





1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	BRIAN H. FLETCHER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	J. BENJAMIN AGUIÑAGA, ESQ.	
7	On behalf of the Respondents	64
8	REBUTTAL ARGUMENT OF:	
9	BRIAN H. FLETCHER, ESQ.	
10	On behalf of the Petitioners	120
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
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23  
24  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-411, Murthy versus Missouri.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER

ON BEHALF OF THE PETITIONERS

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

The government may not use coercive threats to suppress speech, but it is entitled to speak for itself by informing, persuading, or criticizing private speakers.

Like Bantam Books, this case should be about that fundamental distinction between persuasion and coercion. But, unlike Bantam and the case that you'll hear next, this is not a typical suit where a speaker challenges government actions affecting its own speech. Instead, two states and five individuals are trying to use the Article III courts to audit all of the executive branch's communications with and about social media platforms.

That problem has infected every step

1 of this case. Respondents don't have standing  
2 at all because they have not shown an imminent  
3 threat that the government will cause a platform  
4 to moderate their posts in particular. But the  
5 lower courts still reviewed a vast range of  
6 speech by different officials to different  
7 platforms about different topics at different  
8 times without asking whether it had anything to  
9 do with Respondents.

10 And the courts then entered a  
11 universal injunction restricting speech about  
12 any content posted on any platform by anyone and  
13 binding thousands of officials, including  
14 presidential advisors speaking to the public and  
15 FBI agents trying to protect the nation from  
16 foreign threats.

17 Even apart from the Article III  
18 problem, that injunction rests on two  
19 fundamental legal errors. First, the Fifth  
20 Circuit radically expanded the state action  
21 doctrine by holding that even concededly  
22 non-coercive communications, like the CDC's  
23 public health advice, can transform private  
24 platforms' editorial choices into state action.  
25 And, second, the Fifth Circuit mistook

1 persuasion for coercion. It held that the FBI's  
2 communications are inherently coercive because  
3 the FBI is a law enforcement agency, a theory  
4 that even Respondents don't defend in this  
5 Court, and it held that White House officials  
6 engaged in coercion because they used strong  
7 language or referred in a general way to legal  
8 reforms in response to press questions.

9           If this Court reaches the merits, it  
10 should reaffirm that government speech crosses  
11 the line into coercion only if, viewed  
12 objectively, it conveys a threat of adverse  
13 government action. And because no threats  
14 happened here, the Court should reverse.

15           I welcome the Court's questions.

16           JUSTICE THOMAS: Mr. Fletcher, is the  
17 coercion/encouragement framework out of Brant --  
18 of Bantam Book the only way to look at this  
19 case?

20           MR. FLETCHER: So I think there are  
21 two ways to look at this case. I think one of  
22 them is the coercion inquiry, which we think  
23 comes from Bantam Books. You can think of that  
24 as an aspect of state action because, when  
25 private parties are compelled to act, as the

1 Court said in Halleck, they become state actors.  
2 We think that's the right way to think about  
3 this case.

4 Respondents and the lower courts have  
5 also proposed a different way, the state action  
6 way. They've suggested that, even absent  
7 coercion, the government's speech, if it  
8 encourages in some colloquial sense private  
9 action, it can turn that private action --

10 JUSTICE THOMAS: Do we -- do -- do we  
11 --

12 MR. FLETCHER: -- into state action.

13 JUSTICE THOMAS: Just to -- so I  
14 understand your argument, do we normally apply  
15 state action doctrine in cases involving the  
16 government or private parties?

17 MR. FLETCHER: Both, I think. You  
18 know, in some state action cases, you're asking  
19 -- someone is suing a private party and alleging  
20 that that private party is bound by the contours  
21 of the First Amendment or other constitutional  
22 provisions because they're state actors. You  
23 see some suits like that that look like this,  
24 suits against the platforms, suits against  
25 Stanford University, which is referenced in its

1 amicus brief here. But you also see suits  
2 against the government based on conduct by  
3 private parties. That was the case in Blum, and  
4 that's the theory that Respondents are pursuing  
5 here.

6 JUSTICE THOMAS: Are there any First  
7 Amendment cases?

8 MR. FLETCHER: Any First Amendment  
9 cases? I'm sorry, that are --

10 JUSTICE THOMAS: Using, employing  
11 state action doctrine?

12 MR. FLETCHER: Off the -- and suing  
13 the government? Off the top of my head, I can't  
14 think of one. And -- and I --

15 JUSTICE THOMAS: So they're usually  
16 things like Medicare or government contracts or  
17 relationships like that?

18 MR. FLETCHER: Yeah, and I -- I think  
19 what that gets at is that it's very unusual, and  
20 we don't think it's possible for the government,  
21 through speech alone, to transform private  
22 speakers into state actors. We think these  
23 cases are -- usually are and ought to be viewed  
24 through the Bantam Books-type framework, where  
25 there's a problem if the government is engaged



1 in coercion, but if it stays on the persuasion  
2 side of the line and all we're talking about is  
3 government speech, then there's no state action  
4 and there's also no First Amendment --

5 JUSTICE THOMAS: So --

6 MR. FLETCHER: -- problem.

7 JUSTICE THOMAS: -- one final  
8 question. You continue to refer back to --  
9 refer to government speech. Just for my  
10 edification, what's the constitutional basis for  
11 -- for government speech?

12 MR. FLETCHER: Yeah. So the Court has  
13 said, I think, that the government is entitled  
14 to speak for itself. It's not a right that  
15 comes from the First Amendment. It's a feature  
16 of our constitutional democracy. As the Court  
17 has said, the government couldn't function if it  
18 couldn't express points of view. In Walker, the  
19 Court explained, for example, that the  
20 government has to be able to run a vaccination  
21 campaign at times of public health crisis. I  
22 think that's a major part of what was going on  
23 here. So the Court hasn't located it in any  
24 specific constitutional provision. It's just  
25 part of democratic governance.

1 JUSTICE SOTOMAYOR: Can you explain to  
2 me what exactly is the injunction doing?  
3 Meaning how is it affecting your speech, the  
4 government's speech? And there's a lot of  
5 defendants.

6 MR. FLETCHER: Yeah.

7 JUSTICE SOTOMAYOR: There's a lot of  
8 agencies. I know that our case law says an  
9 injunction just can't tell you to violate the  
10 law, and so this injunction might have that  
11 problem inherent in it. But the Fifth Circuit  
12 injunction is what's before us, correct?

13 MR. FLETCHER: Correct.

14 JUSTICE SOTOMAYOR: And it says to  
15 encourage or significantly -- to coerce --  
16 that's a legal term.

17 MR. FLETCHER: Yeah.

18 JUSTICE SOTOMAYOR: Or significantly  
19 encourage. And you're questioning whether --  
20 what the meaning of "significant encouragement"  
21 --

22 MR. FLETCHER: Yeah.

23 JUSTICE SOTOMAYOR: -- is. And I'm  
24 not sure I know exactly what the Fifth Circuit  
25 meant, but we can figure that out. So let's

1 just use to coerce social media companies to  
2 remove, delete, suppress, or reduce, including  
3 through altering their algorithms posted social  
4 media content containing protected speech.

5 How is that harming the government? I  
6 want some specifics.

7 MR. FLETCHER: I'm happy to do that,  
8 and I'll say first just to be clear, because  
9 this Court has stayed the injunction,  
10 fortunately, it's not harming the government  
11 now, but there were times when we were getting  
12 --

13 JUSTICE SOTOMAYOR: Well, what are you  
14 anticipating?

15 MR. FLETCHER: Exactly, right. So I  
16 think the problem with that -- we don't say that  
17 the government can coerce private speakers.  
18 That is prohibited by the First Amendment. But  
19 the problem with the Fifth Circuit's injunction  
20 saying don't coerce or significantly encourage  
21 is that it comes at the end of 80 pages of legal  
22 analysis holding that the government had done  
23 those things by -- for example, when the FBI  
24 would send communications to the platforms  
25 saying, for your information, it has come to our

1 attention that the following URLs or email  
2 addresses or other selectors are being used by  
3 malign foreign actors like Russian intelligence  
4 operatives to spread disinformation on your  
5 platforms, do with it what you will.

6 That, the -- the -- the Fifth Circuit  
7 held, is coercive because the FBI is a powerful  
8 law enforcement agency. And I think, if the  
9 injunction were put in place, the FBI would have  
10 to think very hard about whether it could  
11 continue to do that.

12 Similarly, I think both the Fifth  
13 Circuit and my friends have really said that the  
14 crux of what they claim was coercion here was  
15 what happened in July of 2021 when the Surgeon  
16 General, the White House Press Secretary, and  
17 the President himself made statements  
18 criticizing the platforms' practices on  
19 misinformation and false statements about COVID  
20 vaccines and calling on them to do better.

21 I think it's really troubling, the  
22 idea that those sorts of classic bully pulpit  
23 exhortations, public statements urging actors to  
24 behave in different ways, might be deemed to  
25 violate the First Amendment. And I think, if

1 the injunction were to go into effect and the  
2 President or his senior advisors -- the  
3 President isn't enjoined, but if his senior  
4 advisors, the press secretary or someone else,  
5 wanted to talk to the public about other  
6 problems, like the circulation of anti-Semitic  
7 or Islamophobic content on the social media  
8 platforms or the effects they might be having on  
9 children's mental health or national security  
10 issues, like the anti-Semitic Osama Bin Laden  
11 letter that was trending on TikTok at the end of  
12 last year that we reference towards the end of  
13 our brief, I think all of those things could be  
14 done only under the shadow of the injunction.

15           And that comes around to the other  
16 point that you made, which is that this  
17 injunction, especially read in light of the  
18 opinion comes before -- that becomes before it,  
19 is extremely vague. And I think having that  
20 sort of vague injunction with these contestable  
21 legal terms that have been interpreted very  
22 broadly as applied to past conduct hanging over  
23 the heads of all of these government officials  
24 doing all of these things is a real problem and  
25 I think especially so when you're talking about

1 entering such an injunction at the behest of two  
2 states and five individual social media users  
3 whose main complaints are about the moderation  
4 of posts about COVID-19 many years ago that they  
5 haven't really even shown were traceable to the  
6 government to begin with, we think.

7 And we certainly don't think that they  
8 have shown that they face the sort of imminent  
9 threat of future injury that's required to  
10 satisfy Article III.

11 JUSTICE ALITO: Mr. Fletcher, let me  
12 follow up on that. If even one of the  
13 plaintiffs has standing, then we're required to  
14 get to the merits. So let me ask you about  
15 Ms. Hines, and as you just mentioned, she must  
16 have faced an imminent threat of future injury  
17 at the time when the complaint was filed, and  
18 that injury must be traceable to the actions of  
19 the government.

20 So, in the first part of that,  
21 imminent threat of future injury, her Facebook  
22 personal account was restricted at the time when  
23 the complaint was filed. So why isn't that  
24 sufficient to show a threat of -- an imminent  
25 threat of future injury?

1 MR. FLETCHER: We're not disputing  
2 that when the private platforms moderated the  
3 plaintiffs' pages or their posts, that's an  
4 injury in some sense. We haven't disputed that  
5 they suffered that injury. We've disputed the  
6 traceability question --

7 JUSTICE ALITO: Okay. Fine.

8 MR. FLETCHER: -- and then the  
9 redressability question.

10 JUSTICE ALITO: Okay. Right. So, on  
11 traceability, traceability is basically a  
12 question of causation, right?

13 MR. FLETCHER: Agreed.

14 JUSTICE ALITO: All right. Both --  
15 the -- the district court found that the injury  
16 was traceable to the government's actions, and  
17 the -- the Fifth Circuit accepted that finding,  
18 reviewed it and accepted it.

19 So that's two lower courts. We don't  
20 usually reverse findings of fact that have been  
21 endorsed by two lower courts. And you haven't  
22 attempted to show that it was clear -- that that  
23 finding is clearly erroneous.

24 MR. FLETCHER: So, respectfully,  
25 Justice Alito, I disagree with that. I think

1 that the Fifth Circuit and the district court  
2 applied too loose a notion of traceability.  
3 They didn't try to say this post or any post or  
4 any action against Ms. Hines was traceable to  
5 any action by the government.

6 They did what the red brief calls a  
7 bird's eye view of traceability. They said the  
8 government is talking to the platforms a lot.  
9 The platforms are doing moderation, and so we'll  
10 just assume that all of that moderation is  
11 traceable to the government.

12 JUSTICE ALITO: Well, do you think  
13 that it's necessary to identify a single  
14 government action and then trace it to a single  
15 consequence? Do you think that's required?

16 MR. FLETCHER: No, but I think you  
17 have to trace some government action to some  
18 consequence that befell you. And maybe I could  
19 just be specific about this because we challenge  
20 this in our opening brief, and the red brief  
21 comes back at pages 19 to 21 and offers up what  
22 I take to be their best examples of traceable  
23 harm, and I invite you to go look at the pages  
24 of the record that they're citing because often  
25 what you find is that they're citing moderation



1 of their content that happened either before the  
2 challenged government actions to which they're  
3 referring or long after.

4 JUSTICE ALITO: All right. I -- I  
5 have looked at that.

6 On the issue of causation, under Mt.  
7 Healthy, are they required to show anything more  
8 than the government's action was a motivating  
9 factor?

10 MR. FLETCHER: I -- I don't know the  
11 answer to that in all cases, and I'm -- I'm  
12 reluctant to make sort of broad statements about  
13 what the traceability requirement demands in  
14 different circumstances.

15 I will say here we're not disputing  
16 that. We're saying that they haven't shown any  
17 causal connection between the --

18 JUSTICE ALITO: It has no effect  
19 whatsoever?

20 MR. FLETCHER: Right. And -- and the  
21 -- the reason --

22 JUSTICE ALITO: Both the lower courts  
23 were wrong on that?

24 MR. FLETCHER: I -- I think they were  
25 because, again, they did this blunderbuss

1 approach where they said the government is  
2 talking to the platforms about moderation and  
3 the platforms are moderating content.

4 But the platforms were moderating this  
5 content long before the government was talking  
6 to them. They had powerful business incentives  
7 to do the same thing. The acts of moderation  
8 were consistent with the platforms' own  
9 policies, and this is, I think, another telling  
10 fact. In those red brief examples that we  
11 talked about on pages 19 to 21, some of them  
12 involved platforms like LinkedIn that wasn't  
13 even the subject of the challenged White House  
14 and Solicitor General -- or, excuse me, Surgeon  
15 General's office communications with the  
16 platforms.

17 JUSTICE KAGAN: Do -- do you think  
18 that there are any factual findings with respect  
19 to standing that we are required to give clear  
20 error review to?

21 MR. FLETCHER: I think findings of  
22 historical fact, absolutely. We're not fighting  
23 that, so the idea that pieces of content were  
24 moderated, that the government made certain  
25 statements. And if there had been findings that

1 said Facebook deleted this post because of these  
2 communications by the government, that would be  
3 a factual finding of historical fact, but there  
4 just aren't such findings in our --

5 JUSTICE KAGAN: Right. I mean, that's  
6 what I was really getting at. Are there  
7 findings that you concede, you know, that one,  
8 you have to apply clear error review to? That  
9 one, you have to do the same?

10 MR. FLETCHER: Yeah we -- we do.  
11 And I -- I can't give you a list because there's  
12 a lot of facts in this case, but I -- we agree  
13 historical factual findings count. What we say  
14 don't count are findings that are really  
15 characterizations, which is a lot of what my  
16 friends are relying on, findings that are about  
17 the application of law to facts, which in this  
18 constitutional realm we think get de novo  
19 review, and then findings that are premised on  
20 erroneous legal standards.

21 JUSTICE GORSUCH: So -- so, Mr.  
22 Fletcher, I -- I -- I just want to nail down  
23 what your views are on -- on the legal  
24 standards. On traceability, you're not  
25 disputing that a motivating factor is enough.

1 MR. FLETCHER: We haven't made that  
2 argument here, that's right.

3 JUSTICE GORSUCH: Okay. And then, on  
4 redressability, what's your view of the legal  
5 standard the Court should be applying?

6 MR. FLETCHER: I -- I think, again, it  
7 has to be some showing that I think likely to  
8 redress the injury is the standard from Lujan,  
9 it -- so it doesn't have to be certain, but you  
10 have to make some showing that an injunction  
11 against the government will stop the platforms  
12 from doing what they want.

13 JUSTICE GORSUCH: In -- in  
14 Massachusetts versus EPA, we said likely "to  
15 some extent." Does that strike you as correct?

16 MR. FLETCHER: I -- I -- I think, in  
17 the context of Mass. versus EPA, maybe where  
18 you're talking about a problem of degrees. You  
19 know, here, where the concern is are the  
20 platforms going to moderate my posts or not and  
21 are they going to do it because of the  
22 government or not and will an injunction against  
23 the government stop Facebook and --

24 JUSTICE GORSUCH: To some degree. Is  
25 that an -- an acceptable standard to the

1 government?

2 MR. FLETCHER: I -- I -- I guess I --

3 JUSTICE GORSUCH: I just -- I just  
4 want to know what my yardstick that I'm supposed  
5 to measure these allegations against, and  
6 there's not a lot in your brief about it.

7 So I take "likely" from Lujan.

8 MR. FLETCHER: Yeah.

9 JUSTICE GORSUCH: I take "to some  
10 extent" from Massachusetts versus EPA. And I  
11 take the statement in Larson that it doesn't  
12 have to redress every injury.

13 MR. FLETCHER: Agreed.

14 JUSTICE GORSUCH: You agree with all  
15 of that?

16 MR. FLETCHER: Except that the "to  
17 some extent" I think was there, the state's  
18 injury was about rising sea levels, and so "to  
19 some extent" means it doesn't have to solve the  
20 problem, it has to help it a little bit.

21 JUSTICE GORSUCH: And do you agree --

22 MR. FLETCHER: This is more discrete  
23 acts of content moderation.

24 JUSTICE GORSUCH: But do you agree  
25 with that standard, though, that -- that "to

1 some extent," if -- if they could show that --  
2 that the -- their injury would be remedied "to  
3 some extent" by an injunction, that that would  
4 be enough?

5 MR. FLETCHER: Correct. So, if  
6 they're likely to face moderation on 10 posts  
7 and the -- an injunction against --

8 JUSTICE GORSUCH: Right.

9 MR. FLETCHER: -- the government would  
10 make it eight, that's enough.

11 JUSTICE GORSUCH: Yeah. Okay. And  
12 then just flipping back to traceability, I'm  
13 sorry, I forgot to ask, substantial motivating  
14 factor obviously means it's -- it doesn't have  
15 to be a proximate cause.

16 MR. FLETCHER: Agreed.

17 JUSTICE GORSUCH: Okay. Thank you.

18 JUSTICE ALITO: Mr. Fletcher, when I  
19 read all of the emails exchanged between the  
20 White House and other federal officials on  
21 Facebook in particular but also some of the  
22 other platforms, and I see that the White House  
23 and federal officials are repeatedly saying that  
24 Facebook and the federal government should be  
25 partners, we're on the same team, officials are

1 demanding answers, I want an answer, I want it  
2 right away, when they're unhappy, they -- they  
3 curse them out.

4           There are regular meetings. There is  
5 constant pestering of -- of Facebook and some of  
6 the other platforms and they want to have  
7 regular meetings, and they suggest why don't you  
8 -- they suggest rules that should be applied and  
9 why don't you tell us everything that you're  
10 going to do so we can help you and we can look  
11 it over.

12           And I thought: Wow, I cannot imagine  
13 federal officials taking that approach to the --  
14 the -- the print media, our representatives over  
15 there. If you -- if you did that to -- to them,  
16 what do you think the reaction would be?

17           And so I thought: You know, the only  
18 reason why this is taking place is because the  
19 federal government has got Section 230 and  
20 antitrust in its pocket and it's -- to mix my  
21 metaphors, and it's got these big clubs  
22 available for -- available to it, and so it's  
23 treating Facebook and these other platforms like  
24 they're subordinates.

25           Would you do that to The -- to The New

1 York Times or The Wall Street Journal or the  
2 Associated Press or any other big newspaper or  
3 wire service?

4 MR. FLETCHER: So there's a lot packed  
5 in there. I want to give you one very specific  
6 answer first and then -- wrap -- step back out  
7 to the broader context.

8 So specifically you mentioned  
9 demanding an answer right away and cursing them  
10 out. The only time that happens is in an email  
11 that's about the President's own Instagram  
12 account. It's not about moderating other  
13 people's content.

14 JUSTICE ALITO: Okay. We'll put that  
15 aside. There's all the rest.

16 MR. FLETCHER: So --

17 JUSTICE ALITO: Constant meetings,  
18 constant emails, we want answers.

19 MR. FLETCHER: Right.

20 JUSTICE ALITO: We're partners, we're  
21 on the same team.

22 Do you think that the -- the print  
23 media regards themselves as being on the same  
24 team as the federal government, partners with  
25 the federal government?



1           MR. FLETCHER: So potentially in the  
2 context of an effort to get Americans vaccinated  
3 during a once-in-a-lifetime pandemic. And -- I  
4 really think that piece of context, it doesn't  
5 change the First Amendment principles, but it's  
6 relevant to how they apply here.

7           And I think it's important to  
8 understand that at this time, this was a time  
9 when thousands of Americans were still dying  
10 every week and there was a hope that getting  
11 everyone vaccinated could stop the pandemic.

12           And there was a concern that Americans  
13 were getting their news about the vaccine from  
14 these platforms, and the platforms were  
15 promoting, not just posting --

16           JUSTICE ALITO: Well, I -- I --

17           MR. FLETCHER: -- but promoting, bad  
18 information.

19           JUSTICE ALITO: -- I understand all  
20 that and I know the objectives were good, but --  
21 but, once again, they were also getting their  
22 news from the print media and the broadcast  
23 media and cable media, and I just can't imagine  
24 the federal government doing that to them. But  
25 maybe I'm naive. Maybe that goes on behind the

1 scenes. I don't know. But I -- I -- it struck  
2 me as wow, this is not what I understand the  
3 relationship to be. That's all. I -- I --

4 MR. FLETCHER: Well, but I -- I do. I  
5 think this is important because I have the same  
6 reaction that you do, that these emails look  
7 unusual. I think the idea that there would be  
8 back and forth between the government and the  
9 media isn't unusual at all.

10 When the White House Press Secretary  
11 on July 16th is asked about this by the press at  
12 the time, what she says is, of course, we talk  
13 to the platforms just the way we talk to all of  
14 you when we have concerns about what you're  
15 doing, when we have information that you might  
16 find helpful.

17 Now there's an intensity of the back  
18 and forth here and there's an anger that I think  
19 is unusual, but the context for that I think is  
20 that these platforms were saying publicly, we  
21 want to help, we think we have a responsibility  
22 to give people accurate information and not bad  
23 information, and we're doing everything we can  
24 to meet that goal.

25 That's where this language of

1 partnership comes from. It's not just from the  
2 White House. It's these platforms, which are  
3 powerful sophisticated entities, saying we're  
4 doing the best we can.

5           And the anger, I think really most of  
6 the anger when you read the emails -- and I  
7 appreciate that you have because I think you  
8 have to look at them in context -- the anger is  
9 when the officials think that the platforms are  
10 not being transparent about the scope of the  
11 problem or aren't giving information that's  
12 available.

13           JUSTICE ALITO: Let me ask you one --  
14 one more question and -- and then I'll stop at  
15 least for now. You make a big point in both  
16 your brief and your reply that states don't have  
17 First Amendment rights.

18           But are you saying that they may have  
19 a free speech right, but it comes from someplace  
20 else, or they don't have free speech rights? Do  
21 you think that the federal government could  
22 prohibit a governor or the top-ranking public  
23 health official in a state from speaking to the  
24 residents?

25           MR. FLETCHER: No, I don't think it

1 could. And I want to be clear we're not denying  
2 that they have speech rights. We're saying that  
3 those things like the federal government's  
4 speech rights come from the structure of our  
5 Constitution, not from the First Amendment.

6 This is a First Amendment case. And I  
7 think, really, what's happening here is that  
8 these states, which were the motivating factor  
9 behind the suit, the only plaintiffs in the  
10 initial complaint, are really trying to  
11 represent and to litigate the First Amendment  
12 rights of their citizens on their citizens'  
13 behalf. We think that's an end run around the  
14 limit on parens patriae standing, just like the  
15 one the Court rejected in Brackeen.

16 JUSTICE ALITO: All right. Thank you.

17 JUSTICE KAVANAUGH: Do you think on  
18 the anger point, I guess I had assumed, thought,  
19 experienced government press people throughout  
20 the federal government who regularly call up the  
21 media and -- and berate them.

22 Is that -- I mean, is that not --

23 MR. FLETCHER: I -- I -- I don't want  
24 --

25 JUSTICE KAVANAUGH: -- your

1 understanding? You said the anger here was  
2 unusual. I guess I wasn't --

3 MR. FLETCHER: So that --

4 JUSTICE KAVANAUGH: -- wasn't entirely  
5 clear on that from my own experience.

6 MR. FLETCHER: That's fair.

7 (Laughter.)

8 MR. FLETCHER: I guess I don't want to  
9 endorse "berate," but I guess I will say I bet  
10 this is not the first time that there has been  
11 profanity or intemperate language in exchanges  
12 between White House or agency communications  
13 staff and members of the press.

14 JUSTICE ALITO: Well, I -- I don't  
15 know whether our Public Information Officer is  
16 here today, but maybe she should take a note  
17 about this so whenever --

18 (Laughter.)

19 JUSTICE ALITO: -- whenever they write  
20 something that we don't like, she can call them  
21 up and curse them out and say, why don't you --  
22 you know, why don't we be partners. We're on  
23 the same team. Why don't you show us what  
24 you're going to write beforehand. We'll edit it  
25 for you, make sure it's accurate.

1           MR. FLETCHER: So, Justice Alito, that  
2 -- this is why I want to be careful here. I'm  
3 acknowledging the reality that this happens and  
4 that it's -- it may be commonplace. I'm not  
5 saying it's a good thing or a great thing or a  
6 thing to be celebrated.

7           But, fundamentally, I'm saying the  
8 First Amendment isn't a civility code. It is an  
9 important protection, it's a critical protection  
10 against actual coercion, but I think it's  
11 important to police that line, and I think this  
12 case, the sort of sprawling audit of all of  
13 these communications, shows the danger of  
14 allowing parties, especially parties without  
15 real direct injuries, to come into court and to  
16 challenge these sorts of regular  
17 back-and-forths.

18           JUSTICE KAVANAUGH: On the -- on the  
19 partners point, though, that does strike me as  
20 unusual. I mean, how -- what do you think about  
21 that?

22           MR. FLETCHER: So that, I think, is  
23 traceable to the unusual feature here of this is  
24 not the government where the platforms were  
25 saying we don't want to deal with you about

1 this, and the government is calling them up and  
2 saying, no, we're partners, let's be partners.  
3 You could imagine a situation like that where  
4 there might be a problem. You might start to  
5 think that that starts to shade into coercion.

6 But, here, it's an open door. The  
7 platforms are saying publicly, because they're  
8 getting public criticism about this from other  
9 people too, from the press, from the World  
10 Health Organization, from others, they're saying  
11 publicly we want to do our part. We recognize  
12 we have a responsibility, that we're a source of  
13 information for people, and we want to be a  
14 source of good information.

15 And so, when the White House calls and  
16 says we have some concerns about this, they say  
17 we agree. You know, that's a good point you  
18 make over here. We disagree with you over here.  
19 We're not going to go this far, but we agree  
20 with you.

21 JUSTICE GORSUCH: Mr. --

22 JUSTICE JACKSON: And, Mr. Fletcher,  
23 whether or not that ultimately becomes a First  
24 Amendment violation -- I mean, I appreciate the  
25 coercion point, and that's sort of the

1 government's first point with respect to the  
2 merits of this.

3           But I'm -- I'm interested in your view  
4 that the context doesn't "change the First  
5 Amendment principles." I mean, I understood our  
6 First Amendment jurisprudence to require  
7 heightened scrutiny of government restrictions  
8 of speech but not necessarily a total  
9 prohibition when you're talking about a  
10 compelling interest of the government to ensure,  
11 for example, that the public has accurate  
12 information in the context of -- of a  
13 once-in-a-lifetime pandemic.

14           So I'm -- I'm just interested in the  
15 government sort of conceding that if there was  
16 coercion, then we automatically have a First  
17 Amendment violation.

18           MR. FLETCHER: So I'm not conceding  
19 that that would be the case. I could imagine  
20 that in times of pandemic, if there were actual  
21 restrictions, maybe those would be justified.  
22 But our position here, because we think it's the  
23 position consistent with the facts, is that  
24 there wasn't any coercion to begin with.

25           JUSTICE GORSUCH: Mr. Fletcher --



1 MR. FLETCHER: Yes, Justice Gorsuch?

2 JUSTICE GORSUCH: -- on -- on that  
3 point, you mentioned coercion -- you mentioned  
4 coercion repeatedly in terms of threats. Can  
5 there also be coercion in your view in terms of  
6 inducements?

7 MR. FLETCHER: We think there can. I  
8 think often a threat or an inducement is sort of  
9 the flip side, one or the other. I think, in  
10 the next case, you could construe it either way,  
11 threat of prosecution, offer of leniency.

12 So we acknowledge that it could be  
13 both, but it has to be a threat or an inducement  
14 of some concrete government action, not just  
15 more government speech.

16 JUSTICE GORSUCH: And,  
17 hypothetically -- and I'm not saying this  
18 happened here -- but would a threat or an  
19 inducement with respect to antitrust actions  
20 qualify as coercion?

21 MR. FLETCHER: Sure.

22 JUSTICE GORSUCH: And a -- a threat or  
23 an inducement with respect to Section 230  
24 qualify?

25 MR. FLETCHER: So I think that one's

1 harder for two reasons. One is that these are  
2 executive branch officials who don't have the  
3 ability to unilaterally enact 230 reform. I  
4 think the question is --

5 JUSTICE GORSUCH: But they -- they  
6 have a power to influence that.

7 MR. FLETCHER: Influence that, but the  
8 question is would --

9 JUSTICE GORSUCH: And is that -- would  
10 that be enough to say we're going to -- if you  
11 don't do X, we are going to change our position  
12 on Section 230?

13 MR. FLETCHER: So potentially yes as  
14 to legislation. 230, if I could just get this  
15 out, though --

16 JUSTICE GORSUCH: Sure.

17 MR. FLETCHER: -- I think is different  
18 because 230 is about content moderation. It's  
19 -- it's -- it's about this very issue. And I  
20 think a government official has to be able to  
21 say, I support Section 230 reform because I'm  
22 concerned about these things, and also, in the  
23 meantime, I think platforms should be doing  
24 better.

25 JUSTICE GORSUCH: I understand that,

1 but in terms of advocating for a change of  
2 Section 230, that could be coercion in your  
3 view?

4 MR. FLETCHER: If it were framed as a  
5 threat.

6 JUSTICE GORSUCH: Okay. And how --

7 MR. FLETCHER: Our position is that  
8 wasn't done here.

9 JUSTICE GORSUCH: And how about -- how  
10 about saying you're killing people? Could that  
11 be coercion in some circumstances, that if you  
12 don't change your moderation policies, you're --  
13 you're responsible for killing people?

14 MR. FLETCHER: So I think that one is  
15 much harder. That's a statement that President  
16 Biden made off the cuff to the press.

17 JUSTICE GORSUCH: I -- I'm not -- I'm  
18 -- I'm not -- I -- I -- listen -- I -- I -- I --  
19 I'm not talking about the context-specific  
20 issues, and I understand you have arguments  
21 there, but could that in some circumstances, an  
22 accusation by a government official that unless  
23 you change your policies, you're responsible for  
24 killing people, could that be coercion?

25 MR. FLETCHER: So I find it hard to

1     imagine a situation where that sort of public  
2     statement could be. I'll acknowledge, as you  
3     say, context matters a ton, and so I don't want  
4     to say it's impossible. All I'm saying is it  
5     didn't happen here.

6             The President said this to the public  
7     in the middle of a pandemic, and then three days  
8     later -- I think this is important -- he  
9     clarified. He said, I'm not saying Facebook is  
10    killing people. I'm saying the people spreading  
11    misinformation are.

12            And when he was asked will you hold  
13    the platforms accountable, he was explicitly  
14    asked this, will you hold them accountable if  
15    they don't do better, he said, I'm not looking  
16    to hold anyone accountable. I just want  
17    everyone to look in their mirror and imagine --  
18    look in the mirror and imagine what would happen  
19    if this misinformation was going to their loved  
20    ones. I think it's clear that this was  
21    exhortation, not threat.

22            CHIEF JUSTICE ROBERTS: Thank you, Mr.  
23    Fletcher.

24            How are we supposed to evaluate that  
25    question in what the -- what -- the level at

1     which coercion kicks in? I mean, if you're  
2     trying to coerce or get a particular result out  
3     of a media outlet, is it enough to say, you  
4     know, if you don't do this, we're going to move  
5     your reporter's cubicle down the hall? Or -- I  
6     mean, how do you evaluate when it constitutes  
7     coercion in this context?

8                   MR. FLETCHER: So let me start with I  
9     think Bantam Books has been the lodestar for the  
10    lower courts that have mostly coalesced, with  
11    some errors in application like this case,  
12    around the idea of the question is, is it a  
13    threat or a statement that a reasonable person  
14    would understand, viewed objectively and in  
15    context, as an implicit or explicit threat of  
16    some adverse government action.

17                   Now, as to the cubicles question, I --  
18    I sort of don't know if there are some adverse  
19    government actions that are so trivial that they  
20    don't count. I guess I think something like  
21    that seems less likely to be a coercive threat.

22                   But -- but, in general, I think our  
23    position is, if there's something that the  
24    government is saying that we're going to  
25    exercise government power in some way unless you

1 change your speech in some way or stop  
2 distributing the speech of others, if it's  
3 reasonably understood as that sort of a threat,  
4 that's a First Amendment problem.

5 CHIEF JUSTICE ROBERTS: Well, but,  
6 under Bantam -- Bantam Books, it -- it  
7 presumably is in context, what you're talking  
8 about, a reasonable person. I mean, if there  
9 is, as a regular basis, the kind of back and  
10 forth between a spokesman and -- and a member of  
11 the media, what a reasonable person might view  
12 as -- as coercive might not in that context, you  
13 know -- you know, maybe the press secretary  
14 yells on a regular basis, and if their, you  
15 know, volume increases enough, that might be  
16 viewed as coercion.

17 MR. FLETCHER: So I think that points  
18 out the context sensitivity. And I think, as is  
19 usually the case when the Court says it's a  
20 reasonable person test, it's a reasonable person  
21 with knowledge of all the facts, and I think  
22 that would include the prior course of dealing  
23 between the relevant government official and the  
24 relevant recipient.

25 I think, here, that really strongly

1 reinforces the idea that there -- there wasn't  
2 coercion. These were sophisticated parties.  
3 They routinely said no to the government. They  
4 were open about it. They didn't hesitate to do  
5 it. And when they said no to the government,  
6 the government never engaged in any sort of  
7 retaliation. Instead, it engaged in more  
8 speech. Ultimately, the President and the Press  
9 Secretary and the Surgeon General took to the  
10 bully pulpit. We just don't think that's  
11 coercive.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas?

14 JUSTICE THOMAS: Mr. Fletcher, back to  
15 my point about coercion, couldn't you simply do  
16 the -- censor someone or prevent other speeches,  
17 speech by others, by agreeing with the  
18 platforms, as opposed to coercing the platforms?

19 MR. FLETCHER: I guess I'm not sure  
20 what you mean by "agreeing with the platforms."

21 JUSTICE THOMAS: Well, you just work  
22 together, said: Look, we're right; they're  
23 wrong. Let's work together. You know, we're on  
24 the same team. Let's work together to make sure  
25 that this misinformation doesn't gain sort of

1 any following.

2 MR. FLETCHER: So I think, as long as  
3 the platforms are exercising their own  
4 independent judgment, that's what the First  
5 Amendment protects. It says we don't want the  
6 government messing with --

7 JUSTICE THOMAS: So you're saying that  
8 you can't -- the government can't censor by  
9 coordinating with private parties to exclude  
10 other speech?

11 MR. FLETCHER: I'm saying that when  
12 the government persuades a private party not to  
13 distribute or promote someone else's speech,  
14 that's not censorship; that's persuading a  
15 private party to do something that they're  
16 lawfully entitled to do, and there are lots of  
17 contexts where government officials can persuade  
18 private parties to do things that the officials  
19 couldn't do directly.

20 So, for example, you know, in --  
21 recently, after the October 7th attacks in  
22 Israel, a number of public officials called on  
23 colleges and universities to do more about  
24 anti-Semitic hate speech on campus. I'm not  
25 sure and I doubt that the government could



1 mandate those sorts of changes in enforcement or  
2 policy, but public officials can call for those  
3 changes.

4           The government can encourage parents  
5 to monitor their children's cell phone usage or  
6 Internet companies to watch out for child  
7 pornography on their platforms even if the  
8 Fourth Amendment would prevent the government  
9 from doing that directly.

10           All of those are contexts where the  
11 government can persuade a private party to do  
12 something that the private party's lawfully  
13 entitled to do, and we think that's what the  
14 government is doing when it's saying to these  
15 platforms, your platforms and your algorithms  
16 and the way that you're presenting information  
17 is causing harm and we think you should stop,  
18 and the platforms are --

19           JUSTICE THOMAS: So you -- you really  
20 don't see any difference between the government  
21 coordinating with the platforms to exclude other  
22 speech and persuading the platforms to do this,  
23 to not engage or permit other speech?

