

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
3 SOUTHERN DIVISION

4 LEWIS GERMAN, : Civil Action No.
5 Plaintiff, : PJM 05-494
6 v. :
7 BETHESDA FIRE DEPARTMENT, : Greenbelt, Maryland
8 INC., et al., :
9 Defendant. : Thursday, April 17, 2008
/ 2:00 P.M.

10
11 TRANSCRIPT OF MOTION PROCEEDINGS
12 BEFORE THE HONORABLE PETER J. MESSITTE
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

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25 COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES

P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: The matter now before this Court is Civil Action Number PJM 2005-494, Lewis German versus Bethesda Fire Department, Inc., et al. The matter is now before the Court for motions hearing.

THE COURT: All right. Counsel, identify yourselves for the plaintiff and defendant. First plaintiff.

MR. ZAID: Yes. Mark Zaid and Bradley Moss for the plaintiff, Your Honor.

THE COURT: Are you Mark Zaid?

MR. ZAID: I am, sir.

THE COURT: All right. Next.

MS. SCHMIDT: Good afternoon, Your Honor. Jo Anna Schmidt and Danielle Marone on behalf of Bethesda Fire Department, Virginia Miller, and Dennis Urban.

THE COURT: All right. Have a seat if you would, folks.

We have Cross Motions for Summary Judgment at this time and a Motion to Strike. Let me say a word about the Motion to Strike, and it really is something that we'll I think come to at the end, because I suspect that at this posture the case, at least insofar as I understand the case so far, it may be resolvable without reference to the items. So let's leave those aside for now, because I think some of the same points that are comprehended by the statements are also included in record

1 evidence that was part of the regular discovery. So let's see
2 where we go out with that. All right?

3 Now, deferring that, we've got both the Plaintiff's
4 and Defendants' Motion for Summary Judgment. Let's go with
5 plaintiff first, you filed first, and then you can rejoin. And
6 maybe the way to do this reasonably is instead of having you go
7 through your whole argument, let's do it issue by issue. Let's
8 hear you make argument, counter-argument, on each of the
9 relevant points, okay? I think that way we'll end up with
10 having heard both motions actually by the time we're through.
11 So let's start with plaintiff, and you can begin with any kind
12 of general statement you want, including a statement of facts.
13 Likewise, defendant can do that. And then we'll go issue by
14 issue.

15 In fact, let's perhaps do it that way. You make a
16 statement of facts, Mr. Zaid. Let's have the defendant make any
17 counter-statement that you care to so we see what your essential
18 record is, and then we'll go back and forth by issue. Fair
19 enough?

20 MR. ZAID: That's fine, Your Honor. Do you have a
21 preference, lectern versus --

22 THE COURT: As long as I can hear you, it's okay. So
23 just speak into the mic.

24 MR. ZAID: Not a problem.

25 This case is actually very straightforward, Your

1 Honor, and I think actually both defendants' counsel and I agree
2 on that. We deal here with express concerns of fire department
3 safety and preparedness of the county for biological or chemical
4 attack and what the resulting personnel action was after the
5 deputy fire chief of the Bethesda Fire Department made those
6 remarks in October of 2001.

7 When Mr. German did, one, spoke to Channel 9, you have
8 as part of the record the video of the newscast. He also spoke
9 to several newspapers, Washington Post, Associated Press, those
10 AP stories were reprinted in local newspapers like the
11 Montgomery Journal.

12 THE COURT: Is he in uniform at any time?

13 MR. ZAID: No, sir.

14 THE COURT: All right.

15 MR. ZAID: And he was identified in each of them by
16 himself as only being either a former member of the Bethesda
17 Chevy Chase Rescue Squad, completely different entity, or a
18 volunteer firefighter without any designation. I think --

19 THE COURT: Was his name given?

20 MR. ZAID: I'm sorry?

21 THE COURT: Was his name given?

22 MR. ZAID: Yes. Yes, yes, yes. No shying away, in
23 fact, that Lewis German was the individual speaking. There
24 might have been one article where I believe one of the reporters
25 apparently, at least it's not in quotes, inserted that he was a

1 Bethesda firefighter, I think is how they wrote it, fire member,
2 firefighter.

3 All right. As a result of those comments, and which
4 were made and echoed similar comments by other fire officials
5 within the county, volunteer chiefs, volunteer officers, the
6 county was understandably concerned with those types of
7 comments.

8 You want me to intertwine arguments within or you want
9 me to just lay out facts first? What's better for you?

10 THE COURT: Let me just hear your factual presentation
11 at this point.

12 MR. ZAID: Okay. The county then held a press
13 conference about four days -- three to four days after these
14 media reports came about -- I'm sorry, let me -- the next day
15 held a press conference where Doug Duncan, the executive at the
16 time, and other fire officials obviously, you know, responded
17 saying, this is not the case, don't worry, and they had factual
18 disputes about that.

19 They then convened a meeting of fire chiefs and
20 deputies, as I recall, on that following Saturday to talk about
21 these issues.

22 THE COURT: Are these both regular employees and
23 volunteer chiefs?

24 MR. ZAID: That's my recollection. Defense counsel
25 can correct me -- no, only volunteers.

1 THE COURT: Only the volunteers.

2 MR. ZAID: Only volunteers. Again, I think there's
3 very few facts from a material fact standpoint that are in
4 dispute. So only volunteers.

5 There was both an open meeting and then there was a
6 closed-door meeting between Executive Duncan and other county
7 officials and just the primary representatives of each
8 department. So in this case Defendant Chief Dennis Urban went
9 into the meeting. Lewis German was at the meeting, as I recall,
10 although not -- for example, Executive Duncan recalls that he
11 wasn't at the meeting, but Mr. German recalled being at the
12 meeting.

13 There were allegations as to what comments were said.
14 Some of these are in dispute as to did Mr. Duncan make comments
15 about Mr. German, to what degree he made comments about
16 Mr. German. There had been, as I take one quick step back, an
17 e-mail that Mr. German sent into a LISTSERV of fire officials in
18 the county, fire chiefs, again, I think it was all volunteers,
19 where he reiterated his comments substantively about the
20 preparedness of the county and saying, look, if we want our
21 voices to be known, this is what we all need to do
22 conjunctively, jointly, contact the media and say -- and support
23 what we and the others have said. And then he added a comment
24 at the bottom that -- saying Mr. Duncan was saying we did this
25 for personal gain and no one wants his job nor his wife. And

1 that comment was interpreted by Mr. Duncan particularly as a
2 personal attack involving his wife.

3 There are facts in the record as to what led to that
4 comment being included. I think it's to some extent a little
5 bit periphery. We can go into it if either defense counsel
6 brings it up, more significantly, or Your Honor wishes to do so.

7 And the county then became sporadic because we only
8 have a written record and then recollections from dating six to
9 seven years back when we did the discovery to what extent the
10 county was upset with Mr. German and the Bethesda Fire
11 Department. Mr. German's position is he spoke out as an
12 individual, not as a representative of the department. The
13 department factually said, he was not speaking out on our
14 behalf, authorized in no uncertain terms.

15 THE COURT: When did they say that? Did they respond
16 to that in the press and say that this firefighter is not
17 speaking on our behalf?

18 MR. ZAID: It was in a letter or memo in the end of
19 October that Chief Urban wrote to, I believe to Mr. Duncan
20 routed through the administrative chief officer, Mr. Romer.

21 THE COURT: Well, was any press release issued by --

22 MR. ZAID: No.

23 THE COURT: -- the county disavowing the remarks?

24 MR. ZAID: No, no. In fact, the county testimony was
25 that once they received essentially what they interpreted as a

1 letter of apology that the matter was closed for them; that
2 Bruce Romer testified in fact that, you know what, I think I got
3 that memo, I probably just put it in the file and we thought
4 nothing of it beyond that.

5 THE COURT: Where is the letter of apology?

6 MR. ZAID: That is at Exhibit -- I'm sorry, hang on.
7 I believe that is Summary Judgment Exhibit 17. Yes.

8 THE COURT: The e-mail?

9 MR. ZAID: That's right. And it was an e-mail, I'm
10 sorry.

11 THE COURT: Just one moment.

12 MR. ZAID: That Chief Urban sent, if I'm reading this
13 copy -- October 29th he sent to Mr. Romer to be routed through
14 to Mr. Duncan, to Executive Duncan. And in fact, what was
15 notable about it as well, if you look in the third paragraph,
16 first sentence, where he indicates that Deputy Chief German has
17 been appropriately dealt with by the Bethesda Corporation.

18 And he also notes that the e-mail that caused
19 understandably Mr. Duncan to be upset was essentially an
20 unfortunate incident because it was a private e-mail system and
21 somebody took that internal e-mail and distributed it. That was
22 not meant for public consumption.

23 THE COURT: That refers to specifically the comment
24 about Duncan's wife or --

25 MR. ZAID: Correct.

1 THE COURT: -- or anything else, but about the --

2 MR. ZAID: No. The only -- only with Duncan's wife.
3 In fact, the deposition testimony by the county was, look, we
4 don't agree with what Deputy Chief Mr. German and the others
5 said, but it was a legitimate subject for dispute or debate as
6 far as preparedness. I mean, it's an issue we obviously still
7 talk about today.

8 THE COURT: And Romer was the executive assistant,
9 what you would call the administrative officer of the county?

10 MR. ZAID: Correct.

11 THE COURT: All right.

12 MS. SCHMIDT: That's correct, Your Honor.

13 THE COURT: All right.

14 MR. ZAID: And they -- now, Mr. Duncan had indicated
15 in a lot of his testimony that really actually what he wanted
16 was a personal apology from Mr. German about that comment, and
17 he laughed in fact at the deposition that, you know, he never
18 did get that. It seemed to have been a disconnect of whether
19 Mr. German knew he wanted that, but I don't think Mr. German, as
20 I recall, would have given it anyway, to be honest. I think he
21 said that.

22 In any event, so October goes by. There is then a
23 memo that is sent on October 24th. I don't know necessarily
24 when it was received, this is Summary Judgment Exhibit 18.
25 Presumably -- I'm not sure. Let's see, did he reference it? I

1 don't know if we can see from the face whether Mr. Dennis Urban
2 knew of that memo when he wrote that or not. I would --

3 THE COURT: Sorry, give me that exhibit number again.

4 MR. ZAID: Eighteen. Eighteen, Your Honor.

5 THE COURT: Okay.

6 MR. ZAID: This was Gordon Ayoagi, the fire
7 administrator, sending a memo to Virginia Miller about
8 Station 20, which is a fire department station of Bethesda in
9 which the county has personnel in it. And there was a dispute
10 that preceded 9-11 that had been a subject of tension between
11 the county and the department that the department wanted the
12 county to vacate that station. And this is a decision issued by
13 the county that they were not going to vacate the station, and
14 in the same memo he talks about -- Mr. Ayoagi talks about the
15 German incident, as well as other incidents that had caused
16 obviously some level of adverse interaction between the two.

17 THE COURT: Just as an aside --

18 MR. ZAID: Yes.

19 THE COURT: -- I don't know how much you get into
20 this, but I'm sort of a Montgomery County resident and I'm kind
21 of aware of the fact that the volunteer firefighters and the
22 regular firefighters have kind of been at odds for a long time.
23 Does that plug in in any way to this dispute?

24 MR. ZAID: To some extent. I was a volunteer
25 firefighter for years. It's every -- everywhere there's

1 volunteer firefighters and paid career firefighters, there's
2 issues.

3 THE COURT: You mean not just in Montgomery County?

4 MR. ZAID: Oh, definitely. I can -- several counties
5 in New York State I can tell you about.

6 All right. It did play. I'm not sure if it's
7 relevant to some -- from a material fact standpoint. It's
8 certainly raised more of an issue for the defense than here.
9 The county officials for sure testified that they believed that
10 this was just another conflagration of the dispute between the
11 career paid firefighters and the volunteers. And some of the
12 volunteers I think did see it as, well, why is it we're not
13 given this equipment. That was part of the dispute. The
14 equipment was put into Chevy Chase Station 7 on Connecticut
15 Avenue, and the question was, well, why wasn't this being
16 distributed to the volunteer units? The volunteer units were
17 very often the ones that were first on the scene.

18 And I should say, now, Bethesda, if you don't know,
19 you probably do from the reading, is a mixed component. The
20 firefighters are all county-paid full-time employees. The three
21 officers --

22 THE COURT: The one on Wisconsin Avenue and Bradley?

23 MR. ZAID: Correct, Bradley and Wisconsin.

24 The three chiefs, the chief and the two deputy chiefs,
25 are volunteers, and the board are all volunteers as well. So

1 Mr. German was a volunteer member though he was in charge of
2 paid county employees on fire scenes, obviously. So there's no
3 doubt that that inflated some existing tensions that still exist
4 today.

5 THE COURT: All right.

6 MR. ZAID: Now, from the county perspective, there is
7 no evidence beyond from a documentation standpoint of county
8 involvement. There's deposition testimony that Mr. -- I said
9 Mr. Romer said as far as he was concerned it was closed --

10 THE COURT: Are you talking about the remark about
11 Duncan's wife at this point?

12 MR. ZAID: The whole --

13 THE COURT: Or other things --

14 MR. ZAID: Anything, anything with it. You have
15 Duncan -- again, when Duncan -- I'm sorry, when Mr. Romer was
16 shown the e-mail, Exhibit 17, you know, not that he necessarily
17 remembers it, you know, sitting in 2007 from 2001, but in
18 re-reading it, his testimony was, you know, I looked at it, I
19 can't imagine that didn't just close the issue for me. I filed
20 it away, and I probably -- if I recall him correctly, I probably
21 never even gave it to Mr. Duncan. As I recall, he said that.

22 Now, Mr. Ayoagi said he was still interested in what
23 was going on and he still wanted the department to tell him
24 what, if anything, they did --

25 THE COURT: Let me be clear on timing. When this memo

1 comes from Romer -- actually, it's from Urban to Romer; is that
2 it?

3 MR. ZAID: Yes.

4 THE COURT: All right. Are there any further public
5 statements that are made by the plaintiff?

6 MR. ZAID: No, the public statements were all on
7 October 9th.

8 THE COURT: Okay.

9 MR. ZAID: And appeared on October 10th --

10 THE COURT: Okay.

11 MR. ZAID: -- from the newspaper standpoint.

12 THE COURT: All right.

13 MR. ZAID: And the press conference actually occurred
14 on October 10th.

15 Am I getting my dates correct?

16 MS. SCHMIDT: That's correct.

17 MR. ZAID: Obviously the press conference was in the
18 morning, the newspapers obviously would have been on the stands
19 already, but the county already knew that this was coming
20 because they obviously got phone calls from the press, so they
21 were able to convene the press conference. And then the meeting
22 on October 13th, the Saturday.

23 After that, again, Mr. Ayoagi had said he wanted to be
24 kept apprized, and he later heard that there had been a
25 termination and he never really paid much attention to it.

1 Now, Mr. German's testimony was that as far as he was
2 concerned, by October, because he was actually social friends
3 with Chief Urban, they would go hunting together, they would
4 have dinner together, there was no issue that was continuing to
5 be told. He thought it was a closed matter until November of
6 '01 when Chief Urban told him that Virginia Miller, Ginny
7 Miller, the president of the board, wanted his head on a
8 platter. And from what the facts -- I'm not going to get -- I'm
9 trying to stay completely as to what hopefully would not be in
10 contest. At least it seemed that Virginia Miller was pushing
11 the issue, and then Chief Urban had to deal with the president
12 of his board.

13 They convened a meeting between the three of them on
14 December 10th, 2001, where Mr. German was given the option of,
15 what punishment do you want to have imposed on you? And his
16 response was, for what? I didn't do anything wrong. You can't
17 punish me for speaking out. I did it on my own time.
18 There's -- this was a legitimate issue. I'm not going to accept
19 any punishment.

20 Then there's nothing on the issue. There are again,
21 from what we have in documentation, some e-mails that reflect
22 there was some sort of conversations back through into the new
23 year, and then in January.

24 And then on January 22nd, this is Exhibit 23, the
25 e-mail that is at the crux of this case was sent by Chief Urban

1 to Mr. German that reflects an agreement that Chief Urban
2 apparently negotiated in compromise with President Miller, and
3 from the testimony of the two of them, it was basically Chief
4 Urban coming up with this and President Miller just saying, you
5 know, that's fine by me. And it's the third prong of the three
6 that's at issue.

7 And if you recall, Your Honor, when we last appeared
8 before you on January of '07 on the Motion to Dismiss, you in
9 fact indicated that -- I think I quoted this correctly, that is
10 was really problematic, that particular term, and that you had
11 indicated you expected the defendants in the course of the case
12 to explain this particular e-mail term. I think when we get
13 into the arguments you'll see I don't believe they were able to
14 do so.

15 And that third prong being you can never contact the
16 media in any way, individually, anonymously, third party,
17 et cetera, while a member of the BFD, and that there is no
18 negotiation or compromise on these conditions.

19 Mr. German wrote back saying he was essentially
20 incredulous, where did this come from, I never said anything,
21 how does this reconcile with my free speech rights under the
22 Maryland State Constitution --

23 THE COURT: His response also right there?

24 MR. ZAID: Yes. His response is Exhibit 24 where he
25 says he's not going to agree to any punishment and it's

1 inconsistent with state law and violates his rights. And then
2 in Exhibit 25, which is February 20th, 2002, Chief Urban sends
3 Mr. German an e-mail terminating his position as deputy chief.
4 And because there are no -- he's not a paid firefighter,
5 termination as deputy chief means he's terminated as a member of
6 the Bethesda Fire Department.

7 Mr. German then sends an appeal letter to the board
8 members, which is Exhibit 26, reiterating what his position was
9 as to why he said what he said and that he doesn't understand
10 why there's punishment here and that he was surprised by Chief
11 Urban's role in this. They appeared -- he then appeared --

12 Now, there is no formal process for this appeal within
13 the board. The bylaws at least don't reflect anything. This
14 was, I would say, just something ad hoc that was being permitted
15 for him to come in as deputy chief. Of course, the board
16 members knew him, not very well, there wasn't a great deal of
17 interaction between the board and the operational line officers
18 or the firefighters.

19 He appeared, as I recall, on March 6th of 2002, and he
20 made his pitch. They went into a closed session, and the
21 factual record reflects that the board did nothing. They didn't
22 do anything one way or the other. There's factual disputes
23 among -- or questions within the board members' minds even today
24 whether the chief has the authority to fire a deputy chief or
25 the board has the authority to fire a deputy chief, but most of

1 them just went along with it, and that was the end of it.

2 Now, there's a legal issue that is also factually
3 driven about whether or not Mr. German was required to exhaust
4 further administrative remedies and appeal the Bethesda Fire
5 Department's determination.

6 THE COURT: Well, we'll talk about that in argument.

7 MR. ZAID: Yeah. So from a factual standpoint, after
8 that he's terminated and essentially then he moves out of state.
9 And as a factual damage issue, again, he's a volunteer, he's not
10 on salary, but there are certain financial benefits that one
11 gets as a volunteer in most jurisdictions.

12 THE COURT: Well, what was he getting?

13 MR. ZAID: You get a tax credit of I believe it was
14 \$3,000 per year, and you do get -- you do earn retirement or
15 benefits, retirement benefits that you -- after a certain amount
16 of time that is laid out and not in dispute. Actually we have
17 an agreed stipulation.

18 THE COURT: What is laid out?

19 MR. ZAID: In Exhibit 28 is a stipulation that goes
20 into the out-of -- what I would style as out-of-pocket damage
21 loss. The amount of benefits that he would receive each month
22 and the amount of benefits he would have received had he
23 remained a member of the department.

24 That doesn't talk about the tax credit. That's I
25 think in a footnote in the brief, but that's just a matter of I

1 think an undisputed county -- or federal reg.

2 THE COURT: You are also seeking reinstatement,
3 though, are you not, or you were at least at one point?

4 MR. ZAID: I think technically that is still as a
5 remedy. I'm honestly not sure that that would actually come to
6 fruition were that granted.

7 THE COURT: Thank you. What's the number that's at
8 stake here? Do you have a total that you've worked out?

9 MR. ZAID: There is not. The thing I had asked for
10 was to have a damage hearing. I think most of it's going to
11 come down to looking at when a state actor, which the Bethesda
12 Fire Department is considered as, infringes upon First Amendment
13 right and whether or not there can be -- because I think, as I
14 recall, there are some Maryland regulations or statutes
15 governing a maximum amount of awards, but we honestly haven't
16 gone into that yet.

17 THE COURT: I'm not sure that's true. It applies to a
18 1983 claim. That may --

19 MR. ZAID: But I don't -- this isn't under 1983. It's
20 just under First Amendment.

21 THE COURT: I'm sorry. Well, First Amendment is 1983,
22 isn't it?

23 MR. ZAID: Is it --

24 THE COURT: Well, I mean, 1983 is civil rights,
25 doesn't create a cause of action, it gives you a right to

1 proceed under various constitutional rights that you have. I
2 assume it's a 1983 claim. Am I wrong about that?

3 MS. SCHMIDT: No, I believe that it would be, Your
4 Honor.

5 THE COURT: I guess what you're saying, as long as
6 you're making a constitutional claim under the First
7 Amendment --

8 MR. ZAID: Okay. It gets back under --

9 THE COURT: -- the only way you do that is through a
10 1983 claim.

11 MR. ZAID: There is not a tabulation of the damages at
12 this stage. We were just looking for summary judgment on the
13 law.

14 THE COURT: All right. You want to go from -- switch
15 over to --

16 MR. ZAID: Yeah, let me switch over --

17 THE COURT: -- offer any kind of counter-statement of
18 facts? You can embrace, reject, whatever you want to tell me
19 you have.

20 MS. SCHMIDT: Okay. For the most part, the defendants
21 do not disagree with the statements of fact that are outlined by
22 counsel. There is no question that an article appeared on
23 October 9th. There's no question that the media apparently
24 contacted the county and gave them a heads-up, that they had
25 been tipped off to this information, and these questions

1 regarding the location of the suits, why they had not been
2 distributed, they had not been appropriately fit tested,
3 et cetera.

4 As a result of that media issue, the county scheduled
5 a conference, a press conference, with County Executive Duncan
6 on October 10th. And at that press conference Executive Duncan
7 indicated that he believed the issue that was being raised with
8 respect to biohazard suits was in fact a career versus volunteer
9 issue. And he was very concerned that in -- you know, within a
10 period of less than 30 days from 9-11 we're dealing with a
11 situation where now there's going to be this career versus
12 volunteer issue that quite frankly has existed in Montgomery
13 County for a significant period of time and still exists today.

14 And so the county was trying to cut it off, if you
15 will, so that that would not be an issue of dispute. Executive
16 Duncan indicated in his deposition that he believed it was a
17 scare tactic on the part of the volunteers to kind of get the
18 community in an uproar over this issue of whether or not the
19 county was prepared for a terrorist attack. Certainly, given
20 Montgomery County's proximity to the Capital, to what happened
21 at the Pentagon, there was a large contingent of volunteer and
22 career fire department personnel who responded to the Pentagon
23 following the 9-11 attack, and in that context the county was
24 very much concerned that this was being made an issue.

25 Following the press conference Mr. German, as well as

1 others, had continued contact with the press, same day as the
2 press conference, and then following that press conference he
3 sent out an e-mail over the LISTSERV, which essentially
4 indicated that, look, we -- you know, our opinions are out
5 there, we've got to keep up the pressure, here's a list of the
6 reporters, here's their contact numbers, keep this up. He
7 misinterpreted a statement that was made by Executive Duncan.
8 Executive Duncan indicated that they were doing it for personal
9 reasons. Plaintiff interpreted that to mean that they were --
10 the voluntaries were doing this for personal gain. And so in
11 his e-mail he says, it's not personal gain, nobody wants his job
12 nor his wife.

13 That e-mail gets distributed to, which is known as the
14 12th floor, the Executive Office Building, where the command
15 staff for fire or rescue are located. Obviously, once that
16 happened there was a lot of consternation within the county
17 about the fact that here is a statement that's being made by --
18 against the county executive's wife, he was not happy with it.

19 There was then the meeting at the Public Service
20 Training Academy on October 13th. It was a meeting between
21 Executive Duncan, Bruce Romer, Gordon Ayoagi, who was at the
22 time the fire administration or the administrative head of
23 Montgomery County's Division of Fire and Rescue, as well as all
24 of the volunteer chief assistants and deputy chiefs. So it was
25 a meeting to kind of speak with the volunteer chiefs and say,

1 look, we understand that you have concerns about equipment. Let
2 us discuss this in this forum as opposed to debating it in a
3 public forum where, you know, we have to be concerned about the
4 impact that it's going to have to the community at large, given
5 the time, given the post 9-11 era.

6 Separate and apart -- and that meeting at the Public
7 Service Training Academy, Executive Duncan, although he did not
8 single out the plaintiff by name, did indicate that someone had
9 made a comment or statement regarding his wife and he wished to
10 have an apology.

11 There may be some dispute. My recollection is that
12 Chief Urban indicated not that the -- that there was a period of
13 time when just the chiefs were taken aside, and then there was a
14 period of time where he alone was taken aside.

15 THE COURT: "He" being?

16 MS. SCHMIDT: "He," Chief Urban.

17 THE COURT: All right.

18 MS. SCHMIDT: And the county wanting to know what they
19 were going to do, "they" Bethesda, to deal with the issue of
20 Lewis German making the statement regarding Executive Duncan's
21 wife. Based upon that discussion --

22 THE COURT: How was it interpreted? I'm just trying
23 to understand what the meaning of this clause is. I mean, it
24 sounds like a figure of speech to me, I don't want his job, I
25 don't want his wife, I don't want his dog, I don't want his

1 house. I'm --

2 MS. SCHMIDT: Unfortunately I think Executive --

3 MR. ZAID: I'm sorry.

4 THE COURT: -- asking you specifically what meaning
5 was put on it.

6 MS. SCHMIDT: Executive Duncan interpreted that, I
7 believe, to be some sort of sexual reference to this wife or it
8 was a derogatory comment regarding his wife. I mean, Executive
9 Duncan was clearly upset by the comment and was looking to
10 Bethesda --

11 THE COURT: You think that was an objectively
12 reasonable response?

13 MS. SCHMIDT: Executive Duncan's response?

14 THE COURT: Yeah. I mean, when someone says, I don't
15 want his job, I don't want his wife, is it just a manner of
16 speech?

17 MS. SCHMIDT: Again, I think it was a question of the
18 context in which the comments were made.

19 THE COURT: All right. I just wondered. I'd looked
20 at that clause several times and was trying to figure out what
21 was offensive by it. But in any event, it may -- unless you're
22 relying on that as the basis for discharging him -- are you?

23 MS. SCHMIDT: There is a part of -- it's a dual
24 purpose. Both Virginia Miller, the president of the Bethesda
25 Fire Department, and Chief Urban indicated that there were --

1 they had concerns not only based upon the statements that he
2 made to the media and his actions in that regard, but also the
3 fact that how that statement was interpreted by Executive
4 Duncan --

5 THE COURT: All right. Well, I've perhaps tipped my
6 hand on that. I mean, if that's the reason, one of the reasons,
7 they gave for discharge, you're not going to win summary
8 judgment on that, I can tell you right off. I don't know that
9 you'll lose summary judgment, but it comes close. That's, at
10 best, an ambiguous remark. Maybe at best it's a colorful remark
11 that doesn't offend anybody. At worst it may be an
12 interpretation that's put upon it that is hyper-hypersensitive,
13 but it doesn't give you any basis to discharge. I can tip my
14 hand completely on that. That's about as peripheral as any
15 issue that I see in the case.

16 Leave aside the letter from -- the e-mail from Urban
17 to Romer. We'll deal with the major issue here, which is the
18 free speech issue, I think.

19 MS. SCHMIDT: Right.

20 THE COURT: All right.

21 MS. SCHMIDT: And, Your Honor, so based upon that
22 Chief Urban obviously is feeling some pressure to respond to the
23 county's concerns about what is happening. What happens then is
24 the memo comes out on October 24th, 2001, which is the letter
25 from Gordon Ayoagi to Virginia Miller, and it's Plaintiff's

1 Exhibit 18. Not only does it reference or address the issue of
2 Station 20, but very clearly Gordon Ayoagi is not happy with and
3 has taken the actions of Lewis German and inflicted upon
4 Bethesda a negative effect. He says, I am concerned about the
5 pattern of lack of cooperation from Bethesda Fire Department to
6 fulfill the obligations of our public/private partnership. What
7 was a previously excellent relationship appears to be marred by
8 recent events. And then he proceeds to outline some of the
9 events that he believes Gordon Ayoagi have affected or impaired
10 the relationship. And at the time --

11 THE COURT: Are we back to the career/volunteer issue
12 there?

13 MS. SCHMIDT: I don't think so, Your Honor. I think
14 we're -- at this point we're at a situation where the -- you
15 know, the fire administrator is saying, Bethesda, get your house
16 in order.

17 THE COURT: Okay.

18 MS. SCHMIDT: You have an assistant chief being
19 permitted to be the spokesperson for Bethesda Fire Department
20 and undermining public confidence in the county's planning and
21 response for chemical/biological events. The assistant chief,
22 as the spokesperson for BFD, contradicting statements made by
23 the county executive at a press conference regarding the
24 county's readiness and undermining public confidence in the fire
25 service. The failure by the Bethesda fire chief to report

1 actions taken regarding the personal attacks made by the
2 assistant chief on the county executive's wife. And then he
3 says, and now your demand that the Station 20 space be vacated.

4 But again, Your Honor, so clearly it's not just
5 Bethesda saying, Mr. German, your comments were inappropriate.
6 We have Executive Duncan having a question about the comment and
7 the e-mail, and now you have Gordon Ayoagi questioning it, and
8 clearly making it as a personal attack on the executive's wife.
9 Based upon that inquiry, obviously Virginia Miller contacts
10 Dennis Urban, said, look, we need to deal with this issue. That
11 is what then precipitates the e-mail from Dennis Urban to Bruce
12 Romer on October -- I believe it's October 29th, 2001.

13 It's not clear and the parties' recollection is not
14 great as to what came first, but there was no question that
15 Dennis Urban, when he left the meeting on October 13th,
16 understood that the county intended for him to provide a
17 response regarding how Bethesda was going to handle the issue.

18 In that e-mail that Chief Urban sent to Bruce Romer,
19 it technically is not an apology. He's saying, please be
20 assured he did not speak on behalf of Bethesda Fire Department,
21 he is not our spokesperson, we find the comments to be
22 reprehensible. Understand this is the area in which the comment
23 was made, he believed it to be a private system, but it does
24 not -- it's not an apology letter.

25 THE COURT: He's making that -- your position was he

1 was making the statement about Mrs. Duncan, to the extent that
2 he was at all, as a private person, but anything he was saying
3 about the other matters was as a public person; is that right?

4 MS. SCHMIDT: Well, I think that --

5 THE COURT: I mean, I'm asking you, I --

6 MS. SCHMIDT: I don't think so. I think, quite
7 frankly, Your Honor, the department was looking at it and Chief
8 Urban testified in his deposition that he believed, based upon
9 Mr. German's service to the fire community for the number of
10 years that he had been involved, that it was almost impossible
11 for him to set --

12 THE COURT: Okay.

13 MS. SCHMIDT: -- to speak out on fire department
14 matters as a private citizen, that because of the very nature of
15 the positions that he had held within the fire service, he was
16 going to be recognized as someone who was speaking out. He was
17 known throughout the county as a chief officer, not the chief
18 but a chief officer, of Bethesda Fire Department. And in fact,
19 in his deposition the plaintiff acknowledged that he took a
20 reporter to the Chevy Chase Fire Station, allowed her -- with
21 her, got her access to those suits so that she could see them,
22 count them, indicated where they were located, and that appeared
23 in print. And Mr. German was very clear in his deposition that
24 the only person that told the press where those suits were
25 located, how many they were, and gained her access was him.

1 And again, the county had a concern. Here are suits
2 that are designed to respond to a biochemical hazard, and now
3 the terrorists know where they're housed. Up till then the
4 general public had no knowledge as to where those suits were
5 located. So --

6 THE COURT: Isn't there some dispute about that on the
7 record? I thought there was.

8 MR. ZAID: That he brought the reporter to the
9 station?

10 THE COURT: No, as to where the -- at least a number
11 of outfits were located.

12 MR. ZAID: There is a factual dispute. There's
13 declarations that say people knew that it was there and --

14 THE COURT: Understood. All right. Any more factual
15 matters that you want to --

16 MS. SCHMIDT: The only -- as I said, Your Honor, the
17 real issues with respect to the department is in looking at the
18 factual matters, the plaintiff acknowledges that in his
19 deposition he did not have the board's permission to speak on
20 behalf of the fire department. Although he didn't feel that he
21 needed their permission to speak on behalf of the fire
22 department, he acknowledged that he did present that issue to
23 the board before he went to the press and that they did not
24 specifically authorize him to do that.

25 He also acknowledged that he understood, based upon

1 his service within the fire community in Montgomery County, that
2 under the integrated emergency command structure that generally
3 a deputy chief is not going to speak out on matters of this
4 import on behalf of the department, and in fact, acknowledged
5 that when he was at Bethesda Chevy Chase Rescue he would not
6 have that authority to do that. So --

7 THE COURT: All right. Let me pose a question to both
8 of you, because to some extent it seems like there are issues
9 that are conflated here. One is whether in fact there was
10 retaliation for words that were actually spoken. The other
11 seems to be that he is told that you can only come back if you
12 give up any right to speak about anything. Now, those are
13 really, in some ways, two separate issues; related, but
14 separate.

15 Now, as I'm reading the Complaint -- the Amended
16 Complaint, it seems to me the issue largely goes off on what he
17 was told he could or couldn't do coming back but doesn't
18 strictly posit the argument that I've been retaliated --
19 although I think it's implied, I've been retaliated against for
20 what in fact I've already said. Two different concepts: One is
21 perspective, one is a prior restraint, the other is a
22 retaliation for some statement that may be protected by the
23 First Amendment.

24 I've analyzed this case so far on the theory that
25 there are really two related claims that are made here under the

1 First Amendment, and one, as I say, relates to what has gone on
2 in the past, the other is perspective. So we need to talk about
3 that, because arguably there may be different remedies that
4 attach as to the one as opposed to the other. So we need to
5 talk about it.

6 Now, you might want to say something relative to the
7 second issue, which is when Urban says, in effect, you can never
8 speak again as an individual. That's a rather large statement
9 to make, hard to defend. What do you do by way of explanation
10 as to that?

11 MS. SCHMIDT: Your Honor, the only thing that I can
12 say, and there is somewhat of a factual dispute between the
13 parties as to what transpired between October and the time that
14 this meeting occurred --

15 THE COURT: You got this letter there. I mean right
16 there on its face is problematic.

17 MS. SCHMIDT: I understand that, Your Honor, and what
18 I'm saying is there had been -- according to Chief Urban there
19 had been ongoing discussions between himself and the plaintiff
20 as to what type of discipline would be appropriate. And Chief
21 Urban testified that Lewis German said, I will accept any form
22 of punishment short of termination. Now, the plaintiff denies
23 that, but Chief Urban testified to that. They then had this
24 meeting in December of 2001, Virginia Miller and Dennis Urban
25 asked him, what type of punishment do you feel would be

1 appropriate? Plaintiff said, I don't feel any discipline is
2 appropriate, but they end the meeting saying, think about what
3 you're going to do. Then Dennis Miller and Virginia Miller go
4 back -- Dennis Urban and Virginia Miller go back and forth, and
5 then there's the e-mail that comes out.

