Advanced Writing Strategies
District of Puerto Rico CLE

ROSS GUBERMAN
Founder and President, Legal Writing Pro and BriefCatch

ROSS GUBERMAN is the president of Legal Writing Pro LLC and the founder of BriefCatch LLC. From Alaska and Hawaii to Paris and Hong Kong, Ross has conducted thousands of workshops on three continents for prominent law firms, judges, agencies, corporations, and associations. His workshops are among the highest rated in the world of professional legal education.

Ross holds degrees from Yale, the Sorbonne, and the University of Chicago Law School.

Ross's *Point Made: How to Write Like the Nation's Top Advocates* is an Amazon bestseller that reviewers have praised as a "tour de force" and "a must for the library of veteran litigators." Ross also wrote *Point Taken: How to Write Like the World's Best Judges*, which *Court Review* called "the best book . . . by far . . . about judicial writing." He coauthored *Deal Struck: The World's Best Drafting Tips* with Gary Karl and created the online contract editor ContractCatch.

Ross's newest product, BriefCatch, is a first-of-its-kind editing add-in. Its devoted users include lawyers and law firms, judges and courts, and corporations around the world. BriefCatch was named one of TechnoLawyer's Top 10 Products of 2019.

An active member of the bar and a former attorney at a top law firm, Ross has also worked as a translator, professional musician, and award-winning journalist. *Slate* called his investigative reporting about Fannie Mae "totally brilliant and prescient," and Pulitzer Prize–winner Gretchen Morgenson wrote that his article "made even the most jaded Washingtonian take note."

For nearly a decade, Ross has been invited to train all new federal judges on opinion writing. He has presented at many other judicial conferences and for the Association for Training and Development, the Professional Development Consortium, the Appellate Judges Education Institute, and the Corporate Counsel Summit, among others.

Ross is a founding "Trusted Adviser" for the Professional Development Consortium and consults for Caren Stacy's OnRamp Fellowship. He is often quoted in such publications as the *New York Times* and *American Lawyer*.

Ross won the Legal Writing Institute's 2016 Golden Pen award for making "an extraordinary contribution to the cause of good legal writing." He was also honored as one of the 2016 Fastcase 50 for legal innovators, and his feed has been named to the ABA's Best Law Twitter list.

A Minnesota native, Ross lives with his wife and two children outside Washington, DC. Family travel has taken them everywhere from Argentina and Bhutan to Greenland and Zambia.

Warm-Ups!

TO THE HONORABLE COURT:

COME NOW, co-defendants **Wanda Vázquez-Garced**, Governor of Puerto Rico; **Inés del Carmen Carrau-Martínez**, Interim Secretary of Justice of Puerto Rico; **Pedro Janer**, Secretary of the Department of Public Safety of Puerto Rico; and, **Henry Escalera**, Commissioner of the Puerto Rico Police Department, all in their official capacities, without waiving any right or defense arising from Title III of *Puerto Rico Oversight, Management and Economic Stability Act* ("PROMESA"), 48 U.S.C. §§2101 *et seq*., and the Commonwealth's Petition under said Title or under this case and without submitting to the Court's jurisdiction, and through the undersigned attorney, very respectfully **STATE** and **PRAY** as follows:

Here, Plaintiffs failed to establish a realistic danger of sustaining a direct injury because of the statute's operation or enforcement. *Id*. Instead, they continue to rely on a hypothetical, speculative, remote, and baseless fear of prosecution that has not occurred and that cannot be

To have Article III standing, Plaintiffs' alleged injury has to be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010); *Lujan*, 504 U.S. at 560–61. Moreover, Plaintiffs' supposed injury cannot be "too speculative for Article III purposes", rather it must be "certainly impending to constitute injury in fact." *Lujan*, 504 U.S. at 565, n. 2.

➔ What did Justice Kagan use in place of the boldfaced language?