24           MR. FLETCHER: I -- I guess I'm not  
25 seeing it. And I think that what happened here

1 was definitely on the -- if you do think there  
2 is a difference between those two things, I  
3 guess my argument here would be that what  
4 happened is on the persuasion side of the line  
5 because you do see that back and forth of the  
6 platforms throughout the process saying no  
7 repeatedly when they disagree with what the  
8 government is asking them to do, and I think  
9 that that tells you that what was happening here  
10 is what the First Amendment protects, which is  
11 private speakers making independent judgment  
12 informed by, maybe even influenced by, the  
13 government but deciding it themselves.

14 JUSTICE THOMAS: So there's no  
15 difference between the platforms meeting and  
16 working out an arrangement not to permit certain  
17 speech and the platforms working with the  
18 government to do the exact same thing? There's  
19 no difference?

20 MR. FLETCHER: Well, I think, if -- if  
21 the platforms entered into some agreement  
22 amongst themselves, that might raise issues  
23 under different provisions of the law, that  
24 the -- the modest point I'm making is just that  
25 the government doesn't violate the First

1 Amendment when it persuades another -- a speaker  
2 to not distribute speech by someone else.

3 That's Penthouse versus Meese, Judge  
4 Silberman's opinion there. That's what happens  
5 when the White House Press Secretary calls up  
6 The New York Times and says that was a bad  
7 op-ed, you shouldn't run op-eds like that  
8 anymore. I think that's commonplace.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: On the traceability  
11 causation question, under Mt. Healthy, if the  
12 plaintiffs show that the government's actions  
13 were a motivating factor, it is not their  
14 obligation, isn't this true, to show that they  
15 would not -- that the platforms would not have  
16 done what they did were it not for what the  
17 government did? It would be the defendants'  
18 obligation to show that?

19 MR. FLETCHER: So I confess, Justice  
20 Alito, I'm not sure that the Court has ever  
21 gotten through how that -- whether that  
22 burden-shifting inquiry applies in the context  
23 of traceability as opposed to in a Mt. Healthy  
24 merits-type inquiry.

25 I guess what I'd say is the Court has

1       been pretty emphatic that when your injury is  
2       attributable to independent choices by private  
3       actors, that's not traceable. And our  
4       submission is that that's what happened here.

5                   JUSTICE ALITO: Well, wouldn't it be  
6       very strange to have a stricter standard on the  
7       merits, a less -- a less defendant-friendly  
8       standard on the merits than at the standing  
9       stage? It seems -- it seems odd.

10                   One last question really quickly.  
11       You've never argued that this case is moot?

12                   MR. FLETCHER: We have not, no.

13                   JUSTICE ALITO: Thank you.

14                   CHIEF JUSTICE ROBERTS: Justice  
15       Sotomayor?

16                   JUSTICE SOTOMAYOR: Counsel, you don't  
17       do a lot with Clapper, and it seems that Clapper  
18       really does change all of the cases in terms of  
19       requiring a heightened traceability standard,  
20       does it not?

21                   MR. FLETCHER: So I -- I think Clapper  
22       does -- is very instructive here. We do cite  
23       and rely on it. We think it's relevant to  
24       traceability.

25                   We think it's perhaps most relevant at

1 the -- sort of the future injury question  
2 because I think -- I think we're right about  
3 traceability of all of the past moderation of  
4 their content that they talk about, but I think  
5 we're on even stronger ground in saying that the  
6 vast majority of the things they're talking  
7 about are about COVID-19 or unusual,  
8 idiosyncratic stories from the 2020 election,  
9 and their burden is to show that they face an  
10 imminent threat -- that's from Lyons, that's  
11 from O'Shea -- that the injury is going to  
12 recur. That's Clapper II.

13           And what Clapper also says -- and this  
14 is instructive -- is that to the extent they're  
15 censoring themselves, which is what they say, in  
16 the absence of such an imminent threat of actual  
17 government-caused harm, that's not enough for  
18 our --

19           JUSTICE SOTOMAYOR: Could you go back  
20 to Ms. Hines's 90-day suspension? I'm not sure  
21 -- this record is enormous, but do we know  
22 exactly what was censored for that 90 days?

23           MR. FLETCHER: So that's the problem.  
24 I don't think we do or, if -- if we do, I --

25           JUSTICE SOTOMAYOR: I was looking for

1 it and couldn't find it.

2 MR. FLETCHER: And -- and when I tried  
3 to go through the red brief, pages 19 to 21, and  
4 connect up the dots here, one of the things  
5 that's hard is that there's not a lot of  
6 specifics about even the dates on when things  
7 happened.

8 I guess I will say, when the dates are  
9 provided, though, they don't line up. The very  
10 first example on page 19 of the red brief is,  
11 I -- I think it's Ms. Hines, she gets her  
12 retweet of Robert F. Kennedy, Junior, suppressed  
13 by Twitter and she says, that's an indication  
14 that my harms are traceable to the government  
15 because the government was talking about Robert  
16 F. Kennedy, Junior.

17 But she doesn't say that the  
18 government's statements happened between January  
19 and July of 2021, and the moderation of her  
20 retweet happened in April of 2023, years later,  
21 after Twitter had been sold, after it had  
22 abandoned the COVID-19 moderation policies that  
23 are at issue here.

24 I think that's a strong indication  
25 that there's a real traceability problem, and it

1 just gets worse when you look to the  
2 forward-looking injury that they have to  
3 establish.

4 JUSTICE SOTOMAYOR: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: On the coercion  
7 question, is there anything that we have to  
8 review on clear error, or is it all legal?

9 MR. FLETCHER: I -- I'd give you the  
10 same answer I gave before. I think historical  
11 fact, the statement was made, it was not made.  
12 If there were specific factual findings beyond  
13 that again of historical facts, we'd acknowledge  
14 there clear error, but things like this was  
15 pressure, this was coercion, we think those are  
16 characterizations.

17 And then the ultimate standard, the  
18 ultimate First Amendment standard of was, viewed  
19 objectively and in context, this communicating a  
20 threat, we think that's either law or maybe more  
21 probably law to facts that gets de novo review  
22 the way it usually does in the constitutional  
23 realm.

24 JUSTICE KAGAN: And on the past harm,  
25 future harm question that you were just talking

1 about, I take it, if no future harm, that's  
2 independently sufficient, is that right?

3 MR. FLETCHER: Correct.

4 JUSTICE KAGAN: And would there be any  
5 difficulties with confining a holding to that if  
6 we were to find for you?

7 MR. FLETCHER: I -- I don't think so  
8 at all. I think, in some ways, that's the  
9 narrowest, easiest way to resolve this case, is  
10 to say this is an action for injunctive relief,  
11 they have to show that they faced an imminent  
12 threat of future harm. We don't have to  
13 adjudicate the parties' disputes about the past  
14 harm. We just have to show that they haven't  
15 met that burden.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch?

19 JUSTICE GORSUCH: On that question, in  
20 your view, when is the time that we should be  
21 considering that? Probably not today it seems,  
22 right?

23 MR. FLETCHER: Correct. Yeah.

24 JUSTICE GORSUCH: It would be the time  
25 that the Court in the first instance issued the



1 PI. Is that -- is that your view?

2 MR. FLETCHER: So I -- I think it  
3 might be even earlier than that just to be -- be  
4 candid with that.

5 JUSTICE GORSUCH: Might be the  
6 complaint?

7 MR. FLETCHER: Might be the complaint,  
8 so the complaint for the states is I think May  
9 of 2022, the individuals get added in August of  
10 2022. The place where I think I know for sure  
11 that the PI matters, though, is whether they've  
12 shown a likelihood of irreparable harm which  
13 above and beyond standing is a requisite for  
14 injunctive relief. I think that has to be shown  
15 --

16 JUSTICE GORSUCH: That is at the PI  
17 time?

18 MR. FLETCHER: -- at the PI. Exactly.

19 JUSTICE GORSUCH: Okay. So we --  
20 that's the relevant date?

21 MR. FLETCHER: Yeah.

22 JUSTICE GORSUCH: Okay. And then,  
23 when we're looking at coercion, is it in your  
24 mind a relevant consideration that the industry  
25 is very concentrated and -- and that, therefore,

1 coordination problems that otherwise might be  
2 difficult with the media, which are very  
3 diverse, might not be present in some cases?

4 MR. FLETCHER: So, again, context  
5 matters. And I think, in some ways, the fact  
6 that this is -- these are very large, very  
7 powerful corporations cuts against a finding of  
8 coercion because they are very sophisticated,  
9 they didn't have any problem, they weren't shy  
10 about saying no to the government.

11 I -- I hesitate to say, though, that  
12 it suggests that you should change the First  
13 Amendment standards. I think the Knight brief  
14 is --

15 JUSTICE GORSUCH: I'm not suggesting  
16 that. The Knight brief does discuss this and  
17 says it might be a relevant factor that there's  
18 such a concentration that it makes coordination  
19 between government entities and private entities  
20 easier.

21 MR. FLETCHER: So -- but I --

22 JUSTICE GORSUCH: Do you -- do you  
23 disagree with that?

24 MR. FLETCHER: I -- I -- I'm not sure  
25 whether or not I agree with that, but I -- I

1 think the -- the point is that for our purposes,  
2 the constitutional line is between coercion and  
3 not coercion.

4 JUSTICE GORSUCH: No, I understand  
5 that.

6 MR. FLETCHER: And so the -- the  
7 question --

8 JUSTICE GORSUCH: But in the context-  
9 specific inquiries we've discussed --

10 MR. FLETCHER: Right.

11 JUSTICE GORSUCH: -- you've pointed  
12 out one way in which concentration might make it  
13 less susceptible to coercion. Do we have to  
14 account for the possibility as well that in some  
15 circumstances -- and I'm not -- again, not  
16 case-specific -- it might make -- may -- may  
17 make coercion easier?

18 MR. FLETCHER: So, if that were true,  
19 you would have to account for it. The reason  
20 I'm resisting is because I think the concerns  
21 about concentration in the industry go more to  
22 the potential effects of coercion if it happened  
23 than about whether or not coercion happened at  
24 all.

25 I get that. I'm sensitive to that,

1 and the point that I was trying to draw from the  
2 Knight brief was the First Amendment isn't the  
3 answer to problems of concentration in this  
4 industry.

5 JUSTICE GORSUCH: No. I -- I -- I  
6 take --

7 MR. FLETCHER: That's how they're --

8 JUSTICE GORSUCH: -- I take your  
9 point.

10 MR. FLETCHER: Yeah.

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh?

14 JUSTICE KAVANAUGH: Just so I  
15 understand, your key legal argument is, I think,  
16 but correct me if I'm wrong, that coercion does  
17 not encompass significant encouragement or  
18 entanglement and that it would be a mistake to  
19 so conclude because traditional, everyday  
20 communications would suddenly be deemed  
21 problematic?

22 MR. FLETCHER: Exactly right, and --  
23 and, really, that the -- what the lower courts  
24 have done here, I think, is to go beyond the  
25 coercion test and sort of to openly say we're

1 going to open up this state action encouragement  
2 or -- and that, I think, risks turning the  
3 platforms and lots of other entities that are  
4 interacting with the government into state  
5 actors and restricting their editorial choices  
6 under the First Amendment.

7 JUSTICE KAVANAUGH: And by coercion,  
8 you mean threat of legal consequences or do you  
9 --

10 MR. FLETCHER: Adverse government  
11 action. I -- I --

12 JUSTICE KAVANAUGH: Adverse government  
13 action, okay.

14 Then, on the killing people  
15 hypothetical or -- not hypothetical -- the  
16 statement, I mean, that raises kind of national  
17 security analogies. I don't know what your  
18 experience is or if you've looked into this, but  
19 it's probably not uncommon for government  
20 officials to protest an upcoming story on  
21 surveillance or detention policy and say, you  
22 know, if you run that, it's going to harm the  
23 war effort and put Americans at, you know, risk.

24 MR. FLETCHER: I -- I -- I can't  
25 profess to have had personal experience with

1 that. I know it has happened. The Knight brief  
2 talks about some examples. And I think that's  
3 an example of a valuable sort of interchange as  
4 long as it stays on the persuasion side of the  
5 line. I think plat- -- newspapers want to know  
6 if their publishing a story might put lives at  
7 risk. And they don't have to listen to the  
8 government, but that's information that they can  
9 consider in exercising their editorial judgment.

10 JUSTICE KAVANAUGH: But if they tack  
11 onto that: And if you publish the story, we're  
12 going to pursue antitrust action against you?

13 MR. FLETCHER: A huge problem, yeah.

14 JUSTICE KAVANAUGH: Right. Okay. And  
15 then you haven't really described what you think  
16 the common interactions are. I mean, what --  
17 what -- what do you think those are?

18 MR. FLETCHER: At issue in the  
19 complaint or looking forward?

20 JUSTICE KAVANAUGH: No, just in  
21 general.

22 MR. FLETCHER: Yeah.

23 JUSTICE KAVANAUGH: You're speaking on  
24 behalf of the United States. Again, my  
25 experience is the United States, in all its

1       manifestations, has regular communications with  
2       the media to talk about things they don't like  
3       or don't want to see or are complaining about  
4       factual inaccuracies. But -- I'd be interested  
5       in what you want to describe about that.

6               MR. FLETCHER: Yeah. So I think  
7       that's absolutely right, and I won't profess to  
8       give you a comprehensive overview. We've looked  
9       at this very carefully in the context of these  
10       defendants because we've a couple times been  
11       under the shadow of this injunction, and so we  
12       wanted to understand exactly what would be at  
13       stake there.

14              And so I think it -- it comes into a  
15       couple of different buckets. One of them is  
16       engagement on matters of public policy, and I  
17       think that's what was going on here. I think  
18       childhood mental health, anti-Semitic speech,  
19       Islamophobic speech online are in that category.  
20       Those are issues where the White House, the  
21       Surgeon General, others, might want to make  
22       their views known, to use the bully pulpit to  
23       call on the platforms to do more.

24              Another is the national security  
25       space. I think the record is clearest there on

1 the FBI providing these foreign malign influence  
2 selectors to the platforms for the platforms to  
3 take action if appropriate or briefing them on  
4 foreign threats or about terrorist activity  
5 happening on the platforms.

6 There's also a domestic law  
7 enforcement side of things, child exploitation,  
8 other things like that. The platforms are a  
9 vector for those sorts of activities, and the  
10 government communicates with them about that.

11 There's also election integrity  
12 issues, false statements about the times,  
13 places, or manners of elections, saying, you  
14 know, the polls have closed early, don't bother  
15 coming to vote, in an effort to suppress  
16 people's vote. Or Democrats vote on Wednesday;  
17 Republicans vote on Tuesday. Those sorts of  
18 schemes are of concern to the law enforcement  
19 entities.

20 And then I think there's also the  
21 CDC's interactions, which involve providing  
22 advice, you know: By the way, we're seeing a  
23 lot of this information circulating on your  
24 platform. It's not true or it's misleading  
25 about something that we've put out. Or even



1 just answering the platform's questions.

2 I think one of the flavors you get  
3 from the amicus briefs on our side of the case  
4 is there are a lot of valuable ways where the  
5 government has information or expertise that it  
6 can offer to private speakers, and it would be a  
7 shame to chill that.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Barrett?

11 JUSTICE BARRETT: So this might be a  
12 question about the distinction or the interplay  
13 between Bantam Books and just state action more  
14 generally. In Justice Thomas's questioning of  
15 you, towards the end, he was talking about the  
16 distinction between encouragement and coercion.

17 So what if Facebook said -- and this  
18 is counterfactual; it's not what happened in  
19 this case -- but what if Facebook said, you know  
20 what, we're partners, we're on the same team,  
21 this is a once-in-a-lifetime pandemic, and we  
22 think it would be most efficient and most  
23 helpful for the public good for us to just turn  
24 over our content moderation to you?

25 That's not coercion. That's voluntary

1 --

2 MR. FLETCHER: Yeah.

3 JUSTICE BARRETT: -- on Facebook's  
4 part, but it -- wouldn't it be state action  
5 then?

6 MR. FLETCHER: So, to me, it starts to  
7 veer over, and, obviously, with all the caveats,  
8 state action is incredibly context-specific. I  
9 don't want to be definitive.

10 JUSTICE BARRETT: Sure.

11 MR. FLETCHER: But, to me, that starts  
12 to verge more over into the joint action. We're  
13 doing something together. The government is  
14 doing things. It's actually making decisions.  
15 It's not just advising or persuading the  
16 platforms.

17 I -- I think the rubric may -- that  
18 well be state act action, but the rubric would  
19 be I think more sound in the joint action cases  
20 than under significant encouragement, which has  
21 never been just us trying to persuade you to do  
22 something.

23 JUSTICE BARRETT: How do we consider  
24 the relationship between those two things?  
25 Because I agree with you Bantam Books is about

1 coercion and drawing the line there. But,  
2 clearly, there are some times when things veer  
3 into the joint action space where we would say  
4 that maybe there was state action. And there's  
5 a dispute in this case -- it kind of comes up in  
6 the next one too -- about which framework is the  
7 right one. What advice do you have?

8 MR. FLETCHER: Yeah. So, again, I  
9 think, if I were the Court, I would want to be  
10 cautious about making too definitive  
11 pronouncements. I would say that here, what's  
12 challenged is the persuasion, exhortation, bully  
13 pulpit provision of advice, provision of  
14 information, and that when those things are at  
15 issue, the main yardstick is going to be Bantam  
16 Books. The main concern is going to be have you  
17 crossed the line from just really trying to  
18 persuade to trying to threaten and that Bantam  
19 is the right way to draw that line.

20 I think there are a lot of different  
21 amicus briefs from a lot of different parties,  
22 like the Chamber and NetChoice, they all agree  
23 that's the right line in this context.

24 I think you could reserve and say it  
25 would be a very different question if you're

1 talking about the government and the platforms  
2 acting together, turning over operational  
3 control, integrating their operations. That's a  
4 different case and might present hard state  
5 action issues, but it's just really not the kind  
6 of issue here.

7 JUSTICE BARRETT: And not alleged  
8 here?

9 MR. FLETCHER: Exactly right, yeah.

10 JUSTICE BARRETT: Okay. My other  
11 question is about the findings of fact and clear  
12 error. So you were pretty insistent with  
13 Justice Kagan that we really, to address the  
14 standing point, don't have to review any of the  
15 district court's factual findings for clear  
16 error.

17 And I just want to make sure that  
18 that's right because I'm thinking about things  
19 you talked about with -- I think it was Justice  
20 Alito, the interchange with the expletives, you  
21 know, we're getting mad, we want answers now,  
22 you know, are you, whatever, serious?

23 MR. FLETCHER: Yeah.

24 JUSTICE BARRETT: And -- and that was  
25 actually about his own Facebook account. Or

1 there was another change that was -- exchange  
2 that was actually about somebody impersonating  
3 the President's granddaughter on Twitter.

4 MR. FLETCHER: Yeah.

5 JUSTICE BARRETT: So, if the lower  
6 courts, which I think they did, kind of  
7 conflated some of those threats with threats  
8 that were designed to be threats related to the  
9 pandemic and that kind of suppression, wouldn't  
10 that then be clear error, or do you think that's  
11 application of facts to law or what?

12 MR. FLETCHER: So I apologize. I  
13 didn't mean to say that there -- there's no  
14 clear error here at all. I just meant to say  
15 it's -- would be findings of historical fact.  
16 And I think the ones that you --

17 JUSTICE BARRETT: And those count?

18 MR. FLETCHER: And those -- those  
19 count. Those do get clear error review. But I  
20 think we pointed out places on the -- on the  
21 salient ones where they just are clearly  
22 erroneous, they're just demonstrably inaccurate,  
23 in the two cases that you just identified.

24 JUSTICE BARRETT: Okay.

25 MR. FLETCHER: So, there, we -- we

1 might agree clear error applies, but to the  
2 extent that the lower courts were suggesting,  
3 and -- and, really, more the district court than  
4 the Fifth Circuit, but a little bit the Fifth  
5 Circuit too, that things were said to speakers  
6 that weren't said, that the Press Secretary said  
7 words she never said, our argument there would  
8 just be that those are clear error.

9 JUSTICE BARRETT: So, in considering  
10 traceability, you would say that maybe there are  
11 some things that we would review for clear error  
12 because the erroneous -- assuming that you're  
13 right, the erroneous conclusions about  
14 traceability depended partly on factual errors  
15 and then partly on applications of law to fact?

16 MR. FLETCHER: And -- and an incorrect  
17 legal standard, yeah.

18 JUSTICE BARRETT: Okay. Thanks.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21 JUSTICE JACKSON: So I guess I didn't  
22 perceive there to be such a sharp distinction  
23 between Blum and Bantam Books. The government  
24 seems to be arguing here that Bantam Books is  
25 the way to go, that Blum is not the right test.

1                   And I appreciate that Blum uses  
2                   significant encouragement, but I think it says  
3                   the question is whether the government "has  
4                   provided such significant encouragement, either  
5                   overt or covert, that the choice must in law be  
6                   deemed that of the state," that it's sort of  
7                   suggesting in the same way that Bantam Books  
8                   is that it's really about coercion, as opposed  
9                   to just encouragement.

10                   So am I wrong to think there's really  
11                   not that much difference between the two?

12                   MR. FLETCHER: So I -- I don't think  
13                   you're wrong there. I think we say that that's  
14                   the way you ought to read the "significant  
15                   encouragement" language, that it's positive  
16                   incentives of government action that overwhelm  
17                   the private party's choice and make it really  
18                   the government's choice, not the private  
19                   party's. You can just view that as the flip  
20                   side of the sort of coercive threats from Bantam  
21                   Books.

22                   I think the reason why you may have  
23                   sensed me today and us in our briefs resisting  
24                   Blum is because the lower courts and my friends  
25                   on the other side have really tried to turn that

1 "significant encouragement" language into  
2 something quite different, into circumstances  
3 where the government encourages in some  
4 colloquial sense by urging or persuading or, you  
5 know, really strongly advocating something. And  
6 we just don't think that's what Blum means or  
7 what this Court's state action cases have ever  
8 said.

9 JUSTICE JACKSON: Okay. I understand  
10 that. And even if we have a world in which  
11 significant encouragement is verboten, is there  
12 something different to the government providing  
13 information?

14 MR. FLETCHER: Yes.

15 JUSTICE JACKSON: I mean, I -- I'm a  
16 little worried about the Respondents' -- what I  
17 think could be taken away from their view, which  
18 is that in situations in which the government  
19 has information that may be unique to the  
20 government's knowledge but that it feels  
21 important for the public to have, that that  
22 somehow becomes prohibited if, as a result of  
23 that information, these companies decide they're  
24 going to do something different with respect to  
25 content moderation.



1           MR. FLETCHER: That's our big concern  
2           too. And that's exactly what the lower courts  
3           found crossed the line, the FBI providing  
4           information about covert foreign actors on  
5           platforms, the CDC providing information or even  
6           answering questions about matters of public  
7           health. I think it would be very troubling to  
8           say that those things are impermissible or  
9           create state action.

10           JUSTICE JACKSON: Thank you.

11           CHIEF JUSTICE ROBERTS: Thank you,  
12           counsel.

13           Mr. Aguiñaga.

14           ORAL ARGUMENT OF J. BENJAMIN AGUIÑAGA  
15           ON BEHALF OF THE RESPONDENTS

16           MR. AGUIÑAGA: Good morning, Mr. Chief  
17           Justice, and may it please the Court:

18           Government censorship has no place in  
19           our democracy. That is why this 20,000-page  
20           record is stunning. As the Fifth Circuit put  
21           it, the record reveals unrelenting pressure by  
22           the government to coerce social media platforms  
23           to suppress the speech of millions of Americans.

24           The district court, which analyzed  
25           this record for a year, described it as arguably

1 the most massive attack against free speech in  
2 American history, including the censorship of  
3 renowned scientists opining in their areas of  
4 expertise.

5           And the government's levers of  
6 pressure are anathema to the First Amendment.  
7 Behind closed doors, the government badgers the  
8 platforms 24/7, it abuses them with profanity,  
9 it warns that the highest levels of the White  
10 House are concerned, it ominously says that the  
11 White House is considering its options, and it  
12 accuses platforms both of playing total  
13 Calvinball and of hiding the ball, all to get  
14 the platforms to censor more speech. Under this  
15 onslaught, the platforms routinely cave.

16           Now, last month, in the NetChoice  
17 cases, the platforms told you that it's  
18 incredibly important that they create their own  
19 content moderation policies. But this record  
20 shows that they continually depart from those  
21 policies because of unrelenting government  
22 pressure.

23           Indeed, as Facebook recently disclosed  
24 in an internal email to former UK Deputy Prime  
25 Minister Nick Clegg, the reason Facebook did

1 that was "because we were under pressure by the  
2 administration. We shouldn't have done it."

3 Now my friend says all this is  
4 constitutional because the government has the  
5 right to persuade using the bully pulpit. But  
6 the government has no right to persuade  
7 platforms to violate Americans' constitutional  
8 rights, and pressuring platforms in back rooms  
9 shielded from public view is not using the bully  
10 pulpit at all. That's just being a bully.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Counsel, the -- I  
13 know your argument is basically a Bantam Book  
14 argument, but do you need coercion in order to  
15 -- do you think that's the only way you could  
16 make your case, or could you -- coordination  
17 accomplish the same thing; that is, the  
18 government is censoring by joint actions with  
19 the platforms as opposed to coercing the  
20 platforms?

21 MR. AGUIÑAGA: Your Honor, we don't  
22 need coercion as a theory. That's why we led  
23 with encouragement in our red brief. And I  
24 would point the Court to what it said in  
25 Norwood, which is the Court -- or the -- the

1 government cannot induce, encourage, and promote  
2 private actors to do directly what the  
3 government can't itself do directly.

4           And that's, I think, the principle  
5 that's guiding here, which is, regardless of the  
6 means that the government tries to use to  
7 pressure -- to pressure the platforms to commit  
8 censorship against third parties, the  
9 Constitution really doesn't care about that.  
10 It's the fact that what the government is trying  
11 to accomplish is the suppression of speech.

12           And I would say, Your Honor, I mean,  
13 that's exactly how you addressed this question  
14 in Bantam Books. You asked, did the government  
15 set out to deliberately suppress speech? The  
16 answer in that case was absolutely yes, and  
17 that's absolutely the answer in this case here.

18           And I guess, you know, I -- I would  
19 say, you know, when this Court considered Bantam  
20 Books, one of the key things about the analysis  
21 in Bantam Books was that it was an obscenity  
22 case, and, you know, the Court struggled with  
23 whether the states had the right to police the  
24 line between legitimate speech and illegitimate  
25 speech. And that was why you were talking about

1 coercion in that case. You were asking whether  
2 the states went too far --

3 JUSTICE JACKSON: Can I --

4 JUSTICE SOTOMAYOR: I -- I'm sorry.

5 The reason we were asking about coercion is  
6 because the private parties could have chosen on  
7 their own to censor that speech. They could  
8 have said we think it's obscene, I'm not going  
9 to be involved in this.

10 The only issue became when that choice  
11 was overridden by the government. And so I -- I  
12 don't -- I -- I -- I think you're -- you're cite  
13 -- you're mixing sort of situations and -- and  
14 confusing legal doctrines.

15 MR. AGUIÑAGA: No, Your Honor. The  
16 fundamental principle -- and this comes from  
17 Norwood and it's central to this Court's First  
18 Amendment cases, its Fourth Amendment cases --  
19 is that the government can't do indirectly what  
20 it's prohibited from doing directly.

21 And that's what you see happening in  
22 Bantam Books. That's what you see happening in  
23 a case like this because time and again there  
24 were times where the social media platforms had  
25 policies that didn't go far enough in censoring

1 the speech that the -- that the government  
2 wanted them to censor.

3 JUSTICE JACKSON: But whether or not  
4 the government can do this -- this is something  
5 I took up with Mr. Fletcher -- depends on the  
6 application of our First Amendment  
7 jurisprudence, and there may be circumstances in  
8 which the government could prohibit certain  
9 speech on the Internet or otherwise.

10 I mean, do you -- do you -- do you  
11 disagree that we would have to apply strict  
12 scrutiny and determine whether or not there is a  
13 compelling interest in how the government has  
14 tailored its regulation?

15 MR. AGUIÑAGA: Certainly, Your Honor.  
16 I think, at the end of every First Amendment  
17 analysis, you'll have the strict scrutiny  
18 framework in which, you know, in some national  
19 security hypos, for example, the government may  
20 well be able to demonstrate a compelling  
21 interest, may well be able to demonstrate narrow  
22 tailoring, but the --

23 JUSTICE JACKSON: All right. So --  
24 so -- so not every situation will -- in which  
25 the government engages in conduct that

1 ultimately has some effect on free -- on -- on  
2 speech necessarily becomes a First Amendment  
3 violation, correct?

4 MR. AGUIÑAGA: Maybe not necessarily,  
5 Your Honor. I guess the top-line question I  
6 would ask is, has the government set out to  
7 abridge the freedom of speech? And in this  
8 case, you see that time and time again because,  
9 if you control F --

10 JUSTICE JACKSON: But that's not the  
11 test for First Amendment violations.

12 MR. AGUIÑAGA: Your Honor, this flows  
13 from the plain text of the First Amendment,  
14 right?

15 JUSTICE JACKSON: No, I understand.  
16 But we have a -- we have a test for a  
17 determination of whether or not the First  
18 Amendment is actually violated. So, in certain  
19 situations, you know, the government can  
20 actually require that speech be suppressed if  
21 there's a compelling interest, right?

22 MR. AGUIÑAGA: It can, Your Honor.  
23 And I guess what I would say is that the courts  
24 below never got to strict scrutiny because the  
25 government never raised this. This has never

1       been litigated. The question in this case is  
2       whether at the front end the government itself  
3       has undertaken actions --

4                   JUSTICE JACKSON: It's the coercion,  
5       it's the state action, right? That's the  
6       question in this case?

7                   MR. AGUIÑAGA: And I would urge the  
8       Court to address the state action issue just  
9       like you addressed it in Bantam Books. You used  
10      that term four times in Bantam Books. In  
11      Footnote --

12                   JUSTICE KAGAN: I -- I mean, can I  
13      just understand because it seems like an  
14      extremely expansive argument, I must say,  
15      encouraging people basically to suppress their  
16      own speech. So, like Justice Kavanaugh, I've  
17      had some experience encouraging press to  
18      suppress their own speech.

19                   You -- you just wrote a bad editorial.  
20      Here are the five reasons you shouldn't write  
21      another one. You just wrote a story that's  
22      filled with factual errors. Here are the 10  
23      reasons why you shouldn't do that again.

24                   I mean, this happens literally  
25      thousands of times a day in the federal



1 government.

2 MR. AGUIÑAGA: Yeah, and I would say,  
3 in the mine-run case that you're describing to  
4 me, it's the government going after the speaker  
5 itself and trying to get them to change their  
6 speech.

7 What's so pernicious here is that you  
8 don't see any of these facts in this record  
9 unless we get discovery, which is when the --  
10 when Rob Flaherty, who's Deputy Assistant to the  
11 President, sends an email to Facebook or to  
12 Twitter and complains that they're not doing  
13 enough to censor what they view as vaccine  
14 hesitancy speech. America never sees that.

15 And the third party, people like Jill  
16 Hines and -- and Jim Hoft, whose speech wishes  
17 to express the kinds of viewpoints that the  
18 White House is targeting, they never know that  
19 that's happening behind the scenes.

20 And I think it makes a difference,  
21 Justice Kagan, that you have an intermediary  
22 here who really has no incentive to itself  
23 defend Jim Hoft's speech or to defend Jill  
24 Hines's speech. In The New York Times's  
25 hypothetical, you have a story, a publication

1 that itself is familiar with those kinds of --

2 JUSTICE KAVANAUGH: Well, what about  
3 op-eds?

4 JUSTICE KAGAN: I mean --

5 JUSTICE BARRETT: Don't you think --

6 JUSTICE KAVANAUGH: What about op-eds?

7 MR. AGUIÑAGA: Your Honor, with  
8 op-eds, you know, if it's third-party speech  
9 that -- that has that issue --

10 JUSTICE KAVANAUGH: That -- that  
11 happens too, right?

12 MR. AGUIÑAGA: And I guess there are a  
13 number of ways I would think about that, Your  
14 Honor. One is, if the newspaper declines to run  
15 an op-ed because the government asked, that  
16 op-ed author can go to any number of other  
17 publications and it has an outlet.

18 It's not the same here because, if I'm  
19 on Twitter and I wish to express a viewpoint  
20 that the government wishes to censor and Twitter  
21 bows to that pressure, then --

22 JUSTICE KAGAN: But if one --

23 MR. AGUIÑAGA: -- I lose my account.

24 JUSTICE KAGAN: -- if --

25 MR. AGUIÑAGA: I --

1 CHIEF JUSTICE ROBERTS: I was just  
2 going to say, first, I have no experience  
3 coercing anybody.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: But -- but,  
6 second, I mean, the government is not monolithic  
7 either. I suspect, when there's pressure put on  
8 one of the platforms or certainly one of the  
9 other media outlets, they have people they go  
10 to, probably in the government, to say: Hey,  
11 they're -- they're trying to get me to do this,  
12 and that person may disagree with what the  
13 government's trying to do this. It's not  
14 monolithic. And that has to dilute the concept  
15 of coercion significantly, doesn't it?

16 MR. AGUIÑAGA: Your Honor, I -- I'm  
17 not sure I agree with that. And I guess I'd get  
18 back to one of the earlier points I made, which  
19 is, you know, whether you call this coercion, if  
20 that's the label you attach, you call it  
21 encouragement, you call it promotion, you call  
22 it inducement, whatever it is, if the government  
23 is attempting to abridge the -- the speech  
24 rights of a third party, that has to be  
25 unconstitutional because that falls within the

1 plain text of the First Amendment.

2 And so, you know, this is Bantam Books  
3 of the 21st Century. You haven't had a case  
4 with social media platforms like this where  
5 third-party speech is so at risk of being  
6 censored.

7 CHIEF JUSTICE ROBERTS: Well, but how  
8 do you -- I mean, how do you analyze a situation  
9 where, you know, maybe EPA is trying to coerce a  
10 platform about something, and the Army Corps of  
11 Engineers is trying to coerce them the other  
12 way? I mean, you can't just sort of pick and  
13 choose which part of the government you're  
14 concerned about.

15 MR. AGUIÑAGA: Your Honor --

16 CHIEF JUSTICE ROBERTS: I mean,  
17 obviously, it's different when you're talking  
18 about what the president is saying in  
19 particular, but other than that, I think it's a  
20 very -- more a fluid situation than anything  
21 else.

22 MR. AGUIÑAGA: It is fluid, Your  
23 Honor, but I would say that when you have, as we  
24 have, plaintiffs in this case who wished to  
25 express certain viewpoints that have been

1 specifically targeted by -- targeted by the  
2 government, you know, it's not at least fluid in  
3 these facts.

4 And this is not a case just about  
5 COVID. It's a case about election integrity.  
6 It's a case the district court has a finding  
7 about how the government wishes to --

8 JUSTICE KAGAN: So, I mean, what about  
9 that? I mean, you know, take a -- an example  
10 where -- I mean, these platforms, they're  
11 compilers of speech, and some part of the  
12 government, let's call it part of the law  
13 enforcement arm of the government, says you  
14 might not realize it, but you are hosting a lot  
15 of terrorist speech, which is going to increase  
16 the chances that there's going to be some  
17 terrible harm that's going to take place, and we  
18 want to give you this information, we want to  
19 try to persuade you to take it down.

20 Are -- are -- the government can't do  
21 that?

22 MR. AGUIÑAGA: The government can  
23 absolutely do that, Justice Kagan.

24 JUSTICE KAGAN: They're taking --

25 MR. AGUIÑAGA: Terrorist activity,

1 criminal --

2 JUSTICE KAGAN: -- they're -- they're  
3 asking them to take down the speech.

4 MR. AGUIÑAGA: Terrorist activity,  
5 criminal activity, that is not protected speech.  
6 Absolutely, the government can inform the F --  
7 the --

8 JUSTICE KAGAN: Well, that might --  
9 might be protected speech. I mean, terrorists  
10 engage in, you know, things that come under the  
11 First Amendment. I mean, let's say they're just  
12 recruiting people for their organizations.

13 MR. AGUIÑAGA: Your Honor, if it's  
14 First Amendment speech, protected speech, then I  
15 think we're in an entirely different world. I  
16 mean, that's a case where -- and this comes up  
17 in the FBI findings that the district court made  
18 because what was happening is they were -- the  
19 FBI was sending Teleporter encrypted messages to  
20 the platforms, identifying what the government  
21 represents was foreign actors. The -- the  
22 district court found the government was not  
23 distinguishing between whether it was domestic  
24 or foreign conduct.

25 And the way this issue arises is when

1 maybe you have a foreign actor who tweets, you  
2 know, I love Biden, and there are 20 million  
3 people who wish to retweet that, repost that,  
4 with their own comments, saying, heck, yeah, I  
5 love Biden too. When an American does that,  
6 that's First Amendment protected speech, Your  
7 Honor. And so, when the government comes in and  
8 tries to take down every single post that  
9 contains the core that they say was foreign  
10 speech, but they're also taking down the -- the  
11 added speech by Americans, that's a square First  
12 Amendment issue, Your Honor.

13 JUSTICE KAGAN: So back in -- this --  
14 this -- this still happens now -- decades ago,  
15 it happened all the time, which is somebody from  
16 the White House got in touch with somebody from  
17 The Washington Post and said this will -- this  
18 will just harm national security, and The  
19 Washington Post said, okay, whatever you say.

20 I mean, that was all -- you didn't --  
21 we didn't know enough, but that was -- that was  
22 coercion?

23 MR. AGUIÑAGA: Your Honor, I -- I  
24 thought I understood the government this morning  
25 to say that might be a First Amendment issue.

