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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES ANDREW FOWLER, AKA MAN, :

Petitioner :

v. : No. 10-5443

UNITED STATES :

- - - - - x

Washington, D.C.

Tuesday, March 29, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:22 a.m.

APPEARANCES:

STEPHEN M. CRAWFORD, ESQ., Tampa, Florida; on behalf of Petitioner.

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	STEPHEN M. CRAWFORD, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	SARAH E. HARRINGTON, ESQ.	
7	On behalf of the Respondent	23
8	REBUTTAL ARGUMENT OF	
9	STEPHEN M. CRAWFORD, ESQ.	
10	On behalf of the Petitioner	53
11		
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

(11:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 10-5443, Fowler v. United States.

Mr. Crawford.

ORAL ARGUMENT OF STEPHEN M. CRAWFORD

ON BEHALF OF THE PETITIONER

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

There is a significant disagreement between the circuit court over what the government must prove beyond a reasonable doubt to establish the violation of Title 18, United States Code, section 1512(a)(1)(C). This qualifying Federal criminal statute must be construed clearly, consistently, and narrowly. Yet, the Eleventh Circuit's opinion in this case conflicts with the rulings in factually similar cases: From the Second Circuit, Lopez, and the Fifth Circuit, Causey and other circuit precedent. More specifically --

JUSTICE SCALIA: Are they all consistent?

MR. CRAWFORD: It would be our opinion they are all inconsistent, which is what we need from this Court, Your Honor.

The Eleventh Circuit erred by placing the

1 word "possible" in the statute and, thus, significantly
2 modifying the plain language of the statute, and by
3 proposing a standard of mere possibility --

4 JUSTICE KAGAN: Mr. Crawford, what's your
5 standard? Sometimes you say "certain"; sometimes you
6 say "likely"; sometimes you say "plausible." Which --
7 which is your standard?

8 MR. CRAWFORD: Justice Kagan, we would offer
9 the standard of realistic likelihood, which we cited in
10 our brief on page 17 and page 41, as the appropriate
11 standard in this particular case. That is language that
12 comes from Lopez, the Second Circuit case, and also
13 places a higher burden on the government, which we
14 believe is important in order to maintain the
15 Federal/State balance that is required in Federal
16 criminal matters.

17 It is a reasonable standard, more reasonable
18 than what we would characterize the governor's -- the
19 government's standard of "reasonable possible." In
20 their brief, page 9, 10, and 13, they propose that,
21 which, we would add, differs from what the Eleventh
22 Circuit said.

23 If you'll remember, in Lopez, the Eleventh
24 Circuit offered the standard "possible." And yet, the
25 government, backing away from that a bit, in their

1 briefs, on page 9, 10, and 13, used the phrase
2 "reasonably possible." And while we would concede it is
3 an improvement on the Eleventh Circuit's mere
4 possibility standard, it still is vague. It still
5 upsets the --

6 JUSTICE ALITO: The statute speaks of the
7 intent of the defendant. The defendant must intend to
8 prevent the communication of information about a Federal
9 offense or a possible Federal offense to a law
10 enforcement officer who happens to be a Federal law
11 enforcement officer. So, it's all a matter of intent.

12 Where do you get this question of whether
13 it's possible or likely or certain or whatever that the
14 information will eventually get to a Federal law
15 enforcement officer? Isn't it -- isn't it simply what
16 is in the mind of the defendant?

17 MR. CRAWFORD: We believe that
18 subsection (g) of the statute precludes the -- or takes
19 the mens rea element of the defendant off the table with
20 respect to whether or not the person is a law
21 enforcement official or whether or not there's an
22 ongoing Federal criminal investigation.

23 We would agree with you that the law does
24 require that the defendant intend to prevent a
25 communication. The Eleventh Circuit puts the word

1 "possible" in there and says intent to prevent a
2 possible communication. And that's the rub, Justice
3 Alito, that we're asking this Court to address.

4 JUSTICE SOTOMAYOR: Going -- going back to
5 Justice Alito's question: Obviously, the statute's not
6 written to say the intent to preclude a witness from
7 talking to law enforcement officials. If it were that
8 simple about a Federal crime, then it wouldn't matter
9 whether it was likely, possible. All that we have --
10 know is that the witness was -- that the killing was
11 intended to stop them from talking to law enforcement,
12 period. So, clearly, (g) has to have a meaning
13 different than merely stopping from someone talking to a
14 law enforcement officer, because there has to be some
15 connection to that officer being a Federal officer.

16 So, going back to Justice Alito's question,
17 how do you define the intent? What is the defendant's
18 intent? If he doesn't have to know it's a Federal
19 officer, what does he have to intend?

20 MR. CRAWFORD: We believe that you define or
21 would find -- determine the defendant's intent based on
22 the circumstances and the totality of the circumstances
23 of the case.

24 JUSTICE SOTOMAYOR: Articulate what the
25 intent has to be.

1 MR. CRAWFORD: The intent would have to be a
2 realistic likelihood that there's going to be
3 communication.

4 JUSTICE SOTOMAYOR: Does the defendant have
5 to know that? That's my question. Does he have to
6 intend to stop the witness from communicating this
7 information to someone that's related to either a
8 Federal judge or a Federal law enforcement agent?

9 MR. CRAWFORD: Yes, Your Honor. That is the
10 gravamen of the offense. That intent element is
11 essential.

12 JUSTICE ALITO: What do you say that is --

13 JUSTICE SCALIA: What does that have to do
14 with reasonable likelihood that it would occur? I mean,
15 he either intends it or he doesn't intend it. What --

16 MR. CRAWFORD: The --

17 JUSTICE ALITO: The reasonable likelihood
18 that this person who was killed -- now, you say
19 "realistic likelihood."

20 MR. CRAWFORD: That is correct.

21 JUSTICE SCALIA: The realistic likelihood
22 that this person who was killed might have gone to a
23 Federal officer doesn't at all establish that the intent
24 of the person who killed him was to prevent him from
25 going to that officer, does it?

1 MR. CRAWFORD: We --

2 JUSTICE SCALIA: I mean, it seems to me you
3 have to stand on one stool or the other one. Either
4 it -- it relates to intent, as the statute says, or all
5 there has to be is a reasonable likelihood that this
6 person who was killed would have gone to a Federal
7 official.

8 MR. CRAWFORD: Well --

9 JUSTICE SCALIA: Which is it?

10 MR. CRAWFORD: It is our position that we
11 are trying to determine or the jury has to determine a
12 future act. The prevention of communication denotes the
13 future tense of the word "communicate." So, what
14 standard should we ask the jury to use in order to
15 determine whether the government has provided evidence
16 that there was going to be a future act prevented? And
17 so, it is --

18 JUSTICE SCALIA: No, no, that -- that's not
19 what the statute says. It doesn't talk about preventing
20 a future act. It doesn't say anyone who kills someone
21 who would have gone to a Federal official is -- is
22 subject to this penalty.

23 MR. CRAWFORD: Well, Your Honor, we
24 believe --

25 JUSTICE SCALIA: If that's what it said,

1 your -- your realistic likelihood test would be quite
2 reasonable, but it doesn't say that. It says that
3 the -- the killing has to be with the intent of
4 preventing him from going.

5 MR. CRAWFORD: The intent to prevent the
6 communication, the communication in the future is what
7 is modified by the word "prevent." And so, that's what
8 we're -- that's what we're struggling with, Your Honor.
9 We're trying to come up with a standard as to what --

10 JUSTICE KAGAN: Mr. Crawford, do you think
11 this is right, that the statute says that the person has
12 to prevent the communication to a law enforcement
13 officer? The statute also says that the law enforcement
14 officer, in fact, has to be a Federal law enforcement
15 officer, but because of subsection (g), the statute does
16 not require that the person intend the communication to
17 be to a Federal law enforcement officer, and that's what
18 we're struggling over, correct?

19 MR. CRAWFORD: That is correct, Your Honor.

20 JUSTICE KAGAN: And -- and in doing that --
21 I mean, I guess my question to you is the same as my
22 question to the Government, which is where any of these
23 standards come from. And I agree that the statute does
24 not provide a lot of guidance, but how does one pick
25 between a realistic likelihood or a possibility or a

1 theoretical possibility or any of those things?

2 MR. CRAWFORD: We would urge the Court to
3 pick a particular standard, if you're going to, to help
4 us interpret this statute that would strike the
5 appropriate balance between State and Federal criminal
6 jurisdiction.

7 JUSTICE ALITO: Well, why don't we pick the
8 standard that is set out in the text of the statute?
9 Let me give you this example:

10 Let's -- let's hypothesize a very cold,
11 calculating, rational defendant who is planning a
12 Federal crime, let's say the hijacking of an airplane
13 over international waters, and this defendant finds out
14 that his mother has learned about the plot. Now, he
15 says, well, you know, I think there's a one-tenth of
16 1 percent chance that mom is going to go to the FBI and
17 turn me in, but in order to prevent that, I'm going to
18 kill her. I intend -- I kill her with the -- for the
19 purpose of preventing her from going to the FBI, even
20 though I think very, very, very unlikely she's going to
21 do that.

22 Hasn't that defendant violated this statute?

23 MR. CRAWFORD: We believe the jury would
24 make that determination as to whether or not it was
25 likely, realistically likely that mom would report him

1 to Federal law enforcement officials. That's what we're
2 trying to do, is give the lower courts or the -- or the
3 jury --

4 JUSTICE KENNEDY: I don't -- I think Justice
5 Alito can protect his own question, but I don't think
6 you've answered it. You've put in realistic likelihood.
7 He's asked you whether or not as a matter of law,
8 assuming that you're a juror and you read the statute
9 and you were instructed on the words of the statute and
10 you have Justice Alito's hypothetical, what result?

11 MR. CRAWFORD: The result of the question of
12 intent? Or what are you asking the result of --

13 JUSTICE KENNEDY: The reliability under the
14 statute under Justice Alito's hypothetical.

15 MR. CRAWFORD: Then we would say, yes, that
16 the defendant could be found to have violated the
17 statute under that particular hypothetical.

18 JUSTICE KENNEDY: All right. Then Justice
19 Alito's next question -- again, he can protect his own
20 line of questioning -- but what does that have to do
21 with realistic likelihood? There's no realistic
22 likelihood; it was only a half of 1 percent chance that
23 the communication would be made. So, that takes
24 realistic likelihood off the table, and if it's off the
25 table, you have to give us a different test.

1 MR. CRAWFORD: Well, then, I would go with
2 the beyond a reasonable doubt that the government must
3 prove in any criminal matter.

4 JUSTICE BREYER: That's what I wondered.
5 You haven't really argued that, so maybe I'm missing
6 something, and this question may be better for the other
7 side, but this statute, as you go through it, has some
8 elements.

9 The first are facts about the world, killing
10 people; the second has to do with intent, and then they
11 talk about all these different things to stop him from
12 going to a Federal officer; the third says no state of
13 mind need be proved with respect to the fact he works
14 for the Feds. So, therefore, it's not part of intent.

15 Now, if it's a circumstance that is an
16 element of the offense and it is not part of the intent
17 of the defendant, then isn't it an element, like all
18 other elements, that you have to prove beyond a
19 reasonable doubt?

20 MR. CRAWFORD: We would agree. That is --

21 JUSTICE BREYER: You didn't argue it, so
22 nobody's ever adopted this, so I feel I might be barking
23 up the wrong tree. Now, I grant you, you're not the
24 leaf on the tree that's going to give me the answer I
25 need, which is why I'm wrong, but -- but did you --

1 you've researched this and haven't really argued this
2 point. So, why not?

3 MR. CRAWFORD: Well, we understand. And --
4 and we are assuming, of course, that all elements of the
5 offense have to be proven beyond a reasonable doubt.
6 What we've tried to do is provide the Court with some
7 sort of standard that the jury could be instructed as
8 how to prove that fourth element, and that is this
9 future communication.

10 JUSTICE SCALIA: You think a realistic
11 likelihood must be proven beyond a reasonable doubt?

12 MR. CRAWFORD: We do.

13 JUSTICE SCALIA: You think a juror can grasp
14 all of that in a juror's mind? You must find that there
15 is --

16 MR. CRAWFORD: I do, Your Honor. I
17 believe --

18 JUSTICE SCALIA: -- that there is a
19 realistic likelihood beyond a reasonable doubt?

20 MR. CRAWFORD: We believe that given the
21 proper instructions and definitions of the word
22 "realistic likelihood" --

23 JUSTICE GINSBURG: Suppose the -- suppose
24 the prosecutor argued a realistic prospect there. When
25 Gamble confessed, he confessed to the local police, and

1 they immediately communicated that information to the
2 Federal prosecutors. So, if that's what the government
3 counsel argues, wouldn't that be a realistic prospect --
4 wouldn't they likely have done the same thing with
5 respect to Fowler that they did with respect to Gamble?

6 MR. CRAWFORD: Well, I would answer that two
7 ways, Justice Ginsburg. Number one, that is not what
8 happened in the case below. Once Mr. Gamble decided
9 to -- 4 years after the killing of Officer Horner, to
10 talk to local law enforcement, it was not immediately
11 reported to the Federal law enforcement officials. It
12 was reported years later. So, we don't have that
13 immediacy.

