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MS. ALISON DAWN ANDREWS
MS. EMILY ARLEEN ROHLES
Baker Botts LLP
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002

MR. BRANDT THOMAS ROESSLER
Baker Botts LLP
30 Rockefeller Plaza
New York, NY 10112

FOR THE DEFENDANT
ANGELA COLMENERO:

MS. TAYLOR KATHLEEN GIFFORD
MR. CHARLES KENNETH ELDRED
MR. JOHNATHAN STONE
Office of the attorney general
PO Box 12548
Capitol Station
Austin, Texas 78711

FOR THE DEFENDANTS
TAYLOR COUNTY, TEXAS, ET AL.:

MR. ROBERT B. WAGSTAFF
McMahon Surovik Suttle, P.C.
400 Pine Street
Suite 800
Abilene, Texas 79601

FOR THE DEFENDANT
CITY OF ABILENE, TEXAS:

MR. RAMON G. VIADA, III
Viada Strayer
17 Swallow Tail Court
The Woodlands, Texas 77381

FOR THE DEFENDANTS
MONTGOMERY COUNTY,
TEXAS, ET AL.:

MR. DANIEL PLAKE
501 North Thompson
Suite 300
Conroe, Texas 77301

MR. BENJAMIN DEVANE GRIFFIN, II
B D Griffin Attorney at Law
501 N. Thompson
Suite 300
Conroe, Texas 77301

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FOR THE DEFENDANT
DELIA GARZA:

MS. AMY STOECKL YBARRA
Travis County Attorney's Office
Civil Litigation Division
314 W. 11th Street
Suite 500
Austin, Texas 78701

FOR THE DEFENDANT

MS. LISA VIOLET CUBRIEL
Bexar County District
Attorney's Office
101 West Nueva
7th Floor
San Antonio, Texas 78205

Official Court Reporter:

Lanie M. Smith, CSR, RMR, CRR
Official Court Reporter
United States District Court
Southern District of Texas
515 Rusk
Room 8004
Houston, Texas 77002

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EXAMINATION INDEX

PAGE NO.

Brigitte Bandit

Cross-Examination by Mr. Stone.....	5
Redirect Examination by Ms. Kempf.....	14
Recross-Examination by Mr. Stone.....	15

Plaintiffs Rest.....	17
-----------------------------	-----------

Defense Motion.....	17
----------------------------	-----------

Plaintiffs' Response.....	29
----------------------------------	-----------

Defendants Rest.....	33
-----------------------------	-----------

Questions by the Court.....	34
------------------------------------	-----------

Closing Argument

By Mr. Klosterboer.....	51
By Mr. Eldred.....	79
By Ms. Gifford.....	88
By Mr. Viada.....	105
By Ms. Cubriel.....	111
By Ms. Ybarra.....	112
By Mr. Plake.....	112
By Mr. Wagstaff.....	116
By Mr. Klosterboer (Rebuttal).....	118

Conference.....	126
------------------------	------------

1 A. I mean, that's the biggest one, so, yeah. I mean also
2 I'll change my costuming; but that goes with like pulling my
3 shirt off and stuff like that, you know.

4 Q. So let's explore that a little bit. What outfits would
10:36AM 5 you wear at an adults-only show that you wouldn't wear at an
6 all-ages show?

7 A. At an adults-only show?

8 Q. Uh-huh.

9 A. Like I just said, like something where I'm just like
10:37AM 10 wearing a thong, like having my breasts exposed.

11 Q. When you say that your breasts are exposed, are they fully
12 exposed; or are you wearing some form of like -- like something
13 covering the nipple?

14 A. They're fully exposed. The breastplate is fully exposed.

10:37AM 15 THE COURT: Wait. Say that again, ma'am.

16 THE WITNESS: The breastplate -- whenever I wear -- I
17 have -- I wear fake breasts, the breastplate; and I'll reveal
18 the full breastplate.

19 THE COURT: Oh, okay.

10:37AM 20 THE WITNESS: Yeah.

21 THE COURT: What is a breastplate? Is it like a shirt
22 or --

23 THE WITNESS: Yeah, it's kind of like a --

24 THE COURT: A complete shirt?

10:37AM 25 THE WITNESS: It's like a vest, yeah. It's like a vest

1 that goes all the way around my body, and it has fake breasts
2 on it.

3 THE COURT: All right. Go on.

4 **BY MR. STONE:**

10:37AM

5 Q. When you show your breasts during the adults-only shows,
6 are you showing your breasts below the top of your areola?

7 A. Yeah. It's fully exposed. I'll just be wearing the
8 breastplate and like a, you know, something -- a thong or
9 something to cover --

10 Q. Okay.

11 A. -- the rest of it.

12 Q. I got it. Thank you. I'm sorry. I'm slow.

13 You showed us a picture of you with a large black dildo?

10:38AM

14 A. Yeah. It's actually purple; but it looks weird in the
15 photo, yeah.

16 Q. Okay. Do you use the dildo during all-ages shows?

17 A. I would not use that during an all-ages show.

18 Q. Why not?

10:38AM

19 A. Because it's not something that would appeal to children
20 or would -- I would find appropriate for kids.

21 THE COURT: You're talking an all-adult show, how do
22 you control the admission to it? I know we talked about the
23 restaurants and so forth, but how do you control -- in another
24 one you had a liquor license, that was the reason; but how --
25 generally when you say, "an all-adult show," how restrictive

10:39AM

1 and how excluded are those?

2 THE WITNESS: I mean I would say it's just like the
3 21-up bars and clubs and stuff like that, so typically we
4 really do not see any kinds of minors in those spaces.

10:39AM

5 THE COURT: Have the minors come in? I mean the
6 restaurant or whatever, if they wanted to come into the back,
7 there's no exclusion? Do you just mention to them it's
8 inappropriate for kids; or if a parent just brings a child in,
9 do you stop a whole show just because --

10:39AM

10 THE WITNESS: I mean yeah, sometimes --

11 THE COURT: -- it's adults-only?

12 THE WITNESS: Sometimes you're in the middle of a
13 performance or something like that. It's hard to stop what
14 you're doing if you see somebody in the audience that you may
15 not have expected to be there.

10:39AM

16 THE COURT: But it's not upon your invitation? They
17 have at least some notice that --

18 THE WITNESS: They know what they're getting into,
19 yeah.

10:39AM

20 THE COURT: Who does?

21 THE WITNESS: I mean a parent or anybody who's bringing
22 a child into like a drag show.

23 THE COURT: Okay. All right. Go on.

24 **BY MR. STONE:**

10:40AM

25 Q. How do you know that they know what they're getting into

1 when they bring a child to a drag show?

2 A. When they bring a kid to a drag show?

3 Q. Yeah. If it's -- let me ask it a little differently.

4 A. Yeah.

10:40AM 5 Q. How do you know that they know what they're getting into
6 if they bring a child to a drag show that's advertised as an
7 all-ages event?

8 A. Well, okay. Yeah. We --

9 THE COURT: An all-ages event? You're talking first at
10:40AM 10 an all-ages event, how do they know what they're getting into?

11 MR. STONE: Right.

12 THE COURT: Okay. Ma'am, go right ahead.

13 A. So whenever I promote my shows, we promote them as either
14 all-ages so we understand the content and appropriateness for
10:40AM 15 the audience; or we have 18-up and 21-up and that's what's
16 recommended for the show. It's clearly on the flier and what
17 is -- you know, sometimes even IDs checked at the door for that
18 kind of stuff as well.

19 THE COURT: Well, movies have a rating system, don't
10:41AM 20 they?

21 THE WITNESS: Exactly, yeah. It's the same kind of
22 thing.

23 THE COURT: What is it? If a movie is rated R and a
24 parent wants to bring a child, are they stopped at the door or
10:41AM 25 warned at the door?

1 THE WITNESS: No, they're not stopped at the door or
2 warned at the door.

3 THE COURT: That's what the rating are, the R ratings,
4 PG and so forth?

10:41AM 5 THE WITNESS: Yes, exactly.

6 THE COURT: It's on your brochures?

7 THE WITNESS: Yeah.

8 THE COURT: Are most shows like that?

9 THE WITNESS: Do most shows have the age rating on
10:41AM 10 them?

11 THE COURT: Yes.

12 THE WITNESS: Yes, they do.

13 THE COURT: Okay.

14 **BY MR. STONE:**

10:41AM 15 Q. You testified that most of your routines are not sexual,
16 right?

17 A. I would say most of my routines are not sexual, yeah.

18 Q. But some are?

19 A. But I do have some sexual shows, yes.

10:41AM 20 Q. Would you ever perform one of your sexual shows at an
21 all-ages event?

22 A. No.

23 Q. Why not?

24 A. I mean what I consider to be sexual, which is like having
10:42AM 25 my breasts exposed, right, which is what is defined by the law

1 like that we keep referring to as what is defined as nudity,
2 things like that, you know, that kind of outline of the
3 guidelines of what is appropriate.

4 Q. Are you aware of any specific drag show performances in
10:42AM 5 Texas that involve performances that you believe were not
6 age-appropriate?

7 A. I'm not aware.

8 Q. Is it your contention in this lawsuit that you should be
9 permitted to intentionally perform actual or simulated sex acts
10:42AM 10 for a sexual purpose at all-age events?

11 A. I don't want to do that, but that's not what this law
12 says.

13 THE COURT: Say it again. Did you say it's not what
14 the law says?

10:42AM 15 THE WITNESS: It's not -- it's not everything that this
16 law says. That's not what my issue is. I don't want to
17 perform sex acts in front of kids.

18 **BY MR. STONE:**

19 Q. Okay. Is it your contention in this lawsuit that you
10:42AM 20 should be permitted to perform nude at all-ages events?

21 A. I don't want to perform nude, but "nude" is also not
22 clearly defined.

23 Q. When you say, "nude" is not clearly defined --

24 THE COURT: Are you talking about the proposed law or
10:43AM 25 the law about to go into effect?

1 THE WITNESS: Yeah, the law about to go into effect.
2 "Nude" is not clearly defined. And even if, you know, the butt
3 is exposed or something like, how do you -- how do you define
4 it, especially with drag performers? They have a bunch of
5 padding on and tights and stuff like that. Would that be
6 considered their butt in that case or not? You know, like it's
7 just not clear.

8 THE COURT: One of -- aside from you talking
9 breastplates, they say -- we heard yesterday and into today
10 about this padding. What are you talking about, the padding?

11 THE WITNESS: Padding. So typically somebody who
12 doesn't have hips will put on, like -- it's almost like couch
13 cushioning on their hips to kind of round it out and give them
14 that shape. So they have layers and layers of clothes on to
15 give this illusion, this more female figure illusion. And the
16 same thing with my breastplate. Would my breastplate be
17 considered nude? Because it's not my actual breasts. I do
18 have actual breasts; but with my breastplate, it's something
19 that I'm wearing that looks like breasts. But are those
20 breasts? Could I do that in an all-ages show? You know, it's
21 just not clear what nude is, especially when it comes to drag
22 performers.

23 THE COURT: All right. I'm just mentioning -- since
24 it's come up from time to time, you may or may not want to get
25 into the issue. Is it real or is it -- I wouldn't say an

1 illusion, or just not really the person you're dealing with,
2 because all day long yesterday and today we've heard about
3 breastplates and hip padding and so forth. So I'm just saying
4 don't hesitate to get into that area if you want to, because
10:44AM 5 it's in it now. Whether I'll address it or not, I'm not sure;
6 but I just wanted to mention to everybody at least it's now in
7 the mix in the second day, okay? Because almost everybody
8 mentioned those two items that they use routinely in the drag
9 shows.

10:45AM 10 Go on.

11 MR. STONE: Yes.

12 **BY MR. STONE:**

13 Q. You understand that nudity is already prohibited by law
14 currently?

10:45AM 15 A. Yeah. It's already prohibited, yeah.

16 Q. And there's already a definition in the law of nudity that
17 predates SB 12?

18 A. Oh, I'm very well informed with that law, yes, as a
19 performer.

10:45AM 20 Q. And you weren't confused about whether your performances
21 were nude before SB 12, were you?

22 A. I mean in accordance to that law, yeah.

23 MR. STONE: Okay. I pass the witness, Your Honor.

24 THE COURT: Ladies and gentlemen, any questions?

10:46AM 25 MR. VIADA: No, Your Honor.

1 THE COURT: Okay. Redirect, please?

2 REDIRECT EXAMINATION

3 BY MS. KEMPF:

4 Q. Good morning, Ms. Bandit.

10:46AM 5 A. Good morning.

6 Q. I have just a few questions.

7 THE COURT: The microphone, pull it in, please.

8 Thank you, Your Honor. Chloe Kempf for the
9 plaintiffs.

10:46AM 10 BY MS. KEMPF:

11 Q. Ms. Bandit, even if you don't consider your breastplate
12 nude, are you worried that it could be considered a prosthetic
13 that enhances your female characteristics?

14 A. Absolutely. That's what it's intended to do.

10:46AM 15 Q. And even if you don't consider your breastplate nude,
16 could you worry that it's an exhibition, actual or simulated,
17 of female genitals?

18 A. Yes.

19 Q. Do you worry that your dildo is an exhibition of actual or
10:47AM 20 simulated male genitals?

21 A. Yeah.

22 Q. When you perform with your dildo, you mention that it's at
23 adult-only shows?

24 A. Yes.

10:47AM 25 Q. And I believe yesterday you testified sometimes that

1 happens at a venue called Cheer Up Charlies?

2 A. Yes.

3 Q. At Cheer Up Charlies can people who are not necessarily
4 admitted to the venue sometimes see your performances?

10:47AM

5 MR. STONE: Objection, Your Honor. This is outside the
6 scope of my cross-examination.

7 THE COURT: Is it?

8 MS. KEMPF: No, Your Honor. He asked if her dildo
9 performances were performed for audience of adults-only, I

10:47AM

10 believe.

11 THE COURT: Okay. I'll overrule the objection.

12 A. Yes, people can clearly see the show from outside the
13 venue.

14 **BY MS. KEMPF:**

10:47AM

15 Q. Like from where, for example?

16 A. From the sidewalk.

17 MS. KEMPF: Okay. No further questions, Your Honor.
18 Thank you.

10:47AM

19 THE COURT: Okay. Sir, do you want to follow something
20 up, please, sir?

21 MR. STONE: Yes, Your Honor.

22 THE COURT: Yes. Go right ahead.

23 **RE-CROSS-EXAMINATION**

24 **BY MR. STONE:**

10:47AM

25 Q. You said that it's at Cheer Up Charlies the stage of the

1 venue is visible to people who are not on the property, right?

2 A. Yeah.

3 Q. Would you consider those individuals to be present for the
4 show?

10:48AM

5 A. I think it would depend on if they were actually watching
6 or not. They can see -- if they're walking by, I probably
7 would not consider them being present at the show; but I have
8 had people stop outside of the fence, not even be -- because
9 they are with people who cannot come into the 21-up space,
10 watch the show from outside the club and I would consider them
11 to be watching the show.

10:48AM

12 Q. So even though they didn't pay for a ticket or get ID'd to
13 enter the venue, you would still consider them present even
14 though they're not actually within the physical confines of the
15 venue itself?

10:48AM

16 A. Yeah, they are -- they are present and they want to even
17 talk with me after the show and stuff like that. They'll talk
18 with me literally through the gate.

19 MR. STONE: I pass the witness, Your Honor.

10:48AM

20 THE COURT: All right.

21 Anything further?

22 MS. KEMPF: No, Your Honor.

23 THE COURT: Thank you, ma'am. Please step down.

24 Call your next witness.

10:48AM

25 MR. KLOSTERBOER: Your Honor, the plaintiffs are

1 prepared to rest. We were going to ask the Court to clarify
2 which exhibits are admitted possibly for the record.

3 THE COURT: Have you kept a record?

4 MR. KLOSTERBOER: We have, Your Honor.

10:49AM 5 THE COURT: I think we have a record up here, but we
6 could easily go over that.

7 MR. KLOSTERBOER: Yes, Your Honor. And then the
8 plaintiffs rest.

9 THE COURT: What says the defense? Anything further?
10:49AM 10 Are you going to call a witness?

11 MR. STONE: No, Your Honor, we're not. We would like
12 to do a Rule 52(c).

13 THE COURT: Which is?

14 MR. STONE: We're asking for the judge to enter a
10:49AM 15 directed verdict in this case.

16 THE COURT: All right. Okay. It's a motion for
17 directed verdict on what grounds?

18 MR. STONE: Well, Your Honor, we believe that -- or for
19 judgments on the merits, I should say.

10:49AM 20 We believe that the plaintiffs have not presented
21 sufficient evidence to establish that they intend to -- that
22 they have standing, because they intend to engage in future
23 conduct that is arguably proscribed by the law that they're
24 challenging and for which there's threat of future enforcement
10:49AM 25 that is substantial.

1 If I could use the screen, I'd like to show you
2 the law and go through each of these and show you how they've
3 not presented evidence.

4 THE COURT: Sure. Absolutely.

10:50AM

5 And the video comes on now, doesn't it? Is the
6 screen on? Do you mind my turning the lights on?

7 MR. STONE: No. It's fine, Your Honor.

8 THE COURT: Okay. Now, there's the text up there
9 somewhere because we have it on our screens. There it is.

10:50AM

10 MR. STONE: All right. Your Honor, I'd like to go
11 through each of these in kind and talk about the evidence that
12 has been presented during the case --

13 THE COURT: Do you have a darker copy, or is that it?

14 MR. STONE: I can zoom in, Your Honor.

10:50AM

15 THE COURT: All right. That will help.

16 MR. STONE: Okay. So this is SB 12. This is
17 Exhibit 10, Plaintiffs' Exhibit 10. I'm on Page 7 here, and
18 I've highlighted portions of it that I want to talk about as we
19 go through this. I'm going to talk about the evidence that has
20 been presented, or the lack of evidence in this case, that has
21 been presented.

10:51AM

22 In this case we have the elements of what is the
23 law that they're alleged -- that they're challenging that their
24 conduct is potentially proscribed by. Here "'sexually oriented
25 performance' means a visual" --

10:51AM

1 THE COURT: People have a tendency, in all my years, to
2 speed up when they're reading; so slow down. We sure have
3 plenty of time.

4 MR. STONE: Yes, Your Honor. I'll try to take this
5 slow and --

6 THE COURT: That may be clearer. Go on.

7 MR. STONE: "'Sexually oriented performance' means a
8 visual performance that features: A performer who is nude, as
9 defined by Section 102.051 of the Business and Commercial Code
10 or any other performer who engages in sexual conduct and" --
11 and that's really important -- "and appeals to the prurient
12 interest in sex."

13 So let's start with "nude." We heard testimony
14 from the witnesses that they have policies, procedures and
15 practices that prohibit nude performances.

16 THE COURT: Let me mention it to you this way. We're
17 going to do this, no doubt. No problem. But I don't want you
18 to cover the same thing when you use your 45 minutes, you know,
19 to sum up the case, okay? Because here it is. Because I'm
20 getting a feeling that you could use this as a summary, but
21 you're entitled to put it on at this time or get a ruling and
22 then ask later on, you know, considering it, just renew your
23 motion for -- it's called a judgment as a matter of law. What
24 do you prefer doing? Because I don't want to hear it twice.

25 MR. STONE: Your Honor, if we could, I'll try to do

1 mine in about 5 to 10 minutes; and if we renew, the only thing
2 we would add is if there's anything that I didn't cover that
3 hasn't been discussed by me with respect to this.

4 THE COURT: Fair enough.

10:53AM

5 MR. STONE: Okay. So with respect to nude
6 performances, you heard testimony from the plaintiffs that they
7 have policies, procedures and practices that prohibit nude
8 performances. Woodlands Pride actually testified that if one
9 of their performers performed nude, they would remove them from
10 the stage and prohibit them from coming back.

10:53AM

11 So nudity is already prohibited by law. It's
12 long been prohibited by law. There's nothing new in SB 12
13 prohibiting nude performances. This all already existed.

14 MR. KLOSTERBOER: Objection, Your Honor.

10:53AM

15 I would ask counsel -- nudity is not actually
16 currently proscribed by Texas law. I'd ask the counsel to
17 point -- indecent exposure is a statute, but it's a generalized
18 incorrect legal statement to say, "nudity."

19 MR. STONE: I'm trying to make -- Your Honor, I'm just
20 trying to make my record here.

10:53AM

21 THE COURT: No, sir. He's correct, okay? We're
22 dealing now with switching from live witnesses, okay? So
23 you're dealing with the law, okay? I don't have all the other
24 definitions in front of me, but you've heard it. So if you
25 want to correct it, fine. Don't use any shortcuts.

10:54AM

1 MR. STONE: Okay, Your Honor.

2 The evidence that was presented by the plaintiffs
3 was that they have policies, practices and procedures where
4 they do not perform nude. They have not performed nude in the
5 past, and they do not intend to perform nude in the future in
6 front of children at all-ages events. That was significant.

7 You did hear testimony from Brigitte a moment ago
8 that some of her performances do involve nudity, but they're at
9 adult-only events. They're not at all-ages events with minors.
10 So there is -- there is no standing that the plaintiffs can
11 show because they don't intend to engage in conduct that is
12 proscribed by law.

13 Moving on to the factors under "What is sexual
14 conduct" -- and, again, under "sexual conduct" it's not just
15 the sexual conduct. It also -- there's an "and" in here. "It
16 also has to appeal to the prurient interest in sex."

17 Going through each of these, first "Actual or
18 simulated sexual acts, including vaginal sex, anal sex and" --

19 THE COURT: Hold on a second. You've got a marker
20 there. Where are you reading from?

21 MR. STONE: This is Page 6 of Plaintiffs' Exhibit 10.
22 This is Section 43.28, "Certain sexually oriented performances"
23 and it says: "Sexual conduct means" -- so this is from the
24 previous screen that they were just looking at.

25 So there's two categories here. The first is

1 "nude performances." That's what we just talked about. And
2 the other is "Any other performer who engages in sexual
3 conduct" and then of course for both and "it appeals to the
4 prurient interest in sex."

10:55AM 5 So now I'm going through the second category of
6 "any other performer who engages in sexual conduct."

7 And I'm sorry I'm going -- I'll slow down,
8 Your Honor.

9 So we want to go through each of these and talk
10:55AM 10 about whether or not they've established standing and whether
11 their claims should be permitted to continue.

12 The first is "An actual or simulated sex act,
13 including vaginal sex, anal sex and masturbation."

14 The Court heard testimony from the plaintiffs
10:56AM 15 that they have policies, practices and procedures that prevent
16 simulated sex acts.

17 We asked them -- we asked the plaintiffs if one
18 of their contentions in this case is that they should be
19 permitted to perform simulated sex acts at their all-ages
10:56AM 20 performances and the witnesses that we've asked that question
21 have all said, "no," that's not something that they're
22 challenging in this case. There's been no testimony from any
23 of the plaintiffs that they intend to perform actual or
24 simulated sex acts for the purposes of a prurient interest in
10:56AM 25 sex at an all-ages event. None of the plaintiffs testified

1 that there's vaginal sex -- simulated vaginal sex, anal sex or
2 masturbation at their performances at all-ages events.

3 So with respect to this portion of their
4 challenge to the law, this Court should find that they do not
10:56AM 5 have standing because they do not intend to engage in conduct
6 that is arguably proscribed by the law. This Court should
7 dismiss their claims with respect to 1(A).

8 Under B, this is "Actual or simulated female
9 genitals in a lewd state, including a state of sexual
10:57AM 10 stimulation or arousal."

11 In this case the only evidence that you've heard
12 about simulated male or female genitals had to do with the
13 packers that Abilene Pride testified about. Now, when we
14 talked about those, Abilene Pride testified that they were not
10:57AM 15 lewd in their opinion; but more than that, I asked them: "Is
16 the packer the size of a softball?"

17 And they said, "No, it's not."

18 I asked if it was intended to simulate an
19 erection.

10:57AM 20 And they said, "No, it was not."

21 Instead they said that it was intended to
22 simulate the normal male bulge that every male has in their
23 pants. There's nothing lewd about that or every male is always
24 in a constant state of lewdness.

10:58AM 25 So by their own testimony and by the evidence

1 that they presented during the course of this case nothing
2 about what conduct that they do intend to engage in would be
3 proscribed by this portion of the law. Therefore, this Court
4 should find that they do not have standing. They have
10:58AM 5 presented insufficient evidence to show by a preponderance of
6 the evidence that they intend to engage in conduct that would
7 be arguably proscribed by this portion of the law.

8 This Court should dismiss their claims with
9 respect to that so we shouldn't have to even address this in
10:58AM 10 our close.

11 Next under C, "The exhibition of a device
12 designed or marketed as useful primarily for the sexual
13 stimulation of male or female genitals."

14 They've only in their case-in-chief presented
10:58AM 15 evidence about two devices. The first was condoms, the second
16 one was dildos. And the dildos, the testimony they just heard
17 from Brigitte was that she would not use them at an all-ages
18 event. So strike that. You just dismiss that. That's not
19 even at issue here, then.

10:59AM 20 The first one was condoms, but condoms are not
21 intended or designed and marketed for sexual stimulation.
22 They're intended to prevent insemination and to protect against
23 STDs, so they're not meant for sexual stimulation. They're to
24 prevent STDs and to prevent people from getting pregnant as a
10:59AM 25 form of birth control. Those are the only two examples that

1 this Court heard testimony about. Since neither of those are
2 at issue here -- the dildos because they're not going to be at
3 all-ages events and the condoms because they're not designed
4 and marketed primarily for sexual stimulation -- the plaintiffs
5 have failed to prove by a preponderance of the evidence that
6 they intend to engage in conduct that could arguably be
7 proscribed by the statute or by this portion of the statute.
8 This Court should dismiss --

9 THE COURT: Slow down, please.

10 MR. STONE: Thank you.

11 THE COURT: The court reporter needs to get it down.

12 MR. STONE: I'm sorry, Your Honor.

13 THE COURT: Go on.

14 MR. STONE: So the Court should dismiss their claims
15 with respect to the challenge to this portion of the law.

16 Moving next to D, "Actual contact or simulated
17 contacts occurring between one person and the buttocks, breast
18 or any part of the genitals of another person."

19 This Court heard testimony from the plaintiffs
20 that the only contact that occurred between the performers and
21 attendees at their all-ages shows involved hugs, involved
22 touching each other's waists during conga lines and
23 accidental/incidental contact when they brushed up against
24 somebody unintentionally. This does not obviously meet the
25 standard. Why? Because of that second element where it has to

10:59AM

11:00AM

11:00AM

11:00AM

1 be "appeals to the prurient interest in sex." There's nothing
2 appealing to a prurient interest in sex by hugging somebody or
3 accidentally brushing up against them. They presented --
4 because they failed to prove -- provide any evidence that these
11:01AM 5 incidental contacts could be construed even arguably as having
6 a prurient -- as appealing to a prurient interest in sex, they
7 have failed to show by a preponderance of the evidence that
8 they wish to engage in conduct that would be proscribed by this
9 portion of the statute; so their claims challenging their
11:01AM 10 portion of the statute should be dismissed and they should not
11 be permitted to continue on with it to closing.

12 Under E, "Sexual gesticulations using accessories
13 or prosthetics that exaggerate male or female sexual
14 characteristics."

11:01AM 15 This has been the crux of their case. This has
16 been what the overwhelming majority of the evidence that they
17 put on has been about. This is what they've been focused on
18 during their case-in-chief. But there's a couple of problems,
19 Your Honor.

11:01AM 20 First they testified -- and let me -- I can take
21 this down now if it would be helpful.

22 THE COURT: You want the lights back on, then; or are
23 you going to get into more?

24 MR. STONE: I'm going to -- I'm just going to wrap up,
11:02AM 25 but this is the final part.

1 Their claim really boils down to their contention
2 that drag is inherently appealing to a prurient interest in
3 sex; but they haven't produced any evidence and so regardless
4 of the gesticulations that are done, it could potentially
5 violate this law. But they haven't produced any evidence that
6 would support that. It's been wholly conclusory and
7 speculative testimony that they've produced on their part.
8 They've presented -- they have videos of these performances
9 that they allege could potentially violate SB 12, but they
10 haven't provided those videos to this Court. Instead they've
11 provided sterile still images from these performances and then
12 took the stand and just declared "These performances could
13 arguably violate the law in the eyes of a viewer."

14 But they didn't actually produce the videos so
15 this Court could assess that or so that we could test the
16 validity of that evidence.

17 So this Court -- they haven't met their burden of
18 preponderance of the evidence with respect to that portion of
19 it. Posing -- you know, these sterile images of them holding
20 dollar bills or smiling and posing next to children do not
21 prove that those performances and the gesticulations done
22 during those performances could be construed as appealing to a
23 prurient sexual interest. Additionally they testified that in
24 their opinion they didn't appeal to a prurient sexual interest.
25 Again, all they could do is speculate about what might be in

1 the minds of others.

2 I would note that The Woodlands Pride event --
3 they talked -- they mentioned, I believe, that tens of
4 thousands of people have attended their performances and
5 they've never once had a complaint about the routines that were
6 performed at their all-ages events. I believe there was
7 testimony that the police were only called once at one of the
8 Abilene Pride events; and in that case they didn't know why the
9 police were called, nobody was arrested, there was no citations
10 issued. The police visited because they were called and then
11 left.

12 So there's been no evidence that there's a
13 substantial likelihood that this law would be enforced against
14 them, nor that they intend to engage in conduct that could
15 arguably be proscribed by this portion of the law.

16 In sum, Your Honor there's insufficient evidence
17 for the plaintiffs to meet their burden of showing by a
18 preponderance of evidence -- preponderance of the evidence that
19 they have standing to challenge each of the aspects of SB 12;
20 and this Court should dismiss their claims today.

21 In the event that the Court finds that they have
22 established standing with respect to some, but not all of the
23 elements of this law, then we would ask the Court to dismiss
24 their claims with respect to those that they have not
25 established standing for.

1 Thank you, Your Honor.

2 THE COURT: Does anybody else want to add anything at
3 this time? And you'll be speaking of course. I'm talking to
4 the -- what is it -- the six other parties here, that you
5 certainly will be able to speak; and I encourage you to do so,
6 at least to some extent relative to, you know, your clients.

11:05AM

7 Does anybody want to add anything to the defense
8 motion?

9 (No response.)

11:05AM

10 THE COURT: All right. Let's hear the response from
11 the plaintiff, please.

12 MR. KLOSTERBOER: Yes, Your Honor. May I approach the
13 podium?

11:05AM

14 THE COURT: Again, make it brief. And then I have a
15 number of questions that I've been working on from the
16 beginning, and then I want to ask those questions. If they've
17 already been answered -- they may have been -- it will move
18 pretty quickly.

19 Yes, sir?

11:05AM

20 MR. KLOSTERBOER: Yes, Your Honor. First plaintiffs
21 object to the defendant misstating the witnesses' testimony.
22 I'm not going to take the Court's time to go through
23 one-by-one, but just a few examples. They claim that there was
24 no --

11:05AM

25 THE COURT: What we just heard?

1 MR. KLOSTERBOER: Correct, Your Honor. The attorney
2 general's summary misstated witness testimony throughout the
3 summarization. I didn't want to interrupt, but we want to
4 preserve our objections to every -- pretty much every statement
5 he made.

11:06AM

6 But, for example, he testified that --

7 THE COURT: He didn't testify.

8 MR. KLOSTERBOER: Sorry. He claimed --

9 THE COURT: He claimed.

11:06AM

10 MR. KLOSTERBOER: -- that the Court heard that no one
11 mentioned that any kind of sex toy or dildo could be seen by an
12 all-ages -- by people of all ages. Brigitte Bandit clearly
13 testified that she does use the dildo at her shows at Cheer Up
14 Charlies, where kids can see through the fence at the condo
15 building right across the street.

11:06AM

16 They also didn't establish that sexual lubricant
17 couldn't be considered for sexual stimulation.

18 And on things like the nudity, they somehow
19 ignore the testimony of Extragrams, which testified that
20 wardrobe malfunctions are common, that people have accidentally
21 shown things that would be considered nude under this law.

11:06AM

22 There was a misstatement of the law that counsel
23 said that nudity is illegal in Texas. We would like to see a
24 statute to that effect. It's indecent exposure, which actually
25 has a knowledge requirement, and recklessness; and it has an

11:07AM

1 intense requirement. It's not -- just being naked outside in
2 your backyard is not a crime here in Texas as far as I have
3 seen the law. There has to be an intent to arouse or gratify
4 someone.

11:07AM

5 But overall I think the defendants' motion should
6 be denied because it's clearly foreclosed. They're applying
7 the wrong legal standard to this case.

8 THE COURT: What is it?

9 MR. KLOSTERBOER: It comes from *Turtle* --

11:07AM

10 THE COURT: What is it? In your estimation, what is
11 it?

12 MR. KLOSTERBOER: It comes from *Turtle Island Foods*. I
13 have the -- it's April 2023, from this year. I have copies for
14 the Court, if you'd like.

11:07AM

15 THE COURT: What court?

16 MR. KLOSTERBOER: Fifth Circuit. April of 2023.

17 THE COURT: Hand it up. You've got two copies?

18 Give me one second just to look through this.

19 MR. GRIFFIN: What is the page/line?

11:07AM

20 MR. KLOSTERBOER: It's starting on Page 3.

21 Judge Edith Brown Clement, this April from the
22 Fifth Circuit.

23 THE COURT: Judge Clement, a senior judge out of
24 New Orleans.

11:08AM

25 MR. KLOSTERBOER: Correct, Your Honor.

1 THE COURT: All right. Go on.

2 MR. KLOSTERBOER: So at the bottom of Page 3 the Court
3 can see the ruling at the bottom of the left-hand column.

4 THE COURT: Hold on a second. All right.

11:08AM 5 MR. KLOSTERBOER: The Court says: "Tofurky challenges
6 the statute prior to enforcement."

7 THE COURT: Where are we looking? Yeah, I see it. A.
8 Go on.

9 MR. KLOSTERBOER: Correct, Your Honor.

11:08AM 10 "And pre-enforcement free speech challenges" --
11 now going back to the top of the page, the column: "Chilled
12 speech or self-censorship is an injury sufficient to confer
13 standing. Tofurky need not have experienced an actual arrest,
14 prosecution or other enforcement action to establish standing.
11:08AM 15 All that Tofurky must show is, one, it intends to engage in a
16 course of conduct arguably affected with a constitutional
17 interest, two, that the course of action is arguably proscribed
18 by the statute and, three, that there exists a credible threat
19 of prosecution under the statute."

11:09AM 20 So here in the defendants' motion, the attorney
21 general's motion, they're really focusing on Prong Number 2.
22 They're trying to say that there is arguably no proscription
23 under the statute.

24 But that's where if we turn to Page 5 of this
11:09AM 25 case, there was a dispute in this Tofurky case, the *Turtle*

1 *Island Foods*; and the first full paragraph of Page 5 says and
2 here it is: "The act arguably sweeps broadly enough to capture
3 Tofurky's conduct. Though the State belabors that
4 Section 4744" --

11:09AM

5 THE COURT: It's "belabors," isn't it?

6 MR. KLOSTERBOER: It is belaboring, Your Honor.

7 -- "and the acts, definitions for 'misbrand' and
8 'misrepresent' require intentional mislabeling, Tofurky's
9 alternative reading is arguable."

11:09AM

10 THE COURT: So what does that tell us?

11 MR. KLOSTERBOER: That tell us that all plaintiffs have
12 to show is the chilling of speech that's at issue. If they
13 feel like their speech is arguably proscribed by the statute,
14 the Fifth Circuit tells us that's enough.

11:10AM

15 THE COURT: I think the other circuits and maybe the
16 Supreme Court also say that's enough.

17 MR. KLOSTERBOER: Correct, Your Honor.

18 And I don't know if you have any other further
19 questions, but otherwise we ask you to deny defendants' motion.

11:10AM

20 THE COURT: Okay. All right. I've considered the
21 motion for judgment as a matter of law. It's denied at this
22 time.

23 All right. Anything else?

24 MR. STONE: No, Your Honor. The State defendants rest.

11:10AM

25 THE COURT: All right. Unless told otherwise, I'll

1 assume our additional six defendants rest at this time.

2 I want to look at the list of questions I drew up
3 at the beginning, okay, and see if I need some time to add any
4 of those.

11:10AM

5 Okay. It starts out I'm -- looking first at the
6 plaintiffs. This will give you an idea of how basic it was and
7 why I'm going to rule quickly down through a total of eight
8 items. They may all have been covered. I've not reread it
9 since the beginning of trial. Give me one moment.

11:11AM

10 Right to the point this is just for the response
11 to the plaintiff. If I need defendants' input, I'll find it.

12 If the Court finds that intermediate scrutiny
13 should apply, do you still prevail?

11:11AM

14 MR. KLOSTERBOER: Yes, Your Honor. Even if the Court
15 applies intermediate scrutiny under the third and fourth
16 factors of the *O'Brien* test, the statute at issue has to be
17 unrelated to the suppression of speech, which here on its face
18 and through the legislative history is related to the content
19 and suppression of speech.

11:11AM

20 And the fourth factor of *O'Brien* the Court still
21 has to show -- or the State still has to show that it is less
22 restrictive -- let me find the exact --

23 THE COURT: In any event, your position is?

11:12AM

24 MR. KLOSTERBOER: It is still not narrowly tailored
25 enough for intermediate scrutiny, Your Honor.

1 THE COURT: Stay standing. You've got more coming.

2 Doesn't the State have a compelling interest in
3 protecting minors from explicit sexual performances? Don't
4 they have some concern or role or none?

11:12AM

5 MR. KLOSTERBOER: Yes, they do, Your Honor. Plaintiffs
6 would concede in the cases in *Ginsberg* and *Reno* they still
7 apply strict scrutiny, but they all concede that the State does
8 have a compelling interest in protecting youth generally.

9 THE COURT: All right.

11:12AM

10 Is it your position that the performances that we
11 heard testimony on are speech, expressive conduct or both?

12 MR. KLOSTERBOER: Your Honor, they're treated the same
13 under the analysis, so both.

11:13AM

14 THE COURT: Okay. Are your claims against the
15 municipalities that we have with us today and local officials
16 ripe?

17 MR. KLOSTERBOER: Yes, Your Honor.

18 THE COURT: Why?

11:13AM

19 MR. KLOSTERBOER: There is no factual dispute that
20 would change anything to the Court's analysis. This is a
21 facial challenge to the law. No factual development is
22 required.

11:13AM

23 Their main contention with ripeness blurs with
24 their standing argument. They're trying to say we have to wait
25 for an affirmative step, which we'll get to that later; but for

1 ripeness purposes, ripeness is not an issue in this case.

2 THE COURT: Okay. If that Senate bill adequately
3 defines what behavior is restricted and only addresses certain
4 behavior in front of minors, how is that overbroad?

11:13AM

5 MR. KLOSTERBOER: Your Honor, first of all, we would
6 say it goes far beyond just pure behavior or conduct and it's
7 overbroad in many --

8 THE COURT: How does it go beyond?

11:14AM

9 MR. KLOSTERBOER: That the performances that the
10 plaintiffs demonstrate, host, perform are inherently expressive
11 conduct, which is treated as speech. As this Court found just
12 three years ago in the *D. Houston* case, even exotic dancing is
13 constitutionally protected under the first amendment and
14 subject to at least some heightened scrutiny.

11:14AM

15 THE COURT: All right. Would enjoining the law -- and
16 by the way, enjoining the law -- I'm having to write a final
17 judgment; but there's also some interaction, as we said, with
18 the need for a temporary restraining order to allow me to write
19 the judgment one way or the other.

11:15AM

20 But would enjoining the law from going into
21 effect cause all additional claims against the local defendants
22 to become moot? So now we're finally enjoining the law. Would
23 all the others become moot, too, as sort of a large blanket?

11:15AM

24 MR. KLOSTERBOER: Yes, Your Honor. At least one court
25 has done that before. There was a case in Indiana where

1 plaintiffs in a case similar to this sued the state and local
2 officials and the court found against the state that the entire
3 statute was null and void and dismissed as moot the municipal
4 defendants.

11:15AM 5 THE COURT: Was that one of the typical cases? Because
6 I know we found cases from -- I think it was Tennessee, Montana
7 and Utah already.

8 MR. KLOSTERBOER: Correct, Your Honor.

9 THE COURT: Okay. So that the one case?

11:15AM 10 MR. KLOSTERBOER: This was not a drag case. This was
11 just a case kind of in the context of immigration.

12 THE COURT: Which states? What was the holding again,
13 the bottom-line holding?

14 MR. KLOSTERBOER: The bottom line was if the Court
11:16AM 15 invalidates the entire law and finds that that is proper as to
16 some of the defendants, other defendants there were dismissed
17 as moot.

18 I think our concern here is that we don't know if
19 the AG would concede, you know -- they're going to try to argue
11:16AM 20 that some parts of the law can stand up on their own and that's
21 why there's three different enforcement prongs: Section 1
22 against the AG, Section 2 against counties and municipalities
23 and Section 3 against the prosecutors. It all hinges on
24 Section 3 because that's the definition; so if the Court found
11:16AM 25 that the statute is not severable, which we believe is true

1 because it all hinges on that Section 3, then it could possibly
2 theoretically dismiss it as moot.

3 THE COURT: All right. When you do your amended
4 findings of fact, address that point, okay? Address that
11:16AM 5 point. And I use that as a blanket, does it cover everybody.
6 We can hear from the other side during the summation if you
7 want to; but, yeah, just --

8 MR. KLOSTERBOER: We'll do, Your Honor.

9 THE COURT: I had in my mind what ought to be done, how
11:17AM 10 large the so-called blanket is, because we want to do it once,
11 not coming back later so it enures to everyone, I think; and
12 that's why you-all have input on this point. But if you think
13 you need to elaborate to lock that in, let me know so we don't
14 do all of this again. That's why I converted it from a
11:17AM 15 preliminary injunction to a trial on the merits, which is why I
16 need a little more time to write and a little more time where
17 you can put in an amended final -- an amended findings of fact
18 and conclusions of law. And on the government's side, one at
19 all, because we don't have any yet, not that I'm familiar with
11:17AM 20 on the record.

21 All right. Let me see what else I have here.

22 What irreparable harm would occur if the senate
23 bill was to go into effect before I reach a decision on
24 enjoining, if I do enjoin, was made? What's the harm in
11:18AM 25 letting it go in and in a couple of weeks max probably you'll

1 have a final judgment in this case?

2 MR. KLOSTERBOER: Your Honor, again we believe as of
3 Friday there will be irreparable harm. Plaintiff
4 Brigitte Bandit and Extragrams both testified that they have
5 upcoming performances and would arguably be subject to criminal
6 penalties through aiding and abetting liability for the
7 businesses.

8 That's why 360 Queen Entertainment has already
9 canceled all upcoming events. They testified that they need
10 time. It takes time and money to schedule the drag performers
11 to come to their business; so right now they're already shut
12 down by this law and their free -- the Fifth Circuit and
13 Supreme Court have always said that the chilling of speech
14 itself, violating the First Amendment is an irreparable harm in
15 and of itself.

16 THE COURT: Okay. Thanks.

17 All right. Let's take a look at the defense
18 questions.

19 Now, this is Mr. Rohles?

20 MR. ELDRED: I'm Mr. Eldred.

21 THE COURT: Yes, here it is. Mr. Eldred. The tables
22 are -- there are so many people at each table, I'm now at the
23 middle table.

24 Okay. Let's see.

25 "The law singles out behavior at a drag show, but

1 not similar behavior at other forms of entertainment. Why
2 doesn't that alone make this a content-based restriction?"

3 And I have a definition for myself here, okay?
4 Content-based restrictions limit speech based on its subject
5 matter. In contrast, a content-neutral restriction applies to
6 expression without regard to its substance.

7 So I have two lawyers standing here. Ms. Gifford
8 also. Whoever wants to take it, what's the position?

9 MS. GIFFORD: Your Honor, I'll take the First Amendment
10 questions.

11 THE COURT: Pull the microphone in, please. Pull it in
12 by the base, okay? And it will pick up right there. Yes,
13 ma'am.

14 MS. GIFFORD: So, Your Honor, our position is this is
15 not a content-based ordinance or law. What is being restricted
16 is a sexually oriented performance. There is absolutely
17 nothing in Senate Bill 12 that singles out drag or drag shows.
18 In fact --

19 THE COURT: So you're saying they shouldn't be
20 concerned?

21 MS. GIFFORD: No, they should not be concerned.
22 They're challenging a law, Your Honor, that does not exist.

23 THE COURT: All right.

24 MS. GIFFORD: There's no ban on drag and nothing in
25 Senate Bill 12 specifically bans drag. What it bans is

1 sexually explicit performances, whether it's drag or whether it
2 is a more traditional type.

3 THE COURT: So some of the other comments made by
4 political leaders after it's signed should be either ignored or
5 is it that broad or is it that narrow?

11:21AM

6 MS. GIFFORD: Your Honor, I think under the *O'Brien*
7 case it specifically talks about this, that comments by certain
8 or particular legislatures as to why they voted for something
9 does not make the -- does not imbue that into the reason that
10 the entire bill was passed.

11:21AM

11 THE COURT: You say it speaks for itself as a matter of
12 law, and you can refer to the legislative history of what
13 controls and what comes into effect.

14 MS. GIFFORD: Correct. And in fact Senator Hughes
15 specifically said that this law is broader than drag. It is
16 not about drag. It is about protecting children from seeing
17 sexually explicit performances.

11:22AM

18 THE COURT: Okay. Now the next question.

19 MS. GIFFORD: Okay.

11:22AM

20 THE COURT: There are already state laws that ban
21 behaviors such as sexually oriented performances in front of
22 minors, for example, laws regulating adult entertainment.

23 MS. GIFFORD: No, Your Honor. There are laws
24 regulating adult entertainment, but there is nothing that
25 specifically deals with what is proscribed by Senate Bill 12;

11:22AM

1 so while there are laws related to, for example, lewdness, that
2 is very specific and narrow and it is -- Senate Bill 12
3 addresses things that are not currently addressed in the Penal
4 Code.

11:23AM

5 MR. ELDRED: May I add something, Judge?

6 THE COURT: Yes, sir.

11:23AM

7 MR. ELDRED: The definition of "nude" comes from the
8 Business and Commerce Code, and that's from the so-called pole
9 tax. It's a 5-dollar tax on people who'll go to a sexual
10 performance such as strip show, and children are not allowed to
11 go to that. So nude performances are regulated by that law.

12 THE COURT: Okay. Thanks. I think you've answered my
13 next subquestion. Hang on.

11:23AM

14 All right. What about the parents' role, if any,
15 relative to what we're talking about here, drag shows, shows
16 and parades and so forth?

11:24AM

17 MS. GIFFORD: Your Honor, so the Supreme Court in *Reno*
18 has specifically said that the State absolutely has a
19 compelling interest in protecting children; and with regard to,
20 for example, a parade there is no way for a parent to consent
21 to whether their child sees a parade that comes by that may
22 have sexually explicit performances on it. I mean if you think
23 about taking your child to a parade, you are not anticipating
24 that there may be lewd sexual gesticulations that appeal to the
25 prurient interest in sex, and so there's no -- there's no

11:24AM

1 reasonable way for a parent to give that consent in advance of
2 seeing the performance.

3 THE COURT: All right. What about a show that they
4 know it's going to be a drag performance?

11:24AM

5 MS. GIFFORD: In that case, Your Honor, I think that
6 the law is still narrowly tailored, because to carve out
7 exceptions like that would, I think, create a lot of mischief
8 under this law; and, again, the State has a compelling interest
9 under *Reno* in protecting minors.

11:25AM

10 THE COURT: Okay. Thank you.

11 Okay. That's been covered.

12 What about your position in Senate Bill 12
13 surviving the concept of strict scrutiny?

11:25AM

14 MS. GIFFORD: Your Honor, even if the Court were to get
15 to a strict scrutiny standard, this law is --

16 THE COURT: By the way, I tell all my trial lawyers if
17 you see me looking down like this, if my eyes are open, even if
18 they're closed, I am listening. So again, I'm not taking a
19 particular interest in that one question; but generally address
20 it, please, counsel.

11:26AM

21 MS. GIFFORD: Yes. No, you have been very attentive.
22 At no point have I thought you were not paying attention.

23 THE COURT: That's all right.

24 MS. GIFFORD: So strict -- we still survive strict
25 scrutiny because the law is narrowly tailored to prevent the

11:26AM

1 exposure of children to sexually oriented performances; and,
2 again, under *Reno* the State has a compelling interest in
3 protecting children.

4 THE COURT: The next one was already resolved
5 concerning the possibility of a jury trial. We've discussed
6 that already.

7 MS. GIFFORD: Your Honor, with regard -- if I may go
8 back to your last question --

9 THE COURT: Yes.

10 MS. GIFFORD: -- Senate Bill 12, while it does limit
11 sexually explicit graphic things that can happen in front of
12 children, it by no means restricts the plaintiffs or anyone who
13 may fall under Senate Bill 12 in their ability to express
14 whatever message it is they're intending to express. All it
15 does is limit what they can do in front of someone under the
16 age of 18.

17 THE COURT: Okay. Okay. We've already touched that,
18 and the rest is wrap-up.

19 All right. If any of our other six defendants
20 want to express a position on the questions -- on those set of
21 questions -- there were eight questions that I had for the
22 defendant -- you're free to do so now. Otherwise, I'm seeing
23 no hands.

24 All right. Now, at this point we're going to
25 take just a short break. When we get back in, this is how

1 we're going to work it. For the purposes of my keeping track,
2 okay, I will turn a timer on. Each side has a maximum of 45
3 minutes. I do not think you need it, okay? In the summation I
4 will permit the plaintiff to have a -- since they've got a
5 burden of proof and so forth, you've got -- I'll get it back to
6 you just to wrap up so wherever we are you'll have an
7 additional five minutes after we're through directing our
8 questions to all of the defendants, to all of the seven
9 entities here. They're all going to have a chance to come in.
10 The State has been granted of maximum of 45 minutes. I don't
11 think you need that much time, okay? But we've got time, and
12 you need to express the positions you've got.

13 All right. I'm not going to set any time limit
14 on the six other defendants; so if you want to come up for a
15 brief time to address any specific item, fine. If you get too
16 long, I can cut you off; but certainly I want everybody to have
17 the opportunity. I'll call on you by name, and then you can go
18 for five minutes. So if we go -- and I don't think each side
19 is going to take 45 minutes each, but we're looking at or
20 pushing about an hour and a half for a full wrap-up.

21 Okay. I now have it's 11:31, according to that
22 clock of mine. Get your closing together. We're going to be
23 back in -- well, it's a little after that -- at 11:50. That's
24 15, 18 minutes. We're going to get back in at 11:50, and at
25 that time the plaintiff can go on and then the defendants --

1 I'm going to ask our individual defendants: Do you prefer
2 going first or last, ladies and gentlemen? You tell me.

3 MR. GRIFFIN: Last.

4 MR. PLAKE: Last.

11:30AM

5 THE COURT: Last. Okay. So you use 45 minutes. Again
6 I'm not kicking myself. If you said you need it, fine. It's
7 an important enough case. You've got 45 minutes, then we'll
8 wrap it up. So we're looking at, if everybody takes all their
9 time, about an hour and 45 minutes; and we'll be through with
10 this whole matter.

11:31AM

11 Also think if there's any housekeeping questions
12 because my complete wrap-up will be concerning the findings of
13 fact and conclusions of law. What I need are time frames. You
14 may want to think about this. I want the plaintiffs to submit
15 an amended one, okay, to fill in any gaps or any questions that
16 you perceive that I may have.

11:31AM

17 And also I'll ask the defendant if they desire to
18 file it; but if they do, how much time do you need to submit
19 that because I'm going to start -- I can't really start working
20 on it until I get all of those in to see what your thoughts are
21 if I want to incorporate anything into a final judgment from
22 each one, but I do want you to write it in effect that you
23 would get everything you want, assuming the judge signs it, and
24 the same for the state. I've not decided this case, and once
25 again I'll reiterate with a few comments the purposes of a

11:32AM

1 temporary restraining order just to allow me to do something
2 you don't do very often, write a final judgment, instead of us
3 coming back here and doing it again.

4 So it could theoretically have one purpose, two
11:32AM 5 purposes or whatever; but in my own mind I just need more time
6 to get you a final judgment that you then can either settle out
7 or take it somewhere else.

8 All right. By the way, I need to tell this
9 story. I had a young lawyer in here one time and there's an
11:32AM 10 old saying that we all know. You never threaten a judge with
11 appeal. We know it's coming, okay? And we know -- as the
12 Court is no doubt aware, we know what that means also.

13 But I had a young man. It was his first time in
14 federal court and we had an audience like, in effect, we have
11:33AM 15 around the table. It was a lot of other experienced lawyers.
16 So he said, "Judge, we strongly disagree. We need to take you
17 immediately on appeal."

18 I've only done this once.

19 I said, "Well, counsel, really?"

11:33AM 20 I said, "Well, you know" -- and it's true we have
21 about five or six appellate judges on the 12th floor -- "what I
22 want you to do is get your papers together. It's early in the
23 day, and all these others. Get your papers today, round up
24 three of them up, there tell them the problem; and if they
11:33AM 25 disagree with what I did, come down and tell me."

1 He didn't know if a federal judge tells you to
2 "Wrap up your papers and go to the 12th floor," so he starts
3 putting the papers together and walks out; and as he got into
4 the gallery in that first row of chairs, one old-time lawyer
11:33AM 5 said, "Young man, you've just been had. You better just shut
6 up and sit down and the Judge will get back at you."

7 All right. Thank you so much. It's now 11:35,
8 and we'll see you back -- what did we say? 10 minutes to 12?
9 That's it, and we'll wrap it up. Okay. Thank you.

11:34AM 10 THE LAW CLERK: All rise.

11 THE COURT: Okay. You're free to leave.

12 (Court is in recess.)

13 THE LAW CLERK: All rise.

14 THE COURT: All right. Thank you. Be seated, please.

11:50AM 15 Before we get underway, I have one more question
16 for both the plaintiff and the defendants. By the way, I'm
17 going to use the words or the two words "*mens rea*." It means
18 "guilty mind," okay?

19 Okay. What is the *mens rea* requirement of
11:51AM 20 Senate Bill 12 as it pertains to the criminal enforcement of
21 the law? What is the *mens rea* requirement of the bill as it
22 pertains to the criminal enforcement of the law?

23 Okay. Plaintiff first. Do you want to just
24 respond to that one question?

11:51AM 25 MR. KLOSTERBOER: Yes, Your Honor, I think with regard

1 to the criminal part, Section 3 only, we don't challenge the
2 defendants' contention that you could incorporate the
3 recklessness, knowingly or intentional, into the Penal Code;
4 but that wouldn't apply to the civil part of Section 1.

5 THE COURT: All right.

6 MR. KLOSTERBOER: So it's still strict liability for
7 Section 1.

8 THE COURT: Yeah, but we're talking about defining -- I
9 mean the money find aspects -- the *mens rea* requirement
10 generally for the whole court, because there are some criminal,
11 quasi-criminal penalties, correct?

12 Is there any *mens rea* requirement for somebody
13 like passing in the street and looking?

14 MR. KLOSTERBOER: Yeah. We believe that recklessness
15 doesn't save the law --

16 THE COURT: Hold it. That term was brought up at least
17 once somewhere, all right?

18 MR. KLOSTERBOER: Right.

19 THE COURT: Just address it, how it pertains to this
20 case, to this statute.

21 MR. KLOSTERBOER: Yes, Your Honor. We would concede
22 that Section 3, it would be recklessness, knowing or
23 intentionally. We argue the statute is still unconstitutional.
24 Even recklessness --

25 THE COURT: Does that Section 3 require a *mens rea*

1 aspect?

2 MR. KLOSTERBOER: It doesn't on its -- on its -- in the
3 text, no, but even if they incorporate the recklessness
4 standard, it doesn't say which element goes to it. It's very
11:52AM 5 different from the existing obscenity law.

6 THE COURT: Yeah, but what's your position on that? At
7 least give me that.

8 MR. KLOSTERBOER: We are okay with incorporating a
9 *mens rea* of recklessness, knowingly or intentionally; but
11:53AM 10 Section 3 is still unconditional.

11 THE COURT: Counsel, do you want to add anything to
12 that? I mean, he said there was some sort of a concession
13 or -- that's a rare word in this case -- but a concession to
14 the other side; but I want -- do you have any additional input
11:53AM 15 on that matter?

16 MS. GIFFORD: So, Your Honor, the Penal Code says that
17 if a statute does not explicitly state what the *mens rea* is,
18 then the recklessly, knowingly, intentionally *mens rea*
19 automatically applies; and so there is a *mens rea* for the
11:53AM 20 criminal --

21 THE COURT: To that extent?

22 MS. GIFFORD: To that extent.

23 THE COURT: Okay. Thank you.

24 MS. GIFFORD: The criminal aspect of it.

11:53AM 25 And furthermore, on the civil penalties I think,

1 you know, the statute is clear. It says that a person who
2 controls the premises of a commercial enterprise may not allow
3 an event to happen; and so I would say that that's not
4 absolutely --

11:54AM

5 THE COURT: Okay. Anybody else want to add to that?

6 (No response.)

7 THE COURT: All right. You can split up the summary if
8 you want. Who's going to take the lead on that?

9 MR. KLOSTERBOER: Your Honor, it will be

11:54AM

10 Brian Klosterboer, please.

11 THE COURT: Okay. Hang on. What do you estimate your
12 time is approximately?

13 MR. KLOSTERBOER: Your Honor, about 20 to 25 minutes.
14 I'll save the rest for rebuttal.

11:54AM

15 THE COURT: All right. If you can get close to the 45
16 minutes on either side, I'll give you a five-minute notice,
17 something like that.

18 All right. The lectern is yours, counsel, if you
19 prefer that.

11:54AM

20 MR. KLOSTERBOER: Thank you, Your Honor.

21 As the Court has heard from plaintiffs in this
22 case, drag performances are a type of artistry that is
23 meaningful and significant to countless Texans. Senate Bill 12
24 explicitly targets and regulates content. The attorney general
25 in their argument has blurred what the rule is for content and

11:55AM

1 viewpoint-based discrimination. They argue that sexually
2 oriented performance, which is the name of the statute, is not
3 a content-based restriction; however, that argument is
4 foreclosed by this Court's own finding in the *D. Houston* case
11:55AM 5 as well as from *Reno versus ACLU*, which they cite. We do have
6 copies for the Court of both of these cases if you would like
7 to receive them.

8 THE COURT: If you want to, hand them up. If you
9 would, you may hand them up and give them to my case manager.

11:55AM 10 Joseph, hold those until we're done, okay? Thank
11 you.

12 Okay.

13 MR. KLOSTERBOER: I'll pass out the other two. There
14 are two more cases I'd like to hand to Your Honor. This is
11:56AM 15 *Brown versus Entertainment Merchants Association*.

16 THE COURT: I tell you what. Joseph, why don't you
17 hand me mine also.

18 MR. KLOSTERBOER: And this is Your Honor's own case
19 *D. Houston, Inc. versus United States Small Business*
11:56AM 20 *Administration*.

21 As I mentioned, this Court has already found and,
22 as the Supreme Court has now held numerous times, the
23 Constitution does not permit the government simply to ban
24 sexual performances. Nude dancing, exotic dancing, sexually
11:56AM 25 explicit content -- those things all fall within the protection

1 of the First Amendment. The only exception that is recognized
2 by the First Amendment is obscenity. Current existing Texas
3 law --

4 THE COURT: Recognized by whom? The Supreme Court
5 case?

11:57AM

6 MR. KLOSTERBOER: Correct, Your Honor.

7 THE COURT: All right. Go on.

8 MR. KLOSTERBOER: That is the Court's holding in the
9 *Reno* case, which we'll talk about a little bit more in a
10 minute.

11:57AM

11 THE COURT: Is that *Reno* Janet Reno, the former
12 attorney general; or is it somebody else?

13 MR. KLOSTERBOER: I'm actually not entirely sure. I
14 believe so. I know it was an ACLU case; but I do not know,
15 Your Honor.

11:57AM

16 THE COURT: All right. Go on.

17 MR. KLOSTERBOER: The most extreme -- so what we're
18 going to hear today, as the plaintiffs testified, they arguably
19 and credibly fear that they are subject to this law. This law
20 takes effect on Friday. It comes with steep criminal
21 penalties, a year in jail, up to a 10,000-dollar fine for any
22 commercial enterprise and under the existing 4(A)
23 pre-enforcement facial challenge --

11:57AM

24 THE COURT: Slow down a little bit.

11:57AM

25 MR. KLOSTERBOER: -- under the First Amendment,

1 plaintiffs only have to show that they have that fear that the
2 statute arguably prescribes their conduct; and here that has
3 been established.

4 As this Court noted during its questioning, SB 12
11:58AM 5 makes no allowance for parents' rights. It doesn't make an
6 exception for parents to bring a 17-year-old to a performance.

7 As the Court noted and as Brigitte Bandit
8 testified, most drag performances if they are going to be more
9 on the explicit side -- we heard a lot of testimony that many
11:58AM 10 drag shows are for all ages, but they still arguably fear that
11 the wigs they wear, the prosthetics that they wear, both the
12 breastplate, the packer are going to be targeted and that this
13 law was written in a way that will target them.

14 Similar to what the Court noted with R-rated
11:58AM 15 movies, parents currently in Texas have the discretion to bring
16 their kids to a pride parade, to bring their kids to an R-rated
17 movie and that is -- and this law doesn't even account for the
18 difference between a 17-year-old and a 3-year-old.

19 The attorney general has tried to point to
11:59AM 20 extreme examples and hypothetical examples of what kind of
21 shows could be the most sexually explicit. That is not what
22 this case is about. Plaintiffs are small businesses, two local
23 pride groups and Brigitte Bandit, who each try to cater to
24 their audience, but reasonably fear that the vague and
11:59AM 25 overbroad terms in this law will apply to them.

1 The most extreme examples are arguably already
2 proscribed by Texas law. Section 43.23 of the Texas Penal Code
3 already prohibits any person in Texas from knowingly producing,
4 presenting or directing an obscene performance.

11:59AM 5 "Obscenity" is defined by Section 43.21 of the
6 Penal Code, which means "A material or a performance" and then
7 they apply the long-standing *Miller* test. That test, to read
8 for the Court, is "The average" -- as the Court is already
9 familiar with this test -- "The average person, applying
12:00PM 10 contemporary community standards, would find that, taken as a
11 whole, the performance appeals to the prurient interest in sex
12 and describes or depicts patently offensive representations
13 and, taken as a whole, lacks serious literary, artistic,
14 political and scientific value."

12:00PM 15 THE COURT: All right. Read all of those examples
16 again.

17 MR. KLOSTERBOER: Yes, Your Honor.

18 So SB 12 obliterates --

19 THE COURT: No. No.

12:00PM 20 MR. KLOSTERBOER: -- this test.

21 THE COURT: I think you said -- isn't that the
22 definition?

23 MR. KLOSTERBOER: Yes, Your Honor.

24 THE COURT: All right. The definition had some
12:00PM 25 subsections there such as or whatever.

1 MR. KLOSTERBOER: Yes, Your Honor.

2 THE COURT: What is it? Just read those elements
3 again.

4 MR. KLOSTERBOER: There are three parts to the *Miller*
5 test. The first one is "The average person, applying
6 contemporary community standards, would find, that taken as a
7 whole, the work appeals to the prurient interest in sex."

8 The Court will recognize that that phrase,
9 "prurient interest in sex," has been cherry-picked out of the
10 *Miller* test, but is now divorced from the rest of the parts of
11 that element.

12 The second element is it must depict or describe
13 patently offensive representations and then there's a long list
14 of the kinds of vaginal, anal sex, things like that; but it
15 must be patently offensive for the second prong.

16 And then the third prong, which in *Reno* the
17 Supreme Court talks about being one of the most important
18 prongs, is "Taken as a whole, the work must lack serious
19 literary, artistic, political and scientific value."

20 That's what protects medical schools from being
21 able to have, you know, practice doing very invasive exams on
22 people's genitals and demonstrations. That also protects
23 Shakespeare performances, it protects any kind of thing that
24 has -- or books, books that have, you know, more explicit
25 material are still salvaged and saved within the Constitution

1 because of their value.

2 This law only takes four words, "prurient
3 interest in sex," divorces that. Even that part of the test in
4 *Miller* and an existing Texas law is based upon a reasonable
12:02PM 5 person's standard. SB 12 doesn't say who decides what is the
6 prurient interest in sex.

7 If you look at the text of SB 12, there is no set
8 standard. It also doesn't require it to be based on
9 contemporary community standards. That's what helps us update
12:02PM 10 things over time. So what might have appealed to the prurient
11 interest in sex in 1810 might be different from our current
12 year.

13 It also is very important that the work must be
14 taken as a whole. This law, SB 12, will allow police and
12:03PM 15 prosecutors to pinpoint and target performers, because all they
16 have to find is that one of the elements of SB 12 would appeal
17 to the prurient interest in sex; and that is really what chills
18 the free speech of plaintiffs and also other Texans.

19 The Court is very familiar with the overbreadth
12:03PM 20 doctrine, which allows for plaintiffs in a First Amendment case
21 to bring challenges. To protect their own rights, they must
22 still have Article III standing, but they also can protect the
23 rights of others. And that's why throughout our briefing we
24 use examples about things like ballet, professional wrestling,
12:03PM 25 the Dallas Cowboys Cheerleaders.

1 As the Court is reviewing and reading throughout
2 the statute, you can see that the terms on their own, all that
3 the State is claiming is that the words prurient interest in
4 sex will allow people to know what that means; but that is
5 simply not the case.

12:03PM

6 When you use those terms on their own, the
7 Supreme Court found in *Miller*, it reiterated in *Reno* that you
8 have to have the words around that term.