1 And I think what I would say is, if there's a  
2 national security interest, maybe the government  
3 can satisfy strict scrutiny in that  
4 circumstance.

5 What I would also say is we probably  
6 wouldn't have a lawsuit based on that because I  
7 don't know how that we would get prospective  
8 injunctive relief based on a fleeting offhand,  
9 you know, reach-out from the White House to --

10 JUSTICE BARRETT: But that's --

11 JUSTICE KAGAN: I -- I guess what I'm  
12 just trying to suggest is that there's all kinds  
13 of things that can appear on these platforms  
14 that do all kinds of different harms, and -- and  
15 the inability of government that you're  
16 suggesting to -- to reach out to these platforms  
17 and say we want to give you information that you  
18 might not know about on this, and we want to  
19 give you our perspective on what harms that this  
20 is doing, and -- and, you know, we want to be  
21 able to answer questions that you have because  
22 we really do think that it would be a good thing  
23 if you on your own chose to take this speech  
24 down.

25 MR. AGUIÑAGA: And, Your Honor, if



1 those were the facts in this case, then I think  
2 it would be a much harder case for me. I think  
3 --

4 JUSTICE KAGAN: Well, now I don't know  
5 what your standard is. You just told me that  
6 that was -- that was good enough for you.

7 MR. AGUIÑAGA: No --

8 JUSTICE KAGAN: That was coercion.

9 MR. AGUIÑAGA: No, Your Honor,  
10 because, you know, in that circumstance, you  
11 have a platform who is reaching out -- or the  
12 government reaching out just to -- to identify  
13 what it views as the right state of the law,  
14 right state of facts.

15 The government -- I mean this Court  
16 has made clear for -- for a while, since its  
17 plurality opinion in Alvarez, that if the  
18 government thinks there's false speech out  
19 there, the remedy for that is true speech.  
20 Nothing prohibits the government from going to  
21 that platform and saying we've seen a lot of  
22 false information about election activity and  
23 COVID and vaccines and the like. Nothing  
24 prohibits the government from saying here's a  
25 list of everything we say is true, that is true

1 in our view, and you should amplify our speech,  
2 and anytime that false speech arises, you should  
3 put our posts right there next to it saying this  
4 is the government's view on this issue.

5 The problem here -- and this is -- you  
6 know, I -- I think you see this in the summer of  
7 2021 after the White House goes nuclear on the  
8 platforms -- is that the platforms themselves  
9 reverse course on their own policies. And you  
10 see this in ROA 15322, this is one of the -- the  
11 -- in my view, one of the hottest docs in the --  
12 in the JA because you've got this email from  
13 Nick Clegg, who is, you know, former Deputy  
14 Prime Minister of the UK, and after all of this  
15 pressure for months and months and months, he  
16 sends this email to Vivek Murthy, the Surgeon  
17 General, and he says: Dear Vivek, thanks for  
18 taking the time to meet. I wanted to make sure  
19 you saw the steps we took past -- this past week  
20 to adjust policies on what we're removing to  
21 take steps to further address the "Disinfo  
22 Dozen." We've removed 39 profiles, pages,  
23 groups, Instagram accounts. We're continuing to  
24 make other accounts harder to find.

25 I mean, this is an example of

1 platforms moving beyond what their own policies  
2 require because they felt pressure to take more  
3 action and to censor more speech. And, Your  
4 Honor, if that's -- I mean, if that's not the  
5 clearest example of the government doing --

6 JUSTICE BARRETT: So, counsel --

7 JUSTICE SOTOMAYOR: I'm sorry. Tell  
8 me where -- where you have in the record that --  
9 the 39 accounts that were taken out, that any of  
10 them related to any of the Petitioners here.

11 MR. AGUIÑAGA: Sure, Your Honor. So  
12 what I was quoting --

13 JUSTICE SOTOMAYOR: Give me -- and  
14 give me that cite again.

15 MR. AGUIÑAGA: What I was quoting to  
16 you right now is ROA 15322, and what that email  
17 from Nick Clegg mentions is the so-called  
18 "Disinformation Dozen." This is a group of  
19 people that the government thought was  
20 responsible for the majority of so-called health  
21 misinformation on social media.

22 Now, in paragraphs 5 and 6 of each of  
23 the supplemental declarations in the Joint  
24 Appendix, each of our individual plaintiffs  
25 specifically identifies the fact that they

1 follow members of the so-called "Disinformation  
2 Dozen," they repost their posts, they engage  
3 with their speech.

4 And so, when the government -- or when  
5 the platforms here, in response to the pressure,  
6 are taking down content and accounts related to  
7 those individuals called the "Disinformation  
8 Dozen," that is necessarily impacting our  
9 plaintiffs' right to engage with their speech,  
10 to add their own comments --

11 JUSTICE SOTOMAYOR: Not that they've  
12 taken down any of their posts but that they took  
13 down someone else's posts? That's what this is  
14 saying?

15 MR. AGUIÑAGA: That's what I was  
16 quoting to you right now, Your Honor, the --

17 JUSTICE SOTOMAYOR: That, I'm not sure  
18 how that shows traceability or redressability.

19 MR. AGUIÑAGA: In the same vein, I  
20 think you --

21 JUSTICE SOTOMAYOR: And I don't think  
22 we've ever dispensed standing on the basis of  
23 injury to another, injury to you but not to  
24 another.

25 MR. AGUIÑAGA: So, Justice Sotomayor,

1 let me give you Jill Hines one more time. Look  
2 at JA 7 -- 793 to 794. This is the tweet  
3 that -- or it was a screenshot of a tweet that  
4 Mr. Fletcher mentioned. And this is censorship  
5 four times over because this is a tweet in April  
6 2023. It's on the eve of the preliminary  
7 injunction hearing. And what she says is: This  
8 Facebook post that I posted was taken down by  
9 Facebook. She got a warning for it as a  
10 violation of the community standards.

11 What was that post? It was a  
12 screenshot of Robert F. Kennedy, Junior, who is  
13 a member of the so-called "Disinformation  
14 Dozen." What was the RFK tweet talking about?  
15 It was talking about Tucker Carlson, whom the  
16 administration was obsessed with. Look at JA  
17 701 to 708.

18 JUSTICE SOTOMAYOR: I'm sorry, the RFK  
19 tweet, the -- there's only a record of the White  
20 House asking Twitter to remove a tweet on -- and  
21 not particularly this one from R -- RFK. That  
22 doesn't help Hines's claim that the White House  
23 asked Facebook to remove anything.

24 MR. AGUIÑAGA: It does, Your Honor,  
25 because -- and this is a good example of the

1 interrelationship between the various media  
2 platforms -- you have cross-posting. So what  
3 happened in this example is Jill Hines took a  
4 screenshot of a tweet, and then she moved that  
5 over to Facebook and posted that as her own  
6 Facebook post. And so, when she did that, she  
7 moved RFK's tweet.

8 And I was going to describe what was  
9 in that tweet. He was talking about Tucker  
10 Carlson, that the White House specifically  
11 targeted, in the Joint Appendix, and that --

12 JUSTICE SOTOMAYOR: You know, I -- I  
13 have such a problem with -- with your brief,  
14 counselor. You omit information that changes  
15 the context of some of your claims. You  
16 attribute things to people who it didn't happen  
17 to. At least in one of the defendants, it was  
18 her brother that something happened to, not her.  
19 I don't know what to make of all this because  
20 you're -- you have a -- I'm not sure how we get  
21 to prove direct injury in any way.

22 MR. AGUIÑAGA: So, Justice Sotomayor,  
23 let me start by apologizing if any aspect of our  
24 brief was not as forthcoming as it should have  
25 been. I -- I will take firm -- full

1 responsibility for that. I apologize for that,  
2 Justice Sotomayor.

3           What I would add to the second part of  
4 your question is I think Jill Hines is the best  
5 standing for case -- for our case in multiple  
6 ways. I think one of the ways you look at her  
7 standing is you look at JA 715 to 716. This is  
8 an email to Facebook where the government, the  
9 White House, specifically asks Facebook to not  
10 distribute so-called vaccine hesitancy content  
11 and also to target health groups that do that.  
12 So that's JA 715 to 716.

13           Then you go down earlier in the JA to  
14 JA 631 to 632. This is Jill Hines's  
15 allegations. And what she says is, two months  
16 later -- so the email I described from you -- to  
17 you from the White House was in May -- two  
18 months later in July and then a couple of months  
19 later in September, Jill Hines had two health  
20 groups in Louisiana that were blocked by  
21 Facebook.

22           And I think this is one of the  
23 scariest examples in the record of what is at  
24 stake here, which is those groups were political  
25 action groups. Louisiana had a legislative

1 session in progress. And what Jill Hines was  
2 trying to do is mobilize people to support  
3 certain bills and other legislative materials  
4 that were then pending in the state legislature.

5 But, because the government moved its  
6 pressure, put a thumb on the scales, you know, a  
7 couple of months before and then, lo and behold,  
8 once Jill Hines tries to use the exact kinds of  
9 groups that the government targeted, she can't.  
10 They're pulled down. Her political organization  
11 is stymied. And that's, you know, all over the  
12 record, and that's just one fraction of -- of  
13 the kinds of harm that's at stake here.

14 JUSTICE BARRETT: So, counsel --

15 JUSTICE KAGAN: That -- that's your  
16 best --

17 JUSTICE BARRETT: -- can I ask you --

18 JUSTICE KAGAN: No, go ahead.

19 JUSTICE BARRETT: I -- I want to go  
20 back to actually your interchange with Justice  
21 Kagan about the standards because I have to  
22 confess it left me very confused. It sounded  
23 like you are articulating different standards  
24 depending on -- a different legal standard  
25 depending on different factual circumstances.



1                   For example, when Justice Kagan gave  
2                   you the hypothetical of pressure being placed on  
3                   The New York Times or The Washington Post not to  
4                   run a particular op-ed, it seemed like you  
5                   backed off and said, well, significant  
6                   encouragement wouldn't be enough there because  
7                   the person who wrote the op-ed can go to another  
8                   news outlet.

9                   You also made the point that this is  
10                  just different because social media is such a  
11                  concentrated industry, which is a point that  
12                  Justice Gorsuch was asking Mr. Fletcher about.

13                  So can you clarify? Did I -- did I  
14                  misunderstand? Because it seems to me that as a  
15                  matter of law, the same legal standard would  
16                  have to apply across all of these areas.

17                  MR. AGUIÑAGA: I think that's right,  
18                  Your Honor. And I apologize if I wasn't clear  
19                  earlier.

20                  I guess the top-line legal standard I  
21                  would start with was this Court's line at 635 in  
22                  Norwood, which is the Court can't do indirectly  
23                  what it's constitutionally prohibited from doing  
24                  directly.

25                  The second line in response to that

1 is, well, what sorts of indirect mechanisms can  
2 the government use that would run afoul of that  
3 rule?

4 I think one potential mechanism is  
5 coercion. Another one is encouragement. This  
6 Court also has used the term inducement --

7 JUSTICE BARRETT: Just plain vanilla  
8 encouragement, or does it have to be some kind  
9 of, like, significant encouragement? Because  
10 encouragement would sweep in an awful lot.

11 MR. AGUIÑAGA: I think that's right,  
12 Your Honor. And so let me give you two answers  
13 to that. The top-line answer is, I mean, I'm a  
14 First Amendment purist and so I would say even  
15 mild encouragement, but we don't need that to  
16 win in this case because we are so far afield  
17 from whatever that -- that threshold is.

18 So, if you want to say substantial  
19 encouragement like the Fifth Circuit said and  
20 like Blum said, absolutely. That's a standard  
21 that works.

22 But I guess what I -- I don't --

23 JUSTICE BARRETT: Well, let me just --  
24 let me just ask you then, let me give you a  
25 hypothetical. Let's say that you get doxed and

1 so do numerous other members in Louisiana state  
2 government. You're doxed, and somebody is  
3 posting online about how people should really  
4 rally and do something about this. People  
5 should rally and you should be harmed, okay?

6 The FBI sees these posts and calls the  
7 social media outlet, like X, Facebook, whatever,  
8 and says we really encourage you to take these  
9 down because these are significantly threatening  
10 and we see some people may be responding to  
11 them.

12 That's -- that's a problem?

13 MR. AGUIÑAGA: So my first question,  
14 Your Honor, is whether that would be protected  
15 speech, that those tweets would be protected  
16 speech, Your Honor, under this Court's --

17 JUSTICE BARRETT: Okay. Let's just  
18 assume -- let's assume that everything that's  
19 said, I was trying to make it so that they --

20 MR. AGUIÑAGA: Yes, they are.

21 JUSTICE BARRETT: -- stop short of  
22 actually being illegal in and of themselves.

23 MR. AGUIÑAGA: Your Honor, so I think,  
24 you know, and as I say, I'm a purist on the  
25 First Amendment, so my answer would be like,

1       yeah, like, that --

2                   JUSTICE BARRETT:   So the FBI can't  
3       make -- do you know how often the FBI makes  
4       those kinds of calls?

5                   MR. AGUIÑAGA:   And that's why -- and  
6       that's why I have my backup answer -- answer,  
7       Your Honor, which is, if you think there needs  
8       to be more, the FBI absolutely can identify  
9       certain troubling situations like that for the  
10      platforms and let the platforms take action.

11                   I think we're -- you know, the hypos  
12      are very important, but when you look at what's  
13      happening in this case, for example, with  
14      respect to the FBI, what they're doing is not --  
15      there's no emergency, nothing of the sort.  
16      They're just identifying hundreds of accounts --

17                   JUSTICE BARRETT:   But that's just kind  
18      of falling back on, well, this case is  
19      different, this case is different, and so a  
20      different legal standard should apply.   But, you  
21      know, what we say in this case matters for other  
22      cases too.

23                   MR. AGUIÑAGA:   It does, Your Honor.  
24      And, you know, if that -- if -- I guess what I  
25      would say in response to that, and I'm very

1 sensitive obviously given the facts of the hypo  
2 to the outcome, but if what the FBI is doing is  
3 trying to persuade an intermediary -- a speech  
4 intermediary to take down a private third  
5 party's speech, I mean, that is the -- that is  
6 covered by the plain text of Norwood, and  
7 that's, I mean, an abridgement of speech.

8 And I -- you know, I --

9 JUSTICE JACKSON: So I think -- I  
10 think that part of the reason why you might be  
11 running into all of these difficulties with  
12 respect to the different factual circumstances  
13 is because you're not focusing on the fact that  
14 there are times in which the government can,  
15 depending on the circumstances, encourage,  
16 perhaps even coerce, because they have a  
17 compelling interest in doing so.

18 And so that's why I keep coming back  
19 to the actual underlying First Amendment issue,  
20 which we can isolate in this case and just talk  
21 about -- about coercion, but I think there --  
22 that you have to admit that there are certain  
23 circumstances in which the government can  
24 provide information, encourage the platforms to  
25 take it down, tell them to take it down.

1                   I mean, what about -- what about the  
2                   hypo of someone posting classified information?  
3                   They say it's my free speech right, I believe  
4                   that I -- you know, I got access to this  
5                   information and I want to post it.

6                   Are you suggesting that the government  
7                   couldn't say to the platforms, we need to take  
8                   that down?

9                   MR. AGUIÑAGA: No, Your Honor, because  
10                  I think that would be a great example where  
11                  strict scrutiny would cut in the government's  
12                  favor. They could show a --

13                  JUSTICE JACKSON: All right. So what  
14                  do we -- what do we do then in a situation in  
15                  which -- I mean, I suppose, in this case, we're  
16                  asking -- the -- the government's point is we  
17                  didn't coerce. And I appreciate, you know, the  
18                  debate about that.

19                  But you just seemed to suggest that as  
20                  a blanket matter, the government doesn't have  
21                  the ability to, you know, encourage or require  
22                  this kind of censorship. And I don't know that  
23                  that's the case.

24                  MR. AGUIÑAGA: So, Your Honor, I guess  
25                  this goes to the -- the bully pulpit as well as

1 I understand that the bully pulpit has never  
2 been used to target the object of suppressing a  
3 third party's speech.

4           You can use it to coerce behavior.  
5 You can use it to coerce companies to take  
6 certain actions. But, when the government is  
7 identifying a specific viewpoint and specific  
8 content that it wishes to wholly eliminate from  
9 public discourse, that's, I think, when the  
10 First Amendment problem arises.

11           And so I -- I -- I guess -- I'm  
12 struggling to find an example in the Court's  
13 cases or in history where the Court or anybody  
14 else has said: The government, by virtue of  
15 being the government, can use its power to  
16 pressure speech intermediaries to eliminate  
17 entire viewpoints and -- and -- and content from  
18 the public discourse.

19           And I think, I mean, that's -- that's,  
20 Your Honor --

21           JUSTICE JACKSON: Can I give you a  
22 hypothetical?

23           MR. AGUIÑAGA: Sure.

24           JUSTICE JACKSON: Suppose someone  
25 started posting about a new teen challenge that

1 involved teens jumping out of windows at  
2 increasing elevations. This is the challenge.  
3 And kids all over the country start doing this.  
4 There's an epidemic. Children are seriously  
5 injuring or even killing themselves in  
6 situations.

7 Is it your view that the government  
8 authorities could not declare those  
9 circumstances a public emergency and encourage  
10 social media platforms to take down the  
11 information that is instigating this problem?

12 MR. AGUIÑAGA: Your Honor, the  
13 government absolutely can use the pulpit to say  
14 publicly, here's what we recognize to be a  
15 public health issue, emergency. We -- this is  
16 obviously extremely terrible, and the public  
17 shouldn't tolerate this. The platforms, we see  
18 it's going on on the platforms, you know.

19 JUSTICE JACKSON: But they can't call  
20 the platforms and say, listen, we really think  
21 you should be taking this down because look at  
22 the problems that it's causing?

23 MR. AGUIÑAGA: If it's protected  
24 speech, Your Honor, then I think we get closer.  
25 But, like, look, if -- if you think that



1 that's -- if that's clearly the way you're  
2 asking the question, I -- I understand the  
3 instinct that that's -- may -- you know, may not  
4 be a First Amendment issue.

5 I guess what I'd fall back on, Your  
6 Honor, is that at least where the government  
7 itself, there is no emergency like this, there's  
8 nothing and without --

9 JUSTICE JACKSON: No. My hypothetical  
10 is there is an emergency. My hypothetical is  
11 that there is an emergency, and I guess I'm  
12 asking you, in that circumstance, can the  
13 government call the platforms and say: This  
14 information that you are putting up on your  
15 platform is creating a serious public health  
16 emergency, we are encouraging you to take it  
17 down?

18 MR. AGUIÑAGA: I -- I was with you  
19 right until that last comment, Your Honor. I  
20 think they absolutely can call and say this is a  
21 problem, it's going rampant on your platforms,  
22 but the moment that the government tries to use  
23 its ability as the government and its stature as  
24 the government to pressure them to take it down,  
25 that is when you're interfering with the third

1 party's speech rights.

2 CHIEF JUSTICE ROBERTS: Well, even if  
3 you --

4 MR. AGUIÑAGA: And, remember, that the  
5 third --

6 CHIEF JUSTICE ROBERTS: Go ahead,  
7 finish your --

8 MR. AGUIÑAGA: Your Honor, I was just  
9 going to say even -- remember that the third  
10 party here is completely absent from the  
11 conversation. The third party whose speech is  
12 being targeted and ultimately censored is absent  
13 from this discussion.

14 CHIEF JUSTICE ROBERTS: Well, you  
15 don't think -- well, do you think that simply  
16 that Justice Jackson's hypothetical ended by  
17 saying we encourage you to take it down, is that  
18 rise to the level of coercion that you think is  
19 problematic?

20 MR. AGUIÑAGA: Your Honor, if the test  
21 is coercion and that's the test that this Court  
22 applies, I think I might have a harder case  
23 saying that's coercion. I think it's -- by its  
24 definition, it's maybe easier addressed as a  
25 substantial encouragement case.

1           But if -- you know, whether -- as I  
2       said earlier, regardless of the label that you  
3       apply, whether it's coercion, whether it's  
4       encouragement, or joint participation and  
5       conspiracy, at the end of the day, if what the  
6       government is trying to do is to eliminate  
7       viewpoints from public discourse, that I think  
8       --

9           CHIEF JUSTICE ROBERTS: Well, again,  
10       under my colleague's hypothetical, it was not  
11       necessarily eliminate viewpoints. It was to  
12       eliminate instructions, let's say, about how to  
13       engage in some game that is seriously harming  
14       children around -- around the country, and they  
15       say we -- we encourage you to stop that.

16           I mean, is it -- that violates the  
17       Constitution?

18           MR. AGUIÑAGA: Your Honor, I agree, as  
19       a policy matter, it might be great for the  
20       government to be able to do that, but the moment  
21       that the government identifies an entire  
22       category of content that it wishes to not be in  
23       the modern public sphere, that is a First  
24       Amendment problem.

25           CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE ALITO: Well, Mr. Aguiñaga, I  
5 think some of your most recent colloquy with my  
6 colleagues have gotten off into questions that I  
7 didn't take it from your brief we -- you think  
8 we actually need to decide in this case.

9 So I thought your principal argument  
10 was that whatever coercion means, it -- what  
11 happened here is sufficient and that coercion  
12 doesn't mean only -- it doesn't apply only when  
13 the government says do this, and if you don't do  
14 this, there are going to be legal consequences  
15 when it says that in the same breath but that  
16 it's a more flexible standards and you --  
17 standard and you have to take into account the  
18 whole course of the relationship regarding this  
19 matter.

20 That's what I -- I took to be your  
21 principal argument. Did I understand that  
22 correctly?

23 MR. AGUIÑAGA: That's correct, Your  
24 Honor. And there's an entire volume -- I mean,  
25 we've got 20,000 pages in this record of the

1 government persistently going back to platforms  
2 again and again, pushing them to adjust their  
3 policies, change their policies, do more  
4 censoring.

5           And I think that's what makes this  
6 case so unique, is that you not only have this  
7 vast repetition of communications, but it's  
8 all -- again, the bulk of it is behind closed  
9 doors. And that's what's so pernicious about  
10 this, is that if we don't have a remedy in this  
11 case, then it's hard to see how there will ever  
12 be a remedy for a future plaintiff who turns out  
13 to be censored, but it's difficult for that  
14 person to even identify whether that censoring  
15 actually happened.

16           JUSTICE ALITO: And you got all this  
17 information only through discovery, is that  
18 correct?

19           MR. AGUIÑAGA: That's correct, Your  
20 Honor.

21           JUSTICE ALITO: Thank you.

22           CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24           Justice Kagan?

25           JUSTICE KAGAN: Could we go back to

1 the standing question? And -- and if I ask you  
2 for the single piece of evidence -- and maybe  
3 this is the -- the -- the piece that you were  
4 describing earlier. I just wanted to make clear  
5 what your answer was. The single piece of  
6 evidence that most clearly shows that the  
7 government was responsible for one of your  
8 clients having material taken down, what is that  
9 evidence and, you -- you know, what does it say  
10 about how the government was responsible?

11 MR. AGUIÑAGA: Sure, Your Honor. So,  
12 as I say, I think Jill Hines is the best example  
13 for us on standing. To give you one more  
14 example, look at page --

15 JUSTICE KAGAN: Yeah, but even on that  
16 one, I guess I just didn't understand in what  
17 you were saying how you drew the link to the  
18 government. I mean, we know that there's a lot  
19 of government encouragement around here. We  
20 also know that there's -- the platforms are  
21 actively content moderating, and they're doing  
22 that irrespective of what the government wants.

23 So how do you decide that it's  
24 government action as opposed to platform action?

25 MR. AGUIÑAGA: Your Honor, I think the

1 clearest way, and -- if I understand -- so let  
2 me answer your question directly, Your Honor.

3 The way -- the -- the link that I was  
4 drawing there was a temporal one. If you look  
5 at JA 715 to 716, that's a May 2021 email. Two  
6 months later after that email, calls for  
7 targeting health groups just like Jill Hines's  
8 group. She experiences the first example of  
9 that kind of group being taken down.

10 JUSTICE KAGAN: Yeah. So, in two  
11 months, I mean, a lot of things can happen in  
12 two months. So that decision two months later  
13 could have been caused by the government's  
14 email, or that government email might have been  
15 long since forgotten because, you know, there  
16 are a thousand other communications that  
17 platform employees have had with each other,  
18 that -- a thousand other things that platform  
19 employees have read in the newspaper.

20 I mean, why would we point to one  
21 email two months earlier and say it was that  
22 email that made all the difference?

23 MR. AGUIÑAGA: Your Honor -- and I  
24 would say a thousand other emails between the  
25 White House and Facebook in those two months. I

1 mean, that's the volume of this interaction,  
2 this back and forth, between the platform and  
3 the government, and -- and it's all --

4 JUSTICE KAGAN: Yes, but if it's --

5 MR. AGUIÑAGA: -- about the same  
6 topic.

7 JUSTICE KAGAN: -- but if it's  
8 encouragement -- I mean, let's even take that  
9 this was something that the -- that the  
10 government was continually pressing the --  
11 encouraging the platforms to do. I mean, until  
12 you can show that there's something about --  
13 overbearing the platform's will, which, you  
14 know, seems sort of hard to overbear Facebook's  
15 work -- will from what I can gather from the  
16 world, but, you know, how -- how do you say it's  
17 the government rather than Facebook?

18 MR. AGUIÑAGA: Your Honor, I guess  
19 what I -- what I would say is we're in -- the  
20 context in which these -- these communications  
21 arise, the Facebook emails are attempting --  
22 they say -- they use terms like "partner,"  
23 they're trying to work with the government.

24 And, you know, like, you could say the  
25 same thing about how do you know it's Facebook,



1 not the government, how -- how do you know it's  
2 the government, not Facebook? You could ask it  
3 either way. I think what we do know --

4 JUSTICE KAGAN: Well, you're exactly  
5 right.

6 MR. AGUIÑAGA: I think what we do know  
7 --

8 JUSTICE KAGAN: I mean, you can say  
9 that about pretty much everything that's in your  
10 brief, that there's just nothing where you can  
11 say, okay, the government said take down that  
12 communication.

13 The government is making some broad  
14 statements about the kinds of communications it  
15 thinks harmful. Facebook has a lot of opinions  
16 on its own about various kinds of communications  
17 it thinks harmful.

18 I guess, if you're going to use  
19 standard ideas about traceability and  
20 redressability, I guess what I'm suggesting is I  
21 don't see a single item in your briefs that  
22 would satisfy our normal tests.

23 MR. AGUIÑAGA: So, Your Honor, look at  
24 Jill Hines, and I'll give you one more example.  
25 Look at page 20 of the red brief. This is the

1 Jim Hoft example, because we know that his name  
2 and the Gateway Pundit specifically appear in  
3 the tracking spreadsheet that CISA uses, that  
4 the FBI uses as well. And we also know that the  
5 EIP, the Election Integrity Partnership, that  
6 works with CISA, and the government -- the  
7 district court found this a million times. It  
8 said that it looks like they have a coordinated  
9 effort out to get Jim Hoft.

10 I mean, I think that's our -- our  
11 second-best example on direct traceability, Your  
12 Honor. So, if you're not satisfied with Jill  
13 Hines, look at Jim Hoft, look at page 20 of the  
14 red brief.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch?

18 JUSTICE GORSUCH: You -- you've spoken  
19 with Justice Kagan about your best examples on  
20 traceability. How about redressability, given  
21 that by the time the PI came around, we're in  
22 '23?

23 MR. AGUIÑAGA: Your Honor, so we had  
24 two second supplemental declarations that are at  
25 the end of the Joint Appendix that are from Jim

1 Hoft and from Jill Hines that identify the  
2 specific posts that they had posted on Twitter  
3 and Facebook during the pending preliminary  
4 injunction proceedings.

5 One of the ones we talked about was JA  
6 74 -- 793 and 794, which is the -- the Jill  
7 Hines Facebook post referencing RFK, referencing  
8 Tucker Carlson, referencing vaccines. It's --  
9 it's turtles all the way down. And that is an  
10 example, and all of these are examples, of  
11 injuries that postdate a lot of the earlier  
12 filings in this case.

13 And so, you know, when you talk about  
14 redressability, Your Honor, this injunction is  
15 an order to the government not to continue  
16 engaging in the sorts of censorship that led to  
17 these kinds of censorship decisions.

18 JUSTICE GORSUCH: Then I'd like to  
19 talk just briefly about remedy. This is another  
20 example of a universal injunction, and the  
21 district court enjoined behavior by platforms  
22 that your clients didn't use and enjoined  
23 actions with respect to non-parties, not  
24 affecting your clients.

25 We've seen an epidemic of these

1 lately. What do we do about it?

2 MR. AGUIÑAGA: So a couple of  
3 responses to that, Justice Gorsuch.

4 I think one reason the breadth of the  
5 injunction is what it is is what the Fifth  
6 Circuit explained in JA 81 to 83, which is the  
7 breadth of the government's enterprise in this  
8 case was extremely broad.

9 I mean, when it's identifying -- and I  
10 had this colloquy with Justice Kagan about  
11 whether you can identify them calling out Jill  
12 Hines specifically. The reason it's hard for me  
13 to do that is because they weren't cutting at  
14 that -- at that level in the weeds. What they  
15 were doing -- taking is broader strokes like  
16 vaccines are safe for -- for children, calling  
17 that claim true, and then having the platforms  
18 go out and censor contrary claims.

19 And so the reason you see the breadth  
20 of the injunction being the way it is, Your  
21 Honor, it's a product of what the government  
22 did. Now, if you --

23 JUSTICE GORSUCH: No, that's --

24 MR. AGUIÑAGA: -- if you have concern  
25 --

1 JUSTICE GORSUCH: -- we hear that in  
2 every universal injunction case. But your  
3 clients are your clients. They're the only ones  
4 complaining. And it's their case. It's their  
5 controversy. And, normally, our -- our remedies  
6 are tailored to those who are actually  
7 complaining before us and not to those who  
8 aren't, right?

9 MR. AGUIÑAGA: Your Honor, and if you  
10 have that concern, we're completely fine if you  
11 want to limit the injunction to the five  
12 platforms as to which we were able to get  
13 preliminary discovery. That's completely fine  
14 with us. If you want to limit just to the seven  
15 plaintiffs, also completely fine, Your Honor.

16 I think the most important takeaway in  
17 this case is that the Court has to say something  
18 in our favor on the merits. The government  
19 can't just run rampant pressuring the platforms  
20 to censor private speech.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Kavanaugh?

24 JUSTICE KAVANAUGH: On Bantam Books, I  
25 read that to refer to coercion and not to

1 significant encouragement.

2 MR. AGUIÑAGA: I think that's right,  
3 Your Honor, although, if you look at page 66 to  
4 67, this Court used the term "coercion"  
5 alongside the term "persuasion" and  
6 "intimidation." I mean, I think there is some  
7 flexibility in those terms, and you could -- you  
8 can imagine a world in which you can call  
9 persuasion another variety of encouragement.

10 As I say, I'm not wedded to any label,  
11 we're not wedded to any label, but I do agree  
12 that the word "encouragement" doesn't appear in  
13 Bantam Books, Your Honor.

14 JUSTICE KAVANAUGH: And one thing that  
15 I think I want to square up with you is if  
16 someone calls and -- or contacts the social  
17 media company and says what you have there, this  
18 post, has factually erroneous information, so  
19 not a viewpoint that we disagree with, factually  
20 erroneous information, and the social media  
21 company says, we'll take a look at that and --  
22 and -- you still think that's significant  
23 encouragement that qualifies as coercion, if  
24 they take it down in response to it --  
25 concluding that it, in fact, is factually

1 erroneous?

2 MR. AGUIÑAGA: No, Your Honor. If  
3 there's no ask from the government, if the  
4 government's just saying here's our view of the  
5 statement --

6 JUSTICE KAVANAUGH: Okay. And we  
7 think it shouldn't be -- it should be taken  
8 down, it's up to you, but we think it should be  
9 taken down.

10 MR. AGUIÑAGA: Yeah, I -- I think  
11 that's a harder case for me. I -- I guess, you  
12 know, if you think it's a close case, decide it  
13 in favor of the First Amendment.

14 JUSTICE KAVANAUGH: What -- What --  
15 what's -- oh, that's -- that's the question  
16 here. You can't -- you can't just claim the  
17 mantle. Yeah. What -- what do you think the --  
18 when you say it's a "harder case," why do you  
19 think it's a harder case?

20 MR. AGUIÑAGA: Because I understand  
21 the instinct, Your Honor, that just asking very,  
22 very politely or just saying very, very politely  
23 we think you should take it down, that that  
24 shouldn't be a First Amendment problem, but the  
25 reality is that when somebody like the FBI or

1 somebody like a Deputy Assistant to the  
2 President makes a statement like that, that  
3 statement carries force.

4 That's just the reality. My dear  
5 mother is a saint and if she makes a state --  
6 same statement to Twitter, they're -- they don't  
7 know her from Adam, they don't care, but they do  
8 care if it's the government.

9 JUSTICE KAVANAUGH: And -- and why is  
10 that? Is it your assumption that anyone in  
11 those circumstances is always implicitly  
12 threaded -- threatening adverse consequences?

13 MR. AGUIÑAGA: No, Your Honor, and  
14 this is where Bantam Books, I think, is good for  
15 us because it says you look through the forms to  
16 the substance. And so you look at the substance  
17 of the communication and say, well, is what the  
18 government doing here, is it trying to  
19 effectively suppress a third-party's speech?

20 And so, if the forms cut one way, but  
21 the substance cuts the other ways, then you look  
22 at the substance.

23 JUSTICE KAVANAUGH: The hypo was about  
24 factually inaccurate.

25 MR. AGUIÑAGA: Right, factual --



1 factually inaccurate information. And if the  
2 government says our view of that is that it's  
3 false, they can absolutely say that. But, if  
4 they do more and they say you need to take this  
5 down --

6 JUSTICE KAVANAUGH: You should take it  
7 down?

8 MR. AGUIÑAGA: -- you should take it  
9 down --

10 JUSTICE KAVANAUGH: That's a problem?

11 MR. AGUIÑAGA: -- First Amendment  
12 issue, Your Honor. I mean, I think that --

13 JUSTICE KAVANAUGH: Factually  
14 inaccurate about --

15 MR. AGUIÑAGA: Is that --

16 JUSTICE KAVANAUGH: -- something the  
17 troops are doing, U.S. troops are doing, and,  
18 you know, you should take that down, it's  
19 factually inaccurate, it's harming the war  
20 effort, it's not accurate, and you're just  
21 running post after post describing what's going  
22 on in an inaccurate way, and it's up to you, but  
23 why -- why -- why should you be publishing that  
24 inaccurate information?

25 MR. AGUIÑAGA: Yeah, and the north

1 star for the government in that situation is  
2 more speech. Publish the true speech that they  
3 think should counter what they view as false  
4 speech. The government is not helpless here.  
5 It has tools as it -- at its disposal, and  
6 censorship has never been the default remedy for  
7 a perceived First Amendment violation.

8 JUSTICE KAVANAUGH: What do you do  
9 with the fact that the platforms say no all the  
10 time to the government?

11 MR. AGUIÑAGA: Your Honor, it -- it  
12 doesn't matter. I think Judge Posner made this  
13 -- this point in Backpage versus Dart, which is  
14 you could have a threatener who threatens the  
15 recipient, the recipient says no, and so the  
16 threatener packs their tent and walks away.  
17 That's still a First Amendment violation even  
18 though the recipient refused to comply.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice --  
21 Justice Barrett?

22 JUSTICE BARRETT: Just picking up on  
23 Justice Kavanaugh's question about what makes  
24 something threatening and is it just something  
25 inherent in the nature of a person, the person

1 on the other end of the line being a government  
2 official, so Bantam Books points out that the  
3 speech, the threat, the encouragement, if -- if  
4 that's, you know, what we can posit for this  
5 purpose, comes from someone with the authority  
6 to impose a sanction.

7 Is that important in your view?

8 MR. AGUIÑAGA: Your Honor, it -- I  
9 mean, it is and it isn't. We think it's a  
10 relevant fact that if somebody like an FBI agent  
11 that is meeting regularly with the platforms is  
12 making these kinds of requests, that that's a  
13 fact that you have to take into consideration.

14 Justice Sotomayor has a panel, a  
15 procuring panel decision called Okwedy versus  
16 Molinari in the Second Circuit that addressed  
17 this issue about authority, and the issue in  
18 that case was that the borough president of  
19 Staten Island didn't have authority to take down  
20 a particular billboard, but the court still said  
21 that the fact that the recipient thought that  
22 the borough president might be able to use  
23 whatever authority he did have to cause trouble  
24 for the billboard owner, that was enough.

25 So, if -- if -- if the speaker has

1 that kind of authority, Your Honor, I think  
2 that's a critical fact that you have to take  
3 into account because, as I say, if it's somebody  
4 that Twitter doesn't know from Adam that's  
5 making the request, they're just going to ignore  
6 it. But if it's somebody --

7 JUSTICE BARRETT: Well, I mean, if  
8 it's a staffer or even if it's somebody on the  
9 Hill, I mean, you know, people who work on the  
10 Hill don't have control over DOJ, or if it's a  
11 staffer in the White House, you know, mentioning  
12 230 or maybe that's what's in the platform's  
13 mind, but, you know, no authority to bring an  
14 antitrust suit or to try to change 230 or  
15 advocate for 230 changes, that doesn't matter?

