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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

AYMAN LATIF, et al.)	
)	
Plaintiffs,)	Case No. 3:10-CV-750-BR
)	
v.)	
)	June 20, 2013
ERIC H. HOLDER, JR., et al.)	
)	
Defendants.)	Portland, Oregon
_____)		

ORAL ARGUMENT
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANNA J. BROWN
UNITED STATES DISTRICT COURT JUDGE

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TRANSCRIPT OF PROCEEDINGS

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Thank you, everyone. Please be seated.

So we are here for oral argument on the cross motions for summary judgment in the case of *Latif v. Holder*. This is civil number 10-750.

Before we begin, I want to reiterate the general standing order of the Court; that there should be no electronic or audio or photographic recording of any kind going on in this proceeding. I've given permission to Ms. Young, of *The Oregonian*, to use her laptop for note-taking only.

I understand there's another media representative here.

UNIDENTIFIED SPEAKER: I would like to use a laptop for --

THE COURT: Would you stand up, please? I can't hear you or see you.

UNIDENTIFIED SPEAKER: A laptop for note-taking in a text edit format. Is that possible?

THE COURT: No. Not unless you're a member of the media. Are you?

UNIDENTIFIED SPEAKER: The internet blogging community.

1 UNIDENTIFIED SPEAKER: I'm with The Associated
2 Press.

3 THE COURT: All right. So members of the media
4 may use their laptops to take notes only, only for word
5 processing programming, not for any kind of Internet or
6 realtime communication, not for any kind of photographic or
7 audio recording, but as a -- as a convenience to you instead
8 of pen and paper.

9 All right. And, counsel, if you have laptops, you're
10 free to use them for your own note-taking, as well, as
11 normal.

12 So we're here for argument. We're late in starting.
13 We'll try to make up the time as we go. The time you
14 programmed, counsel, that you need for argument will be
15 provided to you. Let me get that list.

16 I have a couple of basic questions I'm hoping you will
17 address in the scope of your presentations. Of course each
18 side is seeking an order on summary judgment, which, in the
19 first instance, has to be premised on the absence of any
20 genuine issue of disputed material fact. There are a number
21 of declarations in the record about what the plaintiffs
22 encountered when they were denied boarding in various
23 scenarios, and it does not appear, to me, that any of those
24 declarations have been actually refuted.

25 The stipulated fact record that's in the case does not

1 address this particular set of facts. I'm not given any
2 assurance in the record, in other words, that there is or
3 isn't an issue of disputed fact around the contentions the
4 plaintiff makes -- plaintiffs each make about the -- the
5 fact they were denied boarding or the burdens that they
6 encountered once that occurred. I'd like some
7 clarification, please, about what I can assume is the
8 undisputed fact record, at least as a threshold matter, with
9 respect to these -- these motions which address the
10 plaintiffs' first and third claims.

11 I'm mindful of the fact that plaintiffs say I don't
12 need to be concerned today about what relief the Court might
13 fashion in the event plaintiffs prevail in whole, or in
14 part, on their cross motions. But that is a little bit
15 difficult for me to process that assertion, which is to say
16 I think it's very difficult to analyze the liability
17 assertions that are raised here on the cross motions without
18 knowing more about what it is plaintiffs contend could be
19 fashioned or could be done about their contentions of
20 violation and what the defendants contend cannot be done.

21 In other words, I appreciate liability is a separate
22 finding from relief, damages, and remedy, but try to
23 understand the margins here around the asserted right to
24 travel or the lack thereof and the government's interest in
25 security and the plaintiffs' interest in their reputation

1 and their right to travel, I think, requires some suggestion
2 at least by plaintiffs about what it is plaintiffs contend
3 would be the relief that would follow in the event they
4 establish liability; that is to say a judgment in their
5 favor, on the first or third claims, which, as I understand
6 it, are the only two at issue this morning.

