SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES ASHLEY MOODY, ATTORNEY GENERAL OF) FLORIDA, ET AL.,) Petitioners,) v.) No. 22-277 NETCHOICE, LLC, DBA NETCHOICE,) ET AL.,) Respondents.)

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 3 ASHLEY MOODY, ATTORNEY GENERAL OF) FLORIDA, ET AL.,) 4 5 Petitioners,) 6 v.) No. 22-277 7 NETCHOICE, LLC, DBA NETCHOICE,) 8 ET AL.,) 9 Respondents.) 10 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ 11 12 Washington, D.C. 13 Monday, February 26, 2024 14 The above-entitled matter came on for 15 16 oral argument before the Supreme Court of the 17 United States at 10:04 a.m. 18 19 20 21 22 23 24 25

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1	APPEARANCES:
2	HENRY C. WHITAKER, Solicitor General, Tallahassee,
3	Florida; on behalf of the Petitioners.
4	PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on
5	behalf of the Respondents.
6	GEN. ELIZABETH B. PRELOGAR, Solicitor General,
7	Department of Justice, Washington, D.C.; for the
8	United States, as amicus curiae, supporting the
9	Respondents.
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21	
22	
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25	

1	CONTENTS	
2	ORAL ARGUMENT OF:	PAGE:
3	HENRY C. WHITAKER, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	PAUL D. CLEMENT, ESQ.	
7	On behalf of the Respondents	62
8	ORAL ARGUMENT OF:	
9	GEN. ELIZABETH B. PRELOGAR, ESQ.	
10	For the United States, as amicus	
11	curiae, supporting the Respondents	113
12	REBUTTAL ARGUMENT OF:	
13	HENRY C. WHITAKER, ESQ.	
14	On behalf of the Petitioners	154
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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1 PROCEEDINGS 2 (10:04 a.m.) 3 CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 22-277, 4 Moody versus NetChoice. 5 Mr. Whitaker. 6 7 ORAL ARGUMENT OF HENRY C. WHITAKER ON BEHALF OF THE PETITIONERS 8 MR. WHITAKER: Mr. Chief Justice, and 9 may it please the Court: 10 Internet platforms today control the 11 12 way millions of Americans communicate with each other and with the world. The platforms 13 14 achieved that success by marketing themselves as 15 neutral forums for free speech. Now that they 16 host the communications of billions of users, 17 they sing a very different tune. They now say 18 that they are, in fact, editors of their users' speech, rather like a newspaper. They contend 19 20 that they possess a broad First Amendment right 21 to censor anything they host on their sites, 2.2 even when doing so contradicts their own 23 representations to consumers. But the design of the First Amendment 24 25 is to prevent the suppression of speech, not to

1 enable it. That is why the telephone company 2 and the delivery service have no First Amendment right to use their services as a choke point to 3 silence those they disfavor. 4 Broadly facilitating communication in 5 6 that way is conduct, not speech, and if 7 Verizon asserted a First Amendment right to cancel disfavored subscribers at a whim, that 8 9 claim would fail no less than the claimed right to censorship failed in Pruneyard versus Robins 10 11 and Rumsfeld versus FAIR. 12 Social networking companies too are in 13 the business of transmitting their users' 14 speech. Their users are the ones who create and 15 select the content that appears on their sites. 16 The plat -- the -- the platforms, indeed, 17 disavow responsibility for that conduct in their 18 terms of service. The platforms do sort and 19 facilitate the presentation of user speech. But 20 this Court just last term, in Twitter versus 21 Taamneh, and the platforms themselves in 2.2 Gonzalez versus Google describe those tools as little more than passive mechanisms for 23 24 organizing vast amounts of third-party content. 25 The platforms do not have a First

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1	Amendment right to apply their censorship
2	policies in an inconsistent manner and to censor
3	and deplatform certain users.
4	I welcome your questions.
5	JUSTICE THOMAS: Counsel, it would
6	seem that this case is a facial challenge, and
7	to some extent, it relies on the overbreadth
8	doctrine, but that seems to be an odd fit since
9	Respondent represents virtually all of the
10	platforms and that it would be easy enough for a
11	platform who's affected to bring an as-applied
12	challenge.
13	Would you comment on that or at least
14	address the fact that this is a facial
15	challenge?
16	MR. WHITAKER: Certainly, Your Honor.
17	I do think that's a very significant aspect of
18	this case. It comes to the Court on a facial
19	challenge, which means that the only question
20	before the Court is whether the statute has a
21	plainly legitimate sweep.
22	I actually don't understand them, Your
23	Your Honor, to to be making an overbreadth
24	challenge, which, as I understand it, would
25	would rely on the effects on third parties. As

1 I understand it, they're principally relying on 2 the -- effects on their members. If they were bringing an overbreadth challenge, they would --3 they would have to show various third-party --4 JUSTICE THOMAS: Well, I think -- how 5 6 would they do that on -- when they haven't shown 7 that there are no -- there's no way that this statute can be applied that's consistent with 8 9 the Constitution? Have they met that? 10 MR. WHITAKER: They -- they certainly 11 have not, Your Honor. I mean, and -- and we --12 we think the -- the statute has, indeed, a 13 plainly legitimate sweep. 14 And, certainly, there are a number of 15 the platforms that are open to all comers and 16 content, much like a traditional common carrier. 17 And just -- just as a traditional common 18 carrier, consistent with the First Amendment, 19 would be subject to hosting requirements, 20 non-discrimination requirements, so too we think 21 that the platforms that satisfy that 2.2 characterization, which are a number of them, 23 absolutely would give this statute a plainly 24 legitimate sweep. 25 JUSTICE SOTOMAYOR: Can -- can I --

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1 this is such a odd case for our usual 2 jurisprudence. It seems like your law is 3 covering just about every social media platform on the Internet, and we have amici who are not 4 traditional social media platforms, like 5 6 smartphones and others who have submitted amici 7 brief, telling them that readings of this law could cover them. 8

This is so, so broad, it's covering 9 10 almost everything. But the one thing I know 11 about the Internet is that its variety --12 variety is infinite. So at what point in a 13 challenge like this one does the law become so 14 generalized, so broad, so unspecific, really, 15 that you bear the burden of coming in and 16 telling us what exactly the sweep is and telling 17 us how there is a legitimate sweep of virtually -- or -- or a meaningfully -- a swath of cases 18 19 that this law could cover but not others? MR. WHITAKER: Well -- well, let me, 20 21 Your --2.2 JUSTICE SOTOMAYOR: Where -- when does 23 the burden shift to the state, when it write -when it writes a law so broad that it's 24 25 indeterminate?

1 MR. WHITAKER: I don't think so, Your 2 Honor. I still think it is their burden, as the 3 plaintiffs challenging an action of a sovereign state legislature, to show that the law lacks a 4 plainly legitimate sweep. 5 But let me just say a word about the 6 7 -- the breadth of the law. The -- the legislature did define the term "socia media 8 platform," which is part of what triggers the 9 10 law's application, but -- but that -- the breadth of that definition, which -- which 11 12 wouldn't cover every single website, it -- it 13 would -- it would cover certain large websites 14 with large revenues and subscribers and the --15 and -- and the like, but the breadth of the law, 16 apart from that definition, is significantly 17 narrowed by the fact that the substantive 18 provisions of the law are regulating websites 19 that host user-generated content. That's what 20 the substantive provisions of the statute apply 21 to. 2.2 JUSTICE SOTOMAYOR: So let me talk 23 about Etsy. Etsy is a marketplace like -- if --24 I'm going to try to analogize it to physical 25 space, which I think in this area is a little

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crazy because it -- yes, in some ways, this is 1 2 like an online bookstore or online magazines, 3 online newspaper, online whatever you want to call it, an online supermarket, but it's not 4 because, even though it has infinite space, it 5 really doesn't because viewers, myself included, 6 7 or users can't access the millions of things that are on the Internet and actually get 8 9 through them and pick the things we want because there's too much information. So we're limited 10 11 by human attention spans. So are they. 12 So our theories are a little hard, but 13 let's look at Etsy. Etsy is a supermarket that 14 wants to sell only vintage clothes, and so it is 15 going to and does limit users' content. It's a 16 free marketplace, it's open to everyone, but it 17 says to the people who come onto its marketplace 18 we only want this kind of product. 19 They're going to have to censor. 20 They're going to have to take people off. They're going to have to do all the things that 21 2.2 your law say they can't do without all of these 23 conditions. 24 Why is that? Why should we be 25 permitting and under what level of scrutiny

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1 would we be looking at this broad application of 2 this law that affects someone who all they want to do is sell a particular kind of product and 3 they have community standards and they tell you 4 that you -- they don't want you to curse, they 5 6 don't want you to talk politics, they don't want 7 you to do whatever, all they want you to do is sell your product. But, if they're a public 8 9 marketplace, which they are, they're selling to 10 the public, this law would cover them. 11 MR. WHITAKER: I think that's right, 12 Your Honor, but -- but again let me just say a word about how the law might apply to Etsy. 13 14 First of all, it wouldn't regulate the 15 goods Etsy is offering. What our law regulates 16 is the moderation of user-generated content. So 17 it would only apply to Etsy to the extent that they -- and -- and I'm not -- I'm not sure to 18 19 what extent it actually would apply to Etsy. I 20 guess it would apply somewhat, but I guess 21 people are uploading user-generated conduct in 2.2 connection with the sale of goods. And that's 23 the conduct that it would regulate. It doesn't 24 limit what goods Etsy can -- can limit its 25 marketplace to.

1 Let me just say a word about that. Ιt 2 3 JUSTICE SOTOMAYOR: Well, it opens it up for sale of goods and it tells its users --4 MR. WHITAKER: Well --5 JUSTICE SOTOMAYOR: -- don't, please, 6 7 speak about politics because that's not what our marketplace is about. 8 9 MR. WHITAKER: And --10 JUSTICE SOTOMAYOR: That's viewpoint 11 discrimination. This falls under a whole lot of 12 your listings and bans and disclosure 13 requirements. 14 Why are we imposing that on something 15 like this? 16 MR. WHITAKER: Well -- well, in 17 Pruneyard versus Robins, Your Honor, this --18 this Court held that the State of California 19 could regulate the speech-hosting activity of a 20 shopping mall which was hosting speech as an 21 incident to --2.2 JUSTICE SOTOMAYOR: But not inside the 23 stores. We said that they could come, but if they go inside the store, we didn't say anything 24 25 that free speech -- that someone could stand --

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1 stand on a platform in the middle of the store 2 and scream out their political message. 3 We said the common areas, where we're permitting others to speak, we're going to let 4 this particular speaker speak anything he or she 5 wants. That's why I'm afraid of all of these 6 7 common law rules that you're trying to analogize 8 to. MR. WHITAKER: Well -- well -- well, 9 Your Honor, I do think Etsy is similar insofar 10 11 as it is, in fact, hosting speech and some 12 expression as an incident to some other 13 commercial enterprise. And I think that, if 14 anything, makes Etsy's speech interests even 15 weaker than the -- the social --16 JUSTICE SOTOMAYOR: I've monopolized 17 your --18 CHIEF JUSTICE ROBERTS: Counsel, you 19 began your presentation talking about concerned 20 about the power, market power and ability of the 21 social media platforms to control what people 2.2 do, and your response to that is going to be 23 exercising the power of the state to control 24 what goes on on the social media platforms. 25 And I wonder, since we're talking

1 about the First Amendment, whether our first 2 concern should be with the state regulating 3 what, you know, we have called the modern public 4 square?

MR. WHITAKER: Well, I think you 5 6 certainly should be concerned about that, Your 7 Honor. What -- what I would say is -- is that the -- the kind of regulation that the State of 8 9 Florida is imposing is one that is familiar to 10 the law. When you have businesses that have 11 generally opened their facilities to all comers 12 and content, this is the way that traditional common carrier has worked -- regulation has 13 worked for centuries. 14

15 If you were an innkeeper and you held 16 yourself out as open to the public, you could 17 indeed be permitted to act in accordance with 18 that voluntarily chosen business model. So I 19 certainly think the Court should proceed 20 carefully, but one thing the Court, I think, 21 it's important to keep in mind is that there is 2.2 an important First Amendment interest precisely 23 in ensuring that large powerful businesses like that that have undertaken to host massive 24 25 amounts of speech and have the power to silence

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1 those speakers, the state has an interest, a 2 First Amendment interest, in promoting and 3 ensuring the free dissemination of ideas. CHIEF JUSTICE ROBERTS: Is there any 4 aspect of social media that you think is 5 6 protected by the First Amendment? 7 MR. WHITAKER: Yes, Your Honor. Ι 8 can -- I can certainly imagine platforms that 9 would be subject to this law that would have -would indeed have First Amendment rights. 10 I 11 mean, we point out in our brief that when -- we 12 think that if you had a -- an Internet platform 13 that, indeed, had a platform-driven message, was 14 selective on the front end, Democrats.com, I 15 think that would be a very different kind of 16 analysis compared to a company like Facebook or 17 YouTube, who is in the business of just 18 basically trying to get as many eyeballs on 19 their site as possible. 20 JUSTICE KAGAN: But why is it 21 different? You -- you know, when we talked --2.2 when we had the parade case, we said they don't 23 have a lot of rules, but they have some rules, 24 and we're going to respect the rules that they 25 do have. Even though they let a lot of people

1 come in, they don't let a few people come in, 2 and that seems to be quite important to them. 3 And similarly here, I mean, Facebook, YouTube, these are the paradigmatic social media 4 companies that this law applies to, and they 5 6 have rules about content. They say, you know, 7 you can't have hate speech on this site. They say you can't have misinformation with respect 8 9 to particular subject matter areas. 10 And they seem to take those rules and 11 -- I mean, you know, somebody can say maybe they 12 should enforce them even more than they do, but they do seem to take them seriously. They have 13 14 thousands and thousands of employees who are 15 devoted to enforcing those rules. So why aren't they making content 16 17 judgments, not quite as explicit as the -- the 18 kind in your hypothetical, but definitely 19 they're making content judgments about the kind 20 of speech that they think they want on the site 21 and the kinds of speech that they think is 2.2 intolerable. MR. WHITAKER: Well -- well, there's a 23 lot -- lot in there, Your Honor. May -- maybe I 24 can start with the Hurley case. I mean, I -- I 25

1 think what -- what was going on in Hurley, I 2 think, is that you had a parade that was --3 JUSTICE KAGAN: Could -- could you -maybe just start with the more general question. 4 MR. WHITAKER: Sure -- sure -- sure --5 6 for sure. 7 JUSTICE KAGAN: I mean, I'm happy for 8 you to talk about Hurley. I don't want to, you 9 know, get in your way. MR. WHITAKER: I'll start wherever you 10 11 want. It's your time, not mine, Your Honor. 12 So, yeah. So, certainly, the more -- the broader question about rules of the road and the 13 14 like. 15 Common carriers have always conducted 16 their businesses subject to general rules of 17 decorum. I think the fact that the platforms 18 have these general rules of decorum, the fact 19 remains that upwards of 99 percent -- for all 20 that content moderation, that's really a product 21 of the fact that they have so -- they host so 2.2 much content. But the fact remains that 99 --23 upwards of 99 percent of what goes on the 24 platforms is basically passed through without 25 review.

1 Yes, they have spam filters on the 2 front end and the like, and that's not uniquely 3 _ _ JUSTICE KAGAN: But -- but that 4 1 percent seems to have gotten some people 5 6 extremely angry. You know, the 1 percent that's 7 like we don't want --MR. WHITAKER: Well --8 9 JUSTICE KAGAN: -- anti-vaxxers on our site --10 11 MR. WHITAKER: Sure. 12 JUSTICE KAGAN: -- or we don't want 13 insurrectionists on our site. 14 I mean, that's what motivated these 15 laws, isn't it? And that's what's getting 16 people upset about them --17 MR. WHITAKER: Right. 18 JUSTICE KAGAN: -- is that other 19 people have different views about what it means 20 to -- to provide misinformation as to voting and 21 things like that, and, you know, that's the 22 point. There are some sites that can say this 23 kind of talk about vaccination policy is good 24 and some people can say it's bad, but it's up to 25 the individual speakers.

1 MR. WHITAKER: The fact that some 2 people are angry about the content moderation policies doesn't show that is their speech. 3 And -- and my friends talk about their 4 advertisers. Well, we don't know whether the 5 advertisers think it's their speech or whether 6 7 they just disagree with the speech. And their advertisers and people who are anyry with speech 8 9 don't get a heckler's veto on Florida's law. 10 But even more broadly than that, I 11 mean, we know that mere -- the -- the fact that 12 a hosting decision is ideologically charged and 13 causes controversy can't be the end of the game 14 because I think Rumsfeld versus FATR would have 15 had to come out the other way then, because, in 16 Rumsfeld, certainly, the law schools there felt 17 very strongly that the military were being 18 bigots and they didn't want them on campus. 19 And yet this Court did not look to the 20 ideological controversy surrounding those 21 decisions. Instead, it looked at objectively 2.2 whether the law schools were engaged in 23 inherently expressive conduct. 24 CHIEF JUSTICE ROBERTS: Well, it 25 looked at what -- the fact that the schools were

1 getting money from the federal government, and 2 the federal government thought: Well, if they're going to take our money, they have to 3 allow -- allow military recruiters on the 4 I don't think it has much to do with 5 campus. 6 the issues today at all. 7 MR. WHITAKER: Well -- Mr. Chief Justice, it's difficult for me to argue with you 8 9 very much about what Rumsfeld versus FAIR means. 10 (Laughter.) 11 MR. WHITAKER: But let me just take a 12 crack because, I mean, I -- I think, as I -- as I read your opinion for the Court, you didn't 13 14 rely, actually, on the funding aspect of the 15 case to reach the conclusion that what was going 16 on there was not First Amendment protected 17 conduct. You were willing to spot them that 18 this -- the -- the question would be exactly the 19 same if it were a direct regulation of speech as 20 opposed to a funding condition. 21 So I absolutely think that the 2.2 analysis in that case directly speaks to this. 23 And just -- just --24 JUSTICE KAVANAUGH: Can I -- can I ask 25 you about a different precedent, about what we

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1 said in Buckley? And this picks up on the Chief 2 Justice's earlier comment about government 3 intervention because of the power of the social media companies. 4 And it seems like, in Buckley, in 5 6 1976, in a really important sentence in our 7 First Amendment jurisprudence, we said that "the 8 concept that [the] government may restrict the 9 speech of some elements of our society in order to enhance the relative voice of others is 10 11 wholly foreign to the First Amendment...". and 12 that seems to be what you responded with to the 13 Chief Justice.

14 And then, in Tornillo, the Court went 15 on at great length as well about the power of 16 then newspapers, and the Court said they 17 recognized the argument about vast changes that place in a few hands the power to inform the 18 19 American people and shape public opinion and that that had led to abuses of a -- bias and 20 21 manipulation. The Court accepted all that but 2.2 still said that wasn't good enough to allow some 23 kind of government-mandated fairness, right of 24 reply or anything.

25 So how do you deal with those two

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	principles?
	PTTICTPTCD.

2	MR. WHITAKER: Sure sure, Justice
3	Kavanaugh. Well, first of all, if you if you
4	agree with me with our front-line position that
5	what is being regulated here is conduct, not
б	speech, I don't think you get into interests and
7	scrutiny and all that. I do think that the law
8	advances the the First Amendment interests
9	that I mentioned, but I think the the the
10	that interest, the interest that our law is
11	serving, if you did get to a point in the
12	analysis that required consideration of those
13	interests, our interests
14	JUSTICE KAVANAUGH: Do you agree then,
15	if speech is involved, that those cases mean
16	that you lose?
17	MR. WHITAKER: No, I don't agree with
18	that, and and the reason I don't agree with
19	that is because the interests that our laws
20	serve are are legitimate, and and it's
21	and it's hard because different parts of the law
22	serve different interests. But I think the one
23	that that sounds in the in your concern
24	that is most directly implicated would be the
25	hosting requirement applicable to journalistic

23

1 enterprises.

2	So one provision of the law says that
3	the platforms cannot censor, shadow ban, or
4	deplatform journalistic enterprises based on the
5	content of their publication or broadcast. And
6	that serves an interest very similar to the
7	interest that this Court recognized as
8	legitimate in Turner when Congress imposed on
9	cable operators a must-carry obligation for
10	broadcasters.
11	And and just as a broadcaster
12	and and what the Court said was there was not
13	just a legitimate interest in promoting the free
14	dissemination of ideas through broadcasting, but
15	it was a indeed a a compelling interest, a
16	a highly compelling interest. And so I think
17	the journalistic enterprise provision serves a
18	that very similar issue.
19	But there are also other interests
20	that our law serves. For example, the
21	consistency provision, Your Your Honor, is
22	really a consumer protection measure. It
23	it's sort of orthogonal to all that. The
24	consistency provision, which is really the heart
25	of our law, just says to the the platforms:

24

1 Apply your content moderation policies 2 consistently. Have whatever policies you want, 3 but just apply them consistently. 4 JUSTICE KAVANAUGH: Could the government apply such a policy to publishing 5 6 houses and printing presses and movie theaters 7 about what they show? Bookstores, newsstands? 8 MR. WHITAKER: No, no --9 JUSTICE KAVANAUGH: In other words, be 10 consistent in what kinds of content you exclude? 11 Could that be done? 12 MR. WHITAKER: I -- I -- I don't think 13 so, Your Honor. 14 JUSTICE KAVANAUGH: And why not? 15 MR. WHITAKER: Well -- well, I think 16 that there is -- is -- the consumer -- here, the 17 -- the social media platforms, their terms of service, their content moderation policies are 18 19 really part of the terms under which they are 20 offering their service to users. I don't think 21 that that really -- that that paradigm really fits in what Your Honor is -- is talking about. 2.2 23 So -- but I -- but, look, we agree, we 24 certainly agree that a newspaper, a book in a bookstore is engaging in inherently expressive 25

25

conduct. And our whole point is that these
 social media platforms are not like those. And
 why are --

JUSTICE JACKSON: But doesn't it depend on exactly what they're doing? I mean, I -- I guess the hard part for me is really trying to understand how we apply this analysis at the broad level of generality that I think both sides seem to be taking here.

10 I mean, you say what -- what is being 11 regulated here is conduct, not speech. Well, I 12 guess maybe if you're talking about Facebook's 13 news -- news feed feature. But there are lots 14 of other things that Facebook does that -- you 15 know, that might be speech, but then there might 16 be other things that Facebook does that doesn't 17 qualify as speech.

So don't we have to, like, drill down more in order to really figure out whether or not things are protected?

21 MR. WHITAKER: Actually, I don't think 22 so. I think that that -- that precise ambiguity 23 strongly favors our position, Your Honor, 24 because, in the posture of this facial

25 challenge, all you need to look at is whether

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1 there are at least some activities --2 JUSTICE JACKSON: No, but that's --3 no, no, no. I guess what I'm saying is you mentioned the Pruneyard case or the FAIR case, 4 excuse me. I mean, we didn't say that law 5 6 schools, you know, as a categorical matter are, 7 you know, always engaged in unprotected speech. 8 We looked at the particular thing. This was a 9 fair and, you know, the law school was saying, we don't want these certain entities in it. 10 11 I hear you suggesting that we can just 12 say, you know, Facebook is a common carrier and, 13 therefore, everything it does qualifies as 14 conduct and not speech. And I don't think 15 that's really the way we've done this in our 16 past precedents. So can you speak to that? 17 MR. WHITAKER: Sure -- sure. 18 Certainly, that's not what we're saying, Your 19 Honor. I -- I completely agree with you that 20 it's very important to isolate what conduct the particular -- each particular provision of the 21 2.2 law is regulating. 23 JUSTICE JACKSON: Not the law, the 24 entity. What is the entity doing? 25 MR. WHITAKER: Well --

1 JUSTICE JACKSON: Like we have to do 2 3 MR. WHITAKER: Sure. JUSTICE JACKSON: -- an intersection 4 of what the law says they can't do and what in 5 6 particular they are doing, right? 7 MR. WHITAKER: Well, and I guess the 8 right level of generality and the general -- the 9 level of generality that's sufficient, I think, 10 to conclude that the law has a plainly 11 legitimate sweep is we are talking about the --12 the social networking companies' activities in 13 -- in content-moderating user-uploaded content. 14 That -- that, I think, is the relevant activity, 15 and -- and that is what -- that is -- that 16 activity --17 JUSTICE JACKSON: All right. So what 18 do you do about -- what do you do with LinkedIn 19 has a virtual job fair and it has some rules 20 about who can be involved. That seems to map 21 on, I would think, to the FAIR case. Is that 2.2 what you're saying? 23 MR. WHITAKER: Well, I -- I -- I don't 24 -- I don't think so. I don't think it would map on to our theory in this case because it sounds 25

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1 like to me, and I'm not totally aware of all the facts of LinkedIn there, but --2 3 JUSTICE JACKSON: Yeah. MR. WHITAKER: -- if I understand --4 JUSTICE JACKSON: I think that's a 5 6 problem in this case. 7 MR. WHITAKER: Well --8 JUSTICE JACKSON: We're not all aware of the facts --9 MR. WHITAKER: Well --10 11 JUSTICE JACKSON: -- of what's 12 happening. MR. WHITAKER: -- exactly. And I -- I 13 14 think that that -- that is one of the -- the --15 the -- the reasons why this -- this facial 16 challenge is -- has been very confusing to 17 defend, because we kind of don't -- we kind of 18 don't know what to defend against. 19 JUSTICE GORSUCH: Mr. Whitaker, on --20 on that score, so we have some -- in a facial challenge, we have a bit of a problem because 21 22 different legal principles apply in different 23 factual circumstances, and there are many different defendants or plaintiffs here, sorry, 24 25 with different services. So that -- that's a

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1 complicating feature on a -- on a facial 2 challenge. 3 But here's another one for you: What about Section 230, which preempts some of this 4 law? How much of it? And how are we to account 5 for that complication in a facial challenge? 6 7 MR. WHITAKER: Well --8 CHIEF JUSTICE ROBERTS: Why don't you answer the question, then we'll move on. 9 10 JUSTICE GORSUCH: Briefly. Yeah. MR. WHITAKER: Well -- well -- well, I 11 12 -- I think that the Court should answer the question presented, I guess. 13 14 JUSTICE GORSUCH: But how can we do 15 that without looking at 230? 16 MR. WHITAKER: Well, because I -- I --17 I don't -- I don't think that there's any --18 some of this was briefed at the -- at the cert 19 stage, Your Honor. I don't think that the --20 the Section 230(c) preemption -- (c)(2)preemption question is really going to dispose 21 2.2 of the case. You know, the district court 23 actually reached the Section 230 issue but concluded that it still had to reach the 24 25 constitutional issue anyway.

1 JUSTICE GORSUCH: I -- I'll get back 2 to this in my turn. Thank you. 3 CHIEF JUSTICE ROBERTS: Thank you, counsel. 4 Justice Thomas, anything further? 5 JUSTICE THOMAS: Mr. Whitaker, the --6 7 could you give us sort -- your best explanation 8 of what you perceive the speech to be in this 9 case or allege to be in this case? 10 MR. WHITAKER: Well -- well, as I 11 understand their contention, it's -- it's the --12 this idea that the platforms, in having content moderation policies, are somehow creating a 13 14 welcoming community, I guess. It seems to me, 15 at that level of generality, that can't really 16 be a cognizable message -- that seems to me more 17 like a tautology than -- than a message. Basically, we want the people on our sites that 18 19 we want. 20 And -- and -- and I think, at that level of generality, certainly, the Pruneyard 21 2.2 case would have to come out the other way 23 because, in Pruneyard, the mall certainly wanted 24 to ban leafleting because it wanted to create a certain environment, and yet this Court said 25

1 that they did not have a -- a First Amendment 2 right to do that. 3 JUSTICE THOMAS: I -- I think what I was more interested in is, you know, we're 4 talking -- we're using broad terms like "content 5 6 moderation," and throughout the briefs, you have 7 "shadow banning," "deprioritizing," and all sorts of things. 8 And I -- I quess, with these facial 9 10 challenges, I always have a problem that we 11 don't -- we're not talking about anything 12 specific. In an as-applied challenge, at least we know what's in front of us and what your 13 14 interpretation or at least the state's 15 interpretation of its law is in that case. Now 16 we're just speculating as to what the law means. 17 So I'm just trying to get more of a --18 more specificity as to what the speech is in 19 this case. They are censoring as far as I can 20 tell, and I don't know of any protected --21 speech interests in censoring other speech, but 2.2 perhaps there is something else. MR. WHITAKER: Well, I don't think 23 24 that they do have a -- certainly not a speech 25 interest. I mean, at -- at most, I think that

32

1	they would have some interest in the
2	inherently allegedly inherently expressive
3	conduct of speech. You know, that way of
4	looking at it I take it my friends from the
5	United States agree with. But we do not think
б	they have a message in censoring and
7	deplatforming users from the sites any more than
8	the law schools in FAIR had a message in booting
9	military recruiters off campus.
10	JUSTICE THOMAS: Thank you.
11	CHIEF JUSTICE ROBERTS: Justice Alito?
12	JUSTICE ALITO: Did the plaintiffs
13	raise content I I'm sorry overbreadth
14	below?
15	MR. WHITAKER: No no, Your Honor.
16	I'm not a I I I can't I
17	couldn't find the word "overbreadth" in any of
18	their pleadings.
19	JUSTICE ALITO: Where in the record
20	would should I look to find a list of all of
21	the platforms that are covered by the Florida
22	statute?
23	MR. WHITAKER: Well well, Your
24	Honor, I'm afraid that doesn't appear in the
25	in the record because I think that the the

33

1 platforms were fairly cagey about which of their 2 members they thought the statute applied to. The -- the record only contains three 3 platform-specific declarations: Etsy, Facebook, 4 and YouTube. 5 So that -- that's part of the problem 6 7 in this case, is that we -- we -- we don't have a sense of -- it -- the record has not been 8 fully developed to answer that question, so 9 10 we're kind of litigating in the dark here. 11 And this was litigated on a 12 preliminary injunction at breakneck speed 13 without the -- the State having a chance to take 14 discovery, and that's part of the reasons why 15 some of these questions are difficult to answer. 16 JUSTICE ALITO: Well, I'll ask Mr. 17 Clement that argument -- that question too. As to the platforms that are covered, 18 19 where in the record would I look to find a list 20 of all of the functions that those platforms 21 perform? 2.2 MR. WHITAKER: I'm not aware in the 23 record, Your Honor, of a -- an all-encompassing 24 list of all the functions the platforms perform. 25 There certainly are, as I mentioned, three

34

1 platform-specific declarations, also some more 2 general declarations that talk about some of their -- their members more generally, but it's 3 not sort of all in one place. 4 I apologize, Your Honor. 5 JUSTICE ALITO: Does your law cover 6 7 any websites that primarily or even exclusively engage in non-expressive conduct? 8 MR. WHITAKER: I think it does cover 9 10 websites that engage in primarily non-expressive 11 conduct. I mean, we would -- we would 12 characterize the social networking platforms as 13 engaging in primarily non-expressive conduct in -- in -- insofar as they are hosting speech, 14 15 just like a traditional common carrier is not 16 engaged in -- in expressive conduct in 17 transmitting the communications of its 18 subscribers. And we do think our law would 19 apply to certainly the -- the largest -- at a 20 minimum, the largest social networking 21 platforms. 2.2 JUSTICE ALITO: What is the right 23 standard for a facial challenge if we think that your law implicates a -- a -- a portion, a 24 25 percentage of expressive conduct and a portion

35

of non-expressive conduct? 1 2 How should we analyze that? 3 MR. WHITAKER: I think that you would -- that -- so the -- there's a -- there's --4 JUSTICE ALITO: So we need a -- we 5 need a numerator and a denominator there, I 6 7 think. What -- what would they be? MR. WHITAKER: Well, I -- I don't 8 think there isn't -- that the standard would 9 have a numerator and a denominator. Actually, 10 11 Your Honor, in this context, we would view it as 12 the question being whether the statute has a plainly legitimate sweep without the need to 13 14 compare applications. 15 As I understand this Court's precedents, the numerator/denominator comparison 16 17 would be something you would do if there were an 18 overbreadth claim in this case, but I don't 19 understand my friends to be making an 20 overbreadth claim. Maybe they'll say something 21 different, but I could not find the word "overbreadth" in their -- in their pleadings. 2.2 23 In the Texas case, they do have a footnote 24 suggesting that they made an overbreadth claim 25 in the alternative.

36

1 JUSTICE ALITO: Thank you. 2 CHIEF JUSTICE ROBERTS: Justice 3 Sotomayor? 4 Justice Kagan? JUSTICE KAGAN: I -- I just wanted to 5 6 sort of understand your position, and I want to 7 narrow this to the paradigmatic social media companies' sort of news feed postings, Facebook, 8 YouTube, Twitter/X. 9 10 So suppose that -- that I say -- just take this as a given, all right? You can argue 11 12 with the facts, but don't. 13 (Laughter.) 14 JUSTICE KAGAN: Suppose that I say, 15 for the most part, all these places say we're 16 open for business. Post whatever you like and 17 we'll host it. 18 But there are exceptions to that and 19 clearly content-based exceptions, which the companies take seriously. So let's say they say 20 21 there we think that misinformation of particular 2.2 kinds is extremely damaging to society --23 misinformation about voting, misinformation 24 about certain public health issues -- and so too 25 we think that hate speech or bullying is

37

1 extremely problematic. 2 And so we are going to enforce rules 3 against this. They're only going to apply to a small percentage of the things that people want 4 to post. For the most part, they're open for 5 business. But we are serious about those 6 7 content-based restrictions. All right? So, in that world, why isn't that a --8 9 a -- you know, a -- a -- a classic First Amendment violation for the state to come in and 10 11 say, we're not allowing -- going to allow you to 12 enforce those sorts of restrictions even though, you know, you're basically -- it's -- it's like 13 14 an editorial judgment, you're excluding 15 particular kinds of speech? 16 MR. WHITAKER: Well -- well, Your 17 Honor, I think, if you -- I take your -- your hypo to be assuming that it's -- it's First 18 19 Amendment protected activity, and I think that 20 what you would do in that instance, you would have to run intermediate scrutiny -- under 21 2.2 Turner. And -- and the analysis regrettably --23 JUSTICE KAGAN: So you -- don't say what -- what I take it to be First Amendment 24 25 activity. I mean, that -- do you take it to be

38

1 First Amendment activity? MR. WHITAKER: No, no. That's our 2 3 whole point. I mean, again --JUSTICE KAGAN: Even though they're 4 saying, yeah, we're -- we -- we have -- we -- we 5 are a big forum for lots of messages but not for 6 7 those kinds of messages. We want to exclude those kinds of messages. 8 9 Why isn't that First Amendment, a 10 First Amendment judgment? MR. WHITAKER: I mean, I -- I -- I 11 12 think it's very -- the -- the Court held otherwise, I think, in Pruneyard because, there, 13 14 there was an editorial policy against leafleting 15 too. And, again, I don't buy --16 JUSTICE KAGAN: No, that was just 17 about leafleting and the mall owner didn't have 18 any expressive views. I'm taking as a given 19 that these -- that -- that YouTube or Facebook 20 or whatever has expressive views, there are particular kinds of expression defined by 21 2.2 content that they don't want anywhere near their 23 site. MR. WHITAKER: But -- but I think, 24 25 Your Honor, you still would have to look at the

39

1 objective activity being regulated, namely,

2 censoring and deplatforming, and ask whether3 that expresses a message.

And because they host so much content, an objective observer is not going to readily attribute any particular piece of content that appears on their site to some decision to either refrain from or to censor or deplatform. And that makes --

10 JUSTICE KAGAN: Do you think so as to 11 this -- here, this is a real-world example. 12 Twitter users one day woke up and found 13 themselves to be X users and the content rules 14 had changed and their feeds changed, and all of 15 a sudden they were getting a different online 16 newspaper, so to speak, in a metaphorical sense 17 every morning, and a lot of Twitter users 18 thought that was great, and a lot of Twitter 19 users thought that was horrible because, in 20 fact, there were different content judgments 21 being made that was very much affecting the 2.2 speech environment that they entered every time they opened their app. 23 24

24 MR. WHITAKER: Your Honor, that 25 does -- respectfully, that -- that does not

40

1	answer whether they have a message in their
2	censorship any more than, you know, the the
3	I'm sure people objected, again, quite
4	strenuously to the fact that the law schools
5	were permitted to interview on campus. I'm sure
б	people wanted to ban leafleting in the at the
7	mall in Pruneyard. And and that does not
8	give them a message.
9	And that I think the reason for
10	that is, if they are not carefully selecting the
11	content in the newspaper, they don't have a
12	message in the existence, in the mere existence,
13	of the content on the site.
14	JUSTICE KAGAN: Thank you, General.
15	CHIEF JUSTICE ROBERTS: Justice
16	Gorsuch?
17	JUSTICE GORSUCH: I just wanted to
18	give you a chance to finish up on the Section
19	230 point. I think it's Section 6 of your law
20	that says that the law is not enforceable to the
21	extent it conflicts with Section 230.
22	MR. WHITAKER: Sure, sure sure.
23	JUSTICE GORSUCH: So why wouldn't we
24	analytically want to address that early on in
25	these proceedings, whether in this Court or a

41

1 lower court? 2 MR. WHITAKER: Well -- well, the law 3 JUSTICE GORSUCH: And does that 4 complicate our attempt to --5 6 MR. WHITAKER: Sure. 7 JUSTICE GORSUCH: -- resolve things in a facial challenge? 8 9 MR. WHITAKER: Sure -- sure, Your 10 And I think the -- the reason is -- is Honor. 11 because the law is not facially at least 12 preempted under -- under 230(c)(2), which 13 principally regulates takedowns. One reason for that is we -- we 14 15 understand 230(c)(2) not to sanction 16 viewpoint-based content moderation under the 17 rubric of otherwise objectionable. And there's 18 a very nice article that Professor Volokh has on 19 this in the -- in the Journal of Free Speech Law where he lays this out. And we obviously 20 21 haven't briefed this, Your Honor. 2.2 The second point I would make about 23 Section 230(c)(2) is that it only applies to good-faith content moderation, so to the extent 24 25 our law prohibits them from engaging in

42

1 bad-faith content moderation, that is absolutely 2 not preempted by 230(c)(2). 3 And one way to understand their constitutional claims in this case, because they 4 have an expansive view of Section 230(c)(2), is 5 6 that they are in essence asserting a 7 constitutional right to engage in bad-faith content moderation because they already have the 8 right to engage in a lot of moderation of 9 10 illicit content under 230(c)(2) as long as they 11 do so in good faith. 12 JUSTICE GORSUCH: Okay. And -- and 13 then just to follow up on Justice Kagan's line 14 of questioning, you've analogized to common 15 carriers and telegraphs in particular. 16 Why is that an apt analogy here, do 17 you think? 18 MR. WHITAKER: I think it's an apt 19 analogy, Your Honor, because the -- the -- the principal function of a social media site is to 20 21 enable communication, and it's enabling willing 2.2 speakers and willing listeners to talk to each 23 other. 24 And it's true that the posts are more 25 public, but I don't think that Verizon would

43

1	gain any greater right to censor simply because
2	it was a conference call. I don't think that
3	UPS or FedEx would gain a greater right to
4	censor books because it was a truckload of books
5	as opposed to one book.
б	And so that the analogy is indeed
7	apt. And and so there's been talk of market
8	power. Market power is not an element, I think,
9	of traditional common carrier regulation, and,
10	indeed, some entities that are regulated as
11	common carriers, like cellphone providers,
12	operate in a fairly competitive market.
13	JUSTICE GORSUCH: Thank you.
14	CHIEF JUSTICE ROBERTS: Justice
15	Kavanaugh?
16	JUSTICE KAVANAUGH: In your opening
17	remarks, you said the design of the First
18	Amendment is to prevent "suppression of speech."
19	And you left out what I understand to be three
20	key words in the First Amendment or to describe
21	the First Amendment, "by the government."
22	Do you agree "by the government" is
23	what the First Amendment is targeting?
24	MR. WHITAKER: I do agree with that,
25	Your Honor, but I don't agree that there is no

44

1 First Amendment interest in allowing the 2 people's representatives to promote the free 3 exchange of ideas. This Court has recognized 4 that as a legitimate First Amendment interest in the Turner case and all the way going back to 5 the Associated Press case when --6 7 JUSTICE KAVANAUGH: Well, in the Turner case, the intervention was, the Court 8 9 emphasized, unrelated to the suppression of speech, the antitrust-type intervention there. 10 11 So I'm not sure when it's related to ensuring 12 relative voices are balanced out or there's 13 fairness in the speech or balance in the speech, 14 that that is covered by Turner. 15 Do you agree with that? 16 MR. WHITAKER: No, I don't agree with 17 that, Your Honor. Our -- our -- our interest 18 and our law --19 JUSTICE KAVANAUGH: What did Turner 20 mean by "unrelated to" the suppression of 21 speech? 2.2 MR. WHITAKER: Well -- well, we don't 23 view our law as advancing interests that are 24 related to the suppression of speech. We think 25 that the interests, for example, in protecting

45

1 journalistic enterprises from being censored, 2 from -- from MSNBC being censored because an 3 Internet platform doesn't like a broadcast it showed on -- on its station the other day, that 4 -- that is just an interest in preventing from 5 6 being silenced. It's not an equalizing 7 interest. It's giving them a chance. JUSTICE KAVANAUGH: On the editorial 8 9 control point, you really want to fight the idea -- and I understand -- that editorial control is 10 11 the same thing as speech itself. And you've 12 emphasized Pruneyard over and over again. 13 But we have a whole other line of 14 cases, as you're aware, of course, Hurley, PG&E, 15 Tornillo, Turner, which emphasize editorial 16 control as being fundamentally protected by the First Amendment. 17 18 And I understood the line between 19 Pruneyard on the one hand and those cases on the 20 other to be whether you were involved in a speech, communications business, as opposed to a 21 2.2 shopping center owner, which is the other side 23 of the line. 24 Can you respond to those cases? 25 MR. WHITAKER: Sure. I guess I don't

46

1 dispute the general principle of editorial 2 control. I just don't think that this -- that 3 the social media platforms are engaged in editorial control. 4 And, again, the -- the -- the 5 6 recruiters -- the law schools, excuse me, in 7 Rumsfeld versus FAIR argued that they were exercising editorial control when they booted 8 military recruiters off campus and invoked 9 10 Tornillo explicitly. And this Court had none of 11 it. 12 So the Court does need to draw a line, 13 I think, between a selective speech host that is 14 exercising editorial control and a speech host 15 like a common carrier or like the mall in 16 Pruneyard that can indeed be regulated in 17 prevent -- in being prevented from silencing its 18 customers. 19 JUSTICE KAVANAUGH: On the selective 20 speech host point, I think you've made the point to Justice Kagan that they don't eliminate much 21 2.2 speech. But didn't we deal with that in Hurley 23 as well and say that the mere fact that the 24 parade organizer usually took almost all comers 25 was irrelevant to the First Amendment interests

47

1 in essentially editorial control over who 2 participated in the parade? 3 MR. WHITAKER: Yeah, and I -- and I -and I guess I think Hurley, Your Honor, really 4 turned more on the fact that what was the 5 6 activity there was a St. Patrick's Day parade 7 with a particular expressive purpose, and so perhaps the -- the -- the -- it -- it could 8 9 still be expressive and be a little bit more 10 lenient. 11 But I would note that this Court in 12 Hurley did -- in rejecting the conduit argument, relied on the fact that there was front-end 13 14 selection of -- of the members of the parade, 15 that the -- the parade committee -- the 16 committee that was responsible for it was doing 17 front-end selection. So I do think Hurley fits 18 our theory. 19 But I also think that selectivity is 20 totally relevant to who is the speaker. And I -- and we -- we analogize in our brief to the 21 2.2 government speech cases where this Court has 23 made that exact point in a variety of cases, such as Matal versus Tam and Shurtleff. 24 And 25 what you have said is that if the government is

1 not exercising a ton of control over the speech 2 that comes into a forum, it is not speaking and it can't censor. That's what this Court held in 3 Shurtleff the --4 5 JUSTICE KAVANAUGH: Thank -- thank 6 you. 7 CHIEF JUSTICE ROBERTS: Justice 8 Barrett? 9 JUSTICE BARRETT: Mr. Whitaker, I have a question about this editorial control because, 10 11 really, when it comes to platforms that are the 12 traditional social media platforms like YouTube, Instagram, you know, TikTok, Twitter/X, it all 13 rides -- it all turns on editorial control. 14 15 It seems to me that one distinction 16 between this and FAIR is that, here, these 17 companies are speech hosts, right? I mean, the 18 law schools in FAIR were hosting job fairs for 19 this purpose, like online recruiting. They 20 weren't gathering together a whole bunch of people and saying, here, present your ideas, 21 22 present your posts. I mean, these social media 23 companies are hosting speech. 24 So why isn't that more like a 25 newspaper in Tornillo?

1	MR. WHITAKER: It it is it is
2	different, Your Honor, but but I think that
3	that's why we've we've leaned on also on
4	the common carrier analogy, I which I think
5	reflects that a a speech you can't just
6	say it's a speech host and go home because, if
7	that were true, Verizon could censor. Excuse
8	me.
9	JUSTICE BARRETT: Well well, put
10	aside common carrier for one second and just
11	pretend just put common carrier to the side.
12	Just tell me why this doesn't look like the same
13	kind of editorial control we see newspapers
14	exercise.
15	MR. WHITAKER: Because the platforms
16	do not review it it is a strange kind of
17	editor, Your Honor, that does not actually look
18	at the material that is going on its
19	compilation. I mean, in Twitter versus Taamneh,
20	the platforms told you that they didn't even
21	know that ISIS was on their platform and doing
22	things. And it is a strange kind of editor that
23	does not even know that the material that it
24	is editing.
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25 JUSTICE BARRETT: Is it because it's

50

1 not humanized? I mean would -- "humanized," not 2 human eyes. Is it because it could be an 3 algorithm that says, you know, we want to have, as Justice Kagan was pointing out, terms of 4 service, we want to have this kind of site. 5 You 6 know, or -- or -- or some say that, for example, 7 TikTok might have boosted pro-Palestinian speech and reduced -- reduced pro-Israel speech. 8 9 That's a viewpoint, right? And if you have an algorithm do it, is that not speech? 10 MR. WHITAKER: Well, it -- it -- it 11 12 might be, Your Honor, but -- but, again, in -in -- in Twitter and Gonzalez, the -- the -- the 13 14 platforms told you that the algorithms were 15 methods of organizing -- neutral methods of 16 organizing the speech, much like the Dewey 17 decimal system. 18 JUSTICE BARRETT: Well, that's not 19 what they're saying here. So let's -- let's 20 assume that what they're saying here, that they're organizing it, you know, in ways that 21 2.2 reflect preferences, that are expressive of 23 their terms and conditions. In that event, do you think it would 24 25 be editorial control in a First Amendment sense?

1	MR. WHITAKER: No. And and I think
2	it's important to separate the organize and I
3	agree with Justice Jackson that it's important
4	to separate the various functions the
5	organizing function from the hosting function.
б	And this is a point that Professor Volokh has
7	made in his in in his article that we
8	cite.
9	I mean, the if it simply because
10	they they are required to host certain
11	speech, it that does not actually
12	meaningfully prevent prevent them from
13	organizing that speech. So I think the Court
14	has to separate out regulation of the
15	organization from simply preventing them from
16	censoring.
17	And the reason, Your Honor, it is
18	different from a newspaper, I think, is two
19	principal points. First, we've been talking a
20	lot about selection, but, second, space
21	constraints. Space constraints are something
22	that this Court in FAIR and in Tornillo relied
23	on as one factor that is relevant. And the
24	social media companies have don't have any
25	space constraints, which means that a

1 requirement to host an additional piece of -- of 2 content is a -- a relatively less restriction 3 over --

JUSTICE BARRETT: Well, let me just 4 interrupt you there. I mean, Justice Sotomayor 5 6 pointed out that even though there may not be 7 physical space constraints, there are the -- the -- the constraints of attention, right? They 8 9 have to present information to a consumer in 10 some sort of organized way and that there's a limited enough amount of information that the --11 12 the consumer can absorb it.

And don't all methods of organization 13 14 reflect some kind of judgment? I mean, could 15 you tell -- could Florida enact a law telling 16 bookstores that they have to put everything out 17 by alphabetical order and that they can't 18 organize or put some things closer to the front 19 of the store that they think, you know, their 20 customers will want to buy? 21 MR. WHITAKER: I think, first --2.2 first, let me just take a step back because one 23 of the problems here is we don't have any information in this record on their algorithms. 24

25 It's very difficult for us to piece -- pick

52

53

1 apart what exactly the algorithms are doing. 2 You certainly could imagine, I think, to be -you know, to be candid, an algorithm that could 3 be expressive. 4 As far as we can tell, if the 5 algorithms work, though, in the manner that this 6 7 Court described them in Twitter versus Taamneh, they look more like neutral ways to reflect user 8

9 choice, and I don't think there's expression in 10 that.

11 Now you can imagine a different kind 12 of algorithm. If an algorithm -- if it were possible to have an algorithm that made a 13 14 website look like a newspaper, that would be 15 different. But, again, I think the Court -- the 16 -- the question of organization is analytically 17 too distinct from -- from the separate question 18 of whether they can be regulated in their 19 hosting and censorship.

JUSTICE BARRETT: Okay. So your argument that it's not expressive entirely depends on the hypothesis that the sorting and feed functions are solely some sort of neutral algorithm that's designed to user preference and that they reflect no kind of policy judgment

54

1 based on the platform itself? 2 MR. WHITAKER: No. No, not at all, 3 actually, Your Honor, because I think that preventing them from censoring does not 4 meaningfully pre -- pre -- preclude them from 5 6 organizing. 7 If they're required to carry a piece of content, they can organize it however they 8 9 want generally. I mean, there are prohibitions 10 on shadow banning and the like, but they can 11 generally organize it however they want. So a 12 prohibition on censorship and deplatforming is not, I think, a meaningful interference with 13 14 organizing. 15 But -- but, again, on -- on 16 algorithms, I would just stress that this is 17 a -- a facial challenge. We don't have any 18 particular information on what exactly their --19 the content of their algorithms are. And so I 20 think the only question there is whether there's a possible state of the world under which the 21 2.2 algorithms are non-expressive. 23 JUSTICE BARRETT: Okay. Let me just

24 ask you one last question. It's about the 25 facial challenge aspect of this.

1 So Florida's law so far as I can 2 understand it is very broad, and we're talking 3 about the classic social media platforms, but it looks to me like it could cover Uber, it looks 4 to me like it could cover just Google search 5 engines, Amazon Web Service, and all of those 6 7 things would look very different. And, you know, Justice Sotomayor 8 9 brought up Etsy. It seems to me that they're arguing -- now Etsy has a feed recommended for 10 11 you, right, but it also just has shops for 12 handmade goods that you can get. It looks a lot more like a brick-and-mortar marketplace or flea 13 14 market, you know, than, you know, a place for 15 hosting speech. Okay? 16 So, if this is a facial challenge and 17 Florida's law indeed is broad enough to cover a 18 lot of this conduct which is farther away from 19 expression than these standard social media 20 platforms, why didn't you then in your brief 21 kind of defend it by pointing out, look, there's 2.2 all this other stuff that's perfectly fine that 23 Florida covers. We don't want, you know, some 24 person who wants to sell their goods on Etsy to 25 be suppressed because it's, you know, stuff --

56

1	handmarked handmade goods that express a
2	political view, for example.
3	MR. WHITAKER: I think we did defend
4	the application of our law to Etsy, and I think
5	I've I've defended that from from the
6	lectern, but but but I don't think you
7	need to be with me on
8	JUSTICE BARRETT: But, I mean,
9	pointing out, I mean, I can I can sit here
10	and think of all kinds of applications of this
11	law that really wouldn't hit expression, but
12	but I I just don't understand you to have
13	been defending the law in that way
14	MR. WHITAKER: Well
15	JUSTICE BARRETT: as opposed to
16	countering the argument that the the
17	platforms are not engaged in expression.
18	MR. WHITAKER: We're we're
19	we're we're making both arguments, Your
20	Honor, to be clear. As I was as I was
21	discussing with Justice Sotomayor, we view Etsy
22	as not having a significant expressive interest
23	in applying its policy its content moderation
24	policies.
25	JUSTICE BARRETT: So is that enough to

1 just make this whole thing fail, I guess, is my 2 question. If -- if --3 MR. WHITAKER: Yes, I think it is. JUSTICE BARRETT: -- if we agree with 4 you that Etsy, it's fine for it to apply to, or 5 6 Uber, it's fine, you know, Amazon Web Services, 7 if we agreed with you with all that, is that enough to just say, well, then this facial 8 9 challenge can't succeed? 10 MR. WHITAKER: Yes, because that would 11 give the law a plainly legitimate sweep, and 12 that's all the Court needs to -- to address here 13 to reject the facial challenge. 14 JUSTICE BARRETT: Thank you. 15 CHIEF JUSTICE ROBERTS: Justice 16 Jackson? 17 JUSTICE JACKSON: So I feel like 18 there's a lot of indeterminacy in this set of 19 facts and in this circumstance, as Justice Alito tried to, I think, illuminate with his 20 21 questions. We're not quite sure who it covers. 2.2 We're not clear exactly how these -- these 23 platforms work. 24 One of the things I wanted to give you 25 the chance to address is the lack of clarity

58

1 about what the statute necessarily means. 2 You've given a couple of -- you -- you've talked about the consistency provision, for example, 3 and you've represented what you think it means, 4 but we don't have a state court determination 5 6 interpreting that provision, do we? 7 MR. WHITAKER: You do not, Your Honor. In fact, the -- the -- the law was not allowed 8 to go into effect, so the Florida courts have 9 10 not had an opportunity to construe this statute 11 at all. 12 And I think that counsels strongly in 13 favor of rejecting the facial challenge because 14 this Court has considered in Washington State 15 Grange case the -- the fact that the state 16 courts have not had an opportunity to construe a 17 state law that's being attacked on its face as -- as a reason to reject a facial challenge. 18 19 JUSTICE JACKSON: Can I ask you, do 20 you think this statute could be susceptible to 21 multiple interpretations? I mean, I can imagine 2.2 even the consistency provision, you know, well, 23 what does it mean that they have to do this 24 consistently? They have to apply the same 25 standards, or it has to substantively result in

59

the same level of preference? I could imagine there you -- you could interpret that both more narrowly or broadly. MR. WHITAKER: There -- there certainly may be some interpretive questions,

6 Your Honor. On that point, I don't think there 7 is any -- any ambiguity. And let me just read 8 to you what the consistency provision says. It 9 says, "a social media platform must apply 10 censorship, deplatforming, and shadow banning 11 standards in a consistent manner among its users 12 on the platform."

13 And the censorship, deplatforming, and 14 shadow banning standards are the things that the 15 social media company must under a separate 16 provision of the law publicly disclose, which 17 was a disclosure requirement that the Eleventh 18 Circuit upheld.

19 JUSTICE JACKSON: Yes, I understand.

20 MR. WHITAKER: But --

JUSTICE JACKSON: I mean, I -- I
appreciate that Florida's position is that our
law is perfectly clear, but I -- I -MR. WHITAKER: Well -- well -- well,
but I think that that -- that that language I

60

1 just read to you I think makes clear that the 2 baseline for comparison is not some abstract notion of fairness. 3 JUSTICE JACKSON: All right. Well, 4 let me ask you this about that, all right? So 5 6 let's assume we get to the point we disagree 7 with you about whether or not expressive 8 activity is covered and we're actually applying 9 or trying to determine which standard applies, that is, you know, level of scrutiny. 10 11 What I'm a little confused about is 12 how we evaluate, for example, the 30-day restriction with respect to determining whether 13 it's content-based or content-neutral. I 14 15 appreciate that on its face it doesn't 16 particularly -- you know, it doesn't point to a 17 particular type of content -- content, but I 18 suppose it's applied in reference to content, 19 right? MR. WHITAKER: Well, the --20 21 JUSTICE JACKSON: I mean, that -- that 2.2 restriction is a regulated entity can only 23 change its rules, terms, and engagements once 24 every 30 days. But we would have to look at 25 what it was before and what it is now to

61

1	determine if there's a change. So is that a
2	content-based restriction or not?
3	MR. WHITAKER: Certainly not. I mean,
4	the you know, this Court held a couple terms
5	ago in the City of Austin case just that simply
б	because a regulation requires consideration of
7	content doesn't doesn't make it
8	content-based. And there's nothing on the face
9	of that provision that targets any particular
10	message of the platforms.
11	And and and I think just to
12	just to zoom out a little bit on the 30-day
13	provision, I mean, that provision is really an
14	adjunct to the the consistency provision as I
15	understand it, and and the point of it is
16	that it wouldn't do much good to require the
17	platforms to apply their policies consistently
18	if they could just sort of constantly change
19	them. And and that, I think, is the point
20	JUSTICE JACKSON: I understand. But,
21	in the application of even the consistency
22	provisions, to determine whether they're not
23	doing it consistently, aren't we also looking at
24	content to some extent? I mean, I'm just
25	MR. WHITAKER: Well

1 JUSTICE JACKSON: -- it's -- I -- I 2 think it's not necessarily as easy as it might 3 seem to determine whether or not these provisions are actually content-based or 4 5 content-neutral. MR. WHITAKER: Well, again, I -- I --6 7 I don't think the fact that it requires consideration of -- of content makes it 8 9 content-based. I think you would look at 10 whether that -- it's targeting some kind of a 11 message of the platform, and there's nothing on 12 the face of the 30-day provision that does that, 13 Your Honor. 14 JUSTICE JACKSON: Thank you. 15 CHIEF JUSTICE ROBERTS: Thank you, 16 counsel. 17 Mr. Clement. 18 ORAL ARGUMENT OF PAUL D. CLEMENT 19 ON BEHALF OF THE RESPONDENTS MR. CLEMENT: Mr. Chief Justice, and 20 21 may it please the Court: 2.2 Florida's effort to level the playing 23 field and to fight the perceived bias of big tech violates the First Amendment several times 24 25 over. It interferes with editorial discretion.

1 It compels speech. It discriminates on the 2 basis of content, speaker, and view -- and 3 viewpoint. And it does all this in the name of 4 promoting free speech but loses sight of the 5 first principle of the First Amendment, which is 6 it only applies to state action.

7 Florida defends its law, as you've heard this morning, principally by insisting 8 9 that there's no expressive activity being 10 regulated. That blinks reality. This statute 11 defines the targeted websites in part by how big 12 their audience is. It regulates the content and display of particular websites, and it tries to 13 14 prevent my clients from censoring speakers and 15 content.

16 If you are telling the websites that 17 you are -- that they can't censor speakers, you 18 can't turn around and say you're not regulating 19 expressive activity. It's all over this law. 20 And that brings it squarely within the teaching 21 of Tornillo, PG&E, and Hurley.

All three of those cases teach that you cannot have the forced dissemination of third-party speech and they reject considerations of market power, misattribution,

63

or space constraints. And Reno and 303 Creative
 make clear those principles are fully applicable
 on the Internet.

