

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIC SCHNAPPER, ESQ.	
4	On behalf of the Petitioner	3
5	LISA S. BLATT, ESQ.	
6	On behalf of the United States, as amicus	
7	curiae, supporting the Petitioner	17
8	FRANCIS H. YOUNG, ESQ.	
9	On behalf of the Respondent	27
10	REBUTTAL ARGUMENT OF	
11	ERIC SCHNAPPER, ESQ.	
12	On behalf of the Petitioner	53
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
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8
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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-1595, Crawford v. The Metropolitan Government of Nashville and Davidson County.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONER

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

When Vicky Crawford reported to city officials that she had been repeatedly harassed by the board's director of employee relations, her conduct was protected by section 704(a) of Title VII. It is protected first by the first clause of section 704(a), which is known as the opposition clause. The opposition clause has three elements that must be proven. Only one of them is at issue here. But just to set the context, first a plaintiff will have to prove that the employer acted with a retaliatory motive. Second, the employee's statement or conduct must relate to action that was unlawful under Title VII. It might be something that happened in the past. It might be a concern about something that might happen in the future.

And third, the conduct must be in the nature

1 of opposition, and that's the question in dispute in
2 this particular case.

3 It is our view that the -- it is sufficient
4 to establish that element if a reasonable person would
5 conclude from the employee's statement or conduct that
6 the employee disapproved of or objected to the
7 employment practice in question.

8 JUSTICE SCALIA: So a co-worker of your
9 client says, "You know, the boss really was guilty of
10 sexual harassment." And the co-worker says, "Gee, that's
11 terrible."

12 MR. SCHNAPPER: Yes, yes.

13 JUSTICE SCALIA: That's enough? That's
14 opposition?

15 MR. SCHNAPPER: Yes. Yes, it is. In fact,
16 there are cases involving --

17 CHIEF JUSTICE ROBERTS: What if it's just,
18 sexual harassment is terrible?

19 MR. SCHNAPPER: That would be covered. If
20 an employee wore a button --

21 CHIEF JUSTICE ROBERTS: Even if there's no
22 link, there's no link to the person that the original --
23 the complainant says was engaged in that activity?

24 MR. SCHNAPPER: The opposition doesn't have
25 to be directed at a particular event.

1 JUSTICE SCALIA: What about, violating the
2 law is terrible?

3 MR. SCHNAPPER: I think if there's no
4 reference to Title VII that wouldn't suffice.

5 JUSTICE SCALIA: Okay. But if she said that
6 in response to the remark by the co-worker that she had
7 been subjected to sexual harassment and then the remark
8 was "Violating the law is terrible," that's opposition?

9 MR. SCHNAPPER: I think a trier of fact
10 could conclude she was referring to what the co-worker
11 had just said.

12 CHIEF JUSTICE ROBERTS: So if Mr. Jones, the
13 person, did that, that's terrible.

14 MR. SCHNAPPER: Yes.

15 CHIEF JUSTICE ROBERTS: That's actionable as
16 opposition to the practices?

17 MR. SCHNAPPER: It is protected. If the
18 employer comes in and fires her for having said that.
19 The case --

20 JUSTICE GINSBURG: Mr. Schnapper, your case --

21 JUSTICE KENNEDY: I was going to say in part
22 it seems to me that in isolation it seems harmless,
23 almost trivial, but the whole point is that the employer
24 doesn't think it is trivial. The employer uses it, by
25 hypothesis, as a basis to retaliate.

1 MR. SCHNAPPER: Right. That's why the
2 elements are important. If the employer fires a worker
3 for that --

4 JUSTICE SCALIA: But that doesn't solve the
5 problem of having too broad an entry into this thing.
6 You get to the jury by just showing that she said "Oh,
7 if he did that, it's terrible," and then it's up to the
8 jury all of a sudden whether that is the reason that the
9 employer fired this person or not. I mean, that just
10 leaves -- lays the employer open to a lot of jury
11 determinations that he shouldn't be subject to, it seems
12 to me.

13 MR. SCHNAPPER: With all deference, Your
14 Honor, the plaintiff must have sufficient evidence to
15 get to the jury on all three elements. Retaliation
16 claims are routinely dismissed on the causation element.
17 There's not usually a dispute about whether the conduct
18 was protected, and this case in that regard is unusual.
19 But the --

20 JUSTICE SOUTER: Do you believe, as I
21 understood you to suggest a moment ago, that you could
22 prove causation if the statement "It is terrible" or
23 "Sexual harassment is terrible" had been uttered in
24 effect in the abstract without reference to particular
25 behavior or a charge of particular behavior on the part

1 of a co-worker or an employer? In other words, if A
2 says "Sexual harassment is terrible" and elsewhere in
3 the company sexual harassment is going on and A is then
4 fired, would it be your view that A would at least state
5 a claim if A said, I had expressed disapproval of sexual
6 harassment, it turns out there was sexual harassment
7 being gone -- taking place elsewhere; and I was fired
8 for that reason. Would that at least state a claim that
9 would get a harassment case into court?

10 MR. SCHNAPPER: Umm --

11 JUSTICE SOUTER: What I'm getting at,
12 doesn't the statement "It's terrible" or whatever the
13 opposition may be have to be made in relation to some
14 specific activity?

15 MR. SCHNAPPER: No, Your Honor. No, Your
16 Honor. If a worker --

17 JUSTICE SOUTER: Then what is the limit? It
18 seems to me you've got a cause of action in effect under
19 the statute that would be virtually unlimited. Anybody
20 who thinks sexual harassment is bad who later gets fired
21 can claim retaliation under the statute if it turns out
22 just as a matter of good luck that somebody was being
23 sexually harassed unbeknownst to the speaker.

24 MR. SCHNAPPER: That's at least two
25 questions. Let me try to answer them both. With regard

1 to what would constitute protected activity, it is our
2 view -- and I think this is consistent with the lower
3 courts and the view of the government -- that there
4 doesn't have to actually be a violation. If a worker
5 walks into the office with a button saying "Violations
6 of Title VII are bad and I'm against them," she can
7 be -- and fired for that, that's illegal even though
8 nothing was going wrong.

9 JUSTICE GINSBURG: But why are we -- why are
10 we spending so much time on hypotheticals that are so
11 far from this case? This was a person who appeared at
12 an internal proceeding, she gave testimony, very
13 specific testimony. She wasn't saying: I'm against
14 harassment. She said: This boss harassed me. It is
15 about as specific as you get. So we're dealing with a
16 particular case of somebody who was a witness in an
17 internal investigation. Why do we have to reach the
18 outer boundaries of this claim in this case?

19 MR. SCHNAPPER: You do not, Your Honor.

20 CHIEF JUSTICE ROBERTS: Well, but, you know,
21 that's why we ask hypotheticals that aren't related to
22 the specific facts, because we're interested in how
23 broadly the proposition you're asking for goes. I'd
24 still like to find out where you draw the limit. What
25 if the person says: Mr. Jones would never do anything

1 like that, but if he did that would be terrible. Now,
2 is that actionable as opposition?

3 MR. SCHNAPPER: Yes. Expressing
4 disagreement with conduct that violates the law is what
5 the opposition clause protects. It doesn't have to be
6 about a specific instance, although it emphatically is
7 so here. It doesn't have to reference the statute.

8 JUSTICE SCALIA: And there does not have to
9 have been sexual harassment in the employment unit.

10 MR. SCHNAPPER: That's right.

11 JUSTICE SCALIA: So this is a law directed
12 against expressive activity.

13 MR. SCHNAPPER: Yes. Yes.

14 JUSTICE SCALIA: Are those laws good? I
15 thought we had a First Amendment.

16 MR. SCHNAPPER: No, no. It is a law that
17 protects expressive activity and those laws are
18 excellent. It protects the activity.

19 JUSTICE ALITO: What if the employee just
20 made -- reports factual information: Supervisor did
21 such and such; doesn't express opposition to it. Or
22 what if the employee goes further and says: Supervisor
23 did such and such, but I know he was just kidding; or I
24 hope you don't take any action against that person.
25 Would that be opposition?

1 MR. SCHNAPPER: Not necessarily. Again, it
2 depends on the question that was asked and the answer
3 that was given. If I might, for example, in this case
4 the question was did Mr. Hughes engage in inappropriate
5 activity. That was a request -- I think a trier of fact
6 could understand that that was a request for a
7 description of something that the witness objected to.

8 JUSTICE ALITO: Let me ask this. Suppose
9 the employer conducts an investigation because it
10 believes that the supervisor has engaged in improper
11 activity. So what they are trying to do is substantiate
12 grounds for dismissal or some other sanction. And then
13 an employee provides information that's exculpatory.
14 Can -- is that protected? Is that -- is that
15 information protected.

16 MR. SCHNAPPER: It's our view that that is
17 not protected by the opposition clause. It is our view
18 it would be protected by the participation clause.

19 Bur if I might get back to the question --

20 JUSTICE ALITO: Isn't it strange when there
21 are many situations in which testimony or the reporting
22 of information is protected, but when it's done, isn't
23 it usually done both ways, as it is under the
24 participation clause? So that the testimony is --
25 cannot be the subject of retaliation or the reporting of

1 information cannot be the subject of retaliation, but
2 not it's protected only if it goes in one direction?
3 Isn't that a very odd approach to that situation?

4 MR. SCHNAPPER: That's why we're advancing
5 the view that the participation clause here provides as
6 well, so that it's clear that exculpatory witnesses are
7 protected. It is not unimaginable that an exculpatory
8 witness would anger someone.

9 But going back to the question you asked
10 earlier, it's possible that in response to a question an
11 answer might be given which a reasonable person would
12 not conclude reflected disapproval such as, well, he
13 told that joke, and I thought it was funny.

14 And, indeed, in the Harris v. Forklift case
15 there were witnesses like that who -- who confirmed that
16 the owner of Harris Forklift had made the jokes in
17 question but said they didn't mind. That that would not
18 be our position at --

19 JUSTICE ALITO: Wouldn't that be very
20 strange? Suppose that this -- the factual situation
21 actually is very severe and is enough to -- to establish
22 liability on the employer's part, but this particular
23 reporting employee doesn't think so. So then the
24 employer might well be very annoyed that this
25 information which can be the -- the basis for liability

1 has been brought out against the employer, and the
2 employer might want to retaliate.

3 Why would that be unprotected just because
4 this employee adds his or her opinion that it isn't
5 serious?

6 MR. SCHNAPPER: We think it is protected by
7 the participation clause.

8 JUSTICE BREYER: Why don't you follow what
9 the EEOC says? I mean, the EEOC, as I understand it,
10 has said the very fact the employer has initiated an
11 investigation of an alleged discrimination is sufficient
12 to demonstrate the reasonableness of the employee's
13 belief that by providing information relevant to the
14 inquiry she is opposing an employment practice made
15 unlawful by Title VII.

16 And then they go on. To be absolutely clear
17 about it, they say an employee who assists her or her
18 employer in the endeavor, i.e., you go and testify; so
19 the sun was shining on that day; you are assisting your
20 employee by telling the truth-- is by definition -- is
21 opposing practices made unlawful by Title VII.

22 So here we have a difficult question, quite
23 an interstitial question, defining precisely "opposing,"
24 and here we have the EEOC doing it. So why don't we
25 just follow what they say?

1 MR. SCHNAPPER: Well, I -- that would --
2 that would certainly be fine with us.

3 JUSTICE SCALIA: It wouldn't be fine with
4 me.

5 MR. SCHNAPPER: We get to the same place --
6 we get to the same place by a different route.

7 JUSTICE SCALIA: What if -- what if I am
8 indeed very much in favor of sexual harassment? I am a
9 world class sexual harasser, but I'm also not a liar,
10 and I'm -- I am subpoenaed or called up by the employer
11 in connection with this internal investigation and asked
12 whether so-and-so harassed a particular worker. And I'd
13 say, yes, as a matter of fact, he did, and a good thing
14 too.

15 Is that expressing opposition?

16 MR. SCHNAPPER: No. We believe it is
17 covered by the participation clause. We think --

18 JUSTICE SCALIA: Covered by the
19 participation clause?

20 MR. SCHNAPPER: Because our view is that the
21 employer's internal processes for detecting and rooting
22 out sexual harassment, for example, is a -- is a process
23 -- is a process that's under this title within the
24 meaning of --

25 JUSTICE BREYER: Is this a real problem? I

1 mean, let's suppose the opposition clause protects
2 everybody in the internal investigation who could be at
3 all interpreted as favorable to the complainant. It
4 also protects everybody who could possibly be viewed as
5 neutral.

6 Then you have a problem about what about a
7 person who loves sexual harassment? This is the
8 hypothetical: he comes in, testifies: I love sexual
9 harassment; it's wonderful, and they fire him. Now is
10 this a real problem?

11 MR. SCHNAPPER: It -- it is not, Your Honor.
12 But -- but as the -- as the Chief Justice pointed out,
13 I'm -- you know, I'm here to answer hypothetical
14 questions, and I'm going to do so.

15 JUSTICE GINSBURG: But I thought that --
16 [Laughter.]

17 JUSTICE GINSBURG: But I thought that the --
18 real case -- the real case that we're dealing with is
19 somebody who appeared in an internal investigation, and
20 I thought that what was the debate between the two
21 sides; anyone who made a charge, testified, assisted, or
22 participated in any manner in the investigation, I
23 thought that the other side's position was, well, this
24 is not an "investigation" within the meaning of the
25 statute. That what goes on internally doesn't qualify.

1 "Investigation," "proceeding," or "hearing"
2 under Title VII requires first that there be a Title VII
3 charge. I thought that that's what the controversy
4 we're talking about today is about: Is this a
5 qualifying investigation?