6 Chief Urban testified that he didn't feel in his mind
7 when he was saying you cannot speak about anything in any
8 capacity, he said he felt that he couldn't -- that the plaintiff
9 would not separate himself from his position in the fire service
10 and that he believed he was only referring to fire --

11 THE COURT: Are you positing as a statement that in
12 fact he could be prohibited from ever speaking as a citizen on
13 any fire issue? I mean, can that constitutionally be done?
14 Maybe one can agree to it, but --

15 MS. SCHMIDT: I'm not sure that that's exactly what
16 Chief Urban had in mind, but --

17 THE COURT: I'm not asking what he had in mind. I'm
18 reading the paper.

19 MS. SCHMIDT: Right, I understand that, Your Honor. I
20 guess part of the problem is that in his deposition Chief Urban
21 and Virginia Miller both said, you know, I understand that that
22 language is troubling, we weren't intending to completely
23 restrict his speech.

24 THE COURT: But he said, I don't buy that, I quit, or
25 I don't buy that, and they said, well, you're out.

1 MS. SCHMIDT: Right.

2 THE COURT: So whatever he intended -- whatever they
3 intended in their mind, I mean rather clearly there was a nexus
4 between his refusal to accept that among other conditions and
5 his dismissal.

6 MS. SCHMIDT: Well, at that point Chief Urban
7 testified too that he believed -- he kind of felt like he was
8 set up by the plaintiff in that all along he had been saying, I
9 will agree to some form of discipline, and then said, no, I will
10 not accept any discipline whatsoever, I will not write a letter
11 of apology. And at that point he felt like his hands were tied,
12 because Chief Urban testified he felt like the county was
13 looking for some sort of discipline. He was trying to work with
14 Virginia Miller, the president and work with the plaintiff
15 and --

16 THE COURT: All right. Let's shortcut --

17 MS. SCHMIDT: And that's where we are.

18 THE COURT: Let's shortcut at least part of the
19 argument here. Let's assume I hold as a matter of law that this
20 statement is unconstitutional, this proposed condition would
21 clearly be unconstitutional, and that there was a nexus at least
22 between that condition in part and the termination. All right?
23 Now, what do you do at that point? Is that enough to make a
24 case with all the rest being background noise, or do you need
25 everything else that goes before to effectively let this case go

1 forward? And maybe I ought to ask the plaintiff that first --

2 MS. SCHMIDT: Okay.

3 THE COURT: -- because I need to understand your
4 theory. And as I said, that language remains highly
5 problematic. So what about it?

6 MR. ZAID: The *Goldstein* case is really the primary
7 case, and I believe both sides agree.

8 THE COURT: All right. Do I have that?

9 MR. ZAID: You do.

10 THE COURT: Would you find it for me?

11 Go ahead.

12 MR. ZAID: *Goldstein* actually was a similar case in
13 that of a fire department volunteer official -- captain, I
14 believe, if I recall. Captain?

15 MS. SCHMIDT: *Goldstein*?

16 MR. ZAID: *Goldstein*?

17 MS. SCHMIDT: No.

18 MR. ZAID: No?

19 MS. SCHMIDT: He was just a member.

20 MR. ZAID: Just a member.

21 MS. SCHMIDT: He lost the election.

22 MR. ZAID: Okay. Who was disciplined, and I don't
23 remember exactly what the -- that he actually might have gotten
24 kicked out. It doesn't matter. But *Goldstein* from the Fourth
25 Circuit sets forth the standards that are at play and the prongs

1 that are at play. And essentially what this case is boiling
2 down to from a legal factual standpoint is whether or not
3 Bethesda's Fire Department's interest in First Amendment -- I'm
4 sorry, whether German's interest in First Amendment expression
5 must outweigh Bethesda Fire Department's interest in efficient
6 operation of the workplace. That, from the plaintiff's
7 perspective, and I -- my interpretation of the defendants'
8 arguments, that's the core of this case for Your Honor to
9 decide.

10 THE COURT: Well, I'm even asking a narrower question
11 than that. Can it ever be outweighed if you say you can never
12 speak again about any issue in any capacity? At least that's
13 the interpretation. What kind of weighing analysis is there?

14 MR. ZAID: The plaintiff's perspective would be no,
15 you can't.

16 THE COURT: There is really no weigh analysis, is
17 there? I'm posing that rhetorically to you, Counsel, because
18 that's the issue that I'm confronted with. I can see that
19 analysis working with regard to the first part of the case where
20 you're looking retrospectively. Then you get into an analysis
21 of whether there was retaliation because of what went on
22 retrospectively.

23 MR. ZAID: I think they said from a contractual
24 standpoint if the person wants to agree, I guess they can then
25 be bound by the contract. That's a separate argument. But with

1 refusing to abide by that, no, plaintiff's respective would be
2 you absolutely cannot. I mean, we're comfortable to say it
3 doesn't matter either way, because the second prong can't be met
4 by the defendants. But if Your Honor categorically ruled that
5 by itself that took place --

6 THE COURT: I'm only asking --

7 MR. ZAID: No, no, I realize from a --

8 THE COURT: -- at this point --

9 MR. ZAID: If that ruling went that way.

10 THE COURT: Go ahead.

11 MS. SCHMIDT: Your Honor, I believe you still have to
12 engage in the balancing test, because it is -- I think it's a
13 continuity of events. You have the issues to take that arise in
14 October, and then there's this ongoing negotiation, if you will.
15 And so I don't think that you can interpret the February -- the
16 January 2002 and February 2002 e-mails from Chief Urban as
17 saying, we are -- you are being terminated because you refuse to
18 accept that you can no longer speak.

19 I mean, it's very clear in the record that Virginia
20 Miller and Dennis Urban and the board itself felt that he needed
21 to be disciplined, and his refusal to accept discipline was the
22 reason for the termination, and not necessarily that he, you
23 know, refused to accept that he could no longer speak out on
24 matters of the fire department. That's -- I think that's how --

25 THE COURT: All right. There is a possible -- I mean,

1 one can also analyze it a slightly different way, which is that,
2 number one, if he is correct on the fact that he was -- his
3 First Amendment rights were abridged for what he said, then
4 there's no basis for him to be disciplined.

5 Number two, if the remark, which I've already told you
6 I think is, at best, ambiguous, at worst, who knows, but could
7 be -- even be a colorful way of speaking, that in and of itself
8 would not justify something that the -- the termination that
9 took place or at least would be open to dispute before a trier
10 of fact.

11 But then, if in fact he has stated his First Amendment
12 claim, then the additional condition that he not speak again on
13 anything I suppose gives him additional weight in support of his
14 First Amendment claim.

15 The issue that I was grappling with is suppose I had
16 determined that he hadn't stated a First Amendment claim with
17 regard to what he said earlier but then there's an attempted
18 prior restraint on what he's supposed to do in future, could you
19 have those -- could you still have a viable cause of action if
20 he didn't have the first cause of action? That was the way I
21 was looking at it.

22 MR. ZAID: I think there is an overlap between the
23 two. I raised in the brief that there is an aspect of prior
24 restraint. I think it's very clear, and I don't even think this
25 would be disputed from the factual record, there's a but for.

1 You know, had Mr. German not spoken out on October 9th -- 8th,
2 9th, 10th, none of this probably would have -- you know, who
3 knows what could have happened and other issues. But taking
4 that out of the vacuum, all of the testimony was, you know,
5 unlike, for example, in the *Goldstein* case where Goldstein
6 appeared to be a royal pain in the -- you know, introduced here
7 in creating all sorts of issues with his department, and in fact
8 in *Goldstein* he lost because he couldn't prove the fourth prong
9 in correlating the termination with the exercise of his First
10 Amendment right.

11 THE COURT: All right.

12 MR. ZAID: Here you have German coming out with
13 speech, and they are punishing him for that speech --

14 THE COURT: I don't think there's any question --

15 MR. ZAID: -- and then prospectively stopping further
16 speech, so it's a combination. And the standards are different.

17 THE COURT: I'm not really certain, and maybe again to
18 try and telescope things, it certainly looks like that there is
19 adverse action that is taken in response to what he said, and so
20 the idea of adverse action doesn't need to be argued too much by
21 you here. The issue really is whether it's a matter of public
22 concern, number one; and then, secondly, whether it's in any way
23 spoken in his official capacity. And then ultimately whether,
24 if it is a matter of public concern spoken not in his official
25 capacity, whether it's outweighed by concerns of efficiency and

1 discipline and harmony and so on and so forth in the department.

2 So let's get into the basic issues now. If there's
3 more factual development you want to do in connection with your
4 argument you can feel free to do so, but let's go ahead as if
5 you're making a prima facie case, Mr. Zaid.

6 MR. ZAID: Thank you, Your Honor.

7 THE COURT: And do it issue by issue, and I'll have
8 defendants respond as you go.

9 MR. ZAID: There are two counts that remain in the
10 case, Count Two and Count Four. Count Four is the First
11 Amendment, Count Four is the wrongful discharge.

12 THE COURT: Yeah, do Count Two first, the procedural
13 issue.

14 MR. ZAID: Okay.

15 THE COURT: About what you were going to do, because
16 that's something where I think I need you to point me a little
17 bit to the record.

18 MR. ZAID: Sure. The issue that came up with Count
19 Two, and they are very much tied to Count Four, so let me just
20 first start at the back end of Count Four -- I'm sorry, Count
21 Two, because if you resolve Count Two in favor of Mr. German, if
22 I can tie in exhaustion issues, which I'm going to focus on,
23 Count Two goes with it, because the wrongful discharge under
24 Maryland law is the violation of the First Amendment.

25 THE COURT: All right. And let's assume that for

1 present purposes, if in fact he's terminated because he
2 exercised free speech rights.

3 MR. ZAID: Right. And it's clearly --

4 THE COURT: I was more concerned with the procedural
5 issue.

6 MR. ZAID: Yes.

7 THE COURT: Did he do what he was supposed to do --

8 MR. ZAID: Okay.

9 THE COURT: -- to contest what he claims is a wrongful
10 discharge.

11 MR. ZAID: The issue was did he exhaust all of his
12 administrative remedies.

13 THE COURT: Right.

14 MR. ZAID: And that was something that we went back
15 and forth on, perhaps you recall, it was a while ago, and you in
16 fact sua sponte brought up the exhaustion requirement for the
17 State of Maryland. Neither party had addressed that. And in
18 fact, when the county was in, the county had addressed that --

19 THE COURT: You agree that there's no exhaustion
20 requirement for the 1983 claim?

21 MR. ZAID: Yes.

22 THE COURT: All right.

23 MR. ZAID: Now, there have been -- it is unlike
24 dealing with federal statutes, which is fairly easy to find, and
25 even the legislative history. Not so with Montgomery County

1 council in trying to figure out the legislative history. I
2 submitted last night with my apologies that it was last night,
3 but it actually took me up to this point to get what I needed to
4 get. And even then it was contradicting things I had been told
5 in the interim.

6 THE COURT: Did you get a copy of this, Ms. Schmidt?

7 MR. ZAID: Yes.

8 MS. SCHMIDT: I did, Your Honor.

9 THE COURT: All right.

10 MR. ZAID: So here is the key. We have been going
11 back and forth. We had always taken the position that there was
12 no requirement for exhaustion. There was no other avenue of
13 appeal beyond internally within the department, and the
14 department had taken the position, no, you could go to the Fire
15 and Rescue Commission. And then we went back and forth with
16 citations of different provisions of the county law, and then I
17 kept still saying, no, this is a later provision, and the county
18 came --

19 THE COURT: Right, that's where you left me. And
20 that's where I'm --

21 MR. ZAID: The department came back saying, no, it's
22 not -- okay.

23 THE COURT: I'm asking for enlightenment.

24 MR. ZAID: Yes, enlightenment. This is what I found
25 and gave you last night. Exhibit A, the 1998 document --

1 THE COURT: Which bill number?

2 MR. ZAID: I'm sorry, again?

3 THE COURT: Bill number?

4 MR. ZAID: 37-97.

5 THE COURT: 37-97.

6 MR. ZAID: Right. This is what was enacted, and this
7 is the one that even the defendants had talked about July 1st,
8 1998. If you look at page 31, the section that we've always
9 been talking about is 21-7, Appeals To and From the Commission.

10 THE COURT: All right.

11 MR. ZAID: Now, on page two of this document it gives
12 you the explanation.

13 THE COURT: Page two of the document or --

14 MR. ZAID: No. Substantively I'm referring to
15 page 31.

16 THE COURT: Yeah.

17 MR. ZAID: Page two is the key to tell you what
18 brackets mean and what underlining means, you know, which
19 language is being discarded, which is new language.

20 THE COURT: All right. Okay. All right.

21 MR. ZAID: Okay? In this version we don't have to
22 deal with it that much, it's all new language, this is all new
23 for the county, 21-7 here. The jurisdiction of the Fire Rescue
24 Commission is set forth in (a) (1) and (a) (2). Well, (a) (1)
25 doesn't count. It's talking about any action of the fire

1 administrator. That was Mr. Ayoagi. But the county was adamant
2 to say they had nothing to do with Mr. German's punishment,
3 nothing whatsoever, never suggested anything, never did
4 anything, didn't want anything except to know what was going on
5 and what was Bethesda going to do.

6 Section 2 of paragraph (a)(2), any employee or
7 volunteer firefighter -- Mr. German -- can bring an appeal
8 concerning an adverse action of the administrator -- okay, not
9 applicable -- or local fire and rescue department --
10 applicable -- in carrying out a county law or regulation,
11 commission policy, or order of the administrator. None of those
12 are applicable here. That is not what we're talking about.
13 There's no county law, there's no regulation, there's not even a
14 bylaw in the department that pertains to this, that's not in
15 dispute. There's no commission policy, and there's no order of
16 the administrator.

17 In 2005, that's Exhibit B, Bill 3603, on page 31
18 coincidentally, it shows that the county modified the law and made
19 it so that today if this had happened Mr. German could go to the
20 Commission because he could challenge the decision of a local
21 fire department involving the removal, demotion, suspension, or
22 other disciplinary action applied specifically to that
23 individual. But that did not exist in 2002. There was no
24 avenue for Mr. German to go beyond where he went. So the
25 relevant case law talks about exhaustion, you know, only

1 existing where there is exclusive remedies for him to pursue,
2 and there was -- there were no remedies for him.

3 THE COURT: Stop on that and let me hear defendants'
4 response.

5 Are you ready to respond to that?

6 MS. SCHMIDT: I'm sorry, Your Honor.

7 THE COURT: Yeah.

8 MS. SCHMIDT: Yes. What I would say is there are two
9 issues here. In the memo, which is Exhibit 25 of -- Plaintiff's
10 Exhibit Number 25 --

11 THE COURT: Okay.

12 MS. SCHMIDT: -- Dennis Urban, in the e-mail dated
13 February 20th, 2002, advises the plaintiff that, any appeal of
14 this decision must be in accordance with established fire rescue
15 policy and procedures.

16 And then in Gordon Ayoagi's deposition, which is --

17 THE COURT: And where are those policies and
18 procedures? What are they? What were they?

19 MS. SCHMIDT: I believe we attached them to our brief,
20 Your Honor. But more importantly, Gordon Ayoagi, who was the
21 head of the Fire Rescue Commission --

22 THE COURT: Right.

23 MS. SCHMIDT: -- testified in his deposition, and
24 that's Exhibit 4 of the defendants' motion --

25 THE COURT: Their exhibit?

1 All right. Get that, please, Exhibit 4.

2 MS. SCHMIDT: -- at page 106 and 107 testified that,
3 if a local volunteer fire department took an action on a serious
4 violation, the employee could in fact appeal that decision to
5 the Fire Rescue Commission. And at the time Gordon Ayoagi was
6 the chairman, if you will, of the Fire Rescue Commission.

7 THE COURT: Well, is that written somewhere, or is
8 that just him saying that?

9 MS. SCHMIDT: That's what he testified to and that was
10 his interpretation of this 21-7.

11 THE COURT: Now, who is -- Ayoagi is, what, the Fire
12 Rescue --

13 MS. SCHMIDT: He was the fire administrator and the --

14 THE COURT: I don't know that that gives it legal
15 authority, that's just his read on it. When he says -- tell me
16 what -- the Fire and Rescue Board is set up how? What -- tell
17 me about that.

18 MS. SCHMIDT: The Fire Rescue Commission --

19 THE COURT: Commission, excuse me.

20 MS. SCHMIDT: I'm sorry?

21 THE COURT: No, I misspoke as to its name. Tell me
22 what is set up, how it's constructed.

23 MS. SCHMIDT: It is set up by -- there are members of
24 the Fire and Rescue -- Montgomery County Fire and Rescue that
25 are on the board, as well as members at large, and they address

1 not only appeals from volunteer fire departments' volunteers,
2 they also address issues regarding fire rescue policy. For
3 example --

4 THE COURT: Are they nominated by the county
5 executive, is that who --

6 MS. SCHMIDT: Medical -- for example, medical
7 qualifications for fire department personnel --

8 THE COURT: Are they nominated, the members, by the
9 county executive?

10 MS. SCHMIDT: I believe they are, Your Honor. They're
11 appointed by the county executive and confirmed by the county
12 council.

13 THE COURT: All right.

14 MS. SCHMIDT: And at the time that these events took
15 place, Gordon Ayoagi, as the fire administrator, was the titular
16 head of the Fire Rescue Commission.

17 THE COURT: Right. Understood. Any written policy
18 anywhere, though, that says that specifically in the event of a
19 discharge such as -- what did they call it, removal, such as was
20 said in the 2005 amendment, that that was also within the
21 competence of the board, or is that just something that Mr.
22 Ayoagi felt was appropriate?

23 MS. SCHMIDT: It was appropriate and it was the
24 practice at the time, Your Honor.

25 THE COURT: Wasn't it written anywhere as far as you

1 know?

2 MS. SCHMIDT: It was not, other than under 21-7(a)(2)
3 where it says, An employee of a local fire and rescue
4 department, a volunteer firefighter or rescue or other person
5 aggrieved concerning any adverse action of a local fire and
6 rescue department in carrying out a county law or regulation.

7 Certainly there's an argument to be made that there is
8 a county law that says thou shall not discriminate or --

9 THE COURT: Discriminate?

10 MS. SCHMIDT: -- violate someone's First Amendment
11 right to free speech. And so certainly there is an argument to
12 be made that it did. You know, the plaintiff is alleging that
13 there was a violation of his First Amendment right to free
14 speech, as well as under the State of Maryland Constitution and
15 Declaration of Rights that that's a county law or regulation and
16 that he would be able to appeal to the Fire Rescue Commission.

17 THE COURT: All right. Anything more on this point,
18 Mr. Zaid?

19 MR. ZAID: Actually, if you look, for one, at Gordon
20 Ayoagi's testimony, and this is actually Exhibit 7 -- it may be
21 in the summary judgment, but Exhibit 7 to my reply brief is that
22 selected version. And when I asked him did he know of anything
23 that applied that would have allowed this, for one thing the
24 county objected in saying it called for a legal conclusion,
25 rightly so, and Mr. Ayoagi is not a lawyer, and it was an

1 equivocal answer. He goes, it's been a while since I recalled
2 the law, but my recollection there is that if an LFRD -- local
3 fire rescue department --

4 Right?

5 -- takes an action on a serious -- on what is
6 considered to be a serious violation that the employee could
7 appeal that to the Fire and Rescue Commission. He's guessing.
8 You know what, that's good for him. John Hugh in the Justice
9 Department thought torture was proper, and we're finding out
10 that his legal analysis probably wasn't that sound.

11 The fact of the matter is we now have, albeit late,
12 and again my apologies, here is the applicable statute or
13 regulation as it would be by the county that applied at the
14 time. The language is very clear on its face. It doesn't
15 matter how Dennis Urban interpreted it, it doesn't matter how
16 Gordon Ayoagi interpreted it, it doesn't matter how the county
17 attorney interpreted it unless it was issued in a policy legal
18 memo, the county issued the reg and it says you can only appeal
19 if you're carrying out a county law Regulation Commission policy
20 or order of the administrator.

21 That argument has never been made by the defendant at
22 any time, because it can't be. The defendant was imposing
23 discipline on Mr. German because that's what they wanted to do,
24 and there was no way for him to challenge it other than through
25 litigation such as this unless we change the year from 2002 to

1 2005. So unless the defendant can come up with a statute that
2 intervenes these two 1998 and 2005 policy changes, I'm not sure
3 if there's anything else that really needs to be said.

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

5 What I'm going to do, because this is a case with a
6 lot of parts, I'm going to address some of these issues as we go
7 sequentially in a -- either a -- and I'm going to give you my
8 opinion in this case by the end of the day, so you'll have it
9 orally. But because there's a lot to cover and we're looking at
10 one issue at a time, I'm going to decide it in blocks, and then
11 if it ever becomes appropriate to reorder my opinion, you can do
12 so. So let's address this administrative issue first. And I'm
13 not going to get into the recitation of facts at this point,
14 because I'll do that when we get to the key issue in the case.
15 But let's talk about the administrative issue.

16 Just, again, to begin by way of summary of the case,
17 this is a case in which a volunteer fire official in the
18 Bethesda Fire Department has sued for wrongful discharge and
19 violation of First Amendment rights under the U.S. and Maryland
20 Constitution. The central claim is that the defendant was
21 dismissed in violation of these rights, but the immediate issue
22 before the Court is whether he -- as to the wrongful discharge
23 claim, which is the State cause of action, whether he exhausted
24 his available administrative remedies. And in that regard the
25 defendant has argued that -- or defendants have argued that the

1 plaintiff did not exhaust available administrative remedies.

2 Let me go first to the primary argument made by the defendant.

3 According to the defendant, under Montgomery County
4 Code, Section 21-7(a), in effect -- actually, I think the
5 defendant began by citing a code section that was not in effect
6 at the time, so I think I need to go back to that. The
7 defendant's argument is essentially that there was an obligation
8 on the part of the plaintiff under applicable administrative law
9 to take any appeal to the Fire and Rescue Commission and
10 thereafter, arguably, to the Merit System Protection Board.
11 That's the essence of the defendants' claim.

12 The actual citation to the applicable code, however,
13 apparently refers to a section that was not in effect at the
14 time of the events in question. The events in question are
15 alleged to have taken place in October 2001 and early 2002.

16 The applicable Montgomery County code section that is
17 before the Court is Section 21-7 of -- under Bill Number 37-97.
18 I'm not quite certain -- I guess it's under the Code Chapter 2,
19 Administration, Section 2-39(a), and then that section, I guess
20 it's Chapter 21-7(a), is -- refers to the authority of the fire
21 Commission to entertain appeals. And it says under sub (a) as
22 of that time, sub (2), quote, any employee of the fire and
23 rescue service or a local fire and rescue department, volunteer
24 firefighter or rescuer, or other agreed person concerning any
25 adverse action of the administrator or local fire and rescue

1 department in carrying out a county law or regulation,
2 commission policy, or order of the administrator would be an
3 appeal that, quote, the commission must hear and decide each
4 appeal filed by such a person, end quote.

5 Now, that was the applicable law. It does bear noting
6 that that section was amended by Bill Number 36-03 effective
7 January 1, 2005, post this transaction, and under 21-7(a)(2),
8 today it provides that an employee of the fire and rescue
9 service, including an employee of a local fire and rescue
10 department, a volunteer fire department or rescue or any other
11 person or -- aggrieved by any -- by an adverse final action of
12 the chief or a local fire and rescue department, comma -- I
13 guess, let's see, regulation, policy or lawful order -- hard to
14 see where this begins. I gather all that in middle brackets is
15 out; is that correct?

16 MR. ZAID: That's my understanding.

17 THE COURT: All right. I think that's right.

18 MR. ZAID: On page two is the key.

19 THE COURT: Let me go back and read that again,
20 because I'm having a little trouble. The double line is out.

21 MS. SCHMIDT: I think, Your Honor, double underlining
22 is new.

23 THE COURT: What about single under --

24 MS. SCHMIDT: Double bold face brackets eliminates.

25 THE COURT: And single underlining is what?

1 MS. SCHMIDT: Is added to existing law by original
2 bill.

3 THE COURT: All right. So if we read 27 -- 21-7(a),
4 not even (2) anymore, is it, (2) is out.

5 MR. ZAID: Actually, it may -- I have a feeling in
6 one of our briefs we've cited -- we quoted from it in its
7 present form so that you wouldn't have to --

8 THE COURT: Where is that?

9 MR. ZAID: Yeah, where you wouldn't have to figure out
10 brackets and underlines.

11 THE COURT: Well, it looks like under sub (2), a
12 volunteer firefighter or rescuer.

13 MR. ZAID: If you look on page 37 of the plaintiff's
14 Summary Judgment Motion, I believe that's the current one.

15 THE COURT: Thirty-seven, not Exhibit 37, but page 37.

16 MR. ZAID: Page 37.

17 THE COURT: Of the Summary Judgment Motion?

18 MS. SCHMIDT: I believe we have it at page 30 of our
19 brief.

20 THE COURT: Yes, the Summary Judgment Motion.

21 MR. ZAID: Although looks like it's a little different
22 there as well. No, wait. No, no, it's not. Yeah, it's --

23 THE COURT: Right. I think you and I -- I think that
24 is the correct way.

25 MR. ZAID: I think that's correct, fire --

1 THE COURT: Very well. This is the way the Montgomery
2 County Code Section 21-7 reads effective 2005: Quote, a
3 jurisdiction, except as provided the subsection (g), the
4 Commission must hear and decide each appeal filed by a volunteer
5 firefighter or rescuer aggrieved by an adverse final action of
6 the chief or a local fire and rescue department involving the
7 removal, demotion, or suspension of or other disciplinary action
8 applied specifically to that individual. And then I gather (g)
9 has no application to this case.

10 Now, if that -- to the extent that those two versions
11 of the law are placed together, there certainly was some
12 uncertainty as of the date of the earlier legislation as to
13 whether there was jurisdiction in the administrative board with
14 regard to actions by voluntary firefighters involving their
15 removal, demotion, or suspension. And this is now clarified by
16 the amendment that says that they -- that that is in fact the
17 law.

18 So insofar as the argument is made that there was some
19 obligatory administrative appeal that the defendant -- excuse
20 me, that the plaintiff had to pursue at the time, the Court
21 rejects that argument. The mere fact that the fire
22 administrator himself may have read the language to have
23 incorporated that type of jurisdiction of course gives it no
24 particular weight at all. That's a legal interpretation and
25 insofar as there is no obligation to pursue an administrative

1 remedy, the Court finds as a matter of law that there is none.

2 All right. Now, let's take about a five-minute break,
3 folks, and then we'll pick up again. All right.

4 (Recess.)

5 THE COURT: Counsel, I just wanted to add some remarks
6 to my ruling, specifically because I didn't cite any authority,
7 but want to.

8 There is a general rule under Maryland law that an
9 administrative remedy should be exhausted or must be exhausted
10 before there's recourse to courts, and that is stated in a
11 number of cases. Among others, *Holiday Point Marina Partners v.*
12 *Anne Arundel County* at 349 Maryland 190 of 707 A.2d 829, a 1998
13 case from the Court of Appeals. But there are -- it is not an
14 absolute rule. *Poe v. City of Baltimore*, at 241 Maryland 303,
15 216 A.2d at 707, there are various situations in which the rule
16 does not apply. For example, where one case holds that where
17 neither remedy -- the administrative remedy nor judicial remedy
18 is exclusive, then a plaintiff has an option to pursue the
19 judicial remedy without invoking and exhausting the
20 administrative remedy.

21 Again, *the Holiday Point* case is relevant here, but
22 this is a case where it's hardly clear that there even is an
23 administrative remedy or was as of the operative time. And as
24 long as we're at it, of course, the Maryland courts have held
25 that under the Federal Civil Rights Statue there is no

1 exhaustion requirement to that effect, *Esslinger v. Baltimore*
2 *City* at 95 Maryland App. 607, 622 A.2d 774, a 1993 case, Court
3 of Special Appeals.

4 All right. Let's go to this first issue. Well, let's
5 ask whether we really have any genuine dispute on causation
6 here, that is a substantial factor in removing the plaintiff was
7 in fact things that he said or did. Is that disputed here?

8 MS. SCHMIDT: A don't believe so, Your Honor.

9 THE COURT: All right.

10 MS. SCHMIDT: I mean, quite frankly, both Virginia
11 Miller and Dennis Urban said that the decision to discipline him
12 was based upon the fact that he made these statements --

13 THE COURT: All right.

14 MS. SCHMIDT: -- both regarding Executive Duncan's
15 wife, as well as to the media, and that because of the reaction
16 that they received from the county they felt they needed to do
17 something.

18 THE COURT: Well, I don't think you need to argue that
19 further, because I think that with regard to -- I already made
20 my remarks with regard to the statement about, I don't want your
21 job or your wife. I don't think that would be a sufficient
22 basis for anything. At most, it's ambiguous and certainly would
23 not be a reasonable justification under the circumstances, so
24 that we really are back to focusing on the issue of whether the
25 plaintiff was terminated because of things that he said relative

1 to the readiness and preparedness of the -- of the fire and
2 rescue services.

3 The issue of whether it is a matter of public concern,
4 is that disputed?

5 MS. SCHMIDT: Your Honor, again, in our pleadings we
6 have indicated that I think generally given the 9-11 era,
7 everyone assumed that issues regarding the county's preparedness
8 was in fact a matter of public concern, although as I understand
9 it, it is a question of law for the Court. And under the cases
10 I believe that it's your right to certainly review the facts on
11 their own and make your own analysis as to whether or not it was
12 in fact a matter of public concern.

13 THE COURT: All right. Anything you want to say on
14 that point, Mr. Zaid?

15 MR. ZAID: No, sir.

16 THE COURT: Again, before I get into factual
17 recitation in this case, which I think is agreed upon, I'm going
18 to address that specific aspect of the First Amendment
19 retaliation claim. There is a multistep analysis that is used
20 to resolve these First Amendment retaliation claims, *Pickery v.*
21 *Board of Education* is certainly the leading case from the
22 Supreme Court, 391 U.S. 563, a 1963, a 1968; *Connick v. Myers* as
23 well at 461 U.S. 138. The Court first does determine whether
24 the employee's speech can be, quote, fairly characterized as
25 constituting speech on a matter of public concern, and then if

1 so, the Court moves on to other factors.

2 There's no question that the issue of preparedness of
3 the county in the event of a possible terrorist attack would --
4 was a matter of public concern, certainly to the extent that
5 public law enforcement and, in this case, fire rescue people are
6 involved in raising issues that go to that matter are matters of
7 public concern, the Court so holds as a matter of law. So we
8 don't need to revisit that issue again.

9 Really the core issue, then, because I think we've
10 answered issue three, assuming that the balancing of the factors
11 that we'll talk about momentarily tips in favor of the
12 plaintiff, then the Court would move to the third step, which
13 would require the employee to prove that the protected speech
14 was a motivating factor in the detrimental employment decision.
15 And here, that's essentially conceded that he was removed
16 because of the speech, unless you want to say more about that,
17 Ms. Schmidt.

18 MS. SCHMIDT: Your Honor, I think, quite frankly,
19 based upon the deposition testimony of the board members, as
20 well as Miller and Urban, it was -- it was a collective -- the
21 statements that were made and the effect that they had on the
22 department, they felt they needed to do something to respond to
23 the county's concerns.

24 THE COURT: All right. And I'm assuming that it would
25 be the defendants' position that even if it was a motivating

1 factor, while you would argue that you would have shown by --
2 tried to show by a preponderance of the evidence that you would
3 have reached the same decision in the absence of protected
4 activity, that is the remark made about Mr. Duncan's wife, that
5 that's the argument you would make in that regard; is that
6 correct?

7 MS. SCHMIDT: That's correct, Your Honor.

8 THE COURT: All right. Well, again, I think I've
9 addressed that. I don't think that -- that certainly does not
10 demonstrate as a matter of law by a preponderance of evidence
11 that the county --

12 MS. SCHMIDT: Right. And, Your Honor, just -- just so
13 that we're clear, I mean, the issue with respect to -- and we
14 kind of talked about this a little bit before the break, in
15 terms of the e-mail from Chief Urban referencing the proposal,
16 if you will. Certainly, the question is not only the speech,
17 but the fact that he refused to accept any discipline. And so
18 they, you know, interpreted that --

19 THE COURT: Well, if in fact his speech is protected,
20 that's moot, isn't it? No discipline is in order if he's
21 correct.

22 MS. SCHMIDT: If he's correct, although there still is
23 the question, the remark with respect to the county executive.
24 And just, again, making the record, Your Honor.

25 THE COURT: I'm saying to you that that remark is so

1 ambiguous and at most a neutral statement that it's nothing. I
2 mean, the fact that he didn't accept discipline for a remark
3 that could be entirely innocuous is certainly not, as a matter
4 of law -- I'm saying it is not, as a matter of law, compelling
5 to me to somehow result in a grant of summary judgment in your
6 favor on that point.

7 MS. SCHMIDT: Okay.

8 THE COURT: All right. So we don't need to argue it.

9 There is a threshold issue, of course, that we have to
10 talk about when one speaks about a matter of public concern.
11 Yes, the question, however, that is in dispute is whether he's
12 speaking as a citizen and whether he's speaking as a public
13 official. And then we get into the -- even then, the balancing
14 test. So let's start on the issue of whether the Plaintiff in
15 this case, Mr. German, was speaking as a -- as a citizen upon a
16 matter of public concern or whether he was speaking as a matter
17 of his official capacity.

18 MR. ZAID: Thank you, Your Honor.

19 This issue obviously became more paramount because of
20 the *Garcetti* decision by the Supreme Court. We touched upon
21 this a little bit last year. My recollection from my notes is
22 that you actually didn't think that *Garcetti* was going to be an
23 issue, which doesn't necessarily mean you feel the same way
24 today, of course, following more detailed briefing, although I
25 think the basic facts that were even known at that point were

1 sufficient.

2 But the factual testimony certainly from my client was
3 that he was always speaking out as a private citizen. The
4 statements from the factual testimony of the defendants,
5 particularly Chief Urban and Virginia Miller, was that he
6 wasn't -- Mr. German was not speaking for the department. This
7 is all what's in writing and indisputable.

8 Now, the counter to that was from some of the
9 defendants in the sense of the board members and Chief Urban
10 that, well, you can't wear two hats at the same time. I suppose
11 in a -- somewhat of a stretched analogy, we can look at what's
12 going on in modern day with President Carter being over in the
13 Middle East. You know, is he acting on behalf of the United
14 States. He's a former President of the United States, but he's
15 there in his private capacity as a citizen, notwithstanding the
16 fact that his prior role and current, so to speak, brings a
17 little bit of attention.