9 The defendants talked several times about *Reno*,
10 which we know the Court is familiar with; but we handed it to
11 the Court to review, because we think it's actually directly on
12 point and fatal to the attorney general's position in this
13 case. There the Supreme Court invalidated part of a --

12:04PM

14 THE COURT: What year is it? I'm not looking at --

12:04PM

15 MR. KLOSTERBOER: 1997.

16 THE COURT: What about that *Miller* case? What year was
17 that.

18 MR. KLOSTERBOER: *Miller* was 1973, I believe.

19 THE COURT: Who wrote that? Was that Potter Stewart?

12:04PM

20 MR. KLOSTERBOER: I am not sure, Your Honor.

21 The defendants have tried to argue that simply
22 because a statute is targeted at children that that somehow
23 creates a different constitutional analysis. That's simply not
24 true.

12:04PM

25 We also handed the Court *Brown versus*

1 *Entertainment Merchants Association*, a 2011 Supreme Court case
2 written by Justice Scalia.

3 There the State of California tried to ban the
4 sale of violent video games to minors. The law at issue in the
5 *Brown* case applied only to minors. Only people under 18 simply
6 could not buy violent video games. Once -- because that was
7 based on content, the violence of the video games,
8 Justice Scalia and the court held that it was subject to strict
9 scrutiny. Once strict scrutiny is triggered, the burden shifts
10 to the State to show that it is narrowly tailored. The State
11 of California actually adduced and showed psychological studies
12 showing the harmful effects of violent video games on minors;
13 but Justice Scalia, writing for the court, still applied strict
14 scrutiny and invalidated that statute as both overbroad and
15 under-inclusive and not narrowly tailored to the compelling
16 governmental interest.

17 So like in that case, plaintiffs here are not
18 challenging that the State of Texas has no compelling interest
19 in protecting kids. We all share that interest, but even that
20 compelling governmental interest still triggers heightened
21 scrutiny.

22 In the *Brown* case, like the one here, Justice
23 Scalia expressed a concern for the rights of parents in
24 protecting kids; but he wrote: "While some of the
25 legislation's effect may indeed be in support of what some

1 parents of the restricted children actually want, its entire
2 effect is only in support of what the State thinks parents
3 ought to want. This is not the narrow tailoring to assisting
4 parents that restriction of First Amendment rights requires."

12:06PM 5 Here the attorney general has tried to show that
6 this law is content-neutral. We have not seen any evidence of
7 that. Because the law clearly regulates sexually oriented
8 performances based on their content, the Court need look no
9 farther than the text of the law itself.

12:07PM 10 To the extent the attorney general tries to
11 dispute that, we also would encourage the Court to look at
12 Plaintiffs' Exhibit 11, which after the law was finally passed,
13 that's the final statement of intent from the Texas
14 legislature. The Texas legislature wrote: "A recent cultural
15 trend has been for drag shows to be performed in venues
16 generally accessible to the public, including children."

12:07PM 17 Farther down in Exhibit 11 that legislative
18 document continues: "While drag shows have received the most
19 media attention, SB 12 is not limited to this type of sexually
20 oriented performance. Drag shows today may be replaced by
21 other types of harmful performances in the future. SB 12
22 applies to and will protect children from sexually oriented
23 performances in general."

12:07PM 24 THE COURT: All right. That's what? Exhibit 11, you
25 say?

1 MR. KLOSTERBOER: Correct, Your Honor, Exhibit 11.

2 THE COURT: Is that one of the notices that I took?

3 MR. KLOSTERBOER: Correct, Your Honor.

4 THE COURT: Okay. I want to make sure where it's

12:08PM

5 located.

6 MR. KLOSTERBOER: Yes, Your Honor. We believe that
7 further shows the clear -- and that's why I was just saying the
8 State has conflated our arguments on content-based restriction
9 and viewpoint-based.

12:08PM

10 So the content -- the entire statute is
11 content-based regulation. It is defining performances based on
12 their content, whether it be sexual gesticulations, whether it
13 be the nudity provision, you know, this Court and other courts
14 have found that even nude dancing -- nudity in conjunction with
15 dancing is constitutional protected.

12:08PM

16 Now, the viewpoint discrimination that the
17 plaintiffs allege goes specifically to Part 5 of the definition
18 of sexual conduct; and that's the part of the law that talks
19 about performing sexual gesticulations while using an accessory
20 or prosthetic that exaggerates male or female sexual
21 characteristics.

12:09PM

22 The word "exaggerate" is where we get the
23 viewpoint discrimination, because this law does not prohibit
24 people from simply having prosthetics or accessories using
25 sexual gesticulations that exhibit male or female sexual

12:09PM

1 characteristics. This law prohibits people from exaggerating
2 those characteristics; and that's where we get at the intent to
3 target drag shows, because what drag performers -- we heard
4 testimony that it's an illusion. They use things like
12:09PM 5 prosthetic breasts, the packer, accessories like wigs, makeup,
6 clothing to create an illusion of changing, bending, showing us
7 a different gender expression and that is constitutionally
8 protected and that's viewpoint discrimination because the
9 government is now putting its thumb on the scale. They're not
12:09PM 10 prohibiting anyone from simply having accessories and
11 prosthetics and doing sexual gesticulations.

12 So, for example, if you're somebody who already
13 has male or female sexual characteristics, this law doesn't
14 prohibit you from exhibiting them. It prohibits you from
12:10PM 15 exaggerating them. And that's where we believe the entire law
16 is content-based, but specifically that provision is also
17 viewpoint-based. And they're subject to the same strict
18 scrutiny standard; but the court has just said that's even more
19 pernicious, because now the government is putting its thumb on
12:10PM 20 the scale in the marketplace of ideas and trying to suppress
21 specific viewpoints of drag artists and performers.

22 As we mention to the Court, we believe that even
23 if the Court somehow departed from all of this case law
24 requiring strict scrutiny that even under intermediate scrutiny
12:10PM 25 this law still fails. Both under intermediate or strict

1 scrutiny, when the Court is doing that analysis, you look to
2 how could the law have been more narrowly tailored; and once
3 again this is the burden on the government to show that it is
4 narrowly tailored. But there are a number of reasons why this
12:11PM 5 law is not. A few examples.

6 There's no exception for parents' rights, parents
7 to bring their teenagers to a show. There's no protection for
8 works of artistic value or scientific value. Arguably this
9 could sweep in a demonstration at a medical school of somebody
12:11PM 10 who is nude or naked showing -- and a professor trying to show
11 students what they're doing. That kind of demonstration
12 performance.

13 There's no other of the factors of the *Miller*
14 test; and that's what the *Reno* case really goes to is that
12:11PM 15 cherry-picking, just a couple of terms from the obscenity test,
16 divorced from everything else violates the Constitution, the
17 First Amendment and is also vague and overbroad.

18 That's why *Reno* is so helpful for the Court to
19 review, because it goes to the content-based discrimination,
12:11PM 20 overbreadth and the vagueness. In *Reno* the law is that the
21 Court struck down actually contained affirmative defenses for
22 people who make a reasonable mistake. Senate Bill 12 has none
23 of that. It has no affirmative defenses.

24 Brigitte Bandit testified that when she's
12:12PM 25 performing it's hard for her to stop halfway through. What if

1 she sees a kid in the back of the room? Is she supposed to now
2 run off stage because she could be liable for that? There's no
3 affirmative defenses for any kind of mistake that people make.
4 The definitions of this law also could be much more narrow.
5 The law doesn't even define the word "performer." We heard
6 testimony from The Woodlands Pride --

7 THE COURT: Do you need definitions of every term?

8 MR. KLOSTERBOER: Your Honor, you do not need
9 definitions of every term if they're subject to a reasonable
10 construction if the ordinary person would understand what it
11 means. So our claim is not that the statute fails because the
12 word "performer" is undefined, but that just adds to the
13 overbreadth and overall vagueness. Because we heard from the
14 The Woodlands Pride and Abilene Pride that they fear that any
15 person who's dancing near the stage could still be accused of
16 giving a performance because it's not defined by the law.

17 And even the *mens rea* requirement, as we conceded
18 to the Court, we, based on our reading of the Penal Code, the
19 Penal Code could incorporate the recklessness, knowledge and
20 intent standard only for the other part of the Penal Code.
21 That would not apply to -- because the first section of the law
22 amends the different part of the Texas Government Code, it
23 would not apply to that section; but even recklessness is far
24 too low of a *mens rea* element to really add any comfort to
25 performers or the venues or companies that arguably could aid

1 and abet these performers.

2 Brigitte Bandit testified that she sees people
3 outside her shows by the fence, across the street, families
4 choosing to sit there watching her. Would she be considered
5 reckless under this statute?

12:13PM

6 The *Ginsberg* case that the State cites is the
7 only case that they have cited that's actually upheld one of
8 these -- a restriction targeted at sexual content; but that
9 case was still much more narrowly tailored than this case, than
10 Senate Bill 12.

12:14PM

11 In *Ginsberg*, the law that was challenged by the
12 State of New York explicitly incorporated nearly every element
13 of the obscenity test and the Supreme Court in *Reno* talks a lot
14 about the *Ginsberg* case and how that did survive constitutional
15 scrutiny, whereas SB 12 will not.

12:14PM

16 The Court is already very familiar with the
17 concepts of overbreadth and vagueness. We illustrate numerous
18 examples in our briefs of why this law is overbroad and vague.
19 It fails to give adequate notice to artists, to performers, to
20 other people who could be swept up in this law, even Broadway
21 musicals, Shakespeare actors, the Dallas Cowboys Cheerleaders.

12:15PM

22 There are so many terms in this law that are
23 sweeping, broad and undefined. And the key point on the
24 vagueness is that the legitimate -- the legitimate interest of
25 the government pales in comparison to the overbreadth of the

12:15PM

1 law.

2 So here we don't dispute that the government
3 would have an interest in regulating those most extreme shows.
4 To the extent that they're looking at things that are actually
12:15PM 5 obscene, that is already covered and protected by existing law.

6 THE COURT: Repeat that last phrase, what you just
7 said.

8 MR. KLOSTERBOER: Yes, Your Honor.

9 So we don't dispute that there may be some drag
12:15PM 10 shows, possibly even in Texas, that are extreme and possibly
11 obscene. The State would, under the Constitution, be allowed
12 to regulate that very narrow slice of shows. That is not what
13 this law does. We would argue that existing --

14 THE COURT: Well, isn't there some statements or isn't
12:16PM 15 the law supposedly not restricted to drag shows, but you say it
16 really is?

17 MR. KLOSTERBOER: Your Honor, we believe the law is not
18 solely limited to drag shows. It does apply to any -- and
19 that's where we sweep in the Shakespeare performances, the
12:16PM 20 Dallas Cowboys Cheerleaders --

21 THE COURT: Where do you get those examples from? Is
22 it from a case, or is it one that you've used in these type
23 cases?

24 MR. KLOSTERBOER: It's through the overbreadth
12:16PM 25 doctrine. So the plaintiffs are allowed to point to example --

1 a reasonable construction of the law could be "Anyone who uses
2 an accessory or prosthetic to exaggerate male or female sexual
3 characteristics while engaging in a sexual gesticulation that
4 appeals to the prurient interest in sex."

12:16PM 5 I apologize the test is so wordy; but all of
6 those words, even taken together, are not specific. They're
7 very vague. They're overbroad. Arguably the Dallas Cowboy
8 Cheerleaders are using accessories -- fake eyelashes, makeup,
9 wigs, possibly prosthetics -- and that could appeal to some
10 people's prurient interest in sex.

11 Now, the *Miller* test would say that. The *Miller*
12 test would say it's not enough to simply appeal to the prurient
13 interest in sex in isolation from every other factor. You have
14 to also have the other parts of the test, a reasonable person
15 based on community standards, the work taken as a whole and
16 then also the value of the artistic literary merit and it can't
17 be patently offensive.

18 And so that's really, I think, what this law is
19 about. The Texas legislature might not like the *Miller* test.
12:17PM 20 Some people think that no sexual content in any way should be
21 anywhere in public, but that's what our Constitution provides
22 for. People simply have to -- and the Supreme Court cases talk
23 about this. It's incumbent on parents and people to turn their
24 eyes because we in this country value free speech and
12:18PM 25 expression; and that really gets to the prior restraint of the

1 law, Your Honor, Section 2. No defendant in this case has
2 actually tried to defend Section 2 of the law, but that is an
3 even more egregious constitutional violation because it's a
4 clear prior restraint on speech.

12:18PM 5 The attorney general's attorney actually misspoke
6 when they said that this law does not apply to performances in
7 front of minors. It does. Section 2 of the law actually
8 entirely prohibits any sexually oriented performance, including
9 drag performances, on all public property. It says that
12:18PM 10 municipalities and counties may not authorize any such
11 performance. That is an absolute restriction, even if it's
12 just a group of adults.

13 THE COURT: Did you say -- "including drag
14 performances"? Is that your wording; or is it the wording in
12:18PM 15 the statute or any supporting documents?

16 MR. KLOSTERBOER: That is my wording, Your Honor, based
17 on the statute and legislative history.

18 THE COURT: All right.

19 MR. KLOSTERBOER: So I apologize for that.

12:19PM 20 But the point being any kind of sexual
21 performance on any public property with no age restriction
22 attached. So even a group of adults who tries to rent out a
23 room at maybe a public community college with only people 18
24 and up would still be banned from anything that arguably comes
12:19PM 25 within the statute.

1 THE COURT: And you're also considering one of the
2 plaintiffs? I'm going to have a show in a car dealership,
3 right?

4 MR. KLOSTERBOER: Yes, Your Honor.

12:19PM 5 THE COURT: All right. Go on.

6 MR. KLOSTERBOER: Yes, Your Honor.

7 THE COURT: That's not public property.

8 MR. KLOSTERBOER: Correct. Yes.

9 So the Section 1, which I'll get to in a minute,
10 talks more about the private property.

11 THE COURT: All right. Go on.

12 MR. KLOSTERBOER: But the public property which I think
13 all of the plaintiffs except 360 Queen Entertainment allege,
14 you know, that they have and intend to continue having shows on
15 public property, which this law prohibits, which is a clearly
16 unconstitutional prior restraint.

17 The defendants have also failed to cite the four
18 federal court cases just in the last two months that have
19 struck down or blocked very similar laws to this one. In
20 Tennessee a federal court permanently enjoined a law that tried
21 to ban all adult cabaret entertainment, which the court
22 actually found to also be viewpoint discrimination and
23 content-based discrimination and overbroad and vague.

24 The law here in Texas is actually more
12:20PM 25 unconstitutional than the law in Tennessee.

1 THE COURT: How is that?

2 MR. KLOSTERBOER: The Tennessee statute explicitly
3 incorporated the three-part *Miller* test into that statute, but
4 they added an element of "any material harmful to minors" and
12:20PM 5 that's why the court found it went beyond *Miller* to prohibit
6 more than obscenity, but there actually were some safeguards in
7 that statute that are entirely lacking here.

8 So we would encourage the Court to -- that's the
9 *Friends of Georges, Inc. versus Mulroy* and we've cited it in
10 our pleadings and have a copy if the Court needs; but that is a
11 very helpful case.

12 THE COURT: What is that one?

13 MR. KLOSTERBOER: That comes from the Western District
14 of Tennessee, June 2023; and it was a permanent injunction.

12:21PM 15 THE COURT: 2023?

16 MR. KLOSTERBOER: This year, Your Honor, yes.

17 THE COURT: Because I know I think Utah and Montana
18 also have cases.

19 MR. KLOSTERBOER: We'll provide it to the Court.

12:21PM 20 Yes, Your Honor, there has been a number of state
21 legislatures who have enacted similar laws to this one,
22 publicly coined as "the drag ban" and that is the wording of
23 Government Abbott coming from the Exhibit 20, I believe.

24 THE COURT: Did you say "Exhibit 20"?

12:21PM 25 MR. KLOSTERBOER: Yes, Your Honor. Less than a week

1 after signing the drag ban.

2 THE COURT: I'm familiar with it. I just want to find
3 it.

4 MR. KLOSTERBOER: 23, Your Honor.

12:22PM 5 THE COURT: 23.

6 MR. KLOSTERBOER: Yes, Your Honor. So as I was saying,
7 similar state legislatures have passed these laws that our own
8 state leaders have called "banning drag" in public. It was
9 permanently enjoined by the federal court in Tennessee this
10 June.

12:22PM

11 In Florida there was a preliminary injunction
12 blocking a Florida law that targeted drag performances by
13 calling them "adult live performances."

14 THE COURT: What is that aimed at? What is it? Is it
15 a final judgment or a preliminary injunction or what?

12:22PM

16 MR. KLOSTERBOER: The Florida case is a preliminary
17 injunction, Your Honor.

18 THE COURT: Okay. When was it issued?

19 MR. KLOSTERBOER: June 23rd, 2023.

12:22PM

20 THE COURT: All right. You may want to hand that one
21 up, too, because we've got -- we started accumulating some; so
22 rather than us start running the copies, if I have an interest
23 in a case, it would be a lot easier.

24 MR. KLOSTERBOER: We'll go ahead and pass up a few of
25 them, Your Honor.

12:23PM

1 The other two, one comes from Utah.

2 THE COURT: Yeah, that I'm familiar with. But go on
3 and discuss it.

4 MR. KLOSTERBOER: The Utah case was slightly different
5 because it was a local government that tried to cancel a drag
6 performance; but the federal court on June 16, 2023, still
7 found that it was a clear violation of the plaintiffs' First
8 Amendment rights and allowed the drag performance to continue.

9 And in Montana just recently on July 28th --

10 THE COURT: Montana we have.

11 MR. KLOSTERBOER: Great, Your Honor. That case, a
12 federal court actually has it -- they had a hearing yesterday,
13 I believe, on the preliminary injunction --

14 THE COURT: That was a TRO, I believe.

15 MR. KLOSTERBOER: The TRO was issued on July 28th. I
16 haven't had time to check how things went yesterday; but as of
17 July 28th, they had blocked and that one is actually similar to
18 here in Texas because the law there tried to prohibit all
19 sexually oriented shows and here we have a law trying to block
20 all sexually oriented performances.

21 So defendants fail to even mention or distinguish
22 the extremely recent federal court cases unanimously blocking
23 all of these attempts to target drag and to suppress speech
24 more broadly.

25 Just in conclusion, Your Honor, just two more

1 things -- three more things I want to mention before closing.
2 Can I get a time check?

3 THE COURT: You're at 29 minutes.

4 MR. KLOSTERBOER: Okay. So just a couple more things
5 and then I'll reserve the rest.

6 On standing each plaintiff testified to their
7 credible fear that this law will be enforced against them.

8 Under the Fifth Circuit case that we shared with
9 the Court, the *Turtle Island Foods*, that case cites a case
10 called *Speech First versus Fenves*. That's a 2020 Fifth Circuit
11 decision written by Judge Edith Jones; and writing for the
12 Court she wrote that "In a pre-enforcement challenge under the
13 First Amendment, plaintiffs need only show that they have an
14 intention to engage in a course of conduct arguably affected
15 with a constitutional interest."

16 THE COURT: You're talking about prospective?

17 MR. KLOSTERBOER: Correct, Your Honor. A
18 pre-enforcement challenge, prospective relief. We don't have
19 to show that anyone has taken any action against us. All that
20 we have to show is that there's an intention to engage in a
21 course of conduct, which the plaintiffs attested they want to
22 continue the kinds of performances they've been doing.

23 Number 2, they have to show that their intended
24 future conduct is arguably proscribed by SB 12. Their
25 interpretation of the law, as we saw in the *Turtle Islands*

1 *Foods* case, their interpretation of the law doesn't have to be
2 fully correct. It's just arguable. They fear that their
3 speech will be chilled by the policy -- by the law.

4 The third is the threat of future enforcement;
12:25PM 5 and importantly the key quote from Judge Edith Jones'
6 *Speech First* case is that she writes: "When dealing with
7 pre-enforcement challenges to recently enacted statutes that
8 facially restrict expressive activity by the class to which the
9 plaintiffs belong, courts will assume a credible threat of
10 prosecution in the absence of compelling contrary evidence."

11 And so we don't have to show that the defendants
12 have taken any action against the plaintiffs. There is
13 presumption -- it's a new law. It goes into effect on Friday.
14 You know, none of the defendants have shown that they won't
12:26PM 15 enforce it. They haven't disavowed it. There's a presumption
16 that when the law goes into effect, policymakers sued in their
17 official capacity will follow the law.

18 And I will just turn briefly to *Ex parte Young*.
19 We have shown that all of the --

12:26PM 20 THE COURT: Where is that from?

21 MR. KLOSTERBOER: So the key case on this is *Whole*
22 *Woman's Health versus Jackson*. It's a Supreme Court case from
23 2021; and the numerous defendants in this case have tried to
24 argue, as government officials have a right to do, that they
12:27PM 25 have sovereign immunity. But as the Court is intimately aware,

1 *Ex parte Young* provides a clear exception to immunity.

2 1983 is our cause of action in this case, but
3 *Ex parte Young* gets around what is typically the sovereign
4 immunity of government officials.

12:27PM 5 And the 2021 *Whole Woman's Health versus Jackson*,
6 there the Supreme Court held that -- this is a State of Texas
7 case, too, so there's a Texas law, Senate Bill 8, that was
8 challenged and the plaintiffs -- it was pre-enforcement. The
9 law has not yet gone into effect. This was an abortion law and
10 the plaintiffs sued and the court found that they did sue
11 some -- or they could plausibly sue some of the proper
12 defendants and the court explained on -- at 535 and 36 that
13 each of the individuals who was sued was an executive licensing
14 official who may or must take enforcement action against the
15 petitioners if they violate the terms of Texas's Health and
16 Safety Code Senate Bill 8.

17 So that is the key decision that the
18 plaintiffs -- the defendants in this case, they're trying to --
19 are saying that they don't have -- that we can't properly sue
12:28PM 20 them; but of course this law is not yet in effect. That aligns
21 with the Fifth Circuit precedent in this area. Just last week
22 the Fifth Circuit in *Tawakko1*, T-A-W-A-K-K-O-L, *versus*
23 *Vasquez* -- just last week the Fifth Circuit stated that the
24 correct defendant is generally the individual tasked with
12:28PM 25 enforcing the challenged act.

1 So this law has three separate enforcement
2 sections. One is the attorney general. The attorney general
3 in their brief has not conceded -- or they have conceded that
4 they are statutorily tasked with enforcing Section 1. It's
12:29PM 5 clear because the attorney general may or must enforce that
6 part of the law.

7 Section 2 applies to the municipalities and
8 counties, that they are clearly tasked with what we argue is a
9 clear violation of First Amendment rights.

12:29PM 10 And Section 3 imposes criminal penalties. And
11 the case law is clear that the county and district attorneys in
12 this case are the proper defendants for -- because they
13 prosecute Class A misdemeanors.

14 THE COURT: How many defendants -- I'm familiar with
12:29PM 15 it, but for the record -- have you sued? I mean we have
16 municipalities to my right. How many are there? I know we
17 have six entities -- six entities represented.

18 MR. KLOSTERBOER: Yes. We have the attorney general
19 Your Honor; we have Montgomery County; the district attorney
12:30PM 20 for Montgomery County; City of Abilene; Taylor County;
21 James Hicks, the district attorney of Taylor County; the county
22 attorney of Travis County and the district attorney of Bexar
23 County, so I believe nine.

24 THE COURT: Okay. A total of nine?

12:30PM 25 MR. KLOSTERBOER: Possibly eight. I apologize,

1 Your Honor. Sorry. It's nine. All right. Difficult to
2 count, Your Honor.

3 Just in closing, because plaintiffs have standing
4 and defendants are properly named, there is both traceability
5 and redressability. If the Court enters an order finding this
6 law to be unconstitutional, that would alleviate the
7 plaintiffs' chilling of their speech. It would stop them from
8 even going out of business, as 360 Queen Entertainment has
9 already done. Extragrams, too. This law would significantly
10 impair their business.

11 And also the free expression of all five of the
12 plaintiffs, the local civic pride organizations' ability to
13 advocate and be inclusive spaces for their communities and also
14 Brigitte Bandit, her full-time job and artistry.

15 As our plaintiff Jason Rocha testified, this
16 freedom of expression that is cherished by our U.S.
17 Constitution is what he fought for as an Iraq war veteran.
18 It's similar to what Winston Churchill said in 1938 on the eve
19 of World War II when he said: "The arts are essential to any
20 complete national life. The state owes it to itself to sustain
21 and encourage them."

22 Even five years after Winston Churchill said
23 that, Ronald Reagan actually appeared in a movie featuring drag
24 performers in the U.S. military. That film is called *This is*
25 *the Army*.

1 Female impersonators and drag artists have been
2 around for a long time. It's nothing new. 40 years ago in
3 1983 Judge David L. Russell of the Western District of Oklahoma
4 blocked a government attempt to stop drag artists from
5 performing in a Miss Gay USA Pageant. That case is the *Norma*
6 *Kristi, Inc. versus City of Oklahoma City*, from Judge
7 David Russell.

8 The court wrote: "The First Amendment values
9 free and open expression even if distasteful to the majority,
10 including personally distasteful to this court. As Voltaire
11 said, 'I disapprove of what you say, but I will defend to the
12 death your right to say it.'"

13 Thank you, Your Honor.

14 THE COURT: Okay. You've used 38 minutes.

15 All right. The municipality stated that you want
16 the state to go first, which is fine. All right. You've got
17 45 minutes. You don't need it all.

18 Counsel, come on up.

19 MR. ELDRED: Thank you, Judge.

20 THE COURT: Mr. Eldred.

21 MR. ELDRED: Yes, sir. Are you ready?

22 So for the record, I'm Charles Eldred. I
23 represent Angela Colmenero in her official capacity as
24 provisional attorney general, and that's important to our
25 sovereign immunity argument.

1 As you know, sovereign immunity applies to cases
2 against state officials in their official capacity. You cannot
3 sue a state official in her official capacity under
4 Section 1983. So all the claims against her under 1983 should
5 be dismissed.

6 There is an *Ex parte Young* exception that I know
7 you're familiar with. It may only be brought against the
8 enforcement authority. So the claims against Colmenero
9 regarding Sections 2 and 3 of SB 12 should also be dismissed
10 because she has sovereign immunity to those claims.

11 I next want to move to standing. I think I heard
12 you say that you don't want me to repeat everything that
13 Mr. Stone said before, so I'll adopt what he said if that's
14 okay with you.

15 THE COURT: You can relate to it as you move along.
16 Just keep it in context and move.

17 MR. ELDRED: Yes. The big picture is that plaintiffs
18 recognize -- all the plaintiffs recognize that some drag shows
19 are sexual in nature and have content inappropriate for
20 children. And none of them testified or put any evidence
21 forward, as we say, that they plan or want to do anything that
22 is prohibited by SB 12 in front of children; and they didn't
23 even try to show you any conduct that they want to do or plan
24 to do that is regulated by SB 12 in front of children. On this
25 record there's no evidence that plaintiffs intend to violate

1 SB 12 and, therefore, no standing.

2 Now in response to Mr. Stone, plaintiffs made a
3 few points --

4 THE COURT: What about the First Amendment issue, that
5 it's easy to overcome the standing issue relative to a First
6 Amendment right? I think there are numerous cases on that.

7 MR. ELDRED: Ms. Gifford is going to talk about First
8 Amendment.

9 THE COURT: Okay. Sorry.

10 MR. ELDRED: Sneak preview, we don't think there is a
11 First Amendment violation here so that might not apply.

12 THE COURT: Got it. Thank you.

13 MR. ELDRED: Just a few things that came up in
14 plaintiffs' response to Mr. Stone. So I think everyone agrees
15 that nude performances are prohibited in front of children by
16 SB 12 if it appeals to the prurient interest only, so not
17 necessarily every single new performance in the world. But if
18 it appeals to prurient interest, yes. And one of the responses
19 to that was "Well, one of our performers might have a wardrobe
20 malfunction."

21 I don't really understand what they think that
22 gets them. They agree that children should not see nudity, so
23 they must necessarily agree that drag performers need to be
24 careful not to expose themselves, just like everyone else needs
25 to be careful. If they're wearing a costume that might result

1 in exposure of their private parts, they should not be
2 performing in front of children wearing that costume. You
3 can't just recklessly wear something that might expose yourself
4 and then have a get out of jail free card and say, "Oh, it was
5 a wardrobe malfunction."

6 They need to be taking more care what they wear
7 in front of children like everyone else does.

8 THE COURT: How do they determine one from the other?

9 MR. ELDRED: One from the other what? I'm sorry.

12:36PM 10 THE COURT: In other words from an accident or on
11 purpose.

12 MR. ELDRED: Of course there's the
13 accidentally-on-purpose problem. "Oh, I accidentally showed my
14 whatever."

12:36PM 15 How do you show? That would be a jury question.

16 THE COURT: Didn't that happen during the Super Bowl?

17 MR. ELDRED: That was totally on purpose. I watched
18 it. Everyone -- that was completely on purpose.

19 THE COURT: And that's your determination, right?

12:37PM 20 MR. ELDRED: I don't -- I don't know any other possible
21 explanation of that.

22 THE COURT: All right. Go ahead.

23 MR. ELDRED: I know they said it was an accident, but I
24 don't believe them. But a jury would have to decide, I think,
12:37PM 25 in that case.

1 We also talked about Section C of the definition
2 of sexual conduct, which, to repeat, is "The exhibition of a
3 device designed and marketed as useful primarily for the sexual
4 stimulation of male or female genitals that appeals to prurient
5 interest in sex."

6 And we said that they didn't have any evidence
7 that they planned to violate that section; and that one of
8 their responses was "Well, Brigitte Bandit uses a dildo in her
9 show and sometimes people watch it through the fence."

10 That seems inconsistent with me with her own
11 testimony, which is that she does not use a dildo in front of
12 children. So whatever -- whatever they're talking about, she
13 said that she doesn't use it during -- with -- in front of
14 children; so that behavior is not governed by section -- I'm
15 sorry -- by Senate Bill 12.

16 They also talked about use of lubrication in the
17 shows. Well, lubrication is not a device, nor is it exhibited
18 during the show. They said they distributed --

19 THE COURT: Did they say they used it during the show
20 or it was just sold at the shows? Or, no, handed out by some
21 exhibitors?

22 MR. ELDRED: Yes. That was my understanding as well.
23 It was handed out. But that's not exhibiting the device during
24 the show. That's just -- that's unrelated to the show.

25 So the lube exception does not mean that they are

1 intending to -- I'm sorry. Distributing lube does not mean
2 that they are intending to violate SB 12.

3 With respect to parental consent, again, if none
4 of their shows violate SB 12, which was our contention, then
12:38PM 5 the parental consent issue goes away. There is no need for
6 parental consent to a show that does not violate SB 12. I
7 don't think that issue is even before you.

8 I'll skip a lot because we went through that
9 already.

10 So there's no evidence that plaintiffs intend to
11 violate SB 12; therefore, there's no credible threat of
12 enforcement and I disagree with my friends on the other side
13 about that.

14 In the *Speech First* case the Fifth Circuit
12:39PM 15 said -- I'm going to quote them right now and I'll read slowly:
16 "Whereas there must be some evidence that a rule would be
17 applied to the plaintiff, in order for that plaintiff to bring
18 it as an applied challenge, this is not the case for facial
19 challenges. Instead, when dealing with pre-enforcement
12:39PM 20 challenges to recently-enacted statutes that facially restrict
21 expressive activity by the class to which plaintiff belongs,
22 courts will assume a credible threat of prosecution in the
23 absence of compelling contrary evidence."

24 THE COURT: A critical what?

12:39PM 25 MR. ELDRED: I'm sorry.

1 "Courts will assume a credible threat" --
2 "credible threat" --

3 THE COURT: "Credible threat" to?

4 MR. ELDRED: -- "of prosecution in the absence of
12:40PM 5 compelling contrary evidence."

6 That's what the Fifth Circuit said on Page 335 of
7 *Speech First*.

8 But there's no evidence that SB 12 will be
9 applied to plaintiffs; so it does not allow them to bring an
10 as-applied challenge and it does not restrict expressive
11 activity by the class to which plaintiffs belong, as
12 Ms. Gifford will explain later.

13 There's no evidence that plaintiffs intend to do
14 anything regulated by SB 12, and it doesn't unconstitutionally
15 restrict their expressive activity, as she will explain; so the
16 Court cannot assume a credible threat of prosecution and
17 plaintiffs lack standing to bring the facial challenge as well.

18 So because there's no threat of enforcement, the
19 plaintiffs' claimed injuries are self-inflicted; and as the
12:40PM 20 Fifth Circuit has explained, an organization cannot obtain
21 standing to sue in its own right as a result of self-inflicted
22 injuries that are not fairly traceable to the actions of the
23 defendant.

24 That's from *Association of Community*
12:41PM 25 *Organizations for Reform Now versus Fowler*, 178 F.3d 350 at

1 Page 358.

2 In *Clapper versus Amnesty International*, that's
3 568 U.S. 398 of 2013, the plaintiffs also claim they suffered
4 actual injuries as they incurred present costs and burden based
5 on a fear of surveillance, they said.

6 The Supreme Court disagreed. They said, "Your
7 contention that" -- "Respondents' contention that they have
8 standing because they incurred certain costs as a reasonable
9 reaction to a risk of harm is unavailing because the harm
10 respondents seek to avoid is not certainly impending."

11 So just the fact that they've canceled shows
12 doesn't mean that they have standing. They have to have a
13 reasonable fear of harm. They can't just say, "We fear harm so
14 we're doing these things."

15 That doesn't give them standing by themselves.

16 I'm probably speaking too fast. Sorry.

17 They need to show that the impending fear -- the
18 quote I read from *Speech First* is the standard, and they don't
19 meet that standard.

20 There's also a case called *Glass v. Paxton* from
21 the Fifth Circuit, 900 F.3d 233. That's the year 2018. A
22 college professor named Glass said that she was going to
23 self-censor herself regarding new policies allowing handguns on
24 campus; and the Fifth Circuit said, "Well, that doesn't give
25 you standing either. You're just self-censoring yourself out

1 of your own will and that doesn't give you standing. That's a
2 self-inflicted injury."

3 We believe the injuries they're talking about
4 here are similarly self-inflicted in that there was no
12:42PM 5 impending threat of prosecution of them under SB 12, and they
6 haven't shown that there has been.

7 I'm going to quickly turn to some specific
8 reasons that the plaintiffs lack standing against my client,
9 Angela Colmenero, in her official capacity.

12:43PM 10 A reminder: Her enforcement authority is "A
11 person who controls the premises of a commercial enterprise may
12 not allow a sexually oriented performance to be presented on
13 the premises in the presence of an individual younger than
14 18 years ago of age."

12:43PM 15 That is the one thing that my client can enforce
16 and many things that the plaintiff said will not fall into that
17 category.

18 Woodlands Pride says it fears it won't be able to
19 have this event on public property in a public park. Colmenero
12:43PM 20 has no enforcement power over public property. There's no
21 evidence the show will be canceled.

22 Abilene Pride says it fears it won't be able to
23 have a parade on city streets in a county expo center. Same
24 problem. Colmenero has no enforcement authority over those
12:43PM 25 issues, and no one is actually threatening to cancel those

1 events.

2 Extragrams brokers drag performances by
3 independent contractors. It does not control the space where
4 the independent contractor perform, by definition. So
12:44PM 5 Extragrams has no standing to challenge my client's enforcement
6 authority either.

7 360 Queen Entertainment testified it uses space
8 in a restaurant owned by one of the parents -- one of the
9 partner's parents; however, they have not given any evidence
12:44PM 10 that they, rather than the parents, control the space. It's
11 their burden to prove that they control that space during the
12 time they have the shows. I heard no evidence they control the
13 space. They're allowed to use the space. They need more than
14 that to show they control it.

12:44PM 15 Brigitte Bandit hosts and organizes events. That
16 certainly is not self-evidently controlling the space where the
17 event takes place. Just because you host an event doesn't mean
18 you control the space. She could have explained further how
19 she controls the space, but it was very conclusory. It was
12:44PM 20 just "I fear that I may be found in control of the space."

21 That's not good enough. Hosting and organizing
22 events in a space does not necessarily control the space.

23 So the Court has no standing over those claims
24 for those additional reasons.

12:45PM 25 Unless you have questions, I would like to turn

1 it over to Ms. Gifford.

2 THE COURT: No. Thank you.

3 Ms. Gifford?

4 MS. GIFFORD: Your Honor, again this lawsuit is
12:46PM 5 challenging a law that does not exist. There is no ban on drag
6 shows; and the plaintiffs, by their very own admission, have
7 said that Senate Bill 12 does not burden their protected speech
8 to the extent that their performances are protected by the
9 First Amendment because they already tailor their performances
10 to the age of their audience.

11 I'd like to start by talking about facial versus
12 as-applied challenges. A facial challenge, as the Court knows,
13 is a head-on attack of a legislative judgment, an assertion
14 that the challenged statute violates the Constitution in all of
12:46PM 15 its applications.

16 In contrast, an as-applied challenge concedes
17 that the statute may be constitutional under some situations,
18 but contends that under the particular -- under particular
19 circumstances it's not.

12:47PM 20 The distinction between facial and as-applied
21 goes to the breadth of the remedy that the Court intends to
22 apply in this case.

23 A facial challenge obviously has a very broad
24 remedy; and as I argued yesterday, claims of facial invalidity
12:47PM 25 rest -- first should be distributed very conservatively.

1 Claims of facial invalidity often rest on speculation and -- as
2 they have in this case; and as a consequence they raise the
3 risk of premature interpretation of the statute on the basis of
4 factually bare bones records.

12:47PM 5 For example, the fears expressed by the
6 plaintiffs in this case go to this very issue. They are purely
7 speculation. Moreover, facial challenges run contrary to the
8 fundamental principle of judicial restraint that courts should
9 neither, quote, anticipate a question of constitutional law in
10 advance of the necessity of deciding it, nor formulate a rule
11 of constitutional law broader than is required by the precise
12 facts to which it should be applied. And that is from the
13 Supreme Court case in *Ashwander v. TVA*.

12:48PM 14 And finally facial challenges threaten to
15 short-circuit the democratic process by preventing laws
16 embodying the will of the people from being implemented in a
17 manner consistent with the Constitution. An ordinance may be
18 constitutionally invalid on its face either because it's
19 unconstitutional in every conceivable application or because it
12:49PM 20 seeks to prohibit such a broad range of protected activity or
21 protected conduct that it is unconstitutionally overbroad;
22 however, before we even get to the issue of facial challenge
23 the Court must determine whether drag itself is an inherently
24 expressive conduct meriting First Amendment scrutiny.

12:49PM 25 And, Your Honor, it is not. We cannot accept the

1 view that an apparently limitless variety of conduct can be
2 labeled speech whenever the person engaging in the conduct
3 intends to thereby express an idea. That comes from the
4 *O'Brien* case.

12:49PM 5 Furthermore, in the *FAIR* case, the *Rumsfeld*
6 *versus Forum for Academic & Institutional Rights*, the Court
7 says that "In *O'Brien* we rejected the view that conduct can be
8 labeled speech whenever the person engaging in the conduct
9 intends thereby to express an idea. Instead, we have extended
12:50PM 10 First Amendment protection only to conduct that is inherently
11 expressive."

12 And, Your Honor, I would submit to you that this
13 is -- this very issue is what creates mischief in this case,
14 that if, for example, Your Honor wanted to dress up in a way
12:50PM 15 that would be considered drag and do things that violated
16 SB 12, under the plaintiffs' theory of the case that conduct
17 would be protected by the First Amendment simply because it's
18 drag. Regardless of whether you had a message to convey or
19 not, the plaintiffs' position is that drag is inherently
12:50PM 20 expressive and, therefore, merits protection under the
21 First Amendment and to take that position gets the Court to a
22 place that people -- that it can be used in a way that does not
23 take into account any message that may be intended to be
24 conveyed.

12:51PM 25 In deciding whether a particular conduct poses --

1 possesses sufficient communicative elements to bring the
2 First Amendment into play, courts have asked whether an intent
3 to convey a particularized message was present and whether the
4 likelihood was great that the message would be understood by
12:51PM 5 those who viewed it.

6 As the plaintiffs testified yesterday, each one
7 had a different message in the performances, a different
8 message in what they were intending to convey; and if you're
9 looking at this from the standpoint of a --

12:51PM 10 THE COURT: Well, do they need a uniform? Only one
11 message to convey? Because each of them have their own
12 feelings about drag in their community and the history of it
13 also.

14 MS. GIFFORD: Your Honor, the standard would be that
12:52PM 15 from the perspective of an ordinary neutral observer would they
16 know what message was being conveyed without the use of words.

17 THE COURT: So it's objective instead of subjective?

18 MS. GIFFORD: I believe it is.

19 THE COURT: All right.

12:52PM 20 MS. GIFFORD: And so would an objective neutral viewer
21 understand the message trying to be conveyed without the use of
22 speech or words?

23 THE COURT: Is that a requirement?

24 MS. GIFFORD: Yes, Your Honor. In *Rumsfeld* -- what we
12:52PM 25 call "the FAIR case," *Rumsfeld v. Forum for Academic &*

1 *Institutional Rights*, the Supreme Court says that "If combining
2 speech and conduct were enough to create expressive conduct, a
3 regulated party could always transform conduct into speech
4 simply by talking about it."

12:53PM 5 And so, Your Honor, it's not true that merely
6 intending to express a message by your conduct means that you
7 are engaging in free speech. Approving drag and doing drag are
8 different categories, just as, for example, opposing taxes and
9 refusing to pay your taxes would be different categories. One
12:53PM 10 may oppose taxes without commenting on it. That does not
11 necessarily make it protected free speech.

12 And with regard to the second prong, whether the
13 likelihood was great that the message would be understood by
14 those who viewed it, we've heard very little about what the
12:53PM 15 message supposedly is from the plaintiffs. Some have said that
16 the message that they want to -- what's the message you want to
17 express or about -- or they were asked, you know, "What is the
18 message you are expressing and would it be understood by those
19 who viewed it?"

12:54PM 20 And there is no -- there was no testimony that it
21 would be easily understood by a neutral person as to what
22 message it was that they were trying to convey.

23 However, even if the Court finds that there is
24 some expressive conduct, Senate Bill 12 should still be
12:54PM 25 reviewed under intermediate scrutiny. The level of

1 First Amendment scrutiny the Court uses to determine whether
2 the regulation of adult entertainment is constitutional depends
3 on the purpose for which the regulation was adopted. If the
4 regulation was enacted to restrict certain viewpoints or modes
12:55PM 5 of expression, it is presumptively invalid and subject to
6 strict scrutiny.

7 If, on the other hand, the regulation was adopted
8 for the purpose unrelated to the expression -- to the
9 suppression of expression -- for example, to regulate
12:55PM 10 non-expressive conduct of a time, place and manner or
11 expressive conduct -- the Court must apply the less demanding
12 standard of intermediate scrutiny.

13 Your Honor, even if exotic dancing can be
14 considered expressive, the plaintiffs have not specifically
12:55PM 15 said that their drag -- their drag performances are not sexual.
16 Ms. Bandit testified yesterday that drag is not sexual; and so,
17 therefore, how could it be viewed under the standard of
18 sexual -- of a sexual or an exotic performance?

19 Contextually, Your Honor, this SB 12 is an
12:56PM 20 indecency ordinance, because the conduct, what is to be
21 regulated -- or the definition of the conduct is found -- will
22 be found in Chapter 43 of the Penal Code which regulates public
23 indecency; and as the Supreme Court articulated in *Barnes*
24 *versus Glen Theatre* when it applied the *O'Brien* test, the
12:56PM 25 plurality found that, quote, Indiana's public indecency statute

1 was justified, despite its incidental limitations on some
2 expressive activity.

3 The statute was -- applying the four-part *O'Brien*
4 test was, one, that the statute was clearly within the
12:56PM 5 constitutional power of the State and furthers a substantial
6 government interest, which the plaintiffs agree that we have
7 met the first prong of that.

8 The second prong, the state's interest in
9 protecting societal order, that it is unrelated to the
10 suppression of free expression because the requirement -- and
12:57PM 11 this is again from *Barnes versus Glen Theatre* -- the Court said
12 it's "unrelated to the expression" -- "the suppression of free
13 expression because the requirement that dancers don pasties and
14 G-strings does not deprive the dance of whatever erotic message
12:57PM 15 it conveys. It simply makes the message slightly less
16 graphic."

17 Your Honor, that is exactly the situation here.
18 We -- SB 12 is not regulating or suppressing free expression.
19 It is simply making it less graphic in front of children.

12:58PM 20 And the third prong of *O'Brien* is that the
21 regulation be no greater than essential to further the
22 government's interest.

23 Here there is -- when talking about whether it is
24 narrowly tailored, you look at whether there is a way --
12:58PM 25 whether the objective of the statute could be achieved in a

1 less restrictive way. There is not in this situation.

2 And the fourth step -- the fourth prong of --

3 THE COURT: Are you saying there is no less restrictive
4 way?

12:58PM

5 MS. GIFFORD: Correct. Correct. Senate Bill 12
6 achieves its goal in the least restrictive way possible, that
7 there is -- there is not a way that is less restrictive that
8 would achieve the goal of Senate Bill 12.

12:59PM

9 The fourth prong of *O'Brien* is that Indiana's
10 requirement -- in *Barnes* is that "Indiana's requirement that
11 the dancers wear pasties and G-strings is modest and the bare
12 minimum necessary to achieve the state's purpose."

13 Similarly SB 12 is modest and the bare minimum
14 necessary to achieve the state's interest.

12:59PM

15 Justice Scalia, in concurring in that decision,
16 said that "The challenged regulation must be upheld not because
17 it survives some lower level of First Amendment scrutiny, but
18 because as a general law regulating conduct and not
19 specifically directed at expression, it is not subject to
20 First Amendment scrutiny at all."

12:59PM

21 And, again, Your Honor SB 12 is regulating -- to
22 the extent it is regulating any conduct, it's not regulating
23 the message that the plaintiffs in this case want to convey.

01:00PM

24 THE COURT: What message do you think they want to
25 convey? Have you heard any?

1 MS. GIFFORD: I have not heard any, Your Honor, other
2 than what the plaintiffs testified to yesterday; and, again,
3 that goes back to my earlier point that their message has been
4 vague at best. Everyone had -- to the extent they had a
01:00PM 5 message, they had a different message; and that standing in
6 a --

7 THE COURT: Do you need a unitary message?

8 MS. GIFFORD: No, Your Honor; but you do need a message
9 that a ordinary person would understand without the need to
01:00PM 10 explain it with words and that is simply by doing a performance
11 dressed in drag. There needs to be more. There needs to be
12 words to convey the messages that they testified about
13 yesterday.

14 THE COURT: Can they convey it by words or by dance in
01:01PM 15 and of itself?

16 MS. GIFFORD: I think arguably some dance could be
17 expressive enough to convey their meaning, but not in all
18 circumstances; and so to the extent that they are saying that
19 drag as a whole -- just by definition drag as a whole is
01:01PM 20 expressive such that it merits First Amendment protection, it
21 doesn't meet that standard. There are instances, of course,
22 where specific instances of drag performance would merit the
23 less restrictive intermediate scrutiny.

24 Additionally Senate Bill 12 does not unreasonably
01:02PM 25 limit alternative avenues of their communication. Again, the

1 state by no means is prohibiting dancers from performing with
2 the utmost levels of erotic expression. They are simply not
3 permitted to do it in front of children, which the plaintiffs
4 themselves, as we discussed earlier in standing, don't do.

01:02PM

5 There must be a reasonable opportunity -- a reasonable
6 opportunity does not -- furthermore, a reasonable opportunity
7 does not include a concern for economic considerations.

8 THE COURT: What do you mean by that?

01:02PM

9 MS. GIFFORD: So that to the extent that they testify
10 that they are worried about any economic considerations for the
11 self-inflicted harm that -- by restricting -- by not performing
12 that --

01:03PM

13 THE COURT: "Self-inflicted harm," you mean by their
14 canceling different shows in anticipation of the law taking
15 effect? Because we heard a number of that.

01:03PM

16 MS. GIFFORD: Right, canceling shows that otherwise
17 would still be permitted under SB 12, that the concern for
18 economic considerations under *Renton* is not a -- is not a valid
19 reason for granting them the relief they're seeking in this
20 case.

21 And, again, the goal is to make --
22 Senate Bill 12, the goal is to make it less graphic in front of
23 minors. It's not to restrict their speech.

24 THE COURT: But who's to determine that?

01:03PM

25 MS. GIFFORD: Well, so it depends again on what section

1 you're talking about. If you're talking about as a performer
2 while -- and for example, an upset soccer mom may call the
3 police on a performance saying that "Oh, my goodness. This
4 is -- this is way too much for a child to see."

01:04PM

5 She's not the one determining whether the
6 plaintiff has violated SB 12. If the police are called as law
7 enforcement, they're the ones to determine under the legal
8 standard if there has been a violation. This is -- the
9 plaintiffs over the last day and a half have made it sound just
10 like just any passerby could complain that they have violated

01:04PM

11 SB 12 and they could be subject to penalties. And that
12 absolutely is not it, because unlike, for example, the Florida
13 statute that has been enjoined, the Florida statute had a
14 private right of action and so any individual could bring suit
15 against a performer for violating the statute. That is not the
16 case here; and, again, that's one way SB 12 is distinguished
17 from the Florida law that was enjoined is there is no private
18 right of action. So law enforcement would determine whether an
19 individual has violated the statute applying the legal standard
20 of prurient interest and considering the required *mens rea*.

01:05PM

21 THE COURT: Do you think a police officer coming to see
22 something in response to a complaint is in a position to do
23 that? What are they going to do -- shut it down, arrest the
24 folks, fine them -- as far as the police officer in your
25 scenario coming to the premises to answer a call?

01:05PM

1 MS. GIFFORD: Your Honor, again that is speculative
2 and --

3 THE COURT: But isn't that what they're saying is
4 speculative, that they have a real fear for the speculative
5 results of the statute?

01:06PM

6 MS. GIFFORD: I think that there are many scenarios
7 where we can think that the police are called for something
8 that a passerby does not agree with, but that under the legal
9 standard that the police are held to, it's not a violation.
10 And so while they may show up, that doesn't necessarily mean
11 that there is going to be a violation.

01:06PM

12 THE COURT: Go on. Going to be or has been a
13 violation?

14 MS. GIFFORD: Right. Thank you. Yes. Going to be or
15 has been.

01:06PM

16 THE COURT: Because I'm not sure you can do it
17 prospectively, in other words, to call them before an incident
18 of some insult to an onlooker takes place.

19 MS. GIFFORD: Right. And Senate Bill 12 does not --
20 does not say that that would happen either. I mean that
21 absolutely is not part of Senate Bill 12.

01:06PM

22 Your Honor, you have asked if there are any laws
23 that currently, you know, prohibit what Senate Bill 12 is
24 proscribing; and the answer is no. Plaintiffs' counsel
25 mentioned the obscenity law, and that applies equally to adults

01:07PM

1 and to children. Senate Bill 12 is different in that it is
2 limited to the conduct that can be exhibited in front of
3 minors.

4 Even under strict scrutiny, Your Honor, SB 12 is
01:07PM 5 still constitutional. To the extent there's been implication
6 that if we get to a strict scrutiny review then, therefore, it
7 is unconstitutional, as the Court knows, that's not accurate.
8 In cases where a legislative act restricts indecent speech
9 which may not be obscene to adults but, nonetheless, indecent
01:08PM 10 to children, the Supreme Court's been clear that those
11 circumstances still must be relatively narrow and well defined
12 and that no doubt the State possesses, and the plaintiffs
13 agree, a legitimate power to protect children from harm.

14 Again plaintiffs have brought a facial challenge;
01:08PM 15 and so they have to reckon with a higher standard in
16 limitations that such a challenge entails. They have to
17 establish that no set of circumstances exist under which
18 Senate Bill 12 could be valid. They have not done that. They
19 have not met that burden.

01:08PM 20 In fact, to the extent Senate Bill 12 does
21 regulate conduct, the requirement that performers not perform
22 in a sexually explicit manner in front of children still leaves
23 ample capacity for them to convey their message.

24 Plaintiffs mentioned the *Reno* case, which was, in
01:09PM 25 fact, Janet Reno. That case -- I would encourage the Court to

1 look at the facts underlying that case. It was about
2 regulating conduct in the infancy of the internet. I think it
3 was decided -- I don't have it in front of me, but I believe it
4 was 1996 and talking about what regulations and limitations
01:09PM 5 could be placed around distributing obscene materials to
6 children on the internet.

7 I think it's important in the context that it was
8 under *Reno* the Court found that the ordinance or the law that
9 was going into effect was so broad that it captured conduct and
01:10PM 10 speech directed at adults.

11 THE COURT: You've got eight minutes left.

12 MS. GIFFORD: Okay.

13 Moving on to their contention that it is
14 overbroad, again, the idea that a law is overbroad should be
01:10PM 15 employed sparingly, as the Supreme Court has said.

16 THE COURT: Sorry for the interruption. Go right
17 ahead.

18 MS. GIFFORD: As to the -- the plaintiffs say that this
19 idea of prurient interest is confusing, yet they still point to
01:10PM 20 the obscenity law that uses the definition of "prurient
21 interest" and seems to say that that would cover it.

22 So on one hand they say that --

23 THE COURT: What would cover it from where?

24 MS. GIFFORD: From Section 43.21 of the Penal Code.

01:11PM 25 THE COURT: The definition?

1 MS. GIFFORD: Yes. The obscenity statute that includes
2 in it prurient interest; and, as I said earlier, that applies
3 to adults and is not limited to children, yet while they seem
4 to understand prurient interest in that context, they seem to
01:11PM 5 not understand it in the Senate Bill 12.

6 I would submit to the Court that because there is
7 a criminal penalty that attaches to a person who violates --
8 who would violate the third section of Senate Bill 12 that that
9 would be judged eventually by a jury and so a reasonable-person
01:11PM 10 standard, the average person who is deemed to be a reasonably
11 prudent person, would be the standard applied to what -- who --
12 how "prurient interest" is defined.

13 I think our brief, our response to plaintiffs'
14 motion that was filed last week, I think, talks about the
01:12PM 15 definition of "prurient interest"; so I will move on.

16 So as to the *mens rea*, I think we talked about
17 this earlier, but a *mens rea* is not an absolute guarantee.
18 They fear what others may think, as you mentioned earlier, and
19 how others will judge their performance; but again that's not
01:12PM 20 the standard. It's not that someone may call the police and
21 accuse them of violating the statute. That is not it at all.
22 And, again, they also say that they're afraid that they may be
23 charged with aiding and abetting, although they've pointed to
24 no Texas law that would possibly make them liable for aiding
01:13PM 25 and abetting; and that's in part because there is no aiding and

1 abetting. That's not something that is really in Texas law.
2 There is a requirement that -- the Penal Code does say that a
3 person can be convicted of acting as a party to another's
4 conduct if they're acting with an intent to promote or assist
01:13PM 5 in -- but again the *mens rea* there is intentionality.

6 With regard to the definition of "nude,"
7 arguably, Your Honor, a commercial enterprise that allows
8 nudity, that would allow a sexually oriented performance that
9 includes two or more individuals performing nude would be
01:14PM 10 regulated as a sexually oriented business.

11 And then as to their contention that this is not
12 viewpoint neutral, contrary to their mischaracterization, SB 12
13 is, in fact, viewpoint neutral regarding drag performances both
14 facially and as applied.

01:14PM 15 The language of the act neither distinguishes
16 between nor does it treat differently performers who exaggerate
17 male or female characteristics and performers who have
18 characteristics and merely exhibit them as they have argued in
19 their pleadings.

01:14PM 20 Sexual conduct, as defined by Senate Bill 12
21 applies equally to any performance of a sexual nature; so,
22 therefore, the use of accessories or prosthetics that
23 exaggerate male or female characteristics is not unique nor is
24 it limited to drag performances.

01:15PM 25 Performers of all types often don false

1 eyelashes, lavish wigs, dramatic makeup; and anyone desiring to
2 appeared more well-endowed than they naturally are could
3 enhance themselves with accessories or prosthetics.

4 The plaintiffs talked about the *Friends of*
01:15PM 5 *Georges* case that challenged the Tennessee drag ban. The
6 Tennessee law had a definition in it that included male or
7 female impersonators. That is contrary to Senate Bill 12 which
8 is neutral in that it applies to all sexually oriented
9 performances and that was a large reason why the Tennessee
01:16PM 10 court found that --

11 THE COURT: You've got two minutes left.

12 MS. GIFFORD: -- the challenge in Tennessee violated
13 viewpoint and content.

14 As far as the parental consent -- the issue of
01:16PM 15 parental consent, Your Honor -- they have not pled that. That
16 is not in their complaint.

17 The plaintiffs are limited to what's in their
18 complaint. That is not part of it.

19 And finally as to imminent harm as Mr. Eldred
01:16PM 20 talked about earlier, there is no imminent harm to the
21 plaintiffs. They already tailor their performances. As they
22 testified yesterday, the performances that they already do are
23 allowed --

24 THE COURT: You can't take finances into any
01:16PM 25 consideration? That they may lose their business or whatever?

1 MS. GIFFORD: No.

2 THE COURT: Say it again, please.

3 MS. GIFFORD: No. Financial harm is not considered
4 imminent harm for purposes of an injunctive relief.

01:17PM 5 THE COURT: Okay.

6 MS. GIFFORD: Your Honor, again I would submit to the
7 Court that Senate Bill 12 is not a drag ban. It is not banning
8 drag performances. The legislative history makes that very
9 clear. And so what the plaintiffs are seeking the Court to
10 both enjoin and declare unconstitutional does not exist. There
11 is no ban on drag.

12 And, Your Honor, Senate Bill 12 is
13 constitutional. It is not a violation of the First Amendment.

14 THE COURT: Thank you, Counsel.

01:17PM 15 All right. I'm now going to go down the list of
16 the municipalities. If they want to add anything certainly
17 they may.

18 First from Abilene, Mr. Viada.

19 MR. VIADA: Thank you, Your Honor.

01:18PM 20 All right. The City's arguments here are all
21 subsidiary. This is a facial challenge to a state law that
22 has --

23 THE COURT: By the way, I know we've been in session
24 for a while. If anybody needs to get up and leave, come back
01:18PM 25 in, that's fine. We might as well get it all done and just

1 wrap it up for the day. I understand that, but we need to hear
2 from everyone who may want to be heard.

3 Yes, sir?

4 MR. VIADA: Thank you, Your Honor.

01:18PM

5 This is a facial challenge to a statute that has
6 not yet taken effect. The only claim here is to a state law.
7 There's been no separate and independent claim against the City
8 of Abilene for anything the City has either done or hasn't done
9 or threatens to do.

01:19PM

10 So my arguments for the City of Abilene come into
11 play only if the Court rules in favor of the plaintiffs on
12 Senate Bill 12; and if the Court rules for the AG on the
13 validity of the statute, then all the claims against the City
14 fall, too.

01:19PM

15 So I'm just here to talk about what happens if
16 the Court holds part or all of SB 12 invalid.

01:19PM

17 Our first point is -- and this has been alluded
18 to earlier -- that if the Court strikes down SB 12, then the
19 invalidation of the law runs downhill and so there is nothing
20 to enforce. And that if it never takes effect, the City would
21 never enforce it so any claims against the City become moot.

01:20PM

22 All right. We've also argued that there's no
23 standing on this law and I wanted to focus specifically on the
24 statute; but before I get to that, I want to sort of take the
25 broad approach -- the broad slices through these arguments --

1 THE COURT: Let me ask you this. I'm not going to stop
2 the clock. If you think we need to take a short break, we will
3 before we wrap it up. What's your feeling? Keep going or just
4 take a ten-minute break? You tell me.

01:20PM

5 MR. STONE: Your Honor, we'd like to power through if
6 possible.

7 MR. KLOSTERBOER: Agreed, Your Honor.

8 THE COURT: Okay. All right.

9 MR. VIADA: I'm ready to power through here.

01:20PM

10 THE COURT: Power through.

11 MR. VIADA: All right.

12 THE COURT: Power on.

01:20PM

13 MR. VIADA: All right. The *Davis versus Dallas County*
14 case -- that's a 2022 Fifth Circuit case en banc, one of the
15 two en banc cases that the Court dealt with in that case --
16 talks about the importance of who is the final policymaker,
17 both for purposes of standing and for purposes of liability and
18 that was a case where the issue was whether various county
19 officials who were directed to deal with sentencing policies of
20 the State of Texas were state actors and to the extent that
21 they were, then the county itself could not be liable, nor
22 could the county be responsible under *Ex parte Young*.

01:21PM

23 So the policymaker issue takes out the whole case
24 because there's no allegation here made and there's been no
25 proof in your record that the city council of the City of

01:21PM

1 Abilene has had anything to do with this -- that there's no
2 threat on the part of the city council to enforce any laws, the
3 city council is not the body that has any obligation to enforce
4 the law. There's a statute that says that the City can't
01:21PM 5 permit certain activities on City property, which I'll get to
6 in just a moment.

7 But the city council has not weighed in on any of
8 this. There's no allegation against the city council at all.

9 So our position is that there's no standing under
01:22PM 10 *Davis* or there's no merits claims under *Davis* that the City of
11 Abilene has any responsibility in this case.

12 Let me turn quickly to the standing part of this
13 under the three elements. And I heard counsel talk about, you
14 know, that all you need to do is there be a credible threat of
01:22PM 15 enforcement of the law -- enforcement prosecution, enforcement
16 action or actual arrest.

17 But the Section 2 of the act doesn't call for
18 criminal penalties. It is simply a provision that says that
19 cities may not permit the conduct that is prohibited by the
01:22PM 20 statute to occur on public property. They may not permit it.

21 Well, that doesn't mean that there's any threat
22 of enforcement of that law against any of these folks. It's
23 simply --

24 THE COURT: Don't you think that could be inherent?
01:23PM 25 They all said in the testimony we heard there's no problem with

1 Abilene at this time, but they're afraid that once this act
2 goes into effect, that's what could happen.

3 MR. VIADA: That the City hypothetically could pull the
4 permit, but pulling a permit as far as using public property is
01:23PM 5 not the same as enforcing a criminal law.

6 The chill cases that are cited by the plaintiff
7 here deal with threat of criminal prosecution. They don't deal
8 with a situation where the plaintiff is afraid to ask for a
9 permit because they might turn him down.

01:23PM 10 In fact, in this case the evidence conclusively
11 proves that the Abilene organization did apply for a permit and
12 that it was granted and that there's been no threat that it
13 would not be granted in the future.

14 So what's the enforcement here? The only
01:23PM 15 enforcement is that the City says, "Well, you can't use the
16 property."

17 That doesn't chill anybody's free speech to just
18 be told you can't use the property.

19 So who would enforce it if the city said, "Well,
01:24PM 20 we're going to go ahead and give you the permit and we'll let
21 the State sort out whether or not we should have given the
22 permit"?

23 There's no prohibition or there's no enforcement
24 mechanism against the City from the State, as the attorney
01:24PM 25 general pointed out. But let's assume that the City grants a

1 permit and that we allow them to do it in violation of the
2 state prohibition against us allowing them to do it. Well, who
3 would bring suit? Citizens saying, "You can't grant a permit"
4 or the state attorney general filing a lawsuit and saying, "You
01:24PM 5 can't get that permit."

6 But the only prohibition in Section 2 of the act
7 runs against the City. The act tells the City that it can't
8 grant a permit. It's not telling the plaintiffs that they
9 can't have their show on the public property.

01:24PM 10 It is directed -- it's a prohibition directed
11 against the City for us to enforce. We're made to enforce it.
12 We're told to enforce it in the sense of denying a permit but
13 there's no threat to the plaintiffs to come to us and say, "Can
14 I have a permit?"

01:25PM 15 And us to say -- and we can say, "Yes."

16 And if the State takes issue with us granting the
17 permit, that's between us and the State. It's not between us
18 and the plaintiff. If the plaintiffs' permit is denied and
19 they say it's unconstitutional, at that point they can sue and
01:25PM 20 say, "You denied a permit on the ground that it was -- that
21 we're going to engage in protected conduct."

22 At that point they've got a live controversy.
23 But in this particular situation, they've not been chilled from
24 asking for a permit. We've granted them a permit. If in the
01:25PM 25 future they come to us and ask for a permit and we were to deny

1 it, maybe there would be a controversy then. But at this point
2 there's no case or controversy between these plaintiffs and the
3 City. We've given them what they want.

4 The final point that I wanted to make on
5 *Ex parte Young* was --

6 THE COURT: You've got to move along.

7 MR. VIADA: Yes. Only the City has been sued, no city
8 official. They've not sued any City officer to get an
9 injunction. They want an injunction against the City itself.

10 And the City has not taken the position that we
11 have Eleventh Amendment immunity in this case. We're not being
12 sued as the State, we're being sued as the City.

13 So there's no cause of action under *Mone11* and
14 there's no live controversy between us, Your Honor.

15 Thank you.

16 THE COURT: All right. Thank you so much.

17 Ms. Cubriel?

18 MS. CUBRIEL: Yes, Your Honor. I represent the Bexar
19 County District Attorney.

20 THE COURT: Right.

21 MS. CUBRIEL: He indisputably has the authority to
22 prosecute violations of criminal laws that occur within Bexar
23 County and the plaintiffs are absolutely correct that no
24 district attorney or prosecutor in the state can basically
25 disavow an intent to prosecute any criminal offense in the

1 state.

2 That being said, we have raised the defense of
3 sovereign immunity. We have filed briefing on that matter and
4 we will just rely on that briefing, so I'm not going to just
01:27PM 5 restate everything we've already argued.

6 THE COURT: Thank you.

7 Ms. Ybarra.

8 MS. YBARRA: Yes, Your Honor. Travis County Attorney
9 Delia Garza is who I represent.

01:27PM 10 I would reiterate what Ms. Cubriel said as well
11 as to let you know that we have a motion to dismiss based on
12 standing and sovereign immunity before you and we would just
13 let you read that briefing.

14 THE COURT: Okay. Thank you.

01:27PM 15 Yes. All of that will be addressed in that final
16 judgment, and it will be all-encompassing.

17 All right. Mr. Plake, anything further?

18 MR. PLAKE: Yes, Judge.

19 THE COURT: Okay. Go right ahead.

01:27PM 20 And that's from Montgomery County, correct?