14 JUSTICE GINSBURG: Was -- what was the time
15 sequence? How much after Gamble came to the local
16 police did the local police go to the --

17 MR. CRAWFORD: Officer Horner was found dead
18 on March of 1998, and he came forward to the local
19 police in 2002 after he was sentenced to 20 years on an
20 unrelated State robbery. There was then several years
21 before the U.S. Attorney's Office was contacted, and
22 they decided to go forward with the case that is before
23 us today.

24 JUSTICE GINSBURG: Several years after 2002?

25 MR. CRAWFORD: 2002 is when he came forward

1 and began talking to law enforcement.

2 JUSTICE SOTOMAYOR: When did they go to the
3 Federal authorities after 2002?

4 MR. CRAWFORD: I'm sorry?

5 JUSTICE SOTOMAYOR: When did they go to the
6 Federal authorities after 2002?

7 MR. CRAWFORD: 2003. Almost -- almost a
8 year afterwards it was -- it was taken over there.

9 CHIEF JUSTICE ROBERTS: What is -- what is
10 your position on the subsequent element or -- or feature
11 about relating to the commission or possible commission
12 of a Federal offense? Does the defendant have to know
13 that his actions to prevent communication involve an
14 underlying Federal offense?

15 MR. CRAWFORD: No, Your Honor, they do not.
16 You basically take your offense as you find them, just
17 as you take your officer as you find him, and we believe
18 that's the --

19 CHIEF JUSTICE ROBERTS: Why is that?
20 1512(g)(2) talks about with respect to the law
21 enforcement officer.

22 MR. CRAWFORD: Correct.

23 CHIEF JUSTICE ROBERTS: I would have thought
24 you'd say there's a negative implication that intent has
25 to be shown with respect to everything else, including

1 whether or not this is a possible Federal crime.

2 MR. CRAWFORD: Well, we -- we are willing to
3 concede that there was a possible Federal crime that was
4 occurring at the time of Officer Horner's death.

5 CHIEF JUSTICE ROBERTS: Are you willing to
6 concede that the defendant knew that?

7 MR. CRAWFORD: I'm willing to concede the
8 defendant -- it need not be proved that the defendant
9 knew that.

10 Now, if the government can establish
11 evidence of that, we believe that goes to the
12 defendant's intent and to a different element, but the
13 government need not prove that because we believe the
14 subsection (g) takes that off the table.

15 JUSTICE ALITO: The issue -- the issue here
16 is the sufficiency of the evidence. So -- so -- and the
17 question is whether a reasonable juror could adopt a
18 certain view of the facts.

19 Now, couldn't a reasonable juror in this
20 situation take this view of the facts? Your client
21 killed Officer Horner simply because your client didn't
22 want to go to jail. He didn't particularly care whether
23 he was going to be prosecuted in State court or Federal
24 court; he just didn't want to go to jail. So his intent
25 was to prevent the communication of information about

1 the crimes that were being planned to any law
2 enforcement officer who could send him to jail, and that
3 would include a State officer; it also would include a
4 Federal officer. And, therefore, there's a violation of
5 the statute.

6 Now, what's wrong with that view of the
7 facts?

8 MR. CRAWFORD: We believe, Your Honor, that
9 if that is the reading of the statute, that that would
10 basically federalize murder, that there is always going
11 to be some overlapping Federal crime that is possible,
12 or the possible commission of, and if that becomes the
13 standard or the reading or the interpretation of 1512,
14 then every case is going to be allowed to be
15 prosecuted --

16 JUSTICE SCALIA: I would think your answer
17 would be that if that were the law, (a)(1)(C) would have
18 omitted the word "Federal."

19 MR. CRAWFORD: I would agree.

20 JUSTICE SCALIA: It would have said "by any
21 person to a law enforcement officer." And you would --
22 you would eliminate "or judge of the United States" --
23 "information related to commission or possible
24 commission of a violation of the law," period.

25 MR. CRAWFORD: I -- I would agree with you.

1 The Congress sought or deemed fit to put the word
2 "Federal" in there twice, both a Federal offense and a
3 Federal official.

4 JUSTICE ALITO: No, because if there were --
5 if the only crimes that were being planned were State
6 offenses, then there would be no chance that -- that the
7 conveying of that information to a Federal law
8 enforcement officer would send the person to jail.

9 MR. CRAWFORD: Well, the problem, Justice
10 Alito --

11 JUSTICE ALITO: They're planning -- they're
12 planning to hold up a convenience store. It's not a
13 Federal offense; it's a State offense.

14 MR. CRAWFORD: Well --

15 JUSTICE ALITO: So, the person isn't going
16 to go to jail on a Federal charge.

17 MR. CRAWFORD: I'm not so sure that holding
18 up a convenience store would not qualify under the Hobbs
19 Act or under some other Federal statute that a
20 creative --

21 JUSTICE ALITO: Well, are you saying that
22 there is no possible offense that's only a violation of
23 State law and Federal law?

24 MR. CRAWFORD: There are.

25 JUSTICE ALITO: All right.

1 MR. CRAWFORD: But there needs to be proof
2 -- there needs to be proof more than just the mere
3 presence of a potential Federal offense. I believe in
4 the Third Circuit opinion of Bell, which, if I remember
5 it correctly, when you were serving on the Third
6 Circuit, you authored that opinion, that you set up a
7 standard that the Federal crime has to have additional
8 appropriate evidence in order to have a violation under
9 this statute.

10 That's the problem we have with this case,
11 is that we have Federal crimes -- we'll concede that;
12 the cocaine and the potential or conspiracy to rob a
13 bank -- but there is no additional appropriate evidence
14 to meet the standard here. So, using the opinion in
15 Bell, we would ask this Court to find that --

16 JUSTICE KAGAN: Mr. Crawford, what would
17 happen if you were dealing with a Federal offense that
18 was a distinctly Federal offense, that really didn't
19 have a State counterpart, like hijacking an airplane?
20 Would that itself be sufficient to support a prosecution
21 under this statute?

22 MR. CRAWFORD: It would be -- it would make
23 the government's burden easier, because it is more
24 likely than not, it is realistic likelihood that there's
25 going to be Federal involvement, as Justice Scalia

1 pointed out, on a case where it's a threat to kill the
2 President or hijacking or income tax, Federal income
3 tax.

4 JUSTICE KAGAN: Is that actually similar to
5 this case? These guys were going to rob a bank, which I
6 take it is mostly prosecuted by Federal officials.

7 MR. CRAWFORD: Well, I would agree with
8 that.

9 Certainly not in the State of Florida. I
10 would say that most State attorneys handle bank
11 robberies as much if not more than the Federal
12 authorities. But we would concede that bank robbery is
13 a Federal crime. That's why we need something more than
14 just Federal crime to confer jurisdiction.

15 We need Federal law enforcement involvement,
16 and we have nothing on this record that shows any
17 involvement of Federal law enforcement. And that's why
18 the case needs to be reversed. That's why the Eleventh
19 Circuit's standard of mere possibility is too broad, and
20 we're looking for a rule from this Court that will
21 narrow that and keep that -- that balance of Federal and
22 State criminal jurisprudence where it needs to be.

23 And, quite frankly, if there's no other
24 questions --

25 JUSTICE SOTOMAYOR: I have one last one, the

1 plain error question. Neither your brief -- I think
2 you're taking the position that simply because we
3 granted cert, we've accepted there's a plain error; is
4 that your position? Because you haven't really defended
5 against a finding of plain error.

6 MR. CRAWFORD: Well, the trial lawyer did a
7 poor job in articulating the reasons for the judgment of
8 acquittal.

9 JUSTICE BREYER: I take it you were not the
10 trial lawyer?

11 MR. CRAWFORD: Well, unfortunately, Judge, I
12 was. So, that's why I --

13 JUSTICE BREYER: Oh, you were?
14 (Laughter.)

15 MR. CRAWFORD: Did a poor job of
16 articulating the judgment of -- the judgment at
17 acquittal time, the reasons that the court should grant
18 it and quite frankly did disservice to the district
19 court judge, who we need to help out more. But --

20 JUSTICE SOTOMAYOR: So we're really --
21 granted cert to give an advisory opinion?

22 MR. CRAWFORD: No.

23 JUSTICE SOTOMAYOR: Because if there's not
24 plain error, how do we reverse this court below?

25 MR. CRAWFORD: Well, we believe that when

1 the argument was made at the Eleventh Circuit, that
2 whether the sufficiency of the evidence issue was raised
3 there, and the Eleventh Circuit chose not to rule on
4 that, but chose to rule on a statutory construction of
5 1512 -- that then, when this Court granted cert, that
6 basically took that issue off the table.

7 JUSTICE SOTOMAYOR: So, what you're
8 suggesting is that we announce the standard, hopefully
9 different than the courts below for your sake, and then
10 remand to then let the court apply the new standard?

11 MR. CRAWFORD: That is one possibility.
12 Or --

13 JUSTICE SOTOMAYOR: And if it's not, what's
14 the other?

15 MR. CRAWFORD: The other is, is to overrule
16 the Eleventh Circuit and with instructions to enter a
17 judgment of acquittal.

18 JUSTICE SOTOMAYOR: How could we do that
19 unless we found there was plain error? And how can we
20 say there's plain error when this question has vexed so
21 many courts?

22 MR. CRAWFORD: I don't know at this
23 particular point, but I do know that we have a problem
24 in the circuits, that the standards being applied are
25 across the board; and we need a bright line, hopefully a

1 bright-line rule, that will help us in the courts below
2 so we can do our job better.

3 JUSTICE SOTOMAYOR: I have to say to you
4 that even if a bright-line rule is announced, the real
5 work begins in deciding what evidence is sufficient to
6 meet that burden.

7 MR. CRAWFORD: Understood, but it's our
8 position that any of the rules that have been proposed,
9 except maybe the mere possibility, which is overbroad,
10 there still is nothing on this record that is going to
11 show a Federal law enforcement involvement or
12 communication to Federal law enforcement; and we're
13 going to win at any point. That is our fall-back
14 position on that.

15 JUSTICE BREYER: Anyway, you've made a fine
16 argument here, even if you didn't make it --

17 (Laughter.)

18 MR. CRAWFORD: Thank you, sir. I'll do
19 better next time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MR. CRAWFORD: Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Ms. Harrington.

23 ORAL ARGUMENT OF SARAH E. HARRINGTON

24 ON BEHALF OF THE RESPONDENT

25 MS. HARRINGTON: Mr. Chief Justice, and may

1 it please the Court:

2 When Congress enacted section 1512(a)(1)(C),
3 it sought to protect the integrity of Federal criminal
4 investigations and prosecutions. The statute requires
5 the government to prove four things -- an actus reus, a
6 mens rea and two Federal nexus elements, one of which is
7 at issue in this case. The actus reus is murder, the
8 mens rea that's common to every prosecution under
9 section 1512(a)(1)(C) is an intent to prevent the
10 communication of information to a law enforcement
11 officer. The first Federal nexus element requires that
12 that information relate to the commission or possible
13 commission of a Federal offense; and the second Federal
14 nexus element, the one at issue in this case, requires
15 that there's a reasonable possibility that the
16 information would have been communicated to a Federal
17 officer if the murder had not occurred.

18 JUSTICE KAGAN: Well, where does that
19 reasonable possibility standard come from, Ms.
20 Harrington?

21 MS. HARRINGTON: Well, it comes from trying
22 to construe all the different relevant provisions of the
23 statute to make sense together. Section (a)(1)(C)
24 specifies that a defendant has to have an intent to
25 prevent the communication of the relevant information to

1 a law enforcement officer; section 1515 tells us that
2 the law enforcement officer has to be a Federal law
3 enforcement officer, that's the definitional section;
4 and then section 1512(g)(2) specifies that the
5 government doesn't need to prove any state of mind about
6 the fact that the officer is a Federal officer.

7 JUSTICE ALITO: Let me give you a
8 hypothetical similar to the one that I gave your -- your
9 friend. Two men are sitting on a park bench planning
10 the commission of a Federal crime, hijacking of an
11 airplane, and they think they're by themselves; so
12 they're talking about this, and then after they've had a
13 discussion they turn around and they see there's
14 somebody standing very close by; and so they say we have
15 to kill this person to prevent him from going to the
16 FBI, and so they do, and they're prosecuted under this
17 statute. But then at trial they bring out evidence that
18 the person didn't speak a word of English, only spoke
19 Russian. So there wasn't any possibility whatsoever
20 that this person was going to report that to the FBI or
21 any law enforcement officer. Violation of this statute
22 or not?

23 MS. HARRINGTON: Yes. In our view there are
24 two different ways to prove a violation of the statute.
25 One is if you just read section (a)(1)(C), a natural

1 reading of that section is that if a -- if defendant has
2 a specific intent to prevent a communication to a
3 Federal officer specifically, then that's a violation of
4 the statute.

5 What subsection (g)(2) tells us is that you
6 don't need to prove a Federal officer's specific intent
7 for every violation of the statute, but if you can prove
8 that, then that's enough. And so in this case there's
9 no evidence that the Petitioner had a specific intent as
10 to a Federal officer, but, for example, if Officer
11 Horner had said, hey, I'm the FBI or hey, I'm calling
12 the FBI right now, and then he had killed him, that
13 would have been enough whether it were true or not.

14 JUSTICE ALITO: So a realistic probability
15 relates only to the question of whether it would have
16 been conveyed to a Federal officer as opposed to some
17 other law enforcement officer?

