivating 10:21 motivation 19:4 25:12,13 29:12 29:23 motivations 52:8 motive 3:17 4:1 7:9 17:18 42:11 42:21 motives 22:14 mourning 36:15 multi-faceted 34:21,24 murderer 41:13</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 Nation's 12:14 natural 17:8 30:23 nature 15:19 26:1 39:19 necessarily 40:8 need 7:5,12 10:14 24:3 32:17 47:3 53:21 needs 11:3 56:9 negligent 52:16 neither 23:11 nervous 21:3 48:3 nervousness</p>	<p>21:5 never 6:17,22 9:13 35:18,18 49:21 56:10 nice 50:7 Ninth 15:8 nobody's 36:14 48:8 noise 3:20 non-protected 34:7 normal 10:18 normally 9:1 noted 14:4,23 notice 8:5 44:21 no-probable 18:21 no-probable-c... 17:25 23:7 30:6 57:7 number 54:10 57:10 numerous 33:13 43:13</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 object 14:5 27:24 objective 6:16 18:20 23:6 24:4 24:21,22 28:17 30:5,19 31:12 49:25 50:6,6 obligation 53:9 obvious 22:5 occurred 42:13 44:2 occurring 51:2 occurs 43:12 53:17 offense 31:10 56:1 offered 31:25 officer 5:8 6:1 7:7,25 9:18</p>	<p>10:4 20:7 23:15 26:3,6 29:18 30:1 31:7,11 39:1,10 40:12 41:1,6 43:17 46:2,20 47:4 50:10 57:8 officers 5:10,14 5:16 10:15 11:8 11:19 12:11 16:15 19:12 26:16 46:12 56:2 officer's 14:25 31:16 50:2 51:23 official 27:22 officials 27:2 oh 8:5 9:13 19:5 36:14 48:9,9 Ohio 37:13 okay 9:25 11:1 36:7 37:1 38:5 47:13,20 49:3,7 once 14:21 19:11 42:18 one's 30:13 one-time 29:18 29:22 on-street 56:21 57:6,7 opaque 37:15,16 open 4:8 37:14 opening 3:21 opens 49:4 opinion 5:5 22:4 23:22,25 opponent 55:12 opposed 18:12 oral 1:12 2:2,5,9 3:6 16:4 31:20 order 12:22 13:7 13:21 14:2 18:13 48:17 ordinarily 25:9</p>
--	---	---	---	--

<p>ordinary 18:24 25:7 46:12 ostensibly 56:2 57:9 outer 26:16 outlined 8:13 outside 45:22 outweigh 21:7 22:17 overcomes 6:22 overheard 36:3 overhears 25:17</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 32:5 parse 52:8 part 25:3,3 35:2 37:10 45:19 particular 12:21 12:22 15:1 16:10 17:7,21 20:7,23 particularly 13:23,24 pat 33:13 37:16 47:3 patdown 47:15 pats 49:3 patted 32:24 47:18 pattern 29:3 people 8:22,23 19:3 20:18 33:13 48:2,16 49:10 51:25 53:14 54:4 perceive 37:14 perform 9:22 performing 16:15 period 27:1 29:13 53:25 permit 10:16 21:12</p>	<p>persecution 20:6 persecutions 21:2 person 7:25 8:16 18:12,17 25:20 34:2,13,20 38:20 41:10 46:17 personal 3:15,23 39:3 52:21 personally 4:3 53:7 pertain 53:22 Petitioners 1:5 1:17,21 2:4,8 3:7 16:6 22:11 Petitioner's 16:20 Phelps 51:16 pick 16:19 picked 40:2 picket 6:19 picture 23:14 piece 23:20 place 