16 MR. AGUIÑAGA: Your Honor, I mean,  
17 what I would say is, on the facts of this case,  
18 if you have the Deputy Assistant to the  
19 President making that kind of statement, sure --

20 JUSTICE BARRETT: No, no, no.

21 MR. AGUIÑAGA: -- he can't -- he can't  
22 make that -- he can't change --

23 JUSTICE BARRETT: Let's say it's low  
24 level, not Deputy Assistant to the President.  
25 Let's just call it somebody, a low-level

1 staffer.

2 MR. AGUIÑAGA: Two people -- two  
3 people below him, two people below him, he --  
4 they can't unilaterally reform 230 or promulgate  
5 rulemakings, but they can engage in a process  
6 that itself is punishment basically. I mean,  
7 imagine being on the receiving ends of Rob  
8 Flaherty for six months on end and these --  
9 receiving these kinds of emails. In some ways,  
10 it's the adverse consequences that were  
11 threatened and/or actually carried out. Was the  
12 process --

13 JUSTICE BARRETT: So we should focus  
14 less on authority or authority can kind of drop  
15 out. The point is, if it comes from the  
16 government, and so there might be some  
17 conceivable way in which the government could  
18 follow through in some sort of punitive way,  
19 that -- that's the relevant inquiry?

20 MR. AGUIÑAGA: Your Honor, I think  
21 that is certainly one way you can look at the  
22 analysis, absolutely.

23 JUSTICE BARRETT: Okay. Thanks.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Jackson?

1                   JUSTICE JACKSON: So my biggest  
2 concern is that your view has the First  
3 Amendment hamstringing the government in  
4 significant ways in the most important time  
5 periods.

6                   I mean, what would -- what would you  
7 have the government do? I've heard you say a  
8 couple times that the government can post its  
9 own speech. But, in my hypothetical, you know,  
10 kids, this is not safe, don't do it, is not  
11 going to get it done.

12                   And so I guess some might say that the  
13 government actually has a duty to take steps to  
14 protect the citizens of this country, and you  
15 seem to be suggesting that that duty cannot  
16 manifest itself in the government encouraging or  
17 even pressuring platforms to take down harmful  
18 information.

19                   So can you help me? Because I'm  
20 really -- I'm -- I'm really worried about that  
21 because you've got the First Amendment operating  
22 in an environment of threatening circumstances  
23 from the government's perspective, and you're  
24 saying that the government can't interact with  
25 the source of those problems.

1                   MR. AGUIÑAGA: And, Your Honor, I  
2 understand that instinct, and I guess what I'd  
3 tell you is that -- our position is not that the  
4 government can't interact with the platforms  
5 there. They can and they should in certain  
6 circumstances like that that present such  
7 dangerous issues for society and especially  
8 young people.

9                   But the way they do that has to be in  
10 compliance with the First Amendment, and I think  
11 that means they can give them all the true  
12 information that the platform needs and ask to  
13 amplify that and ask --

14                   JUSTICE JACKSON: Right. But you're  
15 just -- you're just saying that. I guess I  
16 thought when you say the way they do that is  
17 consistent with the First Amendment is that they  
18 have to show that they have a compelling  
19 interest to do what they're doing. In other  
20 words, you -- you want us to take the line --

21                   MR. AGUIÑAGA: I see.

22                   JUSTICE JACKSON: -- to be between  
23 compulsion and encouragement, and what we're  
24 looking at is the government can't compel, maybe  
25 they can encourage. I'm wondering whether

1 that's not really the line.

2           The line is does the government,  
3 pursuant to the First Amendment, have a  
4 compelling interest in doing things that result  
5 in restricting the speech in this way? That  
6 test, I think, takes into account all of these  
7 different circumstances, that we don't really  
8 care as much about how much the government is  
9 compelling or maybe we do but in the context of  
10 tailoring and not as sort of a freestanding  
11 inquiry that's overlaid on all of this. Does  
12 that make sense?

13           MR. AGUIÑAGA: It does, Your Honor.  
14 And I -- I apologize for missing your guidance  
15 earlier.

16           So the way I think about that is I --  
17 I've been discussing the standard and I thought  
18 we've all been discussing the standard on the  
19 front end of the analysis, which is, is there a  
20 First Amendment violation? Is there an  
21 abridgement of speech?

22           I guess I would conceptually think of  
23 strict scrutiny, narrow tailoring, compelling  
24 interest as coming in at the back end to say  
25 yes, maybe in the ordinary case, the government



1 shouldn't have been permitted to undertake the  
2 kind of suppression of free speech that it did,  
3 but in this unique circumstance, it actually had  
4 a compelling interest, and it used narrowly  
5 tailored means to accomplish that interest.

6 I mean, I think that's the fail-safe.  
7 If you're concerned with the breadth of our  
8 arguments, that's one fail-safe, which is no  
9 matter how broad the standard the Court adopts,  
10 there's always going to be strict scrutiny at  
11 the end of the line to save the government in  
12 times where it desperately needs to do the  
13 things that you're outlining.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Rebuttal, Mr. Fletcher.

18 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

19 ON BEHALF OF THE PETITIONERS

20 MR. FLETCHER: Thank you, Mr. Chief  
21 Justice. I'd like to start with a few points on  
22 standing and then address the merits and then  
23 try to step back and talk about the bigger  
24 picture.

25 So, first, on standing, I have to

1 start with a clarification about Jill Hines's  
2 emails at pages 793 to 794 of the Joint  
3 Appendix. I had misunderstood the cross-posting  
4 issue that my friend alluded to earlier. I  
5 thought that was a moderation event by Twitter,  
6 not by Facebook. I appreciate his  
7 clarification, and because we've been insistent  
8 on the lower court's turning square corners on  
9 the facts here, I wanted to make sure I did that  
10 too. I don't think that changes the fundamental  
11 point, though, because we're still talking about  
12 an act of moderation in April 2023, years after  
13 the last White House or any government speech  
14 targeting Mr. Kennedy's content, which happened  
15 back in 2021.

16           And that, Justice Kagan, I think  
17 points out the problem that you highlighted,  
18 which is that they're trying to draw the  
19 connection between the government's acts here  
20 and the moderation that harmed them through  
21 timing, and the timing just isn't very good.  
22 And so I want to talk about the two best  
23 examples that he gave you, the one being  
24 Ms. Hines's groups on Facebook, and this is  
25 discussed at page 630 of the Joint Appendix.

1                   Justice Kagan, you pointed out that  
2 her groups were moderated at least two and four  
3 months after the relevant exchange between  
4 Facebook and the government. But it's actually  
5 worse than that. The 2000 -- the May 2021 email  
6 from Facebook to the government says, we've  
7 already taken action on health groups to remove  
8 them from our recommendation feature. It wasn't  
9 reporting on something it would do in the  
10 future. It was reporting on something that was  
11 already done. And it's even not clear from the  
12 email that Facebook was doing that because of  
13 any request from the government. It was a  
14 report of its own action.

15                   And then his next best example is Mr.  
16 Hoft and the appearance of Mr. Hoft on a  
17 spreadsheet that the Department of Homeland  
18 Security's CISA, a sub-agency, maintains. This  
19 appears at Record on Appeal 17,016. And the  
20 problem with that is twofold. First, this is a  
21 tracking spreadsheet that monitors information  
22 sent from election officials to the platforms.  
23 This shows that the report was made by the  
24 Election Integrity Partnership, a private  
25 entity. It wasn't a referral that was made by

1 CISA, the federal agency. CISA was just noting  
2 the existence of the referral. And, second, as  
3 far as I'm aware, there's no indication in the  
4 record that the referenced piece of content was  
5 actually taken down at all.

6 So I think that points up that what  
7 they just haven't shown is any injury traceable  
8 to the government, let alone an imminent risk of  
9 future injury.

10 Second, on the merits, I think it's  
11 instructive to start with what my friend called  
12 one of the hottest documents. This is Record on  
13 Appeal 15,322, the email exchange between  
14 Surgeon General Murthy and someone at Facebook  
15 because this is coming in that critical July  
16 2021 period, and what starts that email exchange  
17 is not any concern about the private email  
18 exchanges, the stuff that happened behind closed  
19 doors, antitrust reform, Section 230. It's  
20 Facebook reaching out and saying we wanted to  
21 get in touch because of the President's  
22 statements about us, the reference to killing  
23 people, and because of the Surgeon General's  
24 health advisory on what platforms could be doing  
25 to be doing more along with others in society.

1                   And I think what that highlights is  
2                   that to the extent that the government had  
3                   influence on the platforms here, and we  
4                   acknowledge there are indications that it did,  
5                   it's influence of the classic bully pulpit sort  
6                   of President Reagan condemning pornography --  
7                   or, excuse me, President Bush condemning  
8                   pornography, President Reagan condemning media  
9                   about drugs and violence, Teddy Roosevelt  
10                  condemning muckrakers. Part of our  
11                  constitutional tradition is that presidents and  
12                  their close advisors have the ability, the  
13                  authority to, in a non-coercive way, to speak  
14                  their mind and call on the public to act. And  
15                  we think that's what was happening here.

16                  And, finally, if I could just step  
17                  back and -- you know, my friend started by  
18                  saying that this is a massive attack on free  
19                  speech. The lower courts called it a  
20                  coordinated censorship campaign. I want to be  
21                  clear, if those things had happened, they would  
22                  be reprehensible. It would be a huge problem.  
23                  But we would think that before validating those  
24                  sorts of charges against senior government  
25                  officials and career employees spanning two

1 different administrations, the lower courts  
2 would insist on a rigorous analysis of the facts  
3 and the law. And with all respect to the lower  
4 courts, we don't think that's happened here. We  
5 don't think that's supported.

6           We think the easiest way for this  
7 Court to resolve this case is on standing, on  
8 the for -- lack of forward-looking injury  
9 ground, Justice Kagan, that you and I discussed  
10 earlier. But, to the extent that the Court does  
11 get to the merits, we'd urge you to make clear  
12 that government officials do not violate the  
13 First Amendment when they flag false information  
14 or malign foreign actors when they answer  
15 questions about public health advice or when  
16 they speak to the public on matters of public  
17 concern the way the President and the Surgeon  
18 General did.

19           The First Amendment is a critical  
20 bulwark against government coercion, and that's  
21 important, but it is also important that Article  
22 III courts stay within the bounds of Article III  
23 and don't enjoin or chill legitimate and  
24 productive interactions between the government  
25 and the public.

1                   We'd ask you to reverse. Thank you.

2                   CHIEF JUSTICE ROBERTS: Thank you,  
3                   counsel.

4                   The case is submitted.

5                   (Whereupon, at 11:47 a.m., the case  
6                   was submitted.)

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## Official

<p><b>1</b></p> <p><b>10</b> [2] 21:6 71:22  <b>10:04</b> [2] 1:16 3:2  <b>11:47</b> [1] 126:5  <b>120</b> [1] 2:10  <b>15,322</b> [1] 123:13  <b>15322</b> [2] 81:10 82:16  <b>16th</b> [1] 25:11  <b>17,016</b> [1] 122:19  <b>18</b> [1] 1:12  <b>19</b> [4] 15:21 17:11 45:3,10</p>	<p><b>9</b></p> <p><b>90</b> [1] 44:22  <b>90-day</b> [1] 44:20</p> <p><b>A</b></p> <p><b>a.m</b> [3] 1:16 3:2 126:5  <b>abandoned</b> [1] 45:22  <b>ability</b> [4] 33:3 93:21 96:23 124:12  <b>able</b> [8] 8:20 33:20 69:20, 21 79:21 98:20 108:12 114:22  <b>above</b> [1] 48:13  <b>above-entitled</b> [1] 1:14  <b>abridge</b> [2] 70:7 74:23  <b>abridgement</b> [2] 92:7 119:21  <b>absence</b> [1] 44:16  <b>absent</b> [3] 6:6 97:10,12  <b>absolutely</b> [12] 17:22 54:7 67:16,17 76:23 77:6 89:20 91:8 95:13 96:20 112:3 116:22  <b>abuses</b> [1] 65:8  <b>acceptable</b> [1] 19:25  <b>accepted</b> [2] 14:17,18  <b>access</b> [1] 93:4  <b>accomplish</b> [3] 66:17 67:11 120:5  <b>account</b> [9] 13:22 23:12 50:14,19 59:25 73:23 99:17 115:3 119:6  <b>accountable</b> [3] 35:13,14, 16  <b>accounts</b> [5] 81:23,24 82:9 83:6 91:16  <b>accurate</b> [4] 25:22 28:25 31:11 112:20  <b>accusation</b> [1] 34:22  <b>accuses</b> [1] 65:12  <b>acknowledge</b> [4] 32:12 35:2 46:13 124:4  <b>acknowledging</b> [1] 29:3  <b>across</b> [1] 88:16  <b>act</b> [4] 5:25 57:18 121:12 124:14  <b>acting</b> [1] 59:2  <b>action</b> [46] 4:20,24 5:13,24 6:5,9,9,12,15,18 7:11 8:3 15:4,5,14,17 16:8 32:14 36:16 47:10 52:1,11,13 53:12 55:3 56:13 57:4,8,12,18, 19 58:3,4 59:5 62:16 63:7 64:9 71:5,8 82:3 86:25 91:10 101:24,24 122:7,14  <b>actions</b> [11] 3:20 13:18 14:16 16:2 32:19 36:19 42:12 66:18 71:3 94:6 106:23  <b>actively</b> [1] 101:21  <b>activities</b> [1] 55:9  <b>activity</b> [5] 55:4 76:25 77:4, 5 80:22  <b>actor</b> [1] 78:1</p>	<p><b>actors</b> [11] 6:1,22 7:22 11:3,23 43:3 52:5 64:4 67:2 77:21 125:14  <b>acts</b> [3] 17:7 20:23 121:19  <b>actual</b> [4] 29:10 31:20 44:16 92:19  <b>actually</b> [15] 57:14 59:25 60:2 70:18,20 87:20 90:22 99:8 100:15 108:6 116:11 117:13 120:3 122:4 123:5  <b>Adam</b> [2] 111:7 115:4  <b>add</b> [2] 83:10 86:3  <b>added</b> [2] 48:9 78:11  <b>address</b> [4] 59:13 71:8 81:21 120:22  <b>addressed</b> [4] 67:13 71:9 97:24 114:16  <b>addresses</b> [1] 11:2  <b>adjudicate</b> [1] 47:13  <b>adjust</b> [2] 81:20 100:2  <b>administration</b> [2] 66:2 84:16  <b>administrations</b> [1] 125:1  <b>admit</b> [1] 92:22  <b>adopts</b> [1] 120:9  <b>adverse</b> [7] 5:12 36:16,18 52:10,12 111:12 116:10  <b>advice</b> [5] 4:23 55:22 58:7, 13 125:15  <b>advising</b> [1] 57:15  <b>advisors</b> [4] 4:14 12:2,4 124:12  <b>advisory</b> [1] 123:24  <b>advocate</b> [1] 115:15  <b>advocating</b> [2] 34:1 63:5  <b>affecting</b> [3] 3:20 9:3 106:24  <b>afield</b> [1] 89:16  <b>afoul</b> [1] 89:2  <b>agencies</b> [1] 9:8  <b>agency</b> [4] 5:3 11:8 28:12 123:1  <b>agent</b> [1] 114:10  <b>agents</b> [1] 4:15  <b>ago</b> [2] 13:4 78:14  <b>agree</b> [13] 18:12 20:14,21, 24 30:17,19 49:25 57:25 58:22 61:1 74:17 98:18 109:11  <b>Agreed</b> [3] 14:13 20:13 21:16  <b>agreeing</b> [2] 38:17,20  <b>agreement</b> [1] 41:21  <b>AGUIÑAGA</b> [85] 1:22 2:6 64:13,14,16 66:21 68:15 69:15 70:4,12,22 71:7 72:2 73:7,12,23,25 74:16 75:15,22 76:22,25 77:4,13 78:23 79:25 80:7,9 82:11,15 83:15,19,25 84:24 85:22 88:17 89:11 90:13,20,23 91:5,23 93:9,24 94:23 95:12,23 96:18 97:4,8,20 98:18 99:4,23 100:19 101:11,</p>	<p>25 102:23 103:5,18 104:6, 23 105:23 107:2,24 108:9 109:2 110:2,10,20 111:13, 25 112:8,11,15,25 113:11 114:8 115:16,21 116:2,20 118:1,21 119:13  <b>ahead</b> [2] 87:18 97:6  <b>AL</b> [2] 1:4,7  <b>algorithms</b> [2] 10:3 40:15  <b>ALITO</b> [30] 13:11 14:7,10, 14,25 15:12 16:4,18,22 21:18 23:14,17,20 24:16,19 26:13 27:16 28:14,19 29:1 42:9,10,20 43:5,13 59:20 99:3,4 100:16,21  <b>allegations</b> [2] 20:5 86:15  <b>alleged</b> [1] 59:7  <b>alleging</b> [1] 6:19  <b>allowing</b> [1] 29:14  <b>alluded</b> [1] 121:4  <b>alone</b> [2] 7:21 123:8  <b>alongside</b> [1] 109:5  <b>already</b> [2] 122:7,11  <b>altering</b> [1] 10:3  <b>although</b> [1] 109:3  <b>Alvarez</b> [1] 80:17  <b>Amendment</b> [60] 6:21 7:7, 8 8:4,15 10:18 11:25 24:5 26:17 27:5,6,11 29:8 30:24 31:5,6,17 37:4 39:5 40:8 41:10 42:1 46:18 49:13 51:2 52:6 65:6 68:18,18 69:6,16 70:2,11,13,18 75:1 77:11,14 78:6,12,25 89:14 90:25 92:19 94:10 96:4 98:24 110:13,24 112:11 113:7, 17 117:3,21 118:10,17 119:3,20 125:13,19  <b>America</b> [1] 72:14  <b>American</b> [2] 65:2 78:5  <b>Americans</b> [6] 24:2,9,12 52:23 64:23 78:11  <b>Americans'</b> [1] 66:7  <b>amicus</b> [3] 7:1 56:3 58:21  <b>amongst</b> [1] 41:22  <b>amplify</b> [2] 81:1 118:13  <b>analogies</b> [1] 52:17  <b>analysis</b> [6] 10:22 67:20 69:17 116:22 119:19 125:2  <b>analyze</b> [1] 75:8  <b>analyzed</b> [1] 64:24  <b>anathema</b> [1] 65:6  <b>and/or</b> [1] 116:11  <b>anger</b> [6] 25:18 26:5,6,8 27:18 28:1  <b>another</b> [11] 17:9 42:1 54:24 60:1 71:21 83:23,24 88:7 89:5 106:19 109:9  <b>answer</b> [16] 16:11 22:1 23:6,9 46:10 51:3 67:16,17 79:21 89:13 90:25 91:6,6 101:5 102:2 125:14  <b>answering</b> [2] 56:1 64:6</p>	<p><b>answers</b> [4] 22:1 23:18 59:21 89:12  <b>anti-Semitic</b> [4] 12:6,10 39:24 54:18  <b>anticipating</b> [1] 10:14  <b>antitrust</b> [5] 22:20 32:19 53:12 115:14 123:19  <b>anybody</b> [2] 74:3 94:13  <b>anytime</b> [1] 81:2  <b>apart</b> [1] 4:17  <b>apologize</b> [4] 60:12 86:1 88:18 119:14  <b>apologizing</b> [1] 85:23  <b>Appeal</b> [2] 122:19 123:13  <b>appear</b> [3] 79:13 105:2 109:12  <b>appearance</b> [1] 122:16  <b>APPEARANCES</b> [1] 1:18  <b>appears</b> [1] 122:19  <b>Appendix</b> [5] 82:24 85:11 105:25 121:3,25  <b>application</b> [4] 18:17 36:11 60:11 69:6  <b>applications</b> [1] 61:15  <b>applied</b> [3] 12:22 15:2 22:8  <b>applies</b> [3] 42:22 61:1 97:22  <b>apply</b> [8] 6:14 18:8 24:6 69:11 88:16 91:20 98:3 99:12  <b>applying</b> [1] 19:5  <b>appreciate</b> [5] 26:7 30:24 62:1 93:17 121:6  <b>approach</b> [2] 17:1 22:13  <b>appropriate</b> [1] 55:3  <b>April</b> [3] 45:20 84:5 121:12  <b>areas</b> [2] 65:3 88:16  <b>aren't</b> [3] 18:4 26:11 108:8  <b>arguably</b> [1] 64:25  <b>argued</b> [1] 43:11  <b>arguing</b> [1] 61:24  <b>argument</b> [18] 1:15 2:2,5,8 3:4,7 6:14 19:2 41:3 51:15 61:7 64:14 66:13,14 71:14 99:9,21 120:18  <b>arguments</b> [2] 34:20 120:8  <b>arise</b> [1] 103:21  <b>arises</b> [3] 77:25 81:2 94:10  <b>arm</b> [1] 76:13  <b>Army</b> [1] 75:10  <b>around</b> [7] 12:15 27:13 36:12 98:14,14 101:19 105:21  <b>arrangement</b> [1] 41:16  <b>Article</b> [5] 3:22 4:17 13:10 125:21,22  <b>articulating</b> [1] 87:23  <b>aside</b> [1] 23:15  <b>asks</b> [1] 86:9  <b>aspect</b> [2] 5:24 85:23  <b>Assistant</b> [4] 72:10 111:1 115:18,24  <b>Associated</b> [1] 23:2  <b>assume</b> [3] 15:10 90:18,18  <b>assumed</b> [1] 27:18</p>
<p><b>2</b></p> <p><b>20</b> [3] 78:2 104:25 105:13  <b>20,000</b> [1] 99:25  <b>20,000-page</b> [1] 64:19  <b>2000</b> [1] 122:5  <b>2020</b> [1] 44:8  <b>2021</b> [7] 11:15 45:19 81:7 102:5 121:15 122:5 123:16  <b>2022</b> [2] 48:9,10  <b>2023</b> [3] 45:20 84:6 121:12  <b>2024</b> [1] 1:12  <b>21</b> [3] 15:21 17:11 45:3  <b>21st</b> [1] 75:3  <b>23</b> [1] 105:22  <b>23-411</b> [1] 3:4  <b>230</b> [13] 22:19 32:23 33:3, 12,14,18,21 34:2 115:12, 14,15 116:4 123:19  <b>24/7</b> [1] 65:8</p>	<p><b>3</b></p> <p><b>3</b> [1] 2:4  <b>39</b> [2] 81:22 82:9</p> <p><b>5</b></p> <p><b>5</b> [1] 82:22</p> <p><b>6</b></p> <p><b>6</b> [1] 82:22  <b>630</b> [1] 121:25  <b>631</b> [1] 86:14  <b>632</b> [1] 86:14  <b>635</b> [1] 88:21  <b>64</b> [1] 2:7  <b>66</b> [1] 109:3  <b>67</b> [1] 109:4</p>	<p><b>actors</b> [11] 6:1,22 7:22 11:3,23 43:3 52:5 64:4 67:2 77:21 125:14  <b>acts</b> [3] 17:7 20:23 121:19  <b>actual</b> [4] 29:10 31:20 44:16 92:19  <b>actually</b> [15] 57:14 59:25 60:2 70:18,20 87:20 90:22 99:8 100:15 108:6 116:11 117:13 120:3 122:4 123:5  <b>Adam</b> [2] 111:7 115:4  <b>add</b> [2] 83:10 86:3  <b>added</b> [2] 48:9 78:11  <b>address</b> [4] 59:13 71:8 81:21 120:22  <b>addressed</b> [4] 67:13 71:9 97:24 114:16  <b>addresses</b> [1] 11:2  <b>adjudicate</b> [1] 47:13  <b>adjust</b> [2] 81:20 100:2  <b>administration</b> [2] 66:2 84:16  <b>administrations</b> [1] 125:1  <b>admit</b> [1] 92:22  <b>adopts</b> [1] 120:9  <b>adverse</b> [7] 5:12 36:16,18 52:10,12 111:12 116:10  <b>advice</b> [5] 4:23 55:22 58:7, 13 125:15  <b>advising</b> [1] 57:15  <b>advisors</b> [4] 4:14 12:2,4 124:12  <b>advisory</b> [1] 123:24  <b>advocate</b> [1] 115:15  <b>advocating</b> [2] 34:1 63:5  <b>affecting</b> [3] 3:20 9:3 106:24  <b>afield</b> [1] 89:16  <b>afoul</b> [1] 89:2  <b>agencies</b> [1] 9:8  <b>agency</b> [4] 5:3 11:8 28:12 123:1  <b>agent</b> [1] 114:10  <b>agents</b> [1] 4:15  <b>ago</b> [2] 13:4 78:14  <b>agree</b> [13] 18:12 20:14,21, 24 30:17,19 49:25 57:25 58:22 61:1 74:17 98:18 109:11  <b>Agreed</b> [3] 14:13 20:13 21:16  <b>agreeing</b> [2] 38:17,20  <b>agreement</b> [1] 41:21  <b>AGUIÑAGA</b> [85] 1:22 2:6 64:13,14,16 66:21 68:15 69:15 70:4,12,22 71:7 72:2 73:7,12,23,25 74:16 75:15,22 76:22,25 77:4,13 78:23 79:25 80:7,9 82:11,15 83:15,19,25 84:24 85:22 88:17 89:11 90:13,20,23 91:5,23 93:9,24 94:23 95:12,23 96:18 97:4,8,20 98:18 99:4,23 100:19 101:11,</p>	<p>25 102:23 103:5,18 104:6, 23 105:23 107:2,24 108:9 109:2 110:2,10,20 111:13, 25 112:8,11,15,25 113:11 114:8 115:16,21 116:2,20 118:1,21 119:13  <b>ahead</b> [2] 87:18 97:6  <b>AL</b> [2] 1:4,7  <b>algorithms</b> [2] 10:3 40:15  <b>ALITO</b> [30] 13:11 14:7,10, 14,25 15:12 16:4,18,22 21:18 23:14,17,20 24:16,19 26:13 27:16 28:14,19 29:1 42:9,10,20 43:5,13 59:20 99:3,4 100:16,21  <b>allegations</b> [2] 20:5 86:15  <b>alleged</b> [1] 59:7  <b>alleging</b> [1] 6:19  <b>allowing</b> [1] 29:14  <b>alluded</b> [1] 121:4  <b>alone</b> [2] 7:21 123:8  <b>alongside</b> [1] 109:5  <b>already</b> [2] 122:7,11  <b>altering</b> [1] 10:3  <b>although</b> [1] 109:3  <b>Alvarez</b> [1] 80:17  <b>Amendment</b> [60] 6:21 7:7, 8 8:4,15 10:18 11:25 24:5 26:17 27:5,6,11 29:8 30:24 31:5,6,17 37:4 39:5 40:8 41:10 42:1 46:18 49:13 51:2 52:6 65:6 68:18,18 69:6,16 70:2,11,13,18 75:1 77:11,14 78:6,12,25 89:14 90:25 92:19 94:10 96:4 98:24 110:13,24 112:11 113:7, 17 117:3,21 118:10,17 119:3,20 125:13,19  <b>America</b> [1] 72:14  <b>American</b> [2] 65:2 78:5  <b>Americans</b> [6] 24:2,9,12 52:23 64:23 78:11  <b>Americans'</b> [1] 66:7  <b>amicus</b> [3] 7:1 56:3 58:21  <b>amongst</b> [1] 41:22  <b>amplify</b> [2] 81:1 118:13  <b>analogies</b> [1] 52:17  <b>analysis</b> [6] 10:22 67:20 69:17 116:22 119:19 125:2  <b>analyze</b> [1] 75:8  <b>analyzed</b> [1] 64:24  <b>anathema</b> [1] 65:6  <b>and/or</b> [1] 116:11  <b>anger</b> [6] 25:18 26:5,6,8 27:18 28:1  <b>another</b> [11] 17:9 42:1 54:24 60:1 71:21 83:23,24 88:7 89:5 106:19 109:9  <b>answer</b> [16] 16:11 22:1 23:6,9 46:10 51:3 67:16,17 79:21 89:13 90:25 91:6,6 101:5 102:2 125:14  <b>answering</b> [2] 56:1 64:6</p>	<p><b>answers</b> [4] 22:1 23:18 59:21 89:12  <b>anti-Semitic</b> [4] 12:6,10 39:24 54:18  <b>anticipating</b> [1] 10:14  <b>antitrust</b> [5] 22:20 32:19 53:12 115:14 123:19  <b>anybody</b> [2] 74:3 94:13  <b>anytime</b> [1] 81:2  <b>apart</b> [1] 4:17  <b>apologize</b> [4] 60:12 86:1 88:18 119:14  <b>apologizing</b> [1] 85:23  <b>Appeal</b> [2] 122:19 123:13  <b>appear</b> [3] 79:13 105:2 109:12  <b>appearance</b> [1] 122:16  <b>APPEARANCES</b> [1] 1:18  <b>appears</b> [1] 122:19  <b>Appendix</b> [5] 82:24 85:11 105:25 121:3,25  <b>application</b> [4] 18:17 36:11 60:11 69:6  <b>applications</b> [1] 61:15  <b>applied</b> [3] 12:22 15:2 22:8  <b>applies</b> [3] 42:22 61:1 97:22  <b>apply</b> [8] 6:14 18:8 24:6 69:11 88:16 91:20 98:3 99:12  <b>applying</b> [1] 19:5  <b>appreciate</b> [5] 26:7 30:24 62:1 93:17 121:6  <b>approach</b> [2] 17:1 22:13  <b>appropriate</b> [1] 55:3  <b>April</b> [3] 45:20 84:5 121:12  <b>areas</b> [2] 65:3 88:16  <b>aren't</b> [3] 18:4 26:11 108:8  <b>arguably</b> [1] 64:25  <b>argued</b> [1] 43:11  <b>arguing</b> [1] 61:24  <b>argument</b> [18] 1:15 2:2,5,8 3:4,7 6:14 19:2 41:3 51:15 61:7 64:14 66:13,14 71:14 99:9,21 120:18  <b>arguments</b> [2] 34:20 120:8  <b>arise</b> [1] 103:21  <b>arises</b> [3] 77:25 81:2 94:10  <b>arm</b> [1] 76:13  <b>Army</b> [1] 75:10  <b>around</b> [7] 12:15 27:13 36:12 98:14,14 101:19 105:21  <b>arrangement</b> [1] 41:16  <b>Article</b> [5] 3:22 4:17 13:10 125:21,22  <b>articulating</b> [1] 87:23  <b>aside</b> [1] 23:15  <b>asks</b> [1] 86:9  <b>aspect</b> [2] 5:24 85:23  <b>Assistant</b> [4] 72:10 111:1 115:18,24  <b>Associated</b> [1] 23:2  <b>assume</b> [3] 15:10 90:18,18  <b>assumed</b> [1] 27:18</p>
<p><b>7</b></p> <p><b>7</b> [1] 84:2  <b>701</b> [1] 84:17  <b>708</b> [1] 84:17  <b>715</b> [3] 86:7,12 102:5  <b>716</b> [3] 86:7,12 102:5  <b>74</b> [1] 106:6  <b>793</b> [3] 84:2 106:6 121:2  <b>794</b> [3] 84:2 106:6 121:2  <b>7th</b> [1] 39:21</p> <p><b>8</b></p> <p><b>80</b> [1] 10:21  <b>81</b> [1] 107:6  <b>83</b> [1] 107:6</p>	<p><b>3</b></p> <p><b>3</b> [1] 2:4  <b>39</b> [2] 81:22 82:9</p> <p><b>5</b></p> <p><b>5</b> [1] 82:22</p> <p><b>6</b></p> <p><b>6</b> [1] 82:22  <b>630</b> [1] 121:25  <b>631</b> [1] 86:14  <b>632</b> [1] 86:14  <b>635</b> [1] 88:21  <b>64</b> [1] 2:7  <b>66</b> [1] 109:3  <b>67</b> [1] 109:4</p>	<p><b>actors</b> [11] 6:1,22 7:22 11:3,23 43:3 52:5 64:4 67:2 77:21 125:14  <b>acts</b> [3] 17:7 20:23 121:19  <b>actual</b> [4] 29:10 31:20 44:16 92:19  <b>actually</b> [15] 57:14 59:25 60:2 70:18,20 87:20 90:22 99:8 100:15 108:6 116:11 117:13 120:3 122:4 123:5  <b>Adam</b> [2] 111:7 115:4  <b>add</b> [2] 83:10 86:3  <b>added</b> [2] 48:9 78:11  <b>address</b> [4] 59:13 71:8 81:21 120:22  <b>addressed</b> [4] 67:13 71:9 97:24 114:16  <b>addresses</b> [1] 11:2  <b>adjudicate</b> [1] 47:13  <b>adjust</b> [2] 81:20 100:2  <b>administration</b> [2] 66:2 84:16  <b>administrations</b> [1] 125:1  <b>admit</b> [1] 92:22  <b>adopts</b> [1] 120:9  <b>adverse</b> [7] 5:12 36:16,18 52:10,12 111:12 116:10  <b>advice</b> [5] 4:23 55:22 58:7, 13 125:15  <b>advising</b> [1] 57:15  <b>advisors</b> [4] 4:14 12:2,4 124:12  <b>advisory</b> [1] 123:24  <b>advocate</b> [1] 115:15  <b>advocating</b> [2] 34:1 63:5  <b>affecting</b> [3] 3:20 9:3 106:24  <b>afield</b> [1] 89:16  <b>afoul</b> [1] 89:2  <b>agencies</b> [1] 9:8  <b>agency</b> [4] 5:3 11:8 28:12 123:1  <b>agent</b> [1] 114:10  <b>agents</b> [1] 4:15  <b>ago</b> [2] 13:4 78:14  <b>agree</b> [13] 18:12 20:14,21, 24 30:17,19 49:25 57:25 58:22 61:1 74:17 98:18 109:11  <b>Agreed</b> [3] 14:13 20:13 21:16  <b>agreeing</b> [2] 38:17,20  <b>agreement</b> [1] 41:21  <b>AGUIÑAGA</b> [85] 1:22 2:</p>		