Indeed, given the vast amount of 4 material on the Internet in general and on these 5 websites in particular, exercising editorial 6 7 discretion is absolutely necessary to make the websites useful for users and advertisers. And 8 9 the closer you look at Florida's law, the more 10 problematic the First Amendment problems become. 11 It singles out particular websites, in 12 plain violation of Minneapolis Star. Its provisions that give preferences to political 13 candidates and to edit -- and -- and to 14 15 journalistic enterprises are content-based in 16 the extreme. 17 I welcome the Court's questions. 18 JUSTICE THOMAS: Mr. Clement, if the government did what your clients are doing, or 19 20 -- would that be government speech? 21 MR. CLEMENT: So it might be 2.2 government speech, but I think it would be 23 unconstitutional government speech, which is to 24 say, when the government -- I mean, you know, 25 obviously, you have government speech cases, but

65

1 when what the government's doing is exercising 2 editorial discretion to censor some viewers or 3 some speakers and not others, I think that plainly violates the First Amendment. 4 And I think that's essentially the 5 thrust of this Court's decision in the Manhattan 6 7 Community Cable case against Halleck, which is that in this area, looking for state action is 8 9 absolutely critical. There are things that the -- if the government does, is a First Amendment 10 11 problem and if a private speaker does, we 12 recognize that as protected activity. 13 JUSTICE THOMAS: So --14 JUSTICE JACKSON: Mr. Clement, you -oh, sorry. 15 16 JUSTICE THOMAS: -- can you give me 17 one example of a case in which we have said the 18 First Amendment protects the right to censor? 19 MR. CLEMENT: So I don't know that the 20 Court used that particular locution, Justice 21 Thomas, but I think that is the thrust of 2.2 Hurley, that is the thrust of PG&E, that is the 23 thrust of Tornillo. In all of those cases, a 24 private party did not want to convey and 25 disseminate the speech of a third party. And in

1 every case, the government said, no, we have 2 some really good reason here why this private 3 party has to disseminate the message of a third party. And --4 JUSTICE THOMAS: I've been fortunate 5 6 or unfortunate to have been here for most of the 7 development of the Internet. 8 (Laughter.) 9 JUSTICE THOMAS: And on the argument under Section 230 has been that you're merely a 10 11 conduit, which it -- exact -- that was the case 12 back in the '90s and perhaps the early 2000s. 13 Now you're saying that you are engaged 14 in editorial discretion and expressive conduct. 15 Doesn't that seem to undermine your Section 230 16 arguments? 17 MR. CLEMENT: With respect, Justice 18 Thomas, I mean, obviously, you were here for all 19 of it. I wasn't here for all of it. But my 20 understanding is that my clients have 21 consistently taken the position that they are 2.2 not mere conduits. And Congress, in passing 23 Section 230, looked at some common law cases that basically said, well, if you're just a pure 24 25 conduit, that means that you're free from

67

liability. But, if you start becoming a 1 2 publisher, by keeping some bad conduct out --3 content out, then you no longer have that common law liability protection. 4 And as I understand 230, the whole 5 6 point of it was to encourage websites and other 7 regulated parties to essentially exercise editorial discretion to keep some of that bad 8 stuff out of there, and as a result, what 9 10 Congress said is -- they didn't say: And you're 11 still a conduit if you do that. No, it said: 12 You shouldn't be treated as a publisher, because Congress recognized that what my clients were 13 14 doing would, in another context, look like 15 publishing, which would come with the kind of 16 traditional defamation liability, and they 17 wanted to protect them against that precisely to 18 encourage them to take down some of the bad 19 material that, if these laws go into effect, 20 we'd be forced to convey on our websites. 21 JUSTICE JACKSON: Mr. Clement, can I 2.2 ask you about the facial nature of this? 23 Because my understanding is that, to strike down 24 this statute as facially unconstitutional, we 25 would have to conclude that there's no possible

68

1 way for this law to govern these entities and 2 their conduct. 3 So, first, do I have the standard 4 right? MR. CLEMENT: With all due respect, I 5 6 don't think so. 7 JUSTICE JACKSON: Okay. MR. CLEMENT: In the First Amendment 8 9 context, as my friend was indicating, the question is whether or not the statute has a 10 11 plainly legitimate sweep. So it's not the 12 Salerno, if there's one little application 13 somewhere, that's enough to save the statute. 14 JUSTICE JACKSON: But, I mean, whose 15 burden is that? I thought it was your burden to 16 say that this statute, in almost all of its 17 applications or in most or a substantial number 18 or something, would be unconstitutional in order to get it facially stricken. 19 20 MR. CLEMENT: So two things, Your 21 I think our burden would be -- it would Honor. 2.2 be our burden to say that this statute doesn't 23 have a plainly legitimate sweep. In fact, it is our position, and we did make this argument 24 25 below and succeeded, that this statute actually

69

1 has no constitutional application, and part of 2 that is because none of this statute, at least none of the part that's in front of you today, 3 applies unless you are a covered website. 4 5 JUSTICE ALITO: Does the --MR. CLEMENT: And the website --6 7 JUSTICE JACKSON: But -- but wait. Т -- can I just -- I don't understand. I'm sorry. 8 9 You -- so no application, but we have 10 so many different applications of the law in 11 this situation precisely because it is so broad. 12 So how -- how can you say that? 13 MR. CLEMENT: Because the statute only 14 applies to websites that are a handful of 15 websites that meet the viewership threshold or 16 the total sales threshold. 17 And it's -- you know, it's not our 18 only argument, obviously, but one of our arguments is you can't regulate expressive 19 20 activity in that kind of targeted way. 21 JUSTICE ALITO: Mr. Clement, does the 2.2 _ _ JUSTICE JACKSON: And those websites 23 24 only --25 JUSTICE ALITO: -- does the Florida

70

1 law cover Gmail? 2 MR. CLEMENT: The -- the Florida law I 3 -- I -- I think by its terms could cover Gmail. JUSTICE ALITO: All right. So does 4 Gmail have a First Amendment right to delete, 5 let's say, Tucker Carlson's or Rachel Maddow's 6 7 Gmail accounts if they don't agree with her -his or her viewpoints? 8 9 MR. CLEMENT: They -- they might be 10 able to do that, Your Honor. I mean, that's 11 obviously not something that has been the square 12 focus of this litigation, but lower courts have 13 looked --JUSTICE ALITO: Well, if they don't, 14 15 then how are we going to judge whether this law 16 satisfies the -- the requirements of either 17 Salerno or overbreadth? 18 MR. CLEMENT: So it's -- you know, again, I think it's the plainly legitimate sweep 19 20 test, which is not synonymous with overbreadth, 21 but in all events, since this statute applies to 2.2 Gmail, if it applies at all, because it's part 23 of Google, which qualifies over the threshold, 24 and it doesn't apply to competing email services 25 that provide identical services, that alone is

71

1 enough to make every application of this statute 2 unconstitutional. 3 JUSTICE KAGAN: I mean, how could that 4 be? JUSTICE ALITO: Does it apply to -- go 5 6 ahead. 7 JUSTICE KAGAN: How could -- how could that be, Mr. Clement? It's not unconstitutional 8 9 to distinguish on the basis of bigness, right? 10 MR. CLEMENT: It -- it is when you're 11 regulating expressive activity. That's what 12 this Court said in Minneapolis Star. So the statute in Minneapolis Star was unconstitutional 13 14 in all its applications. The statute --15 JUSTICE KAGAN: If -- if you -- you're 16 saying, if -- if -- if there were no issue here 17 of -- that this is really a subterfuge, they 18 were trying to get at a certain kind of media 19 company that -- because of their views, and the 20 only issue was it's not worth it to regulate a 21 lot of small sites, you know, we -- we only want 2.2 to go after the big sites that actually have 23 many millions of users, you think that's a First Amendment violation? 24 25 MR. CLEMENT: I do. The way you're

72

asking the question suggests you think that's a
 harder case than the one I actually have before
 you.

JUSTICE KAGAN: I -- I think it's a little bit of an impossible case to say you can't go after big companies under the First Amendment.

MR. CLEMENT: All you have to do is go 8 after all the social website -- media websites 9 or all of the websites. You don't have to draw 10 11 these artificial distinctions that just so, you 12 know, coincidentally happen to coincide with the 13 websites that you think have a bias that you're 14 trying to correct. And just to remind you of 15 how the statute --

16 JUSTICE KAGAN: Right, but I took that 17 out of the -- the -- the -- the question. Let's 18 say that they weren't going after these 19 companies because of bias or because they 20 thought they had a slant. It was just, you 21 know, we're going after the biggest companies 2.2 because those are the companies with the biggest 23 impact and the most number of users. How -- how -- how could that be a First Amendment 24 25 violation?

1 MR. CLEMENT: Because Minneapolis Star 2 says it is, because Arkansas Writers' Project 3 says it is, and because, if you actually got to analyzing their so-called consumer protection 4 interest, the consumer protection interest would 5 be exactly the same for a website with 99 6 7 million global users as it would be with a website with a hundred million global users. 8 9 And so I think there are red flags over all of 10 the distinctions drawn in the statute. 11 And then, if you look at the statute 12 more closely, I mean, my goodness, the political 13 candidates provision says that you can't have 14 posts about a political candidate. I can't 15 imagine anything more obviously content-based 16 than that. That's --17 CHIEF JUSTICE ROBERTS: Counsel, is 18 there --19 MR. CLEMENT: -- unconstitutional in 20 every one of its applications. 21 CHIEF JUSTICE ROBERTS: -- is there 2.2 any aspect of the service that -- provided on 23 the social platforms that is not protected under the First Amendment or that is plainly valid 24 25 under the First Amendment?

1 MR. CLEMENT: I -- I think it's all 2 protected by the First Amendment. I mean, 3 obviously --CHIEF JUSTICE ROBERTS: Direct mess --4 5 direct messages? MR. CLEMENT: I -- I -- I think direct 6 7 messages are protected under the First Amendment. I think that the courts that have 8 looked at things like whether Gmail is a common 9 10 carrier have actually held that -- and there's a 11 case involving the RNC that has a specific 12 holding that Gmail is not a common carrier. I 13 think much of the logic of that would apply to 14 direct messaging. 15 Obviously, if this were a statute that 16 tried to address my clients only to the extent 17 that they operated a job board, this would be a 18 lot closer to FAIR and I might have a harder 19 case. JUSTICE GORSUCH: So, Mr. Clement, the 20 21 government says your brief sometimes errs in 22 suggesting that conduit-type activity is always 23 expressive. And direct messages, Gmail, I -- I 24 take it your view then is that providers can 25 discriminate on the basis -- political views,

75

1 religious beliefs, maybe even race? 2 MR. CLEMENT: So, Justice Gorsuch, I 3 think you have to distinguish between two 4 things. One is sort of a status-based discrimination, and the other is status as 5 speaker. And so I don't think that our clients 6 7 could discriminate and say you can't be on our service, you can't even get access to our 8 service on the basis of race. 9 10 JUSTICE GORSUCH: No, there's -- but 11 -- but in how they use it and -- and their 12 speech. 13 MR. CLEMENT: So --JUSTICE GORSUCH: I'm talking about 14 15 the content of their speech. MR. CLEMENT: Yeah. I think, when it 16 17 comes --18 JUSTICE GORSUCH: That it has 19 something to do with religion or politics or 20 race, you can editorialize and use that 21 editorial power to suppress that speech, right? 2.2 MR. CLEMENT: So I think that gets to 23 a very hard question. I think it would be 24 speech, but like I think it's the --25 JUSTICE GORSUCH: So the answer is

76

yes, we can -- we can delete emails, we can 1 2 delete direct messages that we don't agree with 3 based on politics, religion, or race? MR. CLEMENT: Probably not in 4 application, but I do think, look, a bookstore, 5 6 if it wants to have a display this month to 7 celebrate black history, can they limit that display just to African American authors? I 8 9 think the answer is probably yes. 10 JUSTICE GORSUCH: And so it is here 11 too, right? 12 MR. CLEMENT: I -- I think the answer is that there's at least First Amendment 13 14 activity going on there, and that -- and then 15 you would apply the equal protection clause to 16 it, and then you would decide whether or not 17 that's permissible or not. But, obviously, I 18 think this case involves editorial decisions at 19 its heart. 20 And one thing I just want to make 21 clear on the facial challenge point just so you 2.2 understand how this case came to be, as you 23 heard today, my friend's principal argument is 24 this doesn't cover expressive activity at all. 25 And in the lower court, when we sought

77

1 a preliminary injunction, they put all their 2 eggs in that basket and they specifically said, look, we don't want to do intermediate scrutiny 3 at the preliminary injunction stage, so we 4 really only have an argument to resist this 5 6 preliminary injunction if you hold that this is 7 not expressive activity. And they did the same thing in the Eleventh Circuit. There's a -- we 8 -- we have a footnote in our brief making it 9 10 clear on the pages exactly where they did this. 11 So they basically said: We either 12 want to win this on the threshold question that 13 this is not expressive activity, or we don't 14 want to get into the rest of it at this point. 15 We'll have some discovery and we'll have the 16 preliminary injunction and delay it. 17 JUSTICE ALITO: Mr. Clement --18 JUSTICE BARRETT: Mr. Clement --19 JUSTICE ALITO: -- does the -- does 20 the Florida law apply to Uber? MR. CLEMENT: Its definition would 21 2.2 seem to apply to Uber, yes. 23 JUSTICE ALITO: So you've told us that 24 it's okay for your clients to discriminate on the basis of viewpoint in the provision of email 25

78

1 services or in allowing direct messages, messages from one Facebook user to another on --2 3 on a private facility. How about Uber discriminating on the 4 basis of viewpoint with respect to people that 5 6 its drivers will pick up? 7 MR. CLEMENT: So I -- I think the way 8 that --9 JUSTICE ALITO: Is that okay? MR. CLEMENT: I don't think that's 10 11 I don't think Uber is interested in doing okav. 12 that. I think the way the statute would apply 13 to Uber, just to make clear, is it really would 14 apply, like, on comments on the drivers or 15 comments section on something like that if Uber 16 wants to just sort of -- and -- and -- and Etsy, 17 I think it's the same way. 18 You know, Etsy has an ability for you 19 to put comments on the seller and whether they 20 did a nice job or a bad job. And Etsy doesn't 21 want certain comments on that, and they want to 2.2 clean that up to keep it to be a better place 23 for people to come and look at materials. 24 So, when you think about the 25 applications of this statute to some of the

79

1 things that seem less obvious, it's really focused on that expressive aspect of it. 2 3 But, obviously, the core of the statute and the motivation for the legislation 4 and the examples that my friends from Florida 5 6 include in their own petition appendix are about 7 much more expressive activity by the YouTubes and the Facebooks of the world, excluding 8 certain speakers, and they want to override that 9 10 classic editorial decision. 11 JUSTICE BARRETT: But, Mr. Clement, 12 that's cut -- one of the things that's hard for me about this case is let's posit that I agree 13 with you about Facebook and YouTube and those --14 15 those core social media platforms. 16 Don't we have to consider these 17 questions Justice Alito is raising about DMs and 18 Uber and Etsy because we have to look at the 19 statute as a whole? And, I mean, we don't have 20 a lot of briefing on this, and this is a 21 sprawling statute and it makes me a little bit 2.2 nervous. 23 I'm not sure I agree with you about DMs and -- and Gmail, just it -- it's not 24 25 obvious to me anyway that that -- that they

80

1 would -- that they can't qualify as common 2 carriers. 3 MR. CLEMENT: Look, I agree, you don't want to decide all of that today. 4 JUSTICE BARRETT: 5 Yeah. MR. CLEMENT: But this is not here on 6 7 sort of final judgment. It's here on a preliminary injunction. And the question is, 8 9 you know, do you want this law with all of these 10 unconstitutional applications enforced by every 11 Floridian, so every -- these provisions are 12 enforced by an -- every Floridian being able to go into court and get \$100,000 in civil 13 14 penalties. 15 Now do you want that completely 16 antithetical law to the First Amendment to go 17 into effect while we sort out all these anterior 18 questions, or do you want it to be put on hold 19 while we can litigate all of this stuff, and if 20 it turns out there's a couple of applications 21 that are okay or somebody wants, you know, 2.2 briefing just on the question of whether direct 23 mail is -- is a common carrier, all that --24 JUSTICE KAVANAUGH: And --JUSTICE BARRETT: But can we escape 25

1 that in this posture? 2 MR. CLEMENT: Absolutely you can 3 escape that in this posture. You affirm this preliminary injunction which is in place. 4 Ιf you want to, you can point to the clear 5 6 litigation judgment that Florida expressly made 7 below, which is we're not going to get into all of that intermediate scrutiny stuff. We don't 8 9 want a record on that. We're going to put all 10 our eggs in the expressive activity basket, and 11 they could not have been more clear about that 12 below and in the Eleventh Circuit, and then you say this law which has all of these First 13 14 Amendment problems, this wolf comes as a wolf, 15 we are going to put that on hold and then we can 16 sort out some of these tertiary questions. 17 JUSTICE ALITO: Well, if that's the 18 case, Mr. Clement, to what extent is it the --19 is it the result of your own litigation 20 decisions? You could have brought an as-applied 21 challenge limited to the two platforms that you 2.2 want to talk about, Facebook and YouTube. 23 But, instead, you brought a facial 24 challenge, and you claim that it's also 25 susceptible to analysis under overbreadth. So

82

1 you had to -- to get a preliminary injunction, 2 you had to show you had a probability of success 3 on your facial or overbreadth challenge. 4 MR. CLEMENT: And we did in --JUSTICE ALITO: You can't now shift 5 6 and say let's -- you know, it was a good 7 preliminary injunction because it's fine as 8 applied to the platforms I want to talk about, 9 and let's forget about all the other platforms 10 that might be covered. 11 MR. CLEMENT: Well, Justice Alito, 12 first of all, we -- we did all that and we won. Second of all --13 14 JUSTICE ALITO: Did you bring an as-applied challenge? 15 16 MR. CLEMENT. No, we didn't bring an 17 as-applied challenge because we think this --18 JUSTICE GORSUCH: So --19 MR. CLEMENT: -- we think this --20 JUSTICE GORSUCH: So --21 MR. CLEMENT: -- statute is 22 unconstitutional in all its applications. 23 JUSTICE GORSUCH: Exactly. And so 24 you -- you -- you suggested it could be sorted out on remand, but, on remand, it's still a 25

83

1 facial challenge, and -- and there is no --MR. CLEMENT: It is still a facial 2 3 challenge, you're right. 4 JUSTICE GORSUCH: And so, again, you 5 think all of the applications are unconstitutional, right? 6 7 MR. CLEMENT: I -- I do because the 8 definitions are problematic, the terms --9 JUSTICE GORSUCH: So there's nothing to sort out on remand. It's done. If -- if you 10 11 should prevail in this -- on a -- on a 12 preliminary injunction here, I mean, for 13 practical purposes, it's finished, and so there 14 is no opportunity to sort out anything on 15 remand. 16 MR. CLEMENT: There's the whole 17 merits. What we've shown is a likelihood of 18 success on the merits. We haven't won on the 19 merits yet. JUSTICE GORSUCH: All or nothing. 20 21 JUSTICE JACKSON: Can -- can I try it 22 another way? I mean, I -- I asked you before 23 what was the standard, and now you're saying 24 that you think that all applications are 25 unconstitutional, which I think is your burden

84

1 to establish. 2 So, if we come up with some scenarios in this context in which we can envision it not 3 being unconstitutional, why don't you lose? 4 MR. CLEMENT: First of all, that's not 5 6 the standard with all due respect. I mean, this 7 Court has never applied the Salerno standard in a First Amendment case. 8 And this would be the worst First 9 10 Amendment case in this Court's history if you 11 started down that road because you can always 12 put in some provision into a statute that's innocuous and then you say, well, there's a 13 14 couple of fine things in there. 15 You look at it section by section and 16 these sections are pernicious from a First 17 Amendment standard, can't have content about a 18 political candidate. There's no constitutional 19 application to that. 20 CHIEF JUSTICE ROBERTS: Thank you, 21 counsel. 2.2 Just so I understand precisely, your 23 position is that the only issue before us is 24 whether or not the speech that is regulated 25 qualifies as -- not to beg the question -- the

1 expression that's before us is not speech? 2 MR. CLEMENT: I -- I think that's one 3 way to put it. Obviously, you have two questions presented. You're going to be able to 4 decide whatever you think is fairly included in 5 6 those questions presented. 7 I'm just pointing out that as an artifact of the way my friend's litigated this 8 9 case, you do not have a record on everything 10 that might be interesting for intermediate 11 scrutiny, and it's not my fault. It is based 12 precisely on their representations to the courts 13 below that they did not want to get into the 14 intermediate scrutiny thing, they wanted to tee 15 up the expressive activity issue. 16 CHIEF JUSTICE ROBERTS: If -- if the 17 appropriate standard is not Salerno, could you 18 articulate what you think is the appropriate 19 standard? I think the -- the 20 MR. CLEMENT: appropriate standard is whether the First 21 2.2 Amendment -- the statute that implicates the 23 First Amendment has a plainly legitimate sweep. 24 CHIEF JUSTICE ROBERTS: Thank you. 25 Justice Thomas?

1 JUSTICE THOMAS: Could you again 2 explain to me why, if you win here, it does not 3 present a Section 230 problem for you? MR. CLEMENT: If we win here, we avoid 4 Section 230 problems, I think, Your Honor, and 5 the reason is that 230 is a protection against 6 7 liability. It's a protection against liability 8 because Congress wanted us to operate as publishers, and so it -- it -- it wanted us to 9 10 exercise editorial discretion, and so it gave us 11 liability protection. 12 But liability protection and First 13 Amendment status don't go hand in hand. I don't 14 think the parade organizer in Hurley was 15 responsible for the parade floats that go --16 went into its parade. Historically, newsstands 17 and others aren't responsible for the materials. 18 So -- so I don't think you have to 19 sort of say it's one or the other. I mean, I 20 think the 230 protection stands alone. 21 JUSTICE THOMAS: So what is it that 2.2 you are editing out that fits under Section 230? 23 MR. CLEMENT: So, in some of these --24 I mean, it depends on -- you know, in -- in some 25 cases, it is terrorist material. In other

1 cases, it's kids that are telling other kids, 2 hey, you should do this Tide POD challenge. In 3 some cases, it's kids that are encouraging other 4 kids to commit suicide. There's a whole bunch of stuff that we 5 6 think is, you know, offensive within the terms 7 of 230 that we're exercising our editorial discretion to take out. 8 JUSTICE THOMAS: Well, but 230 does 9 10 not necessarily touch on offensive material. Ιt 11 -- it touches on obscene, lewd, lascivious, 12 filthy, excessively violent, harassing, or 13 otherwise objectionable. Do you think --14 MR. CLEMENT: It's that last one. 15 (Laughter.) 16 JUSTICE THOMAS: Well --17 MR. CLEMENT: I mean, we could have a fine debate about, you know, the -- you know, 18 the last, you know, sort of -- you know, how 19 20 much of that --21 JUSTICE THOMAS: Right. 2.2 MR. CLEMENT: -- you -- you sort of --23 you know, what -- what -- what's the Latin for 24 that, or the company you keep and all of that. 25 I mean, we could have that fine debate in some

88

1 other case, but we would certainly take the 2 position that we're protected in those judgments 3 under 230. JUSTICE THOMAS: Well, I think you'd 4 make that, the ejusdem doctrine, do a lot of 5 6 work. But let's put that aside. 7 Tell me again exactly what the expressive conduct is that, for example, YouTube 8 9 engages in when it -- it -- it -- or, I'm sorry, 10 Twitter deplatforms someone. What is the 11 expressive conduct and to whom is it being 12 communicated? 13 MR. CLEMENT: So, when they, you know, 14 let's say deplatform somebody for violating 15 their terms of use or for continuing to post 16 material that violates the terms of use, then 17 they are sending a message to that person and to 18 their broader audience that that material --19 JUSTICE THOMAS: How would you know someone's been deplatformed? Is there a notice? 20 21 MR. CLEMENT: Typically, you do get a 22 notice of that, and there's a provision --23 JUSTICE THOMAS: No, I mean the 24 audience, the other people. 25 MR. CLEMENT: Well, they're going to

see that they're not there anymore. They're no 1 2 longer in their feed --3 JUSTICE THOMAS: Well, but the --MR. CLEMENT: -- and, presumably --4 JUSTICE THOMAS: -- the message could 5 6 be they didn't want to be there anymore. 7 They're tired of it. They're exhausted. MR. CLEMENT: Well, and -- and -- and 8 9 here's the thing. I mean, you know, that -that -- that message is then going to be carried 10 11 over in -- you know, this isn't just about who 12 gets excised from the platform. It's all about 13 what material people see on their individualized 14 sort of -- you know, when they tap into Facebook 15 or Twitter or -- or -- or YouTube. 16 And what they're not going to see is 17 they're not going to see material that violates the terms of use. They're not going to see a 18 19 bunch of material of -- that -- that glorifies 20 terrorism. They're not going to see a bunch of 21 material that glorifies suicide. 2.2 JUSTICE THOMAS: Is there any 23 distinction between action or editing that takes 24 place as a result of an algorithm as opposed to 25 an individual?

1	MR. CLEMENT: I I don't think so,
2	Your Honor. These algorithms don't spring from
3	the ether. They are essentially computer
4	programs designed by humans to try to do some of
5	this editorial function and is
б	JUSTICE THOMAS: Well, but what do you
7	do with a deep-learning algorithm which teaches
8	itself and and has very little human
9	intervention?
10	MR. CLEMENT: You you still had to
11	have somebody who kind of created the universe
12	that that algorithm is going to look at.
13	JUSTICE THOMAS: So who's speaking
14	then, the algorithm or the person?
15	MR. CLEMENT: I I I think, the,
16	you know, the question in these cases would be
17	that Facebook is speaking, that YouTube is
18	speaking, because they're the ones that are
19	using these devices to run their editorial
20	discretion across these massive volumes.
21	And the reason they're doing this,
22	and, of course, they're supplementing it with
23	lots and lots of humans as well, but the reason
24	they have to use the algorithms, of course, is
25	the volume of material on these sites, which

91

1 just shows you the volume of --2 JUSTICE THOMAS: Okay. 3 MR. CLEMENT: -- editorial discretion. JUSTICE THOMAS: Yeah, and, finally --4 5 I'm sorry to keep going, Mr. Clement -- exactly 6 what are they saying? 7 MR. CLEMENT: So --8 JUSTICE THOMAS: What is the algorithm 9 saying? I don't know. I'm not on any, you know. But what is it saying? 10 11 MR. CLEMENT: It's saying --12 JUSTICE THOMAS: Is it a consistent message? What -- I mean, usually -- when we had 13 14 Hurley, the -- it was their parade and they 15 didn't want certain people in their parade. You 16 understood that. 17 What are they saying here? 18 MR. CLEMENT: They are saying things like Facebook doesn't want pro-terrorist stuff 19 20 on our site. 21 JUSTICE THOMAS: I didn't -- I --22 we're not talking about terrorists here. 23 MR. CLEMENT: Well --24 JUSTICE THOMAS: Those aren't --25 terrorists aren't complaining about it.

1	MR. CLEMENT: Well, I I I think,
2	actually, we are talking about terrorism here
3	because I think, if these laws go into effect
4	JUSTICE THOMAS: But I thought that
5	was a crime. I mean, under they the as
6	I understood Florida, they said that they
7	they one provision in the Act says they
8	nothing that's inconsistent with Section 230.
9	It seems to me that it is consistent with
10	Section 230.
11	MR. CLEMENT: So, Your Your Honor,
12	it is you know, there are things like, if
13	if you have a video on how to build a bomb to
14	blow up, you know, a church or something, maybe
15	that's prohibited by sort of, you know, the
16	that that kind of illegality provision. But,
17	if there's something glorifying the attacks of
18	October 7, and one of these companies wants to
19	keep that off of the sites, or is there
20	something on there that they want to that
21	sort of glorifies sort of, you know sort of
22	incredibly thin teenage bulimia and they want to
23	keep that off their site, they they have the
24	right to do that. And that's an important
25	message.

1	And just like in Hurley, the message
2	that they are sending is a message about what
3	they exclude from their their forum.
4	CHIEF JUSTICE ROBERTS: Justice Alito?
5	JUSTICE ALITO: There's a lot of new
6	terminology bouncing around in these cases, and
7	just out of curiosity, one of them is "content
8	moderation." Could you define that for me?
9	MR. CLEMENT: So, you know, look,
10	content moderation to me is just editorial
11	discretion. It's a way to take the the
12	the all of the content that is potentially
13	posted on the site, exercise editorial
14	discretion in order to make it less offensive to
15	users and advertisers.
16	JUSTICE ALITO: Is it is it
17	anything more than a euphemism for censorship?
18	Let me just ask you this. If somebody in 1917
19	was prosecuted and thrown in jail for opposing
20	U.S. participation in World War I, was that
21	content moderation?
22	MR. CLEMENT: So, if the government's
23	doing it, then content moderation might be a
24	euphemism for censorship. If a private party is
25	doing it, content moderation is a euphemism for

94

editorial discretion. And there's a fundamental 1 2 difference between the two. 3 JUSTICE ALTO: For editorial discretion, are you affirmatively saying --4 never mind. No -- no further questions. 5 6 CHIEF JUSTICE ROBERTS: Justice 7 Sotomayor? JUSTICE SOTOMAYOR: Mr. Clement, I'm 8 9 -- I'm now sort of trying to take all of this in, and I think that I came into this very 10 11 differently than you have. I came into this 12 thinking there are different functionalities by websites. So some host news, like the news feed 13 in Facebook. Some host -- like Justice Barrett 14 15 was talking about and others, Gmail or -- where they're just letting people contact each other, 16 17 direct messaging. 18 And I was thinking that since I think 19 rightly this law seems to cover all of that, that it's so broad, how -- but that it might 20 21 have some plainly legitimate sweep, it might be 2.2 okay to require direct messaging to give you 23 notice, to be consistent, to pay attention to -to 30-day registration. Some of these 24 25 provisions might be okay for those functions.

1 But you're saying to me that's not 2 true. Can you articulate very succinctly why you think, at this stage on a facial challenge, 3 that we can say there is no plainly legitimate 4 sweep, that this particular law, after we sort 5 it all out below, will still survive? 6 7 Now I think the court below said -and you try to take that out from Justice 8 9 Kagan's answer -- maybe I don't want to, okay, 10 is it because this law was passed with viewpoint 11 discrimination in mind? That's what the court 12 below said. The -- the -- the court 13 MR. CLEMENT: below said that. And that would be a sufficient 14 15 basis to take out the whole law. 16 The law is also shot through with 17 content-based provisions. I think that's enough to take out the whole law. It also -- the 18 19 entire law, every provision we challenge is speaker-based in its limited reach. 20 21 And what this Court's cases clearly 2.2 say, including NIFLA, which my recollection is 23 was a facial challenge, says that when you look 24 at speaker-based distinctions, you can then open 25 the lens a little bit and see if those

96

1 speaker-based provisions are infused with

2 viewpoint discrimination or other discriminatory3 influences.

And if you do that here -- I mean, you 4 don't have to get past the governor's official 5 6 signing statement to say -- to understand that 7 -- the restrictions on this statute. I mean, you know, it -- it's one thing to say, well, 8 9 they're only getting the big companies. But, 10 when the governor is telling you we're going 11 after the viewpoints of the -- of the Silicon 12 Valley oligarchs, then all of the sudden, 13 limiting it to the biggest companies starts to 14 tell you that this is targeted like a laser beam 15 at the companies that they don't like the 16 editorial discretion that was being exercised. 17 CHIEF JUSTICE ROBERTS: Justice Kagan? 18 JUSTICE KAGAN: I mean, let me ask the 19 -- the -- the same kind of question in a 20 different way. Suppose that, instead of this 21 law, you -- you -- you had a law that was 2.2 focused, it excluded the kind of curated news 23 feeds, where your argument about editorial discretion sort of leaps out. 24 25 So this law didn't touch those. But.

97

1	it said, you know, with respect to Gmail and
2	direct messaging and Venmo and Dropbox and Uber,
3	with respect to all of those things, a site
4	could not discriminate on the basis of
5	viewpoint, just as maybe a site couldn't
6	discriminate on the basis of race or sex or
7	sexual orientation or what have you. So it just
8	added viewpoint to the list.
9	Wouldn't that be all right?
10	MR. CLEMENT: I I actually don't
11	think it would be all right because all of those
12	things are still in the expressive business.
13	And I also think
14	JUSTICE KAGAN: Well, do you think
15	that you know, suppose it didn't say
16	viewpoint; it just said you can't discriminate
17	on the basis of, you know, all the usual
18	protected characteristics. Is is that all
19	right?
20	MR. CLEMENT: That would probably be
21	all right, but it wouldn't save the whole
22	statute from being
23	JUSTICE KAGAN: Well, so this is just
24	on this statute. You you know, it's just
25	it's a it's a statute about it excludes

1 YouTube and Facebook, and -- you know, the 2 Facebook news feed. 3 MR. CLEMENT: Right. JUSTICE KAGAN: But it's just direct 4 messaging, Venmo, all of those kinds of things. 5 And it just said, you -- you know, we're not 6 7 going to let you exclude on the basis of race 8 and sex and we're also not going to let you 9 exclude people on the basis of viewpoint. 10 MR. CLEMENT: So, I mean, the first 11 part of that statute I don't think my clients 12 would even challenge. I mean, whether there's an abstract First Amendment right to have the 13 14 black authors table for black history month --15 JUSTICE KAGAN: And also on the basis 16 of viewpoint. 17 MR. CLEMENT: When -- when you throw 18 viewpoint into there, then I think, I -- you 19 know, I'd have to ask my clients whether they'd challenge that statute. But, obviously, that's 20 21 not the -- the -- the -- the statute we have 2.2 here. 23 And if you think about --24 JUSTICE KAGAN: I quess what I'm 25 saying is in part it is the statute you have

1 here. 2 MR. CLEMENT: I -- I -- I --JUSTICE KAGAN: And that's -- and --3 4 and -- and -- and that gives you your plainly legitimate sweep, because all it's saying is 5 that when you run a service where you're not 6 7 speaking, unlike in Facebook feed, where your editorial discretion argument is good because 8 9 the -- the -- the platform is engaged in speech 10 activities. 11 Well, when you're running Venmo, 12 you're not engaged in speech activities. And 13 so, when a state says to you, you know what, you 14 have to serve everybody, irrespective of whether 15 you like their political opinions or not, then 16 it seems you have a much less good argument, but 17 this statute also says that, doesn't it? 18 MR. CLEMENT: Not really, Justice 19 Kagan. And I think we're in danger of losing sight of the actual statute. So let me take you 20 21 to Petition Appendix 97A and the definition of 2.2 "censor" used in the statute. It says, "censor includes any action 23 24 taken by a social media platform to delete, 25 regulate, restrict, edit, alter, inhibit the

100

1 publication or republication of, suspend a right 2 to post, remove, or post an addendum to any content or material posted by a user. The term 3 also includes actions to inhibit the ability of 4 the user to be viewable or to interact with 5 another user of the social media platform." 6 7 Censor is all about the expressive activity. Post-prioritization is all about it. 8 9 It specifically talks about a news feed, a feed, 10 a view, search results, and they give 11 essentially political candidates and 12 journalistic enterprises a right to sort of non-discrimination, so they're going to pop up 13 14 there even though, like, I have no interest in 15 politics, I just want to look at, you know, 16 feeds about Italian bicycles, and I'm still 17 going to get these Florida politicians popping 18 in there? That's what this statute does. 19 And then you go through, shadow ban. 20 Shadow ban's not about any of the things you're talking about. Shadow ban is all about content. 21 2.2 And then we go to journalistic enterprises. 23 They get pride of place. Then we talk about 24 25 post-prioritization. That's all about how you

101

1	display the content. So like may maybe the
2	30-day provision, you could sort of say that,
3	well, that applies to, like, Uber, but even
4	then, if Uber wants to change its comment
5	policies because all of a sudden, you know, they
6	did one thing to try to, you know, deal with one
7	set of issues and then a problem comes up and
8	there's a whole bunch of, like, people using the
9	comments in a really rude way, like, why
10	couldn't they change their editorial policy on
11	the on the comments? I just don't understand
12	it.
13	And then all of the duty-to-explain
14	provisions. The duty-to-explain provisions are
15	all driven by decisions to exclude conduct
16	content. And that happens a billion times a
17	quarter at YouTube. So that's a crushing blow.
18	It has nothing to do with some of the other
19	things you're talking about.
20	JUSTICE KAGAN: Thank you.
21	CHIEF JUSTICE ROBERTS: Justice
22	Gorsuch?
23	Justice Kavanaugh?
24	JUSTICE KAVANAUGH: Can I just pick up
25	on the word "censorship" because I think it's

1 being used in lots of different ways. 2 So, when the government censors, when 3 the government excludes speech from the public square, that is obviously a violation of the 4 First Amendment. 5 When a private individual or private 6 7 entity makes decisions about what to include and 8 what to exclude, that's protected generally editorial discretion, even though you could view 9 the private entity's decision to exclude 10 11 something as "private censorship." 12 MR. CLEMENT: Absolutely. That was 13 the whole thrust of this Court's decision in 14 Halleck. And I suppose the Hurley case might 15 have been a completely different case if that 16 was an official City of Boston parade and the 17 City of Boston decided to exclude the group. 18 The whole reason that case came down 19 the way it did unanimously is because it was a 20 private organization exercising its First 21 Amendment right to say we don't want GLIB in our 2.2 parade. 23 JUSTICE KAVANAUGH: How does -- how does 303 fit into that? 24 25 MR. CLEMENT: Well, I think 303 is

103

just further evidence that, you know -- I mean, 1 2 you know, obviously, I think 303, where 303 is 3 most relevant is that, you know, Colorado in that case tried to rely on FAIR, much the way my 4 friends here rely on FAIR, and this Court made 5 clear in 303 Creative, no, it doesn't work that 6 7 way. You know, this is expressive activity. And -- and -- and so -- you know, and 8 -- and the fact that my friend's best case is 9 10 FAIR, I think, just shows how radical this 11 statute is, because this targets expressive 12 activity in its core. If the Solomon amendment said to the 13 14 law schools, you have to give the military equal 15 time in the classroom, I think the case would 16 have been 9/0 the other way. And that's 17 essentially what the -- what -- what Florida is 18 trying to do here. 19 JUSTICE KAVANAUGH: And then, on the 20 procedural posture, I think this is important to 21 try to understand what's exactly before us, and 2.2 you've gotten questions on this, but I want to 23 nail it down for my -- my benefit, which is you 24 said that they came in and opposed a PI solely 25 on the ground that what was involved here was

104

not expressive activity or speech but, instead,
 conduct.

Is that accurate? 3 MR. CLEMENT: That -- that -- that's 4 accurate. It came up in the context of how much 5 6 discovery we were going to have before we had 7 the preliminary injunction hearing, and in that 8 context, the State says, look, we -- we're going 9 to sort of, you know, kind of rest on this kind 10 of threshold question, as my friend said, and 11 that we'll limit discovery on both sides and 12 then, in the Eleventh Circuit, it was even more 13 clear because, in the Eleventh Circuit, the 14 position of the State of Florida was like, we're 15 not going to really engage on intermediate 16 scrutiny at all. We're -- we -- we're putting 17 all our eggs in the expressive eggs basket. 18 JUSTICE KAVANAUGH: So, if we think 19 that the statute does target expressive activity 20 in some respects and we affirm in this case, 21 what is left to Justice Gorsuch's question? 2.2 What's left to happen -- that just means it 23 can't go in place for the next year or two until 24 a final judgment. What -- what will happen in 25 the litigation?

1 MR. CLEMENT: So there'll be 2 litigation on the merits. I don't even think 3 we're past the point where we could amend, so if this Court tells us we sure better have an 4 as-applied challenge in there, I suppose we 5 6 could do that. 7 But the point is the litigation will qo on. There will be discovery. Unless --8 9 unless Florida decides at that point that the writing's on the wall and it tries to pass a 10 11 more narrow statute, but, otherwise, there would 12 be discovery, there would be, you know, 13 essentially, the whole nine yards. But, in --14 in the interim, I -- and -- and, you know, I 15 just can't emphasize enough particularly that 16 \$100,000 civil penalty provision. JUSTICE KAVANAUGH: All that's before 17 18 us then is what should happen in the interim 19 before final judgment and it comes back to us 20 potentially a year or two from now. Should it be in effect or not be effect until it comes 21 2.2 back to us? 23 MR. CLEMENT: Yeah. 24 JUSTICE KAVANAUGH: Correct? 25 MR. CLEMENT: If it comes back to you.

1 Yes. 2 JUSTICE KAVANAUGH: If it came back to 3 us or it goes to the court of appeals. And what will happen -- I mean, you've alluded to it, but 4 what will happen in that year, do you think? 5 Because I don't think we've heard much about 6 7 exactly what you're concerned about. 8 In other words, you're very concerned about this. That's obvious. But what -- what 9 are the specifics of that? 10 11 MR. CLEMENT: Well, I -- I mean, 12 honestly, if this statute goes into effect, we'd 13 sort of have to fundamentally change our 14 business models, and I think each company is 15 going to make their own judgment about how 16 they'd come into compliance. 17 I think, you know, part of the irony 18 here is that as to one of -- you know, they -they say this is going to promote speech, but --19 20 but they allow us to discriminate on the basis 21 of content as long as we do it consistently. 2.2 So, you know, what -- what we might do 23 in the interim, at least some of these companies 24 might do is, you know, just, like, well, let's 25 do only puppy dogs at least in Florida until we

1 can get this straightened out because that's the 2 one way that -- because, you know, these same companies are getting hammered by people that 3 say we're not doing enough to keep material 4 that's harmful to children off of these sites. 5 And yet these laws make it impossible 6 7 for us to keep material that's -- that's harmful to children off of our sites unless we take so 8 much material off of our sites that nobody can 9 say that we're not being inconsistent or not 10 11 discriminating. And in Texas, it's viewpoint 12 discrimination. 13 JUSTICE KAVANAUGH: Could you just say 14 a word about the word "consistency," what you 15 think that entails? 16 MR. CLEMENT: I have no idea. And one 17 of the other cases -- you know, arguments we have in this case, it's just not part of the 18 19 preliminary injunction you have before us is a 20 vagueness challenge. 21 And I think, when you're targeting 2.2 editorial discretion, to put a consistency 23 requirement -- I mean, if you tried to tell The New York Times to be -- I mean, I don't -- I 24

25 haven't met anybody who thinks The New York

107

108

1	Times is a hundred percent consistent in its
2	editorial policy.
3	But, if you put a state action
4	requirement that they editorialize consistently
5	or somebody can sue them for \$1,000 or the state
6	can haul them into court, I think that would be
7	the most obvious First Amendment violation in
8	the world.
9	JUSTICE KAVANAUGH: Thank you.
10	CHIEF JUSTICE ROBERTS: Justice
11	Barrett?
12	JUSTICE BARRETT: I have a practical
13	question. So let's assume that I agree with you
14	about YouTube and Facebook feeds, news feeds,
15	but that I don't want to say that Facebook
16	Marketplace or Gmail or DMs are not within the
17	statute's plainly legitimate sweep.
18	If I if I asked you the question
19	can you still win, I know that you'll say yes,
20	but how would it how would we write that
21	opinion given the standard
22	MR. CLEMENT: Well, I I
23	JUSTICE BARRETT: without having to
24	canvass whether all of those things would be
25	within the plainly legitimate sweep?

1 MR. CLEMENT: I -- honestly, I'm not 2 sure -- well, I'm not sure you could reach that 3 result without definitively holding that that stuff is within the plainly legitimate sweep of 4 the statute. You don't have the record for that 5 in part because of litigation decisions that 6 7 were made by the State of Florida. So I think what you would do is you would affirm the 8 9 preliminary injunction, and then you would 10 perhaps lament the fact that the record here is 11 somewhat stunted, and then you would make clear 12 that there might be a possibility to modify the preliminary injunction on -- on remand. 13 14 Now, at that point, I think, when the 15 lower court sort of sees all the details about 16 how these things actually operate, they might 17 not have the same skepticism that you're starting with. But I think there's lots of ways 18 19 to write the decision that keeps the -- you -you know, and, again, what's -- what's in place 20 right now is a preliminary injunction for the 21 2.2 benefit of my clients. 23 So people that haven't sued yet, I 24 mean, you know, the statute in theory could 25 apply to them. But my clients have the benefit

110

1	of a preliminary injunction while this
2	litigation goes forward. And, obviously,
3	anything this Court says in its opinion that
4	suggests what the future course of that
5	litigation should be, you know, is is going
6	to be powerfully, you know, effective in terms
7	of how this case gets litigated in the district
8	court.
9	JUSTICE BARRETT: Thank you.
10	CHIEF JUSTICE ROBERTS: Justice
11	Jackson?
12	JUSTICE JACKSON: So, Mr. Clement, I
13	just want to push back for a minute on the
14	private versus public distinction. I mean, I
15	I think we agree that the government couldn't
16	make editorial judgments about who can speak and
17	what they can say in the public square.
18	But what do you do with the fact that
19	now, today, the Internet is the public square?
20	And I appreciate that these companies are
21	private companies, but if the speech now is
22	occurring in this environment, why wouldn't the
23	same concerns about censorship apply?
24	MR. CLEMENT: So two reasons, Your
25	Honor. I mean, one is I I really do think

111

that censorship is only something the government can do to you. And if it's not the government, you really shouldn't label it "censorship." It's just a category mistake.

But here's the second thing: You 5 6 would worry about this if websites, like the 7 cable companies in Turner, had some sort of 8 bottleneck control where they could limit your 9 ability to go to some other website and engage 10 in speech. So, if the way websites worked was 11 somehow that if you signed up for Facebook, then 12 Facebook could limit you to only 19 other websites and Facebook could dictate which 20 13 14 websites you saw, then this would be a lot more 15 like Turner.

16 But, as this Court said in Reno in 17 1997, when it was confronted with an argument about the then-fresh Turner decision, this Court 18 19 basically said the Internet is like the opposite 20 of Turner. You know, there's so much 21 information out there, the -- it's so relatively 2.2 easy to have a new website come on and, like, 23 reality tells us that, right? You know, like, X is not what Twitter was, and TikTok came out of 24 25 nowhere. And --

1	JUSTICE JACKSON: All right. I think
2	I get your point.
3	MR. CLEMENT: Yeah.
4	JUSTICE JACKSON: Let me just ask you
5	about the illegitimate sweep point.
6	So what is illegitimate about a
7	government regulation that attempts to require
8	these companies to apply consistently their
9	procedures? I don't I guess I don't
10	understand why the enforcement of sort of
11	antidiscrimination principles is illegitimate.
12	MR. CLEMENT: So consistency when what
13	is being regulated as a as a government
14	mandate when what is being regulated is
15	expressive activity is, I think, a clear First
16	Amendment violation. And I don't think I
17	mean, you know, some of these judgments are very
18	tricky judgments. You know, okay, well, we
19	we're going to we're going to take some of
20	the stuff sort of celebrating October 7 off, but
21	we want to have some
22	JUSTICE JACKSON: All right. What
23	about a straightforward one, right? I
24	understood that one of these was no candidate
25	can be deplatformed. That seems pretty

113

1 straightforward.

2 MR. CLEMENT: Right. And I think it's 3 straight --

4 JUSTICE JACKSON: Right, and so why 5 isn't that enforcing antidiscrimination 6 principles with no candidate -- if somebody is a 7 candidate for office, they can't be 8 deplatformed?

9 MR. CLEMENT: So that means they can't 10 be deplatformed no matter how many times they 11 violate my client's terms of use, no matter how 12 horrible their conduct, no matter how 13 misrepresenting they are in their speech. We 14 still have to carry it and not just have to 15 carry it, but under this statute, we have to 16 give it pride of place.

17 And it doesn't take much to register 18 as a candidate in Florida. And so this gives a 19 license to anybody, even if there is, you know, 20 somebody who's only going to poll, you know, 21 2 percent in their local precinct, they can post 2.2 anything they want, they can cause us to 23 fundamentally change our editorial policies and 24 have to ignore our -- our terms of use where --25 JUSTICE JACKSON: Thank you.

114

1	CHIEF JUSTICE ROBERTS: Thank you,
2	counsel.
3	General Prelogar.
4	ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
5	FOR THE UNITED STATES, AS AMICUS CURIAE,
б	SUPPORTING THE RESPONDENTS
7	GENERAL PRELOGAR: Mr. Chief Justice,
8	and may it please the Court:
9	The First Amendment protects entities
10	that curate, arrange, and present other people's
11	words and images in expressive compilations. As
12	this Court's cases have has held, those
13	principles cover newspaper editors, parade
14	sponsors, and web designers. It also covers
15	social media platforms. Those platforms shape
16	and present collections of content on their
17	websites, and that inherently expressive
18	activity is protected by the First Amendment.
19	That doesn't mean, though, that every
20	business that transmits speech can claim First
21	Amendment protection for that conduct. For
22	example, telephone and delivery companies that
23	carry speech from point A to point B aren't
24	shielded by the First Amendment when they
25	provide that service. But that's because

115

1 they're not producing any expression of their 2 own. It's not because there's some kind of common carrier or communications company 3 exception to the First Amendment. 4 None of this is to say that social 5 6 media platforms are immune from government 7 regulation. And governments at every level 8 obviously have an important interest in 9 facilitating communication and the free exchange 10 of ideas. But, in promoting that interest, 11 governments have to stay within the bounds of 12 the First Amendment. And these state laws which restrict the speech of the platforms to enhance 13 the relative voice of certain users don't 14 15 withstand constitutional scrutiny. 16 I welcome the Court's questions. 17 JUSTICE THOMAS: Normally, you are 18 defending regulations. But are you -- if -- if 19 -- if the U.S. Government did exactly what these 20 Petitioners -- Respondents are doing, would that 21 be government speech? 2.2 GENERAL PRELOGAR: So, if I'm 23 understanding the hypothetical correctly, Justice Thomas, if you're suggesting that the 24 25 government itself would open a forum and allow

116

1 users to post messages on that, you know, I 2 think that that would implicate First Amendment principles because the -- because the government 3 might create -- be creating something like a 4 public forum where it would itself be bound by 5 the Constitution. 6 7 I don't think that that would all 8 necessarily qualify as the government's own 9 speech. 10 JUSTICE THOMAS: But --11 GENERAL PRELOGAR: But the critical 12 difference here, of course, is that these 13 platforms are private parties. They're not 14 bound by the First Amendment as an initial 15 matter. 16 JUSTICE THOMAS: The -- Mr. Clement 17 said the difference is that if the government 18 does it, it is censoring. If a private party 19 does it, it is -- I forget -- content 20 moderation. These euphemisms bypass me 21 sometimes. But -- or elude me. The -- do you 2.2 agree with that distinction? 23 GENERAL PRELOGAR: Yes. I mean, the 24 -- the critical difference is that, as Justice 25 Kavanaugh observed, the government's bound by

117

1 the First Amendment. And so, if it were to, for 2 example, dictate what kind of speech has to 3 appear and in what order, you know, that -- that could create a First Amendment violation. 4 But, here, it's the private platforms 5 6 themselves that are making that expressive 7 choice. And -- and our recognition here is that they're creating their expressive -- their own 8 9 expressive product in doing so. 10 JUSTICE THOMAS: Now --11 GENERAL PRELOGAR: These are websites 12 that are featuring text elements, speech 13 elements, photos, videos, and the platforms, 14 which are private parties not bound by the 15 Constitution, are deciding how they want that to 16 look, what content to put on it and in what 17 order. That's an inherently expressive 18 activity. 19 JUSTICE THOMAS: What are they saying? 20 GENERAL PRELOGAR: So it depends on the platform, the -- the various value judgments 21 2.2 that are embodied in its content moderation 23 standards, you know. The -- the -- I think there's a wide variety in the kind of content 24 25 that the platforms deem objectionable, the --

118

1 the kind of content they think might be harmful 2 or will drive away users and advertisers. There's no one single message that each platform 3 is conveying. 4 But I quess, if you wanted to look at 5 6 the lowest common denominator, you know, at the 7 very least, it seems like their content moderation policies embody a judgment of this is 8 material we think might be of interest to our 9 users or that the users will find interesting 10 and -- and worthy of looking at. 11 12 So it's a lot like the parade in Hurley in that circumstance, where the Court 13 14 specifically said maybe you're lenient, you let 15 a lot of content in, you can't identify a single 16 discernable message from the parade as a whole, 17 but there is still the baseline of the parade sponsors signaling this is something that's 18 19 worthy of looking at in my parade. 20 JUSTICE GORSUCH: General, you -- you 21 indicate in your brief that NetChoice sometimes 2.2 errs by suggesting that the dissemination of 23 speech is always expressive activity. And I 24 just wonder how we're supposed to deal with that 25 fact if I agree with you in this facial

119

1	challenge context and particularly when many of
2	the platforms, while reserving the right to
3	prohibit various kinds of posts, most of which
4	are consistent with Section 230, also say and
5	guarantee users "a right to express their ideas
6	and opinions freely." I'm quoting from one of
7	them. And even if the platform disagrees and
8	they say that they "do not endorse and are not
9	responsible" again, I'm quoting from some of
10	these terms of service sure sounds a lot like
11	conduit, doesn't it?
12	GENERAL PRELOGAR: So I think there is
13	a big difference between a pure conduit, the
14	kind of company that is, you know, quite
15	literally engaged in carrying speech,
16	transmitting it, whether that's across the
17	telephone wires or via telegraph or on a
18	delivery truck like UPS and FedEx, a big
19	difference between that kind of conduct
20	conduit and what the platforms are doing here,
21	because they're not just literally facilitating
22	users' ability to communicate with other users.
23	Instead, they're taking that and arranging it
24	and excluding it.

25 JUSTICE GORSUCH: But some of them are

1 promising that they're not going to interfere, 2 and they're promising you get to express your views freely and openly, and they're promising 3 that they -- that -- and they're representing, 4 rather, that your views don't represent theirs 5 6 and everybody understands that. 7 And those -- those are their terms of service. And -- and this is a facial challenge 8 again, and I'm -- I -- I -- I just think 9 separating the wheat from the chaff here is 10 11 pretty difficult. 12 Can you help us with that? 13 GENERAL PRELOGAR: Sure. And, you 14 know, I think looking at their terms of service, 15 I -- it's certainly true that many of the platforms have generally indicated that they 16 17 welcome a wide variety of views, but it would be 18 incorrect to say that they're holding themselves 19 out as forums for all possible speech. Those same terms of service contain 20 21 the kind of editorial policies that are at issue 2.2 here. And the -- the state laws are narrowly 23 targeted on the kind of speech the platforms want to include. So --24 25 JUSTICE GORSUCH: Yes, I --

1 GENERAL PRELOGAR: -- it wouldn't be 2 implicated in --3 JUSTICE GORSUCH: -- I acknowledge that their terms of service also include the --4 the right to exclude certain -- certain speech, 5 6 but those are usually like the Section 230 7 things, the way they discuss it, the lewd, lascivious, obscene, the blah, blah, blah, and 8 9 after that, they do seem to promise a whole lot of latitude. 10 And when you look at classic common 11 12 carriers, it's very similar. It's -- they don't give up the right to exclude certain -- certain 13 14 activities or speech that might be detrimental 15 to their business or that might be otherwise 16 regulated. That -- that holds true for 17 telegraphs. It holds true for telephones even. 18 But, beyond that, bare minimum, 19 they're open to all comers, and that seems to be how a lot of them are representing themselves to 20 21 the public at least. 2.2 GENERAL PRELOGAR: The key difference, 23 though, with common carriers, the -- the kinds 24 of industries that have traditionally been 25 regulated, those in the transportation sector,

1 railroads, some of the communications companies 2 and so forth, is that they're not creating any 3 kind of expressive speech product in providing their service, and so government regulation that 4 says don't discriminate based on content --5 JUSTICE GORSUCH: Well, the telegraph 6 7 companies argued just the opposite back in the day --8 9 GENERAL PRELOGAR: But I think that those claims failed --10 11 JUSTICE GORSUCH: -- and they lost. 12 GENERAL PRELOGAR: -- because, 13 although they are transmitting the messages, 14 they aren't themselves creating any speech on 15 the side. 16 JUSTICE GORSUCH: Oh, they said they 17 They -- they -- in fact, they curated a were. lot of the speech or tried to, including 18 19 political speech which they didn't agree with. 20 GENERAL PRELOGAR: I think it's wrong to call that curation. It's certainly true they 21 22 tried to adopt certain discriminatory 23 policies --24 JUSTICE GORSUCH: Well, whatever --25 whatever euphemism one wishes to choose.

1 GENERAL PRELOGAR: But they weren't 2 taking that speech out and putting it into a 3 compilation that's expressive. That's the 4 difference here. JUSTICE GORSUCH: On -- on that --5 GENERAL PRELOGAR: This is a -- a --6 7 JUSTICE GORSUCH: Okay, okay. So --GENERAL PRELOGAR: Yeah. 8 9 JUSTICE GORSUCH: -- if they're not -if the -- if the expression of the user is 10 11 theirs because they curate it, where does that 12 leave Section 230? Because the protection there, as I understood it -- and Justice Thomas 13 14 was making this point -- was that Section 230 15 says we're not going to treat you as publishers 16 so long as you are not -- it's not your 17 communication "in whole or in part" is what the 18 definition says. 19 And if it's now their communication in part, do they lose their 230 protections? 20 21 GENERAL PRELOGAR: No, because I think 2.2 it's important to distinguish between two 23 different types of speech. There are the 24 individual user posts on these platforms, and 25 that's what 230 says that the platforms can't be

124

1 held liable for. 2 The kind of speech that we think is 3 protected here under the First Amendment is not each individual post of the user but, instead, 4 the way that the platform shapes that expression 5 6 by compiling it, exercising this kind of 7 filtering function, choosing to exclude none of 8 those things above --9 JUSTICE GORSUCH: Let -- let me interrupt you there, I'm sorry, but -- but I 10 11 understand it's not their communication in 12 whole, but it's -- why isn't it their communication in part if it -- if it's part of 13 this larger mosaic of editorialized discretion 14 15 and the whole feel of the website? 16 GENERAL PRELOGAR: Well, I don't think 17 that there is any basic incompatibility with 18 immunizing them as a matter of -- of Congress's 19 statutory choices and recognizing that they 20 retain First Amendment protection --21 JUSTICE GORSUCH: Isn't the whole 2.2 premise -- I'm sorry --23 GENERAL PRELOGAR: -- for the First 24 Amendment --25 JUSTICE GORSUCH: -- the whole premise

125

1 of Section 230 that they are common carriers, 2 that -- that they're not going to be held liable in part because it isn't their expression, it --3 they are a conduit for somebody else? 4 GENERAL PRELOGAR: No, not at all, 5 6 Justice Gorsuch. I think, you know, to the 7 extent that the states are trying to argue that Section 230 reflects the judgment that the 8 9 platforms aren't publishing and speaking here, 10 there would have been no need to enact Section 11 230 if that were the case. 12 Congress specifically recognized the 13 platforms are creating a speech product. They 14 are literally, factually publishers. And 15 Congress wanted to grant them immunity. And it 16 was for the purpose of encouraging this kind of 17 editorial discretion. That's the whole point of 18 the "Good Samaritan" blocking provision, 19 230(c)(2)(A). 20 CHIEF JUSTICE ROBERTS: General, 21 there's been a lot of talk about the procedural 22 posture of the case, how it was litigated below, 23 what's available if it -- it goes back, when it 24 goes back. I -- I'd like your views on that. 25 GENERAL PRELOGAR: Yes. So we

1 presented our arguments in this case taking the way it had been litigated at face value, and 2 what that means is that below Florida treated 3 this law as though the central provision and 4 scope was focused on the -- the true social 5 media platforms, the thing that -- the website 6 7 you have in mind when I use that term, things like YouTube and X and Facebook. 8 And Florida's presentation to the 9 lower courts was this law isn't a regulation of 10 11 their speech at all and so it's valid. 12 So I understand the force of the questions that the Court has been asking today 13 14 about are there other types of websites that 15 might be covered, could this extend to direct 16 messaging. You know, we don't really have a dog 17 in that fight. To the extent that there are 18 those other applications of the law out there, 19 that's not how Florida sought to defend it. 20 And to Justice Barrett's question, you know, what should the Court do with this, it's 21 2.2 been litigated one way and now it looks like 23 maybe there are other possible applications you would have in mind, I would urge the Court to 24 25 take a really narrow approach here.

126

1	Florida defended this law on the basis
2	that it could control what the true social media
3	platforms are doing with respect to their
4	expressive websites, and if I were the Court, I
5	would really want to reserve judgment on the
6	application to e-commerce sites, to to
7	companies like Uber, which don't seem to be
8	creating a comparable type of expressive
9	product.
10	And I think the Court could save those
11	issues for another day or for further factual
12	development in this case while looking at the
13	decision on the record that was created based on
14	those litigation judgments by the parties.
15	JUSTICE SOTOMAYOR: Am I correct
16	CHIEF JUSTICE ROBERTS: Justice Thomas
17	
18	JUSTICE SOTOMAYOR: I'm sorry.
19	CHIEF JUSTICE ROBERTS: anything
20	further?
21	JUSTICE THOMAS: No.
22	CHIEF JUSTICE ROBERTS: Justice Alito?
23	JUSTICE ALITO: Yeah, I'm baffled by
24	your your your answer to the the Chief
25	Justice. Didn't Florida argue that this that

128

1	a preliminary injunction should not be issued
2	because the plaintiffs had not shown that they
3	were likely to succeed on their facial
4	challenge? Did they not make that argument?
5	GENERAL PRELOGAR: They made that
6	overarching argument, but they didn't go further
7	and say and the reason for that is because
8	here's direct messaging. And it's lawful as
9	applied to that
10	JUSTICE ALITO: All right. Well, do
11	you think that issue is not before us?
12	GENERAL PRELOGAR: I think it would be
13	hard for the Court to figure that issue out
14	because there's a lot of lack of clarity
15	JUSTICE ALITO: Oh, well, it may be
16	hard for us to figure out, but my question was,
17	is the issue before us?
18	GENERAL PRELOGAR: I think that the
19	way Florida litigated this case makes it
20	difficult to say that the issue is properly
21	before you. Usually, the Court holds a party to
22	the arguments it pressed below and that were
23	passed upon below, and there is no court in this
24	case that has considered questions about
25	other types of platforms or about other types of

129

1 functionalities.

2	JUSTICE ALITO: If the record is
3	insufficient to allow us to comfortably decide
4	whether the facial stand facial challenge
5	standard or an overbreadth standard is met,
6	isn't that the fault of the plaintiffs, and
7	isn't the remedy to vacate and remand for all of
8	that to be fleshed out, and that would not mean
9	that wouldn't say anything necessarily about
10	what will happen in the near future.
11	It would mean that it would be
12	litigated and perhaps, if the plaintiffs
13	developed the record in the way that Florida
14	thinks they should and provides a a list of
15	all of the all of the NetChoice members who
16	are covered by this and goes through all of the
17	functions that they perform and assesses whether
18	the law is unconstitutional in every application
19	or whether it has a legitimate scope that is
20	constitutional, then they would be entitled to a
21	preliminary injunction.
22	GENERAL PRELOGAR: So I I certainly
23	don't want to resist the idea that if this Court
24	thinks those issues are properly before it and
25	affect the analysis of the facial challenge,

notwithstanding the way the parties litigated
 the case, I -- I don't want to stand in the way
 of that.

I do think there would be a lot of 4 value, though, in the Court making clear that 5 with respect to Florida's defense of this law in 6 7 the lower courts, namely, the idea that the state really can control the curation and 8 editorial function of the true social media 9 10 platforms with respect to their expressive 11 product, that seems to me a type of provision 12 that is invalid in all of its applications with 13 respect to those platforms.

JUSTICE ALITO: Could I just ask you
to comment on a few things I understood Mr.
Clement to say.