18 MS. HARRINGTON: Yes, that's right, and in
19 section (g)(2) it's described as a circumstance that the
20 Federal, that the officer in question is a Federal
21 officer, and so that's -- that's a fact in the world
22 that the jury needs to make a determination about. Of
23 course, it's a fact in the world about --

24 JUSTICE KENNEDY: But suppose in Justice --
25 please continue. I interrupted you.

1 MS. HARRINGTON: That's okay. I was going
2 to say it's a fact in the world about something that by
3 -- by the design of the defendant is never going to
4 happen. The communication that's at issue when you --
5 when you don't have the Federal officer's specific
6 intent, is a communication that's never going to happen,
7 and so the jury has to make a reasonable prediction
8 about what could have happened in the absence of the
9 murder.

10 JUSTICE SOTOMAYOR: What do you see --

11 JUSTICE KENNEDY: Suppose in Justice Alito's
12 hypothetical, two guys on the park bench, and they find
13 out that the man with the gray coat behind them was
14 listening. They say, we have to get the man with the
15 gray coat. They turn around and they shoot a man with a
16 gray coat, but it's a different man. What result?

17 MS. HARRINGTON: If they -- if they --

18 JUSTICE KENNEDY: It wasn't the man that was
19 listening. They got the wrong guy.

20 MS. HARRINGTON: But if -- if the same --

21 JUSTICE KENNEDY: The intent was there.

22 MS. HARRINGTON: So they say, we have to
23 shoot this guy to keep him from talking to the FBI?
24 That's still a violation of the statute, because they
25 have the requisite intent as to a Federal officer.

1 JUSTICE KENNEDY: But then your realistic
2 possibility -- the realistic probability standard just
3 falls out of your test.

4 MS. HARRINGTON: Well, just to be clear, the
5 realistic possibility part only comes in where the
6 defendant doesn't have a specific intent as to the
7 Federal officer specifically. So, in Justice Alito's
8 hypothetical, the intent was to prevent a communication
9 to the FBI in particular, and if a defendant has that
10 specific Federal officer, a specific intent, it doesn't
11 matter whether it might have happened, would have
12 happened, could have happened.

13 Where the reasonable possibility standard
14 comes in is in cases like this one, where the defendant
15 has an intent to prevent a communication to a law
16 enforcement officer for sure, but doesn't have any
17 specific intent as to the Federal nature.

18 JUSTICE KENNEDY: Well, I think it's very
19 difficult to instruct the jury, to say, now, sometimes
20 there's realistic probability, sometimes there isn't. I
21 just don't know what this jury instruction is going to
22 look like.

23 MS. HARRINGTON: Well, I think the jury
24 instruction would say, you know, you need to make a
25 determination about what could have happened if the

1 murder hadn't occurred, and if you find that there is a
2 reasonable possibility that there would have been a
3 communication with the Federal officer -- and that can
4 be proved in any number of different ways in any
5 particular case -- then you find that there's a
6 violation of the statute.

7 JUSTICE SCALIA: Why do you -- why do you
8 need that? I mean, we're always talking here about --
9 about murders of a witness, right?

10 MS. HARRINGTON: Yes.

11 JUSTICE SCALIA: So you're always talking
12 about a murder that was intended to remove somebody who
13 could incriminate the killer --

14 MS. HARRINGTON: Right.

15 JUSTICE SCALIA: -- for some other crime.
16 Why isn't it enough to say you killed that person to
17 prevent the disclosure of the crime, and if the crime
18 was a Federal crime, the disclosure you were preventing
19 was a disclosure to a Federal Court or to a Federal
20 police officer?

21 Why -- why do you have to create a -- a
22 reasonable likelihood that this person, this particular
23 person, would have gone to a Federal officer rather than
24 a State officer? Isn't it enough to kill the person to
25 prevent disclosure of the crime that the crime was a

1 Federal crime? Why isn't that the test?

2 MS. HARRINGTON: Well, I think that's an
3 interpretation of the statute the government could live
4 with, but the effect of that --

5 JUSTICE SCALIA: Oh, the government could
6 more than live with it. The government could wallow in
7 it.

8 MS. HARRINGTON: But that -- indeed. But
9 that is a more aggressive reading than the reading we're
10 offering, because Congress went to the extra step of
11 defining "law enforcement officer" to mean "Federal law
12 enforcement officer." So the interpretation you're
13 positing would essentially read that out of the statute.

14 JUSTICE SCALIA: No, but the statute reads
15 it out of the statute. It says in (g) that you don't --
16 the intent element does -- does not require that you
17 know it's a Federal officer or that you know it's a
18 Federal judicial proceeding.

19 MS. HARRINGTON: Right. The reason --

20 JUSTICE SCALIA: Why isn't it enough that
21 you -- you kill somebody to prevent the disclosure of a
22 crime that's a Federal crime?

23 MS. HARRINGTON: I mean, Congress could have
24 written the statute that way, but when Congress defined
25 "law enforcement officer" to mean "Federal law

1 enforcement officer," presumably, they meant that to
2 mean something. And in (g)(2), what they do is they
3 take the Federal nature of the law enforcement officer
4 out of the mens rea part of the offense, but they
5 describe it as a circumstance, and so that presumably
6 is -- has to relate to something that could have
7 happened in the world in the absence of the murder.

8 CHIEF JUSTICE ROBERTS: Isn't -- if you have
9 a Federal -- underlying Federal offense, and I gather
10 you don't think -- that just needs to be shown as a
11 matter of fact, right?

12 MS. HARRINGTON: Correct.

13 CHIEF JUSTICE ROBERTS: No intent with
14 respect to that.

15 Isn't it always likely that there's going to
16 be a reasonable possibility, reasonable likelihood, that
17 the communication is going to go to a Federal officer?

18 MS. HARRINGTON: I --

19 CHIEF JUSTICE ROBERTS: It's a Federal
20 offense. If the communication covers Federal judges,
21 that's the person who is going to try the case in every
22 case.

23 MS. HARRINGTON: Except that not all crimes
24 that could be prosecuted as Federal crimes are
25 prosecuted as Federal crimes. For example, there are --

1 most drug crimes are prosecuted by State authorities
2 rather than by Federal authorities, even though --

3 CHIEF JUSTICE ROBERTS: No, obviously not
4 all of them.

5 MS. HARRINGTON: Not all of them. If --

6 CHIEF JUSTICE ROBERTS: So you think that --
7 that it's not an element of the crime, but that feature
8 of the prosecution depends upon what percentage of the
9 crimes are prosecuted Federally as opposed to by State
10 law?

11 MS. HARRINGTON: No, it doesn't. And I
12 think in a particular case, if the drug crime is the
13 underlying crime, that could serve as the predicate
14 crime. But I think that what matters is what the jury
15 has reason to conclude, and jurors generally don't
16 understand the way that the Federal system works
17 vis-à-vis the State system. And so if there's no reason
18 for the jury to think that the information might have
19 gone to Federal officers, then they wouldn't have a
20 basis for a conviction under the statute.

21 CHIEF JUSTICE ROBERTS: Can you instruct the
22 jury that the underlying crime here is a Federal crime
23 and then say the only thing they have to determine under
24 some standard is whether or not the communication would
25 be to a Federal officer?

1 MS. HARRINGTON: You could -- you could give
2 that instruction, but I -- I think -- I took the
3 hypothetical from Justice Scalia to be that you wouldn't
4 need to show that there's any -- any chance that the
5 communication would have gone to a Federal officer. And
6 I think that would read the Federal officer definition
7 out of the statute, if all that was required was that
8 the offense be a Federal offense.

9 And then could you just say, well, you know,
10 in theory -- and it's true that anybody who has
11 information about a commission of a Federal offense,
12 theoretically, could someday choose to give that
13 information to a Federal officer, but that --

14 JUSTICE ALITO: Let's say the case -- that
15 this case arises -- exactly this case arises in two
16 different adjacent jurisdictions. In one, the local
17 sheriff and the local district attorney hate the Feds.
18 They never talk to them unless they absolutely have to.
19 And so if Officer Horner had taken the information that
20 he learned to the local sheriff, there's no chance
21 whatsoever that they would have referred that over to
22 the FBI or the U.S. attorney for prosecution in Federal
23 Court, so no realistic possibility there.

24 In the other jurisdiction, right next door,
25 the local sheriff and the local DA don't want to be

1 bothered with bank robbery trials. They send all of
2 those over to the FBI and the U.S. attorney, so there's
3 a very high probability the information would have
4 gotten to the Federal authorities.

5 Now, would this case come out differently
6 depending on the jurisdiction?

7 MS. HARRINGTON: I think it would, Justice
8 Alito. I think in the first case, the jury wouldn't
9 have a reasonable basis to conclude that the information
10 might have gone to Federal officers in the absence of
11 the murder. In the second case, they would have a very
12 reasonable basis to make that inference.

13 JUSTICE KENNEDY: I don't see what that has
14 to do with the defendant's intent.

15 MS. HARRINGTON: It doesn't have anything to
16 do with the defendant's intent. Again, there are two
17 different ways, in our view, to prove a violation of the
18 statute. One is if the defendant has a specific intent
19 about preventing communication to a specifically Federal
20 officer. If the Federal nature of the officer is in his
21 mind, that's one way to prove a violation of the
22 statute.

23 If he doesn't have that specific intent,
24 which is going to be in most cases, honestly, that are
25 prosecuted under the statute, then you have to prove

1 that there's some reasonable possibility that that
2 communication would have happened --

3 JUSTICE BREYER: Okay, where do we get
4 this --

5 JUSTICE KENNEDY: Then you have to change
6 your answer -- right? Maybe you don't -- to my
7 hypothetical where they shoot the wrong man.

8 MS. HARRINGTON: But in your hypothetical,
9 which I think you borrowed from Justice Alito, there was
10 a specific intent to prevent a communication with the
11 FBI, and so there they have the Federal officer specific
12 intent.

13 JUSTICE SCALIA: Isn't it rather strange,
14 trials? It's such a weird issue to submit to the jury
15 in a criminal trial, you know, whether this witness who
16 was -- whether there's a reasonable likelihood that this
17 person who was killed would have gone to a Federal law
18 enforcement authority rather than the State law
19 enforcement authority?

20 MS. HARRINGTON: But the reason it's weird
21 is because the design of the defendant in killing the
22 victim is to prevent something from happening, and then
23 the jury is asked to make a -- make a determination of
24 whether that thing might have happened or not.

25 And so you don't -- if you place too high a

1 burden on the government, you're basically giving a
2 defendant who acts efficiently and early in the criminal
3 process a leg up, because you're -- if you require the
4 government to prove that it's more likely than not that
5 the communication in question would have happened with
6 the Federal officer, then what you're doing is you're
7 not giving sufficient protection to those communications
8 to Federal officers that would cause a Federal
9 investigation to be initiated. Right? You're -- it's
10 not how --

11 JUSTICE SOTOMAYOR: I'm a little bit
12 confused. Tell me exactly why you see a difference
13 between "realistically likely" or "reasonably possible."
14 Tell me -- tell me what fine line exists between those
15 two and what quantum of evidence more you would need
16 under one as opposed to the other.

17 MS. HARRINGTON: Well, I guess what we
18 see -- where we see the -- sort of the ballpark is,
19 either the government needs to prove that it's more
20 likely than not that it would have happened, or they
21 just need to prove that it's a reasonable possibility.
22 And so we would opt for the second of those two options.
23 You could --

24 JUSTICE SOTOMAYOR: Tell me what the
25 difference in proof would look like.

1 MS. HARRINGTON: The difference in proof --
2 I mean, it depends on the particular case. Right? In
3 many of the cases that are actually prosecuted under the
4 statute, there's already a Federal investigation
5 underway, and in those cases, this element --

6 JUSTICE SOTOMAYOR: "Likely" is proven?

7 MS. HARRINGTON: Easy to prove, yes.

8 JUSTICE SOTOMAYOR: Okay.

9 MS. HARRINGTON: So the cases that are at
10 issue are cases like this, where the murder happens
11 almost contemporaneously with the Federal criminal
12 activity. And in those cases, nobody's had a chance to
13 even think about initiating an investigation, and so --
14 but those initial communications are vital to protecting
15 the Federal interest and protecting the integrity of
16 Federal investigations.

17 JUSTICE SOTOMAYOR: Well, but you still had
18 to prove, didn't you, or wouldn't you have a measure of
19 obligation to have a witness get up on the stand and
20 say, the FBI always looks at bank robberies? In the
21 absence of that, aren't we asking the jury to speculate
22 that, merely because it can be a Federal crime -- bank
23 robbery can be both a State and a Federal -- that it's
24 reasonably possible it would go, not everything you
25 yourself said not everything goes to the Federal

1 government, so --

2 MS. HARRINGTON: Right. And if I -- I would
3 like to try to separate. There is the question of what
4 is the element of the crime, how -- how do we define it,
5 then what -- what is the evidence you would introduce to
6 satisfy that element.

7 In this case, certainly the government could
8 have introduced evidence that -- that local law
9 enforcement officers report all evidence of bank
10 robberies to the FBI. That would have been enough.
11 They didn't introduce that evidence.

12 What they introduced instead was that when
13 local law enforcement officers later got the information
14 through other sources, they then shared the information
15 with Federal officers. If they hadn't proven that, our
16 contention is it wouldn't -- the evidence would not have
17 been sufficient to sustain the conviction.