6 MR. SCHNAPPER: Your Honor, there actually
7 are two distinct questions here. One of them is whether
8 the conduct is protected by the opposition clause and
9 whether it constitutes opposition.

10 The second question is whether this conduct
11 is protected by the participation clause and would be an
12 investigation under Title VII. We are asserting
13 arguments under both claims, and -- and the Respondents
14 disagree with us on both.

15 CHIEF JUSTICE ROBERTS: And those are
16 overlapping but not whatever it -- concurring --

17 MR. SCHNAPPER: Redundant.

18 CHIEF JUSTICE ROBERTS: -- positions. You
19 can oppose without participating. You can participate
20 without opposing.

21 MR. SCHNAPPER: Right. Right. This case is
22 both. But -- but there are circumstances which are only
23 one or the other.

24 And this is -- this is a statute that --
25 that is deliberately written with overlapping provisions

1 to be sure nothing is missed.

2 In the phrase in the Fort Stewart case, I
3 think, Justice Scalia, it is ex abundante cotilla, out
4 of an abundance of caution, or in modern terms boots --
5 belt and suspenders. So these are deliberately
6 overlapping provisions to -- to assure that --

7 JUSTICE ALITO: What is the test for
8 determining whether an investigation has been done, and
9 the person has testified? What degree of formality, if
10 anything, is necessary?

11 If -- if somebody in -- in the company
12 simply goes to the office of an employee or the
13 workplace of an employee or encounters the employee in
14 the hallway or someplace and asks a question, is that
15 enough? Does it have to be --

16 MR. SCHNAPPER: No.

17 JUSTICE ALITO: -- a sort of a formal
18 proceeding in -- in some sense?

19 MR. SCHNAPPER: It -- it -- in our view, it
20 doesn't have to be formal, but there are two essential
21 elements to an investigation or a proceeding or anything
22 other internal being under this title. The first is
23 that the employer must have a rule or policy forbidding
24 the type of discrimination in question which is similar
25 to the requirements in section 706(c) for State and

1 local agencies.

2 Second, the individual -- the official who
3 did whatever you describe has to have been specifically
4 authorized by the employer to play that role. Vicarious
5 here wouldn't cover it.

6 If I could reserve the balance.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Ms. Blatt.

9 ORAL ARGUMENT OF LISA S. BLATT

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE,

12 SUPPORTING THE PETITIONER

13 MS. BLATT: Thank you, Mr. Chief Justice,
14 and may it please the Court:

15 We think this case is best resolved under
16 the opposition clause, and that clause does not require
17 employees to utter magic words of opposition or to
18 initiate the interview in which they express opposition
19 to unlawful conduct. Rather, the clause is satisfied
20 when a reasonable person would understand that the
21 employee has objected to sexual harassment in the
22 workplace.

23 And when an employee discloses or reports
24 that she has been subject to unlawful sexual harassment,
25 a reasonable person could certainly infer that the

1 employee opposes a practice made unlawful by the
2 statute.

3 CHIEF JUSTICE ROBERTS: In that case,
4 doesn't the opposing employee herself have a direct
5 cause of action under Title VII? Given what
6 Ms. Crawford described, you know, "that happened to me,
7 too," she could proceed under Title VII herself.

8 MS. BLATT: Right. She has got timing
9 requirements. So if she hasn't complained to the EEOC
10 within the relevant time, she wouldn't have a cause of
11 action for discrimination. But once she has
12 retaliated -- an adverse action is taken against her
13 because of what she has reported, then she has timing
14 requirements on when she has to sue for the retaliation,
15 and she did that here.

16 And this is a case where the Sixth Circuit
17 tossed the case out on summary judgment, and it erred in
18 doing so because the facts alleged in this case were
19 more than ample to survive summary judgment on the
20 question of whether she opposed what the Director of
21 Employee Relations did to her.

22 She alleged that in the context of a sexual
23 harassment investigation in which she was asked to
24 disclose inappropriate behavior by the director, she
25 reported repeated instances of offensive, objectionable,

1 and unwelcome conduct by him. For instance, she said
2 that she had her head pulled into his lap and that in
3 response she threw him out of the office, thereby
4 indicating that she did not like this conduct.

5 The jury could easily infer from those facts
6 that she opposed the director's conduct. Now, that
7 timing would --

8 CHIEF JUSTICE ROBERTS: Would you go as far
9 as Mr. Schnapper in determining what constitutes
10 "opposition"? I mean, do you agree with him that a case
11 where somebody says, "oh, Mr. Jones would never do that,
12 and if he did, I think that would be awful" -- is that
13 "opposition"?

14 MS. BLATT: If you -- yes, if a reasonable
15 person could infer that. I think that we are similar.

16 But if you just are a reporter of unlawful
17 conduct, that's enough. But this case is easier, much
18 easier. She was a victim.

19 CHIEF JUSTICE ROBERTS: Yes, yes, I know,
20 but -- I know, but --

21 MS. BLATT: I understand that. And if --
22 you can either decide the broader question or the
23 question of the Petitioner here, which she reported that
24 she was subject, and it makes it all the more evident,
25 and certainly a jury could have found that she opposed

1 the conduct.

2 But we do think that at least a reasonable
3 inference could be drawn -- when you report facts that
4 would constitute unlawful activity, the reasonable
5 inference is that you have objected.

6 CHIEF JUSTICE ROBERTS: Facts that would
7 constitute unlawful activity. What about facts that --
8 I mean, many of these cases, of course, are
9 he-said/she-said cases, and what about the facts that
10 you are reporting confirm one side or the other? They
11 just ask you, look -- and, you know, the person says,
12 "Well, every day at three o'clock he came in and do
13 this," and you're outside. And he says, "No, I wasn't
14 there."

15 MS. BLATT: Right. If you just have a --

16 CHIEF JUSTICE ROBERTS: Are you opposing it
17 if you say -- you know, you are asked, "Well, you know,
18 you sit outside the office; did he come in there or
19 not?" And you say, "Yes, he did."

20 MS. BLATT: I think this is where we have
21 not embraced the position of the EEOC, that we don't
22 think that expresses opposition if all you do is say,
23 "here's what a person's job duties were and he was in
24 town on that day" or "I had lunch with him on that day,"
25 and that would verify -- it may verify a victim's

1 statement or corroborate it and thereby be the essential
2 evidence in the case, but it wouldn't come within the
3 statutory language of opposing.

4 CHIEF JUSTICE ROBERTS: Even you knew that
5 that was the critical fact in resolving the complaint?

6 MS. BLATT: If a reasonable -- well, if a
7 reasonable person knew from all the circumstances, then
8 maybe. If this -- unfortunately, if you don't like jury
9 trials, this is a jury question whether you oppose the
10 practice or not, and it would have to go to a jury based
11 on the totality of the evidence.

12 JUSTICE SCALIA: Well, since this is a case
13 where the --

14 JUSTICE KENNEDY: It seems to me that the
15 participation clause is the line of least resistance. I
16 understand we have to say what a hearing is and so
17 forth. Are you asking us to resolve on the opposition
18 clause because that will give more guidance to the
19 system or --

20 MS. BLATT: No. When you said "least
21 resistance," it certainly is the most sweeping and broad
22 coverage. In that sense, you cover all witnesses and
23 participants in the process, and we think Congress
24 intended to do so here.

25 CHIEF JUSTICE ROBERTS: The opposition

1 clause is?

2 MS. BLATT: The participation clause is much
3 broader coverage. It could -- it would cover anyone who
4 participates in the investigation, whether or not they
5 oppose the practice.

6 CHIEF JUSTICE ROBERTS: Well, it depends how
7 you define the investigation --

8 MS. BLATT: Opposition.

9 CHIEF JUSTICE ROBERTS: -- the inquiry, and
10 that's kind of a tough issue, it seems to me.

11 MS. BLATT: If this were before the EEOC,
12 everybody who testifies in that proceeding or
13 participates in the investigation would be covered. It
14 doesn't matter whether you oppose a practice.

15 CHIEF JUSTICE ROBERTS: Right.

16 MS. BLATT: So in that sense, it's broader.
17 The reason why this case is easier for you, under the
18 opposition clause, is it's a narrow holding and it
19 doesn't get you into the question of whether just an
20 employer investigation is an investigation --

21 CHIEF JUSTICE ROBERTS: Well, I guess the
22 question I was asking earlier, you have overlapping but
23 not concentric categories, so the "opposing" may be
24 broader than the "participating in" depending upon how
25 we define either one.

1 MS. BLATT: That's exactly right, but at a
2 minimum when you have a victim of sexual harassment who
3 reports it to her employer in the context of an
4 investigation where she's asked was there anything
5 inappropriate and she recounts here, it's so clearly
6 opposition. It so clearly should not have been thrown
7 out on summary judgment. And it so clearly can force --

8 JUSTICE STEVENS: You think -- you think the
9 conduct in this case is also covered by the
10 participation clause?

11 MS. BLATT: Absolutely.

12 JUSTICE STEVENS: You do?

13 MS. BLATT: Yes.

14 JUSTICE BREYER: The problem with that is
15 that I -- while I have the EEOC with me, say, on --
16 assuming your thing -- on, from what I read, on the
17 opposition clause, when I looked into what the EEOC
18 actually said here on the participation clause, I don't
19 think I can characterize it, except for their litigation
20 position.

21 MS. BLATT: But that --

22 JUSTICE BREYER: I can't characterize what
23 they've said in their compliance manual as being with
24 you on that.

25 MS. BLATT: That's correct. We don't and

1 neither does the EEOC interpret their compliance manual
2 as exhaustive --

3 JUSTICE BREYER: And they could easily
4 change it. They could easily change it.

5 MS. BLATT: Yes, it is true that it's in a
6 brief, it's on their Website, it's on home page, on
7 their Website.

8 JUSTICE BREYER: Yes. It's not in their
9 manual.

10 MS. BLATT: It's not in their compliance
11 manual; it's in our amicus brief, but it is the EEOC's
12 position. And, again, that's why I think it's an easier
13 case for you under the opposition clause.

14 JUSTICE ALITO: Can you think of any other
15 situation in which the law says that a person who
16 testifies or provides information is protected against
17 retaliation only if that person gives testimony of a
18 particular type or gives a statement of a particular
19 type?

20 MS. BLATT: No, but you have to remember
21 there are two separate clauses. The statute under the
22 opposition clause just says "oppose a practice made
23 unlawful." If you didn't oppose a practice, you're not
24 covered under that. You would be covered under -- in
25 the proceeding, why there is such broad coverage. Once

1 you're under the participation clause, no matter what
2 the substance of your testimony is, it's covered. It
3 protects the process itself, regardless of whether it
4 was -- it was determined true.

5 JUSTICE ALITO: Well, I understand that, but
6 I'm -- what I'm asking is, is the reason to doubt
7 whether Congress intended in the opposition clause to
8 provide protection only for people who testify or
9 provide information that goes in a particular direction?

10 MS. BLATT: I think --

11 JUSTICE ALITO: If the purpose is to -- is
12 to elicit information and protect the people who come
13 forward with the information, then why don't you provide
14 the protection irrespective of what the person says?

15 MS. BLATT: I think that position is
16 consistent with the EEOC, and I don't think we would
17 oppose that position in the sense that it would give the
18 greatest and broadest protection.

19 And what is so upsetting about this case is
20 the gaping hole in statutory coverage that the Sixth
21 Circuit left. It is an inexplicable gap that a
22 complaining witness in an employer investigation would
23 be unprotected from retaliation. The statute simply
24 can't function, as intended by Congress, as intended by
25 this Court, if there are all these incentives for

1 employees to investigate unlawful activity, witnesses
2 come forward and report that they, in fact, have been
3 subjected to sexual harassment, and employers are free
4 to retaliate. They simply --

5 JUSTICE KENNEDY: I think that's a very
6 strong argument for the participation clause.

7 MS. BLATT: It is. It is, but it's all the
8 more reason that she has to be covered under one of them
9 if not both of them. Witnesses simply are going to be
10 afraid to fully cooperate if they're not given
11 protection.

12 And if there are no questions, we'd ask that
13 the Sixth Circuit be --

14 JUSTICE GINSBURG: The -- the other side
15 says this is not an investigation. There was no charge
16 filed. She's filed no charge. So this is not a
17 qualifying investigation. What is the government's
18 position on that?

19 MS. BLATT: Well, I mean, we think that is
20 border-line absurd, although all courts that have
21 reached the issue have held that. And it just -- it
22 makes no sense, and it -- I'm not even --

23 CHIEF JUSTICE ROBERTS: I'm sorry. Have
24 held what?

25 MS. BLATT: Have held that -- that the

1 internal investigation is covered as long as somebody
2 has filed a charge. It's not clear who or that it has
3 to be related to the subject matter. And that would
4 mean if the investigation is conducted on the day a
5 charge is filed at noon, all the witnesses who came in,
6 in the morning, are unprotected; yet all the witnesses
7 who came in, in the afternoon, would be protected. Yet
8 nobody even knows that a charge has been filed. And
9 that's just not something that Congress possibly could
10 have intended and wanted to leave the morning witnesses
11 unprotected from retaliation.

12 So I don't think the current state of the
13 law under the participation clause is supported by the
14 text, and it's certainly not supported by any policy
15 under Title VII.

16 No questions?

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Young.

19 ORAL ARGUMENT OF FRANCIS H. YOUNG

20 ON BEHALF OF THE RESPONDENT

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

23 Title VII was the result of a congressional
24 compromise which struck a balance between protecting the
25 interests of employees and employers.