In each of **the aforementioned two** cases, a state court held that it had jurisdiction **regarding** Ford Motor Company **(hereinafter, "Ford")** in a products-liability suit **that was the result of** a car accident. The accident **transpired** in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State—**inter alia**, advertising, selling, and servicing the model of vehicle the suit claims is defective. **However,** Ford **expresses the view that** jurisdiction is improper **owing to the fact that** the particular **car that was involved** in the crash was not **initially** sold in the forum State, nor was it designed or manufactured there. We reject that argument. **Where** a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts **are permitted to entertain** the **suit that results therefrom**.

A man was injured during a festival after he **pushed** away an extra-large inflatable beachball to avoid getting hit in the head. Should **push** count as **strike, punch, or kick?**

An Amusement Device shall include, but not be limited to . . . "any device that **requires the user to strike, punch, or kick**."

From Raw to Refined: Four Core Skills

Based on an Office of Legal Counsel memo on Title IX and sex-segregated 4-H rodeos.

Skill One: Linear Moves

Under Title IX regulations, contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball, and **other sports the purpose or major activity of which involves bodily contact**." Is a youth rodeo a "contact sport"?

Imagine whittling the word cloud down to three or four core points, each expressed in a single sentence. Which points would qualify—and in what order?

1. The question is whether rodeo is some "other sport[] the purpose or major activity of which involves bodily contact." We think it is not.
2. By "bodily contact," we read the regulation to require purposeful and frequent physical contact among the sport's competitors, not contact that may result if a competitor's body hits the ground, a stationary object, an animal, or, incidentally, another competitor.
3. The events offered in the 4-H youth rodeo program are not contact sports in this sense.
4.

5. Rodeo is not a "contact sport" simply because some of its events involve wearing safety equipment to decrease the "risk of an acute injury."

6. The events offered in the 4-H youth rodeo program are not contact sports in this sense.

7. By "bodily contact," we read the regulation to require purposeful and frequent physical contact among the sport's competitors, not contact that may result if a competitor's body hits the ground, a stationary object, an animal, or, incidentally, another competitor.

Linear Moves Persuasive Model

Linear Moves Exercises

The court should _____ for three reasons.

First,
_____
_____.
Second,
_____
_____.
Third,
_____
_____.

A. For decades, under California common law, as interpreted by this Court in *Borello*, a business has been allowed to deal with sole proprietors . . . as independent contractors[.]

B. The *Borello* standard has consistently been applied to wage and hour claims of this kind . . . . *Borello* allows a court to differentiate between employees, who fall within the protections of the Labor Code, and independent contractors, who do not.

C. The opinion of the Court of Appeal would no longer allow for such differentiation . . . . Indeed, the Court of Appeal effectively eviscerates long-established California precedent[, broadly concluding instead] that any business that "suffers or permits" a service provider to work for a contracted fee has automatically "employed" that service provider . . . . [But the] cited language does not, and cannot be used to define who is an "employee" . . . .

D. Since this Court issued the *Borello* decision in 1989, it has been consistently and extensively relied upon by California courts and agencies at every level . . . .

E. In contrast, the test proposed by the Court of Appeal here is both unprecedented and unrealistic . . . [T]he Court of Appeal's redefinition of "employee" would wipe out most independent contractor relationships in California . . . .

Please analyze these provisions from Felicity Huffman's plea agreement. Consider (1) what type of provision it is, (2) whether it arises upon execution or only post-execution, and (3)

whether it applies to a party or to a non-party.

Dear Mr. Murphy:

The United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Felicity Huffman ("Defendant"), agree as follows:

Provision	Affirmative covenant/ negative covenant/ right/ future occurrence/ condition/ consequence/ legal construct?	Arises at execution or post?	Party?	Language choice?
1. No later than April 30, 2019, **Defendant will waive** Indictment and plead guilty to count one				
2. **Defendant also agrees to waive** venue				
3. **The U.S. Attorney agrees that** . . . **no further criminal charges will be brought** against the defendant				
4. **Defendant** . . . **reserves the right to argue** that her offense level should be increased by 2, not 4.				