18 JUSTICE SCALIA: Miss Harrington, we --
19 we've gotten along for over 200 years without this
20 particular Federal law, and I, therefore, am not
21 inclined to give it a -- a sweeping broad
22 interpretation, and I think it's so weird to submit to
23 the jury, you know, how likely is it that this dead
24 person would have gone to a Federal law enforcement
25 officer rather than a State law enforcement officer.

1 Why isn't an entirely satisfactory reading
2 of this statute the following, that if you -- if,
3 indeed, you have in mind specifically the FBI or a
4 Federal proceeding, you're done? If, however, you don't
5 have in mind specifically a Federal proceeding, but you
6 have in mind a particular proceeding, which is a Federal
7 proceeding, or a particular officer who is a Federal
8 officer, then you're done, but anything else isn't
9 covered?

10 So the intent has to be the intent to stop a
11 particular proceeding or -- or to stop the person going
12 to a particular officer. If that proceeding is Federal
13 or if the officer is Federal, you have the -- but
14 otherwise, the laws that we've lived under for 210 years
15 will continue to apply, and -- and -- and this new
16 Federal statute will not apply.

17 MS. HARRINGTON: Well, Justice Scalia, I
18 think it would be insufficiently protective of the
19 Federal interests to say that you could only -- that you
20 would look at what the defendant had in mind about what
21 the chain of communication might be if he didn't murder
22 the person who was witnessing the crime. Most
23 defendants don't think, wow, you know, if Officer Horner
24 is going to call the dispatch, the dispatch is going to
25 call, you know, the other person in the Haines City

1 police department, they're going to call the sheriff,
2 they're going to call the Federal law enforcement
3 officers, most defendants wouldn't have -- wouldn't be
4 thinking down that -- sort of down the chain of
5 communication that way.

6 But the statute criminalizes killing someone
7 to prevent the communication, not a communication, not a
8 particular communication, but the communication by any
9 person of information relating to the commission of a
10 Federal crime.

11 JUSTICE SCALIA: I suspect that what this
12 mainly addressed is -- is killing of witnesses, which
13 has become very common in some jurisdictions, witnesses
14 in criminal trials, and you know darn well what trial is
15 involved. It's a trial that's already underway, and if
16 it's a Federal trial and you kill the witness, you're --
17 you're liable under this statute.

18 What -- what is covered beyond that is if --
19 if you know that the information is going to be given to
20 a Federal officer, then they have you also, but I don't
21 know why we should read the statute any more broadly
22 than that and -- and have these weird questions
23 submitted to the jury how likely was it that this --
24 this dead person would have gone to a Federal officer
25 rather than a State officer and -- and inquire into the

1 question that Justice Alito asked, you know, how is
2 there a friendly relationship between State and local
3 officials so that the State official would -- I don't
4 want to get into that. I don't think the juries do.

5 MS. HARRINGTON: I mean, many of these
6 things are not -- in many of these cases, this is not an
7 element that's difficult to prove. If, as you say, it's
8 a witness in a particular investigation or is going to
9 testify in a particular trial who has been murdered,
10 then it's easy to prove that the Federal officer nexus
11 has been satisfied. But Congress was also trying to
12 protect information that would cause Federal
13 investigations to be initiated. Those are important
14 communications.

15 If you allow murders of people who witness
16 crimes in order to prevent them from reporting that
17 information to law enforcement officers, where the
18 reporting of that information would have caused a
19 Federal investigation to be initiated, then you're
20 insufficiently protecting the Federal interest in
21 prosecuting Federal crimes.

22 JUSTICE KAGAN: Ms. Harrington, what would
23 be -- what would happen if instead of Officer Horner,
24 the custodian of the cemetery had come across these
25 people and the exact same thing had happened, would you

1 then say that there would be -- that there would be a
2 prosecution -- there could be a prosecution under this
3 statute?

4 MS. HARRINGTON: Not unless the custodian of
5 the cemetery was on his cell phone saying I'm calling
6 911. So, if we -- what's important --

7 JUSTICE KAGAN: So is that the difference,
8 that Officer Horner was on his cell phone?

9 MS. HARRINGTON: Well, in terms of whether
10 the evidence that was presented in this case was
11 sufficient, it was sufficient because the jury knew two
12 things. They knew, first, that Officer Horner
13 definitely would have communicated the information
14 that's relevant in the case to local law enforcement
15 officers; and second, they knew that when local law
16 enforcement officers later acquired that information
17 from other sources, they shared it with Federal
18 officers.

19 So if you didn't know the first step, if you
20 didn't know that definitely the person who was killed
21 would have communicated to local law enforcement
22 officers, then there wouldn't be a reason -- first of
23 all, you might not have -- have the correct specific
24 intent to prevent communication with a law enforcement
25 officer which is required.

1 JUSTICE BREYER: I do have a question I
2 would like to ask at some point. Are you finished?

3 MS. HARRINGTON: Yes. Go ahead.

4 JUSTICE BREYER: Because this is very
5 interesting. I normally think purpose is important. In
6 this one I don't, and suppose I'm right, purpose has
7 nothing to do with this. The problem here is with the
8 words "intent" and "prevent."

9 MS. HARRINGTON: Yes.

10 JUSTICE BREYER: And it's how they're used
11 in ordinary English. So let me give you an example,
12 even odder than Justice Alito's. But I think it
13 illustrates the point -- the question.

14 Imagine you put your son in his room, and
15 they say why do you keep your son in his room doing his
16 homework? Because I wanted to prevent him from going to
17 the movies. That's why. Now, when you say that, we
18 would impute, correctly, you wanted to prevent him from
19 going to a Hollywood movie. You wanted to prevent him
20 from going to an old movie, prevent him from going to a
21 new movie, but prevent him from going to a Lithuanian
22 movie?

23 Now, why does that sound so odd? Because
24 there's no realistic possibility that he would go to a
25 Lithuanian movie. Okay.

1 (Laughter.)

2 JUSTICE BREYER: Now, if that's the problem,
3 if that's the problem, the words that capture that
4 problem, are their words "realistic likelihood," not the
5 words "possibility." So if I have to choose between
6 those two, and that is the problem, why don't I choose
7 their solution?

8 MS. HARRINGTON: I guess in our view it's
9 less important which words you pick --

10 JUSTICE BREYER: All right.

11 MS. HARRINGTON: Than it is what they mean.
12 And, so, if by realistic -- realistic probability or
13 realistic likelihood --

14 JUSTICE BREYER: They use realistic
15 likelihood and if someone were to tell me in my odd
16 example there is no realistic likelihood he would go to
17 a Lithuanian movie, that seems to describe perfectly
18 whether I would or would not say in trying to prevent
19 him from going to the movies, you try to prevent him
20 from going to a Lithuanian movie. And your -- yours
21 doesn't -- I mean it's a -- I agree it may not make that
22 much difference, but we have to choose some form of
23 words.

24 JUSTICE SCALIA: Understand this, you mean
25 it would have been okay if he went to a Lithuanian

1 movie?

2 (Laughter.)

3 JUSTICE BREYER: No, it wouldn't have been
4 okay, but you don't normally say of a person when a
5 thing is really weird, but he wants it to happen that
6 doesn't do it for that -- it's so unlikely. I shoot an
7 arrow into the air hoping it will fall on my enemy. All
8 right? It's not going to. But if it does, we say he
9 intended it. You see, that -- that's the kind of
10 linguistic problem that I think is present.

11 MS. HARRINGTON: Right. And it's not -- it
12 doesn't perfectly map on to the problem in this case, of
13 course, because there is subsection (g)(2), which
14 specifically says you take intent out of the equation.
15 And, so, I'll concede it's an awkwardly constructed
16 statutory provision. But I think the important --

17 JUSTICE BREYER: It's not awkwardly
18 constructed. It's trying to get odd possibilities, and
19 if it is trying to get those odd possibilities about
20 which we normally would say he did intend to prevent
21 that from happening, then those things we're trying to
22 leave out are those where there is no realistic
23 possibility that they would happen.

24 MS. HARRINGTON: I would agree with that, so
25 what we would like --

1 JUSTICE BREYER: Then let's take their
2 words.

3 MS. HARRINGTON: Well, we -- again, it
4 depends what it -- what you mean by realistic
5 possibility or likelihood. If you mean more likely than
6 not, then we would say that's too high a burden on the
7 government. We want to include odd possibilities but
8 not outlandish possibilities.

9 JUSTICE SOTOMAYOR: I'm not sure I
10 understand your answer to Justice Kagan's hypothetical.
11 We -- we -- there's no proof that this particular
12 officer who was shot was going to pick up the phone to
13 the FBI. He may have overheard this. He would have
14 called his fellow officers, and somebody, probably his
15 supervisor, or the DA's office was going to make the
16 decision whether to call the FBI. So, how is that
17 different from the cemetery caretaker, who is going to
18 call it in probably to 9-1-1, and he doesn't
19 particularly have an idea of who's going to get involved
20 or not because it's really not his issue. Why is there
21 a difference between those two situations? And isn't
22 the question, going back to what Justice Breyer asked,
23 was, what's the likelihood that this is going to get
24 investigated by the Federal Government? Why is it
25 reasonably possible? Anything is reasonably possible --

1 or almost anything.

2 MS. HARRINGTON: Well, I mean, we -- we
3 attach the word reasonably to possible to sort of to
4 wall off cases that are theoretically possible, right?
5 So again, we would like to cover odd occurrences but not
6 outlandish occurrences, so it's not just anything that's
7 possible. It's -- the jury has to have a reason to
8 think it might have happened in this case.

9 JUSTICE SOTOMAYOR: So I guess then your
10 burden is only to show that it's a Federal offense,
11 because why you need to show anything else because
12 "reasonably possible" encompasses every single Federal
13 offense or anything that could be termed a Federal
14 offense.

15 MS. HARRINGTON: With respect, Your Honor,
16 we don't -- we don't think that's correct. I think
17 there needs to be a reason for the jury to think that if
18 this communication had not been prevented, the
19 information eventually would have gone to Federal
20 officers. The reason --

21 CHIEF JUSTICE ROBERTS: But why isn't that
22 -- maybe I asked this already, but why isn't that the
23 case when you're dealing with the Federal offense?

24 MS. HARRINGTON: Because, the reality is
25 that not information -- that all local law enforcement

1 officers share every piece of information about Federal
2 offenses with --

3 CHIEF JUSTICE ROBERTS: Oh, but there's a
4 possibility.

5 MS. HARRINGTON: There's a possibility, but
6 I think --

7 CHIEF JUSTICE ROBERTS: A realistic
8 possibility.

9 MS. HARRINGTON: And again that's -- if
10 that's how the Court wanted to go, that's something the
11 government could live with. But --

12 JUSTICE GINSBURG: Did you say before that
13 -- that presenting this to the jury; everybody's worried
14 about what the jury will think; that when Gamble came
15 and confessed, the local official went to -- to the
16 Federal? I think we were told that there was a year
17 lapse between when the local police knew about Gamble's
18 confession and when --

19 MS. HARRINGTON: Well, there's a 10-month
20 lapse between when Gamble went to the local law
21 enforcement officers and when Gamble testified before
22 the Federal grand jury. So presumably the Federal --
23 the AUSA was brought in sometime in that 10-month
24 period. So, it wasn't that long a lapse.

25 JUSTICE SOTOMAYOR: Do you know what the

1 difference was between the State and the Federal
2 penalties?

3 MS. HARRINGTON: I don't know the
4 difference. I mean, Gamble when he was -- he was
5 indicted eventually for 14 Federal offenses to which he
6 pled guilty and was sentenced initially to life plus 107
7 years. Some of the -- some of the crimes for which he
8 was indicted could not have been prosecuted in State
9 court; but presumably he could have gotten a life
10 sentence for murdering a police officer if he had been
11 prosecuted in State court as well.

12 JUSTICE KAGAN: So Ms. Harrington, suppose
13 Officer Horner had come to the scene and instead of
14 seeing evidence that there was a robbery about to occur,
15 had seen evidence only of drug use. Now that might be a
16 Federal offense, but typically it wouldn't be prosecuted
17 in -- in a Federal court. Would you say then that the
18 statute is not satisfied?

19 MS. HARRINGTON: No, we would say it is
20 satisfied if everything else was the same.

21 JUSTICE KAGAN: Because?

22 MS. HARRINGTON: Because it -- it's still
23 information relating to the commission or possible
24 commission of a Federal offense, we still know that
25 Officer Horner definitely would have transmitted that

1 information to local law enforcement officers, and we
2 still know that when local law enforcement officers
3 later got the information, they would -- they
4 transmitted it to Federal --

5 JUSTICE KAGAN: Oh, but that's 4 years
6 later. That was way past the time when this incident
7 occurred.

8 MS. HARRINGTON: It's true. And just to be
9 clear, we're not saying that that communication that
10 happened in 2002 is the communication that was prevented
11 or intended to be prevented. What we're saying is that
12 the fact when local cops got the information in 2002,
13 they shared it with Federal officers, that that's a
14 reason for the jury to infer that they would have done
15 the same thing if they had gotten the information --

16 JUSTICE KAGAN: You're saying the fact that
17 they got this information 4 years later, shared it with
18 law enforcement officers after they knew that a murder
19 had occurred as a result of an incident would be the
20 same kind of inquiry that they would make at that time?