1 In relation to the anti-retaliation
2 provisions of section 704, that balance was struck to
3 protect the rights of employees to report allegedly
4 discriminatory activity, as well as employers' rights to
5 manage their workplaces. The participation clause
6 covers activity or conduct in the course of an
7 investigation, proceeding, or hearing under Title VII.

8 The opposition clause -- the actual words of
9 the opposition clause protect an employee who has
10 opposed a particular unlawful practice.

11 CHIEF JUSTICE ROBERTS: What -- what more
12 could Ms. Crawford do to make it clear that she opposes
13 what was alleged in this case?

14 MR. YOUNG: She could have -- she could have
15 initiated making contact with the government official to
16 register a complaint or an objection.

17 Instead, she made a disclosure or she
18 cooperated in the investigation, Your Honor.

19 CHIEF JUSTICE ROBERTS: Well, how can the
20 fact that what led to the statement change the
21 characterization of the statement? She can initiate it,
22 go in and say, "I oppose what's going on," or if
23 somebody just asks her, you know, "how do you feel about
24 what's going on," she says she opposes it. It seems to
25 me in either case you look at the statement and not what

1 led to the statement.

2 MR. YOUNG: Congress chose to use the word
3 "oppose," Your Honor. That's why the short --

4 CHIEF JUSTICE ROBERTS: That's why my
5 hypothetical uses the word "oppose." In the first case,
6 she goes in of own volition and says, "I oppose"; in the
7 second case, she says "I oppose" in response to a
8 question. Congress used the word "oppose," and my
9 hypothetical in both cases used the word "oppose."

10 MR. YOUNG: If she's not taking the
11 initiative, then she has to report it and request that
12 something be done about it. Does the word -- if she
13 uses the word "oppose," as in your hypothetical, that
14 would not be the facts of this case, but that would
15 probably nudge it to the line of opposition conduct
16 because she's using the word "oppose."

17 CHIEF JUSTICE ROBERTS: Right. Well, is it
18 real a magic word? She comes in and says, "you won't
19 believe" -- you know -- "you think that's bad, wait till
20 I tell you what he did to me," and goes on tells -- it's
21 quite obvious from the context that she opposes it.

22 MR. YOUNG: Well, that's why we advocate a
23 reasonableness standard, Your Honor, in the ears of the
24 person receiving the information, but under the facts of
25 this case, that standard was not met.

1 The true opposition activity -- it's called
2 the opposition clause, not the disclosure clause, not
3 the cooperation clause. There's an element -- and all
4 the parties have provided the Court with a dictionary --
5 the various dictionary definitions of the word "oppose,"
6 all of which contain the common theme of resistance,
7 coming up against something, communicating resistance.

8 When the -- when what Mrs. Crawford said to
9 the human resources investigator in response to
10 questioning is actually examined, it is making a
11 disclosure. There's no request that anything be done
12 about it. The time lag between the end of the alleged
13 harassment and the actual reporting is over two months.
14 Mrs. Crawford had multiple opportunities to report to
15 her supervisor, her supervisor's supervisor, the
16 director of employee --

17 JUSTICE SOUTER: You mean if she had made
18 complaints after she had answered the questions in --
19 and given the information at issue here, that would
20 convert her prior statements into opposition?

21 MR. YOUNG: That would -- the fact that Your
22 Honor chose the term "complaint" would be a different
23 situation from what we had here. A subsequent --

24 JUSTICE SOUTER: I'm asking you. You're in
25 effect saying there has got to be some kind of what you

1 call active opposition; and I took it from what you said
2 a moment ago that if she had given the evidence in
3 question here, and then in the period, subsequent period
4 of two months, made some sort of complaint, that that
5 complaint would have qualified her original evidence as
6 opposition.

7 Is that your position?

8 MR. YOUNG: That complaint would undoubtedly
9 be opposition. Would it reach back --

10 JUSTICE SOUTER: You're taking about --

11 MR. YOUNG: Would it retroactively imbue the
12 initial disclosure with an opposition quality? Yes.
13 Yes.

14 JUSTICE SCALIA: It would? Why? It doesn't
15 seem so to me. I mean, it either was or wasn't. Look, you're
16 making the argument, essentially, that "oppose" has two
17 quite different meanings. You can ask somebody, you
18 know, do you oppose the war in Iraq? And all you're
19 asking is what is your opinion of the war in Iraq. Do
20 you think it is good or bad?

21 But "oppose" is also used in a quite
22 different sense. He -- you say somebody opposed the war
23 in Iraq, you mean he went out and -- and paraded against
24 it and so forth.

25 And your assertion is that in this

1 legislation, it has the latter meaning. It just doesn't
2 ask for your opinion about whether sexual harassment is
3 good or bad. It asks whether you were actively --
4 actively opposing it.

5 Now, once you adopt that position, I don't
6 see how the fact that you -- that something that was not
7 active opposition can be converted into active
8 opposition by something that occurred later.

9 I mean, if you want to abandon your other
10 argument, that's fine with me, but --

11 (Laughter.)

12 MR. YOUNG: Your Honor, I'm uncomfortable
13 with the concept that subsequent -- a subsequent
14 complaint can imbue a prior statement with that --

15 JUSTICE SCALIA: Don't be uncomfortable,
16 say it doesn't. I mean, I -- I don't care if you're
17 uncomfortable with it. Does it or doesn't it?

18 MR. YOUNG: Perhaps yes. But if it does --

19 JUSTICE SCALIA: Then I don't understand
20 your case.

21 MR. YOUNG: Well, Your Honor, I -- I don't
22 see that distinction as being relevant. Because if --
23 if a subsequent complaint is made a month, two months
24 after the initial disclosing conduct, then we're -- then
25 we're traveling on that subsequent complaint.

1 And the fact that a disclosure was made a
2 month or two prior doesn't become a relevant watershed
3 date in terms of when the protections of the statute
4 arise.

5 The -- the -- the concept is something more
6 than disclosure, something more than mere cooperation.
7 The language of the statute is he or she has opposed a
8 specific practice, not just opposition to the war in
9 Iraq in general; not just opposition to sexual
10 harassment in general; but that a specific --

11 JUSTICE SCALIA: It isn't just a specific --
12 again, if I don't understand your case, it isn't just a
13 matter of the specific practice.

14 Your point is it is not asking your opinion.
15 It is asking whether you are actively trying to
16 eliminate it.

17 I think even if -- if you were asked your
18 opinion, you know, do you -- do you oppose what, you
19 know, what this supervisor did? And -- and you said
20 yes, I don't favor it, I think it's bad, I think it's a
21 bad idea, I -- as I understand your case, that's not
22 opposition.

23 MR. YOUNG: Your Honor --

24 JUSTICE SCALIA: And I don't see how that is
25 changed at all when you put it in the context of a

1 specific act of harassment as opposed to putting it in
2 the context of harassment in general.

3 You -- you -- if you're hiding behind the --
4 the defenses you've built up, it seems to me those
5 defenses require something more than an expression of
6 your opinion of whether it's good or bad.

7 Your opinion is whether it's good or bad is
8 not opposition.

9 MR. YOUNG: I agree with that, Your Honor.
10 I used the term "practice" inartfully. Our argument is
11 there is a specific act that the employee considers to
12 be unlawful, and that's what the employee is opposing.
13 So that is what needs to be communicated to a reasonable
14 person within the government or within --

15 JUSTICE SOUTER: If the -- if the employee
16 in response to the inquiry that's being made says yes, I
17 saw my employer do "X" and it happened -- and I think
18 it's terrible, that is certainly specific to the act.

19 MR. YOUNG: It's specific to the act, Your
20 Honor, but I -- I would argue that does not cross the
21 line into "and I oppose it."

22 JUSTICE SOUTER: But the reason -- but the
23 reason it doesn't cross the line is you are, in effect,
24 saying that "oppose" within the meaning of the statute
25 has got to be read more narrowly than the -- than the

1 notion of oppose as we commonly use that word in common
2 speech.

3 And I don't know why -- I don't know what
4 your -- what your authority is for saying that "oppose"
5 was not used in its commonsense everyday connotation.

6 MR. YOUNG: Well, I think the word "oppose"
7 can be used in a specific sense in common everyday
8 speech and can be used in a general sense, Your Honor.
9 And I think --

10 JUSTICE SOUTER: But in my hypothetical,
11 we're not talking about a general sense. In my
12 hypothetical we were talking about a reference to a very
13 specific act. So the generality problem doesn't arise.
14 And yet despite the specificity, you say, and despite
15 the fact that in common speech a -- a specific statement
16 like that would be taken as opposition, you say it
17 shouldn't be under the statute.

18 And the statute doesn't have any definition
19 that narrows it. Common speech wouldn't narrow it your
20 way.

21 Why should it be narrowed your way?

22 MR. YOUNG: The -- Your Honor's hypothetical
23 of saying something is terrible would -- would -- would
24 not be commonly understood to communicate opposition
25 to --

1 JUSTICE STEVENS: Mr. Young, even under your
2 definition, why is not the statement that was made in this
3 case, "get the hell out of my office," wouldn't that be
4 opposition even under your statement, under your
5 definition? She's opposing his advance to her. That's
6 an active opposition it seems.

7 MR. YOUNG: Her statement to him to get out
8 of my office would --

9 JUSTICE STEVENS: Get the hell out of my
10 office.

11 MR. YOUNG: Yes, Your Honor.

12 (Laughter.)

13 JUSTICE STEVENS: Why isn't that opposition
14 under your statement -- under your definition?

15 MR. YOUNG: Well, the -- because the -- in
16 the context of anti-retaliation provisions, making a
17 statement to an alleged harasser to stop the harassment
18 or get out of my office does not rise to opposition
19 conduct, because the -- the -- the essence of the
20 opposition clause is somehow putting the employer on
21 notice.

22 If every employee who was a victim of sexual
23 harassment and says stop, if that -- if that constitutes
24 opposition conduct under the retaliation clause,
25 suddenly that employee has two causes of action, one for

1 sexual harassment and one for retaliation.

2 JUSTICE BREYER: Well, that isn't even --
3 look, the best way to oppose a crime is to cooperate
4 with the police when they investigate individual
5 instances.

6 The best way to oppose sexual discrimination
7 in the workplace is to cooperate with the employer when,
8 in fact, he investigates individual instances.

9 Is what I've just said English? Does it
10 make sense? And indeed, I'm just quoting the EEOC's own
11 definition.

12 MR. YOUNG: Yes, it was in English. Yes, it
13 makes sense, Your Honor, but I would beg to differ,
14 respectfully. The best way to oppose sexual harassment
15 is to go and make a complaint about it.

16 JUSTICE BREYER: It is your opinion. The
17 EEOC's opinion is, as they state, the best way to oppose
18 is to cooperate.

19 Now, what are we to do with, at
20 least ambiguity, giving you that, I'll give you
21 ambiguity. But we have the agency charged with the
22 enforcement of this taking the side of it that is the
23 opposite side that you are taking.

24 MR. YOUNG: Yes, Your Honor. There is --
25 there are enough contradictory statements in the

1 compliance manual itself that any deference that this
2 Court is inclined to give to the EEOC's compliance
3 manual should be tempered by the fact that even the EEOC
4 recognizes the importance of employees taking initiative
5 to report harassment and not --

6 CHIEF JUSTICE ROBERTS: I'm sorry. Please
7 finish your answer.

8 MR. YOUNG: -- and not sitting back and
9 waiting for the investigation to come to them.

10 JUSTICE GINSBURG: The investigation is not
11 of her. She's testifying as a witness.

12 MR. YOUNG: She's offering a statement in an
13 interview, Your Honor, as a witness, yes.

14 JUSTICE GINSBURG: And this is an act that's
15 meant to protect people against discrimination in the
16 workplace, including harassment.

17 MR. YOUNG: Yes.

18 JUSTICE GINSBURG: This is a woman who
19 testified truthfully -- we have to assume that because
20 this was tossed out at the very threshold, so we have to
21 assume that everything she alleged in her complaint is
22 true, right?

23 MR. YOUNG: It is not up -- it is not before
24 this Court on a Rule 12 standard of assuming all the
25 allegations are true, Your Honor; but it comes to the

1 Court on summary judgment.

2 JUSTICE GINSBURG: There is no -- no dis --
3 then there has to be no genuine dispute as to any
4 material fact. That means we must take her allegations
5 of fact as true at this point.

6 But in any case this is a statute that's
7 meant to govern the workplace with all of its realities.

8 One of them was when they asked, well, why
9 didn't you make a complaint, use whatever internal
10 remedies are there are? She said, because the person in
11 this outfit who is charged with receiving complaints is
12 the harasser.

13 MR. YOUNG: That isn't -- that was her
14 contention. That's not necessarily true.

15 JUSTICE GINSBURG: But we have to --
16 everything -- for you to prevail, since there has been
17 no trial on the facts, we have to take the facts as she
18 alleges them.

19 MR. YOUNG: There are multiple places to
20 report sexual harassment, Your Honor. She -- she didn't
21 even report it to her boss. She didn't report it to her
22 boss's boss, and she didn't report it to the Director of
23 Human Resources.

24 JUSTICE SCALIA: Well, I suppose your point
25 would be it doesn't matter what the reason was that she

1 didn't report it. In order to recover here she has to
2 have taken a public stand; and whatever the reason why
3 she didn't, the fact is that she didn't.

4 Why do you get into, you know, the reason
5 that she didn't?

6 MR. YOUNG: I agree with you, Your Honor.
7 The reasons why she didn't make a report are immaterial.

8 JUSTICE SCALIA: And -- and I suppose that
9 you -- you would require the -- the opposition to be
10 somehow a public -- a public expression of opposition.
11 No?