17 So I understood him to say that an 18 email -- that the email function could be denied 19 on the basis of -- access to that could be denied on the basis of viewpoint. Direct 20 21 messaging could be denied on the basis of 2.2 viewpoint. Do you -- do you agree with that? 23 GENERAL PRELOGAR: No, we disagree 24 with that. We think that both direct messaging 25 and email service seems a little more like the

131

1 pure transmission of communications, so we would 2 likely put those in the box of the phone 3 company, the telegraph company, Internet service providers, and so forth. 4 We don't think that that's an 5 6 inherently expressive product in the same way as 7 the main website that has the news feed and that's curating the stories and deciding how to 8 9 prioritize them. 10 JUSTICE ALITO: Do you -- do you agree 11 that discrimination on the basis of bigness 12 violates the First Amendment? 13 GENERAL PRELOGAR: No, I don't think 14 that on -- that on its own, simply trying to 15 regulate based on the size of a company is -- is 16 always a First Amendment problem. 17 JUSTICE ALITO: Do you agree that a 18 private party cannot engage in censorship? Let 19 me give you an example. Suppose that a private 20 law school says that any student who expresses 21 support for Israel's war with Hamas will be 2.2 expelled. Is that -- would that be censorship, or would that be content moderation? 23 24 GENERAL PRELOGAR: So I think the --25 JUSTICE ALITO: Because it's a private

1 party. 2 GENERAL PRELOGAR: Yeah. So I quess 3 the first-order question would have to be, is there some kind of regulation that prohibits the 4 law school from acting in that way? So, if 5 you're thinking about a public accommodations 6 7 law, for example --JUSTICE ALITO: No. I'm just saying 8 9 -- I'm just talking about terminology. 10 GENERAL PRELOGAR: Oh, colloquial terminology? You know, I -- I --11 12 JUSTICE ALITO: That's -- that's not 13 censorship; that's content moderation --14 GENERAL PRELOGAR: I -- I -- I think 15 that --16 JUSTICE ALITO: -- because it's a 17 private party? 18 GENERAL PRELOGAR: -- the semantics of 19 it don't matter. You could say that the parade 20 in Hurley was censoring the -- the GLIB 21 contingent that wanted to march or that the 22 newspaper in Tornillo was censoring the 23 candidate who wanted to publish his speech. 24 You know, I think that the particular 25 word you use doesn't matter. What you have to

1 look at is whether what's being regulated by the 2 government is something that's expressive by a 3 private party, and, here, we think you have 4 that. JUSTICE ALITO: Well, I mean, the --5 6 the particular word that you use matters only to 7 the extent that some may want to resist the Orwellian temptation to recategorize offensive 8 9 conduct in seemingly bland terms. But, anyway, 10 thank you. 11 (Laughter.) 12 CHIEF JUSTICE ROBERTS: Justice 13 Sotomayor? 14 JUSTICE SOTOMAYOR: General, I think 15 I'm finally understanding the argument, but let 16 me make sure I do, okay? 17 When I came in, I had the reaction 18 Justice Alito did, which is we should vacate and 19 remand. And I have been thinking about what does that do the -- to the preliminary 20 21 injunction, because I agree with you, as I 2.2 understand what the State did below, was to say 23 we don't have to offer you any justification for 24 any part of our law because everybody of these 25 social media companies are common carriers.

1 And I think what's clear is -- from 2 our questioning -- that that's not true, that 3 there are many functions that are expressive that we can't say are common carriers. But, 4 even if we did say they were like common 5 carriers, it -- the issue would be one of what's 6 7 the level of scrutiny. And the State said there's no level of 8 9 scrutiny we're going to address. They basically 10 said we can do anything we want to common 11 carriers and to any of the expressive 12 platforming or deplatforming things. 13 But I don't even think that's true. 14 They can't come in and -- I -- and I'm not sure 15 they can -- do any of these things or some of 16 these things even to common carriers if it -- it 17 is a sort of content or viewpoint content 18 exclusion. 19 So a common carrier doesn't have to 20 permit unruly behavior. Doesn't have to permit -- it can throw somebody off the train if they 21 2.2 are threatening somebody else or if they're 23 doing other things. 24 So I -- I quess what you're saying is 25 let's keep the injunction in place, vacate and

135

1 remand -- affirm on the preliminary injunction 2 but vacate and remand on the application of this law and how based on what level of scrutiny 3 given the function that's at issue, correct? 4 GENERAL PRELOGAR: So we do think that 5 6 the Court should hold the parties to the way 7 they litigated this case and teed it up for the Court's review. And it's uncommon for the Court 8 9 to start considering new arguments that weren't 10 presented by the party defending its law below. 11 But -- but, if I can respond for a 12 moment on the common carrier point, Justice Sotomayor, because I think you've put your 13 14 finger on a really important response here to 15 many of the arguments that Florida is making. 16 They suggest that the designation of a 17 platform as a common carrier or not has some 18 kind of talismanic significance. But it's 19 completely irrelevant to answering the First 20 Amendment question because it's not like 21 companies that are treated as common carriers 2.2 have no First Amendment rights with respect to 23 their expressive activities. 24 You know, you can take a railroad like 25 Amtrak and you can regulate it as a common

136

1 carrier with the transportation of passengers, 2 but if it creates some kind of magazine for those passengers to peruse, that's entitled to 3 -- to full First Amendment protection. 4 And the reason that the 5 non-discrimination mandate in the common carrier 6 7 scenario usually poses no problem under the First Amendment is there's no speech or 8 9 expressive activity in carrying passengers or in 10 carrying communications. 11 It's entirely different with respect 12 to the activity that Florida is seeking to 13 regulate because that is inherently expressive. 14 It's putting together literally a website with 15 pictures and video and text and arranging it. 16 And that looks just like the kind of protected 17 editorial and curatorial activity the Court has 18 recognized in other cases. 19 So whether you say they're a common carrier or not we think is entirely beside the 20 21 point. 2.2 CHIEF JUSTICE ROBERTS: Justice Kagan? 23 JUSTICE KAGAN: I think I want to try again on this question of, like, where does this 24 25 leave us? Because suppose that I agree with

137

pretty much what you said. Let's just take that as an assumption, which is, you know, when Florida is trying to regulate Facebook news feed, well, it can't do that because Facebook news feed is itself providing a kind of speech product.

7 But, when Florida is trying to regulate Gmail, well, maybe it can do that 8 because Gmail is not in the business of 9 providing that sort of speech product. And if 10 11 you take it -- and if we again assume that this 12 statute covers a variety of things that are 13 Gmail-like, direct messaging and -- and Uber 14 and, you know, things that are not creating 15 speech products, and we have this First 16 Amendment doctrine that says, if you can find a 17 legitimate sweep, we can't overrule something 18 facially, but you don't really want to keep --19 you -- you don't want -- really want to allow 20 this law to go into effect because of the 21 unconstitutional applications that you're 2.2 talking about with respect to all these 23 companies that are creating speech products, what do we do? 24

25 GENERAL PRELOGAR: So I guess, if you

1 were confident that the state law had these 2 applications and that the particular provisions would regulate the kinds of -- of companies that 3 you're referring to that aren't creating an 4 expressive speech product, then I think that 5 6 that would poke holes in the theory of facial 7 invalidity. But I don't think you can have that 8 9 certainty because that's not how Florida 10 litigated this case below. It's not as though it said this statute is not invalid on its face 11 12 because it applies to Gmail or other --JUSTICE KAGAN: I -- I take your 13 14 point. We could just say, gosh, we can't -- we 15 can't even think about those questions because 16 this was litigated in a certain way. So that's 17 one option. 18 But suppose we think it's pretty 19 obvious that this covers a lot of stuff that does not look like Facebook feed and we wanted 20 21 -- I mean, suppose we were to -- you know, we --2.2 we can take notice of that, then what? 23 GENERAL PRELOGAR: Okay. So I think, 24 at that point, what I would do if I were the 25 Court is make clear that with respect to the

139

issues Florida did present and that the Eleventh
 Circuit and the district court resolved, Florida
 is wrong to say that it can apply these
 provisions to the social media companies that
 are engaged in creating an expressive product
 and make that much clear.

7 Otherwise, I think, if the Court just 8 vacates and sends it back, it'll be right back 9 up here on -- in an emergency posture, again on 10 an as-applied basis, with respect to one of 11 those companies. So I think the Court can 12 decide that much. That was the issue that was 13 litigated below and decided.

14 And then, if you think that there are 15 some additional questions about the scope of the 16 Florida law and whether it might have valid 17 applications along the lines we've been 18 discussing, you know, I -- I don't have a 19 particular interest on behalf of the United 20 States in what you do with the preliminary 21 injunction in the meantime. I think there's a 2.2 lot of force to the idea that this is backed up 23 by \$100,000 in penalty per violation, and that 24 could have a huge chilling effect on any 25 protected speech out there that's occurring.

1 But, you know, I think the Court could 2 say there are some unresolved issues about 3 concrete applications of this law and await 4 further factual development on that. 5 JUSTICE KAGAN: Thank you. 6 CHIEF JUSTICE ROBERTS: Justice 7 Gorsuch? JUSTICE GORSUCH: This is a facial 8 9 challenge, right? It's an all-or-nothing deal. 10 How is a court supposed to make as-applied 11 rulings in a facial challenge on remand? 12 GENERAL PRELOGAR: I would do it based 13 on the party presentation principle and the fact --14 15 JUSTICE GORSUCH: No, I got the first 16 point. 17 GENERAL PRELOGAR: Yeah. I --18 I --19 JUSTICE GORSUCH: The first --20 GENERAL PRELOGAR: So I might run out 21 of options --2.2 JUSTICE GORSUCH: Yeah. 23 GENERAL PRELOGAR: -- beyond that, 24 Justice Gorsuch. 25 JUSTICE GORSUCH: After the first one,

1 I --2 GENERAL PRELOGAR: I -- I agree that 3 these are hard questions asked --JUSTICE GORSUCH: Right. So the first 4 -- it's the first one you --5 6 GENERAL PRELOGAR: Now I suppose you 7 could certify to the Florida Supreme Court the unresolved issues of Florida law if you think 8 9 that that is necessary to actually reach a disposition in this case. 10 11 JUSTICE GORSUCH: Okay. Thank you. 12 CHIEF JUSTICE ROBERTS: Justice 13 Kavanauqh? 14 JUSTICE KAVANAUGH: I just want to 15 follow up on Justice Alito's questions, and --16 and he'll have the opportunity since this is 17 continuing to follow up on mine if he wants to. 18 (Laughter.) 19 JUSTICE KAVANAUGH: But the -- I think 20 he asked a good, thought-provoking, important question and used the term "Orwellian." 21 2.2 When I think of "Orwellian," I think 23 of the state, not the private sector, not 24 private individuals. Maybe people have different conceptions of "Orwellian," but the 25

state taking over media, like in some other countries. And in Tornillo, we made clear, the Court made clear, that we don't want to be that -- that country, that we have a different model here and have since the beginning, and we don't want the state interfering with these private choices.

Now Tornillo then dealt with -- and 8 9 this is my question. Tornillo dealt with the 10 idea, well, newspapers have become so 11 concentrated and so big that maybe we should 12 have a different rule. In Tornillo, in -- in the Court's opinion, Chief Justice Burger's 13 opinion for a unanimous court talked about those 14 15 -- those changes. I mentioned those before.

16 He says, those changes have placed in 17 a few hands the power to inform the American people and shape public opinion. "The abuses of 18 19 bias and manipulative reportage are said to be the result of vast accumulations of unreviewable 20 21 power in the modern media empires. In effect, 2.2 it is claimed the public has lost any ability to 23 respond. The monopoly of the means of communication allows for little or no critical 24 25 analysis of the media."

1	And then, though, he and he says,
2	"From this premise, it is reasoned that the only
3	effective way to ensure fairness and accuracy to
4	provide for some accountability is for
5	government to take affirmative action." And
б	then he goes on and explains no, we're not going
7	to do that. The First Amendment stands against
8	that. "However much validity may be found in
9	these arguments, at each point, the
10	implementation of a remedy calls for some
11	mechanism, either government or consensual. And
12	if it's governmental, that's just one brings
13	about a confrontation with the express
14	provisions of the First Amendment. Compelling
15	editors or publishers to publish that which
16	reason tells them should not be published is
17	what is at issue in this case."
18	And so he says for the Court in 1973,
19	no, we're not we don't have a big exception
20	to the idea that the First Amendment
21	distinguishes the state from the private sector
22	and private individuals.
23	Now my here's my question. We're
24	50 years later. How does that principle
25	articulated in Tornillo apply to the current

144

1 situation, the current bigness? 2 GENERAL PRELOGAR: So I think that 3 Tornillo does establish a bright-line proposition that the -- the state, even if it 4 has these concerns about market power and 5 dominance and control, cannot directly overtake 6 7 the editorial function and prevent a private party that's creating an expressive product from 8 making those kinds of judgments about how to 9 10 present that product. 11 But, at the same time, I think that 12 there are legitimate concerns here about the kind of power and influence that social media 13 14 platforms wield. And I want to emphasize it's 15 not like the government lacks tools to deal with 16 this. It's not as though it can't regulate at 17 all. There is a -- a whole body of government 18 regulation that would be permissible that would 19 target conduct, things like antitrust laws that 20 could be applied or data privacy or consumer 21 protection, things that we think wouldn't come 2.2 into any conflict with the First Amendment at 23 all.

And even in a situation where the government does think that it's necessary to

145

regulate in a manner that's going to affect protected speech rights, that's not the end of the inquiry. You still have a chance as the government to establish that your regulation can pass constitutional muster like it did in the Turner case that you were referring to earlier.

7 So I want to be very clear that we are 8 not suggesting that governments are powerless to 9 respond to some of the concerns that Justice Alito mentioned. You know, I think one natural 10 11 place to go as a government is to disclosure, to 12 ensuring that if you think that platforms have Orwellian policies, you at least make sure users 13 14 have information about how they're acting, what 15 their policies are, the kind of generalized 16 disclosure requirements here that were not 17 invalidated by the lower courts and aren't 18 before this Court.

19 JUSTICE KAVANAUGH: On Turner, the key
20 was content-neutral there, right?

21 GENERAL PRELOGAR: Yes. So Turner 22 concluded that the interest -- the governmental 23 interest --

24JUSTICE KAVANAUGH: Or one key.25GENERAL PRELOGAR: -- that was

asserted there, as you put it, was unrelated to
 the suppression of expression.

3 And the problem here, you know, my friend suggested that Florida has precisely the 4 same interest. But, here, the interest that 5 Florida has asserted in affecting these content 6 7 moderation choices is to change the speech on 8 the platforms. It doesn't like the way that the 9 platforms are moderating content and it wants 10 them to create a new expressive product that 11 reflects the state's judgments about what should 12 go on the website, whether that's candidate speech or speech by journalistic entities or 13 14 otherwise.

15 And that is just not an interest 16 that's unrelated to the suppression of 17 expression. So we think the Court should apply 18 intermediate scrutiny here and find that the 19 State can't get out of the starting gate with 20 that interest.

21 JUSTICE KAVANAUGH: Thank you.
22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?
24 JUSTICE BARRETT: General, I asked Mr.
25 Clement at the end this practical question,

147

1	which Justice Kagan also asked you, and so I
2	just want to be sure that I'm understanding
3	maybe exactly your answer to Justice Kagan. It
4	was different than Mr. Clement's to me.
5	You were pointing out to Justice Kagan
б	that if we just vacate and send it back, it's
7	going to be right up here in an emergency
8	posture on an as-applied challenge. So you were
9	encouraging us to address at least this question
10	of whether, like, the Facebook news feed or
11	YouTube, et cetera, is expressive.
12	But, if I think there are real
13	problems with some of these other applications,
14	which may be legitimate, do you think it's an
15	option to say, you know, that we think that some
16	of these editorial applications would be
17	unconstitutional, but because we don't know
18	about these other applications, they might be
19	within the statute's legitimate sweep, that
20	we're going to vacate and remand anyway and send
21	it back for the court to sort out all of those
22	other applications?
23	GENERAL PRELOGAR: So I think that
24	would be one possible approach here. You know,
25	I want to express strong agreement with the

1	instinct I think that is is underlies that
2	question that the Court shouldn't do more than
3	is necessary here with respect to the types of
4	applications that we've been discussing,
5	e-commerce, you know, Gmail, or or websites
6	or or email servers and that kind of thing.
7	I do think they present a really
8	distinctive set of issues. And so, if you think
9	that those issues are properly in this case,
10	I I don't think the Court has received the
11	briefing, frankly, to try to take a stab at
12	resolving them, but it seems like it would be a
13	reasonable thing to do to send it back for
14	further factual development and consideration by
15	the lower courts.
16	JUSTICE BARRETT: Okay. And one other
17	question and this is about Section 230.
18	When you were talking to Justice
19	Gorsuch, you were pointing out the distinction
20	between the post and the post's content for
21	which, you know, the the platform would not
22	be liable, and then the feed, and you were
23	saying, well, the speech the speech that is
24	the platform's is not what's on the post, and
25	that's you know, the the platform can't be

149

1 liable for that. 2 So could a platform be liable then, say, if its algorithm or its feed boosted things 3 like, say, the Tide POD challenge? That's 4 different. Is that within Section 230? 5 GENERAL PRELOGAR: Yeah. So I -- I 6 7 think that this is, you know, a difficult issue about how 230 might apply with respect to kind 8 9 of decisions that the platform is -- is making 10 itself with respect to how to structure its 11 service. 12 And I want to be careful here because 13 I have to confess that I haven't gone back 14 recently to look at the brief we submitted in 15 the Gonzalez case last term that I think touched 16 on some of these issues, but I do think that 17 there are circumstances where, of course, if the thing that's causing harm is the platform's own 18 19 -- own conduct in how it structures its service, 20 that's something that might not be immunized under Section 230. 21 2.2 I think all of this is separate and 23 apart from the First Amendment issue in this 24 case, though, because, here, whether or not you 25 think that, you know, recognizing that they have

150

a speech product affects the proper
interpretation of the statute under 230 and
means that there are some situations where they
won't have immunity, that is a completely
distinct question from whether they are creating
a speech product that warrants First Amendment
protection.

8 JUSTICE BARRETT: I totally agree. But I also think there are a bunch of land 9 mines. And if that's a land mine, if what we 10 11 say about this is that this is speech that's 12 entitled to First Amendment protection, I do think then that has Section 230 implications for 13 14 another case, and so it's always tricky to write 15 an opinion when you know there might be land 16 mines that would affect things later.

17 GENERAL PRELOGAR: Yes. And I -- I 18 certainly would think the Court could try to 19 carefully cabin it and make clear that it's not 20 opining on the specific statutory terms in 230 21 or whether this First Amendment characterization 2.2 of the expressive compilation fits within the 23 provision that Justice Gorsuch cited earlier 24 about creating speech in whole or in part, and 25 the Court could very clearly outline that in its

1 decision to try to caution lower courts away from conflating those two issues. 2 3 JUSTICE BARRETT: Thank you. CHIEF JUSTICE ROBERTS: 4 Justice Jackson? 5 JUSTICE JACKSON: General, I hear you 6 7 struggling valiantly to set aside other kinds of applications in response to a number of the 8 9 questions, and I guess I can't figure out why 10 those other applications aren't in this case. 11 I mean, I think Florida defended the 12 law as NetChoice challenged it, and NetChoice 13 brought a facial challenge. And I had 14 understood that to mean -- I mean, first, I was 15 a little surprised that the government's brief 16 didn't focus on that, but I had understood that 17 -- stood that to mean that NetChoice, number one, bears the burden in this case and, number 18 19 two, that NetChoice has to, you -- you know -- I quess Mr. Clement and I had a difference of 20 21 opinion as to how you say it, but that burden is 2.2 to show that there's either no valid application 23 of this law or that the law has a legitimate 24 sweep. So, if we can identify other valid

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1 applications, if we see worlds in which Uber 2 and, you know, money services or whatnot could be regulated, I don't understand why that does 3 -- just doesn't mean that NetChoice has not met 4 its burden and so that's the answer. 5 GENERAL PRELOGAR: Well, I think you 6 7 would have to conduct it at a more granular level, Justice Jackson, because it's not just 8 9 about what are the universe of platforms out 10 there and what functionality do they offer. 11 You'd really have to parse the 12 challenged provisions of the Florida law and ask: Are those platforms, you know, engaged in 13 any kind of the relevant conduct? And I think 14 15 that --16 JUSTICE JACKSON: I agree with you 17 100 percent, but the question is, isn't it NetChoice's burden to have presented the case to 18 19 us in that way? If we don't have that 20 information, again, I say, don't they lose? 21 GENERAL PRELOGAR: So I want to say 2.2 again that we don't have a particular stake in 23 how you think about their own litigation decisions on both sides, but this case very much 24 25 was teed up in the lower courts as being all

153

1 about what they called the Big 3 social media 2 companies. That's clearly the central aim of 3 this law. It was focused not on the Ubers of the world and their comment boxes but on the 4 core function of creating an expressive website 5 6 that principally contains user-generated 7 components, the text and the photos and so forth, and the -- the provisions that are 8 9 challenged here are the ones that are focused on the type of editorial discretion that those 10 11 types of platforms are engaged in. 12 So I don't think it's as easy to say 13 maybe we can look in the dark recesses of this 14 law and peek around a corner and find some 15 possible valid application. That's not how 16 Florida sought to defend the law. And I think 17 it would go down a complicated road to allow the core provisions of this statute to take effect. 18 19 JUSTICE JACKSON: I understand, 20 General, but the confusion --21 GENERAL PRELOGAR: Yeah. 2.2 JUSTICE JACKSON: -- I think, is that 23 the law on its face is really broad. We've said 24 that. And other people, many people, have, you 25 know, noticed that it could apply to all sorts

1 of things. And yet you say it was litigated 2 below as if it was narrow. I appreciate that. 3 But we have a facial challenge on the -- on the 4 table. GENERAL PRELOGAR: Yeah. 5 JUSTICE JACKSON: And to the extent 6 7 the entire law goes, then I suppose maybe these other lawful applications would go too. And 8 9 isn't that problematic when you're talking about facial challenges? 10 11 GENERAL PRELOGAR: Well, you are 12 looking at this in the posture of a preliminary 13 injunction, so I don't think that the Court is 14 definitively resolving and -- and, you know, 15 kind of issuing the final say on exactly what 16 the status of this Florida law is. 17 But -- but, look, I -- I want to 18 agree, I have some sympathy here. In preparation for this argument, I've been working 19 with my team to say, does this even cover direct 20 messaging? Does this even cover Gmail? And 21 2.2 we've been trying to study the Florida law and 23 figure it out ourselves. We think there's a lot 24 of ambiguity about exactly what the state law 25 provisions require.

1	I I don't think, though, that
2	that's a basis to not resolve the central issue
3	in the case, which is, with respect to what we
4	know the state law does, it would require these
5	social media platforms that are creating the
б	compilation of third-party speech to
7	fundamentally alter their product that they're
8	offering. We think that's an infringement of
9	speech and the Court should say so.
10	JUSTICE JACKSON: Thank you.
11	CHIEF JUSTICE ROBERTS: Thank you,
12	counsel.
13	Rebuttal, Mr. Whitaker?
14	REBUTTAL ARGUMENT OF HENRY C. WHITAKER
15	ON BEHALF OF THE PETITIONERS
16	MR. WHITAKER: First, on the
17	procedural posture, the fact that there's no
18	record in this case is entirely NetChoice's
19	fault. It was NetChoice who insisted in
20	district court on litigating the PI very fast.
21	In fact, we actually wanted to slow it down and
22	take discovery. And what NetChoice and we
23	actually even offered to voluntarily stay the
24	law while we did that. And NetChoice says, no,
25	we want to go fast. And they and the

156

1 district court obliged them, went fast. There 2 was no meaningful opportunity to take discovery. And, in fact, when we appealed, we 3 tried to say, hey, let's litigate this case 4 while it's on appeal and do discovery. And they 5 6 said, no, we want to stay discovery even while 7 it's on appeal. And the district court obliged. So the fact that there's no record in this case 8 is not Florida's fault. It is NetChoice's 9 fault. 10 11 Second, there are clearly 12 constitutional applications of this statute, and 13 contrary to what my friend said, it does apply 14 to Uber. And he read you the definition of 15 "censorship" on 97a, and right before that is 16 the definition of "deplatforming." And Uber --17 if Uber deplatforms a -- a user, that is covered by our law. If users -- if Uber says to a 18 19 journalistic enterprise, I don't like the -- the 20 cut of your jib, the broadcast you -- you did 21 last week, that is covered by our law. And so 2.2 that -- that is something that is there. 23 There -- and there are also -- you 24 know, there -- it's not just Gmail. It's also 25 WhatsApp. There are messaging functions. Those

157

1 are constitutional applications. And the 2 consequences of my friend's argument is really 3 quite sweeping. My friend seems to think that -- that even a traditional common carrier has a 4 First Amendment right, I guess, to -- to censor 5 6 anything. I guess that means that Verizon can 7 turn around tomorrow and have a First Amendment right to kick all Democrats or all Republicans 8 off of the -- the platform, and that is -- that 9 10 would have sweeping consequences that I -- I do 11 not think is supported because Verizon has no 12 message in deplatforming or censoring its users. 13 And that principle is distinct from 14 what my friend from the United States is saying 15 because she's talking about, oh, well, they 16 arrange material on the site in various ways. 17 But that doesn't speak to -- at all to whether 18 they have a constitutional right to censor 19 because just because you have to carry content 20 or carry a particular user, you could still 21 arrange it. 2.2 And -- and I think that's the 23 fundamental conflation -- conflation that the United States does in its brief. It -- it 24 25 ignores the distinction between the hosting

158

1	function and the organizational function, and
2	that's something that I think the Court needs to
3	keep separate in its in its mind. And I
4	would I would commend to the Court Professor
5	Volokh's article cited on page 24 of our brief
6	that that makes this distinction.
7	Thank you.
8	CHIEF JUSTICE ROBERTS: Thank you,
9	counsel.
10	The case is submitted.
11	(Whereupon, at 12:27 p.m., the case
12	was submitted.)
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		Official	-	
\$	ability [6] 13:20 78:18 100:	affirm [4] 81:3 104:20 109:	31: 1 37: 10,19,24 38: 1,9,10	
	4 111: 9 119: 22 142 :22	8 135: 1	43: 18,20,21,23 44: 1,4 45:	56:4 61:21 68:12 69:1,9
\$1,000 [1] 108: 5	able [3] 70:10 80:12 85:4	affirmative [1] 143:5	17 46 :25 50 :25 62 :24 63 :5	71:1 76:5 84:19 127:6 129:
\$100,000 [3] 80: 13 105: 16	above [1] 124:8	affirmatively [1] 94:4	64 :10 65 :4,10,18 68 :8 70 :	18 135: 2 151: 22 153 :15
139:23	above-entitled [1] 1:15	afraid [2] 13:6 32:24	5 71 :24 72 :7,24 73 :24,25	applications [30] 35:14 56:
11	absolutely [7] 7:23 20:21	African [1] 76:8	74 :2,8 76 :13 80 :16 81 :14	10 68 :17 69 :10 71 :14 73 :
1 [2] 18: 5,6	42 :1 64:7 65:9 81:2 102:	ago [1] 61:5	84 :8,10,17 85 :22,23 86 :13	20 78 :25 80 :10,20 82 :22
10:04 [2] 1: 17 4: 2	12	agree [34] 22:4,14,17,18 24:	98: 13 102: 5,21 103: 13	83: 5,24 126: 18,23 130: 12
100 [1] 152: 17	absorb [1] 52:12	23,24 26: 19 32: 5 43: 22,24,	108 :7 112 :16 114 :9,18,21,	137 :21 138 :2 139 :17 140 :
113 [1] 3 :11	abstract [2] 60:2 98:13	25 44: 15,16 51: 3 57: 4 70:	24 115 :4,12 116 :2,14 117 :	3 147: 13,16,18,22 148: 4
12:27 [1] 158: 11	abuses [2] 21:20 142:18	7 76:2 79:13,23 80:3 108:	1,4 124: 3,20,24 131: 12,16	151 :8,10 152 :1 154 :8 156 :
154 [1] 3: 14	accepted [1] 21:21	13 110 :15 116 :22 118 :25	135: 20,22 136: 4,8 137: 16	12 157 :1
19 [1] 111: 12	access [3] 10:7 75:8 130:	122: 19 130: 22 131: 10,17	143 :7,14,20 144 :22 149 :23	
1917 [1] 93: 18	19	133: 21 136: 25 141: 2 150:	150: 6,12,21 157: 5,7	82:8 84:7 128:9 144:20
1973 [1] 143: 18	accommodations [1] 132:	8 152 :16 154 :18	American 3 21:19 76:8	applies [10] 16:5 41:23 60:
1976 [1] 21: 6	6 accordance [1] 14:17	agreed [1] 57:7	Americans [1] 4:12	9 63 :6 69 :4,14 70 :21,22
1997 11 111: 17	account [1] 29:5	agreement [1] 147:25 ahead [1] 71:6	amici [2] 8:4,6	101:3 138:12 apply [34] 6:1 9:20 11:13,
2	accountability [1] 143:4	aim [1] 153:2	amicus [3] 2:8 3:10 114:5	17,19,20 24: 1,3,5 25: 7 28:
2 [1] 113 :21	accounts [1] 70:7	AL [2] 1:4,8	among [1] 59:11	22 34 :19 37 :3 57 :5 58 :24
2 [1] 113 :21 20 [1] 111 :13	accumulations [1] 142:20	Alexandria [1] 2:4	amount [2] 52:11 64:4	59 :9 61 :17 70 :24 71 :5 74 :
2000s [1] 66:12	accuracy [1] 143:3	algorithm [13] 50:3,10 53:	amounts [2] 5:24 14:25	13 76 :15 77 :20,22 78 :12,
2024 [1] 1 :13	accurate [2] 104:3.5	3,12,12,13,24 89: 24 90: 7,	Amtrak [1] 135:25	14 109 :25 110 :23 112 :8
22-277 [1] 4 :4	achieved [1] 4:14	12,14 91: 8 149: 3	analogize [3] 9:24 13:7 47:	
230 [35] 29: 4,15,23 40: 19,	acknowledge [1] 121:3	algorithms [9] 50:14 52:	21	8 153 :25 156 :13
21 66: 10,15,23 67: 5 86: 3,5,	across [2] 90:20 119:16	24 53:1,6 54:16,19,22 90:2,	analogized [1] 42:14	applying [2] 56:23 60:8
6,20,22 87 :7,9 88 :3 92 :8,	act [2] 14:17 92:7	24	analogy [4] 42:16,19 43:6	appreciate [4] 59:22 60:15
10 119 :4 121 :6 123 :12,14,	acting [2] 132:5 145:14	Alito [43] 32:11,12,19 33:16	49 :4	110 :20 154 :2
20,25 125:1,8,11 148:17	action [7] 9:3 63:6 65:8 89:	34:6,22 35:5 36:1 57:19	analysis [8] 15:16 20:22	approach [2] 126:25 147:
149:5,8,21 150:2,13,20	23 99: 23 108 :3 143 :5	69: 5,21,25 70: 4,14 71: 5	22:12 25:7 37:22 81:25	24
230(c [1] 29: 20	actions [1] 100:4	77: 17,19,23 78: 9 79: 17 81:	129:25 142:25	appropriate [3] 85:17,18,
230(c)(2 [6] 41:12,15,23 42:	activities [6] 26:1 27:12 99:	17 82:5,11,14 93:4,5,16 94:	analytically [2] 40:24 53:	21
2,5,10	10,12 121: 14 135: 23	3 127: 22,23 128: 10,15 129:		apt [3] 42:16,18 43:7
230(c)(2)(A [1] 125:19	activity [34] 12:19 27:14,16	2 130 :14 131 :10,17,25 132 :		area [2] 9:25 65:8
24 [1] 158: 5	37 :19,25 38 :1 39 :1 47 :6	8,12,16 133: 5,18 145: 10	analyzing [1] 73:4	areas [2] 13:3 16:9
26 [1] 1 :13	60:8 63:9,19 65:12 69:20	Alito's [1] 141:15	angry ^[3] 18:6 19:2,8	aren't [11] 16:16 61:23 86:
3	71 :11 74 :22 76 :14,24 77 :7,	all-encompassing [1] 33:	another [7] 29:3 67:14 78:	17 91 :24,25 114 :23 122 :14
3 [1] 153:1	13 79 :7 81 :10 85 :15 100 :8	23	2 83:22 100:6 127:11 150:	125 :9 138 :4 145 :17 151 :
30 [1] 60 :24	103 :7,12 104 :1,19 112 :15	all-or-nothing [1] 140:9	14	
30-day 5 60:12 61:12 62:	114 :18 117 :18 118 :23 136 :	allege [1] 30:9	answer [12] 29:9,12 33:9,	argue [4] 20:8 36:11 125:7
12 94:24 101:2	9,12,17	allegedly [1] 32:2	15 40 :1 75 :25 76 :9,12 95 :	127:25
303 [6] 64 :1 102 :24,25 103 :	actual [1] 99:20	allow [9] 20:4,4 21:22 37:	9 127:24 147:3 152:5 answering [1] 135:19	argued [2] 46:7 122:7
2,2,6	actually [23] 6:22 10:8 11: 19 20:14 25:21 29:23 35:	11 106 :20 115 :25 129 :3 137 :19 153 :17	anterior [1] 80:17	arguing [1] 55:10 argument [29] 1:16 3:2,5,8,
	19 20 : 14 25 :21 29 :23 35 : 10 49 :17 51 :11 54 :3 60 :8	allowed [1] 58:8	anti-vaxxers [1] 18:9	12 4:4,7 21:17 33:17 47:
4	62:4 68:25 71:22 72:2 73:	allowing [3] 37:11 44:1 78:	antidiscrimination [2]	12 53 :21 56 :16 62 :18 66 :9
4 [1] 3 :4	3 74:10 92:2 97:10 109:16	1 allowing ⊡ 57.11 44.1 76.	112: 11 113: 5	68:24 69:18 76:23 77:5 96:
5	141: 9 155: 21,23	allows [1] 142:24	antithetical [1] 80:16	23 99 :8,16 111 :17 114 :4
50 [1] 143 :24	added [1] 97:8	alluded [1] 106:4	antitrust [1] 144:19	128: 4,6 133: 15 154: 19
	addendum [1] 100:2	almost [3] 8:10 46:24 68:	antitrust-type [1] 44:10	155 :14 157 :2
6	additional [2] 52:1 139:15	16	anybody [2] 107:25 113:19	arguments [9] 56:19 66:
6 [1] 40: 19	address [7] 6:14 40:24 57:	alone [2] 70:25 86:20	anyway [4] 29:25 79:25	16 69:19 107:17 126:1
62 [1] 3 :7	12,25 74 :16 134 :9 147 :9	alphabetical [1] 52:17	133 :9 147 :20	128 :22 135 :9,15 143 :9
7	adjunct [1] 61:14	already [1] 42:8	apart [3] 9:16 53:1 149:23	Arkansas [1] 73:2
	adopt [1] 122:22	alter [2] 99:25 155:7	apologize [1] 34:5	around [4] 63:18 93:6 153:
7 [2] 92 :18 112 :20	advances [1] 22:8	alternative [1] 35:25	app [1] 39:23	14 157: 7
9	advancing [1] 44:23	although [1] 122:13	appeal [2] 156:5,7	arrange [3] 114:10 157:16,
9/0 [1] 103: 16	advertisers [6] 19:5,6,8 64:	-	appealed [1] 156:3	21
90s [1] 66:12	8 93:15 118:2	ambiguity [3] 25:22 59:7	appeals [1] 106:3	arranging [2] 119:23 136:
97A [2] 99:21 156:15	affect [3] 129:25 145:1 150:	154 :24	appear [2] 32:24 117:3	15
99 [4] 17 :19,22,23 73 :6	16	amend [1] 105:3	APPEARANCES [1] 2:1	article [3] 41:18 51:7 158:5
· · ·	affected [1] 6:11	Amendment [91] 4:20,24	appears [2] 5:15 39:7	articulate [2] 85:18 95:2
<u> </u>	affecting [2] 39:21 146:6	5:2,7 6:1 7:18 14:1,22 15:	appendix [2] 79:6 99:21	articulated [1] 143:25
a.m [2] 1:17 4:2	affects [2] 11:2 150:1	2,6,10 20: 16 21: 7,11 22: 8	applicable [2] 22:25 64:2	artifact [1] 85:8
		taga Daparting Corpor		

		Official		
artificial [1] 72:11	15 135: 3 140: 12	book [2] 24:24 43:5	bypass [1] 116:20	107:17 114:12 136:18
as-applied [9] 6:11 31:12	baseline [2] 60:2 118:17	books ^[2] 43:4,4	<u> </u>	categorical [1] 26:6
81 :20 82 :15,17 105 :5 139 :	basic [1] 124:17	bookstore [3] 10:2 24:25		category [1] 111:4
10 140: 10 147: 8	basically [8] 15:18 17:24	76: 5	c)(2 [1] 29:20 cabin [1] 150:19	cause [1] 113:22
ASHLEY [1] 1:3	30 :18 37 :13 66 :24 77 :11	Bookstores [2] 24:7 52:16		causes [1] 19:13
aside [3] 49:10 88:6 151:7	111 :19 134 :9	boosted [2] 50:7 149:3	cable [3] 23:9 65:7 111:7	causing [1] 149:18
aspect [6] 6:17 15:5 20:14	basis [21] 63:2 71:9 74:25	booted [1] 46:8	cagey [1] 33:1	caution [1] 151:1
54 :25 73 :22 79 :2	75:9 77:25 78:5 95:15 97:	booting [1] 32:8	California [1] 12:18 call [3] 10:4 43:2 122:21	celebrate [1] 76:7
asserted [3] 5:7 146:1,6	4,6,17 98: 7,9,15 106: 20	Boston [2] 102:16,17	called [2] 14:3 153:1	celebrating [1] 112:20
asserting [1] 42:6	127 :1 130 :19,20,21 131 :11	both [6] 25:8 56:19 59:2	calls [1] 143:10	cellphone [1] 43:11
assesses [1] 129:17	139 :10 155 :2	104 :11 130 :24 152 :24	came [10] 1:15 76:22 94:10,	censor [17] 4:21 6:2 10:19
Associated [1] 44:6	basket [3] 77:2 81:10 104:	bottleneck [1] 111:8	11 102 :18 103 :24 104 :5	23 :3 39 :8 43 :1,4 48 :3 49 :7
assume [4] 50:20 60:6 108:	17	bouncing [1] 93:6	106: 2 111: 24 133: 17	63:17 65:2,18 99:22,23
13 137: 11	beam [1] 96:14	bound [4] 116:5,14,25 117:	campus [5] 19:18 20:5 32:	100 :7 157 :5,18
assuming [1] 37:18	bear [1] 8:15	14	9 40 :5 46 :9	censored [2] 45:1,2
assumption [1] 137:2	bears [1] 151:18	bounds [1] 115:11	cancel [1] 5:8	censoring [11] 31:19,21
attacked [1] 58:17	become [3] 8:13 64:10 142:		candid [1] 53:3	32 :6 39 :2 51 :16 54 :4 63 :
attacks [1] 92:17	10	boxes [1] 153:4	candidate [8] 73:14 84:18	14 116 :18 132 :20,22 157 :
attempt [1] 41:5	becoming [1] 67:1	breadth [3] 9:7,11,15	112 :24 113 :6,7,18 132 :23	12
attempts [1] 112:7	beg [1] 84:25	breakneck [1] 33:12	146 :12	censors [1] 102:2
attention [3] 10:11 52:8 94:	began [1] 13:19	brick-and-mortar [1] 55:	candidates [3] 64:14 73:	censorship [18] 5:10 6:1
23 ATTORNEY [1] 1:3	beginning [1] 142:5	13 hrief [11] 0.7 45.11 47.01	13 100: 11	40: 2 53: 19 54: 12 59: 10,13
attribute [1] 39:6	behalf [9] 2:3,5 3:4,7,14 4:	brief [11] 8:7 15:11 47:21 55:20 74:21 77:9 118:21	cannot [4] 23:3 63:23 131:	93: 17,24 101: 25 102: 11
	8 62:19 139:19 155:15		18 144: 6	110: 23 111: 1,3 131: 18,22
audience [3] 63:12 88:18, 24	behavior [1] 134:20	149 :14 151 :15 157 :24 158 : 5	canvass [1] 108:24	132:13 156:15 center [1] 45:22
Austin [1] 61:5	beliefs [1] 75:1	5 briefed [2] 29:18 41:21	careful [1] 149:12	
authors [2] 76:8 98:14	below [18] 32:14 68:25 81:		carefully [3] 14:20 40:10	central (3) 126:4 153:2 155 2
available [1] 125:23	7,12 85:13 95:6,7,12,14	briefing [3] 79:20 80:22 148:11	150 :19	2 centuries [1] 14:14
avoid [1] 86:4	125:22 126:3 128:22,23 133:22 135:10 138:10 139:	Briefly [1] 29:10	Carlson's [1] 70:6	cert [1] 29:18
await [1] 140:3	13 154: 2	briefs [1] 31:6	carried [1] 89:10	certain [17] 6:3 9:13 26:10
aware [4] 28:1,8 33:22 45:	benefit [3] 103:23 109:22,	bright-line [1] 144:3	carrier [21] 7:16,18 14:13	30 :25 36 :24 51 :10 71 :18
14	25	bring [3] 6:11 82:14,16	26 :12 34 :15 43 :9 46 :15 49 :	
away [3] 55:18 118:2 151:1	beside [1] 136:20	bringing [1] 7:3	4,10,11 74: 10,12 80: 23	121: 5,5,13,13 122: 22 138 :
	best [2] 30:7 103:9	brings [2] 63:20 143:12	115:3 134:19 135:12,17	16
B	better [2] 78:22 105:4	broad [12] 4:20 8:9,14,24	136: 1,6,20 157: 4	Certainly [23] 6:16 7:10,14
back [18] 30:1 44:5 52:22	between [11] 45:18 46:13	11 :1 25 :8 31 :5 55 :2,17 69 :	carriers [13] 17:15 42:15	14: 6,19 15: 8 17: 12 19: 16
66:12 105:19,22,25 106:2	48 :16 75 :3 89 :23 94 :2 119 :	11 94 :20 153 :23	43: 11 80: 2 121: 12,23 125:	24 :24 26 :18 30 :21,23 31 :
110:13 122:7 125:23,24	13,19 123: 22 148: 20 157:	broadcast [3] 23:5 45:3	1 133: 25 134: 4,6,11,16	24 33:25 34:19 53:2 59:5
139:8,8 147:6,21 148:13	25	156 :20	135: 21	61:3 88:1 120:15 122:21
149: 13	beyond [2] 121:18 140:23	broadcaster [1] 23:11	carry [6] 54:7 113:14,15	129 :22 150 :18
backed [1] 139:22	bias [5] 21:20 62:23 72:13,	broadcasters [1] 23:10	114: 23 157: 19,20	certainty [1] 138:9
bad [5] 18:24 67:2,8,18 78:	19 142: 19	broadcasting [1] 23:14	carrying [3] 119:15 136:9,	certify [1] 141:7
20	bicycles [1] 100:16	broader [2] 17:13 88:18	10	cetera [1] 147:11
bad-faith [2] 42:1,7	big [11] 38:6 62:23 63:11	Broadly [3] 5:5 19:10 59:3	Case [79] 4:4 6:6,18 8:1 15:	chaff [1] 120:10
baffled [1] 127:23	71:22 72:6 96:9 119:13,18	brought [4] 55:9 81:20,23	22 16 :25 20 :15,22 26 :4,4	challenge [49] 6:6,12,15,
balance [1] 44:13	142:11 143:19 153:1	151 :13	27 :21,25 28 :6 29 :22 30 :9,	19,24 7:3 8:13 25:25 28:
balanced [1] 44:12	biggest [3] 72:21,22 96:13	Buckley [2] 21:1,5	9,22 31 :15,19 33 :7 35 :18,	16,21 29: 2,6 31: 12 34: 23
ban [5] 23:3 30:24 40:6 100:	bigness [3] 71:9 131:11	build [1] 92:13	23 42 :4 44 :5,6,8 58 :15 61 :	41: 8 54: 17,25 55: 16 57: 9,
19,21	144: 1	bulimia [1] 92:22	5 65:7,17 66:1,11 72:2,5	13 58: 13,18 76: 21 81: 21,
ban's [1] 100:20	bigots [1] 19:18	bullying [1] 36:25	74: 11,19 76: 18,22 79: 13	24 82: 3,15,17 83: 1,3 87: 2
banning [4] 31 :7 54 :10 59 :	billion [1] 101:16	bunch [6] 48:20 87:5 89:19,	81: 18 84: 8,10 85: 9 88: 1	95:3,19,23 98:12,20 105:5
10,14 bans (1) 12 :12	billions [1] 4:16	20 101:8 150:9	102: 14,15,18 103: 4,9,15	107:20 119:1 120:8 128:4
bans [1] 12:12 bare [1] 121:18	bit [6] 28:21 47:9 61:12 72:	burden [12] 8:15,23 9:2 68:	104 :20 107 :18 110 :7 125 :	129:4,25 140:9,11 147:8
Barrett [27] 48:8,9 49:9,25	5 79 :21 95 :25	15,15,21,22 83: 25 151: 18,	11,22 126 :1 127 :12 128 :19, 24 130 :2 135 :7 138 :10	143.4 131.13 134.3
50 :18 52 :4 53 :20 54 :23 56 :	black [3] 76:7 98:14,14	21 152 :5,18	141: 10 143: 17 145: 6 148:	challenged [3] 151:12 152:
8,15,25 57 :4,14 77 :18 79 :	blah [3] 121:8,8,8	Burger's [1] 142:13	9 149 :15,24 150 :14 151 :10,	12 153 :9
11 80: 5,25 94: 14 108: 11,	bland [1] 133:9	business [11] 5:13 14:18	18 152 :18,24 155 :3,18 156 :	challenges [2] 31:10 154:
12,23 110 :9 146 :23,24 148 :	blinks [1] 63:10	15 :17 36 :16 37 :6 45 :21 97 :	4,8 158 :10,11	10
16 150 :8 151 :3	blocking [1] 125:18	12 106 :14 114 :20 121 :15	cases [20] 8:18 22:15 45:	challenging [1] 9:3
Barrett's [1] 126:20	blow [2] 92:14 101:17	137 :9	14,19,24 47: 22,23 63: 22	chance 5 33:13 40:18 45:
based [9] 23:4 54:1 76:3	board [1] 74:17	businesses [3] 14:10,23	64: 25 65: 23 66: 23 86: 25	7 57:25 145:3
85:11 122:5 127:13 131:	body [1] 144:17	17: 16	87:1,3 90:16 93:6 95:21	change [8] 60:23 61:1,18
	bomb [1] 92:13	buy [2] 38:15 52:20		101: 4,10 106: 13 113: 23
	** *	to an Domenting Company		