21 MS. HARRINGTON: Well, I think --

22 JUSTICE KAGAN: Before the murder?

23 MS. HARRINGTON: Well, of course, we don't
24 know what would have happened, because Officer Horner
25 was murdered to prevent any of this from happening, but

1 in fact, the evidence before the jury suggested that it
2 wasn't the murder that motivated them to share the
3 information with Federal officers; it was one of the
4 underlying robberies. It was the robbery of the Holiday
5 Inn, which was a Federal offense. The statute of
6 limitations had run on that in State court, and so they
7 wanted to -- but they wanted to maximize the amount of
8 charges they could bring against Chris Gamble. And so
9 they decided to share that information with Federal
10 officers.

11 So it wasn't the murder that made the
12 difference; it was one of the underlying Federal
13 offenses that was charged against -- as one of the
14 predicate crimes against Petitioner here.

15 JUSTICE SCALIA: Would -- would you not
16 acknowledge that the statute is vague enough that the
17 intent which it requires could be either the intent to
18 prevent testimony from being given to a particular
19 Federal proceeding or to a particular Federal officer or
20 the specific intent to withhold it from a proceeding or
21 an officer who happens to be or which happens to be
22 Federal, but which the defendant is not aware is
23 Federal? It could bear that meaning, couldn't it?

24 MS. HARRINGTON: It could, but Justice
25 Scalia, I want to point out that subsections (A) and (B)

1 of (a)(1), those are the provisions that talk about
2 official proceedings. Subsection (a)(1)(C), which is
3 the provision that's at issue here, does not talk about
4 official proceedings. It talks about transferring
5 information to Federal -- to law enforcement officers or
6 to judges. And so there doesn't -- I think by -- just
7 by reading, sort of a plain reading of those provisions
8 together means that for subsection (C), you don't need
9 to have an official proceeding that was in anyone's mind
10 or that was underway at the time.

11 JUSTICE SCALIA: Oh, I acknowledge that, but
12 a particular judge or -- or the conduct of a Federal
13 proceeding, it could -- it could require specific intent
14 of a proceeding or a judge or an officer which happens
15 to be a Federal officer.

16 MS. HARRINGTON: It could, yes, and again, I
17 think if the defendant has a Federal officer specific
18 intent in mind when he commits the murder, that's
19 enough.

20 JUSTICE ALITO: So if a defendant has in
21 mind a particular officer, then there's a potential
22 violation of the statute, but if the defendant just
23 kills for the purpose of preventing this from going to
24 any Federal -- any officer who might happen to be a
25 Federal officer, then there's no violation under this --

1 under this reading of the statute?

2 MS. HARRINGTON: No, there is -- there is
3 violation, if there's a reasonable possibility --

4 JUSTICE ALITO: Under the interpretation
5 that's been suggested to you, that would be the
6 distinction?

7 MS. HARRINGTON: I'm not -- I don't mean to
8 give that -- this is a case where there's not a specific
9 Federal officer intent. I may have misunderstood the
10 question as it was put to me.

11 If there's no specific Federal officer
12 intent, but you can prove that there's a reasonable
13 possibility that one of the communications prevented by
14 the murder would have been with a Federal officer --

15 JUSTICE BREYER: I think the question was.

16 JUSTICE SCALIA: It's unfair for him to ask
17 you what my -- what my hypothetical was. I think the
18 answer is yes.

19 MS. HARRINGTON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Crawford, you have 7 minutes remaining.

22 REBUTTAL ARGUMENT OF STEPHEN M. CRAWFORD

23 ON BEHALF OF THE PETITIONER

24 MR. CRAWFORD: Justice Kagan, if I could go
25 to a question that you posed: If this Court were to

1 find that the mere presence of a possible Federal
2 offense was appropriate to give Federal jurisdiction
3 under this particular statute, then I would ask the
4 Court to consider the effect that that would have on
5 criminal practice throughout this country.

6 There is significant overlap between Federal
7 and State criminal laws, and if we are simply going to
8 confer Federal jurisdiction on this particular statute
9 because of the mere possibility of a Federal offense,
10 you have created a huge exception and, we would
11 respectfully submit, create problems for that delicate
12 balance between State and Federal.

13 JUSTICE GINSBURG: What's delicate about
14 robbery? I mean, robbery is completely a Federal crime,
15 and that was what the -- that was what Horner observed,
16 and they were -- they were planning for the robbery the
17 next day.

18 MR. CRAWFORD: Justice Ginsburg, we would
19 agree that bank robbery is a Federal crime. The
20 question is: Is there any evidence in the record that
21 would show there was going to be any Federal involvement
22 in that Federal crime? Every day, Federal crimes are
23 prosecuted in the State system under their State crimes,
24 but absent some Federal involvement, you have
25 obliterated that line between State and Federal criminal

1 practice, and that is too broad, or that, we believe,
2 upsets this delicate balance that we must maintain.

3 If I could, I want to go to Lithuania and
4 suggest this.

5 JUSTICE BREYER: I'm slightly regretting
6 bringing that up.

7 MR. CRAWFORD: There have been a number of
8 cases cited at the Circuit Court level that give
9 examples of how the government can meet their proof, and
10 quite frankly, it's not difficult. In Romero, there is
11 a Federal -- ongoing Federal law enforcement official
12 investigation going on, so if there is an ongoing
13 Lithuanian movie --

14 JUSTICE BREYER: You agree basically on the
15 point?

16 MR. CRAWFORD: I do.

17 JUSTICE BREYER: I think where you have --
18 where somebody tries to prevent a general thing, we
19 normally say you also prevent -- tries to prevent those
20 things that are specific that fall within the general
21 term, but not every oddball example.

22 MR. CRAWFORD: Exactly.

23 JUSTICE BREYER: And what you want is
24 something that rules out the oddball examples. And your
25 words are "reasonable likelihood," and you'll say if

1 it's an oddball example, you can't hold him guilty of
2 that, if it turns out that in this case the Federal
3 example is an oddball example.

4 My question really is to you: If you win on
5 that, then are you going to go back and argue there was
6 not one piece of evidence whatsoever that there was any
7 reasonable likelihood that the Feds would investigate
8 your case?

9 MR. CRAWFORD: We would argue that there
10 is -- the record is insufficient to establish reasonable
11 likelihood of Federal involvement. And I can't put it
12 any better than that.

13 Thank you, Justice Breyer. Thank you,
14 Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 The case is submitted.

17 (Whereupon, at 12:17 p.m., the case in the
18 above-entitled matter was submitted.)

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A	18:11,15,21,25 25:7 26:14 33:14 34:8 35:9 41:1 52:20 53:4 Alito's 6:5,16 11:10,14,19 27:11 28:7 43:12 allow 41:15 allowed 17:14 amount 51:7 ANDREW 1:3 announce 22:8 announced 23:4 answer 12:24 14:6 17:16 35:6 46:10 53:18 answered 11:6 anybody 33:10 anyone's 52:9 Anyway 23:15 APPEARANC... 1:14 applied 22:24 apply 22:10 39:15,16 appropriate 4:10 10:5 19:8,13 54:2 argue 12:21 56:5 56:9 argued 12:5 13:1 13:24 argues 14:3 argument 1:12 2:2,5,8 3:3,7 22:1 23:16,23 53:22 arises 33:15,15 arrow 45:7 Articulate 6:24 articulating 21:7 21:16 asked 11:7 35:23	41:1 46:22 47:22 asking 6:3 11:12 37:21 Assistant 1:17 assuming 11:8 13:4 attach 47:3 attorney 33:17 33:22 34:2 attorneys 20:10 Attorney's 14:21 AUSA 48:23 authored 19:6 authorities 15:3 15:6 20:12 32:1 32:2 34:4 authority 35:18 35:19 aware 51:22 awkwardly 45:15 45:17 a.m 1:13 3:2	B	B 51:25 back 6:4,16 46:22 56:5 backing 4:25 balance 4:15 10:5 20:21 54:12 55:2 ballpark 36:18 bank 19:13 20:5 20:10,12 34:1 37:20,22 38:9 54:19 barking 12:22 based 6:21 basically 15:16 17:10 22:6 36:1 55:14 basis 32:20 34:9 34:12 bear 51:23	began 15:1 begins 23:5 behalf 1:15,19 2:4,7,10 3:8 23:24 53:23 believe 4:14 5:17 6:20 8:24 10:23 13:17,20 15:17 16:11,13 17:8 19:3 21:25 55:1 Bell 19:4,15 bench 25:9 27:12 better 12:6 23:2 23:19 56:12 beyond 3:13 12:2 12:18 13:5,11 13:19 40:18 bit 4:25 36:11 board 22:25 borrowed 35:9 bothered 34:1 Breyer 12:4,21 21:9,13 23:15 35:3-43:1,4,10 44:2,10,14 45:3 45:17 46:1,22 53:15 55:5,14 55:17,23 56:13 brief 4:10,20 21:1 briefs 5:1 bright 22:25 bright-line 23:1,4 bring 25:17 51:8 bringing 55:6 broad 20:19 38:21 55:1 broadly 40:21 brought 48:23 burden 4:13 19:23 23:6 36:1 46:6 47:10	24:23 25:25 52:2,8 calculating 10:11 call 39:24,25 40:1,2 46:16,18 called 46:14 calling 26:11 42:5 capture 44:3 care 16:22 caretaker 46:17 case 3:4,17 4:11 4:12 6:23 14:8 14:22 17:14 19:10 20:1,5,18 24:7,14 26:8 29:5 31:21,22 32:12 33:14,15 33:15 34:5,8,11 37:2 38:7 42:10 42:14 45:12 47:8,23 53:8 56:2,8,16,17 cases 3:18 28:14 34:24 37:3,5,9 37:10,12 41:6 47:4 55:8 cause 36:8 41:12 caused 41:18 Causey 3:19 cell 42:5,8 cemetery 41:24 42:5 46:17 cert 21:3,21 22:5 certain 4:5 5:13 16:18 certainly 20:9 38:7 chain 39:21 40:4 chance 10:16 11:22 18:6 33:4 33:20 37:12 change 35:5 characterize
		C	C 2:1 3:1 17:17			

<p>4:18 charge 18:16 charged 51:13 charges 51:8 CHARLES 1:3 Chief 3:3,9 15:9 15:19,23 16:5 23:20,22,25 31:8,13,19 32:3 32:6,21 47:21 48:3,7 53:20 56:14,15 choose 33:12 44:5,6,22 chose 22:3,4 Chris 51:8 circuit 3:12,19 3:19,20,25 4:12 4:22,24 5:25 19:4,6 22:1,3 22:16 55:8 circuits 22:24 Circuit's 3:17 5:3 20:19 circumstance 12:15 26:19 31:5 circumstances 6:22,22 cited 4:9 55:8 City 39:25 clear 28:4 50:9 clearly 3:16 6:12 client 16:20,21 close 25:14 coat 27:13,15,16 cocaine 19:12 Code 3:14 cold 10:10 come 9:9,23 24:19 34:5 41:24 49:13 comes 4:12 24:21 28:5,14</p>	<p>commission 15:11,11 17:12 17:23,24 24:12 24:13 25:10 33:11 40:9 49:23,24 commits 52:18 common 24:8 40:13 communicate 8:13 communicated 14:1 24:16 42:13,21 communicating 7:6 communication 5:8,25 6:2 7:3 8:12 9:6,6,12 9:16 11:23 13:9 15:13 16:25 23:12 24:10,25 26:2 27:4,6 28:8,15 29:3 31:17,20 32:24 33:5 34:19 35:2 35:10 36:5 39:21 40:5,7,7 40:8,8 42:24 47:18 50:9,10 communications 36:7 37:14 41:14 53:13 completely 54:14 concede 5:2 16:3 16:6,7 19:11 20:12 45:15 conclude 32:15 34:9 conduct 52:12 confer 20:14 54:8 confessed 13:25 13:25 48:15</p>	<p>confession 48:18 conflicts 3:17 confused 36:12 Congress 18:1 24:2 30:10,23 30:24 41:11 connection 6:15 consider 54:4 consistent 3:21 consistently 3:16 conspiracy 19:12 constructed 45:15,18 construction 22:4 construe 24:22 construed 3:16 contacted 14:21 contemporane... 37:11 contention 38:16 continue 26:25 39:15 convenience 18:12,18 conveyed 26:16 conveying 18:7 conviction 32:20 38:17 cops 50:12 correct 7:20 9:18 9:19 15:22 31:12 42:23 47:16 correctly 19:5 43:18 counsel 14:3 23:20 53:20 56:15 counterpart 19:19 country 54:5 course 13:4 26:23 45:13</p>	<p>50:23 court 1:1,12 3:10 3:12,24 6:3 10:2 13:6 16:23 16:24 19:15 20:20 21:17,19 21:24 22:5,10 24:1 29:19 33:23 48:10 49:9,11,17 51:6 53:25 54:4 55:8 courts 11:2 22:9 22:21 23:1 cover 47:5 covered 39:9 40:18 covers 31:20 Crawford 1:15 2:3,9 3:6,7,9,22 4:4,8 5:17 6:20 7:1,9,16,20 8:1 8:8,10,23 9:5 9:10,19 10:2,23 11:11,15 12:1 12:20 13:3,12 13:16,20 14:6 14:17,25 15:4,7 15:15,22 16:2,7 17:8,19,25 18:9 18:14,17,24 19:1,16,22 20:7 21:6,11,15,22 21:25 22:11,15 22:22 23:7,18 23:21 53:21,22 53:24 54:18 55:7,16,22 56:9 create 29:21 54:11 created 54:10 creative 18:20 crime 6:8 10:12 16:1,3 17:11 19:7 20:13,14</p>	<p>25:10 29:15,17 29:17,18,25,25 30:1,22,22 32:7 32:12,13,14,22 32:22 37:22 38:4 39:22 40:10 54:14,19 54:22 crimes 17:1 18:5 19:11 31:23,24 31:25 32:1,9 41:16,21 49:7 51:14 54:22,23 criminal 3:15 4:16 5:22 10:5 12:3 20:22 24:3 35:15 36:2 37:11 40:14 54:5,7,25 criminalizes 40:6 custodian 41:24 42:4</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 DA 33:25 darn 40:14 day 54:17,22 DA's 46:15 dead 14:17 38:23 40:24 dealing 19:17 47:23 death 16:4 decided 14:8,22 51:9 deciding 23:5 decision 46:16 deemed 18:1 defendant 5:7,7 5:16,19,24 7:4 10:11,13,22 11:16 12:17 15:12 16:6,8,8 24:24 26:1 27:3</p>
---	--	---	--	---