18 Our position actually would be from a *Garcetti*
19 analysis that, no, this wasn't an internal aspect. In *Garcetti*,
20 as I recall, Mr. Garcetti wrote a memorandum that went up the
21 chain of command where he was complaining about how some of the
22 court proceedings were going and he didn't think they were fair
23 or -- with criminal cases, and that memo --

24 THE COURT: Whether a warrant was adequately based and
25 whether there should have been a prosecution based on it.

1 MR. ZAID: And then when he didn't get the result he
2 wanted, he took it outside. So he didn't get the internal
3 results that he wanted as an attorney pushing this issue.

4 Mr. German was not -- this was an issue that had been
5 in existence for a while, even before Mr. German was associated
6 with the Bethesda Fire Department. The facts in the record are
7 that the county purchased these suits in 1998, '99, and that
8 this was a known issue that they were discussing. Mr. German
9 became a member of the department in 2001. And that's one
10 reason why he was making comments when he told the reporters
11 that he's the former chief of the Bethesda Chevy Chase Rescue
12 Squad, not speaking on behalf of the Bethesda Fire Department.
13 So I do not believe you have a *Garcetti* issue there present at
14 all.

15 THE COURT: Let me ask you this: Does the record
16 reveal the extent to which any of these -- I gather the point is
17 that none of this equipment was available in Bethesda; is that
18 right? Or not a sufficient number of suits available in
19 Bethesda?

20 MR. ZAID: Well, it wasn't -- it wasn't -- it actually
21 wasn't a Bethesda issue, it was a county issue. There were X
22 number of suits, 300, something like that, whatever number.

23 MS. SCHMIDT: 150.

24 MR. ZAID: Hundred and fifty, 150. Yes, 150 suits
25 purchased to do X. Now, clearly that's not enough to, you know,

1 be distributed to the county as a whole, and they were stored at
2 Station 7, which is the logical place because that's the hazmat
3 station. There's allegations in dispute, but it doesn't --

4 THE COURT: Station 7 is Chevy Chase?

5 MR. ZAID: That's the Chevy Chase.

6 THE COURT: All right.

7 MR. ZAID: Actually, the factual disputes surrounding
8 the suits in the sense of were they available, were they not
9 available, could they have been distributed to --

10 THE COURT: Were they supposed to be available to all
11 the firefighters in the county, is that the theory, or do you
12 know?

13 MR. ZAID: I don't think you need to worry about that,
14 because the case law actually says the truth of that issue is
15 irrelevant.

16 THE COURT: Well, I wonder whether it is. The reason
17 I ask is because as I read *Garcetti* it may be whether he's
18 saying something that is within his job description, what he's
19 supposed to be talking about, or whether he's outside. Now, if
20 he's commenting on an issue of policy in general around the
21 county, that's one thing. If he's -- part of his description,
22 part of his job description is to specify when supplies are --
23 when certain materials are in short supply in his department and
24 he's addressing it in that context, or at least if arguably he's
25 doing it that way, that may fit more into the *Garcetti* analysis.

1 MR. ZAID: No -- yes. No, that never came up. In
2 fact, Chief Urban testified, though I was somewhat surprised,
3 that he didn't even know about the suits being over there. So
4 this was not a function of Mr. German's --

5 THE COURT: Well, what is it that German is saying
6 about them?

7 MR. ZAID: What was he saying about the suits?

8 THE COURT: Yeah, what does he say?

9 MR. ZAID: That they weren't being distributed to the
10 county, to the different departments --

11 THE COURT: Throughout the county.

12 MR. ZAID: Throughout all the county to the differ
13 volunteer departments.

14 THE COURT: And did he say that there weren't enough
15 suits?

16 MR. ZAID: I believe that was part of it. I mean --

17 THE COURT: Well, let's go to one of his -- let's go
18 to one of the exhibits and --

19 Jo Anna, come up, please.

20 MS. SCHMIDT: My recollection, Your Honor, is one of
21 the concerns is that there had not been fit testing, annual fit
22 tests for the suits.

23 THE COURT: All right. Let's go to some remarks that
24 he makes in particular, typical remarks.

25 MR. ZAID: Okay. If we look in the facts of the

1 Summary Judgment Motion, I know I quoted them, so, for example,
2 page three and four, in the Washington Post he said, the bottom
3 line is the equipment they have not -- they have -- I think I
4 have an error there -- they have not been put in place to
5 protect firefighters. Gazette, it says --

6 THE COURT: Your motion?

7 MR. ZAID: I'm sorry?

8 THE COURT: Three and four; is that right.

9 MR. ZAID: In the Summary Judgment Motion in the
10 factual section, pages three and four are the quotes.

11 THE COURT: Let's see.

12 MR. ZAID: Starting at the bottom paragraph.

13 THE COURT: Very good.

14 MR. ZAID: Starts, within the Washington Post article.
15 So the quote from the Post is there.

16 And the next page it talks about the Gazette, and that
17 quote was, I think the county is a little bit behind the
18 eightball.

19 And then in the Associated Press article, which was
20 also in the Montgomery Journal, it says, we're not going to
21 expose ourselves without having the equipment to protect
22 ourselves, and that's like going to get the firehose so you can
23 put the fire out.

24 THE COURT: Very good. That's fine, that gives me
25 enough of a predicate.

1 MR. ZAID: I'm sorry?

2 THE COURT: That's fine.

3 MR. ZAID: Okay. And there are declarations in the
4 record, I don't think all of which are being moved to be
5 stricken from the other -- some of the other officers who spoke
6 out who were making it very clear this was a county issue that
7 they were all concerned about. You have the bylaws from the
8 department, you have multiple copies, because the department was
9 never able to produce actually what was in effect specifically
10 at the time. But I think we're all of agreement that there is
11 no job description.

12 THE COURT: All right. Is it undisputed that German
13 never said, I am currently the deputy chief at Bethesda?

14 MR. ZAID: It is undisputed there is no quote that he
15 said that, there is an affiliation reference in one of the
16 articles.

17 THE COURT: All right.

18 MR. ZAID: But he denies telling the reporter to put
19 that in.

20 THE COURT: All right. Very good.

21 MR. ZAID: Presumably the reporter found out or maybe
22 was told the background and --

23 THE COURT: And is it undisputed that he was not in
24 uniform at any time when he --

25 MR. ZAID: That's undisputed.

1 THE COURT: All right.

2 MR. ZAID: Yes.

3 THE COURT: All right. What more?

4 MR. ZAID: There are, as you know, and cited in the
5 brief, I don't think I segregated it, discussions of, you know,
6 there are nuances where the employers can speak in a private
7 capacity, in a public capacity, and even in a public capacity,
8 of course, that's been modified to some extent by *Garcetti*.

9 But getting beyond that, you want me to get into the
10 details on the First Amendment argument, or do you want me to
11 follow up further on this motion?

12 THE COURT: Let's just stay on what capacity he's in
13 at this point. We'll talk about the First Amendment -- the
14 balancing issue momentarily.

15 MR. ZAID: I think the key really for that for you to
16 see is German says he's in his private capacity and Chief Urban
17 and the department is saying, you weren't -- clearly you weren't
18 speaking for us. And again, there are nuances, then, of these
19 post hoc arguments, well, you can't distinguish yourself one or
20 the other. You know, I don't think that's a legal issue that
21 fits into *Garcetti*. And again -- and the county wasn't, as I
22 recall from the county testimony, they -- obviously, they knew
23 he was a member of Bethesda, but they were looking at Lewis
24 German making these comments. I believe Gordon Ayoagi testified
25 at one point, that, oh, you know, jeez, you know, German does

1 this. And in fact, I put in the brief there's testimony by
2 Chief Urban that he knows that Mr. German would go to the press
3 when there were issues that related to fire safety, rescue
4 services. Mr. German had been in the service of the fire rescue
5 service for almost four decades, since the '60s. So this is
6 someone who was, you know, very, very dedicated to volunteerism
7 in the county for fire and rescue services. So any issue, you
8 know, he took a stance on, and when he felt that the county
9 wasn't dealing with some issue, he would push it.

10 And again, of course, what's of interest here, this
11 wasn't an issue that he was making about Bethesda, it was an
12 issue he was raising about the county, which is obviously much
13 larger than Bethesda. I'm not sure, unless you have something
14 specific, I have further on --

15 THE COURT: No, I just want to hear you on this issue.

16 I'd like to hear the defendants in response.

17 MS. SCHMIDT: Your Honor, certainly the plaintiff
18 contends in this case the fact that he's not -- he did not
19 identify himself as being a deputy chief with the Bethesda Fire
20 Department or was not wearing Bethesda Fire Department gear,
21 that that in and of itself proves that he is speaking as a
22 private citizen. However, there is no question that the county,
23 and all we need to do is look at Gordon Ayoagi's memorandum of
24 October 24th, 2001, where clearly the county, the fire rescue,
25 and even Executive Duncan assumed that there was a legitimate

1 question as to whether or not the plaintiff was speaking and
2 acting on behalf of the Bethesda Fire Department. And, of
3 course, in their damage control, the defendants, President
4 Miller and Chief Urban, come out and say in their correspondence
5 to the county and their testimony, no, we did not authorize him
6 to speak on behalf of the department, he is not our
7 spokesperson, you know, we do not adopt the statements that he's
8 made. But there's no question that the county certainly
9 perceived the statements that were being made and Mr. German's
10 actions as being something that was being done on behalf of the
11 Bethesda Fire Department.

12 When we look at the testimony of the board members as
13 they were considering the plaintiff's appeal, they too felt like
14 it was a situation -- and I think specifically Mr. Murgolo
15 testified that he believed there was no way that the plaintiff
16 could separate himself from his position within the fire
17 service, and that in and of itself, given his reputation within
18 the community, that he clearly was speaking in an official
19 capacity.

20 The other issue, quite frankly, is the one that I
21 raised earlier, and that is the question of the plaintiff taking
22 one of the reporters to the Chevy Chase station. We have the
23 affidavit of Chief Stephan who indicated that no, you know, Joe
24 Citizen off the street would not be able to come into the Chevy
25 Chase Fire Department and say, I would like to see the biohazard

1 suits that you have in your basement. Again, if Mr. German was
2 not affiliated with the fire service and was not recognized as
3 being involved in the fire service and a member of the Bethesda
4 Fire Department, there certainly is a legitimate question as to
5 whether or not he would have been able to take a reporter --

6 THE COURT: Well, was he being reprimanded for taking
7 the reporter or for what he said? I don't see anything in the
8 dismissal that said, you took a reporter to the service -- to
9 the --

10 MS. SCHMIDT: There's not --

11 THE COURT: -- to the facility.

12 MS. SCHMIDT: There was nothing in the letter of
13 reprimand with respect to taking the reporter. But the question
14 is in the statements that were made and in the articles that
15 appeared, it was very clear that through Mr. German this
16 reporter got access to the suits.

17 THE COURT: Is that what it says? Does it say in the
18 article, German took us there?

19 MS. SCHMIDT: Oh, it doesn't say in the article that
20 he took them there. Mr. German testified to that. But it does
21 indicate in the Montgomery Journal article of Wednesday,
22 October 10th, voluntary firefighter and former chief of the
23 Bethesda Chevy Chase station, Lewis German, said he's concerned
24 that firefighters do not know where the resources are or how to
25 use them. And then he says, they aren't telling people where

1 the suits are, German said, referring to a stock of 150 bio
2 suits in the Chevy Chase Fire Department.

3 So again, that information would not have come to
4 light but for Mr. German, and he would not have had access to
5 those suits but for his official position within the Bethesda
6 fire service.

7 MR. ZAID: If I may, Your Honor?

8 THE COURT: Go ahead, you may respond.

9 MR. ZAID: That last statement in particular has no
10 factual basis whatsoever in the record, it is only a statement
11 by counsel. There is nothing that indicates Mr. German got
12 access to that station but for the fact he was a member of the
13 Bethesda Fire Department. He was the former chief of the
14 Bethesda Chevy Chase Rescue Squad for whatever number of years
15 and a member there for 30-plus. Everybody knew him. I think in
16 fact he testified that he recognized the guy who was at the
17 station who never said -- the people never said anything from
18 his days in the rescue squad.

19 This was never an issue raised by the county back
20 then. It was never an issue raised by the department back then.
21 All these woe is Chicken Little, the sky is falling, the
22 terrorists know where the suits are only came up as a smart
23 degree of lawyering as part of the defense in this lawsuit.
24 You'll find nothing in the newspapers, you'll have the press
25 conference that Executive Duncan gave the next morning saying

1 nothing about any concern of reporters getting into the
2 departments. People knew about it. They had open houses at
3 this department. You've got declarations from a member who was
4 at that department. I mean, I can give you factual evidence
5 from my time in the department. It's so easy to get into these
6 departments. But I think this is all irrelevant. That's why I
7 didn't even oppose the late filing of Stephan's declaration,
8 because even to the degree it's minimally relevant is not a
9 material fact that has anything to do with the First Amendment
10 discipline that was imposed on this particular case.

11 How this story came to be is not part of the equation
12 except for the narrow sense that you're looking at it from a
13 *Garcetti* standpoint. And, you know, there was a Fourth Circuit
14 case preceded *Garcetti*, but my recollection from looking at it
15 is it's not inconsistent with *Garcetti*, *Urofsky v. Gilmore*, 216
16 F.3d 401, that I cite from 2000 in the Fourth Circuit, it's on
17 page 16 of my summary judgment brief where they're talking about
18 critical to a determination. In fact, I think the Fourth
19 Circuit was actually ahead of the Supreme Court about *Garcetti*
20 from what I can tell, in the sense that *Garcetti* was more in
21 sync with what the Fourth Circuit was thinking than the other
22 way around, which wasn't unusual back at that point.

23 Critical to a determination -- this is in quotes -- of
24 whether employee's speech is entitled to First Amendment
25 protection is whether the speech is made primarily in the

1 employee's role as citizen or primarily in his role as employee,
2 end quote, thus saying, my interpretation, that even to some
3 degree there was involvement from his official capacity, it
4 wasn't a primary one, and there's no factual evidence in the
5 record that the defendants could point to that would justify
6 that, either contemporaneously or even currently other than post
7 hoc lawyering.

8 THE COURT: Anything further on that point?

9 MS. SCHMIDT: The only thing that I would point out,
10 Your Honor, is certainly at the time that Gordon Ayoagi
11 testified -- and I just want the record to be clear, I did not
12 represent Mr. Ayoagi in his deposition, he was represented by
13 the county attorney's office. And in his deposition testimony
14 he did in fact point out that he had concerns that here was
15 someone letting the public know and potential terrorists know
16 where the suits were located. So it's not lawyering, it was a
17 legitimate concern that the county expressed through Gordon
18 Ayoagi. It was a legitimate concern that the board had, and
19 that was simply that there was this impression out there, and
20 certainly Mr. Ayoagi's statements in his memo confirm that, that
21 they believed at the time he made those statements the plaintiff
22 was acting on behalf of Bethesda.

23 MR. ZAID: Can I say one final sentence, Your Honor?
24 The test, even under *Garcetti*, is not the perception of others
25 as to how the person was acting, it was the role of the

1 individual who acted. And I think that makes all the
2 distinction and undercuts, actually, all of what defense counsel
3 has said.

4 THE COURT: All right. Let me address this issue now,
5 and we're still on the issue of whether there is a matter of
6 public concern, because not only is the topic, of course, one of
7 public concern, as the Court cited, but the Court needs to
8 determine whether the employee is speaking as a citizen upon a
9 matter of public concern or whether this is a matter of -- in
10 which the individual is speaking in an official capacity in some
11 ways that a la the *Garcetti* case.

12 *Garcetti* did involve an assistant prosecutor in
13 Los Angeles who disagreed with the facts that were put forth in
14 a search warrant, I believe, and recommended after his
15 investigation that prosecution should not go forward. He put
16 that up the line to his supervisors, was overruled and
17 criticized and then shortly after terminated -- I think was
18 assigned some inferior positions and may have been terminated
19 after.

20 And it's not entirely clear where we come out on
21 *Garcetti*, but there have been cases since, and they do largely
22 seem to suggest that if it's in the ordinary duties of an
23 employee to say or do certain things and they write internal
24 memoranda or they say things in that connection that the bright
25 line test will be that they don't have any First Amendment claim

1 if they are overruled and even terminated in consequence of
2 that. And so the issue is the extent to which that bright line
3 test in *Garcetti* plays over into this case.

4 Let us first focus on the fact that the plaintiff,
5 German, is the deputy chief of the Bethesda Fire Department.
6 There's nothing in the description of his duties that says that
7 he is only required -- may only make criticisms of what's going
8 on generally in the county through his position as the deputy
9 chief of the fire department. There's no written description of
10 his duties before the Court and -- that would indicate that
11 that's so. The only evidence that the Court has from the
12 defendants is in effect that he was the deputy fire chief and
13 was known as such and that on that basis it was hard to -- it
14 would be hard to distinguish his remarks made in an individual
15 capacity from remarks made in an official capacity.

16 The law on this point, I think, needs to be recited a
17 little more precisely. When determining these matters, the
18 Court needs to look at the context -- the content form and
19 context of the statement and then, beyond that, the forum in
20 which the statement is made, and again, of course, whether
21 there's a broader public purpose other than some personal
22 interest involved.

23 In this case you've got the following remarks being
24 made by the plaintiff, German, never in uniform and never
25 identifying himself as a current chief -- or deputy chief of the

1 Bethesda Fire Department. According to the uncontested
2 allegations in the Washington Post, he was identified only as a
3 volunteer firearm with no specific affiliation and he said that,
4 quote, the bottom line is the equipment that they have has not
5 been put in place to protect firefighters.

6 And we're talking about, in a sense, the country's
7 preparedness of biochemical attack, we're talking about a
8 perceived lack of adequate protection in Montgomery County,
9 specifically with respect to and as related further on the
10 protective suits that were maintained to provide protection
11 against biochemical effects and other protective gear that would
12 be used by fire rescue personnel in the event of a biochemical
13 attack. So that is his first remark, quote, the bottom line is
14 equipment the equipment they have has not been put in place to
15 protect firefighters, end quote.

16 And then in the Montgomery Gazette German was
17 identified as, quote, the former chief of the Bethesda Chevy
18 Chase Rescue Squad, end quote. The reporter, apparently on the
19 reporter's own, added that German was a, quote, volunteer
20 firefighter with the Bethesda Fire Department. No indication of
21 his official status or that he was speaking on behalf of the
22 department.

23 The position that German takes is he did not indicate
24 that he was affiliated with Bethesda Fire Department. He did
25 say, quote, I think the county is a little bit behind the

1 eightball, end quote.

2 There were other statements that were attributable to
3 German, either made in the Associated Press and/or the
4 Montgomery Journal. Attributed to him was the following
5 statement, quote, we are not going to expose ourselves without
6 having the equipment to protect ourselves, end quote, and,
7 quote, that's like going to get the firehose so you can put the
8 fire out, end quote.

9 And then another quote that is attributed to the
10 plaintiff in the Montgomery Journal is, quote, they aren't
11 telling people where the suits are, end quote. Quote, nobody
12 has told the people in the field how they are going to be
13 deployed, end quote.

14 And according to the plaintiff, these same sentiments
15 or substantially the same sentiments were also expressed by
16 other fire officials, including Captain Bosco of the Rockville
17 Fire Department, Volunteer Fire Department, Chief Stanton of the
18 Kensington Volunteer Fire Department, Assistant Chief Peter
19 Morris of the Bethesda Chevy Chase Rescue Squad, and Chief
20 Robert McHenry of the Gaithersburg Volunteer Fire Department.

21 Now, those are the statements that are made, and the
22 Court, of course, looks at the context of the cases, the --
23 generally speaking, the forum that the plaintiff chose to
24 address was the press, the media, and there were no internal
25 memoranda that were submitted to the Bethesda Fire Department

1 chief, nor is it indicated that it was any part of the duty of
2 German to submit memoranda to the Bethesda Fire Department on
3 these issues, which clearly were countywide in their scope and
4 not specifically related to the Bethesda Fire Department, so
5 that given the high favor that is given to statements,
6 particularly by law enforcement or fire personnel, with regard
7 to malfeasance or unpreparedness, and given the fact that both
8 Chief Urban and President Miller suggested that plaintiff was
9 not acting in his official capacity, certainly there's no basis
10 to conclude as a matter of law, as the defendants would have it,
11 that the plaintiff was acting in an official capacity.

12 There is a very strong inclination on the part of the
13 Court to say that as a matter of law he was not. I'll defer on
14 that for now, because I'll have something to say toward the end
15 of the case about whether he was or was not. But frankly, the
16 scale -- I don't want to talk in terms of scale right now,
17 because that's really the next prop in the analysis. But in
18 terms of the relative positions of the parties, it's clear to
19 the Court that this was a matter of public concern, and that
20 it's almost -- the Court is close to saying as a matter of law
21 that it was something that was stated by the plaintiff in his
22 private capacity, notwithstanding the fact that he was a
23 firefighter, which many of these people are. The question is as
24 a firefighter does he retain some ambit of free speech, and the
25 answer is he does. And so there's a strong argument to make,

1 not conclusive, at least as far as the Court is prepared to say
2 at this moment, that in fact it was made privately, that it
3 certainly was not made publicly -- was not made officially.

4 Now, the real issue, of course, which we get to in
5 this case is to balance the employee's rights against the
6 employer's interest. And the Court has to consider, again, the
7 manner, time, place, and context of the expression. The
8 balancing test obviously is that the free speech rights are
9 protected unless the employer can show that some restriction is
10 necessary to prevent the disruption of official functions or to
11 assure effective performance of the employee, and among these
12 considerations would be whether the statement impairs the
13 discipline by superiors, harmony among co-workers, whether
14 there's a detrimental impact on the close working relationships
15 for which personal loyalty and confidence are necessary, or
16 whether the speech somehow impedes the performance of the
17 speaker's duties or interferes with the regular operation of the
18 enterprise.

19 Now, it is also clear that the government may not
20 rely, in this case the county or the rescue authorities, could
21 not rely on purely speculative allegations that certain
22 statements have caused or will cause disruption to justify the
23 regulation in the speech. So with that context I will hear you,
24 Mr. Zaid, first, on that issue, the balancing factors.

25 MR. ZAID: Thank you, Your Honor.

1 Again, I think the key case here is the *Goldstein*
2 case. Secondarily the *McVey v. Stacey* case, which also handed
3 up from 1998 of the Fourth Circuit, which, of course, *Goldstein*
4 refers to. I think there are some aspects of the *McVey* case
5 that aren't as articulated as much. In particular, there are
6 nine factors relative to the inquiry that we are discussing here
7 about the public employee's speech. And I'll note in *Hall v.*
8 *Marion*, Fourth Circuit, 1994 case -- all these are in the brief,
9 of course -- when an employee's speech substantially involves
10 matters of public concern, the government must -- in quotes,
11 must make a stronger showing of disruption in order to prevail,
12 end quote.

13 Now, the defendants have produced not one concrete
14 example supporting their allegations of disruption or inability
15 to operate efficiently. This is what the factual record shows
16 beyond a reasonable doubt: No interference with the
17 department's ability to operationally function; no impact on the
18 safety of the community; no dissention within the ranks and
19 files of the Bethesda Fire Department; no complaints from the
20 citizens; no creation of conflict or comradery with other fire
21 departments; and according to the fire -- from the county
22 officials, from Executive Duncan, from Mr. Romer, from
23 Mr. Ayoagi, no real issue existed between them that went beyond
24 a very short term, essentially a month -- not even a month, two,
25 three weeks. And in fact, I think that's reflected by the

1 defendants' own actions where they said, Mr. German, you can
2 come back as deputy chief in six months if you agree to this.
3 So clearly they weren't too concerned that this was going to be
4 a continuing source of friction between the department and the
5 county.

6 Now, it is true, and the defendants have provided
7 selected quotes from various board members that gave vague
8 speculative statements that standing alone would give some
9 support that there were some issues going on. It doesn't
10 matter. The burden here is on the defendant to articulate
11 specific examples, as you referenced.

12 The Fourth Circuit in '97 in *Detrick v. Panalpina*, 108
13 F.3d 529 536, a mere scintilla of evidence in support of the
14 non-movant's position will not defeat a Motion for Summary
15 Judgment.

16 You cited *Goldstein*, or you were reading from I
17 believe *Goldstein*, about yield to specific allegations of the
18 plaintiff and generalized and unsubstantiated. I'll give you a
19 couple other -- two cases in the Eighth Circuit talked about to
20 trigger this test there has to be specificity that there was
21 workplace disharmony and impeding the performance.

22 In 2007, the Eighth Circuit indicated again in *Lindsey*
23 *v. City of Orrick*, 491 F.3d 892-900, mere allegations that
24 speech disrupted the workplace or affected morale without
25 evidentiary support are insufficient.

1 And the defendants themselves in the briefs and
2 certainly in the depositions said that many of the statements
3 ultimately didn't have any impact, that they were just saying,
4 we need to maintain harmony, et cetera, et cetera, but that
5 there was no evidence of this.

6 What they're asking you to do is what the Fourth
7 Circuit rejected in *Goldstein*, to, quote, effectively endorse a
8 red line of silence, end quote, so that anytime a fire
9 department member or official or however capacity that they may
10 be in in some form are not permitted to go out and discuss
11 issues that are going to be to the better of the community if
12 somehow it causes some disruption.

13 Now, some of the cases go into from different circuits
14 even a little bit more. The Third Circuit in *Brennan v. Norton*,
15 350 F.3d 399 at 414 says, the right of expression would mean
16 little if an employee could be silenced whenever his or her
17 voice caused any degree of disruption or discomfort for a public
18 employer. The, again, Third Circuit said, the speech may no
19 doubt -- no doubt may disrupt and demoralize much of the public
20 workplace, but that if there is any disruption, it is only a
21 weight on the balancing scale.

22 It doesn't matter, though. There is no evidentiary
23 weight. There is nothing that is in the record to support any
24 type of factual evidence.

25 Now, some of the declarations that are part of the

1 Motion to Strike go to this point.

2 THE COURT: You don't need to get into those.

3 MR. ZAID: The only thing I'll say I think in closing
4 on this, Your Honor, obviously absent any questions, from a
5 procedural standpoint, in the plaintiff's statement of material
6 facts not in dispute, paragraphs 23 through 26, so the document
7 obviously filed with our Summary Judgment Motion in November,
8 paragraphs 23 to 26 deal specifically with this issue of the
9 extent of disruption.

10 Now, the defendants did not contest those paragraphs
11 in their response to the statement. Now, candidly some of those
12 issues they've certainly challenged in their legal briefs, but
13 as a procedural aspect, they did not challenge those paragraphs
14 that dealt with workplace harmony and disruption and what impact
15 German's statements had on the relationships between the career
16 firefighters -- which is always a terrible word, because the
17 volunteers hate that because they're just as much career -- the
18 paid firefighters and the volunteer firefighters or the
19 department and the county. So as a legal matter I'll leave that
20 to you as to the extent of which that has a role in here. But
21 there's a conflict or contradiction between the defendants'
22 procedural response and some of their substantive arguments.

23 THE COURT: All right. Ms. Schmidt.

24 MS. SCHMIDT: Your Honor, to address that issue first,
25 I would point out in the defendants' -- let me get the formal

1 title, Defendants' Response to Plaintiff's Statement of Material
2 Facts, to which there are no genuine issue, and Defendants'
3 Statement of Material Facts Not in Dispute, specifically at page
4 five, paragraph 20, says, there is a genuine issue of material
5 fact regarding plaintiff statement number 22. Whether the
6 county or county officials would reduce Bethesda Fire
7 Department's funding because of plaintiff's statements to the
8 press was a real concern to the defendants.

9 Thereafter, in paragraph --

10 THE COURT: He says there's a genuine dispute in that
11 regard; is that what you said?

12 MS. SCHMIDT: That's correct, Your Honor. Plaintiff's
13 paragraph 21, the defendants say plaintiff's statements to the
14 present tarnished the reputation of the Bethesda Fire
15 Department.

16 Paragraph 22, plaintiff's statement to the press also
17 interfered with Bethesda Fire Department's abilities to perform
18 its functions and responsibilities because it exacerbated
19 relationships between the Bethesda Fire Department and county
20 leadership.

21 And it goes down the page, Your Honor. So I would
22 submit that, in essence, the defendants did in fact dispute
23 those facts.

24 As the Court knows, under Connick there is not a
25 necessity for an employer to allow events to unfold to the

1 extent that the disruption of the office and the destruction of
2 any working relationship is manifest before taking action.

3 In this case, as we talked about, there is the issue
4 that clearly there is sufficient deposition testimony for the
5 Court to look at. The plaintiff's statements to the press
6 undermine the confidence in the county and fire rescue at a time
7 when the nation was dealing --

8 THE COURT: What do you mean, undermine confidence in
9 the county? What does that mean?

10 MS. SCHMIDT: In that the --

11 THE COURT: Can't you always say that in the context
12 of a case, anything that criticizes the department undermines
13 confidence in it?

14 MS. SCHMIDT: I think, Your Honor, in the balancing
15 test we have to look at the context in which this happened.

16 THE COURT: Let me ask you, do you have one affidavit
17 from one citizen that said, based on what German said I have
18 less confidence in the county?

19 MS. SCHMIDT: No, Your Honor, we do not.

20 THE COURT: All right. That's speculative. Try
21 something else.

22 MS. SCHMIDT: Mr. Ayoagi testified in his deposition
23 that the county officials were forced to hold a meeting of all
24 county volunteer chiefs in response to the statements that were
25 made, and that's at page 60 and 61 of his deposition. He

1 testified that they needed to stop undermining the competence of
2 the fire service. His testimony is that the matter should be --

3 THE COURT: The people who were being criticized
4 obviously were upset. Is that enough?

5 MS. SCHMIDT: I think it went beyond that, Your Honor.
6 I mean, they felt that they -- the county needed to respond to
7 these concerns in that post 9-11 era.

8 THE COURT: Well, maybe the county looked bad by
9 reason of what was said. So when you said undermine confidence
10 in the county, you mean -- meaning maybe it made the officials
11 nervous. I want to hear how it undermined the confidence in the
12 department.

13 MS. SCHMIDT: And I will get to that, Your Honor. In
14 terms of the statements that he made, they certainly reflected
15 negatively on the relationship between the career and volunteer
16 firefighters in Montgomery County. As you alluded to, there is
17 a longstanding history of conflict between career and volunteer.
18 Certainly Mr. Ayoagi and Mr. Duncan testified in their
19 depositions that they believed that that in fact was what they
20 were trying to do, is insert a further wedge between career and
21 volunteer firefighters. He was concerned that that be, you
22 know, dealt with in an expeditious manner.

23 Certainly the statements to the press affected the
24 relationship between Fire Rescue officials and Bethesda.
25 Mr. Ayoagi testified in his deposition that the statements

1 concerned him, he wanted to know if in fact Mr. German was
2 representing Bethesda's position. You have the letter from
3 Mr. Ayoagi of October 24th, 2001, where he clearly had some
4 concerns, and it did in fact affect or change the nature of the
5 relationship between the parties.

6 Mr. Ayoagi testified that he was concerned that if the
7 members of the Bethesda Fire Department did not have confidence
8 in their leadership that it would affect service. Mr. Urban,
9 Chief Urban, testified that up to this point there was a good
10 working relationship between Bethesda and the county, and then
11 there was this concern that in fact he's getting pulled into
12 meetings, he's being asked to provide letters of apology, there
13 are specific questions whether or not --

14 THE COURT: Every time someone criticizes particularly
15 a law enforcement officer, people, his superiors or the people
16 who are responsible for what gave rise to the criticism, and
17 they have to react and get upset about it, is that enough to
18 basically squash the -- to outweigh the First Amendment right,
19 because the people who are criticized are upset?

20 MS. SCHMIDT: I don't -- I think it goes beyond that,
21 quite frankly, the facts in this case, Your Honor. I mean, the
22 question --

23 THE COURT: Well, tell me who beyond the people who
24 were criticized were upset, except the people who fired him.

25 MS. SCHMIDT: Well, there were volunteer chiefs and

1 there were also members. Mr. Murgolo, who was a board member,
2 testified in his deposition that he recalled there were members
3 of the Bethesda Fire Department who were county employees who
4 were making inquiries, like what are you doing at Bethesda, why
5 are you making these statements? So Bethesda was a little bit
6 of a hybrid, unlike other stations in Montgomery County that are
7 volunteer fire departments but they have a volunteer staff as
8 well as a career staff. Bethesda Fire Department had three
9 volunteers, they were all chief officers, and their fire board
10 was also volunteers but not involved in the fire service. The
11 only people who were providing fire services other than the
12 three volunteer chiefs were all county employees. And
13 Mr. Murgolo believed that it did in fact effect the relationship
14 between those county employees who were assigned to Bethesda and
15 the Bethesda Fire Department.

16 The record also includes a number of statements from
17 board members and Virginia Miller indicating that they were
18 concerned that this issue was going to affect their funding.
19 Now, the fact that it did not happen post -- you know, several
20 months down the road. The inquiry really is the fact that they
21 are dealing with an issue. The county is giving them pressure,
22 they need to respond, and it is impairing their ability to
23 proceed with the issues they had ongoing with the department.
24 For example, the Station 20 issue.

25 The plaintiff would have us disregard any of the

1 statements that were made by Mr. Ayoagi or board members that
2 they were concerned about that relationship, but it was a
3 legitimate concern, and out of that legitimate concern they felt
4 they needed to do something. There were discussions with the
5 plaintiff trying to mete out some sort of cooling-off period,
6 some sort of discipline in response to the questions that they
7 were being asked from the county, and they proceed down the
8 line. And then plaintiff says, yes, I will accept something
9 less than termination. Of course, he denies that, but that's
10 the testimony of Chief Urban, and then leads him down that path
11 to the point where, no, I'm not going to accept any discipline,
12 I'm not going to issue a letter of apology, don't feel that I
13 need to do one, and it then becomes an issue of insubordination
14 within the department.

15 If the chief does not have the ability to discipline
16 one of his subordinates, does it raise a question of the chain
17 of command, does it raise questions regarding the efficacy of
18 the leadership at the Bethesda Fire Department? And those are
19 the concerns that the department and its board and Virginia
20 Miller and Dennis Urban had with respect to the issue and -- the
21 ongoing issue with plaintiff.

22 THE COURT: All right. Further response?

23 MR. ZAID: Very briefly, Your Honor. Generalized and
24 unsubstantiated allegations of disruptions and predictions
25 thereof, that's the standard. That's all that's been asserted

1 so far today. We took the depositions of the board members. By
2 the way, the board members who are volunteers who show up as in
3 the record maybe one a month, if that, and have nothing to do
4 with the operational aspects of the department, don't interact
5 with the firefighters, don't have any idea. Maybe Mr. Murgolo
6 had water cooler talk with someone, I have no idea. But I do
7 know when we took these depositions I saw lots of Bethesda
8 firefighters walking in and out of the department. I haven't
9 seen one declaration or one deposition that I participated in
10 giving evidence of any of this disruption.

11 The county officials made it very clear that the
12 funding issue, which is nothing more than a red herring, was
13 never on the table, never articulated, never intimated, didn't
14 even have the authority, it's a county council decision on
15 funding. Now we're really getting conspiratorial as to the
16 impact that Mr. German's comments had.

17 The bottom line, I don't know, and maybe -- I wasn't
18 there when these things happened, I don't know the conversations
19 that took place between Chief Urban and Deputy Chief German. I
20 know what the record reflects. I know that there's no evidence
21 whatsoever other than Chief Urban now saying six years later,
22 well, Mr. German, you promised me you'd accept punishment. The
23 record doesn't reflect that, and that's not a material fact
24 that's going to be able to overcome this mere scintilla of this
25 type of argument for summary judgment.