5. **Defendant may not withdraw her guilty plea if**				
6. The U.S. Attorney agrees to recommend the following sentence to the Court: restitution in an amount **to be determined by the Court** at sentencing.				
7. Defendant agrees that . . . **[s]he will not challenge** her conviction on direct appeal				
8. **Defendant keeps the right to later claim** that her lawyer rendered ineffective assistance				
9. **Defendant hereby waives** and releases any claims				
10. Defendant				

understands that **if** she breaches any provision of this Agreement, **Defendant cannot use** that breach as a reason to withdraw her guilty plea.				

Skill Two: Authority Figures

Take the reordered linear moves and plug in the relevant authorities. Order them logically. Cut any that seem duplicative. And then think of the most efficient way to convey what each authority adds to the mix.

1. The question is whether rodeo is some "other sport[] the purpose or major activity of which involves bodily contact." We think it is not.

   7 C.F.R. § 15a.450(b)

2. By "bodily contact," we read the regulation to require purposeful and frequent physical contact among the sport's competitors, not contact that may result if a competitor's body hits the ground, a stationary object, an animal, or, incidentally, another competitor.

   ✓ *American Heritage Dictionary* ("contact sport": "A sport, such as football or hockey, that involves physical contact *between players* as part of normal play." (emphasis added))

   ✓ *Random House Dictionary*

   ✓ USA Boxing, *National Rulebook* 18–19 (2017) (providing that scores depend on the number of "quality blows" struck against an opponent)

3. The events offered in the 4-H youth rodeo program are not contact sports in this sense.

   ✓ *Williams*, 998 F.2d at 173 (concluding that field hockey is similar to a "contact sport" in part because thegame's formal rules sanction "bodily contact" as a regular occurrence within the sport)

- ✓ *Kleczek v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951, 955–56 (D.R.I. 1991) (reviewing the frequency of bodily contact in field hockey and the allowance for such contact within official game rules when evaluating whether field hockey is a "contact sport")

4. Rodeo is not a "contact sport" simply because some of its events involve wearing safety equipment to decrease the "risk of an acute injury."

    - ✓ USDA Position Statement at 5 (relying in part on the "serious risks of injuries" identified by the American Academy of Pediatrics to support application of the contact-sport exception)

    - ✓ Int'l Shooting Sport Fed'n, General Technical Rules 229 (Jan. 2020) (urging use of eye and hearing protection)

    - ✓ USA Cycling, *2020 Rule Book*

Authority Figures Applied

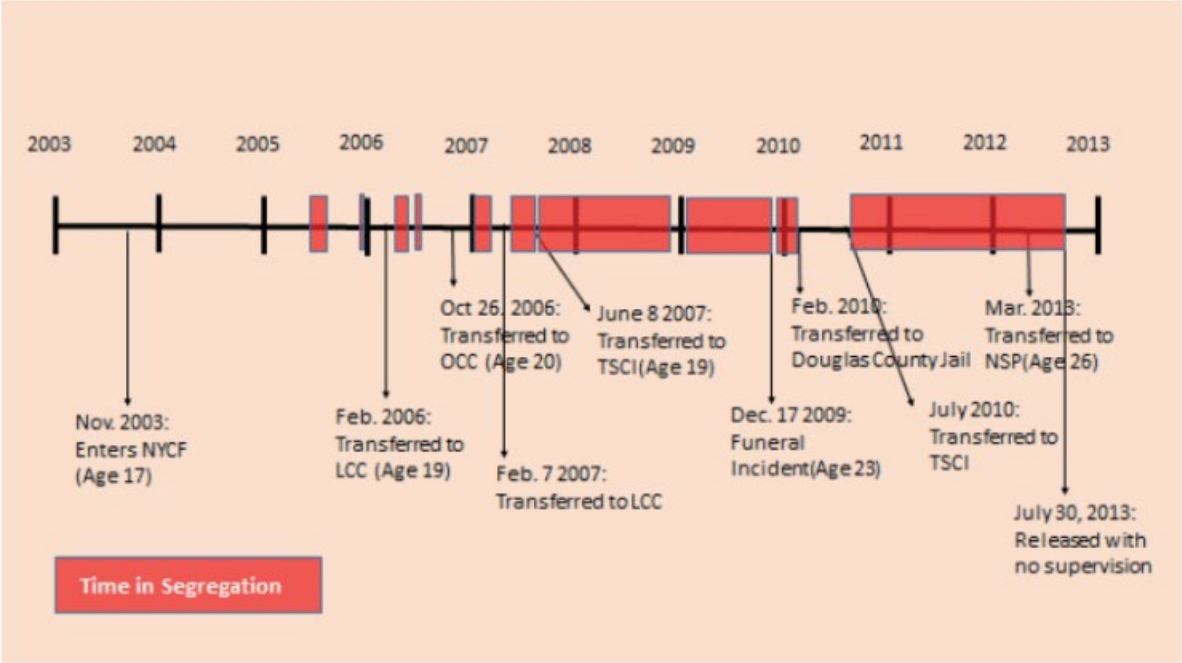
What do you think of these visuals?