12 MR. YOUNG: Yes.

13 JUSTICE SCALIA: I mean, if one political
14 candidate says that the other one opposed the war in
15 Iraq, do you think the other candidate could say, that's
16 a lie? I'm sorry, that the charge would be held to be
17 correct if, in fact, the other candidate had never said
18 anything about the war in Iraq, although deep in his
19 heart he thought it was probably a bad idea.

20 Would you say that he opposed the war in
21 Iraq? I don't think so.

22 MR. YOUNG: Your Honor, even when --

23 JUSTICE SCALIA: The implication is --

24 MR. YOUNG: Even when --

25 JUSTICE SCALIA: The implication is that he

1 came out with some public position opposing it, and
2 that's your position as to the meaning of --

3 MR. YOUNG: Yes, Your Honor. And even the
4 EEOC in its own compliance manual as set forth on page
5 38 of the red brief, the examples of opposition cited by
6 the EEOC are threatening to file a charge, complaining,
7 protesting, picketing. These are active verbs.

8 JUSTICE ALITO: Why wouldn't this fall
9 within the participation clause? There was an
10 investigation, and -- and you described the people who
11 provided information as "witnesses."

12 MR. YOUNG: Yes.

13 JUSTICE ALITO: So why doesn't it fall under
14 the participation clause?

15 MR. YOUNG: An -- an employer's internal
16 sexual harassment investigation is not an investigation
17 under this title.

18 JUSTICE ALITO: Never, even after -- even
19 after a charge has been filed with the EEOC?

20 MR. YOUNG: Well, the five circuits that
21 have squarely considered the issue have held that that's
22 the trigger that brings the internal investigation under
23 the rubric of the participation clause here, Your Honor.

24 JUSTICE ALITO: And what's your argument?

25 MR. YOUNG: I'll -- I'll take that.

1 JUSTICE GINSBURG: And how about taking our
2 decisions in the Faragher and Ellerth case which in a
3 sense made the employer's internal investigation part of
4 the EEO process because it says to the employer, if you
5 don't have that kind of effective internal complaint and
6 investigation procedure, then you're going to be stuck
7 on respondeat superior liability. If you do, then you
8 will be shielded.

9 So this Court's decision in those two cases
10 seemed to me to say to every employer, as part of your
11 EEO compliance you had better have this internal
12 complaint procedure and investigation.

13 MR. YOUNG: I agree. Faragher and Ellerth
14 put the carrot on the stick in front of the employers
15 and say, here's an affirmative defense that will be
16 available to you in certain harassment cases if you
17 adopt a -- an anti-harassment policy which includes an
18 investigation mechanism. However, such a policy and
19 such a mechanism is not made mandatory by Faragher and
20 Ellerth. The argument of --

21 JUSTICE SOUTER: Well, you say it's not made
22 mandatory. Any employer who doesn't go through it is
23 crazy. And I don't see how this Court, having imposed
24 in practical terms the requirement that Justice Ginsburg
25 just described, can then say, oh, but we're going to

1 construe this indefinite term of "investigation"
2 to exclude this kind of employer activity which our
3 construction of the statute has virtually mandated.

4 So that if in fact the employer's
5 investigation succeeds in ending the problem and there
6 is no EEOC complaint, those who participated in the
7 investigation are absolutely helpless against
8 retaliation. That would be a bizarre way to interpret a
9 -- a statute in which we have any -- any opportunity to
10 interpret "investigation" to include this kind of
11 investigation.

12 What do you say to that?

13 MR. YOUNG: The fact that Faragher and
14 Ellerth create an incentive to employers to develop
15 these policies with investigate -- which include
16 investigations, does not elevate such investigations to
17 fall under the statutory requirement of being --

18 JUSTICE SOUTER: No. But I'm -- I'm giving
19 you an argument as to why we should construe it to
20 elevate it, and -- and the argument is that we, in
21 effect, in what I think were correct decisions -- you
22 agree, you said a moment ago, were correct decisions --
23 have in practical terms mandated this kind of an
24 inquiry.

25 Why then would it be reasonable for us, if

1 we have any option in construing the term
2 "investigation," to construe it to exclude this kind of
3 investigation and exclude coverage of the people who
4 under our decisions are supposed to come forward and --
5 and answer questions? Why would that be a reasonable
6 construction?

7 MR. YOUNG: Because at some point, Your
8 Honor, the construction departs so far from what can
9 reasonably be supported by the language of the statute
10 itself that it --

11 JUSTICE SOUTER: Well, why isn't it -- why
12 isn't an investigation by the employer an
13 "investigation"? That's the language of the statute.

14 MR. YOUNG: It -- it is an "investigation."
15 Our contention is it does not fall under the category of
16 an "investigation" under this title even despite
17 Faragher and Ellerth.

18 CHIEF JUSTICE ROBERTS: I thought Faragher
19 and Ellerth --

20 JUSTICE SCALIA: Why couldn't he -- I'm
21 sorry, Chief Justice.

22 CHIEF JUSTICE ROBERTS: I thought Faragher
23 and Ellerth were limited to the hostile work environment
24 cases.

25 MR. YOUNG: Of supervisory harassment,

1 that's true, Your Honor.

2 CHIEF JUSTICE ROBERTS: Well -- well, that's
3 a different question. Is the defense we recognized in
4 Ellerth and Faragher in the hostile work environment
5 case or in the specific action case as well?

6 MR. YOUNG: My understanding of Faragher and
7 Ellerth is that it -- it applies in the hostile work
8 environment case involving harassment by a supervisor.

9 JUSTICE SCALIA: I thought you were going to
10 answer Justice Souter with the assertion that if indeed
11 the Court wants employers to conduct these
12 investigations, it does not want to reduce the incentive
13 to do so.

14 And the rule that is urged by the other side
15 means whenever the -- whenever the employer conducts
16 such an investigation, any employee who is smart enough
17 to come in and testify against -- against sexual
18 harassment has a guaranteed job. It is almost like --
19 almost like being a Federal judge.

20 [Laughter.]

21 JUSTICE SCALIA: You can't be fired after
22 that, or the employer can't fire her without opening
23 himself up to a lawsuit under -- under this provision.
24 And he might win the lawsuit, but it's going to cost
25 money. So why -- maybe an employer would rather say,

1 you know, I'd rather roll the dice and -- and not
2 conduct an investigation and insulate all of my hostile
3 employees from -- from employment actions.

4 MR. YOUNG: That would be the -- that would
5 be the employer's interest. The disincentive that the
6 employers would have to comply with these -- with this
7 Court's directives or strong suggestions in Faragher and
8 Ellerth is employers would stop conducting these
9 investigations if everyone they interviewed was going to
10 be a potential retaliation claim.

11 JUSTICE SOUTER: And instead they would
12 substitute the -- the response to an EEOC investigation
13 in which they would not have the leg to stand on in
14 opposing respondeat superior. I suppose that would be
15 an inducement for them to go ahead with the
16 investigation; wouldn't you?

17 MR. YOUNG: Their -- they would lose the
18 protections of Faragher and Ellerth. We would be back
19 to respondeat superior liability. It sounds illogical,
20 but I -- I submit to the Court that if -- that if it is
21 going to be a Hobson's choice and it -- it would be a
22 situation in which employers would have an incentive to
23 choose not to -- would choose to abandon their policies
24 and take their chances.

25 If they have to interview 20 people in a --

1 in a retaliation -- in a sexual harassment case, there's
2 20 potential plaintiffs because they all participated.
3 It doesn't even matter if the employer knows what the
4 employees said. If -- if some type of discipline or
5 adverse action is imposed by the employer on any of
6 those employees, there is an instant retaliation claim.

7 JUSTICE SOUTER: By the way, I take it in --
8 in this case, although this is not the issue before us,
9 that if you -- if you lose on the issues before us, it
10 is still your position that ultimately you should win
11 this case, because you have good evidence, you say in
12 your briefs, to indicate that the reason for firing had
13 nothing to do with retaliation.

14 That's true, isn't it?

15 MR. YOUNG: I have two arguments left in my
16 quiver on summary judgment, Your Honor, that the trial
17 court didn't even consider. So if this case goes back
18 down, that's what I'm going to ask the trial court to
19 consider.

20 JUSTICE GINSBURG: What are the other
21 arguments on summary judgment.

22 MR. YOUNG: The lack of causation, the lack
23 of knowledge between whatever told the investigator in
24 this confidential interview as to which confidentiality
25 was promised and delivered, the lack of any knowledge --

1 -- the lack of any evidence that the decision-makers
2 regarding Ms. Crawford and her job, that they knew what
3 she said in this interview. The lack of causation is my
4 first ground and the lack of pretext is my second ground
5 that has yet to be considered. Because of the abundant
6 evidence of misconduct which was discovered regarding
7 how Ms. Crawford was not running her office.

8 JUSTICE GINSBURG: When you say it's not
9 that the employer is stuck because there's a potential
10 retaliation claim, if the employer is certain of its
11 grounds, that this discharge had nothing to do with her
12 testimony, then go ahead and discharge her.

13 MR. YOUNG: Yes, Your Honor.

14 JUSTICE SCALIA: Do you get your litigation
15 fees if you win? If the plaintiff here loses, does she
16 pay all the attorneys' fees that this employer has
17 incurred on this litigation?

18 MR. YOUNG: It is very difficult for a
19 victorious defendant to recover attorneys' fees under
20 section 1988, Your Honor. The threshold is very high.
21 I've never recovered the fees in my 14 years working for
22 this office in a section 1983 case.

23 JUSTICE SCALIA: So even when you win you
24 lose.

25 MR. YOUNG: Yes. In that sense, yes, Your

1 Honor. Or a Title VII case.

2 JUSTICE GINSBURG: On the other side, that
3 attorney, there's a large disincentive. He hasn't got a
4 good case. He's not going to be paid any retainer as
5 you might be. And he's not going to get any counsel
6 fees. Why should such -- why should it -- counsel be
7 available to a person who obviously was discharged for
8 having her hand in the till and not because she was
9 harassed?

10 MR. YOUNG: First of all, there is no
11 allegation that Ms. Crawford embezzled or took money.
12 There is no allegation, and she was not disciplined.
13 She was not discharged based on any allegation she was
14 stealing money. That's simply not a factor.

15 JUSTICE GINSBURG: No. I meant that as a
16 hypothetical.

17 MR. YOUNG: Oh, I'm sorry.

18 JUSTICE GINSBURG: What was the reason that
19 she was -- what was the employer's reason for
20 discharging her?

21 MR. YOUNG: Multiple -- she was the payroll
22 coordinator and her office -- all these checks were
23 sitting in her office and they were not being processed.
24 Some of them were six, eight, ten months old. Her
25 office was in complete disarray. And this came to light

1 as a result of this sexual harassment investigation when
2 her subordinates were interviewed and they provided
3 testimony regarding how she was running her office, and
4 that eventually got to the finance department of the
5 government, which hired an outside auditor which went in
6 and generated all this evidence at great expense to the
7 metropolitan government to hire this outside auditor.

8 That's where the evidence was developed to
9 terminate Ms. Crawford six months after the statement to
10 the investigators. So that's -- those were the facts on
11 how it happened.

12 I forgot Your Honor's original question, or
13 maybe I answered it. I don't know.

14 JUSTICE GINSBURG: I said if you have a
15 really strong case of having discharged this person for
16 cause that has nothing at all to do with harassment, you
17 are going to win the lawsuit and it would be hard for
18 the plaintiff to get a decent lawyer to represent her
19 side of the case because she's going to lose.

20 MR. YOUNG: In theory, yes; but the burdens
21 of litigation, which is part of the congressional
22 compromise -- back in 1964 in order to gain passage of
23 the Civil Rights Act, employer's interests were deemed
24 to be of equal magnitude as employees'.

25 CHIEF JUSTICE ROBERTS: You're not going to

1 win -- you're not going to win this case; you're going
2 to settle if you lose up here, right?

3 MR. YOUNG: If I lose up here, first I've
4 got two more shots at summary judgment, Your Honor.

5 JUSTICE KENNEDY: You don't have to answer
6 that. We'll be glad to see you again.

7 (Laughter.)

8 MR. YOUNG: I hope I'm not back --

9 CHIEF JUSTICE ROBERTS: My point is simply
10 that the incentive system is skewed because if you lose
11 you pay not only your attorneys' fees but the
12 complainants'. If you win, you have to incur yours.

13 MR. YOUNG: In civil rights cases the
14 incentives, that incentive fee, that incentive system,
15 is skewed against the defendants because of the public
16 policy reason favoring --

17 CHIEF JUSTICE ROBERTS: I'm not saying it
18 shouldn't be. But in terms of the pressures towards
19 settlement, it is a very strong incentive.

20 MR. YOUNG: Yes.

21 JUSTICE STEVENS: Is bringing frivolous
22 cases cost-free for the plaintiffs? There are certain
23 costs.

24 MR. YOUNG: Well, Your Honor, many of these
25 types of cases are taken on a contingent fee basis

1 except for hard costs.

2 JUSTICE BREYER: It is a mix. I mean, you
3 know, a lot of plaintiffs might be afraid to bring these
4 cases because they'll be accused of doing all kinds of
5 bad things. They don't want their reputations ruined.
6 They have lawyers who take contingent fees because they
7 have to pay for it. Oh the other hand, you have
8 problems with your costs and you have problems
9 dismissing people who should be dismissed. Everybody
10 has problems in this area. That's why we have law and
11 lawyers. They try to minimize it. This doesn't seem
12 fruitful to me.