## Official

<p><b>assuming</b> <sup>[1]</sup> 61:12  <b>assumption</b> <sup>[1]</sup> 111:10  <b>attach</b> <sup>[1]</sup> 74:20  <b>attack</b> <sup>[2]</sup> 65:1 124:18  <b>attacks</b> <sup>[1]</sup> 39:21  <b>attempted</b> <sup>[1]</sup> 14:22  <b>attempting</b> <sup>[2]</sup> 74:23 103:21  <b>attention</b> <sup>[1]</sup> 11:1  <b>attributable</b> <sup>[1]</sup> 43:2  <b>attribute</b> <sup>[1]</sup> 85:16  <b>audit</b> <sup>[2]</sup> 3:22 29:12  <b>August</b> <sup>[1]</sup> 48:9  <b>author</b> <sup>[1]</sup> 73:16  <b>authorities</b> <sup>[1]</sup> 95:8  <b>authority</b> <sup>[9]</sup> 114:5,17,19, 23 115:1,13 116:14,14 124:13  <b>automatically</b> <sup>[1]</sup> 31:16  <b>available</b> <sup>[3]</sup> 22:22,22 26:12  <b>aware</b> <sup>[1]</sup> 123:3  <b>away</b> <sup>[4]</sup> 22:2 23:9 63:17 113:16  <b>awful</b> <sup>[1]</sup> 89:10</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>back</b> <sup>[24]</sup> 8:8 15:21 21:12 23:6 25:8,17 37:9 38:14 41:5 44:19 66:8 74:18 78:13 87:20 91:18 92:18 96:5 100:1,25 103:2 119:24 120:23 121:15 124:17  <b>back-and-forths</b> <sup>[1]</sup> 29:17  <b>backed</b> <sup>[1]</sup> 88:5  <b>Backpage</b> <sup>[1]</sup> 113:13  <b>backup</b> <sup>[1]</sup> 91:6  <b>bad</b> <sup>[4]</sup> 24:17 25:22 42:6 71:19  <b>badgers</b> <sup>[1]</sup> 65:7  <b>ball</b> <sup>[1]</sup> 65:13  <b>Bantam</b> <sup>[28]</sup> 3:15,17 5:18, 23 7:24 36:9 37:6,6 56:13 57:25 58:15,18 61:23,24 62:7,20 66:13 67:14,19,21 68:22 71:9,10 75:2 108:24 109:13 111:14 114:2  <b>Barrett</b> <sup>[32]</sup> 56:10,11 57:3, 10,23 59:7,10,24 60:5,17, 24 61:9,18 73:5 79:10 82:6 87:14,17,19 89:7,23 90:17,21 91:2,17 113:21,22 115:7,20,23 116:13,23  <b>based</b> <sup>[3]</sup> 7:2 79:6,8  <b>basically</b> <sup>[4]</sup> 14:11 66:13 71:15 116:6  <b>basis</b> <sup>[4]</sup> 8:10 37:9,14 83:22  <b>Baton</b> <sup>[1]</sup> 1:22  <b>became</b> <sup>[1]</sup> 68:10  <b>become</b> <sup>[1]</sup> 6:1  <b>becomes</b> <sup>[4]</sup> 12:18 30:23 63:22 70:2  <b>befell</b> <sup>[1]</sup> 15:18</p>	<p><b>beforehand</b> <sup>[1]</sup> 28:24  <b>begin</b> <sup>[2]</sup> 13:6 31:24  <b>behalf</b> <sup>[10]</sup> 1:20,23 2:4,7,10 3:8 27:13 53:24 64:15 120:19  <b>behave</b> <sup>[1]</sup> 11:24  <b>behavior</b> <sup>[2]</sup> 94:4 106:21  <b>behest</b> <sup>[1]</sup> 13:1  <b>behind</b> <sup>[6]</sup> 24:25 27:9 65:7 72:19 100:8 123:18  <b>behold</b> <sup>[1]</sup> 87:7  <b>believe</b> <sup>[1]</sup> 93:3  <b>below</b> <sup>[3]</sup> 70:24 116:3,3  <b>BENJAMIN</b> <sup>[3]</sup> 1:22 2:6 64:14  <b>berate</b> <sup>[2]</sup> 27:21 28:9  <b>best</b> <sup>[8]</sup> 15:22 26:4 86:4 87:16 101:12 105:19 121:22 122:15  <b>bet</b> <sup>[1]</sup> 28:9  <b>better</b> <sup>[3]</sup> 11:20 33:24 35:15  <b>between</b> <sup>[28]</sup> 3:16 16:17 21:19 25:8 28:12 37:10,23 40:20 41:2,15 45:18 49:19 50:2 56:13,16 57:24 61:23 62:11 67:24 77:23 85:1 102:24 103:2 118:22 121:19 122:3 123:13 125:24  <b>beyond</b> <sup>[4]</sup> 46:12 48:13 51:24 82:1  <b>Biden</b> <sup>[3]</sup> 34:16 78:2,5  <b>big</b> <sup>[4]</sup> 22:21 23:2 26:15 64:1  <b>bigger</b> <sup>[1]</sup> 120:23  <b>biggest</b> <sup>[1]</sup> 117:1  <b>billboard</b> <sup>[2]</sup> 114:20,24  <b>bills</b> <sup>[1]</sup> 87:3  <b>Bin</b> <sup>[1]</sup> 12:10  <b>binding</b> <sup>[1]</sup> 4:13  <b>bird's</b> <sup>[1]</sup> 15:7  <b>bit</b> <sup>[2]</sup> 20:20 61:4  <b>blanket</b> <sup>[1]</sup> 93:20  <b>blocked</b> <sup>[1]</sup> 86:20  <b>Blum</b> <sup>[7]</sup> 7:3 61:23,25 62:1, 24 63:6 89:20  <b>blunderbuss</b> <sup>[1]</sup> 16:25  <b>Book</b> <sup>[2]</sup> 5:18 66:13  <b>Books</b> <sup>[22]</sup> 3:15 5:23 36:9 37:6 56:13 57:25 58:16 61:23,24 62:7,21 67:14,20,21 68:22 71:9,10 75:2 108:24 109:13 111:14 114:2  <b>Books-type</b> <sup>[1]</sup> 7:24  <b>borough</b> <sup>[2]</sup> 114:18,22  <b>Both</b> <sup>[7]</sup> 6:17 11:12 14:14 16:22 26:15 32:13 65:12  <b>bother</b> <sup>[1]</sup> 55:14  <b>bound</b> <sup>[1]</sup> 6:20  <b>bounds</b> <sup>[1]</sup> 125:22  <b>bows</b> <sup>[1]</sup> 73:21  <b>Brackeen</b> <sup>[1]</sup> 27:15  <b>branch</b> <sup>[1]</sup> 33:2  <b>branch's</b> <sup>[1]</sup> 3:23</p>	<p><b>Brant</b> <sup>[1]</sup> 5:17  <b>breadth</b> <sup>[4]</sup> 107:4,7,19 120:7  <b>breath</b> <sup>[1]</sup> 99:15  <b>BRIAN</b> <sup>[5]</sup> 1:19 2:3,9 3:7 120:18  <b>brief</b> <sup>[21]</sup> 7:1 12:13 15:6,20, 20 17:10 20:6 26:16 45:3, 10 49:13,16 51:2 53:1 66:23 85:13,24 99:7 104:10, 25 105:14  <b>briefing</b> <sup>[1]</sup> 55:3  <b>briefly</b> <sup>[1]</sup> 106:19  <b>briefs</b> <sup>[4]</sup> 56:3 58:21 62:23 104:21  <b>bring</b> <sup>[1]</sup> 115:13  <b>broad</b> <sup>[4]</sup> 16:12 104:13 107:8 120:9  <b>broadcast</b> <sup>[1]</sup> 24:22  <b>broader</b> <sup>[2]</sup> 23:7 107:15  <b>broadly</b> <sup>[1]</sup> 12:22  <b>brother</b> <sup>[1]</sup> 85:18  <b>buckets</b> <sup>[1]</sup> 54:15  <b>bulk</b> <sup>[1]</sup> 100:8  <b>bully</b> <sup>[10]</sup> 11:22 38:10 54:22 58:12 66:5,9,10 93:25 94:1 124:5  <b>bulwark</b> <sup>[1]</sup> 125:20  <b>burden</b> <sup>[2]</sup> 44:9 47:15  <b>burden-shifting</b> <sup>[1]</sup> 42:22  <b>Bush</b> <sup>[1]</sup> 124:7  <b>business</b> <sup>[1]</sup> 17:6</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>cable</b> <sup>[1]</sup> 24:23  <b>call</b> <sup>[15]</sup> 27:20 28:20 40:2 54:23 74:19,20,21,21 76:12 95:19 96:13,20 109:8 115:25 124:14  <b>called</b> <sup>[5]</sup> 39:22 83:7 114:15 123:11 124:19  <b>calling</b> <sup>[4]</sup> 11:20 30:1 107:11,16  <b>calls</b> <sup>[7]</sup> 15:6 30:15 42:5 90:6 91:4 102:6 109:16  <b>Calvinball</b> <sup>[1]</sup> 65:13  <b>came</b> <sup>[2]</sup> 1:14 105:21  <b>campaign</b> <sup>[2]</sup> 8:21 124:20  <b>campus</b> <sup>[1]</sup> 39:24  <b>candid</b> <sup>[1]</sup> 48:4  <b>cannot</b> <sup>[3]</sup> 22:12 67:1 117:15  <b>care</b> <sup>[4]</sup> 67:9 111:7,8 119:8  <b>career</b> <sup>[1]</sup> 124:25  <b>careful</b> <sup>[1]</sup> 29:2  <b>carefully</b> <sup>[1]</sup> 54:9  <b>Carlson</b> <sup>[3]</sup> 84:15 85:10 106:8  <b>carried</b> <sup>[1]</sup> 116:11  <b>carries</b> <sup>[1]</sup> 111:3  <b>Case</b> <sup>[70]</sup> 3:4,15,18 4:1 5:19,21 6:3 7:3 9:8 18:12 27:6 29:12 31:19 32:10 36:11 37:19 43:11 47:9 56:3,19 58:5 59:4 66:16 67:16,17, 22 68:1,23 70:8 71:1,6 72:3 75:3,24 76:4,5,6 77:16 80:1,2 86:5,5 89:16 91:13, 18,19,21 92:20 93:15,23 97:22,25 99:8 100:6,11 106:12 107:8 108:2,4,17 110:11,12,18,19 114:18 115:17 119:25 125:7 126:4,5  <b>case-specific</b> <sup>[1]</sup> 50:16  <b>cases</b> <sup>[16]</sup> 6:15,18 7:7,9,23 16:11 43:18 49:3 57:19 60:23 63:7 65:17 68:18,18 91:22 94:13  <b>category</b> <sup>[2]</sup> 54:19 98:22  <b>causal</b> <sup>[1]</sup> 16:17  <b>causation</b> <sup>[3]</sup> 14:12 16:6 42:11  <b>cause</b> <sup>[3]</sup> 4:3 21:15 114:23  <b>caused</b> <sup>[1]</sup> 102:13  <b>causing</b> <sup>[2]</sup> 40:17 95:22  <b>cautious</b> <sup>[1]</sup> 58:10  <b>cave</b> <sup>[1]</sup> 65:15  <b>caveats</b> <sup>[1]</sup> 57:7  <b>CDC</b> <sup>[1]</sup> 64:5  <b>CDC's</b> <sup>[2]</sup> 4:22 55:21  <b>celebrated</b> <sup>[1]</sup> 29:6  <b>cell</b> <sup>[1]</sup> 40:5  <b>ensor</b> <sup>[10]</sup> 38:16 39:8 65:14 68:7 69:2 72:13 73:20 82:3 107:18 108:20  <b>ensored</b> <sup>[4]</sup> 44:22 75:6 97:12 100:13  <b>ensoring</b> <sup>[5]</sup> 44:15 66:18 68:25 100:4,14  <b>ensorship</b> <sup>[10]</sup> 39:14 64:18 65:2 67:8 84:4 93:22 106:16,17 113:6 124:20  <b>central</b> <sup>[1]</sup> 68:17  <b>Century</b> <sup>[1]</sup> 75:3  <b>certain</b> <sup>[11]</sup> 17:24 19:9 41:16 69:8 70:18 75:25 87:3 91:9 92:22 94:6 118:5  <b>certainly</b> <sup>[4]</sup> 13:7 69:15 74:8 116:21  <b>challenge</b> <sup>[4]</sup> 15:19 29:16 94:25 95:2  <b>challenged</b> <sup>[3]</sup> 16:2 17:13 58:12  <b>challenges</b> <sup>[1]</sup> 3:19  <b>Chamber</b> <sup>[1]</sup> 58:22  <b>chances</b> <sup>[1]</sup> 76:16  <b>change</b> <sup>[14]</sup> 24:5 31:4 33:11 34:1,12,23 37:1 43:18 49:12 60:1 72:5 100:3 115:14,22  <b>changes</b> <sup>[5]</sup> 40:1,3 85:14 115:15 121:10  <b>characterizations</b> <sup>[2]</sup> 18:15 46:16  <b>charges</b> <sup>[1]</sup> 124:24  <b>CHIEF</b> <sup>[31]</sup> 3:3,9 35:22 37:5 38:12 42:9 43:14 46:5</p>	<p>47:17 51:12 56:9 61:19 64:11,16 74:1,5 75:7,16 97:2, 6,14 98:9,25 100:22 105:16 108:22 113:20 116:24 120:15,20 126:2  <b>child</b> <sup>[2]</sup> 40:6 55:7  <b>childhood</b> <sup>[1]</sup> 54:18  <b>Children</b> <sup>[3]</sup> 95:4 98:14 107:16  <b>children's</b> <sup>[2]</sup> 12:9 40:5  <b>chill</b> <sup>[2]</sup> 56:7 125:23  <b>choice</b> <sup>[4]</sup> 62:5,17,18 68:10  <b>choices</b> <sup>[3]</sup> 4:24 43:2 52:5  <b>choose</b> <sup>[1]</sup> 75:13  <b>chose</b> <sup>[1]</sup> 79:23  <b>chosen</b> <sup>[1]</sup> 68:6  <b>Circuit</b> <sup>[14]</sup> 4:20,25 9:11,24 11:6,13 14:17 15:1 61:4,5 64:20 89:19 107:6 114:16  <b>Circuit's</b> <sup>[1]</sup> 10:19  <b>circulating</b> <sup>[1]</sup> 55:23  <b>circulation</b> <sup>[1]</sup> 12:6  <b>circumstance</b> <sup>[4]</sup> 79:4 80:10 96:12 120:3  <b>circumstances</b> <sup>[15]</sup> 16:14 34:11,21 50:15 63:2 69:7 87:25 92:12,15,23 95:9 111:11 117:22 118:6 119:7  <b>CISA</b> <sup>[5]</sup> 105:3,6 122:18 123:1,1  <b>cite</b> <sup>[3]</sup> 43:22 68:12 82:14  <b>citing</b> <sup>[2]</sup> 15:24,25  <b>citizens</b> <sup>[2]</sup> 27:12 117:14  <b>citizens'</b> <sup>[1]</sup> 27:12  <b>civility</b> <sup>[1]</sup> 29:8  <b>claim</b> <sup>[4]</sup> 11:14 84:22 107:17 110:16  <b>claims</b> <sup>[2]</sup> 85:15 107:18  <b>Clapper</b> <sup>[5]</sup> 43:17,17,21 44:12,13  <b>clarification</b> <sup>[2]</sup> 121:1,7  <b>clarified</b> <sup>[1]</sup> 35:9  <b>clarify</b> <sup>[1]</sup> 88:13  <b>classic</b> <sup>[2]</sup> 11:22 124:5  <b>classified</b> <sup>[1]</sup> 93:2  <b>clear</b> <sup>[23]</sup> 10:8 14:22 17:19 18:8 27:1 28:5 35:20 46:8, 14 59:11,15 60:10,14,19 61:1,8,11 80:16 88:18 101:4 122:11 124:21 125:11  <b>clearest</b> <sup>[3]</sup> 54:25 82:5 102:1  <b>clearly</b> <sup>[5]</sup> 14:23 58:2 60:21 96:1 101:6  <b>Clegg</b> <sup>[3]</sup> 65:25 81:13 82:17  <b>clients</b> <sup>[5]</sup> 101:8 106:22,24 108:3,3  <b>close</b> <sup>[2]</sup> 110:12 124:12  <b>closed</b> <sup>[4]</sup> 55:14 65:7 100:8 123:18  <b>closer</b> <sup>[1]</sup> 95:24</p>
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## Official

<p><b>clubs</b> [1] 22:21  <b>coalesced</b> [1] 36:10  <b>code</b> [1] 29:8  <b>coerce</b> [12] 9:15 10:1,17,20 36:2 64:22 75:9,11 92:16 93:17 94:4,5  <b>coercing</b> [3] 38:18 66:19 74:3  <b>coercion</b> [63] 3:17 5:1,6,11, 22 6:7 8:1 11:14 29:10 30:5,25 31:16,24 32:3,4,5,20 34:2,11,24 36:1,7 37:16 38:2,15 46:6,15 48:23 49:8 50:2,3,13,17,22,23 51:16, 25 52:7 56:16,25 58:1 62:8 66:14,22 68:1,5 71:4 74:15,19 78:22 80:8 89:5 92:21 97:18,21,23 98:3 99:10, 11 108:25 109:4,23 125:20  <b>coercion/encouragement</b> [1] 5:17  <b>coercive</b> [7] 3:11 5:2 11:7 36:21 37:12 38:11 62:20  <b>colleague's</b> [1] 98:10  <b>colleagues</b> [1] 99:6  <b>colleges</b> [1] 39:23  <b>colloquial</b> [2] 6:8 63:4  <b>colloquy</b> [2] 99:5 107:10  <b>come</b> [4] 10:25 27:4 29:15 77:10  <b>comes</b> [15] 5:23 8:15 10:21 12:15,18 15:21 26:1,19 54:14 58:5 68:16 77:16 78:7 114:5 116:15  <b>coming</b> [4] 55:15 92:18 119:24 123:15  <b>comment</b> [1] 96:19  <b>comments</b> [2] 78:4 83:10  <b>commit</b> [1] 67:7  <b>common</b> [1] 53:16  <b>commonplace</b> [2] 29:4 42:8  <b>communicates</b> [1] 55:10  <b>communicating</b> [1] 46:19  <b>communication</b> [2] 104:12 111:17  <b>communications</b> [15] 3:23 4:22 5:2 10:24 17:15 18:2 28:12 29:13 51:20 54:1 100:7 102:16 103:20 104:14,16  <b>community</b> [1] 84:10  <b>companies</b> [4] 10:1 40:6 63:23 94:5  <b>company</b> [2] 109:17,21  <b>compel</b> [1] 118:24  <b>compelled</b> [1] 5:25  <b>compelling</b> [10] 31:10 69:13,20 70:21 92:17 118:18 119:4,9,23 120:4  <b>compilers</b> [1] 76:11  <b>complaining</b> [3] 54:3 108:4,7  <b>complains</b> [1] 72:12</p>	<p><b>complaint</b> [7] 13:17,23 27:10 48:6,7,8 53:19  <b>complaints</b> [1] 13:3  <b>completely</b> [4] 97:10 108:10,13,15  <b>compliance</b> [1] 118:10  <b>comply</b> [1] 113:18  <b>comprehensive</b> [1] 54:8  <b>compulsion</b> [1] 118:23  <b>concede</b> [1] 18:7  <b>concededly</b> [1] 4:21  <b>conceding</b> [2] 31:15,18  <b>conceivable</b> [1] 116:17  <b>concentrated</b> [2] 48:25 88:11  <b>concentration</b> [4] 49:18 50:12,21 51:3  <b>concept</b> [1] 74:14  <b>conceptually</b> [1] 119:22  <b>concern</b> [10] 19:19 24:12 55:18 58:16 64:1 107:24 108:10 117:2 123:17 125:17  <b>concerned</b> [4] 33:22 65:10 75:14 120:7  <b>concerns</b> [3] 25:14 30:16 50:20  <b>conclude</b> [1] 51:19  <b>concluding</b> [1] 109:25  <b>conclusions</b> [1] 61:13  <b>concrete</b> [1] 32:14  <b>condemning</b> [4] 124:6,7,8, 10  <b>conduct</b> [4] 7:2 12:22 69:25 77:24  <b>confess</b> [2] 42:19 87:22  <b>confining</b> [1] 47:5  <b>conflated</b> [1] 60:7  <b>confused</b> [1] 87:22  <b>confusing</b> [1] 68:14  <b>connect</b> [1] 45:4  <b>connection</b> [2] 16:17 121:19  <b>consequence</b> [2] 15:15, 18  <b>consequences</b> [4] 52:8 99:14 111:12 116:10  <b>consider</b> [2] 53:9 57:23  <b>consideration</b> [2] 48:24 114:13  <b>considered</b> [1] 67:19  <b>considering</b> [3] 47:21 61:9 65:11  <b>consistent</b> [3] 17:8 31:23 118:17  <b>conspiracy</b> [1] 98:5  <b>constant</b> [3] 22:5 23:17,18  <b>constitutes</b> [1] 36:6  <b>Constitution</b> [3] 27:5 67:9 98:17  <b>constitutional</b> [10] 6:21 8:10,16,24 18:18 46:22 50:2 66:4,7 124:11  <b>constitutionally</b> [1] 88:23</p>	<p><b>construe</b> [1] 32:10  <b>contacts</b> [1] 109:16  <b>containing</b> [1] 10:4  <b>contains</b> [1] 78:9  <b>content</b> [22] 4:12 10:4 12:7 16:1 17:3,5,23 20:23 23:13 33:18 44:4 56:24 63:25 65:19 83:6 86:10 94:8,17 98:22 101:21 121:14 123:4  <b>contestable</b> [1] 12:20  <b>context</b> [23] 19:17 23:7 24:2,4 25:19 26:8 31:4,12 35:3 36:7,15 37:7,12,18 42:22 46:19 49:4 50:8 54:9 58:23 85:15 103:20 119:9  <b>context-specific</b> [2] 34:19 57:8  <b>contexts</b> [2] 39:17 40:10  <b>continually</b> [2] 65:20 103:10  <b>continue</b> [3] 8:8 11:11 106:15  <b>continuing</b> [1] 81:23  <b>contours</b> [1] 6:20  <b>contracts</b> [1] 7:16  <b>contrary</b> [1] 107:18  <b>control</b> [3] 59:3 70:9 115:10  <b>controversy</b> [1] 108:5  <b>conversation</b> [1] 97:11  <b>conveys</b> [1] 5:12  <b>coordinated</b> [2] 105:8 124:20  <b>coordinating</b> [2] 39:9 40:21  <b>coordination</b> [3] 49:1,18 66:16  <b>core</b> [1] 78:9  <b>corners</b> [1] 121:8  <b>corporations</b> [1] 49:7  <b>Corps</b> [1] 75:10  <b>correct</b> [11] 9:12,13 19:15 21:5 47:3,23 51:16 70:3 99:23 100:18,19  <b>correctly</b> [1] 99:22  <b>couldn't</b> [6] 8:17,18 38:15 39:19 45:1 93:7  <b>Counsel</b> [8] 43:16 64:12 66:12 82:6 87:14 99:1 120:16 126:3  <b>counselor</b> [1] 85:14  <b>count</b> [5] 18:13,14 36:20 60:17,19  <b>counter</b> [1] 113:3  <b>counterfactual</b> [1] 56:18  <b>country</b> [3] 95:3 98:14 117:14  <b>couple</b> [6] 54:10,15 86:18 87:7 107:2 117:8  <b>course</b> [4] 25:12 37:22 81:9 99:18  <b>COURT</b> [46] 1:1,15 3:10 5:5,9,14 6:1 8:12,16,19,23</p>	<p>10:9 14:15 15:1 19:5 27:15 29:15 37:19 42:20,25 47:25 58:9 61:3 64:17,24 66:24,25 67:19,22 71:8 76:6 77:17,22 80:15 88:22 89:6 94:13 97:21 105:7 106:21 108:17 109:4 114:20 120:9 125:7,10  <b>Court's</b> [9] 5:15 59:15 63:7 66:11 68:17 88:21 90:16 94:12 121:8  <b>courts</b> [18] 3:22 4:5,10 6:4 14:19,21 16:22 36:10 51:23 60:6 61:2 62:24 64:2 70:23 124:19 125:1,4,22  <b>covered</b> [1] 92:6  <b>covert</b> [2] 62:5 64:4  <b>COVID</b> [3] 11:19 76:5 80:23  <b>COVID-19</b> [3] 13:4 44:7 45:22  <b>create</b> [2] 64:9 65:18  <b>creating</b> [1] 96:15  <b>criminal</b> [2] 77:1,5  <b>crisis</b> [1] 8:21  <b>critical</b> [4] 29:9 115:2 123:15 125:19  <b>criticism</b> [1] 30:8  <b>criticizing</b> [2] 3:14 11:18  <b>cross-posting</b> [2] 85:2 121:3  <b>crossed</b> [2] 58:17 64:3  <b>crosses</b> [1] 5:10  <b>crux</b> [1] 11:14  <b>cubicle</b> [1] 36:5  <b>cubicles</b> [1] 36:17  <b>cuff</b> [1] 34:16  <b>curse</b> [2] 22:3 28:21  <b>cursing</b> [1] 23:9  <b>cut</b> [2] 93:11 111:20  <b>cuts</b> [2] 49:7 111:21  <b>cutting</b> [1] 107:13</p>	<p><b>declarations</b> [2] 82:23 105:24  <b>declare</b> [1] 95:8  <b>declines</b> [1] 73:14  <b>deemed</b> [3] 11:24 51:20 62:6  <b>default</b> [1] 113:6  <b>defend</b> [3] 5:4 72:23,23  <b>defendant-friendly</b> [1] 43:7  <b>defendants</b> [3] 9:5 54:10 85:17  <b>defendants'</b> [1] 42:17  <b>definitely</b> [1] 41:1  <b>definition</b> [1] 97:24  <b>definitive</b> [2] 57:9 58:10  <b>degree</b> [1] 19:24  <b>degrees</b> [1] 19:18  <b>delete</b> [1] 10:2  <b>deleted</b> [1] 18:1  <b>deliberately</b> [1] 67:15  <b>demanding</b> [2] 22:1 23:9  <b>demands</b> [1] 16:13  <b>democracy</b> [2] 8:16 64:19  <b>democratic</b> [1] 8:25  <b>Democrats</b> [1] 55:16  <b>demonstrably</b> [1] 60:22  <b>demonstrate</b> [2] 69:20,21  <b>denying</b> [1] 27:1  <b>depart</b> [1] 65:20  <b>Department</b> [2] 1:20 122:17  <b>depended</b> [1] 61:14  <b>depending</b> [3] 87:24,25 92:15  <b>depends</b> [1] 69:5  <b>Deputy</b> [7] 1:19 65:24 72:10 81:13 111:1 115:18,24  <b>describe</b> [2] 54:5 85:8  <b>described</b> [3] 53:15 64:25 86:16  <b>describing</b> [3] 72:3 101:4 112:21  <b>designed</b> [1] 60:8  <b>desperately</b> [1] 120:12  <b>detention</b> [1] 52:21  <b>determination</b> [1] 70:17  <b>determine</b> [1] 69:12  <b>difference</b> [7] 40:20 41:2, 15,19 62:11 72:20 102:22  <b>different</b> [30] 4:6,6,7,7 6:5 11:24 16:14 33:17 41:23 54:15 58:20,21,25 59:4 63:2,12,24 75:17 77:15 79:14 87:23,24,25 88:10 91:19, 19,20 92:12 119:7 125:1  <b>difficult</b> [2] 49:2 100:13  <b>difficulties</b> [2] 47:5 92:11  <b>dilute</b> [1] 74:14  <b>direct</b> [3] 29:15 85:21 105:11  <b>directly</b> [7] 39:19 40:9 67:2, 3 68:20 88:24 102:2  <b>disagree</b> [7] 14:25 30:18</p>
---	---	---	--	--

## D

**D.C.** [2] 1:11,20  
**danger** [1] 29:13  
**dangerous** [1] 118:7  
**Dart** [1] 113:13  
**date** [1] 48:20  
**dates** [2] 45:6,8  
**day** [2] 71:25 98:5  
**days** [2] 35:7 44:22  
**de** [2] 18:18 46:21  
**deal** [1] 29:25  
**dealing** [1] 37:22  
**Dear** [2] 81:17 111:4  
**debate** [1] 93:18  
**decades** [1] 78:14  
**decide** [4] 63:23 99:8 101:23 110:12  
**deciding** [1] 41:13  
**decision** [2] 102:12 114:15  
**decisions** [2] 57:14 106:17

## Official

<p>41:7 49:23 69:11 74:12 109:19 <b>disclosed</b> [1] 65:23 <b>discourse</b> [3] 94:9,18 98:7 <b>discovery</b> [3] 72:9 100:17 108:13 <b>discrete</b> [1] 20:22 <b>discuss</b> [1] 49:16 <b>discussed</b> [3] 50:9 121:25 125:9 <b>discussing</b> [2] 119:17,18 <b>discussion</b> [1] 97:13 <b>Disinfo</b> [1] 81:21 <b>disinformation</b> [5] 11:4 82:18 83:1,7 84:13 <b>dispensed</b> [1] 83:22 <b>disposal</b> [1] 113:5 <b>dispute</b> [1] 58:5 <b>disputed</b> [2] 14:4,5 <b>disputes</b> [1] 47:13 <b>disputing</b> [3] 14:1 16:15 18:25 <b>distinction</b> [4] 3:16 56:12, 16 61:22 <b>distinguishing</b> [1] 77:23 <b>distribute</b> [3] 39:13 42:2 86:10 <b>distributing</b> [1] 37:2 <b>district</b> [10] 14:15 15:1 59: 15 61:3 64:24 76:6 77:17, 22 105:7 106:21 <b>diverse</b> [1] 49:3 <b>docs</b> [1] 81:11 <b>doctrine</b> [3] 4:21 6:15 7:11 <b>doctrines</b> [1] 68:14 <b>documents</b> [1] 123:12 <b>doing</b> [32] 9:2 12:24 15:9 19:12 24:24 25:15,23 26:4 33:23 40:9,14 57:13,14 68: 20 72:12 79:20 82:5 88:23 91:14 92:2,17 95:3 101:21 107:15 111:18 112:17,17 118:19 119:4 122:12 123: 24,25 <b>DOJ</b> [1] 115:10 <b>domestic</b> [2] 55:6 77:23 <b>done</b> [8] 10:22 12:14 34:8 42:16 51:24 66:2 117:11 122:11 <b>door</b> [1] 30:6 <b>doors</b> [3] 65:7 100:9 123: 19 <b>dots</b> [1] 45:4 <b>doubt</b> [1] 39:25 <b>down</b> [38] 18:22 36:5 76:19 77:3 78:8,10 79:24 83:6, 12,13 84:8 86:13 87:10 90: 9 92:4,25,25 93:8 95:10,21 96:17,24 97:17 101:8 102: 9 104:11 106:9 109:24 110:8,9,23 112:5,7,9,18 114:19 117:17 123:5 <b>doxed</b> [2] 89:25 90:2 <b>Dozen</b> [5] 81:22 82:18 83:2,</p>	<p>8 84:14 <b>draw</b> [3] 51:1 58:19 121:18 <b>drawing</b> [2] 58:1 102:4 <b>drew</b> [1] 101:17 <b>drop</b> [1] 116:14 <b>drugs</b> [1] 124:9 <b>during</b> [2] 24:3 106:3 <b>duty</b> [2] 117:13,15 <b>dying</b> [1] 24:9</p> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> [3] 82:22,24 102:17 <b>earlier</b> [11] 48:3 74:18 86: 13 88:19 98:2 101:4 102: 21 106:11 119:15 121:4 125:10 <b>early</b> [1] 55:14 <b>easier</b> [3] 49:20 50:17 97: 24 <b>easiest</b> [2] 47:9 125:6 <b>edification</b> [1] 8:10 <b>edit</b> [1] 28:24 <b>editorial</b> [4] 4:24 52:5 53:9 71:19 <b>effect</b> [3] 12:1 16:18 70:1 <b>effectively</b> [1] 111:19 <b>effects</b> [2] 12:8 50:22 <b>efficient</b> [1] 56:22 <b>effort</b> [5] 24:2 52:23 55:15 105:9 112:20 <b>eight</b> [1] 21:10 <b>EIP</b> [1] 105:5 <b>either</b> [6] 16:1 32:10 46:20 62:4 74:7 104:3 <b>election</b> [7] 44:8 55:11 76: 5 80:22 105:5 122:22,24 <b>elections</b> [1] 55:13 <b>elevations</b> [1] 95:2 <b>eliminate</b> [5] 94:8,16 98:6, 11,12 <b>else's</b> [2] 39:13 83:13 <b>email</b> [20] 11:1 23:10 65:24 72:11 81:12,16 82:16 86:8, 16 102:5,6,14,14,21,22 122:5,12 123:13,16,17 <b>emails</b> [8] 21:19 23:18 25: 6 26:6 102:24 103:21 116: 9 121:2 <b>emergency</b> [7] 91:15 95:9, 15 96:7,10,11,16 <b>emphatic</b> [1] 43:1 <b>employees</b> [3] 102:17,19 124:25 <b>employing</b> [1] 7:10 <b>enact</b> [1] 33:3 <b>encompass</b> [1] 51:17 <b>encourage</b> [13] 9:15,19 10: 20 40:4 67:1 90:8 92:15, 24 93:21 95:9 97:17 98:15 118:25 <b>encouragement</b> [30] 9:20 51:17 52:1 56:16 57:20 62: 2,4,9,15 63:1,11 66:23 74: 21 88:6 89:5,8,9,10,15,19</p>	<p>97:25 98:4 101:19 103:8 109:1,9,12,23 114:3 118: 23 <b>encourages</b> [2] 6:8 63:3 <b>encouraging</b> [5] 71:15,17 96:16 103:11 117:16 <b>encrypted</b> [1] 77:19 <b>end</b> [14] 10:21 12:11,12 27: 13 56:15 69:16 71:2 98:5 105:25 114:1 116:8 119: 19,24 120:11 <b>ended</b> [1] 97:16 <b>endorse</b> [1] 28:9 <b>endorsed</b> [1] 14:21 <b>ends</b> [1] 116:7 <b>enforcement</b> [6] 5:3 11:8 40:1 55:7,18 76:13 <b>engage</b> [6] 40:23 77:10 83: 2,9 98:13 116:5 <b>engaged</b> [4] 5:6 7:25 38:6, 7 <b>engagement</b> [1] 54:16 <b>engages</b> [1] 69:25 <b>engaging</b> [1] 106:16 <b>Engineers</b> [1] 75:11 <b>enjoin</b> [1] 125:23 <b>enjoined</b> [3] 12:3 106:21, 22 <b>enormous</b> [1] 44:21 <b>enough</b> [13] 18:25 21:4,10 33:10 36:3 37:15 44:17 68: 25 72:13 78:21 80:6 88:6 114:24 <b>ensure</b> [1] 31:10 <b>entanglement</b> [1] 51:18 <b>entered</b> [2] 4:10 41:21 <b>entering</b> [1] 13:1 <b>enterprise</b> [1] 107:7 <b>entire</b> [3] 94:17 98:21 99: 24 <b>entirely</b> [2] 28:4 77:15 <b>entities</b> [5] 26:3 49:19,19 52:3 55:19 <b>entitled</b> [4] 3:12 8:13 39:16 40:13 <b>entity</b> [1] 122:25 <b>environment</b> [1] 117:22 <b>EPA</b> [4] 19:14,17 20:10 75: 9 <b>epidemic</b> [2] 95:4 106:25 <b>erroneous</b> [8] 14:23 18:20 60:22 61:12,13 109:18,20 110:1 <b>error</b> [12] 17:20 18:8 46:8, 14 59:12,16 60:10,14,19 61:1,8,11 <b>errors</b> [4] 4:19 36:11 61:14 71:22 <b>especially</b> [4] 12:17,25 29: 14 118:7 <b>ESQ</b> [3] 2:3,6,9 <b>establish</b> [1] 46:3 <b>ET</b> [2] 1:4,7 <b>evaluate</b> [2] 35:24 36:6</p>	<p><b>eve</b> [1] 84:6 <b>Even</b> [27] 4:17,21 5:4 6:6 13:5,12 17:13 40:7 41:12 44:5 45:6 48:3 55:25 63: 10 64:5 89:14 92:16 95:5 97:2,9 100:14 101:15 103: 8 113:17 115:8 117:17 122:11 <b>event</b> [1] 121:5 <b>everyday</b> [1] 51:19 <b>everyone</b> [2] 24:11 35:17 <b>everything</b> [5] 22:9 25:23 80:25 90:18 104:9 <b>evidence</b> [3] 101:2,6,9 <b>exact</b> [2] 41:18 87:8 <b>exactly</b> [1] 9:2,24 10:15 44:22 48:18 51:22 54:12 59:9 64:2 67:13 104:4 <b>example</b> [25] 8:19 10:23 31:11 39:20 45:10 53:3 69: 19 76:9 81:25 82:5 84:25 85:3 88:1 91:13 93:10 94: 12 101:12,14 102:8 104:24 105:1,11 106:10,20 122:15 <b>examples</b> [7] 15:22 17:10 53:2 86:23 105:19 106:10 121:23 <b>Except</b> [1] 20:16 <b>exchange</b> [4] 60:1 122:3 123:13,16 <b>exchanged</b> [1] 21:19 <b>exchanges</b> [2] 28:11 123: 18 <b>exclude</b> [2] 39:9 40:21 <b>excuse</b> [2] 17:14 124:7 <b>executive</b> [2] 3:23 33:2 <b>exercise</b> [1] 36:25 <b>exercising</b> [2] 39:3 53:9 <b>exhortation</b> [2] 35:21 58: 12 <b>exhortations</b> [1] 11:23 <b>existence</b> [1] 123:2 <b>expanded</b> [1] 4:20 <b>expansive</b> [1] 71:14 <b>experience</b> [6] 28:5 52:18, 25 53:25 71:17 74:2 <b>experienced</b> [1] 27:19 <b>experiences</b> [1] 102:8 <b>expertise</b> [2] 56:5 65:4 <b>explain</b> [1] 9:1 <b>explained</b> [2] 8:19 107:6 <b>expletives</b> [1] 59:20 <b>explicit</b> [1] 36:15 <b>explicitly</b> [1] 35:13 <b>exploitation</b> [1] 55:7 <b>express</b> [4] 8:18 72:17 73: 19 75:25 <b>extent</b> [10] 19:15 20:10,17, 19 21:1,3 44:14 61:2 124: 2 125:10 <b>extremely</b> [4] 12:19 71:14 95:16 107:8 <b>eye</b> [1] 15:7</p>	<p style="text-align: center;"><b>F</b></p> <p><b>face</b> [3] 13:8 21:6 44:9 <b>Facebook</b> [38] 13:21 18:1 19:23 21:21,24 22:5,23 35: 9 56:17,19 59:25 65:23,25 72:11 84:8,9,23 85:5,6 86: 8,9,21 90:7 102:25 103:17, 21,25 104:2,15 106:3,7 121:6,24 122:4,6,12 123: 14,20 <b>Facebook's</b> [2] 57:3 103: 14 <b>fact</b> [2] 13:16 47:11 <b>fact</b> [18] 14:20 17:10,22 18: 3 46:11 49:5 59:11 60:15 61:15 67:10 82:25 92:13 109:25 113:9 114:10,13,21 115:2 <b>factor</b> [6] 16:9 18:25 21:14 27:8 42:13 49:17 <b>facts</b> [15] 18:12,17 31:23 37:21 46:13,21 60:11 72:8 76:3 80:1,14 92:1 115:17 121:9 125:2 <b>factual</b> [11] 17:18 18:3,13 46:12 54:4 59:15 61:14 71: 22 87:25 92:12 111:25 <b>factually</b> [7] 109:18,19,25 111:24 112:1,13,19 <b>fail-safe</b> [2] 120:6,8 <b>fair</b> [1] 28:6 <b>fall</b> [1] 96:5 <b>falling</b> [1] 91:18 <b>falls</b> [1] 74:25 <b>false</b> [8] 11:19 55:12 80:18, 22 81:2 112:3 113:3 125: 13 <b>familiar</b> [1] 73:1 <b>far</b> [5] 30:19 68:2,25 89:16 123:3 <b>favor</b> [3] 93:12 108:18 110: 13 <b>FBI</b> [18] 4:15 5:3 10:23 11:7, 9 55:1 64:3 77:17,19 90:6 91:2,3,8,14 92:2 105:4 110:25 114:10 <b>FBI's</b> [1] 5:1 <b>feature</b> [3] 8:15 29:23 122: 8 <b>federal</b> [13] 21:20,23,24 22: 13,19 23:24,25 24:24 26: 21 27:3,20 71:25 123:1 <b>feels</b> [1] 63:20 <b>felt</b> [1] 82:2 <b>few</b> [1] 120:21 <b>Fifth</b> [14] 4:19,25 9:11,24 10:19 11:6,12 14:17 15:1 61:4,4 64:20 89:19 107:5 <b>fighting</b> [1] 17:22 <b>figure</b> [1] 9:25 <b>filed</b> [2] 13:17,23 <b>filings</b> [1] 106:12 <b>filled</b> [1] 71:22</p>
---	---	--	--	--