146.7 41.2 T7.171.18.27 178.7.10 65.7 conduits (166.22) 1115 (17.176.22.2 418.21 1 6.10.2 64.21 87.14.1 5.10.2 64.21 87.14.1 21.3 82.04 817.23 51.24 confess (11.44.33 1.3 14.777.146.22 148.22.1 1 8.82.20 68.42.3 87.14.1 7.20.10.2.1 22.20 148.21.20 69.00 conflating (11.61.2) 1.3 14.62.24 81.2.1 3.3 47.771.44.62.1 8.62.40 6.0.aractorization (11.42.2) 97.10.0.2.1 22.80.11.7.89.2.2 2.11.17.71.42.2.2 14.81.1 conflating (11.61.2) con			Unicial		
changes III 21:17 442:16 11:16:19:21:83:22,716 8463 21:19:22:82:128:29:869.89 15:19:10:10:19:21:10:10:19:21:10:10:19:10:20 157:19 characteriztics IIII 97:18 22:88:13:21:25:89:49:89:11 15:16:10:22:20:19:19:10:20 157:19 27:76:16:16:12:20:10:10:10:10:10:10:10:10:10:10:10:10:10	146:7	4,12 77: 17,18,21 78: 7,10	65 :7	conduits [1] 66:22	116:19 117:16,22,24 118:1,
10 852.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20 854.20	changed [2] 39:14,14	79 :11 80 :3,6 81 :2,18 82 :4,	companies [32] 5:12 16:5	conference [1] 43:2	7,15 122: 5 131: 23 132: 13
characteristics (197:16) 22 88:13:21:25 99:43 99:11 13:15 106:22 107:31 102:20 conflation (197:16:21 content-assed (198:11 content-assed (198:11 conflation (197:16:21	changes [3] 21:17 142:15,	11,16,19,21 83:2,7,16 84:5	21:4 36:20 48:17,23 51:24	confess [1] 149:13	134: 17,17 146: 6,9 148: 20
characteristics (197:16) 22 88:13:21:25 99:43 99:11 13:15 106:22 107:31 102:20 conflation (197:16:21 content-assed (198:11 content-assed (198:11 conflation (197:16:21	16			confident [1] 138:1	
characterization IZI722 10,16 81:3.5,71,11,82.322 211117.11228 1422 conflation ID172323 377.60:16 41:2,824.49 characteriza (134:12 977:02.09 83:0.017 99:2 2137.22 138:32 139.4.11 conflation ID14232 277.80:16 41:2,82 CHIEF (M44.5) 913:16 15 23.25 106:11 107:16 108: confraction ID14231 271.33 30:3 2211 38:2 40:15 43 121.32.01 107:16 108: companies' ID 77:12 36:8 confraction ID14231 271.33 30:3 2211 38:2 40:15 43: 121.32.01 1167:2 1153.11 97:16 97:24 companies' ID 77:12 36:8 contextion ID32:0	characteristics [1] 97:18			conflating [1] 151:2	content-based [10] 36:19
160.21 1,11 939.22 94.8 95.13 1221,71 277,71 332.23 136. conflict III 4422 64:15 7.31 95:17 characterize II34:12 197,102 0853,00,77 96.138.33 134.91.41 231.372.318.33 134.91.41 conflict III 4212 conflict III 4211 conflict III 4212 conflict III 44212 conflict III 44213 conflict	characterization [2] 7:22			a	
characet/se 97:10.29 92:1137:23 1337:23 conffortation (1)44:31 27:13 CHIEF (M4.3,9) 12:12:12:04:10:10:16 13:02 confrontation (1)44:31 27:13 14:12:20:72:11:32:02 12:13:22:11:32:23:00 confunction (1)14:11:1 62:14:62:0 contation (1)14:11:1 62:14:62:0 30:32:11:30:2:40:15:02:13 14:42:57:15:02 confunction (1)15:20 contention (1)13:20:11 contation (1)13:20:					
charged U19:12 18 102:122 t044 105:1, 13:32 confrontation [194:313 27:13 0.00000000000000000000000000000000000			-		
CHIEF (#4 43.9 13:16 1:6 23.25 106::1 107:16 106:: companios' P37:12 36:: confronted P1111:1 content-neutral P80:14 30:3 32:1 36::2 40:15 43:: 12132:9 116:16 130:61 157 119 87:24 106:14 confusing P128:16 contusing P128:16 contuning P188:15 contusing P128:16 co					-
4 19:22 407. 21:1,13 29.8 22 109:1 101:12,24 113:3,10 company (10:5) 115:76 89; confused (10:6):11 62:5 148:20 303 32:1 33:24 401:54.3 144:25 151:20 116:3 119:14:74 company (10:5):14 confusion (11:63:20 92:14:14:21 contaxion (11:63:20 93:49:46:21 51:20 contaxion (11:63:20 93:49:46:31:16:21:46:10:64 contaxion (11:63:20 94:14:22 contaxion (11:63:20 94:14:22 contaxion (11:63:20 94:14:22 contaxion (11:63:20 94:14:22 contaxion (11:63:20 contaxion (11					
3/30/32/11/36/24/01:54/37 111/32/14/36/21 (19/24) 115/31/98/24 (19/24) Confusion (19/32/20) C		,			
14 48:7 57:16 52:15.20 146:25 157:20 115:3 119:14 133:315 contusion 1115:32 contusion 1115:32 contusion 1115:32 93:8 448 96:17 101:21 colement's 11147:4 compare 1135:14 compare 1135:16 Congress 112:33:66:22 9 contragle 115:16 135:11 19:22 20 57:13 74:16 75:67 77:24 comparison 133:16 60: Congress 112:41 contragle 1135:16 contragle 1135:13 contragle 1135:13 contragle 1135:13 contragle 1135:13 contragle 1135:13 contragle 1135:13 contragle 1135:14 considere 1172:12 contragle 1135:14		, , ,			
17.21 74.4 84/20 85:16.24 Colments (1147:4) comparable (1127:6) Congress (7128:66:2) 9 84:3 446:45 119:1 393: 946 96:17 1012:1 clients (1143:11 compared (115:16) Congress (1123:16) continuing (1132:2) 133: 12 136:22 140:61 41: 981:11 91 09:22:5 2 contaction (1112:2) control (1112:2) </td <td></td> <td>-</td> <td></td> <td>5</td> <td></td>		-		5	
33.4 49.6 96:17 101:21 client's 0113:11 compare 0135:14 continuing 07	· · · · · · · · · · · · · · · · · · ·				
108:10 10:10 114:17, 2 Centrs U16:3:14 64:19 65: 1 compared II 15:16 Congress's II 12:42:1 continuing (218:15 14:1: Contrart II 15:26 133:12 136:22 140:61 44: 98:11 90:22.25 correl [21:10:10:14 consequences [21:52:1] consequences [21:52:1] contrart III 15:26 consequences [21:52:26 contrart III 15:26 consider III 72:12 consider III 73:26 consider III 73:26 consider III 73:26 consider III 73:26 consequences [21:52:26 consequences [21:52:26:26 consequences [21:52:26:26 consequences [21:52:26:26 consequences [21:52:26:26 consequences [21:52:26:26:26 consequences [21:52:26:26:26 conseq				•	<i>*</i>
1252:0127:16.19.222 20.67:13.71:46:75:677:24 comparison [35:16.60: consequences [1157:2, consequences [1157:2, consequences [1157:2, consider [1157:2, co					
133:12 136:22 1406: 414: 96:11.19 109:22.25 2 compelling [P123:16, 16 consensual [P13:11] contradicts [P14:22] 155:11 158:/8 close [P13:12 compelling [P123:16, 16] consequences [P157:2, 10] contradicts [P14:21, 22] children [P119:32.4 coincide [P17:12] coincide [P10:12] coinci	· · · · · · · · · · · · · · · · · · ·		-		-
12 12 12 13 146:22 151:4 closer (D 32:16) 16 compelling (P 32:15) 16 consider (P 72:16) 175:12 contrary (P 156:13) 100 children (P 107:5,8) clothes (P 10:4) compelling (P 70:24) 100:12 consider (P 72:16) 100:12 45:9) 10.16 46:2,4,8,14 47: choice (P 33:14) coincide (P 72:12) compelling (P 70:24) 100:22 66:80 148:14 11:81 27:21 208: 144:60 choice (P 152:1) coincide (P 72:12) compelling (P 144:16) 100:22 consider 20 (P 22:12) 11:81 27:21 208: 144:60 choice (P 152:1) coincide (P 17:12) compelling (P 144:16) 100:22 consider 20 (P 22:12) consider 20 (P 22:12) conveying (P 118:4) choise (P 122:12) coincide P 17:12:10 compiling (P 141:6) consider 20 (P 22:12) 15:15:10:12:12 choise (P 122:12) coincide P 17:12:10 compliang (P 149:15) correl (P 72:14) 16:11:12 17:15:15:10:12:12 chose (P 122:12) comers (P 17:15:14:11:14) complicate (P 145:17) correl (P 72:14) 16:11:12:12:10:10:10:12:12:12:12 correl (P 72:14) 18:11:13:10:11:11:11:11:11:11:11:11:11:11:11:11:					
155:11 163:13 closer in 52:18 64:9 74:18 143:14 10 control [20]4:11 13:21:23 children [11 01:36] cognizable [11 30:16] compels [11 83:1] consider [17 9:16] 45:9.0.16.46:24.8.14 47: choice [11 22:12] coincide [11 72:12] coincide [11 72:12] coincide [11 72:12] coincide [11 72:12] 11:13 12:12:30:144:6] choice [11 22:12] coincide [11 72:12] coincide [11 72:13] coincer [11 72:14] coincer [11 72:14] coincide [11 72:12] coincide [1					
children IP 107:58 clothes IP 107:58 clothes IP 107:58 consider P107:68 consider P107:78 consider P107:78 <thconsider p107:<="" td=""><td></td><td></td><td></td><td>-</td><td></td></thconsider>				-	
chilling [II 139:24 cognizable (II 30:16 competing (II 70:24 consideration (II 22:12) consideration (II 32:10) consideration (II 32:11) consideration (II 32:12) consideration (II 32:					
choice PI3:e117:7 connot del PI3:e112 connot del PI3:e112 connot del PI3:e112 consideration PI4:e114 consideration PI4:e114 146:7 collections ID141:16 collections ID141:16 consideration PI4:e114 consideration PI4:e114 consideration PI3:e1142:e coll PI3:e1142:e coll PI3:e1142:e coll PI3:e1142:e1142:e coll PI3:e1142:e					
choices (#124:19 142:7 coincidentally (#72:12) compliation (# 49:19 123: considered (#16:123) controversy (# 19:13,20) 146:7 collections (# 114:16) 3 150:22 155:66 considered (# 16:13) conveying (# 116:4) choses (# 122:25) collequial (# 132:10) compliations (# 114:16) considered (# 16:5) conveying (# 116:4) choses (# 122:25) come (# 10:17 12:23 16:1) compliations (# 114:16) consistency (# 16:32) consistency (# 16:32) church (# 19:21:4) 13:3:12 30:22 37:10 67:15 compliance (# 10:6):16 consistency (# 16:32) conder (# 16:32) consistency (# 16:3					
1467 collections (114:16) 3 150:22 155:6 considered [2 56:14 128: convey [2 56:24 67:20 chose (1122:25) colloquial (1132:10) compiling (1124:6) considering (1135:9) core [37:33, 51 03:12 chose (1122:25) come (1111:12) 119:15 30:22 37:10 67:15 compiling (1124:6) considering (1135:9) core [37:33, 51 03:12 chose (1122:25) come (1111:12) 119:15 30:23 37:10 67:15 compiling (1124:6) considering (1124:11 correct (1172:14 105:24 church (1192:14) 78:23 84:2 106:16 111:22 compiling (1124:15) compiling (1124:16) consistent (1124:11 correct (1172:14 105:24 12 104:12,13 139:2 comes (116:14 84:2,1175) compilicate (1141:5) 105:11 91:12 92:9 94:23 correct (119:11:15:23 circumstances [2 8:23] 17 81:14 101:7 105:19,27) compilicate (1142:15) consistent (1142:16) counsel (116:53:14:16:15) cite (13 150:16 102:16,17) comment (116:13:12) conceptions (114:12) consistent (1129:16) countering (116:16) city (136:13 102:16) comment (116:13:14) conceptions (114:12) consistent (1129:16) countering (116:16) city (136:16) 102:16,17) co					
choke II5:3 colloquial (II132:10) compiliations (II14:11) 24 conveying (II18:4) choose (II 12:25) Colorado (II 103:3) compiling (II 12:46) consistency (II 135:9) core (II 135:7) consistency (II 135:9) core (II 135:7) core (II 111:7) core (II 1111:7) core (II 111:7) <t< td=""><td></td><td>-</td><td>-</td><td></td><td></td></t<>		-	-		
choose ID 122:25 Colorado ID 103:3 compiling ID 124:6 consistency ID 135:9 core IP 79:3,15 103:12 chosen ID 14:18 119:15 30:22 37:10 67:15 compileng ID 129:14 153:5,18 corner ID 135:14 church ID 92:14 78:23 84:2 106:16 111:22 15 102:15 135:19 150:4 142:12 corner ID 135:14 corner ID 135:14 12 104:12,13 139:2 compileate ID 106:16 compileate ID 165:16 10 59:11 91:12 92:9 94:23 correctly ID 115:33 circumstances ID 28:23 17 81:14 01:7 105:19,21, compileate ID 165:16 consistently ID 24:2,3 88: couldn't ID 32:17 97:5 cite ID 51:8 comfortably ID 129:3 componts ID 163:17 consistently ID 14:18 counter ID 90:3 cite ID 151:8 comment ID 168:16 concert ID 14:125 constantly ID 129:3 counter ID 90:3 cite ID 151:8 comment ID 153:14 concert ID 14:2:11 concert ID 14:2:15 counter ID 16:16 counter ID 16:16 city ID 15: 153:4 concert ID 14:2:15 concert ID 14:2:15 counter ID 16:16 counter ID 16:1	-				
choosing (II) 124-7 come (II4) 10:17 12:23 16:1, compaining (II) 126:13 completely 192:14 comsen (II 4:13) church (II92:14 19:15 30:22 37:10 67:15 completely 192:16 138:19 150:4 14:22 112:12 corner (II 72:14 105:24 Circuit (III 55:11 373:2 comers (III 1:12) 15 102:15 138:19 150:4 10:55:11 91:12 92:9 94:23 corner (III 72:14 105:24 Circuit (III 55:13 139:2) comers (III 1:17 105:12,11) complicated (III 153:17 consistent (III 72:19 2:9 94:23) coundriv (III 32:17 97:5 118:13 comors (III 1:17 105:19,21) complicated (III 153:17 consistent (III 1:19,42:23,55) coundriv (III 32:17 97:5 circuit 31 105:16 complicated (III 153:17 constent (III 1:19,32) constent (III 1:19,32) counsel (III 1:12) cite II 151:8 commend (III 1:18;37) concept (III 2:18) constent (III 1:18) countering (III 5:12 1:12) cite II 151:8 commend (III 1:18;31) concept (III 2:18) countering (III 5:12 1:12) countering (III 5:12 1:12) countering (III 5:12) cite II 151:8 commend (III 1:14;11 concept (III 2:18) countering (III 4:12) countering (III 4:12) countering (III 4:12) countering (III 4:12) counter		-			
chosen [1] 14:18 1 19:15 30:22 37:10 67:16 completely [5] 26:19 80: 58:32 29:8 61:14,21 107: correr [1] 15:14 church [1] 92:14 78:23 84:2 106:16 111:22 15 102:15 135:19 150:4 correst [4] 7:15 135:4 correct [1] 7:8 12:4 12 104:12,13 139:2 correct [1] 7:8 12:4 12 104:12 correct [1] 7:8 12:4 12 104:12,13 139:2 correct [1] 7:15 135:4 correct [1] 7:15 135:4 12 104:12 correct [1] 7:15 135:4 correct [1] 7:15 135:4 correct [1] 7:15 135:4 12 104:12 correct [1] 7:15 135:4 12 104:11 105:23 coulding [1] 29:1 consistent [1] 7:8,18 24:1 coulding [1] 29:1 coulding [1] 29:1 counsistent [1] 7:15 135:4 counsel [1] 13:13 counsel [1] 12:1					
church [19] 92:14 78:23 84:2 106:16 111:22 15 102:16 13:19 150:4 14:22 112:12 correct [47:214 105:24 Circuit [059:18 77:8 81: 134:14 144:21 compliance [0106:16 1059:11 91:12 92:9 94:23 127:15 13:13 correct [47:214 105:24 correct [47:215 41:36:14 correct [47:216 41:36:36 correct [47:16:36:16 correct [47:16:36:16:37:36:36:16:16:17 correct [47:16:36:16:37:36:1					
Circuit (# 169:18 77:8 81: 12 104:12,13 139:2 134:14 144:21 compliance (# 106:16) consistent (# 7.8.18 24: 12 104:12,13 139:2 127:15 135:4 118:13 comers (# 7.15 14:11 16: circumstance (# 28:2) 24 121:9 complicate (# 115:17) 108:11 19:12 92:9 94:23 councet (# 148:17) 118:13 comes (# 6:18 48:2,11 75: circumstance (# 28:23) 17 81:14 101:7 105:19,21, complicating (# 29:6) complicating (# 29:6) 24 61:17,23 66:21 106:21 counsel (# 163:31 63:04 148:17 25 commont (# 158:7) components (# 153:7) constantly (# 161:8 62:16 73:17 84:21 114:2 Cited (# 160:23 168:6) comment (# 168:13 21:2 concept (# 114:21) constitution (# 79:916:6) countries (# 144:22) Caliam (B: 59 3518;20,24) commercial (# 13:15 concerned (# 13:19 14:6) 176:78 countries (# 144:22) countit (# 18:15) countries (# 14:22) Caliam (B: 79 142:22 21 101:9,11 106:78 concerne (# 13:19 14:6) 129:20 145:5 156:12 157: countries (# 14:19:20) Caliam (B: 79 142:24 commercial (# 13:17) concerne (# 14:19:21) 129:20 145:5 156:12 157: countries (# 14:19:20) Caliam (B: 79 142:24 commercial (# 13:17) conce					
12 104:12,13 139:2 comers 147:15 14:11 46: complicate (1141:5) 10 89:11 91:12 92:9 94:23 correctly (1145:23 circumstance (215):19 24 121:19 complicate (0153:17) complicate (0153:17) complicate (0153:17) constitution (023:16):10 con					
circumstance [2] 57:19 24 121:19 complicated [1] 153:17 108:1119:4 couldn't [4] 32:17 97:5 118:13 comes [0] 6:18 48:2,1175: complicating [1] 29:1 consistently [0] 24:2,3 58: 101:10 110:15 148:13 comes [0] 6:18 48:2,1175: complicating [1] 29:1 consistently [0] 24:2,3 58: 00:101:01 101:15 149:17 25 comfortably [0] 129:3 components [0] 153:7 108:4 112:8 consatuly [0] 6:5 13:18 30:4 cited [2] 150:23 158:5 commend [0] 158:4 concentrated [1] 42:11 Constitution [1] 79:166 counsels [1] 56:16 cited [2] 150:23 158:5 comment [0] 6:13 21:2 concent [2] 14:22:23 42:47 69:1 84:18 1155:5 country [0] 46:16 claim [0] 5:9 142:22 21 101:9,11 106:7,8 1,18 country [0] 46:14 90:22,24 claims [2] 42:125 commerical [1] 13:13 concerns [4] 110:23 144:5 construe [2] 58:10,16 course [0] 46:14 90:22,24 claims [2] 42:14 42:9;11 commerical [2] 27:10 67:25 construe [2] 88:10,16 course [0] 46:14 90:22,24 claims [2] 42:17 97:5 course [2] 41:23 course [2] 41:41:62 course [2] 41:41:62 claim [2] 59:125:18:3 <td< td=""><td></td><td></td><td>-</td><td></td><td></td></td<>			-		
118:13 comes IPI6:18.48:2,11 75: complicating II 29:1 consistently IPI 24:2,3 58: 101:10 110:15 circumstances IPI 28:23 17 81:14 101:7 105:19,21; complication IU 29:6 24 61:17,23 66:21 106:21 Counsel IPI 61:3 01:4 149:17 25 comports IU 1163:7 108:41 12:8 62:16 73:17 84:21 114:2 cite II 915:8 commont III 61:84 concept ID 21:8 177:15 countering ID 56:16 city IPI 61:5 102:16,17 comment IPI 61:3 21:2 concept ID 14:2 Constitution ID 79:116:5 countering ID 56:16 city IPI 61:5 102:16,17 comment IPI 61:3 21:2 concept ID 14:2 22:23 d2:4,7 69:1 84:18 115:15 countries ID 142:2 claimed IPI 59 142:22 21 101:9,11 commercal (II 13:1 concerned III 13:16 countering ID 14:2 22:23 d2:4,7 69:1 84:18 115:15 countries ID 14:22:24 d2:4:14 countering ID 14:24:14 d2:4:14:21 countering ID 14:22:24:14 d2:4:14:21 countering ID 14:21 countering ID 14:22:24 d2:4:14:21 countering ID 14:22:24 d2:4:14:21 countering ID 14:24:24 d2:4:14:21 countering ID 14:22:24:24 d2:4:14:21 countering ID 14:24:24:24 d2:24:14:21:21 countering					-
circumstances [2] 28:23 17 81:14 101:7 105:19,21, 25 complication [11] 29:6 components [11] 15:3 24 61:17,23 66:21 106:21 108:4 112:8 Counsel [9] 6:5 13:18 30:4 62:16 73:17 84:21 114:2 cite [1] 51:8 comfortably [1] 129:3 comtant [9] 61:13 computer [19] 0:3 concept [1] 21:8 constantly [1] 61:18 f55:12 158:9 cite [1] 51:8 concent [1] 61:3 concept [1] 21:8 117:15 countering [1] 56:16 citil [1] 80:13 105:16 comment [9] 61:3 21:2 concert [2] 14:2 22:23 constitution [1] 129:5 countrien [1] 1129:5 claim [9] 59 35:18,20,24 101:4 130:15 153:4 concert [2] 14:2 22:23 constitution [1] 129:5 countrien [1] 142:4 claims [2] 42:4 114:20 comments [9] 71:16; concern [2] 14:2 22:23 constitution [1] 129:5 countrie [1] 42:4 claims [2] 42:4 122:0 commercial [1] 13:13 concerns [4] 110:23 144:5 construe [2] 55:7.8 64:1 course [1] 45:10 6:16 course [1] 45:10 6:16 classic [4] 37:9 55:3 79:10 commit [1] 71:13; conclude [2] 27:10 67:25 consumer [1] 42:12 23:7,12 29:12,23 00:25 38: class [1] 73:11 66:23 67:3 74:9,12 conclusion [1] 20:15 consumer [1] 42:12 23:7,12 29:12,23 00:25 38:					
149:1725components (1) 153:7108:4 112:862:16 73:17 84:21 114:2cited (2) 150:23 158:5comfortably (1) 129:3computer (1) 90:3constantly (1) 61:18155:12 158:9cited (2) 150:23 158:5comment (1) 158:4concentrated (1) 142:11Constitution (2) 19:116countering (1) 56:16civil (2) 80:13 105:16comment (2) 153:12concept (1) 21:8117:15countries (1) 142:2claime (2) 5:9 142:22101:4 130:15 153:4concern (2) 142:2242:4, 7 69:184:18 115:15country (1) 142:4claime (2) 5:9 142:2221 101:9,11106:7,81,18129:20 145:5 156:12 157:couple (4) 85:2 61:4 80:20claimed (2) 5:9 142:2221 101:9,11106:7,81,1884:14course (4) 41:21 44:7claimed (2) 5:9 142:22commercial (1) 13:13concerns (4) 110:23 144:5;construct (2) 55:7,8 64:1110:4 116:12 149:17classic (4) 37:9 55:3 79:10committee (2) 47:15,16conclude (2) 27:10 67:25construe (2) 58:10,16COURT (94) 1:1,16 4:10 5:classic (4) 37:9 75:5 79:10committee (2) 47:15,16conclude (2) 29:24 145:consumer (7) 23:22 24:1620 6:18,20 12:18 14:19,20classorom (1) 103:157 14:13 71:15 26:12 34:15conclude (2) 29:10 33:15constant (1) 9:19 20:13 21:14,16,21classor (7) 76:1542:14 43:9,11 46:15 49:4.conclusion (1) 20:15consumer (1) 42:2323:7,12 29:12,23 20:25 38:classor (7) 76:1542:14 43:9,11 46:15 49:4.conclusion (1) 20:20contains (2) 33:13 153:6.25 53:7,6 64:1classor (7) 76:1552:13 15:6; 61:1cond					
cite III 51:8 comfortably III 129:3 computer III 90:3 constantly III 61:18 155:12 158:9 cited III 150:23 158:5 comment III 158:4 concept III 21:8 concept III 21:8 countries III 129:25 countries III 12			-		
cited [2] 150:23 158:5 coming [1] 8:15 concentrated [1] 142:11 Constitution [3] 7:9 116:6 counsels [1] 5:16 civil [2] 80:13 105:16 comment [6] 6:13 21:2 concent [2] 142:22:23 content [3] 6:13 6:16 county [1] 142:4 81:24 114:20 comment [3] 6:13 13:3 concent [4] 13:19 14:6 129:20 145:5 156:12 157: county [1] 142:4 claims [2] 42:4 122:10 commercial [1] 13:13 concent [4] 110:23 144:5; construe [2] 55:12,12,1 course [6] 45:14 90:22,24 clains [2] 42:4 12:10 commit [1] 87:4 12 145:9 construe [2] 55:16:16 157:12,1 course [6] 45:14 90:22,24 class com [1] 10:315 7 14:13 17:15 26:12 34:15 conclude [2] 27:10 67:25 construe [2] 55:0,74 20 6:18,20 12:18 14:19,20 class com [1] 10:15: 7 4:13 17:15 26:12 34:15 22 52:9,12 73:4,5 144:20 19:19 20:13 21:14,16,21 clause [1] 76:15 42:14 43:9,11 46:15 49:4, conclusion [1] 20:15 constat [1] 42:3 constat [1] 94:13 12 40:25 41:1 44:3,8 46: clause [1] 76:15 42:14 33:25 13:6:1			-		
City IS 61:5 102:16,17 commend II 158:4 concept III 21:8 117:15 countering III 56:16 civil IZ 80:13 105:16 comment III 66:13 21:2 conceptions III 141:25 constitutional IIII 29:25 dz:4 142:2 countries III 42:22 dz:4 142:2 counterins III 42:22 dz:4 7 69:1 84:18 115:15 countries III 42:2 dz:4 142:2 counterins III 42:2 dz:4 142:2 counterins III 42:2 dz:4 142:10 counterins III 43:13 concerns III 11:2:3 144:5 dc:7:8 dz:4 142:10 counterins III 87:4 129:20 145:156:12 157: couple I45:84 20:22,24 claims I2I 42:4 122:10 comments III 187:4 12 145:9 constraints III 51:21,21, course III 164:10 42:17 class I2I 147:15 56:12 3:17 condite I2I 27:10 67:25 constraints III 51:21,221, course III 42:24 dz:14 16:12 149:17 class room III 103:15 7 14:13 71:15 26:12 34:15 conclude I2I 29:14 06:25 consumers III 42:2 dz:14 43:9,11 46:13 64:14 consumers III 42:2 dz:14 43:8,26 144:19,20 claen III 78:22 10,11 66:23 67:3 749;12 concrete III 140:3 contatin III 120:20 contatin III 120:20 do:14:3,8 46: claen I22 56:20 57:22 59: 80:1,23 115:3 118:6 121:			-		
Civil [2] 80:13 105:16 comment [9] 6:13 21:2 conceptions [1] 141:25 constitutional [11] 29:25 countries [1] 142:2 81:24 114:20 comments [9] 78:14,15,19 concern [2] 14:2 22:23 42:4,7 69:1 84:18 115:15 countries [1] 142:4 claimed [2] 5:9 142:22 21 101:9,11 106:7,8 129:20 145:5 156:12 157: couple (4] 58:2 61:4 80:20 claims [2] 42:4 122:10 commercial [1] 13:13 concerns [4] 110:23 144:5 constraints [0] 51:21,21, course [0] 45:14 90:22,24 classic [4] 37:9 55:3 79:10 committee [2] 47:15,16 conclude [2] 29:24 145: constraints [0] 51:21,21, course [0] 48:2 61:4 80:20 classic [4] 77:9 55:3 79:10 common [39] 7:16,17 13:3, conclude [2] 29:24 145: constraints [0] 51:21,21, 20 6:18,20 12:18 14:19,20 class room [1] 103:15 7 14:13 17:15 26:12 34:15 22 consumer [1] 23:22 24:16 20 6:18,20 12:18 14:19,20 clean [1] 76:12 80:1,23 115:3 118:6 121: conclusion [1] 20:20 contain [1] 120:20 10,12 47:11,22 48:3 51:13, clear [2] 56:20 57:22 59: 80:1,23 115:3 118:6 122: conduct [4] 42:21 contain [1] 120:20 10,12 47:11,22 48:3 51:13, 23 60:1 64:27 66:21 77:10 11,23 125:1 133:25 134:4					
claim [#] 5:9 35:18,20,24101:4 130:15 153:4concern [2] 14:2 22:2342:4,7 69:1 84:18 115:15country [1] 142:481:24 114:2021 101:9,11106:7,8129:20 145:5 156:12 157:1,834:14claims [2] 42:4 122:10commercial [1] 13:13concerns [4] 110:23 144:5constraints [6] 51:21,21,course [4] 45:14 40:22,24claity [2] 57:25 128:14commit [1] 87:412 145:925 52:7,8 64:1110:4 116:12 149:17classic [4] 37:9 55:3 79:10commit [1] 87:412 145:925 52:7,8 64:1110:4 116:12 149:17classic [4] 76:1542:14 43:9,11 46:15 49:4,conclude [2] 29:24 145:consumer [7] 23:22 24:1620 6:18,20 12:18 14:19,20class [1] 76:1542:14 43:9,11 46:15 49:4,conclusion [1] 20:15consumers [1] 4:2323:7,12 29:12,22 30:25 38:clean [1] 78:2210,11 66:23 67:3 74:9,12conclusion [1] 20:20contain [1] 120:2010,12 47:11,22 48:3 51:13,clean [1] 78:13 81:51 100:65,10,16,19 135:12,17,21,conditions [2] 30:3 153:622 53:7,15 57:12 58:5,14clean [1] 78:25 139:6 142:2,communicate [2] 4:1211 26:14,20 32:3 34:8,11,19 10:15 11:16 14:12 16:6,13 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1,content [7] 51:5,24 77:69:25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2,communicate [1] 18:12conduct [4] 5:6,17 11:27,content [7] 51:5,24 77:69:25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2,communicate [1] 18:12conduct [4] 5:6,17 11:27,content [7] 51:5,24 77:69:25 80:13 84:7 95:7,11,13134:1 138:25 1					
81:24 114:20 comments (6) 78:14,15,19, claimed (2) 5:9 142:22 comments (6) 78:14,15,19, 21 101:9,11 concerned (4) 13:19 14:61 129:20 145:5 156:12 157: 1,18 couple (4) 58:2 61:4 80:20 84:14 claimed (2) 5:9 142:22 21 101:9,11 commercial (1) 13:13 commercial (1) 13:13 concerns (4) 110:23 144:5, 12 145:9 constraints (6) 51:21,21, 25 52:7,8 64:1 course (6) 45:14 90:22,24 claims (2) 42:4 122:10 commit (1) 87:4 conclude (2) 27:10 67:25 construe (7) 23:22 24:16 COURT (94) 11:1,16 4:10 5: classroom (1) 103:15 7 14:13 17:15 26:12 34:15 conclude (2) 29:24 145: consumer (7) 23:22 24:16 20 6:18,20 12:18 14:19,20 clause (1) 76:15 42:14 43:9,11 46:15 49:4, clause (1) 76:15 conclusion (1) 20:15 consumers (1) 42:3 23:7,12 29:12,22 30:25 38: clean (1) 78:22 10,11 66:23 67:3 74:9,12 conclution (1) 20:0 contact (1) 94:16 12 40:25 41:1 44:3,8 46: clean (1) 78:22 10,11 66:23 67:3 74:9,12 condition (1) 20:0 contain (1) 120:0 10,12 47:1,12 48:3 51:13, clear (1) 66:20 57:2 59: 80:1,23 115:3 113:25 134:4, 78:13 81:5,11 103:6 104: 5,10,16,19 135:1,2,17,21, conduito (1) 40:23 50:23 contain (1) 42:19 10,12 47:1,22 48:3 51:13, 130:11 111 21:15 130:5 25					
claimed [2] 5:9 142:22 21 101:9,11 106:7,8 1,18 84:14 claims [2] 42:4 122:10 commercial [1] 13:13 concerns [4] 110:23 144:5, constraints [6] 51:21,21, course [6] 45:14 90:22,24 classic [4] 37:9 55:3 79:10 commit [1] 87:4 12 145:9 conclude [2] 27:10 67:25 constraints [6] 51:21,21, 110:4 116:12 149:17 classic [4] 37:9 55:3 79:10 commit [1] 87:4 conclude [2] 27:10 67:25 construe [2] 58:10,16 COURT [94] 11,16 4:10 5: classroom [1] 103:15 7 14:13 17:15 26:12 34:15 22 52:9,12 73:4,5 144:20 9:19 20:13 21:14,16,21 clause [1] 76:15 42:14 43:9,11 46:15 49:4, conclusion [1] 20:15 constamers [1] 4:23 23:7,12 29:12,22 30:25 38: clean [1] 78:22 10,11 66:23 67:3 74:9,12 condition [1] 20:20 contact (1] 94:16 12 40:25 41:1 44:3,8 46: 23 60:1 64:2 76:21 77:00 11,23 125:1 133:25 134:4, condition [2] 10:23 50:23 contact (1] 94:16 12 40:25 41:1 44:3,8 46: 78:13 81:5,11 103:6 104: 5,10,16,19 135:12,17,21, conduct [4] 56;17 11:21, contact (1] 94:16 12 40:25 41:1 44:3,8 46: 13:1 13:25 139:6 142:2, 111 26:14,20:21 63:20 33:3 153:6 22 5 80:13 84:				,	
claims [2] 42:4 122:10commercial [1] 13:13concerns [4] 110:23 144:5,constraints [6] 51:21,21,course [6] 45:14 90:22,24clarity [2] 57:25 128:14commit [1] 87:412 145:925 52:7,8 64:1110:4 116:12 149:17classic [4] 37:9 55:3 79:10committee [2] 47:15,16conclude [2] 29:24 145:construe [2] 58:10,16COURT [94] 11.16 4:10 5:121:11commo [39] 7:16,17 13:3,conclude [2] 29:24 145:construe [2] 58:10,16COURT [94] 11.16 4:10 5:classe [0] 76:157 14:13 17:15 26:12 34:152252:9,12 73:4,5 144:2099:19 20:13 21:14,16,21clause [0] 76:1542:14 43:9,11 46:15 49:4,conclusion [1] 20:15consumer [1] 4:2323:7,12 29:12,22 30:25 38:clean [1] 78:2210,11 66:23 67:3 74:9,12concrete [1] 10:20contact [1] 94:1612 40:25 41:1 44:3,8 46:clean [22] 56:20 57:22 59:80:1,23 115:3 118:6 121:conditions [2] 10:23 50:23contant [1] 120:2010,12 47:11,22 48:3 51:13,23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4,conditions [2] 10:23 50:23contant [1] 120:2010,12 47:11,22 48:3 51:13,23 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1,content [7] 51:52 47:16 9:25 80:13 84:7 95:7,11,333 145:7 150:19119:2213,16,25 35:15 86:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:61:8clearly [5] 36:19 95:21 150:communicate [1] 88:1267:2 68:2 88:8,11 101:524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communicate [1] 88:1267:2 68:2 88:8,11 101:553:13 38:22 39:4,6,13,20 <t< td=""><td></td><td></td><td></td><td></td><td></td></t<>					
clarity [2] 57:25 128:14 commit [1] 87:4 12 145:9 25 52:7,8 64:1 110:4 116:12 149:17 classic [4] 37:9 55:3 79:10 committle [2] 47:15,16 conclude [2] 27:10 67:25 consumer [7] 23:22 24:16 20 6:18,20 12:18 14:19,20 classroom [1] 103:15 7 14:13 17:15 26:12 34:15 22 conclude [2] 27:10 67:25 consumer [7] 23:22 24:16 20 6:18,20 12:18 14:19,20 clause [1] 76:15 42:14 43:9,11 46:15 49:4, conclusion [1] 20:15 conclusion [1] 20:15 consumers [1] 4:23 23:7,12 29:12,22 30:25 38: clear [22] 56:20 57:22 59: 80:1,23 115:3 118:6 121: condition [1] 20:20 contain [1] 120:20 10,12 47:11,22 48:3 51:13, 23 60:1 64:2 76:21 77:10 11,23 125:1 133:25 134:4, conditions [2] 10:23 50:23 content [1] 41:9 content [1] 41:19 61:4 62:21 65:20 71:12 76: 3 145:7 150:19 119:22 13,16,25 35:1 55:18 66:14 10:15 11:16 14:12 16:6, 10:3:5 105:4 106:3 108:6 clear [9] 53:6:19 57:21 communicated [1] 88:12 67:2 68:2 88:8,11 101:15 content [77] 5:15,24 7:16 9: 25 80:13 84:7 95:7,11,13 13 45:7 150:19 119:22 13,16,25 35:1 55:18 66:14 10:9:15 1:10:3,8 111:16,18 114:8 118:13 126:13,21,24 <t< td=""><td></td><td>-</td><td>,</td><td></td><td></td></t<>		-	,		
classic (4) 37:9 55: 3 79:10committee [2] 47:15,16conclude [2] 27:10 67:25construe [2] 58:10,16COURT [94] 1:1,16 4:10 5:121:11common [39] 7:16,17 13:3,7 14:13 17:15 26:12 34:152252:9,12 73:4,5 144:2019:19 20:13 21:14,16,21class room [1] 103:157 14:13 17:15 26:12 34:152252:9,12 73:4,5 144:2019:19 20:13 21:14,16,21clause [1] 76:1542:14 43:9,11 46:15 49:4,conclusion [1] 20:15consumers [1] 4:2323:7,12 29:12,22 30:25 38:clean [1] 78:2210,11 66:23 67:3 74:9,12conclusion [1] 20:20contact [1] 94:1612 40:25 41:1 44:38 46:clear [2] 56:20 57:22 59:80:1,23 115:3 118:6 121:conditions [2] 10:23 50:23contain [1] 120:2010,12 47:11,22 48:3 51:13,23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4,conditions [2] 10:23 50:23contains [2] 33:3 153:622 53:7,15 57:12 58:5,1478:13 81:5,11 103:6 104:5,10,16,19 135:12,17,21,23 19:23 20:17 22:5 25:1,content [7] 5:15,24 7:16 9:25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2,communicate [2] 4:1211 26:14,20 32:3 34:8,11,19 10:15 11:16 14:12 16:6,103:5 105:4 106:3 108:63 145:7 150:19119:22communicated [1] 88:12communicated [1] 88:12communicated [1] 88:12104:21 13:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 19:2 15 3:2 156:11communication [8] 5:5104:21 11:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 19:7 16:2(7,18,20 64:18,21)124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11					
121:11common [39] 7:16,17 13:3, classroom [1] 103:15concluded [2] 29:24 145:consumer [7] 23:22 24:1620 6:18,20 12:18 14:19,20classroom [1] 103:157 14:13 17:15 26:12 34:152252:9,12 73:4,5 144:2019:19 20:13 21:14,16,21clause [1] 76:1542:14 43:9,11 46:15 49:4,conclusion [1] 20:15consumers [1] 4:2323:7,12 29:12,22 30:25 38:clean [1] 78:2210,11 66:23 67:3 74:9,12concret [1] 140:3contain [1] 4:2010,12 47:11,22 48:3 51:13,23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4,condition [1] 20:20contain [1] 120:2010,12 47:11,22 48:3 51:13,23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4,conduct [34] 5:6,17 11:21,contend [1] 4:1961:4 62:21 65:20 71:12 76:13 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1,content [77] 5:15,24 7:16 9:25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2,communicate [2] 4:1211 26:14,20 32:3 34:8,11,19 10:15 11:16 14:12 16:6,103:5 105:4 106:3 108:63 145:7 150:19119:2213,16,25 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:16,18clearly [5] 36:19 95:21 150:communicated [1] 88:1267:2 68:2 88:8,11 101:1524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,61,320127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 36:3342:21 11:59 123:17,9119 313:9 144:1940:11,13 41:16,24 42:18,23 13:05 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152	-				
classroom [1] 103:157 14:13 17:15 26:12 34:152252:9,12 73:4,5 144:2019:19 20:13 21:14,16,21clause [1] 76:1542:14 43:9,11 46:15 49:4,conclusion [1] 20:15consumers [1] 4:2323:7,12 29:12,22 30:25 38:clear [22] 56:20 57:22 59:80:1,23 115:3 118:6 121:condition [1] 20:20contain [1] 120:2010,12 47:11,22 48:3 51:13,23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4,conditions [2] 10:23 50:23contains [2] 33:3 153:622 53:7,15 57:12 58:5,1478:13 81:5,11 103:6 104:5,10,16,19 135:12,17,21,conduct [34] 5:6,17 11:21,contains [2] 33:3 153:622 53:7,15 57:12 58:5,1413 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1,content [17] 5:15,24 7:16 9:25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2,communicate [2] 4:1211 26:14,20 32:3 34:8,11,19 10:15 11:16 14:12 16:6,103:5 105:4 106:3 108:613 145:7 150:1919:2213,625 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:16:18clearly [5] 36:19 95:21 150:communicated [1] 88:1267:2 68:2 88:8,11 101:1524:1,0,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communicated [1] 85:5104:2 113:12 114:21 119:53:21 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,communications [7] 4:16conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 1					-
clause [1] 76:1542:14 43:9,11 46:15 49:4, 10,11 66:23 67:3 74:9,12conclusion [1] 20:15 concrete [1] 140:3 contact [1] 94:1623:7,12 29:12,22 30:25 38: 12 40:25 41:1 44:3,8 46: contact [1] 94:16clear [22] 56:20 57:22 59: 23 60:1 64:2 76:21 77:10 78:13 81:5,11 103:6 104: 13 109:11 112:15 130:580:1,23 115:3 118:6 121: 11,23 125:1 133:25 134:4, 5,10,16,19 135:12,17,21, 25 136:6,19 157:4conditions [2] 10:23 50:23 conduct [34] 5:6,17 11:21, conduct [34] 5:6,17 11:21, content [77] 5:15,24 7:16 9: content [17] 5:15,24 7:16 9: content [11] 4:19clearly [5] 36:19 95:21 150: communication [8] 5:5 to content [8] 5:					
clean [1] 78:2210,11 66:23 67:3 74:9,12concrete [1] 140:3contact [1] 94:1612 40:25 41:1 44:3,8 46:clear [22] 56:20 57:22 59:80:1,23 115:3 118:6 121:condition [1] 20:20contain [1] 120:2010,12 47:11,22 48:3 51:13,23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4,conditions [2] 10:23 50:23contains [2] 33:3 153:622 53:7,15 57:12 58:5,1478:13 81:5,11 103:6 104:5,10,16,19 135:12,17,21,conduct [34] 5:6,17 11:21,contend [1] 4:1961:4 62:21 65:20 71:12 76:13 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1,content [77] 5:15,24 7:16 9:25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2,communicate [2] 4:1211 26:14,20 32:3 34:8,11,19 10:15 11:16 14:12 16:6,103:5 105:4 106:3 108:63 145:7 150:19119:2213,16,25 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:16,18clearly [5] 36:19 95:21 150:communicated [1] 88:1267:2 68:2 88:8,11 101:1524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:1,8,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,34:17 45:21 115:3 122:1conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:					
clear [22] 56:20 57:22 59:80:1,23 115:3 118:6 121:condition [1] 20:20contain [1] 120:2010,12 47:11,22 48:3 51:13,23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4,conditions [2] 10:23 50:23contains [2] 33:3 153:622 53:7,15 57:12 58:5,1478:13 81:5,11 103:6 104:5,10,16,19 135:12,17,21,conduct [34] 5:6,17 11:21,contain [1] 4:1961:4 62:21 65:20 71:12 76:13 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1,content [77] 5:15,24 7:16 9:25 80:13 84:7 95:7,11,1313 45:7 150:19119:2213,16,25 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:6,18clearly [5] 36:19 95:21 150:communicated [1] 88:1267:2 68:2 88:8,11 101:1524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:18,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,34:17 45:21 115:3 122:1conduct [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conduit [8] 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:					
23 60:1 64:2 76:21 77:1011,23 125:1 133:25 134:4, 5,10,16,19 135:12,17,21, 25 136:6,19 135:12,17,21, 13 109:11 112:15 130:5conditions [2] 10:23 50:23 conduct [34] 5:6,17 11:21, 23 19:23 20:17 22:5 25:1, 23 19:23 20:17 22:5 25:1, 23 19:23 20:17 22:5 25:1, 13 162:5 136:6,19 157:4conduct [34] 5:6,17 11:21, content [77] 5:15,24 7:16 9: 25 80:13 84:7 95:7,11,1313 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1, 119:22content [77] 5:15,24 7:16 9: 25 80:13 84:7 95:7,11,1313 45:7 150:19119:2211 26:14,20 32:3 34:8,11, 13,16,25 35:1 55:18 66:1419 10:15 11:16 14:12 16:6, 16,19 17:20,22 19:2 23:5109:15 110:3,8 111:16,18clearly [5] 36:19 95:21 150:communicated [1] 88:12 communication [8] 5:567:2 68:2 88:8,11 101:15 104:2 113:12 114:21 119: 19 133:9 144:19 149:1924:1,0,18 27:13 30:12 31: 24:1,0,18 27:13 30:12 31:114:8 118:13 126:13,21,24 127:4,10 128:13,21,23 129: 23 130:5 135:6,8 136:17CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,19 124:11,13 142:2419 133:9 144:19 149:19 19 133:9 144:19 149:1940:11,13 41:16,24 42:1,8, 10 52:2 54:8,19 56:23 60: 138:25 139:2,7,11 140:1, 138:25 139:2,7,11 140:1, 138:25 139:2,7,11 140:1, 152:15 67:3 75:15 84:17 93: 145:18 146:17 147:21 148: 12,15 67:3 75:15 84:17 93: 145:18 146:17 147:21 148: 145:18 146:17 147:21 148: 155:18 145:15		, , ,			
78:13 81:5,11 103:6 104:5,10,16,19 135:12,17,21, 25 136:6,19 157:4conduct [34] 5:6,17 11:21, 23 19:23 20:17 22:5 25:1, 13 19:23 20:17 22:5 25:1, 13 19:23 20:17 22:5 25:1,contend [1] 4:1961:4 62:21 65:20 71:12 76: 25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2, 3 145:7 150:19communicate [2] 4:1211 26:14,20 32:3 34:8,11, 13 16:25 35:1 55:18 66:1419 10:15 11:16 14:12 16:6, 16,19 17:20,22 19:2 23:5103:5 105:4 106:3 108:63 145:7 150:19119:2213,16,25 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:16,18clearly [5] 36:19 95:21 150:communicated [1] 88:1267:2 68:2 88:8,11 101:1524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:1,8,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5, 8,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conduct [8] 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:					
13 109:11 112:15 130:525 136:6,19 157:423 19:23 20:17 22:5 25:1, communicate [2] 4:12content [77] 5:15,24 7:16 9:25 80:13 84:7 95:7,11,13134:1 138:25 139:6 142:2, 3 145:7 150:19communicate [2] 4:1211 26:14,20 32:3 34:8,11, 13,16,25 35:1 55:18 66:1419 10:15 11:16 14:12 16:6, 16,19 17:20,22 19:2 23:5103:5 105:4 106:3 108:63 145:7 150:19119:2213,16,25 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:16,18clearly [5] 36:19 95:21 150:communicated [1] 88:12 communication [8] 5:567:2 68:2 88:8,11 101:1524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:1,8,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5, 8,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conducted [1] 17:1512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:					
134:1 138:25 139:6 142:2, 3 145:7 150:19communicate [2] 4:1211 26:14,20 32:3 34:8,11, 13,16,25 35:1 55:18 66:1419 10:15 11:16 14:12 16:6, 16,19 17:20,22 19:2 23:5103:5 105:4 106:3 108:63 145:7 150:19119:2213,16,25 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:16,18clearly [5] 36:19 95:21 150:communicated [1] 88:1267:2 68:2 88:8,11 101:1524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:1,8,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,communications [7] 4:16conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conduit [8] 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:	· ·				
3 145:7 150:19119:2213,16,25 35:1 55:18 66:1416,19 17:20,22 19:2 23:5109:15 110:3,8 111:16,18clearly [5] 36:19 95:21 150:communicated [1] 88:1267:2 68:2 88:8,11 101:1524:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,2425 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:1,8,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,communications [7] 4:16conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conduit [8] 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:					
clearly [5] 36:19 95:21 150:communicated [1] 88:12 communication [8] 5:567:2 68:2 88:8,11 101:15 104:2 113:12 114:21 119:24:1,10,18 27:13 30:12 31:114:8 118:13 126:13,21,24 127:4,10 128:13,21,23 129:25 153:2 156:11communication [8] 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:1,8,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,communications [7] 4:16conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conduit [8] 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:					
25 153:2 156:11communication (8) 5:5104:2 113:12 114:21 119:5 32:13 38:22 39:4,6,13,20127:4,10 128:13,21,23 129:CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:1,8,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,communications (7) 4:16conducted (1) 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conduit (8) 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:					
CLEMENT [109] 2:4 3:6 33:42:21 115:9 123:17,1919 133:9 144:19 149:1940:11,13 41:16,24 42:18,23 130:5 135:6,8 136:1717 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5,communications [7] 4:16conducted [1] 17:1517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1conduit [8] 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:71:8,10,25 72:8 73:1,19131:1 136:1067:11 119:11,13,20 125:47,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:	-				
17 62:17,18,20 64:18,21124:11,13 142:24152:7,1410 52:2 54:8,19 56:23 60:138:25 139:2,7,11 140:1,65:14,19 66:17 67:21 68:5, 8,20 69:6,13,21 70:2,9,18communications [7] 4:16 34:17 45:21 115:3 122:1conducted [1] 17:15 conduit [8] 47:12 66:11,2517,17,18 61:7,24 62:8 63:2,10 141:7 142:3,14 143:188,20 69:6,13,21 70:2,9,1834:17 45:21 115:3 122:1 131:1 136:10conduit [8] 47:12 66:11,2512,15 67:3 75:15 84:17 93:145:18 146:17 147:21 148:7,10,12,21,23,25 100:3,212,10 150:18,25 154:13 155:					
65:14,1966:1767:2168:5,communications [7]4:16conducted [1]17:1517,17,1861:7,2462:863:2,10141:7142:3,14143:188,2069:6,13,2170:2,9,1834:1745:21115:3122:1conduit [8]47:1266:11,2512,1567:375:1584:1793:145:18146:17147:21148:71:8,10,2572:873:1,19131:1136:1067:11119:11,13,20125:47,10,12,21,23,25100:3,212,10150:18,25154:13155:					
8,2069:6,13,2170:2,9,1834:1745:21115:3122:1conduit8 47:1266:11,2512,1567:375:1584:1793:145:18146:17147:21148:71:8,10,2572:873:1,19131:1136:1067:11119:11,13,20125:47,10,12,21,23,25100:3,212,10150:18,25154:13155:			-		
71 :8,10,25 72 :8 73 :1,19 131 :1 136 :10 67 :11 119 :11,13,20 125 :4 7,10,12,21,23,25 100 :3,21 2,10 150 :18,25 154 :13 155 :					
74: 1, 0, 20 75: 2, 13, 10, 22 76: Community 10 11: 4 30: 14 Conduit-type 10 74: 22 101: 1, 16 106: 21 114: 16 9, 20 156: 1, 7 158: 2, 4					
	14: 1,0,20 13: 2,13,16,22 76:	Community @ 11:4 30:14	conduit-type 11/4:22	101:1,10 100:21 114:16	9,20 100:1,7 158:2,4

Official

114:12 115:16 135:8 142; 36:77:10 02:10.3 309; 66:77:10 02:10.3 309; 19:117:16 127:13 151:1 74:8 3512 126:10 1307; 19:117:16 127:13 151:1 74:8 3512 126:10 1307; 19:117:16 127:13 151:1 74:8 3512 126:10 1307; 145:17 48:15 151:11 74:8 3512 126:10 1307; 145:17 48:15 151:11 74:8 3512 126:10 1307; 145:17 48:15 151:11 74:8 3512 126:10 1307; 145:17 48:15 151:11 74:16 34:2,9 554,5,777; 13:76:24 94:19 114:13 13:76:24 94:19 114:13 13:76:24 94:19 114:13 13:76:24 94:19 114:13 145:27 1026; 15:729:16 156:17,770; 15:21 75:10 126:10 126:170; 15:229:16 156:172; 15:21 75:10 126:10 126:170; 15:229:16 156:172; 15:21 75:10 126:10 126:170; 15:21 75:10 126:10 126:170; 15:21 75:11 126:171 1309; 15:21 15:120; 15:21 15:21 126:171 1309; 15:21 15:21 11:120; 15:21 15:21 126:171 1309; 15:21 15:22 13:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 126:11 12			Official		
141:115:16:138:142: docision !!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!	Court's [10] 35:15 64:17		determine [4] 60:9 61:1,22	disfavored [1] 5:8	editor [2] 49:17,22
13 65.67 73:01 021:0,13 025 detrimental [11:11:14] disposition (11:12) disposition (11:12) 25.45.65 22:17:61.01 30:7 14:51:14:16:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:11:15:	65:6 84:10 95:21 102:13	decimal [1] 50:17	62: 3	display ^[4] 63:13 76:6,8	editorial [47] 37:14 38:14
Courts (19:68): 10 70:12 19 111:10 12:13 16:11 developed (13:39 12:13) disposition (11:41:10) 25:17:61:15:17:13:65:11 25:17:61:15:17:13:65:11 25:17:61:15:17:13:65:11 25:17:61:15:17:13:65:11 25:17:61:15:17:13:65:11 25:17:61:15:17:13:65:11 25:17:61:15:17:13:65:11 25:17:61:15:17:13:15:12:10:15:17:15:55:10 25:17:61:15:17:15:12:10:15:17:15:15:10 25:17:61:15:17:15:12:10:15:17:15:15:10 21:15:11:15:10:10:11:10:12:10:15:17:15:15:10 21:15:11:15:11 25:17:61:15:11:10:11:11:11:11:11:11:11:11:11:11:11:	114:12 115:16 135:8 142:	decision [10] 19:12 39:7		-	45: 8,10,15 46: 1,4,8,14 47:
14:48:12:148:12:165:101:150: decisions #19:217:61 development (#68:712:) disput Pr44:1 62:217:61:47:12: 52:77:61:67:61:32: 52:77:61:67:61:32: 52:77:61:67:61:32: 57:79:65:79:67:32: 57:79:65:79:67:32: 57:79:65:79:67:32: 57:79:65:79:67:32: 57:79:65:79:67:32: 57:79:65:79:72:10:21: 57:79:65:79:72:10:22: 57:79:57:79:79:72:10:22: 57:79:57:79:79:72:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:107:22:10:22: 101:10:10:22:10:12: 111:11:11:11:11:11:11:11:11:11:11:11:11		65: 6 79: 10 102: 10,13 109:			1 48:10,14 49:13 50:25 62:
145:17.48:16 151:15 87.7 90:51 9 113:23 87.7 90:51 9 113:23 25 499 152:24 declarations IP 33.4 34:1, devoted IP 16:15 3 14.82:23 114:15 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 13.7 62:24 14.1 62:15 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62:16 14.1 62			-	-	25 64 :6 65 :2 66 :14 67 :8
25 149:0 13 34:13 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 36:14.3 37:14.3 46:16.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3 17:14.3				-	75 :21 76 :18 79 :10 86 :10
cover (m 28, 9, 8, 12, 12) declaration (0, 13, 3, 24, 24, 14, 14, 11, 11, 14, 26, 84, 24, 12, 14, 14, 14, 14, 14, 14, 14, 14, 14, 14					87:7 90:5,19 91:3 93:10,
11:10 34:60 554.51.77 2 Dewy 19:0:16 14 63:23 14:22 2110:16 13:23 12:0:21 13.76:24 94:174:13 decorum [017:17,18 distinct [019:17:18:0:13:16 125:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:17:13:0:13:17:13:0:13:17:13:0:13:17:13:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:17:13:13:13:13:13:13:13:13:13:13:13:13:13:				-	
1.3 76.22 decorum 01717.18 dictafe 0714113172 distinct 01631740.2 distinct 01631740.2 6.42.02.01 deep-learning 0190.7 172.411913,1912122 distinction 0174.815 80.27 71.4716 163.10 6.414.60.83.64.82.10 123. defond 018217.18.55.21 different 01147.25 distinctions 0172.11 73. editorialize 0172.10 6.0vering 0183.03 553.31261 91.531 defond 0182.12.82.2 defond 0182.12.82.2 distinctions 0172.11 73. editorialize 0172.11 6.0vering 0183.03 557.69.10 94.12.98.20 distinctions 0172.11 73. editorialize 0172.11 6.0vering 0183.03 fisini 01.31.11 defond 0182.11 fisini 01.32.21 fisini 01.31.11 editorialize 01.72.11 6.0vering 0183.22 defined 0183.21 fifferently 01.22.2.2.24.25.32.16.11 fifferently 01.22.11 fifferently 01.22.11.12.12.11 fi	, ,				101 :10 102 :9 107 :22 108 :
164:02:1 deem 1117:25 difference 194:2116:12, 157:13 7.147:16 152:10 164:14 60:8 69:4 82:10 128; defamation 1167:16 distinction 1748:15 89:23 distinction 1748:15 89:23 distinction 1748:15 89:23 151:29:16 162:37:21 14; defamation 1167:16 55:3 15:19 153:16 23:15 85:2 distinctions 1772:11 73; 13:16 distinctions 1749:15 44:14 80:8 177:14 14:10 55:3 15:19 153:16 21:18:19 20:25 22:24:25 32:21:22 10:59:21 10:59:24 44:15:10 177:14 14:10 defandatis 174:25 defandatis 174:15:10 10:25:10:59:21 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:24 10:59:169:22:11:52:15:25:159:159:27 <td></td> <td></td> <td></td> <td></td> <td></td>					
covered [M3:22:1 33:18] deop-learning (M9:7) 17,24 119:13,19 (12):22 distinction (M4:15 83:23) diotorialize (M7:20:10) covering [M3:39] csi 126:19 (15:16) distinction (M4:15 22) 130:14 (16:22) diotorialize (M7:20:10) 14 13:71:2 138:19 defended [M 56:5 127:1 15:20 422:22:22:22:22:22:23:23:138:1 distinction (M4:15 82:11) distinction (M4:15 82:11) distinction (M4:15 82:11) distinction (M4:15 82:12) distinction (M4:15 82:11) distinction (M4:15 82:12) distinction (M4:15 82:13) distinction (M4:15 82:12) distinction (M4:15 82:16) distinction (M4:16 M2:12) distinction (M4:16 M2:12) distinction (M4:16 M2:16) distinc					125 :17 130 :9 136 :17 144 :
44:14 60:8 69:4 82:10 128: defamation (107:16) 123:44 151:20 110:14 116:22 148:19 457: 4 15 129:16 155:37:11 14: 60erol (12 2:17):15:37:12 12:15:37:14:24:12 2:24 2:55 2:22:42 5:55:21:15:10:15:15:10:10:15:15:22:44:55:22:44:55:22:44:55:22:44:55:22:44:55:22:44:55:24:45:10:15:10:15:15:10:15:15:10:15:15:10:15:15:14:14:12:14:14:10:10:15:15:10:15:15:10:15:15:14:14:12:14:14:14:10:10:15:15:14:14:12:14:14:14:11:15:15:15:14:14:12:14:14:14:14:15:15:15:15:15:15:15:15:15:15:15:15:15:					
16 123:16 166:17,21 defend @28:17,18 55:21 different [0:4:17 45:16, 22:42:22:22] 25:22:22.42 55:22:12 distinctions @172:117:32 defors @14:14:14:31 covering @163:23 67:21 114:16 defended [0:6:6:127:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:23:136:11, 15:12:12, 15:22:13:12:12 defind [0:8:6:6:17:19:20:12:12:12:12:12:12:12:12:12:12:12:12:12:			, ,		
coversi (#5.39 563 126:19 163:16 21 48:19 20:25 22:21 23 distinctione (#72:11 73: editors (#4:16 144:13) 14 137:12 138:19 defendant (#22:11 73: defendant (#22:11 73: defendant (#22:11 73: defendant (#23:11 73: distinctive (#14:8:8) 143:15 effective (#10:8:0 67:19 80:2) 143:15 effective (#10:8:0 67:19 80:2) 23:3 (85:12,11 75:3) 133:21 00:12 133:10 133:10 141:15 143:15 effective (#110:6:11 142:2) 13:10 141:15 142:24 12:11 133:10 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12 133:21 00:12					
covers 8 55:23 57:21 114: 14 137:12 138:19 crack 10 20:12 cracy 10 10:1 crack 10 20:11 127:13 crack 10 127:12 127:14 crack 10 127:11 127:13 crack 10 127:12 127:14 crack 10 127:14 crack 10 127:14 crack 10 127:12 127:14 crack 10 127:14 crack 10 127:14 crack 10 12	-				
14 137:12 138:19 defende [0] 66:5 127:1 152.0 49:2 51:16 53:11.15 distinctive [1] 48:8 offect [1] 80:6 07:19 80:2 177:4 146:10 defende [1] 66:5 127:1 151:11 141:25 142.12 147:4 123:22 139:21 106:12 137:20 139:24 142:21 106:12 Create [1] 80:130:2 defende [1] 80:637 149:5 142:42 127:4 139:2 145:20 156:20 158:7.7 effective [2] 1106:12 139:2 145:20 158:7.7 effective [2] 1106:12 139:2 145:20 158:7.7 effective [2] 1106:12 257:22 reg 94:14:22 1106:12 139:2 145:20 158:7.7 effoctive [2] 1106:12 effort [1] 82:5 7:2 effort [1] 82:7.7 effort [1] 82:7 effort [1] 82:7.7 effort [1] 82:7.7 effort [1] 82:7.7 effort [1] 82:7					
crazk (iii 20:12 crazk (iii 20:12 crazk (iii 20:12 crazk (iii 20:14 15:11 16:15 55:7 6:10 94:12 96:20 123:22 distinguishe (iii 14:19:13) 13:22 13:23:22 13:22:10:6:12 13:22:11:22:21:10:1 13:22:11:12:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 13:22:15:22:11:0:1 14:22:15:22:11:0:1 17:72:21:11:0:12: 17:72:21:11:0:12:1 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:71:22:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:72:21:11:0:12: 17:11:11:11:11:11:11:11:11:11:11:11:11:1					
craze (P 10:1) defending (P 56:13 116: 102:115 123:22 136:11 123:22 137:20 139:24 142:14 create (P 30:11 127:13 defends (P 65:7) 149:55 district (P 20:22 210:7) 139:21 152:20 145:17 create (P 30:11 127:13 define (P 39:83:8) difficult (P 20:33:15 52: define (P 39:83:8) define (P 10:62:22 effect (P 62:19 142:13) define (P 10:62:22 effect (P 10:62:22 <					
created ២5:14 30:24 116:4 18 135:10 141:25 142:4:12 147:4 definds 10143:21 18 created № 90:11 127:13 definds 1013:65 definds 1013:65 definds 1013:65 definds 1013:65 effort № 22:12 effort № 22:22 eggs № 77:22 effort № 22:22 eggs № 77:23 effort № 22:22 eggs № 77:23 effort № 22:22 eggs № 77:24				-	
117:4 144:10 defense III 137:13 defense III 136:2 145:5 district III 29:22 10:7 effective III 106: 143:3 created III 136:12 define III 98:8 93:8 define III 98:9 33:8 diffecentIII III 97:14 126:13 diffecentIII III 97:14:22:14:26:13 define III 98:8 93:8 diffecentIIII 107:12:21:12 diffecentIII III 97:12:20:14:97:13 DMs IR 79:17.24 108:16 defint IIII 06:22:2 egg IR 77:28 11:10:104:17 117:6 122:2:14 126:13 definitiol III 91:11:6 77: definitiol III 91:11:6 77: 149:5 disgree III 97:76:16 dogs III 106:143:2 ejiste III 97:70:16 77: dogs III 106:12: dogs III 108:15: doing III 108:15 doing III 108:15 doing III 108:16 dogs III 108:16 dogs III 108:16 dogs III 108:16 doing III 108:17 ejiste III 108:16 doing III 108:16 doing III 108:17 doing III 108:16 doing III 108:17 doing III 108:16 doing IIII 108:16 doing IIII 108:16	-			-	
created (2):90:11 127:13 creates (1):136:2 defines (1):130:6 define (1):93:23 differently (1):94:11 defines (1):93:23 139:21:22:01:56:1.7 defines (1):93:23 efferets (2):62:27:2 effort (1):62:22 127:61:37:142:22:14:125:13 definitely (1):61:18 definition (1):91:11:677: definitely (1):61:18 definition (1):91:11:677: definitely (1):61:18 definition (1):91:11:677: definitely (1):01:17 differently (1):92:13:02:22:41 definition (1):91:11:677: definitely (1):01:12 differently (1):92:13:02:22:42 definition (1):91:11:677: definition (1):91:11:617: definition (1):91:11:617: definition (1):91:12:12:917: definition (1):91:12:12:11:12:12:11:11; definition (1):91:12:12:11:11; definition (1):91:12:12:11:11; definition (1):91:12:12:11:11; definition (1):91:12:12:11:11:11; definition (1):91:12:12:11:11; definition (1):91:12:11:11:11; definition (1):91:12:11:11:11:11; definition (1):91:12:11:11:11:11:11:11:11:11; definition (1):91:12:11:11:11:11:11:1			,		
creating IPB 30:13 116:4 define IP 98 93:8 difficult IP 208 33:15 52: DMs B77:724 108:16 effort IP 62:22 eggs IP 77:24 108:17 effort IP 62:23 108 effort IP 62:23 108 effor 1P 62:23 10					
creating [m 30:13 116:4] defined [m 38:21] 25 120:11 128:20 149:7 dofinition [m 96:8 88:5 137: eggs [m 77:2 81:10 104:17] 117:8 127:4 137:14.23 138:4 definition [m 9:11,16 77: 117:2 97:2 98:4 126:15 16 16 17:3 99:7 123:18 156:11,16 17: 17:2 97:2 98:4 126:15 16 14:32 75:2 78:1 80:22 94:1 16 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 121 151:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 143:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 114:11 151:22 <			-		
117:8 122:2,14 125:13 definities (19.3:11 direct (19.0:19 74.4,5,6, 16 16 17 127:8 137:14,23 138:4 definities (19.63:11 definities (19.63:11 definities (19.63:11 dog (19.126:16) dog (1					
127:8 137:14.23 138:4 definitely II 16:18 14.32 76:2 78:1 80:22 94: dog II 128:16 either II 93:7. 70:16 77: 139:5 144:8 150.5,24 153: 5 165:5 17:22 97:2 98:4 126:15 dog II 106:25 dog II 106:25 dog II 128:16 14:31:1 151:22 ejusdem II 043:8 Creative II 64:1 103:6 definitions II 83:8 definitively II 109:35 directly III 20:02:22 2:22:4 134:23 142:15 ejusdem II 043:8 elements III 14:12 elements III 14:12 144:6 23 64:16 65:1 67:16 74:76:11 133:23 elements III 14:12 134:23 elements III 14:13:11 134:23 elements III 14:14:14:14:14:14:14:14:14:14:14:14:14:1					
139:5144.8 150:5,24 153: definition [P9:11,16 77: 17.22 97:2 984 126:15 doing [P1:06:25 143:11 151:22 5 155:5 Creative [2:64:1103:6 definitions [P3:3:8 156:14,16 128:8 130:20,24 137:13 134:20 27:6 47:16 49:21 53:16 1; elements [P3:21 77:18 1; elements [P3:21 77:18 1; 13:11 151:22 ejustom [P3:22 5:17 77:8 1; elements [P3:21 77:18 1; elements [P3:21 9:17 77:8 1; elements [P3:21 17:71 53:21 40:12 15:7 77:8 1; elements [P3:21 17:71 53:21 40; elements [P3:21 9:17 77:8 1; elements [P3:21 9:13 13:9:1 41:14 11:2:18 103:23 153: elude [P1:16:21 11:2:15 83:10 10; elude [P1:16:21 11:2:18 10; elude [P1:16:21 11:2:18 10; elude [P1:16:21 11:2:1 11:2:1 11:2:1 11:2:1 11:2:1 11:2:1 11:2:1 11:2:1:1:1:1					
5 15:5: 21 99:21 123:18 156:14.16 128:8 130:20.24 137:13 doing [27:422.25:26:24] eluedem 1188:5 Creative [26:11 103:6] definitions 10 83:8 154:20 27:6 47:16 49:21 53:161: 23 64:19 65:16 7:14 78:11 element [0] 43:8 critical [0:65:9 116:11.24 14 144:6 144:6 20:17:9:119:20 127:3 Eleventh [0:65:17 77:8:1 curate [2] 14:10:123:11 delay [17:7:16 disagree [0] 19:7 disagree [0] 19:7 134:23 12 104:12,13 139:1 curate [2] 0:62:22:27:14 delay [17:7:16 disagree [0] 19:7 disagree [0] 119:7 134:23 12 104:12,13 139:1 curate [2] 0:62:22:27:14 delay [17:7:16 disagree [0] 119:7 disagree [0] 119:7 done [0] 24:11 25:15 8:17 114:4 curate [2] 0:62:22:23:14 14 discolse (0:59:16 discolse (0:59:16 discolse (0:59:16 done [0] 24:11 25:18 3:0 elue (0) 116:21 curiosity [19:37:2 department (0:27:7 descolse (0:12:50 discolse (0:12:50:17 17:155:22 discolse (0:13:9:177:153:16 discolse (0:13:9:177:153:16 dive (0:14:12:62:14:12:17:17:16:17:17:16:17:17:17:17:17:17:17:17:17:17:17:17:17:	,		,	-	
Creative [2] 64:1 103:6 crime [19] 92:5 critical [4] 65:9 116:11.24 142:24 crushing [1] 101:17 curate [2] 96:22 122:17 curate [2] 111:5 curatorial [1] 136:17 curre [1] 14:5 curatorial [1] 136:17 curre [1] 14:5 curation [2] 125:144:11 curate [1] 14:22 curate [2] 14:22:1 130:8 curatorial [1] 136:17 curre [2] 14:32:1 44:14 depende [1] 25:5 depend [1] 25:7 depend [1] 25:5 depend [1] 25:7 depend forming [1] 32:7 39: depend [1] 25:7 depend forming [1] 32:7 39: depend [1] 25:7 depend forming [1] 32:7 39: depend [1] 21:22 413:4:10 depend [1] 21:22 413:4:10 depend [1] 21:22 413:4:12 depend [1] 21:22 413:4:12 depend [1] 21:22 413:4:12 depend [1] 21:22 413:4:12 depend [1] 21:22 413:12 depend [1] 21:22 413:12 depe			,		
crime (1) 92:5 critical (4) 65:9 116:11,24 14 definitively (2) 109:3 154: 14 directly (3) 20:22 22:24 144:6 23 64:19 65:1 67:14 78:11 90:21 39:23,25 107:4 115: 13 elements (3) 21:9 117:12 13 curate (2) 144:10 123:11 curate (2) 144:10 123:11 curate (2) 143:25 147: 113:12 24 delagree (3) 19:7 60:6 130: 23 20 117:9 119:20 127:3 134:23 12 104:12,13 139:1 elements (3) 21:9 117:12 disagree (3) 19:7 60:6 130: 23 12 104:12,13 139:1 12 104:12,13 139:1 curate (2) 144:10 2:61 58 3:10 discremable (1) 118:16 curatorial (2) 132:17 77:25 137 delagree (3) 19:7 60:6 130: 134:23 dominance (1) 144:6 dome (3) 24:11 26:15 83:10 dom (3) 25:18 67:18,23 Eleventh (6) 59:17 77:25 137 curatorial (2) 132:13 77:15 curatorial (2) 132:13 Democrats.com (1) 157:8 denominator (6) 130:18,20,21 denominator (7) 110:15 department (1) 2:7 department (1) 2:7 department (1) 2:7 departformed (6) 53:22 86:24 darger (1) 99:19 dark (2) 33:10 153:13 data (1) 144:20 darger (1) 99:19 dark (2) 33:10 153:13 data (1) 144:20 darger (1) 99:19 dark (2) 33:12 45:4 47:6 122: 8 127:11 descriminate (1) 77:24 97:4,6,16 106:20 112:25 140:124 deplatforming (6) 32:7 39: 10; 113:11 descriminator (1) 21:17 descriminator (1)				-	•
critical (4) 65:9 116:11,24 14 144:6 90:21 93:23,25 107:4 115: 13 142:24 delay (1) 77:16 disagree (3) 19:7 60:6 130: 20 117:9 119:20 127:3 12 104:12,13 139:1 curating (1) 101:17 delay (1) 77:16 disagree (3) 19:7 60:6 130: 20 117:9 119:20 127:3 12 104:12,13 139:1 curating (1) 101:17 delivery (3) 5:2 114:22 119: delivery (3) 5:2 114:22 119: discorenable (1) 118:16 dom: (3) 24:11 26:15 83:10 114:4 curating (1) 136:17 Democrats (0) 157:8 Democrats.com (1) 151:4 disclose (1) 59:16 disclose (1) 25:16 disclose (1) 25:17 17 155:21 emails (1) 76:1 curating (2) 130:21 43:25 144:1 Democrats.com (2) 155:14 disclose (1) 25:16 disclose (1) 25:25 64:1 draw (1) 13:10 emails (1) 76:1 embodied (0) 117:22 curating (1) 36:12 Department (1) 2:7 156:2,5,6 disclose (1) 26:25 64:1 drive (1) 118:2 embodied (0) 117:22 embodied (0) 117:22 emphasize (3) 45:15 100 cut (2) 79:12 156:20 117:20 deplatformed (4) 88:20 14 deplatformed (1) 83:27 39: discriminate (1) 77:22 12:11 42:17 6:13 discriminate (1) 66:21 15 144:14 emphasize (2) 44:9 45: darger (1) 99:19 data (1) 14					
$ \begin{array}{ c c c c c c c c c c c c c c c c c c c$		-	-		,
crushing [1] 101:17 delete [4] 70:5 76:1,2 99: 23 134:23 12 104:12,13 139:1 curate [2] 114:10 123:11 24 disagrees [1] 119:7 disagrees [1] 119:7 disagrees [1] 119:7 disagrees [1] 119:7 curate [2] 114:10 123:11 24 delivery [3] 5:2 114:22 119:8 disagrees [1] 119:7 disagrees [1] 119:7 dominance [1] 144:6 dominance [1] 144:6 dominance [1] 144:6 eliminate [1] 42:12 sissec [1] 119:7 dominance [1] 144:6 eliminate [1] 42:12 sissec [1] 119:7 dominance [1] 144:6 eliminate [1] 42:13 eliminate [1] 42:13 eliminate [1] 42:6 sissec [1] 119:7 dominance [1] 144:6 eliminate [1] 42:14 eliminate [1] 42:14 eliminate [1] 42:14 eliminate [1] 42:14 eliminate [1] 42:13 eliminate [1] 42:13 eliminate [1] 42:13 eliminate [1] 42:14 eliminate [1] 42:14 <t< td=""><td></td><td></td><td></td><td></td><td></td></t<>					
Curate I® 114:10 123:11 24 disagrees IP 119:7 dominance IP 144:6 eliminate IP 46:21 curatig IP 96:22 122:17 delivery IP 5:2 114:22 119: disagrees IP 119:7 dominance IP 144:6 eliminate IP 46:21 curatig IP 96:22 122:17 18 bemocrats IP 157:8 discose (P 59:16 dom (P 25:18 67:18,23 114:4 elude (P 116:21 curatorial (P 138:6 denominator IP 35:6,10 denominator IP 35:6,10 discovery (P 33:14 77:15 17 155:21 emails (P 76:24 77:25 130 curse (P 114:12 denominator IP 35:6,10 denominator IP 35:6,10 discovery (P 33:14 77:15 discovery (P 33:14 77:15 18,18,25 148:6 emails (P 76:17) curse (P 114:2 Department (P 27 d56:2,56 discretion (P 16:225 64:7) driven (P 101:15 embody (P 118:2 curt (P 79:12 156:20 T17:20 dss 11,4 94:1 driven (P 101:15 embody (P 118:2 emphasize IP 45:15 100 d. (P 31:12 2:7) deplatform IP 6:3 23:4 39: 1,4 96:16,24 99:8 102:9 driven (P 101:15 emphasize IP 45:15 100 darangi (P 39:3):10 453:13 deplatformig (P 32:7) 777:24 97:4,6,16 106:20 12 empires (P 142:21 emphasize IP 45			•		
curated (2) 96:22 122:17 delivery (3) 5:2 114:22 119: 18 disa ow (1) 5:17 disa ow (1) 5:17 disa ow (1) 5:17 curating (1) 131:8 Democrats (1) 157:8 Democrats (0) 157:8 disclose (1) 59:16 disclose (1) 59:16 etal (1) 136:17 etal (1) 136:16 etal (1) 136:17 etal (1) 127:17 etal (1) 126:12 etal (2) 127					-
curating [1] 131:8 18 discernable [1] 118:16 down [0] 25:18 67:18,23 114:4 curatoria [2] 122:21 130:8 Democrats (1) 157:8 Democrats (1) 157:8 disclose (1) 59:16 38:11 102:18 103:23 153: 114:4 elude (1) 116:21 curatoria [2] 123:25 144:1 denied [3] 130:18,20,21 denied [3] 130:18,20,21 discovery (10] 33:14 77:15 denied [3] 130:18,20,21 discovery (10] 33:14 77:15 draw [2] 46:12 72:10 18;18,25 148:6 emails (1) 76:1 current [2] 142:25 143:1 Department (1) 2:7 156:2,56 discretion [2] 62:25 64:7 drive (1) 118:2 embodied (1) 117:22 cut [2] 79:12 156:20 depends [3] 53:22 86:24 65:2 66:14 67:8 86:10 87: diver (1) 101:15 emergency [2] 139:9 14 darger [1] 99:19 das:14 deplatformed [4] 88:20 10 17:22 124:14 125:17 153: discriminate [8] 74:25 75: 7 77:24 97:4,6,16 106:20 15 14 emphasize [3] 45:15 10: days [1] 60:24 116:21 12:5 51:01:3 134:12 7 77:7:24 97:4,6,16 106:20 14 early [2] 40:24 66:12 early [3] 9:7:3 12 16:147:9 16:147:9 16:147:9 16:147:9 16:147:9 16					
curation Democrats Democrats <thdemocrats< th=""> Democrats <thdemocrats< th=""> <thdemocrats< th=""> <thdem< td=""><td></td><td>-</td><td></td><td></td><td></td></thdem<></thdemocrats<></thdemocrats<></thdemocrats<>		-			
curatorial [1] 136:17 Democrats.com [1] 15:14 disclosure [4] 12:12 59:17 17 155:21 email [6] 70:24 77:25 130 curiae [3] 2:8 3:11 114:5 denied [3] 130:18,20,21 145:11,16 draw [2] 46:12 72:10 18,18,25 148:6 emails [0] 70:24 77:25 130 current [2] 143:25 144:1 118:6 104:6,11 105:8,12 155:22 drill [0] 25:8 drawn [0] 25:14 embodied [0] 117:22 embodied [0] 117:25 emphosize [3] 45:15 102 0.C [2] 1:12 2:7 deplatform [4] 6:3 23:4 39: 1,4 96:16,24 99:8 102:9 driver [0] 12:17 153: deplatformed [4] 88:20 10 14 emphosize [3] 45:14 10 12:25 113:8,10 discriminates [1] 63:1 deplatformig [8] 32:7 39: 7 77:24 97:4,6,16 106:20 14 emphosize [1] 142:21 emplose [1] 142:21 13:11 deplatforms [2] 82:10 156: 136:11 deplatforms [2] 82:10 156: 136:11 ecommerce [2] 127:6 148:5 each [8] 4:12 26:21 42:22 <td>5</td> <td>-</td> <td></td> <td></td> <td></td>	5	-			
curiae [3] 2:8 3:11 114:5 denied [3] 130:18,20,21 145:11,16 draw [2] 46:12 72:10 18,18,25 148:6 current [2] 143:25 144:1 deport ment [0] 2:7 18:6 104:6,11 105:8,12 155:22 draw [2] 46:12 72:10 18,18,25 148:6 current [2] 143:25 144:1 Department [0] 2:7 department [0] 2:7 18:6 draw [2] 46:12 72:10 draw [0] 73:10 current [2] 79:12 156:20 department [0] 2:7 department [0] 2:7 department [0] 2:7 discretion [20] 62:25 64:7 driver [0] 101:15 emergency [2] 139:9 14 D.C [2] 1:12 2:7 department [4] 88:20 14.9 90:16,24 99:8 102:9 Duro [2] 1:25 143:8,10 deplatform [4] 88:20 14.9 90:16,24 99:8 102:9 due [2] 68:5 84:6 emphasize [3] 45:15 10! dark [2] 33:10 153:13 deplatform [6] 82:7 39: 7 77:24 97:4,6,16 106:20 14 E emphasize [2] 142:21 deplatform [9] 9:19 discriminating [2] 78::4 each [6] 4:12 26:21 42:22 emphasize [2] 67:6,18 days [1] 66:24 DBA [1] 1:7 describe [2] 5:22 43:20					email [6] 70:24 77:25 130:
curiosity (1) 93:7 current [2] 143:25 144:1 curse (1) 11:5 customers [2] 46:18 52:20 denominator [3] 35:6,10 118:6 discovery (10] 33:14 77:15 104:6,11 105:8,12 155:22 discovery (10] 33:14 77:15 104:6,11 105:8,12 155:22 discovery (10] 33:14 77:15 discovery (10] 34:24 46:12 earlier (10] 24:24 66:12 earlier (10] 24:22 discovery (10] 25 discover (10] 25 discover (10] 25 disco					
current i2 143:25 144:1 118:6 104:6,11 105:8,12 155:22 drill (1) 25:18 embodied (1) 117:22 customers (2) 46:18 52:20 depends (1) 25:5 depends (3) 53:22 86:24 156:2,5,6 drive (1) 118:2 emergency (2) 139:9 14 D D depends (3) 53:22 86:24 65:2 66:14 67:8 86:10 87: drive (1) 110:15 emphasize (3) 45:15 100 D.C [2] 1:12 2:7 deplatform (4) 63: 23:4 39: 1,4 96:16,24 99:8 102:9 107:22 124:14 125:17 153: duty-to-explain (2) 101:13, emphasize (3) 45:15 100 daraging (1) 36:22 dask (1) 144:20 2 54:12 59:10, 13 134:12 10 12:25 113:8,10 discriminate (8) 74:25 75: discriminating [2) 78:4 14 employees (1) 16:14 employees (1) 16:14 day (5) 39:12 45:4 47:6 122: 17 deplatforms [2] 88:10 156: 177:11 discrimination [0) 12:11 148:5 each [8] 4:12 26:21 42:22 each [8] 4:12 26:21 42:22 94:16 106:14 118:3 124:4 enable [2] 51:42:21 enable [2] 51:42:21 enable [2] 51:14 22:1 enable [2] 51:14 22:1 each [8] 4:12 26:21 42:22 each [8] 4:12 26:21 42:22 94:16 106:14 118:3 124:4 enable [2] 51:14 22:1 each [8] 4:12 26:21 42:22 each [8] 4:12 26:21 42:22 <td></td> <td></td> <td>,</td> <td>drawn [1] 73:10</td> <td></td>			,	drawn [1] 73:10	
curse [1] 11:5 customers [2] 46:18 52:20 Department [1] 2:7 depends [3] 53:22 86:24 156:2,5,6 discretion [2] 62:25 64:7 drive [1] 118:2 diver [1] 101:15 embody [1] 118:8 emergency [2] 139:9 14 D D 117:20 depends [3] 53:22 86:24 discretion [2] 62:25 64:7 driver [1] 101:15 7 D 117:20 deplatform [4] 63: 23:4 39: 8 88:14 14 96:16,24 99:8 102:9 Dropbox [1] 97:2 dulu [2] 68:5 84:6 15 144:14 daraging [1] 36:22 danger [1] 99:19 112:25 113:8,10 deplatformed [4] 88:20 10 discriminates [1] 63:1 14 emphasize [3] 45:15 104 data [1] 144:20 2 54:12 59:10,13 134:12 156:16 157:12 discriminates [1] 63:1 14 empires [1] 142:21 empires [1] 142:21 days [6] 63:21 25 46:22 101:6 17 deplatforms [2] 88:10 156: discriminating [2] 78:4 10 143:9 each [8] 4:12 26:21 42:22 94:16 106:14 118:3 124:4 employees [1] 16:14 employees [1] 16:14 employees [1] 16:14 employees [1] 142:21 employees [1] 16:14 employees [1] 16:14 employees [1] 14:22 each [8] 4:12 26:21 42:22 94:16 106:14 118:3 124:4 employees [1] 6:14:14 emol [6] 15:14 18:2 19:13 143:9 eac			-	drill [1] 25:18	embodied [1] 117:22
cut [2] 79:12 156:20 depends [3] 53:22 86:24 65:2 66:14 67:8 86:10 87: 8 90:20 91:3 93:11,14 94: 14 96:16,24 99:8 102:9 drivers [2] 78:6,14 7 D.C [2] 1:12 2:7 damaging [1] 36:22 danger [1] 99:19 dark [2] 33:10 153:13 data [1] 142:20 deplatform [4] 6:3 23:4 39: 8 88:14 1,4 96:16,24 99:8 102:9 107:22 124:14 125:17 153: deplatformed [4] 88:20 for inters [2] 78:6,14 7 emphasize [3] 45:15 10: 15 144:14 dark [2] 33:10 153:13 data [1] 142:20 deplatforming [8] 32:7 39: 2 54:12 59:10,13 134:12 10 14 e-commerce [2] 127:6 148:5 each [8] 4:12 26:21 42:22 employees [1] 16:14 enable [2] 5:1 42:21 enabling [1] 42:21 days [1] 60:24 DBA [1] 1:7 deal [6] 21:25 46:22 101:6 118:24 140:9 144:15 decide [5] 76:16 80:4 85:5 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [2] 102:17 139:13 details [1] 109:15 131:11 discriminatory [2] 96:2 18 148:4 discriminatory [2] 96:2 18 148:4 earlig [2] 49:24 86:22 89: ending [3] 49:24 86:22 89: ending [3] 49:24 86:22 89: endorse [1] 119:8 enforce [3] 16:12 37:2,12	curse [1] 11:5	Department [1] 2:7			
D 117:20 8 90:20 91:3 93:11,14 94: Dropbox (1) 97:2 emphasize (3) 45:15 104 D.C [2] 1:12 2:7 deplatform (4) 6:3 23:4 39: 1,4 96:16,24 99:8 102:9 107:22 124:14 125:17 153: due [2] 68:5 84:6 15 144:14 emphasize [3] 45:15 104 darging (1) 99:19 data (1) 144:20 deplatforming [8] 32:7 39: 7 77:24 97:4,6,16 106:20 14 emphasize [1] 42:21 emphasize [2] 44:9 45 12 data (1) 144:20 2 54:12 59:10,13 134:12 122:5 discriminates [1] 63:1 discriminates [1] 63:1 discriminating [2] 78:4 14 enable [2] 5:1 42:21 enable [2] 5:1 42:21 enable [2] 5:1 42:21 enable [2] 5:14 18:3 124:4 enable [2] 5:14 18:2 19:13 16 147:9 enable [2] 5:14 18:2 19:13 16 147:9 end [6] 15:14 18:2 19:13 145:2 146:25 early [2] 40:24 66:12 enforce [3] 16:12 37:2,17 decide [2] 76:16 80:4 85:5 129:3 139:12 designer [1] 114:14 discussing [3] 56:21 139: 15 13:12 enforce [3] 16:12 37:2,17 enforce [3] 16:12 37:2,17 enforc	customers [2] 46:18 52:20	depend [1] 25:5	discretion [21] 62:25 64:7	driven [1] 101:15	emergency [2] 139:9 147:
D 117:20 8 90:20 91:3 93:11,14 94: Dropbox (1) 97:2 emphasize (3) 45:15 104 D.C [2] 1:12 2:7 deplatform (4) 6:3 23:4 39: 1,4 96:16,24 99:8 102:9 107:22 124:14 125:17 153: due [2] 68:5 84:6 15 144:14 emphasize [3] 45:15 104 darging (1) 99:19 data (1) 144:20 deplatforming [8] 32:7 39: 7 77:24 97:4,6,16 106:20 14 emphasize [1] 42:21 emphasize [2] 44:9 45 12 data (1) 144:20 2 54:12 59:10,13 134:12 122:5 discriminates [1] 63:1 discriminates [1] 63:1 discriminating [2] 78:4 14 enable [2] 5:1 42:21 enable [2] 5:1 42:21 enable [2] 5:1 42:21 enable [2] 5:14 18:3 124:4 enable [2] 5:14 18:2 19:13 16 147:9 enable [2] 5:14 18:2 19:13 16 147:9 end [6] 15:14 18:2 19:13 145:2 146:25 early [2] 40:24 66:12 enforce [3] 16:12 37:2,17 decide [2] 76:16 80:4 85:5 129:3 139:12 designer [1] 114:14 discussing [3] 56:21 139: 15 13:12 enforce [3] 16:12 37:2,17 enforce [3] 16:12 37:2,17 enforc	cut [2] 79:12 156:20				
D.C [2] 1:12 2:7 damaging [1] 36:22 danger [1] 99:19 dark [2] 33:10 153:13 data [1] 144:20 day [5] 39:12 45:4 47:6 122: 8 127:11 day [5] 39:12 45:4 47:6 122: 156:16 157:12 days [1] 60:24 DBA [1] 1:7 deal [6] 21:25 46:22 101:6 118:24 140:9 144:15 delat [2] 12:5 46:22 101:6 118:24 140:9 144:15 decided [2] 76:16 80:4 85:5 129:3 139:12 decided [2] 102:17 139:13 decided [2] 102:17 139:13 decided [2] 102:17 139:13 deplatform [4] 6:3 23:4 39: 8 88:14 deplatformed [4] 88:20 112:25 113:8,10 deplatformig [8] 32:7 39: 2 54:12 59:10,13 134:12 156:16 157:12 deplatforms [2] 88:10 156: 17 describe [2] 5:22 43:20 design [2] 4:24 43:17 design [2] 4:24 43:17 design [2] 4:24 43:17 design [2] 12:17 139:13 decided [2] 102:17 139:13 decided [2] 102:17 139:13 decided [2] 102:17 139:13 deplatform [4] 6:3 23:4 39: 8 88:14 deplatformig [8] 32:7 39: 2 54:12 59:10,13 134:12 156:16 157:12 desplatforms [2] 88:10 156: 17 describe [2] 5:22 43:20 design [2] 4:24 43:17 design [2] 114:14 design [2] 102:17 139:13 decided [2] 102:17 139:13 deplatform [4] 6:3 23:4 39: 131:11 design [3] 56:21 139: 18 148:4 14 14 14 14 14 12 12 122:5 discrimination [6] 12:11 143:9 earlig [3] 4:24 66:12 easy [4] 6:10 62:2 111:22 153:12 edit [2] 64:14 99:25 edit [2] 64:14 99:2	n		8 90:20 91:3 93:11,14 94:	Dropbox [1] 97:2	emphasize [3] 45:15 105:
damaging [1] 36:22 danger [1] 99:19 dark [2] 33:10 153:13 data [1] 144:20 day [5] 39:12 45:4 47:6 122: 8 127:11 day [5] 39:12 45:4 47:6 122: 8 127:11 day [5] 39:12 45:4 47:6 122: 156:16 157:12 days [1] 60:24 DBA [1] 1:7 deal [6] 21:25 46:22 101:6 118:24 140:9 144:15 destate [2] 87:18,25 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [2] 102:17 139:13 decide [2] 102:17 139:13 107.22 124.14 123.17 163.1 107.22 124.14 123.17 163.1 discriminate [8] 74:25 75: 77:24 97:4,6,16 106:20 122:5 discriminates [1] 63:1 discriminating [2] 78:4 107:11 discriminating [2] 78:4 107:11 discriminator [6] 12:11 discriminator [6] 12:11 design [2] 4:24 43:17 design [2] 4:24 43:17 design [2] 4:24 43:17 design [2] 4:24 43:17 design [2] 111:11 design [2] 12:22 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [2] 102:17 139:13 decide [2] 102:17 139:13 decide [2] 102:17 139:13 decide [2] 102:17 139:13 107.12 discussing [3] 56:21 139: 18 148:4 14 =-commerce [2] 102:1 142:22 94:16 106:14 118:3 124:4 143:9 each [8] 4:12 26:21 42:22 94:16 106:14 118:3 124:4 143:9 each [8] 4:12 26:21 42:22 94:16 106:14 118:3 124:4 143:9 each [8] 4:12 26:21 42:22 94:16 106:12 11:22 145:6 150: 23 earlier [3] 21:2 145:6 150: 23 earlier [3] 21:2 145:6 150: 23 earlier [3] 21:2 145:6 150: 23 earlier [3] 24:24 66:12 easy [4] 6:10 62:2 111:22 easy [4] 6:10 62:2 111:22 edit [2] 64:14 99:25 edit [2] 64:14 99:25 edit [2] 64:14 99:25 editing [3] 49:24 86:22 89: 0 16 enforce [3] 16:12 37:2,12 enforceable [1] 40:20 enforced [2] 80:10,12			1,4 96: 16,24 99: 8 102: 9		
danger (1) 99:19 dark [2] 33:10 153:13 data (1) 144:20 day [5] 39:12 45:4 47:6 122: 8 127:11 days (1) 60:24 DBA (1) 1:7 deal [6] 21:25 46:22 101:6 118:24 140:9 144:15 dealt [2] 142:8,9 debate [2] 87:18,25 decide [5] 76:16 80:4 85:5 129:3 139:12 decided [2] 102:17 139:13 100 discriminate [8] 74:25 75: 7 77:24 97:4,6,16 106:20 122:5 discriminates [1] 63:1 discriminating [2] 78:4 107:11 describe [2] 5:22 43:20 described [1] 53:7 design [2] 4:24 43:17 designers [1] 114:14 designers [1] 114:14 details [1] 109:15 100 discriminate [8] 74:25 75: 7 77:24 97:4,6,16 106:20 122:5 discriminating [2] 78:4 107:11 discriminating [2] 78:4 107:11 discrimination [6] 12:11 75:5 95:11 96:2 107:12 discriminatory [2] 96:2 discussing [3] 56:21 139: 18 148:4 14 14 14 14 14 14 14 14 14 14			107:22 124:14 125:17 153:	duty-to-explain [2] 101:13,	emphasized [2] 44:9 45:
dark [2] 33:10 153:13 data (1) 144:20 day [5] 39:12 45:4 47:6 122: 8 127:11 days [1] 60:24 DBA (1) 1:7 deal [6] 21:25 46:22 101:6 118:24 140:9 144:15 dealt [2] 142:8,9 debate [2] 87:18,25 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [2] 102:17 139:13 Interemption (1) 135:16 deplatforming [8] 32:7 39: 2 54:12 59:10,13 134:12 156:16 157:12 deplatforms [2] 88:10 156: 17 deplatforms [2] 88:10 156: 17 deplatforms [2] 88:10 156: 17 describe [2] 5:22 43:20 describe [2] 5:22 43:20 design [2] 4:24 43:17 design [2] 4:24 43:17 de		•		14	
data (i) 144:20 deplatforming (i) 32:7 39: 7 77:24 97:4,6,16 106:20				E	
day [5] 39:12 45:4 47:6 122: 2 54:12 59:10,13 134:12 122:5 122:5 148:5 enabling [1] 42:21 8 127:11 deplatforms [2] 88:10 156: discriminates [1] 63:1 discriminates [1] 63:1 148:5 each [8] 4:12 26:21 42:22 enabling [1] 42:21 94:16 106:14 118:3 124:4 17 deprioritizing [1] 31:7 discrimination [6] 12:11 143:9 each [8] 4:12 26:21 42:22 encourage [2] 67:6,18 118:24 140:9 144:15 describe [2] 5:22 43:20 75:5 95:11 96:2 107:12 131:11 143:9 earlier [3] 21:2 145:6 150: 16 147:9 dealt [2] 142:8,9 design [2] 4:24 43:17 discriminatory [2] 96:2 131:11 early [2] 40:24 66:12 easy [4] 6:10 62:2 111:22 end [5] 15:14 18:2 19:13 decide [5] 76:16 80:4 85:5 designed [2] 53:24 90:4 discuss [1] 121:7 discuss [1] 121:7 edit [2] 64:14 99:25 enforce [3] 16:12 37:2,12 decide [4] 102:17 139:13 details [1] 109:15 18 148:4 18 148:4 editing [3] 49:24 86:22 89: enforced [2] 80:10,12					
8 127:11 deplatforms [2] 88:10 156: discriminates [0] 63:17 discriminates [0] 63:17 discriminates [0] 63:17 each [8] 4:12 26:21 42:22 enact [2] 52:15 125:10 17 deplatforms [2] 88:10 156: 17 discrimination [6] 12:11 143:9 each [8] 4:12 26:21 42:22 encourage [2] 67:6,18 18:24 140:9 144:15 describe [2] 5:22 43:20 75:5 95:11 96:2 107:12 143:9 earlier [3] 21:2 145:6 150: 16 147:9 dealt [2] 142:8,9 design [2] 4:24 43:17 discriminatory [2] 96:2 131:11 23 early [2] 40:24 66:12 easy [4] 6:10 62:2 111:22 end [5] 15:14 18:2 19:13 decide [5] 76:16 80:4 85:5 designed [2] 53:24 90:4 discuss [1] 121:7 discussing [3] 56:21 139: 153:12 editing [3] 49:24 86:22 89: enforce [3] 16:12 37:2,12 decide [6] 102:17 139:13 details [1] 109:15 18 148:4 18 148:4 editing [3] 49:24 86:22 89: enforced [2] 80:10,12		·			
days [1] 60:24 17 discriminating [2] 78.10 rsc. 94:16 106:14 118:3 124:4 enact [2] 52:10 rsc. encourage [2] 67:6,18 DBA [1] 1:7 deprioritizing [1] 31:7 describe [2] 5:22 43:20 fsc:imination [6] 12:11 143:9 earlier [3] 21:2 145:6 150: encouraging [3] 87:3 12 deal [6] 21:25 46:22 101:6 describe [2] 5:22 43:20 fsc: ps:11 96:2 107:12 143:9 earlier [3] 21:2 145:6 150: 16 147:9 deal [2] 142:8,9 design [2] 4:24 43:17 discriminatory [2] 96:2 131:11 early [2] 40:24 66:12 early [2] 40:24 66:12 early [4] 6:10 62:2 111:22 end [5] 15:14 18:2 19:13 decide [5] 76:16 80:4 85:5 designed [2] 53:24 90:4 discuss [1] 121:7 discussing [3] 56:21 139: 153:12 enforce [3] 16:12 37:2,12 decided [2] 102:17 139:13 details [1] 109:15 18 148:4 18 148:4 enforced [2] 80:10,12		100.10 107.12			
DBA [1] 1:7 deal [6] 21:25 46:22 101:6 118:24 140:9 144:15 dealt [2] 142:8,9 debate [2] 87:18,25 decide [5] 76:16 80:4 85:5 decide [5] 76:16 80:4 85:5 decide [5] 76:16 80:4 85:5 decide [2] 102:17 139:13 details [1] 109:15 discrimination [6] 12:11 75:5 95:11 96:2 107:12 131:11 discriminatory [2] 96:2 131:11 discussing [3] 56:21 139: 18 148:4 143:9 earlier [3] 21:2 145:6 150: 23 earlier [3] 21:2 145:6 150: 23 early [2] 40:24 66:12 easy [4] 6:10 62:2 111:22 t53:12 encouraging [3] 87:3 12 16 147:9 end [5] 15:14 18:2 19:13 145:2 146:25 easy [4] 6:10 62:2 111:22 t53:12		-	-		
deal [6] 21:25 46:22 101:6 118:24 140:9 144:15 dealt [2] 142:8,9 debate [2] 87:18,25 decide [5] 76:16 80:4 85:5 129:3 139:12 decide [2] 102:17 139:13 decide [2] 102:17 139:13 decide [2] 102:17 139:13 desprioritizing [1] 51:7 describe [2] 5:22 43:20 describe [2] 5:22 43:20 describe [2] 5:22 43:20 design [2] 4:24 43:17 design [2] 53:24 90:4 design [2] 102:17 139:13 details [1] 109:15 discrimination [6] 12.11 75:5 95:11 96:2 107:12 131:11 discriminatory [2] 96:2 131:11 discussing [3] 56:21 139: details [1] 109:15 earlier [3] 21:2 145:6 150: 23 early [2] 40:24 66:12 easy [4] 6:10 62:2 111:22 153:12 edit [2] 64:14 99:25 editing [3] 49:24 86:22 89: enforced [2] 80:10,12	-				-
118:24 140:9 144:15 describe [2] 53:7 131:11 23 end [5] 15:14 18:2 19:13 design [2] 42:4 43:17 design [2] 4:24 43:17 discriminatory [2] 96:2 early [2] 40:24 66:12 end [5] 15:14 18:2 19:13 decide [5] 76:16 80:4 85:5 designed [2] 53:24 90:4 discussing [3] 56:21 139: discussing [3] 56:21 139: editing [3] 49:24 86:22 89: enforce [3] 16:12 37:2,12 decide [2] 102:17 139:13 details [1] 109:15 18 148:4 editing [3] 49:24 86:22 89: enforced [2] 80:10,12					
dealt [2] 142:8,9 design [2] 4:24 43:17 discriminatory [2] 96:2 early [2] 40:24 66:12 145:2 146:25 design [2] 4:24 43:17 discriminatory [2] 96:2 122:22 early [2] 40:24 66:12 145:2 146:25 decide [5] 76:16 80:4 85:5 designed [2] 53:24 90:4 discussing [3] 56:21 139: 153:12 editing [3] 49:24 86:22 89: enforce [3] 16:12 37:2,12 decided [2] 102:17 139:13 details [1] 109:15 18 148:4 editing [3] 49:24 86:22 89: enforced [2] 80:10,12					
debate [2] 87:18,25 designation [1] 135:16 122:22 easy [4] 6:10 62:2 111:22 endorse [1] 149:2 decide [5] 76:16 80:4 85:5 designed [2] 53:24 90:4 discuss [1] 121:7 edsigners [1] 114:14 discussing [3] 56:21 139: editing [3] 49:24 86:22 89: enforce [3] 16:12 37:2,12 decide [2] 102:17 139:13 details [1] 109:15 18 148:4 editing [3] 49:24 86:22 89: enforced [2] 80:10,12					
decide [5] 76:16 80:4 85:5 designed [2] 53:24 90:4 discuss [1] 121:7 153:12 enforce [3] 16:12 37:2,12 decided [2] 102:17 139:13 details [1] 109:15 18 148:4 18 148:4 enforce [2] 80:10,12	-	-		•	
129:3 139:12 designers [1] 114:14 discussing [3] 56:21 edit [2] 64:14 99:25 enforceable [1] 40:20 decided [2] 102:17 139:13 details [1] 109:15 18 148:4 editing [3] 49:24 86:22 89:	-			-	
decided ^[2] 102:17 139:13 details ^[1] 109:15 18 148:4 editing ^[3] 49:24 86:22 89: enforced ^[2] 80:10,12		-			
				-	
					enforcement [1] 112:10