24:21 49:11 plaintiff 10:13 plaintiffs 39:15 plan 23:2 plausible 38:23 play 23:23 pleading 39:20 40:17,21 41:16 50:19 please 3:9 16:8 31:23 point 6:20,21 7:9 10:23 16:11,19 19:10 22:4,5,23 28:2 32:23 35:2 39:1 43:8 44:18 44:24 47:21 49:13,18 54:13 pointed 35:17 points 5:15</p>	<p>police 6:18 7:7 10:14 11:8,19 12:11 14:25 38:21 39:1 40:4 40:12,22 41:1,6 46:1,2,12,19 57:8 policemen 8:23 10:6 18:24 policies 32:22 33:18 34:13 44:14 policing 18:24 political 8:3 41:21 42:20 politically 8:1 posed 28:3 poses 37:4 46:23 posit 7:19 52:19 possibility 23:3 post 49:23 50:2 potential 4:13 26:7 potentially 26:20 27:7 power 10:16 16:24 precise 31:3 precisely 25:6 predated 29:14 prepared 3:11,12 8:9 presence 42:20 present 26:3 presented 15:1 presents 46:17 president 3:12 3:18 4:2 5:11 7:4,5 12:18,19 20:20 25:18 32:20 33:12 34:6,14 35:23 36:4,8,14,21 41:20 42:23 43:11 44:12,13</p>	<p>44:22,25 45:3 45:12 46:15,16 48:4,5,13,16 52:22 53:5,10 54:4,5 Presidents 54:22 President's 42:17,18 pretty 47:24 prevent 51:1 primary 15:8 principal 1:18 11:11 16:11 principled 11:3 principles 25:8 prior 29:19 prison 39:18 probable 3:13 4:5,12 5:1,2,4 5:25 7:23 8:7 10:20 11:10,13 11:14 12:3 14:20 24:18 30:9,11,12,20 30:24 31:9 42:12,19 43:5,6 43:8 45:6,23 47:3 49:12,25 50:4 55:25 56:21 probably 6:5 32:16 52:11 problem 17:13 20:18,18,19,23 24:6 26:13,14 32:1,12,15 33:11 37:4,7,10 39:15 53:12,19 54:17 56:8,11 problems 53:18 procedure 50:25 51:4 proceeded 15:15 proceeds 43:9 produce 42:22</p>	<p>proliferation 22:6 proof 24:19 proposed 45:22 prosecute 9:12 57:3 prosecution 8:16 18:2 22:13 23:18 24:2 28:14,20,22 42:13 prosecutions 8:22 9:8 30:7 46:7 prosecutor 23:12 23:13 56:24,25 prosecutors 9:12 22:13 57:2 prospect 14:7 protect 7:5 10:14 18:12 36:8 53:10 protected 7:10 41:17 protecting 12:13 12:18 20:18,19 41:18 42:23 protection 24:18 24:20 25:1 56:10 protective 4:10 9:23 12:13 13:20 14:20 16:16 17:4 19:13 27:2,22 32:9 43:10 protester 46:21 46:23 47:17 prove 10:20 38:11,15 41:23 41:23 44:24 57:15 providing 12:11 public 12:14 17:9 19:13 20:19</p>
--	---	--	--	---

<p>28:12,20 29:3 30:4 publicity 27:14 publicly 44:15 45:13 pulled 38:22 40:1 punish 38:16 55:6 purely 31:15 purpose 25:13 put 28:9 38:20 41:5,6 54:19 putting 47:20 p.m 57:21</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified 4:11,22 13:15,18,22 14:13,15,17 15:7,15 41:16 question 4:7 5:10 7:3 11:6 12:6,8 12:10 18:3,19 21:5 22:9 28:3 28:18 29:21 30:9 32:2 34:21 57:2 questioned 57:1 questions 8:13 16:12 