1 The Supreme Court in *Celotex* and adopted more than
2 ones, but in the Fourth Circuit in *Felty v. Graves-Humphreys*
3 *County*, 818 F.2d 1126, 1997, district courts have an affirmative
4 obligation to prevent factually unsupported defenses from
5 proceeding to trial. And that's all that the defendants have,
6 Your Honor. Thank you.

7 THE COURT: All right. Anything further on that,
8 Ms. Schmidt?

9 MS. SCHMIDT: Your Honor, again, like I -- we would
10 just point to the deposition testimony that's been outlined from
11 the various board members regarding the disruption that they
12 perceived at the time.

13 THE COURT: All right. The core issue in this case is
14 the balancing of the employer's interest and the employee's
15 rights. This is a burden that rests with the employer, and it
16 may not be based on speculative objections.

17 In the *Goldstein* case cited by both parties, this
18 appears at 218 F.3d 337, 2000 case decided by the Fourth
19 Circuit, it also involved complaints of volunteer fire
20 companies, and there was an issue about how they -- that
21 interest in promoting harmony, comradery, et cetera, needed to
22 be weighed against the safety concerns that were being
23 expressed. And the issue is whether there was an extremely
24 strong showing -- and that was the holding of the Fourth
25 Circuit -- with regard to allegation of disruptions,

1 predictions, the same, and so on, as opposed to specific
2 allegations that were made there by those two relating to the
3 safety of the public. And the Court said that -- it
4 particularized the inquiry by not saying that a complainant's
5 interest in voicing safety complaints always outweighs the fire
6 department's interest in maintaining morale and efficiency among
7 its ranks, but concluded that from the evidence in the case, as
8 viewed in the light most favorable to the complainant,
9 generalized and unsubstantiated interest while substantial do
10 not outweigh the public's interest and being aware of the public
11 concerns. And *Pickering* decided to this effect, 391 U.S. at
12 570.

13 In this case the defendants argue that the plaintiff
14 cannot meet this prong of *Goldstein*, that his interest in First
15 Amendment expression does not outweigh the defendants' interest
16 in managing its internal affairs. The decision to terminate him
17 as a volunteer deputy chief with the Bethesda Department was
18 based on these allegedly unauthorized statements -- or
19 unauthorized statements to the press regarding the location,
20 use, and effectiveness of these protective suits that had been
21 acquired by the county and apparently the subsequent
22 inappropriate e-mail comment regarding Duncan's wife, the
23 defendant concedes that comments regarding protective suits is a
24 matter of public concern. They say that the criticism of Duncan
25 and his wife is not a matter of public concern, not subject to

1 judicial review, and particularly in light of 9-11 events, and
2 we're talking about roughly a month thereafter that the combined
3 effect weighs in favor of the defendants under the *Pickering*
4 analysis, among other things, given the extreme sensitivity of
5 the county at that time with regard to safety concerns and
6 particularly in light of terrorist attacks.

7 The further allegation is that German's statements to
8 the press disclosed vital knowledge about the county's ability
9 to respond to potential terrorist attacks. He only knew of the
10 issue of protective suits by reason of his position as deputy
11 chief at the Bethesda Department. He used that information to
12 disclose this vital knowledge to the media, that is Montgomery
13 County's ability to respond to a biochemical attack. He told
14 a -- he has quoted a Washington Post reporter to a location
15 where the suits were housed, and he only was able to do so by
16 reason of his position with the Bethesda Fire Department.

17 He was critical of the county, an agency that the
18 Bethesda Fire Department alleges it had theretofore good working
19 relationships in terms of funding, and so there was an issue
20 also about whether discipline could be maintained by the
21 superiors and harmony among co-workers. And most importantly
22 the county was put at risk for targeting a terrorist attack.
23 Among other things, the statements to the press undermined
24 confidence in the county and the fire and rescue services at a
25 time when the nation was dealing with terrorist attacks, the

1 time, manner, and place of expression, of course, being relevant
2 under *Pickering*. The plaintiff's comments regarding
3 preparedness came only 30 days following 9-11.

4 There had been decisions made by the county officials,
5 that is fire and rescue officials, with regard to how to house,
6 where to house, and how many protective gear it should have, how
7 they should be distributed. Plaintiff's comments questioned
8 this policy, they had a clear impact on the Bethesda department
9 according to defendants and its relation with Montgomery fire
10 officials and community in general. They were made to try and
11 scare the public, according to the defendant, and in fact county
12 officials had to hold a meeting of all county volunteer fire
13 chiefs to talk about the best way to deploy equipment and stop
14 undermining the confidence in the fire service.

15 The fact that they were -- statements were made had a
16 potential to affect public safety, although the defendant
17 concedes it never did.

18 The defendants further contend that the plaintiff's
19 statements to the press affected the relationship between career
20 and volunteer firefighters in Montgomery County, that there was
21 an effort underway before 9-11 to create a fire service that
22 integrated career and volunteer members, and there was a great
23 deal of resistance to that. But plaintiff comments made the
24 situation between career and volunteer firefighters more
25 difficult. That was the statement that the county executive

1 apparently took note of or made. He wanted to make sure the
2 county executive to be said that there was no validity of the
3 concerns and that there were no concerns of public safety, and
4 that this caused disruption in the Bethesda Fire Department's
5 operation and mission. There was a difficult relationship
6 between the Bethesda Fire Department and the fire rescue service
7 as a result allegedly of plaintiff's remarks.

8 There was a close working relationship between the
9 Bethesda department and the county and fire administrator. That
10 relationship was called into question and tarnished by things
11 that plaintiff allegedly said. The County Fire Administrator
12 Ayoagi said in a letter to the president of the Bethesda board,
13 Miller, Virginia Miller, dated October 24, 2001, that a past
14 good relationship had changed and pointed to, quote, an
15 assistant chief being permitted to be the spokesman for the
16 department and undermining public confidence in the county's
17 planning and response for chemical biological events and then
18 acting as a spokesman for the Bethesda Fire Department
19 contradicting the county executive at a press conference and
20 then making attacks on the county executive's wife allegedly,
21 with further reason to undermine the good relationship between
22 Bethesda and the county and the fire administrator.

23 Some board members testified to similar concerns. The
24 further allegation is that plaintiff's statements had the
25 ability to interfere and disrupt the internal affairs of the

1 Bethesda department. He usurped Chief Urban's authority
2 allegedly causing a conflict in the delegation of responsibility
3 in the workplace.

4 And although plaintiff says that there was no policy
5 regarding who could speak for the Bethesda Fire Department,
6 there was also no prohibition, but Chief Urban says, no, there
7 was under the integrated emergency command structure in the
8 county, the chief is the primary spokesman and, therefore, this
9 undermined the chain of command.

10 The further contention is that it's impossible to
11 separate German as an individual from his position within the
12 fire department whenever he speaks on fire department matters.
13 If these comments were allowed to pass unanswered, the
14 assumption would be that he was speaking on behalf of the
15 department and would show that it was in fact officially
16 authorized. On that basis, the defendants argue that the
17 *Pickering* factors weigh in favor of the defendants.

18 Now, the plaintiff's view is that when you apply the
19 *Pickering* factors to the case that they militate in favor of his
20 position. The plaintiff concedes that the Court needs to look
21 at the impaired maintenance of discipline by supervisors, the
22 impaired harmony among co-workers, the extent to which personal
23 relationships may have been affected, the impeded performance of
24 public employees' duties, the interference with the operation of
25 the institution, whether the mission of the institution was

1 undermined, whether it was communicated to the public or to
2 co-workers in private, and whether it conflicted with the
3 responsibilities of the employee within the institution or
4 abused the authority and public accountability that the
5 employee's role entailed.

6 The plaintiff stresses that the defendants have an
7 obligation of a strong showing of disruption in order to
8 prevail, although the Court agrees that *Connick* just shows the
9 reasonable potential, substantial potential, for disruption
10 before it and no need to wait for the actual unfolding as the
11 defense has argued.

12 The specific examples that the defendant has adduced
13 with regard to the effect and potential effect of interfering
14 and disrupting its operations and efficiency are challenged by
15 the plaintiff on the grounds that they are merely speculative.
16 And, for example, President Miller apparently testified that
17 with regarding potential reduction in funding, that was her
18 subjective hope, that it would not be a consideration.

19 Apparently there's no specific reference that there
20 was actual dissention between the Bethesda rank and file. The
21 people who were upset according the plaintiff with what he said
22 were the defendants themselves. And among other things, the
23 plaintiff points to the fact that both Miller and Urban said
24 that he wasn't speaking in an official capacity in any way, that
25 he was on his own, but in any event, that there was a concession

1 in effect as to the seriousness of the disruption, that it was
2 not so serious by reason of the fact that the defendants were
3 prepared to let German resume his position as deputy chief if he
4 would agree to a six-month suspension and write a letter of
5 apology to the county executive about the comment about his wife
6 and would agree -- and the Court needs to look specifically at
7 the language here -- quote, to never again contact the media in
8 any way (individually, anonymously, third party, et cetera)
9 while a member of the BFD, end quote. This is a letter from
10 Urban, the chief, to German dated January 22, 2002.

11 Now, that's the essential argument that's made contra,
12 and the Court would just add in summary that the plaintiff's
13 view is that these are really speculative statements at best
14 that have been made by the defendants, that they have failed to
15 submit material evidence that demonstrates that the press --
16 that statements to the press disclosed vital knowledge about the
17 county's ability to respond to a potential terrorist attack.
18 According to the plaintiff, there were other statements that
19 were made by the county and fire service about the fact that
20 there was these suits, it was well known that they were stored
21 in Station 7 in Chevy Chase, Maryland, who was the primary
22 hazmat response team for the county. Reporters often made
23 broadcasts from outside the county that the defendants have
24 failed to submit any material evidence demonstrating that the
25 statements undermine confidence in the county or elsewhere

1 except for statements that were made by Chief Administrator
2 Ayoagi, that's as a government official saying that because he
3 was criticized that this is a matter that somehow is going to
4 have an effect on safety and public security.

5 The further suggestion is that the defendants have
6 failed to submit any material evidence demonstrating that
7 statements of the press affected the relationship between career
8 and volunteer fire departments. Again, just speculation. Or
9 that they failed to submit any material evidence demonstrating
10 that the statements affected the fire department's relationship
11 with Montgomery County officials, that Bethesda Fire
12 Department's internal affairs were somehow disrupted.

13 Now, just by way of predicate, I haven't really
14 recited an introductory statement of facts because we've been
15 dealing issue by issue, but just for purpose of the Court's
16 decision, let me make a general statement about the background
17 facts.

18 The plaintiff, Lewis German, is a former member and
19 formerly deputy chief of the Bethesda Fire Department. He was
20 discharged from his position on or about February 20th, 2002, as
21 a result of public comments that he made that were critical of
22 certain aspects of the county's preparedness to respond to
23 terrorists attack, particularly equipment that had been bought
24 that he suggested was inadequate. He was -- in the September-
25 October 2001 time period, he provided information to and was

1 interviewed by members of the press concerning the county's fire
2 rescue service's failure to fit test and properly utilize these
3 150 biochemical protective suits and other protective gear that
4 had been purchased several years earlier with federal money for
5 use in the event of biochemical attack.

6 German, along with other fire officials was quoted in
7 articles appearing in October, that is specifically the 9th and
8 10th, 2001, in the Washington Post, the Associated Press, the
9 Montgomery Gazette, and the Montgomery Journal. He also
10 appeared with Chief Stanton of the Kensington Fire Department in
11 a televised interview on CBS Channel 9 on October 9th, 2001, and
12 it was in response to media inquiries that the county executive,
13 Douglas Duncan, on October 9th held a press conference. He
14 stated that German's remarks were inaccurate and were made for
15 personal gain or personal reasons, whatever. German then sent
16 an e-mail to a list serve maintained by the community Fire and
17 Rescue Service of the Chief Officers Association, of which he
18 was a member. He objected to the characterization of his
19 comments and he stated with respect to the county executive,
20 quote, no one wants his job or his wife, end quote.

21 Thereafter, on or about October 13, 2001, county
22 officials convened a meeting of the volunteer chief officers of
23 the Fire and Rescue Service to address those comments and
24 events. Chief of the Bethesda Department, Dennis Urban, and
25 German attended. At least for a portion of the meeting, the

1 primary chiefs were taken alone to meet with Duncan and Fire
2 Administrator, Gordon Ayoagi. And after this meeting Urban
3 spoke with Duncan and Ayoagi and informed them that he would
4 open an investigation into German's conduct.

5 On October 24th, 2001, Ayoagi sent a memorandum to
6 Virginia Miller, who was president of the Bethesda Fire
7 Department Board, regarding some general dispute between the
8 board and the county over the county's presence in Station 20 of
9 the county. There was a paragraph referring to German saying
10 that he had acted, quote, as a spokesman, end quote, for the
11 Bethesda department and that this had undermined, quote, public
12 confidence in the county's planning and response for chemical
13 biological events, and then there was a criticism of German's
14 personal attack on Duncan's wife.

15 There were meetings, then, thereafter. The plaintiff
16 denied wrongdoing, he stated the disciplinary action against him
17 would be inappropriate. And then there was the e-mail regarding
18 German's possible reinstatement sent by Urban indicating what
19 the terms would be, that he would have to submit a letter of
20 apology to Duncan, serve a six-month suspension from the
21 Bethesda Fire Department activities, and agree to, as the Court
22 indicated earlier, quote, never again contact the media in any
23 way (individually, anonymously, third party, et cetera), end
24 quote, while a member of the BFD -- Bethesda Fire Department,
25 end quote. And then the e-mail noted this is not significant,

1 there is, quote, no negotiation or compromise on these
2 conditions, end quote.

3 German would not agree to the punishment. He stated
4 that he believed he had not violated any law, regulation, or
5 statute, and then he was notified by e-mail dated February 20th,
6 2002, that he was terminated from his position as deputy chief
7 effective immediately, end quote.

8 There was, again, some effort to appeal to the board
9 of the Bethesda Fire Department. The Court has addressed the
10 administrative ramifications about that already, and he's now in
11 court seeking he says reinstatement, but other lost wages,
12 benefits, and compensation from the State of Maryland.

13 Now, the Court starts with the analysis that safety
14 issues involving fire department and law enforcement people in
15 general is a very highly protected area. They are not just any
16 employee talking about anything, it's considered to be a highly
17 protected area. So very strong showing is required by the
18 defendants to show that the *Pickering* factors are somehow
19 fulfilled. And the Court, in reviewing this case, can only say
20 that -- again, I hesitate to say as a matter of law, but the
21 most that the Court gleans from the defendants' propositions,
22 and this is independent of the affidavits that are being
23 challenged in the Motion to Strike. The most that can be
24 gleaned is that there is largely speculation on the part of the
25 defendants about any of these factors really having been brought

1 into play. The people who are complaining are the people
2 themselves who are essentially responsible for the situation
3 regarding the -- or at least people to whom responsibility could
4 be attached regarding the quality of the suits, the suitability
5 of the suits, the deployment of the suits, all those issues, the
6 people who are speculating on all these things.

7 And although the defendant is not required to -- the
8 defendants are not required to demonstrate actual disruption,
9 the fact that there is literally no disruption follows sort of
10 suggests that the suggested disruption or potential for it was
11 not reasonable in the first place.

12 One of the most obvious ones, one of the very most
13 obvious ones, is that somehow this statement by the Bethesda
14 Fire Department is going to result in the county denying fire
15 protection funds to the Bethesda Fire Department. That's almost
16 ridiculous in and of itself, that somehow because one chief
17 might say something critical that the residents of Bethesda
18 Chevy Chase are somehow going to be deprived of funding for
19 their fire and rescue purposes. That's speculative, as
20 speculative perhaps as it can get. But there is in fact, as I
21 say, largely, largely speculative statements that are made here.
22 Again, I have real -- no real evidence that anybody in the
23 Bethesda Fire Department apart from the defendants themselves
24 were somehow thrown into disharmony, that the county council
25 itself was somehow disaffected, that the mission of the

1 institution was undermined, that the only close personal
2 relationships were affected were perhaps people with whom German
3 as the speaker had, for example, Urban. But beyond that, there
4 was no turbulence in the ranks, so to speak, that was generated
5 by this.

6 Whereas there may have been continuing animosity or --
7 and typically between career and volunteer firefighters, but
8 that predates all this. The idea that somehow this was
9 causative or even stoked the fire seems to me to be a very
10 improbable suggestion.

11 So this is a case where clearly the defendants have
12 not been able to demonstrate that as a matter of law, and that's
13 what they're asking the Court to decide, that they are entitled
14 to summary judgment. The *Pickering* factors are simply not
15 satisfied as far as the defendants are concerned.

16 Whether they are satisfied from the plaintiff's
17 standpoint, which is the flip side and goes to the issue of
18 plaintiff's Motion for Summary Judgment is another matter.

19 I am strongly inclined, I might say, in favor of the
20 plaintiff's position were I the trier of fact and might well go
21 forward with regard to a grant of the plaintiff's Motion for
22 Summary Judgment, but I do find that there may be, at least
23 debatably with regard to the balancing issue, facts that could
24 be adduced by the defendant that would convince the trier of
25 fact otherwise.

1 Likewise, arguably, although it's not my own personal
2 view at this point, but arguably there was some extent to which
3 it could be said that the plaintiff was acting in his official
4 capacity as opposed to his personal capacity. But again, that
5 only leads to a denial of the plaintiff's Motion for Summary
6 Judgment with the strong caveat to the parties that the Court
7 will look at this at the time of trial very closely and may very
8 well either direct a verdict in favor of the plaintiff and grant
9 summary judgment if this matter comes to trial, because I do
10 think that the defendant clearly has the better part of the case
11 here. I hesitate only because there is some possibility that
12 the defendant could prevail, although that would remain to be
13 seen.

14 And so with that in mind, the Court would deny both
15 Motions for Summary Judgment as to the 1983 claim.

16 As to the wrongful discharge claim, I agree with the
17 plaintiff that if insofar as it may be found that the plaintiff
18 was discharged because -- on the basis of rights that were
19 violated, that would violate a public policy in Maryland and
20 would be separately actionable under Maryland law.

21 Now, we have not addressed -- what that does, of
22 course, is the following, and it makes the whole issue of the
23 terms upon which the plaintiff was offered to come back, it
24 raises that question as well, because if in fact it's determined
25 that his free speech rights were violated, then there was no

1 basis to discipline him at all, that he should not have been
2 subjected to a six-month or offered or demanded or conditioned
3 upon a six-month suspension, or even, as the Court has
4 indicated, an apology to Mr. Duncan's wife, which, again,
5 borders on the slightly fantastic. Those issues would go by the
6 way if in fact the discipline was inappropriate.

7 The Court has no difficulty concluding, however, that
8 the condition that the defendant would have to forego every kind
9 of speech as long as he was a member of the department is
10 facially unconstitutional. There's no question about that in
11 the Court's mind, that it would represent a prior restraint that
12 would be inappropriate, and I think the defendants would have to
13 concede that. And I don't think it's an issue of someone coming
14 in later saying, we'll tell you what we mean when it was said in
15 the letter there's no negotiating on this, there's no talking
16 about this, that was made rather emphatically.

17 So that is where the case stands right now. With
18 regard to the Motion to Strike, the Motion to Strike is denied.
19 But between now and the trial, if somehow the defendants feel
20 they would like to take further depositions of the people who
21 adduced those late affidavits, you'll have leave to do so.

22 What I strongly suggest of the defendants is you give
23 serious thought to settling this case, because this is a case
24 where it, to a virtual certainty, will get to a jury, and it may
25 even end up with a directed verdict in favor of the plaintiff.

1 And so you can go forward and you can depose and you can go
2 forward and you can prepare for trial and you can spend that
3 time and money, but I suggest that you ought to give it a very
4 hard look.

5 Now, having said that, Mr. Zaid, I think you need to
6 sit down and figure out what this case is worth. You need to
7 look hard and clearly on beyond the lost benefits. What do you
8 think you're entitled to under a First Amendment claim? And you
9 need to put that into hard numbers and make a -- what I suggest
10 you do, frankly, at this point, both sides, is within the
11 next -- let's say we'll come to the further discovery issue in a
12 moment.

13 Within the next two weeks, Mr. Zaid, I want you to
14 make a hard demand for settlement, and I don't want you to be
15 fantastic. I want you to look at the law and see what your
16 maximum potential recovery is here.

17 And then within two weeks thereafter, Ms. Schmidt, I
18 want your clients to respond. I'm not requiring you to settle
19 the case, but I want a demand made and I want a response made.
20 And if there's some room for negotiation at that point, then it
21 seems to me you would do well to appear before a magistrate
22 judge of this court at a settlement conference and try and nail
23 this case down; otherwise -- and I think we'll try and keep that
24 within, let's say, a total 60-day period, that is for your
25 demand and offer and response, reply.

1 At the end of 60 days, I would give you an additional
2 30 days to take further depositions in preparation for trial.
3 That is limited to the individuals who filed the late
4 affidavits. I want my decision here clear, I did not rely, do
5 not rely in any way in my decision today on the late-filed
6 affidavits. But insofar as they may be available for trial, you
7 may depose these people and you may find further what they have
8 to say. And I suppose in order to -- you want to be sure that
9 you can't otherwise settle the case before you get to that next
10 round of events.

11 So with that said, I think that covers the various
12 issues. The Motion to Strike is denied. The cross-Motions for
13 Summary Judgment are denied.

14 The one fact that I do, however, find, although it's
15 not I think separately actionable, but I will state that the
16 condition that the plaintiff would have to accept for
17 reinstatement that he could not make any remark at all is
18 facially unconstitutional.

19 Now, goes back to a question I asked earlier, so what
20 if it is, what do I do in this case, what's the effect of it? I
21 leave you to worry about that as you sit down in your settlement
22 discussions. But certainly it is a datum that favors the
23 plaintiff, and strongly, so keep that in mind as you go through
24 your discussions.

25 All right. Anything else?

1 MR. ZAID: No, sir.

2 THE COURT: All right. Thank you, Counsel.

3 MS. SCHMIDT: No, Your Honor.

4 (Recess at 4:55 p.m.)

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CERTIFICATE OF COURT REPORTER

I, Linda C. Marshall, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Linda C. Marshall, RPR
Official Court Reporter

109

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106 [1] 44/2 107 [1] 44/2 108 [1] 79/12 10th [7] 13/9 13/14 14/14 20/6 37/2 68/22 98/8 11 [9] 10/10 20/10 20/23 22/5 55/6 84/7 91/1 92/3 92/21 1126 [1] 89/3 1250 [1] 1/15 1296 [1] 1/21 12th [1] 21/14 13 [1] 98/21 138 [1] 55/23 13th [3] 13/22 21/20 26/15 1400 [1] 1/20 150 [5] 60/23 60/24 60/24 69/1 98/3 16 [1] 70/17 17 [3] 1/8 8/7 12/16 18 [2] 9/24 25/1 190 [1] 53/12 1963 [1] 55/22 1968 [1] 55/22 1983 [8] 18/18 18/19 18/21 18/24 19/2 19/10 39/20 103/15 1993 [1] 54/2 1994 [1] 78/8 1997 [1] 89/3 1998 [6] 40/25 41/8 48/2 53/12 60/7 78/3 1st [1] 41/7	401 [1] 70/16 410-783-1296 [1] 1/21 414 [1] 80/15 461 [1] 55/23 491 [1] 79/23 494 [2] 1/5 2/3 4:55 p.m [1] 107/4	
2	5	
2-39 [1] 49/19 20 [6] 10/8 25/2 26/3 82/4 86/24 99/8 200 [1] 1/16 2000 [2] 70/16 89/18 2001 [16] 4/6 12/17 14/14 24/24 26/12 30/24 49/15 60/9 66/24 85/3 93/13 97/25 98/8 98/11 98/21 99/5 2002 [11] 16/2 16/19 35/16 35/16 42/23 43/13 47/25 49/15 96/10 97/20 100/6 20036 [1] 1/16 2005 [6] 42/17 45/20 48/1 48/2 50/7 52/2 2005-494 [1] 2/3 2007 [2] 12/17 79/22 2008 [1] 1/8 202-454-2809 [1] 1/17 20th [4] 16/2 43/13 97/20 100/5 21 [1] 82/13 21-7 [10] 41/9 41/23 44/10 46/2 49/4 49/17 49/20 50/7 51/3 52/2 21202 [1] 1/21 216 [2] 53/15 70/15 218 [1] 89/18 22 [3] 82/5 82/16 96/10 22nd [1] 14/24 23 [3] 14/24 81/6 81/8 231 [1] 1/20	529 [1] 79/13 536 [1] 79/13 563 [1] 55/22 570 [1] 90/12	
	6	
	7	
	8	
	9	

A	alleging [1] 46/12 allow [1] 82/25 allowed [3] 27/20 46/23 94/13 alluded [1] 84/16 almost [4] 27/10 66/5 76/20 101/15 alone [3] 22/14 79/8 99/1 along [3] 17/1 32/8 98/6 already [6] 13/19 13/19 29/20 36/5 54/19 100/10 also [23] 2/25 4/8 8/18 15/23 17/2 18/2 24/2 28/25 36/1 45/2 45/20 63/20 75/15 77/19 78/2 82/16 86/1 86/10 86/16 89/19 91/20 94/6 98/9 although [15] 6/10 22/7 28/20 29/19 51/21 55/8 57/22 58/24 92/16 94/4 95/8 101/7 103/1 103/12 106/14 always [6] 40/11 41/8 59/3 81/16 83/11 90/5 am [6] 2/11 13/15 19/2 25/4 64/13 102/19 ambiguous [4] 24/10 36/6 54/22 58/1 ambit [1] 76/24 amended [2] 29/15 50/6 amendment [30] 18/12 18/20 18/21 19/7 29/23 30/1 34/3 34/4 36/3 36/11 36/14 36/16 37/10 38/11 38/24 45/20 46/10 46/13 48/19 52/16 55/18 55/20 65/10 65/13 70/9 70/24 72/25 85/18 90/15 105/8 among [11] 16/23 32/4 53/11 77/11 77/13 90/6 91/4 91/21 91/23 94/22 95/22 amount [4] 17/15 17/21 17/22 18/15 analogy [1] 59/11 analysis [12] 34/13 34/16 34/19 34/20 47/10 55/11 55/19 59/19 61/25 76/17 91/4 100/13 analyze [1] 36/1 analyzed [1] 29/24 and/or [1] 75/3 Angeles [1] 72/13 animosity [1] 102/6 ANNA [3] 1/19 2/13 62/19 Anne [1] 53/12 annual [1] 62/21 anonymously [3] 15/16 96/8 99/23 another [3] 11/10 75/9 102/18 answer [2] 47/1 76/25 answered [1] 56/10 any [68] 3/11 3/16 4/12 4/18 7/21 9/22 10/23 13/4 14/19 15/16 15/25 19/17 23/21 24/13 24/14 28/14 29/12 30/21 31/1 31/7 31/13 32/10 34/12 34/12 37/14 37/22 41/25 42/6 43/13 45/17 46/5 47/22 49/9 49/22 49/24 50/10 50/11 53/6 54/5 57/17 60/16 64/24 66/7 70/1 72/25 76/1 80/3 80/17 80/20 80/23 81/4 83/2 86/25 87/11 88/5 88/10 95/24 95/25 96/8 96/24 97/6 97/9 99/22 100/4 100/15 100/25 106/5 106/17 anybody [2] 24/11 101/22 anymore [1] 51/4 anything [28] 9/1 12/14 12/14 12/24 14/16 15/20 16/13 16/22 27/2 29/12 31/7 36/13 42/3 42/4 42/4 46/17 46/22 48/3 54/22 55/13 68/7 69/17 70/9 71/8 83/12 89/7 100/16 106/25 anytime [1] 80/8 anyway [1] 9/20 anywhere [2] 45/18 45/25 AP [1] 4/10 apart [2] 22/6 101/23 apologies [2] 40/2 47/12 apology [12] 8/1 8/5 9/16 22/10 26/19	26/24 32/11 85/12 87/12 96/5 99/20 104/4 App [1] 54/2 apparently [9] 4/25 15/2 19/23 49/13 74/18 90/21 93/1 95/16 95/19 appeal [17] 16/7 16/12 17/4 40/13 42/7 43/13 44/4 46/16 47/7 47/18 49/9 50/3 50/4 52/4 52/19 67/13 100/8 appeals [5] 41/9 45/1 49/21 53/13 54/3 appear [1] 105/21 APPEARANCES [1] 1/13 appeared [10] 13/9 15/7 16/11 16/11 16/19 19/22 27/22 37/6 68/15 98/10 appearing [1] 98/7 appears [2] 25/7 89/18 applicable [8] 42/9 42/10 42/12 47/12 49/8 49/12 49/16 50/5 application [1] 52/9 applied [4] 42/22 46/23 47/13 52/8 applies [1] 18/17 apply [2] 53/16 94/18 appointed [1] 45/11 apprized [1] 13/24 appropriate [6] 30/20 31/1 31/2 45/22 45/23 48/11 appropriately [2] 8/17 20/2 April [1] 1/8 are [116] area [3] 26/22 100/15 100/17 aren't [3] 68/25 75/10 78/5 arguably [5] 30/3 49/10 61/24 103/1 103/2 argue [5] 54/18 57/1 58/8 90/13 94/16 argued [4] 37/20 48/25 48/25 95/11 argument [20] 3/7 3/8 3/8 17/6 29/18 32/19 34/25 38/4 46/7 46/11 47/21 49/2 49/7 52/18 52/21 57/5 65/10 76/25 88/25 96/11 arguments [5] 5/8 15/13 34/8 65/19 81/22 arise [1] 35/13 around [2] 61/20 70/22 article [7] 4/24 19/22 63/14 63/19 68/18 68/19 68/21 articles [3] 64/16 68/14 98/7 articulate [1] 79/10 articulated [2] 78/5 88/13 Arundel [1] 53/12 as [208] aside [5] 2/24 10/17 22/13 22/14 24/16 ask [5] 33/1 54/5 60/15 61/17 83/16 asked [6] 18/9 30/25 46/22 85/12 87/7 106/19 asking [8] 23/4 27/5 31/17 34/10 35/6 40/23 80/6 102/13 aspect [4] 36/23 55/18 59/19 81/13 aspects [3] 78/4 88/4 97/22 asserted [1] 87/25 assigned [2] 72/18 86/14 assistant [7] 9/8 25/18 25/21 26/2 72/12 75/18 93/15 assistants [1] 21/24 associated [5] 4/9 60/5 63/19 75/3 98/8 Association [1] 98/17 assume [3] 19/2 32/19 38/25 assumed [2] 55/7 66/25 assuming [2] 56/10 56/24 assumption [1] 94/14 assure [1] 77/11 assured [1] 26/20 at [144] attach [1] 30/4 attached [2] 43/19 101/4
----------	--	---