Official

engage [7] 34:8,10 42:7,9 14 101:3 102:9 104:12 47:7,9 50:22 53:4,21 56: factually [9] 125:14 2,7 76:13 80:16 81:13 82 104:15 111:9 131:16 105:2 113:19 119:7 121: 22 60:7 63:9,19 66:14 69:: faile [2] 5:9 57:1 12 84:5,8,9,16 85:22,23 9,12 119:15 139:5 152:13 6 157:4 13 79:2,7 81:10 85:15 85: Faile [4] 5:10 122:10 12 98:10,13 102:5,00 9,12 119:15 139:5 152:13 6 157:4 13 79:2,7 81:10 85:15 85: 8:11 97:12 100:7 103:7,11 26:4,9 27:19,21 32:8 46:7 115:4,12 116:2,14 117:1 engage 10 88:9 evert 01 50:24 104:1,77,19 112:15 114:1,9,18,20,24 45:10 14:5,10 19,22 13:4:87:15 44 engages 10 88:9 everybody [8] 99:14 120:6 122:3 123:3 127:4,8 130: fairly [3] 33:1 43:12 85:5 15,19,25 141:4,5 143:7,15 44 engages 10 55:6 everyone [0] 10:16 135:23 136:9,13 138:5 60:3 143:3 20 144:22 149:23 150:4, ensure [0] 10:16 everyone [0] 10:16 139:5 144:8 146:10 147:1 fairly [3] 31:19 43:12 85:14:45 13:2; ensure [0] 10:16 everyone [0] 10:16 everyone [0] 10:16 139:5 144:8 146:10 147:1 fairly [3] 31:19 45:12 21 145:14 155:16 157:5 engages [1] 55:6 everyone [0] 10:16 everyone [0] 10:16 139:5 144:18 1			Official		
1.04:10 102:11:01 102:11:01 102:11:01 102:11:01 102:11:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01 102:10:01	enforcing [2] 16:15 113:5	22 61:21 75:1,8 98:12 100:	25 32: 2 34: 16,25 38: 18,20	140: 4 148: 14	71:23 72:6,24 73:24,25 74:
engage III 21922 287. 17 145.13 (6 138:15 144-6) 19 71:17 74:23 76:24 77.7. 1ailed IIIs-10 422:10 71 42:51 149.18 (1202) 9.12 119:15 138:15 152:13 6 157-4 9 13 77:12 71 81:0 851 58:13 6 157-4 9 13 77:12 71 81:0 851 58:13 28:4 92:71:02.1 320:487. 71 42:51 141:0 402 91 42:11:0 41:14 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:10 402 71 42:51 141:14:14:14:14:14:14:14:14:14:14:14:14:	engage [7] 34:8,10 42:7,9	14 101:3 102:9 104:12	47:7,9 50:22 53:4,21 56:	factually [1] 125:14	2,7 76: 13 80: 16 81: 13 82:
34/1 64:3 8:17 8:17 8:13 42 157:27 8:10 8:57 8:16:17 FAR [Nie]:11 19:14 20:69 71:14:16:18:12 8:46 71:14:23:23 4:67 1154:24 11:26:14:17:1 regagements 11:00:23 everybody 19:51:41:06 10:41:17:19:112:51:14:11 42:10:19:11:22:44:17:1 1154:24 11:26:14:17:1 regagements 11:00:23 everybody 19:51:41:06 12:23:13:23:13:12:41:06 11:36:12:13:14:11:28:55 11:36:14:14:24:14:14:14:14:14:14:14:14:14:14:14:14:14	104 :15 111 :9 131 :18	105:2 113:19 119:7 121:	22 60:7 63:9,19 66:14 69:	fail [2] 5:9 57:1	12 84:5,8,9,16 85:21,23 86:
0,1219:16138:51 6157:4 8,1197:121007:1037,11 25:40.271:02.132:04.657 123:40.233:117.061 engages ments m65:3 events m70:24 171:177:05.03.177.46132 445:10.6127.271:02.132:04.657 123:23:133:172.46130 engages m158:5 events m70:24 171:177:05.03.177.46132 15:192.23:143:12.661 15:192.23:143:12.661 engages m158:5 events m70:24 103:11.013:21:142.31 133:21.44:31:16 15:192.23:14.61:16 15:192.23:14.61:16 15:192.23:14.61:16 15:192.14:14:14:14:14:14:14:14:14:14:14:14:14:1	engaged [12] 19:22 26:7	17 134: 5,13,16 138: 15 144:	19 71 :11 74 :23 76 :24 77 :7,	failed [2] 5:10 122:10	12 98: 10,13 102: 5,20 108:
153:11 event 190:24 104:1,17,19112:15114:11, 45:16,18:12:24:16:19 124:3.02.33.137:16:16 engagem 188:9 everybody 199:14:12:06 122:3:13:37:4,0:130: 139:24 15:19,25:14:14:15:16:17:15 engagem 185:6 everybody 199:14:12:06 139:31:44:14:14:16:16:12:23:44:13 60:3:14:33 21:15:14:14:15:16:16:75:5 ennage 11:10:15:15:10:74 52:16:85:9 11:15:02:12:55: faits 11:42:11 faits 11:42:11 faits 11:42:21:14:15:15:16:17:15 ensuring 11:42:13:24:47:3 50:32:11:06:77:16:12:24:26:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:16:17:17:17:16:17:17:17:16:17:17:16:17:17:16:17:17:16:17:16:17:17:16:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:16:17:17:17:17:17:17:17:17:17:17:17:17:17:	34 :16 46 :3 56 :17 66 :13 99 :	4,24 154:20,21 155:23 156:	13 79: 2,7 81: 10 85: 15 88:	FAIR [16] 5:11 19:14 20:9	7 112: 15 114: 9,18,20,24
engage miss (0.6022) events (0.7021) 17.117.88.9.17.118:23 4.5.10 19.22.1364.8.1377.15.4 engage (0.85.9) everybody (0.91.120.6) 132.52.4 15.12.5 15.12.5 21.42.5.23.13.5.1 21.42.23.43.11 60.31.43.3 21.44.22.14.9.23.40.01 enough (0.61.01.51.3) everything (0.81.0.26.13) 139.51.44.8.14.61.01.47.7 faith (0.22.4) faith (0.22.4) faith (0.22.4) faith (0.22.4) faith (0.22.4) faith (0.22.4) faith (0.12.2)	9,12 119: 15 139 :5 152 :13	6 157 :4	8,11 97: 12 100: 7 103: 7,11	26: 4,9 27: 19,21 32: 8 46: 7	115: 4,12 116: 2,14 117: 1,4
ongaging UB8:9 engaging UB8:9 engaging UB5:6 overybody PB9:14 1206 122:3 123:3 127:4, 8 130: fairty PB 321:43:12 34:13 15,10.25 143:4, 6 143;7, 141:125 412:5 engaging UB5:6 everyone III 10:16 135:23 136:9,1 313:5 603:143:3 21 161:14 185:16 167:5 enugh PB 10:12:125 52:16 85:9 11 16:02 163:14 44:14 44:14:14 613:143:143:14 613:143:3 21 161:14 185:16 167:5 enugh PB 12:10 115:17 52:16 85:9 11 16:02 163:14 extend III 12:21:1 fils III 12:11 fils III 12:11 <td>153:11</td> <td>event [1] 50:24</td> <td>104:1,17,19 112:15 114:11,</td> <td>48:16,18 51:22 74:18 103:</td> <td>124:3,20,23 131:12,16 135:</td>	153: 11	event [1] 50:24	104: 1,17,19 112: 15 114: 11,	48: 16,18 51: 22 74: 18 103:	124:3,20,23 131:12,16 135:
engaging [0] 2:42:5 8::3 33:24 10 131:6 133:2 143:11 fairness [0]:21:23 4::3 20 144:22 149:23 4:00. enging [0] 2:10 63:10 39:5 144:8 146:10 147; fairness [0]:21:23 4::3 21 145:21 4:23 enough [0] 10:51:10 70:12 20 40:12:3 faith [0]:42:11	engagements [1] 60:23	events [1] 70:21	17 117: 6,8,9,17 118: 23	4,5,10	19,22 136: 4,8 137: 15 140:
4125 everyone III 10:16 135:23 138:56 60:3 143.3 21 161:14 185:16 17:52 ennance II 21:10 11:51 52:16 85:9 53:16 34:83 46:10 147: fairs iII 148:18 fairs	engages [1] 88:9	everybody [3] 99:14 120:6		fairly [3] 33:1 43:12 85:5	15,19,25 141: 4,5 143: 7,14,
engines (195:6) everything (4):0.26:13 139:5 144:8 144:0 147; faits (144:8):1 firs (146:8) firs (146:8) enough (19:6):10.21:2.26; evidence (19:03:1) expressly (19:16):6 faits (142:11) fits (14:2:14) fits (14:14) fits (14:14)	engaging [3] 24:25 34:13	133: 24	10 131: 6 133: 2 134: 3,11	fairness [4] 21:23 44:13	20 144:22 149:23 150:6,12,
onhance (in 2:11:0:16:12) S2:16 85:0 11 150:22 153:5 fails (in 142:11) fit (in 8:6:10:224 11 55:17 56:25 67:8 68:13 oxact (i) 142:0:12 oxact (i) 142:0:12 fails (ii) 142:11 fails (iii) 142:11 fails (iiii) 142:11 <td></td> <td></td> <td>135:23 136:9,13 138:5</td> <td>60:3 143:3</td> <td>21 151:14 155:16 157:5,7</td>			135:23 136:9,13 138:5	60: 3 143 :3	21 151: 14 155: 16 157: 5,7
enough (19:610 21:2 22:1 evidence 01103:1 expressly (19:1:6) fails (12:1:1 filts (12:2:2 47:17 86:2:2 11 55:17 65:257 66:13 exactly (19:8:16) exactly (19:8:16) familiar (19:4:9) familiar (19:4:9) ensure (11 44:23 15:3 44: 73:87 71:0 22:3 88:7 91: 18:157:22 14:12:6 1:17 13:7; familiar (19:5:0 25:16:1) familiar (19:5:12) familiar (19:5:12) familiar (19:5:12) familiar (19:5:12) familiar (19:5:12) familiar (19:5:12) familiar (19:5:13) familiar (19:5:13) familiar (19:12) familiar (11:1) familiar (11:1)	-	everything [4] 8:10 26:13	139:5 144:8 146:10 147:		first-order [1] 132:3
11 55:17 66:25 57:6 86:13 exact 1/42:61 (20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 20:16 2			11 150: 22 153: 5	faith [1] 42:11	
17:1 95:17 105:17 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1 17:1	enough [11] 6:10 21:22 52:		expressly [1] 81:6		fits [4] 24:22 47:17 86:22
ensuring III 443:3 5.28:153:154:1857:12 21.41:26:124:74:16:81: farther III 55:18 fiesh III 129:6 entarial III 107:15 147:3154:15.24 21.41:26:17:133:7 fasts III 105:20:25:156: float III 129:6 float IIII 129:6 float IIIIIIIIIIIIIIIIIIIIIIIIIIIIIIIIIIII	11 55 :17 56 :25 57 :8 68 :13				
ensuring in 14:23 15:3 44: 11 14:57 73:6 77:10 82:23 88:7 91: 16:19 18 125;7 126:17 133:7 16:19 fast B1155:20 2516:5: 19 156:30 fleshed In 129:8 10 at 10 86:15 enterprise [01 3:13 23:17] 16:19 147:3 145:15.24 example [01 23:20 39:11 example [01 23:20 39:11 26 51:78 88: 114:22 117 fast B1155:20 251:23 20 155:16 fast B1155:20 251:23 21 31:16 132:17 fast B115:18 fast B112:12 fast B115:18 fast B115:18 <td>71:1 95:17 105:15 107:4</td> <td>exactly [18] 8:16 20:18 25:</td> <td>extent [12] 6:7 11:17,19 40:</td> <td></td> <td>-</td>	71 :1 95 :17 105 :15 107 :4	exactly [18] 8:16 20:18 25:	extent [12] 6:7 11:17,19 40:		-
11 145:12 5 103:21 106:7 115:04 6 408 154:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 164:6 1		5 28 :13 53 :1 54 :18 57 :22	21 41 :24 61 :24 74 :16 81 :		
entaried [01/07:15 147:3 154:15,24 example [10/23:0 39:11 example [10/23:0 39:11 example [10/23:0 39:11 favor [10/23:13 29:11 favor [10/23:13 29:12 favor [10/23:13 29:13 29:12 favor [10/23:13 29:13 29:13 29:13 29:13 29:13 29:13 29:12 favor [10/23:13 29:13 29:13 29:13 29:		73:6 77:10 82:23 88:7 91:		fast [3] 155:20,25 156:1	fleshed [1] 129:8
onterd III 39:22 enterprise IP 13:13 23:17 enterprise IP 15:16 enterprise IP 15:17 enterprise IP 15:17 enterprise IP 15:18 enterprise IP 15:18 enterprise IP 15:18 enterprise IP 15:18 enterprise IP 15:18 enterprise IP 15:18 enterprise IP 15:19 enterprise IP 15:10 enterprise IP 15:10 ente					
Interprise III 3:13 23:17 44:25 50:6 56:2 58:3 60: 37:1 Favors 10:2:33 Favors 10:2				,	FLORIDA [44] 1:4 2:3 14:9
		-	-		32:21 52:15 55:23 58:9 63:
enterprises (0.23): 4.45: 2.13119.132:7 eves (0.50:2) February (0.11:12) February (0.11:12) 104:14 105:9 100:25 00:25 00:10 103:13 entities (0.23): 14.45: 19 exception (0.23): 14.35: 11 fac: (0.23): 14.35: 12 136:12 137: 133: 11 136:12 137: 133: 11 136:12 137: 133: 11 136:12 137: 137: 138: 11 136:12 137: 137: 138: 11 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 12 136:12 137: 137: 138: 13 136:12 137: 137: 137: 138: 13 136:13 137: 137: 137: 137: 137: 137: 137: 1	-			-	
1 64:15:100:12.22 examples III79:5 entirely 95:19 154:7 exception [2] 115:413:19 face ID58:17 60:16 61:8 114:9:146:13 19 exceptions [2] 145:4143:19 face ID58:17 60:16 61:8 114:9:146:13 exceptions [2] 64:31 15:9 face ID58:17 60:16 61:8 face ID58:17 60:16 61:8 114:9:146:13 excested [1] 87:12 23 face ID58:17 60:16 61:8 face ID58:17 60:16 61:8 114:9:146:13 exclude [1] 81:12 exclude [1] 81:12 exclude [1] 81:12 face ID58:17 60:16 61:3 114:9:147:11 face ID58:17 60:16 61:3 face ID58:17 60:16 61:3 face ID58:17 60:16 61:3 114:9:12:71 face ID58:17 60:16 61:3 face ID58:17 60:16 61:3 face ID58:17 60:16 61:3 120:7 face ID58:17 60:16 61:3 face ID58:17 60:16 61:3 face ID58:17 60:16 61:3 environment [3] 30:25 39: excludes [1] 97:25 10:23 face ID58:17 60:16 61:3 face ID58:17 60:16 61:3 environment [3] 30:25 39: excludes [1] 97:25 10:23 face ID58:17 60:16 61:8 face ID58:17 60:16 61:8 environment [3] 30:25 39: excludes [1] 97:21 123:33:48:63 face ID58:17 60:16 61:8 face ID58:17 60:16 61:8 excludes [1] 98:14:43:17 face ID58:17 60:16 61:8 face			-		
entire [2] 95:19 164:7 entirely [4] 52:11 36:11, 20 155:18 exceptions [2] 36:18,19 exceptions [2] 36:18,19 exclude [12] 24:10 38:19 172; 33 18:79 78:27 97:14 31:22 45:28 33 18:79 78:79 71:39 12:39 12:39 39 19:77 101:15 102:8:10, 102:7 entiry [3] 102:10 envision [10] 84:3 equal [3] 76:15 103:14 equal [3] 76:15 103:14 excludes [19] 30:11 13:18 excludes [19] 7:14 79:8 119:24 excludes [19] 37:14 79:8 119:24 excluse [10] 45:6 exercise [10] 45:6 exercise [10] 45:6 exercise [10] 45:10 exercise [10] 45:11	-		eyes [1] 50:2	5	104:14 105:9 106:25 109:
entitles 93:21 136:11 19 face 176:17 60:15 61:16 61:16 61:16 61:16 61:17 60:15 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:17 61:16 61:16 61:16 61:17 61:16 61:16 61:16 61:17 61:16 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:17 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 61:16 <t< td=""><td></td><td></td><td>F</td><td></td><td></td></t<>			F		
entitiely (#3.21 (36.1), 20 (35.1) exceptions (#3.6:16,19) exceptions (#3.6:16,19) exceptions (#3.6:16,19) feed (#2.5:10.89.2.94:13.38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,88:6.8:19) entitiel (#1.26:12.016:13) excessively (#8.7:12) excessively (#8.7:12) fs.6:10.89.2.94:13.38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.8:13,38:6.2:14:14:11,11,11,11,11,11,11,11,11,11,11,11,11,		•			
20 100:16 23 1114:9:148:13 excessively (187:12 23 1114:9:148:13 excessively (187:12 23 1114:9:148:13 excissed (189:12 55:10.89:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:13.98:2.94:14.98:2.14:14.14:14.14:14:14:14:14:14:14:14:14:14:14:14:14:1	-				136: 12 137: 3,7 138: 9 139:
Facebook (20) 15:16 16:2 Facebook (20) 15:16 16:3 Facebook (20) 15:16 16:2 Faceboo					1,2,16 141: 7,8 146: 4,6 151:
111:13:15:17:3 12:11 101:35:11:10:17:3 12:11 111:13:15:12 25:14:16:26:12:33:4:36:8 138:20:147:10 138:22:148:122:148:122:148:13 111:13:15:12 33:19:79:11:19:11:10:17:3 33:19:78:179:11:19:11:11:11 130:6:16:6:9 112:2 112:51:15:12:12:15:13:124:7 12:13:12:51:11:11:11:11:11:11:11:11:11:11:11:11:			-		
180:12 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 81:22 81 36:19 78:279:14 98:23 100: 130:6 156:9 102:21 17 121:5,13 124:7 excludes [2] 97:25 102:3 fold [16:12:18 130:15 focus [2] 70:2 151:16 equal [2] 76:15 103:14 exclusion [0] 134:7 exclusion [0] 134:7 28:15:20 29:16 31:9 34: fold [16:12:23 focus [2] 70:2 95:22 77:29 fold [16:19 12:12 force [2] 126:12 139:22 ersence [0] 42:6 exercised [0] 96:16 exercised [0] 96:16 119:23 42:3 82:3 129:3,23 filtering [11:22:7 119:22 fortm [0] 122:7 force [2] 126:22 31:6:19 fortm [0] 122:2 131:4 153 105:13 essence [0] 40:11 103:17 10:2:0 12:12 filtering [11:13:16:17; 10:2:14 13:15] fortm [0] 132:2 143:5 fortm [0] 133:12 33:14 179:21 fortm [0] 133:14 153:16 fortm [0] 133:14 153:16 fortm [0] 133:12 14:15 fore(10] 131:122 fortm [0] 133:12 14:15		-			
10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:12 10:11 10:12 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 10:11 11:11 11:11 11:11 11:11 <td< td=""><td></td><td></td><td></td><td></td><td></td></td<>					
102:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:7 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17 121:1 17				5	
102.17 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13 1012.13	-		,		
chvironment [9] 30:25 39: excludes [2] 97:25 102:3 20 147:10 felt [1] 19:16 focus 91 07:25 29:22 envision [1] 84:3 exclusion [1] 134:18 exclusion [1] 134:18 20 147:10 felt [1] 19:16 focus 91 07:25 39:22 envision [1] 84:3 exclusion [1] 134:18 exclusion [1] 134:18 exclusion [1] 134:18 facebook's [1] 72:2 felt [1] 19:16 focus 91 07:25 39:22 ers [2] 74:21 118:22 exclusively [1] 34:7 exclusively [1] 34:7 facebook's [1] 72:2 file [1] 14:16 focus 91 07:23 29:22 escape [2] 80:25 81:3 excreise [4] 49:14 67:7 86: 81:3 58:13,18 67:22 76:21 file [1] 19:16 forced [2] 63:23 67:20 essence [1] 12:4 exercising [9] 13:23 46:8, 11 facially [4] 41:11 67:24 68: filters [1] 18:1 fortum 19 38:6 48:2 93:3 for:13 exercising [9] 13:23 46:8, 1 facially [4] 41:11 67:24 68: filters [1] 18:1 fortum 19 38:6 48:2 93:3 filter [1] 9:14 facilitate [1] 5:19 facilitate [1] 5:19 facilitate [1] 19:14 filters [1] 13:16 fortum 19 38:6 48:2 93:3 essence [1] 42:6 explains [1] 143:6 facilitate [1] 5:19 facilitate [1] 5:19 facilitate [1] 9:14 facilitate [1] 9:14 forum [2] 38:14 forum [2] 38:16 48:2 <					
einvindiment (93.25.35) excludes (93.25.102.) excluding (93.25.102.) Facebook's (1) 25:12 Facebook's (1) 25:13:14 Facebook's (1) 25:12					
12110.22 190.21 10.22 120.3 10.33.6 envision (1) 84:3 190.21 10.32 equal [2] 76:15 103:14 exclusion (1) 134:18 exclusion (1) 134:18 equal [2] 76:15 103:14 exclusively (1) 34:7 facial [20] 6:6, 14, 18 25:24 field (1) 6:2:3 footnote [2] 35:23 37:9 equal [2] 76:15 103:14 exclusively (1) 34:7 exclusively (1) 34:7 facial [20] 6:6, 14, 18 25:24 field (1) 6:2:3 footnote [2] 35:23 77:9 escape [2] 80:25 81:3 exercise [4] 49:14 67:7 86: exercise [4] 49:14 67:7 86: fill 51:9 154:23 footnote [2] 35:23 77:9 ESQUIRE [1] 2:4 exercised [1] 96:16 exercising [0] 13:23 46:8, 13:25 128:128:128:13,16 foreign [1] 12:11 fort [3] 18:25 110:2 essentially [7] 47:1 65:5 14 48:1 64:6 65:1 87:7 13:15 61:10:11 fill 19:19 77:12 fort [3] 18:25 110:2 fort [3] 12:23 48:2 fort [3] 18:11 fort [3] 18:2 fort [3] 12:2					
erunal [276:15 103:14 equalizing [0:45:6 115:24 facial [38] 6:6,14,18 25:24 exclusively [0:3:7,6] facial [38] 6:6,14,18 25:24 28:15,20 29:16 319 34: 23:418 54:17,25 55:16 57: 8:13 86:13,18 67:22 76:21 8:13 86:13,18 67:22 76:21 8:13 86:13,18 67:22 76:21 8:123 82:3 83:1,2 95:3,23 figure [0:2:3] figure [0:2:3] 126:12 129:128:13,16 force [2:12:12:129:128:13,16 force [2:12:12:129:128:13,16 force [2:12:129:128:13,16 force [2:12:129:128:13,16 foregin [0:122:139:14 facilitate [0:15:1159 forum [0:32:17,20:33:19:35: forum [0:32:14 facility [0:178:3 fact [0:14:116:17 explanation [0:30:7 explanation [0:30:7 s7:578:16,18,20 79:18 explanation [0:30:7 explanation [0:30:7 s7:578:16,18,20 79:18 explains [0:143:12 explanation [0:30:7 expresse [2:39:31:120 euphemisms [0:113:12 even [8:12:29:13:14 fact [0:14:114:151;72:1 fact [0:14:129:10;41:20;24:52:7, fact [0:14:129:10;41:129:10;41:42:02;45:2,7, even [8:4:22:10:51:31:44;11:42:11;22 forum [0:14:12:42:34:45:11 fact [0:14:12:47] fact [0:16:12:25 fact [0:14:129:10;41:42:02;45:2,7, fact [0:128:13:41;13:14;11:42:11;22 fact [0:16:21:29;11;41 fact [0:16:12:29;36:31:13;15;16;41;13:15;11:123:10;42:125: fact [0:19:123 fact [0:16:12:19;10:34:13;12;44;14:12;12;123:10;44:12;45;125;16;45;15;44;14:11;44:11;44:12;12;123:10;44:2;155;16;45;15;44;14:13:12;42:123:10;44:22:125;11:14;14:14:11;122;123					,
equalizing 10 45:6 exclusively 10 34:7 28:15,20 29:1,6 31:9 34: fight 10 45:9 62:23 126:17 force 12 126:12 139:22 errs 12 74:21 118:22 excuse 13 26:5 46:6 49:7 excreise 14 99:14 67:7 86: 8:13 58:13,18 67:22 76:21 fight 10 45:9 62:23 126:17 force 12 126:12 139:22 ESQ 14 3:3,6,9,13 10 93:13 10 93:13 10 93:13 11 352:3 46:8, 13:28 22:3 83:12 92:4, filter 10 124:7 filters 10 18:1 force 12 122:1 213:4 force 12 122:1 213:4 force 12 122:1 213:4 force 12 122:1 213:4 force 12 126:12 139:2 force 12 126:12 139:1 force 12 126:12 force 12 126:12 <t< td=""><td></td><td></td><td></td><td></td><td></td></t<>					
etric [27] 421 (18:22) force [27] 621 (28:23) 128:13,16 force [28] 128:12,17 fortinate [17] 621 (28:23) 128:13,16 fortinate [17] 621 (28:22) 12	-				
erscape [2] 80:25 81:3 exercise [4] 49:14 67:7 86: 8,13 58:13,18 67:22 76:21 figure [10:12:13] foreign [10:21:14] ESQ [4] 3:3,6,9,13 10 93:13 exercise [4] 49:14 67:7 86: 8,13 58:13,18 67:22 76:21 filtering [11:24:7] ESQ [4] 2:4 exercise [4] 96:16 exercise [4] 96:16 exercise [4] 49:14 67:7 86: filtering [11:24:7] essence [1] 42:6 exercise [4] 96:16 exercise [4] 49:11 67:24 68: filtering [11:24:7] essentially [7] 47:1 65:5 14 48:1 64:6 65:1 87:7 facially [4] 41:11 67:24 68: filtering [1] 124:7 105:13 exhausted [1] 89:7 existence [2] 40:12,12 facially [4] 41:11 67:24 68: final [4] 80:7 104:24 105:19 facially [4] 91:21 faciallitate [1] 5:19 facialitate [1] 5:115:9 facialitate [1] 143:6 fore [1] 42:7 explain [1] 86:2 explain [1] 86:2 facilities [1] 14:11 fore [7] 55:22 57:5,6 82:7 fore [1] 68:9 104:10 142:15 11:13,15,17,19,24 13:10 explain [1] 86:2 explain [1] 86:1 fact [9] 41:22 19:11,11 filtering [1] 135:14 free [1] 61:19 11:13,15,17,19,24 13:10 explain [1] 86:2 facility [1] 77:18 fact [9] 41:23:19 forum [2] 41:19 forum [2] 41:19 forum [2] 41:19 1				•	
ESQ [#3:3,6,9,13] EO 93:13 10 93:13 81:23 82:3 83:1,2 95:3,23 filtering [1 124:7] forget [2 82] 91:16:19 ESQ [#1 42:6] exercised [1] 96:16 exercising [9] 13:23 46:8, 118:25 120:8 128:3 129:4, filtering [1 124:7] forget [2 82] 91:16:19 essentially [7] 47:1 65:5 14 48:1 64:6 65:1 87:7 102:20 124:6 13 154:3,10 filtering [1 124:7] fortunate [1] 66:5 establish [9] 84:1 144:3 extansted [1 89:7] existence [2 40:12,12] facially [4] 41:11 67:24 68: 19 137:18 finally [2] 91:4 133:15 forum [9] 38:6 48:2 93:3 145:4 expelied [1] 131:22 explain [1] 66:2 facilitating [1] 5:5 115:9 finally [2] 91:4 133:15 forum [9] 38:6 48:2 93:3 115:25 116:5 11:3,15,17,19,24 13:10 explain [1] 66:2 facilitating [1] 5:5 115:9 finally [2] 91:4 133:15 forum [2] 39:12 143:8 11:13,15,17,19,24 13:10 explaint [1] 46:10 explaint [1] 46:10 fact [20] 4:18 6:14 9:17 13:1 finset [1] 40:18 finset [1] 40:18 11:13,15,17,19,24 13:14 express [5 5:11 17:7 s9:20 40:4 46:23 47:5 finset [1] 40:18 finse[1] 40:14 finset [1] 40:14 <		• • • • • • • • • • • • • • • • • • • •			• • · · · · · · ·
ESQUIRE [1] 2:4 exercised [1] 96:16 118:25 120:8 128:3 129:4, 4,25 138:6 140:8,11 151: 13 154:3,10 filters [1] 18:1 forth [3] 12:2 131:4 153 essence [1] 42:6 exercised [1] 91:22 14 48:1 64:6 65:1 87:7 13 154:3,10 filters [1] 18:1 forth [3] 12:2 131:4 153 67:7 90:3 100:11 103:17 102:20 124:6 19 81:7 13 154:3,10 facially [4] 41:11 67:24 68: filters [1] 18:1 forth [3] 12:2 131:4 153 105:13 exhausted [1] 89:7 exhausted [1] 89:7 facillitate [1] 5:19 facillitate [1] 5:19 fints [1] 413:15 forum [2] 38:6 48:2 93:3 145:4 expansive [1] 42:5 facillitate [1] 5:19 facillitate [1] 5:19 facillitate [1] 41:11 free [1] 41:10 forum [2] 39:12 143:8 119:21 facillitate [1] 41:11 facillitate [1] 41:11 filters [1] 48:11 free [1] 41:10 forum [2] 39:12 143:8 119:17, 19:23 explain [1] 43:6 facillitate [1] 41:11 filters [1] 41:11 free [1] 41:10 forum [2] 39:12 143:8 1119:12 explain [1] 43:6 facillity [1] 46:12 facillity [1] 48:11 free [1] 41:11 free [1] 41:10 free					-
cssence (i) 42:6 exercising (9) 13:23 46:8, 4,25 138:6 140:8,11 151: filters (1) 60:1 fortm(6) 122.2 151:4 163:5 67:7 90:3 100:11 103:17 102:20 124:6 14 48:1 64:6 65:1 87:7 facially (4) 41:11 67:24 68: fintlers (1) 60:1 fortm (5) 122.2 151:4 153:15 105:13 exhausted (1) 89:7 exhausted (1) 89:7 facially (4) 41:11 67:24 68: finally (2) 91:4 133:15 forum (5) 38:6 48:2 93:3 145:4 expansive (1) 42:5 explain (1) 86:2 facilitate (1) 5:19 facilitate (1) 15:19 facilitate (1) 137:16 146:18 forum (2) 39:12 143:8 ET (3) 1:4,8 147:11 explain (1) 86:2 explain (1) 48:2 facilities (1) 14:11 fine (7) 55:22 57:5, 6 82:7 fore (10) 41:16 12:25 13:54 55:9,10,24 56:4,21 explain (1) 30:7 explain (1) 10:7 fact (30) 4:18 6:14 9:17 13: finish (1) 40:18 free (10) 135:14 free (10) 43:13 41:19 44:2 6: 57:5 78:16,18,20 79:18 explicitly (1) 46:10 express (5) 56:1 119:5 120: fors: 16:23 10:3; 14 finished (1) 83:13 fired (6) 68:9 104:10 14 6:tsy's (1) 13:14 express (5) 56:1 119:5 120: fore (1) 51:23 fors: 10:9 4:4,20,24 5:2,7, 4 156:13 157:3,14 euphemism (4) 93:17,24, 2 143:13 147:25 fise: 62:3 10:3 firiend (6) 68:				•	-
essentially [7] 47:1 65:5 final [4] 80:7 104:24 105:19 67:7 90:3 100:11 103:17 14 48:1 64:6 65:1 87:7 105:13 exhausted [1] 89:7 establish [3] 84:1 144:3 exhausted [1] 89:7 establish [3] 84:1 144:3 expansive [1] 42:5 14 5:4 expansive [1] 42:5 ether [1] 90:3 expleid [1] 131:22 expleid [1] 131:22 facilities [1] 14:11 ether [1] 90:3 expleid [1] 131:22 explant [1] 86:2 explant [1] 143:6 explaint [1] 143:6 explaint [1] 16:17 explaint [1] 16:17 explaint [1] 16:17 explaint [1] 16:17 explaint [1] 16:17 explaint [1] 16:12 explaint [1] 16:17 explores			,		
67:7 90:3 100:11 103:17 102:20 124:6 102:20 124:6 19 137:18 154:15 154:15 115:25 116:5 establish [3] 84:1 144:3 expansive [1] 42:5 expansive [1] 42:5 19 137:18 facially [4] 41:11 67:24 68: 154:15 115:25 116:5 145:4 expansive [1] 42:5 expansive [1] 42:5 facially [4] 41:11 67:24 68: 19 137:18 [ettri [1] 90:3 expelled [1] 131:22 explain [1] 86:2 faciallitating [3] 5:5 115:9 153:14 facially [4] 41:11 ether [1] 90:3 explain [1] 86:2 explains [1] 143:6 facially [4] 41:11 facially [4] 91:4 facially [4] 41:11 find [8] 32:17,20 33:19 35: forums [2] 41:5 120:19 11:13,15,17,19,24 13:10 explains [1] 143:6 explains [1] 143:6 facilitate [1] 5:19 facilitate [1] 5:22 57:5,6 82:7 fine [1] 5:22 57:5,6 82:7 fine [1] 46:10 46:12 fine [1] 5:22 57:5,6 82:7 fine [1] 41:15 10:16 12:25 33:4 55:9,10,24 56:4,21 explicit [1] 16:17 explicit [1] 16:17 fact [30] 41:18 6:14 9:17 13: fine [1] 42:14 fine [1] 42:14 fine [1] 83:13 friend [6] 68:9 104:10 14 25 122:25 explicit [1] 16:17 explicit [1] 16:17 25 39:20 40:4 46:23 47:5, fist [1] 91:42:4 5:2,7,7 25 7:18 11:14 14:1,1,22		•		, , , , , , , , , , , , , , , , , , ,	
105:13 exhausted [1] 89:7 19 137:18 finally [2] 91:4 133:15 forums [2] 4:15 120:19 145:4 expansive [1] 42:5 expansive [1] 42:5 facilitating [3] 5:5 115:9 finally [2] 91:4 133:15 forums [2] 4:15 120:19 ET [3] 1:4,8 147:11 expelled [1] 131:22 explain [1] 86:2 facilities [1] 14:11 fine [7] 55:22 57:5,6 82:7 forums [2] 4:15 10:16 12:25 Etsy [21] 9:23,23 10:13,13 explain [1] 48:6 explain [1] 43:6 fact [30] 4:18 6:14 9:17 13: fine [7] 55:22 57:5,6 82:7 free [10] 4:15 10:16 12:25 11:13,15,17,19,24 13:10 explanation [1] 30:7 explicit [1] 16:17 fact [30] 4:18 6:14 9:17 13: finish [1] 40:18 free [10] 4:15 10:16 12:25 33:4 55:9,10,24 56:4,21 explicit [1] 16:17 explicit [1] 16:17 f3 58:8,15 62:7 68:23 103: finish [1] 40:18 freely [2] 119:6 120:3 57:5 78:16,18,20 79:18 express [5 56:1 119:5 120: f3 58:8,15 62:7 68:23 103: first [109] 4:4,20,24 5:2,7, 4 156:13 157:3,14 euphemism [4] 93:17,24, 2 143:13 147:25 express [2] 39:3 131:20 express [2] 39:3 131:20 facts [4] 28:2,9 36:12 57: fired [4] 62:17,11 9 157:2 even [36] 4:22 10:5 13:14 1 115:1 123:10 124:5 125: facts [4] 28:2,9 36:12 57: facts [4] 28:2,9 36:12 5					
Total StatisticExplanation (1) 30:7facilitate (1) 5:19find (8) 32:17,20 33:19 35:forward (1) 110:2explanation (1) 30:7explanation (1) 30:7facilities (1) 14:11fine (7) 55:22 57:5,6 82:7free (10) 4:15 10:16 12:2533:4 55:9,10,24 56:4,21explanation (1) 30:7fact (30) 4:18 6:14 9:17 13:finish (1) 40:18freel (1) 135:14ether (1) 90:3explanation (1) 30:7fact (30) 4:18 6:14 9:17 13:finish (1) 40:18free (10) 4:15 10:16 12:2511:3,15,17,19,24 13:10explanation (1) 30:7fact (30) 4:18 6:14 9:17 13:finish (1) 40:18freel (1) 135:1433:4 55:9,10,24 56:4,21explicit (1) 16:1711 17:17,18,21,22 19:1,11,finish (1) 40:18freel (2) 119:6 120:357:5 78:16,18,20 79:18explicit (1) 16:1725 39:20 40:4 46:23 47:5,finished (1) 83:13friend (6) 68:9 104:10 14euphemism (4) 93:17,24,2 143:13 147:259 109:10 110:18 118:25first (109) 4:4,20,24 5:2,7,4 156:13 157:3,14euphemisms (1) 116:20expression (13) 13:12 38:factor (1) 51:23factor (1) 51:23firend (5) 19:4 32:4 35:evaluate (1) 60:1221 53:9 55:19 56:11,17 85:facts (4) 28:2,9 36:12 57:1,9,10 43:17,20,21,23 44:1,79:5 103:5even (36) 4:22 10:5 13:141 115:1 123:10 124:5 125:facts (4) 28:2,9 36:12 57:4 45:17 46:25 50:25 51:19front (5) 15:14 18:2 31:1315:25 16:12 19:10 34:7 37:3 146:2,171952:21,22 6:22 4 63:5,5 64:52:18 69:3			•		
145:4 expansive (1) 42:5 (1) facilitating (3) 5:5 115:9 facilitating (3) 5:5 115					
ET (3) 1:4,8 147:11 expelled (1) 131:22 119:21 119:21 153:14 frankly (1) 148:11 ether (1) 90:3 explain (1) 86:2 facilities (1) 14:11 free (10) 4:15 10:16 12:25 Etsy [21] 9:23,23 10:13,13 explains (1) 186:2 explains (1) 130:7 facilities (1) 14:11 facilities (1) 14:11 facilities (1) 14:11 free (10) 4:15 10:16 12:25 33:4 55:9,10,24 56:4,21 explicit (1) 16:17 explicit (1) 16:17 fact [30] 4:18 6:14 9:17 13: finish (1) 40:18 free (10) 4:15 10:16 12:25 57:5 78:16,18,20 79:18 explicitly (1) 46:10 25 39:20 40:4 46:23 47:5, finished (1) 83:13 friend (6) 68:9 104:10 14 Etsy's (1) 13:14 express (5) 56:1 119:5 120: 13 58:8,15 62:7 68:23 103: first (109) 4:4,20,24 5:2,7, 4 156:13 157:3,14 euphemisms (1) 116:20 expression (13) 13:12 38: 9 109:10 110:18 118:25 25 7:18 11:14 14:1,1,22 9 157:2 evaluate (1) 60:12 21 53:9 55:19 56:11,178 5: facts [4] 28:2,9 36:12 57: 14 55:17,20; 12:3 44:1, 79:5 103:5 even (36) 4:22 10:5 13:14 1 15:1 123:10 124:5 125: 19 52:12,22 62:24 63:5,5 64: 52:18 69:3				,	
c1 (8) 1.4,8 (147.11) explain (1) 81:22 facilities (1) 14:11 final Riy (1) 40:11 ether (1) 90:3 explain (1) 86:2 facilities (1) 14:11 fine (7) 55:22 57:5,6 82:7 free (10) 4:15 10:16 12:25 Etsy (21) 9:23,23 10:13,13 explains (1) 143:6 explains (1) 143:6 facilities (1) 14:11 fine (7) 55:22 57:5,6 82:7 free (10) 4:15 10:16 12:25 33:4 55:9,10,24 56:4,21 explaint (1) 16:17 explaint (1) 16:17 fact [30] 4:18 6:14 9:17 13: finishe (1) 135:14 4 66:25 115:9 57:5 78:16,18,20 79:18 expless [5] 56:1 119:5 120: fast 8:15 62:7 68:23 103: finished (1) 83:13 friend [6] 68:9 104:10 14 Etsy's (1) 13:14 express [5] 56:1 119:5 120: 2 143:13 147:25 13 58:8,15 62:7 68:23 103: finished (1) 83:13 friend's [4] 76:23 85:8 10 euphemisms [4] 93:17,24, 2 143:13 147:25 122:17 140:14 155:17,21 15:2,6,10 20:16 21:7,11 9 157:2 euphemisms [1] 116:20 expression [13] 13:12 38: facts [4] 28:2,9 36:12 57: 1,9,10 43:17,20,21,23 44:1, 79:5 103:5 evaluate [1] 60:12 21 53:9 55:19 56:11,17 85: facts [4] 28:2,9 36:12 57: 4 45:17 46:25 50:25 51:19 front [5] 15:14 18:2 31:13 15:25 16:12 19:10 34:7 37: 3 146:2,17 19 52:21,22		•	-		
etter (3) 9:03explain (3) 0022inter (3) 0022inter (3) 0022inter (3) 0022inter (3) 0022Etsy [21] 9:23,23 10:13,13explains (1) 143:6explains (1) 143:6facility (1) 78:384:14 87:18,2515:3 23:13 41:19 44:2 6311:13,15,17,19,24 13:10explaint (1) 30:7explaint (1) 10:17facility (1) 78:3fact [30] 4:18 6:14 9:17 13:11:35:144 66:25 115:933:4 55:9,10,24 56:4,21explicit (1) 16:17explicit (1) 16:1725 39:20 40:4 46:23 47:5,finished (1) 83:13friend [6] 68:9 104:10 14Etsy's (1) 13:14express [5] 56:1 119:5 120:2 143:13 147:2513 58:8,15 62:7 68:23 103:firist (109) 4:4,20,24 5:2,7,4 156:13 157:3,14euphemisms (4) 93:17,24,2 143:13 147:25expresses [2] 39:3 131:209 109:10 110:18 118:2525 7:18 11:14 14:1,1,22friend's (4) 76:23 85:8 10:euphemisms (1) 116:20expression (13) 13:12 38:expression (13) 13:12 38:156:3,822:3,8 31:1 37:9,18,24 38:friends [5] 19:4 32:4 35:evaluate (1) 60:1221 53:9 55:19 56:11,17 85:facts (4) 28:2,9 36:12 57:1,9,10 43:17,20,21,23 44:1,79:5 103:5even [36] 4:22 10:5 13:141115:1 123:10 124:5 125:19formt [5] 15:14 18:2 31:131915:25 16:12 19:10 34:7 37:3 146:2,171952:21,22 62:24 63:5,5 64:52:18 69:3					-
Letsy [2:19:22,22:3 10:13,13] explaints (1) 143.0 11:13,15,17,19,24 13:10 explanation (1) 30:7 33:4 55:9,10,24 56:4,21 explicit (1) 16:17 57:5 78:16,18,20 79:18 explicit (1) 16:17 euphemism (4) 93:17,24, 2 143:13 147:25 euphemisms (1) 116:20 expresses [2] 39:3 131:20 euphemisms (1) 116:20 expression (13) 13:12 38: evaluate (1) 60:12 21 53:9 55:19 56:11,17 85: fact [4] 28:2,9 36:12 57: 1,9,10 43:17,20,21,23 44:1, 15:25 16:12 19:10 34:7 37: 3 146:2,17				,	
11.10, 10, 17, 19, 24 10.10 explanation 1030.77 33:4 55:9, 10, 24 56:4, 21 explicit [1] 16:17 57:5 78:16, 18, 20 79:18 explicit [1] 16:17 euphemism [4] 93:17, 24, express [5] 56:1 119:5 120: 25 122:25 expression [13] 13:12 38: euphemisms [1] 116:20 expression [13] 13:12 38: evaluate [1] 60:12 21 53:9 55:19 56:11,17 85: facts [4] 28:2,9 36:12 57: 14 55:17,20,21,23 44:1, 15:25 16:12 19:10 34:7 37: 3 146:2,17				,	
53:4 53:5, 10,24 53:4, 21 5 explicitly [1] 46:10 25 39:20 40:4 46:23 47:5, 13 58:8,15 62:7 68:23 103: 13 13:14 inistre 1, 10:10 ini					
b) 13 761 10, 10, 20 73 10 express [5] 56:1 119:5 120: 13 58:8,15 62:7 68:23 103: first [109] 4:4,20,24 5:2,7, 4 156:13 157:3,14 euphemism [4] 93:17,24, 2 143:13 147:25 9 109:10 110:18 118:25 25 7:18 11:14 14:1,1,22 friend's [4] 76:23 85:8 10 euphemisms [1] 116:20 expression [13] 13:12 38: expression [13] 13:12 38: 122:17 140:14 155:17,21 15:2,6,10 20:16 21:7,11 9 157:2 evaluate [1] 60:12 21 53:9 55:19 56:11,17 85: factor [1] 51:23 factor [1] 51:23 1,9,10 43:17,20,21,23 44:1, 79:5 103:5 even [36] 4:22 10:5 13:14 1 115:1 123:10 124:5 125: 19 fort [9] 52:21,22 62:24 63:5,5 64: 52:18 69:3					•
euphemisms [4] 93:17,24, 2 143:13 147:25 9 109:10 110:18 118:25 25 7:18 11:14 14:1,1,22 17 friend's [4] 76:23 85:8 10 euphemisms [4] 116:20 expresses [2] 39:3 131:20 122:17 140:14 155:17,21 15:2,6,10 20:16 21:7,11 9 157:2 evaluate [1] 60:12 21 53:9 55:19 56:11,17 85: 125:19 56:11,17 85: 1415:1 123:10 124:5 125: 1415:1 123:10 124:5 125: 19 15:25 16:12 19:10 34:7 37: 3 146:2,17 19 52:21,22 62:24 63:5,5 64: 52:18 69:3					
euphemisms (i) 116:20 expresses [2] 39:3 131:20 122:17 140:14 155:17,21 15:2,6,10 20:16 21:7,11 9 157:2 euphemisms (i) 116:20 expression (i3] 13:12 38: 156:3,8 15:2,6,10 20:16 21:7,11 9 157:2 evaluate (i) 60:12 21 53:9 55:19 56:11,17 85: factor (i) 51:23 1,9,10 43:17,20,21,23 44:1, 79:5 103:5 even (36) 4:22 10:5 13:14 1 115:1 123:10 124:5 125: 19 52:21,22 62:24 63:5,5 64: 52:18 69:3	-	-		mot [100] 4.4,20,24 0.2,7,	
25 122.25 expression [13:12:0] 156:3,8 156:3,8 156:3,8 evaluate [1] 60:12 21 53:9 55:19 56:11,17 85: 115:1 123:10 124:5 125: 156:3,8 1,9,10 43:17,20,21,23 44:1, 79:5 103:5 even [36] 4:22 10:5 13:14 1 115:1 123:10 124:5 125: 146:2,17 19 52:21,22 62:24 63:5,5 64: 52:18 69:3					
evaluate [1] 60:12 21 53:9 55:19 56:11,17 85: factor [1] 51:23 1,9,10 43:17,20,21,23 44:1, 79:5 103:5 even [36] 4:22 10:5 13:14 1 115:1 123:10 124:5 125: factor [1] 51:23 145:17 46:25 50:25 51:19 front [5] 15:14 18:2 31:13 15:25 16:12 19:10 34:7 37: 3 146:2,17 19 52:21,22 62:24 63:5,5 64: 52:18 69:3		•			
even [36] 4:22 10:5 13:14 1 115:1 123:10 124:5 125: facts [4] 28:2,9 36:12 57: 4 45:17 46:25 50:25 51:19 front [5] 15:14 18:2 31:13 15:25 16:12 19:10 34:7 37: 3 146:2,17 19 52:21,22 62:24 63:5,5 64: 52:18 69:3	-	•			
15 :25 16 :12 19 :10 34 :7 37 : 3 146 :2,17 19 52 :21,22 62 :24 63 :5,5 64 : 52 :18 69 :3					
12 30.4 49.20,23 32.0 30. expressive [00] 19.23 24. a series a series a loss of the series of the se					
Uprite as Demonstring Comparation	12 30.4 43.20,23 32:0 58:	-			11 UIII-EIIU (2) 47:13,17