7 So those are two overarching concerns I have. And to
8 the extent you can address them, as you go forward this
9 morning, that would be very helpful.

10 Ms. Siemion, are you on the line, on the telephone?

11 MS. SIEMION: Yes, Your Honor, I am.

12 THE COURT: Have I pronounced your name correctly?
13 Is it Siemion?

14 MS. SIEMION: Siemion. That's exactly right.

15 THE COURT: I'll give you the chambers telephone
16 number. If there's any interruption in your connection to
17 these proceedings, please call chambers, because Ms. Boyer
18 won't be able to take a call. Just a moment.

19 DEPUTY COURTROOM CLERK: She's on the conference
20 line, so she can just call back into the conference line.

21 THE COURT: Oh, I'm given better information. If
22 you get disconnected, just call back to the line you did
23 call and you should be able to rejoin on a conference
24 format. In any event, if you have difficulty there, the
25 chambers number is (503)326-8350. And then you also have

1 Ms. Boyer's email address. You can send her an email
2 message. She'll be monitoring there, too. All right?

3 MS. SIEMION: Okay.

4 THE COURT: Okay. So I think we should just
5 proceed with plaintiffs' counsels' arguments concerning
6 whether the No Fly List deprives plaintiffs of any protected
7 liberty interest. Somewhere along the way I would also like
8 clarification or confirmation, because it seems, to me, a
9 shifting sand around the question whether it is acknowledged
10 that there is a No Fly List, one -- I think that's subsumed
11 in the stipulated statement of facts -- and some comment
12 about what I should assume is the undisputed factual record
13 around what one or more of the plaintiffs may have been told
14 or how it is they're advised that they're not going to be
15 permitted to board or whether that's even important.

16 In other words, should I just assume that the record is
17 a plaintiff has a ticket, has normal boarding papers, but is
18 denied boarding, and should I be concerned with what they're
19 said -- what's said to them or not said to them, or are we
20 just stopping at that threshold point, because it seems to
21 be also an issue that varies from plaintiff to plaintiff,
22 and I need to know whether that's important when I get to
23 these -- these threshold motions.

24 So let's begin there on behalf of the plaintiff,
25 Ms. Choudhury?

1 MS. CHOUDHURY: Choudhury.

2 THE COURT: Ms. Choudhury.

3 MS. CHOUDHURY: Your Honor, do you have a
4 preference as to whether we argue from here?

5 THE COURT: I would like you to come to the
6 podium, which is why we have it set up, so I can hear you
7 best.

8 Ms. Choudhury?

9 MS. CHOUDHURY: Yes.

10 THE COURT: All right. Good morning.

11 MS. CHOUDHURY: Good morning.

12 DEPUTY COURTROOM CLERK: Can you pull the
13 microphone down a little bit?

14 Great. Thank you.

15 MS. CHOUDHURY: Your Honor, for the past three
16 years the defendants in this case have prevented our
17 clients, 13 U.S. citizens, including four military veterans,
18 from traveling to be with their spouses and children, to
19 access medical care, to start their jobs, and conduct their
20 businesses by placing them on the No Fly List.

21 And in those three years the defendants have
22 categorically refused to provide any of the plaintiffs with
23 a single reason why they belong on a list of suspected
24 terrorists.

25 Defendants contend that plaintiffs have no right to any

1 process, even though the government has banned them from
2 boarding planes. This position is extreme. If the
3 defendants were correct, the U.S. government could place
4 anyone on the No Fly List and refuse to provide any redress
5 procedure at all.

6 THE COURT: Could I interrupt you there?

7 I think that's maybe an overstatement of the
8 defendants' position. Isn't their position that the
9 defendants are entitled to a process, this DHS TRIP process,
10 and I certainly agree that your contention is that's wholly
11 inadequate; but they do contend there is a process as
12 opposed to no process.

13 MS. CHOUDHURY: Well, respectfully, Your Honor,
14 the first part of their brief argues that plaintiffs have no
15 liberty interests that have been deprived at all by being
16 banned from flying.