21 MR. PLAKE: Montgomery County and District Attorney
22 Brett Ligon.

23 THE COURT: Thank you.

24 MR. PLAKE: Judge, I agree with what Mr. Viada said and
01:27PM 25 I would adopt his reasoning on *Mone11* and standing so I don't

1 have to repeat it.

2 There is a key distinction with Montgomery County
3 though in which there is no permit. There's no permit
4 applicable. Mr. Rocha testified about that, that he had never
01:28PM 5 sought a permit and the only permit he brought up was
6 potentially needing to close down a road.

7 But when pressed on it, he said he didn't really
8 know, didn't have a venue plan, there were trees in the way.
9 So that would be highly speculative at best.

01:28PM 10 Also, Judge, there's been no policymaker
11 identified for Montgomery County or policies, so the first two
12 elements of *Mone11* are not met.

13 Judge, we talked about *Speech First* --

14 THE COURT: All right. Hang on for a second.

15 MR. PLAKE: Yes, sir.

16 THE COURT: Talking to the plaintiffs in this case,
17 that they're saying that you've served the wrong parties, it's
18 not them and so forth. So briefly address that when you get up
19 for your last go-round.

01:28PM 20 Yes, sir. Go right ahead.

21 MR. PLAKE: After the standard or the burden of proof
22 announced in *Speech First*, I do not believe that is the correct
23 burden of proof. It does not shift to us to prove it will not
24 be enforced. *Speech First*, under the standing heading,
01:28PM 25 specifically says it applies at the preliminary injunction

1 phase --

2 THE COURT: I remember that case, but where is it from?

3 MR. PLAKE: The plaintiff argued that case as to the
4 burden of proof and the enforcement.

01:29PM 5 THE COURT: What case was that that you were
6 referring --

7 MR. PLAKE: *Speech First*.

8 THE COURT: Okay.

9 MR. PLAKE: The very first sentence under the standing
01:29PM 10 section, it says it applies to preliminary injunction. It's a
11 lesser burden than at trial. Same as where the cite that they
12 reference --

13 THE COURT: And we're in a trial now.

14 MR. PLAKE: We're in a trial. So it may apply to the
01:29PM 15 judge's TR0 or under the Court's TR0 considerations, but not to
16 the trial on the merits.

17 THE COURT: Okay. Also, Judge, we do not believe
18 there's any mandated action as to the county because of the
19 permit issue. If you look at the new local Government
01:29PM 20 Code 243.0031(b), that is a may provision. We may do things,
21 but we have not done anything; and if we did it, it would be
22 through ordinance. It would not just be something we did or
23 had some kind of enforcement authority. And without the
24 enforcement authority or the ordinance, we never reached
01:29PM 25 Subpart C, which is the only provision that is required -- the

1 may not provision, may not allow.

2 And especially if there's no contract, as
3 Mr. Rocha testified. He has no contract with local government
4 units, with Montgomery County and no permits. He contracts
01:30PM 5 with local law enforcement individually and with private
6 security.

7 Judge, that brings me around to Mr. Ligon as the
8 DA. We do not believe that the plaintiff has pled a valid 1983
9 cause against Mr. Ligon because he's not a person under 1983.

01:30PM 10 We do highlight that the correct avenue would
11 have been under *Ex parte Young*. That was not brought; but even
12 if they did bring that, it would fail.

13 They do cite -- we cite a few cases in our brief.
14 But they do cite *Whole Woman's Health versus Jackson* for their
01:30PM 15 proposition that those cases have been overruled by the Supreme
16 Court.

17 I do not believe that is correct, Judge. If you
18 look at the cite there that they're quoting, it does say
19 exactly what they say it says, but it has a footnote attached
01:30PM 20 to it and that's Footnote 3. And Footnote 3 says that that
21 holding in that case is specifically as to a licensing official
22 and the license duty, not enforcement. So it's a very narrow
23 holding and it also only applies to motions to dismiss stage.
24 It did not apply to the final stage and that is also in that
25 case.

1 So it has a very narrow exception for one
2 particular type of person, it has nothing to do in law
3 enforcement and particularly disavowed enforcement at all. We
4 do not believe that's a proper standard.

01:31PM

5 And back to reiterate one of my early points on
6 privity, we cited a case on privity, the *Harris County versus*
7 *CarMax* case, where we believe, like Mr. Viada, that if you find
8 a statute unconstitutional, there's simply nothing to enjoin
9 because no prosecutor is going to enforce them.

01:31PM

10 Thank you.

11 MR. PLAKE: Thank you, Judge.

12 THE COURT: Mr. Griffin.

13 MR. GRIFFIN: Mr. Plake, spoke for Montgomery County
14 and DA Ligon.

01:31PM

15 THE COURT: Okay. We have Mr. Wagstaff.

16 MR. WAGSTAFF: Just briefly, Your Honor.

17 Specifically as to the City of Abilene, Mr. Viada
18 covered most of what I was going to cover because it's similar
19 to the county deal because there's been no --

01:32PM

20 THE COURT: You're with Taylor County.

21 MR. WAGSTAFF: Taylor County and DA Hicks. So I adopt
22 the arguments as to the DA and as to the general standing in
23 county issues.

01:32PM

24 And I would just point out to the Court if we
25 just look at the testimony from the Abilene Pride Alliance and

1 what is specific to Taylor County and the City of Abilene,
2 that's been no change of plans. While they may have made
3 backup plans, there's been no change of plans.

4 There's also no irreparable harm because they can
01:32PM 5 only say they're in fear of. But what Gavyn Hardegree
6 testified to was essentially compliance with what is now the
7 law or what will be the law on the 1st.

8 And so it's as you pointed out subjective versus
9 objective. And so it's speculative to think that they don't
01:32PM 10 think it's lewd or they don't think that it's inappropriate to
11 be in front of all ages, to be in front of children. But then
12 somehow say they've got this fear of prosecution when it's the
13 same subjective standard, not objective standard and so
14 therefore it's speculative and therefore there's no irreparable
01:33PM 15 harm, Your Honor.

16 Thank you.

17 THE COURT: Okay. Thank you. All right. I said that
18 you have about -- oh, I said I would give you 10 minutes,
19 remember regardless. So let me just knock off the clock and
01:33PM 20 after you're done with your 10 minutes, I have about five
21 minutes more and then we'll adjourn for good.

22 MR. KLOSTERBOER: Yes, Your Honor.

23 THE COURT: Or until another court says otherwise,
24 okay?

25 MR. KLOSTERBOER: Yes.

1 THE COURT: Go right ahead.

2 MR. KLOSTERBOER: Yes. Thank you, Your Honor.

3 As far as the County and the district attorneys,
4 the prosecutors in this case, just as they rest on their
5 briefing, we, too, believe the case law is very clear, that
6 when there's a criminal law about to go into effect that they
7 have the power to enforce. So I'm not going to delve into
8 those arguments.

9 THE COURT: Okay.

10 MR. KLOSTERBOER: We'll just rest on our briefing as
11 far as against the district attorneys and the county.

12 As I mentioned yesterday at the beginning of the
13 case, we understand the municipalities and the counties'
14 concern. We believe they should take it up with the state
15 legislature. Why is the legislature trying to task them with
16 enforcing what's obviously an unconstitutional law. We do have
17 an actual case or controversy against them.

18 If the Court looks at the case in Montana as well
19 as Tennessee that we cited early, the very recent drag cases,
20 the municipalities in those cases actually agreed with the
21 plaintiffs and stipulated that they thought that the law might
22 be controversial or they took a neutral position explicitly
23 with the Court saying they did not want to enforce the law.

24 Here if any of the municipalities or counties
25 would stipulate that they agree that the law is

1 unconstitutional and will not enforce against the plaintiffs,
2 then that would obviate the case or controversy.

3 THE COURT: You want me to ask for a show of hands?

4 MR. KLOSTERBOER: We've asked, Your Honor.

01:35PM 5 THE COURT: No. There's not too much enthusiasm for
6 your offer.

7 Go right ahead.

8 MR. KLOSTERBOER: So, Your Honor, the presumption is
9 that municipalities, like every state official, will follow the
01:35PM 10 law when it takes effect on Friday and that's really the rub.
11 It is a strange situation. There are not many cases where the
12 legislature tries to delegate authority directly to
13 municipalities and home rule cities and counties, but that is
14 what we have here. And even there is a two-hat problem that we
01:35PM 15 talk about in our brief --

16 THE COURT: A two hat?

17 MR. KLOSTERBOER: The two-hat problem, Your Honor,
18 especially for district and county attorneys, which is not at
19 issue in this case. But sometimes an official is a policymaker
01:35PM 20 for the municipality, sometimes an official is just enforcing
21 the law for the State of Texas.

22 But so here, you know, we agree that they have
23 not yet taken any steps to enforce this law. It's not in
24 effect. Presumably once the law goes into effect, the final
01:36PM 25 policymakers for the municipalities will be the responsible

1 entity.

2 So if Montgomery County is going to, you know,
3 prohibit any of The Woodlands Pride's upcoming events, the
4 final policymaker would be the county commissioners court.

01:36PM

5 Now, they haven't yet done that, but that doesn't mean that we
6 can never show a final policymaker. We just haven't had to do
7 that yet, because it's a pre-enforcement challenge.

8 THE COURT: One point. What about the investment --
9 you know, investment as a final -- at some sort of a loss or
10 damage -- financial loss in the granting of a -- what is it --
11 a permanent injunction?

01:36PM

12 MR. KLOSTERBOER: That's correct, Your Honor.
13 Generally --

14 THE COURT: The fear of financial loss, is that any
15 kind of a grounds to look for as far as irreparable harm or any
16 kind of a status quo or whatever? Someone mentioned -- one of
17 the other counsel here about -- what is it -- Ms. Gifford
18 mentioned that the financial loss is not to be considered in
19 this kind of an equity matter.

01:37PM

20 MR. KLOSTERBOER: Your Honor, even for the businesses,
21 it's not just a financial loss. They're shut down from all of
22 their expressive activity, so it's still a First Amendment
23 chilling of speech.

24 THE COURT: All right.

01:37PM

25 MR. KLOSTERBOER: There's a financial loss, but it's

1 irreparable harm as a constitutional chilling of speech.

2 And then just briefly last thing on the municipal
3 liability, it doesn't have to be criminal. They have not cited
4 any case that you can't sue a municipality for squelching
01:37PM 5 speech in a pre-enforcement case.

6 Both the *Turtle Foods* case as well as
7 *Speech First* both have civil penalties and that's what chills
8 the speech.

9 If the Court adopts the -- under the municipal -
01:38PM 10 the counties' theory and the City of Abilene's theory, the
11 state legislature could always delegate enforcement of any
12 clearly unconstitutional law just to municipalities.

13 So even if they're right that they're acting just
14 as a servant of the State, that's where we find the
01:38PM 15 *Ex parte Young* exception.

16 Now, typically you always sue municipalities
17 under *Mone11* and that's what we believe we've done here because
18 as soon as Montgomery County or Taylor County or the City of
19 Abilene enforces, that enforcement would have to be approved by
01:38PM 20 the final policymaker implementing the law.

21 But even if the Court finds that we don't meet
22 the requirements of *Mone11*, then under their theory, they're
23 just acting as a state official. *Mone11* itself, the original
24 case, teaches us that municipalities are persons under 1983.

01:39PM 25 And so the Court would be well within its power

1 under *Ex parte Young* still to enjoin anyone who is acting on
2 behalf of the State to enforce this law.

3 Under either theory, they're not immune. They're
4 not pointing to a single case that they're just off the hook.
01:39PM 5 The State legislature then would always delegate enforcement to
6 a municipality and could ban anything they want. They could
7 ban all speech in the state and just task the counties with
8 enforcement. No one could ever sue.

9 Your Honor, turning lastly to the attorney
01:39PM 10 general's arguments, almost all of their arguments we have
11 specifically addressed and rebutted in our brief so I will just
12 go through a couple of things to clear up.

13 There were two different legal standards that
14 were urged to the Court.

01:39PM 15 In the first half, Mr. Eldred cited the correct
16 standard from *Speech First*, the standard for a facial challenge
17 to a law.

18 Ms. Gifford also referred to what's not at issue
19 here, which is the legal standard for an as-applied challenge.

01:40PM 20 In plaintiffs' complaint we pled our as-applied
21 challenge as an alternative, but it's a pleading for the Court.
22 If the Court doesn't find a facial challenge, you could then
23 use the standard for as-applied.

24 THE COURT: That's one of the alternatives.

01:40PM 25 MR. KLOSTERBOER: Correct, Your Honor.

1 Ms. Gifford kept saying that the plaintiffs have
2 to show that no application -- or that there is no application
3 of this statute. Sorry.

4 The plaintiffs have to show that every
5 application of this statute is unconstitutional and that's not
6 the test we have to show in a facial challenge.

7 We've provided the Court already with the
8 authorities on facial challenges to laws exactly like this one
9 and that's the correct standard to follow.

10 Just briefly on severability, you know, the
11 attorney general has called for dismissal of all claims
12 relating to Sections 2 and 3 of the law. We believe that this
13 statute is not severable. Such dismissal would be improper.

14 The Fifth Circuit in 2013 in the
15 *Parkside Partners versus City of Farmers Branch* case,
16 726 F.3d 524, said that we conclude that the ordinance
17 provisions are so essentially and inseparably connected in
18 substance, that despite the presence of a severability clause,
19 they are not severable.

20 THE COURT: Is there a severability clause in this
21 case?

22 MR. KLOSTERBOER: There is a severability clause. Yes,
23 Your Honor.

24 THE COURT: All right. So you're saying what? That
25 it's so intertwined, all of the three major sections, that it

1 does not apply.

2 MR. KLOSTERBOER: Correct, Your Honor. Every section
3 refers to Section 3 of the statute, which lays out the
4 definition for sexually oriented performance. So even if --
5 and that's really the heart of what we're challenging against
6 all three different types of enforcement officials.

7 Our claims run against the statute -- the
8 language and the enforcement authority is how the Court should
9 enjoin these three sets of officials. But the AG cannot be
10 enjoined simply with regards to one section. The whole statute
11 is intertwined together and they must be enjoined from trying
12 to enforce anything. They have not actually really disclaimed
13 that they could pressure or push a municipality to enforce
14 Section 2. We're not arguing that here. They have very clear
15 standing or very clear enforceability for Section 1. But we
16 just want to say that the statute is not severable and they're
17 not off the hook simply because they ask for it. They're not
18 entitled to that.

19 Two other things, Your Honor.

20 They mention that there's no aiding and abetting,
21 but then they actually read the Court the aiding and abetting
22 statute from the Penal Code. I think what they're trying to
23 say is the Penal Code says that anyone who acts with intent to
24 promote or insist the commission of offense can be found to
25 violate the offense itself.

1 And here all of our plaintiffs host, produce, or
2 perform in drag performances and if those are proscribed by the
3 law and anything that could arguably be a sexually oriented
4 performance and they're acting with intent to keep doing those
01:43PM 5 shows, they have the intention to continue that conduct, they
6 are subject to aiding and abetting liability.

7 The attorney general just said in a very
8 conclusory way this statute is the least restrictive means.
9 They didn't say how or why. Even more damaging is that they
01:43PM 10 try to say that the kind of performances that the plaintiffs
11 testified about find no shelter or protection within the
12 First Amendment at all.

13 We cite in our brief the case *Hurley versus*
14 *Irish-American Gay, Lesbian, and Bisexual Group* from 1995 at a
01:43PM 15 time when same-sex relations were still criminalized before
16 *Lawrence versus Texas*.

17 And in that case the Supreme Court held that a
18 narrow, succinctly articulable message is not a condition of
19 constitutional protection. If it were, the First Amendment
01:43PM 20 would never reach the unquestionably shielded painting of
21 Jackson Pollock, music of Arnold Schonberg, or the Jabberwocky
22 verse of Lewis Carroll.

23 Even under the attorney general's flawed theory,
24 the plaintiffs testified that they do have messages for the
01:44PM 25 performances. The Woodlands Pride, Jason Rocha, testified that

1 for them it means liberation.

2 Abilene Pride Alliance, Gavyn Hardegree,
3 testified that the drag performances are a source of healing
4 for the community in Abilene.

01:44PM

5 Brigitte Bandit said that her performances are
6 based on love and acceptance and sometimes include explicitly
7 political messages like when she did drag in the Texas Capitol
8 building against this very bill while also having a message to
9 advocate for the children of Uvalde.

01:44PM

10 Your Honor, it is simply wrong on the law and
11 also dangerous for the attorney general to try to wholesale
12 exclude drag performances and other types of sexually oriented
13 performances from constitutional scrutiny.

14 Thank you.

01:45PM

15 THE COURT: I've got just two short matters.

16 As I stated, it will help my drafting of a final
17 judgment in this case and also allow you to bring up to date
18 any points that you brought up during trial.

01:45PM

19 The plaintiff has already on file -- what is
20 it -- a final pretrial --

21 MR. KLOSTERBOER: Yes, Your Honor, a proposed findings
22 of fact --

01:45PM

23 THE COURT: Findings of fact and conclusions of law.
24 So I need you to update those and I need one from the attorney
25 general -- are you going to file any?

1 MS. GIFFORD: Yes, Your Honor. I propose that we get
2 it to you by Thursday morning.

3 THE COURT: No. We're going to set a time.

4 MS. GIFFORD: Okay.

01:45PM 5 THE COURT: Yes. Okay. All right. Now, if the six
6 other defendants want to file anything, certainly you're free
7 to do so.

8 But as far as the findings of fact and
9 conclusions of law, I'm going to request it of the plaintiff
01:46PM 10 and the state defendant.

11 Let's see. You e-mail a copy to my case manager
12 in Word format. So that's going to help us if we want to take
13 something from that.

14 I'm going to request that you order a transcript
01:46PM 15 of these proceedings.

16 Now, what about a date? What about a date that
17 you will get either your amended findings of fact and
18 conclusions of laws and the original filing now by the State of
19 Texas? You propose what date?

01:46PM 20 MS. GIFFORD: Your Honor, I would propose by Thursday
21 morning as we have to get back to Austin first before we can
22 get on to that.

23 THE COURT: What about the plaintiffs?

24 MR. KLOSTERBOER: Your Honor, I think we can -- we
01:47PM 25 should be able to -- we talked about -- whenever the transcript

1 is available, we can start working on it and so --

2 THE COURT: Well, why don't you talk to the court
3 reporter right now?

4 MR. KLOSTERBOER: We did earlier and the court reporter
5 indicated that we should get it tomorrow, the final transcript.

6 We would say Thursday or Friday, but whatever the
7 Court wants, we will do.

8 THE COURT: All right. Let's talk about it practically
9 okay? The law, unless it's temporarily halted, goes into
10 effect on Friday, okay? Monday is Labor Day. I don't want to
11 ruin anybody's holiday.

12 If you want since -- and I have the wording here.
13 I want to read this because I actually prepared this. I've not
14 reached a final decision as of yet. I really have not.

15 I will take into consideration the testimony,
16 exhibits, all motions, submissions and applicable law. If I
17 deem it appropriate, I may issue a temporary restraining order
18 just and only just to maintain a status quo until a final order
19 can be drafted and a final judgment entered.

20 That's why I appreciate how everybody got
21 together relative to getting a trial on the merits so we don't
22 have to do it again. And if anybody comes up on the short end,
23 they can quickly move it up the line if you have to, okay?

24 If a TRO is deemed appropriate, it will be
25 entered on Thursday, which is -- what is it -- just ahead of

1 Senate Bill 12 taking effect on Friday.

2 Excuse me for the hoarseness. We all got through
3 it one way or the other.

4 Any questions on these housekeeping matters?

01:49PM 5 MR. KLOSTERBOER: Your Honor, just one note --

6 THE COURT: First of all, Ms. Gifford said Thursday.
7 If you want to give yourself over the week or a little
8 breathing room, it's okay because we're going to immediately
9 start on the opinion as soon as we get the findings of fact and
01:49PM 10 conclusions of law in. But, you know, you've got a life.
11 You've got a weekend coming up. What's your feeling? What's
12 your feeling on getting those to me? Can you use a little more
13 time or you want to get it in -- right in before we take our
14 weekend?

01:49PM 15 MR. KLOSTERBOER: Yes, Your Honor. I think we would
16 like to make it fully accurate with the transcript, and we
17 would like a week to work on it.

18 THE COURT: Any objection by the State?

19 MS. GIFFORD: Well, Your Honor, there's --

01:50PM 20 THE COURT: I know exactly what you're thinking. Go
21 on.

22 MS. GIFFORD: To be perfectly honest, Your Honor, I
23 mean if you were to grant a TRO --

24 THE COURT: What?

01:50PM 25 MS. GIFFORD: -- I don't know whether or not the

1 attorney general would immediately file an appeal.

2 THE COURT: On a TRO?

3 MS. GIFFORD: Yes, Your Honor.

01:50PM

4 THE COURT: How do you get up on a temporary
5 restraining order?

6 MS. GIFFORD: That in order to stay the TRO because --

01:51PM

7 THE COURT: TRO is a different animal from a
8 preliminary injunction. We're dealing here with a trial on the
9 merits with a final injunction or a final denial of the frontal
10 attack on the statute.

11 I understand exactly what you're saying. I
12 anticipate it. So if you want to make a call whether or not
13 you're going to file it or not, it's a lot of work and I
14 understand that.

01:51PM

15 MS. GIFFORD: Your Honor, I think -- because I don't
16 have an answer for you on that right now. I would need to make
17 a call in order -- you appreciate the --

18 THE COURT: Say that again.

01:51PM

19 MS. GIFFORD: You appreciate the chain of command here
20 and so --

21 THE COURT: All right. So what I'm going to do is
22 this.

23 MS. GIFFORD: I would need to make a call.

01:51PM

24 THE COURT: What I'm going to do is this: The
25 plaintiff has until -- what day do you want? Day?

1 MR. KLOSTERBOER: Next Wednesday, Your Honor.

2 THE COURT: Next Wednesday by close of business to get
3 theirs in, okay?

4 MR. KLOSTERBOER: Thank you, Your Honor.

01:51PM 5 THE COURT: The State of Texas, if you want to get it
6 in earlier, fine. I'm going to set the same deadline, okay?
7 And so if you -- yeah, you can talk about it. But keep in mind
8 specifically a temporary restraining order is different, okay,
9 than a preliminary injunction.

01:52PM 10 But by agreement or at least by my agreement it
11 was converted into a trial on the merits so you don't have to
12 do this again.

13 So what I'll do, I'll leave that up to the State,
14 okay? If you desire to file it, fine. You will have a
01:52PM 15 determination.

16 Keep in mind this is not -- it's not going to be
17 a 10-page order. So we're granting that delay so I can
18 consider, you know, your concerns and then at that time get it
19 out in 14 days or the rules allow it for one extension for
01:52PM 20 another 14 days. So that's the max that you're looking at.

21 But I understand your position, counsel.

22 All right. I will say this: If you desire to
23 file findings of fact and conclusions of law, okay, you also
24 may get it in close of business -- let's say by 4:00 in the
01:53PM 25 afternoon on next Wednesday, okay?

1 Any objections?

2 (No response.)

3 THE COURT: All right. On a personal note I want to
4 thank the attorneys for putting on one of the most interesting
01:53PM 5 cases that I've had in 37 years on the federal bench. Still
6 going I guess up to a point. But it's been a pleasure. It's
7 one of the best cases and the most interesting and one of the
8 most important that I've had in all of my federal career.

9 So thank you so much. You moved it along as best
01:54PM 10 you could. And darn it, it was interesting; and that's one
11 thing why the job never gets tiring. You learn about different
12 things and different folks and different science every day.

13 So it's interesting, it's important. You get the
14 final pegs put in the board and I will get you an opinion as
01:54PM 15 quick as we can. We're not going to sit on this because we
16 can't sit on this. That was the promise in effect I made to
17 you that you're going to get a final judgment so you don't have
18 to get a preliminary injunction and take it up and get it
19 modified or whatever and coming back and then we have a trial
01:54PM 20 itself.

21 And thanks to all the witnesses and the folks
22 that came. As far as I'm concerned, nothing beats the federal
23 court. It never gets tiring with me and hopefully you feel the
24 same about the practice of law.

01:54PM 25 Thank you so much. We now stand adjourned.

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COURTROOM SECURITY OFFICER: All rise.

THE COURT: Okay. Free to depart.

(The proceedings were adjourned.)

* * * *

REPORTER'S CERTIFICATE

I, Lanie M. Smith, CSR, RMR, CRR, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

 /s/ Lanie M. Smith
Official Court Reporter

	<p>1938 [1] - 77:18 1973 [1] - 58:18 1983 [7] - 75:2, 78:3, 79:4, 115:8, 115:9, 121:24 1995 [1] - 125:14 1996 [1] - 101:4 1997 [1] - 58:15 1st [1] - 117:7</p>	<p>43.28 [1] - 21:22 45 [9] - 19:18, 45:2, 45:10, 45:19, 46:5, 46:7, 46:9, 51:15, 78:17 4744 [1] - 33:4 4:00 [1] - 131:24 4:23-CV-02847 [1] - 1:4</p>
' misbrand ' [1] - 33:7 ' misrepresent ' [1] - 33:8 ' sexually ' [2] - 18:24, 19:7		
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/s [1] - 133:10		
1	2	5
<p>1 [6] - 37:21, 49:4, 49:7, 69:9, 76:4, 124:15 1(A) [1] - 23:7 10 [7] - 18:17, 20:1, 21:21, 48:8, 117:18, 117:20 10,000-dollar [1] - 53:21 10-page [1] - 131:17 101 [1] - 3:6 10112 [1] - 2:6 1018 [1] - 1:23 102.051 [1] - 19:9 105 [1] - 4:13 11 [4] - 60:12, 60:17, 60:24, 61:1 111 [1] - 4:14 112 [2] - 4:14, 4:15 116 [1] - 4:15 118 [1] - 4:16 11:31 [1] - 45:21 11:35 [1] - 48:7 11:50 [2] - 45:23, 45:24 11th [1] - 3:2 12 [74] - 13:17, 13:21, 18:16, 20:12, 27:9, 28:19, 40:17, 40:25, 41:25, 42:2, 43:12, 44:10, 44:13, 48:8, 48:20, 51:23, 54:4, 55:18, 57:5, 57:7, 57:14, 57:16, 60:19, 60:21, 63:22, 65:10, 65:15, 73:24, 79:9, 79:22, 79:24, 80:1, 80:16, 82:15, 83:2, 83:4, 83:6, 83:11, 84:8, 84:14, 86:5, 88:7, 90:16, 92:24, 93:19, 94:18, 95:5, 95:8, 95:13, 95:21, 96:24, 97:17, 97:22, 98:6, 98:11, 98:16, 99:19, 99:21, 99:23, 100:1, 100:4, 100:18, 100:20, 102:5, 102:8, 103:12, 103:20, 104:7, 105:7, 105:12, 106:12, 106:16, 106:18, 129:1 12548 [1] - 2:10 126 [1] - 4:17 12th [2] - 47:21, 48:2 14 [3] - 4:4, 131:19, 131:20 15 [2] - 4:5, 45:24 16 [1] - 72:6 17 [3] - 2:17, 4:6, 4:7 17-year-old [2] - 54:6, 54:18 178 [1] - 84:25 18 [5] - 44:16, 45:24, 59:5, 68:23, 86:14 18-up [1] - 9:15 1810 [1] - 57:11</p>	<p>2 [13] - 1:10, 32:21, 37:22, 68:1, 68:2, 68:7, 73:23, 76:7, 79:9, 108:17, 110:6, 123:12, 124:14 20 [3] - 51:13, 70:23, 70:24 2011 [1] - 59:1 2013 [2] - 85:3, 123:14 2018 [1] - 85:21 2020 [1] - 73:10 2021 [2] - 74:23, 75:5 2022 [1] - 107:14 2023 [7] - 1:7, 31:13, 31:16, 70:14, 70:15, 71:19, 72:6 21-up [3] - 8:3, 9:15, 16:9 23 [2] - 71:4, 71:5 233 [1] - 85:21 23rd [1] - 71:19 243.0031(b) [1] - 114:20 25 [1] - 51:13 28th [3] - 72:9, 72:15, 72:17 29 [3] - 1:7, 4:8, 73:3</p>	<p>5 5 [5] - 4:4, 20:1, 32:24, 33:1, 61:17 5-dollar [1] - 42:9 500 [1] - 3:3 501 [2] - 2:20, 2:23 51 [1] - 4:12 515 [1] - 3:11 52(c) [1] - 17:12 5225 [1] - 1:16 524 [1] - 123:16 535 [1] - 75:12 568 [1] - 85:3</p>
	3	6
	<p>3 [15] - 31:20, 32:2, 37:23, 37:24, 38:1, 49:1, 49:22, 49:25, 50:10, 76:10, 79:9, 115:20, 123:12, 124:3 3-year-old [1] - 54:18 30 [1] - 2:6 300 [2] - 2:21, 2:24 314 [1] - 3:2 33 [1] - 4:9 335 [1] - 84:6 34 [1] - 4:10 350 [2] - 1:16, 84:25 358 [1] - 85:1 36 [1] - 75:12 360 [4] - 39:8, 69:13, 77:8, 87:7 37 [1] - 132:5 38 [1] - 78:14 398 [1] - 85:3</p>	<p>6 6 [1] - 21:21</p>
	4	7
	<p>4(A) [1] - 53:22 40 [1] - 78:2 400 [1] - 2:14 43 [1] - 93:22 43.21 [2] - 55:5, 101:24 43.23 [1] - 55:2</p>	<p>7 7 [1] - 18:17 726 [1] - 123:16 77002 [3] - 1:23, 2:3, 3:12 77007 [1] - 1:17 77288 [1] - 1:20 77301 [2] - 2:21, 2:24 77381 [1] - 2:18 78205 [1] - 3:7 78701 [1] - 3:3 78711 [1] - 2:11 79 [1] - 4:12 79601 [1] - 2:15 7th [1] - 3:6</p>
		8
		<p>8 [2] - 75:7, 75:16 800 [1] - 2:14 8004 [1] - 3:11 8306 [1] - 1:20 88 [1] - 4:13</p>
		9
		<p>900 [1] - 85:21 910 [1] - 2:3</p>
		A
		<p>A [4] - 32:7, 55:6, 76:13, 86:10 a [538] - 6:4, 6:10, 6:21, 6:23, 6:24, 6:25, 7:8, 7:13, 7:24, 8:8, 8:9, 8:12, 8:21, 8:22, 9:1, 9:2, 9:3, 9:6, 9:19, 9:23,</p>

9:24, 11:10, 12:4, 13:16, 13:18, 14:6, 14:12, 15:1, 16:12, 17:3, 17:5, 17:10, 17:12, 17:14, 17:16, 18:13, 18:25, 19:1, 19:7, 19:8, 19:20, 19:21, 19:23, 20:17, 21:7, 21:19, 22:24, 23:9, 23:16, 23:24, 24:5, 24:11, 24:24, 25:5, 26:2, 26:6, 26:7, 26:18, 27:2, 27:13, 27:22, 27:24, 28:5, 28:12, 28:17, 29:14, 29:23, 30:22, 30:23, 30:25, 31:2, 31:23, 32:4, 32:15, 32:16, 32:18, 32:25, 33:21, 34:7, 35:2, 35:8, 35:20, 36:16, 36:18, 36:23, 36:25, 37:1, 37:10, 37:11, 38:5, 38:14, 38:15, 38:16, 38:23, 38:25, 39:1, 39:17, 39:25, 40:2, 40:3, 40:5, 40:15, 40:16, 40:22, 41:2, 41:11, 42:9, 42:18, 42:20, 42:21, 42:23, 43:1, 43:3, 43:4, 43:7, 43:8, 43:15, 43:18, 44:2, 44:5, 44:20, 44:25, 45:2, 45:4, 45:9, 45:14, 45:20, 45:23, 46:21, 46:25, 47:2, 47:6, 47:9, 47:10, 47:13, 47:15, 48:1, 49:25, 50:8, 50:12, 50:13, 50:17, 50:19, 51:1, 51:2, 51:16, 51:22, 52:3, 53:9, 53:21, 53:24, 54:6, 54:9, 54:13, 54:16, 54:18, 55:6, 55:10, 55:13, 56:6, 56:13, 56:18, 57:4, 57:14, 57:20, 58:13, 58:22, 58:23, 59:1, 59:23, 60:14, 62:7, 63:4, 63:5, 63:7, 63:9, 63:10, 63:15, 63:22, 64:1, 64:9, 64:16, 64:24, 65:8, 65:13, 66:22, 67:1, 67:3, 67:14, 67:15, 68:3, 68:12, 68:22, 68:23, 69:2, 69:9, 69:15, 69:20, 70:10, 70:14, 70:20, 70:25, 71:11, 71:12, 71:15, 71:16, 71:23, 71:24, 72:5, 72:7, 72:11, 72:12, 72:14, 72:19, 73:2, 73:4, 73:9, 73:10, 73:12, 73:14, 73:15, 73:17, 73:20, 74:9, 74:13, 74:15, 74:22, 74:24, 75:1, 75:6, 75:7, 76:8, 76:24, 77:23, 78:2, 78:4, 78:5, 79:3, 80:2, 80:5, 80:10, 80:13, 80:19, 80:25, 81:4, 81:5, 81:15, 81:24, 82:2, 82:8, 82:11, 82:17, 83:6, 83:8, 83:16, 83:22, 83:24, 84:1, 84:16, 84:21, 85:5, 85:8, 85:9, 85:12, 85:20, 85:21, 86:1, 86:10, 86:11, 86:12, 86:19, 86:23, 87:8, 87:22, 88:5, 88:12, 88:13, 88:23, 89:2, 89:9, 89:10, 89:16, 89:20, 90:14, 90:18, 90:21, 90:22, 90:25, 91:3, 91:7, 91:9, 91:10, 91:23, 92:2, 92:6, 92:21, 93:10, 93:18, 94:5, 94:24, 94:25, 95:7, 95:18, 96:4, 96:5, 96:6, 96:7, 96:8, 96:9, 96:10, 96:19, 97:5, 97:6, 97:7, 97:15, 97:18, 98:1, 98:3, 98:4, 98:8, 98:9, 98:13, 98:15, 98:21, 98:22, 98:25, 99:4, 99:8, 99:9, 99:11, 99:12, 100:6, 100:8, 100:13, 100:14, 100:15, 100:16, 100:22, 101:14, 102:7, 102:9, 102:10, 102:17, 103:2, 103:3, 103:7, 103:8, 103:10, 103:21, 104:6, 104:9, 105:7, 105:13, 105:21, 105:24, 106:5, 106:6, 107:2, 107:4, 107:14, 107:18, 108:4, 108:6, 108:14, 108:18, 109:4, 109:5, 109:8, 109:11, 109:25, 110:3, 110:4, 110:8,

110:10, 110:12, 110:14, 110:20, 110:22, 110:24, 110:25, 111:1, 112:11, 113:2, 113:5, 113:6, 113:8, 113:14, 114:10, 114:13, 114:14, 114:20, 115:8, 115:9, 115:13, 115:19, 115:21, 115:22, 116:1, 116:4, 116:6, 116:8, 118:6, 118:22, 119:3, 119:11, 119:14, 119:16, 119:19, 120:6, 120:7, 120:9, 120:10, 120:11, 120:15, 120:16, 120:21, 120:22, 120:25, 121:1, 121:4, 121:5, 121:14, 121:23, 122:4, 122:6, 122:12, 122:16, 122:17, 122:21, 122:22, 123:6, 123:18, 123:20, 123:22, 124:13, 125:3, 125:7, 125:14, 125:17, 125:18, 126:3, 126:8, 126:16, 126:20, 126:21, 127:3, 127:11, 127:14, 127:16, 128:14, 128:17, 128:18, 128:19, 128:21, 128:24, 129:7, 129:10, 129:11, 129:12, 129:17, 129:23, 130:2, 130:4, 130:7, 130:8, 130:9, 130:12, 130:13, 130:17, 130:23, 131:8, 131:9, 131:11, 131:14, 131:17, 132:3, 132:6, 132:17, 132:18, 132:19, 133:7

Abbott [1] - 70:23

abet [1] - 65:1

abetting [7] - 39:6, 102:23, 102:25, 103:1, 124:20, 124:21, 125:6

Abilene [20] - 2:15, 23:13, 23:14, 28:8, 64:14, 76:20, 86:22, 105:18, 106:8, 106:10, 108:1, 108:11, 109:1, 109:11, 116:17, 116:25, 117:1, 121:19, 126:2, 126:4

ABILENE [1] - 2:17

Abilene's [1] - 121:10

ability [3] - 44:13, 77:12, 133:7

able [5] - 29:5, 56:21, 86:18, 86:22, 127:25

abortion [1] - 75:9

about [93] - 7:22, 11:24, 11:25, 12:1, 12:10, 13:2, 13:20, 18:11, 18:18, 18:19, 20:1, 22:1, 22:10, 23:12, 23:13, 23:14, 23:23, 24:2, 24:15, 25:1, 26:17, 27:25, 28:5, 41:7, 41:16, 42:14, 42:15, 42:23, 43:3, 43:12, 45:20, 46:9, 46:14, 47:21, 49:8, 51:13, 53:9, 54:22, 56:17, 57:24, 58:9, 58:16, 61:19, 65:14, 67:19, 67:23, 69:10, 73:16, 80:4, 80:7, 82:1, 82:12, 82:16, 83:13, 86:3, 88:11, 91:12, 92:4, 92:14, 92:17, 94:23, 96:12, 97:10, 98:1, 101:1, 101:4, 102:14, 102:16, 104:4, 104:20, 106:15, 107:16, 108:13, 113:4, 113:13, 117:18, 117:20, 118:6, 119:15, 120:8, 120:17, 125:11, 127:16, 127:23, 127:25, 128:8, 131:7, 132:11, 132:24

above [1] - 133:8

above-entitled [1] - 133:8

absence [3] - 74:10, 83:23, 84:4

absolute [2] - 68:11, 102:17

absolutely [8] - 14:14, 18:4, 40:16, 42:18, 51:4, 98:12, 99:21, 111:23

Academic [2] - 90:6, 91:25

accept [1] - 89:25

acceptance [1] - 126:6

accessible [1] - 60:16

accessories [7] - 26:12, 61:24, 62:5, 62:10, 67:8, 103:22, 104:3

accessory [2] - 61:19, 67:2

accident [2] - 81:10, 81:23

accidental/incidental [1] - 25:23

accidentally [4] - 26:3, 30:20, 81:13

accidentally-on-purpose [1] - 81:13

accordance [1] - 13:22

according [1] - 45:21

account [2] - 54:17, 90:23

accumulating [1] - 71:21

accurate [2] - 100:7, 129:16

accuse [1] - 102:21

accused [1] - 64:15

achieve [3] - 95:8, 95:12, 95:14

achieved [1] - 94:25

achieves [1] - 95:6

ACLU [5] - 1:15, 1:19, 1:22, 52:5, 53:14

across [2] - 30:15, 65:3

act [9] - 22:12, 33:2, 75:25, 100:8, 103:15, 108:17, 109:1, 110:6, 110:7

acting [6] - 103:3, 103:4, 121:13, 121:23, 122:1, 125:4

action [11] - 32:14, 32:17, 73:19, 74:12, 75:2, 75:14, 98:14, 98:18, 108:16, 111:13, 114:18

actions [1] - 84:22

activities [1] - 108:5

activity [7] - 74:8, 83:21, 84:11, 84:15, 89:20, 94:2, 120:22

actors [2] - 65:21, 107:20

acts [8] - 11:9, 11:17, 21:18, 22:16, 22:19, 22:24, 33:7, 124:23

Actual [3] - 21:17, 23:8, 25:16

actual [11] - 11:9, 12:17, 12:18, 14:16, 14:19, 22:12, 22:23, 32:13, 85:4, 108:16, 118:17

actually [28] - 7:14, 16:5, 16:14, 20:8, 20:15, 27:14, 30:24, 53:13, 58:11, 59:11, 60:1, 63:21, 65:7, 66:4, 68:2, 68:5, 68:7, 69:22, 69:24, 70:6, 72:12, 72:17, 77:23, 86:25, 118:20, 124:12, 124:21, 128:13

add [9] - 20:2, 29:2, 29:7, 34:3, 42:5, 50:11, 51:5, 64:24, 105:16

added [1] - 70:4

additional [5] - 34:1, 36:21, 45:7, 50:14, 87:24

additionally [2] - 27:23, 96:24

address [8] - 13:5, 24:9, 38:4, 43:19, 45:15, 49:19, 113:18

addressed [3] - 42:3, 112:15, 122:11

addresses [2] - 36:3, 42:3

adds [1] - 64:12

adduced [1] - 59:11
adequate [1] - 65:19
adequately [1] - 36:2
adjourn [1] - 117:21
adjourned [2] - 132:25, 133:3
Administration [1] - 52:20
admission [2] - 7:22, 88:6
admitted [2] - 15:4, 17:2
adopt [3] - 79:13, 112:25, 116:21
adopted [2] - 93:3, 93:7
adopts [1] - 121:9
adult [11] - 5:15, 5:20, 7:21, 7:25, 14:23, 21:9, 41:22, 41:24, 69:21, 71:13, 93:2
adult-only [4] - 5:15, 5:20, 14:23, 21:9
adults [12] - 5:24, 6:5, 6:7, 7:5, 8:11, 15:9, 68:12, 68:22, 99:25, 100:9, 101:10, 102:3
adults-only [6] - 5:24, 6:5, 6:7, 7:5, 8:11, 15:9
advance [2] - 43:1, 89:10
advertised [1] - 9:6
advocate [2] - 77:13, 126:9
affected [2] - 32:16, 73:14
affirmative [4] - 35:25, 63:21, 63:23, 64:3
afraid [3] - 102:22, 109:1, 109:8
after [9] - 16:17, 41:4, 45:7, 45:23, 60:12, 71:1, 77:22, 113:21, 117:20
afternoon [1] - 131:25
AG [4] - 37:19, 37:22, 106:12, 124:9
again [37] - 6:15, 11:13, 21:14, 27:25, 29:14, 37:12, 38:14, 39:2, 43:8, 43:18, 44:2, 46:5, 46:25, 47:3, 55:16, 56:3, 63:3, 83:3, 88:4, 94:11, 95:21, 96:2, 96:25, 97:21, 97:25, 98:16, 99:1, 100:14, 101:14, 102:19, 102:22, 103:5, 105:2, 105:6, 128:22, 130:18, 131:12
against [37] - 24:22, 25:23, 26:3, 28:13, 35:14, 36:21, 37:2, 37:22, 37:23, 73:7, 73:19, 74:12, 75:14, 79:2, 79:4, 79:7, 79:8, 86:8, 98:15, 106:7, 106:13, 106:21, 108:8, 108:22, 109:24, 110:2, 110:7, 110:11, 111:9, 115:9, 118:11, 118:17, 119:1, 124:5, 124:7, 126:8
age [8] - 5:17, 10:9, 11:6, 11:10, 44:16, 68:21, 86:14, 88:10
age-appropriate [1] - 11:6
ages [26] - 5:14, 5:21, 5:25, 6:6, 7:16, 7:17, 9:7, 9:9, 9:10, 9:14, 10:21, 11:20, 12:20, 21:6, 21:9, 22:19, 22:25, 23:2, 24:17, 25:3, 25:21, 28:6, 30:12, 54:10, 117:11
ago [4] - 21:7, 36:12, 78:2, 86:14
agree [8] - 80:22, 80:23, 94:6, 99:8, 100:13, 112:24, 118:25, 119:22
agreed [2] - 107:7, 118:20
agreement [2] - 131:10
agrees [1] - 80:14
ahead [13] - 5:7, 9:12, 15:22, 71:24,

81:22, 101:17, 109:20, 112:19, 113:20, 118:1, 119:7, 128:25
aid [1] - 64:25
aiding [7] - 39:6, 102:23, 102:24, 102:25, 124:20, 124:21, 125:6
aimed [1] - 71:14
AL [4] - 1:4, 1:7, 2:13, 2:21
aligns [1] - 75:20
ALISON [1] - 2:1
all [175] - 5:2, 5:14, 5:21, 5:25, 6:6, 7:1, 7:3, 7:16, 7:17, 7:21, 7:25, 8:23, 9:7, 9:9, 9:10, 9:14, 10:21, 11:10, 11:20, 12:20, 12:23, 13:2, 16:20, 17:16, 18:10, 18:15, 19:1, 20:13, 20:23, 21:6, 21:9, 22:19, 22:21, 22:25, 23:2, 24:17, 25:3, 25:21, 27:25, 28:6, 28:22, 29:10, 30:12, 32:1, 32:4, 32:15, 33:11, 33:20, 33:23, 33:25, 34:8, 35:7, 35:9, 36:5, 36:15, 36:21, 36:23, 37:23, 38:1, 38:3, 38:12, 38:14, 38:19, 38:21, 39:9, 39:17, 40:23, 42:14, 43:3, 43:16, 43:23, 44:14, 44:19, 44:24, 45:8, 45:9, 45:13, 46:8, 46:20, 47:8, 47:10, 47:23, 48:7, 48:10, 48:13, 48:14, 49:5, 49:17, 51:7, 51:15, 51:18, 52:25, 53:7, 53:16, 54:10, 55:15, 55:24, 57:15, 58:2, 59:19, 60:24, 62:23, 67:5, 68:9, 68:18, 69:5, 69:11, 69:13, 69:21, 71:20, 72:18, 72:20, 72:23, 73:19, 74:19, 77:1, 77:11, 78:15, 78:16, 78:17, 79:4, 79:18, 81:22, 88:14, 91:19, 95:20, 96:17, 102:21, 103:25, 104:8, 105:15, 105:20, 105:25, 106:13, 106:16, 106:22, 107:8, 107:11, 107:13, 108:8, 108:14, 108:25, 111:16, 112:15, 112:16, 112:17, 113:14, 116:3, 117:11, 117:17, 120:21, 120:24, 122:7, 122:10, 123:11, 123:24, 123:25, 124:6, 125:1, 125:12, 127:5, 128:8, 128:16, 129:2, 129:6, 130:21, 131:22, 132:3, 132:8, 132:21, 133:1
all-adult [2] - 7:21, 7:25
all-age [1] - 11:10
all-ages [22] - 5:21, 5:25, 6:6, 7:16, 7:17, 9:7, 9:9, 9:10, 9:14, 10:21, 11:20, 12:20, 21:6, 21:9, 22:19, 22:25, 23:2, 24:17, 25:3, 25:21, 28:6, 30:12
all-encompassing [1] - 112:16
allegation [2] - 107:24, 108:8
allege [3] - 27:9, 61:17, 69:13
alleged [1] - 18:23
alleviate [1] - 77:6
Alliance [2] - 116:25, 126:2
allow [12] - 36:18, 47:1, 51:2, 57:14, 58:4, 84:9, 86:12, 103:8, 110:1, 115:1, 126:17, 131:19
allowance [1] - 54:5
allowed [6] - 42:10, 66:11, 66:25, 72:8, 87:13, 104:23
allowing [2] - 85:23, 110:2
allows [2] - 57:20, 103:7

alluded [1] - 106:17
almost [3] - 12:12, 13:7, 122:10
alone [1] - 40:2
along [3] - 79:15, 111:6, 132:9
already [28] - 13:13, 13:15, 13:16, 20:11, 20:13, 29:17, 37:7, 39:8, 39:11, 41:20, 44:4, 44:6, 44:17, 52:21, 55:1, 55:3, 55:8, 62:12, 65:16, 66:5, 77:9, 83:9, 88:9, 104:21, 104:22, 112:5, 123:7, 126:19
also [48] - 6:1, 11:21, 21:15, 21:16, 30:16, 33:16, 36:17, 40:8, 46:11, 46:17, 47:12, 52:17, 56:22, 57:8, 57:13, 57:18, 57:22, 58:25, 60:11, 62:16, 63:17, 64:4, 67:14, 67:16, 69:1, 69:17, 69:22, 70:18, 77:11, 77:13, 79:9, 82:1, 82:16, 85:3, 85:20, 91:13, 102:22, 106:22, 113:10, 114:17, 115:23, 115:24, 117:4, 122:18, 126:8, 126:11, 126:17, 131:23
alternative [3] - 33:9, 96:25, 122:21
alternatives [1] - 122:24
although [1] - 102:23
always [6] - 23:23, 39:13, 92:3, 121:11, 121:16, 122:5
am [2] - 43:18, 58:20
amended [5] - 38:3, 38:17, 46:15, 127:17
Amendment [31] - 39:14, 40:9, 53:1, 53:2, 53:25, 57:20, 60:4, 63:17, 72:8, 73:13, 76:9, 78:8, 80:4, 80:6, 80:8, 80:11, 88:9, 89:24, 90:10, 90:17, 90:21, 91:2, 93:1, 95:17, 95:20, 96:20, 105:13, 111:11, 120:22, 125:12, 125:19
amendment [1] - 36:13
amends [1] - 64:22
American [1] - 125:14
Amnesty [1] - 85:2
ample [1] - 100:23
AMY [1] - 3:1
An [1] - 22:12
an [98] - 5:25, 6:5, 6:7, 7:17, 7:21, 7:25, 9:6, 9:9, 9:10, 10:20, 12:20, 12:25, 14:16, 14:19, 21:15, 22:25, 23:18, 24:17, 30:11, 30:25, 31:3, 32:12, 32:13, 34:6, 35:25, 36:1, 38:17, 39:14, 45:6, 45:20, 46:7, 46:9, 46:15, 47:9, 47:14, 51:3, 53:14, 54:5, 54:16, 55:4, 57:4, 61:19, 62:4, 62:6, 66:3, 67:2, 68:2, 68:11, 70:4, 71:22, 73:13, 73:20, 75:9, 75:13, 77:5, 77:17, 79:6, 81:10, 81:23, 83:18, 84:9, 84:20, 86:13, 87:17, 88:13, 88:16, 89:17, 89:23, 90:1, 90:3, 90:9, 91:2, 91:15, 91:20, 93:18, 93:19, 98:2, 98:18, 99:17, 99:18, 102:17, 103:4, 105:4, 111:8, 111:9, 111:25, 118:16, 118:17, 119:19, 119:20, 120:19, 122:19, 122:21, 130:1, 130:16, 132:14
anal [4] - 21:18, 22:13, 23:1, 56:14
analysis [4] - 35:13, 35:20, 58:23, 63:1

AND [1] - 1:10

and [580] - 5:14, 6:3, 6:17, 7:1, 7:8, 7:23, 8:1, 8:3, 9:14, 9:15, 9:16, 9:23, 10:4, 12:2, 12:5, 12:9, 12:13, 12:14, 12:15, 13:2, 13:3, 13:16, 13:20, 13:24, 14:15, 14:25, 16:10, 16:16, 16:17, 17:7, 17:24, 18:2, 18:5, 18:11, 18:17, 19:5, 19:9, 19:10, 19:11, 19:14, 19:21, 20:1, 20:7, 20:10, 21:3, 21:5, 21:14, 21:15, 21:18, 21:23, 22:1, 22:3, 22:7, 22:9, 22:10, 22:13, 22:15, 22:20, 23:17, 23:20, 23:25, 24:16, 24:21, 24:22, 24:24, 25:3, 25:4, 25:17, 25:20, 25:22, 26:10, 26:20, 27:3, 27:6, 27:11, 27:12, 27:20, 27:21, 28:4, 28:8, 28:10, 28:20, 29:3, 29:5, 29:14, 29:16, 30:18, 30:25, 32:10, 32:18, 33:1, 33:7, 33:15, 33:18, 34:3, 34:6, 34:15, 34:18, 34:19, 34:20, 35:6, 35:15, 36:3, 36:6, 36:13, 36:15, 37:1, 37:2, 37:3, 37:7, 37:15, 37:20, 37:22, 37:23, 38:5, 38:11, 38:16, 38:18, 38:25, 39:4, 39:5, 39:6, 39:10, 39:12, 39:15, 40:3, 40:12, 40:24, 41:12, 41:13, 41:14, 42:2, 42:8, 42:10, 42:16, 42:19, 42:25, 43:8, 44:1, 44:18, 45:5, 45:11, 45:17, 45:18, 45:20, 45:24, 45:25, 46:2, 46:9, 46:13, 46:17, 46:23, 46:24, 47:3, 47:9, 47:11, 47:14, 47:20, 47:23, 47:24, 47:25, 48:2, 48:3, 48:6, 48:8, 48:9, 48:16, 49:13, 50:19, 50:25, 51:3, 51:23, 51:24, 51:25, 52:9, 52:18, 52:21, 53:19, 53:22, 54:2, 54:7, 54:12, 54:17, 54:18, 54:20, 54:23, 54:24, 55:6, 55:12, 55:13, 55:14, 56:13, 56:16, 56:19, 56:22, 56:25, 57:4, 57:14, 57:15, 57:17, 57:18, 57:23, 58:1, 58:12, 59:8, 59:11, 59:14, 59:15, 60:22, 61:7, 61:9, 61:13, 61:18, 62:2, 62:7, 62:8, 62:10, 62:11, 62:15, 62:17, 62:20, 62:21, 63:2, 63:10, 63:14, 63:17, 63:20, 64:13, 64:14, 64:17, 64:19, 65:1, 65:13, 65:14, 65:17, 65:18, 65:23, 66:5, 66:10, 66:18, 67:9, 67:15, 67:16, 67:18, 67:22, 67:23, 67:24, 67:25, 68:10, 68:17, 68:24, 69:1, 69:14, 69:22, 69:23, 70:4, 70:9, 70:10, 70:14, 70:17, 70:22, 71:24, 72:3, 72:8, 72:9, 72:17, 72:19, 72:23, 73:5, 73:11, 74:5, 74:11, 74:18, 74:23, 75:5, 75:8, 75:9, 75:10, 75:12, 75:15, 76:7, 76:10, 76:11, 76:22, 77:4, 77:5, 77:11, 77:13, 77:14, 77:21, 78:1, 78:9, 78:24, 79:9, 79:16, 79:19, 79:20, 79:22, 80:1, 80:18, 81:4, 81:19, 82:3, 82:6, 82:7, 82:9, 83:12, 83:15, 84:10, 84:14, 84:16, 84:19, 85:4, 85:18, 85:24, 86:1, 86:5, 86:16, 86:25, 87:15, 87:21, 88:6, 88:20, 88:24, 89:1, 89:2, 89:12, 89:14, 89:25, 90:12, 90:15, 90:20, 90:21, 91:3, 91:8, 91:12, 91:20, 92:2, 92:5, 92:7, 92:8, 92:12, 92:18, 92:20, 93:5, 93:10, 93:16, 93:23, 94:5, 94:10, 94:13, 94:20, 95:2, 95:11, 95:13,

95:18, 95:21, 96:2, 96:5, 96:10, 96:15, 96:18, 97:21, 98:2, 98:9, 98:11, 98:14, 98:16, 98:20, 99:2, 99:10, 99:19, 99:24, 99:25, 100:1, 100:11, 100:12, 100:15, 101:4, 101:9, 101:21, 102:2, 102:3, 102:9, 102:18, 102:20, 102:22, 102:23, 102:25, 103:11, 103:14, 103:17, 103:18, 104:1, 104:9, 104:13, 104:19, 105:9, 105:10, 105:12, 105:24, 105:25, 106:7, 106:12, 106:17, 106:19, 106:20, 106:23, 107:17, 107:20, 107:24, 108:13, 109:11, 109:12, 109:20, 110:1, 110:4, 110:13, 110:15, 110:16, 110:17, 110:18, 110:19, 110:25, 111:2, 111:10, 111:13, 111:23, 112:3, 112:12, 112:16, 112:20, 112:21, 112:24, 112:25, 113:5, 113:18, 114:4, 114:13, 114:21, 114:23, 115:2, 115:4, 115:5, 115:20, 115:22, 115:23, 115:24, 116:3, 116:5, 116:14, 116:21, 116:22, 116:24, 116:25, 117:1, 117:8, 117:9, 117:13, 117:14, 117:19, 117:21, 118:3, 118:11, 118:13, 118:21, 119:1, 119:10, 119:13, 119:14, 119:18, 121:2, 121:7, 121:10, 121:17, 121:25, 122:6, 122:7, 122:11, 123:5, 123:9, 123:12, 123:17, 124:5, 124:8, 124:11, 124:16, 124:20, 124:21, 125:1, 125:2, 125:3, 125:4, 125:6, 125:14, 125:17, 126:6, 126:10, 126:12, 126:17, 126:23, 126:24, 127:8, 127:10, 127:17, 127:18, 128:1, 128:4, 128:12, 128:16, 128:18, 128:19, 128:22, 129:9, 129:16, 130:13, 130:20, 131:7, 131:18, 131:23, 132:7, 132:10, 132:12, 132:14, 132:18, 132:19, 132:21, 132:23, 133:7, 133:7, 133:8

ANDREWS [1] - 2:1

Angela [2] - 78:23, 86:9

ANGELA [2] - 1:7, 2:8

animal [1] - 130:7

announced [1] - 113:22

another [4] - 7:23, 25:18, 117:23, 131:20

another's [1] - 103:3

answer [3] - 98:25, 99:24, 130:16

answered [2] - 29:17, 42:12

anticipate [2] - 89:9, 130:12

anticipating [1] - 42:23

anticipation [1] - 97:14

Antonio [1] - 3:7

any [81] - 5:23, 8:4, 11:4, 13:24, 19:10, 20:25, 22:6, 22:22, 25:18, 26:4, 27:3, 27:5, 30:11, 33:18, 34:3, 34:23, 38:19, 42:14, 44:19, 45:13, 45:15, 46:11, 46:15, 49:12, 50:14, 53:21, 55:3, 56:23, 60:6, 64:3, 64:14, 64:24, 66:18, 67:20, 68:8, 68:10, 68:15, 68:20, 68:21, 70:4, 73:19, 74:12, 77:19, 79:20, 79:23, 81:20, 82:6, 87:9, 90:23, 95:22, 95:25, 96:1, 97:10, 98:10, 98:14, 99:22,

103:21, 104:24, 106:21, 108:2, 108:3, 108:7, 108:11, 108:21, 108:22, 111:8, 111:25, 114:18, 118:24, 119:23, 120:3, 120:14, 120:15, 121:4, 121:11, 126:18, 126:25, 129:4, 129:18, 132:1

Any [1] - 22:2

anybody [6] - 8:21, 29:2, 29:7, 51:5, 105:24, 128:22

anybody's [2] - 109:17, 128:11

anyone [6] - 44:12, 62:10, 73:19, 104:1, 122:1, 124:23

Anyone [1] - 67:1

anything [21] - 16:21, 17:9, 20:2, 29:2, 29:7, 33:23, 35:20, 46:21, 50:11, 68:24, 79:21, 84:14, 105:16, 106:8, 108:1, 112:17, 114:21, 122:6, 124:12, 125:3, 127:6

anywhere [1] - 67:21

apologize [3] - 67:5, 68:19, 76:25

apparently [1] - 90:1

appeal [10] - 7:19, 21:16, 27:24, 42:24, 47:11, 47:17, 57:16, 67:9, 67:12, 130:1

appealed [1] - 57:10

appealing [4] - 26:2, 26:6, 27:2, 27:22

appeals [9] - 19:11, 22:3, 26:1, 55:11, 56:7, 67:4, 80:16, 80:18, 82:4

APPEARANCES [1] - 1:14

appeared [2] - 77:23, 104:2

appellate [1] - 47:21

applicable [2] - 113:4, 128:16

application [4] - 89:19, 123:2, 123:5

applications [1] - 88:15

applied [16] - 59:5, 59:13, 83:17, 83:18, 84:9, 84:10, 88:12, 88:16, 88:20, 89:12, 93:24, 102:11, 103:14, 122:19, 122:20, 122:23

applies [13] - 34:15, 40:5, 50:19, 60:22, 76:7, 79:1, 99:25, 102:2, 103:21, 104:8, 113:25, 114:10, 115:23

apply [16] - 34:13, 35:7, 49:4, 54:25, 55:7, 64:21, 64:23, 66:18, 68:6, 80:11, 88:22, 93:11, 109:11, 114:14, 115:24, 124:1

applying [5] - 31:6, 55:9, 56:5, 94:3, 98:19

appreciate [3] - 128:20, 130:17, 130:19

approach [2] - 29:12, 106:25

appropriate [5] - 7:20, 11:3, 11:6, 128:17, 128:24

appropriateness [1] - 9:14

approved [1] - 121:19

approving [1] - 92:7

approximately [1] - 51:12

April [3] - 31:13, 31:16, 31:21

are [121] - 5:23, 6:11, 6:12, 7:6, 8:1, 9:24, 10:3, 10:8, 10:15, 10:17, 10:18, 11:4, 11:24, 12:10, 12:19, 14:12, 15:3, 16:1, 16:9, 16:16, 16:25, 17:2, 17:10, 21:20, 24:20, 24:25, 25:1, 26:22, 27:4,

30:20, 32:7, 35:11, 35:14, 36:10, 39:22, 41:20, 41:23, 42:1, 42:3, 42:10, 42:11, 42:23, 43:17, 45:6, 46:13, 46:20, 49:10, 50:8, 51:22, 52:14, 53:19, 54:8, 54:10, 54:12, 54:22, 55:1, 56:4, 56:25, 59:17, 63:4, 65:22, 66:4, 66:10, 66:25, 67:6, 67:8, 70:7, 75:19, 76:4, 76:8, 76:12, 76:16, 77:4, 77:19, 78:21, 79:19, 80:6, 80:15, 82:25, 83:2, 84:19, 84:22, 86:4, 88:8, 89:6, 92:7, 92:18, 93:15, 95:3, 96:18, 96:21, 97:2, 97:10, 98:6, 98:23, 99:6, 99:7, 99:9, 99:22, 104:2, 104:17, 104:22, 105:9, 105:20, 109:6, 111:23, 113:12, 119:11, 121:24, 123:17, 123:19, 125:2, 125:6, 126:3, 126:5, 126:25

area [2] - 13:4, 75:21

areola [1] - 7:6

arguable [2] - 33:9, 74:2

arguably [26] - 17:23, 23:6, 24:7, 25:6, 26:5, 27:13, 28:15, 32:16, 32:17, 32:22, 33:2, 33:13, 39:5, 53:18, 54:2, 54:10, 55:1, 63:8, 64:25, 67:7, 68:24, 73:14, 73:24, 96:16, 103:7, 125:3

argue [7] - 37:19, 49:23, 52:1, 58:21, 66:13, 74:24, 76:8

argued [5] - 88:24, 103:18, 106:22, 112:5, 114:3

arguing [1] - 124:14

argument [4] - 35:24, 51:25, 52:3, 78:25

Argument [1] - 4:11

arguments [8] - 61:8, 105:20, 106:10, 106:25, 116:22, 118:8, 122:10

ARLEEN [1] - 2:1

Army [1] - 77:25

Arnold [1] - 125:21

around [7] - 7:1, 47:15, 58:8, 75:3, 78:2, 101:5, 115:7

arousal [1] - 23:10

arouse [1] - 31:3

arrest [3] - 32:13, 98:23, 108:16

arrested [1] - 28:9

Article [1] - 57:22

articulable [1] - 125:18

articulated [1] - 93:23

artistic [4] - 55:13, 56:19, 63:8, 67:16

artistry [2] - 51:22, 77:14

artists [4] - 62:21, 65:19, 78:1, 78:4

arts [1] - 77:19

as [172] - 5:10, 9:6, 9:13, 9:18, 11:1, 13:18, 18:18, 19:8, 19:20, 19:23, 24:12, 24:24, 26:5, 26:6, 27:22, 31:2, 33:21, 36:11, 36:17, 36:23, 37:3, 37:15, 37:17, 38:2, 38:5, 39:2, 41:8, 41:11, 41:21, 42:10, 47:11, 48:3, 48:20, 48:21, 51:21, 52:5, 52:21, 52:22, 53:18, 54:4, 54:7, 55:8, 55:10, 55:13, 55:25, 56:6, 56:18, 57:14, 58:1, 59:14, 62:22, 64:17, 67:15, 70:22, 71:6, 72:16, 73:25, 74:24, 74:25,

77:8, 77:15, 77:17, 78:10, 78:23, 79:1, 79:15, 79:21, 82:3, 82:22, 83:18, 84:10, 84:11, 84:15, 84:17, 84:19, 84:21, 85:4, 85:8, 88:12, 88:16, 88:20, 88:24, 89:1, 89:2, 91:6, 92:8, 92:21, 93:23, 95:18, 96:19, 97:4, 98:1, 98:6, 98:24, 100:7, 101:15, 101:18, 102:2, 102:16, 102:18, 103:3, 103:10, 103:11, 103:14, 103:18, 103:20, 104:14, 104:19, 104:21, 105:25, 109:4, 109:5, 109:24, 111:12, 112:10, 112:11, 114:3, 114:11, 114:18, 115:2, 115:7, 115:21, 116:17, 116:22, 117:8, 118:3, 118:4, 118:10, 118:11, 118:12, 118:18, 118:19, 120:9, 120:15, 121:1, 121:6, 121:14, 121:18, 121:23, 122:19, 122:20, 122:21, 122:23, 126:16, 127:8, 127:21, 128:14, 129:9, 132:9, 132:14, 132:15, 132:22

as-applied [7] - 84:10, 88:12, 88:16, 88:20, 122:19, 122:20, 122:23

Ashwander [1] - 89:13

aside [1] - 12:8

ask [15] - 9:3, 17:1, 19:22, 20:15, 20:16, 28:23, 29:16, 33:19, 46:1, 46:17, 107:1, 109:8, 110:25, 119:3, 124:17

asked [10] - 15:8, 22:17, 22:20, 23:15, 23:18, 91:2, 92:17, 99:22, 119:4

asking [2] - 17:14, 110:24

aspect [2] - 50:1, 50:24

aspects [2] - 28:19, 49:9

assertion [1] - 88:13

assess [1] - 27:15

assist [1] - 103:4

assisting [1] - 60:3

Association [3] - 52:15, 59:1, 84:24

assume [6] - 34:1, 74:9, 83:22, 84:1, 84:16, 109:25

assuming [1] - 46:23

at [117] - 2:23, 5:20, 5:21, 5:24, 5:25, 6:5, 6:7, 8:17, 9:9, 9:17, 9:24, 9:25, 10:1, 10:2, 10:20, 11:10, 11:20, 13:6, 14:22, 15:1, 15:3, 15:25, 16:7, 19:21, 21:6, 21:8, 21:9, 21:24, 22:19, 22:25, 23:2, 24:17, 24:19, 25:2, 25:21, 28:6, 28:7, 29:2, 29:6, 30:13, 30:14, 32:2, 32:3, 33:12, 33:21, 34:1, 34:2, 34:3, 34:5, 34:16, 36:14, 36:24, 38:18, 39:17, 39:22, 39:25, 40:1, 43:22, 44:24, 45:19, 45:23, 45:24, 46:8, 48:6, 49:16, 50:6, 57:7, 58:14, 58:22, 59:4, 60:11, 62:2, 63:9, 65:8, 66:4, 68:23, 71:14, 73:3, 75:12, 82:20, 84:25, 91:9, 94:24, 95:19, 95:20, 96:4, 101:1, 101:10, 102:21, 108:8, 109:1, 110:19, 110:22, 111:1, 113:9, 113:25, 114:11, 114:19, 115:18, 116:3, 116:25, 118:12, 118:18, 119:18, 120:9, 122:18, 125:12, 125:14, 131:10, 131:18, 131:20

attached [2] - 68:22, 115:19

attaches [1] - 102:7

attack [2] - 88:13, 130:10

attempt [1] - 78:4

attempts [1] - 72:23

attended [1] - 28:4

attendees [1] - 25:21

attention [2] - 43:22, 60:19

attentive [1] - 43:21

attested [1] - 73:21

Attorney [4] - 2:23, 111:19, 112:8, 112:21

attorney [30] - 2:9, 30:1, 32:20, 51:24, 53:12, 54:19, 58:12, 60:5, 60:10, 68:5, 76:2, 76:5, 76:18, 76:19, 76:21, 76:22, 78:24, 109:24, 110:4, 111:24, 122:9, 123:11, 125:7, 125:23, 126:11, 126:24, 130:1