## Official

<p><b>final</b> <sup>[1]</sup> 8:7  <b>finally</b> <sup>[1]</sup> 124:16  <b>find</b> <sup>[7]</sup> 15:25 25:16 34:25  45:1 47:6 81:24 94:12  <b>finding</b> <sup>[5]</sup> 14:17,23 18:3  49:7 76:6  <b>findings</b> <sup>[15]</sup> 14:20 17:18,  21,25 18:4,7,13,14,16,19  46:12 59:11,15 60:15 77:  17  <b>Fine</b> <sup>[4]</sup> 14:7 108:10,13,15  <b>finish</b> <sup>[1]</sup> 97:7  <b>firm</b> <sup>[1]</sup> 85:25  <b>first</b> <sup>[72]</sup> 3:4 4:19 6:21 7:6,8  8:4,15 10:8,18 11:25 13:  20 23:6 24:5 26:17 27:5,6,  11 28:10 29:8 30:23 31:1,  4,6,16 37:4 39:4 41:10,25  45:10 46:18 47:25 49:12  51:2 52:6 65:6 68:17 69:6,  16 70:2,11,13,17 74:2 75:1  77:11,14 78:6,11,25 89:14  90:13,25 92:19 94:10 96:4  98:23 102:8 110:13,24  112:11 113:7,17 117:2,21  118:10,17 119:3,20 120:25  122:20 125:13,19  <b>five</b> <sup>[4]</sup> 3:21 13:2 71:20 108:  11  <b>flag</b> <sup>[1]</sup> 125:13  <b>Flaherty</b> <sup>[2]</sup> 72:10 116:8  <b>flavors</b> <sup>[1]</sup> 56:2  <b>fleeting</b> <sup>[1]</sup> 79:8  <b>FLETCHER</b> <sup>[129]</sup> 1:19 2:3,  9 3:6,7,9 5:16,20 6:12,17  7:8,12,18 8:6,12 9:6,13,17,  22 10:7,15 13:11 14:1,8,13,  24 15:16 16:10,20,24 17:  21 18:10,22 19:1,6,16 20:2,  8,13,16,22 21:5,9,16,18 23:  4,16,19 24:1,17 25:4 26:25  27:23 28:3,6,8 29:1,22 30:  22 31:18,25 32:1,7,21,25  33:7,13,17 34:4,7,14,25 35:  23 36:8 37:17 38:14,19 39:  2,11 40:24 41:20 42:19 43:  12,21 44:23 45:2 46:9 47:  3,7,23 48:2,7,18,21 49:4,  21,24 50:6,10,18 51:7,10,  22 52:10,24 53:13,18,22  54:6 57:2,6,11 58:8 59:9,  23 60:4,12,18,25 61:16 62:  12 63:14 64:1 69:5 84:4  88:12 120:17,18,20  <b>flexibility</b> <sup>[1]</sup> 109:7  <b>flexible</b> <sup>[1]</sup> 99:16  <b>flip</b> <sup>[2]</sup> 32:9 62:19  <b>flipping</b> <sup>[1]</sup> 21:12  <b>flows</b> <sup>[1]</sup> 70:12  <b>fluid</b> <sup>[3]</sup> 75:20,22 76:2  <b>focus</b> <sup>[1]</sup> 116:13  <b>focusing</b> <sup>[1]</sup> 92:13  <b>follow</b> <sup>[3]</sup> 13:12 83:1 116:  18</p>	<p><b>following</b> <sup>[2]</sup> 11:1 39:1  <b>Footnote</b> <sup>[1]</sup> 71:11  <b>force</b> <sup>[1]</sup> 111:3  <b>foreign</b> <sup>[10]</sup> 4:16 11:3 55:1,  4 64:4 77:21,24 78:1,9  125:14  <b>forgot</b> <sup>[1]</sup> 21:13  <b>forgotten</b> <sup>[1]</sup> 102:15  <b>former</b> <sup>[2]</sup> 65:24 81:13  <b>forms</b> <sup>[2]</sup> 111:15,20  <b>forth</b> <sup>[5]</sup> 25:8,18 37:10 41:5  103:2  <b>forthcoming</b> <sup>[1]</sup> 85:24  <b>fortunately</b> <sup>[1]</sup> 10:10  <b>forward</b> <sup>[1]</sup> 53:19  <b>forward-looking</b> <sup>[2]</sup> 46:2  125:8  <b>found</b> <sup>[4]</sup> 14:15 64:3 77:22  105:7  <b>four</b> <sup>[3]</sup> 71:10 84:5 122:2  <b>Fourth</b> <sup>[2]</sup> 40:8 68:18  <b>fraction</b> <sup>[1]</sup> 87:12  <b>framed</b> <sup>[1]</sup> 34:4  <b>framework</b> <sup>[4]</sup> 5:17 7:24  58:6 69:18  <b>free</b> <sup>[7]</sup> 26:19,20 65:1 70:1  93:3 120:2 124:18  <b>freedom</b> <sup>[1]</sup> 70:7  <b>freestanding</b> <sup>[1]</sup> 119:10  <b>friend</b> <sup>[4]</sup> 66:3 121:4 123:  11 124:17  <b>friends</b> <sup>[3]</sup> 11:13 18:16 62:  24  <b>front</b> <sup>[2]</sup> 71:2 119:19  <b>full</b> <sup>[1]</sup> 85:25  <b>function</b> <sup>[1]</sup> 8:17  <b>fundamental</b> <sup>[4]</sup> 3:16 4:19  68:16 121:10  <b>fundamentally</b> <sup>[1]</sup> 29:7  <b>further</b> <sup>[1]</sup> 81:21  <b>future</b> <sup>[11]</sup> 13:9,16,21,25  44:1 46:25 47:1,12 100:12  122:10 123:9</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>gain</b> <sup>[1]</sup> 38:25  <b>game</b> <sup>[1]</sup> 98:13  <b>Gateway</b> <sup>[1]</sup> 105:2  <b>gather</b> <sup>[1]</sup> 103:15  <b>gave</b> <sup>[3]</sup> 46:10 88:1 121:23  <b>GENERAL</b> <sup>[13]</sup> 1:3,19,22 5:  7 11:16 17:14 36:22 38:9  53:21 54:21 81:17 123:14  125:18  <b>General's</b> <sup>[2]</sup> 17:15 123:23  <b>generally</b> <sup>[1]</sup> 56:14  <b>gets</b> <sup>[4]</sup> 7:19 45:11 46:1,21  <b>getting</b> <sup>[7]</sup> 10:11 18:6 24:  10,13,21 30:8 59:21  <b>give</b> <sup>[18]</sup> 17:19 18:11 23:5  25:22 46:9 54:8 76:18 79:  17,19 82:13,14 84:1 89:12,  24 94:21 101:13 104:24  118:11</p>	<p><b>given</b> <sup>[2]</sup> 92:1 105:20  <b>giving</b> <sup>[1]</sup> 26:11  <b>goal</b> <sup>[1]</sup> 25:24  <b>GORSUCH</b> <sup>[48]</sup> 18:21 19:3,  13,24 20:3,9,14,21,24 21:8,  11,17 30:21 31:25 32:1,2,  16,22 33:5,9,16,25 34:6,9,  17 47:18,19,24 48:5,16,19,  22 49:15,22 50:4,8,11 51:5,  8,11 88:12 105:17,18 106:  18 107:3,23 108:1,21  <b>got</b> <sup>[10]</sup> 22:19,21 70:24 78:  16 81:12 84:9 93:4 99:25  100:16 117:21  <b>gotten</b> <sup>[2]</sup> 42:21 99:6  <b>governance</b> <sup>[1]</sup> 8:25  <b>government</b> <sup>[227]</sup> 3:11,20  4:3 5:10,13 6:16 7:2,13,16,  20,25 8:3,9,11,13,17,20 10:  5,10,17,22 12:23 13:6,19  15:5,8,11,14,17 16:2 17:1,  5,24 18:2 19:11,22,23 20:1  21:9,24 22:19 23:24,25 24:  24 25:8 26:21 27:19,20 29:  24 30:1 31:7,10,15 32:14,  15 33:20 34:22 36:16,19,  24,25 37:23 38:3,5,6 39:6,  8,12,17,25 40:4,8,11,14,20  41:8,13,18,25 42:17 45:14,  15 49:10,19 52:4,10,12,19  53:8 55:10 56:5 57:13 59:  1 61:23 62:3,16 63:3,12,18  64:18,22 65:7,21 66:4,6,18  67:1,3,6,10,14 68:11,19 69:  1,4,8,13,19,25 70:6,19,25  71:2 72:1,4 73:15,20 74:6,  10,22 75:13 76:2,7,12,13,  20,22 77:6,20,22 78:7,24  79:2,15 80:12,15,18,20,24  82:5,19 83:4 86:8 87:5,9  89:2 90:2 92:14,23 93:6,  20 94:6,14,15 95:7,13 96:6,  13,22,23,24 98:6,20,21 99:  13 100:1 101:7,10,18,19,  22,24 102:14 103:3,10,17,  23 104:1,2,11,13 105:6  106:15 107:21 108:18 110:  3 111:8,18 112:2 113:1,4,  10 114:1 116:16,17 117:3,  7,8,13,16,24 118:4,24 119:  2,8,25 120:11 121:13 122:  4,6,13 123:8 124:2,24 125:  12,20,24  <b>government's</b> <sup>[20]</sup> 6:7 9:4  14:16 16:8 27:3 31:1 42:  12 45:18 62:18 63:20 65:5  74:13 81:4 93:11,16 102:  13 107:7 110:4 117:23  121:19  <b>government-caused</b> <sup>[1]</sup>  44:17  <b>governor</b> <sup>[1]</sup> 26:22  <b>granddaughter</b> <sup>[1]</sup> 60:3  <b>great</b> <sup>[3]</sup> 29:5 93:10 98:19</p>	<p><b>ground</b> <sup>[2]</sup> 44:5 125:9  <b>group</b> <sup>[3]</sup> 82:18 102:8,9  <b>groups</b> <sup>[10]</sup> 81:23 86:11,20,  24,25 87:9 102:7 121:24  122:2,7  <b>guess</b> <sup>[34]</sup> 20:2 27:18 28:2,  8,9 36:20 38:19 40:24 41:  3 42:25 45:8 61:21 67:18  70:5,23 73:12 74:17 79:11  88:20 89:22 91:24 93:24  94:11 96:5,11 101:16 103:  18 104:18,20 110:11 117:  12 118:2,15 119:22  <b>guidance</b> <sup>[1]</sup> 119:14  <b>guiding</b> <sup>[1]</sup> 67:5</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>hall</b> <sup>[1]</sup> 36:5  <b>Halleck</b> <sup>[1]</sup> 6:1  <b>hamstringing</b> <sup>[1]</sup> 117:3  <b>hanging</b> <sup>[1]</sup> 12:22  <b>happen</b> <sup>[4]</sup> 35:5,18 85:16  102:11  <b>happened</b> <sup>[23]</sup> 5:14 11:15  16:1 32:18 40:25 41:4 43:  4 45:7,18,20 50:22,23 53:1  56:18 78:15 85:3,18 99:11  100:15 121:14 123:18 124:  21 125:4  <b>happening</b> <sup>[9]</sup> 27:7 41:9  55:5 68:21,22 72:19 77:18  91:13 124:15  <b>happens</b> <sup>[6]</sup> 23:10 29:3 42:  4 71:24 73:11 78:14  <b>happy</b> <sup>[1]</sup> 10:7  <b>hard</b> <sup>[7]</sup> 11:10 34:25 45:5  59:4 100:11 103:14 107:  12  <b>harder</b> <sup>[8]</sup> 33:1 34:15 80:2  81:24 97:22 110:11,18,19  <b>harm</b> <sup>[13]</sup> 15:23 40:17 44:  17 46:24,25 47:1,12,14 48:  12 52:22 76:17 78:18 87:  13  <b>harmed</b> <sup>[2]</sup> 90:5 121:20  <b>harmful</b> <sup>[3]</sup> 104:15,17 117:  17  <b>harming</b> <sup>[4]</sup> 10:5,10 98:13  112:19  <b>harms</b> <sup>[3]</sup> 45:14 79:14,19  <b>hate</b> <sup>[1]</sup> 39:24  <b>head</b> <sup>[1]</sup> 7:13  <b>heads</b> <sup>[1]</sup> 12:23  <b>health</b> <sup>[16]</sup> 4:23 8:21 12:9  26:23 30:10 54:18 64:7 82:  20 86:11,19 95:15 96:15  102:7 122:7 123:24 125:  15  <b>Healthy</b> <sup>[3]</sup> 16:7 42:11,23  <b>hear</b> <sup>[3]</sup> 3:3,18 108:1  <b>heard</b> <sup>[1]</sup> 117:7  <b>hearing</b> <sup>[1]</sup> 84:7  <b>heck</b> <sup>[1]</sup> 78:4  <b>heightened</b> <sup>[2]</sup> 31:7 43:19</p>	<p><b>held</b> <sup>[3]</sup> 5:1,5 11:7  <b>help</b> <sup>[5]</sup> 20:20 22:10 25:21  84:22 117:19  <b>helpful</b> <sup>[2]</sup> 25:16 56:23  <b>helpless</b> <sup>[1]</sup> 113:4  <b>hesitancy</b> <sup>[2]</sup> 72:14 86:10  <b>hesitate</b> <sup>[2]</sup> 38:4 49:11  <b>hiding</b> <sup>[1]</sup> 65:13  <b>highest</b> <sup>[1]</sup> 65:9  <b>highlighted</b> <sup>[1]</sup> 121:17  <b>highlights</b> <sup>[1]</sup> 124:1  <b>Hill</b> <sup>[2]</sup> 115:9,10  <b>himself</b> <sup>[1]</sup> 11:17  <b>Hines</b> <sup>[16]</sup> 13:15 15:4 45:  11 72:16 84:1 85:3 86:4,  19 87:1,8 101:12 104:24  105:13 106:1,7 107:12  <b>Hines's</b> <sup>[7]</sup> 44:20 72:24 84:  22 86:14 102:7 121:1,24  <b>historical</b> <sup>[6]</sup> 17:22 18:3,  13 46:10,13 60:15  <b>history</b> <sup>[2]</sup> 65:2 94:13  <b>Hoft</b> <sup>[7]</sup> 72:16 105:1,9,13  106:1 122:16,16  <b>Hoff's</b> <sup>[1]</sup> 72:23  <b>hold</b> <sup>[3]</sup> 35:12,14,16  <b>holding</b> <sup>[3]</sup> 4:21 10:22 47:  5  <b>Homeland</b> <sup>[1]</sup> 122:17  <b>Honor</b> <sup>[66]</sup> 66:21 67:12 68:  15 69:15 70:5,12,22 73:7,  14 74:16 75:15,23 77:13  78:7,12,23 79:25 80:9 82:  4,11 83:16 84:24 88:18 89:  12 90:14,16,23 91:7,23 93:  9,24 94:20 95:12,24 96:6,  19 97:8,20 98:18 99:24  100:20 101:11,25 102:2,23  103:18 104:23 105:12,23  106:14 107:21 108:9,15  109:3,13 110:2,21 111:13  112:12 113:11 114:8 115:  1,16 116:20 118:1 119:13  <b>hope</b> <sup>[1]</sup> 24:10  <b>hosting</b> <sup>[1]</sup> 76:14  <b>hottest</b> <sup>[2]</sup> 81:11 123:12  <b>House</b> <sup>[25]</sup> 5:5 11:16 17:13  21:20,22 25:10 26:2 28:12  30:15 42:5 54:20 65:10,11  72:18 78:16 79:9 81:7 84:  20,22 85:10 86:9,17 102:  25 115:11 121:13  <b>huge</b> <sup>[2]</sup> 53:13 124:22  <b>hundreds</b> <sup>[1]</sup> 91:16  <b>hypo</b> <sup>[3]</sup> 92:1 93:2 111:23  <b>hypos</b> <sup>[2]</sup> 69:19 91:11  <b>hypothetical</b> <sup>[11]</sup> 52:15,15  72:25 88:2 89:25 94:22 96:  9,10 97:16 98:10 117:9  <b>hypothetically</b> <sup>[1]</sup> 32:17</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> <sup>[5]</sup> 11:22 17:23 25:7  36:12 38:1</p>
--	--	--	--	---

## Official

<p><b>ideas</b> <sup>[1]</sup> 104:19  <b>identified</b> <sup>[1]</sup> 60:23  <b>identifies</b> <sup>[2]</sup> 82:25 98:21  <b>identify</b> <sup>[6]</sup> 15:13 80:12 91:8 100:14 106:1 107:11  <b>identifying</b> <sup>[4]</sup> 77:20 91:16 94:7 107:9  <b>idiosyncratic</b> <sup>[1]</sup> 44:8  <b>ignore</b> <sup>[1]</sup> 115:5  <b>II</b> <sup>[1]</sup> 44:12  <b>III</b> <sup>[5]</sup> 3:22 4:17 13:10 125:22,22  <b>illegal</b> <sup>[1]</sup> 90:22  <b>illegitimate</b> <sup>[1]</sup> 67:24  <b>imagine</b> <sup>[9]</sup> 22:12 24:23 30:3 31:19 35:1,17,18 109:8 116:7  <b>imminent</b> <sup>[9]</sup> 4:2 13:8,16,21,24 44:10,16 47:11 123:8  <b>impacting</b> <sup>[1]</sup> 83:8  <b>impermissible</b> <sup>[1]</sup> 64:8  <b>impersonating</b> <sup>[1]</sup> 60:2  <b>implicit</b> <sup>[1]</sup> 36:15  <b>implicitly</b> <sup>[1]</sup> 111:11  <b>important</b> <sup>[13]</sup> 24:7 25:5 29:9,11 35:8 63:21 65:18 91:12 108:16 114:7 117:4 125:21,21  <b>impose</b> <sup>[1]</sup> 114:6  <b>impossible</b> <sup>[1]</sup> 35:4  <b>inability</b> <sup>[1]</sup> 79:15  <b>inaccuracies</b> <sup>[1]</sup> 54:4  <b>inaccurate</b> <sup>[7]</sup> 60:22 111:24 112:1,14,19,22,24  <b>incentive</b> <sup>[1]</sup> 72:22  <b>incentives</b> <sup>[2]</sup> 17:6 62:16  <b>include</b> <sup>[1]</sup> 37:22  <b>including</b> <sup>[3]</sup> 4:13 10:2 65:2  <b>incorrect</b> <sup>[1]</sup> 61:16  <b>increase</b> <sup>[1]</sup> 76:15  <b>increases</b> <sup>[1]</sup> 37:15  <b>increasing</b> <sup>[1]</sup> 95:2  <b>incredibly</b> <sup>[2]</sup> 57:8 65:18  <b>Indeed</b> <sup>[1]</sup> 65:23  <b>independent</b> <sup>[3]</sup> 39:4 41:11 43:2  <b>independently</b> <sup>[1]</sup> 47:2  <b>indication</b> <sup>[3]</sup> 45:13,24 123:3  <b>indications</b> <sup>[1]</sup> 124:4  <b>indirect</b> <sup>[1]</sup> 89:1  <b>indirectly</b> <sup>[2]</sup> 68:19 88:22  <b>individual</b> <sup>[2]</sup> 13:2 82:24  <b>individuals</b> <sup>[3]</sup> 3:21 48:9 83:7  <b>induce</b> <sup>[1]</sup> 67:1  <b>inducement</b> <sup>[6]</sup> 32:8,13,19,23 74:22 89:6  <b>inducements</b> <sup>[1]</sup> 32:6  <b>industry</b> <sup>[4]</sup> 48:24 50:21 51:4 88:11  <b>infected</b> <sup>[1]</sup> 3:25</p>	<p><b>influence</b> <sup>[5]</sup> 33:6,7 55:1 124:3,5  <b>influenced</b> <sup>[1]</sup> 41:12  <b>inform</b> <sup>[1]</sup> 77:6  <b>information</b> <sup>[38]</sup> 10:25 24:18 25:15,22,23 26:11 28:15 30:13,14 31:12 40:16 53:8 55:23 56:5 58:14 63:13,19,23 64:4,5 76:18 79:17 80:22 85:14 92:24 93:2,5 95:11 96:14 100:17 109:18,20 112:1,24 117:18 118:12 122:21 125:13  <b>informed</b> <sup>[1]</sup> 41:12  <b>informing</b> <sup>[1]</sup> 3:13  <b>inherent</b> <sup>[2]</sup> 9:11 113:25  <b>inherently</b> <sup>[1]</sup> 5:2  <b>initial</b> <sup>[1]</sup> 27:10  <b>injunction</b> <sup>[27]</sup> 4:11,18 9:2,9,10,12 10:9,19 11:9 12:1,14,17,20 13:1 19:10,22 21:3,7 54:11 84:7 106:4,14,20 107:5,20 108:2,11  <b>injunctive</b> <sup>[3]</sup> 47:10 48:14 79:8  <b>injuries</b> <sup>[2]</sup> 29:15 106:11  <b>injuring</b> <sup>[1]</sup> 95:5  <b>injury</b> <sup>[22]</sup> 13:9,16,18,21,25 14:4,5,15 19:8 20:12,18 21:2 43:1 44:1,11 46:2 83:23,23 85:21 123:7,9 125:8  <b>inquiries</b> <sup>[1]</sup> 50:9  <b>inquiry</b> <sup>[5]</sup> 5:22 42:22,24 116:19 119:11  <b>insist</b> <sup>[1]</sup> 125:2  <b>insistent</b> <sup>[2]</sup> 59:12 121:7  <b>Instagram</b> <sup>[2]</sup> 23:11 81:23  <b>instance</b> <sup>[1]</sup> 47:25  <b>Instead</b> <sup>[2]</sup> 3:21 38:7  <b>instigating</b> <sup>[1]</sup> 95:11  <b>instinct</b> <sup>[3]</sup> 96:3 110:21 118:2  <b>instructions</b> <sup>[1]</sup> 98:12  <b>instructive</b> <sup>[3]</sup> 43:22 44:14 123:11  <b>integrating</b> <sup>[1]</sup> 59:3  <b>integrity</b> <sup>[4]</sup> 55:11 76:5 105:5 122:24  <b>intelligence</b> <sup>[1]</sup> 11:3  <b>intemperate</b> <sup>[1]</sup> 28:11  <b>intensity</b> <sup>[1]</sup> 25:17  <b>interact</b> <sup>[2]</sup> 117:24 118:4  <b>interacting</b> <sup>[1]</sup> 52:4  <b>interaction</b> <sup>[1]</sup> 103:1  <b>interactions</b> <sup>[3]</sup> 53:16 55:21 125:24  <b>interchange</b> <sup>[3]</sup> 53:3 59:20 87:20  <b>interest</b> <sup>[11]</sup> 31:10 69:13,21 70:21 79:2 92:17 118:19 119:4,24 120:4,5  <b>interested</b> <sup>[3]</sup> 31:3,14 54:4  <b>interfering</b> <sup>[1]</sup> 96:25  <b>intermediaries</b> <sup>[1]</sup> 94:16</p>	<p><b>intermediary</b> <sup>[3]</sup> 72:21 92:3,4  <b>internal</b> <sup>[1]</sup> 65:24  <b>Internet</b> <sup>[2]</sup> 40:6 69:9  <b>interplay</b> <sup>[1]</sup> 56:12  <b>interpreted</b> <sup>[1]</sup> 12:21  <b>interrelationship</b> <sup>[1]</sup> 85:1  <b>intimidation</b> <sup>[1]</sup> 109:6  <b>invite</b> <sup>[1]</sup> 15:23  <b>involve</b> <sup>[1]</sup> 55:21  <b>involved</b> <sup>[3]</sup> 17:12 68:9 95:1  <b>involving</b> <sup>[1]</sup> 6:15  <b>irreparable</b> <sup>[1]</sup> 48:12  <b>irrespective</b> <sup>[1]</sup> 101:22  <b>Islamophobic</b> <sup>[2]</sup> 12:7 54:19  <b>Island</b> <sup>[1]</sup> 114:19  <b>isn't</b> <sup>[8]</sup> 12:3 13:23 25:9 29:8 42:14 51:2 114:9 121:21  <b>isolate</b> <sup>[1]</sup> 92:20  <b>Israel</b> <sup>[1]</sup> 39:22  <b>issue</b> <sup>[20]</sup> 16:6 33:19 45:23 53:18 58:15 59:6 68:10 71:8 73:9 77:25 78:12,25 81:4 92:19 95:15 96:4 112:12 114:17,17 121:4  <b>issued</b> <sup>[1]</sup> 47:25  <b>issues</b> <sup>[7]</sup> 12:10 34:20 41:22 54:20 55:12 59:5 118:7  <b>item</b> <sup>[1]</sup> 104:21  <b>itself</b> <sup>[10]</sup> 3:13 8:14 67:3 71:2 72:5,22 73:1 96:7 116:6 117:16</p> <p style="text-align: center;"><b>J</b></p> <p><b>JA</b> <sup>[10]</sup> 81:12 84:2,16 86:7,12,13,14 102:5 106:5 107:6  <b>JACKSON</b> <sup>[23]</sup> 30:22 61:20,21 63:9,15 64:10 68:3 69:3,23 70:10,15 71:4 92:9 93:13 94:21,24 95:19 96:9 116:25 117:1 118:14,22 120:14  <b>Jackson's</b> <sup>[1]</sup> 97:16  <b>January</b> <sup>[1]</sup> 45:18  <b>Jill</b> <sup>[17]</sup> 72:15,23 84:1 85:3 86:4,14,19 87:1,8 101:12 102:7 104:24 105:12 106:1,6 107:11 121:1  <b>Jim</b> <sup>[6]</sup> 72:16,23 105:1,9,13,25  <b>joint</b> <sup>[10]</sup> 57:12,19 58:3 66:18 82:23 85:11 98:4 105:25 121:2,25  <b>Journal</b> <sup>[1]</sup> 23:1  <b>Judge</b> <sup>[2]</sup> 42:3 113:12  <b>judgment</b> <sup>[3]</sup> 39:4 41:11 53:9  <b>July</b> <sup>[5]</sup> 11:15 25:11 45:19 86:18 123:15  <b>jumping</b> <sup>[1]</sup> 95:1  <b>Junior</b> <sup>[3]</sup> 45:12,16 84:12</p>	<p><b>jurisprudence</b> <sup>[2]</sup> 31:6 69:7  <b>Justice</b> <sup>[279]</sup> 1:20 3:3,10 5:16 6:10,13 7:6,10,15 8:5,7 9:1,7,14,18,23 10:13 13:11 14:7,10,14,25 15:12 16:4,18,22 17:17 18:5,21 19:3,13,24 20:3,9,14,21,24 21:8,11,17,18 23:14,17,20 24:16,19 26:13 27:16,17,25 28:4,14,19 29:1,18 30:21,22 31:25 32:1,2,16,22 33:5,9,16,25 34:6,9,17 35:22 37:5 38:12,13,14,21 39:7 40:19 41:14 42:9,9,10,19 43:5,13,14,14,16 44:19,25 46:4,5,5,6,24 47:4,16,17,17,19,24 48:5,16,19,22 49:15,22 50:4,8,11 51:5,8,11,12,12,14 52:7,12 53:10,14,20,23 56:8,9,9,11,14 57:3,10,23 59:7,10,13,19,24 60:5,17,24 61:9,18,19,19,21 63:9,15 64:10,11,17 66:12 68:3,4 69:3,23 70:10,15 71:4,12,16 72:21 73:2,4,5,6,10,22,24 74:1,5 75:7,16 76:8,23,24 77:2,8 78:13 79:10,11 80:4,8 82:6,7,13 83:11,17,21,25 84:18 85:12,22 86:2 87:14,15,17,18,19,20 88:1,12 89:7,23 90:17,21 91:2,17 92:9 93:13 94:21,24 95:19 96:9 97:2,6,14,16 98:9,25 99:2,3,4 100:16,21,22,22,24,25 101:15 102:10 103:4,7 104:4,8 105:15,16,16,18,19 106:18 107:3,10,23 108:1,21,22,22,24 109:14 110:6,14 111:9,23 112:6,10,13,16 113:8,19,20,20,21,22,23 114:14 115:7,20,23 116:13,23,24,24 117:1 118:14,22 120:14,15,21 121:16 122:1 125:9 126:2  <b>justified</b> <sup>[1]</sup> 31:21</p> <p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> <sup>[40]</sup> 17:17 18:5 46:5,6,24 47:4,16 59:13 71:12 72:21 73:4,22,24 76:8,23,24 77:2,8 78:13 79:11 80:4,8 87:15,18,21 88:1 100:24,25 101:15 102:10 103:4,7 104:4,8 105:15,19 107:7 104:4,8 105:15,19 107:7 101:16 122:1 125:9  <b>KAVANAUGH</b> <sup>[30]</sup> 27:17,25 28:4 29:18 51:13,14 52:7,12 53:10,14,20,23 56:8 71:16 73:2,6,10 108:23,24 109:14 110:6,14 111:9,23 112:6,10,13,16 113:8,19  <b>Kavanaugh's</b> <sup>[1]</sup> 113:23  <b>keep</b> <sup>[1]</sup> 92:18</p>	<p><b>Kennedy</b> <sup>[3]</sup> 45:12,16 84:12  <b>Kennedy's</b> <sup>[1]</sup> 121:14  <b>key</b> <sup>[2]</sup> 51:15 67:20  <b>kicks</b> <sup>[1]</sup> 36:1  <b>kids</b> <sup>[2]</sup> 95:3 117:10  <b>killing</b> <sup>[7]</sup> 34:10,13,24 35:10 52:14 95:5 123:22  <b>kind</b> <sup>[14]</sup> 37:9 52:16 58:5 59:5 60:6,9 89:8 91:17 93:22 102:9 115:1,19 116:14 120:2  <b>kinds</b> <sup>[12]</sup> 72:17 73:1 79:12,14 87:8,13 91:4 104:14,16 106:17 114:12 116:9  <b>Knight</b> <sup>[4]</sup> 49:13,16 51:2 53:1  <b>knowledge</b> <sup>[2]</sup> 37:21 63:20  <b>known</b> <sup>[1]</sup> 54:22</p> <p style="text-align: center;"><b>L</b></p> <p><b>label</b> <sup>[4]</sup> 74:20 98:2 109:10,11  <b>lack</b> <sup>[1]</sup> 125:8  <b>Laden</b> <sup>[1]</sup> 12:10  <b>language</b> <sup>[5]</sup> 5:7 25:25 28:11 62:15 63:1  <b>large</b> <sup>[1]</sup> 49:6  <b>Larson</b> <sup>[1]</sup> 20:11  <b>last</b> <sup>[5]</sup> 12:12 43:10 65:16 96:19 121:13  <b>lately</b> <sup>[1]</sup> 107:1  <b>later</b> <sup>[7]</sup> 35:8 45:20 86:16,18,19 102:6,12  <b>Laughter</b> <sup>[3]</sup> 28:7,18 74:4  <b>law</b> <sup>[17]</sup> 5:3 9:8,10 11:8 18:17 41:23 46:20,21 55:6,18 60:11 61:15 62:5 76:12 80:13 88:15 125:3  <b>lawfully</b> <sup>[2]</sup> 39:16 40:12  <b>lawsuit</b> <sup>[1]</sup> 79:6  <b>least</b> <sup>[5]</sup> 26:15 76:2 85:17 96:6 122:2  <b>led</b> <sup>[2]</sup> 66:22 106:16  <b>left</b> <sup>[1]</sup> 87:22  <b>legal</b> <sup>[18]</sup> 4:19 5:7 9:16 10:21 12:21 18:20,23 19:4 46:8 51:15 52:8 61:17 68:14 87:24 88:15,20 91:20 99:14  <b>legislation</b> <sup>[1]</sup> 33:14  <b>legislative</b> <sup>[2]</sup> 86:25 87:3  <b>legislature</b> <sup>[1]</sup> 87:4  <b>legitimate</b> <sup>[2]</sup> 67:24 125:23  <b>leniency</b> <sup>[1]</sup> 32:11  <b>less</b> <sup>[5]</sup> 36:21 43:7,7 50:13 116:14  <b>letter</b> <sup>[1]</sup> 12:11  <b>level</b> <sup>[4]</sup> 35:25 97:18 107:14 115:24  <b>levels</b> <sup>[2]</sup> 20:18 65:9  <b>levers</b> <sup>[1]</sup> 65:5</p>
---	---	--	---	---