13 JUSTICE SCALIA: Isn't it true that
14 financially it is always cost-free for the plaintiff
15 because she has an attorney who is taking it on a
16 contingent basis? Now, you could say it's not cost-free
17 to the lawyer; but even that's not always true because
18 if the lawyer has nothing else to do he may as well be
19 doing this, you know, whatever the odds are.

20 MR. YOUNG: I agree with that, Your Honor.
21 And if the Court has no more questions,
22 thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 Mr. Schnapper, you have four minutes
25 remaining.

1 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

2 ON BEHALF OF THE PETITIONER

3 MR. SCHNAPPER: Thank you, Your Honor, may
4 it please the Court:

5 Protecting witnesses from being fired
6 because they provide information in internal
7 investigations is not going to interfere with the conduct
8 of those investigations or deter them. We know that
9 from experience. Until the decision in this case, no
10 one had questioned the applicability of the opposition
11 clause to a witness in an investigation who complains
12 about sexual harassment. It was simply not in dispute.
13 The compliance manual in this regard was entirely clear
14 since 2000 because the Commission took the position
15 witnesses who complained were protected by the
16 opposition clause. None of the problems Mr. Young
17 expressed concern about had happened.

18 CHIEF JUSTICE ROBERTS: Counsel, Ms. Blatt
19 said the government would prefer a decision under the
20 opposition ground as opposed to the participation. Do
21 you have a preference?

22 MR. SCHNAPPER: I think she said she thought
23 it was easier. We don't have a preference. But I'd
24 like to address briefly the participation clause. The
25 participation clause does have the singular value, as

1 Justice Alito suggested, that it is evenhanded, that it
2 will protect witnesses for both sides. And the
3 integrity of the process is certainly strengthened if
4 both witnesses, witnesses on both sides, know that they're
5 protected from retaliation.

6 JUSTICE KENNEDY: Is the only question --
7 -the participation is not in doubt. The only question
8 is whether it's an investigation under this subtitle.

9 MR. SCHNAPPER: But the question is under
10 this title. That language its certainly broad enough,
11 as Justice Souter suggested, to encompass the sort of
12 process that's at issue here. As Justice Ginsburg
13 pointed out, this Court's decisions in Faragher
14 virtually mandate these decisions.

15 In response to the Chief Justice's point --

16 JUSTICE SCALIA: You think the language
17 "investigation under this title" is the equivalent of
18 "investigation with respect to an alleged offense under
19 this title"? That doesn't strike me as self-evident at
20 all. It seems to me "investigation under this title" to
21 me means an investigation under this title, which is not
22 an investigation by the employer.

23 MR. SCHNAPPER: I think the words under this
24 title are elastic enough to support either meaning. The
25 context of the statute and the way this Court has

1 repeatedly construed it give meaning to it. In response
2 to the concern that the Chief Justice raised, Faragher
3 and Ellerth are not the only decisions that provide an
4 incentive for these investigations. The Court's
5 decision in Kolstad makes the existence of this sort of
6 process essential to avoid awards of punitive damages.
7 So even in non-harassment cases that same incentive has
8 been created by the courts.

9 In a situation involving harassment, the
10 contours of the investigation are in fact largely shaped by
11 Federal law, not only policy guidance which the EEOC has
12 issued helping employers figure out what to do, but a
13 large and growing body of case law under Faragher and
14 Ellerth elucidating what those requirements are.
15 Particularly importantly here, the victims of sexual
16 harassment are virtually required by the court to use
17 these processes. Ms. Crawford had to speak up at some
18 point or she had had no claim.

19 And last, as a practical matter, if sexual
20 harassment is going to be stopped, it's mostly going to
21 happen through these internal processes. By the time
22 most of these controversies about sexual harassment get
23 to the EEOC or the courts, the victims have left their
24 jobs. In this Court's decision in Pollard, the
25 harassed individual had been fired. In Souter's she had been

1 driven from her job. In Faragher and Ellerth and
2 Harris, those victims had quit. If you look at the array of
3 lower court decisions involving sexual harassment, by
4 the time a case gets to the Commission in most of those
5 cases the victim has given up and left.

6 So it's exceptionally important that these
7 processes be effective and evenhanded.

8 No further questions.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 1:59 p.m., the case in the
12 above-entitled matter was submitted.)

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abandon 32:9 46:23	afraid 26:10 52:3	28:1 36:16	48:19 51:11	23:1,11,13,21 23:25 24:5,10
above-entitled 1:13 56:12	afternoon 27:7	Anybody 7:19	auditor 50:5,7	24:20 25:10,15
absolutely 12:16 23:11 43:7	agencies 17:1	APPEARAN... 1:16	authority 35:4	26:7,19,25 53:18
abstract 6:24	agency 37:21	appeared 8:11 14:19	authorized 17:4	board's 3:13
absurd 26:20	ago 6:21 31:2 43:22	applicability 53:10	available 42:16 49:7	body 55:13
abundance 16:4	agree 19:10 34:9 40:6 42:13	applies 45:7	avoid 55:6	boots 16:4
abundant 48:5	43:22 52:20	approach 11:3	awards 55:6	border-line 26:20
abundante 16:3	ahead 46:15 48:12	area 52:10	awful 19:12	boss 4:9 8:14 39:21,22
accused 52:4	Alito 9:19 10:8 10:20 11:19	argue 34:20	B	boss's 39:22
act 34:1,11,18 34:19 35:13	16:7,17 24:14	argument 1:14 2:2,10 3:3,7	back 10:19 11:9 31:9 38:8	boundaries 8:18
38:14 50:23	25:5,11 41:8	17:9 26:6	46:18 47:17	BREYER 12:8 13:25 23:14,22
acted 3:20	41:13,18,24	27:19 31:16	50:22 51:8	24:3,8 37:2,16 52:2
action 3:21 7:18 9:24 18:5,11	54:1	32:10 34:10	bad 7:20 8:6 29:19 31:20	brief 24:6,11 41:5
18:12 36:25	allegation 49:11 49:12,13	41:24 42:20	32:3 33:20,21	briefly 53:24
45:5 47:5	allegations 38:25 39:4	43:19,20 53:1	34:6,7 40:19 52:5	briefs 47:12
actionable 5:15 9:2	alleged 12:11 18:18,22 28:13	arguments 15:13 47:15,21	balance 17:6 27:24 28:2	bring 52:3
actions 46:3	30:12 36:17	array 56:2	based 21:10 49:13	bringing 51:21
active 31:1 32:7 32:7 36:6 41:7	38:21 54:18	asked 10:2 11:9 13:11 18:23	basis 5:25 11:25 51:25 52:16	brings 41:22
actively 32:3,4 33:15	allegedly 28:3	20:17 23:4	based 21:10 49:13	broad 6:5 21:21 24:25 54:10
activity 4:23 7:14 8:1 9:12	alleges 39:18	33:17 39:8	behavior 6:25 6:25 18:24	broader 19:22 22:3,16,24
9:17,18 10:5	ambiguity 37:20 37:21	asking 8:23 21:17 22:22	behalf 1:17,20 1:24 2:4,6,9,12	broadest 25:18
10:11 20:4,7	Amendment 9:15	25:6 30:24	3:8 17:10	broadly 8:23
26:1 28:4,6	amicus 1:21 2:6 17:11 24:11	31:19 33:14,15	27:20 53:2	brought 12:1
30:1 43:2	ample 18:19	asks 16:14 28:23 32:3	behavior 6:25 6:25 18:24	built 34:4
actual 28:8 30:13	anger 11:8	asserting 15:12	believe 6:20 13:16 29:19	Bur 10:19
address 53:24	annoyed 11:24	assertion 31:25 45:10	believes 10:10	burdens 50:20
adds 12:4	answer 7:25 10:2 11:11	Assistant 1:19 1:23	belt 16:5	button 4:20 8:5
adopt 32:5 42:17	14:13 38:7	assisted 14:21	best 17:15 37:3 37:6,14,17	C
advance 36:5	44:5 45:10	assisting 12:19	better 42:11	C 2:1 3:1
advancing 11:4	51:5	assists 12:17	bizarre 43:8	call 31:1
adverse 18:12 47:5	answered 30:18 50:13	assume 38:19,21	Blatt 1:19 2:5 17:8,9,13 18:8	called 13:10 30:1
advocate 29:22	anti-harassme... 42:17	assuming 23:16 38:24	19:14,21 20:15	candidate 40:14 40:15,17
affirmative 42:15	anti-retaliation	assure 16:6	20:20 21:6,20	care 32:16
		attorney 1:23 49:3 52:15	22:2,8,11,16	carrot 42:14
		attorneys 48:16		case 3:4 4:2 5:19

5:20 6:18 7:9 8:11,16,18 10:3 11:14 14:18,18 15:21 16:2 17:15 18:3,16,17,18 19:10,17 21:2 21:12 22:17 23:9 24:13 25:19 28:13,25 29:5,7,14,25 32:20 33:12,21 36:3 39:6 42:2 45:5,5,8 47:1,8 47:11,17 48:22 49:1,4 50:15 50:19 51:1 53:9 55:13 56:4,10,11	charge 6:25 14:21 15:3 26:15,16 27:2 27:5,8 40:16 41:6,19 charged 37:21 39:11 checks 49:22 Chief 3:3,9 4:17 4:21 5:12,15 8:20 14:12 15:15,18 17:7 17:13 18:3 19:8,19 20:6 20:16 21:4,25 22:6,9,15,21 26:23 27:17,21 28:11,19 29:4 29:17 38:6 44:18,21,22 45:2 50:25 51:9,17 52:23 53:18 54:15 55:2 56:9 choice 46:21 choose 46:23,23 chose 29:2 30:22 Circuit 18:16 25:21 26:13 circuits 41:20 circumstances 15:22 21:7 cited 41:5 city 3:11 civil 50:23 51:13 claim 7:5,8,21 8:18 46:10 47:6 48:10 55:18 claims 6:16 15:13 class 13:9 clause 3:15,16 3:17 9:5 10:17 10:18,24 11:5 12:7 13:17,19 14:1 15:8,11	17:16,16,19 21:15,18 22:1 22:2,18 23:10 23:17,18 24:13 24:22 25:1,7 26:6 27:13 28:5,8,9 30:2,2 30:3 36:20,24 41:9,14,23 53:11,16,24,25 clauses 24:21 clear 11:6 12:16 27:2 28:12 53:13 clearly 23:5,6,7 client 4:9 come 20:18 21:2 25:12 26:2 38:9 44:4 45:17 comes 5:18 14:8 29:18 38:25 coming 30:7 Commission 53:14 56:4 common 30:6 35:1,7,15,19 commonly 35:1 35:24 commonsense 35:5 communicate 35:24 communicated 34:13 communicating 30:7 company 7:3 16:11 complainant 4:23 14:3 complainants 51:12 complained 18:9 53:15 complaining 25:22 41:6	complains 53:11 complaint 21:5 28:16 30:22 31:4,5,8 32:14 32:23,25 37:15 38:21 39:9 42:5,12 43:6 complaints 30:18 39:11 complete 49:25 compliance 23:23 24:1,10 38:1,2 41:4 42:11 53:13 comply 46:6 compromise 27:24 50:22 concentric 22:23 concept 32:13 33:5 concern 3:23 53:17 55:2 conclude 4:5 5:10 11:12 concurring 15:16 conduct 3:13,21 3:25 4:5 6:17 9:4 15:8,10 17:19 19:1,4,6 19:17 20:1 23:9 28:6 29:15 32:24 36:19,24 45:11 46:2 53:7 conducted 27:4 conducting 46:8 conducts 10:9 45:15 confidential 47:24 confidentiality 47:24 confirm 20:10 confirmed 11:15 Congress 21:23	25:7,24 27:9 29:2,8 congressional 27:23 50:21 connection 13:11 connotation 35:5 consider 47:17 47:19 considered 41:21 48:5 considers 34:11 consistent 8:2 25:16 constitute 8:1 20:4,7 constitutes 15:9 19:9 36:23 construction 43:3 44:6,8 construe 43:1,19 44:2 construed 55:1 construing 44:1 contact 28:15 contain 30:6 contention 39:14 44:15 context 3:18 18:22 23:3 29:21 33:25 34:2 36:16 54:25 contingent 51:25 52:6,16 contours 55:10 contradictory 37:25 controversies 55:22 controversy 15:3 convert 30:20 converted 32:7 cooperate 26:10 37:3,7,18
---	--	--	--	---