		Official		
front-line [1] 22:4	21	Hamas [1] 131:21	11 19: 12 22: 25 34: 14 48:	inconsistent [3] 6:2 92:8
full [1] 136:4	glorifying [1] 92:17	hammered [1] 107:3	18,23 51: 5 53: 19 55: 15	107: 10
fully [2] 33:9 64:2	Gmail [18] 70:1,3,5,7,22 74:	hand [3] 45:19 86:13,13	157: 25	incorrect [1] 120:18
function [12] 42:20 51:5,5	9,12,23 79: 24 94: 15 97: 1	handful [1] 69:14	hosts [1] 48:17	incredibly [1] 92:22
90: 5 124: 7 130: 9,18 135: 4	108:16 137:8,9 138:12	handmade [2] 55:12 56:1	houses [1] 24:6	indeed [11] 5:16 7:12 14:
144:7 153:5 158:1,1	148:5 154:21 156:24	handmarked [1] 56:1	however [3] 54:8,11 143:8	17 15: 10,13 23: 15 43: 6,10
functionalities [2] 94:12	Gmail-like [1] 137:13	hands [2] 21:18 142:17	huge [1] 139:24	46:16 55:17 64:4
129 :1	Gonzalez [3] 5:22 50:13	happen [7] 72:12 104:22,	human [3] 10:11 50:2 90:8	indeterminacy [1] 57:18
functionality [1] 152:10	149: 15	24 105:18 106:4,5 129:10	humanized [2] 50:1,1	indeterminate [1] 8:25
functions [8] 33:20,24 51:	good-faith [1] 41:24	happening [1] 28:12	humans [2] 90:4,23	indicate [1] 118:21
4 53 :23 94 :25 129 :17 134 :	goodness [1] 73:12	happens [1] 101:16	hundred [2] 73:8 108:1	indicated [1] 120:16
3 156: 25	goods [7] 11:15,22,24 12:4	happy [1] 17:7	Hurley [16] 16:25 17:1,8 45:	indicating [1] 68:9
fundamental [2] 94:1 157:	55 :12,24 56 :1	harassing [1] 87:12	14 46: 22 47: 4,12,17 63: 21	individual [5] 18:25 89:25
23	Google [3] 5:22 55:5 70:23	hard [8] 10:12 22:21 25:6	65:22 86:14 91:14 93:1	102: 6 123: 24 124: 4
fundamentally [4] 45:16	GORSUCH [51] 28:19 29:	75:23 79:12 128:13,16	102:14 118:13 132:20	individualized [1] 89:13
106 :13 113 :23 155 :7	10,14 30: 1 40: 16,17,23 41:	141: 3	hypo [1] 37:18	individuals [2] 141:24 143:
funding [2] 20:14,20	4,7 42 :12 43 :13 74 :20 75 :	harder [2] 72:2 74:18	hypothesis [1] 53:22	22
further [8] 30:5 94:5 103:1	2,10,14,18,25 76: 10 82: 18,	harm [1] 149:18	hypothetical [2] 16:18 115:	industries [1] 121:24
127: 11,20 128: 6 140: 4	20,23 83: 4,9,20 101 :22	harmful [3] 107:5,7 118:1	23	infinite [2] 8:12 10:5
148 :14	118 :20 119 :25 120 :25 121 :	hate [2] 16:7 36:25		influence [1] 144:13
future [2] 110:4 129:10	3 122: 6,11,16,24 123: 5,7,9	haul [1] 108:6	I	influences [1] 96:3
	124: 9,21,25 125: 6 140: 7,8,	he'll [1] 141:16	idea [8] 30:12 45:9 107:16	inform [2] 21:18 142:17
G	15,19,22,24,25 141: 4,11	health [1] 36:24	129:23 130:7 139:22 142:	information [8] 10:10 52:9,
gain [2] 43:1,3	148 :19 150 :23	hear [3] 4:3 26:11 151:6	10 143 :20	11,24 54 :18 111 :21 145 :14
game [1] 19:13	Gorsuch's [1] 104:21	heard [3] 63:8 76:23 106:6	ideas [6] 15:3 23:14 44:3	152 :20
gate [1] 146:19	gosh [1] 138:14	hearing [1] 104:7	48:21 115:10 119:5	infringement [1] 155:8
gathering [1] 48:20	got [2] 73:3 140:15	heart [2] 23:24 76:19	identical [1] 70:25	infused [1] 96:1
gave [1] 86:10	gotten [2] 18:5 103:22	heckler's [1] 19:9	identify [2] 118:15 151:25	inherently [8] 19:23 24:25
GEN [3] 2:6 3:9 114:4	govern [1] 68:1	held [9] 12:18 14:15 38:12	ideological [1] 19:20	32 :2,2 114 :17 117 :17 131 :
GENERAL [70] 1:3 2:2,6	government [40] 20:1,2 21:		ideologically [1] 19:12	6 136 :13
17: 4,16,18 27: 8 34: 2 40:	2,8 24 :5 43 :21,22 47 :22,25	124 :1 125 :2	ignore [1] 113:24	inhibit [2] 99:25 100:4
14 46 :1 64 :5 114 :3,7 115 :	64: 19,20,22,23,24,25 65:	help [1] 120 :12	ignores [1] 157:25	initial [1] 116:14
22 116: 11,23 117: 11,20	10 66:1 74:21 102:2,3 110:	HENRY [5] 2:2 3:3,13 4:7	illegality [1] 92:16	injunction [23] 33:12 77:1,
118 :20 119 :12 120 :13 121 :		155: 14	illegitimate [3] 112:5,6,11	-
1,22 122: 9,12,20 123: 1,6,8,	15 111: 1,2 112: 7,13 115: 6,	highly [1] 23:16	illicit [1] 42:10	4,6,16 80: 8 81: 4 82: 1,7 83:
21 124 :16,23 125 :5,20,25	13,21,23 110.3,17 122.4	Historically [1] 86:16	illuminate [1] 57:20	12 104: 7 107: 19 109: 9,13,
128 :5,12,18 129 :22 130 :23	133: 2 143: 5,11 144 :15,17, 25 145: 4,11	-	images [1] 114:11	21 110 :1 128 :1 129 :21
131 :13,24 132 :2,10,14,18		history [3] 76:7 84:10 98: 14	imagine [6] 15:8 53:2,11	133 :21 134 :25 135 :1 139 : 21 154 :13
133 :14 135 :5 137 :25 138 :	government's [5] 65:1 93:	hit [1] 56:11	58: 21 59: 1 73: 15	
23 140:12,17,20,23 141:2,	22 116: 8,25 151: 15		immune [1] 115:6	innkeeper [1] 14:15
0 444-0 445-04 05 440-04	government-mandated	hold [4] 77:6 80:18 81:15	immunity [2] 125:15 150:4	innocuous [1] 84:13
147: 23 149: 6 150: 17 151:	[1] 21: 23	135:6	immunized [1] 149:20	inquiry [1] 145:3
6 152 :6,21 153 :20,21 154 :	governmental [2] 143:12	holding [3] 74:12 109:3	immunizing [1] 124:18	inside [2] 12:22,24
5,11	145:22	120: 18	impact [1] 72:23	insisted [1] 155:19
generality [5] 25:8 27:8,9	governments [3] 115:7,11	holds [3] 121:16,17 128:21	implementation [1] 143:	insisting [1] 63:8
30 :15,21	145:8	holes [1] 138:6	10	insofar [2] 13:10 34:14
generalized [2] 8:14 145:	governor [1] 96:10	home [1] 49:6	implicate [1] 116:2	Instagram [1] 48:13
15	governor's [1] 96:5	honestly [2] 106:12 109:1	implicated [2] 22:24 121:2	instance [1] 37:20
generally [6] 14:11 34:3	Grange [1] 58:15	Honor [46] 6:16,23 7:11 9:2	implicates [2] 34:24 85:22	Instead [6] 19:21 81:23 96:
54 :9,11 102 :8 120 :16	grant [1] 125:15	11 :12 12 :17 13 :10 14 :7 15 :	implications [1] 150:13	20 104 :1 119 :23 124 :4
gets [3] 75:22 89:12 110:7	granular [1] 152:7	7 16 :24 17 :11 23 :21 24 :13,	important [13] 14:21,22 16:	instinct [1] 148:1
	great [2] 21:15 39:18	22 25 :23 26 :19 29 :19 32 :	2 21 :6 26 :20 51 :2,3 92 :24	insufficient [1] 129:3
getting [5] 18:15 20:1 39:	greater [2] 43:1,3	15,24 33: 23 34: 5 35: 11 37:		insurrectionists [1] 18:13
15 96:9 107:3	ground [1] 103:25	17 38: 25 39: 24 41: 10,21	103 :20 115 :8 123 :22 135 :	interact [1] 100:5
give [14] 7:23 30:7 40:8,18	group [1] 102:17	42 :19 43 :25 44 :17 47 :4 49 :	14 141 :20	interest [31] 14:22 15:1,2
57: 11,24 64: 13 65: 16 94:	guarantee [1] 119:5	2,17 50: 12 51: 17 54: 3 56:	imposed [1] 23:8	22:10,10 23:6,7,13,15,16
22 100 :10 103 :14 113 :16	guess [22] 11:20,20 25:6,	20 58:7 59:6 62:13 68:21	imposing [2] 12:14 14:9	31: 25 32: 1 44: 1,4,17 45: 5,
121: 13 131: 19	12 26: 3 27: 7 29: 13 30: 14	70:10 86:5 90:2 92:11 110:	impossible [2] 72:5 107:6	7 56: 22 73: 5,5 100: 14 115:
given [6] 36:11 38:18 58:2	31 :9 45 :25 47 :4 57 :1 98 :	25	incident [2] 12:21 13:12	8,10 118: 9 139: 19 145: 22,
64:4 108:21 135:4	24 112:9 118:5 132:2 134:	horrible [2] 39:19 113:12	include [4] 79:6 102:7 120:	23 146: 5,5,15,20
gives [2] 99:4 113:18	24 137: 25 151: 9,20 157: 5,	host [15] 4:16,21 9:19 14:	24 121 :4	interested [2] 31:4 78:11
giving [1] 45:7	6	24 17: 21 36: 17 39: 4 46: 13,	included [2] 10:6 85:5	interesting [2] 85:10 118:
GLIB [2] 102:21 132:20	Н	14,20 49: 6 51 :10 52: 1 94 :	includes [2] 99:23 100:4	10
global [2] 73:7,8		13,14	including [2] 95:22 122:18	interests [12] 13:14 22:6,8,
glorifies [3] 89:19,21 92:	Halleck [2] 65:7 102:14	hosting [12] 7:19 12:20 13:	incompatibility [1] 124:17	13,13,19,22 23: 19 31: 21
		taga Danarting Corner		

165	
-----	--

		Official		
44: 23,25 46: 25	21 60: 4,21 61: 20 62: 1,14	118:20 119:25 120:25 121:	lack [2] 57:25 128:14	129:19 137:17 144:12 147:
interfere [1] 120:1	65:14 67:21 68:7,14 69:7,	3 122: 6,11,16,24 123: 5,7,9,	lacks [2] 9:4 144:15	14,19 151: 23
interference [1] 54:13	23 83: 21 110: 11,12 112: 1,	13 124: 9,21,25 125: 6,20	lament [1] 109:10	length [1] 21:15
interferes [1] 62:25	4,22 113: 4,25 151: 5,6 152:	126:20 127:15,16,16,18,19,	land ଓ 150:9,10,15	lenient [2] 47:10 118:14
interfering [1] 142:6	8,16 153: 19,22 154: 6 155:	21,22,22,23,25 128: 10,15	language [1] 59:25	lens [1] 95:25
interim [3] 105:14,18 106:	10	129: 2 130 :14 131 :10,17,25	large [3] 9:13,14 14:23	less [5] 5:9 52:2 79:1 93:14
23	jail [1] 93:19	132: 8,12,16 133: 5,12,12,	larger [1] 124:14	99 :16
intermediate [7] 37:21 77:	jib [1] 156:20	14,18 135 :12 136 :22,22,23	largest [2] 34:19,20	letting [1] 94:16
3 81:8 85:10,14 104:15	job [5] 27:19 48:18 74:17	138: 13 140: 5,6,6,8,15,19,	lascivious [2] 87:11 121:8 laser [1] 96:14	level [14] 10:25 25:8 27:8,9
146:18 Internet [12] 4:11 8:4,11 10:	78:20,20 Journal [1] 41:19	22,24,25 141: 4,11,12,12, 14,15,19 142: 13 145: 9,19,	last [6] 5:20 54:24 87:14,19	30:15,21 59:1 60:10 62:22 115:7 134:7,8 135:3 152:8
8 15 :12 45 :3 64 :3,5 66 :7	journalistic [9] 22:25 23:4,	24 146: 21,22,22,24 147: 1,	149: 15 156: 21	lewd [2] 87:11 121:7
110 :19 111 :19 131 :3	17 45 :1 64 :15 100 :12,22	3,5 148: 16,18 150: 8,23	later [2] 143:24 150:16	liability [7] 67:1,4,16 86:7,
interpret [1] 59:2	146: 13 156: 19	151 :3,4,4,6 152 :8,16 153 :	Latin [1] 87:23	7,11,12
interpretation [3] 31:14,	judge [1] 70:15	19,22 154: 6 155: 10,11 158:		liable [5] 124:1 125:2 148:
15 150 :2	judgment [12] 37:14 38:10	8	Laughter 6 20:10 36:13	22 149: 1,2
interpretations [1] 58:21	52:14 53:25 80:7 81:6 104:	Justice's [1] 21:2	66:8 87:15 133:11 141:18	license [1] 113:19
interpreting [1] 58:6	24 105 :19 106 :15 118 :8	justification [1] 133:23	law [120] 8:2,7,13,19,24 9:4,	likelihood [1] 83:17
interpretive [1] 59:5	125 :8 127 :5	K	7,15,18 10: 22 11: 2,10,13,	likely [2] 128:3 131:2
interrupt [2] 52:5 124:10	judgments [11] 16:17,19	KAGAN [39] 15:20 17:3,7	15 13 :7 14 :10 15 :9 16 :5	limit [7] 10:15 11:24,24 76:
intersection [1] 27:4	39 :20 88 :2 110 :16 112 :17,	18: 4,9,12,18 36: 4,5,14 37:	19 :9,16,22 22 :7,10,21 23 :2,	7 104 :11 111 :8,12
intervention [4] 21:3 44:8,	18 117 :21 127 :14 144 :9	23 38: 4,16 39: 10 40: 14 46:	20,25 26: 5,9,22,23 27: 5,10	limited [4] 10:10 52:11 81:
10 90:9	146: 11	21 50 :4 71 :3,7,15 72 :4,16	29: 5 31: 15,16 32: 8 34: 6,	21 95 :20
interview [1] 40:5 intolerable [1] 16:22	jurisprudence [2] 8:2 21: 7	96: 17,18 97: 14,23 98: 4,15,	18,24 40: 4,19,20 41: 2,11, 19,25 44: 18,23 46: 6 48: 18	limiting [1] 96:13 line [5] 42:13 45:13,18,23
invalid [2] 130:12 138:11	Justice [347] 2:7 4:3,9 6:5	24 99:3,19 101:20 136:22,	52 :15 55 :1,17 56 :4,11,13	46: 12
invalidated [1] 145:17	7 :5,25 8 :22 9 :22 12 :3,6,10,	23 138: 13 140: 5 147: 1,3,5	57 :11 58 :8,17 59 :16,23 63 :	lines [1] 139:17
invalidity [1] 138:7	22 13 :16,18 15 :4,20 17 :3,7	Kagan's [2] 42:13 95:9	7,19 64 :9 66 :23 67 :4 68 :1	LinkedIn [2] 27:18 28:2
invoked [1] 46:9	18: 4,9,12,18 19: 24 20: 8,24	KAVANAUGH [31] 20:24	69 :10 70 :1,2,15 77 :20 80 :	list [5] 32:20 33:19,24 97:8
involved [4] 22:15 27:20	21: 13 22: 2,14 24: 4,9,14	22: 3,14 24: 4,9,14 43: 15,16	9,16 81:13 94:19 95:5,10,	129 :14
45: 20 103 :25	25 :4 26 :2,23 27 :1,4,17 28 :	44 :7,19 45 :8 46 :19 48 :5	15,16,18,19 96: 21,21,25	listeners [1] 42:22
involves [1] 76:18	3,5,8,11,19 29: 8,10,14 30:	80 :24 101 :23,24 102 :23	103: 14 126: 4,10,18 127: 1	listings [1] 12:12
involving [1] 74:11	1,3,5,6 31: 3 32: 10,11,11,	103: 19 104: 18 105: 17,24	129 :18 130 :6 131 :20 132 :	literally [4] 119:15,21 125:
irony [1] 106:17	12,19 33: 16 34: 6,22 35: 5	106:2 107: 13 108: 9 116:	5,7 133: 24 135: 3,10 137:	14 136: 14
irrelevant [2] 46:25 135:19	36 :1,2,2,4,5,14 37 :23 38 :4,	25 141 :13,14,19 145: 19,24 146: 21	20 138 :1 139 :16 140 :3	litigate [2] 80:19 156:4
irrespective [1] 99:14	16 39: 10 40: 14,15,15,17,	keep ^[12] 14:21 67:8 78:22	141:8 151: 12,23,23 152: 12	litigated [14] 33:11 85:8
ISIS [1] 49:21	23 41: 4,7 42: 12,13 43: 13,	87:24 91:5 92:19,23 107:4,	153: 3,14,16,23 154: 7,16,	110: 7 125: 22 126: 2,22
isn't [15] 18:15 35:9 37:8	14,14,16 44: 7,19 45: 8 46:	7 134 :25 137 :18 158 :3	22,24 155: 4,24 156: 18,21 law's [1] 9:10	128 :19 129 :12 130 :1 135 :
38:9 48:24 89:11 113:5 124:12,21 125:3 126:10	19,21 48: 5,7,7,9 49: 9,25 50: 4,18 51: 3 52: 4,5 53: 20	keeping [1] 67:2	lawful [2] 128:8 154:8	7 138:10,16 139:13 154:1 litigating [2] 33:10 155:20
124 .12,21 125 .3 126 .10 129 :6,7 152 :17 154 :9	54: 23 55: 8 56: 8,15,21,25	keeps [1] 109:19	laws [8] 18:15 22:19 67:19	litigation [11] 70:12 81:6,
isolate [1] 26:20	57: 4,14,15,15,17,19 58: 19	key [4] 43:20 121:22 145:	92 :3 107 :6 115 :12 120 :22	19 104: 25 105: 2,7 109: 6
Israel's [1] 131:21	59 :19,21 60 :4,21 61 :20 62 :	19,24	144: 19	110 :2,5 127 :14 152 :23
issue [19] 23:18 29:23,25	1,14,15,20 64: 18 65: 13,14,	kick [1] 157:8	lays [1] 41:20	little [14] 5:23 9:25 10:12
71 :16,20 84 :23 85 :15 120 :	16,20 66:5,9,17 67:21 68:7,	kids [4] 87:1,1,3,4	leafleting [4] 30:24 38:14,	47:9 60:11 61:12 68:12 72:
21 128: 11,13,17,20 134: 6	14 69: 5,7,21,23,25 70: 4,14	kind [52] 10:18 11:3 14:8	17 40: 6	5 79: 21 90: 8 95: 25 130: 25
135: 4 139 :12 143 :17 149 :	71: 3,5,7,15 72: 4,16 73: 17,	15: 15 16: 18,19 18: 23 21:	leaned [1] 49:3	142 :24 151 :15
7,23 155:2	21 74: 4,20 75: 2,10,14,18,	23 28 :17,17 33 :10 49 :13, 16,22 50 :5 52 :14 53 :11,25	leaps [1] 96:24	LLC [1] 1:7
issued [1] 128:1	25 76 :10 77 :17,18,19,23	55: 21 62: 10 67: 15 69: 20	least [13] 6:13 26:1 31:12,	local [1] 113:21
issues [12] 20:6 36:24 101:	78: 9 79: 11,17 80: 5,24,25	71 :18 90 :11 92 :16 96 :19,	14 41 :11 69 :2 76 :13 106 :	locution [1] 65:20
7 127:11 129:24 139:1	81:17 82:5,11,14,18,20,23	22 104 :9,9 115 :2 117 :2,24	23,25 118 :7 121 :21 145 :13	logic [1] 74:13
140:2 141:8 148: 8,9 149: 16 151: 2	83: 4,9,20,21 84: 20 85: 16, 24,25 86: 1,21 87: 9,16,21	118 :1 119 :14,19 120 :21,23	147: 9 leave [2] 123: 12 136: 25	long ^[3] 42:10 106:21 123: 16
issuing [1] 154:15	88: 4,19,23 89: 3,5,22 90: 6,	122:3 124:2,6 125:16 132:	lectern [1] 56:6	longer [2] 67:3 89:2
it'll [1] 139:8	13 91: 2,4,8,12,21,24 92: 4	4 135: 18 136: 2,16 137: 5	led [1] 21:20	look [37] 10:13 19:19 24:23
Italian [1] 100:16	93 :4,4,5,16 94 :3,6,6,8,14	144:13 145:15 148:6 149:	left [3] 43:19 104:21,22	25:25 32:20 33:19 38:25
itself [7] 45:11 54:1 90:8	95 :8 96 :17,17,18 97 :14,23	8 152 :14 154 :15	legal [1] 28:22	49: 12,17 53: 8,14 55: 7,21
115:25 116:5 137:5 149:	98:4,15,24 99:3,18 101:20,	kinds [14] 16:21 24:10 36:	legislation [1] 79:4	60:24 62:9 64:9 67:14 73:
10	21,21,23,24 102: 23 103: 19	22 37:15 38:7,8,21 56:10	legislature [2] 9:4,8	11 76: 5 77: 3 78: 23 79: 18
J	104:18,21 105:17,24 106:2	98:5 119:3 121:23 138:3	legitimate [28] 6:21 7:13,	80:3 84:15 90:12 93:9 95:
	107:13 108:9,10,10,12,23	144:9 151:7	24 8:17 9:5 22:20 23:8,13	23 100 :15 104 :8 117 :16
JACKSON ^[43] 25 :4 26 :2, 23 27 :1,4,17 28 :3,5,8,11	110: 9,10,10,12 112: 1,4,22	L	27 :11 35 :13 44 :4 57 :11 68 :	
51 :3 57 :16,17 58 :19 59 :19,	113: 4,25 114: 1,7 115: 17,	label [1] 111:3	11,23 70 :19 85 :23 94 :21	20 149 :14 153 :13 154 :17
	24 116: 10,16,24 117: 10,19		95 :4 99 :5 108 :17,25 109 :4	looked [6] 19:21,25 26:8

		Official		
66:23 70:13 74:9	18 132: 19,25	152: 4	20 99 :16 103 :4 104 :5 106 :	Normally [1] 115:17
looking [10] 11:1 29:15 32:	matters [1] 133:6	metaphorical [1] 39:16	6 107 :9 111 :20 113 :17	note [1] 47:11
4 61:23 65:8 118:11,19	mean [80] 7:11 15:11 16:3,	methods [3] 50:15,15 52:	137: 1 139: 6,12 143: 8 152:	nothing [6] 61:8 62:11 83:
120:14 127:12 154:12	11,25 17 :7 18 :14 19 :11 20 :	13	24	9,20 92:8 101:18
looks [5] 55:4,4,12 126:22	12 22:15 25:5,10 26:5 31:	middle [1] 13:1	multiple [1] 58:21	notice [4] 88:20,22 94:23
136 :16	25 34 :11 37 :25 38 :3,11 44 :	might [32] 11:13 25:15,15	must [2] 59:9,15	138 :22
lose [4] 22:16 84:4 123:20	20 48 :17,22 49 :19 50 :1 51 :	50:7,12 62:2 64:21 70:9	must-carry [1] 23:9	noticed [1] 153:25
152 :20	9 52: 5,14 54: 9 56: 8,9 58:	74:18 82:10 85:10 93:23	muster [1] 145:5	notion [1] 60:3
loses [1] 63:4	21,23 59: 21 60: 21 61: 3,13,	94:20,21,25 102:14 106:22,	myself [1] 10:6	notwithstanding [1] 130:
losing [1] 99:19	24 64:24 66:18 68:14 70:	24 109:12,16 116:4 118:1,	<u>N</u>	1
lost [2] 122:11 142:22	10 71 :3 73 :12 74 :2 79 :19	9 121: 14,15 126: 15 139: 16		nowhere [1] 111:25
lot [30] 12:11 15:23,25 16:	83: 12,22 84: 6 86: 19,24 87:	140:20 147:18 149:8,20	nail [1] 103:23	number [7] 7:14,22 68:17
24,24 39 :17,18 42 :9 51 :20	17,25 88: 23 89: 9 91: 13 92:	150: 15	name [1] 63:3	72:23 151:8,17,18
55 :12,18 57 :18 71 :21 74 :	5 96: 4,7,18 98: 10,12 103: 1	military [5] 19:17 20:4 32:9	namely [2] 39:1 130:7	numerator [2] 35:6,10
18 79: 20 88: 5 93: 5 111 :14	106 :4,11 107 :23,24 109 :24	46 :9 103 :14	narrow [4] 36:7 105:11	numerator/denominator
118 :12,15 119 :10 121 :9,20	110 :14,25 112 :17 114 :19	million [2] 73:7,8	126: 25 154: 2	^[1] 35: 16
122 :18 125 :21 128 :14 130 :	116:23 129:8,11 133:5	millions [3] 4:12 10:7 71:	narrowed [1] 9:17	0
4 138:19 139:22 154:23	138: 21 151: 11,14,14,17	23	narrowly [2] 59:3 120:22	
lots [6] 25:13 38:6 90:23,23	152:4	mind [6] 14:21 94:5 95:11	natural [1] 145:10	objected [1] 40:3
102: 1 109: 18	meaningful [2] 54:13 156:	126:7,24 158:3	nature [1] 67:22	objectionable [3] 41:17
lower [10] 41:1 70:12 76:25	2	mine [3] 17:11 141:17 150:	near [2] 38:22 129:10	87:13 117:25
109:15 126:10 130:7 145:	meaningfully । ३। ८२१ व्या अ	10	necessarily [5] 58:1 62:2	objective [2] 39:1,5
17 148:15 151:1 152:25	12 54 :5	mines [2] 150:10,16	87 :10 116 :8 129 :9	objectively [1] 19:21
lowest [1] 118:6	means [14] 6:19 18:19 20:9	minimum [2] 34:20 121:18	necessary [4] 64:7 141:9	obligation [1] 23:9
M	31 :16 51 :25 58 :1,4 66 :25	Minneapolis [4] 64:12 71:	144: 25 148: 3	obliged [2] 156:1,7
	104 :22 113 :9 126 :3 142 :	12,13 73: 1	need [7] 25:25 35:5,6,13	obscene [2] 87:11 121:8
Maddow's [1] 70:6	23 150 :3 157 :6	minute [1] 110:13	46:12 56:7 125:10	observed [1] 116:25
made [12] 35:24 39:21 46:	meantime [1] 139:21	misattribution [1] 63:25	needs [2] 57:12 158:2	observer [1] 39:5
20 47 :23 51 :7 53 :13 81 :6	measure [1] 23:22	misinformation [5] 16:8	nervous [1] 79:22	obvious [5] 79:1,25 106:9
103 :5 109 :7 128 :5 142 :2,3	mechanism [1] 143:11	18:20 36:21,23,23	NETCHOICE [13] 1:7,7 4:5	108 :7 138 :19
magazine [1] 136:2	mechanisms [1] 5:23	misrepresenting [1] 113:	118: 21 129: 15 151: 12,12,	obviously [16] 41:20 64:25
magazines [1] 10:2	media [38] 8:3,5 9:8 13:21,	13	17,19 152: 4 155: 19,22,24	66:18 69:18 70:11 73:15
mail [1] 80:23	24 15 :5 16 :4 21 :4 24 :17	mistake [1] 111:4	NetChoice's [3] 152:18	74: 3,15 76: 17 79: 3 85: 3
main [1] 131:7	25:2 36:7 42:20 46:3 48:	model [2] 14:18 142:4	155 :18 156 :9	98 :20 102 :4 103 :2 110 :2
mall [5] 12:20 30:23 38:17	12,22 51: 24 55: 3,19 59: 9,	models [1] 106:14	networking [4] 5:12 27:12	115 :8
40:7 46: 15	15 71 :18 72 :9 79 :15 99 :24	moderating [1] 146:9	34: 12,20	occurring [2] 110:22 139:
mandate [2] 112:14 136:6	100 :6 114 :15 115 :6 126 :6	moderation [24] 11:16 17:	neutral [4] 4:15 50:15 53:8,	25
Manhattan [1] 65:6	127 :2 130 :9 133 :25 139 :4	20 19:2 24:1,18 30:13 31:	23	October [2] 92:18 112:20
manipulation [1] 21:21	142: 1,21,25 144: 13 153: 1	6 41: 16,24 42: 1,8,9 56: 23	never [2] 84:7 94:5	odd [2] 6:8 8:1
manipulative [1] 142:19	155: 5	93:8,10,21,23,25 116:20	new [6] 93:5 107:24,25 111:	
manner [4] 6:2 53:6 59:11	meet [1] 69:15	117:22 118:8 131:23 132:	22 135 :9 146 :10	14 133: 8
145 :1	members [5] 7:2 33:2 34:3	13 146: 7	news [13] 25:13,13 36:8 94:	
many [10] 15:18 28:23 69:	47 :14 129 :15	modern [2] 14:3 142:21	13,13 96: 22 98: 2 100: 9	offered [1] 155:23
10 71 :23 113 :10 119 :1	mentioned [5] 22:9 26:4	modify [1] 109:12	108 :14 131 :7 137 :3,5 147 :	offering [3] 11:15 24:20
120: 15 134: 3 135: 15 153:	33: 25 142: 15 145: 10	moment [1] 135:12	10	155 :8
24	mere [4] 19:11 40:12 46:23	Monday [1] 1:13	newspaper [10] 4:19 10:3	office [1] 113:7
map [2] 27:20,24	66:22	money [3] 20:1,3 152:2	24 :24 39 :16 40 :11 48 :25	official [2] 96:5 102:16
march [1] 132:21	merely [1] 66:10	monopolized [1] 13:16	51:18 53:14 114:13 132:	Okay [20] 42:12 53:20 54:
market [7] 13:20 43:7,8,12	merits [4] 83:17,18,19 105:	monopoly [1] 142:23	22	23 55: 15 68: 7 77: 24 78: 9,
55 :14 63 :25 144 :5	2	month [2] 76:6 98:14	newspapers [3] 21:16 49:	11 80: 21 91: 2 94: 22,25 95:
marketing [1] 4:14	mess [1] 74:4	MOODY [2] 1:3 4:5	13 142 :10	9 112: 18 123: 7,7 133: 16
marketplace [8] 9:23 10:	message [23] 13:2 15:13	morning [3] 4:4 39:17 63:8	newsstands [2] 24:7 86:	138 :23 141 :11 148 :16
16,17 11: 9,25 12: 8 55: 13	30 :16,17 32 :6,8 39 :3 40 :1,	mosaic [1] 124:14	16	oligarchs [1] 96:12
108 :16	8,12 61:10 62:11 66:3 88:	most [10] 22:24 31:25 36:	next [1] 104:23	once [1] 60:23
massive [2] 14:24 90:20	17 89:5,10 91:13 92:25 93:	15 37:5 66:6 68:17 72:23	nice [2] 41:18 78:20	one [59] 8:10,13 14:9,20 22:
Matal [1] 47:24	1,2 118: 3,16 157: 12	103:3 108:7 119:3	NIFLA [1] 95:22	22 23:2 28:14 29:3 34:4
material [19] 49:18,23 64:5	messages [11] 38:6,7,8 74:		nine [1] 105:13	39 :12 41 :14 42 :3 43 :5 45 :
67 :19 86 :25 87 :10 88 :16,	5,7,23 76:2 78:1,2 116:1	motivation [1] 79:4	nobody [1] 107:9	19 48 :15 49 :10 51 :23 52 :
18 89: 13,17,19,21 90: 25	122: 13	move [1] 29 :9	non-discrimination [3] 7:	22 54 :24 57 :24 65 :17 68 :
100: 3 107: 4,7,9 118: 9 157:	messaging [12] 74:14 94:	movie [1] 24: 6	20 100 :13 136 :6	12 69 :18 72 :2 73 :20 75 :4
16	17,22 97:2 98:5 126:16	MSNBC [1] 45:2	non-expressive [5] 34:8,	76:20 78:2 79:12 85:2 86:
materials [2] 78:23 86:17	128:8 130:21,24 137:13	much [26] 7:16 10:10 17:22	10,13 35: 1 54: 22	19 87: 14 92: 7,18 93: 7 96:
matter [10] 1:15 16:9 26:6	154: 21 156: 25	20:5,9 29:5 39:4,21 46:21	none [5] 46:10 69:2,3 115:	8 101: 6,6 106: 18 107: 2,16
113: 10,11,12 116: 15 124:	met [4] 7:9 107:25 129:5	50:16 61:16 74:13 79:7 87:	5 124: 7	110 :25 112 :23,24 118 :3
L	1			