<div>A</div> <div>attack [14] 4/4 7/2 20/19 20/23 26/8 56/3 74/7 74/13 91/13 91/22 96/17 97/23 98/5 99/14</div> <div>attacks [5] 26/1 91/6 91/9 91/25 93/20</div> <div>attempted [1] 36/17</div> <div>attended [1] 98/25</div> <div>attention [2] 13/25 59/17</div> <div>attorney [2] 47/17 60/3</div> <div>attorney's [1] 71/13</div> <div>attributable [1] 75/2</div> <div>attributed [2] 75/4 75/9</div> <div>authorities [1] 77/20</div> <div>authority [9] 16/24 16/25 29/6 44/15 49/20 53/6 88/14 94/1 95/4</div> <div>authorize [2] 28/24 67/5</div> <div>authorized [2] 7/14 94/16</div> <div>available [8] 48/24 49/1 60/17 60/18 61/8 61/9 61/10 106/6</div> <div>avenue [5] 1/15 11/15 11/22 40/12 42/24</div> <div>awards [1] 18/15</div> <div>aware [2] 10/21 90/10</div> <div>away [2] 4/22 12/20</div> <div>Ayoagi [33] 10/6 10/14 12/22 13/23 21/21 24/25 25/2 25/9 26/7 42/1 43/20 44/5 44/11 45/15 45/22 46/25 47/16 65/24 71/10 71/12 71/18 78/23 83/22 84/18 84/25 85/3 85/6 87/1 93/12 97/2 99/2 99/3 99/5</div> <div>Ayoagi's [4] 43/16 46/20 66/23 71/20</div>	<div>before [19] 1/11 2/2 2/4 15/8 28/23 32/25 36/9 48/22 49/17 53/10 55/16 57/14 60/5 73/10 83/2 92/21 95/10 105/21 106/9</div> <div>began [1] 49/5</div> <div>begin [2] 3/11 48/16</div> <div>begins [1] 50/14</div> <div>behalf [15] 2/14 7/14 7/17 26/20 28/20 28/21 29/4 59/13 60/12 67/2 67/6 67/10 71/22 74/21 94/14</div> <div>behind [2] 63/17 74/25</div> <div>being [33] 4/16 6/11 7/4 11/15 15/15 16/14 20/7 20/24 21/17 22/15 25/18 32/24 35/17 41/19 59/12 62/3 62/9 64/4 66/19 67/9 67/10 67/10 68/3 68/6 73/23 84/3 85/12 87/7 89/22 90/10 92/1 93/15 100/22</div> <div>believe [22] 4/24 7/19 8/7 15/13 17/13 19/3 23/7 26/12 33/7 33/14 35/11 43/19 45/10 51/14 51/18 54/8 55/10 60/13 62/16 65/24 72/14 79/17</div> <div>believed [12] 11/9 20/7 20/16 26/23 27/8 31/10 32/7 67/15 71/21 84/19 86/13 100/4</div> <div>believes [1] 25/9</div> <div>benefits [7] 17/10 17/15 17/15 17/21 17/22 100/12 105/7</div> <div>best [5] 24/10 24/10 36/6 92/13 96/13</div> <div>BETHESDA [100] 1/7 2/3 2/14 4/5 4/16 5/1 7/10 8/17 10/8 11/18 16/6 17/4 18/11 22/19 23/10 23/24 25/4 25/5 25/15 25/19 25/25 26/5 26/17 26/20 27/18 29/5 34/5 42/5 48/18 60/6 60/11 60/12 60/17 60/19 60/21 64/13 65/23 66/11 66/13 66/19 66/20 67/2 67/11 68/3 68/23 69/5 69/13 69/14 71/22 73/5 74/1 74/17 74/20 74/24 75/19 75/25 76/2 76/4 78/19 82/6 82/14 82/17 82/19 84/24 85/7 85/10 86/3 86/4 86/5 86/8 86/14 86/15 87/18 88/7 90/17 91/11 91/16 91/18 92/8 93/4 93/6 93/9 93/12 93/18 93/22 94/1 94/5 95/20 97/11 97/19 98/24 99/6 99/11 99/21 99/24 100/9 101/13 101/15 101/17 101/23</div> <div>Bethesda's [2] 34/3 85/2</div> <div>better [3] 5/9 80/11 103/10</div> <div>between [36] 6/6 10/10 10/16 11/10 14/13 16/17 21/20 30/12 30/13 30/19 32/4 32/22 36/22 78/23 79/4 81/15 81/21 82/19 84/15 84/17 84/20 84/24 85/5 85/10 86/14 88/19 92/19 92/24 93/6 93/8 93/21 95/20 97/7 99/7 102/7 104/19</div> <div>beyond [13] 8/4 12/7 40/13 42/24 65/9 73/19 78/16 78/23 84/5 85/20 85/23 102/3 105/7</div> <div>BFD [4] 15/17 25/22 96/9 99/24</div> <div>bill [6] 41/1 41/3 42/17 49/17 50/6 51/2</div> <div>bio [1] 69/1</div> <div>biochemical [7] 28/2 74/7 74/11 74/12 91/13 98/3 98/5</div> <div>biohazard [2] 20/8 67/25</div> <div>biological [4] 4/3 25/21 93/17 99/13</div> <div>bit [9] 7/5 38/17 57/14 58/21 59/17 63/17 74/25 80/14 86/5</div> <div>blocks [1] 48/10</div> <div>board [36] 11/25 14/7 14/12 16/7 16/13 16/15 16/17 16/21 16/23 16/25 28/23 35/20 44/16 44/25 45/21 49/10 52/13 55/21 56/19 59/9 67/12 71/18 79/7 86/1 86/9 86/17 87/1 87/19 88/1 88/2 89/11 93/12 93/23 99/7 99/8 100/8</div> <div>board's [1] 28/19</div> <div>boiling [1] 34/1</div> <div>bold [1] 50/24</div> <div>borders [1] 104/5</div>	<div>Bosco [1] 75/16</div> <div>both [16] 3/3 3/10 4/1 5/22 6/5 23/24 29/7 31/21 33/7 54/10 54/14 76/7 89/17 95/23 103/14 105/10</div> <div>bottom [6] 6/24 63/2 63/12 74/4 74/13 88/17</div> <div>bought [1] 97/23</div> <div>bound [1] 34/25</div> <div>brackets [4] 41/18 50/14 50/24 51/10</div> <div>BRADLEY [4] 1/14 2/8 11/22 11/23</div> <div>break [2] 53/2 57/14</div> <div>Brennan [1] 80/14</div> <div>brief [9] 17/25 36/23 43/19 46/21 51/19 65/5 66/1 70/17 78/8</div> <div>briefing [1] 58/24</div> <div>briefly [1] 87/23</div> <div>briefs [3] 51/6 80/1 81/12</div> <div>bright [2] 72/24 73/2</div> <div>bring [1] 42/7</div> <div>brings [2] 7/6 59/16</div> <div>broadcasts [1] 96/23</div> <div>broader [1] 73/21</div> <div>brought [3] 28/8 39/16 100/25</div> <div>Bruce [4] 8/2 21/21 26/11 26/18</div> <div>Building [1] 21/14</div> <div>burden [2] 79/10 89/15</div> <div>but [100] 6/11 9/1 9/5 9/19 10/20 12/17 13/19 16/25 17/10 17/25 18/15 18/19 23/21 24/2 24/9 24/13 25/2 26/4 26/14 26/23 27/2 27/18 29/13 29/17 30/23 31/2 31/14 31/16 31/24 33/24 34/25 35/4 36/6 36/11 36/17 36/25 37/3 38/4 40/3 42/1 42/23 43/20 46/21 47/2 48/9 48/15 48/21 51/15 53/7 53/13 53/21 57/17 59/2 59/14 61/3 64/10 64/18 65/9 65/23 67/8 68/13 68/20 69/4 69/5 69/12 70/6 70/14 72/7 72/21 76/15 76/17 80/4 80/20 81/12 81/20 86/7 86/10 87/2 87/9 88/6 89/2 90/7 92/23 94/6 95/25 97/15 100/11 100/20 101/20 102/3 102/7 102/22 103/2 103/4 104/19 105/3 105/19 106/6 106/15 106/22</div> <div>buy [2] 31/24 31/25</div> <div>bylaw [1] 42/14</div> <div>bylaws [2] 16/13 64/7</div>
<div>B</div> <div>back [25] 3/18 6/16 7/9 14/22 15/19 19/8 25/11 29/11 29/17 31/4 31/4 38/20 39/14 40/11 40/15 40/21 49/6 50/19 54/24 69/19 69/20 70/22 79/2 103/23 106/19</div> <div>background [3] 32/24 64/22 97/16</div> <div>bad [1] 84/8</div> <div>balance [1] 77/5</div> <div>balancing [10] 35/12 56/10 58/13 65/14 77/8 77/24 80/21 83/14 89/14 102/23</div> <div>Baltimore [4] 1/20 1/21 53/14 54/1</div> <div>based [13] 22/21 24/1 24/21 26/9 27/8 28/25 54/12 56/19 59/24 59/25 83/17 89/16 90/18</div> <div>basement [1] 68/1</div> <div>basic [2] 38/2 58/25</div> <div>basically [2] 15/3 85/18</div> <div>basis [10] 23/22 24/13 36/4 54/22 69/10 73/13 76/9 94/16 103/18 104/1</div> <div>be [111]</div> <div>bear [1] 50/5</div> <div>became [3] 7/7 58/19 60/9</div> <div>because [58] 2/21 2/24 7/7 8/20 13/20 14/2 16/4 18/13 27/14 29/8 30/3 32/12 33/3 34/17 34/21 35/3 35/12 35/17 37/8 38/15 38/21 38/23 39/1 42/20 47/22 47/23 48/5 48/9 48/14 50/20 53/6 54/15 54/19 54/25 56/9 56/16 58/19 61/2 61/14 61/17 64/8 70/8 72/6 76/14 76/17 81/16 81/17 82/7 82/18 85/19 97/2 97/14 101/16 103/9 103/11 103/18 103/24 104/23</div> <div>becomes [2] 48/11 87/13</div> <div>been [48] 4/24 6/16 8/17 9/18 10/10 10/22 13/18 13/24 19/25 20/1 20/2 27/10 29/18 29/19 30/18 30/19 32/8 39/23 40/4 40/10 41/9 47/1 47/21 59/25 60/4 61/9 62/21 63/4 65/8 66/4 68/5 72/18 72/21 74/5 74/14 87/25 89/10 90/20 92/4 94/23 96/14 97/14 97/23 98/4 100/25 102/6 102/12 104/1</div>	<div>C</div> <div>call [2] 9/9 45/19</div> <div>called [2] 46/24 93/10</div> <div>calls [1] 13/20</div> <div>came [9] 5/14 26/14 38/18 40/18 40/21 62/1 69/22 70/11 92/3</div> <div>can [50] 3/5 3/11 3/13 3/22 5/25 7/5 10/1 11/4 11/5 15/15 18/13 19/18 24/8 24/13 29/11 30/7 30/11 31/13 31/14 34/11 34/11 34/18 34/24 35/15 35/18 36/1 38/4 38/22 42/7 47/18 48/1 48/11 55/24 59/11 63/22 65/6 70/4 70/20 71/23 75/7 77/9 79/1 100/19 100/23 101/20 105/1 105/1 105/1 105/2 105/2</div> <div>can't [9] 12/19 14/16 34/15 35/3 47/22 59/10 65/19 83/11 106/9</div> <div>candidly [1] 81/11</div> <div>cannot [3] 31/7 35/2 90/14</div> <div>capacity [23] 31/8 34/12 37/23 37/25 58/17 59/15 65/7 65/7 65/7 65/12 65/16 67/19 71/3 72/10 73/15 73/15 76/9 76/11 76/22 80/9 95/24 103/4 103/4</div> <div>Capital [1] 20/20</div> <div>captain [3] 33/13 33/14 75/16</div> <div>care [1] 3/17</div> <div>career [17] 11/1 11/11 20/8 20/11 20/22 25/11 81/15 81/17 84/15 84/17 84/20</div>	

C		
career... [6] 86/8 92/19 92/22 92/24 97/7 102/7	57/15 59/5 59/9 60/11 62/2 64/13 65/16 66/2 66/19 67/4 67/23 68/22 69/13 73/5 73/9 73/12 73/25 73/25 74/17 75/17 75/18 75/19 76/1 76/8 79/2 85/9 86/9 87/10 87/15 88/19 88/19 88/21 90/17 91/11 93/15 94/1 94/6 94/8 96/3 96/10 97/1 97/19 98/10 98/17 98/22 98/24 100/6 101/16	commission [20] 40/15 41/9 41/24 42/11 42/15 42/20 43/21 44/5 44/6 44/18 44/19 45/16 46/16 47/7 47/19 49/9 49/21 50/2 50/3 52/4
career/volunteer [1] 25/11	chiefs [14] 5/5 5/19 5/23 6/18 11/24 11/24 21/24 21/25 22/13 83/24 85/25 86/12 92/13 99/1	communicated [1] 95/1
carrying [4] 42/10 46/6 47/19 50/1	chose [1] 75/23	community [9] 20/18 22/4 27/9 29/1 67/18 78/18 80/11 92/10 98/16
Carter [1] 59/12	Circuit [16] 33/25 70/13 70/16 70/19 70/21 78/3 78/8 79/12 79/19 79/22 80/7 80/14 80/18 89/2 89/19 89/25	companies [1] 89/20
case [71] 2/21 2/22 3/25 5/17 6/8 14/25 15/11 24/15 29/24 32/24 32/25 33/6 33/7 33/12 34/1 34/8 34/19 37/5 38/5 38/10 42/25 48/5 48/8 48/14 48/16 48/17 52/9 53/13 53/16 53/21 53/22 54/2 55/17 55/21 56/5 58/15 61/14 66/18 70/10 70/14 72/11 73/3 73/23 76/15 77/5 77/20 78/1 78/2 78/2 78/4 78/8 83/3 83/12 85/21 89/13 89/17 89/18 90/7 90/13 94/19 100/19 102/11 103/10 104/17 104/23 104/23 105/6 105/19 105/23 106/9 106/20	circuits [1] 80/13	compelling [1] 58/4
cases [7] 53/11 55/9 59/23 72/21 75/22 79/19 80/13	circumstances [1] 54/23	compensation [1] 100/12
categorically [1] 35/4	citation [1] 49/12	competence [2] 45/21 84/1
causation [1] 54/5	citations [1] 40/16	complainant [1] 90/8
causative [1] 102/9	cite [2] 53/6 70/16	complainant's [1] 90/4
cause [5] 18/25 36/19 36/20 48/23 77/22	cited [5] 51/6 65/4 72/7 79/16 89/17	complaining [2] 59/21 101/1
caused [5] 8/18 10/15 77/22 80/17 93/4	citing [1] 49/5	Complaint [2] 29/15 29/16
causes [1] 80/12	citizen [11] 27/14 31/12 58/12 58/15 59/3 59/15 66/22 67/24 71/1 72/8 83/17	complaints [3] 78/19 89/19 90/5
causing [1] 94/2	citizens [1] 78/20	completely [4] 4/17 14/9 24/14 31/22
caveat [1] 103/6	City [3] 53/14 54/2 79/23	component [1] 11/19
CBS [1] 98/11	civil [4] 1/4 2/3 18/24 53/25	comprehended [1] 2/25
Celotex [1] 89/1	claim [16] 18/18 19/2 19/6 19/10 36/12 36/14 36/16 39/20 48/20 48/23 49/11 55/19 72/25 103/15 103/16 105/8	compromise [3] 15/2 15/18 100/1
central [1] 48/20	claims [3] 29/25 39/9 55/20	COMPUTER [1] 1/25
certain [8] 17/10 17/15 37/17 49/18 61/23 72/23 77/21 97/22	clarified [1] 52/15	COMPUTER-AIDED [1] 1/25
certainly [27] 11/8 20/19 37/18 46/7 46/11 52/11 54/22 55/10 55/21 56/4 57/9 57/16 58/3 59/2 66/17 67/8 68/4 71/10 71/20 76/9 77/3 80/2 81/12 84/14 84/18 84/23 106/22	clause [2] 22/23 23/20	comradery [2] 78/20 89/21
certainty [1] 104/24	clear [17] 12/25 26/13 27/23 35/19 36/24 47/14 53/22 57/13 64/6 68/15 71/11 72/20 76/18 77/19 88/11 92/8 106/4	concede [1] 104/13
CERTIFICATE [1] 108/1	clearly [18] 23/9 25/2 26/4 26/8 32/3 32/21 39/3 60/25 65/17 66/24 67/18 76/3 79/3 83/4 85/3 102/11 103/10 105/7	conceded [1] 56/15
certify [1] 108/2	client [1] 59/2	concedes [3] 90/23 92/17 94/20
cetera [7] 15/17 20/3 80/4 80/4 89/21 96/8 99/23	clients [1] 105/18	concepts [1] 29/20
chain [3] 59/21 87/16 94/9	close [6] 12/19 24/9 76/20 77/14 93/8 102/1	concern [25] 28/1 37/22 37/24 55/3 55/8 55/12 55/25 56/4 56/7 58/10 58/16 70/1 71/17 71/18 72/6 72/7 72/9 76/19 78/10 82/8 85/11 87/3 87/3 90/24 90/25
chairman [1] 44/6	closed [5] 6/6 8/1 12/9 14/5 16/20	concerned [17] 5/6 12/9 14/2 20/9 20/24 22/3 25/4 39/4 64/7 68/23 79/3 84/21 85/1 85/6 86/18 87/2 102/15
challenge [3] 42/20 47/24 81/13	closed-door [1] 6/6	concerning [4] 42/8 46/5 49/24 98/1
challenged [3] 81/12 95/14 100/23	closely [1] 103/7	concerns [17] 4/2 22/1 24/1 24/23 37/25 56/23 62/21 71/14 84/7 85/4 87/19 89/22 90/11 91/5 93/3 93/3 93/23
change [2] 47/25 85/4	closing [1] 81/3	concession [1] 95/25
changed [1] 93/14	co [4] 77/13 91/21 94/22 95/2	conclude [1] 76/10
changes [1] 48/2	co-workers [4] 77/13 91/21 94/22 95/2	concluded [1] 90/7
Channel [2] 4/7 98/11	code [6] 49/4 49/5 49/12 49/16 49/18 52/2	concluding [1] 104/7
Channel 9 [1] 4/7	coincidentally [1] 42/18	conclusion [1] 46/24
Chapter [2] 49/18 49/20	collective [1] 56/20	conclusive [1] 77/1
characterization [1] 98/18	colorful [2] 24/10 36/7	concrete [1] 78/13
characterized [1] 55/24	combination [1] 37/16	condition [5] 32/20 32/22 36/12 104/8 106/16
charge [1] 12/1	combined [1] 91/2	conditioned [1] 104/2
Chase [16] 4/17 11/14 27/20 29/5 60/11 61/4 61/5 67/22 67/25 68/23 69/2 69/14 74/18 75/19 96/21 101/18	come [15] 2/20 15/20 16/15 18/5 18/11 29/11 48/1 62/19 67/4 67/24 69/3 72/20 79/2 103/23 105/11	conditions [3] 15/18 32/4 100/2
chemical [4] 4/3 25/21 93/17 99/12	comes [5] 13/1 24/9 24/24 31/5 103/9	conduct [1] 99/4
chemical/biological [1] 25/21	comfortable [1] 35/2	conference [16] 5/13 5/15 13/13 13/17 13/21 20/5 20/5 20/6 20/25 21/2 21/2 25/23 69/25 93/19 98/13 105/22
Chevy [16] 4/17 11/14 27/20 29/5 60/11 61/4 61/5 67/22 67/24 68/23 69/2 69/14 74/17 75/19 96/21 101/18	coming [5] 13/19 15/4 29/17 37/12 104/13	confidence [15] 25/20 25/24 77/15 83/6 83/8 83/13 83/18 84/9 84/11 85/7 91/24 92/14 93/16 96/25 99/12
Chicken [1] 69/21	comma [1] 50/12	confirm [1] 71/20
chief [96] 4/5 6/8 7/19 7/20 8/12 8/16 9/4 11/24 14/3 14/6 14/11 14/25 15/1 15/3 16/2 16/3 16/5 16/10 16/15 16/24 16/24 16/25 21/24 22/12 22/16 23/25 24/22 25/18 25/21 25/25 26/2 26/18 27/7 27/17 27/17 27/18 29/3 30/18 30/20 30/23 31/6 31/16 31/20 32/6 32/12 35/16 50/12 52/6	command [6] 21/14 29/2 59/21 87/17 94/7 94/9	confirmed [1] 45/11
	comment [12] 6/23 7/1 7/4 8/23 9/16 22/9 23/8 23/9 26/6 26/22 90/22 96/5	conflagration [1] 11/10
	commenting [1] 61/20	conflated [1] 29/9
	comments [21] 5/3 5/4 5/7 6/13 6/14 6/15 6/19 23/18 26/5 26/21 60/10 65/24 88/16 90/23 92/2 92/7 92/23 94/13 97/21 98/19 98/23	conflict [4] 78/20 81/21 84/17 94/2
		conflicted [1] 95/2
		confronted [1] 34/18
		conjunctively [1] 6/22
		Connecticut [2] 1/15 11/14
		connection [2] 38/3 72/24
		Connick [3] 55/22 82/24 95/8
		consequence [1] 73/1
		consider [1] 77/6
		consideration [1] 95/18
		considerations [1] 77/12
		considered [3] 18/12 47/6 100/16
		considering [1] 67/13

C	<p>countywide [1] 76/3 couple [1] 79/19 course [18] 15/11 16/15 52/23 53/24 58/9 58/24 65/8 66/10 67/3 72/6 73/20 75/22 77/4 78/3 78/9 87/9 92/1 103/22 court [52] 1/1 1/24 2/2 2/5 48/22 49/17 52/20 53/1 53/13 54/2 55/9 55/22 55/23 56/1 56/7 56/12 58/20 59/22 70/19 72/7 72/7 73/10 73/11 73/18 75/22 76/13 76/19 76/20 77/1 77/6 82/24 83/5 89/1 90/3 94/20 95/8 96/6 96/12 99/21 100/9 100/11 100/13 100/19 100/21 102/13 103/6 103/14 104/3 104/7 105/22 108/1 108/9 Court's [2] 97/15 104/11 courts [3] 53/10 53/24 89/3 cover [1] 48/9 covers [1] 106/11 create [2] 18/25 92/21 creating [1] 37/7 creation [1] 78/20 credit [2] 17/13 17/24 criminal [1] 59/23 critical [5] 70/18 70/23 91/17 97/21 101/17 criticism [3] 85/16 90/24 99/13 criticisms [1] 73/7 criticized [5] 72/17 84/3 85/19 85/24 97/3 criticizes [2] 83/12 85/14 cross [2] 2/18 106/12 cross-Motions [1] 106/12 crux [1] 14/25 current [3] 51/14 59/16 73/25 currently [2] 64/13 71/6 cut [1] 20/14</p>	<p>47/21 47/22 48/1 48/20 48/25 49/2 49/3 49/5 52/19 79/10 90/23 92/11 92/16 95/12 101/7 102/24 103/10 103/12 104/8 defendant's [1] 49/7 defendants [42] 15/11 19/20 35/4 38/8 41/7 48/25 59/4 59/9 66/16 67/3 71/5 73/12 76/10 78/13 79/6 80/1 81/10 82/8 82/13 82/22 89/5 90/13 91/3 92/9 92/18 94/16 94/17 95/6 95/22 96/2 96/14 96/23 97/5 100/18 100/25 101/8 101/23 102/11 102/15 104/12 104/19 104/22 defendants' [14] 3/4 4/1 34/7 43/3 43/24 49/11 56/25 79/1 81/21 81/25 82/1 82/2 90/15 100/21 defense [6] 5/24 7/5 11/8 69/23 72/2 95/11 defenses [1] 89/4 defer [1] 76/13 deferring [1] 3/3 definitely [1] 11/4 degree [5] 6/15 69/23 70/8 71/3 80/17 delegation [1] 94/2 demand [4] 26/3 105/14 105/19 105/25 demanded [1] 104/2 demonstrate [3] 57/10 101/8 102/12 demonstrates [1] 96/15 demonstrating [3] 96/24 97/6 97/9 demoralize [1] 80/19 demotion [3] 42/21 52/7 52/15 denial [1] 103/5 denied [4] 99/16 104/18 106/12 106/13 denies [3] 30/22 64/18 87/9 Dennis [15] 2/15 6/8 10/1 26/10 26/11 26/15 30/24 31/3 31/4 35/20 43/12 47/15 54/11 87/20 98/24 deny [1] 103/14 denying [1] 101/14 department [131] department's [10] 17/5 34/3 34/5 78/17 82/7 82/17 90/6 93/4 97/10 97/12 departments [7] 62/10 62/13 70/2 70/6 78/21 86/7 97/8 departments' [1] 45/1 deploy [1] 92/13 deployed [1] 75/13 deployment [1] 101/5 depose [2] 105/1 106/7 deposition [21] 9/3 9/17 12/8 20/16 27/8 27/19 27/23 28/19 31/20 43/16 43/23 56/19 71/12 71/13 83/4 83/22 83/25 84/25 86/2 88/9 89/10 depositions [6] 80/2 84/19 88/1 88/7 104/20 106/2 deprived [1] 101/18 deputies [1] 5/20 deputy [24] 4/5 8/16 9/4 11/24 16/3 16/5 16/15 16/24 16/25 21/24 29/3 64/13 66/19 73/5 73/8 73/12 73/25 79/2 88/19 90/17 91/10 96/3 97/19 100/6 derogatory [1] 23/8 description [6] 61/18 61/21 61/22 64/11 73/6 73/9 designation [1] 4/18 designed [1] 28/2 destruction [1] 83/1 detailed [1] 58/24 details [1] 65/10 determination [3] 17/5 70/18 70/23 determine [2] 55/23 72/8 determined [2] 36/16 103/24 determining [1] 73/17 Detrick [1] 79/12 detrimental [2] 56/14 77/14</p>
D	<p>D.C [1] 1/16 Dailey [1] 1/20 damage [4] 17/9 17/20 18/10 67/3 damages [1] 19/11 DANIELLE [2] 1/19 2/14 date [1] 52/12 dated [4] 43/12 93/13 96/10 100/5 dates [1] 13/15 dating [1] 7/8 datum [1] 106/22 day [5] 5/14 21/1 48/8 59/12 105/24 days [7] 5/13 5/13 20/10 69/18 92/3 106/1 106/2 deal [9] 4/2 14/11 16/16 22/19 24/17 26/10 41/22 81/8 92/23 dealing [7] 20/10 39/24 66/9 83/7 86/21 91/25 97/15 dealt [3] 8/17 81/14 84/22 debatably [1] 102/23 debate [1] 9/5 debating [1] 22/2 decades [1] 66/5 December [2] 14/14 30/24 December 10th [1] 14/14 decide [5] 34/9 48/10 50/3 52/4 102/13 decided [2] 89/18 90/11 decision [13] 10/12 42/20 43/14 44/4 54/11 56/14 57/3 58/20 88/14 90/16 97/16 106/4 106/5 decisions [1] 92/4 declaration [3] 46/15 70/7 88/9 declarations [4] 28/13 64/3 70/3 80/25 dedicated [1] 66/6 defeat [1] 79/14 defend [1] 30/9 defendant [25] 1/8 1/19 2/7 3/13 3/16 6/8</p>	

<p>D</p> <p>development [1] 38/3</p> <p>did [48] 4/7 6/14 6/24 7/9 7/15 7/15 9/18 9/25 11/6 11/12 12/24 14/17 15/20 16/21 22/7 22/8 26/20 28/19 28/22 28/23 39/7 39/11 40/6 40/8 42/3 42/23 45/19 46/12 46/22 49/1 54/7 62/14 66/18 67/5 71/11 71/14 72/12 74/23 74/24 81/10 81/13 82/22 85/4 85/7 86/13 86/19 92/17 106/4</p> <p>didn't [17] 12/19 14/16 16/21 28/20 31/6 36/20 42/4 53/6 58/2 58/22 59/22 60/1 60/2 62/3 70/7 80/3 88/13</p> <p>differ [1] 62/12</p> <p>different [9] 4/17 29/20 30/3 36/1 37/16 40/16 51/21 62/10 80/13</p> <p>difficult [2] 92/25 93/5</p> <p>difficulty [1] 104/7</p> <p>dinner [1] 14/4</p> <p>direct [1] 103/8</p> <p>directed [1] 104/25</p> <p>disaffected [1] 101/25</p> <p>disagree [1] 19/21</p> <p>disagreed [1] 72/13</p> <p>disavowing [1] 7/23</p> <p>discarded [1] 41/19</p> <p>discharge [9] 24/7 24/13 38/11 38/23 39/10 45/19 48/18 48/22 103/16</p> <p>discharged [2] 97/20 103/18</p> <p>discharging [1] 23/22</p> <p>disciplinary [3] 42/22 52/7 99/16</p> <p>discipline [21] 30/20 31/1 32/9 32/10 32/13 35/21 38/1 47/23 54/11 57/17 57/20 58/2 70/10 77/13 87/6 87/11 87/15 91/20 94/21 104/1 104/6</p> <p>disciplined [3] 33/22 35/21 36/4</p> <p>disclose [1] 91/12</p> <p>disclosed [2] 91/8 96/16</p> <p>discomfort [1] 80/17</p> <p>disconnect [1] 9/18</p> <p>discovery [3] 3/1 7/9 105/11</p> <p>discriminate [2] 46/8 46/9</p> <p>discuss [2] 22/2 80/10</p> <p>discussing [2] 60/8 78/6</p> <p>discussion [1] 22/21</p> <p>discussions [5] 30/19 65/5 87/4 106/22 106/24</p> <p>disharmony [2] 79/21 101/24</p> <p>Dismiss [1] 15/8</p> <p>dismissal [2] 32/5 68/8</p> <p>dismissed [1] 48/21</p> <p>dispute [23] 6/4 6/14 9/5 10/9 10/23 11/10 11/13 17/16 20/15 22/11 28/6 28/12 30/12 36/9 42/15 54/5 58/11 61/3 81/6 82/3 82/10 82/22 99/7</p> <p>disputed [3] 36/25 54/7 55/4</p> <p>disputes [3] 5/18 16/22 61/7</p> <p>disregard [1] 86/25</p> <p>disrupt [2] 80/19 93/25</p> <p>disrupted [2] 79/24 97/12</p> <p>disrupting [1] 95/14</p> <p>disruption [19] 77/10 77/22 78/11 78/14 80/12 80/17 80/20 81/9 81/14 83/1 88/10 89/11 93/4 95/7 95/9 96/1 101/8 101/9 101/10</p> <p>disruptions [2] 87/24 89/25</p> <p>dissention [2] 78/18 95/20</p> <p>distinction [1] 72/2</p> <p>distinguish [2] 65/19 73/14</p> <p>distributed [8] 8/21 11/16 20/2 21/13 61/1 61/9 62/9 92/7</p> <p>district [4] 1/1 1/1 1/12 89/3</p> <p>DIVISION [2] 1/2 21/23</p>	<p>do [77] 3/6 3/7 3/13 3/15 3/20 6/21 7/6 11/19 14/15 14/16 15/14 16/22 17/14 17/14 18/8 19/9 19/21 22/19 28/24 29/6 29/17 30/9 30/9 30/25 31/3 32/23 32/23 32/24 33/8 33/9 36/18 38/3 38/4 38/7 38/12 38/15 39/7 39/7 42/2 42/5 47/23 48/5 48/11 48/14 54/16 56/22 60/13 60/25 61/11 65/10 66/23 67/7 68/24 70/9 72/21 72/23 80/6 83/8 83/16 83/19 84/20 87/4 87/13 88/3 88/6 90/9 91/15 102/22 103/9 104/21 105/7 105/10 105/21 106/4 106/14 106/20 106/20</p> <p>document [4] 40/25 41/11 41/13 81/6</p> <p>documentation [2] 12/7 14/21</p> <p>does [21] 10/23 15/21 25/1 26/23 50/5 53/16 55/23 57/9 60/15 62/8 65/25 68/17 68/20 76/24 76/25 83/9 87/15 87/16 87/17 90/15 103/21</p> <p>doesn't [19] 16/9 17/24 18/25 24/11 24/13 29/17 33/24 35/3 37/20 41/25 47/14 47/15 47/16 58/23 61/3 68/19 79/9 80/22 88/23</p> <p>dog [1] 22/25</p> <p>doing [4] 21/8 21/10 61/25 86/4</p> <p>don't [51] 5/17 9/4 9/19 9/23 10/1 10/19 11/18 15/13 16/13 18/19 22/24 22/25 22/25 22/25 23/14 23/15 24/8 25/13 27/6 31/1 31/24 31/25 33/22 35/15 36/24 37/14 41/21 44/14 54/8 54/18 54/20 54/21 56/8 57/9 58/8 61/13 64/4 65/5 65/20 68/7 72/25 76/16 81/2 85/20 87/12 88/4 88/5 88/17 88/18 104/13 105/14</p> <p>done [2] 31/13 67/10</p> <p>door [1] 6/6</p> <p>double [3] 50/20 50/21 50/24</p> <p>doubt [4] 12/3 78/16 80/19 80/19</p> <p>Doug [1] 5/15</p> <p>Douglas [1] 98/13</p> <p>down [9] 18/11 34/2 82/21 86/20 87/7 87/10 105/6 105/23 106/21</p> <p>driven [1] 17/3</p> <p>dual [1] 23/23</p> <p>Duncan [35] 5/15 6/6 6/10 6/14 6/24 7/1 7/19 8/14 8/14 8/19 9/14 12/15 12/15 12/21 20/5 20/6 20/16 21/7 21/8 21/21 22/7 23/6 23/9 24/4 26/6 27/1 66/25 69/25 78/22 84/18 90/24 98/13 99/1 99/3 99/20</p> <p>Duncan's [10] 8/24 9/2 12/11 22/20 23/13 54/14 57/4 90/22 99/14 104/4</p> <p>duties [5] 72/22 73/6 73/10 77/17 94/24</p> <p>duty [1] 76/1</p> <p>E</p> <p>e-mail [25] 6/17 8/8 8/9 8/18 8/20 8/21 12/16 14/25 15/12 16/3 21/3 21/11 21/13 24/16 26/7 26/11 26/18 31/5 43/12 57/15 90/22 98/16 99/17 99/25 100/5</p> <p>e-mails [2] 14/21 35/16</p> <p>each [6] 3/8 4/15 6/7 17/21 50/3 52/4</p> <p>earlier [6] 36/17 52/12 67/21 98/4 99/22 106/19</p> <p>early [1] 49/15</p> <p>earn [1] 17/14</p> <p>East [1] 59/13</p> <p>easy [2] 39/24 70/5</p> <p>echoed [1] 5/4</p> <p>Education [1] 55/21</p> <p>effect [17] 25/4 30/7 49/4 49/5 49/13 54/1 56/21 64/9 73/12 86/13 90/11 91/3 95/13 95/13 96/1 97/4 106/20</p> <p>effective [4] 50/6 52/2 77/11 100/7</p> <p>effectively [2] 32/25 80/7</p>	<p>effectiveness [1] 90/20</p> <p>effects [1] 74/11</p> <p>efficacy [1] 87/17</p> <p>efficiency [3] 37/25 90/6 95/14</p> <p>efficient [1] 34/5</p> <p>efficiently [1] 78/15</p> <p>effort [2] 92/21 100/8</p> <p>eightball [2] 63/18 75/1</p> <p>Eighteen [2] 10/4 10/4</p> <p>Eighth [2] 79/19 79/22</p> <p>either [7] 4/16 7/5 35/3 48/7 71/6 75/3 103/8</p> <p>election [1] 33/21</p> <p>eliminates [1] 50/24</p> <p>else [5] 9/1 32/25 48/3 83/21 106/25</p> <p>elsewhere [1] 96/25</p> <p>embrace [1] 19/18</p> <p>emergency [2] 29/2 94/7</p> <p>emphatically [1] 104/16</p> <p>employee [15] 42/6 44/4 46/3 47/6 49/22 50/8 50/9 56/13 71/1 72/8 72/23 77/11 80/16 95/3 100/16</p> <p>employee's [8] 55/24 70/24 71/1 77/5 78/7 78/9 89/14 95/5</p> <p>employees [6] 5/22 11/20 12/2 86/3 86/12 86/14</p> <p>employees' [1] 94/24</p> <p>employer [4] 77/9 80/18 82/25 89/15</p> <p>employer's [2] 77/6 89/14</p> <p>employers [1] 65/6</p> <p>employment [1] 56/14</p> <p>enacted [1] 41/6</p> <p>end [28] 2/21 3/9 7/18 17/1 31/2 38/20 48/8 50/4 71/2 74/15 74/18 75/1 75/6 75/8 75/11 75/13 76/14 78/12 80/8 96/9 98/20 99/10 99/23 99/25 100/2 100/7 104/25 106/1</p> <p>endorse [1] 80/7</p> <p>enforcement [4] 56/5 76/6 85/15 100/14</p> <p>engage [1] 35/12</p> <p>enlightenment [2] 40/23 40/24</p> <p>enough [7] 3/19 32/23 60/25 62/14 63/25 84/4 85/17</p> <p>entailed [1] 95/5</p> <p>enterprise [1] 77/18</p> <p>entertain [1] 49/21</p> <p>entirely [2] 58/3 72/20</p> <p>entitled [4] 70/24 102/13 105/8 108/4</p> <p>entity [1] 4/17</p> <p>equation [1] 70/11</p> <p>equipment [12] 11/13 11/14 22/1 60/17 63/3 63/21 74/4 74/14 74/14 75/6 92/13 97/23</p> <p>equivocal [1] 47/1</p> <p>era [3] 22/5 55/6 84/7</p> <p>error [1] 63/4</p> <p>ESQUIRE [4] 1/14 1/14 1/19 1/19</p> <p>essence [2] 49/11 82/22</p> <p>essential [2] 3/17 96/11</p> <p>essentially [10] 7/25 8/19 15/19 17/8 21/3 34/1 49/7 56/15 78/24 101/2</p> <p>Esslinger [1] 54/1</p> <p>established [1] 43/14</p> <p>et [9] 1/7 2/4 15/17 20/3 80/4 80/4 89/21 96/8 99/23</p> <p>et cetera [2] 15/17 20/3</p> <p>even [30] 12/21 16/23 34/10 36/7 36/24 39/25 40/4 41/7 42/13 51/4 53/22 56/25 58/13 58/25 60/5 62/3 65/7 66/25 70/7 70/8 71/2 71/6 71/24 73/1 78/24 80/14 88/14 102/9 104/3 104/25</p> <p>event [7] 9/22 23/21 45/18 56/3 74/12 95/25 98/5</p>
--	---	--