cooperated 28:18	4:10 5:6,10 7:1	38:1	direction 11:2 25:9	32:22
cooperation 30:3 33:6	Crawford 1:3 3:4,11 18:6	define 22:7,25	directives 46:7	doing 12:24 18:18 52:4,19
coordinator 49:22	28:12 30:8,14	defining 12:23	director 3:13 18:20,24 30:16	Don't 32:15
correct 23:25 40:17 43:21,22	48:2,7 49:11	definition 12:20 35:18 36:2,5	39:22	doubt 25:6 54:7
corroborate 21:1	50:9 55:17	36:14 37:11	director's 19:6	draw 8:24
cost 45:24	crazy 42:23	definitions 30:5	dis 39:2	drawn 20:3
costs 51:23 52:1 52:8	create 43:14	degree 16:9	disagree 15:14	driven 56:1
cost-free 51:22 52:14,16	created 55:8	deliberately 15:25 16:5	disagreement 9:4	duties 20:23
cotilla 16:3	crime 37:3	delivered 47:25	disapproval 7:5 11:12	D.C 1:10,20
counsel 17:7 27:17 49:5,6	critical 21:5	demonstrate 12:12	disapproved 4:6	<hr/> E <hr/>
52:23 53:18	cross 34:20,23	department 1:20 50:4	disarray 49:25	E 2:1 3:1,1
56:9	curiae 1:21 2:7 17:11	departs 44:8	discharge 48:11 48:12	earlier 11:10 22:22
County 1:8 3:5	current 27:12	depending 22:24	discharged 49:7 49:13 50:15	ears 29:23
course 20:8 28:6	<hr/> D <hr/>	depends 10:2 22:6	discharging 49:20	easier 19:17,18 22:17 24:12
court 1:1,14 3:10 7:9 17:14	D 3:1	describe 17:3	discipline 47:4	53:23
25:25 27:22	damages 55:6	described 18:6 41:10 42:25	disciplined 49:12	easily 19:5 24:3 24:4
30:4 38:2,24	date 33:3	description 10:7	disclose 18:24	EEO 42:4,11
39:1 42:23	Davidson 1:7 3:5	despite 35:14,14 44:16	discloses 17:23	EEOC 12:9,9,24 18:9 20:21
45:11 46:20	day 12:19 20:12 20:24,24 27:4	detecting 13:21	disclosing 32:24	22:11 23:15,17
47:17,18 52:21	dealing 8:15 14:18	deter 53:8	disclosure 28:17 30:2,11 31:12	24:1 25:16
53:4 54:25	debate 14:20	determinations 6:11	33:1,6	38:3 41:4,6,19
55:16 56:3	decent 50:18	determined 25:4	discovered 48:6	43:6 46:12
courts 8:3 26:20 55:8,23	decide 19:22	determining 16:8 19:9	discrimination 12:11 16:24	55:11,23
Court's 42:9 46:7 54:13	decision 42:9 53:9,19 55:5	develop 43:14	18:11 37:6	EEOC's 24:11 37:10,17 38:2
55:4,24	55:24	developed 50:8	38:15	effect 6:24 7:18 30:25 34:23
cover 17:5 21:22 22:3	decisions 42:2 43:21,22 44:4	dice 46:1	discriminatory 28:4	43:21
coverage 21:22 22:3 24:25	54:13,14 55:3	dictionary 30:4 30:5	disincentive 46:5 49:3	effective 42:5 56:7
25:20 44:3	56:3	differ 37:13	dismissal 10:12	eight 49:24
covered 4:19 13:17,18 22:13	decision-make... 48:1	different 13:6 30:22 31:17,22	dismissed 6:16 52:9	either 19:22 22:25 28:25
23:9 24:24,24	deemed 50:23	45:3	dismissing 52:9	31:15 54:24
25:2 26:8 27:1	deep 40:18	difficult 12:22 48:18	dispute 4:1 6:17 39:3 53:12	elastic 54:24
covers 28:6	defendant 48:19	direct 18:4	distinct 15:7	element 4:4 6:16 30:3
co-worker 4:8	defendants 51:15	directed 4:25 9:11	distinction	elements 3:17 6:2,15 16:21
	defense 42:15 45:3			elevate 43:16,20
	defenses 34:4,5			elicit 25:12
	deference 6:13			

eliminate 33:16	employer's	50:6,8	11:20	forgot 50:12
Ellerth 42:2,13	11:22 13:21	evident 19:24	fall 41:8,13	Forklift 11:14
42:20 43:14	41:15 42:3	ex 16:3	43:17 44:15	11:16
44:17,19,23	43:4 46:5	exactly 23:1	far 8:11 19:8	formal 16:17,20
45:4,7 46:8,18	49:19 50:23	examined 30:10	44:8	formality 16:9
55:3,14 56:1	employment 4:7	example 10:3	Faragher 42:2	Fort 16:2
elucidating	9:9 12:14 46:3	13:22	42:13,19 43:13	forth 21:17
55:14	encompass	examples 41:5	44:17,18,22	31:24 41:4
embezzled 49:11	54:11	excellent 9:18	45:4,6 46:7,18	forward 25:13
embraced 20:21	encounters	exceptionally	54:13 55:2,13	26:2 44:4
emphatically	16:13	56:6	56:1	found 19:25
9:6	endeavor 12:18	exclude 43:2	favor 13:8 33:20	four 52:24
employee 3:13	enforcement	44:2,3	favorable 14:3	FRANCIS 1:23
4:6,20 9:19,22	37:22	exculpatory	favoring 51:16	2:8 27:19
10:13 11:23	engage 10:4	10:13 11:6,7	Federal 45:19	free 26:3
12:4,17,20	engaged 4:23	exhaustive 24:2	55:11	frivolous 51:21
16:12,13,13	10:10	existence 55:5	fee 51:14,25	front 42:14
17:21,23 18:1	English 37:9,12	expense 50:6	feel 28:23	fruitful 52:12
18:4,21 28:9	entirely 53:13	experience 53:9	fees 48:15,16,19	fully 26:10
30:16 34:11,12	entry 6:5	express 9:21	48:21 49:6	function 25:24
34:15 36:22,25	environment	17:18	51:11 52:6	funny 11:13
45:16	44:23 45:4,8	expressed 7:5	figure 55:12	further 9:22
employees 17:17	equal 50:24	53:17	file 41:6	56:8
26:1 27:25	equivalent	expresses 20:22	filed 26:16,16	future 3:24
28:3 38:4 46:3	54:17	expressing 9:3	27:2,5,8 41:19	
47:4,6 50:24	ERIC 1:17 2:3	13:15	finance 50:4	G
employee's 3:20	2:11 3:7 53:1	expression 34:5	financially	G 3:1
4:5 12:12	erred 18:17	40:10	52:14	gain 50:22
employer 3:19	ESQ 1:17,19,23	expressive 9:12	find 8:24	gap 25:21
5:18,23,24 6:2	2:3,5,8,11	9:17	fine 13:2,3 32:10	gaping 25:20
6:9,10 7:1 10:9	essence 36:19		finish 38:7	Gee 4:10
11:24 12:1,2	essential 16:20	F	fire 14:9 45:22	general 1:19
12:10,18 13:10	21:1 55:6	fact 4:15 5:9	fired 6:9 7:4,7	33:9,10 34:2
16:23 17:4	essentially 31:16	10:5 12:10	7:20 8:7 45:21	35:8,11
22:20 23:3	establish 4:4	13:13 21:5	53:5 55:25	generality 35:13
25:22 34:17	11:21	26:2 28:20	fires 5:18 6:2	generated 50:6
36:20 37:7	evenhanded	30:21 32:6	firing 47:12	genuine 39:3
42:4,10,22	54:1 56:7	33:1 35:15	first 3:15,15,19	getting 7:11
43:2 44:12	event 4:25	37:8 38:3 39:4	9:15 15:2	Ginsburg 5:20
45:15,22,25	eventually 50:4	39:5 40:3,17	16:22 29:5	8:9 14:15,17
47:3,5 48:9,10	everybody 14:2	43:4,13 55:10	48:4 49:10	26:14 38:10,14
48:16 54:22	14:4 22:12	factor 49:14	51:3	38:18 39:2,15
employers 26:3	52:9	facts 8:22 18:18	five 41:20	42:1,24 47:20
27:25 28:4	everyday 35:5,7	19:5 20:3,6,7,9	follow 12:8,25	48:8 49:2,15
42:14 43:14	evidence 6:14	29:14,24 39:17	forbidding	49:18 50:14
45:11 46:6,8	21:2,11 31:2,5	39:17 50:10	16:23	54:12
46:22 55:12	47:11 48:1,6	factual 9:20	force 23:7	give 21:18 25:17

37:20 38:2 55:1 given 10:3 11:11 18:5 26:10 30:19 31:2 56:5 gives 24:17,18 giving 37:20 43:18 glad 51:6 go 12:16,18 19:8 21:10 28:22 37:15 42:22 46:15 48:12 goes 8:23 9:22 11:2 14:25 16:12 25:9 29:6,20 47:17 going 5:21 7:3 8:8 11:9 14:14 26:9 28:22,24 42:6,25 45:9 45:24 46:9,21 47:18 49:4,5 50:17,19,25 51:1,1 53:7 55:20,20 good 7:22 9:14 13:13 31:20 32:3 34:6,7 47:11 49:4 govern 39:7 government 1:6 3:5 8:3 28:15 34:14 50:5,7 53:19 government's 26:17 great 50:6 greatest 25:18 ground 48:4,4 53:20 grounds 10:12 48:11 growing 55:13 guaranteed 45:18	guess 22:21 guidance 21:18 55:11 guilty 4:9 <hr/> H <hr/> H 1:23 2:8 27:19 hallway 16:14 hand 49:8 52:7 happen 3:24 55:21 happened 3:23 18:6 34:17 50:11 53:17 harassed 3:12 7:23 8:14 13:12 49:9 55:25 harasser 13:9 36:17 39:12 harassment 4:10,18 5:7 6:23 7:2,3,6,6 7:9,20 8:14 9:9 13:8,22 14:7,9 17:21,24 18:23 23:2 26:3 30:13 32:2 33:10 34:1,2 36:17,23 37:1 37:14 38:5,16 39:20 41:16 42:16 44:25 45:8,18 47:1 50:1,16 53:12 55:9,16,20,22 56:3 hard 50:17 52:1 harmless 5:22 Harris 11:14,16 56:2 head 19:2 hear 3:3 hearing 15:1 21:16 28:7 heart 40:19 held 26:21,24,25	40:16 41:21 hell 36:3,9 helping 55:12 helpless 43:7 he-said/she-said 20:9 hiding 34:3 high 48:20 hire 50:7 hired 50:5 Hobson's 46:21 holding 22:18 hole 25:20 home 24:6 Honor 6:14 7:15 7:16 8:19 14:11 15:6 28:18 29:3,23 30:22 32:12,21 33:23 34:9,20 35:8 36:11 37:13,24 38:13 38:25 39:20 40:6,22 41:3 41:23 44:8 45:1 47:16 48:13,20 49:1 51:4,24 52:20 53:3 Honor's 35:22 50:12 hope 9:24 51:8 hostile 44:23 45:4,7 46:2 Hughes 10:4 human 30:9 39:23 hypothesis 5:25 hypothetical 14:8,13 29:5,9 29:13 35:10,12 35:22 49:16 hypotheticals 8:10,21 <hr/> I <hr/> idea 33:21 40:19	illegal 8:7 illogical 46:19 imbue 31:11 32:14 immaterial 40:7 implication 40:23,25 importance 38:4 important 6:2 56:6 importantly 55:15 imposed 42:23 47:5 improper 10:10 inappropriate 10:4 18:24 23:5 inartfully 34:10 incentive 43:14 45:12 46:22 51:10,14,14,19 55:4,7 incentives 25:25 51:14 inclined 38:2 include 43:10,15 includes 42:17 including 38:16 incur 51:12 incurred 48:17 indefinite 43:1 indicate 47:12 indicating 19:4 individual 17:2 37:4,8 55:25 inducement 46:15 inexplicable 25:21 infer 17:25 19:5 19:15 inference 20:3,5 information 9:20 10:13,15 10:22 11:1,25 12:13 24:16	25:9,12,13 29:24 30:19 41:11 53:6 initial 31:12 32:24 initiate 17:18 28:21 initiated 12:10 28:15 initiative 29:11 38:4 inquiry 12:14 22:9 34:16 43:24 instance 9:6 19:1 instances 18:25 37:5,8 instant 47:6 insulate 46:2 integrity 54:3 intended 21:24 25:7,24,24 27:10 interest 46:5 interested 8:22 interests 27:25 50:23 interfere 53:7 internal 8:12,17 13:11,21 14:2 14:19 16:22 27:1 39:9 41:15,22 42:3 42:5,11 53:6 55:21 internally 14:25 interpret 24:1 43:8,10 interpreted 14:3 interstitial 12:23 interview 17:18 38:13 46:25 47:24 48:3 interviewed 46:9 50:2
---	--	--	---	--