144:5 143:12 145:14 143:12 144:14 143:24 143:24 143:24 143:24 143:24 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 143:26 144:26 144:26 144:26			Official		
6 138:71 738:10 149:25 24 154:84 10 653 86:79 48:15 7422 154:14 89:24 100:23 7622 10 1201 718:22 24:15 88:14 100:23 5325 552:30 110:10 108:22 0 mile 0 11 90:12 33.37 34:24 155:00 11 574:14 121:16 129 31 3174:14 118:122:11 31 375:14 142:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 121:16 129 71 472:14 120:17 129 72:10 38:13 71 471:16 472 72:10 38:13 71 472:16 48:14 71 472:14 120:17 129 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 38:13 71 471:16 472 72:10 48:13 71 471:16 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14 48:14	119 :6 122 :25 126 :22 134 :	22 148:16 151:7,10,25 153:	15 119: 1	place [12] 21:18 34:4 55:14	21 122: 23 145: 13,15
1415 1415 1415 1415 1415 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 1422 <td< td=""><td>6 138:17 139:10 140:25</td><td></td><td></td><td>78:22 81:4 89:24 100:23</td><td>policy [7] 18:23 24:5 38:14</td></td<>	6 138 :17 139 :10 140 :25			78:22 81:4 89:24 100:23	policy [7] 18:23 24:5 38:14
Ones (5:49:0:14 (5:3) Otherwise (7:38:13 4:17) Party (146:2:42 26:33.4) Party (146:2:41:12:12) Party (146:2:41:12) Party (146:2:41:12) Party (146:2:41:12) Party (146:2:41:12:12) Party (146:2:41:12) Party (146:2:13) Party (146:2:14) Party (146:2:14) <th< td=""><td>141:5 143:12 145:10,24</td><td>others [7] 8:6,19 13:4 21:</td><td>13 117:14 127:14 130:1</td><td>104:23 109:20 113:16 134:</td><td>53:25 56:23 101:10 108:2</td></th<>	141: 5 143: 12 145: 10,24	others [7] 8:6,19 13:4 21:	13 117 :14 127 :14 130 :1	104:23 109:20 113:16 134:	53 :25 56 :23 101 :10 108 :2
Ones (5:49:0:14 (5:3) Otherwise (7:38:13 4:17) Party (146:2:42 26:33.4) Party (146:2:41:12:12) Party (146:2:41:12) Party (146:2:41:12) Party (146:2:41:12) Party (146:2:41:12:12) Party (146:2:41:12) Party (146:2:13) Party (146:2:14) Party (146:2:14) <th< td=""><td>147:24 148:16 151:18</td><td>10 65:3 86:17 94:15</td><td>135:6</td><td>25 145:11</td><td>political [10] 13:2 56:2 64:</td></th<>	147 :24 148 :16 151 :18	10 65: 3 86: 17 94: 15	135 :6	25 145 :11	political [10] 13:2 56:2 64:
15 48:19 7 46:14 35:24 116:16 128:21 131: plain() IM6:21 7:13.23 35: pollticians () 100:17 17 33:3 37:3 41:23 64:20 out () IM1:52 21:13:22 41:16 15:11 16:32 51:11,17 13:33 13:51:15 pollain() IM6:21 7:12.29 pollticians () 100:17 20.21 74:16 77:5 64:23 65:15 43:19 44:12 50:45 61:14 52: passed IN172;49:10 23 94:12 95:49 94:102:11 popli () 100:17 133:6 143:2 000 min () 16:22 63:13:02 41:14:52 passed IN172;49:10 23 94:12 95:49 94:102:11 popli () 100:17 133:6 143:2 000 min () 16:22 63:13:01 passive () 16:20 23 19:44 popli () 100:17 000 min () 16:32 63:13:02 16:12 16:32 63:13:02 passive () 16:32 23 19:44 popli () 100:17 00 pont () 17:30 10:12 16:32 16:10 45:15 passive () 16:52:10 45:15 passive () 16:52:10 45:15 popli () 100:17 popli () 100:17 00 pont () 17:30 10:10 45:15 16:10 45:15 post () 16:10 45:14	ones [3] 5:14 90:18 153:9	otherwise [7] 38:13 41:17	parts [1] 22:21	placed [1] 142:16	13 73 :12,14 74 :25 84 :18
15 48:19 7 46:14 35:24 116:16 128:21 131: plain() IM6:21 7:13.23 35: pollticians () 100:17 17 33:3 37:3 41:23 64:20 out () IM1:52 21:13:22 41:16 15:11 16:32 51:11,17 13:33 13:51:15 pollain() IM6:21 7:12.29 pollticians () 100:17 20.21 74:16 77:5 64:23 65:15 43:19 44:12 50:45 61:14 52: passed IN172;49:10 23 94:12 95:49 94:102:11 popli () 100:17 133:6 143:2 000 min () 16:22 63:13:02 41:14:52 passed IN172;49:10 23 94:12 95:49 94:102:11 popli () 100:17 133:6 143:2 000 min () 16:22 63:13:01 passive () 16:20 23 19:44 popli () 100:17 000 min () 16:32 63:13:02 16:12 16:32 63:13:02 passive () 16:32 23 19:44 popli () 100:17 00 pont () 17:30 10:12 16:32 16:10 45:15 passive () 16:52:10 45:15 passive () 16:52:10 45:15 popli () 100:17 popli () 100:17 00 pont () 17:30 10:10 45:15 16:10 45:15 post () 16:10 45:14	online [7] 10:2,2,3,3,4 39:	87:13 105:11 121:15 139:	party [14] 65:24,25 66:3,4	-	99:15 100:11 122:19
17 33:3 37:3 41:23 64:27: 9:37:94:41:23 64:20 010:119:115:21:11:20 010:119:115:21:20 723:100:115 723:100:115 723:100:115 20:21 74:16 77:5 84:23 80:12 43:19:44:12 50:45:11:42: passe 01:117:20:45:10:45:11 23:41:21:95:49:49:41:02:11 pop:1111:10:20 23:19:42:195:49:49:41:02:11 pop:1111:10:20 23:19:42:195:49:49:41:02:11 pop:1111:10:20 pop:1111:10:10:20 pop:1111:10:12:20 pop:11111:10:12:20 pop:111:10:12:20		7 146: 14		plain [1] 64:12	politicians [1] 100:17
17 33:3 37:3 41:23 64:27: 9:37:94:41:23 64:20 010:119:115:21:11:20 010:119:115:21:20 723:100:115 723:100:115 723:100:115 20:21 74:16 77:5 84:23 80:12 43:19:44:12 50:45:11:42: passe 01:117:20:45:10:45:11 23:41:21:95:49:49:41:02:11 pop:1111:10:20 23:19:42:195:49:49:41:02:11 pop:1111:10:20 23:19:42:195:49:49:41:02:11 pop:1111:10:20 pop:1111:10:10:20 pop:1111:10:12:20 pop:11111:10:12:20 pop:111:10:12:20	only [25] 6:19 10:14,18 11:	ourselves [1] 154:23	18 132: 1,17 133: 3 135 :10	plainly [19] 6:21 7:13,23 9:	
20.21 74:16 77:6 94:29 43:10 4:12 50:4 51:14 62:0 passed 19 17:24 95:10 25 94:21 55:49 94:108:74 popping 11100:17 138:61 37:5 95:24 115:25 16 55:21 56:96 114 62:0 passengers 1136:1.3,0 paintiffs 190:32 82:43 22: popting 11100:17 116 72:33, 72:17 80:17 20 98:24 107:1112.12 passing 1166:22 passengers 1136:1.3,0 paintiffs 190:32 82:43 22: popting 11100:17 21:19:22 126:18 22: 98:24 107:1112.12 passing 1166:22 passing 1166:11 passing 1166:22 passing 1166:22 passing 116:22:13:11:12 passing 116:22:13:11:12 passing 116:22:13:11:12 passing 116:22:13:11:12 passing 116:11:12:12:12:11:12 passing 116:11:12:12:12:11:12 passing 116:11:12:12:12:11:12 passing 116:11:12:12:12:11:12:12:12:11:12:12:12:11:12:12		out [54] 13:2 14:16 15:11			-
20.21 74:16 77:6 94:29 94:10 44:12 50:4 51:14 62 passengers µ136:1.39 palmtiffs №3:28 24:39 popping №100:17 136:6 143:2 16 65:21 65:6 11:6 42: 25:109 25:109 pontion №3:42:25 0pen №7:15 0:16 14:16 16:72:33 72:17 80:17.20 passengers №136:1.39 palmtiffs №3:28:22:126:12 pontion №3:42:25 0pen №7:16 0:16 14:16 36:16 32:55 80:12 b9:24:107:111:12:12 passing №5:108:23 passing №5:108:117:29 passing №5:108:117:29 passing №5:108:117:29 passing №5:108:117:20 passing №5:108:117:117:120 passing №5:108:117:117:120 passing №5:108:11	60: 22 63: 6 69: 13,18,24 71:	19:15 25:19 30:22 41:20	pass [2] 105:10 145:5	68:11,23 70:19 73:24 85:	poll [1] 113:20
9 106.25 111:1,12 113:20 6,16 552 169:6 61:12 64:. 128:23 25 109:4 popling II 100:17 103:6 143:5 17:15 01:6 41:16 81:16 82:25 83:10,14 85:7 passing II 66:12 passing II 66:12 past II 128:2 129:6,12 past II 128:2 129:6,12 past II 128:12 128:2 129:6,12 past II 128:12 128:2 129:6,12 past II 128:12 128:2 129:6,12 past II 128:14 128:14 past II 128:14:128:14 past II 128:14 past II 128:14:128:14 past II 128:14:128:14 past II 128:14:128:14:128:14:128:14 past II 128:11:128:118:128:14:128:118:128:14:128:118:128:14 past II 128:118:128:118:128:118:128:118:128:128:			•	,	
1336 1432: 11672.3372:17.80:17.20 passengers B136:1.30 plaintiffs 109:32.223:12 portion 1034242.5 0pen M7.151.00:16.41:6 35:16.82:55.00:14.85:7 passive 105:23 12.128:22456.12 postit 107:13.21 121.19 19:82:40.21:11.11:21.24 passive 105:23 pastive 105:21 past			-		
open W7:15 10:16 41:16 81:18 82:25 83:10.14 85:7 passing (1) 66:22 12 128:2 129:6 12 poses (1) 136:7 121:19 10:9 022 16:25 83:10.14 85:7 past (1) 22:16 22:63 19:02 past (1) 12:16 22:23 19:16 19:16 past (1) 12:16 22:16 29:16 19:25 past (1) 12:16 22:16 29:16 19:26 past (1) 12:16 19:22 10:17 12:11 past (1) 12:16 19:22 10:17 12:16 19:25 19:11 18:16 19:22 past (1) 12:16 19:22 10:17 12:16 19:25 19:11 18:16 19:16 past (1) 12:16 19:22 19:16 19:16 19:16 19:12 past (1) 12:16 19:16 19:12 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:16 19:		,			
36:16 37:6 95:24 11:22 6:22 87:8 93:7 95:68.15 passive ID:23 plat (P::16 position (P::24:25:33) opening (P::41:13:22) 19:62:10 7:12:24 19:62:10 7:12:24 19:12:22:12:18:31 position (P::24:18:32:92:16:18:24) opening (P::41:13:22) 19:62:10 7:12:24 19:12:12:14:11:22 passive (P::42:18:12:14:11:12:12) passive (P::42:18:12:14:11:12:12) passive (P::42:18:12:14:11:12:12) passive (P::42:18:12:14:11:12:14:11:12:14:11:12:14:11:14:12:14:11:14:12:14:11:14:11:14:12:14:14:14:14:14:14:14:14:14:14:14:14:14:				-	-
121:19 18 96:24 107:1 111:21 24 past № 25:16 96:5 105:3 platform № 6:1:18 39:9 position № 22:4 25:23 80:2 opening № 42:16 0:1:10:12:25:16:16:12 0:1:10:12:25:16:16:12 0:1:10:12:25:16:16:12 0:1:10:12:25:16:12:12:12:17:16:12 opening № 42:12 0:1:10:12:25:16:12:10:12:12:12:12:12:12:12:12:12:12:12:12:12:		-			
opened [P] 44:11 39:23 120:19 123:2 125:18 128 Partick's II 47:6 13:1 15:12 45:3 221 52:11 48:12 99:21 54:1 6 59:22 68:21 68:24 84:23 opens [II 123] 16:16 128:3 129:25 140:20 16:16 128:3 129:25 140:20 possibility III 109:12 operate [II 43:12 86:8 109: 15:19 152:0 152:14 84:19 possibility III 109:12 possibility III 109:12 operate [II 43:12 86:8 109: outline [II 150:25 overarching III 124:1 possibility III 109:12 operate [II 44:11 39:23 73:9 85:11 142:1 possibility III 109:12 possibility III 109:12 operate [II 44:11 39:23 73:9 85:11 142:1 37:4 40:36 48:21 73:523 34:1 13:2 147:24 419:18 53:16 109:23 oppinons [II 99:15 151:21 overirde [II 79:79:9 0verirde [II 79:71:9 0verirde [II 79:71:9 0verirde [II 79:71:9 0verirde [II 79:71:9 0verirde [II 79:72:9 0verirde [II 79:72:9 </td <td></td> <td></td> <td>•</td> <td></td> <td></td>			•		
opening [III 42:6] 13,16 128:6 139:22 140:20 PAUL [III 24:36 62:18] 159:9.12 62:11 82:12 99: 88:2 104:41 opening [III 12:3] 161:9 145:2:14 148:19 possible [III 143:19 possible [III 160:25] operates [III 12:3] 151:9 152:9:154:23 possible [III 160:25] possible [III 160:25] operators [III 12:3] 152:3 62:26 63:19 70:23 possible [III 160:25] possible [III 160:25] operators [III 12:3] 152:3 62:26 63:19 70:23 possible [III 160:26] possible [III 160:26] operators [III 12:3] 152:3 62:26 63:19 70:23 possible [III 160:72 possible [III 160:72 operators [III 160:26] overfroed [III 160:72 17:42:36 128:11 100:22 113:21:114:11 100:22 113:21:114:11 opportunity [III 95:10:16] 32:13:17:3 73:18:20:22:24 82:24 89:13 91:15 94:16 100:22 113:21:116:11 100:22 113:21:116:11 opportunity [III 95:10:16] 32:11 14:12;17:17 poster [III 17:1] poster [III 160:26] 14:12:24 42:14:15 85:17 100:20 22:13:14:10:20 14:19:23:12:44:12:35:17 opposing [III 33:11 16:22:17:24:16:25:17:14:24:15:21 poster [III 160:22:17:24:15:24:16:25:17:14:24:13:17:25:13:11:13:11:13:12:17:2 poster [IIII 160:22:17:24:24:13:13:12:15:11:13:11:13:12:15:15			-	-	-
opens III 122:3 operate III 43:12 86:8 109: 16 146:19 147:5,21 148:19 over 10945:12,12 47:148: 1519 1529 154:26 86:19 70:23 over 10945:12,12 47:148: penaltis III 05:16 139.23 operate III 05:26 over arching III 128:6 92/194/23 penalty III 05:16 139.23 penalty III 05:16 139.23 paratiform-specific III 33:11 132:11 1522 161:1185.16 platform-specific III 33:12 113:111124 552.12 125:120 132:1116:1124 92.14 10:05:11 132:11 152:116:1124 00:21 01:01 01 02:02 0 rover arching III 128:6 rover arching III 138:20:22.4 rover arching III 138:20:22.4 rover arching III 138:20:22.5 rover arching III 138:20:20:20:20:20:20:20:20:20:20:20:20:20:	1 -				
operate Interpretation					
operate (PI 43:12 86:8 109: joperate (PI 43:12 46:8 109: operated (PT 4:17) outline (PI 150:26) penaltige (PI 6:16 39:23) paratige (PI 6:13):25 paratige (PI 6:13		,			•
i6 over III 45:12 47:1 48: penalty IX 105:16 138:23 platforms IX 148:24 448: 54:21 67:25 120:19 12: opratod IV 74:17 13:23 63:25 63:10 70:23 poplo FX 107:20 11:21 13:21 15:25 16:11 18:5;16, platform 5x IV 148:24 148:: 23:47:24 153:15 opinion IV 20:13 21:19 overbreadth IV 16:7;23 7:37 33:37 35:18,20,22,24 88:24 89:13 91:15 94:16 13:21 15:25 16:11 18:5;16, platform 5x IV 148:20,24 140:22 113:21 116:17 24 opinion IV 20:13 21:19 0verbreadth IV 16:7;23 7:37 33:37 35:18,20,22,24 88:24 89:13 91:15 94:16 13:14 142:10 100:22 113:21 116:17 24 opinion IV 20:20 43:64: overtale IV 1144:2 portale IV 120:20 portale IV 120:20 100:82:5 100:82:5 opportunity IV 85:10.16 0:00:11 13:12 116:17:17 overtale IV 114:22 portale IV 120:20 100:11 13:21 11:21 portale IV 120:20 100:82:5 100:82:5 opposing IV 33:19 0:00:11 13:12 11:61:17:10 overtale IV 114:19:12:22:17:12:18 portale IV 120:20 11:18:12:10:11 100:11:13:11:11:12:10:11 100:11:13:11:11:12:12:10:11 100:11:13:11:11:12:12:10:11 100:11:11:11:11:12:12:10:11 100:11:11:11:11:12:12:12:10:11 100:11:11:11:11:12:12:12:10:11 100:11:11:11:11:11	1 -		-		
operated III 74-117 15:23:62:25:63:19 70:23 popole [S21:017:20:11:21] 18 23:47:24:13:16 opining II 160:20 overarching III 128:6 13:21:15:25:16:11:18:5,16; platform-driven III 15:13 Post III 43:16 opining II 160:20 overarching III 128:6 37:4:40:3,6:48:17:82:23 37:4:40:3,6:48:17:82:23 37:4:40:3,6:48:17:82:23 13:11:14:21:16:11:16:116:116:116:116:116:116:116			-		
operators (n 23:9) 73:8 99:11 142:1 13:21 14:52 16:1 18:5,16. platform/reven (n 15:13) Post (n 35:16 37:5 8:15) opinion (n 20:13 21:19) overbreadth (n 67:23 7: 37:13) 73:18:12,022,224 88:24 99:13 91:15 94:16 34:1 144:20,24 144:20,24 opinion (n 20:13 21:19) 33:21:31,7 35:18,20,22,24 88:24 99:13 91:15 94:16 92:11 10:32 34:1 44:11 13:17 Post (n 35:16 48:27) opinions (n 39:16 19:16; 10:7:6 overrule (n 17:29) overrule (n 17:29) overrule (n 14:22) post (n 14:22) post (n 14:22) post (n 14:22) post (n 13:10:3) opinion (n 140:21 overrule (n 14:22) proceive (n 30:8) gaz:21 33:11,80,224 34:12, post (n 23:10 8:17) post (n 23:11 10:13 10:3) opposing (n 193:19) overrule (n 14:22 79:6 81:19) porceive (n 30:8) gaz:21 33:11,80,224 34:12, post (n 31:13 10:3) opposing (n 138:17 44:23) overrule (n 14:22 79:6 81:19) porceint (n 17:19,23 13:22) porceint (n 17:19,23 13:22) porceint (n 17:19,23 13:22) porceint (n 17:19,23 13:22) porceint (n 13:21)		-		-	
opinion (1) (150:2) overraching (1) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) (128:6) <td>1 -</td> <td></td> <td></td> <td></td> <td></td>	1 -				
opinion P0.013 2119 overbreadth 144 67.23 7; 37.4 40:3.6 48:27 78:5.23 34:1 4 148:20,24 108:21 110:3 142:13,14.18 3 32:13,17 35:18,20,22,24 88:24 89:13 91:15 94:16 platforming IV 134:12 platforming IV 134:12 platforming IV 134:12 platforming IV 134:12 post IV 148:20 opinotinity IV 58:10.16 overrule IV 79:9 overrule IV 79:9 overrule IV 79:9 tots 15:124 145:81 77.24 posted IV 32:124 15:81 77.724 posted IV 39:13 100:3 opposing IV 93:19 overrule IV 137:17 overrule IV 137:17 overrule IV 137:17 perole's R/44:21 14:10 s2:124 15:81 77.724 posted IV 39:124 14:8: 14:14:12, 29:1520 posted IV 39:13 100:3 opposing IV 93:19 overrule IV 137:17 overrule IV 137:17 perole's R/42:23 18:5.5 fo1:10,17 73:23 79:16 81: 100:82:124 25:8 posture IV 30:20 125:22 14:15:8: posture IV 30:20 125:22 14:15:8: posture IV 30:20 125:22 14:15:8: organization IV 141:10 fo1:10:10:12 fo1:10:17:12:24:14:15:17 perosen IV 31:22:47:8: fo1:10:17:73:23 79:16:81: now: 10:20:12:22:12:15:10: port IV 13:20:12:10:10:10:13:20:12:22:12:12:10:10:13:13:12:10:10:13:12:10:10:13:12:10:10:13:12:10:10:13:12:10:12:10:10:13:12:10:10:13:12:10:10:13:12:10:12:10:10:13:12:10:11:10:11:13:12:10:11:13:12:10:11:13:12:10:11:13:12:10:11:13:12:10:11:	1 -				
108:21 110:3 142:13,14,18 3 32:13,17 35:18,20,22,24 88:24 89:13 91:15 94:16 platforming [P1 144:12] posts [P1 148:20] oppinions [P3 91:51 119:6] override [P1 79:9] override [P1 79:9] 108:23 16,18,2,125 61:07:15,218 100:8,25 opposing [P3 1:16 146:16 override [P1 71:16 32:16,84:17:6 100:8,25 23:3,25 24:17,252 30:12 100:8,25 posting [P1 34:12,24 18:5,17 17:24 posting [P1 34:22 44:22 18:25,17 opposing [P1 11:16 12:27] 101:14 149:18,19 152:27 owmer [P1 38:17 45:22 perceive [P1 30:8 32:21 33:1,18,20,22 44:12,1 105:22 17:32:24:123 organizational [P1 15:1] paradig [P1 3:22 158:5 paradig [P1 3:22 158:5 perceive [P1 33:22 124:123 125:11,12:14:15:15 15:6 13:16:13 117:5;13,25 116:6,17:34:13:13:12 13:16:13 117:5;13,25 116:6,17:34:13:13:12:14:15:15 13:16:12 16:6:17:34:13:13:12:14:15:15 organizational [P1 15:21 paradig [P1 32:12 10;22:12 perrititiz] 14:12:10:12:12 permititiz] 14:12:10:12:12 pereil 14:12:10:12:12 pereil 14:2:12:12 pereil 14:2:12:12:12 pereil 14:2:12:12:12 pereil 14:2:12:12:12 pereil 14:2:12:12:12 powerful [P1 14:2:5:13:13:12:14:15:13:13:12:14:15:13:13:12:14:15:13:13:13:13:12:14:11:13:14:14:14:14:14:14:14:14:14:14:14:14:14:					
150:151 151:21 70:17.20 81/25 82:3 129:5 989: 101:8 107:3 109:23 plattice 107:5 (2) 411:13 5: Post-prioritization [2] 0pportunity [6] 56:10.15 0verride [179:9 override [179:9 0verride [179:9 0verride [179:9 0verride [179:9 0verride [179:9 0verride [179:9 100:8,224 100:8,225 100:8,224 0verride [179:9 0verride [179:12 0verride [179				-	,
opinions @ 99:15 119:6 opportunity @ 58:10.16 33:14 44:16 156:2 opposed @ 20:20 43:5 45 opposing [!] 93:19 21 56:15 89:24 103:24 opposing [!] 11:16 3:2,58 4:7 62: 81 81 14:4 organization [!] 155:1 organization [!] 155:2 organization [!] 155:21 organization [!] 155:11 organization [!] 152:17:2 organization [!] 152:17:2 organization [!] 152:17 organization [!] 152:17 organization [!] 151:15 2:11 organization [!] 152:17 organization [!] 152:17 organization [!] 152:17 organization [!] 152:17 organization [!] 152:11 organization [!] 152:11 org					•
opportunity (#) 58:10.16 33:14 141:16 156:2 over 114:22 79:6 81:19 opposed (#) 20:20 43:5 45: over 114:22 79:6 81:19 21 56:15 89:24 103:24 opposing (#) 93:19 over 114:12 79:6 81:19 21 56:15 89:24 103:24 opposing (#) 93:19 over 114:19 12:27 optoing (#) 141:19 21 56:15 89:24 103:24 opposing (#) 93:19 over 113:12 115:21 112:11 over 113:21 152:11 over 113:21 152:11 over 113:21 152:11 over 113:21 152:11 over 113:21 152:11 over 113:21 152:11 organizer (#) 51:22 1155 16 91:14,15 15 12:16 0rganizer (#) 51:22 1155 16 113:21 152:11 organizer (#) 51:22 158:51 forganizer (#) 51:22 158:51 forganizer (#) 51:25 21:55 16 91:14,15 15 12:16 0rganizer (#) 51:22 115 organizer (#) 51:22 1155 17 organizer (#) 51:22 115 organizer (#) 51:22 115 organizer (#) 51:22 115 organizer (#) 51:22 51:55 16 91:14,15 15 37:5 63:11 69: 13 18:12,16 17.19 93:21 03:22 31:24:53 13 102:3 02:23 12:14 133:12 15:31 16 91:14,15 15 02:16 62:21 142:4 17 organizer (#) 51:22 51:15 16 91:14,15 15 02:16 62:21 142:17 0rganizer (#) 51:22 51:15 16 91:14,15 15 02:16 62:11 0rientation (#) 51:33 544:12, 17 organizer (#) 51:22 11 organizer (#) 52:21 55:15 16 91:14,15 15 02:16 62:16 61:1 07:18 109:64 123:17,20 17 0rientation (#) 51:33 544:12, 17 0rientation (#) 51:33 544:12, 17 0rientation (#) 51:33 544:12, 17 0rientation (#) 51:33 544:13 0rientation (#) 51:33 544:13 0rientation (#) 51:33 544:13 0rientation (#) 51:33 544:12, 17 0rientation (#) 51:33 544:13 0rientation (#) 51:33 544:13 0rientation (#) 51:33 544:12, 17 0rientation (#) 51:33 544:13 0rientation (#) 51:32 544;13 0rientation (#) 51:32 545;13 0rientation (#) 51				-	-
83:14 141:16 166:2 opposed [% 20:20 43:5 45: 0wortake [1144:6 opposing [1193:19 opposing [1193:19 opposing [1193:19 opposing [1193:19 opposing [1193:19 opposing [1193:19 opposing [1193:19 opposing [1193:19 opposing [1193:19 optoms [1140:21 optoms [1140:22] potratke [1144:6 own [1132:24273:36 own [1232:248:14 own [1232:248:14 own [1232:247:365:1 pages [1152:217:246: 2477:56:14,55 365:14 optoms [1140:22] potratke [1144:6 own [1232:248:14 own [1232:248:14 own [1232:248:14] potratke [1144:6 own [1232:2424:13:145:14] potratke [1144:6 own [1232:2424:13:145:14] 18 114:14:14:14:14:14:14:14:14:14:14:14:14:	1 -		,		,
opposed [6] 20:20 43:5 45: own [11] 4:22 79:6 81:19 perceive (1) 30:8 32:21 33:1,18,20,24 34:12, posts [6] 42:24 48:22 73: 21 65:15 88:24 103:24 106:15 115:2 116:8 117:8 106:15 115:2 116:8 117:8 124 62:3 48:11,12 49:15,20 14 119:3 122:24 opposing [1] 31:19 131:14 449:18,19 15:21:23 owner [2] 38:17 45:22 108:1 113:21 152:17 61:10,17 73:23 79:15 81: 103:20 125:24 81:1,3 order [7] 21:9 25:19 52:17 page [1] 77:10 parade [2] 32:12 21 7:2 46: parade [2] 31:12 21 7:2 46: perhaps [6] 31:22 47:8 66: 12 109:10 129:12 12 109:10 129:12 12 109:10 129:12 12 109:10 129:12 12 109:10 129:12 22 130:10,13 144:14 145: 25 21:3,15,18 43:8,8 83:2 20 organization [1] 158:1 parade [20] 15:22 17:2 46:1 permit [2] 14:17 00; permit [2] 14:17 00; permit [2] 14:17 00; power [19] 13:20,02,31 44; 14 45:8 9 152; 20 power [19] 13:20,02,31 44; organization [1] 158:11 parade [20] 15:22 17:2 46: permit [2] 14:17,00 parade [20] 15:21 17; permit [2] 14:20,02 power [19] 13:20,02,31 44; 14 45:8 power [19] 13:20,02,31 44; 14 45:8 power [19] 13:20,02,02 31 44; 14 45:8 power [19] 13:20,02,02 31 44; 14 45:	1				-
21 56:15 89:24 103:24 106:15 115:2 116:8 117:8 perceived III 62:23 21 46:3 48:11,12 49:15,20 14 119:3 123:24 opposite III 141:21 12:7 opmosite III 141:21 142:15:10 percent III 17:19,23 18:5,6 50:14 55:3,20 56:17 57:23 posture III 25:24 18:1,3 optosite III 40:21 ord III 116:13 117:5,13,25 119 percent III 13:21 16:17 form III 33:21 24:25 37:4 percent III 13:21 16:17 21 82:8,9 114:15,15 18:1.6 8 154:12 155:17 ord III 116:13 117:5,13,25 119 percent III 13:21 15:17 percent III 13:21 16:13 117:5,13,25 119 potentially III 33:20 42:52 potentially III 33:20 42:52 potentially III 33:20 42:52 potentially III 32:0,20,23 14: organization III 15:15 paradigm III 24:21 permit III 13:21 16:16 permit III 13:21 16:16 permit III 13:20:16:21 14:5:3 powerfull III 14:23 powerfull III 14:23 organization III 15:1 paradigm III 24:21 paradigm III 24:21 permit III 13:21 16:16 permit III 13:21 16:16 perceive III 13:21 powerfull III 14:5:8 powerfull III 14:5:8 perceedent III 20:25 precedent III 14:5:8 precedent III 14:5:8 precedent III 14:5:8 precedent III 14:5:8 precide III 14:5:8 p					
opposing (!) 93:19 opposite (!?) 11:19 122:7 option [!] 138:17 14:22 131:14 149:18,19 152:23 owner (!?) 38:17 45:22 percent [!] 17:19,23 18:56 108:11 13:21 15:17 50:14 55:3,20 56:17 57:23 61:10,17 73:23 79:15 81: 61:28:9 114:15;15 115:6, 61:28:9 114:15;15 115:6, 61:28:9 114:15;15 115:6, 13 116:13 117:5,13,25 119: parade [!] 15:62: 13 116:13 117:5,13,25 119: parade [!] 15:62: 13 53:16 102:20 posture [!] 25:24 58:7 parade [!] 15:52: 13 53:16 102:20 power [!] 18:21 17:2 46: parade [!] 15:21 power [!] 13:20,20,23 14: parade [!] 15:22 power [!] 13:20,20,23 14: parade [!] 15:21 organizational [!] 15:52: 8,11 13 18:12,16,17,19 132:19 paradigm [!] 24:12 13 18:12,16,17,19 132:19 paradigm [!] 24:12 permissible [!] 76:17 114: 13 18:12,16,17,19 132:19 paradigm [!] 24:12 permittel !] 14:17 40:5 permittel !!] 14:20,20 permittel !!] 14:20; power [!] 14:23 power [!] 14:23 0rganizational [!] 5:24 50:15, 16,21 51:5,13 54:6,14 organizational [!] 5:24 50:15, 16; 21 51:5,13 54:6,14 orientation [!] 97:7 paradigm [!] 24:13 permittel !] 14:20,20 permittel !!] 14:20 permittel !] 14:20 permittel !] 14:20 permittel !] 14:20 permittel !] 14:20 power [!] 14:23 power [!] 14:23 10:21 51:5 23:19 part [!] 9:92 42:19 25:6 33: 10:21 31:31 12:8:13 part [!] 9:92 42:19 25:6 33: 11:4:13 31:16 12:3:133:24 percisel !] 14:22 precisel !] 25:25 precisel !] 25:25 precisel !] 25:25 precisel !] 25:25 precisel !] 26:22 precisel !			-		•
opposite [2] 111:19 122:7 options [1] 411:19 122:7 options [1] 438:17 147:15 options [1] 438:17 147:15 options [1] 40:21 owner [2] 38:17 45:22 108:1 113:21 152:17 percentage [2] 43:25 37:4 percentage [2] 43:25 37:4 61:10,17 73:23 79:15 81: 21 82:8,9 114:15,15 115:6, 21 82:8,9 114:15,15 115:6, 21 82:8,9 114:15,15 115:6, 22 125:9,13 126:6 127:3 128: potentially [2] 93:12 105: potentially [2] 93:12 105: power [16] 13:20,20,23 14; potentially [2] 93:12 105: power [16] 13:20,20,23 14; power [16] 13:20,20,23 14; power [16] 13:20,10,13 14d:14 145: power [16] 14:21 142:17,21 144:5,13 power [16] 14:21 142:17,21 144:5,13 power [16] 14:21 142:17,21 144:5,13 power [16] 14:23 power [16] 14:23 power [16] 14:23 15:22 power [16] 14:21 142:13 power [16] 14:23 power [16] 14:24 power [16] 14:25 power [16] 14:25 precedent [12] 12:1 precisel [16] 14:25 precisel					
option [2] 138:17 147:15 options [0] 140:21 oral [7] 146:21, 0ral [7] 147:25, 0ral [7] 146:21, 0ral [7] 147:25, 0ral [7			-	-	•
options (I) 140:21 oral (I) 1:16 3:2,5,8 4:7 62: 18 114:4 order (I) 21:9 25:19 52:17 68:18 93:14 117:3,17 organizational (I) 158:1 organizational (I) 158:1 0 rganizational (I) 158:1 0 rganizational (I) 158:1 0 rganizational (I) 158:1 0 rganize (I) 151:2 52:18 54: 18 114:15 102:16,22 117:10 0 rganize (I) 151:2 17:2 46: 13 118:12,16,17,19 132:19 organize (I) 152:10 organize (I) 152:11 parse (I) 152:11 parse (I) 152:11 parse (I) 152:11 orthogonal (I) 23:23 Other (I) 13 113 125:3 133:24 116:13 117:5; 13,25 1142:1 0; 13 118:12,17,20 122:14 22:12 22:18 34:12 0; 13 118:12,17,20 122:12 122:13 35:12 125:13 13,21 125:13 13,21 125:13 14:18 0; 13 116:13 117:5; 13,225 119:13 14:18 0; 13 118:12,12 18:18 0; 13 118:12,12 18:18 0; 13 11 125:3 13:24 15:22 25:14 14:25; 13 12:25:15 15:24 25:22 13:14 122:13 15:19 67:6 76:21 77:14 81: 15:19 67:6 76:21 77:14 81: 15:19 67:6 76:21 77:14 81: 15:19 67:6 76:21 77:14 81: 15:19 67:6 76:21 77:14 81: 14:23 23 123:14 125:7 0; 11 84:22 85:12 146:4 0; 11 84:22 17; 1 0; 11 84:22 85:12 146:4 0; 11 84:21 17 0; 11 84:12 17 0; 11 84:12 17 0; 11 84:12 17 0; 11 84:1	1	owner [2] 38:17 45:22			
options (i) 140:21 oral (7) 11:16 3:2,5,8 4:7 62: 18 114:4 j m (i) 158:11 PAGE (2) 3:2 158:5 pages (i) 77:10 parade (20) 15:22 17:2 46: 0 arganization (4) 51:15 52: 13 53:16 102:20 j m (i) 158:11 PAGE (2) 3:2 158:5 pages (i) 77:10 parade (20) 15:22 17:2 46: 10 91:14,15 102:16,22 114: 13 53:16 102:20 j and (20) 15:22 17:2 46: 12 109:10 129:12 j and (20) 15:22 17:2 14: 12 109:10 129:12 j and (20) 15:22 17:2 14: 11 15:5: j and (20) 12:6:22 j and (20) 12:6:25 j and (20) 12:6:12 j and (20) 12:6:12 j and (20) 12:6:12 j and (20) 12:6:12		Р			
Order [7] 21:9 25:19 52:17 PAGE [2] 3:2 158:5 pages [0] 77:10 parade [20] 15:22 17:2 46: pages [0] 77:10 parade [20] 15:22 17:2 46: power [16] 13:20,20,23 14: order [7] 21:9 25:19 52:17 pages [0] 177:10 parade [20] 15:22 17:2 46: pages [0] 77:10 parade [20] 15:22 17:2 46: power [16] 13:20,20,23 14: organizational [0] 158:1 paradigm [0] 22:21 17:2 46: permissible [27 6:17 144: paradigm [0] 24:21 permissible [27 6:17 144: paradigm [0] 22:21 powerfull [11 11:25 powerfull [11 14:23 powerfull [11 11:23 powerfull [11 14:23 powerfull [11 14:23 powerfull [11 11:23 powerfull [11 12:24:17:24:24:17:14:14:15:20 powerfull [11 12:24:17:24:14:25:13:24:14:14:14:14:15:22 powerfull [11 12:24:17:24:14:24:17:24:14:14:14:15:12 precedent [12 2:24:14:24:17:14:14:14:14:15:12 powerfull [11 12:25:13:23:24:14:14:14:14:14:15:12 precedent [12 2	1 -				potentially [2] 93:12 105:
10 114:4 order (7] 21:9 25:19 52:17 pages (1) 77:10 pages (1) 77:10 parade (20) 15:22 17: 2 46: 13 53:16 102:20 24 47:2,6,14,15 86:14,15; 13 53:16 102:20 118:12,16,17,19 132:19 organization [4] 51:15 52: 16 91:14,15 102:16,22 114: organizational [1] 158:1 1318:12,16,17,19 132:19 paradigm (1) 24:21 paradigm (1) 24:21 paradigm (1) 22:10 part (2) 9:2:14:16:3 organized (1) 57:10 part (2) 9:2:14:15 organized (1) 197:7 1,3 70:22 98:11,25 106:17 orfieltation (1) 97:7 1,3 70:22 98:11,25 106:17 <td>oral [7] 1:16 3:2,5,8 4:7 62:</td> <td></td> <td>perform [3] 33:21,24 129:</td> <td>2,20 120:16,23 123:24,25</td> <td></td>	oral [7] 1:16 3:2,5,8 4:7 62:		perform [3] 33:21,24 129:	2,20 120: 16,23 123: 24,25	
Gitte (012) (02) (03) (02) (03) (03) (03) (03) (03) (03) (03) (03	18 114: 4		17	125: 9,13 126: 6 127: 3 128:	power [15] 13:20,20,23 14:
bit 19 53: 14 1173; 17 24 47:2,6,14,15 86:14,15, 16 91:14,15 102:16,22 114: 13 53:16 102:20 12 103:10 102:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 12 103:10 112:12 11 155:5 10 11 11:22 powerfull [11 14:23 powerfull [11 14:23 powerfull [11 14:23 powerfull [11 14:23 powerfull [11 11:23 powerfull [1	order [7] 21:9 25:19 52:17		perhaps [5] 31:22 47:8 66:	25 130: 10,13 144: 14 145:	25 21: 3,15,18 43: 8,8 63: 25
13 53:16 102:20 16 91:14,15 102:16,22 114: 18 playing (1) 62:22 powerfully (1) 110:6 organizational (1) 158:1 13 18:12,16,17,19 132:19 paradigm (1) 24:21 paradigm (1) 24:21 paradigm (1) 24:21 permit (2) 134:20,20 playing (1) 62:22 p	68:18 93:14 117:3,17		12 109: 10 129: 12	12 146: 8,9 152: 9,13 153:	75:21 142:17,21 144:5,13
13 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 113 11	organization [4] 51:15 52:		permissible [2] 76:17 144:	11 155: 5	
organizet (4) 51:2 52:18 54: 8,11 paradigm (1) 24:21 paradigmatic (2) 16:4 36: 7 permitting (2) 16:12 62:21 paradigmatic (2) 16:4 36: 7 permitting (2) 16:12 62:21 paradigmatic (2) 16:3 (2) protices (3) 15:22 1 paradigmatic (2) 16:3 (2) organizet (1) 52:10 organizer (2) 46:24 86:14 organizing (8) 5:24 50:15, 16:21 51:5,13 54:6,14 7 parse (1) 152:11 part (23) 9:9 24:19 25:6 33: 6,14 36:15 37:5 63:11 69: 14 permitting (2) 10:25 13:4 permitting (2) 10:25 13:4 permitting (2) 10:25 13:4 organizet (2) 46:24 86:14 organizing (8) 5:24 50:15, 16:21 51:5,13 54:6,14 6,14 36:15 37:5 63:11 69: 107:18 109:6 123:17,20 peruse (1) 136:3 peruse (1) 136:3 peruse (1) 136:3 peruse (1) 136:3 percict (1) 113:21 orthogonal (1) 23:23 107:18 109:6 123:17,20 107:18 109:6 123:17,20 participated (1) 47:2 participated (1) 47:2 participated (1) 47:2 participated (1) 47:2 percise (1) 155:15 5 105:3,7,9 109:14 112:2,5 precise (1) 24:2 67:17 0ther (53) 4:13 13:12 18:18 participated (1) 47:2 participated (1) 47:2 participated (1) 47:2 participate (1) 131:2 phone (1) 131:2 points (2) 109:14 112:2,5 preculate (1) 54:5 preculate (1) 54:5 0:22 2 55:22 67:6 75:5 82: 16:9 26:8,21,21 27:6 36: 16:9 26:8,21,21 27:6 36: physical (2) 9:24 25:7 points (1) 51:19 points (1) 51:19 points (1) 51:19 preempt	13 53 :16 102 :20		18	playing [1] 62:22	powerfully [1] 110:6
a,11 paradigmatic [2] 16:4 36: paradigmatic [2] 16:4 36: permitting [2] 10:25 13:4 plate [1] 14:8 plate [2] 16:1 16:1 16:1 16:1 16:1 16:1 16:1 16:	organizational [1] 158:1		permit [2] 134:20,20	pleadings [2] 32:18 35:22	powerless [1] 145:8
0, 11 7 parse [1] 52:10 7 parse [1] 152:11 parse [1] 152:12 parse [1] 152:11 parse [1] 131:12 parse [1] 152:11 parse [1]	organize [4] 51:2 52:18 54:		permitted [2] 14:17 40:5	please [4] 4:10 12:6 62:21	practical [3] 83:13 108:12
organized [1] 52:10 organizer [2] 46:24 86:14 organizing [8] 5:24 50:15, 16,21 51:5,13 54:6,14 orientation [1] 97:7 orthogonal [1] 23:23 Orwellian [5] 133:8 141:21, 22,25 145:13 0rwellian [5] 133:8 141:21, 150:24 participated [1] 47:2 participated [1] 47:2 participated [1] 47:2 participated [1] 47:2 participated [1] 93:20 particular [27] 11:3 13:5 16:9 26:8,21,21 27:6 36: 16:9 26:8,21,21 27:6 36: 13 64:6,11 65:20 95:5 132: 13 64:6,11 65:20 95:5 132: 13 64:6,11 65:20 95:5 132: 13 64:6,11 65:20 95:5 132: 13 64:6,11 65:20 95:5 132: 14 13:6 138:2 139:19 13 64:6,11 65:20 95:5 132: 14 13:6 138:2 139:19 152:22 157:20pernicious (1] 84:16 person [3] 55:24 88:17 90: 13 66:13 61:28 12] 13 66:13 66:28 61:17POD [2] 87:2 149:4 point [3] 95:3 8:12 14:12 13 66:16 61: 19 14:22 45:9 46:20,20 47: 14 4:8 115:20 155:15 PG& [3] 45:14 63:21 65: 114:23,23 123:14 125:17 14 4:8 115:20 155:15 points [1] 136:15POD [2] 87:2 149:4 points [1] 14:23,23 123:14 125:17 14:12 12:26 13 64:6,11 65:20 95:5 132: 14 4:8 115:20 155:15 pick [4] 10:9 52:25 78:6 101:24 points [1] 136:15POD [2] 87:2 148:19 points [1] 136:15 points [1] 136:15POD [2	8,11		permitting [2] 10:25 13:4	114: 8	-
organizerparse [1] 152:11 part [23] 9:9 24:19 25:6 33: 16,21 51:5,13 54:6,14 orientation [1] 97:7 orthogonal [1] 23:23parse [1] 152:11 part [23] 9:9 24:19 25:6 33: 6,14 36:15 37:5 63:11 69: 1,3 70:22 98:11,25 106:17 107:18 109:6 123:17,20 124:13,13 125:3 133:24 122:25 145:13person [3] 55:24 88:17 90: 14 peruse [1] 136:3 peruse [1] 136:3point [39] 5:3 8:12 15:11 18:22 22:11 25:1 38:340: 19 41:22 45:9 46:20,20 47: 16 97:6 76:21 77:14 81: precise [1] 25:22 precisely [6] 14:22 67:17 69:11 84:22 85:12 146:4 precise [1] 132:2 phone [1] 131:2 phone [1] 131:2 phose [2] 117:13 153:7 pointed [1] 50:4 55:21 56: pointing [6] 50:4 55:21 56: preempts [1] 29:4 preference [2] 53:24 59:1 preference [2] 53:24 59:1 preference [2] 53:24 59:1 preferences [2] 50:22 64: 1314:10 119:22 126:14,18, 23 128:25,25 134:23 136:152:22 187:20 14 4:8 115:20pointed [1] 51:19 pointed [1] 51:19 points [1] 51:19preferences [2] 50:22 64: 1314:10 119:22 126:14,18, 23 128:25,25 134:23 136:152:22 187:20 14 133:6 138:2 139:19 <td></td> <td></td> <td></td> <td></td> <td></td>					
organizing [8] 5:24 50:15, 16;21 51:5,13 54:6,14 orientation [1] 97:7 orthogonal [1] 23:23 Orwellian [5] 133:8 141:21, 22;25 145:13 other [53] 4:13 13:12 18:18 19:15 23:19 24:9 25:14,16 9eruse [1] 13:12 107:18 109:6 123:17,20 124:13,13 125:3 133:24 150:24 participated [1] 47:2 participated [1] 47:2 participation [1] 93:20 particular [27] 11:3 13:5 96:19,25 57:1,3 88:1,24 98:19,25 57:1,3 88:1,24 98:19,25 57:1,3 88:1,24 94:16 96:2 101:18 103:16 106:8 107:17 111:9,12 114:10 119:22 126:14,18, 23 128:25,25 134:23 136: 14 14 18:22 22:11 25:1 38:3 40: peruse [1] 136:3 peruse [1] 136:3 peruse [1] 136:15 precedents [2] 26:16 35: 19 41:22 45:9 46:20,20 47: 19 41:22 45:17 66: 114:23,23 123:14 125:17 15,19 67:6 76:21 77:14 81: precise [1] 25:22 precisely [6] 14:22 67:17 69:11 84:22 85:12 146:4 preclude [1] 54:5 preempted [2] 41:12 42:2 phone [1] 131:2 phone [2] 117:13 153:7 plysical [2] 9:24 52:7 plysical [2] 9:24 52:7 plysical [2] 9:24 52:7 plysical [2] 9:24 52:7 plick [4] 10:9 52:25 78:6 101:24 picks [1] 21:1 pictures [1] 136:15 precedents [2] 60:16 35: 106:8 107:17 111:9,12 13 64:6,11 65:20 95:5 132: 13 64:6,11 65:20 95:5 132: 24 133:6 138:2 139:19		-			-
16,21 51:5,13 54:6,14 6,14 36:15 37:5 63:11 69: peruse [1] 136:3 19 41:22 45:9 46:20,20 47: 16 orientation [1] 97:7 107:18 109:6 123:17,20 peruse [1] 136:3 petition [2] 79:6 99:21 23 51:6 59:6 60:6,16 61: precinct [1] 113:21 0rwellian [5] 133:8 141:21, 124:13,13 125:3 133:24 150:24 participated [1] 47:2 peruse [1] 131:2 phone [1] 131:2 precuse [1] 136:3 precuse [1] 136:3 precuse [1] 136:3 precuse [1] 136:3 precise [1] 25:22 22,25 145:13 150:24 participated [1] 47:2 participated [1] 47:2 participated [1] 47:2 participated [1] 47:2 porticipated [1] 131:2 phone [1] 131:2 phone [1] 131:2 phone [1] 131:2 phone [1] 131:2 pointed [1] 52:6 precude [1] 54:5 precude [1] 29:20,21 9 86:19,25 87:1,3 88:1,24 96:19,25 87:1,3 88:1,24 13 64:6,11 65:20 95:5 132: physical [2] 9:24 52:7 points [1] 51:19 preference [2] 53:24 59:1 9 41:6 96:2 101:18 103:16 13 64:6,11 65:20 95:5 132: 14 10:9 52:25 78		-		-	-
orientation [1] 97:7 orthogonal [1] 23:231,3 70:22 98:11,25 106:17 107:18 109:6 123:17,20 124:13,13 125:3 133:24 150:24petition [2] 79:6 99:21 Petitioners [7] 1:5 2:3 3:4, 14 4:8 115:20 155:1523 51:6 59:6 60:6,16 61: 15,19 67:6 76:21 77:14 81: precise [1] 25:22 precisely [6] 14:22 67:17 69:11 84:22 85:12 146:4other [53] 4:13 13:12 18:18 19:15 23:19 24:9 25:14,16 30:22 31:21 42:23 45:4,13, 20,22 55:22 67:6 75:5 82: 9 86:19,25 87:1,3 88:1,24 94:16 96:2 101:18 103:16 106:8 107:17 111:9,12 114:10 119:22 126:14,18, 23 128:25,25 134:23 136:1,3 70:22 98:11,25 106:17 107:18 109:6 123:17,20 14:12 133:24 Poticipation [1] 93:20 participation [2] 11:3 13:5 16:9 26:8,21,21 27:6 36: 21 37:15 38:21 39:6 42:15 11 [2] 103:24 155:20 pick [4] 10:9 52:25 78:6 101:24 picks [1] 21:1 picks [1] 21:1 picks [1] 21:1 picks [1] 21:1 picks [1] 21:1 picks [1] 21:1 picks [1] 21:1 pick [1] 136:1523 51:2 59:6 60:6,16 61: participation [2] 29:24,21 participation [2] 29:22,21 preempts [1] 29:24 participation [2] 29:24,		6,14 36: 15 37: 5 63: 11 69:	peruse [1] 136:3		-
orthogonal [1] 23:23 107:18 109:6 123:17,20 Petitioners [7] 1:5 2:3 3:4, 15,19 67:6 76:21 77:14 81: precise [1] 25:22 0rwellian [5] 133:8 141:21, 124:13,13 125:3 133:24 14 4:8 115:20 155:15 5 105:3,7,9 109:14 112:2,5 precise [1] 25:22 22,25 145:13 participated [1] 47:2 participated [1] 47:2 participation [1] 93:20 participation [1] 93:20 participation [1] 93:20 particular [27] 11:3 13:5 16:9 26:8,21,21 27:6 36: precise [1] 131:2 photos [2] 117:13 153:7 pointed [1] 52:6 preempted [2] 41:12 42:2 9 86:19,25 87:1,3 88:1,24 94:16 96:2 101:18 103:16 47:7 54:18 60:17 61:9 63: 13 64:6,11 65:20 95:5 132: pick [4] 10:9 52:25 78:6 9 85:7 147:5 148:19 preferences [2] 53:24 59:1 9 k110 119:22 126:14,18, 24 133:6 138:2 139:19 13 64:6,11 65:20 95:5 132: 101:24 pick [1] 136:15 2,18 30:13 56:24 61:17 14,6,16 80:8 81:4 82:1,7		1,3 70: 22 98: 11,25 106: 17			
Orwellian [5] 133:8 141:21, 124:13,13 125:3 133:24 14 4:8 115:20 155:15 5 105:3,7,9 109:14 112:2,5 precisely [6] 14:22 67:17 22,25 145:13 150:24 participated [1] 47:2 participated [1] 47:2 participated [1] 47:2 porticipation [1] 93:20 30:22 31:21 42:23 45:4,13, participated [1] 47:2 participated [1] 47:2 phone [1] 131:2 phone [1] 131:2 precude [1] 54:5 9.86:19,25 87:1,3 88:1,24 participation [1] 93:642:15 16:9 26:8,21,21 27:6 36: physical [2] 9:24 52:7 pointed [1] 52:6 preempted [2] 41:12 42:2 9.86:19,25 87:1,3 88:1,24 21 37:15 38:21 39:6 42:15 pick [4] 10:9 52:25 78:6 points [1] 51:19 preference [2] 53:24 59:1 9.416 96:2 101:18 103:16 47:7 54:18 60:17 61:9 63: 13 64:6,11 65:20 95:5 132: pick [4] 10:9 52:25 78:6 points [1] 51:19 preferences [2] 50:22 64: 106:8 107:17 111:9,12 13 64:6,11 65:20 95:5 132: 101:24 picks [1] 21:1 picks [1] 21:1 picks [1] 21:1 pointies [15] 6:2 19:3 24:1, preliminary [22] 33:12 77: 23 128:25,25 134:23 136: 152:22 157:20 pictures [1] 136:15 2,18 30:13 56:24 61:17 1,4,6,16 80:8 81:4 82:1,7		107: 18 109: 6 123: 17,20		-	
22,25 145:13 150:24 PG&E [3] 45:14 63:21 65: 114:23,23 123:14 125:17 69:11 84:22 85:12 146:4 other [53] 4:13 13:12 18:18 participated [1] 47:2 participation [1] 93:20 participation [1] 131:2 phone [1] 131:2 phone [1] 131:2 phone [1] 131:2 pointed [1] 52:6 preempted [2] 41:12 42:2 9 86:19,25 87:1,3 88:1,24 21 37:15 38:21 39:6 42:15 16:9 26:8,21,21 27:6 36: physical [2] 9:24 52:7 pointing [6] 50:4 55:21 56: preempted [2] 43:24 59:12 9 46:19 96:2 101:18 103:16 47:7 54:18 60:17 61:9 63: 13 64:6,11 65:20 95:5 132: pick [4] 10:9 52:25 78:6 points [1] 51:19 preferences [2] 50:22 64: 106:8 107:17 111:9,12 13 64:6,11 65:20 95:5 132: 101:24 pick [1] 138:6 13 23 128:25,25 134:23 136: 152:22 157:20 pick [1] 136:15 2,18 30:13 56:24 61:17 1,46,16 80:8 81:4 82:1,7		124: 13,13 125: 3 133: 24			
other fisile participated file	,				
19:15 23:19 24:9 25:14,16 participation [1] 93:20 phone [1] 131:2 photos [2] 117:13 153:7 photos [2] 113:15 photos [2] 117:13 153:7 photos [2] 113:13 15		participated [1] 47:2			
10:10:20:10:21:0:24:0:24:0:24:0:24:0:24:					•
20,22 55:22 67:6 75:5 82: 16:9 26:8,21,21 27:6 36: physical [2] 9:24 52:7 pointing [6] 50:4 55:21 56: preempts [1] 29:4 9 86:19,25 87:1,3 88:1,24 21 37:15 38:21 39:6 42:15 physical [2] 9:24 52:7 pointing [6] 50:4 55:21 56: preempts [1] 29:4 94:16 96:2 101:18 103:16 47:7 54:18 60:17 61:9 63: pick [4] 10:9 52:25 78:6 points [1] 51:19 preference [2] 53:24 59:1 106:8 107:17 111:9,12 13 64:6,11 65:20 95:5 132: 101:24 pick [4] 10:9 52:25 78:6 points [1] 138:6 13 23 128:25,25 134:23 136: 152:22 157:20 pictures [1] 136:15 2,18 30:13 56:24 61:17 1,46,16 80:8 81:4 82:1,7					
21 37:15 38:21 39:6 42:15 PI 21 03:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 05:24 <td></td> <td></td> <td>-</td> <td></td> <td>• •</td>			-		• •
94:16 96:2 101:18 103:16 47:7 54:18 60:17 61:9 63:1 105:24 103:20 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 103:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 101:24 10					
106:8 107:17 111:9,12 13 64:6,11 65:20 95:5 132: 101:24 pick [1] 138:6 13 114:10 119:22 126:14,18, 24 133:6 138:2 139:19 picks [1] 21:1 policies [15] 6:2 19:3 24:1, preliminary [22] 33:12 77:20 23 128:25,25 134:23 136: 152:22 157:20 pictures [1] 136:15 2,18 30:13 56:24 61:17 1,4,6,16 80:8 81:4 82:1,7					-
100.3 107.17 111.5,12 24 133:6 138:2 139:19 101.24 poke (1130.0 13 114:10 119:22 126:14,18, 24 133:6 138:2 139:19 picks [1] 21:1 policies [15] 6:2 19:3 24:1, preliminary [22] 33:12 77: 23 128:25,25 134:23 136: 152:22 157:20 pictures [1] 136:15 2,18 30:13 56:24 61:17 1,4,6,16 80:8 81:4 82:1,7			-	-	-
23 128:25,25 134:23 136: 152:22 157:20 pictures [1] 136:15 2,18 30:13 56:24 61:17 1,4,6,16 80:8 81:4 82:1,7					
			•		
piece @39:6 52:1,25 54:7 101:5 113:23 118:8 120: 83:12 104:7 107:19 109:9	· ·	nortioularly [2] C0.40 405.			
	10 138 :12 142 :1 147 :13,18,		piece [4] 39:0 52:1,25 54:7	101:5 113:23 118:8 120:	03: 12 104:7 107:19 109:9,

12problematic [4] 37:1 64:95:17 96:1 101:14,14 138:race [6] 75:1,9,20 76:3 97:625PRELOGAR [56] 2:6 3:910 83:8 154:92 139:4 143:14 152:1298:7reflects [3] 49:5 125:8 146114:3,4,7 115:22 116:11,problems [5] 52:23 64:10153:8,18 154:25Rachel [1] 70:61123 117:11,20 119:12 120:81:14 86:5 147:13Pruneyard [10] 5:10 12:17radical [1] 103:10refiration [1] 39:813 121:1,22 122:9,12,20procedural [3] 103:20 125:26:4 30:21,23 38:13 40:7radical [1] 135:24register [1] 113:17123:1,6,8,21 124:16,2321 155:1745:12,19 46:16railroads [1] 122:1registration [1] 94:24125:5,25 128:5,12,18 129:procedings [1] 40:25procedings [1] 40:25proceedings [1] 40:25ratio 12:23:1310,14,18 135:5 137:25 138:proceedings [1] 40:25110:14,17,19 116:5 121:21rather [2] 4:19 120:5regulate [14] 11:14,23 12:23 140:12,17,20,23 141:2,producing [1] 115:1publication [2] 23:5 100:1publication [2] 23:5 100:196:19 71:20 99:25 131:153:21 154:5,11127:9 130:11 131:6 137:6,publish [2] 132:23 143:15reached [1] 29:23reached [1] 29:23153:21 154:5,1110 138:5 139:5 144:8,10published [1] 143:16reached [4] 20:13 59:7 60:122 63:10 67:7 84:24 112:			Official		
133:20 135: 133:20 145: 135:20 145: 1 16 136:7 146.3 22 22 42 46 13 80:1 143:67 Tecs 19 75: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 75: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76:3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 3 97: 7 72 25: 10.20 76: 10.20 76: 7 72 25: 10.20 76: 10.20 76: 7 72 25: 10.20 76: 10.20 76: 7 72 25: 10.20 76: 1	13,21 110: 1 128: 1 129: 21	33:6 65:11 86:3 101:7 131:	provisions [18] 9:18,20 61:	R	referring [2] 138:4 145:6
PRELOGAR IM 2-3.34 10 833 14-36 21 334 14/31 14:212 88-7 refactor M 49-5 12:58 146 11 413.4,7 1422 1412.1 11 143.6,7 14:22,1 11 143.6,7 14:22,1 11 143.6,7 14:22,1 11 143.6,7 14:22,1 12 31 51 21,1 22 14:22,1 11 148.65 14:13,2 11 148.65 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:13,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,7 14:14,2 11 143.6,					reflect [4] 50:22 52:14 53:8,
Prace Dorat, 10:20:30 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:00 00:20:30:40:40:20:30:40:00 00:20:30:40:40:20:30:40:40:40:40:40:40:40:40:40:40:40:40:40					
3 3 41 21 21 21 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 <td></td> <td></td> <td></td> <td></td> <td></td>					
13 13 121 223 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123 123		-	,		
1221:122:122:122 producting in 1022:12 producting in 1022:12 registration 103:422 125:52:123:12:122:123 producting in 112:0 45:12:0:416:10:14:3:12 registration 103:42:3 125:52:125:52:123:12:122:123 producting in 112:0 112:0:5:42:12:0:12 registration 103:42:3 125:12:12:12:12:12:12:12:12:12:12:12:12:12:	-		-		
1255.257 12:61, 12:16 12: proceed III 14:19 public III 14:8, 10 14:3, 16 raise III 79:17 raise III 79:17 regulate III 14:19 21:09:251 13:12:13:12:13:12:13:12:13:12:13:12:13:12:13:12:13:12:13:12:13:12:13:12:13:12:13:13:13:13:13:13:13:13:13:13:13:13:13:					
22 1302 1311 324 1322, proceed [114:19] provide [115:1] pr				raise [1] 32:13	
10,14,13356,13725,132 proceedings ID4025 110;14,17,19,1165,121;21 reach #0,2015,29:24,455; 135,221,132,151,215,22,143,51 2,140;12,77,2017,29,22,21,22; product [0110;16,113,20] 122,21,22; 109,2,141,9 126,21,22,22,143,51 7,152,21,22,144,51 127,210,113,16,137,6 publication [0122,510,01] 126,144,12,129,114,151,11 135,142,164,45,1 135,142,164,45,1 135,143,164,45,1 135,144,164,45,1 135,144,164,45,1 135,144,164,45,1 135,144,164,144,14,14,144,144,144,144,144,1		•		raising [1] 79:17	
23 440:12,17,20.23 4412; producing 10:115:1 132:6 142:1452,12 153:22 144:16 153:22 144:16 149:6 150:17 152:62,11 77:20 117:9 122:3 125:13 publicity 10:59:16 20 10:32:141:9 reached 11:23:23 reached 11:23:24:45:16 reached 11:23:23 reached 11:23:24:45:16 reached 11:23:23 reached 11:23:24:45:16 reached 11:23:23 reached 11:23:24:45:16 reached 11:23:24:45:16:24:21:30:16 reached 11:23:25:16:16:16:17:17:17:17:17:17:17:17:17:17:17:17:17:				rather [2] 4:19 120:5	-
6 1442 1452 15 1442 15 1442 1452 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 1442 </td <td></td> <td></td> <td></td> <td>reach [5] 20:15 29:24 95:</td> <td></td>				reach [5] 20:15 29:24 95:	
1486 10:17 152:02 114 17.20 117:9 142:3 142:16 142:16 publicity in 59:16 reached in 193:17 reached i			-		,
H32.2 Trans.0, T Th/2 is 10.0 (1) Th/2 is 10.0 (1) Frad (4) 2213 82.7 (6):1		-	•		regulated [16] 22:5 25:11
12 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10<	153:21 154:5,11	127: 9 130: 11 131: 6 137: 6,	publish [2] 132:23 143:15		39:1 43:10 46:16 53:18 60:
10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10 10<	premise [3] 124:22,25 143:	10 138: 5 139: 5 144: 8,10	published [1] 143:16		22 63:10 67:7 84:24 112:
present Masch Professor Profesor <td>2</td> <td>146:10 150:1,6 155:7</td> <td></td> <td></td> <td>13,14 121:16,25 133:1 152</td>	2	146: 10 150: 1,6 155: 7			13,14 121: 16,25 133: 1 152
Decent Nutrice Note 1, 19, 19, 19, 19, 19, 19, 19, 19, 19,		products [2] 137:15,23	publishers [4] 86:9 123:15		•
bits bits <th< td=""><td>-</td><td></td><td></td><td></td><td></td></th<>	-				
In 14.2.7 In 2glastins 15.0.4 In 2glastins 15.0.4 In 2glastins 15.0.4 19 resented (% 28): 13.8:.6 prohibited (% 19.2): 15 prohibite (% 19.2): 15 proprohibite (% 19.2): 11 prohibite (% 19.2): 11 <td></td> <td></td> <td></td> <td></td> <td></td>					
protection profinition (11 13) profinition (11 14) profinion (11 14) profinion (11 14) p					
Discretion Discretion <thdiscretion< th=""> Discretion Discreti</thdiscretion<>	-			, <u>,</u>	
problem of 128:128 prohibitions 10:142 purpose 10:47:7 48:19 256:13 26:15 29:21 30:16 157:7 122:4 126:11 01:22:4 pressed 10:28:22 problem of 128:22 problem of 128:22 problem of 128:22 problem of 128:22 157:7 122:4 126:10 122:4 presumably 10:89:4 promoting 14:12:13 promoting 14:12:13 purpose 11:13:13 136:17 177:5 78:13 reject 10:37:13 58:18 63: prevent 10:42:12 25:11:1 promoting 14:15:22:11:2:12 136:14 137:13 136:14 137:13 136:12 11:2:12 126:16 29:2:13:1:13 reject 10:37:13 58:18 63: prevent 10:42:14:14:7 proper 10:150:1 prosotition 10:144:4 prosotition 10:144:4 126:10 12:2:14 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:11:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:12:1 126:10 12:2:14:11:14:12:1 126:10 12:2:14:11:14:12:1 126:10 12:2:14:11:14:12:1 126:10 12:2:14:11:14:12:1 126:11:14:12:10:11:14:12:1 126:11:14:12:10:11:14:12:11:11:14:12:11:11:14:12:11:11:14:12:11:11:14:12:11:11:14:12:11:11:14:11:14:12:11:11:14:12:11:11:14:12:11:11:14:11:14:12:11:11:14:12:11:11:14:12:11:11:14:11:14:11:14:11:14:11:14:11:14:11:14:11:14:11:14:11:14:11:14:11:14:11:14:11:14		•	pure [3] 66:24 119:13 131:		-
Inc. 1 Inc. 1 <thinc. 1<="" th=""> <thinc. 1<="" t<="" td=""><td>-</td><td></td><td></td><td></td><td></td></thinc.></thinc.>	-				
Pressed U128:22 project U172:2 Proj					
presset 1/25/2 promise 1/25/2 product 10/12/19 prosect 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2 1/25/2					
presumably [18:9:4] promising [8] 120:1.2.3 protext [8] 142:25 120:11 promising [8] 120:1.2.3 protext [8] 142:25 120:11 promising [8] 120:1.2.3 protext [8] 142:25 120:11 promising [8] 120:1.2.3 protext [8] 143:11 promising [8] 120:1.2.3 protext [8] 143:12 promising [8] 120:1.2.3 protext [8] 144:12 promising [8] 120:1.2.3 protext [8] 143:12 promising [8] 120:1.2.3 protext [8] 143:12 promising [8] 120:1.2.3 protext [8] 144:12 promising [8] 120:1.2.3 protext [8] 143:12 promising [8] 120:1.2.3 protext [8] 156:13 promising [8] 120:1.3 protext [8] 156:13 promising [8] 120:13 promising [8] 120					-
pretend () () 49:11 promote (2) (42:12 66:19 77:1 78:19 (80:18 81:9,15 127:5 130:8 136:14 137: rejecting (2) 47:12 58:13 137:1 138:18 63:4 115:10 proper (0) 150:1 13:146:1 100:3 117:16 131:2 13: 157:2 relate (2) 44:11 132:3 relate (2) 44:11 132:3 17 51:22, 26 31:18 46: proper (0) 150:1 13:146:1 10:145:17.16 131:2 13: 10:145:17.16 131:2 13: 17:17 58:18 66:2 86: 69:0;21,23 102:18 128:7 relate (2) 44:11.24 17 51:12, 26 31:14 1437: proper (0) 150:1 13:146:1 10:145:12 13:16 relate (2) 44:12.21 relate (2) 44:12.21 17 51:12, 26 31:14 136:1 proper (0) 150:1 13:146:1 10:143:2 reasonal (0) 143:2 relate (2) 44:12.21				110: 25 111: 3 126 :16,25	-
prety @ 112:25 120:11 promoting [4] 15:2 23:13 84:12 85:3 88:6 107:22 18,19 148:7 152:11 153:23 related [2] 44:11,24 137:1 138:16 proper [0] 150:1 13 46:1 100:3 117:16 131:2 135: 157:2 realated [2] 44:1,24 17 51:12,12 63:14 144:7 proper [0] 150:1 13 46:1 0.14 45:17 58:18 86:2 26: 169:21:23 102:18 128:7 realated [2] 44:12 relative [2] 21:10 44:12 17 51:12,12 63:14 144:7 prosecuted [1] 93:19 protectiol [167:17 gualifies [2] 25:13 70:23 84:25 97:18 102:8 114:18 124:3 qualify [2] 25:17 80:116: 51:23 103:3 152:14 related [2] 44:13 47:3 51:22 principal [2] 44:20 51:19 protection [167:17 qualify [2] 25:17 80:116: 8 reasonabel [2] 143:16 related [2] 44:13 47:3 51:22 principal [2] 44:20 51:19 protection [11 22:23 74:27 88:10 55:12 48:10 53:16;17 754: 20:18 29:9;13;21 33:9;17 recasons [2] 8:15 33:14 religion [2] 75:19 76:3 principal [2] 44:11 13:6 16:3: 140: protection [11 22:20 20:14 57:26 8:10 77:12 reconglize [1] 13:14 recognize [1] 13:14 recognize [1] 13:14 principal [2] 44:11 33:14 29:21 12:2: protection [1] 23:12 12:2:12 recogniii 11 11:17 recogniii 11 11:17 <td></td> <td></td> <td>-</td> <td>127:5 130:8 135:14 137:</td> <td></td>			-	127 :5 130 :8 135 :14 137 :	
137: 1 138:18 63:4 115:10 108:3 117:16 131:2 135: 157:2 reason [14] 22:16 40:9 41: 115:14 provent [0] 42:25 43:16 41:44:7 proport [0] 126:20 129:24 148:9 proposition [0] 144:4 proposition [0] 144:4 reason [14] 22:16 40:9 41: 10:14 51:17 58:18 66:2 86: 69:21:23 102:18 128:7 136:14 10:14 51:17 58:18 66:2 86: 69:21:23 102:18 128:7 136:14 10:14 51:17 58:18 66:2 86: 69:21:23 102:18 128:7 136:14 10:14 51:17 58:18 66:2 86: 69:21:23 102:18 128:7 136:14 11:2 136:14 11:2 136:14 11:2 136:14 11:2 136:14 11:2 136:14 11:2 136:14 11:2 136:14 11:2 136:12 20:13 70:23 84:25 reasonable [0] 148:13 religious [0] 75:1 religious [0] 72:1	-	-		18,19 148: 7 152: 11 153: 23	
prevail (1) 83:11 proper (1) 150:1 13 146:1 reason (14) 22:18 40:9 41: 115:14 prevent (7) 4:25 43:18 46: properly (9) 128:20 129:24 148:9 (0) 14 5:17 58:18 66:2 86: 69 00:21,23 102:18 128 77: 148:14 relatively (2) 52:2111:21 prevent (7) 4:25 43:18 44: properly (9) 128:20 129:24 136:14 (0) 14 5:17 58:18 66:2 86: 69 00:21,23 102:18 146:17 136:14 136:16 139:12 51:23 102:31 12:27:14 47:20 pride (2) 100:23 113:16 protected (19) 15:6 20:16 galifies (2) 26:13 70:23 84:25 reasons (9) 28:15 33:14 religious (175:1 religious (175:1 religious (175:1 religious (175:1 religious (175:1 religious (175:1 recentry (1149:14 10:24 recentry (1149:14 recognize (1165:12 recognize (1165:12 remotry (1149:14 recognize (1165:12 remotry (1149:14 recognize (1165:12 remotry (1149:14 recognize (1165:12 remotry (1149:14 recognize (1165:12 recognize (116		• •		157:2	-
prevent [7] 4:25 43:18 46: property [3] 128:20 129:24 putting [3] 104:16 123:2 10.14 61:17 58:18 66:2 86: relatively [3] 52:11:21 17 51:12,12 63:14 144:7 proposition [1] 144:4 proposition [1] 144:4 protect [1] 65: 20:16 36:14 pride [2] 100:23 113:16 protect [1] 65: 20:16 gualify [3] 26:13 70:23 84:25 relies [1] 48:13 relies [1] 48:12 pride [2] 100:23 113:16 protect [1] 65: 20:16 84:25 gualify [3] 25:17 80:1116: relies [1] 48:13 relies [1] 48:12 principal [3] 42:20 51:19 65:12 73:23 74:2, 78:2 guarter [1] 101:17 relies [1] 48:10 relies [1] 48:10 principal [3] 42:20 51:19 protection [1] 23:22 67:4 35:12 48:10 53:16,17 54: recategorize [1] 133:8 recategorize [1] 133:8 g3:8 153:6 protection [1] 23:22 67:4 35:12 48:10 53:16,17 54: recategorize [1] 133:13 recategorize [1] 133:13 g1:11 13:6 114:23 protection [1] 23:22 67:4 35:12 48:10 53:16,17 54: recognize [1] 133:13 recognize [1] 133:13 g2:11 22:1 23:22 protection [1] 23:22 protection [1] 23:22 protection [1] 23:20 protection [1] 23:22 protection [1] 23:20 protection [1] 23:22 protection [1] 23:22 protection [1] 23:22 protection [1] 23:	prevail [1] 83:11	proper [1] 150:1			
17 51:12,12 63:14 144:7 148:9 148:9 136:14 6 90:21,23 102:18 128:7 136:14 128:7 prevented (0.46:17) proposition (0.144:4) prosecuted (0.93:19) protect (0.67:17) 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:14 136:16 136:14 136:16 136:14 136:16 136:14 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16 136:16			putting [3] 104:16 123:2		relatively [2] 52:2 111:21
Dipose intering [0] 45:5 Dipose intering [0] 45:5 <thdipose 45:5<="" [0]="" intering="" th=""> <thdipose in<="" td=""><td>-</td><td></td><td></td><td></td><td></td></thdipose></thdipose>	-				
proventing [9] 45:5 51:15 prosecute (1193:19 pr	prevented [1] 46:17	proposition [1] 144:4	0		
bride protected (i) bride (i) <	preventing [3] 45:5 51:15	prosecuted [1] 93:19	-		relied [2] 47:13 51:22
primarily (0) 34:7, 10, 13 primarily (0) 37:19, 45:16 number of the formarily (0) 14:10, 11 number of the formarily (0) 14:10, 21 number of the formarily (0)					
Principal (9, 42:20 51:19) Principal (1, 12:10) Principal (1, 12:10) <th< td=""><td></td><td></td><td></td><td></td><td></td></th<>					
principlar (942.20 s1) is 00.12 13.23 14.21 00.2 quarter (1) 101:17 13,14 rely (90.20 20 14) 100.4,05 principlar (942.20 s1.19 00.12 13.23 14.21 324.23 quarter (1) 101:17 13,14 recategorize (1) 133:8 rely (90.20 20 14) 100.4,05 grinciplar (91.42.20 s1.19 136:14 139:25 145:2 protecting (1) 44:25 20.24 57:2 68:10 72:1,17 recategorize (1) 133:8 recived (1) 148:10 principles (7) 22: 12 8:22 20 14:21 123:12 124:20 75:23 77:12 80:8,22 84:25 recognizin (1) 117:7 recognize (1) 65:12 10,15 109:13 129:7 133:10 prioritize (1) 131:9 protection (11) 123:20 protection (11) 123:20 poite 66:19 104:10,21 recognize (1) 65:12 recognize (1) 65:12 remove (1) 100:2 prioritize (1) 131:9 protection (11) 123:20 protection (11) 123:20 poite 66:19 104:10,21 recognize (1) 65:12 recognize (1) 65:12 remove (1) 100:2 private (27) 65:11,24 66:2 provide (4) 173:22 provides (3) 43:11 74:24 147:9 148:2,17 150:5 152: recollection (1) 95:22 recollection (1) 95:22 represent (1) 120:5 17 133:3 141:23,24 142:6 provides (1) 129:14 provides (1) 129:14 138:16 85:4,6 94:5 103: 18 15:6 8 represent (1) 20:5 17 133:3 141:23,24 142:6				-	
10:25 17:16 12:3 17:19 12:43 question [44] 6:19 17:4,13 recategorize [1] 133:8 remins [2] 17:19,22 63:8 153:6 protecting [1] 44:25 protecting [1] 44:25 20:18 29:9,13,21 33:9,17 received [1] 148:10 received [1] 148:10 13 143:24 157:13 73:4,5 76:15 86:6,7,11,12, 20:18 29:9,13,21 33:9,17 received [1] 148:10 received [1] 148:10 principles [7] 22:1 28:22 20 114:21 123:12 124:20 75:23 77:12 80:8,22 84:25 recognize [1] 65:12 recognize [1] 65:12 printing [1] 24:6 protections [1] 123:20 protections [1] 123:20 108:13,18 126:20 128:16 recognize [1] 65:12 remody [2] 129:7 143:10 private [27] 65:11,224 protide [4] 18:20 70:25 114:25 143:4 132:3 135:20 136:24 141: 44:3 67:13 125:12 136:18 remody [2] 129:7 143:10 private [27] 65:11,24 66:2 provided [1] 73:22 provided [1] 73:22 142:9 143:21 76:5 152: recodlist [2] 95:23 33:8, recodlist [2] 95:23 33:8, reportage [1] 142:19 713:3 314:23,24 142:6 provides [1] 129:14 provides [1] 129:14 13 19:23 52:24 81:9 85:9 109 85:12 representatives [1] 44:23 713:3 13:12,212 144:7 10 138:15 139:15 141:315 19:23 52:24 81:9 85:9 109: 85:12 representat					
principle [5] 46:1 63:5 140: protecting [1] 44:25 20:18 29:9,13,21 33:9,17 received [1] 148:10 remand [1] 82:25,25 83: principle [5] 46:1 63:5 140: protecting [1] 44:25 35:12 48:10 53:16,17 54: received [1] 148:10 remand [1] 82:25,25 83: 13 143:24 157:13 73:4,5 76:15 86:6,7,11,12, 20:24 57:2 68:10 72:1,17 received [1] 148:10 received [1] 148:10 principles [7] 22:1 28:22 20 114:21 123:12 124:20 90:16 96:19 104:10,21 recognize [1] 65:12 recognized [6] 21:17 23:7 16:3 protections [1] 12:20 108:13,18 126:20 128:16 recognized [6] 21:17 23:7 remond [1] 72:14 printing [1] 24:6 provide [4] 18:20 70:25 114:25 143:4 132:3 135:20 136:24 141: 44:3 67:13 125:12 136:18 recognized [6] 21:17 23:7 private [27] 65:11,24 66:2 provide [4] 18:20 70:25 114:25 143:4 147:9 148:2,17 150:5 152: recollection [1] 95:22 recollection [1] 95:22 recollection [1] 95:22 represent [1] 120:5 private [27] 65:11,24 66:2 provides [1] 42:14 131:4 2 114:25 143:4 19,23 52:24 81:9 85:9 109: represent [1] 122:14 provides [1] 129:14 provides [1] 129:14 provides [1] 129:14 18 81:16 126:13 128:24 recruiters [4] 20:4 32:9 45:9 8			-		
bit 100:10 protection [17] 23:22 67:4 35:12 48:10 53:16,17 54: recently [1] 149:14 10,15 109:13 129:71 33:15 13 143:24 157:13 73:4,5 76:15 86:6,7,11,12, 20,24 57:2 68:10 72:1,17 recently [1] 149:14 10,15 109:13 129:71 33:15 principle [5] 46:1 63:5 140: 136:4 144:21 123:12 124:20 75:23 77:12 80:8,22 84:25 recognize [1] 65:12 recognize [1] 65:12 64:2 112:11 113:6 114:13 136:4 144:21 150:7,12 90:16 96:19 104:10,21 recognize [1] 65:12 recognize [1] 65:12 principle [5] 46:1 61:5 protections [1] 123:20 108:13,18 126:20 128:16 recognize [1] 65:12 remove [1] 100:2 printing [1] 24:6 protectios [1] 123:20 108:13,18 126:20 128:16 recognize [1] 65:12 remove [1] 100:2 private [27] 65:11,24 66:2 provide [4] 18:20 70:25 114:25 143:4 147:9 148:2,17 150:5 152: recollection [1] 95:22 recollection [1] 95:22 recollection [1] 95:22 repovide [1] 129:14 repovides [1] 129:14 repovides [1] 129:14 repovides [1] 129:14 represent [1] 62:13 128:24 represent [1] 120:5 represent [1] 120:5 represent [1] 42:19 represent [1] 42:19 <td></td> <td></td> <td>-</td> <td>-</td> <td></td>			-	-	
principle (1) 24:6 protection (1) 123:20 73:4,5 76:15 86:6,7,11,12, 20,24 57:2 68:10 72:1,17 recesses (1) 153:13 135:1,2 140:11 17:7 principles (7) 22:1 28:22 20 114:21 123:12 124:20 90:16 96:19 104:10,21 recognize (1) 65:12 recognize (1) 65:12 remarks (1) 43:17 64:2 112:11 113:6 114:13 136:4 144:21 150:7,12 poitections (1) 123:20 108:13,18 126:20 128:16 recognize (1) 65:12 recognize (1) 65:12 remarks (1) 43:17 printing (1) 24:6 protectis [2] 65:18 114:9 132:3 135:20 136:24 141: 143:21 123:12 123:10 recognizing [2] 124:19 recognizing [2] 124:19 recognizing [2] 124:19 recollection (1) 95:22 recollection (1) 95:22 reply (1) 121:24 reply (1) 120:5 represent (1) 1					-
15 143.24 153.12 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.4,3,76.13 173.23 175.23 177.12 108:13,18 126:20 128:16 176.13 123:23 135:20 136:24 141:1 142:21 123:23 135:20 136:24 141:14 142:31 125:12 136:4 141:11 173:14 100:2 recognizing 121:24:19 remarks 10 101:12:24 repovides 114:21 121:24 representations 121:24 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23 124:23				-	
64:2 112:11 113:6 114:13 136:4 144:21 150:7,12 protections [1] 123:20 protections [1] 123:20 protects [2] 65:18 114:9 provide [4] 18:20 70:25 90:16 96:19 104:10,21 108:13,18 126:20 128:16 132:3 135:20 136:24 141: 21 142:9 143:23 146:25 recognize [1] 65:12 recognize [6] 21:17 23:7 recognize [6] 21:17 23:7 reco					
116:3 protections (1) 123:20 108:13,18 126:20 128:16 recognized (6) 21:17 23:7 remotel (1) 72:14 printing (1) 24:6 protects (2) 65:18 114:9 provide (4) 18:20 70:25 114:25 143:4 121:12 9 143:23 146:25 144:3 67:13 125:12 136:18 remove (1) 100:2 privacy (1) 144:20 114:25 143:4 provide (1) 73:22 147:9 148:2,17 150:5 152: 149:25 recollection (1) 95:22 reportage (1) 142:19 78:3 93:24 102:6,6,10,11, provides (1) 129:14 provides (1) 129:14 questions (20) 6:4 33:15 19,23 52:24 81:9 85:9 109: 57:21 59:5 64:17 79:17 80: 18 81:16 85:4,6 94:5 103: 19,23 52:24 81:9 85:9 109: 51:0 127:13 129:2,13 155: representations (2) 4:23 pro-lsrael (1) 50:8 provision (28) 23:2,17,21, 24 26:21 58:3,6,22 59:8,16 151:9 151:9 recruiters (4) 20:4 32:9 46: 6,9 representing (2) 120:4 probability (1) 82:2 77:25 84:12 88:22 92:7,16 95:19 101:2 105:16 125: 151:9 reduced (2) 50:8,8 represents (1) 6:9 republicans (1) 157:8 republicans (1) 157:8 republicant (1) 100:1 republication (1) 100:1					
Initial protocols (2) 61/2 (2) protocols (2) 65/2 (2) 132:3 135:20 136:24 141: 21 14:29 143:23 146:25 44:3 67:13 125:12 136:18 recognizing (2) 124:19 remove (1) 100:2 privacy (1) 144:20 provide (4) 18:20 70:25 114:25 143:4 21 142:9 143:23 146:25 147:9 148:2,17 150:5 152: 17 149:25 recognizing (2) 124:19 reply (1) 21:24 private (27) 65:11,24 66:2 provides (1) 73:22 provides (1) 129:14 questioning (2) 42:14 134: 2 recommended (1) 55:10 represent (1) 120:5 17 133:3 141:23,24 142:6 provides (1) 129:14 provides (1) 129:14 questions (20) 6:4 33:15 19,23 52:24 81:9 85:9 109: 5,10 127:13 129:2,13 155: representations (2) 4:23 17 133:3 141:23,24 142:6 provision (28) 23:2,17,21, 143:21,22 144:7 10 18 81:16 85:4,6 94:5 103: 22 115:16 126:13 128:24 18 156:8 recruiters (4) 20:4 32:9 46: 6,9 representatives (1) 44:2 pro-Palestinian (1) 50:7 24 26:21 58:3,6,22 59:8,16 181:51 39:15 141:3,15 181:9 recruiters (4) 20:4 32:9 46: 6,9 6,9 representing (2) 120:4 121:20 probability (1) 82:2 77:25 84:12 88:22 92:7,16 quite [6] 16:2,17 40:3 57: 21 119:14 157:3 red (1) 73:9 red (1) 73:9 republication [1] 100:1		,	108:13,18 126:20 128:16		
prioritize [1] 131:9 provide [4] 18:20 70:25 21 142:9 143:23 146:25 recognizing [2] 124:19 Reno [2] 64:1 111:16 privacy [1] 144:20 114:25 143:4 provide [0] 73:22 provide [0] 73:22 recollection [1] 95:22 recommended [1] 55:10 reportage [1] 142:19 78:3 93:24 102:6,6,10,11, provides [1] 129:14 provides [1] 129:14 questions [2] 64:1 33:15 19,23 52:24 81:9 85:9 109: represent [1] 120:5 17 133:3 141:23,24 142:6 provision [28] 23:2,17,21, 10 57:21 59:5 64:17 79:17 80: 18 81:16 85:4,6 94:5 103: 18 156:8 representatives [1] 44:2 pro-lsrael [1] 50:8 provision [28] 23:2,17,21, 24 26:21 58:3,6,22 59:8,16 138:15 139:15 141:3,15 6,9 recruiters [4] 20:4 32:9 46: 6,9 probability [1] 82:2 77:25 84:12 88:22 92:7,16 95:19 101:2 105:16 125: 1119:14 157:3 red [1] 73:9 red [1] 73:9 republicans [1] 157:8 Probably [3] 76:4,9 97:20 95:19 101:2 105:16 125: 21 119:14 157:3 red [2] 50:8,8 republication [1] 100:1			132:3 135:20 136:24 141:	_	
privacy [1] 144:20114:25 143:4147:9 148:2,17 150:5 152:149:25reply [1] 21:24private [27] 65:11,24 66:2provided [1] 73:22provided [1] 73:22recollection [1] 95:22reportage [1] 142:1978:3 93:24 102:6,6,10,11,provides [3] 43:11 74:24131:4questioning [2] 42:14 134:recommended [1] 55:10represent [1] 120:520 110:14,21 116:13,18131:4questions [20] 6:4 33:1519,23 52:24 81:9 85:9 109:s5:12represent [1] 120:517 133:3 141:23,24 142:6provides [1] 129:14providing [3] 122:3 137:5,18 81:16 85:4,6 94:5 103:18 156:8s5:12143:21,22 144:71057:21 59:5 64:17 79:17 80:5,10 127:13 129:2,13 155:s5:12representatives [1] 44:2pro-lsrael [1] 50:8provision [28] 23:2,17,21,24 26:21 58:3,6,22 59:8,16138:15 139:15 141:3,156,9recruiters [4] 20:4 32:9 46:121:20pro-terrorist [1] 91:1961:9,13,13,14 62:12 73:13151:9recruiting [1] 48:19represents [1] 6:9represents [1] 6:9probability [1] 82:277:25 84:12 88:22 92:7,1695:19 101:2 105:16 125:21 119:14 157:3red [1] 73:9reduced [2] 50:8,8republicans [1] 157:8Probably [3] 76:4,9 97:2095:19 101:2 105:16 125:21 119:14 157:3reduced [2] 50:8,8republication [1] 100:1		-			
private [27] 65:11,24 66:2 78:3 93:24 102:6,6,10,11, 20 110:14,21 116:13,18 117:5,14 131:18,19,25 132: 17 133:3 141:23,24 142:6 143:21,22 144:7 pro-Israel [1] 50:8 provides [2] 23:2,17,21, provision [28] 23:2,17,21, pro-terrorist [1] 91:19 probability [1] 82:2 17 provides [2] 42:14 134: 2 questioning [2] 42:14 134: 2 questions [20] 6:4 33:15 57:21 59:5 64:17 79:17 80: 18 81:16 85:4,6 94:5 103: 22 115:16 126:13 128:24 138:15 139:15 141:3,15 pro-terrorist [1] 91:19 probability [1] 82:2 recollection [1] 95:22 recommended [1] 55:10 record [16] 32:19,25 33:3,8, 19,23 52:24 81:9 85:9 109: 5,10 127:13 129:2,13 155: 18 156:8 recruiters [4] 20:4 32:9 46: 6,9 recruiting [1] 48:19 represents [1] 6:9 Republicans [1] 157:8 reduced [2] 50:8,8	-				
78:3 93:24 102:6,6,10,11, 20 110:14,21 116:13,18 providers [3] 43:11 74:24 131:4 questioning [2] 42:14 134: 2 recommended [1] 55:10 record [16] 32:19,25 33:3,8, 19,23 52:24 81:9 85:9 109: 5,10 127:13 129:2,13 155: 18 156:8 represent [1] 120:5 representations [2] 4:23 17 133:3 141:23,24 142:6 143:21,22 144:7 provides [1] 129:14 providing [3] 122:3 137:5, 143:21,22 144:7 questions [20] 6:4 33:15 10 19,23 52:24 81:9 85:9 109: 5,10 127:13 129:2,13 155: 18 156:8 representations [2] 4:23 pro-lsrael [1] 50:8 proversite [1] 9:119 provision [28] 23:2,17,21, 24 26:21 58:3,6,22 59:8,16 18:15 139:15 141:3,15 151:9 6,9 recruiters [4] 20:4 32:9 46: 6,9 representatives [1] 44:2 representatives [1] 48:19 probability [1] 82:2 77:25 84:12 88:22 92:7,16 95:19 101:2 105:16 125: quite [6] 16:2,17 40:3 57: 21 119:14 157:3 red [1] 73:9 red [1] 73:9 Republicans [1] 157:8 republication [1] 100:1		provided [1] 73:22			
20 110:14,21 116:13,18 131:4 2 record [16] 32:19,25 33:3,8, representations [2] 4:23 117:5,14 131:18,19,25 132: provides [1] 129:14 questions [20] 6:4 33:15 19,23 52:24 81:9 85:9 109: s5:12 17 133:3 141:23,24 142:6 providing [3] 122:3 137:5, 10 57:21 59:5 64:17 79:17 80: 5,10 127:13 129:2,13 155: representatives [1] 44:2 143:21,22 144:7 10 18 81:16 85:4,6 94:5 103: 18 156:8 representatives [1] 44:2 representatives [1] 44:2 pro-lsrael [1] 50:8 provision [28] 23:2,17,21, 24 26:21 58:3,6,22 59:8,16 138:15 139:15 141:3,15 6,9 representing [2] 120:4 pro-terrorist [1] 91:19 61:9,13,13,14 62:12 73:13 151:9 recruiting [1] 48:19 represents [1] 6:9 probability [1] 82:2 77:25 84:12 88:22 92:7,16 quite [6] 16:2,17 40:3 57: red [1] 73:9 republicans [1] 157:8 Probably [3] 76:4,9 97:20 95:19 101:2 105:16 125: 21 119:14 157:3 reduced [2] 50:8,8 republication [1] 100:1		-	• •		
117.5, 14 131.10, 19, 25 132. provides (i) 125.14 provides (-			representations [2] 4:23
143:21,22 144:7 10 18 81:16 85:4,6 94:5 103: 18 156:8 represented [1] 58:4 pro-Israel [1] 50:8 provision [28] 23:2,17,21, 24 26:21 58:3,6,22 59:8,16 138:15 139:15 141:3,15 6,9 121:20 represented [1] 58:4 pro-Palestinian [1] 50:7 24 26:21 58:3,6,22 59:8,16 138:15 139:15 141:3,15 6,9 121:20 121:20 121:20 probability [1] 82:2 77:25 84:12 88:22 92:7,16 quite [6] 16:2,17 40:3 57: red [1] 73:9 red [1] 73:9 republicans [1] 157:8 Probably [3] 76:4,9 97:20 95:19 101:2 105:16 125: 21 119:14 157:3 reduced [2] 50:8,8 republication [1] 100:1					
140.21/22 144.7 10 pro-lsrael [1] 50:8 provision [28] 23:2,17,21, pro-Palestinian [1] 50:7 24 26:21 58:3,6,22 59:8,16 pro-terrorist [1] 91:19 61:9,13,13,14 62:12 73:13 probability [1] 82:2 77:25 84:12 88:22 92:7,16 Probably [3] 76:4,9 97:20 95:19 101:2 105:16 125:					
pro-Palestinian [1] 50:7 24 26:21 58:3,6,22 59:8,16 138:15 139:15 141:3,15 6,9 121:20 pro-terrorist [1] 91:19 61:9,13,13,14 62:12 73:13 151:9 recruiting [1] 48:19 represents [1] 6:9 probability [1] 82:2 77:25 84:12 88:22 92:7,16 quite [6] 16:2,17 40:3 57: red [1] 73:9 Republicans [1] 157:8 Probably [3] 76:4,9 97:20 95:19 101:2 105:16 125: 21 119:14 157:3 red [2] 50:8,8 republication [1] 100:1					
pro-terrorist [1] 91:19 61:9,13,13,14 62:12 73:13 151:9 recruiting [1] 48:19 represents [1] 6:9 probability [1] 82:2 77:25 84:12 88:22 92:7,16 quite [6] 16:2,17 40:3 57: red [1] 73:9 republicans [1] 157:8 Probably [3] 76:4,9 95:19 101:2 105:16 125: 21 119:14 157:3 red [2] 50:8,8 republication [1] 100:1	-	-			
probability [1] 82:2 77:25 84:12 88:22 92:7,16 quite [6] 16:2,17 40:3 57: red [1] 73:9 Republicans [1] 157:8 Probably [3] 76:4,9 97:20 95:19 101:2 105:16 125: 21 119:14 157:3 red [2] 50:8,8 republication [1] 100:1	-			-	
Probably [3] 76:4,9 97:20 95:19 101:2 105:16 125: 21 119:14 157:3 reduced [2] 50:8,8 republication [1] 100:1				-	-
			-		
					-
	problem [10] 28:6,21 31:10	18 120:4 130:11 150:23			require ৩ 61:16 94:22