E	F.3d [5] 70/16 79/13 79/23 80/15 89/18 face [4] 10/1 30/16 47/14 50/24 facially [2] 104/10 106/18 facie [1] 38/5 facility [1] 68/11 fact [75] 3/15 4/23 6/3 7/24 8/2 8/14 9/3 9/17 10/21 11/7 15/9 19/21 20/8 21/17 24/3 27/18 29/4 29/9 29/20 31/12 36/2 36/10 36/11 37/7 39/1 39/16 39/18 44/4 47/11 52/16 52/21 54/7 54/12 55/8 55/12 57/17 57/19 58/2 59/16 62/2 66/1 66/18 69/12 69/16 70/9 70/18 71/14 73/4 76/7 76/22 77/2 78/25 82/5 82/22 84/19 85/1 85/4 85/11 86/13 86/19 86/20 88/23 92/11 92/15 94/15 95/23 96/2 96/19 101/9 101/20 102/20 102/25 103/24 104/6 106/14 factor [3] 54/6 56/14 57/1 factors [9] 56/1 56/10 77/24 78/6 94/17 94/19 100/18 100/25 102/14 facts [21] 3/12 3/16 5/9 6/3 7/3 14/8 19/18 48/13 55/10 58/25 60/6 62/25 72/13 81/6 82/2 82/3 82/23 85/21 97/14 97/17 102/23 factual [23] 5/10 5/17 16/21 16/22 17/7 17/9 28/12 28/14 28/18 30/12 34/2 36/25 38/3 55/16 59/2 59/4 61/7 63/10 69/10 70/4 71/4 78/15 80/24 factually [3] 7/13 17/2 89/4 failed [4] 96/14 96/24 97/6 97/9 failure [2] 25/25 98/2 fair [2] 3/18 59/22 fairly [2] 39/24 55/24 falling [1] 69/21 fantastic [2] 104/5 105/15 far [9] 2/22 9/6 12/9 14/1 29/24 45/25 77/1 88/1 102/15 favor [10] 38/21 56/11 58/6 76/5 91/3 94/17 94/19 102/19 103/8 104/25 favorable [1] 90/8 favors [1] 106/22 February [6] 16/2 35/15 35/16 43/13 97/20 100/5 February 2002 [1] 35/16 February 20th [3] 16/2 43/13 100/5 federal [4] 18/1 39/24 53/25 98/4 feel [8] 28/20 30/25 31/1 31/6 38/4 58/23 87/12 104/19 feeling [2] 24/22 51/5 felt [12] 31/8 32/7 32/11 32/12 35/20 45/22 54/16 56/22 66/8 67/13 84/6 87/3 Felty [1] 89/2 few [1] 6/3 field [1] 75/12 fifty [1] 60/24 figure [5] 22/24 23/20 40/1 51/9 105/6 file [2] 8/3 95/20 filed [7] 3/5 12/19 50/4 52/4 81/7 106/3 106/5 files [1] 78/19 filing [1] 70/7 final [3] 50/11 52/5 71/23 financial [1] 17/10 find [7] 26/21 33/10 39/24 69/24 102/22 106/7 106/14 finding [1] 47/9 finds [1] 53/1 fine [4] 3/20 15/5 63/24 64/2 fire [187] firearm [1] 74/3 fired [1] 85/24 firefighter [15] 4/18 5/1 5/2 7/16 10/25 16/4 42/7 46/4 49/24 51/12 52/5 68/22	74/20 76/23 76/24 firefighters [23] 10/21 10/22 11/1 11/1 11/11 11/20 16/18 52/14 61/11 63/5 68/24 74/5 74/15 81/16 81/18 81/18 84/16 84/21 88/5 88/8 92/20 92/24 102/7 firehose [2] 63/22 75/7 first [49] 2/7 3/5 3/5 5/9 8/16 11/17 18/12 18/20 18/21 19/6 26/14 29/23 30/1 33/1 34/3 34/4 34/19 36/3 36/11 36/14 36/16 36/20 37/9 38/10 38/12 38/20 38/24 46/10 46/13 48/12 48/19 49/2 54/4 55/18 55/20 55/23 65/10 65/13 70/9 70/24 72/25 73/4 74/13 77/24 81/24 85/18 90/14 101/11 105/8 fit [5] 20/2 61/25 62/21 62/21 98/2 fits [1] 65/21 five [2] 53/2 82/4 five-minute [1] 53/2 flip [1] 102/17 floor [1] 21/14 focus [2] 38/22 73/4 focusing [1] 54/24 folks [2] 2/17 53/3 follow [1] 65/11 following [9] 5/20 20/23 20/25 21/2 58/24 73/23 75/4 92/3 103/22 follows [1] 101/9 footnote [1] 17/25 forced [1] 83/23 forego [1] 104/8 foregoing [1] 108/2 form [5] 30/21 32/9 51/7 73/18 80/10 formal [2] 16/12 81/25 former [7] 4/16 59/14 60/11 68/22 69/13 74/17 97/18 formerly [1] 97/19 forth [9] 3/18 31/4 33/25 38/1 39/15 40/11 40/15 41/24 72/13 forum [4] 22/2 22/3 73/19 75/23 forward [5] 33/1 72/15 102/21 105/1 105/2 found [3] 40/24 64/21 103/17 four [11] 5/13 5/13 38/10 38/10 38/11 38/19 38/20 63/2 63/8 63/10 66/5 fourth [13] 33/24 37/8 70/13 70/16 70/18 70/21 78/3 78/8 79/12 80/6 89/2 89/18 89/24 frankly [8] 20/12 27/7 54/10 56/18 67/20 76/15 85/21 105/10 free [9] 15/21 24/18 38/4 39/2 46/11 46/13 76/24 77/8 103/25 friction [1] 79/4 friends [1] 14/2 fruition [1] 18/6 fulfill [1] 25/6 fulfilled [1] 100/19 full [1] 11/20 full-time [1] 11/20 function [2] 62/4 78/17 functions [2] 77/10 82/18 funding [7] 82/7 86/18 88/12 88/15 91/19 95/17 101/18 funds [1] 101/15 further [21] 13/4 17/4 37/15 54/19 65/11 66/14 71/8 74/9 84/20 87/22 89/7 91/7 92/18 93/21 93/24 94/10 97/5 104/20 105/11 106/2 106/7 future [1] 36/18
F	G	
F.2d [1] 89/3	gain [4] 6/25 21/10 21/11 98/15 gained [1] 27/25 Gaithersburg [1] 75/20	

<p>G</p> <p>Garcetti [20] 58/20 58/22 59/18 59/19 59/20 60/13 61/17 61/25 65/8 65/21 70/13 70/14 70/15 70/19 70/20 71/24 72/11 72/12 72/21 73/3</p> <p>gather [3] 50/14 52/8 60/16</p> <p>gave [7] 12/21 19/24 24/7 40/25 69/25 79/7 85/16</p> <p>Gazette [4] 63/5 63/16 74/16 98/9</p> <p>gear [4] 66/20 74/11 92/6 98/3</p> <p>general [8] 3/12 28/4 53/8 61/20 92/10 97/16 99/7 100/15</p> <p>generalized [3] 79/18 87/23 90/9</p> <p>generally [4] 29/2 55/6 73/8 75/23</p> <p>generated [1] 102/4</p> <p>genuine [4] 54/5 82/2 82/4 82/10</p> <p>GERMAN [78] 1/4 2/3 4/7 4/23 6/9 6/11 6/15 6/16 6/17 7/10 8/16 9/4 9/16 9/19 9/19 10/15 12/1 14/14 15/1 15/19 16/3 16/7 17/3 20/25 22/20 25/3 26/5 27/23 30/21 37/1 37/12 38/21 42/7 42/19 42/24 47/23 58/15 59/6 60/4 60/5 60/8 62/5 64/12 65/16 65/24 65/25 66/2 66/4 68/1 68/15 68/18 68/20 68/23 69/1 69/4 69/11 73/5 73/24 74/16 74/19 74/23 75/3 76/2 79/1 83/17 85/1 88/19 88/22 94/11 96/3 96/10 97/18 98/6 98/15 98/25 99/9 100/3 102/2</p> <p>German's [14] 7/11 14/1 27/9 34/4 42/2 62/4 67/9 81/15 88/16 91/7 98/14 99/4 99/13 99/18</p> <p>get [32] 9/18 10/19 14/8 15/12 17/13 17/14 20/17 25/15 34/20 38/2 40/3 40/4 40/6 44/1 48/13 48/14 55/16 58/13 60/1 60/2 63/22 65/9 70/5 75/7 77/4 81/2 81/25 84/13 85/17 101/20 104/24 106/9</p> <p>gets [3] 17/11 19/8 21/13</p> <p>getting [6] 13/15 17/12 65/9 70/1 85/11 88/15</p> <p>Gilmore [1] 70/15</p> <p>Ginny [1] 14/6</p> <p>give [10] 10/3 24/13 29/12 48/7 70/4 79/8 79/18 104/22 105/3 106/1</p> <p>given [14] 4/19 4/21 9/20 11/13 14/14 20/19 22/4 22/5 55/6 67/17 76/5 76/5 76/7 91/4</p> <p>gives [6] 18/25 36/13 41/11 44/14 52/23 63/24</p> <p>giving [2] 86/21 88/10</p> <p>gleaned [1] 100/24</p> <p>gleans [1] 100/21</p> <p>go [38] 3/2 3/4 3/6 3/13 3/18 7/5 14/3 19/14 31/3 31/4 32/25 33/11 35/10 38/4 38/8 40/14 42/19 42/24 48/6 49/2 49/6 50/19 54/4 56/6 62/17 62/17 62/23 66/2 69/8 72/15 80/10 80/13 81/1 102/20 104/5 105/1 105/1 106/23</p> <p>goes [10] 9/22 17/19 29/16 32/25 38/23 47/1 82/21 85/20 102/17 106/19</p> <p>going [44] 10/13 12/23 14/8 14/18 15/25 18/10 20/11 22/4 22/19 24/7 26/17 27/16 29/3 31/3 38/15 38/22 40/10 42/4 42/5 48/5 48/6 48/7 48/10 48/13 55/17 58/22 59/12 59/22 63/20 63/22 73/7 75/5 75/7 75/12 79/3 79/9 80/11 86/18 87/11 87/12 88/24 97/3 101/14 101/18</p> <p>Goldstein [15] 33/6 33/12 33/15 33/16 33/24 37/5 37/5 37/8 78/1 78/3 79/16 79/17 80/7 89/17 90/14</p> <p>gone [2] 18/16 30/1</p> <p>good [9] 2/13 47/8 63/13 63/24 64/20 85/9 91/18 93/14 93/21</p>	<p>Gordon [17] 10/6 21/21 24/25 25/2 25/9 26/7 43/16 43/20 44/5 45/15 46/19 47/16 65/24 66/23 71/10 71/17 99/2</p> <p>got [10] 3/3 8/2 13/20 21/5 27/21 30/15 68/16 69/11 70/3 73/23</p> <p>gotten [1] 33/23</p> <p>governing [1] 18/15</p> <p>government [3] 77/19 78/10 97/2</p> <p>grant [3] 58/5 102/21 103/8</p> <p>granted [1] 18/6</p> <p>grappling [1] 36/15</p> <p>Graves [1] 89/2</p> <p>Graves-Humphreys [1] 89/2</p> <p>great [3] 16/16 26/14 92/22</p> <p>Greenbelt [1] 1/7</p> <p>grounds [1] 95/15</p> <p>guess [6] 19/5 31/20 34/24 49/18 49/19 50/13</p> <p>guessing [1] 47/7</p> <p>guy [1] 69/16</p> <p>H</p> <p>had [67] 5/17 6/16 9/14 10/10 10/15 13/23 13/24 14/11 15/10 17/22 18/9 19/24 20/1 20/2 21/1 22/8 24/1 27/10 27/15 28/1 28/4 30/18 30/19 30/23 31/16 31/17 32/8 36/15 37/1 39/17 39/18 40/4 40/11 40/14 41/7 42/2 42/19 52/20 56/21 60/4 62/21 66/4 69/4 70/2 71/14 71/18 81/15 85/3 86/8 86/23 87/20 88/6 88/16 90/20 91/18 92/4 92/8 92/12 92/15 93/14 93/24 97/23 98/4 99/10 99/11 100/4 102/3</p> <p>hadn't [1] 36/16</p> <p>Hall [1] 78/7</p> <p>hand [2] 24/6 24/14</p> <p>handed [1] 78/2</p> <p>handle [1] 26/17</p> <p>hands [1] 32/11</p> <p>hang [1] 8/6</p> <p>happen [1] 86/19</p> <p>happened [6] 20/20 21/16 37/3 42/19 83/15 88/18</p> <p>happening [1] 24/23</p> <p>happens [1] 24/23</p> <p>happy [2] 21/18 25/2</p> <p>hard [8] 30/9 50/13 73/13 73/14 105/4 105/7 105/9 105/14</p> <p>hardly [1] 53/22</p> <p>harmony [7] 38/1 77/13 80/4 81/14 89/21 91/21 94/22</p> <p>has [30] 8/16 10/9 16/24 16/25 20/12 25/3 30/1 36/11 47/21 48/18 48/25 52/9 53/18 69/9 70/9 72/3 73/11 74/4 74/14 75/12 77/6 79/20 81/20 91/14 95/11 95/12 100/9 103/10 104/3 104/7</p> <p>hate [1] 81/17</p> <p>hats [1] 59/10</p> <p>have [125]</p> <p>haven't [3] 18/15 88/8 97/13</p> <p>having [8] 3/6 3/10 26/6 50/20 63/21 75/6 100/25 105/5</p> <p>hazard [1] 28/2</p> <p>hazmat [2] 61/2 96/22</p> <p>he [257]</p> <p>he's [33] 15/25 16/4 16/5 17/8 17/9 17/9 26/19 26/25 36/18 39/1 47/7 57/20 57/22 58/11 58/12 59/14 59/14 60/11 61/17 61/18 61/19 61/20 61/21 61/24 61/24 65/12 65/16 66/18 67/7 68/23 85/11 85/12 100/10</p> <p>head [4] 14/7 21/22 43/21 45/16</p> <p>heads [1] 19/24</p>	<p>heads-up [1] 19/24</p> <p>hear [10] 3/8 3/22 5/10 43/3 50/3 52/4 66/15 66/16 77/23 84/11</p> <p>heard [2] 3/10 13/24</p> <p>hearing [2] 2/5 18/10</p> <p>held [5] 5/12 5/15 27/15 53/24 98/13</p> <p>her [6] 27/20 27/21 27/21 27/25 80/16 95/17</p> <p>here [33] 4/2 11/8 16/10 18/8 21/17 24/17 28/1 29/9 29/25 32/19 37/6 37/12 37/21 40/10 41/23 42/12 43/9 47/12 53/21 54/6 54/7 56/15 66/10 71/14 78/1 78/6 79/10 81/20 96/7 101/21 103/11 105/16 106/4</p> <p>here's [2] 21/5 21/6</p> <p>herring [1] 88/12</p> <p>hesitate [2] 100/20 103/11</p> <p>high [1] 76/5</p> <p>highly [3] 33/4 100/15 100/16</p> <p>him [30] 12/20 12/23 14/6 16/15 16/16 23/22 26/16 27/11 27/25 28/24 30/25 36/4 36/13 37/13 43/1 43/2 44/8 46/22 47/8 47/24 54/11 67/5 69/15 75/4 85/1 85/24 87/10 90/16 99/16 104/1</p> <p>himself [7] 4/16 30/19 31/9 52/22 66/19 67/16 73/25</p> <p>his [111]</p> <p>history [3] 39/25 40/1 84/17</p> <p>hoc [3] 16/14 65/19 71/7</p> <p>hold [4] 32/19 48/4 83/23 92/12</p> <p>holding [1] 89/24</p> <p>holds [2] 53/16 56/7</p> <p>Holiday [2] 53/11 53/21</p> <p>honest [1] 9/20</p> <p>honestly [2] 18/5 18/15</p> <p>Honor [53] 2/9 2/13 3/20 4/1 7/6 9/12 10/4 15/7 19/4 24/21 25/13 26/4 27/7 28/16 30/11 30/17 31/19 34/8 35/4 35/11 38/6 40/8 43/6 43/20 45/10 45/24 50/21 54/8 55/5 56/18 57/7 57/12 57/24 58/18 62/20 66/17 69/7 71/10 71/23 77/25 81/4 81/24 82/12 82/21 83/14 83/19 84/5 84/13 85/21 87/23 89/6 89/9 107/3</p> <p>HONORABLE [1] 1/11</p> <p>hope [1] 95/18</p> <p>hopefully [1] 14/9</p> <p>house [4] 23/1 25/15 92/5 92/6</p> <p>housed [2] 28/3 91/15</p> <p>houses [1] 70/2</p> <p>how [23] 5/1 10/19 15/21 22/22 24/3 26/17 27/25 35/24 44/16 44/22 47/15 47/15 47/16 59/21 68/24 70/11 71/25 75/12 84/11 89/20 92/5 92/6 92/6</p> <p>however [6] 49/12 58/11 66/22 80/9 104/7 106/14</p> <p>Hugh [1] 47/8</p> <p>Humphreys [1] 89/2</p> <p>Hundred [1] 60/24</p> <p>hunting [1] 14/3</p> <p>hybrid [1] 86/6</p> <p>hyper [1] 24/12</p> <p>hyper-hypersensitive [1] 24/12</p> <p>hypersensitive [1] 24/12</p> <p>I</p> <p>I'd [2] 23/19 66/16</p> <p>I'll [8] 38/7 48/14 76/13 76/14 78/7 79/18 81/3 81/19</p> <p>I'm [57] 4/20 5/14 8/6 8/9 8/12 9/25 10/20 10/20 11/6 12/15 14/8 14/8 14/18 18/5 18/17 18/21 22/22 23/1 23/3 27/5 29/15 30/18 31/15 31/17 31/17 34/3 34/10 34/17 34/18 35/6 37/17 38/20</p>
--	--	--

I	inflated [1] 12/3 inflicted [1] 25/3 information [4] 19/25 69/3 91/11 97/25 informed [1] 99/3 infringes [1] 18/12 innocuous [1] 58/3 inquiries [2] 86/4 98/12 inquiry [4] 26/9 78/6 86/20 90/4 insert [1] 84/20 inserted [1] 4/25 insofar [5] 2/22 52/18 52/25 103/17 106/6 instead [1] 3/6 institution [4] 94/25 94/25 95/3 102/1 insubordination [1] 87/13 insufficient [1] 79/25 integrated [3] 29/2 92/22 94/7 intended [3] 26/16 32/2 32/3 intending [1] 31/22 interact [1] 88/4 interaction [2] 10/16 16/17 interest [14] 34/3 34/4 34/5 66/10 73/22 77/6 89/14 89/21 90/5 90/6 90/9 90/10 90/14 90/15 interested [1] 12/22 interfere [1] 93/25 interfered [1] 82/17 interference [2] 78/16 94/24 interferes [1] 77/17 interfering [1] 95/13 interim [1] 40/5 internal [8] 8/21 59/19 60/2 72/23 75/24 90/16 93/25 97/12 internally [1] 40/13 interpret [1] 35/15 interpretation [6] 24/12 34/7 34/13 44/10 52/24 71/2 interpreted [10] 7/1 7/25 21/9 22/22 23/6 24/3 47/15 47/16 47/17 57/18 intertwine [1] 5/8 intervenes [1] 48/2 interview [1] 98/11 interviewed [1] 98/1 intimated [1] 88/13 into [31] 3/23 6/9 6/17 7/5 10/19 11/14 14/22 15/13 16/20 17/20 18/16 34/20 38/2 48/13 55/16 58/13 61/25 65/9 65/21 67/24 70/1 70/5 73/3 80/13 81/2 85/11 93/10 99/4 101/1 101/24 105/9 introduced [1] 37/6 introductory [1] 97/14 investigation [2] 72/15 99/4 invoking [1] 53/19 involve [1] 72/12 involved [6] 27/10 56/6 68/3 73/22 86/10 89/19 involvement [2] 12/8 71/3 involves [1] 78/9 involving [5] 7/2 42/21 52/6 52/14 100/14 irrelevant [2] 61/15 70/6 is [357] isn't [4] 18/19 18/22 28/6 57/20 issue [111] issued [4] 7/21 10/12 47/17 47/18 issues [25] 5/21 11/2 28/17 29/8 29/13 35/13 37/3 37/7 38/2 38/22 43/9 45/2 48/6 55/7 56/6 66/3 76/3 79/9 80/11 81/12 86/23 100/14 101/5 104/5 106/12 it [247] it's [61] 3/22 4/25 7/4 9/6 10/25 11/6 11/7 13/1 15/5 15/25 18/10 18/19 19/2 21/11 22/4 23/23 24/10 24/25 26/4 26/12 26/13 26/24 29/19 35/12 35/19 36/24 37/16	37/21 37/22 37/25 39/3 40/21 41/22 41/25 44/22 47/1 49/18 49/20 51/21 51/22 51/22 53/22 54/22 55/10 58/1 70/5 70/8 70/15 70/16 71/16 72/20 72/22 76/18 76/20 88/14 94/10 100/16 103/1 103/24 104/13 106/14 items [1] 2/23 its [10] 30/16 44/21 47/14 51/6 82/18 87/19 90/7 90/16 92/9 95/14 itself [7] 35/5 35/20 36/7 66/21 67/17 101/16 101/25
J	January [6] 14/23 14/24 15/8 35/16 50/7 96/10 January 1 [1] 50/7 January 2002 [1] 35/16 January 22 [1] 96/10 January of [1] 15/8 jeez [1] 65/25 JO [3] 1/19 2/13 62/19 job [9] 6/25 21/11 22/24 23/15 54/21 61/18 61/22 64/11 98/20 Joe [1] 67/23 John [1] 47/8 jointly [1] 6/22 Journal [6] 4/11 63/20 68/21 75/4 75/10 98/9 judge [2] 1/12 105/22 judgment [25] 2/18 3/4 8/7 9/24 19/12 24/8 24/9 46/21 51/14 51/17 51/20 58/5 63/1 63/9 70/17 79/15 81/7 88/25 102/14 102/18 102/22 103/6 103/9 103/15 106/13 judicial [3] 53/17 53/19 91/1 July [1] 41/7 July 1st [1] 41/7 jurisdiction [4] 41/23 52/3 52/13 52/23 jurisdictions [1] 17/11 jury [1] 104/24 just [44] 3/23 5/9 5/10 6/7 8/3 8/11 10/17 11/3 11/10 12/19 15/4 16/14 17/1 17/25 18/20 19/12 22/13 22/22 23/15 23/19 26/4 33/19 33/20 38/19 44/8 44/15 45/21 48/16 53/5 57/12 57/12 57/24 65/12 66/15 71/11 80/3 81/17 89/10 95/8 96/12 97/8 97/13 97/15 100/15 Justice [1] 47/8 justification [1] 54/23 justify [3] 36/8 71/5 77/22	
K	keep [4] 21/5 21/6 105/23 106/23 Kensington [2] 75/18 98/10 kept [2] 13/24 40/17 key [6] 40/10 41/17 48/14 50/18 65/15 78/1 kicked [1] 33/24 kind [10] 3/11 10/20 10/22 19/17 20/17 21/25 32/7 34/13 57/14 104/8 knew [9] 9/19 10/2 13/19 16/16 28/13 65/22 69/15 70/2 91/9 know [60] 5/16 8/2 9/17 9/23 10/1 10/19 11/18 12/16 12/17 12/18 15/5 20/9 21/4 22/3 22/18 24/8 25/15 28/3 31/21 35/23 37/1 37/2 37/4 37/6 41/18 42/4 42/25 44/14 46/1 46/12 46/12 46/22 47/8 57/18 59/13 60/25 61/12 62/3 63/1 65/4 65/5 65/20 65/25 65/25 66/6 66/8 67/7 67/23 68/24 69/22 70/13 71/15 71/15 84/22 85/1 86/19 88/7 88/17 88/18 88/20 88/20 knowledge [4] 28/4 91/8 91/12 96/16 known [7] 6/21 21/13 27/17 58/25 60/8	

118

K	LINDA [3] 1/24 108/2 108/8 Lindsey [1] 79/22 line [11] 16/17 50/20 63/3 72/16 72/25 73/2 74/4 74/13 80/8 87/8 88/17 list [2] 21/5 98/16 LISTSERV [2] 6/17 21/3 literally [1] 101/9 litigation [1] 47/25 little [14] 7/4 38/16 50/20 51/21 57/14 58/21 59/17 63/17 69/21 73/17 74/25 80/14 80/16 86/5 LLC [1] 1/20 local [12] 4/10 42/9 42/20 44/3 46/3 46/5 47/2 49/23 49/25 50/9 50/12 52/6 located [6] 21/15 27/22 27/25 28/5 28/11 71/16 location [3] 20/1 90/19 91/14 logical [1] 61/2 long [5] 3/22 10/22 19/5 53/24 104/9 longer [2] 35/18 35/23 longstanding [1] 84/17 look [22] 6/20 8/15 9/3 21/4 22/1 26/10 41/8 46/19 51/13 59/11 62/25 66/23 67/12 73/18 83/5 83/15 94/20 96/6 103/7 105/4 105/7 105/15 looked [3] 12/18 23/19 84/8 looking [12] 18/11 19/12 23/9 27/7 28/17 32/13 34/20 36/21 48/9 65/23 70/12 70/14 looks [4] 37/18 51/11 51/21 75/22 Los [1] 72/13 Los Angeles [1] 72/13 lose [1] 24/9 loss [1] 17/21 lost [4] 33/21 37/8 100/11 105/7 lot [4] 9/15 21/16 48/6 48/9 lots [1] 88/7 loyalty [1] 77/15	March [1] 16/19 March 6th [1] 16/19 Marina [1] 53/11 Marion [1] 78/8 MARK [4] 1/14 1/15 2/8 2/10 MARONE [2] 1/19 2/14 marred [1] 25/7 MARSHALL [3] 1/24 108/2 108/8 MARYLAND [18] 1/1 1/7 1/21 15/22 18/14 38/24 39/17 46/14 48/19 53/8 53/12 53/14 53/24 54/2 96/21 100/12 103/19 103/20 material [12] 6/3 11/7 70/9 81/5 82/1 82/3 82/4 88/23 96/15 96/24 97/6 97/9 materials [1] 61/23 matter [47] 2/2 2/4 8/1 14/5 17/25 32/19 33/24 35/3 37/21 37/24 47/11 47/15 47/15 47/16 53/1 55/3 55/8 55/12 55/25 56/4 56/6 56/7 57/10 58/3 58/4 58/10 58/16 58/16 72/5 72/9 72/9 76/10 76/13 76/19 76/20 79/10 80/22 81/19 84/2 90/24 90/25 97/3 100/20 102/12 102/18 103/9 108/4 matters [10] 27/3 27/14 28/15 28/18 29/3 35/24 56/6 73/17 78/10 94/12 maximum [2] 18/15 105/16 may [30] 2/22 18/18 22/11 23/21 24/11 29/22 30/3 46/20 51/5 52/22 61/17 61/25 69/7 69/8 72/18 73/7 77/19 80/9 80/18 80/19 89/16 94/23 102/6 102/22 103/7 103/17 104/24 106/6 106/7 106/7 maybe [11] 3/6 24/10 31/14 33/1 37/17 64/21 84/8 84/10 88/3 88/5 88/17 McHenry [1] 75/20 McVey [2] 78/2 78/4 me [42] 2/19 5/8 5/9 5/10 5/14 5/25 10/3 12/19 12/25 14/17 15/5 19/16 19/18 22/24 29/7 29/16 33/10 38/16 38/19 40/3 40/19 43/3 44/15 44/17 44/19 44/21 49/2 50/19 52/20 58/5 60/15 63/24 65/9 65/10 72/4 81/25 83/16 85/23 88/22 97/16 102/9 105/21 mean [29] 9/6 11/3 18/24 21/9 22/23 23/8 23/14 24/6 27/5 30/15 31/13 32/3 35/2 35/19 35/25 41/18 54/10 57/13 58/2 58/23 62/16 70/4 80/15 83/8 83/9 84/6 84/10 85/21 104/14 meaning [3] 22/23 23/4 84/10 means [2] 16/5 41/18 meant [1] 8/22 media [12] 5/14 6/22 15/16 19/23 20/4 24/2 54/15 75/24 91/12 96/7 98/12 99/22 medical [2] 45/6 45/6 meet [2] 90/14 99/1 meeting [22] 5/19 6/5 6/6 6/9 6/9 6/11 6/12 13/21 14/13 21/19 21/20 21/25 22/6 26/15 30/14 30/24 31/2 83/23 92/12 98/22 98/25 99/2 meetings [2] 85/12 99/15 member [21] 4/16 5/1 12/1 15/17 16/5 17/23 33/19 33/20 60/9 65/23 68/3 69/12 69/15 70/3 80/9 86/1 96/9 97/18 98/18 99/24 104/9 members [20] 16/8 16/16 44/23 44/25 45/8 56/19 59/9 67/12 79/7 85/7 86/1 86/2 86/17 87/1 88/1 88/2 89/11 92/22 93/23 98/1 members' [1] 16/23 memo [12] 7/18 8/3 9/23 10/2 10/7 10/14 12/25 24/24 43/9 47/18 59/23 71/20 memoranda [3] 72/24 75/25 76/2 memorandum [3] 59/20 66/23 99/5 mere [4] 52/21 79/13 79/23 88/24
L	M	
la [1] 72/11 lack [2] 25/5 74/8 laid [2] 17/16 17/18 language [8] 31/22 33/4 41/19 41/19 41/22 47/14 52/22 96/7 large [4] 20/21 22/4 30/8 44/25 largely [5] 29/16 72/21 100/24 101/21 101/21 larger [1] 66/13 last [6] 15/7 40/2 40/2 40/25 58/21 69/9 late [5] 47/11 70/7 104/21 106/3 106/5 late-filed [1] 106/5 later [4] 13/24 40/17 88/21 104/14 laughed [1] 9/17 law [41] 16/1 19/13 32/19 38/24 40/16 42/10 42/13 42/18 42/25 46/6 46/8 46/15 47/2 47/19 49/8 50/1 50/5 51/1 52/11 52/17 53/1 53/8 55/9 56/5 56/7 57/10 58/4 58/4 61/14 73/16 76/6 76/10 76/13 76/20 85/15 100/4 100/14 100/20 102/12 103/20 105/15 lawful [1] 50/13 lawsuit [1] 69/23 lawyer [1] 46/25 lawyering [3] 69/23 71/7 71/16 lay [1] 5/9 leadership [3] 82/20 85/8 87/18 leading [1] 55/21 leads [2] 87/10 103/5 least [15] 2/22 4/25 14/10 16/13 18/3 28/10 32/18 32/21 34/12 36/9 61/24 77/1 98/25 101/3 102/22 leave [5] 2/23 24/16 81/19 104/21 106/21 lectern [1] 3/21 led [1] 7/3 left [2] 26/15 40/19 legal [10] 17/2 34/2 44/14 46/24 47/10 47/17 52/24 65/20 81/12 81/19 legislation [1] 52/12 legislative [2] 39/25 40/1 legitimate [8] 9/5 14/18 66/25 68/4 71/17 71/18 87/3 87/3 less [3] 20/10 83/18 87/9 let [19] 2/19 5/10 5/14 12/25 19/16 22/1 29/7 32/25 38/19 43/3 49/2 50/19 60/15 72/4 73/4 81/25 83/16 96/3 97/16 let's [29] 2/23 3/1 3/4 3/7 3/7 3/11 3/15 3/16 9/25 32/16 32/18 32/19 38/2 38/4 38/25 48/12 48/15 50/13 53/2 54/4 54/4 58/14 62/17 62/17 62/23 63/11 65/12 105/11 105/24 letter [17] 7/18 8/1 8/5 16/7 24/16 24/24 26/24 30/15 32/10 68/12 85/2 87/12 93/12 96/4 96/9 99/19 104/15 letters [1] 85/12 letting [1] 71/15 level [1] 10/16 LEWIS [10] 1/4 2/3 4/23 6/9 22/20 25/3 30/21 65/23 68/23 97/18 LFRD [1] 47/2 light [4] 69/4 90/8 91/1 91/6 like [18] 4/10 22/24 29/8 32/7 32/11 32/12 37/18 51/11 51/21 60/22 63/22 66/16 67/13 67/25 75/7 86/4 89/9 104/20 Likewise [2] 3/13 103/1 limited [1] 106/3	made [61] 4/5 5/4 6/15 13/5 16/20 20/24 21/7 21/17 22/9 23/18 24/2 25/22 26/1 26/23 29/25 42/18 46/7 46/12 47/21 49/2 52/18 54/12 54/19 56/21 57/4 67/8 67/9 68/14 70/25 71/21 73/14 73/15 73/20 73/24 75/3 75/21 77/2 77/3 77/3 83/25 84/10 84/14 87/1 88/11 90/2 92/4 92/10 92/15 92/23 93/1 96/11 96/14 96/19 96/22 97/1 97/21 98/14 101/21 104/16 105/19 105/19 magistrate [1] 105/21 mail [25] 6/17 8/8 8/9 8/18 8/20 8/21 12/16 14/25 15/12 16/3 21/3 21/11 21/13 24/16 26/7 26/11 26/18 31/5 43/12 57/15 90/22 98/16 99/17 99/25 100/5 mails [2] 14/21 35/16 maintain [1] 80/4 maintained [3] 74/10 91/20 98/16 maintaining [1] 90/6 maintenance [1] 94/21 major [1] 24/17 make [16] 3/8 3/15 3/16 6/14 30/9 32/23 55/11 57/5 73/7 76/25 78/11 93/1 97/16 105/9 105/14 106/17 makes [3] 62/24 72/1 103/22 making [14] 19/6 22/20 26/8 26/25 27/1 38/5 57/24 60/10 64/6 65/24 66/11 86/4 86/5 93/20 malfeasance [1] 76/7 managing [1] 90/16 manifest [1] 83/2 manner [4] 23/15 77/7 84/22 92/1 many [4] 27/25 76/23 80/2 92/6	