Attorney's [2] - 3:1, 3:5

attorneys [5] - 76:11, 118:3, 118:11, 119:18, 132:4

audience [7] - 5:17, 8:14, 9:15, 15:9, 47:14, 54:24, 88:10

AUGUST [1] - 1:7

Austin [3] - 2:11, 3:3, 127:21

authorities [1] - 123:8

authority [9] - 79:8, 86:10, 86:24, 87:6, 111:21, 114:23, 114:24, 119:12, 124:8

authorize [1] - 68:10

automatically [1] - 50:19

available [1] - 128:1

avenue [1] - 115:10

avenues [1] - 96:25

average [4] - 55:8, 55:9, 56:5, 102:10

avoid [1] - 85:10

aware [4] - 11:4, 11:7, 47:12, 74:25

away [1] - 83:5

B

B [3] - 2:13, 2:23, 23:8

back [19] - 8:6, 20:10, 26:22, 32:11, 38:11, 44:8, 44:25, 45:5, 45:23, 45:24, 47:3, 48:6, 48:8, 64:1, 96:3, 105:24, 116:5, 127:21, 132:19

backup [1] - 117:3

backyard [1] - 31:2

Baker [2] - 2:2, 2:5

ballet [1] - 57:24

ban [13] - 40:24, 41:20, 52:23, 59:3, 69:21, 70:22, 71:1, 88:5, 104:5, 105:7, 105:11, 122:6, 122:7

banc [2] - 107:14, 107:15

Bandit [15] - 4:3, 5:5, 14:4, 14:11, 30:12, 39:4, 54:7, 54:23, 63:24, 65:2, 77:14, 82:8, 87:15, 93:16, 126:5

BANDIT [1] - 5:9

banned [1] - 68:24

banning [2] - 71:8, 105:7

bans [2] - 40:25

bare [3] - 89:4, 95:11, 95:13

Barnes [3] - 93:23, 94:11, 95:10

bars [1] - 8:3
base [1] - 40:12
based [24] - 40:2, 40:4, 40:15, 52:1, 52:3, 57:4, 57:8, 59:7, 60:8, 61:8, 61:9, 61:11, 62:16, 62:17, 63:19, 64:18, 67:15, 68:16, 69:23, 85:4, 112:11, 126:6
basic [1] - 34:6
basically [1] - 111:24
basis [1] - 89:3
be [178] - 5:3, 7:7, 8:15, 10:24, 11:8, 11:20, 12:5, 12:16, 14:12, 16:3, 16:8, 16:11, 19:6, 22:11, 22:18, 24:2, 24:7, 25:2, 25:6, 26:1, 26:5, 26:8, 26:10, 26:11, 26:21, 27:22, 27:25, 28:13, 28:15, 29:3, 29:5, 30:11, 30:17, 30:21, 31:3, 31:6, 34:16, 38:9, 39:3, 39:5, 40:19, 40:21, 41:4, 42:24, 43:4, 45:22, 46:9, 46:12, 48:14, 49:22, 51:9, 54:8, 54:12, 54:21, 56:15, 57:8, 57:11, 57:13, 59:25, 60:15, 60:20, 61:12, 61:13, 64:2, 64:4, 64:15, 65:4, 65:20, 66:9, 66:11, 67:1, 67:17, 67:20, 68:24, 69:22, 71:23, 73:7, 74:1, 74:3, 77:6, 77:13, 79:5, 79:7, 79:9, 80:23, 80:25, 81:1, 81:6, 81:15, 83:16, 84:8, 86:12, 86:18, 86:21, 86:22, 87:20, 88:17, 88:25, 89:12, 89:17, 90:1, 90:7, 90:15, 90:17, 90:22, 90:23, 91:4, 91:14, 91:21, 92:9, 92:13, 92:18, 92:21, 92:24, 93:13, 93:17, 93:20, 93:22, 94:21, 94:25, 95:16, 96:11, 96:16, 97:5, 97:17, 98:11, 99:11, 99:12, 99:14, 100:2, 100:9, 100:11, 100:18, 101:5, 101:14, 102:9, 102:10, 102:11, 102:22, 103:3, 103:9, 106:2, 107:21, 107:22, 108:14, 108:24, 109:13, 109:18, 111:1, 112:15, 112:16, 113:9, 113:24, 114:21, 114:22, 117:7, 117:11, 118:22, 119:25, 120:4, 120:18, 121:3, 121:19, 121:25, 123:13, 124:9, 124:11, 124:24, 125:3, 127:25, 128:19, 128:24, 129:22, 131:16
beats [1] - 132:22
because [92] - 7:19, 8:9, 12:17, 13:2, 13:4, 13:7, 16:8, 17:22, 18:9, 19:19, 19:24, 21:11, 23:5, 25:2, 25:3, 25:25, 26:4, 28:10, 31:6, 37:5, 37:24, 38:1, 38:10, 38:19, 43:6, 43:25, 46:12, 46:19, 49:10, 57:1, 57:15, 58:11, 58:22, 59:6, 60:7, 61:23, 62:3, 62:8, 62:19, 63:19, 64:2, 64:11, 64:13, 64:16, 64:21, 67:24, 68:3, 70:17, 71:21, 72:5, 72:18, 76:5, 76:12, 77:3, 79:10, 83:8, 84:18, 85:8, 85:9, 87:17, 88:9, 89:18, 89:19, 90:17, 91:11, 93:20, 94:10, 94:13, 95:16, 95:18, 97:15, 98:12, 99:16, 102:6, 102:25, 107:24, 109:9, 114:18, 115:9, 116:9, 116:18, 116:19, 117:4, 120:7, 121:17, 124:17, 128:13, 129:8, 130:6, 130:15, 132:15

become [3] - 36:22, 36:23, 106:21
been [50] - 5:10, 18:12, 18:20, 18:21, 20:3, 20:12, 22:22, 26:15, 26:16, 26:17, 27:6, 28:12, 29:15, 29:17, 34:8, 43:11, 43:21, 45:10, 48:5, 54:3, 56:9, 60:15, 63:2, 70:20, 73:22, 78:1, 86:6, 96:3, 98:8, 98:13, 99:12, 99:15, 100:5, 100:10, 105:23, 106:7, 106:17, 107:24, 109:12, 110:23, 111:7, 113:10, 115:11, 115:15, 116:19, 117:2, 117:3, 132:6
before [15] - 13:21, 36:25, 38:23, 48:15, 73:1, 79:13, 83:7, 89:22, 99:17, 106:24, 107:3, 112:12, 125:15, 127:21, 129:13
BEFORE [1] - 1:11
beginning [4] - 29:16, 34:3, 34:9, 118:12
behalf [1] - 122:2
behavior [6] - 36:3, 36:4, 36:6, 39:25, 40:1, 82:14
behaviors [1] - 41:21
being [11] - 16:7, 31:1, 40:15, 56:17, 56:20, 68:20, 89:16, 91:16, 111:11, 111:12, 112:2
belaboring [1] - 33:6
belabors [2] - 33:3, 33:5
believe [34] - 11:5, 14:25, 15:10, 17:18, 17:20, 28:3, 28:6, 37:25, 39:2, 49:14, 53:14, 58:18, 61:6, 62:15, 62:22, 66:17, 70:23, 72:13, 72:14, 76:23, 81:24, 86:3, 91:18, 101:3, 113:22, 114:17, 115:8, 115:17, 116:4, 116:7, 118:5, 118:14, 121:17, 123:12
belong [2] - 74:9, 84:11
belongs [1] - 83:21
below [1] - 7:6
bench [1] - 132:5
bending [1] - 62:6
BENJAMIN [1] - 2:22
best [5] - 96:4, 113:9, 132:7, 132:9, 133:7
better [1] - 48:5
between [9] - 25:17, 25:20, 54:18, 88:20, 103:16, 110:17, 111:2, 111:14
Bexar [4] - 3:5, 76:22, 111:18, 111:22
beyond [3] - 36:6, 36:8, 70:5
big [1] - 79:17
biggest [1] - 6:1
Bill [34] - 40:17, 40:25, 41:25, 42:2, 43:12, 44:10, 44:13, 48:20, 51:23, 63:22, 65:10, 75:7, 75:16, 82:15, 88:7, 92:24, 95:5, 95:8, 96:24, 97:22, 99:19, 99:21, 99:23, 100:1, 100:18, 100:20, 102:5, 102:8, 103:20, 104:7, 105:7, 105:12, 106:12, 129:1
bill [5] - 36:2, 38:23, 41:10, 48:21, 126:8
bills [1] - 27:20
birth [1] - 24:25
Bisexual [1] - 125:14

bit [3] - 6:4, 53:9, 53:24
black [1] - 7:13
blanket [3] - 36:23, 38:5, 38:10
block [1] - 72:19
blocked [3] - 69:19, 72:17, 78:4
blocking [2] - 71:12, 72:22
blurred [1] - 51:25
blurs [1] - 35:23
board [1] - 132:14
body [2] - 7:1, 108:3
boils [1] - 27:1
bones [1] - 89:4
books [2] - 56:24
both [15] - 22:3, 35:11, 35:13, 39:4, 48:16, 52:6, 54:11, 59:14, 62:25, 77:4, 103:13, 105:10, 107:17, 121:6, 121:7
bottom [4] - 32:2, 32:3, 37:13, 37:14
bottom-line [1] - 37:13
Botts [2] - 2:2, 2:5
Bowl [1] - 81:16
Box [2] - 1:20, 2:10
Branch [1] - 123:15
BRANDT [1] - 2:5
breadth [1] - 88:21
break [3] - 44:25, 107:2, 107:4
breast [1] - 25:17
breastplate [12] - 6:14, 6:16, 6:17, 6:18, 6:21, 7:8, 12:16, 12:18, 14:11, 14:15, 54:12
breastplates [2] - 12:9, 13:3
breasts [14] - 5:22, 5:23, 6:10, 6:11, 6:17, 7:1, 7:5, 7:6, 10:25, 12:17, 12:18, 12:19, 12:20, 62:5
breathing [1] - 129:8
Brett [1] - 112:22
BRIAN [1] - 1:15
Brian [1] - 51:10
brief [8] - 29:14, 45:15, 76:3, 102:13, 115:13, 119:15, 122:11, 125:13
briefing [6] - 57:23, 112:3, 112:4, 112:13, 118:5, 118:10
briefly [5] - 74:18, 113:18, 116:16, 121:2, 123:10
briefs [1] - 65:18
Brigitte [13] - 4:3, 21:7, 24:17, 30:12, 39:4, 54:7, 54:23, 63:24, 65:2, 77:14, 82:8, 87:15, 126:5
BRIGITTE [1] - 5:9
bring [17] - 9:1, 9:2, 9:6, 9:24, 54:6, 54:15, 54:16, 57:21, 63:7, 83:17, 84:9, 84:17, 91:1, 98:14, 110:3, 115:12, 126:17
bringing [1] - 8:21
brings [2] - 8:8, 115:7
broad [7] - 41:5, 65:23, 88:23, 89:20, 101:9, 106:25
broader [2] - 41:15, 89:11
broadly [2] - 33:2, 72:24
Broadway [1] - 65:20

brochures [1] - 10:6
brokers [1] - 87:2
brought [6] - 49:16, 79:7, 100:14, 113:5, 115:11, 126:18
Brown [5] - 31:21, 52:15, 58:25, 59:5, 59:22
brushed [1] - 25:23
brushing [1] - 26:3
building [2] - 30:15, 126:8
bulge [1] - 23:22
bunch [1] - 12:4
burden [13] - 27:17, 28:17, 45:5, 59:9, 63:3, 85:4, 87:11, 88:7, 100:19, 113:21, 113:23, 114:4, 114:11
BUSER [1] - 1:19
BUSER-CLANCY [1] - 1:19
Business [3] - 19:9, 42:8, 52:19
business [7] - 39:11, 77:8, 77:10, 103:10, 104:25, 131:2, 131:24
businesses [3] - 39:7, 54:22, 120:20
but [145] - 6:2, 7:14, 7:23, 7:24, 8:16, 10:18, 10:19, 11:11, 11:21, 12:18, 12:19, 13:6, 16:7, 17:5, 19:17, 19:20, 20:17, 20:24, 21:8, 23:15, 24:20, 26:18, 26:25, 27:3, 27:5, 27:9, 27:14, 28:22, 29:23, 30:3, 30:6, 32:24, 33:19, 35:7, 35:25, 36:17, 36:20, 38:7, 38:12, 39:25, 41:24, 43:19, 45:11, 45:16, 45:19, 46:18, 46:22, 47:5, 47:13, 49:4, 49:8, 50:3, 50:6, 50:9, 50:13, 50:14, 53:14, 54:10, 54:24, 56:10, 56:14, 57:22, 58:4, 58:10, 59:13, 59:19, 59:24, 62:16, 62:18, 63:4, 64:12, 64:23, 65:8, 66:15, 67:5, 67:21, 68:2, 68:20, 69:12, 70:3, 70:6, 70:10, 72:2, 72:6, 72:16, 74:25, 75:2, 75:20, 76:15, 78:11, 80:17, 81:23, 81:24, 82:23, 84:8, 87:19, 88:18, 95:17, 96:8, 96:17, 97:24, 99:3, 99:8, 100:9, 101:3, 102:17, 102:19, 103:5, 106:1, 106:24, 108:7, 108:17, 109:1, 109:4, 109:25, 110:6, 110:12, 110:23, 111:1, 113:7, 114:2, 114:15, 114:21, 115:11, 115:14, 115:19, 117:5, 117:11, 119:13, 119:19, 119:22, 120:5, 120:25, 121:21, 122:21, 124:9, 124:15, 124:21, 127:8, 128:6, 129:10, 131:7, 131:10, 131:21, 132:6
But [1] - 31:5
butt [2] - 12:2, 12:6
buttocks [1] - 25:17
buy [1] - 59:6
by [119] - 1:24, 4:4, 4:4, 4:5, 4:10, 10:25, 13:13, 16:6, 17:23, 18:24, 19:9, 20:3, 20:11, 20:12, 20:16, 21:2, 21:12, 23:6, 23:25, 24:3, 24:5, 24:7, 25:5, 25:7, 26:2, 26:7, 26:8, 28:15, 28:17, 29:23, 30:11, 30:12, 32:18, 33:13, 36:16, 39:12, 40:12, 41:3, 41:7, 41:25, 42:11, 42:21, 43:16, 44:12, 45:17, 47:8, 48:16, 52:4, 53:2, 53:4, 55:2, 55:5,

59:2, 60:20, 64:16, 65:3, 65:11, 66:5, 71:9, 71:12, 73:11, 73:24, 74:3, 74:8, 77:16, 79:22, 79:24, 80:15, 82:14, 82:15, 82:20, 83:21, 84:11, 84:14, 85:15, 87:2, 87:4, 87:8, 88:6, 88:8, 88:11, 89:5, 89:11, 89:15, 90:17, 91:4, 92:4, 92:6, 92:13, 92:18, 92:21, 96:10, 96:14, 96:19, 97:1, 97:8, 97:11, 97:13, 102:9, 103:20, 105:23, 108:19, 109:6, 115:15, 121:19, 125:2, 127:2, 127:18, 127:20, 129:18, 131:2, 131:10, 131:24
By [9] - 4:12, 4:12, 4:13, 4:13, 4:14, 4:14, 4:15, 4:15, 4:16
BY [10] - 5:13, 7:4, 8:24, 10:14, 11:18, 13:12, 14:3, 14:10, 15:14, 15:24

C

C [4] - 5:1, 24:11, 82:1, 114:25
cabaret [1] - 69:21
California [2] - 59:3, 59:11
call [12] - 16:24, 17:10, 45:17, 91:25, 98:2, 98:25, 99:17, 102:20, 108:17, 130:12, 130:17, 130:23
called [14] - 15:1, 19:23, 28:7, 28:9, 28:10, 38:10, 42:8, 71:8, 73:10, 77:24, 85:20, 98:6, 99:7, 123:11
calling [1] - 71:13
came [2] - 80:13, 132:22
campus [1] - 85:24
Can [1] - 110:13
can [49] - 15:3, 15:12, 16:6, 18:14, 21:10, 26:20, 30:14, 32:3, 37:20, 38:6, 38:17, 41:12, 44:11, 44:15, 45:16, 45:17, 45:25, 47:6, 51:7, 51:15, 57:22, 58:2, 73:2, 79:15, 86:15, 90:1, 90:7, 90:22, 93:13, 96:14, 99:7, 99:16, 100:2, 103:3, 110:15, 110:19, 111:24, 117:4, 120:6, 124:24, 127:21, 127:24, 128:1, 128:19, 128:23, 129:12, 131:7, 131:17, 132:15
can't [15] - 46:19, 67:16, 75:19, 81:3, 85:13, 104:24, 108:4, 109:15, 109:18, 110:3, 110:5, 110:7, 110:9, 121:4, 132:16
cancel [2] - 72:5, 86:25
canceled [3] - 39:9, 85:11, 86:21
canceling [2] - 97:14, 97:16
cannot [6] - 16:9, 79:2, 84:16, 84:20, 89:25, 124:9
capacity [6] - 74:17, 78:23, 79:2, 79:3, 86:9, 100:23
Capitol [2] - 2:10, 126:7
capture [1] - 33:2
captured [1] - 101:9
car [1] - 69:2
card [1] - 81:4
care [1] - 81:6
career [1] - 132:8
careful [2] - 80:24, 80:25

CarMax [1] - 116:7
Carroll [1] - 125:22
carve [1] - 43:6
case [130] - 12:6, 17:15, 18:12, 18:20, 18:22, 19:19, 22:18, 22:22, 23:11, 24:1, 24:14, 26:15, 26:18, 28:8, 31:7, 32:25, 36:1, 36:12, 36:25, 37:1, 37:9, 37:10, 37:11, 39:1, 41:7, 43:5, 46:7, 46:24, 49:20, 50:13, 51:22, 52:4, 52:9, 52:18, 53:5, 53:9, 53:14, 54:22, 57:20, 58:5, 58:13, 58:16, 59:1, 59:5, 59:17, 59:22, 62:23, 63:14, 65:6, 65:7, 65:9, 65:14, 66:22, 68:1, 70:11, 71:16, 71:23, 72:4, 72:11, 73:8, 73:9, 74:1, 74:6, 74:21, 74:22, 74:23, 75:2, 75:7, 75:18, 76:11, 76:12, 78:5, 81:25, 83:14, 83:18, 85:20, 88:22, 89:2, 89:6, 89:13, 90:4, 90:5, 90:13, 90:16, 91:25, 95:23, 97:20, 98:16, 100:24, 100:25, 101:1, 104:5, 107:14, 107:15, 107:18, 107:23, 108:11, 109:10, 111:2, 111:11, 113:16, 114:2, 114:3, 114:5, 115:21, 115:25, 116:6, 116:7, 118:4, 118:5, 118:13, 118:17, 118:18, 119:2, 119:19, 121:4, 121:5, 121:6, 121:24, 122:4, 123:15, 123:21, 125:13, 125:17, 126:17, 127:11
case-in-chief [2] - 24:14, 26:18
cases [22] - 35:6, 37:5, 37:6, 52:6, 52:14, 66:23, 67:22, 69:18, 70:18, 72:22, 79:1, 80:6, 100:8, 107:15, 109:6, 115:13, 115:15, 118:19, 118:20, 119:11, 132:5, 132:7
categories [3] - 21:25, 92:8, 92:9
category [2] - 22:5, 86:17
cater [2] - 5:17, 54:23
cause [4] - 36:21, 75:2, 111:13, 115:9
ensor [1] - 85:23
ensoring [1] - 85:25
ensorship [1] - 32:12
center [1] - 86:23
certain [5] - 36:3, 41:7, 85:8, 93:4, 108:5
Certain [1] - 21:22
certainly [6] - 29:5, 45:16, 85:10, 87:16, 105:16, 127:6
CERTIFICATE [1] - 133:5
certify [1] - 133:7
chain [1] - 130:19
chairs [1] - 48:4
challenge [27] - 23:4, 25:15, 28:19, 35:21, 49:1, 53:23, 73:12, 73:18, 83:18, 84:10, 84:17, 87:5, 88:12, 88:16, 88:23, 89:22, 100:14, 100:16, 104:12, 105:21, 106:5, 120:7, 122:16, 122:19, 122:21, 122:22, 123:6
challenged [6] - 65:11, 75:8, 75:25, 88:14, 95:16, 104:5
challenges [10] - 32:5, 32:10, 57:21, 74:7, 83:19, 83:20, 88:12, 89:7, 89:14, 123:8

challenging [8] - 17:24, 18:23, 22:22, 26:9, 40:22, 59:18, 88:5, 124:5
chance [1] - 45:9
change [4] - 6:2, 35:20, 117:2, 117:3
changing [1] - 62:6
Chapter [1] - 93:22
characteristics [10] - 14:13, 26:14, 61:21, 62:1, 62:2, 62:13, 67:3, 103:17, 103:18, 103:23
charged [1] - 102:23
Charles [1] - 78:22
CHARLES [1] - 2:8
Charlies [4] - 15:1, 15:3, 15:25, 30:14
check [2] - 72:16, 73:2
checked [1] - 9:17
Cheer [4] - 15:1, 15:3, 15:25, 30:13
Cheerleaders [4] - 57:25, 65:21, 66:20, 67:8
cherished [1] - 77:16
cherry [2] - 56:9, 63:15
cherry-picked [1] - 56:9
cherry-picking [1] - 63:15
chief [2] - 24:14, 26:18
child [8] - 8:8, 8:22, 9:1, 9:6, 9:24, 42:21, 42:23, 98:4
children [32] - 7:19, 21:6, 27:20, 41:16, 42:10, 42:19, 44:1, 44:3, 44:12, 58:22, 60:1, 60:16, 60:22, 79:20, 79:22, 79:24, 80:15, 80:22, 81:2, 81:7, 82:12, 82:14, 94:19, 97:3, 100:1, 100:10, 100:13, 100:22, 101:6, 102:3, 117:11, 126:9
chill [2] - 109:6, 109:17
chilled [3] - 32:11, 74:3, 110:23
chilling [5] - 33:12, 39:13, 77:7, 120:23, 121:1
chills [2] - 57:17, 121:7
Chloe [1] - 14:8
CHLOE [1] - 1:22
choosing [1] - 65:4
Churchill [2] - 77:18, 77:22
Circuit [16] - 31:16, 31:22, 33:14, 39:12, 73:8, 73:10, 75:21, 75:22, 75:23, 83:14, 84:6, 84:20, 85:21, 85:24, 107:14, 123:14
circuit [1] - 89:15
circuits [1] - 33:15
circumstances [4] - 88:19, 96:18, 100:11, 100:17
citations [1] - 28:9
cite [8] - 52:5, 69:17, 114:11, 115:13, 115:14, 115:18, 125:13
cited [7] - 65:7, 70:9, 109:6, 116:6, 118:19, 121:3, 122:15
cites [2] - 65:6, 73:9
cities [2] - 108:19, 119:13
citizens [1] - 110:3
City [31] - 76:20, 78:6, 106:7, 106:8, 106:10, 106:13, 106:20, 106:21, 107:25, 108:4, 108:5, 108:10, 109:3,

109:15, 109:24, 109:25, 110:7, 110:11, 111:3, 111:7, 111:8, 111:9, 111:10, 111:12, 116:17, 117:1, 121:10, 121:18, 123:15
city [8] - 86:23, 107:25, 108:2, 108:3, 108:7, 108:8, 109:19, 111:7
CITY [1] - 2:17
City's [1] - 105:20
civic [1] - 77:12
Civil [1] - 3:2
civil [3] - 49:4, 50:25, 121:7
claim [6] - 27:1, 29:23, 64:11, 85:3, 106:6, 106:7
claimed [3] - 30:8, 30:9, 84:19
claiming [1] - 58:3
claims [20] - 22:11, 23:7, 24:8, 25:14, 26:9, 28:20, 28:24, 35:14, 36:21, 79:4, 79:8, 79:10, 87:23, 88:24, 89:1, 106:13, 106:21, 108:10, 123:11, 124:7
CLANCY [1] - 1:19
Clapper [1] - 85:2
clarify [1] - 17:1
Class [1] - 76:13
class [3] - 74:8, 83:21, 84:11
clause [3] - 123:18, 123:20, 123:22
clear [16] - 12:7, 12:21, 51:1, 61:7, 68:4, 72:7, 75:1, 76:5, 76:9, 76:11, 100:10, 105:9, 118:5, 122:12, 124:14, 124:15
clearer [1] - 19:6
clearly [12] - 9:16, 11:22, 11:23, 12:2, 15:12, 30:12, 31:6, 60:7, 69:15, 76:8, 94:4, 121:12
Clement [2] - 31:21, 31:23
CLERK [3] - 5:2, 48:10, 48:13
client [2] - 86:8, 86:15
client's [1] - 87:5
clients [1] - 29:6
clock [3] - 45:22, 107:2, 117:19
close [5] - 24:10, 51:15, 113:6, 131:2, 131:24
closed [1] - 43:18
closing [4] - 26:11, 45:22, 73:1, 77:3
Closing [1] - 4:11
clothes [1] - 12:14
clothing [1] - 62:6
club [1] - 16:10
clubs [1] - 8:3
Code [18] - 19:9, 42:4, 42:8, 49:3, 50:16, 55:2, 55:6, 64:18, 64:19, 64:20, 64:22, 75:16, 93:22, 101:24, 103:2, 114:20, 124:22, 124:23
coined [1] - 70:22
college [2] - 68:23, 85:22
COLMENERO [2] - 1:7, 2:8
Colmenero [5] - 78:23, 79:8, 86:9, 86:19, 86:24
column [2] - 32:3, 32:11
combining [1] - 92:1

come [13] - 8:5, 8:6, 12:24, 16:9, 39:11, 45:9, 45:14, 47:25, 78:18, 105:24, 106:10, 110:13, 110:25
comes [13] - 12:21, 18:5, 31:9, 31:12, 41:13, 42:7, 42:21, 53:20, 68:24, 70:13, 72:1, 90:3, 128:22
comfort [1] - 64:24
coming [10] - 20:10, 35:1, 38:11, 47:3, 47:11, 70:23, 98:21, 98:25, 129:11, 132:19
command [1] - 130:19
commenting [1] - 92:10
comments [3] - 41:3, 41:7, 46:25
Commerce [1] - 42:8
commercial [4] - 51:2, 53:22, 86:11, 103:7
Commercial [1] - 19:9
commission [1] - 124:24
commissioners [1] - 120:4
common [1] - 30:20
communication [1] - 96:25
communicative [1] - 91:1
communities [1] - 77:13
community [7] - 55:10, 56:6, 57:9, 67:15, 68:23, 91:12, 126:4
Community [1] - 84:24
companies [1] - 64:25
comparison [1] - 65:25
compelling [11] - 35:2, 35:8, 42:19, 43:8, 44:2, 59:15, 59:18, 59:20, 74:10, 83:23, 84:5
complain [1] - 98:10
complaint [5] - 28:5, 98:22, 104:16, 104:18, 122:20
complete [3] - 6:24, 46:12, 77:20
completely [1] - 81:18
compliance [1] - 117:6
computer [1] - 1:25
concede [4] - 35:6, 35:7, 37:19, 49:21
conceded [3] - 64:17, 76:3
concedes [1] - 88:16
conceivable [1] - 89:19
concept [1] - 43:13
concepts [1] - 65:17
concern [6] - 35:4, 37:18, 59:23, 97:7, 97:17, 118:14
concerned [3] - 40:20, 40:21, 132:22
concerning [2] - 44:5, 46:12
concerns [1] - 131:18
concession [2] - 50:12, 50:13
conclude [1] - 123:16
conclusion [1] - 72:25
conclusions [7] - 38:18, 46:13, 126:23, 127:9, 127:18, 129:10, 131:23
conclusively [1] - 109:10
conclusory [3] - 27:6, 87:19, 125:8
concurring [1] - 95:15
condition [1] - 125:18
condo [1] - 30:14

condoms [4] - 24:15, 24:20, 25:3
conduct [57] - 17:23, 18:24, 19:10, 21:11, 21:14, 21:15, 21:23, 22:3, 22:6, 23:5, 24:2, 24:6, 25:6, 26:8, 28:14, 32:16, 33:3, 35:11, 36:6, 36:11, 54:2, 61:18, 73:14, 73:21, 73:24, 79:23, 82:2, 89:21, 89:24, 90:1, 90:2, 90:7, 90:8, 90:10, 90:16, 90:25, 92:2, 92:3, 92:6, 92:24, 93:10, 93:11, 93:20, 93:21, 95:18, 95:22, 100:2, 100:21, 101:2, 101:9, 103:4, 103:20, 108:19, 110:21, 125:5
confer [1] - 32:12
Conference.....
 [1] - 4:17
confines [1] - 16:14
conflated [1] - 61:8
confused [1] - 13:20
confusing [1] - 101:19
conga [1] - 25:22
conjunction [1] - 61:14
connected [1] - 123:17
Conroe [2] - 2:21, 2:24
consent [7] - 42:20, 43:1, 83:3, 83:5, 83:6, 104:14, 104:15
consequence [1] - 89:2
conservatively [1] - 88:25
consider [8] - 10:24, 14:11, 14:15, 16:3, 16:7, 16:10, 16:13, 131:18
consideration [2] - 104:25, 128:15
considerations [4] - 97:7, 97:10, 97:18, 114:15
considered [11] - 12:6, 12:17, 14:12, 30:17, 30:21, 33:20, 65:4, 90:15, 93:14, 105:3, 120:18
considering [3] - 19:22, 69:1, 98:20
consistent [1] - 89:17
CONSOLIDATED [1] - 1:10
constant [1] - 23:24
Constitution [8] - 52:23, 56:25, 63:16, 66:11, 67:21, 77:17, 88:14, 89:17
constitutional [16] - 32:16, 58:23, 61:15, 65:14, 68:3, 73:15, 88:17, 89:9, 89:11, 93:2, 94:5, 100:5, 105:13, 121:1, 125:19, 126:13
constitutionally [3] - 36:13, 62:7, 89:18
construction [2] - 64:10, 67:1
construed [2] - 26:5, 27:22
contact [3] - 25:16, 25:20, 25:23
contacts [2] - 25:17, 26:5
contained [1] - 63:21
contemporary [3] - 55:10, 56:6, 57:9
contends [1] - 88:18
content [24] - 9:14, 34:18, 40:2, 40:4, 40:5, 40:15, 51:24, 51:25, 52:3, 52:25, 59:7, 60:6, 60:8, 61:8, 61:10, 61:11, 61:12, 62:16, 63:19, 65:8, 67:20, 69:23, 79:19, 104:13
content-based [9] - 40:2, 40:4, 40:15,

52:3, 61:8, 61:11, 62:16, 63:19, 69:23
content-neutral [2] - 40:5, 60:6
contention [10] - 11:8, 11:19, 27:1, 35:23, 49:2, 83:4, 85:7, 101:13, 103:11
contentions [1] - 22:18
context [4] - 37:11, 79:16, 101:7, 102:4
contextually [1] - 93:19
continue [6] - 22:11, 26:11, 69:14, 72:8, 73:22, 125:5
continues [1] - 60:18
contract [2] - 115:2, 115:3
contractor [1] - 87:4
contractors [1] - 87:3
contracts [1] - 115:4
contrary [6] - 74:10, 83:23, 84:5, 89:7, 103:12, 104:7
contrast [2] - 40:5, 88:16
control [11] - 7:22, 7:23, 24:25, 87:3, 87:10, 87:11, 87:12, 87:14, 87:18, 87:20, 87:22
controlling [1] - 87:16
controls [4] - 41:13, 51:2, 86:11, 87:19
controversial [1] - 118:22
controversy [6] - 110:22, 111:1, 111:2, 111:14, 118:17, 119:2
converted [2] - 38:14, 131:11
convey [11] - 90:18, 91:3, 91:8, 91:11, 92:22, 95:23, 95:25, 96:12, 96:14, 96:17, 100:23
conveyed [3] - 90:24, 91:16, 91:21
conveys [1] - 94:15
convicted [1] - 103:3
copies [4] - 31:13, 31:17, 52:6, 71:22
copy [3] - 18:13, 70:10, 127:11
correct [29] - 20:21, 20:25, 30:1, 31:25, 32:9, 33:17, 37:8, 41:14, 49:11, 53:6, 61:1, 61:3, 69:8, 73:17, 74:2, 75:24, 95:5, 111:23, 112:20, 113:22, 115:10, 115:17, 120:12, 122:15, 122:25, 123:9, 124:2, 133:7
costs [2] - 85:4, 85:8
costume [2] - 80:25, 81:2
costuming [1] - 6:2
couch [1] - 12:12
could [58] - 12:20, 14:12, 14:16, 17:6, 18:1, 19:20, 19:25, 25:6, 26:5, 27:4, 27:9, 27:12, 27:15, 27:22, 27:25, 28:14, 30:11, 38:1, 47:4, 49:2, 54:21, 59:6, 63:2, 63:9, 64:2, 64:4, 64:15, 64:19, 64:25, 65:20, 67:1, 67:9, 75:11, 87:18, 92:3, 93:17, 94:25, 96:16, 98:10, 98:11, 98:14, 100:18, 101:5, 104:2, 107:21, 107:22, 108:24, 109:2, 109:3, 121:11, 122:6, 122:8, 122:22, 124:13, 125:3, 132:10
couldn't [1] - 30:17
council [5] - 107:25, 108:2, 108:3, 108:7, 108:8
counsel [12] - 20:15, 20:16, 30:22,

43:20, 47:19, 50:11, 51:18, 78:18, 99:24, 108:13, 120:17, 131:21
Counsel [1] - 105:14
count [1] - 77:2
counties [6] - 37:22, 68:10, 76:8, 118:24, 119:13, 122:7
counties' [2] - 118:13, 121:10
countless [1] - 51:23
country [1] - 67:24
COUNTY [2] - 2:13, 2:20
County [26] - 3:1, 3:5, 76:19, 76:20, 76:21, 76:22, 76:23, 107:13, 111:19, 111:23, 112:8, 112:20, 112:21, 113:2, 113:11, 115:4, 116:6, 116:13, 116:20, 116:21, 117:1, 118:3, 120:2, 121:18
county [12] - 76:11, 76:21, 86:23, 107:18, 107:21, 107:22, 114:18, 116:19, 116:23, 118:11, 119:18, 120:4
couple [5] - 26:18, 38:25, 63:15, 73:4, 122:12
course [10] - 22:3, 24:1, 29:3, 32:16, 32:17, 73:14, 73:21, 75:20, 81:12, 96:21
COURT [262] - 1:1, 5:3, 6:15, 6:19, 6:21, 6:24, 7:3, 7:21, 8:5, 8:11, 8:16, 8:20, 8:23, 9:9, 9:12, 9:19, 9:23, 10:3, 10:6, 10:8, 10:11, 10:13, 11:13, 11:24, 12:8, 12:23, 13:24, 14:1, 14:7, 15:7, 15:11, 15:19, 15:22, 16:20, 16:23, 17:3, 17:5, 17:9, 17:13, 17:16, 18:4, 18:8, 18:13, 18:15, 19:1, 19:6, 19:16, 20:4, 20:21, 21:19, 25:9, 25:11, 25:13, 26:22, 29:2, 29:10, 29:14, 29:25, 30:7, 30:9, 31:8, 31:10, 31:15, 31:17, 31:23, 32:1, 32:4, 32:7, 33:5, 33:10, 33:15, 33:20, 33:25, 34:23, 35:1, 35:9, 35:14, 35:18, 36:2, 36:8, 36:15, 37:5, 37:9, 37:12, 38:3, 38:9, 39:16, 39:21, 40:11, 40:19, 40:23, 41:3, 41:11, 41:18, 41:20, 42:6, 42:12, 43:3, 43:10, 43:16, 43:23, 44:4, 44:9, 44:17, 46:5, 48:11, 48:14, 49:5, 49:8, 49:16, 49:19, 49:25, 50:6, 50:11, 50:21, 50:23, 51:5, 51:7, 51:11, 51:15, 52:8, 52:16, 53:4, 53:7, 53:11, 53:16, 53:24, 55:15, 55:19, 55:21, 55:24, 56:2, 58:14, 58:16, 58:19, 60:24, 61:2, 61:4, 64:7, 66:6, 66:14, 66:21, 68:13, 68:18, 69:1, 69:5, 69:7, 69:11, 70:1, 70:12, 70:15, 70:17, 70:24, 71:2, 71:5, 71:14, 71:18, 71:20, 72:2, 72:10, 72:14, 73:3, 73:16, 74:20, 76:14, 76:24, 78:14, 78:20, 79:15, 80:4, 80:9, 80:12, 81:8, 81:10, 81:16, 81:19, 81:22, 82:19, 83:24, 84:3, 88:2, 91:10, 91:17, 91:19, 91:23, 95:3, 95:24, 96:7, 96:14, 97:8, 97:13, 97:24, 98:21, 99:3, 99:12, 99:16, 101:11, 101:16, 101:23, 101:25, 104:11, 104:24, 105:2, 105:5, 105:14, 105:23, 107:1, 107:8, 107:10, 107:12, 108:24, 111:6, 111:16, 111:20, 112:6,

112:14, 112:19, 112:23, 113:14,
113:16, 114:2, 114:5, 114:8, 114:13,
114:17, 116:12, 116:15, 116:20,
117:17, 117:23, 118:1, 118:9, 119:3,
119:5, 119:16, 120:8, 120:14, 120:24,
122:24, 123:20, 123:24, 126:15,
126:23, 127:3, 127:5, 127:23, 128:2,
128:8, 129:6, 129:18, 129:20, 129:24,
130:2, 130:4, 130:7, 130:18, 130:21,
130:24, 131:2, 131:5, 132:3, 133:2
court [27] - 25:11, 31:15, 36:24, 37:2,
47:14, 49:10, 59:8, 59:13, 62:18, 69:18,
69:20, 69:21, 70:5, 71:9, 72:6, 72:12,
72:22, 75:10, 75:12, 78:8, 78:10,
104:10, 117:23, 120:4, 128:2, 128:4,
132:23
Court [122] - 2:17, 3:9, 3:9, 3:10, 17:1,
22:14, 23:4, 23:6, 24:3, 24:8, 25:1,
25:8, 25:14, 25:19, 27:10, 27:15, 27:17,
28:20, 28:21, 28:23, 30:10, 31:14, 32:2,
32:5, 33:16, 34:12, 34:14, 34:20, 36:11,
37:14, 37:24, 39:13, 42:17, 43:14,
47:12, 48:12, 51:21, 52:6, 52:21, 52:22,
53:4, 54:4, 54:7, 54:14, 55:8, 56:8,
56:17, 57:19, 58:1, 58:7, 58:10, 58:11,
58:13, 58:25, 59:1, 60:8, 60:11, 61:13,
62:22, 62:23, 63:1, 63:18, 63:21, 64:18,
65:13, 65:16, 67:22, 70:8, 70:10, 70:19,
73:9, 73:12, 74:22, 74:25, 75:6, 77:5,
84:16, 85:6, 87:23, 88:12, 88:21, 89:13,
89:23, 90:6, 90:21, 92:1, 92:23, 93:1,
93:11, 93:23, 94:11, 100:7, 100:25,
101:8, 101:15, 102:6, 105:7, 105:9,
106:11, 106:12, 106:16, 106:18,
107:15, 115:16, 116:24, 118:18,
118:23, 121:9, 121:21, 121:25, 122:14,
122:21, 122:22, 123:7, 124:8, 124:21,
125:17, 128:7, 133:6, 133:10
Court's [6] - 29:22, 35:20, 52:4, 53:8,
100:10, 114:15
Court..... [1] - 4:10
COURTROOM [1] - 133:1
courts [6] - 61:13, 74:9, 83:22, 84:1,
89:8, 91:2
cover [7] - 7:9, 19:18, 20:2, 38:5,
101:21, 101:23, 116:18
covered [4] - 34:8, 43:11, 66:5, 116:18
covering [1] - 6:13
Cowboy [1] - 67:7
Cowboys [3] - 57:25, 65:21, 66:20
create [3] - 43:7, 62:6, 92:2
creates [2] - 58:23, 90:13
credible [10] - 32:18, 73:7, 74:9, 83:11,
83:22, 84:1, 84:2, 84:3, 84:16, 108:14
credibly [1] - 53:19
crime [1] - 31:2
criminal [18] - 39:5, 48:20, 48:22, 49:1,
49:10, 49:11, 50:20, 50:24, 53:20,
76:10, 102:7, 108:18, 109:5, 109:7,
111:22, 111:25, 118:6, 121:3

criminalized [1] - 125:15
critical [1] - 83:24
cross [1] - 15:6
CROSS [1] - 5:12
Cross [1] - 4:4
cross-examination [1] - 15:6
Cross-Examination [1] - 4:4
CROSS-EXAMINATION [1] - 5:12
CRR [2] - 3:9, 133:6
crux [1] - 26:15
CSR [2] - 3:9, 133:6
Cubriel [2] - 111:17, 112:10
CUBRIEL [3] - 3:4, 111:18, 111:21
Cubriel..... [1] - 4:14
cultural [1] - 60:14
current [2] - 53:2, 57:11
currently [5] - 13:14, 20:16, 42:3,
54:15, 99:23
cushioning [1] - 12:13
cut [1] - 45:16

D

D [6] - 2:23, 5:1, 25:16, 36:12, 52:4,
52:19
DA [4] - 115:8, 116:14, 116:21, 116:22
Dallas [5] - 57:25, 65:21, 66:20, 67:7,
107:13
damage [1] - 120:10
damaging [1] - 125:9
dance [3] - 94:14, 96:14, 96:16
dancers [3] - 94:13, 95:11, 97:1
dancing [7] - 36:12, 52:24, 61:14,
61:15, 64:15, 93:13
dangerous [1] - 126:11
DANIEL [1] - 2:20
darker [1] - 18:13
darn [1] - 132:10
date [4] - 126:17, 127:16, 127:19
David [2] - 78:3, 78:7
DAVID [1] - 1:11
Davis [3] - 107:13, 108:10
DAWN [1] - 2:1
day [8] - 13:2, 13:7, 47:23, 98:9, 106:1,
130:25, 132:12
Day [1] - 128:10
DAY [1] - 1:10
days [2] - 131:19, 131:20
deadline [1] - 131:6
deal [4] - 107:19, 109:7, 116:19
dealership [1] - 69:2
dealing [6] - 13:1, 20:22, 20:23, 74:6,
83:19, 130:8
deals [1] - 41:25
dealt [1] - 107:15
death [1] - 78:12
decide [1] - 81:24
decided [2] - 46:24, 101:3
decides [1] - 57:5
deciding [2] - 89:10, 90:25
decision [5] - 38:23, 73:11, 75:17,
95:15, 128:14
declare [1] - 105:10
declared [1] - 27:12
deem [1] - 128:17
deemed [2] - 102:10, 128:24
defend [2] - 68:2, 78:11
DEFENDANT [4] - 2:8, 2:16, 3:1, 3:4
defendant [7] - 29:21, 44:22, 46:17,
68:1, 75:24, 84:23, 127:10
defendants [25] - 33:24, 34:1, 36:21,
37:4, 37:16, 44:19, 45:8, 45:14, 45:25,
46:1, 48:16, 58:9, 58:21, 69:17, 72:21,
74:11, 74:14, 74:23, 75:12, 75:18,
76:12, 76:14, 77:4, 127:6
DEFENDANTS [2] - 2:13, 2:20
Defendants [1] - 4:9
defendants' [5] - 31:5, 32:20, 33:19,
34:11, 49:2
defense [4] - 17:9, 29:7, 39:17, 112:2
Defense [1] - 4:7
defenses [3] - 63:21, 63:23, 64:3
define [2] - 12:3, 64:5
defined [11] - 10:25, 11:1, 11:22,
11:23, 12:2, 19:9, 55:5, 64:16, 100:11,
102:12, 103:20
defines [1] - 36:3
defining [2] - 49:8, 61:11
definition [17] - 13:16, 37:24, 40:3,
42:7, 55:22, 55:24, 61:17, 82:1, 87:4,
93:21, 96:19, 101:20, 101:25, 102:15,
103:6, 104:6, 124:4
definitions [5] - 20:24, 33:7, 64:4,
64:7, 64:9
delay [1] - 131:17
delegate [3] - 119:12, 121:11, 122:5
Delia [1] - 112:9
DELIA [1] - 3:1
delve [1] - 118:7
demanding [1] - 93:11
democratic [1] - 89:15
demonstrate [1] - 36:10
demonstration [2] - 63:9, 63:11
demonstrations [1] - 56:22
denial [1] - 130:9
denied [4] - 31:6, 33:21, 110:18,
110:20
deny [2] - 33:19, 110:25
denying [1] - 110:12
depart [1] - 133:2
departed [1] - 62:23
depend [1] - 16:5
depends [2] - 93:2, 97:25
depict [1] - 56:12
depicts [1] - 55:12
deprive [1] - 94:14
describe [1] - 56:12
describes [1] - 55:12

designed [4] - 24:12, 24:21, 25:3, 82:3
desire [3] - 46:17, 131:14, 131:22
desiring [1] - 104:1
despite [2] - 94:1, 123:18
determination [2] - 81:19, 131:15
determine [6] - 81:8, 89:23, 93:1, 97:24, 98:7, 98:18
determining [1] - 98:5
DEVANE [1] - 2:22
development [1] - 35:21
device [4] - 24:11, 82:3, 82:17, 82:23
devices [1] - 24:15
did [17] - 11:13, 21:7, 47:25, 48:8, 65:14, 68:13, 70:24, 75:10, 82:19, 109:11, 114:21, 114:22, 115:12, 115:24, 118:23, 126:7, 128:4
didn't [15] - 16:12, 20:2, 27:14, 27:24, 28:8, 30:3, 30:7, 30:16, 48:1, 79:22, 81:16, 82:6, 113:7, 113:8, 125:9
difference [1] - 54:18
different [21] - 37:21, 50:5, 57:11, 58:23, 62:7, 64:22, 72:4, 91:7, 92:8, 92:9, 96:5, 97:14, 100:1, 122:13, 124:6, 130:7, 131:8, 132:11, 132:12
differently [2] - 9:3, 103:16
difficult [1] - 77:1
dildo [9] - 7:13, 7:16, 14:19, 14:22, 15:8, 30:11, 30:13, 82:8, 82:11
dildos [3] - 24:16, 25:2
directed [7] - 17:15, 17:17, 95:19, 101:10, 107:19, 110:10
directing [2] - 45:7, 55:4
directly [2] - 58:11, 119:12
disagree [3] - 47:16, 47:25, 83:12
disagreed [1] - 85:6
disapprove [1] - 78:11
disavow [1] - 111:25
disavowed [2] - 74:15, 116:3
disclaimed [1] - 124:12
discretion [1] - 54:15
discrimination [7] - 52:1, 61:16, 61:23, 62:8, 63:19, 69:22, 69:23
discuss [1] - 72:3
discussed [3] - 20:3, 44:5, 97:4
dismiss [10] - 23:7, 24:8, 24:18, 25:8, 25:14, 28:20, 28:23, 38:2, 112:11, 115:23
dismissal [2] - 123:11, 123:13
dismissed [5] - 26:10, 37:3, 37:16, 79:5, 79:9
dispute [5] - 32:25, 35:19, 60:11, 66:2, 66:9
distasteful [2] - 78:9, 78:10
distinction [2] - 88:20, 113:2
distinguish [1] - 72:21
distinguished [1] - 98:16
distinguishes [1] - 103:15
distributed [2] - 82:18, 88:25
distributing [2] - 83:1, 101:5

District [9] - 3:5, 3:10, 3:10, 70:13, 78:3, 111:19, 112:21, 133:6
district [8] - 76:11, 76:19, 76:21, 76:22, 111:24, 118:3, 118:11, 119:18
DISTRICT [3] - 1:1, 1:1, 1:11
Division [1] - 3:2
DIVISION [1] - 1:2
divorced [2] - 56:10, 63:16
divorces [1] - 57:3
do [112] - 5:5, 7:16, 7:21, 7:23, 8:4, 8:7, 8:9, 8:25, 9:5, 9:10, 10:9, 10:12, 10:19, 11:11, 12:3, 12:17, 12:20, 14:14, 14:19, 15:19, 17:12, 18:6, 18:13, 19:17, 19:24, 19:25, 21:4, 21:5, 21:8, 23:4, 23:5, 23:12, 24:2, 24:4, 27:20, 27:25, 29:5, 34:13, 35:5, 38:3, 38:8, 38:10, 38:14, 38:24, 44:15, 44:22, 45:3, 46:1, 46:18, 46:22, 47:1, 47:2, 47:22, 48:23, 50:11, 50:14, 51:11, 52:5, 53:14, 64:7, 64:8, 66:21, 74:24, 79:21, 79:23, 79:24, 81:8, 81:15, 84:13, 90:15, 91:10, 95:24, 96:7, 96:8, 97:3, 97:4, 97:8, 98:21, 98:22, 98:23, 99:16, 104:22, 106:9, 108:1, 108:14, 110:1, 110:2, 113:22, 114:17, 114:20, 115:8, 115:10, 115:13, 115:14, 115:17, 116:2, 116:4, 118:16, 120:6, 125:24, 127:7, 128:7, 128:22, 130:4, 130:21, 130:24, 130:25, 131:12, 131:13, 133:7
doctrine [2] - 57:20, 66:25
document [1] - 60:18
documents [1] - 68:15
does [49] - 8:20, 25:24, 29:2, 29:7, 30:13, 33:10, 35:7, 36:8, 38:5, 40:22, 41:9, 44:10, 44:15, 49:25, 50:17, 52:23, 61:23, 66:13, 66:18, 68:6, 68:7, 81:7, 82:11, 82:25, 83:1, 83:6, 84:9, 84:10, 87:3, 87:22, 88:5, 88:7, 90:22, 92:10, 94:14, 96:24, 97:6, 97:7, 99:8, 99:19, 99:20, 100:20, 103:2, 103:16, 105:10, 113:23, 115:18, 124:1
doesn't [30] - 5:20, 12:12, 18:5, 35:2, 40:2, 49:15, 50:2, 50:4, 54:5, 54:17, 57:5, 57:8, 62:13, 64:5, 74:1, 82:13, 84:14, 85:12, 85:15, 85:24, 86:1, 87:17, 96:21, 99:10, 108:17, 108:21, 109:17, 120:5, 121:3, 122:22
doing [12] - 8:14, 19:24, 47:3, 56:21, 62:11, 63:1, 63:11, 73:22, 85:14, 92:7, 96:10, 125:4
dollar [1] - 27:20
don [2] - 94:13, 103:25
don't [51] - 9:19, 11:11, 11:16, 11:21, 13:4, 14:11, 14:15, 19:17, 19:24, 20:23, 20:25, 21:11, 33:18, 35:3, 37:18, 38:13, 38:19, 45:10, 45:18, 47:2, 49:1, 52:16, 66:2, 66:9, 73:18, 74:11, 75:19, 78:17, 79:12, 80:10, 80:21, 81:20, 81:24, 83:7, 85:18, 97:4, 101:3, 108:24, 109:7, 112:25, 117:9, 117:10, 121:21, 128:2,

128:10, 128:21, 129:25, 130:15, 131:11, 132:17
done [15] - 27:4, 27:21, 36:25, 38:9, 47:18, 52:10, 77:9, 100:18, 105:25, 106:8, 114:21, 117:20, 120:5, 121:17
door [5] - 9:17, 9:24, 9:25, 10:1, 10:2
doubt [3] - 19:17, 47:12, 100:12
down [22] - 16:23, 19:2, 22:7, 25:9, 25:11, 26:21, 27:1, 34:7, 39:12, 43:17, 47:25, 48:6, 53:24, 60:17, 63:21, 69:19, 98:23, 105:15, 106:18, 109:9, 113:6, 120:21
downhill [1] - 106:19
drafted [1] - 128:19
drafting [1] - 126:16
drag [74] - 8:22, 9:1, 9:2, 9:6, 11:4, 12:4, 12:21, 13:8, 27:2, 37:10, 39:10, 39:25, 40:17, 40:24, 40:25, 41:1, 41:15, 41:16, 42:15, 43:4, 51:22, 54:8, 54:10, 60:15, 60:18, 60:20, 62:3, 62:21, 66:9, 66:15, 66:18, 68:9, 68:13, 70:22, 71:1, 71:8, 71:12, 72:5, 72:8, 72:23, 77:23, 78:1, 78:4, 79:18, 80:23, 87:2, 88:5, 89:23, 90:15, 90:18, 90:19, 91:12, 92:7, 93:15, 93:16, 96:11, 96:19, 96:22, 103:13, 103:24, 104:5, 105:7, 105:8, 105:11, 118:19, 125:2, 126:3, 126:7, 126:12
dramatic [1] - 104:1
dress [1] - 90:14
dressed [1] - 96:11
drew [1] - 34:2
duly [1] - 5:10
during [17] - 7:5, 7:16, 7:17, 18:12, 24:1, 25:22, 26:18, 27:22, 38:6, 54:4, 81:16, 82:13, 82:18, 82:19, 82:23, 87:11, 126:18
duty [1] - 115:22

E

E [3] - 5:1, 26:12
e [1] - 127:11
e-mail [1] - 127:11
each [16] - 18:2, 18:11, 21:17, 22:9, 25:22, 28:19, 39:22, 45:2, 45:18, 45:19, 46:22, 54:23, 73:6, 75:13, 91:6, 91:11
earlier [9] - 96:3, 97:4, 102:2, 102:17, 102:18, 104:20, 106:18, 128:4, 131:6
early [3] - 47:22, 116:5, 118:19
easier [1] - 71:23
easily [2] - 17:6, 92:21
easy [1] - 80:5
economic [3] - 97:7, 97:10, 97:18
Edith [3] - 31:21, 73:11, 74:5
effect [27] - 11:25, 12:1, 30:24, 36:21, 38:23, 41:13, 46:22, 47:14, 53:20, 59:25, 60:2, 74:13, 74:16, 75:9, 75:20, 97:15, 101:9, 106:6, 106:20, 109:2, 118:6, 119:10, 119:24, 128:10, 129:1,

132:16
effects [1] - 59:12
egregious [1] - 68:3
eight [4] - 34:7, 44:21, 76:25, 101:11
either [11] - 9:13, 41:4, 47:6, 51:16, 85:25, 87:6, 89:18, 99:20, 106:8, 122:3, 127:17
elaborate [1] - 38:13
Eldred [6] - 39:20, 39:21, 78:20, 78:22, 104:19, 122:15
ELDRED [18] - 2:8, 39:20, 42:5, 42:7, 78:19, 78:21, 79:17, 80:7, 80:10, 80:13, 81:9, 81:12, 81:17, 81:20, 81:23, 82:22, 83:25, 84:4
Eldred..... [1] - 4:12
element [7] - 25:25, 50:4, 56:11, 56:12, 64:24, 65:12, 70:4
elements [7] - 18:22, 28:23, 56:2, 57:16, 91:1, 108:13, 113:12
Eleventh [1] - 111:11
else [9] - 29:2, 33:23, 38:21, 47:7, 51:5, 53:12, 63:16, 80:24, 81:7
embodying [1] - 89:16
EMILY [1] - 2:1
employed [1] - 101:15
en [2] - 107:14, 107:15
enacted [4] - 70:21, 74:7, 83:20, 93:4
encompassing [1] - 112:16
encourage [5] - 29:5, 60:11, 70:8, 77:21, 100:25
end [1] - 128:22
endowed [1] - 104:2
enforce [19] - 74:15, 76:5, 86:15, 106:20, 106:21, 108:2, 108:3, 109:19, 110:11, 110:12, 116:9, 118:7, 118:23, 119:1, 119:23, 122:2, 124:12, 124:13
enforceability [1] - 124:15
enforced [3] - 28:13, 73:7, 113:24
enforcement [47] - 17:24, 32:6, 32:10, 32:14, 37:21, 48:20, 48:22, 53:23, 73:12, 73:18, 74:4, 74:7, 75:8, 75:14, 76:1, 79:8, 83:12, 83:19, 84:18, 86:10, 86:20, 86:24, 87:5, 98:7, 98:18, 108:15, 108:22, 109:14, 109:15, 109:23, 114:4, 114:23, 114:24, 115:5, 115:22, 116:3, 120:7, 121:5, 121:11, 121:19, 122:5, 122:8, 124:6, 124:8
enforces [1] - 121:19
enforcing [5] - 75:25, 76:4, 109:5, 118:16, 119:20
engage [12] - 17:22, 21:11, 23:5, 24:2, 24:6, 25:6, 26:8, 28:14, 32:15, 73:14, 73:20, 110:21
engages [3] - 19:10, 22:2, 22:6
engaging [4] - 67:3, 90:2, 90:8, 92:7
enhance [1] - 104:3
enhances [1] - 14:13
enjoin [5] - 38:24, 105:10, 116:8, 122:1, 124:9
enjoined [6] - 69:20, 71:9, 98:13,

98:17, 124:10, 124:11
enjoining [5] - 36:15, 36:16, 36:20, 36:22, 38:24
enough [10] - 20:4, 33:2, 33:14, 33:16, 34:25, 46:7, 67:12, 87:21, 92:2, 96:17
entails [1] - 100:16
enter [2] - 16:13, 17:14
entered [2] - 128:19, 128:25
enterprise [4] - 51:2, 53:22, 86:11, 103:7
enters [1] - 77:5
Entertainment [6] - 39:8, 52:15, 59:1, 69:13, 77:8, 87:7
entertainment [5] - 40:1, 41:22, 41:24, 69:21, 93:2
enthusiasm [1] - 119:5
entire [6] - 37:2, 37:15, 41:10, 60:1, 61:10, 62:15
entirely [3] - 53:13, 68:8, 70:7
entities [3] - 45:9, 76:17
entitled [3] - 19:21, 124:18, 133:8
entity [1] - 120:1
enures [1] - 38:11
equally [2] - 99:25, 103:21
equity [1] - 120:19
erection [1] - 23:19
erotic [2] - 94:14, 97:2
especially [4] - 12:4, 12:21, 115:2, 119:18
essential [2] - 77:19, 94:21
essentially [2] - 117:6, 123:17
establish [4] - 17:21, 30:16, 32:14, 100:17
established [4] - 22:10, 28:22, 28:25, 54:3
estimate [1] - 51:11
estimation [1] - 31:10
ET [4] - 1:4, 1:7, 2:13, 2:21
eve [1] - 77:18
even [51] - 9:17, 12:2, 14:11, 14:15, 16:8, 16:12, 16:13, 16:16, 24:9, 24:19, 26:5, 34:14, 36:12, 43:14, 43:17, 49:24, 50:3, 54:17, 57:3, 59:19, 61:14, 62:18, 62:22, 62:24, 64:5, 64:17, 64:23, 65:20, 66:10, 67:6, 68:3, 68:11, 68:22, 72:21, 77:8, 77:22, 78:9, 79:23, 83:7, 89:22, 92:23, 93:13, 100:4, 115:11, 119:14, 120:20, 121:13, 121:21, 124:4, 125:9, 125:23
event [13] - 9:7, 9:9, 9:10, 10:21, 22:25, 24:18, 28:2, 28:21, 34:23, 51:3, 86:19, 87:17
events [14] - 11:10, 11:20, 21:6, 21:9, 23:2, 25:3, 28:6, 28:8, 39:9, 87:1, 87:15, 87:22, 120:3
eventually [1] - 102:9
ever [2] - 10:20, 122:8
every [14] - 23:22, 23:23, 30:4, 64:7, 64:9, 65:12, 67:13, 80:17, 89:19, 119:9, 123:4, 124:2, 132:12

everybody [7] - 5:4, 13:6, 13:7, 38:5, 45:16, 46:8, 128:20
everyone [7] - 38:11, 80:14, 80:24, 81:7, 81:18, 96:4, 106:2
everything [5] - 11:15, 46:23, 63:16, 79:12, 112:5
evidence [38] - 17:21, 18:3, 18:11, 18:19, 18:20, 21:2, 23:11, 23:25, 24:5, 24:6, 24:15, 25:5, 26:4, 26:7, 26:16, 27:3, 27:5, 27:16, 27:18, 28:12, 28:16, 28:18, 60:6, 74:10, 79:20, 79:25, 82:6, 83:10, 83:16, 83:23, 84:5, 84:8, 84:13, 86:21, 87:9, 87:12, 109:10
evidently [1] - 87:16
Ex [9] - 74:18, 75:1, 75:3, 79:6, 107:22, 111:5, 115:11, 121:15, 122:1
exact [1] - 34:22
exactly [7] - 9:21, 10:5, 94:17, 115:19, 123:8, 129:20, 130:11
exaggerate [5] - 26:13, 61:22, 67:2, 103:16, 103:23
exaggerates [1] - 61:20
exaggerating [2] - 62:1, 62:15
EXAMINATION [4] - 4:1, 5:12, 14:2, 15:23
examination [1] - 15:6
Examination [3] - 4:4, 4:4, 4:5
example [13] - 15:15, 30:6, 41:22, 42:1, 42:20, 62:12, 66:25, 89:5, 90:14, 92:8, 93:9, 98:2, 98:12
examples [10] - 24:25, 29:23, 54:20, 55:1, 55:15, 57:24, 63:5, 65:18, 66:21
exams [1] - 56:21
except [1] - 69:13
exception [8] - 53:1, 54:6, 63:6, 75:1, 79:6, 82:25, 116:1, 121:15
exceptions [1] - 43:7
exclude [1] - 126:12
excluded [1] - 8:1
exclusion [1] - 8:7
excuse [1] - 129:2
executive [1] - 75:13
Exhibit [9] - 18:17, 21:21, 60:12, 60:17, 60:24, 61:1, 70:23, 70:24
exhibit [2] - 61:25, 103:18
exhibited [2] - 82:17, 100:2
exhibiting [2] - 62:14, 82:23
exhibition [4] - 14:16, 14:19, 24:11, 82:2
exhibitors [1] - 82:21
exhibits [2] - 17:2, 128:16
exist [4] - 40:22, 88:5, 100:17, 105:10
existed [1] - 20:13
existing [6] - 50:5, 53:2, 53:22, 57:4, 66:5, 66:13
exists [1] - 32:18
exotic [4] - 36:12, 52:24, 93:13, 93:18
expected [1] - 8:15
experienced [2] - 32:13, 47:15
explain [3] - 84:12, 84:15, 96:10

explained [3] - 75:12, 84:20, 87:18
explanation [1] - 81:21
explicit [10] - 35:3, 41:1, 41:17, 42:22, 44:11, 52:25, 54:9, 54:21, 56:24, 100:22
explicitly [6] - 50:17, 51:24, 65:12, 70:2, 118:22, 126:6
explore [1] - 6:4
expo [1] - 86:23
expose [2] - 80:24, 81:3
exposed [8] - 6:10, 6:11, 6:12, 6:14, 7:7, 10:25, 12:3
exposure [4] - 20:17, 30:24, 44:1, 81:1
express [8] - 44:13, 44:14, 44:20, 45:12, 90:3, 90:9, 92:6, 92:17
expressed [2] - 59:23, 89:5
expressing [1] - 92:18
expression [15] - 40:6, 62:7, 67:25, 77:11, 77:16, 78:9, 93:5, 93:8, 93:9, 94:10, 94:12, 94:13, 94:18, 95:19, 97:2
expressive [18] - 35:11, 36:10, 74:8, 83:21, 84:10, 84:15, 89:24, 90:11, 90:20, 92:2, 92:24, 93:10, 93:11, 93:14, 94:2, 96:17, 96:20, 120:22
extended [1] - 90:9
extension [1] - 131:19
extent [13] - 29:6, 50:21, 50:22, 60:10, 66:4, 88:8, 95:22, 96:4, 96:18, 97:9, 100:5, 100:20, 107:20
Extragrams [5] - 30:19, 39:4, 77:9, 87:2, 87:5
extreme [5] - 53:17, 54:20, 55:1, 66:3, 66:10
extremely [1] - 72:22
eyelashes [2] - 67:8, 104:1
eyes [3] - 27:13, 43:17, 67:24