17 THE COURT: Well, that's a little different,
18 though, than saying defendants contend plaintiffs are
19 entitled to no process.

20 MS. CHOUDHURY: To be clear, Your Honor, if no
21 liberty interest is deprived by inclusion of the No Fly
22 List --

23 THE COURT: Right.

24 MS. CHOUDHURY: -- the government isn't required
25 to provide process.

1 THE COURT: Fair enough.

2 MS. CHOUDHURY: And that is the implication of
3 their argument.

4 THE COURT: Okay.

5 MS. CHOUDHURY: This is because the defendants
6 principally claim that banning people from one mode of
7 transportation, no matter how draconian that restriction,
8 doesn't trigger a right to due process at all, because it
9 doesn't entirely restrict all travel.

10 But this position is not only deeply troubling, it's
11 contrary to two separate and independent doctrines
12 establishing that plaintiffs do have a right to fair
13 procedures when defendants ban them from traveling by plane.

14 Inclusion on the No Fly List, Your Honor, deprives the
15 plaintiffs of their liberty interests in travel, and it
16 injures their reputation in connection with altering their
17 legal status.

18 Under either the liberty interest in travel theory or
19 the stigma-plus doctrine, the plaintiffs have a cognizable
20 right to fair procedures when they're placed on the No Fly
21 List.

22 I'd like to first make four points about the liberty
23 interest and travel claim before addressing the stigma-plus
24 theory.

25 First, Your Honor, there's no dispute that the

1 constitution affords procedural due process protection to
2 the liberty interest in travel. In *Kent v. Dulles* and
3 numerous decisions issued in the subsequent five decades,
4 the Supreme Court has repeatedly recognized that the right
5 to travel is a liberty protected by the Fifth Amendment, and
6 it affirmed that the freedom to travel is a critically
7 important one. It may be necessary for livelihood and may
8 be as close to the heart of the individual as a choice of
9 what he eats or wears or reads.

10 And the Ninth Circuit held in *DeNueva v. Rayes*, Your
11 Honor, that in 1988 --

12 THE COURT REPORTER: I'm sorry. The case name
13 again?

14 THE COURT: You'll need to slow down.

15 MS. CHOUDHURY: Sorry.

16 THE COURT: D-E-N-I-E-V-A. Go ahead.

17 MS. CHOUDHURY: Thank you. In that case the Ninth
18 Circuit held that it was clearly established that since 1988
19 government action that infringes upon a person's ability to
20 travel -- and that's a quote from the case -- deprives the
21 liberty interest in travel and therefore entitles that
22 person to procedural due process rights.

23 Plaintiffs, in this case, assert that same right and
24 seek parallel relief. This is consistent with the broader
25 due process jurisprudence. The government may restrict

1 liberty interests, like the liberty interest in travel, but
2 when it does so, it must provide fair procedures, erroneous
3 deprivation of those liberties.

4 Second, Your Honor, the undisputed record shows that
5 the No Fly List -- that inclusion on the No Fly List
6 deprives the plaintiffs of this liberty interest in travel
7 because it imparts a draconian restriction.

8 The Ninth Circuit made clear in *DeNueva* that a person
9 has a right to procedure -- procedural due process when
10 government infringement of travel leaves that person able to
11 travel internationally only with great difficulty.

12 Inclusion in the No Fly List completely bans listed
13 persons from boarding an aircraft to the United States.

14 This fact is undisputed. And so are the facts showing
15 that the plaintiff -- their placement on the list has
16 severely restricted plaintiffs' ability to travel.

17 Plaintiff Steven Washburn has been stranded in New
18 Mexico, unable to see his wife for more than three years,
19 because he cannot travel to Ireland without boarding a
20 prohibited flight.

21 Plaintiff Salah Ali Ahmed, in Georgia, cannot travel to
22 see his family in Yemen, because he cannot cross the
23 thousands of miles over ocean and land without boarding a
24 prohibited flight.