<p>investigate 26:1 37:4 43:15 investigates 37:8 53:7 investigation 8:17 10:9 12:11 13:11 14:2,19,22,24 15:1,5,12 16:8 16:21 18:23 22:4,7,13,20 22:20 23:4 25:22 26:15,17 27:1,4 28:7,18 38:9,10 41:10 41:16,16,22 42:3,6,12,18 43:1,5,7,10,11 44:2,3,12,13 44:14,16 45:16 46:2,12,16 50:1 53:11 54:8,17,18,20 54:21,22 55:10 investigations 43:16,16 45:12 46:9 53:8 55:4 investigator 30:9 47:23 investigators 50:10 involving 4:16 45:8 55:9 56:3 Iraq 31:18,19,23 33:9 40:15,18 40:21 irrespective 25:14 isolation 5:22 issue 3:18 22:10 26:21 30:19 41:21 47:8 54:12 issued 55:12 issues 47:9 i.e 12:18</p>	<hr/> <p>J</p> <hr/> <p>job 20:23 45:18 48:2 56:1 jobs 55:24 joke 11:13 jokes 11:16 Jones 5:12 8:25 19:11 judge 45:19 judgment 18:17 18:19 23:7 39:1 47:16,21 51:4 jury 6:6,8,10,15 19:5,25 21:8,9 21:10 Justice 1:20 3:3 3:9 4:8,13,17 4:21 5:1,5,12 5:15,20,21 6:4 6:20 7:11,17 8:9,20 9:8,11 9:14,19 10:8 10:20 11:19 12:8 13:3,7,18 13:25 14:12,15 14:17 15:15,18 16:3,7,17 17:7 17:13 18:3 19:8,19 20:6 20:16 21:4,12 21:14,25 22:6 22:9,15,21 23:8,12,14,22 24:3,8,14 25:5 25:11 26:5,14 26:23 27:17,21 28:11,19 29:4 29:17 30:17,24 31:10,14 32:15 32:19 33:11,24 34:15,22 35:10 36:1,9,13 37:2 37:16 38:6,10 38:14,18 39:2 39:15,24 40:8 40:13,23,25</p>	<p>41:8,13,18,24 42:1,21,24 43:18 44:11,18 44:20,21,22 45:2,9,10,21 46:11 47:7,20 48:8,14,23 49:2,15,18 50:14,25 51:5 51:9,17,21 52:2,13,23 53:18 54:1,6 54:11,12,16 55:2 56:9 Justice's 54:15</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KENNEDY 5:21 21:14 26:5 51:5 54:6 kidding 9:23 kind 22:10 30:25 42:5 43:2,10,23 44:2 kinds 52:4 knew 21:4,7 48:2 know 4:9 8:20 9:23 14:13 18:6 19:19,20 20:11,17,17 28:23 29:19 31:18 33:18,19 35:3,3 40:4 46:1 50:13 52:3,19 53:8 54:4 knowledge 47:23,25 known 3:16 knows 27:8 47:3 Kolstad 55:5</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 47:22,22,25 48:1,3,4</p>	<p>lag 30:12 language 21:3 33:7 44:9,13 54:10,16 lap 19:2 large 49:3 55:13 largely 55:10 Laughter 14:16 32:11 36:12 45:20 51:7 law 5:2,8 9:4,11 9:16 24:15 27:13 52:10 55:11,13 laws 9:14,17 lawsuit 45:23,24 50:17 lawyer 50:18 52:17,18 lawyers 52:6,11 lays 6:10 leave 27:10 leaves 6:10 led 28:20 29:1 left 25:21 47:15 55:23 56:5 leg 46:13 legislation 32:1 let's 14:1 liability 11:22 11:25 42:7 46:19 liar 13:9 lie 40:16 light 49:25 limit 7:17 8:24 limited 44:23 line 21:15 29:15 34:21,23 link 4:22,22 LISA 1:19 2:5 17:9 litigation 23:19 48:14,17 50:21 local 17:1 long 27:1 look 20:11 28:25</p>	<p>31:15 37:3 56:2 looked 23:17 lose 46:17 47:9 48:24 50:19 51:2,3,10 loses 48:15 lot 6:10 52:3 love 14:8 loves 14:7 lower 8:2 56:3 luck 7:22 lunch 20:24</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>magic 17:17 29:18 magnitude 50:24 making 28:15 30:10 31:16 36:16 manage 28:5 mandate 54:14 mandated 43:3 43:23 mandatory 42:19,22 manner 14:22 manual 23:23 24:1,9,11 38:1 38:3 41:4 53:13 material 39:4 matter 1:13 7:22 13:13 22:14 25:1 27:3 33:13 39:25 47:3 55:19 56:12 mean 6:9 12:9 14:1 19:10 20:8 26:19 27:4 30:17 31:15,23 32:9 32:16 40:13 52:2</p>
--	--	---	---	--

meaning 13:24 14:24 32:1 34:24 41:2 54:24 55:1	necessarily 10:1 39:14	24:25 32:5	28:8,9 29:15 30:1,2,20 31:1 31:6,9,12 32:7 32:8 33:8,9,22 34:8 35:16,24 36:4,6,13,18 36:20,24 40:9 40:10 41:5 53:10,16,20	12:7 13:17,19 15:11 21:15 22:2 23:10,18 25:1 26:6 27:13 28:5 41:9,14,23 53:20,24,25 54:7
meanings 31:17	necessary 16:10	open 6:10	option 44:1	particular 4:2 4:25 6:24,25 8:16 11:22 13:12 24:18,18 25:9 28:10
means 39:4 45:15 54:21	needs 34:13	opening 45:22	oral 1:13 2:2 3:7 17:9 27:19	Particularly 55:15
meant 38:15 39:7 49:15	neither 24:1	opinion 12:4 31:19 32:2 33:14,18 34:6 34:7 37:16,17	order 40:1 50:22	parties 30:4
mechanism 42:18,19	neutral 14:5	opportunities 30:14	original 4:22 31:5 50:12	passage 50:22
mere 33:6	never 8:25 19:11 40:17 41:18 48:21	opportunity 43:9	outer 8:18	pay 48:16 51:11 52:7
met 29:25	non-harassment 55:7	oppose 15:19 21:9 22:5,14 24:22,23 25:17 28:22 29:3,5,6 29:7,8,9,13,16 30:5 31:16,18 31:21 33:18 34:21,24 35:1 35:4,6 37:3,6 37:14,17	outfit 39:11	payroll 49:21
metropolitan 1:6,23 3:4 50:7	noon 27:5	opposed 18:20 19:6,25 28:10 31:22 33:7 34:1 40:14,20 53:20	outside 20:13,18 50:5,7	people 25:8,12 38:15 41:10 44:3 46:25 52:9
mind 11:17	notice 36:21	opposes 18:1 28:12,24 29:21	overlapping 15:16,25 16:6 22:22	period 31:3,3
minimize 52:11	notion 35:1	opposing 12:14 12:21,23 15:20 18:4 20:16 21:3 22:23 32:4 34:12 36:5 41:1 46:14	owner 11:16	person 4:4,22 5:13 6:9 8:11 8:25 9:24 11:11 14:7 16:9 17:20,25 19:15 20:11 21:7 24:15,17 25:14 29:24 34:14 39:10 49:7 50:15
minimum 23:2	nudge 29:15	opposite 37:23	o'clock 20:12	person's 20:23
minutes 52:24	<hr/> O <hr/>	opposition 3:16 3:16 4:1,14,24 5:8,16 7:13 9:2 9:5,21,25 10:17 13:15 14:1 15:8,9 17:16,17,18 19:10,13 20:22 21:17,25 22:8 22:18 23:6,17 24:13,22 25:7	<hr/> P <hr/>	Petitioner 1:4 1:18,22 2:4,7 2:12 3:8 17:12 19:23 53:2
misconduct 48:6	O 2:1 3:1	opposed 18:20	P 3:1	phrase 16:2
missed 16:1	objected 4:6 10:7 17:21 20:5	opposes 18:1	page 2:2 24:6 41:4	picketing 41:7
mix 52:2	objection 28:16	opposing 12:14	paid 49:4	place 7:7 13:5,6
modern 16:4	objectionable 18:25	opposes 18:1	paraded 31:23	places 39:19
moment 6:21 31:2 43:22	obvious 29:21	opposing 12:14	part 5:21 6:25 11:22 42:3,10 50:21	plaintiff 3:19 6:14 48:15 50:18 52:14
money 45:25 49:11,14	obviously 49:7	opposed 18:20	participants 21:23	
month 32:23 33:2	occurred 32:8	opposes 18:1	participate 15:19	
months 30:13 31:4 32:23 49:24 50:9	October 1:11	opposing 12:14	participated 14:22 43:6 47:2	
morning 27:6,10	odd 11:3	opposes 18:1	participates 22:4,13	
motive 3:20	odds 52:19	opposing 12:14	participating 15:19 22:24	
multiple 30:14 39:19 49:21	offense 54:18	opposed 18:20	participation 10:18,24 11:5	
<hr/> N <hr/>	offensive 18:25	opposes 18:1		
N 2:1,1 3:1	offering 38:12	opposing 12:14		
narrow 22:18 35:19	office 8:5 16:12 19:3 20:18 36:3,8,10,18 48:7,22 49:22 49:23,25 50:3	opposed 18:20		
narrowed 35:21	official 17:2 28:15	opposes 18:1		
narrowly 34:25	officials 3:12	opposing 12:14		
narrows 35:19	oh 6:6 19:11 42:25 49:17 52:7	opposed 18:20		
Nashville 1:7,24 3:5	Okay 5:5	opposes 18:1		
nature 3:25	old 49:24	opposing 12:14		
	once 18:11	opposed 18:20		

<p>plaintiffs 47:2 51:22 52:3 play 17:4 please 3:10 17:14 27:22 38:6 53:4 point 5:23 33:14 39:5,24 44:7 51:9 54:15 55:18 pointed 14:12 54:13 police 37:4 policies 43:15 46:23 policy 16:23 27:14 42:17,18 51:16 55:11 political 40:13 Pollard 55:24 position 11:18 14:23 20:21 23:20 24:12 25:15,17 26:18 31:7 32:5 41:1 41:2 47:10 53:14 positions 15:18 possible 11:10 possibly 14:4 27:9 potential 46:10 47:2 48:9 practical 42:24 43:23 55:19 practice 4:7 12:14 18:1 21:10 22:5,14 24:22,23 28:10 33:8,13 34:10 practices 5:16 12:21 precisely 12:23 prefer 53:19 preference 53:21,23 pressures 51:18</p>	<p>pretext 48:4 prevail 39:16 prior 30:20 32:14 33:2 probably 29:15 40:19 problem 6:5 13:25 14:6,10 23:14 35:13 43:5 problems 52:8,8 52:10 53:16 procedure 42:6 42:12 proceed 18:7 proceeding 8:12 15:1 16:18,21 22:12 24:25 28:7 process 13:22,23 21:23 25:3 42:4 54:3,12 55:6 processed 49:23 processes 13:21 55:17,21 56:7 promised 47:25 proposition 8:23 protect 25:12 28:3,9 38:15 54:2 protected 3:14 3:15 5:17 6:18 8:1 10:14,15 10:17,18,22 11:2,7 12:6 15:8,11 24:16 27:7 53:15 54:5 protecting 27:24 53:5 protection 25:8 25:14,18 26:11 protections 33:3 46:18 protects 9:5,17 9:18 14:1,4</p>	<p>25:3 protesting 41:7 prove 3:19 6:22 proven 3:17 provide 25:8,9 25:13 53:6 55:3 provided 30:4 41:11 50:2 provides 10:13 11:5 24:16 providing 12:13 provision 45:23 provisions 15:25 16:6 28:2 36:16 public 40:2,10 40:10 41:1 51:15 pulled 19:2 punitive 55:6 purpose 25:11 put 33:25 42:14 putting 34:1 36:20 p.m 1:15 3:2 56:11</p> <hr/> <p>Q</p> <p>qualified 31:5 qualify 14:25 qualifying 15:5 26:17 quality 31:12 question 4:1,7 10:2,4,19 11:9 11:10,17 12:22 12:23 15:10 16:14,24 18:20 19:22,23 21:9 22:19,22 29:8 31:3 45:3 50:12 54:6,7,9 questioned 53:10 questioning 30:10</p>	<p>questions 7:25 14:14 15:7 26:12 27:16 30:18 44:5 52:21 56:8 quit 56:2 quite 12:22 29:21 31:17,21 quiver 47:16 quoting 37:10</p> <hr/> <p>R</p> <p>R 3:1 raised 55:2 reach 8:17 31:9 reached 26:21 read 23:16 34:25 real 13:25 14:10 14:18,18 29:18 realities 39:7 really 4:9 50:15 reason 6:8 7:8 22:17 25:6 26:8 34:22,23 39:25 40:2,4 47:12 49:18,19 51:16 reasonable 4:4 11:11 17:20,25 19:14 20:2,4 21:6,7 34:13 43:25 44:5 reasonableness 12:12 29:23 reasonably 44:9 reasons 40:7 REBUTTAL 2:10 53:1 receiving 29:24 39:11 recognized 45:3 recognizes 38:4 recounts 23:5 recover 40:1 48:19 recovered 48:21</p>	<p>red 41:5 reduce 45:12 Redundant 15:17 reference 5:4 6:24 9:7 35:12 referring 5:10 reflected 11:12 regard 6:18 7:25 53:13 regarding 48:2 48:6 50:3 regardless 25:3 register 28:16 relate 3:21 related 8:21 27:3 relation 7:13 28:1 relations 3:13 18:21 relevant 12:13 18:10 32:22 33:2 remaining 52:25 remark 5:6,7 remedies 39:10 remember 24:20 repeated 18:25 repeatedly 3:12 55:1 report 20:3 26:2 28:3 29:11 30:14 38:5 39:20,21,21,22 40:1,7 reported 3:11 18:13,25 19:23 reporter 19:16 reporting 10:21 10:25 11:23 20:10 30:13 reports 9:20 17:23 23:3 represent 50:18 reputations 52:5</p>
--	--	---	--	--