28:6,9,14 34:18 35:21 36:2 39:20 51:22 52:17,20,22 defendants 39:23 40:3 defendant's 6:17 6:21 16:12 34:14,16 defended 21:4 define 6:17,20 38:4 defined 30:24 defining 30:11 definitely 42:13 42:20 49:25 definition 33:6 definitional 25:3 definitions 13:21 delicate 54:11,13 55:2 denotes 8:12 department 1:18 40:1 depending 34:6 depends 32:8 37:2 46:4 describe 31:5 44:17 described 26:19 design 27:3 35:21 determination 10:24 26:22 28:25 35:23 determine 6:21 8:11,11,15 32:23 difference 36:12 36:25 37:1 42:7 44:22 46:21 49:1,4 51:12 different 6:13 11:25 12:11	16:12 22:9 24:22 25:24 27:16 29:4 33:16 34:17 46:17 differently 34:5 differs 4:21 difficult 28:19 41:7 55:10 disagreement 3:11 disclosure 29:17 29:18,19,25 30:21 discussion 25:13 dispatch 39:24 39:24 disservice 21:18 distinction 53:6 distinctly 19:18 district 21:18 33:17 doing 9:20 36:6 43:15 door 33:24 doubt 3:13 12:2 12:19 13:5,11 13:19 drug 32:1,12 49:15 D.C 1:8,18	16:12 24:11,14 30:16 32:7 37:5 38:4,6 41:7 elements 12:8,18 13:4 24:6 Eleventh 3:17,25 4:21,23 5:3,25 20:18 22:1,3,16 eliminate 17:22 enacted 24:2 encompasses 47:12 enemy 45:7 enforcement 5:10,11,15,21 6:7,11,14 7:8 9:12,13,14,17 11:1 14:10,11 15:1,21 17:2,21 18:8 20:15,17 23:11,12 24:10 25:1,2,3,21 26:17 28:16 30:11,12,25 31:1,3 35:18,19 38:9,13,24,25 40:2 41:17 42:14,16,21,24 47:25 48:21 50:1,2,18 52:5 55:11 English 25:18 43:11 enter 22:16 entirely 39:1 equation 45:14 erred 3:25 error 21:1,3,5,24 22:19,20 ESQ 1:15,17 2:3 2:6,9 essential 7:11 essentially 30:13 establish 3:13	7:23 16:10 56:10 eventually 5:14 47:19 49:5 everybody's 48:13 evidence 8:15 16:11,16 19:8 19:13 22:2 23:5 25:17 26:9 36:15 38:5,8,9 38:11,16 42:10 49:14,15 51:1 54:20 56:6 exact 41:25 exactly 33:15 36:12 55:22 example 10:9 26:10 31:25 43:11 44:16 55:21 56:1,3,3 examples 55:9 55:24 exception 54:10 exists 36:14 extra 30:10	feature 15:10 32:7 Federal 3:15 4:15 5:8,9,10 5:14,22 6:8,15 6:18 7:8,8,23 8:6,21 9:14,17 10:5,12 11:1 12:12 14:2,11 15:3,6,12,14 16:1,3,23 17:4 17:11,18 18:2,2 18:3,7,13,16 18:19,23 19:3,7 19:11,17,18,25 20:2,6,11,13 20:14,15,17,21 23:11,12 24:3,6 24:11,13,13,16 25:2,6,10 26:3 26:6,10,16,20 26:20 27:5,25 28:7,10,17 29:3 29:18,19,19,23 30:1,11,17,18 30:22,25 31:3,9 31:9,17,19,20 31:24,25 32:2 32:16,19,22,25 33:5,6,8,11,13 33:22 34:4,10 34:19,20 35:11 35:17 36:6,8,8 37:4,11,15,16 37:22,23,25 38:15,20,24 39:4,5,6,7,12 39:13,16,19 40:2,10,16,20 40:24 41:10,12 41:19,20,21 42:17 46:24 47:10,12,13,19 47:23 48:1,16
F				
			fact 9:14 12:13 25:6 26:21,23 27:2 31:11 50:12,16 51:1 facts 12:9 16:18 16:20 17:7 factually 3:18 fall 45:7 55:20 falls 28:3 fall-back 23:13 FBI 10:16,19 25:16,20 26:11 26:12 27:23 28:9 33:22 34:2 35:11 37:20 38:10 39:3 46:13,16	

<p>48:22,22 49:1,5 49:16,17,24 50:4,13 51:3,5 51:9,12,19,19 51:22,23 52:5 52:12,15,17,24 52:25 53:9,11 53:14 54:1,2,6 54:8,9,12,14 54:19,21,22,22 54:24,25 55:11 55:11 56:2,11 federalize 17:10 Federally 32:9 Federal/State 4:15 Feds 12:14 33:17 56:7 feel 12:22 fellow 46:14 Fifth 3:19 find 6:21 13:14 15:16,17 19:15 27:12 29:1,5 54:1 finding 21:5 finds 10:13 fine 23:15 36:14 finished 43:2 first 12:9 24:11 34:8 42:12,19 42:22 fit 18:1 Florida 1:15 20:9 following 39:2 form 44:22 forward 14:18,22 14:25 found 11:16 14:17 22:19 four 24:5 fourth 13:8 Fowler 1:3 3:4 14:5</p>	<p>frankly 20:23 21:18 55:10 friend 25:9 friendly 41:2 future 8:12,13,16 8:20 9:6 13:9</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>g 3:1 5:18 6:12 9:15 16:14 26:5 26:19 30:15 31:2 45:13 Gamble 13:25 14:5,8,15 48:14 48:20,21 49:4 51:8 Gamble's 48:17 gather 31:9 general 1:18 55:18,20 generally 32:15 Ginsburg 13:23 14:7,14,24 48:12 54:13,18 give 10:9 11:2,25 12:24 21:21 25:7 33:1,12 38:21 43:11 53:8 54:2 55:8 given 13:20 40:19 51:18 giving 36:1,7 go 10:16 12:1,7 14:16,22 15:2,5 16:22,24 18:16 31:17 37:24 43:3,24 44:16 48:10 53:24 55:3 56:5 goes 16:11 37:25 going 6:4,4,16 7:2,25 8:16 9:4 10:3,16,17,19 10:20 12:12,24 16:23 17:10,14</p>	<p>18:15 19:25 20:5 23:10,13 25:15,20 27:1,3 27:6 28:21 31:15,17,21 34:24 39:11,24 39:24 40:1,2,19 41:8 43:16,19 43:20,20,21 44:19,20 45:8 46:12,15,17,19 46:22,23 52:23 54:7,21 55:12 56:5 gotten 34:4 38:19 49:9 50:15 government 3:12 4:13,25 8:15 9:22 12:2 14:2 16:10,13 24:5 25:5 30:3,5,6 36:1,4,19 38:1 38:7 46:7,24 48:11 55:9 government's 4:19 19:23 governor's 4:18 grand 48:22 grant 12:23 21:17 granted 21:3,21 22:5 grasp 13:13 gravamen 7:10 gray 27:13,15,16 guess 9:21 36:17 44:8 47:9 guidance 9:24 guilty 49:6 56:1 guy 27:19,23 guys 20:5 27:12</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Haines 39:25</p>	<p>half 11:22 handle 20:10 happen 19:17 27:4,6 41:23 45:5,23 52:24 happened 14:8 27:8 28:11,12 28:12,25 31:7 35:2,24 36:5,20 41:25 47:8 50:10,24 happening 35:22 45:21 50:25 happens 5:10 37:10 51:21,21 52:14 Harrington 1:17 2:6 23:22,23,25 24:20,21 25:23 26:18 27:1,17 27:20,22 28:4 28:23 29:10,14 30:2,8,19,23 31:12,18,23 32:5,11 33:1 34:7,15 35:8,20 36:17 37:1,7,9 38:2,18 39:17 41:5,22 42:4,9 43:3,9 44:8,11 45:11,24 46:3 47:2,15,24 48:5 48:9,19 49:3,12 49:19,22 50:8 50:21,23 51:24 52:16 53:2,7,19 hate 33:17 hear 3:3 help 10:3 21:19 23:1 hew 49:4 hey 26:11,11 high 34:3 35:25 46:6</p>	<p>higher 4:13 hijacking 10:12 19:19 20:2 25:10 Hobbs 18:18 hold 18:12 56:1 holding 18:17 Holiday 51:4 Hollywood 43:19 homework 43:16 honestly 34:24 Honor 3:24 7:9 8:23 9:8,19 13:16 15:15 17:8 23:21 47:15 hopefully 22:8 22:25 hoping 45:7 Horner 14:9,17 16:21 26:11 33:19 39:23 41:23 42:8,12 49:13,25 50:24 54:15 Horner's 16:4 huge 54:10 hypothesize 10:10 hypothetical 11:10,14,17 25:8 27:12 28:8 33:3 35:7,8 46:10 53:17</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 46:19 illustrates 43:13 Imagine 43:14 immediacy 14:13 immediately 14:1,10 implication 15:24 important 4:14 41:13 42:6 43:5</p>
--	--	--	---	--

<p>44:9 45:16 improvement 5:3 impute 43:18 incident 50:6,19 inclined 38:21 include 17:3,3 46:7 including 15:25 income 20:2,2 inconsistent 3:23 incriminate 29:13 indicted 49:5,8 infer 50:14 inference 34:12 information 5:8 5:14 7:7 14:1 16:25 17:23 18:7 24:10,12 24:16,25 32:18 33:11,13,19 34:3,9 38:13,14 40:9,19 41:12 41:17,18 42:13 42:16 47:19,25 48:1 49:23 50:1 50:3,12,15,17 51:3,9 52:5 initial 37:14 initially 49:6 initiated 36:9 41:13,19 initiating 37:13 Inn 51:5 inquire 40:25 inquiry 50:20 instruct 28:19 32:21 instructed 11:9 13:7 instruction 28:21 28:24 33:2 instructions 13:21 22:16</p>	<p>insufficient 56:10 insufficiently 39:18 41:20 integrity 24:3 37:15 intend 5:7,24 6:19 7:6,15 9:16 10:18 45:20 intended 6:11 29:12 45:9 50:11 intends 7:15 intent 5:7,11 6:1 6:6,17,18,21 6:25 7:1,10,23 8:4 9:3,5 11:12 12:10,14,16 15:24 16:12,24 24:9,24 26:2,6 26:9 27:6,21,25 28:6,8,10,15 28:17 30:16 31:13 34:14,16 34:18,23 35:10 35:12 39:10,10 42:24 43:8 45:14 51:17,17 51:20 52:13,18 53:9,12 interest 37:15 41:20 interesting 43:5 interests 39:19 international 10:13 interpret 10:4 interpretation 17:13 30:3,12 38:22 53:4 interrupted 26:25 introduce 38:5</p>	<p>38:11 introduced 38:8 38:12 investigate 56:7 investigated 46:24 investigation 5:22 36:9 37:4 37:13 41:8,19 55:12 investigations 24:4 37:16 41:13 involve 15:13 involved 40:15 46:19 involvement 19:25 20:15,17 23:11 54:21,24 56:11 issue 16:15,15 22:2,6 24:7,14 27:4 35:14 37:10 46:20 52:3</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jail 16:22,24 17:2 18:8,16 job 21:7,15 23:2 judge 7:8 17:22 21:11,19 52:12 52:14 judges 31:20 52:6 judgment 21:7 21:16,16 22:17 judicial 30:18 juries 41:4 jurisdiction 10:6 20:14 33:24 34:6 54:2,8 jurisdictions 33:16 40:13 jurisprudence</p>	<p>20:22 juror 11:8 13:13 16:17,19 jurors 32:15 juror's 13:14 jury 8:11,14 10:23 11:3 13:7 26:22 27:7 28:19,21,23 32:14,18,22 34:8 35:14,23 37:21 38:23 40:23 42:11 47:7,17 48:13 48:14,22 50:14 51:1 Justice 1:18 3:3 3:9,21 4:4,8 5:6 6:2,4,5,16,24 7:4,12,13,17 7:21 8:2,9,18 8:25 9:10,20 10:7 11:4,4,10 11:13,14,18,18 12:4,21 13:10 13:13,18,23 14:7,14,24 15:2 15:5,9,19,23 16:5,15 17:16 17:20 18:4,9,11 18:15,21,25 19:16,25 20:4 20:25 21:9,13 21:20,23 22:7 22:13,18 23:3 23:15,20,22,25 24:18 25:7 26:14,24,24 27:10,11,11,18 27:21 28:1,7,18 29:7,11,15 30:5 30:14,20 31:8 31:13,19 32:3,6 32:21 33:3,14</p>	<p>34:7,13 35:3,5 35:9,13 36:11 36:24 37:6,8,17 38:18 39:17 40:11 41:1,22 42:7 43:1,4,10 43:12 44:2,10 44:14,24 45:3 45:17 46:1,9,10 46:22 47:9,21 48:3,7,12,25 49:12,21 50:5 50:16,22 51:15 51:24 52:11,20 53:4,15,16,20 53:24 54:13,18 55:5,14,17,23 56:13,14,15</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 4:4,8 9:10 9:20 19:16 20:4 24:18 41:22 42:7 49:12,21 50:5,16,22 53:24 Kagan's 46:10 keep 20:21 27:23 43:15 KENNEDY 11:4 11:13,18 26:24 27:11,18,21 28:1,18 34:13 35:5 kill 10:18,18 20:1 25:15 29:24 30:21 40:16 killed 7:18,22,24 8:6 16:21 26:12 29:16 35:17 42:20 killer 29:13 killing 6:10 9:3 12:9 14:9 35:21 40:6,12</p>
---	---	--	---	---