## Official

<p><b>light</b> <sup>[1]</sup> 12:17  <b>likelihood</b> <sup>[1]</sup> 48:12  <b>likely</b> <sup>[5]</sup> 19:7,14 20:7 21:6 36:21  <b>limit</b> <sup>[3]</sup> 27:14 108:11,14  <b>line</b> <sup>[20]</sup> 5:11 8:2 29:11 41:4 45:9 50:2 53:5 58:1,17,19,23 64:3 67:24 88:21,25 114:1 118:20 119:1,2 120:11  <b>link</b> <sup>[2]</sup> 101:17 102:3  <b>LinkedIn</b> <sup>[1]</sup> 17:12  <b>list</b> <sup>[2]</sup> 18:11 80:25  <b>listen</b> <sup>[3]</sup> 34:18 53:7 95:20  <b>literally</b> <sup>[1]</sup> 71:24  <b>litigate</b> <sup>[1]</sup> 27:11  <b>litigated</b> <sup>[1]</sup> 71:1  <b>little</b> <sup>[3]</sup> 20:20 61:4 63:16  <b>lives</b> <sup>[1]</sup> 53:6  <b>lo</b> <sup>[1]</sup> 87:7  <b>located</b> <sup>[1]</sup> 8:23  <b>lodestar</b> <sup>[1]</sup> 36:9  <b>long</b> <sup>[5]</sup> 16:3 17:5 39:2 53:4 102:15  <b>look</b> <sup>[30]</sup> 5:18,21 6:23 15:23 22:10 25:6 26:8 35:17,18 38:22 46:1 84:1,16 86:6,7 91:12 95:21,25 101:14 102:4 104:23,25 105:13,13 109:3,21 111:15,16,21 116:21  <b>looked</b> <sup>[3]</sup> 16:5 52:18 54:8  <b>looking</b> <sup>[5]</sup> 35:15 44:25 48:23 53:19 118:24  <b>looks</b> <sup>[1]</sup> 105:8  <b>loose</b> <sup>[1]</sup> 15:2  <b>lose</b> <sup>[1]</sup> 73:23  <b>lot</b> <sup>[20]</sup> 9:4,7 15:8 18:12,15 20:6 23:4 43:17 45:5 55:23 56:4 58:20,21 76:14 80:21 89:10 101:18 102:11 104:15 106:11  <b>lots</b> <sup>[2]</sup> 39:16 52:3  <b>Louisiana</b> <sup>[4]</sup> 1:23 86:20,25 90:1  <b>love</b> <sup>[2]</sup> 78:2,5  <b>loved</b> <sup>[1]</sup> 35:19  <b>low</b> <sup>[1]</sup> 115:23  <b>low-level</b> <sup>[1]</sup> 115:25  <b>lower</b> <sup>[15]</sup> 4:5 6:4 14:19,21 16:22 36:10 51:23 60:5 61:2 62:24 64:2 121:8 124:19 125:1,3  <b>Lujan</b> <sup>[2]</sup> 19:8 20:7  <b>Lyons</b> <sup>[1]</sup> 44:10</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>mad</b> <sup>[1]</sup> 59:21  <b>made</b> <sup>[15]</sup> 11:17 12:16 17:24 19:1 34:16 46:11,11 74:18 77:17 80:16 88:9 102:22 113:12 122:23,25  <b>main</b> <sup>[3]</sup> 13:3 58:15,16  <b>maintains</b> <sup>[1]</sup> 122:18</p>	<p><b>major</b> <sup>[1]</sup> 8:22  <b>majority</b> <sup>[2]</sup> 44:6 82:20  <b>malign</b> <sup>[3]</sup> 11:3 55:1 125:14  <b>mandate</b> <sup>[1]</sup> 40:1  <b>manifest</b> <sup>[1]</sup> 117:16  <b>manifestations</b> <sup>[1]</sup> 54:1  <b>manners</b> <sup>[1]</sup> 55:13  <b>mantle</b> <sup>[1]</sup> 110:17  <b>many</b> <sup>[1]</sup> 13:4  <b>March</b> <sup>[1]</sup> 1:12  <b>Mass</b> <sup>[1]</sup> 19:17  <b>Massachusetts</b> <sup>[2]</sup> 19:14 20:10  <b>massive</b> <sup>[2]</sup> 65:1 124:18  <b>material</b> <sup>[1]</sup> 101:8  <b>materials</b> <sup>[1]</sup> 87:3  <b>matter</b> <sup>[8]</sup> 1:14 88:15 93:20 98:19 99:19 113:12 115:15 120:9  <b>matters</b> <sup>[7]</sup> 35:3 48:11 49:5 54:16 64:6 91:21 125:16  <b>mean</b> <sup>[60]</sup> 18:5 27:22 29:20 30:24 31:5 36:1,6 37:8 38:20 52:8,16 53:16 60:13 63:15 67:12 69:10 71:12,24 73:4 74:6 75:8,12,16 76:8,9,10 77:9,11,16 78:20 80:15 81:25 82:4 89:13 92:5,7 93:1,15 94:19 98:16 99:12,24 101:18 102:11,20 103:1,8,11 104:8 105:10 107:9 109:6 112:12 114:9 115:7,9,16 116:6 117:6 120:6  <b>Meaning</b> <sup>[2]</sup> 9:3,20  <b>means</b> <sup>[7]</sup> 20:19 21:14 63:6 67:6 99:10 118:11 120:5  <b>meant</b> <sup>[2]</sup> 9:25 60:14  <b>meantime</b> <sup>[1]</sup> 33:23  <b>measure</b> <sup>[1]</sup> 20:5  <b>mechanism</b> <sup>[1]</sup> 89:4  <b>mechanisms</b> <sup>[1]</sup> 89:1  <b>media</b> <sup>[28]</sup> 3:24 10:1,4 12:7 13:2 22:14 23:23 24:22,23,23 25:9 27:21 36:3 37:11 49:2 54:2 64:22 68:24 74:9 75:4 82:21 85:1 88:10 90:7 95:10 109:17,20 124:8  <b>Medicare</b> <sup>[1]</sup> 7:16  <b>Meese</b> <sup>[1]</sup> 42:3  <b>meet</b> <sup>[2]</sup> 25:24 81:18  <b>meeting</b> <sup>[2]</sup> 41:15 114:11  <b>meetings</b> <sup>[3]</sup> 22:4,7 23:17  <b>member</b> <sup>[2]</sup> 37:10 84:13  <b>members</b> <sup>[3]</sup> 28:13 83:1 90:1  <b>mental</b> <sup>[2]</sup> 12:9 54:18  <b>mentioned</b> <sup>[5]</sup> 13:15 23:8 32:3,3 84:4  <b>mentioning</b> <sup>[1]</sup> 115:11  <b>mentions</b> <sup>[1]</sup> 82:17  <b>merits</b> <sup>[9]</sup> 5:9 13:14 31:2</p>	<p>43:7,8 108:18 120:22 123:10 125:11  <b>merits-type</b> <sup>[1]</sup> 42:24  <b>messages</b> <sup>[1]</sup> 77:19  <b>messing</b> <sup>[1]</sup> 39:6  <b>met</b> <sup>[1]</sup> 47:15  <b>metaphors</b> <sup>[1]</sup> 22:21  <b>middle</b> <sup>[1]</sup> 35:7  <b>might</b> <sup>[35]</sup> 9:10 11:24 12:8 25:15 30:4,4 37:11,12,15 41:22 48:3,5,7 49:1,3,17 50:12,16 53:6 54:21 56:11 59:4 61:1 76:14 77:8,9 78:25 79:18 92:10 97:22 98:19 102:14 114:22 116:16 117:12  <b>mild</b> <sup>[1]</sup> 89:15  <b>million</b> <sup>[2]</sup> 78:2 105:7  <b>millions</b> <sup>[1]</sup> 64:23  <b>mind</b> <sup>[3]</sup> 48:24 115:13 124:14  <b>mine-run</b> <sup>[1]</sup> 72:3  <b>Minister</b> <sup>[2]</sup> 65:25 81:14  <b>mirror</b> <sup>[2]</sup> 35:17,18  <b>misinformation</b> <sup>[5]</sup> 11:19 35:11,19 38:25 82:21  <b>misleading</b> <sup>[1]</sup> 55:24  <b>missing</b> <sup>[1]</sup> 119:14  <b>MISSOURI</b> <sup>[2]</sup> 1:7 3:5  <b>mistake</b> <sup>[1]</sup> 51:18  <b>mistook</b> <sup>[1]</sup> 4:25  <b>misunderstand</b> <sup>[1]</sup> 88:14  <b>misunderstood</b> <sup>[1]</sup> 121:3  <b>mix</b> <sup>[1]</sup> 22:20  <b>mixing</b> <sup>[1]</sup> 68:13  <b>mobilize</b> <sup>[1]</sup> 87:2  <b>moderate</b> <sup>[2]</sup> 4:4 19:20  <b>moderated</b> <sup>[3]</sup> 14:2 17:24 122:2  <b>moderating</b> <sup>[4]</sup> 17:3,4 23:12 101:21  <b>moderation</b> <sup>[19]</sup> 13:3 15:9,10,25 17:2,7 20:23 21:6 33:18 34:12 44:3 45:19,22 56:24 63:25 65:19 121:5,12,20  <b>modern</b> <sup>[1]</sup> 98:23  <b>modest</b> <sup>[1]</sup> 41:24  <b>Molinari</b> <sup>[1]</sup> 114:16  <b>moment</b> <sup>[2]</sup> 96:22 98:20  <b>Monday</b> <sup>[1]</sup> 1:12  <b>monitor</b> <sup>[1]</sup> 40:5  <b>monitors</b> <sup>[1]</sup> 122:21  <b>monolithic</b> <sup>[2]</sup> 74:6,14  <b>month</b> <sup>[1]</sup> 65:16  <b>months</b> <sup>[15]</sup> 81:15,15,15 86:15,18,18 87:7 102:6,11,12,12,21,25 116:8 122:3  <b>moot</b> <sup>[1]</sup> 43:11  <b>morning</b> <sup>[3]</sup> 3:4 64:16 78:24  <b>most</b> <sup>[9]</sup> 26:5 43:25 56:22,22 65:1 99:5 101:6 108:16 117:4</p>	<p><b>mostly</b> <sup>[1]</sup> 36:10  <b>mother</b> <sup>[1]</sup> 111:5  <b>motivating</b> <sup>[5]</sup> 16:8 18:25 21:13 27:8 42:13  <b>move</b> <sup>[1]</sup> 36:4  <b>moved</b> <sup>[3]</sup> 85:4,7 87:5  <b>moving</b> <sup>[1]</sup> 82:1  <b>Ms</b> <sup>[5]</sup> 13:15 15:4 44:20 45:11 121:24  <b>Mt</b> <sup>[3]</sup> 16:6 42:11,23  <b>much</b> <sup>[6]</sup> 34:15 62:11 80:2 104:9 119:8,8  <b>muckrakers</b> <sup>[1]</sup> 124:10  <b>multiple</b> <sup>[1]</sup> 86:5  <b>MURTHY</b> <sup>[4]</sup> 1:3 3:5 81:16 123:14  <b>must</b> <sup>[4]</sup> 13:15,18 62:5 71:14</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>nail</b> <sup>[1]</sup> 18:22  <b>naive</b> <sup>[1]</sup> 24:25  <b>name</b> <sup>[1]</sup> 105:1  <b>narrow</b> <sup>[2]</sup> 69:21 119:23  <b>narrowest</b> <sup>[1]</sup> 47:9  <b>narrowly</b> <sup>[1]</sup> 120:4  <b>nation</b> <sup>[1]</sup> 4:15  <b>national</b> <sup>[6]</sup> 12:9 52:16 54:24 69:18 78:18 79:2  <b>nature</b> <sup>[1]</sup> 113:25  <b>necessarily</b> <sup>[5]</sup> 31:8 70:2,4 83:8 98:11  <b>necessary</b> <sup>[1]</sup> 15:13  <b>need</b> <sup>[6]</sup> 66:14,22 89:15 93:7 99:8 112:4  <b>needs</b> <sup>[3]</sup> 91:7 118:12 120:12  <b>NetChoice</b> <sup>[2]</sup> 58:22 65:16  <b>never</b> <sup>[11]</sup> 38:6 43:11 57:21 61:7 70:24,25,25 72:14,18 94:1 113:6  <b>New</b> <sup>[5]</sup> 22:25 42:6 72:24 88:3 94:25  <b>news</b> <sup>[3]</sup> 24:13,22 88:8  <b>newspaper</b> <sup>[3]</sup> 23:2 73:14 102:19  <b>newspapers</b> <sup>[1]</sup> 53:5  <b>next</b> <sup>[5]</sup> 3:18 32:10 58:6 81:3 122:15  <b>Nick</b> <sup>[3]</sup> 65:25 81:13 82:17  <b>non-coercive</b> <sup>[2]</sup> 4:22 124:13  <b>non-parties</b> <sup>[1]</sup> 106:23  <b>normal</b> <sup>[1]</sup> 104:22  <b>normally</b> <sup>[2]</sup> 6:14 108:5  <b>north</b> <sup>[1]</sup> 112:25  <b>Norwood</b> <sup>[4]</sup> 66:25 68:17 88:22 92:6  <b>note</b> <sup>[1]</sup> 28:16  <b>Nothing</b> <sup>[5]</sup> 80:20,23 91:15 96:8 104:10  <b>noting</b> <sup>[1]</sup> 123:1  <b>notion</b> <sup>[1]</sup> 15:2  <b>novo</b> <sup>[2]</sup> 18:18 46:21</p>	<p><b>nuclear</b> <sup>[1]</sup> 81:7  <b>number</b> <sup>[3]</sup> 39:22 73:13,16  <b>numerous</b> <sup>[1]</sup> 90:1</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O'Shea</b> <sup>[1]</sup> 44:11  <b>object</b> <sup>[1]</sup> 94:2  <b>objectively</b> <sup>[3]</sup> 5:12 36:14 46:19  <b>objectives</b> <sup>[1]</sup> 24:20  <b>obligation</b> <sup>[2]</sup> 42:14,18  <b>obscene</b> <sup>[1]</sup> 68:8  <b>obsessed</b> <sup>[1]</sup> 67:21  <b>obsessed</b> <sup>[1]</sup> 84:16  <b>obviously</b> <sup>[5]</sup> 21:14 57:7 75:17 92:1 95:16  <b>October</b> <sup>[1]</sup> 39:21  <b>odd</b> <sup>[1]</sup> 43:9  <b>offer</b> <sup>[2]</sup> 32:11 56:6  <b>offers</b> <sup>[1]</sup> 15:21  <b>offhand</b> <sup>[1]</sup> 79:8  <b>office</b> <sup>[1]</sup> 17:15  <b>Officer</b> <sup>[1]</sup> 28:15  <b>official</b> <sup>[5]</sup> 26:23 33:20 34:22 37:23 114:2  <b>officials</b> <sup>[18]</sup> 4:6,13 5:5 12:23 21:20,23,25 22:13 26:9 33:2 39:17,18,22 40:2 52:20 122:22 124:25 125:12  <b>often</b> <sup>[3]</sup> 15:24 32:8 91:3  <b>Okay</b> <sup>[2]</sup> 14:7,10 19:3 21:11,17 23:14 34:6 48:19,22 52:13 53:14 59:10 60:24 61:18 63:9 78:19 90:5,17 104:11 110:6 116:23  <b>Okwedy</b> <sup>[1]</sup> 114:15  <b>ominously</b> <sup>[1]</sup> 65:10  <b>omit</b> <sup>[1]</sup> 85:14  <b>once</b> <sup>[2]</sup> 24:21 87:8  <b>once-in-a-lifetime</b> <sup>[3]</sup> 24:3 31:13 56:21  <b>one</b> <sup>[5]</sup> 5:21 7:14 8:7 13:12 18:7,9 23:5 26:13,14 27:15 32:9 33:1 34:14 43:10 45:4 50:12 54:15 56:2 58:6,7 67:20 71:21 73:14,22 74:8,8,18 81:10,11 84:1,21 85:17 86:6,22 87:12 89:4,5 101:7,13,16 102:4,20 104:24 106:5 107:4 109:14 111:20 116:21 120:8 121:23 123:12  <b>one's</b> <sup>[1]</sup> 32:25  <b>ones</b> <sup>[5]</sup> 35:20 60:16,21 106:5 108:3  <b>online</b> <sup>[2]</sup> 54:19 90:3  <b>only</b> <sup>[14]</sup> 5:11,18 12:14 22:17 23:10 27:9 66:15 68:10 84:19 99:12,12 100:6,17 108:3  <b>onslaught</b> <sup>[1]</sup> 65:15  <b>op-ed</b> <sup>[5]</sup> 42:7 73:15,16 88:4,7  <b>op-eds</b> <sup>[4]</sup> 42:7 73:3,6,8</p>
---	---	--	---	--

## Official

<p><b>open</b> <sup>[3]</sup> 30:6 38:4 52:1  <b>opening</b> <sup>[1]</sup> 15:20  <b>openly</b> <sup>[1]</sup> 51:25  <b>operating</b> <sup>[1]</sup> 117:21  <b>operational</b> <sup>[1]</sup> 59:2  <b>operations</b> <sup>[1]</sup> 59:3  <b>operatives</b> <sup>[1]</sup> 11:4  <b>opining</b> <sup>[1]</sup> 65:3  <b>opinion</b> <sup>[3]</sup> 12:18 42:4 80:17  <b>opinions</b> <sup>[1]</sup> 104:15  <b>opposed</b> <sup>[5]</sup> 38:18 42:23 62:8 66:19 101:24  <b>options</b> <sup>[1]</sup> 65:11  <b>oral</b> <sup>[5]</sup> 1:15 2:2,5 3:7 64:14  <b>order</b> <sup>[2]</sup> 66:14 106:15  <b>ordinary</b> <sup>[1]</sup> 119:25  <b>Organization</b> <sup>[2]</sup> 30:10 87:10  <b>organizations</b> <sup>[1]</sup> 77:12  <b>Osama</b> <sup>[1]</sup> 12:10  <b>other</b> <sup>[35]</sup> 6:21 11:2 12:5, 15 21:20,22 22:6,23 23:2, 12 30:8 32:9 38:16 39:10 40:21,23 52:3 55:8 59:10 62:25 73:16 74:9 75:11,19 81:24 87:3 90:1 91:21 102:16,17,18,24 111:21 114:1 118:19  <b>others</b> <sup>[5]</sup> 30:10 37:2 38:17 54:21 123:25  <b>otherwise</b> <sup>[2]</sup> 49:1 69:9  <b>ought</b> <sup>[2]</sup> 7:23 62:14  <b>out</b> <sup>[32]</sup> 5:17 9:25 22:3 23:6, 10 28:21 33:15 36:2 37:18 40:6 41:16 50:12 55:25 60:20 67:15 70:6 79:16 80:11, 12,18 82:9 95:1 100:12 105:9 107:11,18 114:2 116:11,15 121:17 122:1 123:20  <b>outcome</b> <sup>[1]</sup> 92:2  <b>outlet</b> <sup>[4]</sup> 36:3 73:17 88:8 90:7  <b>outlets</b> <sup>[1]</sup> 74:9  <b>outlining</b> <sup>[1]</sup> 120:13  <b>over</b> <sup>[14]</sup> 12:22 22:11,14 30:18,18 56:24 57:7,12 59:2 84:5 85:5 87:11 95:3 115:10  <b>overbear</b> <sup>[1]</sup> 103:14  <b>overbearing</b> <sup>[1]</sup> 103:13  <b>overlaid</b> <sup>[1]</sup> 119:11  <b>overridden</b> <sup>[1]</sup> 68:11  <b>overt</b> <sup>[1]</sup> 62:5  <b>overview</b> <sup>[1]</sup> 54:8  <b>overwhelm</b> <sup>[1]</sup> 62:16  <b>own</b> <sup>[19]</sup> 3:20 17:8 23:11 28:5 39:3 59:25 65:18 68:7 71:16,18 78:4 79:23 81:9 82:1 83:10 85:5 104:16 117:9 122:14  <b>owner</b> <sup>[1]</sup> 114:24</p>	<p style="text-align: center;"><b>P</b></p> <p><b>packed</b> <sup>[1]</sup> 23:4  <b>packs</b> <sup>[1]</sup> 113:16  <b>PAGE</b> <sup>[7]</sup> 2:2 45:10 101:14 104:25 105:13 109:3 121:25  <b>pages</b> <sup>[9]</sup> 10:21 14:3 15:21, 23 17:11 45:3 81:22 99:25 121:2  <b>pandemic</b> <sup>[7]</sup> 24:3,11 31:13,20 35:7 56:21 60:9  <b>panel</b> <sup>[2]</sup> 114:14,15  <b>paragraphs</b> <sup>[1]</sup> 82:22  <b>parens</b> <sup>[1]</sup> 27:14  <b>parents</b> <sup>[1]</sup> 40:4  <b>part</b> <sup>[11]</sup> 8:22,25 13:20 30:11 57:4 75:13 76:11,12 86:3 92:10 124:10  <b>participation</b> <sup>[1]</sup> 98:4  <b>particular</b> <sup>[6]</sup> 4:4 21:21 36:2 75:19 88:4 114:20  <b>particularly</b> <sup>[1]</sup> 84:21  <b>parties</b> <sup>[11]</sup> 5:25 6:16 7:3 29:14,14 38:2 39:9,18 58:21 67:8 68:6  <b>parties'</b> <sup>[1]</sup> 47:13  <b>partly</b> <sup>[2]</sup> 61:14,15  <b>partner</b> <sup>[1]</sup> 103:22  <b>partners</b> <sup>[8]</sup> 21:25 23:20, 24 28:22 29:19 30:2,2 56:20  <b>partnership</b> <sup>[3]</sup> 26:1 105:5 122:24  <b>party</b> <sup>[9]</sup> 6:19,20 39:12,15 40:11 72:15 74:24 97:10, 11  <b>party's</b> <sup>[6]</sup> 40:12 62:17,19 92:5 94:3 97:1  <b>past</b> <sup>[6]</sup> 12:22 44:3 46:24 47:13 81:19,19  <b>patriae</b> <sup>[1]</sup> 27:14  <b>pending</b> <sup>[2]</sup> 87:4 106:3  <b>Penthouse</b> <sup>[1]</sup> 42:3  <b>people</b> <sup>[27]</sup> 25:22 27:19 30:9,13 34:10,13,24 35:10,10 52:14 71:15 72:15 74:9 77:12 78:3 82:19 85:16 87:2 90:3,4,10 115:9 116:2,3,3 118:8 123:23  <b>people's</b> <sup>[2]</sup> 23:13 55:16  <b>perceive</b> <sup>[1]</sup> 61:22  <b>perceived</b> <sup>[1]</sup> 113:7  <b>perhaps</b> <sup>[2]</sup> 43:25 92:16  <b>period</b> <sup>[1]</sup> 123:16  <b>periods</b> <sup>[1]</sup> 117:5  <b>permit</b> <sup>[2]</sup> 40:23 41:16  <b>permitted</b> <sup>[1]</sup> 120:1  <b>pernicious</b> <sup>[2]</sup> 72:7 100:9  <b>persistently</b> <sup>[1]</sup> 100:1  <b>person</b> <sup>[10]</sup> 36:13 37:8,11, 20,20 74:12 88:7 100:14 113:25,25  <b>personal</b> <sup>[2]</sup> 13:22 52:25</p>	<p><b>perspective</b> <sup>[2]</sup> 79:19 117:23  <b>persuade</b> <sup>[8]</sup> 39:17 40:11 57:21 58:18 66:5,6 76:19 92:3  <b>persuades</b> <sup>[2]</sup> 39:12 42:1  <b>persuading</b> <sup>[5]</sup> 3:13 39:14 40:22 57:15 63:4  <b>persuasion</b> <sup>[8]</sup> 3:17 5:1 8:1 41:4 53:4 58:12 109:5,9  <b>pestering</b> <sup>[1]</sup> 22:5  <b>Petitioners</b> <sup>[7]</sup> 1:5,21 2:4, 10 3:8 82:10 120:19  <b>phone</b> <sup>[1]</sup> 40:5  <b>PI</b> <sup>[5]</sup> 48:1,11,16,18 105:21  <b>pick</b> <sup>[1]</sup> 75:12  <b>picking</b> <sup>[1]</sup> 113:22  <b>picture</b> <sup>[1]</sup> 120:24  <b>piece</b> <sup>[5]</sup> 24:4 101:2,3,5 123:4  <b>pieces</b> <sup>[1]</sup> 17:23  <b>place</b> <sup>[5]</sup> 11:9 22:18 48:10 64:18 76:17  <b>placed</b> <sup>[1]</sup> 88:2  <b>places</b> <sup>[2]</sup> 55:13 60:20  <b>plain</b> <sup>[4]</sup> 70:13 75:1 89:7 92:6  <b>plaintiff</b> <sup>[1]</sup> 100:12  <b>plaintiffs</b> <sup>[6]</sup> 13:13 27:9 42:12 75:24 82:24 108:15  <b>plaintiffs'</b> <sup>[2]</sup> 14:3 83:9  <b>plat</b> <sup>[1]</sup> 53:5  <b>platform</b> <sup>[12]</sup> 4:3,12 55:24 75:10 80:11,21 96:15 101:24 102:17,18 103:2 118:12  <b>platform's</b> <sup>[3]</sup> 56:1 103:13 115:12  <b>platforms</b> <sup>[100]</sup> 3:24 4:7 6:24 10:24 11:5 12:8 14:2 15:8,9 17:2,3,4,12,16 19:11,20 21:22 22:6,23 24:14, 14 25:13,20 26:2,9 29:24 30:7 33:23 35:13 38:18,18, 20 39:3 40:7,15,15,18,21, 22 41:6,15,17,21 42:15 52:3 54:23 55:2,2,5,8 57:16 59:1 64:5,22 65:8,12,14,15, 17 66:7,8,19,20 67:7 68:24 74:8 75:4 76:10 77:20 79:13,16 81:8,8 82:1 83:5 85:2 91:10,10 92:24 93:7 95:10,17,18,20 96:13,21 100:1 101:20 103:11 106:21 107:17 108:12,19 113:9 114:11 117:17 118:4 122:22 123:24 124:3  <b>platforms'</b> <sup>[3]</sup> 4:24 11:18 17:8  <b>playing</b> <sup>[1]</sup> 65:12  <b>please</b> <sup>[2]</sup> 3:10 64:17  <b>plurality</b> <sup>[1]</sup> 80:17  <b>pocket</b> <sup>[1]</sup> 22:20  <b>point</b> <sup>[22]</sup> 12:16 26:15 27:18 29:19 30:17,25 31:1 32:</p>	<p>3 38:15 41:24 50:1 51:1,9 59:14 66:24 88:9,11 93:16 102:20 113:13 116:15 121:11  <b>pointed</b> <sup>[3]</sup> 50:11 60:20 122:1  <b>points</b> <sup>[7]</sup> 8:18 37:17 74:18 114:2 120:21 121:17 123:6  <b>police</b> <sup>[2]</sup> 29:11 67:23  <b>policies</b> <sup>[12]</sup> 17:9 34:12,23 45:22 65:19,21 68:25 81:9, 20 82:1 100:3,3  <b>policy</b> <sup>[4]</sup> 40:2 52:21 54:16 98:19  <b>politely</b> <sup>[2]</sup> 110:22,22  <b>political</b> <sup>[2]</sup> 86:24 87:10  <b>polls</b> <sup>[1]</sup> 55:14  <b>pornography</b> <sup>[3]</sup> 40:7 124:6,8  <b>posit</b> <sup>[1]</sup> 114:4  <b>position</b> <sup>[6]</sup> 31:22,23 33:11 34:7 36:23 118:3  <b>positive</b> <sup>[1]</sup> 62:15  <b>Posner</b> <sup>[1]</sup> 113:12  <b>possibility</b> <sup>[1]</sup> 50:14  <b>possible</b> <sup>[1]</sup> 7:20  <b>post</b> <sup>[16]</sup> 15:3,3 18:1 78:8, 17,19 84:8,11 85:6 88:3 93:5 106:7 109:18 112:21, 21 117:8  <b>postdate</b> <sup>[1]</sup> 106:11  <b>posted</b> <sup>[5]</sup> 4:12 10:3 84:8 85:5 106:2  <b>posting</b> <sup>[4]</sup> 24:15 90:3 93:2 94:25  <b>posts</b> <sup>[11]</sup> 4:4 13:4 14:3 19:20 21:6 81:3 83:2,12,13 90:6 106:2  <b>potential</b> <sup>[2]</sup> 50:22 89:4  <b>potentially</b> <sup>[2]</sup> 24:1 33:13  <b>power</b> <sup>[3]</sup> 33:6 36:25 94:15  <b>powerful</b> <sup>[4]</sup> 11:7 17:6 26:3 49:7  <b>practices</b> <sup>[1]</sup> 11:18  <b>preliminary</b> <sup>[3]</sup> 84:6 106:3 108:13  <b>premised</b> <sup>[1]</sup> 18:19  <b>present</b> <sup>[3]</sup> 49:3 59:4 118:6  <b>presenting</b> <sup>[1]</sup> 40:16  <b>President</b> <sup>[17]</sup> 11:17 12:2, 3 34:15 35:6 38:8 72:11 75:18 111:2 114:18,22 115:19,24 124:6,7,8 125:17  <b>President's</b> <sup>[3]</sup> 23:11 60:3 123:21  <b>presidential</b> <sup>[1]</sup> 4:14  <b>presidents</b> <sup>[1]</sup> 124:11  <b>press</b> <sup>[15]</sup> 5:8 11:16 12:4 23:2 25:10,11 27:19 28:13 30:9 34:16 37:13 38:8 42:5 61:6 71:17</p>	<p><b>pressing</b> <sup>[1]</sup> 103:10  <b>pressure</b> <sup>[16]</sup> 46:15 64:21 65:6,22 66:1 67:7,7 73:21 74:7 81:15 82:2 83:5 87:6 88:2 94:16 96:24  <b>pressuring</b> <sup>[3]</sup> 66:8 108:19 117:17  <b>presumably</b> <sup>[1]</sup> 37:7  <b>pretty</b> <sup>[3]</sup> 43:1 59:12 104:9  <b>prevent</b> <sup>[2]</sup> 38:16 40:8  <b>Prime</b> <sup>[2]</sup> 65:24 81:14  <b>Principal</b> <sup>[3]</sup> 1:19 99:9,21  <b>principle</b> <sup>[2]</sup> 67:4 68:16  <b>principles</b> <sup>[2]</sup> 24:5 31:5  <b>print</b> <sup>[3]</sup> 22:14 23:22 24:22  <b>prior</b> <sup>[1]</sup> 37:22  <b>private</b> <sup>[30]</sup> 3:14 4:23 5:25 6:8,9,16,19,20 7:3,21 10:17 14:2 39:9,12,15,18 40:11,12 41:11 43:2 49:19 56:6 62:17,18 67:2 68:6 92:4 108:20 122:24 123:17  <b>probably</b> <sup>[5]</sup> 46:21 47:21 52:19 74:10 79:5  <b>problem</b> <sup>[29]</sup> 3:25 4:18 7:25 8:6 9:11 10:16,19 12:24 19:18 20:20 26:11 30:4 37:4 44:23 45:25 49:9 53:13 81:5 85:13 90:12 94:10 95:11 96:21 98:24 110:24 112:10 121:17 122:20 124:22  <b>problematic</b> <sup>[2]</sup> 51:21 97:19  <b>problems</b> <sup>[5]</sup> 12:6 49:1 51:3 95:22 117:25  <b>proceedings</b> <sup>[1]</sup> 106:4  <b>process</b> <sup>[3]</sup> 41:6 116:5,12  <b>procuring</b> <sup>[1]</sup> 114:15  <b>product</b> <sup>[1]</sup> 107:21  <b>productive</b> <sup>[1]</sup> 125:24  <b>profanity</b> <sup>[2]</sup> 28:11 65:8  <b>profess</b> <sup>[2]</sup> 52:25 54:7  <b>profiles</b> <sup>[1]</sup> 81:22  <b>progress</b> <sup>[1]</sup> 87:1  <b>prohibit</b> <sup>[2]</sup> 26:22 69:8  <b>prohibited</b> <sup>[4]</sup> 10:18 63:22 68:20 88:23  <b>prohibition</b> <sup>[1]</sup> 31:9  <b>prohibits</b> <sup>[2]</sup> 80:20,24  <b>promote</b> <sup>[2]</sup> 39:13 67:1  <b>promoting</b> <sup>[2]</sup> 24:15,17  <b>promotion</b> <sup>[1]</sup> 74:21  <b>promulgate</b> <sup>[1]</sup> 116:4  <b>pronouncements</b> <sup>[1]</sup> 58:11  <b>proposed</b> <sup>[1]</sup> 6:5  <b>prosecution</b> <sup>[1]</sup> 32:11  <b>prospective</b> <sup>[1]</sup> 79:7  <b>protect</b> <sup>[2]</sup> 4:15 117:14  <b>protected</b> <sup>[8]</sup> 10:4 77:5,9, 14 78:6 90:14,15 95:23  <b>protection</b> <sup>[2]</sup> 29:9,9  <b>protects</b> <sup>[2]</sup> 39:5 41:10</p>
---	--	---	---	---

## Official

<p><b>protest</b> <sup>[1]</sup> 52:20</p> <p><b>prove</b> <sup>[1]</sup> 85:21</p> <p><b>provide</b> <sup>[1]</sup> 92:24</p> <p><b>provided</b> <sup>[2]</sup> 45:9 62:4</p> <p><b>providing</b> <sup>[5]</sup> 55:1,21 63:12 64:3,5</p> <p><b>provision</b> <sup>[3]</sup> 8:24 58:13,13</p> <p><b>provisions</b> <sup>[2]</sup> 6:22 41:23</p> <p><b>proximate</b> <sup>[1]</sup> 21:15</p> <p><b>public</b> <sup>[31]</sup> 4:14,23 8:21 11:23 12:5 26:22 28:15 30:8 31:11 35:1,6 39:22 40:2 54:16 56:23 63:21 64:6 66:9 94:9,18 95:9,15,16 96:15 98:7,23 124:14 125:15,16,16,25</p> <p><b>publication</b> <sup>[1]</sup> 72:25</p> <p><b>publications</b> <sup>[1]</sup> 73:17</p> <p><b>publicly</b> <sup>[4]</sup> 25:20 30:7,11 95:14</p> <p><b>publish</b> <sup>[2]</sup> 53:11 113:2</p> <p><b>publishing</b> <sup>[2]</sup> 53:6 112:23</p> <p><b>pulled</b> <sup>[1]</sup> 87:10</p> <p><b>pulpit</b> <sup>[10]</sup> 11:22 38:10 54:22 58:13 66:5,10 93:25 94:1 95:13 124:5</p> <p><b>Pundit</b> <sup>[1]</sup> 105:2</p> <p><b>punishment</b> <sup>[1]</sup> 116:6</p> <p><b>punitive</b> <sup>[1]</sup> 116:18</p> <p><b>purist</b> <sup>[2]</sup> 89:14 90:24</p> <p><b>purpose</b> <sup>[1]</sup> 114:5</p> <p><b>purposes</b> <sup>[1]</sup> 50:1</p> <p><b>pursuant</b> <sup>[1]</sup> 119:3</p> <p><b>pursue</b> <sup>[1]</sup> 53:12</p> <p><b>pursuing</b> <sup>[1]</sup> 7:4</p> <p><b>pushing</b> <sup>[1]</sup> 100:2</p> <p><b>put</b> <sup>[9]</sup> 11:9 23:14 52:23 53:6 55:25 64:20 74:7 81:3 87:6</p> <p><b>putting</b> <sup>[1]</sup> 96:14</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qualifies</b> <sup>[1]</sup> 109:23</p> <p><b>qualify</b> <sup>[2]</sup> 32:20,24</p> <p><b>question</b> <sup>[32]</sup> 8:8 14:6,9,12 26:14 33:4,8 35:25 36:12,17 42:11 43:10 44:1 46:7,25 47:19 50:7 56:12 58:25 59:11 62:3 67:13 70:5 71:1,6 86:4 90:13 96:2 101:1 102:2 110:15 113:23</p> <p><b>questioning</b> <sup>[2]</sup> 9:19 56:14</p> <p><b>questions</b> <sup>[8]</sup> 5:8,15 56:1 64:6 66:11 79:21 99:6 125:15</p> <p><b>quickly</b> <sup>[1]</sup> 43:10</p> <p><b>quite</b> <sup>[1]</sup> 63:2</p> <p><b>quoting</b> <sup>[3]</sup> 82:12,15 83:16</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>radically</b> <sup>[1]</sup> 4:20</p> <p><b>raise</b> <sup>[1]</sup> 41:22</p>	<p><b>raised</b> <sup>[1]</sup> 70:25</p> <p><b>raises</b> <sup>[1]</sup> 52:16</p> <p><b>rally</b> <sup>[2]</sup> 90:4,5</p> <p><b>rampant</b> <sup>[2]</sup> 96:21 108:19</p> <p><b>range</b> <sup>[1]</sup> 4:5</p> <p><b>rather</b> <sup>[1]</sup> 103:17</p> <p><b>reach</b> <sup>[1]</sup> 79:16</p> <p><b>reach-out</b> <sup>[1]</sup> 79:9</p> <p><b>reaches</b> <sup>[1]</sup> 5:9</p> <p><b>reaching</b> <sup>[3]</sup> 80:11,12 123:20</p> <p><b>reaction</b> <sup>[2]</sup> 22:16 25:6</p> <p><b>read</b> <sup>[6]</sup> 12:17 21:19 26:6 62:14 102:19 108:25</p> <p><b>reaffirm</b> <sup>[1]</sup> 5:10</p> <p><b>Reagan</b> <sup>[2]</sup> 124:6,8</p> <p><b>real</b> <sup>[3]</sup> 12:24 29:15 45:25</p> <p><b>reality</b> <sup>[3]</sup> 29:3 110:25 111:4</p> <p><b>realize</b> <sup>[1]</sup> 76:14</p> <p><b>really</b> <sup>[34]</sup> 11:13,21 13:5 18:6,14 24:4 26:5 27:7,10 37:25 40:19 43:10,18 51:23 53:15 58:17 59:5,13 61:3 62:8,10,17,25 63:5 67:9 72:22 79:22 90:3,8 95:20 117:20,20 119:1,7</p> <p><b>realm</b> <sup>[2]</sup> 18:18 46:23</p> <p><b>reason</b> <sup>[10]</sup> 16:21 22:18 50:19 62:22 65:25 68:5 92:10 107:4,12,19</p> <p><b>reasonable</b> <sup>[5]</sup> 36:13 37:8,11,20,20</p> <p><b>reasonably</b> <sup>[1]</sup> 37:3</p> <p><b>reasons</b> <sup>[3]</sup> 33:1 71:20,23</p> <p><b>REBUTTAL</b> <sup>[3]</sup> 2:8 120:17,18</p> <p><b>receiving</b> <sup>[2]</sup> 116:7,9</p> <p><b>recent</b> <sup>[1]</sup> 99:5</p> <p><b>recently</b> <sup>[2]</sup> 39:21 65:23</p> <p><b>recipient</b> <sup>[5]</sup> 37:24 113:15,15,18 114:21</p> <p><b>recognize</b> <sup>[2]</sup> 30:11 95:14</p> <p><b>recommendation</b> <sup>[1]</sup> 122:8</p> <p><b>record</b> <sup>[16]</sup> 15:24 44:21 54:25 64:20,21,25 65:19 72:8 82:8 84:19 86:23 87:12 99:25 122:19 123:4,12</p> <p><b>recruiting</b> <sup>[1]</sup> 77:12</p> <p><b>recur</b> <sup>[1]</sup> 44:12</p> <p><b>red</b> <sup>[8]</sup> 15:6,20 17:10 45:3,10 66:23 104:25 105:14</p> <p><b>redress</b> <sup>[2]</sup> 19:8 20:12</p> <p><b>redressability</b> <sup>[6]</sup> 14:9 19:4 83:18 104:20 105:20 106:14</p> <p><b>reduce</b> <sup>[1]</sup> 10:2</p> <p><b>refer</b> <sup>[3]</sup> 8:8,9 108:25</p> <p><b>reference</b> <sup>[2]</sup> 12:12 123:22</p> <p><b>referenced</b> <sup>[2]</sup> 6:25 123:4</p> <p><b>referencing</b> <sup>[3]</sup> 106:7,7,8</p> <p><b>referral</b> <sup>[2]</sup> 122:25 123:2</p> <p><b>referred</b> <sup>[1]</sup> 5:7</p>	<p><b>referring</b> <sup>[1]</sup> 16:3</p> <p><b>reform</b> <sup>[4]</sup> 33:3,21 116:4 123:19</p> <p><b>reforms</b> <sup>[1]</sup> 5:8</p> <p><b>refused</b> <sup>[1]</sup> 113:18</p> <p><b>regarding</b> <sup>[1]</sup> 99:18</p> <p><b>regardless</b> <sup>[2]</sup> 67:5 98:2</p> <p><b>regards</b> <sup>[1]</sup> 23:23</p> <p><b>regular</b> <sup>[6]</sup> 22:4,7 29:16 37:9,14 54:1</p> <p><b>regularly</b> <sup>[2]</sup> 27:20 114:11</p> <p><b>regulation</b> <sup>[1]</sup> 69:14</p> <p><b>reinforces</b> <sup>[1]</sup> 38:1</p> <p><b>rejected</b> <sup>[1]</sup> 27:15</p> <p><b>related</b> <sup>[3]</sup> 60:8 82:10 83:6</p> <p><b>relationship</b> <sup>[3]</sup> 25:3 57:24 99:18</p> <p><b>relationships</b> <sup>[1]</sup> 7:17</p> <p><b>relevant</b> <sup>[11]</sup> 24:6 37:23,24 43:23,25 48:20,24 49:17 114:10 116:19 122:3</p> <p><b>relief</b> <sup>[3]</sup> 47:10 48:14 79:8</p> <p><b>reluctant</b> <sup>[1]</sup> 16:12</p> <p><b>rely</b> <sup>[1]</sup> 43:23</p> <p><b>relying</b> <sup>[1]</sup> 18:16</p> <p><b>remedied</b> <sup>[1]</sup> 21:2</p> <p><b>remedies</b> <sup>[1]</sup> 108:5</p> <p><b>remedy</b> <sup>[5]</sup> 80:19 100:10,12 106:19 113:6</p> <p><b>remember</b> <sup>[2]</sup> 97:4,9</p> <p><b>remove</b> <sup>[4]</sup> 10:2 84:20,23 122:7</p> <p><b>removed</b> <sup>[1]</sup> 81:22</p> <p><b>removing</b> <sup>[1]</sup> 81:20</p> <p><b>renowned</b> <sup>[1]</sup> 65:3</p> <p><b>repeatedly</b> <sup>[3]</sup> 21:23 32:4 41:7</p> <p><b>repetition</b> <sup>[1]</sup> 100:7</p> <p><b>reply</b> <sup>[1]</sup> 26:16</p> <p><b>report</b> <sup>[2]</sup> 122:14,23</p> <p><b>reporter's</b> <sup>[1]</sup> 36:5</p> <p><b>reporting</b> <sup>[2]</sup> 122:9,10</p> <p><b>repost</b> <sup>[2]</sup> 78:3 83:2</p> <p><b>reprehensible</b> <sup>[1]</sup> 124:22</p> <p><b>represent</b> <sup>[1]</sup> 27:11</p> <p><b>representatives</b> <sup>[1]</sup> 22:14</p> <p><b>represents</b> <sup>[1]</sup> 77:21</p> <p><b>Republicans</b> <sup>[1]</sup> 55:17</p> <p><b>request</b> <sup>[2]</sup> 115:5 122:13</p> <p><b>requests</b> <sup>[1]</sup> 114:12</p> <p><b>require</b> <sup>[4]</sup> 31:6 70:20 82:2 93:21</p> <p><b>required</b> <sup>[5]</sup> 13:9,13 15:15 16:7 17:19</p> <p><b>requirement</b> <sup>[1]</sup> 16:13</p> <p><b>requiring</b> <sup>[1]</sup> 43:19</p> <p><b>requisite</b> <sup>[1]</sup> 48:13</p> <p><b>reserve</b> <sup>[1]</sup> 58:24</p> <p><b>residents</b> <sup>[1]</sup> 26:24</p> <p><b>resisting</b> <sup>[2]</sup> 50:20 62:23</p> <p><b>resolve</b> <sup>[2]</sup> 47:9 125:7</p> <p><b>respect</b> <sup>[9]</sup> 17:18 31:1 32:19,23 63:24 91:14 92:12 106:23 125:3</p>	<p><b>respectfully</b> <sup>[1]</sup> 14:24</p> <p><b>Respondents</b> <sup>[9]</sup> 1:8,23 2:7 4:1,9 5:4 6:4 7:4 64:15</p> <p><b>Respondents'</b> <sup>[1]</sup> 63:16</p> <p><b>responding</b> <sup>[1]</sup> 90:10</p> <p><b>response</b> <sup>[5]</sup> 5:8 83:5 88:25 91:25 109:24</p> <p><b>responses</b> <sup>[1]</sup> 107:3</p> <p><b>responsibility</b> <sup>[3]</sup> 25:21 30:12 86:1</p> <p><b>responsible</b> <sup>[5]</sup> 34:13,23 82:20 101:7,10</p> <p><b>rest</b> <sup>[1]</sup> 23:15</p> <p><b>restricted</b> <sup>[1]</sup> 13:22</p> <p><b>restricting</b> <sup>[3]</sup> 4:11 52:5 119:5</p> <p><b>restrictions</b> <sup>[2]</sup> 31:7,21</p> <p><b>rests</b> <sup>[1]</sup> 4:18</p> <p><b>result</b> <sup>[3]</sup> 36:2 63:22 119:4</p> <p><b>retaliation</b> <sup>[1]</sup> 38:7</p> <p><b>retweet</b> <sup>[3]</sup> 45:12,20 78:3</p> <p><b>reveals</b> <sup>[1]</sup> 64:21</p> <p><b>reverse</b> <sup>[4]</sup> 5:14 14:20 81:9 126:1</p> <p><b>review</b> <sup>[8]</sup> 17:20 18:8,19 46:8,21 59:14 60:19 61:11</p> <p><b>reviewed</b> <sup>[2]</sup> 4:5 14:18</p> <p><b>RFK</b> <sup>[4]</sup> 84:14,18,21 106:7</p> <p><b>RFK's</b> <sup>[1]</sup> 85:7</p> <p><b>rights</b> <sup>[8]</sup> 26:17,20 27:2,4,12 66:8 74:24 97:1</p> <p><b>rigorous</b> <sup>[1]</sup> 125:2</p> <p><b>rise</b> <sup>[1]</sup> 97:18</p> <p><b>rising</b> <sup>[1]</sup> 20:18</p> <p><b>risk</b> <sup>[4]</sup> 52:23 53:7 75:5 123:8</p> <p><b>risks</b> <sup>[1]</sup> 52:2</p> <p><b>ROA</b> <sup>[2]</sup> 81:10 82:16</p> <p><b>Rob</b> <sup>[2]</sup> 72:10 116:7</p> <p><b>Robert</b> <sup>[3]</sup> 45:12,15 84:12</p> <p><b>ROBERTS</b> <sup>[28]</sup> 3:3 35:22 37:5 38:12 42:9 43:14 46:5 47:17 51:12 56:9 61:19 64:11 74:1,5 75:7,16 97:2,6,14 98:9,25 100:22 105:16 108:22 113:20 116:24 120:15 126:2</p> <p><b>rooms</b> <sup>[1]</sup> 66:8</p> <p><b>Roosevelt</b> <sup>[1]</sup> 124:9</p> <p><b>Rouge</b> <sup>[1]</sup> 1:22</p> <p><b>routinely</b> <sup>[2]</sup> 38:3 65:15</p> <p><b>rubric</b> <sup>[2]</sup> 57:17,18</p> <p><b>rule</b> <sup>[1]</sup> 89:3</p> <p><b>rulemakings</b> <sup>[1]</sup> 116:5</p> <p><b>rules</b> <sup>[1]</sup> 22:8</p> <p><b>run</b> <sup>[8]</sup> 8:20 27:13 42:7 52:22 73:14 88:4 89:2 108:19</p> <p><b>running</b> <sup>[2]</sup> 92:11 112:21</p> <p><b>Russian</b> <sup>[1]</sup> 11:3</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>safe</b> <sup>[2]</sup> 107:16 117:10</p> <p><b>saint</b> <sup>[1]</sup> 111:5</p> <p><b>salient</b> <sup>[1]</sup> 60:21</p>	<p><b>same</b> <sup>[20]</sup> 17:7 18:9 21:25 23:21,23 25:5 28:23 38:24 41:18 46:10 56:20 62:7 66:17 73:18 83:19 88:15 99:15 103:5,25 111:6</p> <p><b>sanction</b> <sup>[1]</sup> 114:6</p> <p><b>satisfied</b> <sup>[1]</sup> 105:12</p> <p><b>satisfy</b> <sup>[3]</sup> 13:10 79:3 104:22</p> <p><b>save</b> <sup>[1]</sup> 120:11</p> <p><b>saw</b> <sup>[1]</sup> 81:19</p> <p><b>saying</b> <sup>[42]</sup> 10:20,25 16:16 21:23 25:20 26:3,18 27:2 29:5,7,25 30:2,7,10 32:17 34:10 35:4,9,10 36:24 39:7,11 40:14 41:6 44:5 49:10 55:13 75:18 78:4 80:21,24 81:3 83:14 97:17,23 101:17 110:4,22 117:24 118:15 123:20 124:18</p> <p><b>says</b> <sup>[26]</sup> 9:8,14 25:12 30:16 37:19 39:5 42:6 44:13 45:13 49:17 62:2 65:10 66:3 76:13 81:17 84:7 86:15 90:8 99:13,15 109:17,21 111:15 112:2 113:15 122:6</p> <p><b>scales</b> <sup>[1]</sup> 87:6</p> <p><b>scariest</b> <sup>[1]</sup> 86:23</p> <p><b>scenes</b> <sup>[2]</sup> 25:1 72:19</p> <p><b>schemes</b> <sup>[1]</sup> 55:18</p> <p><b>scientists</b> <sup>[1]</sup> 65:3</p> <p><b>scope</b> <sup>[1]</sup> 26:10</p> <p><b>screenshot</b> <sup>[3]</sup> 84:3,12 85:4</p> <p><b>scrutiny</b> <sup>[8]</sup> 31:7 69:12,17 70:24 79:3 93:11 119:23 120:10</p> <p><b>sea</b> <sup>[1]</sup> 20:18</p> <p><b>second</b> <sup>[8]</sup> 4:25 74:6 86:3 88:25 105:24 114:16 123:2,10</p> <p><b>second-best</b> <sup>[1]</sup> 105:11</p> <p><b>Secretary</b> <sup>[7]</sup> 11:16 12:4 25:10 37:13 38:9 42:5 61:6</p> <p><b>Section</b> <sup>[6]</sup> 22:19 32:23 33:12,21 34:2 123:19</p> <p><b>security</b> <sup>[6]</sup> 12:9 52:17 54:24 69:19 78:18 79:2</p> <p><b>Security's</b> <sup>[1]</sup> 122:18</p> <p><b>see</b> <sup>[18]</sup> 6:23 7:1 21:22 40:20 41:5 54:3 68:21,22 70:8 72:8 81:6,10 90:10 95:17 100:11 104:21 107:19 118:21</p> <p><b>seeing</b> <sup>[2]</sup> 40:25 55:22</p> <p><b>seem</b> <sup>[1]</sup> 117:15</p> <p><b>seemed</b> <sup>[2]</sup> 88:4 93:19</p> <p><b>seems</b> <sup>[9]</sup> 36:21 43:9,9,17 47:21 61:24 71:13 88:14 103:14</p> <p><b>seen</b> <sup>[2]</sup> 80:21 106:25</p> <p><b>sees</b> <sup>[2]</sup> 72:14 90:6</p>
--	---	--	---	---