While Ashley's claims are factually distinguishable from *Lithium Ion*, they are squarely on point with *In re Domestic Drywall Antitrust Litig.*, No. 13-2437, 2016 WL 3453147 (E.D. Pa. Jun. 22, 2016), an opt-out case in which the plaintiffs also sought to extend the end-date of an alleged conspiracy period:

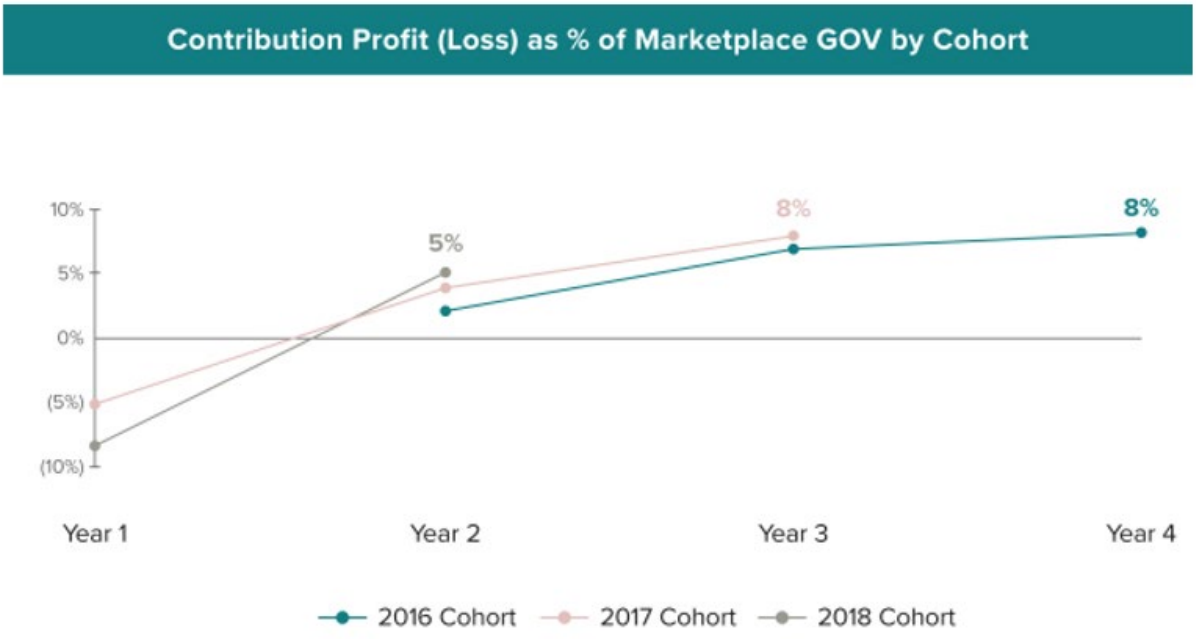
Comparison of Issues: *Lithium Ion, Drywall, and Ashley Furniture*

	Lithium Ion	*Drywall*	*Ashley*
Was the underlying conspiracy in dispute?	No	Yes	Yes
Did the new claim extend past the date the first litigation began?	No	Yes	Yes
Did plaintiff plead "specific instances" of "sensitive, non-public information being exchanged"?	Yes	No	No

Sources: *Lithium Ion*, 2014 WL 309192, at *2-4, *12; *Drywall*, 2016 WL 3453147 at *1-3.