M	85/8 86/1 86/13 87/1 88/5 88/16 88/22 104/4 105/5 105/13 Mr. Ayoagi [10] 13/23 46/25 71/12 78/23 83/22 84/18 84/25 85/3 85/6 87/1 Mr. Ayoagi's [1] 71/20 Mr. Dennis [1] 10/1 Mr. Duncan [9] 6/14 6/24 7/1 7/19 8/14 8/19 9/14 12/21 84/18 Mr. Duncan's [2] 57/4 104/4 Mr. Garcetti [1] 59/20 Mr. German [40] 4/7 6/11 6/15 6/16 6/17 7/10 9/4 9/16 9/19 9/19 12/1 14/14 15/1 15/19 16/3 16/7 17/3 20/25 26/5 27/23 37/1 38/21 42/7 42/19 42/24 47/23 58/15 59/6 60/4 60/5 60/8 66/2 66/4 68/1 68/15 68/20 69/4 69/11 79/1 88/22 Mr. German's [6] 7/11 14/1 27/9 42/2 67/9 88/16 Mr. Murgolo [4] 67/14 86/1 86/13 88/5 Mr. Romer [4] 8/13 12/9 12/15 78/22 Mr. Urban [1] 85/8 Mr. Zaid [7] 3/16 38/5 46/18 55/14 77/24 105/5 105/13 Mrs. [1] 27/1 Mrs. Duncan [1] 27/1 Ms [1] 40/6 Ms. [4] 56/17 81/23 89/8 105/17 Ms. Schmidt [4] 56/17 81/23 89/8 105/17 much [10] 10/19 13/25 20/24 37/20 38/19 41/22 66/12 78/5 80/19 81/17 multiple [1] 64/8 multistep [1] 55/19 Murgolo [4] 67/14 86/1 86/13 88/5 must [7] 34/5 43/14 50/3 52/4 53/9 78/10 78/11 my [28] 5/24 13/15 14/17 15/21 22/11 24/5 24/13 34/7 40/2 46/21 47/2 47/12 48/7 48/11 50/16 53/6 54/20 58/21 58/21 59/2 62/20 70/5 70/14 70/17 71/2 103/1 106/4 106/5 Myers [1] 55/22	new [6] 11/5 14/22 41/19 41/22 41/22 50/22 newscast [1] 4/8 newspaper [1] 13/11 newspapers [4] 4/9 4/10 13/18 69/24 next [8] 2/12 5/14 63/16 69/25 76/17 105/11 105/13 106/9 nexus [2] 32/3 32/21 night [3] 40/2 40/2 40/25 nine [1] 78/6 no [111] nobody [2] 21/11 75/11 noise [1] 32/24 nominated [2] 45/4 45/8 non [1] 79/14 non-movant's [1] 79/14 none [4] 37/2 42/11 53/1 60/17 nor [4] 6/25 21/12 53/17 76/1 Norton [1] 80/14 not [190] notable [1] 8/15 note [2] 78/7 93/1 noted [1] 99/25 notes [3] 1/25 8/18 58/21 nothing [14] 8/4 14/20 16/21 42/2 42/3 58/1 68/12 69/11 69/24 70/1 73/6 80/23 88/3 88/12 notified [1] 100/5 noting [1] 50/5 notwithstanding [2] 59/15 76/22 November [2] 14/5 81/7 now [57] 2/2 2/4 2/24 3/3 9/14 11/18 12/6 12/22 14/1 16/12 17/2 20/11 26/3 26/7 28/2 29/12 29/15 30/6 30/22 32/23 38/2 39/23 41/11 44/11 47/11 50/5 52/10 52/15 53/2 59/8 60/25 61/19 72/4 75/21 76/14 76/16 77/4 77/19 78/13 79/6 80/13 80/25 81/10 81/11 86/19 88/15 88/21 94/18 96/11 97/13 100/10 100/13 103/21 104/17 104/19 105/5 106/19 nuances [2] 65/6 65/18 number [20] 2/3 10/3 18/7 27/9 28/10 36/2 36/5 37/22 41/1 41/3 43/10 49/17 50/6 53/11 60/18 60/22 60/22 69/14 82/5 86/16 numbers [2] 21/6 105/9 NW [1] 1/15
	O	
	O'Neill [1] 1/20 objected [2] 46/24 98/18 objections [1] 89/16 objectively [1] 23/11 obligation [4] 49/7 52/25 89/4 95/7 obligations [1] 25/6 obligatory [1] 52/19 obvious [2] 101/12 101/13 obviously [17] 5/16 9/6 10/16 12/2 13/17 13/18 13/20 21/15 24/22 26/9 58/19 65/22 66/12 77/8 81/4 81/7 84/4 occurred [2] 13/13 30/14 October [31] 4/6 7/19 8/13 9/22 9/23 13/7 13/9 13/14 13/22 14/2 19/23 20/6 21/20 24/24 26/12 26/12 26/15 30/13 35/14 37/1 49/15 66/24 68/22 85/3 93/13 97/25 98/7 98/11 98/13 98/21 99/5 October 10th [4] 13/9 13/14 20/6 68/22 October 13 [1] 98/21 October 13th [3] 13/22 21/20 26/15 October 2001 [1] 49/15 October 24th [2] 24/24 66/24 October 29th [1] 26/12 October 9th [5] 13/7 19/23 37/1 98/11	

<p>October 9th... [1] 98/13 odds [1] 10/22 off [6] 19/25 20/14 24/8 29/16 67/24 87/5 offend [1] 24/11 offensive [1] 23/21 offer [2] 19/17 105/25 offered [2] 103/23 104/2 office [3] 21/14 71/13 83/1 officer [5] 7/20 9/9 27/17 27/18 85/15 officers [7] 5/5 11/21 16/17 64/5 86/9 98/17 98/22 official [21] 1/24 33/13 37/23 37/24 48/17 58/13 58/17 67/18 69/5 71/3 72/10 73/15 74/21 76/9 76/11 77/10 80/9 95/24 97/2 103/3 108/9 officially [2] 77/3 94/15 officials [19] 5/4 5/16 6/7 6/17 11/9 75/16 78/22 82/6 83/23 84/10 84/24 88/11 92/4 92/5 92/10 92/12 97/11 98/6 98/22 often [2] 11/17 96/22 oh [3] 11/4 65/25 68/19 okay [22] 3/9 3/22 5/12 10/5 13/8 13/10 19/8 19/20 25/17 27/12 33/2 33/22 38/14 39/8 40/22 41/20 41/21 42/8 43/11 58/7 62/25 64/3 on [161] once [2] 7/25 21/15 one [55] 4/7 4/24 4/24 6/16 6/25 8/11 11/22 16/22 17/10 18/3 24/6 29/9 29/20 29/21 30/1 30/4 31/14 36/1 36/2 37/22 41/7 46/19 46/23 48/4 48/10 51/6 51/14 53/16 58/10 60/9 61/21 62/17 62/18 62/20 64/15 65/19 65/25 67/20 67/22 71/4 71/23 72/6 78/13 83/16 83/17 87/13 87/16 88/3 88/9 88/9 98/20 101/12 101/12 101/16 106/14 ones [4] 11/17 89/2 101/12 101/13 ongoing [4] 30/19 35/14 86/23 87/21 only [39] 4/16 5/25 6/1 6/2 6/4 7/7 9/2 9/2 19/9 24/1 25/1 27/24 28/16 29/11 30/11 31/10 35/6 42/25 45/1 47/18 57/16 69/10 69/22 71/9 72/6 73/7 73/7 73/11 74/2 80/20 81/3 86/11 91/9 91/15 92/3 100/19 102/1 103/5 103/11 open [4] 6/5 36/9 70/2 99/4 operate [1] 78/15 operation [4] 34/6 77/17 93/5 94/24 operational [2] 16/17 88/4 operationally [1] 78/17 operations [1] 95/14 operative [1] 53/23 opinion [2] 48/8 48/11 opinions [1] 21/4 oppose [1] 70/7 opposed [4] 22/2 30/4 90/1 103/4 option [2] 14/14 53/18 or [138] orally [1] 48/9 order [10] 25/16 42/11 42/15 47/20 50/2 50/13 57/20 78/11 95/7 106/8 ordinary [1] 72/22 original [1] 51/1 Orrick [1] 79/23 other [44] 5/4 5/16 6/6 10/15 12/13 16/22 27/3 29/10 29/21 30/2 30/4 32/4 37/3 40/12 42/22 46/2 46/4 47/24 49/24 50/10 52/7 56/1 64/5 64/5 65/20 67/20 70/21 71/6 73/21 74/11 75/2 75/16 78/20 79/19 86/6 86/11 88/21 91/4 91/23 95/22 96/18 98/3 98/6 100/11 others [5] 6/23 9/4 21/1 53/11 71/24</p>	<p>otherwise [3] 102/25 105/23 106/9 ought [2] 33/1 105/3 our [13] 6/20 7/13 7/17 21/4 25/6 26/21 43/19 51/6 51/18 55/5 59/18 67/6 81/7 ourselves [4] 63/21 63/22 75/5 75/6 out [52] 3/2 5/9 7/11 7/13 14/17 17/8 17/16 17/18 17/20 17/20 18/8 21/3 21/4 22/8 23/20 24/24 27/13 27/16 29/3 31/5 31/25 33/24 35/23 37/1 37/4 37/12 40/1 42/10 46/6 47/9 47/19 50/1 50/15 50/20 51/4 51/9 59/3 63/23 64/6 64/21 67/4 71/9 71/14 71/19 72/20 75/8 80/10 81/25 87/3 87/5 88/8 105/6 out-of [1] 17/20 out-of-pocket [1] 17/20 outfits [1] 28/11 outline [1] 25/8 outlined [2] 19/21 89/10 outside [3] 60/2 61/19 96/23 outweigh [4] 34/5 85/18 90/10 90/15 outweighed [2] 34/11 37/25 outweighs [1] 90/5 over [8] 19/15 19/16 20/18 21/3 59/12 62/3 73/3 99/8 overcome [1] 88/24 overlap [1] 36/22 overruled [2] 72/16 73/1 own [7] 14/17 55/11 55/11 74/19 79/1 95/25 103/1</p>	<p>106/7 per [1] 17/14 perceived [3] 67/9 74/8 89/12 perception [1] 71/24 perform [1] 82/17 performance [4] 77/11 77/16 79/21 94/23 perhaps [5] 3/15 24/5 39/15 101/20 102/2 period [7] 20/10 20/13 22/12 22/14 87/5 97/25 105/24 peripheral [1] 24/14 periphery [1] 7/5 permission [2] 28/19 28/21 permitted [4] 16/14 25/19 80/10 93/15 person [9] 27/2 27/3 27/24 34/24 46/4 49/24 50/4 50/11 71/25 personal [17] 6/25 7/2 9/16 21/8 21/10 21/11 26/1 26/8 73/21 77/15 94/22 98/15 98/15 99/14 102/1 103/1 103/4 personnel [6] 4/4 10/9 20/22 45/7 74/12 76/6 perspective [5] 12/6 29/21 30/2 34/7 34/14 pertains [1] 42/14 PETER [2] 1/11 75/18 phone [1] 13/20 pick [1] 53/3 Pickering [7] 90/11 91/3 92/2 94/17 94/19 100/18 102/14 Pickery [1] 55/20 pitch [1] 16/20 PJM [2] 1/5 2/3 place [12] 35/5 36/9 45/15 49/15 61/2 63/4 74/5 74/14 77/7 88/19 92/1 101/11 placed [1] 52/11 plaintiff [68] 1/5 1/14 2/7 2/7 2/9 3/5 3/11 13/5 21/9 22/8 27/19 28/18 30/19 30/22 31/1 31/8 32/8 32/14 33/1 43/13 46/12 49/1 49/8 52/20 53/18 54/6 54/25 56/12 58/14 66/17 67/1 67/15 67/21 71/21 73/4 73/24 75/10 75/14 75/23 76/8 76/11 76/21 79/18 82/5 86/25 87/5 87/8 87/21 90/13 92/23 93/11 94/4 94/20 95/6 95/15 95/21 95/23 96/18 97/18 99/15 103/3 103/8 103/17 103/17 103/23 104/25 106/16 106/23 plaintiffs [27] 3/3 24/25 34/6 34/14 35/1 43/9 51/13 67/13 81/5 82/1 82/7 82/12 82/13 82/16 83/5 92/2 92/7 92/18 93/7 93/24 94/18 96/12 102/16 102/18 102/20 102/21 103/5 planning [3] 25/20 93/17 99/12 platter [1] 14/8 play [4] 11/6 33/25 34/1 101/1 plays [1] 73/3 pleadings [1] 55/5 please [3] 26/19 44/1 62/19 plug [1] 10/23 plus [1] 69/15 pocket [1] 17/20 Poe [1] 53/14 point [34] 5/11 12/11 18/3 25/14 32/6 32/11 32/23 35/8 38/16 40/3 46/17 48/13 53/11 53/21 55/14 58/6 58/25 60/16 65/13 65/25 70/22 71/5 71/8 71/9 71/14 73/16 81/1 81/25 85/9 87/11 89/10 103/2 105/10 105/20 pointed [1] 93/14 points [3] 2/24 3/9 95/23 policies [1] 43/17 policy [14] 42/11 42/15 43/15 45/2 45/17 47/17 47/19 48/2 50/2 50/13 61/20 92/8 94/4 103/19</p>
	<p>P P-R-O-C-E-E-D-I-N-G-S [1] 2/1 p.m [2] 1/9 107/4 page [18] 41/8 41/11 41/13 41/15 41/17 42/17 44/2 50/18 51/13 51/15 51/16 51/18 63/2 63/16 70/17 82/3 82/21 83/25 page 31 [1] 41/15 pages [1] 63/10 paid [7] 11/1 11/11 11/20 12/2 13/25 16/4 81/18 pain [1] 37/6 Panalpina [1] 79/12 paper [1] 31/18 paragraph [8] 8/15 42/6 63/12 82/4 82/9 82/13 82/16 99/9 paragraphs [4] 81/6 81/8 81/10 81/13 paramount [1] 58/19 part [21] 3/1 4/8 11/13 19/20 20/17 23/23 31/20 32/18 32/22 34/19 49/8 61/21 61/22 62/16 69/23 70/11 76/1 76/12 80/25 100/24 103/10 participated [1] 88/9 particular [7] 15/10 15/12 52/24 62/24 69/9 70/10 78/5 particularized [1] 90/4 particularly [7] 7/1 59/5 76/6 85/14 91/1 91/6 97/23 parties [5] 30/13 76/18 85/5 89/17 103/6 parties' [1] 26/13 Partners [1] 53/11 partnership [1] 25/6 parts [1] 48/6 party [4] 15/16 39/17 96/8 99/23 pass [1] 94/13 past [2] 30/2 93/13 path [1] 87/10 pattern [1] 25/5 PC [1] 1/15 Pentagon [2] 20/21 20/22 people [24] 28/13 56/5 68/25 69/17 70/2 75/11 75/12 76/23 84/3 85/15 85/15 85/19 85/23 85/24 86/11 95/21 100/14 101/1 101/1 101/3 101/6 102/2 104/20</p>	

<p>P</p> <p>portion [1] 98/25 pose [1] 29/7 posing [1] 34/17 posit [1] 29/18 positing [1] 31/11 position [23] 7/11 16/3 16/8 26/25 31/9 40/11 40/14 56/25 59/18 67/16 69/5 73/8 74/23 79/14 85/2 91/10 91/16 94/11 94/20 96/3 97/20 100/6 102/20 positions [3] 27/15 72/18 76/18 possibility [1] 103/11 possible [3] 35/25 56/3 99/18 post [13] 4/9 22/5 50/7 63/2 63/14 63/15 65/19 71/6 74/2 84/7 86/19 91/14 98/8 posture [1] 2/21 potential [10] 71/15 91/9 92/16 95/9 95/9 95/13 95/17 96/17 101/10 105/16 practice [1] 45/24 preceded [2] 10/10 70/14 precipitates [1] 26/11 precisely [1] 73/17 predates [1] 102/8 predicate [2] 63/25 97/13 predictions [2] 87/24 90/1 preference [1] 3/21 preparation [1] 106/2 prepare [1] 105/2 prepared [3] 20/19 77/1 96/3 preparedness [9] 4/3 6/20 9/6 55/1 55/7 56/2 74/7 92/3 97/22 preponderance [2] 57/2 57/10 presence [1] 99/8 present [5] 28/22 39/1 51/7 60/13 82/14 presentation [1] 5/10 president [13] 14/7 14/11 15/2 15/4 23/24 32/14 59/12 59/14 67/3 76/8 93/12 95/16 99/6 press [38] 4/9 5/12 5/15 7/16 7/21 13/13 13/17 13/20 13/21 20/5 20/6 20/25 21/1 21/2 21/2 25/23 27/24 28/23 63/19 66/2 69/24 75/3 75/24 82/8 82/16 83/5 84/23 90/19 91/8 91/23 92/19 93/19 96/15 96/16 97/7 98/1 98/8 98/13 pressure [3] 21/5 24/22 86/21 Presumably [2] 9/25 64/21 prevail [3] 78/11 95/8 103/12 prevent [2] 77/10 89/4 previously [1] 25/7 prima [1] 38/5 primarily [2] 70/25 71/1 primary [7] 6/7 33/6 49/2 71/4 94/8 96/21 99/1 print [1] 27/23 prior [5] 29/21 36/18 36/23 59/16 104/11 private [12] 8/20 25/6 26/23 27/2 27/14 59/3 59/15 65/6 65/16 66/22 76/22 95/2 privately [1] 77/2 probably [6] 8/3 11/19 12/20 12/20 37/2 47/10 problem [2] 3/24 31/20 problematic [3] 15/10 30/16 33/5 procedural [5] 38/12 39/4 81/5 81/13 81/22 procedures [2] 43/15 43/18 proceed [3] 19/1 86/23 87/7 proceeding [1] 89/5 proceedings [3] 1/11 59/22 108/3 proceeds [1] 25/8 process [1] 16/12 produce [1] 64/9 produced [1] 78/13</p>	<p>prohibited [1] 31/12 prohibition [1] 94/6 promised [1] 88/22 promoting [1] 89/21 prong [5] 15/5 15/15 35/3 37/8 90/14 prongs [1] 33/25 prop [1] 76/17 proper [1] 47/9 properly [1] 98/2 proposal [1] 57/15 proposed [1] 32/20 propositions [1] 100/21 prosecution [2] 59/25 72/15 prosecutor [1] 72/12 prospectively [1] 37/15 protect [5] 63/5 63/21 74/5 74/15 75/6 protected [7] 29/22 56/13 57/3 57/19 77/9 100/15 100/17 protection [5] 49/10 70/25 74/8 74/10 101/15 protective [8] 74/10 74/11 90/20 90/23 91/10 92/6 98/3 98/3 prove [2] 37/8 56/13 proves [1] 66/21 provide [3] 26/16 74/10 85/12 provided [3] 52/3 79/6 97/25 provides [1] 50/8 providing [1] 86/11 provision [1] 40/17 provisions [1] 40/16 proximity [1] 20/20 public [50] 8/22 13/4 13/6 21/19 22/3 22/6 25/6 25/20 25/24 27/3 28/4 37/21 37/24 55/3 55/8 55/12 55/25 56/4 56/5 56/7 58/10 58/12 58/16 65/7 65/7 71/15 72/6 72/7 72/9 73/21 76/19 78/7 78/10 80/17 80/19 90/3 90/10 90/24 90/25 92/11 92/16 93/3 93/16 94/24 95/1 95/4 97/4 97/21 99/11 103/19 public's [1] 90/10 public/private [1] 25/6 publicly [1] 77/3 pulled [1] 85/11 punish [1] 14/17 punishing [1] 37/13 punishment [9] 14/15 14/19 15/25 16/10 30/22 30/25 42/2 88/22 100/3 purchased [3] 60/7 60/25 98/4 purely [1] 77/21 purpose [3] 23/24 73/21 97/15 purposes [2] 39/1 101/19 pursue [4] 43/1 52/20 52/25 53/18 push [1] 66/9 pushing [2] 14/10 60/3 put [15] 8/3 11/14 23/5 24/12 63/4 63/23 64/18 66/1 72/13 72/15 74/5 74/14 75/7 91/22 105/9</p> <p>Q</p> <p>qualifications [1] 45/7 quality [1] 101/4 question [29] 11/15 19/22 19/23 23/17 26/6 26/14 29/7 34/10 37/14 49/14 49/14 55/9 56/2 57/16 57/23 58/11 66/22 67/1 67/8 67/21 68/4 68/13 76/23 85/22 87/16 93/10 103/24 104/10 106/19 questioned [1] 92/7 questioning [1] 26/7 questions [6] 16/23 19/25 81/4 85/13 87/6 87/17 quick [1] 6/16 quit [1] 31/24 quite [7] 20/12 27/6 49/18 54/10 56/18</p>	<p>67/20 85/21 quote [43] 49/22 50/3 50/4 52/2 55/24 63/15 63/17 64/14 71/2 74/4 74/13 74/15 74/17 74/18 74/19 74/25 75/1 75/5 75/6 75/7 75/8 75/9 75/10 75/11 75/11 75/13 78/12 80/7 80/8 93/14 96/7 96/9 98/20 98/20 99/10 99/10 99/11 99/22 99/24 99/25 100/1 100/2 100/7 quoted [5] 15/9 51/6 63/1 91/14 98/6 quotes [5] 4/25 63/10 70/23 78/10 79/7</p> <p>R</p> <p>raise [2] 87/16 87/17 raised [6] 11/8 20/7 36/23 67/21 69/19 69/20 raises [1] 103/24 raising [2] 56/6 66/12 ramifications [1] 100/10 rank [1] 95/20 ranks [3] 78/18 90/7 102/4 rather [3] 30/8 32/3 104/16 re [1] 12/18 re-reading [1] 12/18 reached [1] 57/3 react [1] 85/17 reaction [1] 54/15 read [5] 44/15 50/19 51/3 52/22 61/17 readiness [2] 25/24 55/1 reading [6] 8/12 11/19 12/18 29/15 31/18 79/16 reads [1] 52/2 ready [1] 43/5 real [6] 28/17 77/4 78/23 82/8 101/22 101/22 realize [1] 35/7 really [21] 2/20 9/15 13/25 15/10 29/13 29/25 33/6 34/16 37/17 37/21 48/3 54/5 54/24 56/9 65/15 76/17 86/20 88/15 96/13 97/13 100/25 reason [9] 24/6 35/22 60/10 61/16 84/9 91/10 91/16 93/21 96/2 reasonable [5] 23/12 54/23 78/16 95/9 101/11 reasonably [1] 3/6 reasons [3] 21/9 24/6 98/15 recall [12] 5/20 6/9 9/20 12/20 12/21 15/7 16/19 18/14 33/14 39/15 59/20 65/22 recalled [3] 6/11 47/1 86/2 recalls [1] 6/10 receive [1] 17/21 received [4] 7/25 9/24 17/22 54/16 recent [1] 25/8 Recess [2] 53/4 107/4 recitation [2] 48/13 55/17 recited [2] 73/16 97/14 recognized [3] 27/16 68/2 69/16 recollection [7] 5/24 22/11 26/13 47/2 58/21 62/20 70/14 recollections [1] 7/8 recommended [1] 72/14 reconcile [1] 15/21 record [24] 2/25 3/18 4/8 7/3 7/8 16/21 28/7 35/19 36/25 38/17 57/24 60/6 60/15 64/4 69/10 71/5 71/11 78/15 80/23 86/16 88/3 88/20 88/23 108/3 recourse [1] 53/10 recovery [1] 105/16 red [2] 80/8 88/12 reduce [1] 82/6 reduction [1] 95/17 reference [6] 2/23 9/25 23/7 25/1 64/15 95/19</p>
--	--	---

R		
<p>referenced [1] 79/11 referencing [1] 57/15 referring [4] 31/10 41/14 69/1 99/9 refers [4] 8/23 49/13 49/20 78/4 reflect [3] 14/21 16/13 88/23 reflected [2] 78/25 84/14 reflects [3] 15/1 16/21 88/20 refusal [2] 32/4 35/21 refuse [1] 35/17 refused [2] 35/23 57/17 refusing [1] 35/1 reg [2] 18/1 47/18 regard [17] 24/2 34/19 36/17 48/24 52/14 54/19 54/20 57/5 76/6 82/11 89/25 91/5 92/5 95/13 102/21 102/23 104/18 regarding [23] 20/1 22/9 22/20 23/8 25/23 26/1 26/17 45/2 54/14 55/7 82/5 87/17 89/11 90/19 90/22 90/23 92/2 94/5 95/17 99/7 99/17 101/3 101/4 regular [4] 3/1 5/22 10/22 77/17 regulation [10] 42/10 42/13 46/6 46/15 47/13 47/19 50/1 50/13 77/23 100/4 regulations [1] 18/14 reinstatement [4] 18/2 99/18 100/11 106/17 reiterated [1] 6/19 reiterating [1] 16/8 reject [1] 19/18 rejected [1] 80/7 rejects [1] 52/21 rejoin [1] 3/5 related [5] 29/13 29/25 66/3 74/9 76/4 relates [1] 30/1 relating [1] 90/2 relation [1] 92/9 relationship [17] 25/7 25/10 83/2 84/15 84/24 85/5 85/10 86/13 87/2 92/19 93/5 93/8 93/10 93/14 93/21 97/7 97/10 relationships [6] 77/14 81/15 82/19 91/19 94/23 102/2 relative [4] 30/6 54/25 76/18 78/6 release [1] 7/21 relevant [6] 3/9 11/7 42/25 53/21 70/8 92/1 rely [4] 77/20 77/21 106/4 106/5 relying [1] 23/22 remain [2] 38/9 103/12 remained [1] 17/23 remains [1] 33/4 remark [10] 12/10 24/10 24/10 36/5 57/4 57/23 57/25 58/2 74/13 106/17 remarks [11] 4/6 7/23 53/5 54/20 62/23 62/24 73/14 73/15 73/23 93/7 98/14 remedies [7] 17/4 30/3 39/12 43/1 43/2 48/24 49/1 remedy [9] 18/5 53/1 53/9 53/17 53/17 53/17 53/19 53/20 53/23 remember [1] 33/23 remembers [1] 12/17 removal [4] 42/21 45/19 52/7 52/15 removed [1] 56/15 removing [1] 54/6 reorder [1] 48/11 reply [2] 46/21 105/25 report [1] 25/25 reporter [14] 1/24 27/20 28/8 64/18 64/21 68/5 68/7 68/8 68/13 68/16 74/18 91/14 108/1 108/9 reporter's [1] 74/19 reporters [6] 4/24 21/6 60/10 67/22 70/1 96/22</p>	<p>reports [1] 5/14 reprehensible [1] 26/22 represent [2] 71/12 104/11 representative [1] 7/12 representatives [1] 6/7 represented [1] 71/12 representing [1] 85/2 reprimand [1] 68/13 reprimanded [1] 68/6 reprinted [1] 4/10 reputation [2] 67/17 82/14 require [1] 56/13 required [5] 17/3 73/7 100/17 101/7 101/8 requirement [4] 39/16 39/20 40/12 54/1 requiring [1] 105/18 rescue [55] 4/17 21/15 21/23 29/5 40/15 41/23 42/9 43/14 43/21 44/5 44/6 44/12 44/16 44/18 44/24 44/24 45/2 45/16 46/3 46/4 46/6 46/16 47/3 47/7 49/9 49/23 49/23 49/25 50/8 50/9 50/10 50/12 52/6 55/2 56/5 60/11 66/3 66/4 66/7 66/24 69/14 69/18 74/12 74/18 75/19 77/20 83/6 84/24 91/24 92/5 93/6 98/2 98/17 98/23 101/19 rescuer [3] 49/24 51/12 52/5 resident [1] 10/20 residents [1] 101/17 resistance [1] 92/23 resolvable [1] 2/23 resolve [2] 38/21 55/20 resources [1] 68/24 respect [8] 20/8 28/17 57/13 57/23 68/13 74/9 87/20 98/19 respective [1] 35/1 respond [14] 7/15 24/22 28/2 38/8 43/5 56/22 69/8 84/6 86/22 91/9 91/13 96/17 97/22 105/18 responded [2] 5/16 20/22 response [22] 14/16 15/23 15/24 23/12 23/13 25/21 26/17 37/19 43/4 66/16 81/11 81/22 82/1 83/24 87/6 87/22 93/17 96/22 98/12 99/12 105/19 105/25 responsibilities [2] 82/18 95/3 responsibility [2] 94/2 101/3 responsible [2] 85/16 101/2 rest [1] 32/24 restraint [4] 29/21 36/18 36/24 104/11 restrict [1] 31/23 restriction [1] 77/9 rests [1] 89/15 result [7] 5/3 20/4 58/5 60/1 93/7 97/21 101/14 resulting [1] 4/4 results [1] 60/3 resume [1] 96/3 retain [1] 76/24 retaliated [2] 29/18 29/19 retaliation [5] 29/10 29/22 34/21 55/19 55/20 retirement [2] 17/14 17/15 retrospectively [2] 34/20 34/22 reveal [1] 60/16 review [2] 55/10 91/1 reviewing [1] 100/19 revisit [1] 56/8 rhetorically [1] 34/17 ridiculous [1] 101/16 right [91] 2/6 2/12 2/16 3/2 4/14 5/3 8/9 9/11 9/13 11/6 12/5 13/4 13/12 15/23 18/13 18/25 19/14 22/17 23/19 24/5 24/8 24/19 24/20 27/3 28/14 29/7 29/12 30/15 31/19 32/1 32/16 32/22 33/8 35/25 37/10</p>	<p>37/11 38/25 39/3 39/13 39/22 40/9 40/19 41/6 41/10 41/20 41/20 43/22 44/1 45/13 45/17 46/11 46/13 46/17 47/4 48/4 50/17 50/17 51/3 51/23 53/2 53/3 54/4 54/9 54/13 55/10 55/13 56/24 57/8 57/12 58/8 60/18 61/6 62/23 63/8 64/12 64/17 64/20 65/1 65/3 72/4 76/16 80/15 81/23 83/20 85/18 87/22 89/7 89/13 104/17 106/25 107/2 rightly [1] 46/25 rights [15] 15/21 16/1 18/24 19/1 36/3 39/2 46/15 48/19 48/21 53/25 77/5 77/8 89/15 103/18 103/25 rise [1] 85/16 risk [1] 91/22 road [1] 86/20 Robert [1] 75/20 Rockville [1] 75/16 role [7] 16/11 59/16 71/1 71/1 71/25 81/20 95/5 Romer [13] 7/20 8/2 8/13 9/8 12/9 12/15 13/1 13/1 21/21 24/17 26/12 26/18 78/22 room [1] 105/20 roughly [1] 91/2 round [1] 106/10 routed [2] 7/20 8/13 royal [1] 37/6 RPR [1] 108/8 rule [3] 53/8 53/14 53/15 ruled [1] 35/4 ruling [2] 35/9 53/6</p> <p>S</p> <p>safety [11] 4/3 66/3 78/18 89/22 90/3 90/5 91/5 92/16 93/3 97/4 100/13 said [62] 6/13 6/23 7/13 9/5 9/21 12/8 12/9 12/21 12/22 13/23 15/20 16/9 16/9 26/10 28/16 29/20 30/21 31/1 31/8 31/21 31/24 31/25 32/9 33/4 34/23 36/3 36/17 37/19 45/20 48/3 54/7 54/11 54/25 63/2 64/13 64/15 68/7 68/8 68/23 69/1 69/17 69/17 72/3 74/3 79/1 80/2 80/18 82/11 83/17 83/17 84/9 84/9 90/3 93/2 93/11 93/12 95/21 95/23 103/3 104/14 105/5 106/11 salary [1] 17/10 same [9] 2/24 10/14 21/1 57/3 58/23 59/10 75/14 75/15 90/1 satisfied [2] 102/15 102/16 Saturday [2] 5/20 13/22 saw [1] 88/7 say [42] 2/19 6/22 7/15 7/16 11/18 16/14 21/25 28/13 30/1 30/6 30/12 34/11 35/2 42/2 43/8 55/13 56/16 62/8 62/14 67/4 67/25 68/17 68/19 71/23 72/23 72/24 74/25 76/13 76/14 77/1 81/3 82/13 83/11 90/24 100/19 100/20 101/17 101/21 102/19 105/11 105/24 106/8 saying [35] 5/17 6/20 6/24 6/24 15/4 15/19 19/5 25/15 26/5 26/19 27/2 30/18 31/2 31/7 32/8 35/17 40/17 40/21 44/8 46/24 57/25 58/4 61/18 62/5 62/7 65/17 69/25 71/2 76/20 80/3 88/21 90/4 97/2 99/9 104/14 says [27] 15/25 21/11 23/14 25/4 26/3 30/7 44/15 45/18 46/3 46/8 47/18 49/21 52/16 61/14 63/5 63/20 65/16 68/17 68/25 73/6 80/15 82/4 82/10 87/8 94/4 94/6 100/11 scale [3] 76/16 76/16 80/21 scare [2] 20/17 92/11 scene [1] 11/17 scenes [1] 12/2</p>