<p>kills 8:20 52:23 kind 45:9 50:20 knew 16:6,9 42:11,12,15 48:17 50:18 know 6:10,18 7:5 10:15 15:12 22:22,23 28:21 28:24 30:17,17 33:9 35:15 38:23 39:23,25 40:14,19,21 41:1 42:19,20 48:25 49:3,24 50:2,24</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>language 4:2,11 lapse 48:17,20 48:24 Laughter 21:14 23:17 44:1 45:2 law 5:9,10,14,20 5:23 6:7,11,14 7:8 9:12,13,14 9:17 11:1,7 14:10,11 15:1 15:20 17:1,17 17:21,24 18:7 18:23,23 20:15 20:17 23:11,12 24:10 25:1,2,2 25:21 26:17 28:15 30:11,11 30:25,25 31:3 32:10 35:17,18 38:8,13,20,24 38:25 40:2 41:17 42:14,15 42:21,24 47:25 48:20 50:1,2,18 52:5 55:11 laws 39:14 54:7 lawyer 21:6,10 leaf 12:24</p>	<p>learned 10:14 33:20 leave 45:22 leg 36:3 let's 10:10,10,12 33:14 46:1 level 55:8 liable 40:17 life 49:6,9 likelihood 4:9 7:2 7:14,17,19,21 8:5 9:1,25 11:6 11:21,22,24 13:11,19,22 19:24 29:22 31:16 35:16 44:4,13,15,16 46:5,23 55:25 56:7,11 limitations 51:6 line 11:20 22:25 36:14 54:25 linguistic 45:10 listening 27:14 27:19 Lithuania 55:3 Lithuanian 43:21 43:25 44:17,20 44:25 55:13 little 36:11 live 30:3,6 48:11 lived 39:14 local 13:25 14:10 14:15,16,18 33:16,17,20,25 33:25 38:8,13 41:2 42:14,15 42:21 47:25 48:15,17,20 50:1,2,12 long 48:24 look 28:22 36:25 39:20 looking 20:20</p>	<p>looks 37:20 Lopez 3:19 4:12 4:23 lot 9:24 lower 11:2</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 1:15 2:3,9 3:7 53:22 maintain 4:14 55:2 man 1:3 27:13,14 27:15,16,18 35:7 map 45:12 March 1:9 14:18 matter 1:11 5:11 6:8 11:7 12:3 28:11 31:11 56:18 matters 4:16 32:14 maximize 51:7 mean 7:14 8:2 9:21 29:8 30:11 30:23,25 31:2 37:2 41:5 44:11 44:21,24 46:4,5 47:2 49:4 53:7 54:14 meaning 6:12 51:23 means 52:8 meant 31:1 measure 37:18 meet 19:14 23:6 55:9 men 25:9 mens 5:19 24:6,8 31:4 mere 4:3 5:3 19:2 20:19 23:9 54:1 54:9 merely 6:13 37:22</p>	<p>mind 5:16 12:13 13:14 25:5 34:21 39:3,5,6 39:20 52:9,18 52:21 minutes 53:21 missing 12:5 misunderstood 53:9 modified 9:7 modifying 4:2 mom 10:16,25 morning 3:4 mother 10:14 motivated 51:2 movie 43:19,20 43:21,22,25 44:17,20 45:1 55:13 movies 43:17 44:19 murder 17:10 24:7,17 27:9 29:1,12 31:7 34:11 37:10 39:21 50:18,22 51:2,11 52:18 53:14 murdered 41:9 50:25 murdering 49:10 murders 29:9 41:15</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narrow 20:21 narrowly 3:16 natural 25:25 nature 28:17 31:3 34:20 need 3:23 12:13 12:25 16:8,13 20:13,15 21:19 22:25 25:5 26:6</p>	<p>28:24 29:8 33:4 36:15,21 47:11 52:8 needs 19:1,2 20:18,22 26:22 31:10 36:19 47:17 negative 15:24 Neither 21:1 never 27:3,6 33:18 new 22:10 39:15 43:21 nexus 24:6,11,14 41:10 nobody's 12:22 37:12 normally 43:5 45:4,20 55:19 number 14:7 29:4 55:7</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obligation 37:19 obliterated 54:25 observed 54:15 obviously 6:5 32:3 occur 7:14 49:14 occurred 24:17 29:1 50:7,19 occurrences 47:5 47:6 occurring 16:4 odd 43:23 44:15 45:18,19 46:7 47:5 oddball 55:21,24 56:1,3 odder 43:12 offense 5:9,9 7:10 12:16 13:5 15:12,14,16 18:2,13,13,22</p>
---	---	--	---	---

<p>19:3,17,18 24:13 31:4,9,20 33:8,8,11 47:10 47:13,14,23 49:16,24 51:5 54:2,9 offenses 18:6 48:2 49:5 51:13 offer 4:8 offered 4:24 offering 30:10 office 14:21 46:15 officer 5:10,11 5:15 6:14,15,15 6:19 7:23,25 9:13,14,15,17 12:12 14:9,17 15:17,21 16:4 16:21 17:2,3,4 17:21 18:8 24:11,17 25:1,2 25:3,6,6,21 26:3,10,10,16 26:17,20,21 27:25 28:7,10 28:16 29:3,20 29:23,24 30:11 30:12,17,25 31:1,3,17 32:25 33:5,6,13,19 34:20,20 35:11 36:6 38:25,25 39:7,8,12,13 39:23 40:20,24 40:25 41:10,23 42:8,12,25 46:12 49:10,13 49:25 50:24 51:19,21 52:14 52:15,17,21,24 52:25 53:9,11 53:14 officers 32:19</p>	<p>34:10 36:8 38:9 38:13,15 40:3 41:17 42:15,16 42:18,22 46:14 47:20 48:1,21 50:1,2,13,18 51:3,10 52:5 officer's 26:6 27:5 official 5:21 8:7 8:21 18:3 41:3 48:15 52:2,4,9 55:11 officials 6:7 11:1 14:11 20:6 41:3 Oh 21:13 30:5 48:3 50:5 52:11 okay 27:1 35:3 37:8 43:25 44:25 45:4 old 43:20 omitted 17:18 Once 14:8 one-tenth 10:15 ongoing 5:22 55:11,12 opinion 3:17,22 19:4,6,14 21:21 opposed 26:16 32:9 36:16 opt 36:22 options 36:22 oral 1:11 2:2,5 3:7 23:23 order 4:14 8:14 10:17 19:8 41:16 ordinary 43:11 outlandish 46:8 47:6 overbroad 23:9 overheard 46:13 overlap 54:6 overlapping</p>	<p>17:11 overrule 22:15</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 4:10,10 4:20 5:1 park 25:9 27:12 part 12:14,16 28:5 31:4 particular 4:11 10:3 11:17 22:23 28:9 29:5 29:22 32:12 37:2 38:20 39:6 39:7,11,12 40:8 41:8,9 46:11 51:18,19 52:12 52:21 54:3,8 particularly 16:22 46:19 penalties 49:2 penalty 8:22 people 12:10 41:15,25 percent 10:16 11:22 percentage 32:8 perfectly 44:17 45:12 period 6:12 17:24 48:24 person 5:20 7:18 7:22,24 8:6 9:11,16 17:21 18:8,15 25:15 25:18,20 29:16 29:22,23,24 31:21 35:17 38:24 39:11,22 39:25 40:9,24 42:20 45:4 Petitioner 1:4,16 2:4,10 3:8 26:9 51:14 53:23</p>	<p>phone 42:5,8 46:12 phrase 5:1 pick 9:24 10:3,7 44:9 46:12 piece 48:1 56:6 place 35:25 places 4:13 placing 3:25 plain 4:2 21:1,3,5 21:24 22:19,20 52:7 planned 17:1 18:5 planning 10:11 18:11,12 25:9 54:16 plausible 4:6 please 3:10 24:1 26:25 pled 49:6 plot 10:14 plus 49:6 point 13:2 22:23 23:13 43:2,13 51:25 55:15 pointed 20:1 police 13:25 14:16,16,19 29:20 40:1 48:17 49:10 poor 21:7,15 posed 53:25 positing 30:13 position 8:10 15:10 21:2,4 23:8,14 possibilities 45:18,19 46:7,8 possibility 4:3 5:4 9:25 10:1 20:19 22:11 23:9 24:15,19 25:19 28:2,5,13</p>	<p>29:2 31:16 33:23 35:1 36:21 43:24 44:5 45:23 46:5 48:4,5,8 53:3 53:13 54:9 possible 4:1,19 4:24 5:2,9,13 6:1,2,9 15:11 16:1,3 17:11,12 17:23 18:22 24:12 36:13 37:24 46:25,25 47:3,4,7,12 49:23 54:1 potential 19:3,12 52:21 practice 54:5 55:1 precedent 3:20 preclude 6:6 precludes 5:18 predicate 32:13 51:14 prediction 27:7 presence 19:3 54:1 present 45:10 presented 42:10 presenting 48:13 President 20:2 presumably 31:1 31:5 48:22 49:9 prevent 5:8,24 6:1 7:24 9:5,7 9:12 10:17 15:13 16:25 24:9,25 25:15 26:2 28:8,15 29:17,25 30:21 35:10,22 40:7 41:16 42:24 43:8,16,18,19 43:20,21 44:18</p>
--	--	---	--	---

<p>44:19 45:20 50:25 51:18 55:18,19,19 prevented 8:16 47:18 50:10,11 53:13 preventing 8:19 9:4 10:19 29:18 34:19 52:23 prevention 8:12 probability 26:14 28:2,20 34:3 44:12 probably 46:14 46:18 problem 18:9 19:10 22:23 43:7 44:2,3,4,6 45:10,12 problems 54:11 proceeding 30:18 39:4,5,6 39:7,11,12 51:19,20 52:9 52:13,14 proceedings 52:2 52:4 process 36:3 proof 19:1,2 36:25 37:1 46:11 55:9 proper 13:21 propose 4:20 proposed 23:8 proposing 4:3 prosecuted 16:23 17:15 20:6 25:16 31:24,25 32:1,9 34:25 37:3 49:8 49:11,16 54:23 prosecuting 41:21 prosecution</p>	<p>19:20 24:8 32:8 33:22 42:2,2 prosecutions 24:4 prosecutor 13:24 prosecutors 14:2 prospect 13:24 14:3 protect 11:5,19 24:3 41:12 protecting 37:14 37:15 41:20 protection 36:7 protective 39:18 prove 3:12 12:3 12:18 13:8 16:13 24:5 25:5 25:24 26:6,7 34:17,21,25 36:4,19,21 37:7 37:18 41:7,10 53:12 proved 12:13 16:8 29:4 proven 13:5,11 37:6 38:15 provide 9:24 13:6 provided 8:15 provision 45:16 52:3 provisions 24:22 52:1,7 purpose 10:19 43:5,6 52:23 put 11:6 18:1 43:14 53:10 56:11 puts 5:25 p.m 56:17</p> <hr/> <p style="text-align: center;">Q</p> <p>qualify 18:18 qualifying 3:15 quantum 36:15</p>	<p>question 5:12 6:5 6:16 7:5 9:21 9:22 11:5,11,19 12:6 16:17 21:1 22:20 26:15,20 36:5 38:3 41:1 43:1,13 46:22 53:10,15,25 54:20 56:4 questioning 11:20 questions 20:24 40:22 quite 9:1 20:23 21:18 55:10</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 raised 22:2 rational 10:11 rea 5:19 24:6,8 31:4 read 11:8 25:25 30:13 33:6 40:21 reading 17:9,13 26:1 30:9,9 39:1 52:7,7 53:1 reads 30:14 real 23:4 realistic 4:9 7:2 7:19,21 9:1,25 11:6,21,21,24 13:10,19,22,24 14:3 19:24 26:14 28:1,2,5 28:20 33:23 43:24 44:4,12 44:12,13,14,16 45:22 46:4 48:7 realistically 10:25 36:13 reality 47:24 really 12:5 13:1</p>	<p>19:18 21:4,20 45:5 46:20 56:4 reason 30:19 32:15,17 35:20 42:22 47:7,17 47:20 50:14 reasonable 3:13 4:17,17,19 7:14 7:17 8:5 9:2 12:2,19 13:5,11 13:19 16:17,19 24:15,19 27:7 28:13 29:2,22 31:16,16 34:9 34:12 35:1,16 36:21 53:3,12 55:25 56:7,10 reasonably 5:2 36:13 37:24 46:25,25 47:3 47:12 reasons 21:7,17 REBUTTAL 2:8 53:22 record 20:16 23:10 54:20 56:10 referred 33:21 regretting 55:5 relate 24:12 31:6 related 7:7 17:23 relates 8:4 26:15 relating 15:11 40:9 49:23 relationship 41:2 relevant 24:22 24:25 42:14 reliability 11:13 remaining 53:21 remand 22:10 remember 4:23 19:4 remove 29:12 report 10:25</p>	<p>25:20 38:9 reported 14:11 14:12 reporting 41:16 41:18 require 5:24 9:16 30:16 36:3 52:13 required 4:15 33:7 42:25 requires 24:4,11 24:14 51:17 requisite 27:25 researched 13:1 respect 5:20 12:13 14:5,5 15:20,25 31:14 47:15 respectfully 54:11 Respondent 1:19 2:7 23:24 result 11:10,11 11:12 27:16 50:19 reus 24:5,7 reverse 21:24 reversed 20:18 right 9:11 11:18 18:25 26:12,18 29:9,14 30:19 31:11 33:24 35:6 36:9 37:2 38:2 43:6 44:10 45:8,11 47:4 rob 19:12 20:5 robberies 20:11 37:20 38:10 51:4 robbery 14:20 20:12 34:1 37:23 49:14 51:4 54:14,14 54:16,19</p>
--	--	--	---	--