F

F.3d [3] - 84:25, 85:21, 123:16
face [2] - 34:17, 89:18
facial [20] - 35:21, 53:23, 83:18, 84:17, 88:11, 88:12, 88:20, 88:23, 88:24, 89:1, 89:7, 89:14, 89:22, 100:14, 105:21, 106:5, 122:16, 122:22, 123:6, 123:8
facially [3] - 74:8, 83:20, 103:14
fact [16] - 38:4, 38:17, 40:18, 41:14, 46:13, 85:11, 100:20, 100:25, 103:13, 109:10, 126:22, 126:23, 127:8, 127:17, 129:9, 131:23
factor [2] - 34:20, 67:13
factors [3] - 21:13, 34:16, 63:13
facts [2] - 89:12, 101:1
factual [2] - 35:19, 35:21
factually [1] - 89:4
fail [2] - 72:21, 115:12
failed [4] - 25:5, 26:4, 26:7, 69:17
fails [3] - 62:25, 64:11, 65:19
fair [1] - 20:4
FAIR [2] - 90:5, 91:25

fairly [1] - 84:22
fake [3] - 6:17, 7:1, 67:8
fall [4] - 44:13, 52:25, 86:16, 106:14
false [1] - 103:25
familiar [9] - 38:19, 55:9, 57:19, 58:10, 65:16, 71:2, 72:2, 76:14, 79:7
families [1] - 65:3
far [11] - 31:2, 36:6, 64:23, 98:24, 104:14, 109:4, 118:3, 118:11, 120:15, 127:8, 132:22
Farmers [1] - 123:15
farther [2] - 60:9, 60:17
fast [1] - 85:16
fatal [1] - 58:12
favor [1] - 106:11
fear [17] - 53:19, 54:1, 54:10, 54:24, 64:14, 73:7, 74:2, 85:5, 85:13, 85:17, 87:20, 99:4, 102:18, 117:5, 117:12, 120:14
fears [3] - 86:18, 86:22, 89:5
features [1] - 19:8
featuring [1] - 77:23
federal [11] - 47:14, 48:1, 69:18, 69:20, 71:9, 72:6, 72:12, 72:22, 132:5, 132:8, 132:22
feel [2] - 33:13, 132:23
feeling [4] - 19:20, 107:3, 129:11, 129:12
feelings [1] - 91:12
female [16] - 12:15, 14:13, 14:17, 23:8, 23:12, 24:13, 26:13, 61:20, 61:25, 62:13, 67:2, 78:1, 82:4, 103:17, 103:23, 104:7
fence [4] - 16:8, 30:14, 65:3, 82:9
Fences [1] - 73:10
few [8] - 14:6, 29:23, 46:25, 63:5, 71:24, 80:3, 80:13, 115:13
Fifth [16] - 31:16, 31:22, 33:14, 39:12, 73:8, 73:10, 75:21, 75:22, 75:23, 83:14, 84:6, 84:20, 85:21, 85:24, 107:14, 123:14
figure [1] - 12:15
file [8] - 46:18, 126:19, 126:25, 127:6, 130:1, 130:13, 131:14, 131:23
filed [2] - 102:14, 112:3
filing [2] - 110:4, 127:18
fill [1] - 46:15
film [1] - 77:24
final [28] - 26:25, 36:16, 38:17, 39:1, 46:21, 47:2, 47:6, 60:13, 71:15, 107:16, 111:4, 112:15, 115:24, 119:24, 120:4, 120:6, 120:9, 121:20, 126:16, 126:20, 128:5, 128:14, 128:18, 128:19, 130:9, 132:14, 132:17
finally [4] - 36:22, 60:12, 89:14, 104:19
finances [1] - 104:24
financial [6] - 105:3, 120:10, 120:14, 120:18, 120:21, 120:25
find [14] - 7:20, 23:4, 24:4, 34:11, 34:22, 49:9, 55:10, 56:6, 57:16, 71:2,

116:7, 121:14, 122:22, 125:11
finding [2] - 52:4, 77:5
findings [9] - 38:4, 38:17, 46:12, 126:21, 126:23, 127:8, 127:17, 129:9, 131:23
finds [5] - 28:21, 34:12, 37:15, 92:23, 121:21
fine [10] - 18:7, 20:25, 45:15, 46:6, 53:21, 78:16, 98:24, 105:25, 131:6, 131:14
first [28] - 9:9, 21:17, 21:25, 22:12, 24:15, 24:20, 26:20, 29:20, 33:1, 34:5, 36:5, 36:13, 46:2, 47:13, 48:4, 48:23, 56:5, 64:21, 78:16, 88:25, 94:7, 105:18, 106:17, 113:11, 114:9, 122:15, 127:21, 129:6
First [41] - 39:14, 40:9, 53:1, 53:2, 53:25, 57:20, 60:4, 63:17, 72:7, 73:10, 73:13, 74:6, 76:9, 78:8, 80:4, 80:5, 80:7, 80:11, 83:14, 84:7, 85:18, 88:9, 89:24, 90:10, 90:17, 90:21, 91:2, 93:1, 95:17, 95:20, 96:20, 105:13, 113:13, 113:22, 113:24, 114:7, 120:22, 121:7, 122:16, 125:12, 125:19
five [7] - 45:7, 45:18, 47:21, 51:16, 77:11, 77:22, 117:20
five-minute [1] - 51:16
flawed [1] - 125:23
flier [1] - 9:16
floor [2] - 47:21, 48:2
Floor [1] - 3:6
Florida [6] - 71:11, 71:12, 71:16, 98:12, 98:13, 98:17
focus [1] - 106:23
focused [1] - 26:17
focusing [1] - 32:21
folks [4] - 98:24, 108:22, 132:12, 132:21
follow [4] - 15:19, 74:17, 119:9, 123:9
follows [1] - 5:10
Foods [5] - 31:12, 33:1, 73:9, 74:1, 121:6
footnote [1] - 115:19
Footnote [2] - 115:20
FOR [7] - 1:15, 2:8, 2:13, 2:16, 2:20, 3:1, 3:4
for [166] - 5:14, 7:20, 8:8, 9:14, 9:16, 9:17, 11:10, 14:8, 15:9, 15:15, 16:3, 16:12, 17:2, 17:14, 17:16, 17:18, 17:24, 19:23, 22:3, 22:24, 24:12, 24:21, 24:23, 25:4, 28:17, 28:25, 30:6, 30:17, 31:13, 33:7, 33:21, 34:10, 34:25, 35:25, 36:18, 39:6, 40:3, 41:8, 41:11, 41:22, 42:1, 42:20, 43:1, 44:21, 45:1, 45:14, 45:18, 45:20, 46:24, 48:16, 49:6, 49:10, 49:12, 50:19, 51:14, 51:25, 52:6, 53:21, 54:5, 54:6, 54:10, 54:17, 55:8, 56:15, 57:20, 59:13, 59:23, 60:15, 62:12, 63:6, 63:7, 63:18, 63:21, 63:25, 64:2, 64:3, 64:20, 67:22, 68:19, 73:11, 76:12, 76:15,

76:20, 77:13, 77:17, 78:2, 78:22, 79:19, 82:3, 83:5, 83:17, 83:18, 84:25, 87:24, 89:5, 90:6, 90:14, 91:25, 92:8, 93:3, 93:8, 93:9, 97:7, 97:10, 97:17, 97:19, 98:2, 98:4, 98:12, 98:15, 99:4, 99:7, 100:23, 101:16, 102:24, 105:4, 105:24, 106:1, 106:8, 106:10, 106:12, 107:17, 108:17, 109:8, 109:11, 110:11, 110:24, 110:25, 113:11, 113:14, 113:19, 115:14, 116:1, 116:13, 117:21, 119:3, 119:5, 119:18, 119:20, 119:21, 119:25, 120:15, 120:20, 121:4, 122:16, 122:19, 122:21, 122:23, 123:11, 124:4, 124:15, 124:17, 125:24, 126:1, 126:4, 126:9, 126:11, 129:2, 130:16, 131:19, 132:4

foreclosed [2] - 31:6, 52:4

foregoing [1] - 133:7

form [2] - 6:12, 24:25

format [1] - 127:12

former [1] - 53:11

forms [1] - 40:1

formulate [1] - 89:10

forth [6] - 7:23, 10:4, 13:3, 42:16, 45:5, 113:18

Forum [1] - 90:6

forum [1] - 91:25

forward [1] - 79:21

fought [1] - 77:17

found [18] - 36:11, 37:2, 37:6, 37:24, 52:21, 58:7, 61:14, 69:22, 70:5, 72:7, 75:10, 87:20, 93:21, 93:22, 93:25, 101:8, 104:10, 124:24

Foundation [1] - 1:15

four [3] - 57:2, 69:17, 94:3

four-part [1] - 94:3

fourth [5] - 34:15, 34:20, 95:2, 95:9

Fowler [1] - 84:25

frames [1] - 46:13

free [17] - 32:10, 39:12, 44:22, 48:11, 57:18, 67:24, 77:11, 78:9, 81:4, 92:7, 92:11, 94:10, 94:12, 94:18, 109:17, 127:6, 133:2

freedom [1] - 77:16

Freeway [1] - 1:16

Friday [7] - 39:3, 53:20, 74:13, 119:10, 128:6, 128:10, 129:1

Friends [2] - 70:9, 104:4

friends [1] - 83:12

from [102] - 12:8, 12:24, 15:12, 15:15, 15:16, 16:10, 19:14, 20:6, 20:9, 20:10, 20:22, 21:7, 21:20, 21:23, 22:14, 22:22, 24:17, 24:24, 25:19, 27:11, 29:10, 29:15, 31:9, 31:12, 31:13, 31:21, 35:3, 36:20, 37:6, 38:6, 38:14, 41:16, 42:7, 42:8, 46:21, 50:5, 51:21, 52:5, 55:3, 56:10, 56:20, 57:11, 60:13, 60:22, 61:24, 62:1, 62:10, 62:14, 62:23, 63:15, 63:16, 64:6, 64:13, 66:21, 66:22, 67:13, 68:24, 70:13, 70:23, 72:1, 74:5, 74:20, 74:22, 77:7, 78:4, 78:6, 81:8, 81:9,

81:10, 84:24, 85:18, 85:20, 89:12, 89:16, 90:3, 91:9, 91:15, 92:15, 94:11, 97:1, 98:17, 100:13, 101:23, 101:24, 105:18, 106:2, 109:24, 110:23, 112:20, 114:2, 116:25, 120:21, 122:16, 124:11, 124:22, 125:14, 126:13, 126:24, 127:13, 130:7, 133:8

front [23] - 11:17, 20:24, 21:6, 36:4, 41:21, 44:11, 44:15, 68:7, 79:22, 79:24, 80:15, 81:2, 81:7, 82:11, 82:13, 94:19, 97:3, 97:22, 100:2, 100:22, 101:3, 117:11

frontal [1] - 130:9

full [4] - 6:18, 33:1, 45:20, 77:14

full-time [1] - 77:14

fully [6] - 6:11, 6:14, 7:7, 74:2, 129:16

fundamental [1] - 89:8

further [8] - 15:17, 16:21, 17:9, 33:18, 61:7, 87:18, 94:21, 112:17

furthermore [3] - 50:25, 90:5, 97:6

further [1] - 94:5

future [8] - 17:22, 17:24, 21:5, 60:21, 73:24, 74:4, 109:13, 110:25

G

G [4] - 2:16, 5:1, 94:14, 95:11

G-strings [2] - 94:14, 95:11

gallery [1] - 48:4

games [4] - 59:4, 59:6, 59:7, 59:12

gaps [1] - 46:15

Garza [1] - 112:9

GARZA [1] - 3:1

gate [1] - 16:18

Gavyn [2] - 117:5, 126:2

Gay [2] - 78:5, 125:14

gender [1] - 62:7

general [21] - 2:9, 51:24, 53:12, 54:19, 60:5, 60:10, 60:23, 76:2, 76:5, 76:18, 78:24, 95:18, 109:25, 110:4, 116:22, 123:11, 125:7, 126:11, 126:25, 130:1

general's [6] - 30:2, 32:21, 58:12, 68:5, 122:10, 125:23

generalized [1] - 20:17

generally [7] - 7:25, 35:8, 43:19, 49:10, 60:16, 75:24, 120:13

genitals [8] - 14:17, 14:20, 23:9, 23:12, 24:13, 25:18, 56:22, 82:4

gentlemen [2] - 13:24, 46:2

Georges [2] - 70:9, 104:5

gesticulation [1] - 67:3

gesticulations [8] - 26:12, 27:4, 27:21, 42:24, 61:12, 61:19, 61:25, 62:11

get [53] - 12:24, 13:4, 16:12, 19:21, 25:11, 26:23, 35:25, 43:14, 44:25, 45:5, 45:15, 45:22, 45:24, 46:20, 46:23, 47:6, 47:22, 47:23, 48:6, 48:15, 51:15, 61:22, 62:2, 66:21, 69:9, 73:2, 81:4, 89:22, 100:6, 105:24, 105:25, 106:24, 108:5, 110:5, 111:8, 113:18, 127:1, 127:17,

127:21, 127:22, 128:5, 129:9, 129:13, 130:4, 131:2, 131:5, 131:18, 131:24, 132:13, 132:14, 132:17, 132:18

gets [6] - 67:25, 75:3, 80:22, 90:21, 132:11, 132:23

getting [8] - 8:18, 8:25, 9:5, 9:10, 19:20, 24:24, 128:21, 129:12

GIFFORD [54] - 2:8, 40:9, 40:14, 40:21, 40:24, 41:6, 41:14, 41:19, 41:23, 42:17, 43:5, 43:14, 43:21, 43:24, 44:7, 44:10, 50:16, 50:22, 50:24, 88:4, 91:14, 91:18, 91:20, 91:24, 95:5, 96:1, 96:8, 96:16, 97:9, 97:16, 97:25, 99:1, 99:6, 99:14, 99:19, 101:12, 101:18, 101:24, 102:1, 104:12, 105:1, 105:3, 105:6, 127:1, 127:4, 127:20, 129:19, 129:22, 129:25, 130:3, 130:6, 130:15, 130:19, 130:23

Gifford [9] - 40:7, 80:7, 84:12, 88:1, 88:3, 120:17, 122:18, 123:1, 129:6

gifford..... [1] - 4:13

Ginsberg [4] - 35:6, 65:6, 65:11, 65:14

give [16] - 12:13, 12:15, 31:18, 34:6, 34:9, 43:1, 50:7, 51:16, 52:9, 65:19, 85:15, 85:24, 86:1, 109:20, 117:18, 129:7

given [3] - 87:9, 109:21, 111:3

giving [1] - 64:16

Glass [2] - 85:20, 85:22

Glen [2] - 93:24, 94:11

Go [1] - 118:1

go [49] - 5:7, 7:3, 8:23, 9:12, 11:25, 12:1, 13:10, 15:22, 17:6, 18:2, 18:10, 18:19, 19:6, 22:9, 25:13, 29:22, 32:1, 32:8, 36:8, 38:23, 38:25, 42:9, 42:11, 44:7, 45:17, 45:18, 45:25, 48:2, 53:7, 53:16, 69:5, 69:11, 71:24, 72:2, 78:16, 81:22, 89:6, 99:12, 101:16, 105:15, 109:20, 112:19, 113:19, 113:20, 118:6, 119:7, 122:12, 129:20

go-round [1] - 113:19

goal [4] - 95:6, 95:8, 97:21, 97:22

goes [15] - 6:2, 7:1, 36:6, 50:4, 61:17, 63:14, 63:19, 74:13, 74:16, 83:5, 88:21, 96:3, 109:2, 119:24, 128:9

going [67] - 17:1, 17:10, 18:19, 19:17, 21:17, 22:5, 22:7, 25:2, 26:23, 26:24, 29:22, 32:11, 34:7, 36:20, 37:19, 43:4, 44:24, 45:1, 45:9, 45:13, 45:19, 45:22, 45:24, 46:1, 46:2, 46:19, 48:17, 51:8, 53:18, 54:8, 54:12, 69:2, 77:8, 80:7, 83:15, 85:22, 86:7, 98:23, 99:11, 99:12, 99:14, 101:9, 105:15, 107:1, 107:3, 109:20, 110:21, 112:4, 116:9, 116:18, 118:7, 120:2, 126:25, 127:3, 127:9, 127:12, 127:14, 129:8, 130:13, 130:21, 130:24, 131:6, 131:16, 132:6, 132:15, 132:17

gone [1] - 75:9

good [5] - 5:4, 14:4, 14:5, 87:21,

117:21
goodness [1] - 98:3
got [23] - 7:12, 21:19, 31:17, 35:1, 45:4, 45:5, 45:11, 45:12, 46:7, 48:3, 71:21, 78:16, 80:12, 101:11, 104:11, 110:22, 111:6, 117:12, 126:15, 128:20, 129:2, 129:10, 129:11
governed [1] - 82:14
government [12] - 52:23, 62:9, 62:19, 63:3, 65:25, 66:2, 72:5, 74:24, 75:4, 78:4, 94:6, 115:3
Government [3] - 64:22, 70:23, 114:19
government's [2] - 38:18, 94:22
governmental [2] - 59:16, 59:20
grant [3] - 110:3, 110:8, 129:23
granted [4] - 45:10, 109:12, 109:13, 110:24
granting [4] - 97:19, 110:16, 120:10, 131:17
grants [1] - 109:25
graphic [4] - 44:11, 94:16, 94:19, 97:22
gratify [1] - 31:3
great [3] - 72:11, 91:4, 92:13
greater [1] - 94:21
GRIFFIN [4] - 2:22, 31:19, 46:3, 116:13
Griffin [2] - 2:23, 116:12
ground [1] - 110:20
grounds [2] - 17:17, 120:15
Group [1] - 125:14
group [2] - 68:12, 68:22
groups [1] - 54:23
guarantee [1] - 102:17
guess [1] - 132:6
guidelines [1] - 11:3
guilty [1] - 48:18

H

had [27] - 7:24, 16:8, 23:12, 28:5, 38:9, 44:21, 47:9, 47:13, 47:14, 48:5, 55:24, 72:12, 72:16, 72:17, 90:18, 91:7, 96:4, 96:5, 98:13, 104:6, 108:1, 113:4, 114:23, 120:6, 132:5, 132:8
half [3] - 45:20, 98:9, 122:15
halfway [1] - 63:25
halted [1] - 128:9
hand [9] - 31:17, 32:3, 52:8, 52:9, 52:14, 52:17, 71:20, 93:7, 101:22
handed [4] - 58:10, 58:25, 82:20, 82:23
handguns [1] - 85:23
hands [2] - 44:23, 119:3
hang [3] - 42:13, 51:11, 113:14
happen [8] - 5:20, 5:24, 5:25, 44:11, 51:3, 81:16, 99:20, 109:2
happens [3] - 5:20, 15:1, 106:15
hard [2] - 8:13, 63:25
Hardegree [2] - 117:5, 126:2
harm [19] - 38:22, 38:24, 39:3, 39:14,

85:9, 85:13, 97:11, 97:13, 100:13, 104:19, 104:20, 105:3, 105:4, 117:4, 117:15, 120:15, 121:1
harmful [3] - 59:12, 60:21, 70:4
Harris [1] - 116:6
has [83] - 7:1, 18:12, 18:19, 18:20, 21:16, 23:22, 25:25, 26:15, 26:17, 30:25, 31:3, 34:16, 34:21, 36:25, 39:8, 42:18, 43:8, 44:2, 45:2, 45:10, 51:21, 51:25, 52:21, 52:22, 54:2, 54:19, 56:9, 56:24, 59:18, 60:5, 60:15, 61:8, 62:13, 62:18, 63:22, 63:23, 68:1, 70:20, 72:12, 73:19, 75:9, 76:1, 76:3, 77:8, 79:10, 84:20, 86:6, 86:20, 86:24, 87:5, 87:23, 88:23, 96:3, 98:6, 98:8, 98:13, 98:19, 99:12, 99:15, 101:15, 105:22, 106:5, 106:8, 106:17, 108:1, 108:3, 108:7, 108:11, 111:7, 111:10, 111:21, 115:3, 115:8, 115:19, 116:1, 116:2, 123:11, 126:19, 130:25
hasn't [2] - 20:3, 106:8
hat [3] - 119:14, 119:16, 119:17
have [213] - 6:17, 8:5, 8:15, 8:17, 9:15, 9:19, 10:9, 10:19, 12:4, 12:12, 12:14, 12:18, 14:6, 16:7, 17:3, 17:4, 17:5, 17:20, 17:22, 18:9, 18:13, 18:22, 19:1, 19:2, 19:14, 20:7, 20:23, 21:3, 21:4, 22:15, 22:21, 23:5, 24:4, 24:9, 25:5, 26:7, 27:8, 28:4, 28:19, 28:21, 28:24, 29:14, 29:17, 30:20, 31:2, 31:13, 32:13, 33:11, 33:18, 34:8, 35:2, 35:4, 35:8, 35:15, 35:24, 38:12, 38:19, 38:21, 39:1, 39:4, 39:13, 40:3, 40:7, 42:22, 43:21, 43:22, 45:4, 45:6, 45:9, 45:16, 45:21, 46:16, 47:4, 47:14, 47:20, 48:15, 50:14, 52:5, 54:1, 54:15, 56:21, 56:24, 57:10, 57:16, 57:22, 58:8, 58:21, 60:6, 60:18, 61:14, 63:2, 65:7, 66:3, 67:13, 67:14, 67:22, 69:2, 69:14, 69:17, 69:18, 70:10, 70:18, 70:21, 71:7, 71:8, 71:22, 72:10, 72:19, 73:13, 73:18, 73:20, 73:23, 74:1, 74:11, 74:12, 74:14, 74:19, 74:23, 74:24, 74:25, 75:19, 76:3, 76:15, 76:17, 76:18, 76:19, 77:3, 78:1, 79:19, 80:19, 81:4, 81:24, 82:6, 85:7, 85:12, 86:19, 86:23, 87:9, 87:12, 87:18, 87:25, 88:6, 89:2, 90:9, 91:2, 91:11, 92:15, 93:14, 94:6, 95:25, 96:1, 98:9, 98:10, 99:4, 99:22, 100:14, 100:15, 100:16, 100:18, 100:19, 101:3, 103:17, 103:18, 104:15, 109:21, 110:9, 110:14, 111:11, 112:2, 112:3, 112:11, 113:1, 113:8, 114:21, 115:11, 115:15, 116:15, 117:2, 117:18, 117:20, 118:7, 118:16, 119:14, 119:22, 121:3, 121:7, 121:19, 122:10, 123:1, 123:4, 123:6, 124:12, 124:14, 125:5, 125:24, 127:21, 128:12, 128:14, 128:22, 128:23, 130:16, 131:11, 131:14, 132:17, 132:19
haven't [9] - 27:3, 27:5, 27:10, 27:17,

72:16, 74:15, 86:6, 120:5, 120:6
having [9] - 5:10, 6:10, 10:24, 26:5, 36:16, 61:24, 62:10, 69:14, 126:8
he [22] - 15:8, 30:5, 30:6, 30:7, 30:8, 30:9, 47:16, 48:1, 48:2, 48:3, 50:12, 59:24, 77:17, 77:19, 79:13, 111:21, 113:4, 113:5, 113:7, 115:3, 115:4
he's [2] - 20:21, 115:9
head [1] - 88:13
head-on [1] - 88:13
heading [1] - 113:24
healing [1] - 126:3
Health [4] - 74:22, 75:5, 75:15, 115:14
hear [6] - 19:24, 21:7, 29:10, 38:6, 53:18, 106:1
HEARD [1] - 1:11
heard [27] - 12:9, 13:2, 19:13, 20:6, 20:24, 22:14, 23:11, 24:16, 25:1, 25:19, 29:25, 30:10, 35:11, 51:21, 54:9, 62:3, 64:5, 64:13, 79:11, 87:12, 92:14, 95:25, 96:1, 97:15, 106:2, 108:13, 108:25
hearing [1] - 72:12
HEARING [1] - 1:10
heart [1] - 124:5
heightened [2] - 36:14, 59:20
held [5] - 52:22, 59:8, 75:6, 99:9, 125:17
help [3] - 18:15, 126:16, 127:12
helpful [3] - 26:21, 63:18, 70:11
helps [1] - 57:9
her [15] - 15:8, 21:8, 30:13, 63:25, 65:3, 65:4, 77:14, 78:23, 79:3, 79:4, 82:8, 82:10, 86:9, 86:10, 126:5
here [55] - 17:5, 18:17, 18:24, 19:19, 20:20, 21:15, 21:25, 24:19, 25:2, 29:4, 31:2, 32:20, 33:2, 34:17, 37:18, 38:21, 39:21, 40:3, 40:7, 42:15, 45:9, 47:3, 47:9, 54:2, 59:17, 59:22, 60:5, 66:2, 69:24, 70:7, 72:18, 72:19, 80:11, 86:4, 94:17, 94:23, 98:16, 105:20, 106:6, 106:15, 107:9, 107:24, 109:7, 109:14, 118:24, 119:14, 119:22, 120:17, 121:17, 122:19, 124:14, 125:1, 128:12, 130:8, 130:19
hereby [1] - 133:7
herself [1] - 85:23
hesitate [1] - 13:4
Hicks [2] - 76:21, 116:21
higher [1] - 100:15
highlight [1] - 115:10
highlighted [1] - 18:18
highly [1] - 113:9
him [1] - 109:9
hinges [2] - 37:23, 38:1
hip [1] - 13:3
hips [2] - 12:12, 12:13
his [2] - 47:13, 112:25
history [5] - 34:18, 41:12, 68:17, 91:12, 105:8
HITTNER [1] - 1:11

hoarseness [1] - 129:2
hold [4] - 21:19, 32:4, 49:16, 52:10
holding [6] - 27:19, 37:12, 37:13, 53:8, 115:21, 115:23
holds [1] - 106:16
holiday [1] - 128:11
home [1] - 119:13
honest [1] - 129:22
Honor [146] - 5:8, 13:23, 13:25, 14:8, 15:5, 15:8, 15:17, 15:21, 16:19, 16:22, 16:25, 17:4, 17:7, 17:11, 17:18, 18:7, 18:10, 18:14, 19:4, 19:25, 20:14, 20:19, 21:1, 22:8, 25:12, 26:19, 28:16, 29:1, 29:12, 29:20, 30:1, 31:25, 32:9, 33:6, 33:17, 33:24, 34:14, 34:25, 35:5, 35:12, 35:17, 36:5, 36:24, 37:8, 38:8, 39:2, 40:9, 40:14, 40:22, 41:6, 41:23, 42:17, 43:5, 43:14, 44:7, 48:25, 49:21, 50:16, 51:9, 51:13, 51:20, 52:14, 53:6, 53:15, 55:17, 55:23, 56:1, 58:20, 61:1, 61:3, 61:6, 64:8, 66:8, 66:17, 68:1, 68:16, 69:4, 69:6, 70:16, 70:20, 70:25, 71:4, 71:6, 71:17, 71:25, 72:11, 72:25, 73:17, 76:19, 77:1, 77:2, 78:13, 88:4, 89:25, 90:12, 90:14, 91:14, 91:24, 92:5, 93:13, 93:19, 94:17, 95:21, 96:1, 96:8, 99:1, 99:22, 100:4, 103:7, 104:15, 105:6, 105:12, 105:19, 106:4, 107:5, 107:7, 111:14, 111:18, 112:8, 116:16, 117:15, 117:22, 118:2, 119:4, 119:8, 119:17, 120:12, 120:20, 122:9, 122:25, 123:23, 124:2, 124:19, 126:10, 126:21, 127:1, 127:20, 127:24, 129:5, 129:15, 129:19, 129:22, 130:3, 130:15, 131:1, 131:4
Honor's [1] - 52:18
HONORABLE [1] - 1:11
hook [2] - 122:4, 124:17
hopefully [1] - 132:23
host [3] - 36:10, 87:17, 125:1
hosting [1] - 87:21
hosts [1] - 87:15
hour [2] - 45:20, 46:9
housekeeping [2] - 46:11, 129:4
HOUSTON [2] - 1:2, 1:6
Houston [8] - 1:17, 1:20, 1:23, 2:3, 3:12, 36:12, 52:4, 52:19
how [34] - 7:21, 7:23, 7:24, 7:25, 8:1, 8:25, 9:5, 9:10, 12:3, 18:2, 34:6, 36:4, 36:8, 38:9, 44:25, 46:18, 49:19, 63:2, 65:14, 70:1, 72:16, 76:14, 76:16, 81:8, 81:15, 87:18, 93:17, 102:12, 102:19, 124:8, 125:9, 128:20, 130:4
however [4] - 52:3, 87:9, 89:22, 92:23
hugging [1] - 26:2
Hughes [1] - 41:14
hugs [1] - 25:21
huh [1] - 6:8
Hurley [1] - 125:13
hypothetical [1] - 54:20
hypothetically [1] - 109:3

I

I [255] - 5:1, 5:22, 6:1, 6:9, 6:16, 6:17, 7:12, 7:17, 7:20, 7:22, 8:2, 8:5, 8:10, 8:21, 9:13, 10:17, 10:19, 10:24, 11:11, 11:16, 11:21, 12:17, 12:20, 12:25, 13:6, 13:22, 13:23, 14:25, 15:9, 16:5, 16:6, 16:7, 16:10, 17:5, 17:19, 18:1, 18:14, 18:18, 19:17, 19:24, 20:2, 20:15, 20:23, 23:15, 23:18, 26:20, 28:2, 28:3, 28:6, 29:5, 29:12, 29:14, 29:16, 30:3, 31:2, 31:5, 31:13, 32:7, 33:15, 33:18, 34:2, 34:3, 34:11, 37:6, 37:18, 38:5, 38:9, 38:11, 38:14, 38:15, 38:21, 38:23, 38:24, 40:3, 40:7, 41:6, 42:5, 42:12, 43:5, 43:7, 43:16, 43:18, 43:22, 44:7, 44:21, 45:2, 45:3, 45:10, 45:16, 45:18, 45:21, 46:13, 46:14, 46:16, 46:19, 46:20, 46:21, 46:22, 47:5, 47:8, 47:9, 47:13, 47:19, 47:20, 47:21, 47:25, 48:15, 48:25, 49:8, 50:12, 50:14, 50:25, 51:3, 52:16, 52:21, 53:13, 53:14, 55:21, 58:18, 58:20, 61:2, 61:4, 61:7, 67:5, 67:18, 68:19, 69:12, 70:17, 70:23, 71:2, 71:6, 71:22, 72:13, 72:14, 72:15, 73:1, 73:2, 74:18, 76:15, 76:16, 76:23, 76:25, 78:11, 78:22, 79:6, 79:11, 80:6, 80:14, 80:21, 81:13, 81:17, 81:20, 81:23, 81:24, 83:6, 83:12, 85:18, 87:12, 87:20, 87:25, 88:24, 90:12, 91:18, 96:1, 96:16, 99:6, 99:20, 100:25, 101:2, 101:3, 101:7, 102:2, 102:6, 102:13, 102:14, 102:15, 102:16, 105:6, 105:23, 106:1, 106:23, 106:24, 108:13, 110:14, 111:4, 111:18, 112:9, 112:10, 112:24, 112:25, 113:22, 114:2, 115:17, 116:18, 116:21, 116:24, 117:17, 117:18, 117:20, 118:12, 122:11, 124:22, 126:16, 126:24, 127:1, 127:20, 127:24, 128:10, 128:12, 128:13, 128:14, 128:15, 128:16, 128:17, 128:20, 129:15, 129:20, 129:22, 129:25, 130:11, 130:13, 130:15, 130:16, 130:23, 131:17, 131:21, 131:22, 132:3, 132:6, 132:14, 132:16, 133:6
i [5] - 8:2, 14:6, 16:19, 31:12, 42:22
I'd [5] - 18:1, 18:10, 20:16, 52:14, 88:11
I'll [26] - 6:2, 6:17, 7:7, 13:5, 15:11, 19:4, 19:25, 22:7, 33:25, 34:11, 40:9, 45:5, 45:17, 46:17, 46:25, 51:14, 51:16, 52:13, 69:9, 73:5, 79:13, 83:8, 83:15, 108:5, 131:13
I'm [62] - 6:9, 7:12, 11:7, 12:19, 12:23, 13:3, 13:5, 13:18, 18:17, 18:19, 19:19, 20:19, 22:5, 22:7, 25:12, 26:24, 29:3, 29:22, 34:5, 34:7, 36:16, 38:19, 39:20, 39:22, 43:18, 44:22, 45:13, 46:1, 46:6, 46:19, 48:16, 53:13, 58:14, 69:2, 71:2, 72:2, 76:14, 78:22, 81:9, 82:14, 83:1,

83:15, 83:25, 85:16, 86:7, 99:16, 105:15, 106:15, 107:1, 107:9, 112:4, 118:7, 127:9, 127:14, 130:21, 130:24, 131:6, 132:22
I've [10] - 18:18, 29:15, 33:20, 34:8, 46:24, 47:18, 126:15, 128:13, 132:5, 132:8
ID'd [1] - 16:12
idea [5] - 34:6, 90:3, 90:9, 101:14, 101:19
ideas [1] - 62:20
identified [1] - 113:11
IDs [1] - 9:17
If [1] - 92:1
if [140] - 8:6, 8:8, 8:14, 9:3, 9:6, 9:23, 12:2, 13:4, 14:11, 14:15, 15:8, 16:5, 16:6, 18:1, 19:25, 20:1, 20:2, 20:8, 20:24, 22:17, 23:18, 26:21, 29:16, 31:14, 32:24, 33:12, 33:18, 34:3, 34:11, 34:12, 34:14, 36:2, 37:14, 37:18, 37:24, 38:6, 38:12, 38:22, 38:24, 42:14, 42:22, 43:14, 43:16, 43:17, 44:7, 44:19, 45:14, 45:15, 45:18, 46:6, 46:8, 46:11, 46:17, 46:18, 46:21, 47:24, 48:1, 50:3, 50:17, 51:7, 51:15, 51:18, 52:6, 52:8, 54:8, 57:7, 62:12, 62:23, 63:25, 64:9, 64:10, 68:11, 70:10, 71:22, 75:15, 77:5, 78:9, 79:13, 80:16, 80:17, 80:25, 83:3, 90:14, 91:8, 92:23, 93:3, 93:7, 93:13, 98:1, 98:6, 98:8, 99:22, 100:6, 103:4, 105:16, 105:24, 106:11, 106:12, 106:15, 106:18, 106:20, 107:2, 107:5, 109:19, 110:16, 110:18, 110:24, 114:19, 114:21, 115:2, 115:12, 115:17, 116:7, 116:24, 118:18, 118:24, 120:2, 121:9, 121:13, 121:21, 122:22, 124:4, 125:2, 125:19, 127:5, 127:12, 128:12, 128:16, 128:22, 128:23, 128:24, 129:7, 129:23, 130:12, 131:5, 131:7, 131:14, 131:22
ignore [1] - 30:19
ignored [1] - 41:4
II [2] - 2:22, 77:19
III [2] - 2:16, 57:22
illegal [1] - 30:23
illusion [5] - 12:15, 13:1, 62:4, 62:6
illustrate [1] - 65:17
images [2] - 27:11, 27:19
imbue [1] - 41:9
immediately [3] - 47:17, 129:8, 130:1
immigration [1] - 37:11
imminent [3] - 104:19, 104:20, 105:4
immune [1] - 122:3
immunity [9] - 74:25, 75:1, 75:4, 78:25, 79:1, 79:10, 111:11, 112:3, 112:12
impair [1] - 77:10
impending [3] - 85:10, 85:17, 86:5
impersonators [2] - 78:1, 104:7
implemented [1] - 89:16
implementing [1] - 121:20

implication [1] - 100:5
importance [1] - 107:16
important [8] - 19:11, 46:7, 56:17, 57:13, 78:24, 101:7, 132:8, 132:13
importantly [1] - 74:5
imposes [1] - 76:10
improper [1] - 123:13
in [411] - 7:14, 7:23, 8:4, 8:5, 8:8, 8:12, 8:14, 11:4, 11:8, 11:17, 11:19, 12:6, 12:20, 13:5, 13:6, 13:7, 13:8, 13:16, 13:22, 14:7, 17:15, 17:22, 18:11, 18:14, 18:20, 18:22, 19:1, 19:10, 19:12, 20:1, 20:12, 20:24, 21:4, 21:5, 21:11, 21:15, 21:16, 22:2, 22:4, 22:6, 22:18, 22:22, 22:24, 23:5, 23:9, 23:11, 23:15, 23:22, 23:24, 24:2, 24:6, 24:9, 24:14, 25:6, 26:1, 26:2, 26:6, 26:8, 26:18, 27:2, 27:13, 27:23, 27:25, 28:8, 28:14, 28:16, 28:21, 30:23, 31:1, 31:2, 31:10, 32:15, 32:20, 32:25, 34:23, 35:2, 35:6, 35:8, 36:1, 36:4, 36:7, 36:12, 36:25, 37:1, 37:11, 38:9, 38:13, 38:17, 38:24, 38:25, 39:1, 39:14, 40:5, 40:11, 40:17, 40:24, 41:14, 41:21, 42:3, 42:17, 42:19, 42:25, 43:1, 43:5, 43:9, 43:12, 43:19, 44:2, 44:11, 44:13, 44:15, 44:25, 45:3, 45:9, 45:23, 45:24, 46:15, 46:20, 46:22, 47:5, 47:9, 47:13, 47:14, 47:22, 48:4, 48:12, 49:13, 50:2, 50:13, 51:21, 51:25, 52:4, 53:8, 53:9, 53:21, 54:13, 54:15, 54:25, 55:3, 55:11, 56:7, 56:9, 56:16, 57:3, 57:6, 57:11, 57:17, 57:20, 58:3, 58:7, 58:12, 59:4, 59:17, 59:19, 59:22, 59:23, 59:25, 60:2, 60:15, 60:17, 60:21, 60:23, 61:14, 62:20, 63:9, 63:20, 64:1, 65:11, 65:13, 65:18, 65:20, 65:22, 65:25, 66:3, 66:10, 66:19, 66:22, 67:3, 67:4, 67:10, 67:13, 67:20, 67:21, 67:24, 68:1, 68:6, 68:14, 69:2, 69:9, 69:18, 69:19, 69:24, 69:25, 70:6, 70:9, 71:8, 71:9, 71:11, 71:23, 72:9, 72:18, 72:25, 73:14, 73:20, 73:25, 74:10, 74:16, 74:23, 75:2, 75:18, 75:20, 75:21, 75:22, 76:3, 76:11, 77:3, 77:18, 77:23, 77:24, 78:2, 78:5, 78:23, 79:2, 79:3, 79:16, 79:19, 79:22, 79:24, 80:2, 80:13, 80:15, 80:17, 81:1, 81:2, 81:7, 81:10, 81:25, 82:5, 82:8, 82:11, 82:13, 82:16, 83:14, 83:17, 83:22, 84:4, 84:21, 85:2, 86:4, 86:9, 86:13, 86:19, 86:23, 87:8, 87:20, 87:22, 88:14, 88:16, 88:22, 89:2, 89:6, 89:9, 89:13, 89:16, 89:19, 90:2, 90:5, 90:8, 90:13, 90:14, 90:22, 90:25, 91:7, 91:8, 91:12, 91:24, 92:7, 93:22, 93:23, 94:8, 94:19, 94:25, 95:1, 95:6, 95:10, 95:15, 95:23, 96:5, 96:11, 96:14, 96:17, 97:3, 97:4, 97:14, 97:19, 97:22, 98:22, 98:24, 99:17, 100:1, 100:2, 100:8, 100:15, 100:22, 100:24, 101:2, 101:3, 101:7, 102:2, 102:4, 102:5, 102:25, 103:1, 103:5,

103:13, 103:18, 104:6, 104:8, 104:12, 104:16, 104:17, 105:23, 105:25, 106:11, 107:15, 107:25, 108:6, 108:7, 108:11, 108:25, 109:10, 109:13, 110:1, 110:6, 110:12, 110:21, 110:23, 110:24, 111:11, 111:24, 111:25, 112:15, 113:3, 113:8, 113:16, 113:22, 114:13, 114:14, 115:13, 115:21, 115:24, 116:2, 116:22, 117:5, 117:11, 118:4, 118:18, 118:20, 119:15, 119:19, 119:23, 120:10, 120:18, 121:5, 122:7, 122:11, 122:15, 122:20, 123:6, 123:14, 123:17, 123:20, 125:2, 125:7, 125:13, 125:17, 126:4, 126:7, 126:17, 127:12, 129:10, 129:13, 130:6, 130:17, 131:3, 131:6, 131:7, 131:16, 131:19, 131:24, 132:5, 132:8, 132:14, 132:16, 133:8
In [5] - 40:18, 73:12, 90:7, 100:20, 109:10
inappropriate [3] - 8:8, 79:19, 117:10
Inc [3] - 52:19, 70:9, 78:6
INC [1] - 1:4
incident [1] - 99:17
incidental [2] - 26:5, 94:1
include [2] - 97:7, 126:6
included [1] - 104:6
includes [2] - 102:1, 103:9
including [7] - 21:18, 22:13, 23:9, 60:16, 68:8, 68:13, 78:10
inclusive [2] - 59:15, 77:13
inconsistent [1] - 82:10
incorporate [4] - 46:21, 49:2, 50:3, 64:19
incorporated [2] - 65:12, 70:3
incorporating [1] - 50:8
incorrect [1] - 20:18
incumbent [1] - 67:23
incurred [2] - 85:4, 85:8
indecenty [3] - 93:20, 93:23, 93:25
indecent [4] - 20:17, 30:24, 100:8, 100:9
indeed [1] - 59:25
independent [3] - 87:3, 87:4, 106:7
INDEX [1] - 4:1
Indiana [1] - 36:25
Indiana's [3] - 93:25, 95:9, 95:10
indicated [1] - 128:5
indisputably [1] - 111:21
individual [5] - 46:1, 75:24, 86:13, 98:14, 98:19
individually [1] - 115:5
individuals [3] - 16:3, 75:13, 103:9
infancy [1] - 101:2
inflicted [6] - 84:19, 84:21, 86:2, 86:4, 97:11, 97:13
informed [1] - 13:18
inherent [1] - 108:24
inherently [5] - 27:2, 36:10, 89:23, 90:10, 90:19
INJUNCTION [1] - 1:10

injunction [15] - 38:15, 70:14, 71:11, 71:15, 71:17, 72:13, 111:9, 113:25, 114:10, 120:11, 130:8, 130:9, 131:9, 132:18
injunctive [1] - 105:4
injuries [4] - 84:19, 84:22, 85:4, 86:3
injury [2] - 32:12, 86:2
input [3] - 34:11, 38:12, 50:14
insemination [1] - 24:22
inseparably [1] - 123:17
insist [1] - 124:24
instances [2] - 96:21, 96:22
instead [6] - 23:21, 27:10, 47:2, 83:19, 90:9, 91:17
Institutional [2] - 90:6, 92:1
insufficient [2] - 24:5, 28:16
insult [1] - 99:18
intend [14] - 17:21, 17:22, 21:5, 21:11, 22:23, 23:5, 24:2, 24:6, 25:6, 28:14, 69:14, 79:25, 83:10, 84:13
intended [7] - 14:14, 23:18, 23:21, 24:21, 24:22, 73:23, 90:23
intending [5] - 44:14, 83:1, 83:2, 91:8, 92:6
intends [4] - 32:15, 88:21, 90:3, 90:9
intense [1] - 31:1
intent [9] - 31:3, 60:13, 62:2, 64:20, 91:2, 103:4, 111:25, 124:23, 125:4
intention [3] - 73:14, 73:20, 125:5
intentional [2] - 33:8, 49:3
intentionality [1] - 103:5
intentionally [4] - 11:9, 49:23, 50:9, 50:18
interaction [1] - 36:17
interest [51] - 19:12, 21:16, 22:4, 22:24, 26:1, 26:2, 26:6, 27:2, 27:23, 27:24, 32:17, 35:2, 35:8, 42:19, 42:25, 43:8, 43:19, 44:2, 55:11, 56:7, 56:9, 57:3, 57:6, 57:11, 57:17, 58:3, 59:16, 59:18, 59:19, 59:20, 65:24, 66:3, 67:4, 67:10, 67:13, 71:22, 73:15, 80:16, 80:18, 82:5, 94:6, 94:8, 94:22, 95:14, 98:20, 101:19, 101:21, 102:2, 102:4, 102:12, 102:15
interesting [4] - 132:4, 132:7, 132:10, 132:13
intermediate [8] - 34:12, 34:15, 34:25, 62:24, 62:25, 92:25, 93:12, 96:23
International [1] - 85:2
internet [2] - 101:2, 101:6
interpretation [3] - 73:25, 74:1, 89:3
interrupt [1] - 30:3
interruption [1] - 101:16
intertwined [2] - 123:25, 124:11
intimately [1] - 74:25
into [38] - 8:6, 8:18, 8:22, 8:25, 9:5, 9:10, 11:25, 12:1, 12:9, 12:25, 13:4, 16:9, 26:23, 36:20, 38:23, 41:9, 41:13, 46:21, 48:3, 49:3, 70:3, 74:13, 74:16, 75:9, 86:16, 90:23, 91:2, 92:3, 101:9,

104:24, 106:10, 109:2, 118:6, 118:7, 119:24, 128:9, 128:15, 131:11
invalid [3] - 89:18, 93:5, 106:16
invalidated [2] - 58:13, 59:14
invalidates [1] - 37:15
invalidity [1] - 106:19
invalidity [2] - 88:24, 89:1
invasive [1] - 56:21
investment [2] - 120:8, 120:9
invitation [1] - 8:16
involve [2] - 11:5, 21:8
involved [2] - 25:21
Iraq [1] - 77:17
Irish [1] - 125:14
Irish-American [1] - 125:14
irreparable [7] - 38:22, 39:3, 39:14, 117:4, 117:14, 120:15, 121:1
is [449] - 6:14, 6:21, 9:17, 9:23, 10:24, 10:25, 11:1, 11:3, 11:8, 11:16, 11:19, 11:21, 11:23, 12:2, 12:3, 12:21, 12:25, 13:13, 14:19, 15:5, 15:7, 16:1, 17:13, 17:23, 17:25, 18:5, 18:9, 18:13, 18:16, 18:22, 18:24, 19:8, 19:19, 20:2, 20:11, 20:15, 20:17, 21:10, 21:11, 21:13, 21:21, 21:22, 21:23, 21:25, 22:2, 22:12, 22:18, 23:6, 23:8, 23:15, 23:23, 26:17, 26:25, 27:2, 27:25, 29:4, 30:23, 31:2, 31:8, 31:10, 31:19, 32:12, 32:15, 32:17, 32:22, 33:2, 33:6, 33:9, 33:12, 33:13, 34:10, 34:18, 34:21, 34:23, 34:24, 35:10, 35:19, 35:20, 35:21, 36:1, 36:3, 36:4, 36:11, 36:12, 37:15, 37:18, 37:25, 38:10, 38:15, 39:14, 39:19, 39:21, 40:14, 40:15, 40:16, 40:25, 41:2, 41:5, 41:15, 41:16, 41:24, 41:25, 42:2, 42:20, 43:6, 43:15, 43:25, 44:14, 44:15, 44:18, 44:25, 45:19, 47:12, 47:22, 48:12, 48:19, 48:21, 49:12, 49:23, 50:10, 50:17, 50:19, 51:1, 51:12, 51:18, 51:22, 51:25, 52:2, 52:3, 52:14, 52:18, 53:1, 53:2, 53:8, 53:11, 53:12, 54:17, 54:21, 54:22, 55:5, 55:8, 56:2, 56:5, 56:10, 56:12, 56:18, 57:4, 57:5, 57:7, 57:13, 57:16, 57:17, 57:19, 58:1, 58:3, 58:4, 58:10, 58:14, 58:22, 59:9, 59:10, 60:2, 60:3, 60:6, 60:19, 61:2, 61:10, 61:11, 61:15, 61:22, 62:7, 62:9, 62:16, 62:19, 63:1, 63:3, 63:5, 63:10, 63:14, 63:17, 63:18, 63:20, 64:1, 64:11, 64:12, 64:23, 65:6, 65:16, 65:18, 65:24, 66:5, 66:12, 66:16, 66:17, 66:21, 66:22, 67:5, 67:18, 68:2, 68:11, 68:14, 68:16, 69:15, 69:24, 70:1, 70:10, 70:12, 70:22, 71:14, 71:16, 72:17, 73:20, 73:24, 74:4, 74:6, 74:12, 74:20, 74:21, 74:25, 75:2, 75:3, 75:6, 75:17, 75:20, 75:24, 76:2, 76:8, 76:11, 77:4, 77:16, 77:17, 77:24, 78:5, 78:16, 79:6, 79:17, 79:22, 79:24, 80:7, 80:10, 82:2, 82:11, 82:14, 82:17, 83:5, 83:7, 83:18, 85:9, 85:10, 85:18, 86:10, 86:15,

86:25, 87:16, 88:4, 88:5, 88:13, 89:11, 89:12, 89:21, 89:23, 89:25, 90:10, 90:13, 90:19, 91:18, 91:23, 92:15, 92:17, 92:20, 92:23, 93:2, 93:5, 93:16, 93:19, 93:20, 93:21, 94:9, 94:11, 94:17, 94:18, 94:19, 94:20, 94:23, 94:24, 95:1, 95:3, 95:7, 95:9, 95:10, 95:11, 95:13, 95:19, 95:21, 95:22, 96:10, 96:19, 97:1, 97:18, 97:21, 97:22, 98:4, 98:8, 98:12, 98:15, 98:16, 98:17, 98:22, 99:1, 99:3, 99:11, 99:21, 99:23, 99:24, 100:1, 100:4, 100:7, 101:13, 101:14, 101:19, 102:3, 102:6, 102:10, 102:12, 102:17, 102:21, 102:25, 103:1, 103:2, 103:5, 103:11, 103:13, 103:23, 104:7, 104:8, 104:16, 104:18, 104:20, 105:3, 105:7, 105:11, 105:12, 105:13, 105:21, 106:5, 106:6, 106:17, 106:19, 107:16, 108:3, 108:9, 108:14, 108:18, 108:19, 109:4, 109:8, 109:15, 110:10, 110:18, 112:9, 113:2, 113:3, 113:22, 114:2, 114:20, 114:25, 115:17, 115:21, 115:24, 116:9, 117:1, 117:6, 118:5, 118:15, 118:25, 119:8, 119:11, 119:13, 119:14, 119:18, 119:19, 119:20, 120:2, 120:10, 120:14, 120:17, 120:18, 122:1, 122:19, 123:2, 123:5, 123:13, 123:20, 123:22, 124:8, 124:11, 124:16, 124:23, 125:8, 125:9, 125:18, 126:10, 126:19, 128:1, 128:10, 128:24, 128:25, 130:7, 130:21, 130:24, 131:8, 131:16, 133:7
Island [3] - 31:12, 33:1, 73:9
Islands [1] - 73:25
isn't [5] - 33:5, 55:21, 66:14, 99:3
isolation [1] - 67:13
issue [23] - 11:16, 12:25, 24:19, 25:2, 33:12, 34:16, 36:1, 59:4, 80:4, 80:5, 83:5, 83:7, 89:6, 89:22, 90:13, 104:14, 107:18, 107:23, 110:16, 114:19, 119:19, 122:18, 128:17
issued [3] - 28:10, 71:18, 72:15
issues [2] - 86:25, 116:23
it [362] - 6:21, 7:1, 7:2, 7:11, 7:12, 7:14, 7:22, 9:3, 9:23, 11:8, 11:13, 11:19, 12:4, 12:13, 12:21, 12:25, 13:5, 14:7, 14:12, 15:7, 16:5, 18:5, 18:9, 18:13, 18:18, 19:16, 19:19, 19:21, 19:22, 19:24, 20:24, 20:25, 21:15, 21:23, 22:3, 23:18, 23:20, 23:21, 25:11, 25:25, 26:11, 26:21, 27:4, 27:19, 29:4, 29:14, 29:17, 30:25, 31:8, 31:9, 31:10, 31:11, 31:12, 31:17, 32:7, 32:15, 33:2, 33:5, 33:6, 34:5, 34:6, 34:8, 34:11, 34:21, 34:24, 35:10, 36:6, 36:8, 37:6, 37:23, 38:1, 38:2, 38:5, 38:10, 38:11, 38:14, 38:25, 39:10, 39:21, 40:8, 40:11, 40:12, 40:25, 41:1, 41:5, 41:7, 41:11, 41:15, 41:16, 42:2, 42:22, 43:20, 44:10, 44:12, 44:14, 45:1, 45:3, 45:5, 46:6, 46:8, 46:18, 46:20, 46:22, 46:23, 47:3, 47:4,

47:7, 47:13, 47:15, 48:9, 48:17, 48:20, 48:21, 49:16, 49:19, 49:22, 50:2, 50:4, 50:24, 51:1, 51:9, 53:12, 53:14, 53:20, 54:5, 56:2, 56:12, 56:14, 56:23, 57:8, 57:13, 58:7, 58:10, 58:14, 59:8, 59:10, 61:11, 61:12, 62:14, 63:3, 63:19, 63:23, 64:10, 64:22, 65:19, 66:15, 66:18, 66:22, 67:16, 68:7, 68:9, 68:14, 70:5, 70:9, 70:14, 70:19, 71:2, 71:3, 71:8, 71:14, 71:18, 71:23, 72:3, 72:5, 72:7, 72:12, 74:13, 74:15, 75:8, 76:15, 77:7, 77:20, 78:12, 78:17, 79:7, 79:15, 79:16, 80:12, 80:16, 80:18, 81:4, 81:18, 81:23, 82:9, 82:13, 82:17, 82:19, 82:20, 82:23, 83:18, 84:9, 84:10, 84:14, 86:18, 86:22, 87:3, 87:7, 87:14, 87:19, 88:1, 89:10, 89:12, 89:19, 89:21, 89:25, 90:22, 91:5, 91:12, 91:18, 92:4, 92:10, 92:11, 92:14, 92:18, 92:19, 92:20, 92:22, 93:5, 93:17, 93:24, 94:9, 94:15, 94:19, 94:23, 95:17, 95:19, 95:22, 96:10, 96:14, 96:20, 97:3, 97:22, 97:25, 98:9, 98:12, 98:23, 99:16, 100:1, 100:6, 101:1, 101:2, 101:3, 101:7, 101:9, 101:13, 101:21, 101:23, 102:2, 102:5, 102:21, 103:16, 103:24, 104:6, 104:8, 104:18, 105:2, 105:7, 105:13, 105:25, 106:1, 106:20, 106:21, 107:3, 108:18, 108:20, 109:12, 109:19, 110:1, 110:2, 110:7, 110:10, 110:11, 110:12, 110:20, 111:1, 112:16, 113:1, 113:7, 113:23, 113:25, 114:2, 114:10, 114:14, 114:21, 114:22, 115:12, 115:18, 115:19, 115:20, 115:23, 115:24, 116:1, 116:2, 118:14, 119:10, 119:11, 120:10, 120:17, 121:3, 123:25, 124:17, 125:19, 126:1, 126:10, 126:16, 126:20, 127:2, 127:9, 128:1, 128:5, 128:8, 128:17, 128:22, 128:23, 128:24, 128:25, 129:3, 129:13, 129:16, 129:17, 130:12, 130:13, 131:5, 131:7, 131:10, 131:14, 131:18, 131:19, 131:24, 132:9, 132:10, 132:18, 132:23
it's [120] - 6:23, 6:25, 7:7, 7:14, 7:19, 8:2, 8:7, 8:11, 8:13, 8:16, 9:3, 9:16, 9:21, 10:6, 11:13, 11:15, 12:6, 12:12, 12:17, 12:18, 12:20, 12:24, 13:5, 13:6, 13:15, 14:14, 14:16, 14:22, 15:25, 17:16, 18:7, 19:23, 20:11, 20:17, 21:14, 23:17, 27:6, 30:24, 31:1, 31:6, 31:13, 31:20, 33:5, 33:21, 36:6, 41:1, 41:4, 42:9, 43:4, 45:21, 45:23, 46:6, 47:11, 47:20, 47:22, 48:7, 49:6, 50:4, 58:11, 61:4, 62:4, 63:25, 64:16, 66:24, 67:12, 67:23, 68:3, 68:11, 74:2, 74:13, 74:22, 76:4, 77:1, 77:18, 78:2, 80:5, 87:10, 88:19, 89:18, 90:17, 91:17, 92:5, 94:12, 95:22, 97:23, 99:9, 101:7, 102:20, 108:22, 110:8, 110:10, 110:17, 110:19, 113:17, 114:10, 115:22, 116:18, 117:8, 117:9, 117:10, 117:12, 117:14, 119:23, 120:7, 120:21, 120:22, 120:25, 122:21,

<p>123:25, 128:9, 129:8, 130:13, 131:16, 132:6, 132:13 item [1] - 45:15 items [2] - 13:8, 34:8 its [15] - 34:17, 40:4, 40:6, 50:2, 54:4, 60:1, 62:9, 62:19, 84:21, 88:15, 89:18, 94:1, 95:6, 121:25 itself [13] - 16:15, 39:14, 39:15, 41:11, 60:9, 77:20, 89:23, 96:15, 107:21, 111:9, 121:23, 124:25, 132:20</p>	<p>124:16, 125:7, 126:15, 128:18, 128:25, 129:5 Justice [5] - 59:2, 59:8, 59:13, 59:22, 95:15 justified [1] - 94:1</p>	<p>81:23, 91:16, 92:17, 99:23, 105:23, 108:14, 112:11, 113:8, 119:22, 120:2, 120:9, 123:10, 129:10, 129:20, 129:25, 131:18 knowing [1] - 49:22 knowingly [4] - 49:3, 50:9, 50:18, 55:3 knowledge [2] - 30:25, 64:19 knows [2] - 88:12, 100:7 Kristi [1] - 78:6</p>
K		
J	<p>KATHLEEN [1] - 2:8 Katy [1] - 1:16 keep [6] - 11:1, 79:16, 107:3, 125:4, 131:7, 131:16 keeping [1] - 45:1 Kempf [1] - 14:8 KEMPF [7] - 1:22, 14:3, 14:10, 15:8, 15:14, 15:17, 16:22 Kempf..... [1] - 4:4 KENNETH [1] - 2:8 kept [2] - 17:3, 123:1 key [5] - 65:23, 74:5, 74:21, 75:17, 113:2 kicking [1] - 46:6 kid [2] - 9:2, 64:1 kids [8] - 7:20, 8:8, 11:17, 30:14, 54:16, 59:19, 59:24 kind [18] - 6:23, 9:18, 9:21, 11:2, 12:13, 18:11, 30:11, 37:11, 54:20, 56:23, 63:11, 64:3, 68:20, 114:23, 120:15, 120:16, 120:19, 125:10 kinds [3] - 8:4, 56:14, 73:22 Klosterboer [2] - 4:16, 51:10 KLOSTERBOER [112] - 1:15, 16:25, 17:4, 17:7, 20:14, 29:12, 29:20, 30:1, 30:8, 30:10, 31:9, 31:12, 31:16, 31:20, 31:25, 32:2, 32:5, 32:9, 33:6, 33:11, 33:17, 34:14, 34:24, 35:5, 35:12, 35:17, 35:19, 36:5, 36:9, 36:24, 37:8, 37:10, 37:14, 38:8, 39:2, 48:25, 49:6, 49:14, 49:18, 49:21, 50:2, 50:8, 51:9, 51:13, 51:20, 52:13, 52:18, 53:6, 53:8, 53:13, 53:17, 53:25, 55:17, 55:20, 55:23, 56:1, 56:4, 58:15, 58:18, 58:20, 61:1, 61:3, 61:6, 64:8, 66:8, 66:17, 66:24, 68:16, 68:19, 69:4, 69:6, 69:8, 69:12, 70:2, 70:13, 70:16, 70:19, 70:25, 71:4, 71:6, 71:16, 71:19, 71:24, 72:4, 72:11, 72:15, 73:4, 73:17, 74:21, 76:18, 76:25, 107:7, 117:22, 117:25, 118:2, 118:10, 119:4, 119:8, 119:17, 120:12, 120:20, 120:25, 122:25, 123:22, 124:2, 126:21, 127:24, 128:4, 129:5, 129:15, 131:1, 131:4 Klosterboer..... [1] - 4:12 knock [1] - 117:19 know [62] - 6:3, 7:8, 7:22, 8:18, 8:25, 9:5, 9:10, 9:17, 11:2, 12:2, 12:6, 12:20, 19:18, 19:22, 27:19, 28:8, 29:6, 33:18, 37:6, 37:18, 37:19, 38:13, 43:4, 47:10, 47:11, 47:12, 47:20, 48:1, 51:1, 53:14, 56:21, 56:24, 58:4, 58:10, 61:13, 69:14, 70:17, 74:14, 76:16, 79:1, 79:6, 81:20,</p>	L
<p>Jabberwocky [1] - 125:21 Jackson [4] - 74:22, 75:5, 115:14, 125:21 jail [2] - 53:21, 81:4 James [1] - 76:21 Janet [2] - 53:11, 100:25 Jason [2] - 77:15, 125:25 job [2] - 77:14, 132:11 JOHNATHAN [1] - 2:9 Jones [1] - 73:11 Jones' [1] - 74:5 Joseph [2] - 52:10, 52:16 judge [10] - 17:14, 31:21, 31:23, 46:23, 47:10, 48:1, 102:19, 112:24, 113:13, 115:7 Judge [14] - 31:23, 42:5, 47:16, 48:6, 73:11, 74:5, 78:3, 78:6, 78:19, 112:18, 113:10, 114:17, 115:17, 116:11 JUDGE [1] - 1:11 judge's [1] - 114:15 judged [1] - 102:9 judges [1] - 47:21 judgment [14] - 19:23, 33:21, 36:17, 36:19, 39:1, 46:21, 47:2, 47:6, 71:15, 88:13, 112:16, 126:17, 128:19, 132:17 judgments [1] - 17:19 judicial [1] - 89:8 July [3] - 72:9, 72:15, 72:17 June [4] - 70:14, 71:10, 71:19, 72:6 jury [4] - 44:5, 81:15, 81:24, 102:9 just [106] - 6:9, 7:7, 8:2, 8:7, 8:8, 8:9, 12:7, 12:21, 12:23, 13:1, 13:3, 13:6, 14:6, 19:22, 20:19, 21:14, 21:24, 22:1, 24:16, 24:18, 26:24, 27:12, 29:23, 29:25, 31:1, 31:18, 34:10, 36:6, 36:11, 37:11, 38:7, 44:25, 45:6, 47:1, 47:5, 48:5, 48:23, 49:19, 56:2, 61:7, 62:18, 63:15, 64:12, 66:6, 68:12, 69:18, 71:2, 72:9, 72:25, 73:4, 74:2, 74:18, 75:21, 75:23, 77:3, 79:16, 80:13, 80:24, 81:3, 82:20, 82:24, 85:11, 85:13, 85:25, 87:17, 87:20, 92:8, 96:19, 98:9, 98:10, 105:25, 106:15, 107:3, 108:6, 109:17, 112:4, 112:12, 114:22, 116:16, 116:24, 116:25, 117:19, 118:4, 118:10, 119:20, 120:6, 120:21, 121:2, 121:12, 121:13, 121:23, 122:4, 122:7, 122:11, 123:10,</p>		<p>L [1] - 78:3 labeled [2] - 90:2, 90:8 Labor [1] - 128:10 lack [4] - 18:20, 56:18, 84:17, 86:8 lacking [1] - 70:7 lacks [1] - 55:13 ladies [2] - 13:24, 46:2 language [2] - 103:15, 124:8 Lanie [3] - 3:9, 133:6, 133:10 large [4] - 7:13, 36:23, 38:10, 104:9 last [13] - 44:8, 46:2, 46:3, 46:4, 46:5, 66:6, 69:18, 75:21, 75:23, 98:9, 102:14, 113:19, 121:2 lastly [1] - 122:9 later [4] - 19:22, 35:25, 38:11, 84:12 lavish [1] - 104:1 Law [1] - 2:23 LAW [3] - 5:2, 48:10, 48:13 law [176] - 10:25, 11:11, 11:14, 11:16, 11:24, 11:25, 12:1, 13:13, 13:16, 13:18, 13:22, 17:23, 18:2, 18:23, 19:23, 20:11, 20:12, 20:16, 20:23, 21:12, 23:4, 23:6, 24:3, 24:7, 25:15, 27:5, 27:13, 28:13, 28:15, 28:23, 30:21, 30:22, 31:3, 33:21, 35:21, 36:15, 36:16, 36:20, 36:22, 37:15, 37:20, 38:18, 39:12, 39:25, 40:15, 40:22, 41:12, 41:15, 42:11, 43:6, 43:8, 43:15, 43:25, 46:13, 48:21, 48:22, 49:15, 50:5, 53:3, 53:19, 54:13, 54:17, 54:25, 55:2, 57:2, 57:4, 57:14, 59:4, 60:6, 60:7, 60:9, 60:12, 61:18, 61:23, 62:1, 62:13, 62:15, 62:23, 62:25, 63:2, 63:5, 63:20, 64:4, 64:5, 64:16, 64:21, 65:11, 65:18, 65:20, 65:22, 66:1, 66:5, 66:13, 66:15, 66:17, 67:1, 67:18, 68:1, 68:2, 68:6, 68:7, 69:15, 69:20, 69:24, 69:25, 71:12, 72:18, 72:19, 73:7, 73:25, 74:1, 74:3, 74:13, 74:16, 74:17, 75:7, 75:9, 75:20, 76:1, 76:6, 76:11, 77:6, 77:9, 88:5, 89:9, 89:11, 95:18, 97:14, 98:6, 98:17, 98:18, 99:25, 101:8, 101:14, 101:20, 102:24, 103:1, 104:6, 105:21, 106:6, 106:19, 106:23, 108:4, 108:15, 108:22, 109:5, 115:5, 116:2, 117:7, 118:5, 118:6, 118:16, 118:21, 118:23, 118:25, 119:10, 119:21, 119:23, 119:24, 121:12, 121:20, 122:2, 122:17, 123:12, 125:3, 126:10, 126:23,</p>