18:5 35:15 40:16 45:15 57:17 quite 23:21 30:14 53:12 quiver 37:13 39:7 quo 56:12</p> <hr/> <p style="text-align: center;">R</p> <p>R 1:16 2:3 3:1,6 race 24:12,21 25:7,8,11,12 25:12 racial 38:4 raise 41:11</p>	<p>rare 42:11 rationale 49:23 reach 33:9 reached 8:6 react 17:10 43:2 reacting 26:8,9 read 12:1,1,4 15:13 ready 42:5 real 6:18 57:13 really 24:3 32:11 39:16 53:19 reason 4:16 5:9,9 5:25 6:14,18 7:2 8:17 13:14 19:5 23:16 25:4 25:8 31:2 34:23 38:4 40:2 42:4 47:18 53:1 54:19 57:14 reasonable 34:16 35:7 38:1 47:1,4 48:24 reasons 4:3 5:17 23:10 24:6 28:21 reckless 52:16 recognize 37:7 record 54:2 recover 10:14 reference 21:16 referred 42:9 refused 4:16 regard 13:4,17 15:6 regarding 53:25 regardless 4:19 13:8 17:20 regards 9:21 Reichle 1:3 3:4 5:19 31:7 44:5 44:5,7,8,11,18 44:20 45:7 55:12 Reichle's 45:5</p>	<p>relationship 29:4 29:20,22 relevant 5:21 23:21 25:9 relied 15:8,10 remedy 7:11 remember 11:10 remotely 32:14 reported 32:9 repository 54:14 require 12:3 required 4:6 5:17 requirement 17:25 18:21 30:6 57:7 requirements 41:16 requires 50:19 requisite 13:20 research 27:17 reservation 24:25 respect 6:9,11 6:18 10:4 23:19 respects 23:21 Respondent 1:23 2:11 3:14,23 31:21 response 7:13 17:16 26:4,19 28:3 30:3 44:12 results 26:14 53:16 retaliation 6:19 7:9 27:19 28:11 38:11 41:12 42:21 47:8,15 47:19 51:24 53:9 retaliatory 3:13 3:16 4:1,6,14 4:15,17 6:23 7:24 8:17 18:1 18:22 21:11 22:13 27:3</p>	<p>28:14,19,20,22 32:8 35:13 41:15 46:7,8 53:25 54:3,11 retirement 23:2 review 15:12 Ridner 14:24 right 6:24,25 7:1 11:21 15:19,24 16:2 21:4 34:2 34:8,22 35:3,9 36:6 46:20,25 48:1,21 49:3,20 50:4 55:13,22 55:24 rights 15:22 38:24 risk 5:22 41:22 road 57:8 ROBERTS 3:3 4:24 16:1,3,25 17:3 31:18 34:1 34:4,10,19,23 35:6 38:19 39:9 39:25 40:6,10 41:4 49:19 51:5 51:10,20 53:1 57:19 room 13:21 roughly 21:19 rule 4:20 7:6,6 16:12,13,17 17:19 19:12 20:3 21:7 22:10 22:17,20,21 23:17 24:4 25:10 28:5,17 31:12 36:19 54:19 rules 32:18 50:25 51:3 53:21 run 22:20 46:7 53:19 rush 41:14</p>	<hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 sacrifice 55:21 saw 43:12,17 52:21,22 saying 7:2,22 9:25 12:2,4,22 13:7 19:25 37:7 38:6 40:3 43:1 46:21 47:14,16 54:16 55:18 56:18 says 8:5,15,16 26:7 36:19,20 38:21 39:1 40:23 49:7,24 52:3 Scalia 5:23 6:3,4 6:9,13 9:11,16 18:23 19:2,10 25:21 33:1,4,8 33:16,21 37:19 37:23 38:3,7 40:19 47:6 54:21 scene 15:1 18:4 18:17 35:18,21 50:11 52:24 science 32:4 scientific 32:3 54:12 scores 22:1,2 screen 24:21,22 screening 18:20 23:7 30:5 scrutiny 40:17 SEAN 1:16 2:3 3:6 search 21:15,18 27:24 32:3,6 54:9,17 seat 57:13 second 4:9 5:18 11:7 12:5,9 43:15</p>