Pet. App. 270a.



Before reaching this question, we should have heeded what the Supreme Court has said about the matter. Many times, the Court has discussed the nature of *Miranda*. And the answer could not be clearer:

Supreme Court cases referring to *Miranda* warnings as "prophylactic"	**Supreme Court cases referring to *Miranda* warnings as a "constitutional right"**
Michigan v. Payne, 412 U.S. 47, 53 (1973) • *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) • *Brown v. Illinois*, 422 U.S. 590, 600 (1975) • *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) • *North Carolina v. Butler*, 441 U.S. 369, 374 (1979) • *United States v. Henry*, 447 U.S. 264, 274 (1980) • *South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1983) • *New York v. Quarles*, 467 U.S. 649, 654 (1984) • *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) • *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) • *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) • *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) • *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) • *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991) • *Withrow v. Williams*, 507 U.S. 680, 691 (1993) • *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) • *Davis v. United States*, 512 U.S. 452, 458 (1994) • *Montejo v. Louisiana*, 556 U.S. 778, 794 (2009) • *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010) • *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) • *Howes v. Fields*, 565 U.S. 499, 507 (2012)	

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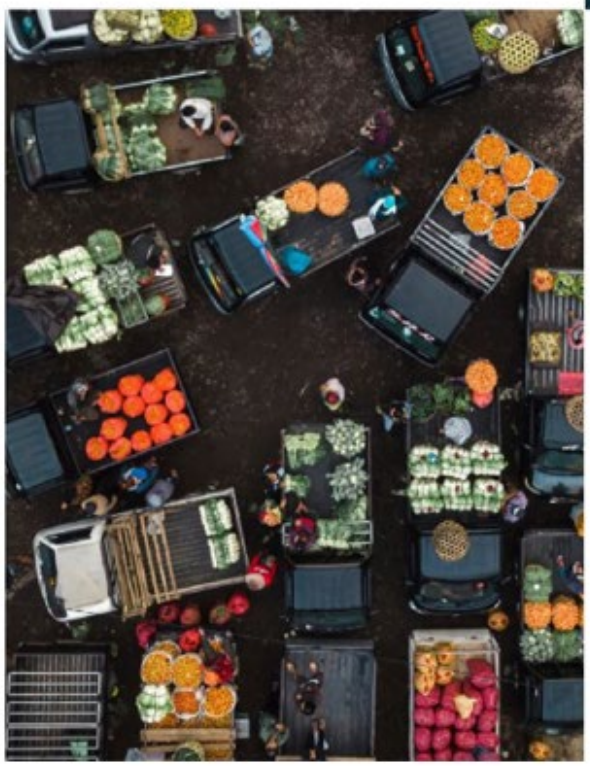
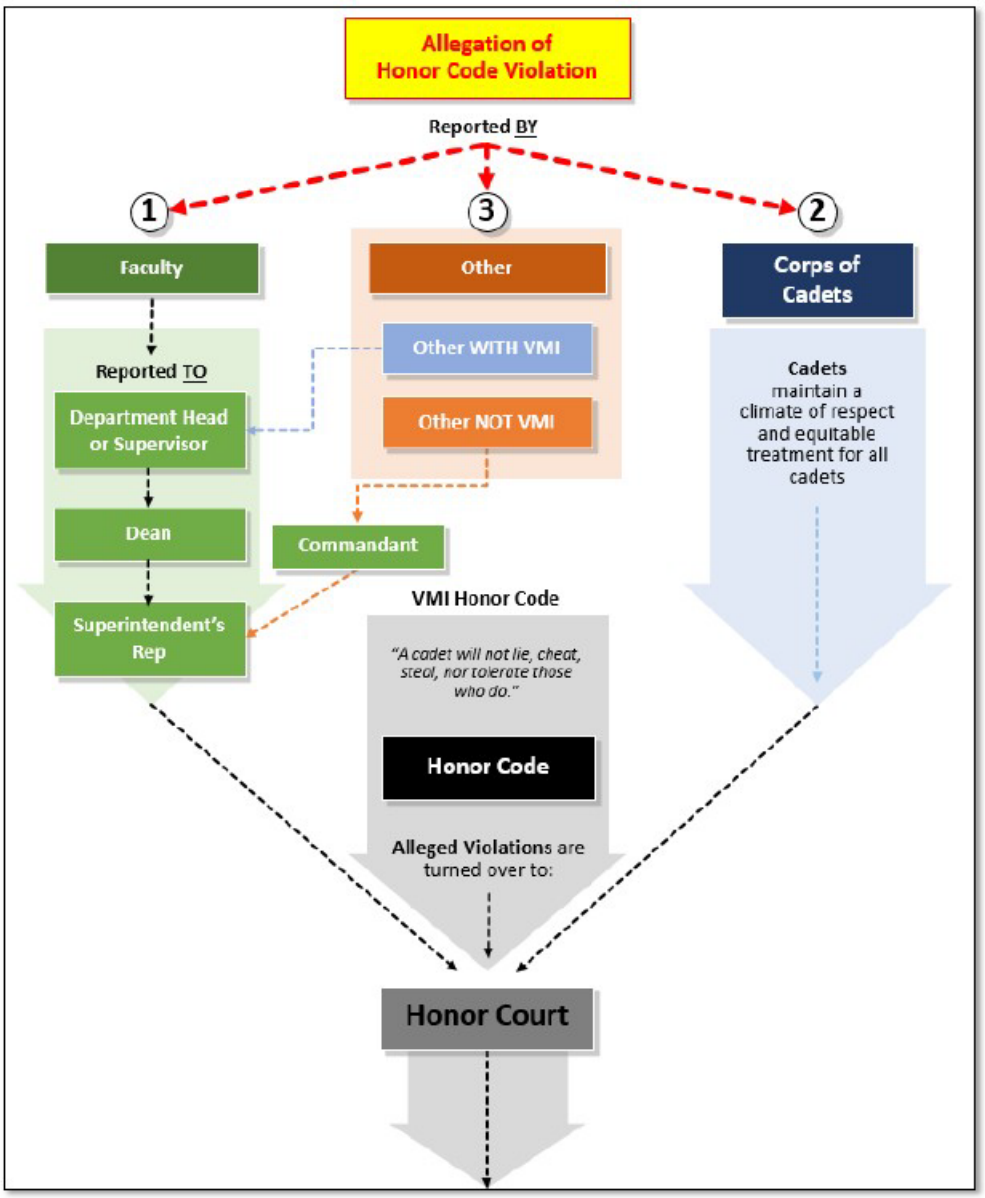
Create an open financial system for the world