127:9, 128:9, 128:16, 129:10, 131:23, 132:24
Lawrence [1] - 125:16
laws [13] - 41:20, 41:22, 41:23, 42:1, 69:19, 70:21, 71:7, 89:15, 99:22, 108:2, 111:22, 123:8, 127:18
lawsuit [4] - 11:8, 11:19, 88:4, 110:4
lawyer [2] - 47:9, 48:4
lawyers [3] - 40:7, 43:16, 47:15
layers [2] - 12:14
lays [1] - 124:3
lead [1] - 51:8
leaders [2] - 41:4, 71:8
learn [1] - 132:11
least [10] - 8:17, 13:6, 29:6, 36:14, 36:24, 49:16, 50:7, 95:6, 125:8, 131:10
leave [3] - 48:11, 105:24, 131:13
leaves [1] - 100:22
lectern [1] - 51:18
left [4] - 28:11, 32:3, 101:11, 104:11
left-hand [1] - 32:3
legal [7] - 20:18, 31:7, 98:7, 98:19, 99:8, 122:13, 122:19
legislation's [1] - 59:25
legislative [7] - 34:18, 41:12, 60:17, 68:17, 88:13, 100:8, 105:8
legislature [8] - 60:14, 67:19, 118:15, 119:12, 121:11, 122:5
legislatures [3] - 41:8, 70:21, 71:7
legitimate [3] - 65:24, 100:13
Lesbian [1] - 125:14
less [10] - 34:21, 70:25, 93:11, 94:15, 94:19, 95:1, 95:3, 95:7, 96:23, 97:22
lesser [1] - 114:11
let [12] - 9:3, 19:16, 26:20, 34:22, 38:13, 38:21, 107:1, 108:12, 109:20, 112:11, 112:13, 117:19
let's [9] - 6:4, 19:13, 29:10, 39:17, 39:24, 109:25, 127:11, 128:8, 131:24
letting [1] - 38:25
level [2] - 92:25, 95:17
levels [1] - 97:2
lewd [5] - 23:9, 23:15, 23:23, 42:24, 117:10
lewdness [2] - 23:24, 42:1
Lewis [1] - 125:22
liability [5] - 39:6, 49:6, 107:17, 121:3, 125:6
liable [3] - 64:2, 102:24, 107:21
liberation [1] - 126:1
license [2] - 7:24, 115:22
licensing [2] - 75:13, 115:21
life [2] - 77:20, 129:10
lights [2] - 18:6, 26:22
Ligon [4] - 112:22, 115:7, 115:9, 116:14
like [62] - 6:2, 6:3, 6:9, 6:10, 6:12, 6:21, 6:23, 6:25, 7:8, 8:2, 8:3, 8:13, 8:22, 10:8, 10:24, 11:1, 11:2, 12:3,

12:5, 12:6, 12:12, 12:19, 15:15, 16:17, 17:11, 18:1, 18:10, 30:18, 30:23, 31:14, 33:13, 43:7, 43:17, 47:14, 49:13, 51:17, 52:6, 52:14, 56:14, 57:24, 59:17, 59:22, 62:4, 62:5, 67:19, 80:24, 81:7, 87:25, 88:11, 98:10, 107:5, 116:7, 119:9, 123:8, 126:7, 129:16, 129:17
likelihood [3] - 28:13, 91:4, 92:13
limit [5] - 40:4, 44:10, 44:15, 45:13, 96:25
limitations [3] - 94:1, 100:16, 101:4
limited [6] - 60:19, 66:18, 100:2, 102:3, 103:24, 104:17
limitless [1] - 90:1
line [3] - 37:13, 37:14, 128:23
lines [1] - 25:22
liquor [1] - 7:24
LISA [1] - 3:4
list [3] - 34:2, 56:13, 105:15
listening [1] - 43:18
literally [1] - 16:18
literary [3] - 55:13, 56:19, 67:16
Litigation [1] - 3:2
little [10] - 6:4, 9:3, 38:16, 45:23, 53:9, 53:24, 92:14, 129:7, 129:12
live [4] - 20:22, 71:13, 110:22, 111:14
LLP [2] - 2:2, 2:5
local [9] - 35:15, 36:21, 37:1, 54:22, 72:5, 77:12, 114:19, 115:3, 115:5
located [1] - 61:5
lock [1] - 38:13
long [6] - 13:2, 20:12, 45:16, 55:7, 56:13, 78:2
long-standing [1] - 55:7
look [13] - 31:18, 34:2, 39:17, 57:7, 60:8, 60:11, 63:1, 94:24, 101:1, 114:19, 115:18, 116:25, 120:15
looking [11] - 21:24, 32:7, 34:5, 43:17, 45:19, 46:8, 49:13, 58:14, 66:4, 91:9, 131:20
looks [3] - 7:14, 12:19, 118:18
lose [1] - 104:25
loss [6] - 120:9, 120:10, 120:14, 120:18, 120:21, 120:25
lot [7] - 43:7, 47:15, 54:9, 65:13, 71:23, 83:8, 130:13
Louisiana [1] - 2:3
love [1] - 126:6
low [1] - 64:24
lower [1] - 95:17
lube [2] - 82:25, 83:1
lubricant [1] - 30:16
lubrication [2] - 82:16, 82:17

M

M [3] - 3:9, 133:6, 133:10
ma'am [4] - 6:15, 9:12, 16:23, 40:13
made [9] - 30:5, 38:24, 41:3, 80:2, 98:9, 107:24, 110:11, 117:2, 132:16

mail [1] - 127:11
main [1] - 35:23
maintain [1] - 128:18
major [1] - 123:25
majority [2] - 26:16, 78:9
make [18] - 20:19, 20:20, 29:14, 40:2, 41:9, 54:5, 61:4, 63:22, 64:3, 92:11, 97:21, 97:22, 102:24, 111:4, 129:16, 130:12, 130:16, 130:23
makes [3] - 54:5, 94:15, 105:8
makeup [3] - 62:5, 67:8, 104:1
making [1] - 94:19
male [15] - 14:20, 23:12, 23:22, 23:23, 24:13, 26:13, 61:20, 61:25, 62:13, 67:2, 82:4, 103:17, 103:23, 104:6
malfunction [2] - 80:20, 81:5
malfunctions [1] - 30:20
man [2] - 47:13, 48:5
manager [2] - 52:9, 127:11
mandated [1] - 114:18
manner [3] - 89:17, 93:10, 100:22
many [9] - 36:7, 39:22, 54:9, 65:22, 76:14, 76:16, 86:16, 99:6, 119:11
marker [1] - 21:19
marketed [4] - 24:12, 24:21, 25:4, 82:3
marketplace [1] - 62:20
masturbation [2] - 22:13, 23:2
material [3] - 55:6, 56:25, 70:4
materials [1] - 101:5
matter [9] - 19:23, 33:21, 40:5, 41:11, 46:10, 50:15, 112:3, 120:19, 133:8
matters [2] - 126:15, 129:4
max [2] - 38:25, 131:20
maximum [2] - 45:2, 45:10
may [49] - 8:14, 12:24, 19:6, 29:12, 29:17, 34:8, 42:5, 42:21, 42:24, 44:7, 44:13, 46:14, 46:16, 51:2, 52:9, 59:25, 60:20, 66:9, 68:10, 71:20, 75:14, 76:5, 79:7, 86:11, 87:20, 88:17, 89:17, 90:23, 92:10, 98:2, 99:10, 100:9, 102:18, 102:20, 102:22, 104:25, 105:17, 106:2, 108:19, 108:20, 114:14, 114:20, 115:1, 117:2, 128:17, 131:24
maybe [3] - 33:15, 68:23, 111:1
McMahon [1] - 2:13
me [31] - 9:3, 16:17, 16:18, 19:16, 20:3, 20:24, 26:20, 31:18, 34:9, 34:22, 36:18, 38:13, 38:21, 43:17, 46:2, 47:1, 47:25, 50:7, 52:17, 79:12, 82:10, 101:3, 107:1, 107:4, 108:12, 115:7, 117:19, 119:3, 129:2, 129:12, 132:23
mean [23] - 6:1, 8:2, 8:5, 8:10, 8:21, 10:24, 13:22, 42:22, 49:9, 50:12, 76:15, 82:25, 83:1, 85:12, 87:17, 97:8, 97:13, 99:10, 99:20, 108:21, 120:5, 129:23
meaning [1] - 96:17
meaningful [1] - 51:23
means [13] - 18:25, 19:7, 21:23, 44:12, 47:12, 48:17, 55:6, 58:4, 64:11, 92:6, 97:1, 125:8, 126:1

meant [1] - 24:23
mechanical [1] - 1:24
mechanism [1] - 109:24
media [1] - 60:19
medical [2] - 56:20, 63:9
meet [5] - 25:24, 28:17, 85:19, 96:21, 121:21
mens [16] - 48:17, 48:19, 48:21, 49:9, 49:12, 49:25, 50:9, 50:17, 50:18, 50:19, 64:17, 64:24, 98:20, 102:16, 102:17, 103:5
mention [8] - 8:7, 13:6, 14:22, 19:16, 62:22, 72:21, 73:1, 124:20
mentioned [10] - 13:8, 28:3, 30:11, 52:21, 99:25, 100:24, 102:18, 118:12, 120:16, 120:18
mentioning [1] - 12:23
Merchants [2] - 52:15, 59:1
merely [2] - 92:5, 103:18
merit [2] - 67:16, 96:22
meriting [1] - 89:24
MERITS [1] - 1:10
merits [9] - 17:19, 38:15, 90:20, 96:20, 108:10, 114:16, 128:21, 130:9, 131:11
message [29] - 44:14, 90:18, 90:23, 91:3, 91:4, 91:7, 91:8, 91:11, 91:16, 91:21, 92:6, 92:13, 92:15, 92:16, 92:18, 92:22, 94:14, 94:15, 95:23, 95:24, 96:3, 96:5, 96:7, 96:8, 100:23, 125:18, 126:8
messages [3] - 96:12, 125:24, 126:7
met [4] - 27:17, 94:7, 100:19, 113:12
microphone [2] - 14:7, 40:11
middle [2] - 8:12, 39:23
might [11] - 27:25, 57:10, 57:11, 67:19, 80:11, 80:19, 80:25, 81:3, 105:25, 109:9, 118:21
military [1] - 77:24
Miller [13] - 55:7, 56:4, 56:10, 57:4, 58:7, 58:16, 58:18, 63:13, 67:11, 67:19, 70:3, 70:5
mind [6] - 18:6, 38:9, 47:5, 48:18, 131:7, 131:16
minds [1] - 28:1
mine [3] - 20:1, 45:22, 52:17
minimum [2] - 95:12, 95:13
minors [14] - 8:4, 8:5, 21:9, 35:3, 36:4, 41:22, 43:9, 59:4, 59:5, 59:12, 68:7, 70:4, 97:23, 100:3
minute [4] - 51:16, 53:10, 69:9, 107:4
minutes [22] - 19:18, 20:1, 45:3, 45:7, 45:10, 45:18, 45:19, 45:24, 46:5, 46:7, 46:9, 48:8, 51:13, 51:16, 73:3, 78:14, 78:17, 101:11, 104:11, 117:18, 117:20, 117:21
mischaracterization [1] - 103:12
mischievous [2] - 43:7, 90:13
misdemeanors [1] - 76:13
mislabeling [1] - 33:8
Miss [1] - 78:5
misspoke [1] - 68:5

misstated [1] - 30:2
misstatement [1] - 30:22
misstating [1] - 29:21
mistake [2] - 63:22, 64:3
mix [1] - 13:7
modes [1] - 93:4
modest [2] - 95:11, 95:13
modified [1] - 132:19
mom [1] - 98:2
moment [3] - 21:7, 34:9, 108:6
Monday [1] - 128:10
Monell [6] - 111:13, 112:25, 113:12, 121:17, 121:22, 121:23
money [2] - 39:10, 49:9
Montana [5] - 37:6, 70:17, 72:9, 72:10, 118:18
Montgomery [10] - 76:19, 76:20, 112:20, 112:21, 113:2, 113:11, 115:4, 116:13, 120:2, 121:18
MONTGOMERY [1] - 2:20
months [1] - 69:18
moot [6] - 36:22, 36:23, 37:3, 37:17, 38:2, 106:21
more [33] - 12:15, 23:15, 26:23, 35:1, 38:16, 41:2, 47:5, 48:15, 52:14, 53:9, 54:8, 56:24, 62:18, 63:2, 64:4, 65:9, 68:3, 69:10, 69:24, 70:6, 72:24, 72:25, 73:1, 73:4, 81:6, 87:13, 96:11, 103:9, 104:2, 117:21, 125:9, 129:12
moreover [1] - 89:7
morning [5] - 5:4, 14:4, 14:5, 127:2, 127:21
most [15] - 10:8, 10:9, 10:15, 10:17, 53:17, 54:8, 54:21, 55:1, 56:17, 60:18, 66:3, 116:18, 132:4, 132:7, 132:8
motion [10] - 17:16, 19:23, 29:8, 31:5, 32:20, 32:21, 33:19, 33:21, 102:14, 112:11
Motion..... [1] - 4:7
motions [2] - 115:23, 128:16
move [7] - 29:17, 79:11, 79:15, 79:16, 102:15, 111:6, 128:23
moved [1] - 132:9
movie [3] - 9:23, 54:17, 77:23
movies [2] - 9:19, 54:15
moving [3] - 21:13, 25:16, 101:13
Mr [29] - 4:4, 4:5, 4:12, 4:12, 4:13, 4:15, 4:15, 4:16, 39:19, 39:20, 39:21, 78:20, 79:13, 80:2, 80:14, 104:19, 105:18, 112:17, 112:24, 113:4, 115:3, 115:7, 115:9, 116:7, 116:12, 116:13, 116:15, 116:17, 122:15
MR [195] - 1:15, 1:19, 2:5, 2:8, 2:9, 2:13, 2:16, 2:20, 2:22, 5:8, 5:13, 7:4, 8:24, 9:11, 10:14, 11:18, 13:11, 13:12, 13:23, 13:25, 15:5, 15:21, 15:24, 16:19, 16:25, 17:4, 17:7, 17:11, 17:14, 17:18, 18:7, 18:10, 18:14, 18:16, 19:4, 19:7, 19:25, 20:5, 20:14, 20:19, 21:1, 21:21, 25:10, 25:12, 25:14, 26:24, 29:12,

29:20, 30:1, 30:8, 30:10, 31:9, 31:12, 31:16, 31:19, 31:20, 31:25, 32:2, 32:5, 32:9, 33:6, 33:11, 33:17, 33:24, 34:14, 34:24, 35:5, 35:12, 35:17, 35:19, 36:5, 36:9, 36:24, 37:8, 37:10, 37:14, 38:8, 39:2, 39:20, 42:5, 42:7, 46:3, 46:4, 48:25, 49:6, 49:14, 49:18, 49:21, 50:2, 50:8, 51:9, 51:13, 51:20, 52:13, 52:18, 53:6, 53:8, 53:13, 53:17, 53:25, 55:17, 55:20, 55:23, 56:1, 56:4, 58:15, 58:18, 58:20, 61:1, 61:3, 61:6, 64:8, 66:8, 66:17, 66:24, 68:16, 68:19, 69:4, 69:6, 69:8, 69:12, 70:2, 70:13, 70:16, 70:19, 70:25, 71:4, 71:6, 71:16, 71:19, 71:24, 72:4, 72:11, 72:15, 73:4, 73:17, 74:21, 76:18, 76:25, 78:19, 78:21, 79:17, 80:7, 80:10, 80:13, 81:9, 81:12, 81:17, 81:20, 81:23, 82:22, 83:25, 84:4, 105:19, 106:4, 107:5, 107:7, 107:9, 107:11, 107:13, 109:3, 111:7, 112:18, 112:21, 112:24, 113:15, 113:21, 114:3, 114:7, 114:9, 114:14, 116:11, 116:13, 116:16, 116:21, 117:22, 117:25, 118:2, 118:10, 119:4, 119:8, 119:17, 120:12, 120:20, 120:25, 122:25, 123:22, 124:2, 126:21, 127:24, 128:4, 129:5, 129:15, 131:1, 131:4
MS [68] - 1:22, 2:1, 2:1, 2:8, 3:1, 3:4, 14:3, 14:10, 15:8, 15:14, 15:17, 16:22, 40:9, 40:14, 40:21, 40:24, 41:6, 41:14, 41:19, 41:23, 42:17, 43:5, 43:14, 43:21, 43:24, 44:7, 44:10, 50:16, 50:22, 50:24, 88:4, 91:14, 91:18, 91:20, 91:24, 95:5, 96:1, 96:8, 96:16, 97:9, 97:16, 97:25, 99:1, 99:6, 99:14, 99:19, 101:12, 101:18, 101:24, 102:1, 104:12, 105:1, 105:3, 105:6, 111:18, 111:21, 112:8, 127:1, 127:4, 127:20, 129:19, 129:22, 129:25, 130:3, 130:6, 130:15, 130:19, 130:23
Ms [20] - 4:4, 4:13, 4:14, 4:14, 5:5, 14:4, 14:11, 40:7, 80:7, 84:12, 88:1, 88:3, 93:16, 111:17, 112:7, 112:10, 120:17, 122:18, 123:1, 129:6
much [11] - 30:4, 45:11, 46:18, 48:7, 64:4, 65:9, 98:4, 111:16, 119:5, 132:9, 132:25
Mulroy [1] - 70:9
municipal [3] - 37:3, 121:2, 121:9
municipalities [15] - 35:15, 37:22, 68:10, 76:7, 76:16, 105:16, 118:13, 118:20, 118:24, 119:9, 119:13, 119:25, 121:12, 121:16, 121:24
municipality [5] - 78:15, 119:20, 121:4, 122:6, 124:13
music [1] - 125:21
musicals [1] - 65:21
must [16] - 32:15, 56:12, 56:15, 56:18, 57:13, 57:21, 75:14, 76:5, 80:23, 83:16, 89:23, 93:11, 95:16, 97:5, 100:11,

124:11

my ^[42] - 5:22, 6:2, 6:10, 7:1, 9:13, 10:17, 10:25, 11:16, 12:16, 12:17, 12:18, 15:6, 18:6, 19:1, 20:20, 38:9, 42:12, 43:16, 43:17, 45:1, 46:12, 47:5, 52:9, 68:16, 76:16, 81:13, 82:22, 83:12, 86:8, 86:15, 87:5, 96:3, 98:3, 106:10, 116:5, 126:16, 127:11, 131:10, 132:8, 133:7

myself ^[2] - 40:3, 46:6

N

N ^[2] - 2:23, 5:1

naked ^[2] - 31:1, 63:10

name ^[2] - 45:17, 52:2

named ^[2] - 77:4, 85:22

narrow ^[9] - 41:5, 42:2, 60:3, 64:4, 66:12, 100:11, 115:22, 116:1, 125:18

narrowly ^[9] - 34:24, 43:6, 43:25, 59:10, 59:15, 63:2, 63:4, 65:9, 94:24

national ^[1] - 77:20

naturally ^[1] - 104:2

nature ^[2] - 79:19, 103:21

near ^[1] - 64:15

nearly ^[1] - 65:12

necessarily ^[6] - 15:3, 80:17, 80:23, 87:22, 92:11, 99:10

necessary ^[2] - 95:12, 95:14

necessity ^[1] - 89:10

need ^[37] - 32:13, 34:3, 34:11, 36:18, 38:13, 38:16, 39:9, 45:3, 45:11, 45:12, 46:6, 46:13, 46:18, 47:5, 47:8, 47:16, 60:8, 64:7, 64:8, 73:13, 78:17, 80:23, 81:6, 83:5, 85:17, 87:13, 91:10, 96:7, 96:8, 96:9, 106:1, 107:2, 108:14, 126:24, 130:16, 130:23

needing ^[1] - 113:6

needs ^[6] - 25:11, 70:10, 80:24, 96:11, 105:24

neither ^[3] - 25:1, 89:9, 103:15

neutral ^[9] - 40:5, 60:6, 91:15, 91:20, 92:21, 103:12, 103:13, 104:8, 118:22

never ^[10] - 28:5, 47:10, 106:20, 106:21, 113:4, 114:24, 120:6, 125:20, 132:11, 132:23

new ^[6] - 20:12, 74:13, 78:2, 80:17, 85:23, 114:19

New ^[3] - 2:6, 31:24, 65:12

next ^[11] - 16:24, 24:11, 25:16, 27:20, 41:18, 42:13, 44:4, 79:11, 131:1, 131:2, 131:25

NICOLE ^[1] - 1:22

nine ^[3] - 76:23, 76:24, 77:1

nipple ^[1] - 6:13

NO ^[1] - 4:1

No ^[5] - 23:17, 23:20, 29:9, 51:6, 132:2

no ^[121] - 8:7, 10:1, 10:22, 13:25, 15:8, 15:17, 16:22, 17:11, 18:7, 19:17, 20:21, 21:10, 22:21, 22:22, 28:9, 28:12, 29:24,

30:10, 32:22, 33:24, 35:19, 35:21, 40:21, 40:24, 41:23, 42:20, 42:25, 43:21, 43:22, 44:12, 44:23, 47:12, 50:3, 54:5, 55:19, 57:7, 59:18, 60:8, 63:6, 63:7, 63:13, 63:23, 64:2, 67:20, 68:1, 68:21, 79:25, 80:1, 82:20, 83:5, 83:10, 83:11, 84:8, 84:13, 84:18, 86:4, 86:20, 86:24, 86:25, 87:5, 87:12, 87:23, 88:2, 88:5, 92:20, 94:21, 95:3, 96:8, 97:1, 98:17, 99:24, 100:12, 100:17, 102:24, 102:25, 104:20, 105:1, 105:3, 105:11, 106:7, 106:22, 107:24, 108:1, 108:8, 108:9, 108:10, 108:25, 109:12, 109:23, 110:13, 111:2, 111:7, 111:13, 111:14, 111:23, 113:3, 113:10, 115:2, 115:3, 115:4, 116:9, 116:19, 117:2, 117:3, 117:4, 117:14, 119:5, 122:8, 123:2, 124:20, 125:11, 127:3

nobody ^[1] - 28:9

non ^[1] - 93:10

non-expressive ^[1] - 93:10

none ^[6] - 22:25, 35:4, 63:22, 74:14, 79:20, 83:3

nonetheless ^[1] - 100:9

nor ^[6] - 28:14, 82:17, 89:10, 103:16, 103:23, 107:21

Norma ^[1] - 78:5

normal ^[1] - 23:22

North ^[1] - 2:20

not ^[280] - 7:17, 7:18, 7:19, 8:4, 8:15, 8:16, 10:1, 10:15, 10:17, 10:23, 11:5, 11:7, 11:11, 11:13, 11:15, 11:16, 11:21, 11:23, 12:2, 12:6, 12:7, 12:17, 12:21, 12:24, 13:1, 13:5, 15:3, 16:1, 16:6, 16:7, 16:8, 16:14, 17:11, 17:20, 18:3, 20:15, 21:4, 21:5, 21:9, 21:14, 22:10, 22:21, 23:4, 23:5, 23:14, 23:17, 23:20, 24:4, 24:17, 24:18, 24:20, 24:23, 25:2, 25:3, 25:24, 26:10, 27:20, 28:22, 28:24, 29:22, 31:1, 31:2, 32:13, 34:8, 34:24, 36:1, 37:10, 37:25, 38:11, 38:19, 40:1, 40:15, 40:21, 40:22, 41:9, 41:16, 42:3, 42:10, 42:23, 43:18, 43:22, 45:3, 45:13, 46:6, 46:24, 50:17, 51:2, 51:3, 52:2, 52:23, 53:13, 53:14, 54:21, 58:5, 58:14, 58:20, 58:23, 59:6, 59:15, 59:17, 60:3, 60:6, 60:19, 61:23, 62:9, 63:5, 64:8, 64:11, 64:16, 64:21, 64:23, 65:15, 66:12, 66:15, 66:17, 67:6, 67:12, 67:19, 68:6, 68:10, 69:7, 75:9, 75:20, 76:3, 80:11, 80:16, 80:22, 80:24, 81:1, 82:11, 82:14, 82:17, 82:23, 82:25, 83:1, 83:6, 83:18, 84:9, 84:10, 84:22, 85:10, 86:12, 86:16, 87:3, 87:9, 87:16, 87:21, 87:22, 88:5, 88:7, 88:19, 89:25, 90:19, 90:22, 92:5, 92:10, 93:14, 93:15, 93:16, 94:14, 94:18, 95:1, 95:7, 95:16, 95:18, 95:19, 95:22, 96:1, 96:17, 96:24, 97:2, 97:6, 97:7, 97:11, 97:18, 97:23, 98:5, 98:12, 98:15, 99:8, 99:9, 99:16, 99:19, 99:20,

99:21, 100:7, 100:9, 100:18, 100:19, 100:21, 102:3, 102:5, 102:17, 102:19, 102:20, 102:21, 103:1, 103:11, 103:23, 104:15, 104:16, 104:18, 105:3, 105:7, 105:10, 105:13, 106:6, 107:1, 107:21, 108:3, 108:7, 108:19, 108:20, 109:5, 109:13, 109:21, 110:8, 110:17, 110:23, 111:8, 111:10, 111:11, 112:4, 113:12, 113:18, 113:22, 113:23, 114:15, 114:17, 114:21, 114:22, 115:1, 115:8, 115:9, 115:11, 115:17, 115:22, 115:24, 116:4, 117:13, 118:7, 118:23, 119:1, 119:5, 119:11, 119:18, 119:23, 120:18, 120:21, 121:3, 122:3, 122:4, 122:18, 123:5, 123:13, 123:19, 124:1, 124:12, 124:14, 124:16, 124:17, 125:18, 128:13, 128:14, 129:25, 130:12, 130:13, 131:16, 132:15

note ^[3] - 28:2, 129:5, 132:3

noted ^[3] - 54:4, 54:7, 54:14

nothing ^[12] - 20:12, 23:23, 24:1, 26:1, 40:17, 40:24, 41:24, 78:2, 106:19, 116:2, 116:8, 132:22

notice ^[3] - 8:17, 51:16, 65:19

notices ^[1] - 61:2

Now ^[1] - 84:25

now ^[38] - 13:5, 13:6, 18:5, 18:8, 20:22, 22:5, 23:13, 26:21, 32:11, 36:22, 39:11, 39:19, 39:22, 41:18, 44:22, 44:24, 45:21, 48:7, 52:22, 56:10, 61:16, 62:9, 62:19, 64:1, 67:11, 80:2, 83:15, 105:15, 114:13, 117:6, 120:5, 121:16, 127:5, 127:16, 127:18, 128:3, 130:16, 132:25

nude ^[30] - 11:20, 11:21, 11:23, 12:2, 12:17, 12:21, 13:21, 14:12, 14:15, 19:8, 19:13, 19:15, 20:5, 20:7, 20:9, 20:13, 21:4, 21:5, 22:1, 30:21, 42:7, 42:11, 52:24, 61:14, 63:10, 80:15, 103:6, 103:9

nudity ^[13] - 11:1, 13:13, 13:16, 20:11, 20:15, 20:18, 21:8, 30:18, 30:23, 61:13, 61:14, 80:22, 103:8

Nueva ^[1] - 3:6

null ^[1] - 37:3

number ^[4] - 29:15, 63:4, 70:20, 97:15

Number ^[2] - 32:21, 73:23

numbered ^[1] - 133:8

numerous ^[4] - 52:22, 65:17, 74:23, 80:6

NY ^[1] - 2:6

O

O ^[1] - 5:1

O'Brien ^[9] - 34:16, 34:20, 41:6, 90:4, 90:7, 93:24, 94:3, 94:20, 95:9

object ^[1] - 29:21

objection ^[4] - 15:5, 15:11, 20:14, 129:18

objections [2] - 30:4, 132:1
objective [5] - 91:17, 91:20, 94:25, 117:9, 117:13
obligation [1] - 108:3
obliterates [1] - 55:18
obscene [5] - 55:4, 66:5, 66:11, 100:9, 101:5
obscenity [9] - 50:5, 53:2, 55:5, 63:15, 65:13, 70:6, 99:25, 101:20, 102:1
observer [1] - 91:15
obtain [1] - 84:20
obviate [1] - 119:2
obviously [3] - 25:24, 88:23, 118:16
occur [3] - 38:22, 108:20, 111:22
occurred [1] - 25:20
occurring [1] - 25:17
OF [3] - 1:1, 1:10, 2:17
of [579] - 1:15, 1:19, 1:22, 2:9, 3:10, 5:17, 6:12, 6:23, 7:6, 7:11, 7:13, 8:4, 8:12, 9:18, 9:21, 10:15, 10:17, 10:20, 11:2, 11:3, 11:4, 11:17, 12:4, 12:8, 12:13, 12:14, 13:16, 14:17, 14:19, 15:6, 15:9, 15:25, 16:8, 16:14, 17:24, 18:2, 18:11, 18:18, 18:20, 18:22, 19:3, 19:9, 19:23, 20:9, 20:24, 21:6, 21:8, 21:17, 21:21, 22:3, 22:5, 22:9, 22:18, 22:23, 22:24, 22:25, 23:3, 23:9, 23:16, 23:24, 24:1, 24:3, 24:5, 24:7, 24:11, 24:13, 24:25, 25:1, 25:5, 25:7, 25:15, 25:18, 25:25, 26:7, 26:9, 26:10, 26:15, 26:16, 26:18, 27:4, 27:8, 27:13, 27:16, 27:17, 27:18, 27:19, 28:1, 28:3, 28:4, 28:7, 28:15, 28:17, 28:18, 28:19, 28:22, 28:23, 29:3, 29:15, 30:11, 30:12, 30:19, 30:22, 31:16, 31:23, 32:2, 32:3, 32:11, 32:16, 32:17, 32:19, 32:24, 33:1, 33:12, 33:21, 34:2, 34:4, 34:6, 34:7, 34:9, 34:16, 34:17, 34:19, 34:20, 36:4, 36:5, 36:23, 37:5, 37:11, 37:16, 37:20, 38:4, 38:14, 38:17, 38:18, 38:25, 39:2, 39:13, 39:15, 40:1, 41:3, 41:11, 41:12, 41:21, 42:7, 43:1, 43:7, 43:13, 44:1, 44:5, 44:11, 44:15, 44:16, 44:19, 44:20, 45:1, 45:2, 45:5, 45:8, 45:10, 45:22, 46:12, 46:13, 46:20, 46:25, 47:2, 47:15, 47:24, 48:4, 48:19, 48:20, 48:21, 48:22, 49:4, 50:9, 50:12, 50:24, 51:2, 51:22, 52:2, 52:6, 53:1, 54:9, 54:20, 55:2, 55:5, 55:15, 56:9, 56:10, 56:14, 56:17, 56:23, 57:1, 57:3, 57:7, 57:16, 57:18, 57:23, 58:13, 59:3, 59:4, 59:7, 59:11, 59:12, 59:18, 59:23, 59:24, 59:25, 60:1, 60:2, 60:4, 60:6, 60:9, 60:13, 60:19, 60:21, 61:2, 61:17, 61:18, 62:6, 62:20, 62:21, 62:23, 63:4, 63:8, 63:9, 63:11, 63:13, 63:15, 63:23, 64:1, 64:3, 64:4, 64:7, 64:9, 64:15, 64:18, 64:20, 64:21, 64:22, 64:24, 65:7, 65:12, 65:13, 65:17, 65:18, 65:24, 65:25, 66:12, 67:1, 67:5, 67:14, 67:16, 67:25, 68:2, 68:7, 68:12, 68:20,

68:22, 69:1, 69:13, 70:4, 70:9, 70:14, 70:20, 70:22, 71:24, 72:7, 72:16, 72:23, 73:14, 73:21, 73:22, 73:25, 74:1, 74:4, 74:9, 74:10, 74:14, 74:19, 75:2, 75:4, 75:6, 75:11, 75:13, 75:15, 75:20, 76:6, 76:9, 76:20, 76:21, 76:22, 76:24, 77:7, 77:8, 77:11, 77:16, 77:19, 78:3, 78:6, 78:11, 79:9, 79:20, 79:22, 79:24, 80:15, 80:18, 80:19, 81:1, 81:2, 81:4, 81:7, 81:12, 81:21, 82:1, 82:2, 82:4, 82:7, 82:11, 82:13, 82:16, 83:4, 83:11, 83:22, 83:23, 84:4, 84:6, 84:16, 84:18, 84:21, 84:22, 84:24, 85:3, 85:5, 85:9, 85:13, 86:1, 86:5, 86:11, 86:13, 86:14, 87:8, 87:20, 88:10, 88:13, 88:14, 88:21, 88:24, 89:1, 89:3, 89:8, 89:9, 89:10, 89:11, 89:16, 89:20, 89:22, 90:1, 90:16, 90:18, 91:9, 91:11, 91:12, 91:15, 91:16, 91:17, 91:21, 92:25, 93:2, 93:5, 93:9, 93:10, 93:12, 93:17, 93:18, 93:21, 93:22, 94:5, 94:7, 94:10, 94:12, 94:14, 94:19, 94:20, 94:25, 95:2, 95:8, 95:9, 95:17, 96:15, 96:21, 96:22, 96:25, 97:2, 97:3, 97:14, 97:15, 97:22, 98:14, 98:18, 98:20, 99:5, 99:18, 99:21, 100:2, 100:17, 100:22, 101:2, 101:3, 101:19, 101:20, 101:24, 102:8, 102:15, 102:21, 103:3, 103:6, 103:15, 103:21, 103:22, 103:25, 104:4, 104:14, 104:18, 105:4, 105:13, 105:15, 106:8, 106:10, 106:11, 106:13, 106:16, 106:19, 106:24, 107:14, 107:16, 107:17, 107:19, 107:20, 107:25, 108:2, 108:7, 108:10, 108:12, 108:14, 108:15, 108:17, 108:22, 109:7, 110:1, 110:6, 110:12, 111:13, 111:22, 112:2, 112:15, 113:12, 113:21, 113:23, 114:4, 114:18, 114:23, 116:2, 116:5, 116:17, 116:18, 117:1, 117:2, 117:3, 117:5, 117:11, 117:12, 118:12, 118:24, 119:3, 119:21, 120:3, 120:9, 120:10, 120:14, 120:15, 120:16, 120:19, 120:21, 120:23, 121:1, 121:10, 121:11, 121:14, 121:18, 121:22, 122:2, 122:10, 122:12, 122:24, 123:3, 123:5, 123:11, 123:12, 123:15, 123:18, 123:25, 124:3, 124:5, 124:6, 124:9, 124:24, 125:1, 125:10, 125:18, 125:20, 125:21, 125:22, 126:3, 126:9, 126:12, 126:16, 126:22, 126:23, 127:8, 127:9, 127:15, 127:17, 127:18, 128:14, 128:25, 129:6, 129:9, 129:10, 130:9, 130:13, 130:19, 131:2, 131:5, 131:23, 131:24, 132:4, 132:7, 132:8, 132:24, 133:7, 133:7, 133:8
off [6] - 6:3, 45:16, 64:2, 117:19, 122:4, 124:17
offense [3] - 111:25, 124:24, 124:25
offensive [4] - 55:12, 56:13, 56:15, 67:17
offer [1] - 119:6

Office [3] - 2:9, 3:1, 3:5
officer [3] - 98:21, 98:24, 111:8
OFFICER [1] - 133:1
official [13] - 74:17, 75:14, 78:23, 79:2, 79:3, 86:9, 111:8, 115:21, 119:9, 119:19, 119:20, 121:23
Official [4] - 3:9, 3:9, 133:6, 133:10
officials [8] - 35:15, 37:2, 74:24, 75:4, 79:2, 107:19, 124:6, 124:9
often [3] - 47:2, 89:1, 103:25
Oh [3] - 81:4, 81:13, 98:3
oh [3] - 6:19, 13:18, 117:18
okay [90] - 6:19, 7:10, 7:16, 8:23, 9:8, 9:12, 10:13, 11:19, 13:7, 13:23, 14:1, 15:11, 15:17, 15:19, 17:16, 18:8, 18:16, 19:19, 20:5, 20:21, 20:22, 20:23, 21:1, 33:20, 34:3, 34:5, 35:14, 36:2, 37:9, 38:4, 39:16, 39:24, 40:3, 40:12, 41:18, 41:19, 42:12, 43:10, 43:11, 44:17, 45:2, 45:3, 45:11, 45:21, 46:5, 46:15, 47:11, 48:9, 48:11, 48:18, 48:19, 48:23, 50:8, 50:23, 51:5, 51:11, 52:10, 52:12, 61:4, 71:18, 73:4, 76:24, 78:14, 79:14, 80:9, 101:12, 105:5, 107:8, 112:14, 112:19, 114:8, 114:17, 116:15, 117:17, 117:24, 118:9, 127:4, 127:5, 128:9, 128:10, 128:23, 129:8, 131:3, 131:6, 131:8, 131:14, 131:23, 131:25, 133:2
Oklahoma [2] - 78:3, 78:6
old [2] - 47:10, 48:4
old-time [1] - 48:4
on [195] - 7:2, 7:3, 8:23, 9:16, 10:6, 10:9, 12:5, 12:12, 12:13, 12:14, 13:10, 16:1, 16:5, 17:17, 17:19, 18:5, 18:6, 18:9, 18:17, 19:6, 19:21, 19:22, 21:13, 21:19, 25:13, 26:11, 26:17, 26:22, 27:7, 29:15, 30:18, 31:20, 32:1, 32:4, 32:8, 32:21, 34:17, 35:11, 37:20, 37:23, 38:1, 38:12, 38:15, 38:18, 38:20, 38:23, 40:4, 40:24, 42:9, 42:13, 42:22, 44:20, 45:2, 45:14, 45:17, 45:25, 46:20, 47:17, 47:21, 50:2, 50:6, 50:15, 50:25, 51:8, 51:11, 51:16, 53:7, 53:16, 53:20, 54:9, 56:21, 57:8, 58:2, 58:6, 58:11, 59:7, 59:12, 60:8, 61:8, 61:11, 62:9, 62:19, 63:3, 64:18, 65:23, 67:15, 67:23, 68:4, 68:9, 68:17, 68:21, 69:5, 69:11, 69:14, 72:2, 72:6, 72:9, 72:13, 72:15, 73:6, 74:13, 74:21, 75:12, 77:18, 78:18, 79:24, 80:6, 81:10, 81:13, 81:17, 81:18, 83:12, 84:6, 85:5, 85:23, 86:12, 86:19, 86:23, 88:5, 88:13, 89:1, 89:3, 89:18, 92:10, 93:3, 93:7, 94:1, 97:25, 98:3, 99:12, 101:6, 101:13, 101:22, 102:15, 105:11, 106:11, 106:12, 106:23, 107:12, 108:2, 108:5, 108:7, 108:20, 110:9, 110:20, 111:4, 112:3, 112:4, 112:11, 112:25, 113:7, 113:14, 114:16, 116:5, 116:6, 117:7, 118:4, 118:10, 119:10, 121:2, 122:1, 123:8, 123:10,

126:6, 126:10, 126:19, 127:22, 128:1, 128:10, 128:21, 128:22, 128:25, 129:1, 129:4, 129:9, 129:12, 129:17, 129:21, 130:2, 130:4, 130:8, 130:10, 130:16, 131:11, 131:25, 132:3, 132:4, 132:5, 132:15, 132:16

ON [1] - 1:10

once [11] - 28:5, 28:7, 38:10, 46:24, 47:18, 49:17, 59:6, 59:9, 63:2, 109:1, 119:24

one [78] - 6:1, 7:24, 10:20, 12:8, 20:8, 22:17, 24:16, 24:20, 25:17, 28:7, 29:23, 30:10, 31:18, 32:15, 34:9, 36:19, 36:24, 37:5, 37:9, 38:18, 43:19, 44:4, 46:15, 46:22, 47:4, 47:9, 48:4, 48:15, 48:24, 56:5, 56:17, 57:16, 59:22, 61:2, 65:7, 66:22, 69:1, 69:19, 70:12, 70:21, 71:20, 72:1, 72:17, 76:2, 80:18, 80:19, 81:8, 81:9, 82:7, 86:15, 86:25, 87:8, 91:6, 91:10, 92:9, 94:4, 98:5, 98:16, 101:22, 107:14, 116:1, 116:5, 120:8, 120:16, 122:8, 122:24, 123:8, 124:10, 126:24, 129:3, 129:5, 131:19, 132:4, 132:7, 132:10

One [1] - 2:2

one-by-one [1] - 29:23

ones [1] - 98:7

onlooker [1] - 99:18

only [43] - 5:15, 5:20, 5:24, 6:5, 6:7, 7:5, 8:11, 14:23, 15:9, 20:1, 21:9, 23:11, 24:14, 24:25, 25:20, 28:7, 36:3, 47:18, 49:1, 53:1, 54:1, 57:2, 59:5, 60:2, 64:20, 65:7, 68:23, 73:13, 79:7, 80:16, 90:10, 91:10, 106:6, 106:11, 109:14, 110:6, 111:7, 113:5, 114:25, 115:23, 117:5, 128:18

open [2] - 43:17, 78:9

opinion [4] - 23:15, 27:24, 129:9, 132:14

opportunity [4] - 45:17, 97:5, 97:6

oppose [1] - 92:10

opposing [1] - 92:8

or [185] - 6:12, 6:22, 7:8, 7:20, 8:6, 8:8, 8:13, 8:21, 9:15, 9:24, 10:1, 11:9, 11:24, 12:3, 12:6, 12:24, 12:25, 13:1, 13:5, 14:16, 14:19, 16:6, 16:12, 17:18, 18:13, 18:20, 19:10, 19:21, 21:17, 22:10, 22:12, 22:23, 23:1, 23:8, 23:10, 23:12, 23:23, 24:12, 24:13, 24:21, 25:7, 25:16, 25:18, 26:2, 26:13, 26:22, 27:15, 27:20, 30:11, 31:3, 32:12, 32:14, 34:21, 35:4, 35:11, 36:6, 36:19, 40:15, 40:17, 41:1, 41:4, 41:5, 41:8, 44:12, 45:19, 46:2, 46:15, 47:5, 47:7, 47:21, 48:17, 49:3, 49:22, 50:9, 50:13, 53:12, 55:4, 55:6, 55:12, 55:25, 56:12, 56:24, 61:20, 61:24, 61:25, 62:13, 62:25, 63:8, 63:10, 64:25, 66:14, 66:22, 67:2, 68:14, 68:15, 69:19, 71:15, 72:21, 75:11, 75:14, 76:3, 76:5, 79:20, 79:21, 79:23, 81:10, 82:4,

82:20, 89:19, 89:20, 90:18, 91:22, 92:17, 93:4, 93:10, 93:18, 93:21, 94:18, 96:14, 99:12, 99:14, 101:8, 103:4, 103:9, 103:17, 103:22, 103:23, 104:3, 104:6, 104:25, 106:8, 106:9, 106:16, 107:3, 108:10, 108:16, 109:21, 109:23, 110:4, 111:2, 111:24, 113:11, 113:21, 114:15, 114:22, 114:24, 117:7, 117:10, 117:23, 118:17, 118:22, 118:24, 119:2, 120:9, 120:15, 120:16, 121:18, 123:2, 124:13, 124:15, 124:24, 125:1, 125:9, 125:11, 125:21, 128:6, 129:3, 129:7, 129:13, 129:25, 130:9, 130:12, 130:13, 131:10, 131:19, 132:19

order [13] - 36:18, 47:1, 77:5, 83:17, 94:9, 127:14, 128:17, 128:18, 130:5, 130:6, 130:17, 131:8, 131:17

ordinance [7] - 40:15, 89:17, 93:20, 101:8, 114:22, 114:24, 123:16

ordinary [3] - 64:10, 91:15, 96:9

organization [2] - 84:20, 109:11

Organizations [1] - 84:25

organizations' [1] - 77:12

organizes [1] - 87:15

organizing [1] - 87:21

oriented [20] - 18:24, 19:7, 21:22, 40:16, 41:21, 44:1, 52:2, 60:7, 60:20, 60:22, 68:8, 72:19, 72:20, 86:12, 103:8, 103:10, 104:8, 124:4, 125:3, 126:12

original [2] - 121:23, 127:18

Orleans [1] - 31:24

other [44] - 5:14, 5:23, 19:10, 20:23, 22:2, 22:6, 29:4, 32:14, 33:15, 33:18, 36:19, 37:16, 38:6, 40:1, 41:3, 44:19, 45:14, 47:15, 50:14, 52:13, 57:18, 60:21, 61:13, 63:13, 64:20, 65:20, 67:13, 67:14, 72:1, 81:8, 81:9, 81:10, 81:20, 83:12, 93:7, 96:1, 99:17, 120:17, 124:19, 126:12, 127:6, 129:3

other's [1] - 25:22

others [6] - 28:1, 36:23, 47:23, 57:23, 102:18, 102:19

otherwise [5] - 33:19, 33:25, 44:22, 97:16, 117:23

ought [2] - 38:9, 60:3

our [37] - 18:9, 24:10, 30:4, 34:1, 37:18, 40:14, 44:19, 45:7, 46:1, 57:11, 57:23, 61:8, 64:11, 64:18, 65:18, 67:21, 70:10, 71:7, 75:2, 77:15, 77:16, 78:24, 80:19, 83:4, 102:13, 106:17, 108:9, 115:13, 118:10, 119:15, 122:11, 122:20, 124:7, 125:1, 125:13, 129:13

out [25] - 5:22, 5:23, 12:13, 31:23, 34:5, 39:25, 40:17, 43:6, 47:6, 48:3, 52:13, 56:9, 68:22, 77:8, 81:4, 82:20, 82:23, 85:25, 107:23, 109:21, 109:25, 116:24, 117:8, 124:3, 131:19

outfits [1] - 6:4

outline [1] - 11:2

outside [6] - 15:5, 15:12, 16:8, 16:10,

31:1, 65:3

over [8] - 17:6, 57:10, 86:20, 86:24, 87:23, 88:1, 98:9, 129:7

overall [2] - 31:5, 64:13

overbreadth [6] - 57:19, 63:20, 64:13, 65:17, 65:25, 66:24

overbroad [11] - 36:4, 36:7, 54:25, 59:14, 63:17, 65:18, 67:7, 69:23, 89:21, 101:14

overcome [1] - 80:5

overrule [1] - 15:11

overruled [1] - 115:15

overwhelming [1] - 26:16

owes [1] - 77:20

own [14] - 23:25, 37:20, 47:5, 52:4, 52:18, 57:21, 58:2, 58:6, 71:7, 82:10, 84:21, 86:1, 88:6, 91:11

owned [1] - 87:8

P

P [1] - 5:1

P.C [1] - 2:13

packer [3] - 23:16, 54:12, 62:5

packers [1] - 23:13

padding [5] - 12:5, 12:10, 12:11, 13:3

page [1] - 32:11

PAGE [1] - 4:1

Page [8] - 18:17, 21:21, 31:20, 32:2, 32:24, 33:1, 84:6, 85:1

page/line [1] - 31:19

Pageant [1] - 78:5

painting [1] - 125:20

pales [1] - 65:25

pants [1] - 23:23

papers [4] - 47:22, 47:23, 48:2, 48:3

parade [5] - 42:20, 42:21, 42:23, 54:16, 86:23

parades [1] - 42:16

paragraph [1] - 33:1

parent [5] - 8:8, 8:21, 9:24, 42:20, 43:1

parental [5] - 83:3, 83:5, 83:6, 104:14, 104:15

parents [11] - 54:6, 54:15, 59:23, 60:1, 60:2, 60:4, 63:6, 67:23, 87:8, 87:9, 87:10

parents' [3] - 42:14, 54:5, 63:6

park [1] - 86:19

Parkside [1] - 123:15

part [19] - 25:18, 26:25, 27:7, 49:1, 49:4, 57:3, 58:13, 61:18, 64:20, 64:22, 70:3, 76:6, 94:3, 99:21, 102:25, 104:18, 106:16, 108:2, 108:12

Part [1] - 61:17

parte [9] - 74:18, 75:1, 75:3, 79:6, 107:22, 111:5, 115:11, 121:15, 122:1

particular [7] - 41:8, 43:19, 88:18, 90:25, 110:23, 116:2

particularized [1] - 91:3

particularly [1] - 116:3

parties [2] - 29:4, 113:17
partner's [1] - 87:9
Partners [1] - 123:15
parts [5] - 37:20, 56:4, 56:10, 67:14, 81:1
party [2] - 92:3, 103:3
pass [4] - 13:23, 16:19, 52:13, 71:24
passed [3] - 41:10, 60:12, 71:7
passerby [2] - 98:10, 99:8
passing [1] - 49:13
past [1] - 21:5
pasties [2] - 94:13, 95:11
patently [4] - 55:12, 56:13, 56:15, 67:17
PAUL [1] - 1:19
Paxton [1] - 85:20
pay [2] - 16:12, 92:9
paying [1] - 43:22
pegs [1] - 132:14
Penal [13] - 42:3, 49:3, 50:16, 55:2, 55:6, 64:18, 64:19, 64:20, 93:22, 101:24, 103:2, 124:22, 124:23
penalties [8] - 39:6, 49:11, 50:25, 53:21, 76:10, 98:11, 108:18, 121:7
penalty [1] - 102:7
people [27] - 15:3, 15:12, 16:1, 16:8, 16:9, 19:1, 24:24, 28:4, 30:12, 30:20, 39:22, 42:9, 58:4, 59:5, 61:24, 62:1, 63:22, 64:3, 65:2, 65:20, 67:20, 67:22, 67:23, 68:23, 82:9, 89:16, 90:22
people's [2] - 56:22, 67:10
perceive [1] - 46:16
perfectly [1] - 129:22
perform [15] - 5:14, 10:20, 11:9, 11:17, 11:20, 11:21, 14:22, 21:4, 21:5, 22:19, 22:23, 36:10, 87:4, 100:21, 125:2
performance [30] - 8:13, 19:8, 40:16, 42:10, 43:2, 43:4, 52:2, 54:6, 55:4, 55:6, 55:11, 60:20, 63:12, 64:16, 68:8, 68:11, 68:21, 72:6, 72:8, 80:17, 86:12, 93:18, 96:10, 96:22, 98:3, 102:19, 103:8, 103:21, 124:4, 125:4
performance' [2] - 18:25, 19:7
performances [66] - 5:17, 11:4, 11:5, 13:20, 15:4, 15:9, 19:15, 20:6, 20:8, 20:13, 21:8, 21:22, 22:1, 22:20, 23:2, 27:8, 27:11, 27:12, 27:21, 27:22, 28:4, 35:3, 35:10, 36:9, 39:5, 41:1, 41:17, 41:21, 42:11, 42:22, 44:1, 51:22, 52:24, 54:8, 56:23, 60:8, 60:21, 60:23, 61:11, 66:19, 68:6, 68:9, 68:14, 71:12, 71:13, 72:20, 73:22, 80:15, 87:2, 88:8, 88:9, 91:7, 93:15, 103:13, 103:24, 104:9, 104:21, 104:22, 105:8, 125:2, 125:10, 125:25, 126:3, 126:5, 126:12, 126:13
performed [5] - 15:9, 20:9, 21:4, 28:6, 60:15
performer [9] - 13:19, 19:8, 19:10, 22:2, 22:6, 64:5, 64:12, 98:1, 98:15
performers [18] - 12:4, 12:22, 20:9,

25:20, 39:10, 57:15, 62:3, 62:21, 64:25, 65:1, 65:19, 77:24, 80:19, 80:23, 100:21, 103:16, 103:17, 103:25
performing [7] - 61:19, 63:25, 78:5, 81:2, 97:1, 97:11, 103:9
permanent [2] - 70:14, 120:11
permanently [2] - 69:20, 71:9
permit [28] - 45:4, 52:23, 108:5, 108:19, 108:20, 109:4, 109:9, 109:11, 109:20, 109:22, 110:1, 110:3, 110:5, 110:8, 110:12, 110:14, 110:17, 110:18, 110:20, 110:24, 110:25, 113:3, 113:5, 114:19
permits [1] - 115:4
permitted [7] - 11:9, 11:20, 22:11, 22:19, 26:11, 97:3, 97:17
pernicious [1] - 62:19
person [22] - 13:1, 25:17, 25:18, 51:1, 55:3, 55:9, 56:5, 64:10, 64:15, 67:14, 86:11, 90:2, 90:8, 92:21, 96:9, 102:7, 102:9, 102:10, 102:11, 103:3, 115:9, 116:2
person's [1] - 57:5
personal [1] - 132:3
personally [1] - 78:10
persons [1] - 121:24
perspective [1] - 91:15
pertains [3] - 48:20, 48:22, 49:19
petitioners [1] - 75:15
PG [1] - 10:4
phase [1] - 114:1
photo [1] - 7:15
phrase [2] - 56:8, 66:6
physical [1] - 16:14
pick [1] - 40:12
picked [1] - 56:9
picking [1] - 63:15
picture [2] - 7:13, 79:17
Pine [1] - 2:14
pinpoint [1] - 57:15
place [4] - 87:17, 90:22, 93:10, 99:18
placed [1] - 101:5
plaintiff [22] - 29:11, 34:11, 39:3, 45:4, 45:25, 48:16, 48:23, 73:6, 77:15, 83:17, 83:21, 86:16, 98:6, 109:6, 109:8, 110:18, 114:3, 115:8, 126:19, 127:9, 130:25
PLAINTIFFS [1] - 1:15
plaintiffs [85] - 14:9, 16:25, 17:8, 17:20, 20:6, 21:2, 21:10, 22:14, 22:17, 22:23, 22:25, 25:4, 25:19, 28:17, 29:20, 33:11, 34:6, 35:5, 36:10, 37:1, 44:12, 46:14, 51:21, 53:18, 54:1, 54:22, 57:18, 57:20, 59:17, 61:17, 66:25, 69:2, 69:13, 73:13, 73:21, 74:9, 74:12, 75:8, 75:10, 75:18, 77:3, 77:12, 79:17, 79:18, 79:25, 80:2, 83:10, 84:9, 84:11, 84:13, 84:17, 85:3, 86:8, 88:6, 89:6, 91:6, 92:15, 93:14, 94:6, 95:23, 96:2, 97:3, 98:9, 100:12, 100:14, 100:24, 101:18, 104:4,

104:17, 104:21, 105:9, 106:11, 110:8, 110:13, 111:2, 111:23, 113:16, 118:21, 119:1, 123:1, 123:4, 125:1, 125:10, 125:24, 127:23
Plaintiffs [1] - 4:6
plaintiffs' [10] - 72:7, 77:7, 80:14, 84:19, 90:16, 90:19, 99:24, 102:13, 110:18, 122:20
Plaintiffs' [4] - 4:8, 18:17, 21:21, 60:12
Plake [2] - 112:17, 116:13
PLAKE [12] - 2:20, 46:4, 112:18, 112:21, 112:24, 113:15, 113:21, 114:3, 114:7, 114:9, 114:14, 116:11
Plake..... [1] - 4:15
plan [3] - 79:21, 79:23, 113:8
planned [1] - 82:7
plans [3] - 117:2, 117:3
plausibly [1] - 75:11
play [2] - 91:2, 106:11
Plaza [2] - 2:2, 2:6
pleading [1] - 122:21
pleadings [2] - 70:10, 103:19
please [12] - 5:6, 14:1, 14:7, 15:20, 16:23, 25:9, 29:11, 40:11, 43:20, 48:14, 51:10, 105:2
pleasure [1] - 132:6
pled [3] - 104:15, 115:8, 122:20
plenty [1] - 19:3
plurality [1] - 93:25
PO [2] - 1:20, 2:10
podium [1] - 29:13
point [22] - 20:17, 34:10, 38:4, 38:5, 38:12, 43:22, 44:24, 54:19, 58:12, 65:23, 66:25, 68:20, 96:3, 101:19, 106:17, 110:19, 110:22, 111:1, 111:4, 116:24, 120:8, 132:6
pointed [3] - 102:23, 109:25, 117:8
pointing [1] - 122:4
points [3] - 80:3, 116:5, 126:18
pole [1] - 42:8
police [11] - 28:7, 28:9, 28:10, 57:14, 98:3, 98:6, 98:21, 98:24, 99:7, 99:9, 102:20
policies [7] - 19:14, 20:7, 21:3, 22:15, 85:23, 107:19, 113:11
policy [1] - 74:3
policymaker [7] - 107:16, 107:23, 113:10, 119:19, 120:4, 120:6, 121:20
policymakers [2] - 74:16, 119:25
political [4] - 41:4, 55:14, 56:19, 126:7
Pollock [1] - 125:21
portion [9] - 23:3, 24:3, 24:7, 25:7, 25:15, 26:9, 26:10, 27:18, 28:15
portions [1] - 18:18
poses [1] - 90:25
posing [2] - 27:19, 27:20
position [15] - 34:23, 35:10, 40:8, 40:14, 43:12, 44:20, 50:6, 58:12, 90:19, 90:21, 98:22, 108:9, 111:10, 118:22, 131:21

<p>positions [1] - 45:12</p> <p>possesses [2] - 91:1, 100:12</p> <p>possibility [1] - 44:5</p> <p>possible [3] - 81:20, 95:6, 107:6</p> <p>possibly [7] - 17:2, 38:1, 66:10, 67:9, 76:25, 102:24</p> <p>potentially [4] - 18:24, 27:4, 27:9, 113:6</p> <p>Potter [1] - 58:19</p> <p>power [9] - 86:20, 94:5, 100:13, 107:5, 107:9, 107:10, 107:12, 118:7, 121:25</p> <p>practically [1] - 128:8</p> <p>practice [2] - 56:21, 132:24</p> <p>practices [4] - 19:15, 20:7, 21:3, 22:15</p> <p>pre [9] - 32:10, 53:23, 73:12, 73:18, 74:7, 75:8, 83:19, 120:7, 121:5</p> <p>pre-enforcement [9] - 32:10, 53:23, 73:12, 73:18, 74:7, 75:8, 83:19, 120:7, 121:5</p> <p>precedent [1] - 75:21</p> <p>precise [1] - 89:11</p> <p>predates [1] - 13:17</p> <p>prefer [3] - 19:24, 46:1, 51:19</p> <p>pregnant [1] - 24:24</p> <p>PRELIMINARY [1] - 1:10</p> <p>preliminary [10] - 38:15, 71:11, 71:15, 71:16, 72:13, 113:25, 114:10, 130:8, 131:9, 132:18</p> <p>premature [1] - 89:3</p> <p>premises [4] - 51:2, 86:11, 86:13, 98:25</p> <p>prepared [2] - 17:1, 128:13</p> <p>preponderance [6] - 24:5, 25:5, 26:7, 27:18, 28:18</p> <p>prescribes [1] - 54:2</p> <p>presence [2] - 86:13, 123:18</p> <p>present [6] - 16:3, 16:7, 16:13, 16:16, 85:4, 91:3</p> <p>presented [12] - 17:20, 18:3, 18:12, 18:20, 18:21, 21:2, 24:1, 24:5, 24:14, 26:3, 27:8, 86:12</p> <p>presenting [1] - 55:4</p> <p>preserve [1] - 30:4</p> <p>pressed [1] - 113:7</p> <p>pressure [1] - 124:13</p> <p>Preston [1] - 1:23</p> <p>presumably [1] - 119:24</p> <p>presumption [3] - 74:13, 74:15, 119:8</p> <p>presumptively [1] - 93:5</p> <p>pretrial [1] - 126:20</p> <p>pretty [2] - 29:18, 30:4</p> <p>prevail [1] - 34:13</p> <p>prevent [5] - 22:15, 24:22, 24:24, 43:25</p> <p>preventing [1] - 89:15</p> <p>preview [1] - 80:10</p> <p>previous [1] - 21:24</p> <p>previously [1] - 5:10</p> <p>Pride [13] - 20:8, 23:13, 23:14, 28:2,</p>	<p>28:8, 64:6, 64:14, 86:18, 86:22, 116:25, 125:25, 126:2</p> <p>pride [3] - 54:16, 54:23, 77:12</p> <p>PRIDE [1] - 1:4</p> <p>Pride's [1] - 120:3</p> <p>primarily [3] - 24:12, 25:4, 82:3</p> <p>principle [1] - 89:8</p> <p>prior [4] - 32:6, 67:25, 68:4, 69:16</p> <p>private [5] - 69:10, 81:1, 98:14, 98:17, 115:5</p> <p>privity [2] - 116:6</p> <p>probably [3] - 16:6, 38:25, 85:16</p> <p>problem [7] - 19:17, 47:24, 81:13, 86:24, 108:25, 119:14, 119:17</p> <p>problems [1] - 26:18</p> <p>procedures [4] - 19:14, 20:7, 21:3, 22:15</p> <p>proceed [1] - 5:4</p> <p>Proceedings [1] - 1:24</p> <p>proceedings [3] - 127:15, 133:3, 133:8</p> <p>process [1] - 89:15</p> <p>produce [2] - 27:14, 125:1</p> <p>produced [4] - 1:25, 27:3, 27:5, 27:7</p> <p>producing [1] - 55:3</p> <p>professional [1] - 57:24</p> <p>professor [2] - 63:10, 85:22</p> <p>prohibit [10] - 19:15, 20:7, 20:10, 61:23, 62:14, 70:5, 72:18, 89:20, 99:23, 120:3</p> <p>prohibited [7] - 13:13, 13:15, 20:11, 20:12, 79:22, 80:15, 108:19</p> <p>prohibiting [3] - 20:13, 62:10, 97:1</p> <p>prohibition [4] - 109:23, 110:2, 110:6, 110:10</p> <p>prohibits [5] - 55:3, 62:1, 62:14, 68:8, 69:15</p> <p>promise [1] - 132:16</p> <p>promote [4] - 9:13, 103:4, 124:24</p> <p>Prong [1] - 32:21</p> <p>prong [8] - 56:15, 56:16, 92:12, 94:7, 94:8, 94:20, 95:2, 95:9</p> <p>prongs [2] - 37:21, 56:18</p> <p>proof [5] - 45:5, 107:25, 113:21, 113:23, 114:4</p> <p>proper [4] - 37:15, 75:11, 76:12, 116:4</p> <p>properly [2] - 75:19, 77:4</p> <p>property [15] - 16:1, 68:9, 68:21, 69:7, 69:10, 69:12, 69:15, 86:19, 86:20, 108:5, 108:20, 109:4, 109:16, 109:18, 110:9</p> <p>propose [3] - 127:1, 127:19, 127:20</p> <p>proposed [2] - 11:24, 126:21</p> <p>proposition [1] - 115:15</p> <p>proscribed [16] - 17:23, 18:24, 20:16, 21:12, 23:6, 24:3, 24:7, 25:7, 26:8, 28:15, 32:17, 33:13, 41:25, 55:2, 73:24, 125:2</p> <p>proscribing [1] - 99:24</p> <p>proscription [1] - 32:22</p>	<p>prosecute [3] - 76:13, 111:22, 111:25</p> <p>prosecution [10] - 32:14, 32:19, 74:10, 83:22, 84:4, 84:16, 86:5, 108:15, 109:7, 117:12</p> <p>prosecutor [2] - 111:24, 116:9</p> <p>prosecutors [3] - 37:23, 57:15, 118:4</p> <p>prospective [2] - 73:16, 73:18</p> <p>prospectively [1] - 99:17</p> <p>prosthetic [4] - 14:12, 61:20, 62:5, 67:2</p> <p>prosthetics [7] - 26:13, 54:11, 61:24, 62:11, 67:9, 103:22, 104:3</p> <p>protect [5] - 24:22, 57:21, 57:22, 60:22, 100:13</p> <p>protected [11] - 36:13, 61:15, 62:8, 66:5, 88:7, 88:8, 89:20, 89:21, 90:17, 92:11, 110:21</p> <p>protecting [9] - 35:3, 35:8, 41:16, 42:19, 43:9, 44:3, 59:19, 59:24, 94:9</p> <p>protection [7] - 52:25, 63:7, 90:10, 90:20, 96:20, 125:11, 125:19</p> <p>protects [3] - 56:20, 56:22, 56:23</p> <p>prove [5] - 25:5, 26:4, 27:21, 87:11, 113:23</p> <p>proves [1] - 109:11</p> <p>provide [2] - 26:4, 70:19</p> <p>provided [3] - 27:10, 27:11, 123:7</p> <p>provides [2] - 67:21, 75:1</p> <p>provision [6] - 61:13, 62:16, 108:18, 114:20, 114:25, 115:1</p> <p>provisional [1] - 78:24</p> <p>provisions [1] - 123:17</p> <p>prudent [1] - 102:11</p> <p>prurient [33] - 19:11, 21:16, 22:4, 22:24, 26:1, 26:2, 26:6, 27:2, 27:23, 27:24, 42:25, 55:11, 56:7, 56:9, 57:2, 57:6, 57:10, 57:17, 58:3, 67:4, 67:10, 67:12, 80:16, 80:18, 82:4, 98:20, 101:19, 101:20, 102:2, 102:4, 102:12, 102:15</p> <p>psychological [1] - 59:11</p> <p>public [17] - 60:16, 67:21, 68:9, 68:21, 68:23, 69:7, 69:12, 69:15, 71:8, 86:19, 86:20, 93:22, 93:25, 108:20, 109:4, 110:9</p> <p>publicly [1] - 70:22</p> <p>pull [5] - 5:22, 14:7, 40:11, 109:3</p> <p>pulling [3] - 5:23, 6:2, 109:4</p> <p>pure [1] - 36:6</p> <p>purely [1] - 89:6</p> <p>purple [1] - 7:14</p> <p>purpose [9] - 11:10, 47:4, 81:11, 81:13, 81:17, 81:18, 93:3, 93:8, 95:12</p> <p>purposes [8] - 22:24, 36:1, 45:1, 46:25, 47:5, 105:4, 107:17</p> <p>push [1] - 124:13</p> <p>pushing [1] - 45:20</p> <p>put [6] - 12:12, 19:21, 26:17, 38:17, 79:20, 132:14</p> <p>putting [4] - 48:3, 62:9, 62:19, 132:4</p>
--	---	--