---	---	--	---	---

second-guessed 15:5	16:18,21 17:6 19:14 25:16,19	13:25 19:15 20:15 22:15	38:12,17 47:16 47:19 55:7,23	stay 44:15
second-guessing 14:8,25	32:12,19 34:5 34:12,25 41:17	41:22 51:2	55:25	steadfastly 4:16
Secret 3:11,15	46:11,13 47:25	sketch 7:12	speech-suppre... 29:23	stepped 57:4
3:24 4:9,13	53:22,23 54:3	Skoog 15:9,9,13	speech-suppre... 29:12	steps 38:1 39:18 51:18
5:21 9:21 10:21	54:17,20 55:5	15:14,18,25	speed 57:11,12	Steve 44:10 48:24
11:4 12:10,11	56:9 57:9	snap 14:2	speeding 39:10	STEVEN 1:7
12:12,17,20,24	Service's 35:7	snatched 8:6	40:2	stick 41:2
13:4,5,14,19	set 22:12	Snyder 51:16	spoken 55:11	sticker 38:21,25 39:24 40:3,20
13:25 14:1,19	shaking 33:13	Solicitor 1:18	spot 15:4	40:23,24 41:6,9
15:3 16:10,14	shift 35:11	solution 31:24	SRI 1:18 2:6	57:14
16:17,21 17:6	shoulder 32:25	32:11 37:8,10	16:4	stop 5:24 37:11
19:14 25:16,19	33:9	54:16 56:8	Srinivasan 1:18	37:13 38:11,15
32:12,18 34:5	show 37:15 39:11	somebody 9:1	2:6 16:3,4,7	40:12,13 41:1
34:12,25 35:7	39:12 55:19	33:9,18 34:12	17:2,5,23 19:1	46:25,25 51:23
41:17 46:11,13	showed 43:16	48:10 50:3	19:9 20:2,9,13	stopped 6:1
47:25 53:22,23	shows 32:9	51:18 56:7	20:21 21:4,14	39:23 40:21,24
54:3,17,20 55:5	side 28:20,21,23	someone's 14:3	21:23 22:1	50:16
56:9 57:8	29:2 40:25	son 34:11	23:19 24:13,15	stopping 37:3
security 51:24	sidewalk 56:3	sorry 33:3	25:3,25 27:4,7	story 57:5
see 9:7 20:17,17	side-stepped 8:18 51:17	sort 12:25 17:16	27:12,20,23	strange 30:14
20:18,19 21:18	sign 6:20	19:13 20:4 21:8	30:15 31:2 54:8	stringent 24:22
22:6 34:12 38:7	significant 32:15	21:17 29:7 31:8	stake 42:17,18	strong 7:4 42:11
43:2 48:20 52:3	44:9 53:19	32:18 52:6	56:19	42:21 55:12
56:8,9	similar 12:25	Sotomayor 9:24	stand 18:7 41:7	subject 4:13 7:18
seeks 3:14,23	16:15 23:4	10:11 11:8,12	standard 9:10	18:18 26:6,19
selective 24:12	similarly 13:5	11:17 12:7	11:15 21:18	36:11
sense 16:14,17	31:14	21:10,21,24	28:11 29:3	subjective 30:20
18:19 19:11,15	simple 14:6	43:14,22 44:23	39:21 47:2 50:6	31:9 35:14
21:10 22:10	42:20	45:2,14,21,25	50:20,24 51:4	50:10 52:14
25:19 28:16	simply 40:18	sounds 7:11 8:8	standards 14:6	submitted 57:20
29:2,10,13 30:3	47:4,16 55:20	Souter 23:10	50:7	57:22
30:19	56:18	Souter's 23:22	standing 43:10	sudden 41:8
serious 55:1,1	single 41:10	speak 48:1,2	start 16:9 20:11	sued 56:24
56:11	sit 52:2 57:17	special 32:18	started 54:16	sufficient 28:15