ROBERTS 3:3 15:9,19,23 16:5 23:20,22 31:8 31:13,19 32:3,6 32:21 47:21 48:3,7 53:20 56:15 Romero 55:10 room 43:14,15 rub 6:2 rule 20:20 22:3,4 23:1,4 rules 23:8 55:24 rulings 3:18 run 51:6 Russian 25:19	12:10 24:13 34:11 36:22 42:15 section 3:14 24:2 24:9,23 25:1,3 25:4,25 26:1,19 see 25:13 27:10 34:13 36:12,18 36:18 45:9 seeing 49:14 seen 49:15 send 17:2 18:8 34:1 sense 24:23 sentence 49:10 sentenced 14:19 49:6 separate 38:3 sequence 14:15 serve 32:13 servicing 19:5 set 10:8 19:6 share 48:1 51:2,9 shared 38:14 42:17 50:13,17 sheriff 33:17,20 33:25 40:1 shoot 27:15,23 35:7 45:6 shot 46:12 show 23:11 33:4 47:10,11 54:21 shown 15:25 31:10 shows 20:16 side 12:7 significant 3:11 54:6 significantly 4:1 similar 3:18 20:4 25:8 simple 6:8 simply 5:15 16:21 21:2 54:7	single 47:12 sir 23:18 sitting 25:9 situation 16:20 situations 46:21 slightly 55:5 Solicitor 1:17 solution 44:7 somebody 25:14 29:12 30:21 46:14 55:18 someday 33:12 son 43:14,15 sorry 15:4 sort 13:7 36:18 40:4 47:3 52:7 SOTOMAYOR 6:4,24 7:4 15:2 15:5 20:25 21:20,23 22:7 22:13,18 23:3 27:10 36:11,24 37:6,8,17 46:9 47:9 48:25 sought 18:1 24:3 sound 43:23 sources 38:14 42:17 speak 25:18 speaks 5:6 specific 26:2,6,9 27:5 28:6,10,10 28:17 34:18,23 35:10,11 42:23 51:20 52:13,17 53:8,11 55:20 specifically 3:20 26:3 28:7 34:19 39:3,5 45:14 specifies 24:24 25:4 speculate 37:21 spoke 25:18 stand 8:3 37:19	standard 4:3,5,7 4:9,11,17,19 4:24 5:4 8:14 9:9 10:3,8 13:7 17:13 19:7,14 20:19 22:8,10 24:19 28:2,13 32:24 standards 9:23 22:24 standing 25:14 state 10:5 12:12 14:20 16:23 17:3 18:5,13,23 19:19 20:9,10 20:22 25:5 29:24 32:1,9,17 35:18 37:23 38:25 40:25 41:2,3 49:1,8 49:11 51:6 54:7 54:12,23,23,25 States 1:1,6,12 3:5,14 17:22 statute 3:15 4:1 4:2 5:6,18 8:4 8:19 9:11,13,15 9:23 10:4,8,22 11:8,9,14,17 12:7 17:5,9 18:19 19:9,21 24:4,23 25:17 25:21,24 26:4,7 27:24 29:6 30:3 30:13,14,15,24 32:20 33:7 34:18,22,25 37:4 39:2,16 40:6,17,21 42:3 49:18 51:5,16 52:22 53:1 54:3 54:8 statute's 6:5 statutory 22:4	45:16 step 30:10 42:19 STEPHEN 1:15 2:3,9 3:7 53:22 stool 8:3 stop 6:11 7:6 12:11 39:10,11 stopping 6:13 store 18:12,18 strange 35:13 strike 10:4 struggling 9:8,18 subject 8:22 submit 35:14 38:22 54:11 submitted 40:23 56:16,18 subsection 5:18 9:15 16:14 26:5 45:13 52:2,8 subsections 51:25 subsequent 15:10 sufficiency 16:16 22:2 sufficient 19:20 23:5 36:7 38:17 42:11,11 suggest 55:4 suggested 51:1 53:5 suggesting 22:8 supervisor 46:15 support 19:20 suppose 13:23 13:23 26:24 27:11 43:6 49:12 Supreme 1:1,12 sure 18:17 28:16 46:9 suspect 40:11 sustain 38:17
S				
S 2:1 3:1 sake 22:9 SARAH 1:17 2:6 23:23 satisfactory 39:1 satisfied 41:11 49:18,20 satisfy 38:6 saying 18:21 42:5 50:9,11,16 says 6:1 8:4,19 9:2,11,13 10:15 12:12 30:15 45:14 Scalia 3:21 7:13 7:21 8:2,9,18 8:25 13:10,13 13:18 17:16,20 19:25 29:7,11 29:15 30:5,14 30:20 33:3 35:13 38:18 39:17 40:11 44:24 51:15,25 52:11 53:16 scene 49:13 second 3:18 4:12				

sweeping 38:21	35:24 41:25	tried 13:6	<hr/> V <hr/>	we'll 3:3 19:11
system 32:16,17 54:23	45:5 50:15 55:18	tries 55:18,19	v 1:5 3:4	we're 6:3 9:8,8,9 9:18 11:1 20:20 21:20 23:12 29:8 30:9 45:21 50:9,11
<hr/> T <hr/>	things 10:1 12:11 24:5 41:6 42:12 45:21 55:20	true 26:13 33:10 50:8	vague 5:4 51:16	we've 13:6 21:3 38:19 39:14
T 2:1,1	think 9:10 10:15 10:20 11:4,5 13:10,13 17:16 21:1 25:11 28:18,23 30:2 31:10 32:6,12 32:14,18 33:2,6 34:7,8 35:9 37:13 38:22 39:18,23 41:4 43:5,12 45:10 45:16 47:8,16 47:16,17 48:6 48:14,16 50:21 52:6,17 53:15 53:17 55:17	try 31:21 38:3 44:19	vexed 22:20	whatsoever 25:19 33:21 56:6
table 5:19 11:24 11:25 16:14 22:6	think 9:10 10:15 10:20 11:4,5 13:10,13 17:16 21:1 25:11 28:18,23 30:2 31:10 32:6,12 32:14,18 33:2,6 34:7,8 35:9 37:13 38:22 39:18,23 41:4 43:5,12 45:10 45:16 47:8,16 47:16,17 48:6 48:14,16 50:21 52:6,17 53:15 53:17 55:17	trying 8:11 9:9 11:2 24:21 41:11 44:18 45:18,19,21	view 16:18,20 17:6 25:23 34:17 44:8	willing 16:2,5,7
take 15:16,17 16:20 20:6 21:9 31:3 45:14 46:1	think 9:10 10:15 10:20 11:4,5 13:10,13 17:16 21:1 25:11 28:18,23 30:2 31:10 32:6,12 32:14,18 33:2,6 34:7,8 35:9 37:13 38:22 39:18,23 41:4 43:5,12 45:10 45:16 47:8,16 47:16,17 48:6 48:14,16 50:21 52:6,17 53:15 53:17 55:17	turn 10:17 25:13 27:15	victim 35:22	win 23:13 56:4
taken 15:8 33:19	thinking 40:4	turns 56:2	violated 10:22 11:16	withhold 51:20
takes 5:18 11:23 16:14	third 12:12 19:4 19:5	twice 18:2	violation 3:13 17:4,24 18:22 19:8 25:21,24 26:3,7 27:24 29:6 34:17,21 52:22,25 53:3	witness 6:6,10 7:6 29:9 35:15 37:19 40:16 41:8,15
talk 8:19 12:11 14:10 33:18 52:1,3	thought 15:23	two 14:6 24:6 25:9,24 27:12 33:15 34:16 36:15,22 42:11 44:6 46:21	vis-à-vis 32:17	witnesses 40:12 40:13
talking 6:7,11,13 15:1 25:12 27:23 29:8,11	threat 20:1	typically 49:16	<hr/> W <hr/>	witnessing 39:22
talks 15:20 52:4	time 14:14 16:4 21:17 23:19 50:6,20 52:10	<hr/> U <hr/>	wall 47:4	wondered 12:4
Tampa 1:15	Title 3:14	underlying 15:14 31:9 32:13,22 51:4,12	wallow 30:6	word 4:1 5:25 8:13 9:7 13:21 17:18 18:1 25:18 47:3
tax 20:2,3	today 14:23	understand 13:3 32:16 44:24 46:10	want 16:22,24 33:25 41:4 46:7 51:25 55:3,23	words 11:9 43:8 44:3,4,5,9,23 46:2 55:25
tell 36:12,14,14 36:24 44:15	told 48:16	Understood 23:7	wanted 43:16,18 43:19 48:10 51:7,7	work 23:5
tells 25:1 26:5	totality 6:22	underway 37:5 40:15 52:10	wants 45:5	works 12:13 32:16
tense 8:13	transferring 52:4	unfair 53:16	Washington 1:8 1:18	world 12:9 26:21 26:23 27:2 31:7
term 55:21	transmitted 49:25 50:4	unfortunately 21:11	wasn't 25:19 27:18 48:24 51:2,11	worried 48:13
termed 47:13	tree 12:23,24	United 1:1,6,12 3:4,14 17:22	waters 10:13	wouldn't 6:8 14:3 14:4 32:19 33:3 34:8 37:18 38:16 40:3,3 42:22 45:3 49:16
terms 42:9	trial 21:6,10 25:17 35:15 40:14,15,16 41:9	unrelated 14:20	way 30:24 32:16 34:21 40:5 50:6	wow 39:23
test 9:1 11:25 28:3 30:1	trials 34:1 35:14 40:14	upsets 5:5 55:2	ways 14:7 25:24 29:4 34:17	written 6:6 30:24
testified 48:21		urge 10:2	weird 35:14,20 38:22 40:22 45:5	wrong 12:23,25
testify 41:9		use 8:14 44:14 49:15	went 30:10 44:25 48:15,20	
testimony 51:18		U.S 14:21 33:22 34:2		
text 10:8				
Thank 23:18,20 23:21 53:19,20 56:13,13,15				
theoretical 10:1				
theoretically 33:12 47:4				
theory 33:10				
thing 14:4 32:23				

17:6 27:19 35:7	23 2:7			
<hr/>	29 1:9			
X	<hr/>			
x 1:2,7	3			
<hr/>	3 2:4			
Y	<hr/>			
year 15:8 48:16	4			
years 14:9,12,19	4 14:9 50:5,17			
14:20,24 38:19	41 4:10			
39:14 49:7 50:5	<hr/>			
50:17	5			
<hr/>	53 2:10			
1	<hr/>			
1 10:16 11:22	7			
17:17 24:23	7 53:21			
25:25 52:1,2	<hr/>			
10 4:20 5:1	9			
10-month 48:19	9 4:20 5:1			
48:23	9-1-1 46:18			
10-5443 1:5 3:4	911 42:6			
107 49:6				
11:22 1:13 3:2				
12:17 56:17				
13 4:20 5:1				
14 49:5				
1512 17:13 22:5				
1512(a)(1)(C)				
3:14 24:2,9				
1512(g)(2) 15:20				
25:4				
1515 25:1				
17 4:10				
18 3:14				
1998 14:18				
<hr/>				
2				
2 26:5,19 31:2				
45:13				
20 14:19				
200 38:19				
2002 14:19,24,25				
15:3,6 50:10,12				
2003 15:7				
2011 1:9				
210 39:14				