Q		
<p>quasi [1] - 49:11 quasi-criminal [1] - 49:11 Queen [4] - 39:8, 69:13, 77:8, 87:7 question [8] - 22:20, 41:18, 43:19, 44:8, 48:15, 48:24, 81:15, 89:9 questioning [1] - 54:4 Questions [1] - 4:10 questions [17] - 13:24, 14:6, 15:17, 29:15, 29:16, 33:19, 34:2, 39:18, 40:10, 44:20, 44:21, 45:8, 46:11, 46:15, 87:25, 129:4 quick [1] - 132:15 quickly [5] - 29:18, 34:7, 86:7, 108:12, 128:23 quo [2] - 120:16, 128:18 quote [5] - 74:5, 83:15, 85:18, 89:9, 93:25 quoting [1] - 115:18</p>	<p>reasons [3] - 63:4, 86:8, 87:24 rebuttal [1] - 51:14 Rebuttal)..... [1] - 4:16 rebutted [1] - 122:11 receive [1] - 52:7 received [1] - 60:18 recent [3] - 60:14, 72:22, 118:19 recently [3] - 72:9, 74:7, 83:20 recently-enacted [1] - 83:20 recess [1] - 48:12 reckless [1] - 65:5 recklessly [2] - 50:18, 81:3 recklessness [9] - 30:25, 49:3, 49:14, 49:22, 49:24, 50:3, 50:9, 64:19, 64:23 reckon [1] - 100:15 recognize [3] - 56:8, 79:18 recognized [2] - 53:1, 53:4 recommended [1] - 9:16 record [10] - 17:2, 17:3, 17:5, 20:20, 38:20, 76:15, 78:22, 79:25, 107:25, 133:8 recorded [1] - 1:24 records [1] - 89:4 Recross [1] - 4:5 RECROSS [1] - 15:23 Recross-Examination [1] - 4:5 RECROSS-EXAMINATION [1] - 15:23 redirect [1] - 14:1 Redirect [1] - 4:4 REDIRECT [1] - 14:2 redressability [1] - 77:5 refer [1] - 41:12 reference [1] - 114:12 referred [1] - 122:18 referring [2] - 11:1, 114:6 refers [1] - 124:3 Reform [1] - 84:25 refusing [1] - 92:9 regard [6] - 40:6, 42:19, 44:7, 48:25, 92:12, 103:6 regarding [3] - 79:9, 85:23, 103:13 regardless [3] - 27:3, 90:18, 117:19 regards [1] - 124:10 regulate [3] - 66:12, 93:9, 100:21 regulated [6] - 42:11, 79:24, 84:14, 92:3, 93:21, 103:10 regulates [3] - 51:24, 60:7, 93:22 regulating [9] - 41:22, 41:24, 66:3, 94:18, 95:18, 95:21, 95:22, 101:2 regulation [7] - 61:11, 93:2, 93:3, 93:4, 93:7, 94:21, 95:16 regulations [1] - 101:4 reiterate [3] - 46:25, 112:10, 116:5 reiterated [1] - 58:7 rejected [1] - 90:7 relate [1] - 79:15 related [2] - 34:18, 42:1 relating [1] - 123:12 relations [1] - 125:15</p>	<p>relative [4] - 29:6, 42:15, 80:5, 128:21 relatively [1] - 100:11 relief [3] - 73:18, 97:19, 105:4 rely [1] - 112:4 remedy [2] - 88:21, 88:24 remember [2] - 114:2, 117:19 reminder [1] - 86:10 remove [1] - 20:9 renew [2] - 19:22, 20:1 Reno [18] - 35:6, 42:17, 43:9, 44:2, 52:5, 53:9, 53:11, 56:16, 58:7, 58:9, 63:14, 63:18, 63:20, 65:13, 100:24, 100:25, 101:8 rent [1] - 68:22 Renton [1] - 97:18 repeat [4] - 66:6, 79:12, 82:2, 113:1 replaced [1] - 60:20 Reporter [4] - 3:9, 3:9, 133:6, 133:10 reporter [3] - 25:11, 128:3, 128:4 REPORTER'S [1] - 133:5 represent [3] - 78:23, 111:18, 112:9 representations [2] - 55:12, 56:13 represented [1] - 76:17 request [2] - 127:9, 127:14 require [3] - 33:8, 49:25, 57:8 required [4] - 35:22, 89:11, 98:20, 114:25 requirement [14] - 30:25, 31:1, 48:19, 48:21, 49:9, 49:12, 64:17, 91:23, 94:10, 94:13, 95:10, 100:21, 103:2 requirements [1] - 121:22 requires [1] - 60:4 requiring [1] - 62:24 reread [1] - 34:8 reserve [1] - 73:5 resolved [1] - 44:4 respect [10] - 20:3, 20:5, 23:3, 23:7, 24:9, 25:15, 27:18, 28:22, 28:24, 83:3 respond [1] - 48:24 respondents [1] - 85:10 Respondents' [1] - 85:7 response [9] - 29:9, 29:10, 34:10, 51:6, 80:2, 80:14, 98:22, 102:13, 132:2 Response..... [1] - 4:8 responses [2] - 80:18, 82:8 responsibility [1] - 108:11 responsible [2] - 107:22, 119:25 rest [13] - 7:11, 17:1, 17:8, 33:24, 34:1, 44:18, 51:14, 56:10, 73:5, 88:25, 89:1, 118:4, 118:10 Rest..... [2] - 4:6, 4:9 restate [1] - 112:5 restaurant [2] - 8:6, 87:8 restaurants [1] - 7:23 restraining [5] - 36:18, 47:1, 128:17, 130:5, 131:8 restraint [4] - 67:25, 68:4, 69:16, 89:8 restrict [6] - 74:8, 83:20, 84:10, 84:15,</p>
R		
<p>R [5] - 5:1, 9:23, 10:3, 54:14, 54:16 R-rated [2] - 54:14, 54:16 raise [1] - 89:2 raised [1] - 112:2 RAMON [1] - 2:16 range [1] - 89:20 rare [1] - 50:13 rated [3] - 9:23, 54:14, 54:16 rather [2] - 71:22, 87:10 rating [3] - 9:19, 10:3, 10:9 ratings [1] - 10:3 rea [16] - 48:17, 48:19, 48:21, 49:9, 49:12, 49:25, 50:9, 50:17, 50:18, 50:19, 64:17, 64:24, 98:20, 102:16, 102:17, 103:5 reach [2] - 38:23, 125:20 reached [2] - 114:24, 128:14 reaction [1] - 85:9 read [8] - 55:7, 55:15, 56:2, 83:15, 85:18, 112:13, 124:21, 128:13 reading [5] - 19:2, 21:20, 33:9, 58:1, 64:18 ready [3] - 5:4, 78:21, 107:9 Reagan [1] - 77:23 real [2] - 12:25, 99:4 really [20] - 8:4, 13:1, 19:11, 27:1, 32:21, 46:19, 47:19, 57:17, 63:14, 64:24, 66:16, 67:18, 67:25, 80:21, 103:1, 113:7, 119:10, 124:5, 124:12, 128:14 reason [4] - 7:24, 41:9, 97:19, 104:9 reasonable [12] - 43:1, 57:4, 63:22, 64:9, 67:1, 67:14, 85:8, 85:13, 97:5, 97:6, 102:9 reasonable-person [1] - 102:9 reasonably [2] - 54:24, 102:10 reasoning [1] - 112:25</p>		

93:4, 97:23
restricted [4] - 36:3, 40:15, 60:1, 66:15
restricting [1] - 97:11
restriction [8] - 40:2, 40:5, 52:3, 60:4, 61:8, 65:8, 68:11, 68:21
restrictions [1] - 40:4
restrictive [8] - 7:25, 34:22, 95:1, 95:3, 95:6, 95:7, 96:23, 125:8
restricts [2] - 44:12, 100:8
result [2] - 80:25, 84:21
results [1] - 99:5
reveal [1] - 6:17
review [3] - 58:11, 63:19, 100:6
reviewed [1] - 92:25
reviewing [1] - 58:1
right [101] - 5:7, 5:18, 7:3, 8:23, 9:11, 9:12, 10:16, 10:25, 12:23, 15:22, 16:1, 16:20, 17:16, 18:10, 18:15, 29:10, 30:15, 32:1, 32:4, 33:20, 33:23, 33:25, 34:10, 35:9, 36:15, 38:3, 38:21, 39:11, 39:17, 40:12, 40:23, 42:14, 43:3, 43:23, 44:19, 44:24, 45:13, 47:8, 48:7, 48:14, 49:5, 49:17, 49:18, 51:7, 51:15, 51:18, 53:7, 53:16, 55:15, 55:24, 60:24, 68:18, 69:3, 69:5, 69:11, 71:20, 74:24, 76:16, 77:1, 78:12, 78:15, 78:16, 80:6, 81:19, 81:22, 83:15, 84:21, 91:19, 97:16, 98:14, 98:18, 99:14, 99:19, 101:16, 105:15, 105:20, 106:22, 107:8, 107:11, 107:13, 111:16, 111:20, 112:17, 112:19, 113:14, 113:20, 117:17, 118:1, 119:7, 120:24, 121:13, 123:24, 127:5, 128:3, 128:8, 129:13, 130:16, 130:21, 131:22, 132:3
rights [8] - 54:5, 57:21, 57:23, 59:23, 60:4, 63:6, 72:8, 76:9
Rights [2] - 90:6, 92:1
ripe [1] - 35:16
ripeness [3] - 35:23, 36:1
rise [4] - 5:2, 48:10, 48:13, 133:1
risk [2] - 85:9, 89:3
RMR [2] - 3:9, 133:6
road [1] - 113:6
ROBERT [1] - 2:13
Rocha [4] - 77:15, 113:4, 115:3, 125:25
Rockefeller [1] - 2:6
ROESSLER [1] - 2:5
Rohles [1] - 39:19
ROHLES [1] - 2:1
role [2] - 35:4, 42:14
Ronald [1] - 77:23
room [3] - 64:1, 68:23, 129:8
Room [1] - 3:11
round [3] - 12:13, 47:23, 113:19
routinely [1] - 13:8
routines [3] - 10:15, 10:17, 28:5
row [1] - 48:4
rub [1] - 119:10
ruin [1] - 128:11

Rule [1] - 17:12
rule [5] - 34:7, 51:25, 83:16, 89:10, 119:13
rules [3] - 106:11, 106:12, 131:19
ruling [2] - 19:21, 32:3
Rumsfeld [3] - 90:5, 91:24, 91:25
run [3] - 64:2, 89:7, 124:7
running [1] - 71:22
runs [2] - 106:19, 110:7
Rusk [1] - 3:11
Russell [2] - 78:3, 78:7

S

S [1] - 5:1
safeguards [1] - 70:6
Safety [1] - 75:16
said [57] - 6:9, 15:25, 22:21, 23:17, 23:20, 23:21, 30:23, 36:17, 39:13, 41:15, 42:18, 46:6, 47:16, 47:19, 47:20, 48:5, 50:12, 55:21, 62:18, 66:7, 68:6, 77:18, 77:19, 77:22, 78:11, 79:13, 81:23, 82:6, 82:13, 82:18, 83:15, 84:6, 85:5, 85:6, 85:22, 85:24, 86:16, 88:7, 92:15, 93:15, 94:11, 95:16, 101:15, 102:2, 108:25, 109:19, 112:2, 112:10, 112:24, 113:7, 117:17, 117:18, 123:16, 125:7, 126:5, 129:6
sale [1] - 59:4
salvaged [1] - 56:25
same [13] - 9:21, 12:16, 19:18, 35:12, 46:24, 62:17, 86:23, 109:5, 114:11, 117:13, 125:15, 131:6, 132:24
same-sex [1] - 125:15
San [1] - 3:7
save [2] - 49:15, 51:14
saved [1] - 56:25
saw [1] - 73:25
say [58] - 6:11, 6:15, 7:25, 8:2, 10:17, 11:13, 11:23, 12:9, 12:25, 17:19, 20:18, 32:22, 33:16, 35:24, 36:6, 41:11, 48:8, 50:4, 51:3, 57:5, 60:25, 66:15, 67:11, 67:12, 68:13, 70:24, 78:11, 78:12, 79:12, 79:21, 81:4, 82:19, 85:13, 99:20, 101:18, 101:21, 101:22, 102:22, 103:2, 105:2, 110:13, 110:15, 110:19, 110:20, 115:18, 115:19, 117:5, 117:12, 124:16, 124:23, 125:9, 125:10, 128:6, 130:18, 131:22, 131:24
saying [17] - 13:3, 40:19, 47:10, 61:7, 71:6, 75:19, 95:3, 96:18, 98:3, 99:3, 110:3, 110:4, 113:17, 118:23, 123:1, 123:24, 130:11
says [23] - 11:12, 11:14, 11:16, 17:9, 21:23, 32:5, 33:1, 50:16, 51:1, 68:9, 86:18, 86:22, 90:7, 92:1, 108:4, 108:18, 109:15, 113:25, 114:10, 115:19, 115:20, 117:23, 124:23
SB [41] - 13:17, 13:21, 18:16, 20:12, 27:9, 28:19, 54:4, 55:18, 57:5, 57:7,

57:14, 57:16, 60:19, 60:21, 65:15, 73:24, 79:9, 79:22, 79:24, 80:1, 80:16, 83:2, 83:4, 83:6, 83:11, 84:8, 84:14, 86:5, 90:16, 93:19, 94:18, 95:13, 95:21, 97:17, 98:6, 98:11, 98:16, 100:4, 103:12, 106:16, 106:18
scale [2] - 62:9, 62:20
Scalia [5] - 59:2, 59:8, 59:13, 59:23, 95:15
scenario [1] - 98:25
scenarios [1] - 99:6
schedule [1] - 39:10
Schonberg [1] - 125:21
school [1] - 63:9
schools [1] - 56:20
science [1] - 132:12
scientific [3] - 55:14, 56:19, 63:8
scope [1] - 15:6
screen [3] - 18:1, 18:6, 21:24
screens [1] - 18:9
scrutiny [28] - 34:12, 34:15, 34:25, 35:7, 36:14, 43:13, 43:15, 43:25, 59:9, 59:14, 59:21, 62:18, 62:24, 63:1, 65:15, 89:24, 92:25, 93:1, 93:6, 93:12, 95:17, 95:20, 96:23, 100:4, 100:6, 126:13
seated [2] - 5:3, 48:14
second [12] - 13:7, 21:19, 22:5, 24:15, 25:25, 31:18, 32:4, 56:12, 56:15, 92:12, 94:8, 113:14
Section [30] - 19:9, 21:22, 33:4, 37:22, 37:23, 37:24, 38:1, 49:1, 49:4, 49:7, 49:22, 49:25, 50:10, 55:2, 55:5, 68:1, 68:2, 68:7, 69:9, 76:4, 76:7, 76:10, 79:4, 82:1, 101:24, 108:17, 110:6, 124:3, 124:14, 124:15
section [10] - 37:21, 64:21, 64:23, 82:7, 82:14, 97:25, 102:8, 114:10, 124:2, 124:10
sections [2] - 76:2, 123:25
Sections [2] - 79:9, 123:12
SECURITY [1] - 133:1
security [1] - 115:6
see [20] - 8:4, 8:14, 15:4, 15:12, 16:6, 30:14, 30:23, 32:3, 32:7, 34:3, 38:21, 39:24, 43:17, 46:20, 48:8, 58:2, 80:22, 98:4, 98:21, 127:11
seeing [3] - 41:16, 43:2, 44:22
seek [1] - 85:10
seeking [2] - 97:19, 105:9
seeks [1] - 89:20
seem [2] - 102:3, 102:4
seems [2] - 82:10, 101:21
seen [3] - 30:11, 31:3, 60:6
sees [3] - 42:21, 64:1, 65:2
self [10] - 32:12, 84:19, 84:21, 85:23, 85:25, 86:2, 86:4, 87:16, 97:11, 97:13
self-censor [1] - 85:23
self-censoring [1] - 85:25
self-censorship [1] - 32:12
self-evidently [1] - 87:16

self-inflicted [6] - 84:19, 84:21, 86:2, 86:4, 97:11, 97:13
senate [1] - 38:22
Senate [35] - 36:2, 40:17, 40:25, 41:25, 42:2, 43:12, 44:10, 44:13, 48:20, 51:23, 63:22, 65:10, 75:7, 75:16, 82:15, 88:7, 92:24, 95:5, 95:8, 96:24, 97:22, 99:19, 99:21, 99:23, 100:1, 100:18, 100:20, 102:5, 102:8, 103:20, 104:7, 105:7, 105:12, 106:12, 129:1
Senator [1] - 41:14
senior [1] - 31:23
sense [1] - 110:12
sentence [1] - 114:9
sentencing [1] - 107:19
separate [2] - 76:1, 106:7
serious [2] - 55:13, 56:18
servant [1] - 121:14
served [1] - 113:17
session [1] - 105:23
set [6] - 44:20, 45:13, 57:7, 100:17, 127:3, 131:6
sets [1] - 124:9
settle [1] - 47:6
seven [1] - 45:8
severability [4] - 123:10, 123:18, 123:20, 123:22
severable [4] - 37:25, 123:13, 123:19, 124:16
several [1] - 58:9
sex [37] - 11:9, 11:17, 19:12, 21:16, 21:18, 22:4, 22:12, 22:13, 22:16, 22:19, 22:24, 22:25, 23:1, 26:1, 26:2, 26:6, 27:3, 30:11, 42:25, 55:11, 56:7, 56:9, 56:14, 57:3, 57:6, 57:11, 57:17, 58:4, 67:4, 67:10, 67:13, 82:5, 125:15
sexual [50] - 10:15, 10:17, 10:19, 10:20, 10:24, 11:10, 19:10, 21:13, 21:14, 21:15, 21:18, 21:23, 22:2, 22:6, 23:9, 24:12, 24:21, 24:23, 25:4, 26:13, 27:23, 27:24, 30:16, 30:17, 35:3, 42:9, 42:24, 52:24, 61:12, 61:18, 61:19, 61:20, 61:25, 62:11, 62:13, 65:8, 67:2, 67:3, 67:20, 68:20, 79:19, 82:2, 82:3, 93:15, 93:16, 93:18, 103:20, 103:21
Sexual [1] - 26:12
sexually [25] - 21:22, 40:16, 41:1, 41:17, 41:21, 42:22, 44:1, 44:11, 52:1, 52:24, 54:21, 60:7, 60:19, 60:22, 68:8, 72:19, 72:20, 86:12, 100:22, 103:8, 103:10, 104:8, 124:4, 125:3, 126:12
Shakespeare [3] - 56:23, 65:21, 66:19
shape [1] - 12:14
share [1] - 59:19
shared [1] - 73:8
she [18] - 24:17, 30:13, 64:1, 64:2, 65:2, 65:4, 73:12, 74:6, 79:10, 82:11, 82:12, 82:13, 84:15, 85:22, 87:18, 87:19, 126:7
she's [2] - 63:24, 98:5

Shell [1] - 2:2
shelter [1] - 125:11
shielded [1] - 125:20
shift [1] - 113:23
shifts [1] - 59:9
shirt [3] - 6:3, 6:21, 6:24
short [5] - 44:25, 89:15, 107:2, 126:15, 128:22
short-circuit [1] - 89:15
shortcuts [1] - 20:25
should [33] - 11:8, 11:20, 17:19, 22:11, 22:18, 23:4, 23:6, 24:4, 24:8, 25:8, 25:14, 26:10, 28:20, 31:5, 34:13, 40:21, 41:4, 67:20, 79:4, 79:9, 80:22, 81:1, 88:25, 89:8, 89:12, 92:24, 101:14, 109:21, 118:14, 124:8, 127:25, 128:5
shouldn't [2] - 24:9, 40:19
show [63] - 6:5, 6:6, 6:7, 7:5, 7:17, 7:21, 7:25, 8:9, 8:22, 9:1, 9:2, 9:6, 9:16, 11:4, 12:20, 15:12, 16:4, 16:7, 16:10, 16:11, 16:17, 18:1, 18:2, 21:11, 24:5, 26:7, 32:15, 33:12, 34:21, 39:25, 42:10, 43:3, 54:1, 59:10, 60:5, 63:3, 63:7, 63:10, 69:2, 73:13, 73:19, 73:20, 73:23, 74:11, 79:23, 81:15, 82:9, 82:18, 82:19, 82:24, 83:6, 85:17, 86:21, 87:14, 99:10, 110:9, 119:3, 120:6, 123:2, 123:4, 123:6
showed [3] - 7:13, 59:11, 81:13
showing [5] - 7:6, 28:17, 59:12, 62:6, 63:10
shown [4] - 30:21, 74:14, 74:19, 86:6
shows [45] - 5:14, 5:20, 5:21, 5:24, 5:25, 7:5, 7:16, 9:13, 10:8, 10:9, 10:19, 10:20, 13:9, 14:23, 25:21, 30:13, 40:17, 42:15, 54:10, 54:21, 60:15, 60:18, 60:20, 61:7, 62:3, 65:3, 66:3, 66:10, 66:12, 66:15, 66:18, 69:14, 72:19, 79:18, 82:17, 82:20, 83:4, 85:11, 87:12, 88:6, 97:14, 97:16, 125:5
shut [4] - 39:11, 48:5, 98:23, 120:21
side [8] - 38:6, 38:18, 45:2, 45:18, 50:14, 51:16, 54:9, 83:12
sidewalk [1] - 15:16
signed [1] - 41:4
significant [2] - 21:6, 51:23
significantly [1] - 77:9
signing [1] - 71:1
signs [1] - 46:23
similar [9] - 37:1, 40:1, 54:14, 69:19, 70:21, 71:7, 72:17, 77:18, 116:18
similarly [2] - 86:4, 95:13
simply [21] - 52:23, 58:5, 58:21, 58:23, 59:5, 61:24, 62:10, 67:12, 67:22, 90:17, 92:4, 94:15, 94:19, 96:10, 97:2, 108:18, 108:23, 116:8, 124:10, 124:17, 126:10
simulate [2] - 23:18, 23:22
simulated [12] - 11:9, 14:16, 14:20, 21:18, 22:12, 22:16, 22:19, 22:24, 23:1, 23:8, 23:12, 25:16

since [5] - 12:23, 25:1, 34:9, 45:4, 128:12
single [2] - 80:17, 122:4
singles [2] - 39:25, 40:17
sir [9] - 15:19, 15:20, 20:21, 29:19, 42:6, 78:21, 106:3, 113:15, 113:20
sit [4] - 48:6, 65:4, 132:15, 132:16
situation [5] - 94:17, 95:1, 109:8, 110:23, 119:11
situations [1] - 88:17
six [8] - 29:4, 34:1, 44:19, 45:14, 47:21, 76:17, 127:5
size [1] - 23:16
skip [1] - 83:8
slice [1] - 66:12
slashes [1] - 106:25
slightly [2] - 72:4, 94:15
slow [6] - 7:12, 19:2, 19:5, 22:7, 25:9, 53:24
slowly [1] - 83:15
small [1] - 54:22
Small [1] - 52:19
smiling [1] - 27:20
Smith [3] - 3:9, 133:6, 133:10
sneak [1] - 80:10
so [197] - 6:1, 6:4, 7:23, 8:3, 9:13, 9:14, 10:4, 12:11, 12:14, 13:3, 16:12, 18:16, 19:2, 19:13, 20:5, 20:11, 20:22, 20:24, 21:10, 21:23, 21:25, 22:5, 22:9, 23:3, 23:25, 24:9, 24:18, 24:23, 25:14, 26:9, 27:3, 27:14, 27:15, 27:17, 28:12, 29:5, 32:2, 32:20, 33:10, 35:13, 36:22, 37:9, 37:24, 38:10, 38:11, 38:13, 39:11, 39:22, 40:7, 40:14, 40:19, 41:3, 42:1, 42:8, 42:11, 42:16, 42:17, 42:25, 43:18, 43:24, 44:22, 45:5, 45:6, 45:14, 45:18, 46:5, 46:8, 47:4, 47:16, 48:2, 48:7, 49:6, 50:16, 50:19, 51:3, 53:14, 53:17, 55:18, 57:10, 59:17, 61:10, 62:12, 63:18, 64:11, 65:22, 66:2, 66:9, 66:25, 67:5, 67:18, 68:19, 68:22, 69:9, 70:8, 71:6, 71:21, 72:21, 73:4, 74:11, 74:21, 75:7, 75:17, 76:1, 76:23, 78:22, 79:4, 79:8, 79:13, 80:11, 80:14, 80:16, 80:22, 82:12, 82:14, 82:25, 83:10, 84:9, 84:15, 84:18, 85:11, 85:13, 87:4, 87:23, 91:17, 91:20, 92:5, 93:16, 96:18, 97:9, 97:25, 98:14, 98:18, 99:10, 100:15, 101:9, 101:22, 102:9, 102:15, 102:16, 103:21, 105:9, 106:10, 106:15, 106:19, 106:21, 107:23, 108:9, 109:14, 109:19, 111:13, 111:16, 112:4, 112:25, 113:9, 113:11, 113:18, 114:14, 115:22, 116:1, 116:21, 117:8, 117:9, 117:13, 117:19, 118:7, 119:8, 119:22, 120:2, 120:22, 121:13, 121:25, 122:11, 123:17, 123:24, 123:25, 124:4, 126:24, 127:7, 127:12, 128:1, 128:21, 130:12, 130:20, 130:21, 131:7, 131:11, 131:13, 131:17, 131:20, 132:9, 132:13, 132:17, 132:25

so-called [2] - 38:10, 42:8
soccer [1] - 98:2
societal [1] - 94:9
softball [1] - 23:16
sold [1] - 82:20
solely [1] - 66:18
some [41] - 5:14, 6:12, 8:17, 10:18, 10:19, 21:8, 28:22, 29:6, 34:3, 35:4, 36:14, 36:17, 37:16, 37:20, 41:3, 49:10, 50:12, 55:24, 59:24, 59:25, 66:9, 66:14, 67:9, 67:20, 70:6, 71:21, 75:11, 79:18, 82:20, 83:16, 86:7, 88:17, 92:15, 92:24, 94:1, 95:17, 96:16, 99:18, 114:23, 120:9
somebody [8] - 8:14, 12:11, 25:24, 26:2, 49:12, 53:12, 62:12, 63:9
somehow [4] - 30:18, 58:22, 62:23, 117:12
someone [4] - 31:4, 44:15, 102:20, 120:16
something [20] - 6:9, 6:12, 7:8, 7:9, 7:19, 8:13, 12:3, 12:18, 15:19, 22:21, 41:8, 42:5, 47:1, 51:17, 81:3, 98:22, 99:7, 103:1, 114:22, 127:13
sometimes [9] - 8:10, 8:12, 9:17, 14:25, 15:4, 82:9, 119:19, 119:20, 126:6
somewhere [3] - 18:9, 47:7, 49:17
soon [2] - 121:18, 129:9
sorry [13] - 7:12, 22:7, 25:12, 30:8, 77:1, 80:9, 81:9, 82:15, 83:1, 83:25, 85:16, 101:16, 123:3
sort [5] - 36:23, 50:12, 106:24, 109:21, 120:9
sought [1] - 113:5
sound [1] - 98:9
source [1] - 126:3
Southern [1] - 133:6
SOUTHERN [1] - 1:1
southern [1] - 3:10
sovereign [7] - 74:25, 75:3, 78:25, 79:1, 79:10, 112:3, 112:12
space [13] - 16:9, 87:3, 87:7, 87:10, 87:11, 87:13, 87:16, 87:18, 87:19, 87:20, 87:22
spaces [2] - 8:4, 77:13
sparingly [1] - 101:15
speak [1] - 29:5
speaking [2] - 29:3, 85:16
speaks [1] - 41:11
specific [8] - 11:4, 42:2, 45:15, 62:21, 67:6, 86:7, 96:22, 117:1
specifically [15] - 40:25, 41:7, 41:15, 41:25, 42:18, 61:17, 62:16, 93:14, 95:19, 106:23, 113:25, 115:21, 116:17, 122:11, 131:8
speculate [1] - 27:25
speculation [2] - 89:1, 89:7
speculative [7] - 27:7, 99:1, 99:4, 113:9, 117:9, 117:14

speech [33] - 32:10, 32:12, 33:12, 33:13, 34:17, 34:19, 35:11, 36:11, 39:13, 40:4, 57:18, 67:24, 68:4, 72:23, 74:3, 77:7, 88:7, 90:2, 90:8, 91:22, 92:2, 92:3, 92:7, 92:11, 97:23, 100:8, 101:10, 109:17, 120:23, 121:1, 121:5, 121:8, 122:7
Speech [11] - 73:10, 74:6, 83:14, 84:7, 85:18, 113:13, 113:22, 113:24, 114:7, 121:7, 122:16
speed [1] - 19:2
split [1] - 51:7
spoke [1] - 116:13
squelching [1] - 121:4
stage [6] - 15:25, 20:10, 64:2, 64:15, 115:23, 115:24
stand [4] - 5:5, 27:12, 37:20, 132:25
standard [30] - 25:25, 31:7, 43:15, 50:4, 57:5, 57:8, 62:18, 64:20, 85:18, 85:19, 91:14, 93:12, 93:17, 96:21, 98:8, 98:19, 99:9, 100:15, 102:10, 102:11, 102:20, 113:21, 116:4, 117:13, 122:16, 122:19, 122:23, 123:9
standards [5] - 55:10, 56:6, 57:9, 67:15, 122:13
standing [42] - 17:22, 21:10, 22:10, 23:5, 24:4, 28:19, 28:22, 28:25, 32:13, 32:14, 35:1, 35:24, 40:7, 55:7, 57:22, 73:6, 77:3, 79:11, 80:1, 80:5, 84:17, 84:21, 85:8, 85:12, 85:15, 85:25, 86:1, 86:8, 87:5, 87:23, 96:5, 97:4, 106:23, 107:17, 108:9, 108:12, 112:12, 112:25, 113:24, 114:9, 116:22, 124:15
standpoint [1] - 91:9
start [7] - 19:13, 46:19, 71:22, 88:11, 128:1, 129:9
started [1] - 71:21
starting [1] - 31:20
starts [2] - 34:5, 48:2
state [29] - 23:9, 23:24, 37:1, 37:2, 41:20, 46:24, 50:17, 70:20, 71:7, 71:8, 77:20, 78:16, 79:2, 79:3, 97:1, 105:21, 106:6, 107:20, 110:2, 110:4, 111:24, 112:1, 118:14, 119:9, 121:11, 121:23, 122:7, 127:10
State [36] - 33:3, 33:24, 34:21, 35:2, 35:7, 42:18, 43:8, 44:2, 45:10, 58:3, 59:3, 59:10, 59:18, 60:2, 61:8, 65:6, 65:12, 66:11, 75:6, 94:5, 100:12, 107:20, 109:21, 109:24, 110:16, 110:17, 111:12, 119:21, 121:14, 122:2, 122:5, 127:18, 129:18, 131:5, 131:13
state's [3] - 94:8, 95:12, 95:14
stated [3] - 75:23, 78:15, 126:16
statement [3] - 20:18, 30:4, 60:13
statements [1] - 66:14
states [1] - 37:12
STATES [2] - 1:1, 1:11
States [3] - 3:10, 52:19, 133:6
Station [1] - 2:10

status [2] - 120:16, 128:18
statute [62] - 20:17, 25:7, 26:9, 26:10, 30:24, 32:6, 32:18, 32:19, 32:23, 33:13, 34:16, 37:3, 37:25, 49:20, 49:23, 50:17, 51:1, 52:2, 54:2, 58:2, 58:22, 59:14, 61:10, 64:11, 65:5, 68:15, 68:17, 68:25, 70:2, 70:3, 70:7, 88:14, 88:17, 89:3, 93:25, 94:3, 94:4, 94:25, 98:13, 98:15, 98:19, 99:5, 102:1, 102:21, 106:5, 106:13, 106:24, 108:4, 108:20, 116:8, 123:3, 123:5, 123:13, 124:3, 124:7, 124:10, 124:16, 124:22, 125:8, 130:10
statutes [2] - 74:7, 83:20
statutorily [1] - 76:4
stay [2] - 35:1, 130:6
STDs [2] - 24:23, 24:24
steep [1] - 53:20
stenography [1] - 1:24
step [3] - 16:23, 35:25, 95:2
steps [1] - 119:23
sterile [2] - 27:11, 27:19
Stewart [1] - 58:19
still [32] - 16:13, 27:11, 34:13, 34:20, 34:21, 34:24, 35:6, 43:6, 43:24, 49:6, 49:23, 50:10, 54:10, 56:25, 57:22, 59:13, 59:20, 62:25, 64:15, 65:9, 68:24, 72:6, 92:24, 97:17, 100:5, 100:11, 100:22, 101:19, 120:22, 122:1, 125:15, 132:5
stimulation [7] - 23:10, 24:13, 24:21, 24:23, 25:4, 30:17, 82:4
stipulate [1] - 118:25
stipulated [1] - 118:21
STOECKL [1] - 3:1
STONE [35] - 2:9, 5:8, 5:13, 7:4, 8:24, 9:11, 10:14, 11:18, 13:11, 13:12, 13:23, 15:5, 15:21, 15:24, 16:19, 17:11, 17:14, 17:18, 18:7, 18:10, 18:14, 18:16, 19:4, 19:7, 19:25, 20:5, 20:19, 21:1, 21:21, 25:10, 25:12, 25:14, 26:24, 33:24, 107:5
stone [3] - 79:13, 80:2, 80:14
Stone..... [1] - 4:5
Stone..... [1] - 4:4
stop [7] - 8:9, 8:13, 16:8, 63:25, 77:7, 78:4, 107:1
stopped [2] - 9:24, 10:1
story [1] - 47:9
strange [1] - 119:11
Strayer [1] - 2:17
Street [4] - 1:23, 2:3, 2:14, 3:2
street [3] - 30:15, 49:13, 65:3
streets [1] - 86:23
strict [15] - 35:7, 43:13, 43:15, 43:24, 49:6, 59:8, 59:9, 59:13, 62:17, 62:24, 62:25, 93:6, 100:4, 100:6
strike [1] - 24:18
strikes [1] - 106:18
strings [2] - 94:14, 95:11
strip [1] - 42:10

strongly [1] - 47:16
struck [2] - 63:21, 69:19
students [1] - 63:11
studies [1] - 59:11
stuff [5] - 6:3, 8:3, 9:18, 12:5, 16:17
subject [11] - 36:14, 39:5, 40:4, 53:19, 59:8, 62:17, 64:9, 93:5, 95:19, 98:11, 125:6
subjective [3] - 91:17, 117:8, 117:13
submissions [1] - 128:16
submit [5] - 46:14, 46:18, 90:12, 102:6, 105:6
Subpart [1] - 114:25
subquestion [1] - 42:13
subsections [1] - 55:25
subsidiary [1] - 105:21
substance [2] - 40:6, 123:18
substantial [3] - 17:25, 28:13, 94:5
succinctly [1] - 125:18
such [8] - 41:21, 42:10, 55:25, 68:10, 89:20, 96:20, 100:16, 123:13
sue [9] - 75:10, 75:11, 75:19, 79:3, 84:21, 110:19, 121:4, 121:16, 122:8
sued [9] - 37:1, 74:16, 75:10, 75:13, 76:15, 111:7, 111:8, 111:12
suffered [1] - 85:3
sufficient [3] - 17:21, 32:12, 91:1
suit [2] - 98:14, 110:3
Suite [5] - 1:16, 2:14, 2:21, 2:24, 3:3
sum [2] - 19:19, 28:16
summarization [1] - 30:3
summary [3] - 19:20, 30:2, 51:7
summation [2] - 38:6, 45:3
Super [1] - 81:16
support [3] - 27:6, 59:25, 60:2
supporting [1] - 68:15
supposed [1] - 64:1
supposedly [2] - 66:15, 92:15
suppress [2] - 62:20, 72:23
suppressing [1] - 94:18
suppression [5] - 34:17, 34:19, 93:9, 94:10, 94:12
Supreme [21] - 33:16, 39:13, 42:17, 52:22, 53:4, 56:17, 58:7, 58:13, 59:1, 65:13, 67:22, 74:22, 75:6, 85:6, 89:13, 92:1, 93:23, 100:10, 101:15, 115:15, 125:17
sure [7] - 13:5, 18:4, 19:2, 53:13, 58:20, 61:4, 99:16
Surovik [1] - 2:13
surveillance [1] - 85:5
survive [2] - 43:24, 65:14
survives [1] - 95:17
surviving [1] - 43:13
sustain [1] - 77:20
Suttle [1] - 2:13
Swallow [1] - 2:17
sweep [2] - 63:9, 66:19
sweeping [1] - 65:23

sweeps [1] - 33:2
swept [1] - 65:20
switching [1] - 20:22
sworn [1] - 5:10
system [1] - 9:19

T

table [3] - 39:22, 39:23, 47:15
tables [1] - 39:21
Tail [1] - 2:17
tailor [2] - 88:9, 104:21
tailored [9] - 34:24, 43:6, 43:25, 59:10, 59:15, 63:2, 63:4, 65:9, 94:24
tailoring [1] - 60:3
take [24] - 5:5, 19:4, 26:20, 29:22, 39:17, 40:8, 40:9, 44:25, 45:19, 47:7, 47:16, 51:8, 75:14, 90:21, 90:23, 104:24, 106:24, 107:2, 107:4, 118:14, 127:12, 128:15, 129:13, 132:18
Taken [1] - 56:18
taken [11] - 55:10, 55:13, 56:6, 57:14, 67:6, 67:15, 73:19, 74:12, 106:6, 111:10, 119:23
takes [10] - 39:10, 46:8, 53:20, 57:2, 87:17, 99:18, 106:20, 107:23, 110:16, 119:10
taking [5] - 42:23, 43:18, 81:6, 97:14, 129:1
talk [15] - 16:17, 18:11, 18:18, 18:19, 22:9, 53:9, 67:22, 80:7, 106:15, 108:13, 119:15, 128:2, 128:8, 131:7
talked [12] - 7:22, 22:1, 23:14, 28:3, 58:9, 82:1, 82:16, 102:16, 104:4, 104:20, 113:13, 127:25
talking [18] - 7:21, 9:9, 11:24, 12:8, 12:10, 29:3, 42:15, 49:8, 73:16, 82:12, 86:3, 88:11, 92:4, 94:23, 98:1, 101:4, 113:16
talks [7] - 41:7, 56:17, 61:18, 65:13, 69:10, 102:14, 107:16
target [4] - 54:13, 57:15, 62:3, 72:23
targeted [4] - 54:12, 58:22, 65:8, 71:12
targets [1] - 51:24
task [2] - 118:15, 122:7
tasked [3] - 75:24, 76:4, 76:8
Tawakkol [1] - 75:22
TAWAKKOL [1] - 75:22
tax [2] - 42:9
taxes [3] - 92:8, 92:9, 92:10
Taylor [6] - 76:20, 76:21, 116:20, 116:21, 117:1, 121:18
TAYLOR [2] - 2:8, 2:13
teaches [1] - 121:24
teenagers [1] - 63:7
tell [9] - 33:10, 33:11, 43:16, 46:2, 47:8, 47:24, 47:25, 52:16, 107:4
telling [1] - 110:8
tells [3] - 33:14, 48:1, 110:7
temporarily [1] - 128:9

temporary [5] - 36:18, 47:1, 128:17, 130:4, 131:8
ten [1] - 107:4
ten-minute [1] - 107:4
tendency [1] - 19:1
Tennessee [11] - 37:6, 69:20, 69:25, 70:2, 70:14, 71:9, 104:5, 104:6, 104:9, 104:12, 118:19
tens [1] - 28:3
term [4] - 49:16, 58:8, 64:7, 64:9
terms [6] - 54:25, 58:2, 58:6, 63:15, 65:22, 75:15
test [21] - 27:15, 34:16, 55:7, 55:9, 55:20, 56:5, 56:10, 57:3, 63:14, 63:15, 65:13, 67:5, 67:11, 67:12, 67:14, 67:19, 70:3, 93:24, 94:4, 123:6
testified [34] - 5:10, 10:15, 14:25, 20:8, 22:25, 23:13, 23:14, 26:20, 27:23, 30:6, 30:13, 30:19, 39:4, 39:9, 53:18, 54:8, 63:24, 65:2, 73:6, 77:15, 79:20, 87:7, 91:6, 93:16, 96:2, 96:12, 104:22, 113:4, 115:3, 117:6, 125:11, 125:24, 125:25, 126:3
testify [2] - 30:7, 97:9
testimony [23] - 19:13, 20:6, 21:7, 22:14, 22:22, 23:25, 24:16, 25:1, 25:19, 27:7, 28:7, 29:21, 30:2, 30:19, 35:11, 54:9, 62:4, 64:6, 82:11, 92:20, 108:25, 116:25, 128:15
Texans [2] - 51:23, 57:18
TEXAS [4] - 1:1, 1:6, 2:13, 2:17
tEXAS [1] - 2:21
Texas [45] - 1:15, 1:17, 1:19, 1:20, 1:22, 1:23, 2:3, 2:11, 2:15, 2:18, 2:21, 2:24, 3:3, 3:7, 3:10, 3:12, 11:5, 20:16, 30:23, 31:2, 53:2, 54:15, 55:2, 55:3, 57:4, 59:18, 60:13, 60:14, 64:22, 66:10, 67:19, 69:24, 72:18, 75:6, 75:7, 102:24, 103:1, 107:20, 119:21, 125:16, 126:7, 127:19, 131:5, 133:7
Texas's [1] - 75:15
text [4] - 18:8, 50:3, 57:7, 60:9
than [19] - 5:23, 23:15, 41:15, 60:9, 65:9, 69:25, 70:6, 70:25, 71:22, 86:13, 87:10, 87:13, 89:11, 94:21, 96:2, 104:2, 114:11, 131:9
thank [38] - 5:3, 5:8, 7:12, 14:8, 15:18, 16:23, 25:10, 29:1, 43:10, 48:7, 48:9, 48:14, 50:23, 51:20, 52:10, 78:13, 78:19, 80:12, 88:2, 99:14, 105:14, 105:19, 106:4, 111:15, 111:16, 112:6, 112:14, 112:23, 116:10, 116:11, 117:16, 117:17, 118:2, 126:14, 131:4, 132:4, 132:9, 132:25
thanks [3] - 39:16, 42:12, 132:21
that [835] - 5:20, 5:24, 6:2, 6:3, 6:4, 6:5, 6:11, 6:15, 7:1, 7:17, 7:19, 7:24, 8:3, 8:13, 8:14, 8:17, 8:25, 9:5, 9:17, 10:8, 10:15, 11:1, 11:2, 11:5, 11:8, 11:11, 11:15, 11:19, 12:5, 12:6, 12:14,

12:19, 12:20, 13:4, 13:8, 13:13, 13:16, 13:18, 13:22, 14:12, 14:13, 14:16, 14:19, 14:22, 14:25, 15:25, 16:17, 17:6, 17:18, 17:20, 17:21, 17:23, 17:25, 18:11, 18:13, 18:15, 18:18, 18:19, 18:20, 18:23, 19:6, 19:8, 19:14, 19:15, 19:20, 20:2, 20:6, 20:7, 20:8, 21:2, 21:3, 21:6, 21:8, 21:10, 21:11, 21:24, 22:15, 22:18, 22:20, 22:21, 22:23, 23:1, 23:4, 23:6, 23:11, 23:13, 23:14, 23:15, 23:21, 23:22, 23:23, 24:1, 24:2, 24:4, 24:6, 24:9, 24:17, 24:18, 24:25, 25:5, 25:6, 25:20, 25:25, 26:4, 26:7, 26:8, 26:13, 26:16, 27:2, 27:4, 27:5, 27:6, 27:7, 27:9, 27:15, 27:16, 27:18, 27:21, 27:23, 28:2, 28:3, 28:5, 28:7, 28:8, 28:12, 28:13, 28:14, 28:18, 28:21, 28:24, 29:4, 29:15, 29:23, 30:6, 30:10, 30:11, 30:13, 30:16, 30:19, 30:20, 30:21, 30:22, 30:23, 30:24, 32:15, 32:17, 32:18, 32:22, 33:3, 33:10, 33:11, 34:12, 34:21, 35:7, 35:10, 35:15, 35:19, 35:25, 36:2, 36:4, 36:9, 36:25, 37:2, 37:5, 37:9, 37:15, 37:18, 37:20, 37:25, 38:1, 38:4, 38:5, 38:13, 38:19, 39:4, 39:9, 39:13, 40:2, 40:17, 40:22, 41:5, 41:7, 41:9, 41:15, 41:20, 41:24, 42:1, 42:3, 42:11, 42:18, 42:21, 42:24, 43:1, 43:3, 43:5, 43:7, 43:19, 44:6, 44:11, 44:17, 44:21, 45:11, 45:21, 45:23, 45:25, 46:15, 46:16, 46:19, 46:22, 47:6, 47:10, 47:12, 48:4, 48:24, 49:2, 49:4, 49:14, 49:16, 49:22, 49:25, 50:6, 50:7, 50:12, 50:15, 50:16, 50:21, 50:22, 51:1, 51:3, 51:5, 51:8, 51:17, 51:19, 51:22, 52:1, 52:3, 53:1, 53:8, 53:11, 53:19, 54:1, 54:2, 54:9, 54:10, 54:11, 54:12, 54:13, 54:17, 54:21, 54:24, 55:7, 55:10, 55:21, 56:6, 56:8, 56:11, 56:14, 56:22, 56:23, 56:24, 57:3, 57:13, 57:16, 57:17, 58:2, 58:3, 58:4, 58:7, 58:8, 58:16, 58:17, 58:19, 58:21, 58:22, 59:6, 59:8, 59:10, 59:14, 59:17, 59:18, 59:19, 60:4, 60:5, 60:7, 60:11, 60:17, 61:2, 61:6, 61:14, 61:16, 61:18, 61:20, 61:25, 62:4, 62:7, 62:16, 62:22, 62:24, 63:1, 63:3, 63:11, 63:14, 63:20, 63:23, 63:24, 64:2, 64:3, 64:11, 64:12, 64:14, 64:21, 64:23, 64:25, 65:2, 65:6, 65:7, 65:8, 65:11, 65:14, 65:22, 65:24, 66:2, 66:4, 66:5, 66:6, 66:9, 66:10, 66:12, 66:13, 66:22, 67:3, 67:9, 67:11, 67:20, 67:25, 68:2, 68:6, 68:9, 68:11, 68:14, 68:16, 68:19, 68:24, 69:14, 69:18, 69:20, 70:1, 70:3, 70:7, 70:10, 70:12, 70:13, 70:22, 71:7, 71:12, 71:14, 71:20, 72:2, 72:5, 72:7, 72:11, 72:14, 72:17, 73:7, 73:8, 73:9, 73:12, 73:13, 73:19, 73:20, 73:23, 74:2, 74:6, 74:7, 74:11, 74:14, 74:16, 74:19, 74:20, 74:24, 75:6, 75:7, 75:10, 75:12, 75:17, 75:19, 75:20, 75:23, 76:3, 76:5,

76:8, 76:11, 77:6, 77:16, 77:23, 77:24, 78:5, 78:15, 79:6, 79:12, 79:17, 79:18, 79:21, 79:23, 79:24, 79:25, 80:4, 80:6, 80:11, 80:13, 80:15, 80:19, 80:21, 80:22, 80:23, 80:25, 81:2, 81:3, 81:15, 81:16, 81:17, 81:18, 81:21, 81:25, 82:4, 82:6, 82:7, 82:10, 82:11, 82:13, 82:14, 82:22, 82:25, 83:2, 83:6, 83:7, 83:8, 83:10, 83:13, 83:16, 83:17, 83:20, 84:8, 84:13, 84:22, 85:7, 85:11, 85:12, 85:15, 85:17, 85:19, 85:22, 85:24, 86:1, 86:4, 86:6, 86:8, 86:15, 86:16, 87:10, 87:11, 87:14, 87:15, 87:20, 88:5, 88:7, 88:8, 88:14, 88:17, 88:18, 88:21, 89:8, 89:12, 89:21, 90:1, 90:3, 90:7, 90:10, 90:12, 90:14, 90:15, 90:16, 90:19, 90:21, 90:22, 90:23, 91:4, 91:14, 91:23, 92:1, 92:5, 92:6, 92:10, 92:13, 92:15, 92:16, 92:20, 92:22, 92:23, 93:15, 93:16, 93:25, 94:4, 94:6, 94:7, 94:9, 94:13, 94:17, 94:20, 95:6, 95:7, 95:9, 95:10, 95:15, 95:16, 95:23, 96:3, 96:5, 96:9, 96:10, 96:12, 96:18, 96:20, 96:21, 97:8, 97:9, 97:10, 97:11, 97:12, 97:15, 97:16, 97:17, 97:24, 98:3, 98:10, 98:11, 98:13, 98:15, 98:17, 98:23, 99:1, 99:3, 99:4, 99:6, 99:7, 99:8, 99:9, 99:10, 99:11, 99:20, 99:23, 99:25, 100:1, 100:2, 100:6, 100:10, 100:12, 100:16, 100:17, 100:18, 100:19, 100:21, 100:25, 101:1, 101:7, 101:8, 101:9, 101:13, 101:14, 101:18, 101:20, 101:21, 101:22, 102:1, 102:2, 102:4, 102:6, 102:7, 102:8, 102:14, 102:20, 102:21, 102:22, 102:24, 103:1, 103:2, 103:7, 103:8, 103:11, 103:22, 104:5, 104:6, 104:7, 104:8, 104:9, 104:10, 104:15, 104:18, 104:22, 104:25, 105:7, 105:8, 105:21, 106:1, 106:5, 106:18, 106:20, 106:22, 106:24, 107:15, 107:18, 107:20, 107:25, 108:1, 108:3, 108:4, 108:9, 108:10, 108:14, 108:18, 108:19, 108:21, 108:22, 108:24, 109:1, 109:3, 109:6, 109:11, 109:12, 109:15, 109:17, 109:25, 110:1, 110:5, 110:7, 110:8, 110:19, 110:20, 110:22, 111:4, 111:10, 111:22, 111:23, 112:2, 112:3, 112:4, 113:17, 113:18, 113:22, 114:2, 114:3, 114:5, 114:11, 114:20, 114:25, 115:7, 115:8, 115:10, 115:11, 115:12, 115:15, 115:17, 115:18, 115:20, 115:21, 115:24, 116:7, 117:9, 117:10, 117:17, 118:5, 118:6, 118:19, 118:21, 118:25, 119:2, 119:9, 119:13, 119:14, 119:22, 120:5, 120:7, 120:14, 120:18, 121:4, 121:13, 121:19, 121:21, 121:24, 122:4, 122:13, 123:1, 123:2, 123:4, 123:12, 123:16, 123:18, 123:24, 123:25, 124:13, 124:14, 124:16, 124:18, 124:20, 124:23, 125:3, 125:5, 125:9,

125:10, 125:17, 125:24, 125:25, 126:3, 126:5, 126:18, 127:1, 127:13, 127:14, 127:16, 127:22, 128:5, 130:6, 130:14, 130:16, 130:18, 131:13, 131:17, 131:18, 131:20, 132:5, 132:8, 132:16, 132:17, 132:22, 133:7
that's [87] - 6:1, 9:6, 9:15, 10:3, 11:11, 11:16, 14:14, 19:11, 22:1, 22:21, 24:18, 32:24, 33:12, 33:14, 33:16, 37:20, 37:24, 38:12, 38:14, 39:8, 42:8, 43:11, 43:23, 45:23, 48:9, 50:13, 51:3, 56:20, 57:9, 57:23, 58:23, 60:13, 60:24, 61:7, 61:18, 62:2, 62:8, 62:15, 62:18, 63:14, 63:18, 65:7, 66:19, 67:18, 67:21, 69:7, 70:5, 70:8, 73:10, 78:24, 79:13, 81:19, 82:23, 82:24, 84:6, 84:24, 85:2, 85:21, 86:1, 87:21, 98:16, 100:7, 102:19, 102:25, 103:1, 105:25, 107:14, 109:2, 110:17, 112:20, 115:20, 116:4, 117:2, 119:10, 120:12, 121:7, 121:14, 121:17, 122:24, 123:5, 123:9, 124:5, 127:12, 128:20, 131:20, 132:10
The [14] - 2:18, 24:11, 24:20, 28:2, 55:8, 55:9, 56:5, 64:6, 64:14, 82:2, 95:16, 120:3, 125:25, 133:3
the [1454] - 2:9, 4:10, 5:5, 5:17, 6:1, 6:13, 6:14, 6:16, 6:17, 6:18, 7:1, 7:5, 7:6, 7:7, 7:11, 7:14, 7:16, 7:22, 7:24, 8:2, 8:5, 8:6, 8:12, 8:14, 9:14, 9:15, 9:16, 9:17, 9:21, 9:24, 9:25, 10:1, 10:2, 10:3, 10:9, 10:25, 11:2, 11:14, 11:24, 11:25, 12:1, 12:2, 12:10, 12:15, 12:25, 13:1, 13:7, 13:8, 13:16, 13:23, 14:7, 14:8, 15:4, 15:5, 15:11, 15:12, 15:16, 15:25, 16:1, 16:3, 16:7, 16:8, 16:9, 16:10, 16:11, 16:13, 16:14, 16:17, 16:18, 16:19, 16:25, 17:1, 17:2, 17:7, 17:9, 17:14, 17:19, 17:20, 17:23, 18:1, 18:2, 18:5, 18:6, 18:8, 18:11, 18:12, 18:19, 18:20, 18:22, 19:9, 19:11, 19:14, 19:18, 19:19, 20:1, 20:6, 20:10, 20:16, 20:23, 21:2, 21:4, 21:5, 21:10, 21:13, 21:15, 21:16, 21:23, 21:25, 22:2, 22:3, 22:5, 22:12, 22:14, 22:17, 22:20, 22:23, 22:24, 22:25, 23:4, 23:6, 23:11, 23:12, 23:16, 23:22, 23:25, 24:1, 24:3, 24:6, 24:7, 24:12, 24:15, 24:16, 24:25, 25:2, 25:3, 25:4, 25:5, 25:7, 25:11, 25:14, 25:15, 25:17, 25:18, 25:19, 25:20, 25:24, 26:1, 26:7, 26:9, 26:10, 26:15, 26:16, 26:22, 26:25, 27:4, 27:12, 27:13, 27:14, 27:15, 27:18, 27:21, 28:1, 28:5, 28:7, 28:8, 28:10, 28:15, 28:17, 28:18, 28:19, 28:21, 28:22, 28:23, 29:4, 29:7, 29:10, 29:11, 29:12, 29:15, 29:21, 29:22, 30:1, 30:2, 30:10, 30:13, 30:14, 30:15, 30:18, 30:19, 30:22, 31:3, 31:5, 31:7, 31:13, 31:14, 31:19, 31:21, 32:2, 32:3, 32:5, 32:6, 32:11, 32:17, 32:18, 32:19, 32:20, 32:23, 32:25, 33:1, 33:2, 33:3, 33:7, 33:12, 33:13, 33:14, 33:15,

33:20, 33:24, 34:2, 34:3, 34:5, 34:9,
34:10, 34:11, 34:12, 34:14, 34:15,
34:16, 34:17, 34:18, 34:20, 34:21,
34:22, 35:2, 35:6, 35:7, 35:10, 35:12,
35:13, 35:14, 35:20, 35:21, 36:9, 36:12,
36:13, 36:15, 36:16, 36:18, 36:19,
36:20, 36:21, 36:22, 36:23, 37:1, 37:2,
37:3, 37:5, 37:9, 37:11, 37:12, 37:13,
37:14, 37:15, 37:16, 37:19, 37:20,
37:22, 37:23, 37:24, 37:25, 38:6, 38:10,
38:15, 38:18, 38:20, 38:22, 38:24, 39:6,
39:10, 39:12, 39:13, 39:14, 39:17,
39:21, 39:22, 39:25, 40:8, 40:9, 40:11,
40:12, 41:3, 41:6, 41:9, 41:10, 41:12,
41:18, 42:3, 42:7, 42:8, 42:14, 42:17,
42:18, 42:24, 43:2, 43:6, 43:8, 43:13,
43:14, 43:16, 43:25, 44:2, 44:4, 44:5,
44:12, 44:15, 44:18, 44:20, 44:21, 45:1,
45:3, 45:4, 45:8, 45:10, 45:12, 45:14,
45:17, 45:25, 46:12, 46:14, 46:17,
46:23, 46:24, 46:25, 47:8, 47:11, 47:15,
47:21, 47:22, 47:24, 48:2, 48:3, 48:4,
48:6, 48:16, 48:17, 48:19, 48:20, 48:21,
48:22, 49:1, 49:2, 49:3, 49:4, 49:9,
49:10, 49:13, 49:15, 49:23, 50:2, 50:3,
50:5, 50:14, 50:16, 50:17, 50:18, 50:19,
50:24, 50:25, 51:1, 51:2, 51:7, 51:8,
51:14, 51:15, 51:18, 51:21, 51:24,
51:25, 52:2, 52:4, 52:6, 52:13, 52:22,
52:23, 52:25, 53:1, 53:2, 53:4, 53:8,
53:11, 53:17, 53:18, 53:22, 53:25, 54:1,
54:7, 54:9, 54:11, 54:12, 54:14, 54:15,
54:17, 54:19, 54:21, 54:24, 55:1, 55:2,
55:5, 55:7, 55:8, 55:11, 55:21, 55:24,
56:4, 56:5, 56:7, 56:8, 56:9, 56:10,
56:12, 56:14, 56:15, 56:16, 56:17,
56:18, 56:25, 57:3, 57:5, 57:7, 57:10,
57:13, 57:16, 57:17, 57:18, 57:19,
57:22, 57:25, 58:1, 58:2, 58:3, 58:5,
58:6, 58:8, 58:9, 58:10, 58:11, 58:12,
58:13, 58:21, 58:25, 59:3, 59:4, 59:7,
59:8, 59:9, 59:10, 59:12, 59:13, 59:15,
59:18, 59:22, 59:23, 59:24, 60:1, 60:2,
60:3, 60:5, 60:7, 60:8, 60:9, 60:10,
60:11, 60:12, 60:13, 60:14, 60:16,
60:18, 60:21, 61:2, 61:7, 61:10, 61:13,
61:16, 61:17, 61:18, 61:22, 62:2, 62:5,
62:8, 62:9, 62:15, 62:17, 62:18, 62:19,
62:20, 62:22, 62:23, 63:1, 63:2, 63:3,
63:13, 63:14, 63:15, 63:16, 63:18,
63:19, 63:20, 64:1, 64:4, 64:5, 64:10,
64:11, 64:12, 64:13, 64:15, 64:16,
64:17, 64:18, 64:19, 64:20, 64:21,
64:22, 64:25, 65:3, 65:6, 65:11, 65:13,
65:14, 65:16, 65:21, 65:23, 65:24,
65:25, 66:2, 66:4, 66:11, 66:15, 66:17,
66:19, 66:24, 66:25, 67:1, 67:4, 67:5,
67:7, 67:11, 67:12, 67:14, 67:15, 67:16,
67:19, 67:22, 67:25, 68:2, 68:5, 68:7,
68:14, 68:15, 68:17, 68:20, 68:25, 69:1,
69:9, 69:10, 69:12, 69:13, 69:17, 69:18,

69:21, 69:24, 69:25, 70:2, 70:3, 70:5,
70:8, 70:10, 70:13, 70:19, 70:22, 70:23,
71:1, 71:9, 71:16, 71:22, 72:1, 72:4,
72:6, 72:7, 72:8, 72:13, 72:15, 72:18,
72:22, 73:5, 73:8, 73:9, 73:11, 73:12,
73:21, 73:22, 73:25, 74:1, 74:3, 74:4,
74:5, 74:8, 74:10, 74:11, 74:12, 74:14,
74:16, 74:17, 74:19, 74:21, 74:23,
74:25, 75:3, 75:5, 75:6, 75:8, 75:10,
75:11, 75:12, 75:13, 75:14, 75:15,
75:17, 75:18, 75:21, 75:22, 75:23,
75:24, 75:25, 76:2, 76:5, 76:6, 76:7,
76:11, 76:12, 76:15, 76:18, 76:19,
76:21, 76:22, 77:5, 77:6, 77:11, 77:12,
77:18, 77:19, 77:20, 77:24, 77:25, 78:3,
78:5, 78:8, 78:9, 78:11, 78:15, 78:16,
78:22, 79:4, 79:7, 79:8, 79:17, 79:18,
80:4, 80:5, 80:16, 80:17, 80:18, 81:8,
81:9, 81:12, 81:16, 82:1, 82:3, 82:9,
82:16, 82:18, 82:19, 82:20, 82:23,
82:24, 82:25, 83:5, 83:12, 83:14, 83:17,
83:18, 83:21, 83:22, 84:4, 84:6, 84:11,
84:15, 84:17, 84:18, 84:19, 84:22, 85:3,
85:6, 85:9, 85:11, 85:17, 85:18, 85:21,
85:24, 86:3, 86:8, 86:11, 86:13, 86:15,
86:16, 86:21, 87:3, 87:4, 87:8, 87:10,
87:11, 87:12, 87:13, 87:16, 87:18,
87:19, 87:20, 87:22, 87:23, 88:6, 88:8,
88:10, 88:12, 88:14, 88:17, 88:18,
88:20, 88:21, 89:2, 89:3, 89:5, 89:7,
89:10, 89:11, 89:12, 89:15, 89:16,
89:17, 89:22, 89:23, 89:25, 90:2, 90:3,
90:5, 90:6, 90:7, 90:8, 90:16, 90:17,
90:19, 90:20, 90:21, 91:1, 91:3, 91:4,
91:6, 91:7, 91:9, 91:12, 91:14, 91:15,
91:16, 91:21, 91:25, 92:1, 92:12, 92:13,
92:14, 92:15, 92:16, 92:17, 92:23,
92:25, 93:1, 93:2, 93:3, 93:7, 93:8,
93:11, 93:14, 93:17, 93:20, 93:21,
93:22, 93:23, 93:24, 94:3, 94:4, 94:5,
94:6, 94:7, 94:8, 94:9, 94:10, 94:11,
94:12, 94:13, 94:14, 94:15, 94:17,
94:20, 94:21, 94:25, 95:2, 95:6, 95:8,
95:9, 95:11, 95:12, 95:13, 95:14, 95:22,
95:23, 96:2, 96:4, 96:9, 96:12, 96:18,
96:22, 96:25, 97:2, 97:3, 97:9, 97:10,
97:14, 97:17, 97:19, 97:21, 97:22, 98:2,
98:5, 98:6, 98:7, 98:8, 98:9, 98:12,
98:13, 98:15, 98:17, 98:19, 98:20,
98:23, 98:24, 98:25, 99:4, 99:5, 99:7,
99:8, 99:9, 99:24, 99:25, 100:2, 100:5,
100:7, 100:10, 100:12, 100:20, 100:21,
100:24, 100:25, 101:1, 101:2, 101:6,
101:7, 101:8, 101:14, 101:15, 101:16,
101:18, 101:20, 101:24, 101:25, 102:1,
102:5, 102:6, 102:8, 102:10, 102:11,
102:14, 102:16, 102:20, 102:21, 103:2,
103:5, 103:6, 103:15, 103:22, 104:4,
104:5, 104:9, 104:12, 104:14, 104:17,
104:20, 104:22, 105:6, 105:8, 105:9,
105:13, 105:15, 105:16, 105:20,

105:23, 106:1, 106:6, 106:7, 106:8,
106:10, 106:11, 106:12, 106:13,
106:16, 106:18, 106:19, 106:20,
106:21, 106:23, 106:24, 106:25, 107:2,
107:13, 107:14, 107:15, 107:16,
107:18, 107:20, 107:21, 107:22,
107:23, 107:25, 108:2, 108:3, 108:4,
108:7, 108:8, 108:10, 108:12, 108:13,
108:15, 108:17, 108:19, 108:25, 109:3,
109:5, 109:6, 109:8, 109:10, 109:11,
109:13, 109:14, 109:15, 109:18,
109:19, 109:20, 109:21, 109:24,
109:25, 110:1, 110:4, 110:6, 110:7,
110:8, 110:9, 110:11, 110:12, 110:13,
110:16, 110:17, 110:18, 110:20,
110:24, 111:2, 111:4, 111:7, 111:9,
111:10, 111:12, 111:18, 111:21,
111:23, 111:24, 111:25, 112:2, 113:5,
113:8, 113:11, 113:16, 113:17, 113:21,
113:22, 113:24, 113:25, 114:3, 114:4,
114:9, 114:11, 114:14, 114:15, 114:16,
114:18, 114:19, 114:23, 114:24,
114:25, 115:7, 115:8, 115:10, 115:15,
115:18, 115:22, 115:24, 116:6, 116:17,
116:19, 116:22, 116:24, 116:25, 117:1,
117:6, 117:7, 117:12, 117:19, 118:3,
118:4, 118:5, 118:7, 118:11, 118:12,
118:13, 118:14, 118:15, 118:18,
118:19, 118:20, 118:21, 118:23,
118:24, 118:25, 119:1, 119:2, 119:8,
119:9, 119:10, 119:11, 119:17, 119:20,
119:21, 119:24, 119:25, 120:3, 120:4,
120:8, 120:10, 120:14, 120:17, 120:18,
120:20, 121:2, 121:6, 121:8, 121:9,
121:10, 121:14, 121:18, 121:20,
121:21, 121:22, 121:23, 121:25, 122:2,
122:4, 122:5, 122:7, 122:9, 122:14,
122:15, 122:16, 122:19, 122:21,
122:22, 122:23, 122:24, 123:1, 123:4,
123:6, 123:7, 123:9, 123:10, 123:12,
123:14, 123:16, 123:18, 123:25, 124:3,
124:5, 124:7, 124:8, 124:9, 124:10,
124:16, 124:17, 124:21, 124:22,
124:23, 124:24, 124:25, 125:2, 125:5,
125:7, 125:8, 125:10, 125:11, 125:13,
125:17, 125:19, 125:20, 125:21,
125:23, 125:24, 126:3, 126:4, 126:7,
126:9, 126:10, 126:11, 126:19, 126:24,
127:5, 127:8, 127:9, 127:10, 127:18,
127:23, 127:25, 128:2, 128:4, 128:5,
128:6, 128:9, 128:12, 128:15, 128:21,
128:22, 128:23, 129:2, 129:3, 129:7,
129:9, 129:16, 129:18, 129:25, 130:6,
130:8, 130:9, 130:10, 130:17, 130:19,
130:24, 131:5, 131:6, 131:11, 131:13,
131:19, 131:20, 131:24, 132:4, 132:5,
132:7, 132:11, 132:13, 132:14, 132:16,
132:21, 132:22, 132:23, 132:24, 133:7,
133:7, 133:8
THE^[292] - 1:4, 1:10, 1:11, 1:15, 2:8,
2:13, 2:16, 2:20, 3:1, 3:4, 5:2, 5:3, 6:15,