serves 25:13	situated 31:14	specific 23:10	state 5:12 31:4	sufficiently 14:6
Service 3:11,15	situation 5:22	specifically 53:22	35:25 39:13	suggest 11:8
3:25 4:9,13	10:19 13:1,3	specified 11:15	40:1	42:1
5:21 9:22 10:22	15:2,3 19:7	spectrum 28:10	statement 3:21	suggesting 14:10
11:4 12:10,11	23:24 30:2,11	28:19	5:8 6:20	14:12 22:11
12:12,17,20,24	46:11 47:24	speech 11:21,22	States 1:1,13,20	suit 23:12 26:20
13:4,5,14,19	49:2,2 55:3	12:16,20 24:9	2:7 16:5 42:24	summary 50:20
13:25 14:1,19	situations 13:22	25:2 28:25	status 56:12	50:23 51:4,5,7
15:3 16:10,14		29:11 30:1		

support 39:23 42:12 44:19	51:9	33:18 34:16	treating 10:2	unscientific 21:15
supported 40:16	talks 10:1	35:16 37:6,9	trial 8:5 18:7	unwanted 33:5
supporting 1:20	tapped 32:24	39:6 42:2,14	40:7,9,11 41:2	33:23
2:8 16:6	tell 33:21 36:22	44:19 56:19	50:13,17 52:12	use 10:15 21:15
suppose 42:15	telling 33:14	thinking 48:3	52:19 53:15	37:3
55:10	tells 33:18	third 4:19	55:6,10,11,13	U.S 3:15,24 4:9
supposed 24:17	Tenth 5:3 7:16	thought 28:14	55:15,16,20	17:1
48:22,23	7:16 15:9,10	35:24 43:18	57:16	
suppress 17:18	35:11 43:4	threat 12:23 13:7	trials 55:16	<hr/> V <hr/>
18:13 19:22	49:23,25	14:3 17:16	true 51:3	v 1:6 3:4 14:24
24:8,10 26:11	term 14:23	18:11 19:22	try 34:22	15:21 32:14
26:22	termination 29:9	37:14 46:22	trying 18:12 21:8	37:13 51:16
Supreme 1:1,13	terms 46:22	48:20,25	34:24 43:1	vast 10:15
sure 3:22 9:2	54:11	three 3:24 4:2	turns 34:11	vehemence 26:1
10:10 11:23	Terry 37:13 38:1	ticket 10:8 39:2	55:10,11	Vice 3:12,18 4:2
21:24 22:1 48:6	38:11,15 46:25	39:11 40:2	two 3:15,24 5:15	5:11 7:5 12:19
surrounding	47:2,4,15	tied 23:17,18	12:1 23:10,21	25:18 32:20
27:14 43:7	test 5:24	till 8:7	23:23	33:12 34:6,14
surviving 14:7	testified 43:12	time 4:21 8:22	two-individual	35:22 36:4,8,21
suspect 29:19	44:3,10,17	9:16,16 15:17	13:3	43:11 44:12,13
51:25	49:22	18:8,9 21:15	type 14:17 51:25	44:21,25 45:3
suspected 31:6	Thank 16:1,2,7	29:5 32:7,10	<hr/> U <hr/>	45:12 46:16
swear 47:23	31:17,18,22	34:7 35:1,8	underlied 5:4	48:4 52:21 53:4
sweeps 7:11	57:18,19	38:22 41:13	understand 4:25	53:10 54:5
<hr/> T <hr/>	theoretically	51:7	7:21 10:1 19:11	vicinity 46:15
T 2:1,1	41:10 53:11	times 39:11 56:6	19:14 21:4 23:8	Vietnam 55:12
tagged 56:14,15	theory 38:20	today 3:10	36:17 45:14	view 4:12 6:20
tail 6:4	43:23	told 43:19	47:7 48:2 54:25	6:21 7:9 17:21
taillight 30:10	They'd 27:6	tort 12:3	understanding	47:21 51:22
take 3:11,12	the-board 22:17	torts 38:14	16:13	viewpoint 18:14