25 Mohamed Sheikh Abdirahm Kariye cannot take his mother

1 on a religious pilgrimage because he can't travel from here,
2 in Portland, to Saudi Arabia, without boarding a plane.

3 These severe burdens on travel more than meets the Ninth
4 Circuit's standards. They show that plaintiffs can engage
5 in international travel and long distance interstate travel
6 only with great difficulty. And that, again, is a quote
7 from the *DeNieva* case. And they are therefore entitled to
8 fair procedures.

9 Your Honor, the plaintiffs' declarations on those
10 points are undisputed. The plaintiffs have all shown that
11 they were prohibited from boarding flights. Defendants
12 haven't contested those facts, and so the fact of the travel
13 restrictions that the No Fly List imposes on people who are
14 denied boarding is undisputed for purpose of this motion.

15 THE COURT: Is the reason why they were denied
16 boarding also undisputed; i.e., that each plaintiff
17 purportedly was on the so-called No Fly List?

18 MS. CHOUDHURY: At this point, for this motion,
19 Your Honor, yes. The plaintiffs have submitted sworn
20 affidavits and declarations attesting to the fact that
21 government officials and airline officials explicitly told
22 each of them that they are on the No Fly List. And the
23 government has chosen, in their litigation position, not to
24 confirm or deny those declarations -- those facts.

25 The third point, Your Honor, is that the possibility

1 that plaintiffs might have alternative modes of travel for
2 certain trips that they might want to take does not lessen
3 the severity of the restriction on travel that the No Fly
4 List imparts, nor does it eliminate their right to fair
5 procedures.

6 In *Goss v. Lopez*, the Supreme Court squarely held that
7 de minimis deprivation of protected interest gives rise to a
8 right of fair procedures. It recognized that while more
9 severe deprivation might give rise to some more process,
10 that doesn't alter the fact that minimal process is required
11 for even anything but a de minimis deprivation.

12 And in *Brittain v. Hansen*, which we cite in our reply
13 brief, the Ninth Circuit clearly held that even de minimis
14 deprivations of liberty interests in contrast to protected
15 property interests, entitle a person to procedural due
16 process.

17 The No Fly -- the No Fly List flight ban, however, is
18 that from de minimis. It is a draconian restriction. And
19 it is so severe that it entitles plaintiffs to procedural
20 due process even if it is conceivable that the ban could be
21 more restrictive. It is undisputed that the No Fly List
22 restricts travel to or from the United States on commercial
23 aircraft or over U.S. air space.

24 But the record also shows plaintiffs have submitted
25 facts that are undisputed that it also bans plaintiffs from

1 boarding ships. And this is because CBP's own final
2 regulations issued to implement the Intelligence Reform and
3 Terrorism Prevention Act of 2004 show that CBP as pursuant
4 to congressional directive, screens passengers on ships
5 departing the United States against the No Fly List, and its
6 purpose of that screening is to deny passage to individuals
7 on the watchlist.

8 THE COURT: For the record, C-B-P?

9 MS. CHOUDHURY: Customs and Border Protection,
10 Your Honor.

11 The deprivation of plaintiff Abudullatif Muthanna,
12 moreover, shows that he was denied boarding on a ship
13 sailing from the United States to Europe and on a ship
14 sailing from Europe to the United Arab of Emirates.

15 Defendants contend that that decision wasn't the result
16 of Customs and Border Protection action. It was the result
17 of private ship captains. But that doesn't matter. What
18 matters is that the government screens the watchlist,
19 including the No Fly List, against the list of passengers on
20 ships with the express purpose of denying them boarding.
21 And those are in the regulations we cite in our brief.