6:16, 6:19, 6:20, 6:21, 6:23, 6:24, 6:25, 7:3, 7:21, 8:2, 8:5, 8:10, 8:11, 8:12, 8:16, 8:18, 8:20, 8:21, 8:23, 9:9, 9:12, 9:19, 9:21, 9:23, 10:1, 10:3, 10:5, 10:6, 10:7, 10:8, 10:9, 10:11, 10:12, 10:13, 11:13, 11:15, 11:24, 12:1, 12:8, 12:11, 12:23, 13:24, 14:1, 14:7, 15:7, 15:11, 15:19, 15:22, 16:20, 16:23, 17:3, 17:5, 17:9, 17:13, 17:16, 18:4, 18:8, 18:13, 18:15, 19:1, 19:6, 19:16, 20:4, 20:21, 21:19, 25:9, 25:11, 25:13, 26:22, 29:2, 29:10, 29:14, 29:25, 30:7, 30:9, 31:8, 31:10, 31:15, 31:17, 31:23, 32:1, 32:4, 32:7, 33:5, 33:10, 33:15, 33:20, 33:25, 34:23, 35:1, 35:9, 35:14, 35:18, 36:2, 36:8, 36:15, 37:5, 37:9, 37:12, 38:3, 38:9, 39:16, 39:21, 40:11, 40:19, 40:23, 41:3, 41:11, 41:18, 41:20, 42:6, 42:12, 43:3, 43:10, 43:16, 43:23, 44:4, 44:9, 44:17, 46:5, 48:10, 48:11, 48:13, 48:14, 49:5, 49:8, 49:16, 49:19, 49:25, 50:6, 50:11, 50:21, 50:23, 51:5, 51:7, 51:11, 51:15, 52:8, 52:16, 53:4, 53:7, 53:11, 53:16, 53:24, 55:15, 55:19, 55:21, 55:24, 56:2, 58:14, 58:16, 58:19, 60:24, 61:2, 61:4, 64:7, 66:6, 66:14, 66:21, 68:13, 68:18, 69:1, 69:5, 69:7, 69:11, 70:1, 70:12, 70:15, 70:17, 70:24, 71:2, 71:5, 71:14, 71:18, 71:20, 72:2, 72:10, 72:14, 73:3, 73:16, 74:20, 76:14, 76:24, 78:14, 78:20, 79:15, 80:4, 80:9, 80:12, 81:8, 81:10, 81:16, 81:19, 81:22, 82:19, 83:24, 84:3, 88:2, 91:10, 91:17, 91:19, 91:23, 95:3, 95:24, 96:7, 96:14, 97:8, 97:13, 97:24, 98:21, 99:3, 99:12, 99:16, 101:11, 101:16, 101:23, 101:25, 104:11, 104:24, 105:2, 105:5, 105:14, 105:23, 107:1, 107:8, 107:10, 107:12, 108:24, 111:6, 111:16, 111:20, 112:6, 112:14, 112:19, 112:23, 113:14, 113:16, 114:2, 114:5, 114:8, 114:13, 114:17, 116:12, 116:15, 116:20, 117:17, 117:23, 118:1, 118:9, 119:3, 119:5, 119:16, 120:8, 120:14, 120:24, 122:24, 123:20, 123:24, 126:15, 126:23, 127:3, 127:5, 127:23, 128:2, 128:8, 129:6, 129:18, 129:20, 129:24, 130:2, 130:4, 130:7, 130:18, 130:21, 130:24, 131:2, 131:5, 132:3, 133:2

Theatre^[2] - 93:24, 94:11

their^[99] - 12:6, 12:13, 18:23, 20:9, 22:11, 22:18, 22:19, 23:2, 23:3, 23:7, 23:15, 23:22, 23:25, 24:8, 24:14, 25:14, 25:21, 26:9, 26:15, 26:18, 27:1, 27:7, 27:17, 27:24, 28:4, 28:6, 28:17, 28:20, 28:24, 33:13, 35:23, 35:24, 37:20, 39:11, 39:12, 42:21, 44:13, 46:8, 51:25, 54:2, 54:16, 54:24, 57:1, 57:21, 58:2, 58:6, 60:8, 61:12, 63:7, 67:23, 73:6, 73:23, 73:24, 74:1, 74:2, 74:16, 76:3, 77:7, 77:10, 77:13, 79:2, 81:1, 82:8,

83:4, 84:15, 87:11, 88:6, 88:7, 88:8, 88:9, 88:10, 91:11, 91:12, 93:15, 96:3, 96:17, 96:25, 97:13, 97:23, 100:23, 101:13, 102:19, 103:11, 103:12, 103:19, 104:16, 104:17, 104:21, 104:25, 110:9, 115:14, 118:4, 120:22, 121:22, 122:10

theirs^[1] - 131:3

them^[55] - 8:7, 9:13, 10:10, 12:13, 16:7, 16:10, 16:13, 20:9, 20:10, 22:17, 23:15, 24:17, 26:3, 27:19, 28:14, 47:24, 52:7, 52:8, 52:9, 54:13, 54:25, 62:14, 62:15, 71:13, 71:25, 73:7, 75:20, 77:7, 77:21, 79:20, 80:22, 81:24, 83:15, 84:9, 85:15, 86:5, 91:11, 97:19, 98:24, 99:17, 100:23, 102:21, 102:24, 103:18, 110:1, 110:2, 110:24, 111:3, 113:18, 116:9, 118:15, 118:17, 126:1

themselves^[4] - 80:24, 85:15, 97:4, 104:3

then^[39] - 17:7, 19:22, 22:3, 24:19, 26:22, 27:11, 28:10, 28:23, 29:14, 29:16, 38:1, 45:17, 45:25, 46:7, 47:6, 50:18, 55:6, 56:13, 56:16, 67:16, 73:5, 81:4, 83:4, 100:6, 103:11, 106:13, 106:18, 107:21, 111:1, 117:11, 117:21, 119:2, 121:2, 121:22, 122:5, 122:22, 124:21, 131:18, 132:19

theoretically^[2] - 38:2, 47:4

theory^[6] - 90:16, 121:10, 121:22, 122:3, 125:23

there^[98] - 5:23, 8:15, 18:8, 18:9, 21:10, 21:20, 28:6, 28:9, 29:23, 30:22, 31:3, 32:18, 32:22, 32:25, 35:19, 36:25, 37:16, 39:3, 39:22, 40:12, 40:16, 41:20, 41:23, 41:24, 42:1, 42:20, 42:24, 44:21, 47:24, 49:10, 49:12, 50:12, 50:19, 52:13, 55:25, 56:4, 57:7, 58:13, 59:3, 63:4, 65:4, 65:22, 66:9, 66:14, 70:6, 70:20, 71:11, 72:18, 74:12, 75:6, 76:16, 77:4, 79:6, 80:6, 80:10, 83:5, 83:16, 86:4, 86:6, 88:5, 92:20, 92:23, 94:23, 94:24, 95:1, 95:3, 95:7, 96:11, 96:21, 97:5, 98:8, 98:17, 99:6, 99:11, 99:22, 102:6, 102:25, 103:2, 103:5, 104:20, 105:10, 106:19, 108:14, 111:1, 113:2, 113:3, 113:8, 115:18, 119:11, 119:14, 122:13, 123:2, 123:20, 123:22

there's^[73] - 8:7, 13:16, 17:24, 18:8, 20:2, 20:12, 21:15, 21:25, 22:22, 23:1, 23:23, 26:1, 26:18, 28:12, 28:16, 36:17, 37:21, 40:24, 42:25, 46:11, 47:9, 56:13, 63:6, 63:7, 63:13, 64:2, 73:20, 74:15, 75:7, 79:25, 81:12, 83:10, 83:11, 84:8, 84:13, 84:18, 85:20, 86:20, 100:5, 106:7, 106:22, 107:24, 108:1, 108:4, 108:8, 108:9, 108:10, 108:21, 108:25, 109:12, 109:23, 110:13, 111:2, 111:13, 111:14, 113:3, 113:10, 114:18, 115:2, 116:8, 116:19, 117:3, 117:4, 117:14,

118:6, 119:5, 120:25, 124:20, 129:19

thereby^[2] - 90:3, 90:9

therefore^[9] - 24:3, 80:1, 83:11, 90:20, 93:17, 100:6, 103:22, 117:14

These^[1] - 27:12

these^[22] - 18:2, 18:11, 21:17, 22:9, 26:4, 27:8, 27:11, 27:19, 47:23, 52:6, 65:1, 65:8, 66:22, 71:7, 72:23, 85:14, 106:25, 108:22, 111:2, 124:9, 127:15, 129:4

they^[265] - 6:11, 8:6, 8:16, 8:18, 8:25, 9:1, 9:2, 9:5, 9:6, 9:10, 9:20, 9:24, 10:12, 12:4, 12:9, 12:14, 13:8, 16:5, 16:6, 16:9, 16:12, 16:16, 17:21, 17:22, 19:14, 20:6, 20:9, 21:3, 21:4, 21:5, 21:11, 21:24, 22:15, 22:18, 22:23, 23:4, 23:5, 23:14, 23:17, 23:20, 23:21, 24:1, 24:2, 24:4, 24:6, 24:16, 25:6, 25:23, 26:3, 26:4, 26:6, 26:8, 26:10, 26:16, 26:20, 27:3, 27:5, 27:8, 27:9, 27:14, 27:17, 27:23, 27:24, 27:25, 28:3, 28:8, 28:10, 28:14, 28:19, 28:21, 28:24, 29:17, 29:23, 30:16, 30:18, 33:12, 34:8, 35:4, 35:5, 35:6, 35:7, 39:4, 39:9, 40:19, 40:21, 41:8, 43:3, 44:15, 46:17, 46:18, 47:24, 50:3, 52:1, 52:5, 53:18, 53:19, 54:1, 54:8, 54:10, 54:11, 55:7, 57:15, 57:21, 57:22, 62:4, 64:14, 65:7, 68:6, 69:14, 70:4, 72:12, 72:17, 73:13, 73:21, 73:23, 74:2, 74:14, 74:15, 74:24, 75:10, 75:11, 75:15, 75:19, 76:3, 76:4, 76:8, 76:12, 79:21, 79:22, 79:23, 80:21, 80:22, 80:23, 81:1, 81:6, 81:8, 81:23, 82:6, 82:7, 82:16, 82:18, 82:19, 82:25, 83:2, 85:3, 85:4, 85:5, 85:6, 85:7, 85:8, 85:12, 85:13, 85:17, 85:18, 86:5, 87:9, 87:10, 87:11, 87:12, 87:13, 87:14, 88:9, 89:2, 89:6, 91:8, 91:10, 91:15, 92:16, 92:17, 92:22, 95:24, 96:4, 96:5, 96:12, 96:14, 96:18, 97:2, 97:9, 97:10, 98:10, 98:11, 98:23, 99:4, 99:10, 100:15, 100:16, 100:18, 101:19, 101:22, 102:3, 102:4, 102:18, 102:22, 103:18, 104:2, 104:15, 104:21, 104:22, 104:25, 105:16, 105:17, 107:21, 108:20, 108:25, 109:7, 109:9, 110:8, 110:19, 110:25, 111:3, 111:9, 114:11, 115:12, 115:13, 115:14, 115:19, 117:2, 117:4, 117:9, 117:10, 118:4, 118:6, 118:14, 118:21, 118:22, 118:23, 118:25, 119:22, 120:5, 121:3, 122:6, 123:19, 124:11, 124:12, 124:13, 124:14, 124:17, 124:20, 124:21, 125:5, 125:9, 125:24, 128:23

they'll^[1] - 16:17

they're^[63] - 6:14, 8:18, 8:25, 9:5, 9:10, 10:1, 16:6, 16:14, 17:23, 18:23, 19:2, 21:8, 21:9, 22:21, 24:22, 24:23, 25:2, 25:3, 31:6, 32:21, 32:22, 35:12, 35:24, 37:19, 39:11, 40:22, 43:18,

44:14, 45:9, 62:9, 62:17, 63:11, 64:9, 66:4, 67:6, 67:7, 75:18, 80:25, 82:12, 86:3, 87:13, 97:19, 98:7, 99:3, 102:22, 103:4, 109:1, 113:17, 115:18, 117:5, 120:21, 121:13, 121:22, 122:3, 122:4, 124:16, 124:17, 124:22, 125:4

they've [17] - 18:2, 22:10, 24:14, 26:17, 27:7, 27:8, 27:10, 28:5, 29:16, 45:4, 73:22, 85:11, 102:23, 110:22, 110:23, 111:8, 117:12

thing [8] - 9:22, 12:16, 19:18, 20:1, 56:23, 86:15, 121:2, 132:11

things [24] - 5:24, 11:2, 30:18, 30:21, 42:3, 44:11, 52:25, 56:14, 57:10, 57:24, 62:4, 66:4, 72:16, 73:1, 73:4, 80:13, 85:14, 86:16, 90:15, 114:20, 122:12, 124:19, 132:12

think [53] - 16:5, 17:5, 31:5, 33:15, 37:6, 37:18, 38:11, 38:12, 41:6, 42:12, 42:22, 43:5, 43:7, 45:3, 45:11, 45:18, 46:11, 46:14, 48:25, 50:25, 55:21, 58:11, 67:18, 67:20, 69:12, 70:17, 79:11, 80:6, 80:10, 80:14, 80:21, 81:24, 83:7, 95:24, 96:16, 98:21, 99:6, 99:7, 101:2, 101:7, 102:13, 102:14, 102:16, 102:18, 107:2, 108:24, 117:9, 117:10, 124:22, 127:24, 129:15, 130:15

thinking [1] - 129:20

thinks [1] - 60:2

third [5] - 34:15, 56:16, 74:4, 94:20, 102:8

this [220] - 11:8, 11:11, 11:15, 11:19, 12:10, 12:15, 15:5, 17:15, 18:16, 18:19, 18:20, 18:22, 19:4, 19:16, 19:17, 19:20, 19:21, 20:3, 20:13, 21:21, 21:22, 21:23, 22:18, 22:22, 23:3, 23:4, 23:6, 23:8, 23:11, 24:1, 24:3, 24:7, 24:8, 24:9, 25:1, 25:7, 25:8, 25:15, 25:19, 25:24, 26:8, 26:15, 26:17, 26:21, 26:25, 27:5, 27:10, 27:15, 27:17, 28:13, 28:15, 28:20, 28:23, 29:3, 30:21, 31:7, 31:13, 31:18, 31:21, 32:24, 32:25, 33:21, 34:1, 34:6, 34:10, 35:20, 36:1, 36:11, 37:1, 37:10, 38:12, 38:14, 39:1, 39:12, 39:19, 40:2, 40:14, 41:7, 41:15, 43:8, 43:15, 43:17, 44:24, 44:25, 46:10, 46:14, 46:24, 47:8, 47:18, 49:19, 49:20, 50:13, 51:21, 52:4, 52:14, 52:18, 52:21, 53:19, 54:4, 54:12, 54:17, 54:22, 54:25, 55:9, 55:20, 57:2, 57:14, 58:12, 60:3, 60:6, 60:19, 61:13, 61:23, 62:1, 62:13, 62:23, 62:25, 63:3, 63:4, 63:8, 64:4, 65:5, 65:9, 65:18, 65:20, 65:22, 66:13, 67:18, 67:23, 67:24, 68:1, 68:6, 69:15, 69:19, 70:16, 70:21, 71:9, 73:7, 74:21, 74:23, 75:2, 75:6, 75:9, 75:18, 75:20, 75:21, 76:1, 76:12, 77:5, 77:9, 77:15, 78:10, 79:24, 83:18, 86:19, 88:4, 88:22, 89:2, 89:6, 90:12, 90:13, 91:9, 93:19, 94:11, 95:1, 95:23, 97:19, 98:3, 98:4, 98:8,

101:18, 102:17, 103:11, 105:21, 106:5, 106:17, 106:23, 107:1, 108:1, 108:8, 108:11, 108:12, 109:1, 109:10, 110:23, 111:1, 111:11, 113:16, 117:12, 118:4, 119:19, 119:23, 120:19, 122:2, 123:3, 123:5, 123:8, 123:12, 123:20, 125:8, 126:8, 126:17, 128:13, 130:22, 130:24, 131:12, 131:16, 131:22, 132:15, 132:16

This [1] - 77:24

THOMAS [2] - 1:19, 2:5

Thompson [2] - 2:20, 2:23

thong [2] - 6:10, 7:8

those [41] - 8:1, 8:4, 12:19, 13:8, 16:3, 23:14, 24:25, 25:1, 27:10, 27:21, 27:22, 28:24, 29:16, 34:4, 44:20, 46:20, 52:10, 52:25, 55:15, 56:2, 58:6, 62:2, 66:3, 66:21, 67:6, 79:10, 86:24, 86:25, 87:23, 87:24, 91:5, 92:14, 92:18, 100:10, 115:15, 118:8, 118:20, 125:2, 125:4, 126:24, 129:12

though [4] - 16:12, 16:14, 33:3, 113:3

thought [2] - 43:22, 118:21

thoughts [1] - 46:20

thousands [1] - 28:4

threat [18] - 17:24, 32:18, 74:4, 74:9, 83:11, 83:22, 84:1, 84:2, 84:3, 84:16, 84:18, 86:5, 108:2, 108:14, 108:21, 109:7, 109:12, 110:13

threaten [2] - 47:10, 89:14

threatening [1] - 86:25

threatens [1] - 106:9

three [12] - 32:18, 36:12, 37:21, 47:24, 56:4, 70:3, 73:1, 76:1, 108:13, 123:25, 124:6, 124:9

three-part [1] - 70:3

through [26] - 16:18, 18:2, 18:11, 18:19, 21:17, 22:5, 22:9, 29:22, 30:14, 31:18, 34:7, 34:18, 39:6, 45:7, 46:9, 63:25, 66:24, 82:9, 83:8, 106:25, 107:5, 107:9, 107:10, 114:22, 122:12, 129:2

throughout [3] - 30:2, 57:23, 58:1

thumb [2] - 62:9, 62:19

Thursday [5] - 127:2, 127:20, 128:6, 128:25, 129:6

ticket [1] - 16:12

tights [1] - 12:5

time [38] - 12:24, 19:3, 19:21, 29:3, 29:22, 33:22, 34:1, 34:3, 38:16, 39:10, 45:11, 45:13, 45:15, 45:25, 46:9, 46:13, 46:18, 47:5, 47:9, 47:13, 48:4, 51:12, 57:10, 72:16, 73:2, 77:14, 78:2, 87:12, 93:10, 109:1, 125:15, 127:3, 129:13, 131:18

timer [1] - 45:2

times [2] - 52:22, 58:9

tiring [2] - 132:11, 132:23

to [821] - 5:4, 5:5, 5:10, 5:17, 7:9, 7:19, 7:22, 8:6, 8:7, 8:13, 8:15, 9:1, 9:2, 9:6, 9:24, 10:24, 11:1, 11:9, 11:11, 11:16, 11:20, 11:21, 11:25, 12:1, 12:13, 12:14,

12:21, 12:24, 13:4, 13:6, 13:22, 14:14, 15:4, 15:19, 16:1, 16:3, 16:11, 16:12, 16:16, 17:1, 17:10, 17:12, 17:14, 17:21, 17:22, 18:1, 18:10, 18:18, 18:19, 19:1, 19:4, 19:11, 19:16, 19:17, 19:18, 19:19, 19:21, 19:24, 19:25, 20:1, 20:3, 20:5, 20:16, 20:18, 20:19, 20:20, 20:25, 21:5, 21:11, 21:13, 21:16, 22:3, 22:9, 22:11, 22:19, 22:23, 23:3, 23:4, 23:5, 23:7, 23:12, 23:18, 23:21, 24:2, 24:5, 24:6, 24:9, 24:22, 24:23, 24:24, 25:2, 25:5, 25:6, 25:11, 25:15, 25:16, 25:25, 26:1, 26:2, 26:4, 26:6, 26:7, 26:8, 26:11, 26:23, 26:24, 27:1, 27:2, 27:10, 27:18, 27:20, 27:22, 27:24, 28:14, 28:17, 28:19, 28:22, 28:23, 28:24, 29:2, 29:3, 29:5, 29:6, 29:7, 29:16, 29:21, 29:22, 30:3, 30:4, 30:23, 30:24, 31:3, 31:7, 31:18, 32:6, 32:11, 32:12, 32:14, 32:15, 32:22, 32:24, 33:2, 33:12, 33:19, 34:2, 34:3, 34:7, 34:10, 34:11, 34:16, 34:17, 34:18, 34:21, 35:20, 35:21, 35:24, 35:25, 36:14, 36:16, 36:18, 36:22, 37:1, 37:15, 37:19, 38:7, 38:9, 38:10, 38:11, 38:13, 38:15, 38:16, 38:23, 39:5, 39:10, 39:11, 40:5, 40:6, 40:8, 41:8, 41:12, 42:1, 42:9, 42:10, 42:11, 42:15, 42:19, 42:20, 42:21, 42:23, 42:24, 43:1, 43:4, 43:6, 43:14, 43:15, 43:25, 44:1, 44:8, 44:13, 44:14, 44:20, 44:22, 44:24, 45:1, 45:4, 45:5, 45:6, 45:8, 45:9, 45:12, 45:13, 45:14, 45:15, 45:16, 45:19, 45:21, 45:22, 45:24, 46:1, 46:14, 46:15, 46:17, 46:18, 46:19, 46:20, 46:21, 46:22, 47:1, 47:6, 47:8, 47:16, 47:22, 48:1, 48:2, 48:8, 48:11, 48:17, 48:20, 48:22, 48:23, 48:24, 49:1, 49:4, 49:19, 49:20, 50:4, 50:11, 50:13, 50:21, 50:22, 51:3, 51:5, 51:8, 51:13, 51:15, 51:23, 52:7, 52:8, 52:9, 52:14, 52:23, 53:18, 53:19, 53:21, 54:1, 54:6, 54:8, 54:12, 54:14, 54:15, 54:16, 54:19, 54:23, 54:25, 55:7, 55:11, 56:4, 56:7, 56:21, 57:8, 57:10, 57:15, 57:16, 57:17, 57:21, 58:4, 58:8, 58:10, 58:11, 58:12, 58:21, 59:3, 59:4, 59:5, 59:8, 59:10, 59:15, 60:3, 60:5, 60:10, 60:11, 60:15, 60:16, 60:19, 60:22, 61:4, 61:17, 62:2, 62:6, 62:17, 62:20, 62:22, 63:1, 63:3, 63:7, 63:10, 63:14, 63:18, 63:19, 63:25, 64:1, 64:9, 64:12, 64:18, 64:21, 64:23, 64:24, 65:4, 65:19, 65:25, 66:4, 66:12, 66:15, 66:18, 66:25, 67:2, 67:4, 67:9, 67:12, 67:14, 67:22, 67:23, 67:25, 68:2, 68:6, 68:22, 69:2, 69:9, 69:14, 69:17, 69:19, 69:21, 69:22, 70:4, 70:5, 70:8, 70:19, 70:21, 71:2, 71:20, 72:5, 72:8, 72:16, 72:17, 72:18, 72:19, 72:21, 72:23, 73:1, 73:6, 73:14, 73:19, 73:20, 73:21, 73:23, 74:1, 74:7, 74:8, 74:11, 74:18, 74:23, 74:24, 75:1, 75:18, 76:7, 76:16, 77:1,

77:6, 77:12, 77:18, 77:19, 77:20, 78:4, 78:9, 78:10, 78:11, 78:12, 78:16, 78:24, 79:1, 79:10, 79:11, 79:12, 79:15, 79:21, 79:23, 79:24, 79:25, 80:2, 80:5, 80:7, 80:14, 80:16, 80:18, 80:19, 80:23, 80:24, 80:25, 81:6, 81:24, 82:2, 82:4, 82:7, 82:24, 83:1, 83:2, 83:3, 83:6, 83:10, 83:15, 83:17, 83:20, 83:21, 84:3, 84:9, 84:11, 84:13, 84:17, 84:21, 84:22, 85:9, 85:10, 85:12, 85:17, 85:22, 86:7, 86:12, 86:18, 86:22, 86:25, 87:5, 87:11, 87:13, 87:14, 87:25, 88:1, 88:8, 88:10, 88:11, 88:21, 89:6, 89:7, 89:12, 89:14, 89:20, 89:22, 90:3, 90:9, 90:10, 90:12, 90:14, 90:18, 90:21, 90:23, 91:1, 91:3, 91:8, 91:11, 91:21, 92:2, 92:6, 92:9, 92:12, 92:16, 92:21, 92:22, 93:1, 93:4, 93:5, 93:8, 93:9, 93:20, 94:9, 94:12, 94:21, 95:12, 95:14, 95:19, 95:21, 95:23, 95:24, 96:2, 96:3, 96:4, 96:9, 96:11, 96:12, 96:17, 96:18, 97:3, 97:9, 97:21, 97:22, 97:23, 97:24, 98:4, 98:7, 98:11, 98:21, 98:22, 98:23, 98:25, 99:9, 99:11, 99:12, 99:14, 99:17, 99:18, 99:25, 100:1, 100:2, 100:5, 100:6, 100:9, 100:10, 100:13, 100:15, 100:16, 100:20, 100:23, 100:25, 101:5, 101:13, 101:18, 101:19, 101:21, 102:3, 102:4, 102:6, 102:7, 102:10, 102:11, 102:13, 102:16, 102:23, 103:3, 103:4, 103:6, 103:11, 103:12, 103:21, 103:24, 104:1, 104:7, 104:8, 104:17, 104:19, 104:20, 105:6, 105:9, 105:15, 105:16, 105:21, 105:24, 106:1, 106:2, 106:5, 106:6, 106:9, 106:15, 106:18, 106:20, 106:23, 106:24, 107:1, 107:2, 107:5, 107:9, 107:19, 107:20, 108:1, 108:2, 108:3, 108:5, 108:12, 108:14, 108:20, 109:8, 109:17, 109:20, 110:1, 110:2, 110:11, 110:12, 110:13, 110:15, 110:21, 110:25, 111:4, 111:6, 111:8, 111:21, 111:25, 112:4, 112:11, 113:1, 113:6, 113:16, 113:23, 114:3, 114:10, 114:14, 114:15, 114:18, 115:7, 115:20, 115:21, 115:23, 115:24, 116:2, 116:5, 116:8, 116:9, 116:17, 116:18, 116:19, 116:22, 116:24, 117:1, 117:6, 117:9, 117:10, 117:11, 118:6, 118:7, 118:15, 118:23, 119:3, 119:12, 119:23, 120:2, 120:6, 120:15, 120:18, 121:3, 121:12, 121:19, 122:1, 122:2, 122:4, 122:5, 122:9, 122:12, 122:14, 122:17, 122:18, 123:2, 123:4, 123:6, 123:8, 123:9, 123:12, 124:3, 124:10, 124:12, 124:13, 124:16, 124:18, 124:22, 124:23, 124:24, 125:4, 125:5, 125:6, 125:10, 126:8, 126:11, 126:17, 126:24, 126:25, 127:2, 127:3, 127:6, 127:7, 127:9, 127:11, 127:12, 127:14, 127:21, 127:22, 127:25, 128:2, 128:10, 128:13, 128:18, 128:21, 128:22, 128:23, 129:7, 129:8, 129:12,

129:13, 129:16, 129:17, 129:22, 129:23, 130:6, 130:12, 130:13, 130:16, 130:21, 130:23, 130:24, 131:2, 131:5, 131:6, 131:11, 131:13, 131:14, 131:16, 131:22, 132:3, 132:6, 132:15, 132:16, 132:17, 132:18, 132:21, 133:2, 133:7
today [7] - 12:9, 13:2, 28:20, 35:15, 47:23, 53:18, 60:20
Tofurky [4] - 32:5, 32:13, 32:15, 32:25
Tofurky's [2] - 33:3, 33:8
together [6] - 45:22, 47:22, 48:3, 67:6, 124:11, 128:21
told [3] - 33:25, 109:18, 110:12
tomorrow [1] - 128:5
too [11] - 36:23, 45:15, 64:24, 71:21, 75:7, 77:9, 85:16, 98:4, 106:14, 118:5, 119:5
took [3] - 27:12, 61:2, 118:22
top [2] - 7:6, 32:11
total [2] - 34:7, 76:24
totally [1] - 81:17
touched [1] - 44:17
touching [1] - 25:22
toy [1] - 30:11
traceability [1] - 77:4
traceable [1] - 84:22
track [1] - 45:1
traditional [1] - 41:2
transcript [6] - 1:25, 127:14, 127:25, 128:5, 129:16, 133:7
TRANSCRIPT [1] - 1:10
transform [1] - 92:3
Travis [3] - 3:1, 76:22, 112:8
treat [1] - 103:16
treated [2] - 35:12, 36:11
trees [1] - 113:8
trend [1] - 60:15
trial [13] - 34:9, 38:15, 43:16, 44:5, 114:11, 114:13, 114:14, 114:16, 126:18, 128:21, 130:8, 131:11, 132:19
TRIAL [1] - 1:10
tried [9] - 54:19, 58:21, 59:3, 60:5, 68:2, 69:20, 72:5, 72:18, 74:23
tries [3] - 60:10, 68:22, 119:12
triggered [1] - 59:9
triggers [1] - 59:20
TRO [9] - 72:14, 72:15, 114:15, 128:24, 129:23, 130:2, 130:6, 130:7
true [5] - 37:25, 47:20, 58:24, 92:5, 133:7
try [7] - 19:4, 19:25, 37:19, 54:23, 79:23, 125:10, 126:11
trying [13] - 20:19, 20:20, 32:22, 35:24, 62:20, 63:10, 72:19, 75:18, 91:21, 92:22, 118:15, 124:11, 124:22
turn [8] - 32:24, 45:2, 67:23, 74:18, 86:7, 87:25, 108:12, 109:9
turning [2] - 18:6, 122:9
Turtle [6] - 31:9, 31:12, 32:25, 73:9, 73:25, 121:6

TVA [1] - 89:13
twice [1] - 19:24
two [25] - 13:8, 21:25, 24:15, 24:25, 31:17, 32:17, 40:7, 47:4, 48:17, 52:13, 52:14, 54:22, 69:18, 72:1, 72:25, 103:9, 104:11, 107:15, 113:11, 119:14, 119:16, 119:17, 122:13, 124:19, 126:15
two-hat [2] - 119:14, 119:17
type [5] - 41:2, 51:22, 60:19, 66:22, 116:2
types [4] - 60:21, 103:25, 124:6, 126:12
typical [1] - 37:5
typically [4] - 8:3, 12:11, 75:3, 121:16

U

U.S [3] - 77:16, 77:24, 85:3
uh [1] - 6:8
uh-huh [1] - 6:8
unanimously [1] - 72:22
unavailing [1] - 85:9
unconditional [1] - 50:10
unconstitutional [13] - 49:23, 69:16, 69:25, 77:6, 89:19, 100:7, 105:10, 110:19, 116:8, 118:16, 119:1, 121:12, 123:5
unconstitutionally [2] - 84:14, 89:21
undefined [2] - 64:12, 65:23
under [61] - 21:13, 21:14, 23:8, 24:11, 26:12, 30:21, 32:19, 32:23, 34:15, 35:13, 36:13, 41:6, 43:8, 43:9, 44:2, 44:13, 44:15, 53:22, 53:25, 59:5, 59:15, 62:24, 62:25, 65:5, 66:11, 73:8, 73:12, 79:3, 79:4, 86:5, 88:17, 88:18, 90:16, 90:20, 92:25, 93:17, 97:17, 97:18, 98:7, 99:8, 100:4, 100:17, 101:8, 107:22, 108:9, 108:10, 108:13, 111:13, 113:24, 114:9, 114:15, 115:9, 115:11, 121:9, 121:17, 121:22, 121:24, 122:1, 122:3, 125:23
under-inclusive [1] - 59:15
underlying [1] - 101:1
understand [13] - 9:14, 13:13, 64:10, 80:21, 91:21, 96:9, 102:4, 102:5, 106:1, 118:13, 130:11, 130:14, 131:21
understanding [2] - 82:22, 133:8
understood [4] - 91:4, 92:13, 92:18, 92:21
underway [1] - 48:15
uniform [1] - 91:10
unintentionally [1] - 25:24
unique [1] - 103:23
unitary [1] - 96:7
United [3] - 3:10, 52:19, 133:6
UNITED [2] - 1:1, 1:11
units [1] - 115:4
unless [3] - 33:25, 87:25, 128:9
unlike [1] - 98:12
unquestionably [1] - 125:20

unreasonably [1] - 96:24
unrelated [5] - 34:17, 82:24, 93:8, 94:9, 94:12
until [5] - 46:20, 52:10, 117:23, 128:18, 130:25
Up [4] - 15:1, 15:3, 15:25, 30:13
up [53] - 12:24, 15:20, 17:5, 18:8, 19:2, 19:19, 25:23, 26:3, 26:24, 31:17, 34:2, 37:20, 40:12, 44:18, 45:6, 45:14, 45:20, 46:8, 46:12, 47:23, 47:24, 48:2, 48:6, 48:9, 49:16, 51:7, 52:8, 52:9, 53:21, 65:20, 68:24, 71:21, 71:24, 78:18, 80:13, 90:14, 99:10, 105:24, 106:1, 107:3, 113:5, 113:18, 118:14, 122:12, 126:17, 126:18, 128:22, 128:23, 129:11, 130:4, 131:13, 132:6, 132:18
upcoming [3] - 39:5, 39:9, 120:3
update [2] - 57:9, 126:24
upheld [2] - 65:7, 95:16
upon [2] - 8:16, 57:4
upset [1] - 98:2
urged [1] - 122:14
us [22] - 7:13, 33:10, 33:11, 33:14, 35:15, 47:2, 57:9, 62:6, 71:22, 73:19, 110:2, 110:11, 110:13, 110:15, 110:16, 110:17, 110:25, 111:14, 113:23, 121:24, 127:12
USA [1] - 78:5
use [26] - 7:16, 7:17, 13:8, 18:1, 19:18, 19:20, 20:25, 24:17, 30:13, 38:5, 46:5, 48:17, 57:24, 58:6, 62:4, 82:11, 82:13, 82:16, 87:13, 91:16, 91:21, 103:22, 109:15, 109:18, 122:23, 129:12
used [4] - 66:22, 78:14, 82:19, 90:22
useful [2] - 24:12, 82:3
uses [5] - 67:1, 82:8, 87:7, 93:1, 101:20
using [5] - 26:12, 61:19, 61:24, 67:8, 109:4
Utah [4] - 37:7, 70:17, 72:1, 72:4
utmost [1] - 97:2
Uvalde [1] - 126:9

V

v [3] - 85:20, 89:13, 91:25
vaginal [5] - 21:18, 22:13, 23:1, 56:14
vague [6] - 54:24, 63:17, 65:18, 67:7, 69:23, 96:4
vagueness [4] - 63:20, 64:13, 65:17, 65:24
valid [3] - 97:18, 100:18, 115:8
validity [2] - 27:16, 106:13
value [7] - 55:14, 56:19, 57:1, 63:8, 67:16, 67:24
values [1] - 78:8
variety [1] - 90:1
various [1] - 107:18
Vasquez [1] - 75:23
venue [7] - 15:1, 15:4, 15:13, 16:1,

16:13, 16:15, 113:8
venues [2] - 60:15, 64:25
verdict [2] - 17:15, 17:17
verse [1] - 125:22
versus [23] - 52:5, 52:15, 52:19, 58:25, 70:9, 73:10, 74:22, 75:5, 75:22, 78:6, 84:25, 85:2, 88:11, 90:6, 93:24, 94:11, 107:13, 115:14, 116:6, 117:8, 123:15, 125:13, 125:16
very [30] - 13:18, 42:2, 43:21, 47:2, 50:4, 56:21, 57:13, 57:19, 65:16, 66:12, 67:7, 69:19, 70:11, 87:19, 88:6, 88:23, 88:25, 89:6, 90:13, 92:14, 105:8, 114:9, 115:22, 116:1, 118:5, 118:19, 124:14, 124:15, 125:7, 126:8
vest [2] - 6:25
veteran [1] - 77:17
via [1] - 1:25
VIADA [9] - 2:16, 13:25, 105:19, 106:4, 107:9, 107:11, 107:13, 109:3, 111:7
Viada [5] - 2:17, 105:18, 112:24, 116:7, 116:17
Viada..... [1] - 4:13
video [5] - 18:5, 59:4, 59:6, 59:7, 59:12
videos [3] - 27:8, 27:10, 27:14
view [2] - 90:1, 90:7
viewed [4] - 91:5, 92:14, 92:19, 93:17
viewer [2] - 27:13, 91:20
viewpoint [10] - 52:1, 61:9, 61:16, 61:23, 62:8, 62:17, 69:22, 103:12, 103:13, 104:13
viewpoint-based [3] - 52:1, 61:9, 62:17
viewpoints [2] - 62:21, 93:4
violate [12] - 27:5, 27:9, 27:13, 75:15, 79:25, 82:7, 83:2, 83:4, 83:6, 83:11, 102:8, 124:25
violated [5] - 90:15, 98:6, 98:10, 98:19, 104:12
violates [3] - 63:16, 88:14, 102:7
violating [3] - 39:14, 98:15, 102:21
violation [10] - 68:3, 72:7, 76:9, 80:11, 98:8, 99:9, 99:11, 99:13, 105:13, 110:1
violations [1] - 111:22
violence [1] - 59:7
violent [3] - 59:4, 59:6, 59:12
VIOLET [1] - 3:4
visible [1] - 16:1
visited [1] - 28:10
visual [2] - 18:25, 19:8
void [1] - 37:3
Voltaire [1] - 78:10
voted [1] - 41:8
VS [1] - 1:6

W

W [1] - 3:2
Wagstaff [1] - 116:15
WAGSTAFF [3] - 2:13, 116:16, 116:21

Wagstaff..... [1] - 4:15
waists [1] - 25:22
wait [2] - 6:15, 35:24
walking [1] - 16:6
walks [1] - 48:3
want [73] - 5:5, 11:11, 11:16, 11:21, 12:24, 13:4, 15:19, 16:16, 18:18, 19:17, 19:24, 20:25, 22:9, 26:22, 29:2, 29:7, 29:16, 30:3, 34:2, 38:7, 38:10, 44:20, 45:14, 45:16, 46:14, 46:21, 46:22, 46:23, 47:22, 48:23, 50:11, 50:14, 51:5, 51:8, 52:8, 60:1, 60:3, 61:4, 71:2, 71:20, 73:1, 73:21, 78:15, 79:11, 79:12, 79:21, 79:23, 92:16, 95:23, 95:24, 105:16, 106:2, 106:24, 111:3, 111:9, 118:23, 119:3, 122:6, 124:16, 127:6, 127:12, 128:10, 128:12, 128:13, 129:7, 129:13, 130:12, 130:25, 131:5, 132:3
wanted [5] - 8:6, 13:6, 90:14, 106:23, 111:4
wants [3] - 9:24, 40:8, 128:7
war [1] - 77:17
War [1] - 77:19
wardrobe [3] - 30:20, 80:19, 81:5
warned [2] - 9:25, 10:2
was [110] - 7:24, 21:2, 21:3, 21:6, 23:18, 23:20, 23:21, 24:15, 24:16, 24:17, 24:20, 28:6, 28:9, 29:23, 30:22, 32:25, 34:6, 36:25, 37:3, 37:5, 37:6, 37:10, 37:12, 37:14, 38:23, 38:24, 41:10, 44:4, 47:13, 47:15, 49:16, 50:12, 53:14, 54:13, 58:16, 58:18, 58:19, 59:6, 59:8, 60:12, 61:7, 65:9, 65:11, 70:14, 71:6, 71:8, 71:11, 71:18, 72:4, 72:5, 72:7, 72:14, 72:15, 75:7, 75:8, 75:9, 75:13, 80:19, 81:4, 81:17, 81:18, 81:23, 82:8, 82:20, 82:22, 82:23, 83:4, 85:22, 86:4, 87:19, 91:3, 91:4, 91:16, 92:13, 92:20, 92:22, 93:3, 93:4, 93:7, 94:1, 94:3, 94:4, 98:17, 100:24, 101:1, 101:3, 101:4, 101:7, 101:9, 102:14, 104:9, 107:18, 109:12, 110:20, 111:5, 113:5, 114:5, 115:11, 116:18, 117:6, 131:11, 132:10, 132:16
watch [2] - 16:10, 82:9
watched [1] - 81:17
watching [3] - 16:5, 16:11, 65:4
way [24] - 7:1, 19:16, 36:16, 36:19, 42:20, 43:1, 43:16, 47:8, 48:16, 54:13, 67:20, 90:14, 90:22, 94:24, 95:1, 95:4, 95:6, 95:7, 98:4, 98:16, 105:23, 113:8, 125:8, 129:3
We [1] - 85:13
we [205] - 7:22, 8:3, 9:8, 9:13, 9:14, 9:15, 11:1, 12:9, 17:1, 17:4, 17:5, 17:11, 17:18, 17:20, 18:9, 18:18, 18:22, 19:2, 19:13, 19:25, 20:1, 20:2, 22:1, 22:9, 22:17, 23:13, 24:9, 27:15, 28:23, 29:25, 30:3, 30:23, 32:7, 32:24, 33:19, 35:10, 35:15, 35:24, 36:5, 36:17, 37:6,

37:18, 37:25, 38:6, 38:10, 38:13, 38:19, 39:2, 43:24, 44:25, 45:6, 45:18, 47:10, 47:11, 47:12, 47:14, 47:16, 47:20, 48:8, 48:15, 49:1, 49:14, 49:21, 49:23, 50:8, 52:5, 54:9, 57:23, 58:10, 58:11, 58:25, 59:19, 60:6, 60:11, 61:6, 61:22, 62:2, 62:3, 62:15, 62:22, 64:5, 64:13, 64:17, 64:18, 65:17, 66:2, 66:9, 66:13, 66:17, 66:19, 67:24, 70:8, 71:21, 72:10, 72:19, 73:8, 73:18, 73:20, 73:25, 74:11, 74:19, 75:19, 76:8, 76:15, 76:16, 76:18, 76:19, 79:21, 80:10, 82:1, 82:6, 83:8, 86:3, 89:22, 89:25, 90:7, 90:9, 91:24, 94:6, 94:18, 97:4, 97:15, 99:7, 100:6, 102:16, 105:25, 106:1, 107:2, 107:3, 108:25, 109:21, 110:1, 110:15, 110:25, 111:10, 112:2, 112:3, 112:4, 112:11, 112:12, 113:13, 114:17, 114:20, 114:21, 114:22, 114:24, 115:8, 115:10, 115:13, 116:3, 116:6, 116:7, 116:15, 116:24, 118:5, 118:13, 118:14, 118:16, 118:19, 119:14, 119:22, 120:5, 120:6, 121:14, 121:17, 121:21, 122:10, 122:20, 123:6, 123:12, 123:16, 124:15, 125:13, 127:1, 127:12, 127:21, 127:24, 127:25, 128:1, 128:4, 128:5, 128:6, 128:7, 128:21, 129:2, 129:9, 129:13, 129:15, 129:16, 132:15, 132:19, 132:25

we'd [1] - 107:5

we'll [11] - 35:25, 38:8, 46:7, 46:9, 48:9, 53:9, 70:19, 71:24, 109:20, 117:21, 118:10

we're [33] - 5:4, 17:11, 17:14, 19:16, 20:21, 36:22, 42:15, 44:24, 45:1, 45:7, 45:19, 45:22, 45:24, 46:8, 49:8, 52:10, 53:17, 85:14, 109:20, 110:11, 110:12, 110:21, 111:11, 111:12, 114:13, 114:14, 124:5, 124:14, 127:3, 129:8, 130:8, 131:17, 132:15

we've [16] - 13:2, 22:20, 44:5, 44:17, 45:11, 70:9, 71:21, 92:14, 105:23, 106:22, 110:24, 111:3, 112:5, 119:4, 121:17, 123:7

wear [9] - 6:5, 6:16, 6:17, 54:11, 81:3, 81:6, 95:11

wearing [6] - 6:10, 6:12, 7:7, 12:19, 80:25, 81:2

Wednesday [3] - 131:1, 131:2, 131:25

week [6] - 70:25, 75:21, 75:23, 102:14, 129:7, 129:17

weekend [2] - 129:11, 129:14

weeks [1] - 38:25

weighed [1] - 108:7

weird [1] - 7:14

well [25] - 9:8, 9:18, 9:19, 13:18, 17:18, 45:23, 48:8, 52:5, 66:14, 82:17, 82:22, 84:17, 91:10, 97:25, 100:11, 104:2, 105:25, 108:21, 110:2, 112:10, 118:18, 121:6, 121:25, 128:2, 129:19

Well [7] - 47:19, 47:20, 80:19, 82:8,

85:24, 109:15, 109:19

well-endowed [1] - 104:2

went [3] - 70:5, 72:16, 83:8

were [33] - 11:5, 13:21, 15:9, 16:5, 17:1, 21:24, 23:14, 28:5, 28:7, 28:9, 28:10, 37:16, 43:14, 43:22, 44:21, 70:6, 91:8, 92:2, 92:17, 92:22, 107:19, 107:20, 107:21, 110:25, 113:8, 114:5, 122:13, 122:14, 125:15, 125:19, 129:23, 133:3

weren't [1] - 13:20

West [1] - 3:6

Western [2] - 70:13, 78:3

what [158] - 5:20, 6:21, 8:13, 8:18, 8:25, 9:5, 9:10, 9:16, 9:23, 10:3, 10:24, 10:25, 11:1, 11:3, 11:11, 11:13, 11:16, 12:10, 12:21, 14:14, 17:9, 17:17, 18:22, 19:23, 22:1, 24:2, 26:16, 26:17, 27:25, 29:4, 29:25, 31:8, 31:10, 31:15, 31:19, 33:10, 36:3, 37:12, 38:9, 38:21, 38:22, 40:15, 40:25, 41:12, 41:13, 41:25, 42:14, 42:15, 43:12, 44:15, 46:13, 46:20, 47:12, 47:21, 47:25, 48:8, 48:19, 48:21, 50:17, 51:11, 51:25, 52:16, 53:17, 54:14, 54:20, 54:21, 56:2, 56:20, 57:5, 57:9, 57:10, 57:17, 58:4, 58:14, 58:16, 59:25, 60:2, 60:24, 62:3, 63:11, 63:14, 63:25, 64:10, 66:6, 66:12, 67:18, 67:21, 70:12, 71:14, 71:15, 75:3, 76:8, 77:17, 77:18, 78:11, 79:13, 80:4, 80:21, 81:6, 81:9, 83:24, 84:6, 90:13, 91:8, 91:16, 91:24, 92:14, 92:21, 93:20, 95:24, 96:2, 97:8, 97:25, 98:23, 99:3, 99:23, 101:4, 101:23, 102:11, 102:18, 105:9, 106:15, 109:2, 111:3, 112:10, 112:24, 114:5, 115:19, 116:18, 117:1, 117:5, 117:6, 117:7, 119:14, 120:8, 120:10, 120:17, 121:7, 121:17, 123:24, 124:5, 124:22, 126:19, 127:16, 127:19, 127:23, 128:25, 129:20, 129:24, 130:11, 130:21, 130:24, 130:25, 131:13

What [4] - 6:4, 21:13, 43:3, 92:17

what's [12] - 9:15, 38:24, 40:8, 50:6, 92:16, 104:17, 107:3, 109:14, 118:16, 122:18, 129:11

whatever [12] - 8:6, 44:14, 47:5, 55:25, 81:14, 82:12, 94:14, 104:25, 120:16, 128:6, 132:19

when [31] - 6:11, 7:5, 7:25, 9:1, 9:2, 11:23, 12:21, 14:22, 19:2, 19:18, 23:13, 25:23, 38:3, 44:25, 58:6, 63:1, 63:24, 68:6, 71:18, 74:16, 77:19, 83:19, 93:24, 94:23, 113:7, 113:18, 117:12, 118:6, 119:10, 125:15, 126:7

When [1] - 74:6

whenever [5] - 6:16, 9:13, 90:2, 90:8, 127:25

where [30] - 6:9, 15:15, 21:3, 21:20, 25:25, 30:14, 32:7, 32:24, 36:25, 38:16, 61:4, 61:22, 62:2, 62:15, 66:19, 66:21,

74:20, 87:3, 87:16, 96:22, 99:7, 100:8, 101:23, 107:18, 109:8, 114:2, 114:11, 116:7, 119:11, 121:14

whereas [2] - 65:15, 83:16

wherever [1] - 45:6

whether [25] - 13:5, 13:20, 22:10, 41:1, 42:21, 61:12, 89:23, 90:18, 90:25, 91:2, 91:3, 92:12, 93:1, 94:23, 94:24, 94:25, 98:5, 98:18, 107:18, 109:21, 129:25, 130:12

which [51] - 10:24, 10:25, 17:2, 17:13, 17:24, 30:19, 30:24, 34:17, 35:25, 36:11, 37:12, 37:25, 38:15, 50:4, 52:2, 52:5, 53:9, 55:6, 56:16, 57:20, 58:10, 60:12, 69:9, 69:12, 69:15, 69:21, 73:21, 74:8, 78:16, 82:2, 82:11, 83:4, 83:21, 84:11, 89:12, 93:3, 93:22, 94:6, 97:3, 100:9, 100:17, 100:24, 104:7, 108:5, 113:3, 114:25, 119:18, 122:19, 124:3, 128:25

while [12] - 42:1, 44:10, 59:24, 60:18, 61:19, 67:3, 98:2, 99:10, 102:3, 105:24, 117:2, 126:8

who [41] - 8:20, 12:11, 15:3, 16:1, 16:9, 19:8, 19:10, 22:2, 22:6, 44:12, 51:1, 54:23, 57:5, 58:19, 62:12, 63:10, 63:22, 65:20, 67:1, 68:22, 70:21, 75:13, 75:14, 86:11, 91:5, 92:14, 92:19, 102:7, 102:8, 102:10, 102:11, 103:16, 103:17, 106:2, 107:16, 107:19, 109:19, 110:2, 112:9, 122:1, 124:23

who'll [1] - 42:9

who's [4] - 8:21, 51:8, 64:15, 97:24

whoever [1] - 40:8

whole [13] - 8:9, 46:10, 49:10, 55:11, 55:13, 56:7, 56:18, 57:14, 67:15, 96:19, 107:23, 124:10

Whole [3] - 74:21, 75:5, 115:14

wholesale [1] - 126:11

wholly [1] - 27:6

whom [1] - 53:4

why [26] - 7:18, 10:23, 25:25, 28:8, 34:7, 35:18, 37:21, 38:12, 38:14, 38:15, 39:8, 40:1, 41:8, 52:16, 57:23, 61:7, 63:4, 63:18, 65:18, 70:5, 104:9, 118:15, 125:9, 128:2, 128:20, 132:11

wigs [4] - 54:11, 62:5, 67:9, 104:1

will [56] - 5:22, 12:12, 18:15, 29:5, 29:17, 34:6, 39:3, 40:12, 45:2, 45:4, 46:12, 48:6, 51:9, 54:13, 54:25, 56:8, 57:14, 58:4, 60:22, 65:15, 73:7, 74:3, 74:9, 74:17, 74:18, 78:11, 83:22, 84:1, 84:8, 84:12, 84:15, 86:1, 86:16, 86:21, 89:16, 93:21, 102:15, 102:19, 107:2, 112:4, 112:15, 112:16, 113:23, 117:7, 119:1, 119:9, 119:25, 122:11, 126:16, 127:17, 128:7, 128:15, 128:24, 131:14, 131:22, 132:14

Winston [2] - 77:18, 77:22

wish [1] - 26:8

wit [1] - 5:11

with [107] - 6:2, 7:13, 12:4, 12:16, 12:18, 13:1, 13:18, 14:22, 16:9, 16:17, 16:18, 19:13, 20:3, 20:5, 20:22, 20:23, 21:9, 23:3, 23:7, 23:12, 24:8, 25:15, 26:11, 27:18, 28:22, 28:24, 32:16, 35:15, 35:23, 36:17, 38:19, 41:25, 42:19, 44:7, 46:9, 46:25, 47:10, 47:25, 48:25, 50:8, 53:20, 54:14, 55:9, 57:19, 58:10, 61:14, 65:16, 68:21, 68:23, 71:2, 72:2, 73:8, 73:15, 74:6, 75:21, 75:24, 76:4, 76:8, 76:14, 79:7, 79:14, 82:10, 82:13, 83:3, 83:12, 83:19, 89:17, 92:12, 96:10, 97:1, 99:8, 100:15, 102:23, 103:4, 103:6, 104:3, 107:15, 107:19, 108:1, 108:25, 109:7, 109:8, 110:16, 112:24, 113:2, 115:3, 115:4, 115:5, 116:20, 117:6, 117:20, 118:14, 118:15, 118:20, 118:23, 122:7, 123:7, 124:10, 124:23, 125:4, 129:16, 130:8, 130:9, 132:23

within [8] - 16:14, 52:25, 56:25, 68:25, 94:4, 111:22, 121:25, 125:11

without [6] - 40:6, 91:16, 91:21, 92:10, 96:9, 114:23

witness [5] - 13:23, 16:19, 16:24, 17:10, 30:2

WITNESS [18] - 6:16, 6:20, 6:23, 6:25, 8:2, 8:10, 8:12, 8:18, 8:21, 9:21, 10:1, 10:5, 10:7, 10:9, 10:12, 11:15, 12:1, 12:11

witnesses [4] - 19:14, 20:22, 22:20, 132:21

witnesses' [1] - 29:21

Woman's [3] - 74:22, 75:5, 115:14

won't [3] - 74:14, 86:18, 86:22

WOODLANDS [1] - 1:4

Woodlands [8] - 2:18, 20:8, 28:2, 64:6, 64:14, 86:18, 120:3, 125:25

word [4] - 50:13, 61:22, 64:5, 64:12

Word [1] - 127:12

wording [5] - 68:14, 68:16, 70:22, 128:12

words [13] - 48:17, 57:2, 58:3, 58:8, 67:6, 81:10, 91:16, 91:22, 96:10, 96:12, 96:14, 99:17

wordy [1] - 67:5

work [7] - 45:1, 56:7, 56:18, 57:13, 67:15, 129:17, 130:13

working [3] - 29:15, 46:19, 128:1

works [1] - 63:8

World [1] - 77:19

world [1] - 80:17

worried [2] - 14:12, 97:10

worry [2] - 14:16, 14:19

would [127] - 6:4, 7:17, 7:19, 7:20, 8:2, 10:17, 10:20, 12:5, 12:16, 16:3, 16:5, 16:7, 16:10, 16:13, 17:11, 20:2, 20:9, 20:15, 24:2, 24:6, 24:17, 26:8, 26:21, 27:6, 28:2, 28:13, 28:23, 30:21, 30:23,

35:6, 35:20, 36:5, 36:15, 36:20, 36:22, 37:19, 38:22, 39:5, 43:7, 46:23, 49:21, 49:22, 51:3, 52:6, 52:9, 55:10, 56:6, 57:16, 60:11, 64:10, 64:21, 64:23, 65:4, 66:3, 66:11, 66:13, 67:11, 67:12, 68:24, 70:8, 71:23, 77:6, 77:7, 77:9, 81:15, 81:24, 83:16, 87:25, 90:12, 90:15, 90:17, 91:4, 91:14, 91:15, 91:20, 92:9, 92:13, 92:18, 92:21, 95:8, 96:9, 96:22, 97:17, 98:18, 99:20, 100:25, 101:21, 101:23, 102:6, 102:8, 102:9, 102:11, 102:24, 103:8, 103:9, 105:6, 106:20, 109:13, 109:19, 110:3, 111:1, 112:10, 112:12, 112:25, 113:9, 114:21, 114:22, 115:10, 115:12, 116:24, 117:18, 118:25, 119:2, 120:4, 121:19, 121:25, 122:5, 123:13, 125:20, 127:20, 128:6, 129:15, 129:17, 130:1, 130:16, 130:23

wouldn't [4] - 5:24, 6:5, 12:25, 49:4

wrap [9] - 26:24, 44:18, 45:6, 45:20, 46:8, 46:12, 48:9, 106:1, 107:3

Wrap [1] - 48:2

wrap-up [3] - 44:18, 45:20, 46:12

wrestling [1] - 57:24

write [5] - 36:16, 36:18, 38:16, 46:22, 47:2

writes [1] - 74:6

writing [2] - 59:13, 73:11

written [3] - 54:13, 59:2, 73:11

wrong [3] - 31:7, 113:17, 126:10

wrote [5] - 58:19, 59:24, 60:14, 73:12, 78:8

Y

YBARRA [2] - 3:1, 112:8

Ybarra [1] - 112:7

Ybarra..... [1] - 4:14

yeah [30] - 5:19, 6:1, 6:20, 6:23, 6:25, 7:7, 7:14, 7:15, 8:10, 8:19, 9:3, 9:4, 9:8, 9:21, 10:7, 10:17, 12:1, 13:15, 13:22, 14:21, 16:2, 16:16, 32:7, 38:7, 49:8, 49:14, 50:6, 72:2, 131:7

year [7] - 31:13, 53:21, 57:12, 58:14, 58:16, 70:16, 85:21

years [6] - 19:1, 36:12, 77:22, 78:2, 86:14, 132:5

Yes [2] - 110:15, 113:15

yes [65] - 5:16, 10:5, 10:11, 10:12, 10:19, 13:11, 13:18, 14:18, 14:24, 15:2, 15:12, 15:21, 15:22, 17:7, 19:4, 29:12, 29:19, 29:20, 34:14, 35:5, 35:17, 36:24, 39:21, 40:12, 42:6, 43:21, 44:9, 48:25, 49:21, 55:17, 55:23, 56:1, 61:6, 66:8, 69:4, 69:6, 69:8, 70:16, 70:20, 70:25, 71:6, 76:18, 78:21, 79:17, 80:18, 82:22, 91:24, 99:14, 102:1, 106:3, 111:7, 111:18, 112:8, 112:15, 112:18, 113:20, 117:22, 117:25, 118:2, 123:22, 126:21, 127:1, 127:5, 129:15, 130:3

yesterday [12] - 12:9, 13:2, 14:25, 72:12, 72:16, 88:24, 91:6, 93:16, 96:2, 96:13, 104:22, 118:12

yet [10] - 38:19, 75:9, 75:20, 101:19, 102:3, 106:6, 119:23, 120:5, 120:7, 128:14

York [2] - 2:6, 65:12

you [318] - 5:3, 5:5, 5:8, 5:14, 5:17, 6:3, 6:5, 6:11, 6:12, 7:5, 7:6, 7:8, 7:12, 7:13, 7:16, 7:22, 7:23, 7:24, 7:25, 8:7, 8:9, 8:14, 8:25, 9:5, 9:17, 10:15, 10:20, 11:2, 11:4, 11:5, 11:8, 11:13, 11:19, 11:23, 11:24, 12:2, 12:3, 12:6, 12:8, 12:10, 12:20, 12:24, 13:4, 13:13, 13:20, 13:21, 14:8, 14:11, 14:12, 14:15, 14:16, 14:19, 14:22, 14:25, 15:18, 15:19, 15:25, 16:3, 16:13, 16:23, 17:3, 17:10, 18:1, 18:2, 18:6, 18:13, 19:16, 19:17, 19:18, 19:20, 19:22, 19:24, 20:6, 20:24, 21:7, 21:20, 24:18, 25:10, 26:22, 26:23, 27:19, 29:1, 29:4, 29:5, 29:6, 33:18, 33:19, 34:6, 34:13, 37:19, 38:3, 38:6, 38:12, 38:13, 38:17, 41:11, 41:12, 42:22, 42:23, 43:10, 43:17, 43:21, 43:22, 45:3, 45:6, 45:11, 45:12, 45:14, 45:15, 45:16, 45:17, 46:1, 46:2, 46:5, 46:6, 46:13, 46:16, 46:18, 46:22, 46:23, 47:2, 47:6, 47:10, 47:16, 47:20, 47:22, 48:1, 48:5, 48:6, 48:7, 48:8, 48:9, 48:14, 48:23, 49:2, 50:11, 50:14, 50:23, 51:1, 51:7, 51:8, 51:11, 51:15, 51:16, 51:18, 51:20, 52:6, 52:8, 52:9, 52:11, 52:16, 55:21, 56:21, 56:24, 57:7, 58:2, 58:6, 58:7, 60:24, 61:13, 62:14, 63:1, 64:7, 64:8, 66:6, 66:15, 66:21, 67:13, 68:13, 69:14, 70:24, 71:20, 74:14, 76:15, 78:11, 78:13, 78:15, 78:17, 78:19, 78:21, 79:1, 79:2, 79:12, 79:14, 79:15, 79:23, 80:12, 81:2, 81:15, 83:7, 85:25, 86:1, 87:17, 87:18, 87:25, 88:2, 90:12, 90:18, 92:6, 92:16, 92:17, 92:18, 94:24, 95:3, 95:24, 95:25, 96:7, 96:8, 97:8, 97:13, 98:21, 99:14, 99:16, 99:22, 99:23, 102:18, 104:24, 105:14, 105:19, 106:4, 107:1, 107:2, 107:4, 108:13, 108:14, 108:24, 109:15, 109:18, 109:20, 111:15, 111:16, 112:6, 112:11, 112:12, 112:13, 112:14, 112:23, 113:18, 114:5, 114:19, 115:17, 116:7, 116:10, 116:11, 117:8, 117:16, 117:17, 117:18, 118:2, 119:3, 119:22, 120:2, 120:9, 121:4, 121:16, 122:22, 123:10, 126:14, 126:17, 126:18, 126:24, 126:25, 127:2, 127:11, 127:14, 127:17, 127:19, 128:2, 128:12, 128:23, 129:7, 129:10, 129:12, 129:13, 129:23, 130:4, 130:12, 130:16, 130:17, 130:19, 130:25, 131:4, 131:5, 131:7, 131:11, 131:14, 131:18, 131:22, 131:23, 132:9, 132:10, 132:11, 132:13, 132:14, 132:17, 132:23, 132:25

You ^[3] - 110:3, 110:4, 110:20

you'd ^[1] - 31:14

you'll ^[3] - 29:3, 38:25, 45:6

you're ^[27] - 7:21, 8:12, 8:14, 9:9, 13:1, 19:21, 20:23, 40:19, 44:22, 48:11, 62:12, 69:1, 73:3, 73:16, 79:7, 85:25, 91:8, 98:1, 117:20, 123:24, 127:6, 129:20, 130:11, 130:13, 131:20, 132:17

You're ^[1] - 116:20

you've ^[19] - 20:24, 21:19, 23:11, 31:17, 35:1, 42:12, 45:5, 45:12, 46:7, 48:5, 66:22, 78:14, 78:16, 101:11, 104:11, 111:6, 113:17, 129:10, 129:11

you-all ^[1] - 38:12

young ^[2] - 47:9, 47:13

Young ^[10] - 48:5, 74:18, 75:1, 75:3, 79:6, 107:22, 111:5, 115:11, 121:15, 122:1

younger ^[1] - 86:13

your ^[59] - 5:17, 5:20, 5:21, 5:23, 5:24, 6:11, 7:5, 7:6, 8:16, 10:6, 10:15, 10:20, 11:8, 11:19, 13:20, 14:11, 14:13, 14:15, 14:19, 14:22, 15:4, 16:24, 19:18, 19:22, 29:6, 31:2, 31:10, 34:23, 35:10, 35:14, 38:3, 42:23, 43:12, 44:8, 45:22, 46:20, 47:22, 47:23, 48:2, 50:6, 51:11, 68:14, 78:12, 81:19, 86:1, 92:6, 92:9, 98:24, 107:3, 107:25, 113:19, 117:20, 119:6, 127:17, 129:11, 129:12, 131:18, 131:21

Your ^[148] - 5:8, 13:23, 13:25, 14:8, 15:5, 15:8, 15:17, 15:21, 16:19, 16:22, 16:25, 17:4, 17:7, 17:11, 17:18, 18:7, 18:10, 18:14, 19:4, 19:25, 20:14, 20:19, 21:1, 22:8, 25:12, 26:19, 28:16, 29:1, 29:12, 29:20, 30:1, 31:25, 32:9, 33:6, 33:17, 33:24, 34:14, 34:25, 35:5, 35:12, 35:17, 36:5, 36:24, 37:8, 38:8, 39:2, 40:9, 40:14, 40:22, 41:6, 41:23, 42:17, 43:5, 43:14, 44:7, 48:25, 49:21, 50:16, 51:9, 51:13, 51:20, 52:14, 52:18, 53:6, 53:15, 55:17, 55:23, 56:1, 58:20, 61:1, 61:3, 61:6, 64:8, 66:8, 66:17, 68:1, 68:16, 69:4, 69:6, 70:16, 70:20, 70:25, 71:4, 71:6, 71:17, 71:25, 72:11, 72:25, 73:17, 76:19, 77:1, 77:2, 78:13, 85:6, 88:4, 89:25, 90:12, 90:14, 91:14, 91:24, 92:5, 93:13, 93:19, 94:17, 95:21, 96:1, 96:8, 99:1, 99:22, 100:4, 103:7, 104:15, 105:6, 105:12, 105:19, 106:4, 107:5, 107:7, 111:14, 111:18, 112:8, 116:16, 117:15, 117:22, 118:2, 119:4, 119:8, 119:17, 120:12, 120:20, 122:9, 122:25, 123:23, 124:2, 124:19, 126:10, 126:21, 127:1, 127:20, 127:24, 129:5, 129:15, 129:19, 129:22, 130:3, 130:15, 131:1, 131:4

yours ^[1] - 51:18

yourself ^[3] - 81:3, 85:25, 129:7

youth ^[1] - 35:8

Z

zoom ^[1] - 18:14