8:25 13:6 16:11	thing 26:11 48:7	total 54:12	understood	19:23 24:10
16:22 19:16,25	51:20 52:1	touch 33:9 36:22	43:18	26:22
30:1 32:4 35:16	things 9:1 38:9	touched 3:17 4:2	undertakes 29:8	views 20:24,25
37:25 43:3	39:12,19 53:14	34:6 36:23	44:15	26:9,10 41:21
46:14	54:4	48:13	undisclosed	53:4
taken 25:5,15	think 5:11,18 6:8	touches 34:13	44:15	violated 38:23
28:25 39:17	7:14 9:20 10:23	touching 33:5,23	undisputed 44:24	violating 11:18
55:5	15:2 16:13 17:7	43:19 44:25	unfortunately	violation 5:5
takes 33:4	17:23 18:3,18	53:4	20:25 51:9,13	11:21 35:10,20
talk 44:5,7,11	19:14 20:9,21	track 27:6	unique 11:3	37:20,24 43:5
talked 42:11	22:9 23:4,8,9	traditions 57:1	27:11	45:10 50:9
talking 17:4 19:7	23:20 24:2,16	trample 10:17	United 1:1,13,20	violations 57:10
22:3 48:16 51:7	25:3,7,25 27:14	11:9	2:7 16:5 42:24	VIRGIL 1:3
	28:8,21 31:5,8	treat 10:21	unpopular 6:20	Virtually 12:17
	31:24 32:1,22	treated 31:15	6:21 20:24	

voicing 45:18	54:21	14 8:1		
<hr/> W <hr/>	whatsoever 32:7	15 32:9 53:24		
walk 52:24	32:10 36:1	54:12		
walked 32:20	white 51:22	16 2:7		
walking 51:19	Whren 24:17,25	1983 32:8		
wand 37:17,17	win 8:10 23:3	<hr/> 2 <hr/>		
wandering 34:10	55:19,20	2006 4:20 13:10		
34:16 52:4 53:5	wondering 34:15	13:10,12 15:8		
want 20:3,10	word 19:25 20:1	46:6		
22:19,21 25:22	words 32:8 44:16	2012 1:10		
28:2 32:21 43:2	47:23 55:11	21 1:10		
44:5,11,14	work 25:14 29:12	25 21:17		
wanted 7:3 26:10	29:24 56:13	<hr/> 3 <hr/>		
wants 57:9	worked 56:13	3 2:4 13:13		
war 52:3 55:12	working 56:20	30,000-foot		
warrant 16:23	world 25:19	15:23		
17:11	wouldn't 7:23	31 2:11		
warranted 26:19	17:6 22:7 27:6	<hr/> 4 <hr/>		
30:3,11	37:19,23	400 54:9		
warrants 17:16	wrong 53:7,16	450 21:19		
26:4	wrongly 53:14	<hr/> 5 <hr/>		
Washington 1:9	<hr/> X <hr/>	5 27:1		
1:19	x 1:2,8	55-mile 9:3		
wasn't 5:9 25:12	<hr/> Y <hr/>	<hr/> 6 <hr/>		
30:23 50:2	year 21:22	60 9:3 38:24		
watch 49:9	years 14:8 21:17	65 40:13		
way 4:12 8:10	27:1 41:17 56:5	<hr/> 8 <hr/>		
11:3 12:15,15	<hr/> Z <hr/>	8 32:6		
26:8 27:25,25	zone 9:4 12:16			
28:8 35:22 41:4	<hr/> 1 <hr/>			
51:8,11,14 54:6	1 57:10,12			
55:6 56:18	10 8:14 11:25			
ways 12:1	23:4			
weak 42:12,19	100 21:19 41:17			
wearing 10:12	54:8 56:5			
57:13	1001 5:5,5,9,14			
Wednesday 1:10	30:10,13 35:19			
weed 39:8	35:25 43:5 45:9			
weigh 23:5	11-262 1:5 3:4			
went 44:18	11:31 1:14 3:2			
weren't 26:8	12:30 57:21			
Westlaw 54:7	13 32:5			
we're 29:16				
we've 45:11				