## Official

<p><b>selectors</b> [2] 11:2 55:2  <b>send</b> [1] 10:24  <b>sending</b> [1] 77:19  <b>sends</b> [2] 72:11 81:16  <b>senior</b> [3] 12:2,3 124:24  <b>sense</b> [4] 6:8 14:4 63:4 119:12  <b>sensed</b> [1] 62:23  <b>sensitive</b> [2] 50:25 92:1  <b>sensitivity</b> [1] 37:18  <b>sent</b> [1] 122:22  <b>September</b> [1] 86:19  <b>serious</b> [2] 59:22 96:15  <b>seriously</b> [2] 95:4 98:13  <b>service</b> [1] 23:3  <b>session</b> [1] 87:1  <b>set</b> [2] 67:15 70:6  <b>seven</b> [1] 108:14  <b>shade</b> [1] 30:5  <b>shadow</b> [2] 12:14 54:11  <b>shame</b> [1] 56:7  <b>sharp</b> [1] 61:22  <b>shielded</b> [1] 66:9  <b>short</b> [1] 90:21  <b>shouldn't</b> [8] 42:7 66:2 71:20,23 95:17 110:7,24 120:1  <b>show</b> [14] 13:24 14:22 16:7 21:1 28:23 42:12,14,18 44:9 47:11,14 93:12 103:12 118:18  <b>showing</b> [2] 19:7,10  <b>shown</b> [7] 4:2 13:5,8 16:16 48:12,14 123:7  <b>shows</b> [5] 29:13 65:20 83:18 101:6 122:23  <b>shy</b> [1] 49:9  <b>side</b> [8] 8:2 32:9 41:4 53:4 55:7 56:3 62:20,25  <b>significant</b> [13] 9:20 51:17 57:20 62:2,4,14 63:1,11 88:5 89:9 109:1,22 117:4  <b>significantly</b> [5] 9:15,18 10:20 74:15 90:9  <b>Silberman's</b> [1] 42:4  <b>Similarly</b> [1] 11:12  <b>simply</b> [2] 38:15 97:15  <b>since</b> [2] 80:16 102:15  <b>single</b> [6] 15:13,14 78:8 101:2,5 104:21  <b>situation</b> [7] 30:3 35:1 69:24 75:8,20 93:14 113:1  <b>situations</b> [5] 63:18 68:13 70:19 91:9 95:6  <b>six</b> [1] 116:8  <b>so-called</b> [5] 82:17,20 83:1 84:13 86:10  <b>social</b> [14] 3:24 10:1,3 12:7 13:2 64:22 68:24 75:4 82:21 88:10 90:7 95:10 109:16,20  <b>society</b> [2] 118:7 123:25  <b>sold</b> [1] 45:21  <b>Solicitor</b> [3] 1:19,22 17:14</p>	<p><b>solve</b> [1] 20:19  <b>somebody</b> [11] 60:2 78:15,16 90:2 110:25 111:1 114:10 115:3,6,8,25  <b>somehow</b> [1] 63:22  <b>someone</b> [11] 6:19 12:4 38:16 39:13 42:2 83:13 93:2 94:24 109:16 114:5 123:14  <b>someplace</b> [1] 26:19  <b>sophisticated</b> [3] 26:3 38:2 49:8  <b>sorry</b> [5] 7:9 21:13 68:4 82:7 84:18  <b>sort</b> [24] 12:20 13:8 16:12 29:12 30:25 31:15 32:8 35:1 36:18 37:3 38:6,25 44:1 51:25 53:3 62:6,20 68:13 75:12 91:15 103:14 116:18 119:10 124:5  <b>sorts</b> [8] 11:22 29:16 40:1 55:9,17 89:1 106:16 124:24  <b>SOTOMAYOR</b> [24] 9:1,7,14,18,23 10:13 43:15,16 44:19,25 46:4 68:4 82:7,13 83:11,17,21,25 84:18 85:12,22 86:2 100:23 114:14  <b>sound</b> [1] 57:19  <b>sounded</b> [1] 87:22  <b>source</b> [3] 30:12,14 117:25  <b>space</b> [2] 54:25 58:3  <b>spanning</b> [1] 124:25  <b>speaker</b> [4] 3:19 42:1 72:4 114:25  <b>speakers</b> [6] 3:14 7:22 10:17 41:11 56:6 61:5  <b>speaking</b> [3] 4:14 26:23 53:23  <b>specific</b> [8] 8:24 15:19 23:5 46:12 50:9 94:7,7 106:2  <b>specifically</b> [7] 23:8 76:1 82:25 85:10 86:9 105:2 107:12  <b>specifics</b> [2] 10:6 45:6  <b>speech</b> [96] 3:12,20 4:6,11 5:10 6:7 7:21 8:3,9,11 9:3,4 10:4 26:19,20 27:2,4 31:8 32:15 37:1,2 38:8,17 39:10,13,24 40:22,23 41:17 42:2 54:18,19 64:23 65:1,14 67:11,15,24,25 68:7 69:1,9 70:2,7,20 71:16,18 72:6,14,16,23,24 73:8 74:23 75:5 76:11,15 77:3,5,9,14,14 78:6,10,11 79:23 80:18,19 81:1,2 82:3 83:3,9 90:15,16 92:3,5,7 93:3 94:3,16 95:24 97:1,11 108:20 111:19 113:2,2,4 114:3 117:9 119:5,21 120:2 121:13 124:19  <b>speeches</b> [1] 38:16</p>	<p><b>sphere</b> [1] 98:23  <b>spoken</b> [1] 105:18  <b>spokesman</b> [1] 37:10  <b>sprawling</b> [1] 29:12  <b>spread</b> [1] 11:4  <b>spreading</b> [1] 35:10  <b>spreadsheet</b> [3] 105:3 122:17,21  <b>square</b> [3] 78:11 109:15 121:8  <b>staff</b> [1] 28:13  <b>staffer</b> [3] 115:8,11 116:1  <b>stage</b> [1] 43:9  <b>stake</b> [3] 54:13 86:24 87:13  <b>standard</b> [21] 19:5,8,25 20:25 43:6,8,19 46:17,18 61:17 80:5 87:24 88:15,20 89:20 91:20 99:17 104:19 119:17,18 120:9  <b>standards</b> [7] 18:20,24 49:13 84:10 87:21,23 99:16  <b>standing</b> [15] 4:1 13:13 17:19 27:14 43:8 48:13 59:14 83:22 86:5,7 101:1,13 120:22,25 125:7  <b>Stanford</b> [1] 6:25  <b>star</b> [1] 113:1  <b>start</b> [8] 30:4 36:8 85:23 88:21 95:3 120:21 121:1 123:11  <b>started</b> [2] 94:25 124:17  <b>starts</b> [4] 30:5 57:6,11 123:16  <b>state</b> [31] 4:20,24 5:24 6:1,5,12,15,18,22 7:11,22 8:3 26:23 52:1,4 56:13 57:4,8,18 58:4 59:4 62:6 63:7 64:9 71:5,8 80:13,14 87:4 90:1 111:5  <b>state's</b> [1] 20:17  <b>statement</b> [11] 20:11 34:15 35:2 36:13 46:11 52:16 110:5 111:2,3,6 115:19  <b>statements</b> [9] 11:17,19,23 16:12 17:25 45:18 55:12 104:14 123:22  <b>Staten</b> [1] 114:19  <b>STATES</b> [11] 1:1,16 3:21 13:2 26:16 27:8 48:8 53:24,25 67:23 68:2  <b>stature</b> [1] 96:23  <b>stay</b> [1] 125:22  <b>stayed</b> [1] 10:9  <b>stays</b> [2] 8:1 53:4  <b>step</b> [4] 3:25 23:6 120:23 124:16  <b>steps</b> [3] 81:19,21 117:13  <b>still</b> [7] 4:5 24:9 78:14 109:22 113:17 114:20 121:11  <b>stop</b> [8] 19:11,23 24:11 26:14 37:1 40:17 90:21 98:15  <b>stories</b> [1] 44:8  <b>story</b> [5] 52:20 53:6,11 71:21 72:25</p>	<p><b>strange</b> [1] 43:6  <b>Street</b> [1] 23:1  <b>strict</b> [7] 69:11,17 70:24 79:3 93:11 119:23 120:10  <b>stricter</b> [1] 43:6  <b>strike</b> [2] 19:15 29:19  <b>strokes</b> [1] 107:15  <b>strong</b> [2] 5:6 45:24  <b>stronger</b> [1] 44:5  <b>strongly</b> [2] 37:25 63:5  <b>struck</b> [1] 25:1  <b>structure</b> [1] 27:4  <b>struggled</b> [1] 67:22  <b>struggling</b> [1] 94:12  <b>stuff</b> [1] 123:18  <b>stunning</b> [1] 64:20  <b>stymied</b> [1] 87:11  <b>sub-agency</b> [1] 122:18  <b>subject</b> [1] 17:13  <b>submission</b> [1] 43:4  <b>submitted</b> [2] 126:4,6  <b>subordinates</b> [1] 22:24  <b>substance</b> [4] 111:16,16,21,22  <b>substantial</b> [3] 21:13 89:18 97:25  <b>suddenly</b> [1] 51:20  <b>suffered</b> [1] 14:5  <b>sufficient</b> [3] 13:24 47:2 99:11  <b>suggest</b> [4] 22:7,8 79:12 93:19  <b>suggested</b> [1] 6:6  <b>suggesting</b> [7] 49:15 61:2 62:7 79:16 93:6 104:20 117:15  <b>suggests</b> [1] 49:12  <b>suing</b> [2] 6:19 7:12  <b>suit</b> [3] 3:19 27:9 115:14  <b>suits</b> [4] 6:23,24,24 7:1  <b>summer</b> [1] 81:6  <b>supplemental</b> [2] 82:23 105:24  <b>support</b> [2] 33:21 87:2  <b>supported</b> [1] 125:5  <b>suppose</b> [2] 93:15 94:24  <b>supposed</b> [2] 20:4 35:24  <b>suppress</b> [8] 3:12 10:2 55:15 64:23 67:15 71:15,18 111:19  <b>suppressed</b> [2] 45:12 70:20  <b>suppressing</b> [1] 94:2  <b>suppression</b> [3] 60:9 67:11 120:2  <b>SUPREME</b> [2] 1:1,15  <b>SURGEON</b> [9] 1:3 11:15 17:14 38:9 54:21 81:16 123:14,23 125:17  <b>surveillance</b> [1] 52:21  <b>susceptible</b> [1] 50:13  <b>suspect</b> [1] 74:7  <b>suspension</b> [1] 44:20  <b>sweep</b> [1] 89:10</p>	<p style="text-align: center;"><b>T</b></p> <p><b>tack</b> [1] 53:10  <b>tailored</b> [3] 69:14 108:6 120:5  <b>tailoring</b> [3] 69:22 119:10,23  <b>takeaway</b> [1] 108:16  <b>talked</b> [3] 17:11 59:19 106:5  <b>talks</b> [1] 53:2  <b>target</b> [2] 86:11 94:2  <b>targeted</b> [5] 76:1,1 85:11 87:9 97:12  <b>targeting</b> [3] 72:18 102:7 121:14  <b>team</b> [6] 21:25 23:21,24 28:23 38:24 56:20  <b>Teddy</b> [1] 124:9  <b>teen</b> [1] 94:25  <b>teens</b> [1] 95:1  <b>Teleporter</b> [1] 77:19  <b>tells</b> [1] 41:9  <b>temporal</b> [1] 102:4  <b>tent</b> [1] 113:16  <b>term</b> [5] 9:16 71:10 89:6 109:4,5  <b>terms</b> [7] 12:21 32:4,5 34:1 43:18 103:22 109:7  <b>terrible</b> [2] 76:17 95:16  <b>terrorist</b> [4] 55:4 76:15,25 77:4  <b>terrorists</b> [1] 77:9  <b>test</b> [8] 37:20 51:25 61:25 70:11,16 97:20,21 119:6  <b>tests</b> [1] 104:22  <b>text</b> [3] 70:13 75:1 92:6  <b>Thanks</b> [3] 61:18 81:17 116:23  <b>themselves</b> [7] 23:23 41:13,22 44:15 81:8 90:22 95:5  <b>theory</b> [3] 5:3 7:4 66:22  <b>there's</b> [41] 7:25 8:3,4 9:4,7 18:11 20:6 23:4,15 25:17,18 36:23 41:14,18 45:5,25 49:17 55:6,11,20 58:4 60:13 62:10 70:21 74:7 76:16 79:1,12 80:18 84:19 91:15 95:4 96:7 99:24 101:18,20 103:12 104:10 110:3 120:10 123:3  <b>therefore</b> [1] 48:25  <b>They've</b> [3] 6:6 48:11 83:11  <b>thinking</b> [1] 59:18  <b>thinks</b> [3] 80:18 104:15,17  <b>third</b> [9] 67:8 72:15 74:24 92:4 94:3 96:25 97:5,9,11  <b>third-party</b> [2] 73:8 75:5  <b>third-party's</b> [1] 111:19  <b>THOMAS</b> [16] 5:16 6:10,13 7:6,10,15 8:5,7 38:13,14,21 39:7 40:19 41:14 66:12</p>
---	---	---	--	---

## Official

<p>99:2  <b>Thomas's</b> <sup>[1]</sup> 56:14  <b>though</b> <sup>[8]</sup> 20:25 29:19 33:15 45:9 48:11 49:11 113:18 121:11  <b>thousand</b> <sup>[3]</sup> 102:16,18,24  <b>thousands</b> <sup>[3]</sup> 4:13 24:9 71:25  <b>threaded</b> <sup>[1]</sup> 111:12  <b>threat</b> <sup>[24]</sup> 4:3 5:12 13:9,16,21,24,25 32:8,11,13,18,22 34:5 35:21 36:13,15,21 37:3 44:10,16 46:20 47:12 52:8 114:3  <b>threaten</b> <sup>[1]</sup> 58:18  <b>threatened</b> <sup>[1]</sup> 116:11  <b>threatener</b> <sup>[2]</sup> 113:14,16  <b>threatening</b> <sup>[4]</sup> 90:9 111:12 113:24 117:22  <b>threatens</b> <sup>[1]</sup> 113:14  <b>threats</b> <sup>[9]</sup> 3:12 4:16 5:13 32:4 55:4 60:7,7,8 62:20  <b>three</b> <sup>[1]</sup> 35:7  <b>threshold</b> <sup>[1]</sup> 89:17  <b>throughout</b> <sup>[2]</sup> 27:19 41:6  <b>thumb</b> <sup>[1]</sup> 87:6  <b>TikTok</b> <sup>[1]</sup> 12:11  <b>Times's</b> <sup>[1]</sup> 72:24  <b>timing</b> <sup>[2]</sup> 121:21,21  <b>today</b> <sup>[3]</sup> 28:16 47:21 62:23  <b>together</b> <sup>[5]</sup> 38:22,23,24 57:13 59:2  <b>tolerate</b> <sup>[1]</sup> 95:17  <b>ton</b> <sup>[1]</sup> 35:3  <b>took</b> <sup>[6]</sup> 38:9 69:5 81:19 83:12 85:3 99:20  <b>tools</b> <sup>[1]</sup> 113:5  <b>top</b> <sup>[1]</sup> 7:13  <b>top-line</b> <sup>[3]</sup> 70:5 88:20 89:13  <b>top-ranking</b> <sup>[1]</sup> 26:22  <b>topic</b> <sup>[1]</sup> 103:6  <b>topics</b> <sup>[1]</sup> 4:7  <b>total</b> <sup>[2]</sup> 31:8 65:12  <b>touch</b> <sup>[2]</sup> 78:16 123:21  <b>towards</b> <sup>[2]</sup> 12:12 56:15  <b>trace</b> <sup>[2]</sup> 15:14,17  <b>traceability</b> <sup>[20]</sup> 14:6,11,11 15:2,7 16:13 18:24 21:12 42:10,23 43:19,24 44:3 45:25 61:10,14 83:18 104:19 105:11,20  <b>traceable</b> <sup>[10]</sup> 13:5,18 14:16 15:4,11,22 29:23 43:3 45:14 123:7  <b>tracking</b> <sup>[2]</sup> 105:3 122:21  <b>tradition</b> <sup>[1]</sup> 124:11  <b>traditional</b> <sup>[1]</sup> 51:19  <b>transform</b> <sup>[2]</sup> 4:23 7:21  <b>transparent</b> <sup>[1]</sup> 26:10  <b>treating</b> <sup>[1]</sup> 22:23  <b>trending</b> <sup>[1]</sup> 12:11  <b>tried</b> <sup>[2]</sup> 45:2 62:25</p>	<p><b>tries</b> <sup>[4]</sup> 67:6 78:8 87:8 96:22  <b>trivial</b> <sup>[1]</sup> 36:19  <b>troops</b> <sup>[2]</sup> 112:17,17  <b>trouble</b> <sup>[1]</sup> 114:23  <b>troubling</b> <sup>[3]</sup> 11:21 64:7 91:9  <b>true</b> <sup>[9]</sup> 42:14 50:18 55:24 80:19,25,25 107:17 113:2 118:11  <b>try</b> <sup>[4]</sup> 15:3 76:19 115:14 120:23  <b>trying</b> <sup>[22]</sup> 3:22 4:15 27:10 36:2 51:1 57:21 58:17,18 67:10 72:5 74:11,13 75:9,11 79:12 87:2 90:19 92:3 98:6 103:23 111:18 121:18  <b>Tucker</b> <sup>[3]</sup> 84:15 85:9 106:8  <b>Tuesday</b> <sup>[1]</sup> 55:17  <b>turn</b> <sup>[3]</sup> 6:9 56:23 62:25  <b>turning</b> <sup>[3]</sup> 52:2 59:2 121:8  <b>turns</b> <sup>[1]</sup> 100:12  <b>turtles</b> <sup>[1]</sup> 106:9  <b>tweet</b> <sup>[9]</sup> 84:2,3,5,14,19,20 85:4,7,9  <b>tweets</b> <sup>[2]</sup> 78:1 90:15  <b>Twitter</b> <sup>[11]</sup> 45:13,21 60:3 72:12 73:19,20 84:20 106:2 111:6 115:4 121:5  <b>two</b> <sup>[28]</sup> 3:21 4:18 5:21 13:1 14:19,21 33:1 41:2 57:24 60:23 62:11 86:15,17,19 89:12 102:5,10,12,12,21,25 105:24 116:2,2,3 121:22 122:2 124:25  <b>twofold</b> <sup>[1]</sup> 122:20  <b>typical</b> <sup>[1]</sup> 3:19</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>U.S</b> <sup>[1]</sup> 112:17  <b>UK</b> <sup>[2]</sup> 65:24 81:14  <b>ultimate</b> <sup>[2]</sup> 46:17,18  <b>ultimately</b> <sup>[4]</sup> 30:23 38:8 70:1 97:12  <b>uncommon</b> <sup>[1]</sup> 52:19  <b>unconstitutional</b> <sup>[1]</sup> 74:25  <b>under</b> <sup>[13]</sup> 12:14 16:6 37:6 41:23 42:11 52:6 54:11 57:20 65:14 66:1 77:10 90:16 98:10  <b>underlying</b> <sup>[1]</sup> 92:19  <b>understand</b> <sup>[20]</sup> 6:14 24:8,19 25:2 33:25 34:20 36:14 50:4 51:15 54:12 63:9 70:15 71:13 94:1 96:2 99:21 101:16 102:1 110:20 118:2  <b>understanding</b> <sup>[1]</sup> 28:1  <b>understood</b> <sup>[3]</sup> 31:5 37:3 78:24  <b>undertake</b> <sup>[1]</sup> 120:1</p>	<p><b>undertaken</b> <sup>[1]</sup> 71:3  <b>unhappy</b> <sup>[1]</sup> 22:2  <b>unilaterally</b> <sup>[2]</sup> 33:3 116:4  <b>unique</b> <sup>[3]</sup> 63:19 100:6 120:3  <b>UNITED</b> <sup>[4]</sup> 1:1,16 53:24,25  <b>universal</b> <sup>[3]</sup> 4:11 106:20 108:2  <b>universities</b> <sup>[1]</sup> 39:23  <b>University</b> <sup>[1]</sup> 6:25  <b>unless</b> <sup>[3]</sup> 34:22 36:25 72:9  <b>unlike</b> <sup>[1]</sup> 3:17  <b>unrelenting</b> <sup>[2]</sup> 64:21 65:21  <b>until</b> <sup>[2]</sup> 96:19 103:11  <b>unusual</b> <sup>[8]</sup> 7:19 25:7,9,19 28:2 29:20,23 44:7  <b>up</b> <sup>[18]</sup> 13:12 15:21 27:20 28:21 30:1 42:5 45:4,9 52:1 58:5 69:5 77:16 96:14 109:15 110:8 112:22 113:22 123:6  <b>updating</b> <sup>[1]</sup> 52:20  <b>urge</b> <sup>[2]</sup> 71:7 125:11  <b>urging</b> <sup>[2]</sup> 11:23 63:4  <b>URLs</b> <sup>[1]</sup> 11:1  <b>usage</b> <sup>[1]</sup> 40:5  <b>users</b> <sup>[1]</sup> 13:2  <b>uses</b> <sup>[3]</sup> 62:1 105:3,4  <b>Using</b> <sup>[3]</sup> 7:10 66:5,9</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>vaccinated</b> <sup>[2]</sup> 24:2,11  <b>vaccination</b> <sup>[1]</sup> 8:20  <b>vaccine</b> <sup>[3]</sup> 24:13 72:13 86:10  <b>vaccines</b> <sup>[4]</sup> 11:20 80:23 106:8 107:16  <b>vague</b> <sup>[2]</sup> 12:19,20  <b>validating</b> <sup>[1]</sup> 124:23  <b>valuable</b> <sup>[2]</sup> 53:3 56:4  <b>vanilla</b> <sup>[1]</sup> 89:7  <b>variety</b> <sup>[1]</sup> 109:9  <b>various</b> <sup>[2]</sup> 85:1 104:16  <b>vast</b> <sup>[3]</sup> 4:5 44:6 100:7  <b>vector</b> <sup>[1]</sup> 55:9  <b>veer</b> <sup>[2]</sup> 57:7 58:2  <b>vein</b> <sup>[1]</sup> 83:19  <b>verboden</b> <sup>[1]</sup> 63:11  <b>verge</b> <sup>[1]</sup> 57:12  <b>versus</b> <sup>[7]</sup> 3:5 19:14,17 20:10 42:3 113:13 114:15  <b>view</b> <sup>[22]</sup> 8:18 15:7 19:4 31:3 32:5 34:3 37:11 47:20 48:1 62:19 63:17 66:9 72:13 81:1,4,11 95:7 110:4 112:2 113:3 114:7 117:2  <b>viewed</b> <sup>[5]</sup> 5:11 7:23 36:14 37:16 46:18  <b>viewpoint</b> <sup>[3]</sup> 73:19 94:7 109:19  <b>viewpoints</b> <sup>[5]</sup> 72:17 75:</p>	<p>25 94:17 98:7,11  <b>views</b> <sup>[3]</sup> 18:23 54:22 80:13  <b>violate</b> <sup>[5]</sup> 9:9 11:25 41:25 66:7 125:12  <b>violated</b> <sup>[1]</sup> 70:18  <b>violates</b> <sup>[1]</sup> 98:16  <b>violation</b> <sup>[7]</sup> 30:24 31:17 70:3 84:10 113:7,17 119:20  <b>violations</b> <sup>[1]</sup> 70:11  <b>violence</b> <sup>[1]</sup> 124:9  <b>virtue</b> <sup>[1]</sup> 94:14  <b>VIVEK</b> <sup>[3]</sup> 1:3 81:16,17  <b>volume</b> <sup>[3]</sup> 37:15 99:24 103:1  <b>voluntary</b> <sup>[1]</sup> 56:25  <b>vote</b> <sup>[4]</sup> 55:15,16,16,17</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>Walker</b> <sup>[1]</sup> 8:18  <b>walks</b> <sup>[1]</sup> 113:16  <b>Wall</b> <sup>[1]</sup> 23:1  <b>wanted</b> <sup>[7]</sup> 12:5 54:12 69:2 81:18 101:4 121:9 123:20  <b>wants</b> <sup>[1]</sup> 101:22  <b>war</b> <sup>[2]</sup> 52:23 112:19  <b>warning</b> <sup>[1]</sup> 84:9  <b>warns</b> <sup>[1]</sup> 65:9  <b>Washington</b> <sup>[5]</sup> 1:11,20 78:17,19 88:3  <b>watch</b> <sup>[1]</sup> 40:6  <b>way</b> <sup>[40]</sup> 5:7,18 6:2,5,6 25:13 32:10 36:25 37:1 40:16 46:22 47:9 50:12 55:22 58:19 61:25 62:7,14 66:15 75:12 77:25 85:21 96:1 102:1,3 104:3 106:9 107:20 111:20 112:22 116:17,18,21 118:9,16 119:5,16 124:13 125:6,17  <b>ways</b> <sup>[11]</sup> 5:21 11:24 47:8 49:5 56:4 73:13 86:6,6 111:21 116:9 117:4  <b>wedded</b> <sup>[2]</sup> 109:10,11  <b>Wednesday</b> <sup>[1]</sup> 55:16  <b>weeds</b> <sup>[1]</sup> 107:14  <b>week</b> <sup>[2]</sup> 24:10 81:19  <b>welcome</b> <sup>[2]</sup> 5:15 66:11  <b>whatever</b> <sup>[7]</sup> 59:22 74:22 78:19 89:17 90:7 99:10 114:23  <b>whatsoever</b> <sup>[1]</sup> 16:19  <b>whenever</b> <sup>[2]</sup> 28:17,19  <b>Whereupon</b> <sup>[1]</sup> 126:5  <b>whether</b> <sup>[25]</sup> 4:8 9:19 11:10 28:15 30:23 42:21 48:11 49:25 50:23 62:3 67:23 68:1 69:3,12 70:17 71:2 74:19 77:23 90:14 98:1,3,3 100:14 107:11 118:25  <b>White</b> <sup>[25]</sup> 5:5 11:16 17:13 21:20,22 25:10 26:2 28:12 30:15 42:5 54:20 65:9,11</p>	<p>72:18 78:16 79:9 81:7 84:19,22 85:10 86:9,17 102:25 115:11 121:13  <b>who's</b> <sup>[1]</sup> 72:10  <b>whole</b> <sup>[1]</sup> 99:18  <b>wholly</b> <sup>[1]</sup> 94:8  <b>whom</b> <sup>[1]</sup> 84:15  <b>will</b> <sup>[16]</sup> 4:3 11:5 16:15 19:11,22 28:9 35:12,14 45:8 69:24 78:17,18 85:25 100:11 103:13,15  <b>win</b> <sup>[1]</sup> 89:16  <b>windows</b> <sup>[1]</sup> 95:1  <b>wire</b> <sup>[1]</sup> 23:3  <b>wish</b> <sup>[2]</sup> 73:19 78:3  <b>wished</b> <sup>[1]</sup> 75:24  <b>wishes</b> <sup>[5]</sup> 72:16 73:20 76:7 94:8 98:22  <b>within</b> <sup>[2]</sup> 74:25 125:22  <b>without</b> <sup>[3]</sup> 4:8 29:14 96:8  <b>wondering</b> <sup>[1]</sup> 118:25  <b>word</b> <sup>[1]</sup> 109:12  <b>words</b> <sup>[2]</sup> 61:7 118:20  <b>work</b> <sup>[6]</sup> 38:21,23,24 103:15,23 115:9  <b>working</b> <sup>[2]</sup> 41:16,17  <b>works</b> <sup>[2]</sup> 89:21 105:6  <b>World</b> <sup>[5]</sup> 30:9 63:10 77:15 103:16 109:8  <b>worried</b> <sup>[2]</sup> 63:16 117:20  <b>worse</b> <sup>[2]</sup> 46:1 122:5  <b>Wow</b> <sup>[2]</sup> 22:12 25:2  <b>wrap</b> <sup>[1]</sup> 23:6  <b>write</b> <sup>[3]</sup> 28:19,24 71:20  <b>wrote</b> <sup>[3]</sup> 71:19,21 88:7</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>yardstick</b> <sup>[2]</sup> 20:4 58:15  <b>year</b> <sup>[2]</sup> 12:12 64:25  <b>years</b> <sup>[3]</sup> 13:4 45:20 121:12  <b>yells</b> <sup>[1]</sup> 37:14  <b>York</b> <sup>[4]</sup> 23:1 42:6 72:24 88:3  <b>young</b> <sup>[1]</sup> 118:8</p>
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