<p>request 10:5,6 29:11 30:11 require 17:16 34:5 40:9 required 55:16 requirement 42:24 43:17 requirements 16:25 18:9,14 55:14 requires 15:2 reserve 17:6 resistance 21:15 21:21 30:6,7 resolve 21:17 resolved 17:15 resolving 21:5 resources 30:9 39:23 respect 54:18 respectfully 37:14 respondeat 42:7 46:14,19 Respondent 1:24 2:9 27:20 Respondents 15:13 response 5:6 11:10 19:3 29:7 30:9 34:16 46:12 54:15 55:1 result 27:23 50:1 retainer 49:4 retaliate 5:25 12:2 26:4 retaliated 18:12 retaliation 6:15 7:21 10:25 11:1 18:14 24:17 25:23 27:11 36:24 37:1 43:8 46:10 47:1,6 47:13 48:10</p>	<p>54:5 retaliatory 3:20 retroactively 31:11 right 6:1 9:10 15:21,21 18:8 20:15 22:15 23:1 29:17 38:22 51:2 rights 28:3,4 50:23 51:13 rise 36:18 ROBERTS 3:3 4:17,21 5:12 5:15 8:20 15:15,18 17:7 18:3 19:8,19 20:6,16 21:4 21:25 22:6,9 22:15,21 26:23 27:17 28:11,19 29:4,17 38:6 44:18,22 45:2 50:25 51:9,17 52:23 53:18 56:9 role 17:4 roll 46:1 rooting 13:21 route 13:6 routinely 6:16 rubric 41:23 ruined 52:5 rule 16:23 38:24 45:14 running 48:7 50:3</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 1:3,19 2:1,5 3:1 17:9 sanction 10:12 satisfied 17:19 saw 34:17 saying 8:5,13 30:25 34:24 35:4,23 51:17</p>	<p>says 4:9,10,23 7:2 8:25 9:22 12:9 19:11 20:11,13 24:15 24:22 25:14 26:15 28:24 29:6,7,18 34:16 36:23 40:14 42:4 Scalia 4:8,13 5:1 5:5 6:4 9:8,11 9:14 13:3,7,18 16:3 21:12 31:14 32:15,19 33:11,24 39:24 40:8,13,23,25 44:20 45:9,21 48:14,23 52:13 54:16 Schnapper 1:17 2:3,11 3:6,7,9 4:12,15,19,24 5:3,9,14,17,20 6:1,13 7:10,15 7:24 8:19 9:3 9:10,13,16 10:1,16 11:4 12:6 13:1,5,16 13:20 14:11 15:6,17,21 16:16,19 19:9 52:24 53:1,3 53:22 54:9,23 Seattle 1:17 second 3:20 15:10 17:2 29:7 48:4 section 3:14,15 16:25 28:2 48:20,22 see 32:6,22 33:24 42:23 51:6 self-evident 54:19 sense 16:18 21:22 22:16</p>	<p>25:17 26:22 31:22 35:7,8 35:11 37:10,13 42:3 48:25 separate 24:21 serious 12:5 set 3:18 41:4 settle 51:2 settlement 51:19 severe 11:21 sexual 4:10,18 5:7 6:23 7:2,3 7:5,6,20 9:9 13:8,9,22 14:7 14:8 17:21,24 18:22 23:2 26:3 32:2 33:9 36:22 37:1,6 37:14 39:20 41:16 45:17 47:1 50:1 53:12 55:15,19 55:22 56:3 sexually 7:23 shaped 55:10 shielded 42:8 shining 12:19 short 29:3 shots 51:4 showing 6:6 side 20:10 26:14 37:22,23 45:14 49:2 50:19 sides 14:21 54:2 54:4 side's 14:23 similar 16:24 19:15 simply 16:12 25:23 26:4,9 49:14 51:9 53:12 singular 53:25 sit 20:18 sitting 38:8 49:23 situation 11:3</p>	<p>11:20 24:15 30:23 46:22 55:9 situations 10:21 six 49:24 50:9 Sixth 18:16 25:20 26:13 skewed 51:10,15 smart 45:16 Solicitor 1:19 solve 6:4 somebody 7:22 8:16 14:19 16:11 19:11 27:1 28:23 31:17,22 someplace 16:14 sorry 26:23 38:6 40:16 44:21 49:17 sort 16:17 31:4 54:11 55:5 sounds 46:19 Souter 6:20 7:11 7:17 30:17,24 31:10 34:15,22 35:10 42:21 43:18 44:11 45:10 46:11 47:7 54:11 Souter's 55:25 so-and-so 13:12 speak 55:17 speaker 7:23 specific 7:14 8:13,15,22 9:6 33:8,10,11,13 34:1,11,18,19 35:7,13,15 45:5 specifically 17:3 specificity 35:14 speech 35:2,8,15 35:19 spending 8:10 squarely 41:21 stand 40:2 46:13</p>
---	--	--	--	---

standard 29:23 29:25 38:24	17:24 19:24 27:3	27:14 44:9	testified 14:21 16:9 38:19	threshold 38:20 48:20
state 7:4,8 16:25 27:12 37:17	subjected 5:7 26:3	supporting 1:21 2:7 17:12	testifies 14:8 22:12 24:16	threw 19:3
statement 3:21 4:5 6:22 7:12 21:1 24:18 28:20,21,25 29:1 32:14 35:15 36:2,4,7 36:14,17 38:12 50:9	submit 46:20 submitted 56:10 56:12	suppose 10:8 11:20 14:1 39:24 40:8 46:14	testify 12:18 25:8 45:17	thrown 23:6
statements 30:20 37:25	subordinates 50:2	supposed 44:4	testifying 38:11	till 29:19 49:8
States 1:1,14,21 2:6 17:10	subpoenaed 13:10	Supreme 1:1,14	testimony 8:12 8:13 10:21,24 24:17 25:2 48:12 50:3	time 8:10 18:10 30:12 55:21 56:4
statute 7:19,21 9:7 14:25 15:24 18:2 24:21 25:23 33:3,7 34:24 35:17,18 39:6 43:3,9 44:9,13 54:25	subsequent 30:23 31:3 32:13,13,23,25	sure 16:1	text 27:14	timing 18:8,13 19:7
statutory 21:3 25:20 43:17	substance 25:2	survive 18:19	thank 17:7,13 27:17,21 52:22 52:23 53:3 56:9	title 3:14,22 5:4 8:6 12:15,21 13:23 15:2,2 15:12 16:22 18:5,7 27:15 27:23 28:7 41:17 44:16 49:1 54:10,17 54:19,20,21,24
stealing 49:14	substantiate 10:11	suspenders 16:5	theme 30:6	today 15:4
STEVENs 23:8 23:12 36:1,9 36:13 51:21	substitute 46:12	sweeping 21:21	theory 50:20	told 11:13 47:23
Stewart 16:2	subtitle 54:8	system 21:19 51:10,14	thing 6:5 13:13 23:16	tossed 18:17 38:20
stick 42:14	succeeds 43:5		things 52:5	totality 21:11
stop 36:17,23 46:8	sudden 6:8	T	think 5:3,9,24 8:2 10:5 11:23 12:6 13:17 16:3 17:15 19:12,15 20:2 20:20,22 21:23 23:8,8,19 24:12,14 25:10 25:15,16 26:5 26:19 27:12 29:19 31:20 33:17,20,20 34:17 35:6,9 40:15,21 43:21 53:22 54:16,23	tough 22:10
stopped 55:20	suddenly 36:25	T 2:1,1	think 5:3,9,24 8:2 10:5 11:23 12:6 13:17 16:3 17:15 19:12,15 20:2 20:20,22 21:23 23:8,8,19 24:12,14 25:10 25:15,16 26:5 26:19 27:12 29:19 31:20 33:17,20,20 34:17 35:6,9 40:15,21 43:21 53:22 54:16,23	town 20:24
strange 10:20 11:20	sue 18:14	take 9:24 39:4 39:17 41:25 46:24 47:7 52:6	think 5:3,9,24 8:2 10:5 11:23 12:6 13:17 16:3 17:15 19:12,15 20:2 20:20,22 21:23 23:8,8,19 24:12,14 25:10 25:15,16 26:5 26:19 27:12 29:19 31:20 33:17,20,20 34:17 35:6,9 40:15,21 43:21 53:22 54:16,23	traveling 32:25
strengthened 54:3	suffice 5:4	taken 18:12 35:16 40:2 51:25	think 5:3,9,24 8:2 10:5 11:23 12:6 13:17 16:3 17:15 19:12,15 20:2 20:20,22 21:23 23:8,8,19 24:12,14 25:10 25:15,16 26:5 26:19 27:12 29:19 31:20 33:17,20,20 34:17 35:6,9 40:15,21 43:21 53:22 54:16,23	trial 39:17 47:16 47:18
strike 54:19	sufficient 4:3 6:14 12:11	talking 15:4 35:11,12	thinks 7:20	trials 21:9
strong 26:6 46:7 50:15 51:19	suggest 6:21	tell 29:20	third 3:25	trier 5:9 10:5
struck 27:24 28:2	suggested 54:1 54:11	telling 12:20	thought 9:15 11:13 14:15,17 14:20,23 15:3 40:19 44:18,22 45:9 53:22	trigger 41:22
stuck 42:6 48:9	suggestions 46:7	tells 29:20	threatening 41:6	trivial 5:23,24
subject 6:11 10:25 11:1	summary 18:17 18:19 23:7 39:1 47:16,21 51:4	tempered 38:3	three 3:17 6:15 20:12	true 24:5 25:4 30:1 38:22,25 39:5,14 45:1 47:14 52:13,17
	sun 12:19	ten 49:24		truth 12:20
	superior 42:7 46:14,19	Tenn 1:24		truthfully 38:19
	supervisor 9:20 9:22 10:10 30:15,15 33:19 45:8	TENNESSEE 1:8		try 7:25 52:11 33:15
	supervisory 44:25	term 30:22 34:10 43:1 44:1		turns 7:6,21
	supervisor's 30:15	terminate 50:9		two 7:24 14:20 15:7 16:20 24:21 30:13 31:4,16 32:23
	support 54:24	terms 16:4 33:3 42:24 43:23 51:18		
	supported 27:13	terrible 4:11,18 5:2,8,13 6:7,22 6:23 7:2,12 9:1 34:18 35:23		
		test 16:7		

<p>33:2 36:25 42:9 47:15 51:4 type 16:24 24:18 24:19 47:4 types 51:25</p> <hr/> <p style="text-align: center;">U</p> <p>ultimately 47:10 Umm 7:10 unbeknownst 7:23 uncomfortable 32:12,15,17 understand 10:6 12:9 17:20 19:21 21:16 25:5 32:19 33:12,21 understanding 45:6 understood 6:21 35:24 undoubtedly 31:8 unfortunately 21:8 unimaginable 11:7 unit 9:9 United 1:1,14,21 2:6 17:10 unlawful 3:22 12:15,21 17:19 17:24 18:1 19:16 20:4,7 24:23 26:1 28:10 34:12 unlimited 7:19 unprotected 12:3 25:23 27:6,11 unusual 6:18 unwelcome 19:1 upsetting 25:19 urged 45:14 use 29:2 35:1</p>	<p>39:9 55:16 uses 5:24 29:5 29:13 usually 6:17 10:23 utter 17:17 uttered 6:23</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 3:4 11:14 value 53:25 various 30:5 verbs 41:7 verify 20:25,25 Vicarious 17:4 Vicky 1:3 3:11 victim 19:18 23:2 36:22 56:5 victims 55:15,23 56:2 victim's 20:25 victorious 48:19 view 4:3 7:4 8:2 8:3 10:16,17 11:5 13:20 16:19 viewed 14:4 VII 3:14,22 5:4 8:6 12:15,21 15:2,2,12 18:5 18:7 27:15,23 28:7 49:1 violates 9:4 violating 5:1,8 violation 8:4 Violations 8:5 virtually 7:19 43:3 54:14 55:16 volition 29:6</p> <hr/> <p style="text-align: center;">W</p> <p>wait 29:19 waiting 38:9 walks 8:5 want 12:2 32:9</p>	<p>45:12 52:5 wanted 27:10 wants 45:11 war 31:18,19,22 33:8 40:14,18 40:20 Wash 1:17 Washington 1:10,20 wasn't 8:13 20:13 31:15 watershed 33:2 way 35:20,21 37:3,6,14,17 43:8 47:7 54:25 ways 10:23 Website 24:6,7 Wednesday 1:11 went 31:23 50:5 We'll 3:3 51:6 we're 8:15,22 11:4 14:18 15:4 32:24,25 35:11 42:25 win 45:24 47:10 48:15,23 50:17 51:1,1,12 witness 8:16 10:7 11:8 25:22 38:11,13 53:11 witnesses 11:6 11:15 21:22 26:1,9 27:5,6 27:10 41:11 53:5,15 54:2,4 54:4 woman 38:18 wonderful 14:9 word 29:2,5,8,9 29:12,13,16,18 30:5 35:1,6 words 7:1 17:17 28:8 54:23 wore 4:20</p>	<p>work 44:23 45:4 45:7 worker 6:2 7:16 8:4 13:12 working 48:21 workplace 16:13 17:22 37:7 38:16 39:7 workplaces 28:5 world 13:9 wouldn't 5:4 11:19 13:3 17:5 18:10 21:2 35:19 36:3 41:8 46:16 written 15:25 wrong 8:8</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,9 34:17</p> <hr/> <p style="text-align: center;">Y</p> <p>years 48:21 Young 1:23 2:8 27:18,19,21 28:14 29:2,10 29:22 30:21 31:8,11 32:12 32:18,21 33:23 34:9,19 35:6 35:22 36:1,7 36:11,15 37:12 37:24 38:8,12 38:17,23 39:13 39:19 40:6,12 40:22,24 41:3 41:12,15,20,25 42:13 43:13 44:7,14,25 45:6 46:4,17 47:15,22 48:13 48:18,25 49:10 49:17,21 50:20 51:3,8,13,20 51:24 52:20</p>	<p>53:16</p> <hr/> <p style="text-align: center;">0</p> <p>06-1595 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <p>1:59 56:11 12 38:24 12:59 1:15 3:2 14 48:21 17 2:7 1964 50:22 1983 48:22 1988 48:20</p> <hr/> <p style="text-align: center;">2</p> <p>20 46:25 47:2 2000 53:14 2008 1:11 27 2:9</p> <hr/> <p style="text-align: center;">3</p> <p>3 2:4 38 41:5</p> <hr/> <p style="text-align: center;">5</p> <p>53 2:12</p> <hr/> <p style="text-align: center;">7</p> <p>704 28:2 704(a) 3:14,15 706(c) 16:25</p> <hr/> <p style="text-align: center;">8</p> <p>8 1:11</p>
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