coinbase

Figure 20: Flowchart for Honor Court procedures



Skill Three: Stylish

Email Style

Rank These Greetings

Hey

Hello

Greetings

Dear

Good morning/afternoon

Hi

[No greeting]

Happy [insert day]

To whom it may concern

Rank These Closings

Regards

Yours truly

Cheers

Thanks in advance

Best wishes

Sincerely

[No sign off]

Best regards

Thanks

Talk soon

Proofing: Can you find a mistake in each sentence?

1. They were field on July 1.
2. I know a good web site.
3. The hospital violated HIPPA.
4. Under the Second Amendment Complaint, you would lose.
5. The Securities Exchange Act of 1933 applies.
6. We filed it at the Security Exchange Commission.
7. Under the Administrative Procedures Act, the agency's decision was arbitrary and capricious.
8. The case was retired six months later.

***United States v. Stevens*: Patricia Millett's brief for Robert Stevens**

Replace the boldfaced terms with something tighter or punchier. Aim for vivid verbs and fewer adverbs.

This is not a case **regarding** dogfighting or animal cruelty. The government and Stevens stand together **taking a firm stance against** that. The question **in this case** is more fundamental: **whether or not** the government **has the ability to** send an individual to jail for up to five years just for making films–films that are not obscene, pornographic, inflammatory, defamatory, or even untruthful. They are controversial. But that is supposed to invigorate, not **substantially limit**, the First Amendment's protection.