22 Fourth, Your Honor -- just to close that point,
23 Your Honor, because No Fly List inclusion not only bans
24 people from flights over U.S. air space, because it may
25 also, and has in the case of at least one plaintiff in this

1 lawsuit, bans them from trip travel and may even be used by
2 foreign governments, 22 foreign governments who have access
3 to those lists. That just heightens the severity of the
4 travel restriction and the liberty interest deprivation at
5 issue. It simply requires even more process.

6 But even if Your Honor were to find that the No Fly
7 List only results in restriction on travel on flights, that,
8 in and of itself, is enough. Plaintiffs have a right to
9 fair procedures.

10 My fourth point, Your Honor, is that defendants rely on
11 the wrong law to argue that plaintiffs do not have a right
12 to procedural due process due to the deprivation of their
13 liberty interest in travel. They rely heavily on the
14 *Gilmore* case; the Ninth Circuit's decision in *Gilmore v.*
15 *Gonzales*. That case concerned a person who didn't want to
16 show identification before boarding a plane. He didn't
17 challenge a travel ban banning his ability to fly, period.
18 He brought a claim seeking to invalidate this TSA
19 identification policy under a different right at issue in
20 this motion, the fundamental right to interstate travel. He
21 did not bring what plaintiffs assert here, a claim under the
22 procedural due process right for fair procedures to guard
23 against the erroneous deprivation of their ability to
24 travel.

25 The Ninth Circuit held that Mr. Gilmore didn't show a

1 violation of a fundamental right, because the identification
2 policy applied only to air travel. And that reasoning may
3 be applicable to the fundamental rights line of cases, but
4 it's wholly inapplicable to this line of cases. The line of
5 cases of *DeNieva* and the claim that plaintiffs bring here.

6 THE COURT: You're -- are you equating,
7 effectively, the revocation of a passport to being on the No
8 Fly List? Are you pretty much equating those?

9 MS. CHOUDHURY: Well, we don't dispute that the
10 revocation of a passport may be a greater restriction and
11 deprivation of the liberty interest in travel.

12 THE COURT: But for practical purposes, relative
13 to the burdens that you're pointing to, are you saying the
14 analysis of *Green* and *DeNieva* apply equally to denial of
15 boarding because someone is on a No Fly List?

16 MS. CHOUDHURY: Your Honor, I'm saying that the
17 infringement of travel that the passport revocation decision
18 in *DeNieva* imposed is akin to the restriction of travel that
19 the No Fly List imposes. There may be some lesser
20 deprivation in this case than that one, and that we
21 acknowledge; but the restriction is draconian, and it is
22 sufficient to rise to the level.

23 The Ninth Circuit made -- was explicitly stated in
24 *DeNieva* that the passport revocation left her, quote, able
25 to travel internationally only with great difficulty, if at

1 all. It didn't premise its finding on a complete travel
2 restriction. And that is key. And that makes sense, in
3 light of *Goss v. Lopez*, the Supreme Court's decision, and
4 the Ninth Circuit's decision in *Brittain v. Hansen*. Even de
5 minimis deprivations of liberty interest gives rise to fair
6 produce. So here the restriction is far or more than de
7 minimis.

8 To answer Your Honor's question about *Green*, *Green* was
9 brought under a stigma-plus theory. The plaintiffs there
10 didn't allege an independent liberty interest in travel
11 claim. But even if they had, the plaintiffs there were able
12 to board planes. They were all able to board planes. They
13 challenged the fact that they were screened extra and those
14 screens lasted for less than an hour.

15 Now, while there may be some dispute about whether
16 being able to board but being secondarily screened for an
17 amount of time less than an hour, whether that is a
18 restriction of the liberty interest in travel. There may be
19 some dispute there. And that court was not persuaded that
20 there was a deprivation of a liberty interest. But this is
21 different. Plaintiffs can't board planes at all. And
22 they've tried to fly multiple times. Many of the plaintiffs
23 have tried to board multiple times and aren't able to do so
24 and have all been told that they're on a list of suspected
25 terrorists called a No Fly List. It is undisputed that the

1 list exists and that the list results in denial of boarding
2 on commercial flights over U.S. air space.