Official

		Official		
112:7 154:25 155:4	22 133:12 136:22 140:6	20 82:13 111:5 156:11	shapes [1] 124:5	114:15 115:5 126:5 127:2
required [3] 22:12 51:10	141:12 146:22 151:4 155:	Section [30] 29:4,20,23 40:	she's [1] 157:15	130:9 133:25 139:4 144:
54 :7	11 158: 8	18,19,21 41: 23 42: 5 66: 10,	shielded [1] 114:24	13 153: 1 155: 5
requirement [5] 22:25 52:	Robins [2] 5:10 12:17	15,23 78: 15 84: 15,15 86: 3,	shift [2] 8:23 82:5	society [2] 21:9 36:22
1 59:17 107:23 108:4	rubric [1] 41:17	5,22 92:8,10 119:4 121:6	shopping [2] 12:20 45:22	solely [2] 53:23 103:24
requirements [5] 7:19,20	rude [1] 101:9	123:12,14 125:1,8,10 148:	shops [1] 55:11	Solicitor [2] 2:2,6
12:13 70:16 145:16	rule [1] 142:12	17 149: 5,21 150: 13	shot [1] 95:16	Solomon [1] 103:13
requires [2] 61:6 62:7	rules [14] 13:7 15:23,23,24	sections [1] 84:16	shouldn't । । 67:12 111:3	somebody [11] 16:11 80:
reserve [1] 127:5	16:6,10,15 17:13,16,18 27:	sector [3] 121:25 141:23	148:2	21 88:14 90:11 93:18 108:
reserving [1] 119:2	19 37: 2 39: 13 60: 23	143: 21	show [6] 7:4 9:4 19:3 24:7	5 113: 6,20 125: 4 134: 21,
resist [3] 77:5 129:23 133:	rulings [1] 140:11	see [9] 49:13 89:1,13,16,17,	82:2 151:22	22
7	Rumsfeld [5] 5:11 19:14,	18,20 95: 25 152 :1	showed [1] 45:4	somehow [2] 30:13 111:
resolve [2] 41:7 155:2	16 20 :9 46 :7	seeking [1] 136:12	shown [3] 7:6 83:17 128:2	11
resolved [1] 139:2	run [4] 37:21 90:19 99:6	seem [10] 6:6 16:10,13 25:	shows [2] 91:1 103:10	someone [3] 11:2 12:25
resolving [2] 148:12 154:	140: 20	9 62:3 66:15 77:22 79:1	Shurtleff [2] 47:24 48:4	88: 10
14	running [1] 99:11	121: 9 127 :7	side [3] 45:22 49:11 122:15	someone's [1] 88:20
respect [22] 15:24 16:8 60:	S	seemingly [1] 133:9	sides [3] 25:9 104:11 152:	sometimes [3] 74:21 116:
13 66:17 68:5 78:5 84:6		seems [21] 6:8 8:2 16:2 18:	24	21 118: 21
97:1,3 127:3 130:6,10,13	sale [2] 11:22 12:4	5 21: 5,12 27: 20 30: 14,16	sight [2] 63:4 99:20	somewhat [2] 11:20 109:
135:22 136:11 137:22 138:	Salerno [4] 68:12 70:17 84:	48:15 55:9 92:9 94:19 99:	signaling [1] 118:18	11
25 139 :10 148 :3 149 :8,10	7 85 :17	16 112: 25 118: 7 121 :19	signed [1] 111:11	somewhere [1] 68:13
155: 3	sales [1] 69:16	130:11,25 148:12 157:3	significance [1] 135:18	sorry [9] 28:24 32:13 65:15
respectfully [1] 39:25	Samaritan [1] 125:18	sees [1] 109:15	significant [2] 6:17 56:22	69:8 88:9 91:5 124:10,22
respects [1] 104:20	same [16] 20:19 45:11 49:	select [1] 5:15	significantly [1] 9:16	127: 18
respond [4] 45:24 135:11	12 58 :24 59 :1 73 :6 77 :7	selecting [1] 40:10	signing [1] 96:6	sort [38] 5:18 23:23 30:7 34
142 :23 145 :9	78:17 96:19 107:2 109:17	selection [3] 47:14,17 51:	silence [2] 5:4 14:25	4 36:6,8 52:10 53:23 61:
responded [1] 21:12	110:23 120:20 131:6 144:	20	silenced [1] 45:6	18 75:4 78:16 80:7,17 81:
Respondent [1] 6:9	11 146: 5	selective [3] 15:14 46:13,	silencing [1] 46:17	16 83 :10,14 86 :19 87 :19,
Respondents [8] 1:9 2:5,	sanction [1] 41:15	19	Silicon [1] 96:11	22 89:14 92:15,21,21,21
9 3:7,11 62:19 114:6 115:	satisfies [1] 70:16	selectivity [1] 47:19	similar [4] 13:10 23:6,18	94 :9 95 :5 96 :24 100 :12
20	satisfy [1] 7:21	sell [4] 10:14 11:3,8 55:24	121 :12	101 :2 104 :9 106 :13 109 :
response [3] 13:22 135:14	save [3] 68:13 97:21 127:	seller [1] 78:19	similarly [1] 16:3	15 111:7 112:10,20 134:17
151:8	10	selling [1] 11:9	simply [5] 43:1 51:9,15 61:	137 :10 147 :21
responsibility [1] 5:17	saw [1] 111:14	semantics [1] 132:18	5 131 :14	sorted [1] 82:24
responsible [4] 47:16 86:	saying [26] 26:3,9,18 27:22	send [3] 147:6,20 148:13	since [6] 6:8 13:25 70:21	sorting [1] 53:22
15,17 119 :9	38:5 48:21 50:19,20 66:13	sending [2] 88:17 93:2	94 :18 141 :16 142 :5	sorts [3] 31:8 37:12 153:25
rest [2] 77:14 104:9	71:16 83:23 91:6,9,10,11,	sends [1] 139:8	sing [1] 4:17	SOTOMAYOR [19] 7:25 8:
restrict [3] 21:8 99:25 115:	17,18 94: 4 95: 1 98: 25 99:	sense [3] 33:8 39:16 50:25	single [3] 9:12 118:3,15	22 9:22 12:3,6,10,22 13:16
13	5 117 :19 132 :8 134 :24	sentence [1] 21:6	singles [1] 64:11	36: 3 52: 5 55: 8 56: 21 94: 7,
restriction [4] 52:2 60:13,	148: 23 157: 14	separate [7] 51:2,4,14 53:	sit [1] 56:9	8 127: 15,18 133: 13,14 135
22 61: 2	says [30] 10:17 23:2,25 27:	17 59:15 149:22 158:3	site [16] 15:19 16:7,20 18:	13
restrictions [3] 37:7,12 96:	5 40:20 50:3 59:8,9 73:2,3,	separating [1] 120:10	10,13 38: 23 39: 7 40: 13 42:	
7	13 74:21 92:7 95:23 99:13,	serious [1] 37:6	20 50 :5 91 :20 92 :23 93 :13	153 :16
result [6] 58:25 67:9 81:19	17,23 104: 8 110: 3 122: 5	seriously [2] 16:13 36:20	97 :3,5 157 :16	sounds [3] 22:23 27:25
89:24 109:3 142:20	123:15,18,25 131:20 137:	serve [3] 22:20,22 99:14	sites [13] 4:21 5:15 18:22	119 :10
results [1] 100:10	16 142: 16 143: 1,18 155: 24	servers [1] 148:6	30 :18 32 :7 71 :21,22 90 :25	sovereign [1] 9:3
retain [1] 124: 20	156: 18	servers [3] 23:6,17,20	30 :18 32 :7 71 :21,22 90 :25 92 :19 107 :5,8,9 127 :6	•
	scenario [1] 136:7			space [7] 9:25 10:5 51:20,
revenues [1] 9:14	scenarios [1] 84:2	Service [21] 5:2,18 24:18, 20 50:5 55:6 73:22 75:8 0	situation 3 69:11 144:1,	21,25 52:7 64: 1
review [3] 17:25 49:16 135:	school [3] 26:9 131:20 132:	20 50 :5 55 :6 73 :22 75 :8,9	24 situations (1) 150:2	spam [1] 18:1
8 ridoo (1) 49 :14	5	99:6 114: 25 119: 10 120: 8,	situations [1] 150:3	spans [1] 10:11
rides [1] 48:14	schools [9] 19:16,22,25 26:	14,20 121: 4 122: 4 130: 25	size [1] 131:15	speaker [5] 13:5 47:20 63:
rightly [1] 94:19	6 32 :8 40 :4 46 :6 48 :18	131: 3 149: 11,19	skepticism [1] 109:17	2 65:11 75:6
rights [3] 15:10 135:22 145:	103 :14	services [7] 5:3 28:25 57:6	slant [1] 72:20	speaker-based [3] 95:20,
2	scope [3] 126:5 129:19	70:24,25 78:1 152:2	slow [1] 155:21	24 96:1
L R N (111 77 11		serving [1] 22:11	small [2] 37:4 71:21	speakers [7] 15:1 18:25
RNC [1] 74:11	139 .15	set [4] 57:18 101:7 148:8	smartphones [1] 8:6	42 :22 63 :14,17 65 :3 79 :9
road [3] 17:13 84:11 153:	139: 15 score [1] 28: 20			and a labor to the state of the second
road ଓ 17:13 84:11 153: 17	score [1] 28:20	151: 7	so-called [1] 73:4	
road [3] 17:13 84:11 153: 17 ROBERTS [38] 4:3 13:18	score [1] 28:20 scream [1] 13:2	151:7 several [1] 62:24	so-called [1] 73:4 socia [1] 9:8	18 99 :7 125 :9
road [3] 17:13 84:11 153: 17 ROBERTS [38] 4:3 13:18 15:4 19:24 29:8 30:3 32:	score ^[1] 28:20 scream ^[1] 13:2 scrutiny ^[14] 10:25 22:7 37:	151:7 several ^[1] 62:24 sex ^[2] 97:6 98:8	so-called [1] 73:4 socia [1] 9:8 Social [39] 5:12 8:3,5 13:	18 99:7 125:9 speaks [1] 20:22
road [3] 17:13 84:11 153: 17 ROBERTS [38] 4:3 13:18 15:4 19:24 29:8 30:3 32: 11 36:2 40:15 43:14 48:7	score [1] 28:20 scream [1] 13:2 scrutiny [14] 10:25 22:7 37: 21 60:10 77:3 81:8 85:11,	151:7 several ^[1] 62:24 sex ^[2] 97:6 98:8 sexual ^[1] 97:7	so-called [1] 73:4 socia [1] 9:8 Social [39] 5:12 8:3,5 13: 15,21,24 15:5 16:4 21:3	18 99:7 125:9 speaks [1] 20:22 specific [3] 31:12 74:11
road [3] 17:13 84:11 153: 17 ROBERTS [38] 4:3 13:18 15:4 19:24 29:8 30:3 32: 11 36:2 40:15 43:14 48:7 57:15 62:15 73:17,21 74:4	score [1] 28:20 scream [1] 13:2 scrutiny [14] 10:25 22:7 37: 21 60:10 77:3 81:8 85:11, 14 104:16 115:15 134:7,9	151:7 several [1] 62:24 sex [2] 97:6 98:8 sexual [1] 97:7 shadow [8] 23:3 31:7 54:	so-called [1] 73:4 socia [1] 9:8 Social [39] 5:12 8:3,5 13: 15,21,24 15:5 16:4 21:3 24:17 25:2 27:12 34:12,20	18 99:7 125:9 speaks [1] 20:22 specific [3] 31:12 74:11 150:20
road [3] 17:13 84:11 153: 17 ROBERTS [38] 4:3 13:18 15:4 19:24 29:8 30:3 32: 11 36:2 40:15 43:14 48:7 57:15 62:15 73:17,21 74:4 84:20 85:16,24 93:4 94:6	score [1] 28:20 scream [1] 13:2 scrutiny [14] 10:25 22:7 37: 21 60:10 77:3 81:8 85:11, 14 104:16 115:15 134:7,9 135:3 146:18	151:7 several [1] 62:24 sex [2] 97:6 98:8 sexual [1] 97:7 shadow [8] 23:3 31:7 54: 10 59:10,14 100:19,20,21	so-called [1] 73:4 socia [1] 9:8 Social [39] 5:12 8:3,5 13: 15,21,24 15:5 16:4 21:3 24:17 25:2 27:12 34:12,20 36:7 42:20 46:3 48:12,22	18 99:7 125:9 speaks [1] 20:22 specific [3] 31:12 74:11 150:20 specifically [4] 77:2 100:9
road [3] 17:13 84:11 153: 17 ROBERTS [38] 4:3 13:18 15:4 19:24 29:8 30:3 32: 11 36:2 40:15 43:14 48:7 57:15 62:15 73:17,21 74:4	score [1] 28:20 scream [1] 13:2 scrutiny [14] 10:25 22:7 37: 21 60:10 77:3 81:8 85:11, 14 104:16 115:15 134:7,9	151:7 several [1] 62:24 sex [2] 97:6 98:8 sexual [1] 97:7 shadow [8] 23:3 31:7 54:	so-called [1] 73:4 socia [1] 9:8 Social [39] 5:12 8:3,5 13: 15,21,24 15:5 16:4 21:3 24:17 25:2 27:12 34:12,20	speaks [1] 20:22 specific [3] 31:12 74:11 150:20

10 31:142:189 73:2Heritage Reporting Corporation

		Official		
specifics [1] 106:10	4	substantial [1] 68:17	14	16 84: 13,18 87: 5 88: 22 92 :
speculating [1] 31:16	state's [2] 31:14 146:11	substantive [2] 9:17,20	talks [1] 100:9	17 93:5 94:1 98:12 101:8
speech [127] 4:15,19,25 5:	statement [1] 96:6	substantively [1] 58:25	Tallahassee [1] 2:2	109:18 111:20 115:2 117:
6,14,19 12: 20,25 13: 11,14	STATES [10] 1:1,17 2:8 3:	subterfuge [1] 71:17	Tam [1] 47:24	24 118:3 125:21 128:14
14: 25 16: 7,20,21 19: 3,6,7,	10 32:5 114:5 125:7 139:	succeed [2] 57:9 128:3	tap [1] 89:14	134:8 136:8 139:21 151:
8 20:19 21:9 22:6,15 25:	20 157: 14,24	succeeded [1] 68:25	target [2] 104:19 144:19	22 154:23 155:17 156:8
11,15,17 26: 7,14 30: 8 31:	station [1] 45:4	success [3] 4:14 82:2 83:	targeted [4] 63:11 69:20	therefore [1] 26:13
18,21,21,24 32 :3 34 :14 36 :	status [3] 75:5 86:13 154:	18	96 :14 120 :23	they'll [1] 35:20
25 37 :15 39 :22 41 :19 43 :	16	succinctly [1] 95:2	targeting [3] 43:23 62:10	thin [1] 92:22
18 44 :10,13,13,21,24 45 :	status-based [1] 75:4	sudden [3] 39:15 96:12	107 :21	thinking [4] 94:12,18 132:
11,21 46 :13,14,20,22 47 :	statute [60] 6:20 7:8,12,23	101: 5	targets [2] 61:9 103:11	6 133 :19
22 48 :1,17,23 49 :5,6 50 :7,	9: 20 32: 22 33: 2 35: 12 58:	sue [1] 108:5	tautology [1] 30:17	thinks [3] 107:25 129:14,
8,10,16 51 :11,13 55 :15 63 :	1,10,20 63: 10 67: 24 68: 10,	sued [1] 109:23	teach [1] 63:22	24
1,4,24 64 :20,22,23,25 65 :	13,16,22,25 69: 2,13 70: 21	sufficient [2] 27:9 95:14	teaches [1] 90:7	third [3] 6:25 65:25 66:3
25 75 :12,15,21,24 84 :24	71 :1,13,14 72 :15 73 :10,11	suggest [1] 135:16	teaching [1] 63:20	third-party [4] 5:24 7:4 63:
85 :1 99 :9,12 102 :3 104 :1	74: 15 78: 12,25 79: 4,19,21	suggested [2] 82:24 146:4	team [1] 154:20	24 155 :6
106 :19 110 :21 111 :10 113 :	82:21 84:12 85:22 96:7 97:		tech [1] 62:24	THOMAS [43] 6:5 7:5 30:5,
13 114 :20,23 115 :13,21		24 74:22 115:24 118:22	tee [1] 85:14	6 31 :3 32 :10 64 :18 65 :13,
	22,24,25 98: 11,20,21,25			,
116 :9 117 :2,12 118 :23	99 :17,20,22 100 :18 103 :11 104 :19 105 :11 106 :12 109 :	145:8 Suggests [2] 72:1 110:4	teed [2] 135:7 152:25	16,21 66: 5,9,18 85: 25 86: 1,
119 :15 120 :19,23 121 :5,14		suggests [2] 72:1 110:4	teenage [1] 92:22	21 87: 9,16,21 88: 4,19,23
122: 3,14,18,19 123: 2,23	5,24 113 :15 137 :12 138 :11	suicide [2] 87:4 89:21	telegraph [3] 119:17 122:6	89: 3,5,22 90: 6,13 91: 2,4,8,
124 :2 125 :13 126 :11 132 :	150:2 153: 18 156: 12	supermarket [2] 10:4,13	131:3	12,21,24 92: 4 115: 17,24
23 136 :8 137 :5,10,15,23	statute's [2] 108:17 147:19	supplementing [1] 90:22	telegraphs [2] 42:15 121:	116 :10,16 117 :10,19 123 :
138 :5 139 :25 145 :2 146 :7,	statutory [2] 124:19 150:	support [1] 131:21	17	13 127 :16,21
13,13 148: 23,23 150: 1,6,	20	supported [1] 157:11	telephone [3] 5:1 114:22	though [17] 10:5 15:25 37:
11,24 155: 6,9	stay [3] 115:11 155:23 156:	supporting [3] 2:8 3:11	119 :17	12 38: 4 52: 6 53: 6 100 :14
speech-hosting [1] 12:19	6	114: 6	telephones [1] 121:17	102 :9 114 :19 121 :23 126 :
speed [1] 33:12	step [1] 52:22	suppose [13] 36:10,14 60:	tells [4] 12:4 105:4 111:23	4 130 :5 138 :10 143 :1 144 :
sponsors [2] 114:14 118:	still [17] 9:2 21:22 29:24 38:	18 96: 20 97: 15 102: 14	143 :16	16 149: 24 155: 1
18	25 47 :9 67 :11 82 :25 83 :2	105:5 131:19 136:25 138:	temptation [1] 133:8	thought-provoking [1]
spot [1] 20:17	90:10 95:6 97:12 100:16	18,21 141: 6 154: 7	term [6] 5:20 9:8 100:3 126:	141: 20
sprawling [1] 79:21	108:19 113:14 118:17 145:	supposed [2] 118:24 140:	7 141: 21 149: 15	thousands [2] 16:14,14
spring [1] 90:2	3 157 :20	10	terminology [3] 93:6 132:	threatening [1] 134:22
square [5] 14:4 70:11 102:	stood [1] 151:17	suppress [1] 75:21	9,11	three [4] 33:3,25 43:19 63:
4 110 :17,19	store [3] 12:24 13:1 52:19	suppressed [1] 55:25	terms [24] 5:18 24:17,19	22
squarely [1] 63:20	stores [1] 12:23	suppression [7] 4:25 43:	31 :5 50 :4,23 60 :23 61 :4	threshold [5] 69:15,16 70:
St [1] 47:6	stories [1] 131:8	18 44: 9,20,24 146: 2,16	70: 3 83:8 87:6 88:15,16	23 77 :12 104 :10
stab [1] 148:11	straight [1] 113:3	SUPREME [3] 1:1,16 141:	89: 18 110: 6 113: 11,24	throughout [1] 31:6
		,		
। stage ଓ 29:19 77:4 95:3	•	7	119: 10 120: 7.14.20 121: 4	throw [2] 98:17 134:21
stage [3] 29:19 77:4 95:3 stake [1] 152:22	straightened [1] 107:1	-	119 :10 120 :7,14,20 121 :4 133 :9 150 :20	throw [2] 98:17 134:21 thrown [1] 93:19
stake [1] 152:22	straightened 11 107:1 straightforward 12 112:	surprised [1] 151:15	133 :9 150 :20	thrown [1] 93:19
stake [1] 152:22 stand [4] 12:25 13:1 129:4	straightened [1] 107:1 straightforward [2] 112: 23 113:1	surprised [1] 151:15 surrounding [1] 19:20	133:9 150:20 terrorism ^[2] 89:20 92:2	thrown [1] 93:19 thrust [5] 65:6,21,22,23
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6	133:9 150:20 terrorism ^[2] 89:20 92:2 terrorist ^[1] 86:25	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81:	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111:
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8:	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153:	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76:
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57:	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147:	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19 struggling [1] 151:7	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121:	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80:	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109:	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13: 23 14:2,8 15:1 33:13 37:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19 stunted [1] 109:11	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17 T	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6 there'll [1] 105:1	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3 total [1] 69:16
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13: 23 14:2,8 15:1 33:13 37: 10 54:21 58:5,14,15,17 63:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17 Taamneh [3] 5:21 49:19	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6 there'll [1] 105:1 there's [50] 7:7 10:10 16:	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3 total [1] 69:16 totally [3] 28:1 47:20 150:8
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13: 23 14:2,8 15:1 33:13 37:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19 stunted [1] 109:11	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17 <u>T</u> Taamneh [3] 5:21 49:19 53:7	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6 there'll [1] 105:1	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3 total [1] 69:16
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13: 23 14:2,8 15:1 33:13 37: 10 54:21 58:5,14,15,17 63:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19 stunted [1] 109:11 subject [4] 7:19 15:9 16:9	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17 <u>T</u> Taamneh [3] 5:21 49:19 53:7 table [2] 98:14 154:4	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6 there'll [1] 105:1 there's [50] 7:7 10:10 16:	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3 total [1] 69:16 totally [3] 28:1 47:20 150:8
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13: 23 14:2,8 15:1 33:13 37: 10 54:21 58:5,14,15,17 63: 6 65:8 99:13 104:8,14 108:	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:10 structures [1] 149:19 struggling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19 stunted [1] 109:11 subject [4] 7:19 15:9 16:9 17:16	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17 <u>T</u> Taamneh [3] 5:21 49:19 53:7 table [2] 98:14 154:4 takedowns [1] 41:13	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6 there'll [1] 105:1 there's [50] 7:7 10:10 16: 23 29:17 35:4,4 41:17 43:	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3 total [1] 69:16 totally [3] 28:1 47:20 150:8 touch [2] 87:10 96:25
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13: 23 14:2,8 15:1 33:13 37: 10 54:21 58:5,14,15,17 63: 6 65:8 99:13 104:8,14 108: 3,5 109:7 115:12 120:22	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:10 strucgling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19 stunted [1] 109:11 subject [4] 7:19 15:9 16:9 17:16 submitted [4] 8:6 149:14	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17 <u>T</u> Taamneh [3] 5:21 49:19 53:7 table [2] 98:14 154:4 takedowns [1] 41:13 talismanic [1] 135:18	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6 there'll [1] 105:1 there's [50] 7:7 10:10 16: 23 29:17 35:4,4 41:17 43: 7 44:12 52:10 53:9 54:20	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3 total [1] 69:16 totally [3] 28:1 47:20 150:8 touch [2] 87:10 96:25 touched [1] 149:15 touches [1] 87:11
stake [1] 152:22 stand [4] 12:25 13:1 129:4 130:2 standard [15] 34:23 35:9 55:19 60:9 68:3 83:23 84: 6,7,17 85:17,19,21 108:21 129:5,5 standards [5] 11:4 58:25 59:11,14 117:23 stands [2] 86:20 143:7 Star [4] 64:12 71:12,13 73: 1 start [5] 16:25 17:4,10 67:1 135:9 started [1] 84:11 starting [2] 109:18 146:19 starts [1] 96:13 state [36] 8:23 9:4 12:18 13: 23 14:2,8 15:1 33:13 37: 10 54:21 58:5,14,15,17 63: 6 65:8 99:13 104:8,14 108: 3,5 109:7 115:12 120:22 130:8 133:22 134:8 138:1	straightened [1] 107:1 straightforward [2] 112: 23 113:1 strange [2] 49:16,22 strenuously [1] 40:4 stress [1] 54:16 stricken [1] 68:19 strike [1] 67:23 strong [1] 147:25 strongly [3] 19:17 25:23 58:12 structure [1] 149:10 structures [1] 149:10 strucgling [1] 151:7 student [1] 131:20 study [1] 154:22 stuff [10] 55:22,25 67:9 80: 19 81:8 87:5 91:19 109:4 112:20 138:19 stunted [1] 109:11 subject [4] 7:19 15:9 16:9 17:16 submitted [4] 8:6 149:14 158:10,12	surprised [1] 151:15 surrounding [1] 19:20 survive [1] 95:6 susceptible [2] 58:20 81: 25 suspend [1] 100:1 swath [1] 8:18 sweep [23] 6:21 7:13,24 8: 16,17 9:5 27:11 35:13 57: 11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147: 19 151:24 sweeping [2] 157:3,10 sympathy [1] 154:18 synonymous [1] 70:20 system [1] 50:17 <u>T</u> Taamneh [3] 5:21 49:19 53:7 table [2] 98:14 154:4 takedowns [1] 41:13	133:9 150:20 terrorism [2] 89:20 92:2 terrorist [1] 86:25 terrorists [2] 91:22,25 tertiary [1] 81:16 test [1] 70:20 Texas [2] 35:23 107:11 text [3] 117:12 136:15 153: 7 theaters [1] 24:6 theirs [2] 120:5 123:11 themselves [7] 4:14 5:21 39:13 117:6 120:18 121: 20 122:14 then-fresh [1] 111:18 theories [1] 10:12 theory [4] 27:25 47:18 109: 24 138:6 there'll [1] 105:1 there's $[50]$ 7:7 10:10 16: 23 29:17 35:4,4 41:17 43: 7 44:12 52:10 53:9 54:20 55:21 57:18 61:1,8 62:11	thrown [1] 93:19 thrust [5] 65:6,21,22,23 102:13 Tide [2] 87:2 149:4 TikTok [3] 48:13 50:7 111: 24 tired [1] 89:7 today [7] 4:11 20:6 69:3 76: 23 80:4 110:19 126:13 together [2] 48:20 136:14 tomorrow [1] 157:7 ton [1] 48:1 took [2] 46:24 72:16 tools [2] 5:22 144:15 Tornillo [14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3 total [1] 69:16 totally [3] 28:1 47:20 150:8 touch [2] 87:10 96:25 touched [1] 149:15 touches [1] 87:11

Official

		Official		
16 157 :4	73:19 80:10 82:22 83:6,25	user-uploaded [1] 27:13	112 :16 117 :4 139 :23	Whereupon [1] 158:11
traditionally [1] 121:24	84:4 129:18 137:21 147:	users [28] 4:16 5:14 6:3 10:	violent [1] 87:12	wherever [1] 17:10
train [1] 134:21	17	7 12:4 24:20 32:7 39:12,	Virginia [1] 2:4	whether [44] 6:20 14:1 19:
transmission [1] 131:1	under [24] 10:25 12:11 24:	13,17,19 59: 11 64: 8 71: 23	virtual [1] 27:19	5,6,22 25 :19,25 35 :12 39 :2
transmits [1] 114:20	19 37: 21 41: 12,12,16 42:	72:23 73:7,8 93:15 115:14	virtually [2] 6:9 8:17	40 :1,25 45 :20 53 :18 54 :20
transmitting [4] 5:13 34:	10 54 :21 59 :15 66 :10 72 :6	116:1 118:2,10,10 119:5,	voice [2] 21:10 115:14	60:7,13 61:22 62:3,10 68:
17 119 :16 122 :13	73: 23,25 74: 7 81: 25 86: 22	22 145: 13 156: 18 157: 12	voices [1] 44:12	10 70:15 74:9 76:16 78:19
transportation [2] 121:25	88:3 92:5 113:15 124:3	users' [4] 4:18 5:13 10:15	Volokh [2] 41:18 51:6	80:22 84:24 85:21 98:12,
136: 1	136:7 149:21 150:2	119: 22	Volokh's [1] 158:5	19 99: 14 108: 24 119: 16
treat [1] 123:15	underlies [1] 148:1	using [3] 31:5 90:19 101:8	volume [2] 90:25 91:1	129: 4,17,19 133: 1 136: 19
treated [3] 67:12 126:3	undermine [1] 66:15	usual [2] 8:1 97:17	volumes [1] 90:20	139:16 146:12 147:10 149:
135: 21	understand [31] 6:22,24 7:	V	voluntarily [2] 14:18 155:	24 150: 5,21 157: 17
tricky [2] 112:18 150:14	1 25:7 28:4 30:11 35:15,		23	whim [1] 5:8
tried [7] 57:20 74:16 103:4	19 36 :6 41 :15 42 :3 43 :19	vacate [6] 129:7 133:18	voting [2] 18:20 36:23	WHITAKER [92] 2:2 3:3,13
107: 23 122: 18,22 156: 4	45 :10 55 :2 56 :12 59 :19 61 :	134: 25 135: 2 147: 6,20	w	4 :6,7,9 6 :16 7 :10 8 :20 9 :1
tries [2] 63:13 105:10	15,20 67: 5 69: 8 76: 22 84:	vacates [1] 139:8	wait [1] 69:7	11: 11 12: 5,9,16 13: 9 14: 5
triggers [1] 9:9	22 96:6 101:11 103:21	vaccination [1] 18:23 vagueness [1] 107:20	wall [1] 105:10	15:7 16:23 17:5,10 18:8,
truck [1] 119:18	112 :10 124 :11 126 :12 133 :	valiantly [1] 151:7	wanted [16] 30:23,24 36:5	11,17 19: 1 20: 7,11 22: 2,17
truckload [1] 43:4	22 152 :3 153 :19	valid [6] 73:24 126:11 139:	40 :6,17 57 :24 67 :17 85 :14	24:8,12,15 25:21 26:17,25
true [12] 42:24 49:7 95:2	understanding [5] 66:20	16 151 :22,25 153 :15	86: 8,9 118: 5 125: 15 132:	27: 3,7,23 28: 4,7,10,13,19
120 :15 121 :16,17 122 :21	67 :23 115 :23 133 :15 147 :	validity [1] 143:8	21,23 138: 20 155: 21	29 :7,11,16 30 :6,10 31 :23
126 :5 127 :2 130 :9 134 :2,	2	Valley [1] 96:12	wants [10] 10:14 13:6 55:	32: 15,23 33: 22 34: 9 35: 3,
13	understands [1] 120:6	value [3] 117:21 126:2 130:	24 76:6 78:16 80:21 92:18	8 37: 16 38: 2,11,24 39: 24
try [10] 9:24 83:21 90:4 95:	understood [9] 45:18 91:	5	101 :4 141 :17 146 :9	40 :22 41 :2,6,9 42 :18 43 :
8 101:6 103:21 136:23	16 92:6 112:24 123:13	variety [6] 8:11,12 47:23	War [2] 93:20 131:21	24 44:16,22 45:25 47:3 48:
148: 11 150: 18 151: 1	130: 15,17 151: 14,16	117 :24 120 :17 137 :12	warrants [1] 150:6	9 49:1,15 50:11 51:1 52:
trying [14] 13:7 15:18 25:6	undertaken [1] 14:24	various [5] 7:4 51:4 117:21	Washington [3] 1:12 2:7	21 54: 2 56: 3,14,18 57: 3,10
31 :17 60 :9 71 :18 72 :14 94 : 9 103 :18 125 :7 131 :14	unfortunate [1] 66:6 uniquely [1] 18:2	119 :3 157 :16	58 :14	58 :7 59 :4,20,24 60 :20 61 : 3,25 62 :6 155 :13,14,16
137 :3,7 154 :22	UNITED [9] 1:1,17 2:8 3:10	vast [4] 5:24 21:17 64:4	way [46] 4:12 5:6 7:7 14:12	who's [3] 6:11 90:13 113:
Tucker [1] 70:6	32: 5 114 :5 139 :19 157 :14,	142: 20	17:9 19:15 26:15 30:22 32:	20
tune [1] 4:17	24	Venmo [3] 97:2 98:5 99:11	3 42: 3 44: 5 52 :10 56 :13	whole [27] 12:11 25:1 38:3
turn [3] 30:2 63:18 157:7	universe [2] 90:11 152:9	Verizon [5] 5:7 42:25 49:7	68: 1 69: 20 71: 25 78: 7,12,	45 :13 48 :20 57 :1 67 :5 79 :
turned [1] 47:5	unless [4] 69:4 105:8,9	157: 6,11	17 83:22 85:3,8 93:11 96:	19 83:16 87:5 95:15,18 97:
Turner [14] 23:8 37:22 44:5,		versus [13] 4:5 5:10,11,20,	20 101: 9 102: 19 103: 4,7,	21 101 :8 102 :13,18 105 :13
8,14,19 45: 15 111: 7,15,18,	unlike [1] 99:7	22 12: 17 19: 14 20: 9 46: 7	16 107 :2 111 :10 121 :7	118 :16 121 :9 123 :17 124 :
20 145: 6,19,21	unprotected [1] 26:7	47:24 49:19 53:7 110:14	124: 5 126: 2,22 128: 19	12,15,21,25 125: 17 144: 17
turns [2] 48:14 80:20	unrelated [4] 44:9,20 146:	veto [1] 19: 9	129 :13 130 :1,2 131 :6 132 :	150:24
Twitter [10] 5 :20 39 :12,17,	1,16	via [1] 119:17	5 135: 6 138 :16 143 :3 146 :	wholly [1] 21:11
18 49 :19 50 :13 53 :7 88 :10	unresolved [2] 140:2 141:	video [2] 92:13 136:15	8 152 :19	whom ^[1] 88:11
89:15 111:24	8	videos [1] 117:13	ways [6] 10:1 50:21 53:8	wide [2] 117:24 120:17
Twitter/X [2] 36:9 48:13	unreviewable [1] 142:20	view [9] 35:11 42:5 44:23	102:1 109:18 157:16	wield [1] 144:14
two [13] 21:25 51:18 68:20	unruly [1] 134:20	56: 2,21 63: 2 74: 24 100: 10	weaker [1] 13:15	will [13] 4:3 52:20 78:6 95:6
75 :3 81 :21 85 :3 94 :2 104 :	unspecific [1] 8:14	102:9	Web [3] 55:6 57:6 114:14	104:24 105:7,8 106:4,5
23 105: 20 110: 24 123: 22	until [3] 104:23 105:21 106:	viewable [1] 100:5 viewers [2] 10:6 65:2	website [15] 9:12 53:14 69:	110.2,10 120.10 101.21
151: 2,19	25		4,6 72:9 73:6,8 111:9,22	willing [3] 20:17 42:21,22
type [4] 60:17 127:8 130:11	up [25] 12:4 18:24 21:1 39:	viewership [1] 69:15	124 :15 126 :6 131 :7 136 : 14 146 :12 153 :5	win [4] 77:12 86:2,4 108:19
153 :10	12 40: 18 42: 13 55: 9 78: 6,	viewpoint [17] 12:10 50:9 63:3 77:25 78:5 95:10 96:	websites [28] 9:13,18 34:7,	wires [1] 119:17
types [6] 123:23 126:14	22 84:2 85:15 92:14 100:	2 97:5,8,16 98:9,16,18 107:		wishes [1] 122:25
128 :25,25 148 :3 153 :11	13 101 :7,24 104 :5 111 :11	11 130 :20,22 134 :17	67: 6,20 69: 14,15,23 72: 9,	within [9] 63:20 87:6 108:
Typically [1] 88:21	121: 13 135: 7 139: 9,22	viewpoint-based [1] 41:	10,13 94: 13 111: 6,10,13,	16,25 109 :4 115 :11 147 :19
U	141: 15,17 147: 7 152: 25	16	14 114 :17 117 :11 126 :14	149:5 150:22
U.S [2] 93:20 115:19	upheld [1] 59:18	viewpoints [2] 70:8 96:11	127:4 148: 5	without [7] 10:22 17:24 29:
Uber [19] 55: 4 57: 6 77: 20,		views [9] 18:19 38:18,20	week [1] 156:21	15 33: 13 35: 13 108: 23
22 78 :4,11,13,15 79 :18 97 :	UPS [2] 43:3 119:18	71 :19 74 :25 120 :3,5,17	welcome [4] 6:4 64:17 115:	109:3 withstand [1] 115:15
2 101 :3,4 127 :7 137 :13	upset [1] 18:16 upwards [2] 17:19,23	125 :24	16 120 :17	withstand [1] 115:15 woke [1] 39:12
152: 1 156: 14,16,17,18	upwards [2] 17:19,23 urge [1] 126:24	vintage [1] 10:14	welcoming [1] 30:14	woke [1] 39:12 wolf [2] 81:14,14
Ubers [1] 153:3	urge 11/126:24 useful [1] 64:8	violate [1] 113:11	whatever [8] 10:3 11:7 24:	won [2] 82:12 83:18
unanimous [1] 142:14	user [12] 5:19 53:8,24 78:2	violates [5] 62:24 65:4 88:	2 36:16 38:20 85:5 122:24,	wonder [2] 13:25 118:24
unanimously [1] 102:19	100: 3,5,6 123: 10,24 124: 4	16 89: 17 131: 12	25	word [10] 9:6 11:13 12:1
uncommon [1] 135:8	156 :17 157 :20	violating [1] 88:14	whatnot [1] 152:2	32 :17 35 :21 101 :25 107 :
unconstitutional [15] 64:	user-generated [4] 9:19	violation [9] 37:10 64:12	WhatsApp [1] 156:25	14,14 132 :25 133 :6
23 67:24 68:18 71:2,8,13	11 :16,21 153 :6	71:24 72:25 102:4 108:7	wheat [1] 120:10	words [4] 24:9 43:20 106:8
	,			

Heritage Reporting Corporation

114:11 work [4] 53:6 57:23 88:6 103:6 worked [3] 14:13,14 111: 10 working [1] 154:19 world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u> zoom [1] 61:12	
103:6 worked [3] 14:13,14 111: 10 working [1] 154:19 world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	114: 11
103:6 worked [3] 14:13,14 111: 10 working [1] 154:19 world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	work [4] 53.6 57.23 88.6
worked [3] 14:13,14 111: 10 working [1] 154:19 world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	
10 working [1] 154:19 world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	103:6
10 working [1] 154:19 world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	worked [3] 14:13.14 111:
working [1] 154:19 world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	,
world [7] 4:13 37:8 54:21 79:8 93:20 108:8 153:4 worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 \boxed{Y} yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 \boxed{Z}	
$\begin{array}{r} \textbf{79:8} \ \textbf{93:20} \ \textbf{108:8} \ \textbf{153:4} \\ \textbf{worlds} \ \textbf{(1)} \ \textbf{152:1} \\ \textbf{worry} \ \textbf{(1)} \ \textbf{111:6} \\ \textbf{worst} \ \textbf{(1)} \ \textbf{84:9} \\ \textbf{worth} \ \textbf{(1)} \ \textbf{71:20} \\ \textbf{worthy} \ \textbf{(2)} \ \textbf{118:11,19} \\ \textbf{write} \ \textbf{(4)} \ \textbf{82:3} \ \textbf{108:20} \ \textbf{109:} \\ \textbf{19} \ \textbf{150:14} \\ \textbf{Writers'} \ \textbf{(1)} \ \textbf{73:2} \\ \textbf{writes} \ \textbf{(1)} \ \textbf{73:2} \\ \textbf{writes} \ \textbf{(1)} \ \textbf{82:4} \\ \textbf{writing's} \ \textbf{(1)} \ \textbf{105:10} \\ \hline \textbf{Y} \\ \textbf{yards} \ \textbf{(1)} \ \textbf{105:13} \\ \textbf{year} \ \textbf{(3)} \ \textbf{104:23} \ \textbf{105:20} \ \textbf{106:} \\ \textbf{5} \\ \textbf{years} \ \textbf{(1)} \ \textbf{143:24} \\ \textbf{York} \ \textbf{(2)} \ \textbf{107:24,25} \\ \textbf{yourself} \ \textbf{(1)} \ \textbf{143:24} \\ \textbf{York} \ \textbf{(2)} \ \textbf{107:24,25} \\ \textbf{yourself} \ \textbf{(1)} \ \textbf{143:16} \\ \textbf{YouTube} \ \textbf{(16)} \ \textbf{15:17} \ \textbf{16:4} \\ \textbf{33:5} \ \textbf{36:9} \ \textbf{38:19} \ \textbf{48:12} \ \textbf{79:} \\ \textbf{14} \ \textbf{81:22} \ \textbf{88:8} \ \textbf{89:15} \ \textbf{90:17} \\ \textbf{98:1} \ \textbf{101:17} \ \textbf{108:14} \ \textbf{126:8} \\ \textbf{147:11} \\ \textbf{YouTubes} \ \textbf{(1)} \ \textbf{79:7} \\ \hline \textbf{Z} \\ \end{array}$	working [1] 154:19
$\begin{array}{r} \textbf{79:8} \ \textbf{93:20} \ \textbf{108:8} \ \textbf{153:4} \\ \textbf{worlds} \ \textbf{(1)} \ \textbf{152:1} \\ \textbf{worry} \ \textbf{(1)} \ \textbf{111:6} \\ \textbf{worst} \ \textbf{(1)} \ \textbf{84:9} \\ \textbf{worth} \ \textbf{(1)} \ \textbf{71:20} \\ \textbf{worthy} \ \textbf{(2)} \ \textbf{118:11,19} \\ \textbf{write} \ \textbf{(4)} \ \textbf{82:3} \ \textbf{108:20} \ \textbf{109:} \\ \textbf{19} \ \textbf{150:14} \\ \textbf{Writers'} \ \textbf{(1)} \ \textbf{73:2} \\ \textbf{writes} \ \textbf{(1)} \ \textbf{73:2} \\ \textbf{writes} \ \textbf{(1)} \ \textbf{82:4} \\ \textbf{writing's} \ \textbf{(1)} \ \textbf{105:10} \\ \hline \textbf{Y} \\ \textbf{yards} \ \textbf{(1)} \ \textbf{105:13} \\ \textbf{year} \ \textbf{(3)} \ \textbf{104:23} \ \textbf{105:20} \ \textbf{106:} \\ \textbf{5} \\ \textbf{years} \ \textbf{(1)} \ \textbf{143:24} \\ \textbf{York} \ \textbf{(2)} \ \textbf{107:24,25} \\ \textbf{yourself} \ \textbf{(1)} \ \textbf{143:24} \\ \textbf{York} \ \textbf{(2)} \ \textbf{107:24,25} \\ \textbf{yourself} \ \textbf{(1)} \ \textbf{143:16} \\ \textbf{YouTube} \ \textbf{(16)} \ \textbf{15:17} \ \textbf{16:4} \\ \textbf{33:5} \ \textbf{36:9} \ \textbf{38:19} \ \textbf{48:12} \ \textbf{79:} \\ \textbf{14} \ \textbf{81:22} \ \textbf{88:8} \ \textbf{89:15} \ \textbf{90:17} \\ \textbf{98:1} \ \textbf{101:17} \ \textbf{108:14} \ \textbf{126:8} \\ \textbf{147:11} \\ \textbf{YouTubes} \ \textbf{(1)} \ \textbf{79:7} \\ \hline \textbf{Z} \\ \end{array}$	world [7] 4.13 37.8 54.21
worlds [1] 152:1 worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	
worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	79 :8 93 :20 108 :8 153 :4
worry [1] 111:6 worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	worlds [1] 152.1
worst [1] 84:9 worth [1] 71:20 worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 <u>Y</u> yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 <u>Z</u>	
$worth [1] 71:20 \\worthy [2] 118:11,19 \\write [4] 8:23 108:20 109: 19 150:14 \\Writers' [1] 73:2 \\writes [1] 8:24 \\writing's [1] 105:10 \\\hline Y \\yards [1] 105:13 \\year [3] 104:23 105:20 106: 5 \\years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 \\33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 \\98:1 101:17 108:14 126:8 \\147:11 \\YouTubes [1] 79:7 \\\hline Z \\$	worry 1111:6
$worth [1] 71:20 \\worthy [2] 118:11,19 \\write [4] 8:23 108:20 109: 19 150:14 \\Writers' [1] 73:2 \\writes [1] 8:24 \\writing's [1] 105:10 \\\hline Y \\yards [1] 105:13 \\year [3] 104:23 105:20 106: 5 \\years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 \\33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 \\98:1 101:17 108:14 126:8 \\147:11 \\YouTubes [1] 79:7 \\\hline Z \\$	worst [1] 84:9
worthy [2] 118:11,19 write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 $\begin{tabular}{lllllllllllllllllllllllllllllllllll$	
write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
write [4] 8:23 108:20 109: 19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	worthy [2] 118:11,19
19 150:14 Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
Writers' [1] 73:2 writes [1] 8:24 writing's [1] 105:10 Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
writes [1] 8:24 writing's [1] 105:10 Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	19 150: 14
writes [1] 8:24 writing's [1] 105:10 Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	Writers' [1] 73.2
writing's [1] 105:10 Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	writes [1] 8:24
Y yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	writing's [1] 105.10
yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
yards [1] 105:13 year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	Y
year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	•
year [3] 104:23 105:20 106: 5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	vards [1] 105:13
5 years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	-
years [1] 143:24 York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	5
York [2] 107:24,25 yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	-
yourself ^[1] 14:16 YouTube ^[16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes ^[1] 79:7 Z	-
yourself [1] 14:16 YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	York [2] 107:24,25
YouTube [16] 15:17 16:4 33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	, -
33:5 36:9 38:19 48:12 79: 14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	YouTube [16] 15:17 16:4
14 81:22 88:8 89:15 90:17 98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	33.5 36.0 38.10 48.12 79.
98:1 101:17 108:14 126:8 147:11 YouTubes [1] 79:7 Z	
147:11 YouTubes ^[1] 79:7 Z	14 81:22 88:8 89:15 90:17
147:11 YouTubes ^[1] 79:7 Z	98.1 101.17 108.14 126.8
YouTubes [1] 79:7	
Z	147: 11
Z	VouTubes 11 70.7
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