S		
scheduled [1] 20/4	significantly [1] 7/6	speaker's [1] 77/17
SCHMIDT [8] 1/19 1/20 2/14 40/6 56/17	silence [1] 80/8	speaking [24] 4/23 7/13 7/17 14/17 27/16
81/23 89/8 105/17	silenced [1] 80/16	31/12 36/7 58/12 58/12 58/15 58/16 59/3
scintilla [2] 79/13 88/24	similar [3] 5/4 33/12 93/23	59/6 60/12 65/18 66/21 67/1 67/18 72/8
scope [1] 76/3	simply [2] 71/19 102/14	72/10 74/21 75/23 94/14 95/24
search [1] 72/14	since [3] 47/1 66/5 72/21	speaks [2] 58/10 94/12
seat [1] 2/16	single [3] 22/8 50/23 50/25	Special [1] 54/3
second [3] 30/7 35/3 48/4	sir [4] 2/11 4/13 55/15 107/1	specific [9] 55/18 66/14 74/3 79/11 79/17
Secondarily [1] 78/2	sit [2] 105/6 106/21	85/13 90/1 95/12 95/19
secondly [1] 37/22	sitting [1] 12/17	specifically [15] 8/23 23/4 28/24 42/22
section [12] 41/8 42/6 49/4 49/5 49/13	situation [5] 20/11 25/14 67/14 92/24	45/18 52/8 53/6 64/9 67/14 74/9 76/4
49/16 49/17 49/19 49/19 50/6 52/2 63/10	101/2	81/8 82/3 96/6 98/7
security [1] 97/4	situations [1] 53/15	specificity [1] 79/20
see [16] 3/1 3/17 9/25 10/1 11/12 15/13	six [7] 7/8 79/2 88/21 96/4 99/20 104/2	specify [1] 61/22
24/15 27/21 34/18 50/13 50/14 63/11	104/3	speculating [1] 101/6
65/16 67/25 68/7 105/15	six-month [4] 96/4 99/20 104/2 104/3	speculation [2] 97/8 100/24
seeking [2] 18/2 100/11	sky [1] 69/21	speculative [9] 77/21 79/8 83/20 89/16
seem [1] 72/22	slightly [2] 36/1 104/5	95/15 96/13 101/19 101/20 101/21
seemed [2] 9/18 14/10	smart [1] 69/22	speech [29] 15/21 22/24 23/16 24/18
seems [5] 29/8 29/11 29/16 102/9	so [104] 2/22 2/23 3/1 3/11 3/17 3/22 6/4	31/23 37/13 37/13 37/16 39/2 46/11
105/21	6/8 7/6 9/22 11/25 12/2 13/20 15/14 17/7	46/14 55/24 55/25 56/13 56/16 57/16
seen [2] 88/9 103/13	20/14 20/15 21/10 21/24 24/21 25/13	57/19 70/24 70/25 76/24 77/8 77/16
segregated [1] 65/5	26/4 27/6 27/21 28/5 29/6 29/24 30/2	77/23 78/7 78/9 79/24 80/18 103/25
selected [2] 46/22 79/7	30/4 32/2 33/5 35/15 37/16 37/19 38/1	104/9
sending [1] 10/7	38/1 38/2 38/4 38/19 39/25 40/10 42/19	spend [1] 105/2
sends [2] 16/2 16/7	42/24 46/11 46/25 48/1 48/8 48/12 48/12	spoke [5] 4/7 4/8 7/11 64/5 99/3
sense [5] 59/9 61/8 70/12 70/20 74/6	49/6 51/3 51/7 52/18 54/8 54/23 56/1	spoken [4] 29/10 37/1 37/23 37/24
sensitivity [1] 91/4	56/7 56/7 57/12 57/17 57/25 58/8 58/14	spokesman [4] 93/15 93/18 94/8 99/10
sent [10] 6/17 8/12 8/13 9/23 14/25 21/3	59/16 60/2 60/13 62/3 63/1 63/15 63/22	spokesperson [4] 25/19 25/22 26/21
26/18 98/15 99/5 99/18	66/5 66/7 69/3 70/5 71/16 73/2 73/11	67/7
sentence [2] 8/16 71/23	74/13 75/7 76/4 76/25 77/23 79/3 80/8	sponte [1] 39/16
sentiments [2] 75/14 75/15	81/6 81/19 82/21 84/9 86/5 88/1 90/1	sporadic [1] 7/7
separate [7] 22/6 29/13 29/14 31/9 34/25	91/15 91/19 96/2 100/17 102/4 102/11	squad [6] 4/17 60/12 69/14 69/18 74/18
67/16 94/11	103/14 104/17 104/21 105/1 106/11	75/19
separately [2] 103/20 106/15	106/19 106/23	squash [1] 85/18
September [1] 97/24	social [1] 14/2	Stacey [1] 78/2
sequentially [1] 48/7	some [55] 2/24 6/14 7/4 10/16 10/24	staff [3] 21/15 86/7 86/8
serious [5] 44/3 47/5 47/6 96/2 104/23	11/7 11/11 12/3 14/21 14/22 18/14 22/11	stage [1] 19/12
seriousness [1] 96/1	23/7 24/22 25/8 28/6 29/8 29/13 29/22	stake [1] 18/8
serve [2] 98/16 99/20	32/9 32/13 48/6 52/11 52/18 53/5 59/8	stance [1] 66/8
service [25] 21/19 22/7 25/25 27/9 27/15	59/21 62/23 64/5 65/8 66/9 71/2 72/10	standard [1] 87/25
29/1 31/9 49/23 50/9 66/4 66/5 67/17	72/18 73/21 76/24 77/9 78/4 79/8 79/9	standards [2] 33/25 37/16
68/2 68/3 68/8 69/6 84/2 85/8 86/10	80/10 80/12 80/13 80/25 81/11 81/22	standing [1] 79/8
92/14 92/21 93/6 96/19 98/17 98/23	85/3 87/5 87/6 93/23 99/7 100/8 103/2	standpoint [10] 6/3 11/7 12/7 13/11 17/7
service's [1] 98/2	103/11 105/20	34/2 34/24 70/13 81/5 102/17
services [5] 55/2 66/4 66/7 86/11 91/24	somebody [1] 8/21	stands [2] 13/18 104/17
session [1] 16/20	somehow [13] 58/5 77/16 80/12 97/3	Stanton [2] 75/17 98/10
set [6] 27/11 32/8 41/24 44/16 44/22	97/12 100/18 101/13 101/16 101/18	start [3] 3/11 38/20 58/14
44/23	101/24 101/25 102/8 104/19	Starting [1] 63/12
sets [1] 33/25	someone [8] 22/8 23/14 27/16 66/6	starts [2] 63/14 100/13
settle [2] 105/18 106/9	71/15 85/14 88/6 104/13	state [10] 11/5 15/22 16/1 17/8 18/11
settlement [3] 105/14 105/22 106/21	someone's [1] 46/10	39/17 46/14 48/23 100/12 106/15
settling [1] 104/23	something [19] 2/20 16/14 30/6 36/8	stated [8] 36/11 36/16 53/10 76/21 98/14
seven [2] 7/9 51/15	38/16 39/14 45/21 54/17 56/22 60/22	98/19 99/16 100/3
several [5] 4/9 11/4 23/20 86/19 98/4	61/18 66/13 67/10 76/14 76/21 83/21	statement [33] 3/12 3/12 3/16 3/17 19/17
sexual [1] 23/7	87/4 87/8 101/17	21/7 21/17 22/9 22/20 24/3 27/1 29/22
shall [1] 46/8	somewhat [3] 30/12 59/11 62/2	30/8 31/11 32/20 54/20 58/1 69/9 69/10
she [1] 27/21	somewhere [1] 44/7	73/19 73/20 75/5 77/12 81/5 81/11 82/1
short [3] 30/22 61/23 78/24	sorry [15] 4/20 5/14 8/6 8/10 10/3 12/15	82/3 82/5 82/16 92/25 97/14 97/16
shortcut [2] 32/16 32/18	18/21 23/3 34/4 38/20 41/2 43/6 44/20	101/13
shortly [1] 72/17	63/7 64/1	statements [46] 2/25 13/5 13/6 19/21
should [8] 11/18 53/9 59/25 72/15 84/2	sort [7] 10/20 14/22 23/7 32/13 87/5 87/6	24/1 25/22 54/12 56/21 59/4 67/7 67/9
92/6 92/7 104/1	101/9	68/14 71/20 71/21 75/2 75/21 76/5 77/22
show [5] 57/2 77/9 88/2 94/15 100/18	sorts [1] 37/7	79/8 80/2 81/15 82/7 82/13 83/5 83/24
showing [4] 78/11 89/24 95/7 100/17	sound [1] 47/10	84/14 84/23 84/25 86/5 86/16 87/1 90/18
shown [2] 12/16 57/1	sounds [1] 22/24	90/19 91/7 91/23 92/15 92/19 93/24
shows [3] 42/18 78/15 95/8	source [1] 79/4	96/13 96/16 96/18 96/25 97/1 97/7 97/10
shying [1] 4/22	SOUTHERN [1] 1/2	101/21
side [1] 102/17	space [1] 26/3	STATES [4] 1/1 1/12 59/14 59/14
sides [2] 33/7 105/10	speak [19] 3/23 21/25 26/20 27/13 28/19	station [19] 10/8 10/8 10/12 10/13 11/14
significant [2] 20/13 99/25	28/21 29/3 29/12 30/8 31/7 34/12 35/18	25/2 26/3 27/20 28/9 61/2 61/3 61/4
	35/23 36/12 59/16 65/6 67/6 94/5 102/4	67/22 68/23 69/12 69/17 86/24 96/21
	speaker [1] 102/3	99/8

S		
<p>Station 20 [2] 10/8 25/2 Station 7 [3] 11/14 61/2 61/4 stations [1] 86/6 Statue [1] 53/25 status [1] 74/21 statute [3] 47/12 48/1 100/5 statutes [2] 18/14 39/24 stay [2] 14/9 65/12 STENOTYPE [1] 1/25 step [2] 6/16 56/12 Stephan [1] 67/23 Stephan's [1] 70/7 STEVEN [1] 1/14 still [11] 9/6 12/3 12/22 12/23 18/4 20/13 35/11 36/19 40/17 57/22 72/5 stipulation [2] 17/17 17/19 stock [1] 69/1 stoked [1] 102/9 stop [3] 43/3 84/1 92/13 stopping [1] 37/15 stored [2] 61/1 96/20 stories [1] 4/10 story [1] 70/11 straightforward [1] 3/25 street [2] 1/20 67/24 stresses [1] 95/6 stretched [1] 59/11 stricken [1] 64/5 strictly [1] 29/18 Strike [7] 2/19 2/20 81/1 100/23 104/18 104/18 106/12 strong [6] 76/12 76/25 89/24 95/7 100/17 103/6 stronger [1] 78/11 strongly [3] 102/19 104/22 106/23 structure [2] 29/2 94/7 style [1] 17/20 sua [1] 39/16 sub [3] 49/21 49/22 51/11 subject [3] 9/5 10/10 90/25 subjected [1] 104/2 subjective [1] 95/18 submit [7] 76/2 82/22 96/15 96/24 97/6 97/9 99/19 submitted [2] 40/2 75/25 subordinates [1] 87/16 subsection [1] 52/3 subsequent [1] 90/21 substantial [3] 54/6 90/9 95/9 substantially [2] 75/15 78/9 substantive [1] 81/22 substantively [2] 6/19 41/14 such [5] 45/19 45/19 47/25 50/4 73/13 sued [1] 48/18 sufficient [4] 54/21 59/1 60/18 83/4 suggest [4] 72/22 104/22 105/3 105/9 suggested [4] 42/3 76/8 97/24 101/10 suggestion [2] 97/5 102/10 suggests [1] 101/10 suitability [1] 101/4 Suite [2] 1/16 1/20 suits [33] 20/1 20/8 27/21 27/24 28/1 28/4 60/7 60/18 60/22 60/24 61/8 62/3 62/7 62/15 62/22 68/1 68/16 69/1 69/2 69/5 69/22 71/16 74/10 75/11 90/20 90/23 91/10 91/15 96/20 98/3 101/4 101/5 101/5 summary [27] 2/18 3/4 8/7 9/24 19/12 24/7 24/9 46/21 48/16 51/14 51/17 51/20 58/5 63/1 63/9 70/17 79/14 81/7 88/25 96/12 102/14 102/18 102/22 103/5 103/9</p>	<p>103/15 106/13 superiors [3] 77/13 85/15 91/21 supervisors [2] 72/16 94/21 supplies [1] 61/22 supply [1] 61/23 support [6] 6/22 36/13 79/9 79/13 79/25 80/23 supporting [1] 78/14 suppose [4] 36/13 36/15 59/10 106/8 supposed [4] 36/18 39/7 61/10 61/19 Supreme [4] 55/22 58/20 70/19 89/1 sure [11] 9/25 11/6 11/9 18/5 18/17 31/15 38/18 48/2 66/13 93/1 106/8 surprised [2] 16/10 62/2 surrounding [1] 61/7 suspect [1] 2/21 suspension [6] 42/21 52/7 52/15 96/4 99/20 104/3 switch [2] 19/14 19/16 sync [1] 70/21 system [3] 8/20 26/23 49/10</p> <p>T</p> <p>table [1] 88/13 tabulation [1] 19/11 tactic [1] 20/17 take [7] 6/16 35/13 49/9 53/2 68/5 104/20 106/2 taken [9] 22/13 22/14 25/3 26/1 37/19 40/11 40/14 49/15 99/1 takes [2] 47/5 74/23 taking [5] 37/3 67/21 68/6 68/13 83/2 talk [13] 5/20 9/7 17/6 17/24 30/2 30/5 48/15 56/11 58/10 65/13 76/16 88/6 92/13 talked [4] 41/7 57/14 79/19 83/3 talking [11] 12/10 41/9 41/25 42/12 61/19 70/17 74/6 74/7 91/2 100/16 104/15 talks [4] 10/14 10/14 42/25 63/16 targeting [1] 91/22 tarnished [2] 82/14 93/10 tax [2] 17/13 17/24 team [1] 96/22 technically [2] 18/4 26/19 telescope [1] 37/18 televised [1] 98/11 tell [11] 11/5 12/23 19/18 24/8 41/17 44/15 44/16 44/21 70/20 85/23 104/14 telling [3] 64/18 68/25 75/11 tension [1] 10/10 tensions [1] 12/3 term [3] 15/10 15/12 78/24 terminate [1] 90/16 terminated [9] 16/5 17/8 35/17 39/1 54/25 72/17 72/18 73/1 100/6 terminating [1] 16/3 termination [8] 13/25 16/5 30/22 32/22 35/22 36/8 37/9 87/9 terms [8] 7/14 57/15 76/16 76/18 84/14 91/19 99/19 103/23 terrible [1] 81/16 terrorist [7] 20/19 56/3 91/6 91/9 91/22 91/25 96/17 terrorists [4] 28/3 69/22 71/15 97/23 test [9] 35/12 58/14 71/24 72/25 73/3 77/8 79/20 83/15 98/2 tested [1] 20/2 testified [26] 8/2 11/9 27/8 30/21 30/23 31/6 32/7 32/12 43/23 44/2 44/9 62/2 65/24 67/15 68/20 69/16 71/11 83/22 84/1 84/18 84/25 85/6 85/9 86/2 93/23 95/16 testimony [21] 7/24 9/3 9/15 12/8 12/18</p>	<p>14/1 15/3 37/4 46/20 56/19 59/2 59/4 65/22 66/1 67/5 67/12 71/13 83/4 84/2 87/10 89/10 testing [1] 62/21 tests [1] 62/22 than [14] 11/8 20/10 34/11 46/2 47/24 66/13 70/21 71/6 73/21 86/11 87/9 88/12 88/21 89/1 Thank [6] 18/7 38/6 58/18 77/25 89/6 107/2 that [849] that's [79] 3/20 5/24 8/9 9/12 13/16 15/5 15/6 17/24 17/25 18/7 18/17 21/17 24/6 24/9 24/12 24/14 30/8 31/15 32/17 34/8 34/12 34/18 34/25 35/24 35/24 38/16 40/19 40/20 42/14 42/17 43/24 44/9 44/15 46/15 47/8 47/23 49/11 50/16 50/17 51/14 51/25 52/24 56/15 57/5 57/7 57/20 60/9 60/25 61/2 61/5 61/21 63/22 63/24 64/2 64/25 65/8 65/20 70/6 73/11 75/7 76/17 78/25 82/12 83/20 83/25 87/9 87/25 87/25 87/25 88/23 88/24 89/5 89/10 96/11 96/11 97/2 101/15 101/19 102/12 the First [1] 38/24 their [20] 21/6 28/21 32/3 43/25 52/14 55/11 67/3 67/4 67/5 76/3 78/14 81/11 81/12 81/22 84/18 85/8 86/9 86/18 86/22 101/19 them [16] 4/15 8/1 14/13 15/3 17/1 19/24 27/21 27/22 43/19 62/6 63/1 68/20 68/25 78/23 86/21 99/3 themselves [4] 80/1 95/22 101/2 101/23 then [80] 3/5 3/13 3/18 5/12 5/19 6/5 6/23 7/7 7/8 9/22 13/21 14/11 14/20 14/23 14/24 16/1 16/7 16/11 17/8 21/2 21/19 22/13 24/23 25/8 26/2 26/11 28/3 30/23 31/3 31/5 32/9 34/20 34/24 35/14 36/3 36/11 36/12 36/17 37/15 37/22 37/23 40/4 40/15 40/16 43/16 48/10 49/19 52/8 53/3 53/18 55/25 56/9 56/12 58/13 58/13 60/1 63/19 65/18 68/25 69/20 69/20 72/17 73/19 74/16 75/9 85/10 87/8 87/10 87/13 93/17 93/20 98/15 99/13 99/15 99/17 99/25 100/5 103/25 105/17 105/20 theory [3] 29/24 33/4 61/11 there [180] there's [50] 6/2 10/25 11/1 12/2 12/8 14/18 14/20 16/10 16/22 17/2 19/23 20/11 28/12 31/5 35/14 36/4 36/17 36/25 37/14 38/2 39/19 42/13 42/13 42/13 42/15 42/15 46/7 48/3 48/9 53/10 56/2 61/3 66/1 67/8 68/10 71/4 73/6 73/9 73/21 76/9 76/25 77/14 81/21 82/10 88/20 95/19 104/10 104/15 104/15 105/20 thereafter [6] 49/10 82/9 91/2 98/21 99/15 105/17 therefore [1] 94/8 thereof [1] 87/25 theretofore [1] 91/18 these [38] 5/13 5/21 5/22 6/14 15/18 19/25 45/14 48/2 48/6 48/21 54/12 55/20 60/7 60/16 65/18 65/24 69/21 70/5 73/17 75/14 76/3 76/23 77/11 78/8 84/7 86/5 88/7 88/18 90/18 90/20 94/13 96/13 96/20 98/2 100/1 100/25 101/6 106/7 they [128] they're [6] 28/3 45/10 70/17 80/6 81/17 102/13 they've [1] 81/12 thing [6] 18/9 30/11 46/23 61/21 71/9</p>

T	toward [1] 76/14 Training [2] 21/20 22/7 transaction [1] 50/7 transcript [2] 1/11 108/3 TRANSCRIPTION [1] 1/25 transpired [1] 30/13 trial [7] 89/5 103/7 103/9 104/19 105/2 106/2 106/6 tried [1] 57/2 trier [3] 36/9 102/20 102/24 trigger [1] 79/20 trouble [1] 50/20 troubling [1] 31/22 true [2] 18/17 79/6 truth [1] 61/14 try [5] 37/18 83/20 92/10 105/22 105/23 trying [8] 14/9 20/14 22/22 23/20 32/13 40/1 84/20 87/5 turbulence [1] 102/4 two [28] 10/16 11/24 15/3 29/13 29/20 29/25 36/5 36/23 38/9 38/10 38/12 38/19 38/21 38/21 38/23 41/11 41/13 41/17 43/8 48/2 50/18 52/10 59/10 78/24 79/19 90/2 105/13 105/17 type [6] 20/13 30/20 30/25 52/23 80/24 88/25 types [1] 5/6 typical [1] 62/24 typically [1] 102/7	unpreparedness [1] 76/7 unsubstantiated [3] 79/18 87/24 90/9 unsupported [1] 89/4 until [1] 14/5 unusual [1] 70/22 up [27] 3/9 7/6 15/4 19/24 21/5 21/6 28/3 29/12 32/8 38/18 39/16 40/3 44/16 44/22 44/23 48/1 53/3 59/20 62/1 62/19 65/11 69/22 72/16 78/3 85/9 88/2 104/25 upon [17] 18/12 22/21 24/1 24/12 24/21 25/3 26/9 27/8 28/25 54/12 55/17 56/19 58/15 58/20 72/8 103/23 104/3 uproar [1] 20/18 upset [8] 7/10 8/19 23/9 84/4 85/17 85/19 85/24 95/21 Urban [61] 2/15 6/8 7/19 8/12 10/1 13/1 14/3 14/6 14/11 14/25 15/1 15/4 16/2 22/12 22/16 23/25 24/16 24/22 26/10 26/11 26/15 26/18 27/8 30/7 30/18 30/21 30/23 30/24 31/4 31/6 31/16 31/20 32/6 32/12 35/16 35/20 43/12 47/15 54/11 56/20 57/15 59/5 59/9 62/2 65/16 66/2 67/4 76/8 85/8 85/9 87/10 87/20 88/19 88/21 94/6 95/23 96/10 98/24 99/2 99/18 102/3 Urban's [2] 16/11 94/1 Urofsky [1] 70/15 us [5] 22/2 65/18 68/18 73/4 86/25 use [3] 68/25 90/20 98/5 used [3] 55/19 74/12 91/11 usurped [1] 94/1 utilize [1] 98/2
	U	V
thing... [1] 81/3 things [13] 12/13 37/18 40/4 54/7 54/25 72/23 72/24 88/18 91/4 91/23 93/10 95/22 101/6 think [91] 2/20 2/24 3/9 4/1 4/18 5/1 6/2 6/18 7/4 8/2 9/19 9/20 11/12 15/9 15/12 17/25 18/1 18/4 18/10 18/13 23/2 23/11 23/17 24/18 25/13 25/13 27/4 27/6 27/6 29/19 31/2 34/23 35/12 35/15 35/24 36/6 36/22 36/24 36/24 37/14 38/16 49/4 49/6 50/17 50/21 51/23 51/23 51/25 54/18 54/19 54/21 55/6 55/17 56/9 56/18 57/8 57/9 58/22 58/25 59/22 61/13 63/3 63/17 64/4 64/10 65/5 65/15 65/20 67/14 69/15 70/6 70/18 72/1 72/17 73/16 74/25 78/1 78/4 78/25 81/3 83/14 84/5 85/20 103/10 104/12 104/13 105/5 105/8 105/23 106/11 106/15 thinking [1] 70/21 third [9] 8/15 15/5 15/15 15/16 56/12 80/14 80/18 96/8 99/23 Thirty [1] 51/15 Thirty-seven [1] 51/15 this [183] those [28] 2/23 4/5 4/9 5/3 5/6 27/21 27/24 28/4 29/12 36/19 42/11 43/17 52/10 69/5 71/21 75/21 81/2 81/10 81/11 81/13 82/23 86/14 87/18 90/2 98/23 101/5 104/5 104/21 thou [1] 46/8 though [5] 12/1 18/3 45/18 62/2 80/22 thought [5] 8/3 14/5 28/7 47/9 104/23 three [12] 5/13 11/20 11/24 14/13 15/5 56/10 63/2 63/8 63/10 78/25 86/8 86/12 threshold [1] 58/9 through [12] 3/7 3/10 7/20 8/13 14/22 19/9 47/24 68/15 71/17 73/8 81/6 106/23 throughout [3] 27/17 62/11 62/12 thrown [1] 101/24 Thursday [1] 1/8 thus [1] 71/2 tie [1] 38/22 tied [2] 32/11 38/19 till [1] 28/3 time [41] 2/19 3/10 4/12 5/16 10/22 11/20 14/17 17/16 21/22 22/5 22/13 22/14 25/10 30/13 44/5 45/14 45/24 47/14 47/22 48/10 49/6 49/14 49/22 52/20 53/23 59/10 64/10 64/24 70/5 71/10 71/21 77/7 83/6 85/14 89/12 91/5 91/25 92/1 97/25 103/7 105/3 times [1] 23/20 timing [1] 12/25 tip [1] 24/13 tipped [2] 19/25 24/5 tips [1] 56/11 title [1] 82/1 titular [1] 45/15 today [9] 9/7 12/4 16/23 20/13 42/19 50/8 58/24 88/1 106/5 together [3] 14/3 14/4 52/11 told [11] 14/5 14/6 27/24 29/11 29/17 36/5 40/4 60/10 64/22 75/12 91/13 too [4] 32/7 37/20 67/13 79/3 took [16] 8/21 27/19 35/5 36/9 40/3 44/3 45/14 60/2 66/8 68/8 68/18 68/20 88/1 88/7 88/19 93/1 topic [1] 72/6 torture [1] 47/9 total [2] 18/8 105/24 touched [1] 58/20	U.S [4] 48/19 55/22 55/23 90/11 ultimately [2] 37/23 80/3 unanswered [1] 94/13 unauthorized [2] 90/18 90/19 uncertain [1] 7/14 uncertainty [1] 52/12 unconstitutional [4] 32/20 32/21 104/10 106/18 uncontested [1] 74/1 under [31] 15/21 18/19 18/20 19/1 19/6 19/8 29/2 29/25 38/23 46/2 46/14 48/19 49/3 49/8 49/17 49/18 49/21 50/7 50/23 51/11 53/8 53/25 54/23 55/9 71/24 82/24 91/3 92/2 94/7 103/20 105/8 undercuts [1] 72/2 underlines [1] 51/10 underlining [3] 41/18 50/21 50/25 undermine [5] 83/6 83/8 84/9 93/21 96/25 undermined [6] 84/11 91/23 94/9 95/1 99/11 102/1 undermines [1] 83/12 undermining [5] 25/20 25/24 84/1 92/14 93/16 understand [10] 2/22 16/9 22/1 22/23 26/22 30/17 31/19 31/21 33/3 55/8 understandably [2] 5/6 8/19 understanding [1] 50/16 understood [4] 26/16 28/14 28/25 45/17 underway [1] 92/21 undisputed [5] 18/1 64/12 64/14 64/23 64/25 unfold [1] 82/25 unfolding [1] 95/10 unfortunate [1] 8/20 Unfortunately [1] 23/2 uniform [3] 4/12 64/24 73/24 UNITED [4] 1/1 1/12 59/13 59/14 units [2] 11/16 11/16 unless [7] 23/21 47/17 47/25 48/1 56/16 66/13 77/9 unlike [3] 37/5 39/23 86/6	vacate [2] 10/12 10/13 vacated [1] 26/3 vacuum [1] 37/4 vague [1] 79/7 validity [1] 93/2 various [5] 19/1 53/15 79/7 89/11 106/11 verdict [2] 103/8 104/25 version [2] 41/21 46/22 versions [1] 52/10 versus [4] 2/3 3/21 20/8 20/11 very [32] 3/25 6/3 11/17 16/16 20/9 20/24 25/2 27/14 27/23 35/19 36/24 38/19 47/14 52/1 63/13 63/24 64/6 64/20 66/6 66/6 68/15 76/12 78/24 87/23 88/11 100/15 100/17 101/12 102/9 103/7 103/7 105/3 viable [1] 36/19 video [1] 4/8 view [3] 94/18 96/13 103/2 viewed [1] 90/8 violate [2] 46/10 103/19 violated [3] 100/4 103/19 103/25 violates [1] 16/1 violation [6] 38/24 44/4 46/13 47/6 48/19 48/21 Virginia [19] 2/15 10/7 14/6 14/10 23/24 24/25 26/9 30/24 31/3 31/4 31/21 32/14 35/19 54/10 59/5 86/17 87/19 93/13 99/6 virtual [1] 104/24 vital [3] 91/8 91/12 96/16 voice [1] 80/17 voices [1] 6/21 voicing [1] 90/5 voluntaries [1] 21/10 voluntary [2] 52/14 68/22 volunteer [52] 4/18 5/5 5/5 5/23 10/21 10/24 11/1 11/16 11/16 12/1 17/9 17/11 20/8 20/12 20/21 21/24 21/25 25/11 33/13 42/7 44/3 45/1 46/4 48/17 49/23

V	84/8 85/23 85/25 86/8 88/22 96/20 102/20 103/8 103/24 105/21 went [12] 6/8 16/20 17/1 28/23 34/21 35/9 39/14 40/15 42/24 59/20 78/23 84/5 were [110] weren't [6] 31/22 62/9 62/14 65/17 65/17 79/3 what [123] what's [7] 5/9 18/7 59/7 59/11 66/10 73/7 106/20 whatever [6] 19/18 32/2 32/2 60/22 69/14 98/15 whatsoever [4] 32/10 42/3 69/10 88/21 when [40] 4/7 7/9 7/15 9/24 10/2 12/15 12/15 12/25 14/6 15/7 15/12 18/11 22/13 23/14 26/15 29/5 30/7 31/7 39/18 44/15 46/22 48/14 58/10 60/1 60/10 61/22 61/23 64/24 66/3 66/8 67/12 73/17 78/9 83/7 84/9 88/7 88/18 91/25 94/18 104/14 whenever [2] 80/16 94/12 where [53] 3/2 4/24 5/15 6/19 8/5 8/16 14/14 15/20 15/24 20/11 21/14 22/3 22/14 25/14 27/22 27/24 28/3 28/4 28/10 32/17 34/19 37/5 38/16 40/19 40/20 42/24 43/1 43/17 46/3 50/14 51/8 51/9 53/16 53/16 53/22 59/21 65/6 66/24 68/24 68/25 69/22 70/17 71/16 72/20 75/11 79/1 85/3 87/11 91/15 92/6 102/11 104/17 104/24 Whereas [1] 102/6 whether [51] 9/18 10/1 16/24 17/3 18/13 20/18 29/9 34/2 34/4 34/21 37/21 37/22 37/23 37/25 48/22 48/23 52/13 54/5 54/24 55/3 55/11 55/23 58/11 58/12 58/14 58/16 59/24 59/25 61/16 61/17 61/19 67/1 68/5 70/24 70/25 72/5 72/8 72/9 73/20 76/15 77/12 77/13 77/16 82/5 85/13 89/23 91/20 94/25 95/1 95/2 102/16 which [54] 5/3 10/8 10/9 16/2 16/8 18/11 21/3 21/13 23/18 24/17 24/24 26/22 30/7 36/1 36/5 38/22 39/24 41/1 41/18 41/19 43/9 43/16 48/17 48/23 53/15 55/17 56/12 58/23 60/16 61/2 63/19 64/4 66/12 70/22 72/10 73/2 73/20 76/3 76/23 77/4 77/15 78/2 78/3 81/16 81/20 82/2 83/15 88/12 94/22 98/17 102/17 103/2 103/23 104/4 while [8] 15/17 39/15 47/1 57/1 60/5 90/9 96/9 99/24 who [40] 20/22 21/21 27/16 33/22 36/6 37/2 43/20 44/11 45/5 64/5 64/6 66/6 67/23 69/16 69/17 70/3 72/1 72/13 84/3 85/16 85/19 85/23 85/23 85/24 86/1 86/3 86/3 86/11 86/14 88/2 88/2 94/5 95/21 96/21 99/6 101/1 101/2 101/6 104/20 106/3 whole [4] 3/7 12/12 61/1 103/22 whom [2] 101/3 102/2 why [8] 11/12 11/15 16/9 16/10 20/1 60/10 70/6 86/4 wife [25] 6/25 7/2 8/24 9/2 12/11 21/12 21/18 22/9 22/21 22/25 23/7 23/8 23/15 26/2 26/8 54/15 54/21 57/4 90/22 90/25 93/20 96/5 98/20 99/14 104/4 will [17] 20/15 30/21 32/9 32/9 32/10 35/14 44/6 57/16 72/25 77/22 77/23 79/14 84/13 87/8 103/7 104/24 106/15 win [1] 24/7 Wisconsin [2] 11/22 11/23 wished [1] 22/9 wishes [1] 7/6 within [23] 5/5 5/8 16/12 16/23 20/9	21/16 27/15 29/1 40/13 45/20 61/18 63/14 67/16 67/17 69/5 78/18 87/14 94/11 95/3 105/10 105/13 105/17 105/24 without [6] 2/23 4/18 53/19 63/21 75/5 79/24 woe [1] 69/21 wonder [1] 61/16 wondered [1] 23/19 word [2] 2/19 81/16 words [1] 29/10 work [2] 32/13 32/14 worked [1] 18/8 workers [4] 77/13 91/21 94/22 95/2 working [6] 34/19 77/14 83/2 85/10 91/18 93/8 workplace [6] 34/6 79/21 79/24 80/20 81/14 94/3 worry [3] 5/17 61/13 106/21 worst [2] 24/11 36/6 worth [1] 105/6 would [90] 2/16 9/9 9/20 10/2 13/18 14/3 14/3 14/9 16/14 17/20 17/21 17/22 18/5 19/3 20/15 29/5 30/20 30/25 31/9 32/20 33/10 34/14 35/1 36/8 36/9 36/25 37/2 43/8 46/16 46/23 47/13 50/2 54/21 54/22 56/3 56/12 56/13 56/24 57/1 57/1 57/2 57/5 59/18 66/2 66/9 67/24 67/25 68/5 69/3 69/4 71/5 71/9 73/10 73/14 74/11 76/10 77/12 79/8 80/15 81/25 82/6 82/21 85/8 86/25 89/9 94/14 94/15 95/18 96/4 96/6 96/12 99/3 99/17 99/19 99/19 100/3 102/24 103/12 103/14 103/19 103/20 104/5 104/8 104/11 104/12 104/12 104/20 105/21 106/1 106/16 wouldn't [2] 51/7 51/9 write [3] 32/10 72/23 96/4 writing [1] 59/7 written [5] 7/8 44/7 45/17 45/25 73/9 wrong [2] 14/16 19/2 wrongdoing [1] 99/16 wrongful [6] 38/11 38/23 39/9 48/18 48/22 103/16 wrote [5] 5/1 7/19 10/2 15/19 59/20
W	Y	
wages [1] 100/11 wait [2] 51/22 95/10 walking [1] 88/8 want [35] 3/12 5/8 5/8 6/20 14/15 19/14 19/18 22/24 22/25 22/25 22/25 23/15 23/15 28/15 30/6 38/3 42/4 53/7 54/20 55/13 56/16 65/9 65/10 66/15 71/11 76/16 84/11 105/13 105/14 105/15 105/18 105/19 105/19 106/4 106/8 wanted [12] 9/15 9/19 10/11 12/23 13/23 14/7 47/23 53/5 60/2 60/3 85/1 93/1 wanting [1] 22/18 wants [4] 6/25 21/11 34/24 98/20 warrant [2] 59/24 72/14 was [363] Washington [7] 1/16 4/9 63/2 63/14 74/2 91/14 98/8 wasn't [17] 6/11 11/15 16/16 45/25 47/10 59/6 59/19 60/20 60/20 60/21 65/21 66/9 66/11 70/22 71/4 88/17 95/24 water [1] 88/6 way [30] 3/6 3/9 3/15 10/23 15/16 16/22 19/9 30/9 35/3 35/9 36/1 36/7 36/20 37/22 47/24 48/16 51/24 52/1 58/23 61/25 67/15 70/22 88/2 92/13 95/24 96/8 97/13 99/23 104/6 106/5 ways [2] 29/13 72/11 we [75] 2/18 3/2 3/17 4/2 6/20 6/21 6/23 6/24 7/5 7/7 7/9 8/3 9/3 9/6 10/1 14/21 15/7 15/12 17/16 18/15 19/12 21/4 22/1 22/3 25/11 26/6 26/10 26/21 30/2 30/4 31/22 32/17 35/17 39/14 40/10 40/11 40/15 41/21 43/19 47/11 47/25 48/6 48/14 51/3 51/6 51/18 54/5 54/24 55/5 56/7 57/13 58/8 58/9 58/13 58/20 59/11 62/25 66/23 67/5 67/7 67/12 67/22 72/20 75/5 77/4 78/6 80/4 83/3 83/15 83/19 88/1 88/7 89/9 103/21 104/14 we'll [12] 2/20 3/9 3/13 3/18 17/6 24/17 53/3 56/11 65/13 104/14 105/11 105/23 we're [18] 3/10 11/12 20/10 25/14 25/14 35/2 42/12 47/9 48/9 53/24 57/13 63/20 64/10 72/5 74/6 74/7 88/15 91/2 we've [6] 3/3 21/5 41/8 51/6 56/9 97/14 wear [1] 59/10 wearing [1] 66/20 wedge [1] 84/20 Wednesday [1] 68/21 weeks [3] 78/25 105/13 105/17 weigh [2] 34/16 94/17 weighed [1] 89/22 weighing [1] 34/13 weighs [1] 91/3 weight [4] 36/13 52/24 80/21 80/23 well [49] 7/21 8/15 10/15 11/12 11/15 11/25 16/16 17/6 17/12 18/21 18/24 20/25 21/23 24/5 27/4 31/25 32/6 34/10 41/24 44/7 44/25 46/14 51/11 51/22 52/1 54/4 54/15 54/18 55/23 56/20 57/8 57/19 59/10 60/20 61/16 62/5 62/17 65/19 68/6	Yeah [9] 17/7 19/16 23/14 38/12 41/16 43/7 51/9 51/22 62/8 year [4] 14/23 17/14 47/25 58/21 years [6] 7/9 10/25 27/10 69/14 88/21 98/4 yes [20] 2/8 4/22 4/22 4/22 4/22 8/7 10/18 13/3 15/24 39/6 39/21 40/7 40/24 43/8 51/20 58/11 60/24 62/1 65/2 87/8 yet [1] 18/16 yield [1] 79/17 York [1] 11/5 you [243] you'd [1] 88/22 you'll [6] 15/13 24/9 48/8 69/24 69/24 104/21 you're [11] 19/5 19/6 23/21 24/7 31/3 31/25 34/20 38/5 47/19 70/12 105/8 you've [3] 18/8 70/3 73/23 your [74] 2/9 2/13 3/7 3/17 3/20 3/25 5/10 7/6 9/12 10/4 15/7 19/3 24/21 25/13 25/15 26/3 26/4 26/5 26/25 27/7 28/16 30/11 30/17 31/19 33/3 34/8 35/4 35/11 38/3 38/6 40/8 43/6 43/20 45/10 45/24 50/21 54/8 54/20 54/21 55/5 55/10 55/11 56/18 57/7 57/12 57/24 58/5 58/18 62/20 63/6 66/17 68/1 69/7 71/10 71/23 77/25 81/4 81/24 82/12 82/21 83/14 83/19 84/5 84/13 85/21 87/23 89/6 89/9 105/15	

yourselves [1] 2/6

ZAID [11]	1/14	1/15	2/8	2/10	3/16	38/5
	46/18	55/14	77/24	105/5	105/13	