The Solicitor General **adamantly claims**, however, that, **with regard to** a subject as topical as the humane treatment of animals, Congress has the power to roll back the First Amendment's protection based **upon** no more than a legislative weighing of the speech's pros and cons. **Nevertheless,** the notion that Congress can suddenly strip a broad swath of never-before-regulated speech of First Amendment protection and send its creators to federal prison, based on no more than an ad hoc balancing of the "expressive value" of the speech against its "societal costs" is alien to constitutional jurisprudence and a dangerous threat to liberty.

That is just the beginning of this statute's problems. Neither the government nor its amici can really believe the foundational premise on which their constitutional arguments rest: that images of animals being intentionally wounded or killed are valueless and harmful. One need look no further than the websites of the government's animal-rights amici, which use such images to inform, educate, and raise funds. Documentaries and photographs depicting **significantly** more gruesome dogfights . . . have fueled the animal rights movement, **provided support for** legislation, and **actively encouraged** vigorous public debate. Similar images **are commonly found in** our media, from Hemingway to hunting videos, from Charge of the Light Brigade to Conan, the Barbarian, and from the reports of investigative journalists to the work of independent documentary makers.

The government's only answer is to ensure that prosecutors and juries will inevitably agree that depictions **similar to** Conan, the Barbarian have "serious value." That is debatable. **Additionally, it** misses the point. As the seven "value" exceptions **indicate**, Congress implicitly concluded that this speech was not valueless based on its content, but only based on its viewpoint or speaker identity. **Therefore,** Congress enacted a statute, the effect of which is to **make** the freedom to speak **contingent upon** the speaker's willingness to run the gauntlet of value assessments by prosecutors and juries with a five-year felony sentence hanging over his head.

- Replace a phrase with a word
- Replace a longer word with a shorter word
- Replace a vague verb with a precise verb
- Replace a vague verb and an adverb with a single precise verb
- Replace a long transitional word with a punchier transitional word
- Shift a transitional device to add variety in sentence structure
- Replace flat language with a vivid image
- Replace a "fake" verb phrase ("TAKE into account," "PROVIDE an illustration of") with a strong verb ("consider," "illustrate")
- Replace a "to be" phrase ("IS indicative of") with a single strong verb ("suggests")
- Create a parallel sequence of strong verbs or strong nouns

Skill Four: Transitions

___But
___Indeed
___Just as
___so too
___~~That remains true~~
___To be sure
___To the contrary

A person "has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland,* 442 U.S. 735, 743-44 (1979). That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose."

Individuals do not have a reasonable expectation of privacy in images or other information that they (or others) have "voluntarily turn[ed] over to third parties" like social media sites or directly transmitted into the public sphere. *Smith,* 442 U.S. at 734-44; *see also California v. Greenwood,* 486 U.S. 35, 40-41 (1988) (no Fourth Amendment interest in trash placed at a curb for pickup; individuals had put out garbage "for the express purpose of conveying it to a third party" and for, "in a manner of speaking ... public consumption"). That remains true even if an individual uploaded an image for a "limited purpose" (for example, a job networking site).

Miller, 425 U.S. at 443. _____ the Fourth Amendment would not be implicated by using a Google search to obtain information made available on the internet, _____ is the Fourth Amendment not implicated by using Clearview to do the same.

_____, the Supreme Court observed in *Carpenter* that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." 138 S. Ct. at 2217. The Court held in that case that . . . . _____ *Carpenter* was a "narrow" decision that focused on one particular set of circumstances—obtaining cell phone records that provide a " comprehensive chronicle of the user's past movements."

None of these concerns is implicated in the case of Clearview: it does not track a person's " physical movements"; the images against which it compares a user-generated image are made publicly available to a range of third parties by voluntary acts rather than the incidental operation of a device used for other purposes. _____, the Court expressly stated in *Carpenter* that it was not "call[ing] into question conventional surveillance techniques and tools . . . . _____, the fact that four Justices did not think there was a Fourth Amendment problem in *Carpenter* goes a long way to . . . .

Notes