3 So, Your Honor, the *Gilmore* line of cases that focus on
4 that fundamental right to interstate travel deal with a
5 right that plaintiffs don't assert is impacted by the
6 restriction of their ability to fly.

7 Those cases are different. They -- the Ninth Circuit
8 reasoning that alternative modes of transportation were
9 available in *Gilmore* doesn't lessen the deprivation of
10 plaintiffs' liberty interests here. The plaintiff there
11 didn't invoke procedural due process. And the Ninth
12 Circuit's decision, quite remarkably, did not discuss any of
13 the liberty interest in travel cases that Supreme Court's
14 authority in *Kent v. Dulles*, in *Aptheker v. Secretary of*
15 *State* or even the Ninth Circuit's decision in *DeNieva*. That
16 decision didn't purport to overrule what the Ninth Circuit
17 had found in *DeNieva*, which is that a restriction upon a
18 person's ability to travel, that leaves travel possible only
19 with great difficulty, gives rise to a right to procedural
20 due process.

21 If Your Honor doesn't have any questions about the
22 liberty interest in travel, I can --

23 THE COURT: Well, that would be an overstatement.

24 MS. CHOUDHURY: I'm happy to answer your
25 questions.

1 THE COURT: No, your argument is helpful. Go
2 ahead.

3 MS. CHOUDHURY: So, you know, as we discussed, for
4 the same reasons *Green v. TSA* is actually not on point at
5 all for the liberty interest in travel argument for that
6 claim.

7 Separate and apart from the right to travel claim,
8 Your Honor, the plaintiffs show an independent right to fair
9 procedures based on the stigma-plus doctrine. There is no
10 dispute that defendants' inclusion of the plaintiffs' names
11 on the No Fly List has smeared them as suspected
12 terrorists; one of the most reprehensible labels of our
13 time. The plaintiffs were all denied boarding publicly in
14 ways that made them feel deeply stigmatized as suspected
15 terrorists.

16 Marine veteran Abe Mashal was surrounded by
17 approximately 30 security officials at O'Hare Airport when
18 he was denied boarding on flight. He and Ayman Latif,
19 Ray Knaeble, and Steven Washburn, all military veterans of
20 the United States, when they were denied public boarding in
21 a public fashion, felt that their reputation as military
22 veterans was tarnished. And Stephen Persaud was surrounded
23 by security officials and denied boarding in front of his
24 wife and his son; Elis Mohamed in front of five of his
25 classmates at university. These experiences publicly marked

1 the plaintiffs with a badge of suspected terrorist; a fact
2 that defendants do not dispute in their briefs. The
3 parties' only dispute is whether the plaintiffs have showed
4 the plus factor.

5 Under controlling Ninth Circuit law, Your Honor, they
6 have. And that's for two reasons. First, plaintiffs have
7 shown that the defendants altered their legal status, and
8 that is what the Ninth Circuit made clear satisfies the plus
9 factor. They have shown that the defendants altered their
10 legal status because, once listed, they were legally unable
11 to do something they could otherwise do. And that's a quote
12 from the Ninth Circuit's decision in *Humphries*.

13 Plaintiffs were unable to board planes by operation of
14 law under 49 USC § 114(h), TSA is required to use the
15 watchlist to deny boarding to people on the No Fly List.
16 And there -- in its decision in *Miller* and *Humphries*, the
17 Ninth Circuit made clear that rendering individuals legally
18 unable to do something they could otherwise do satisfies the
19 plus and makes the stigma-plus claim cognizable.

20 This alteration of legal status actually is notably
21 parallel to the one in the seminal case that established the
22 stigma-plus doctrine itself, and that's *Wisconsin v.*
23 *Constantineau* where the plaintiff was stigmatized as a
24 drunkard or an alcoholic, was placed on a list, and then
25 prohibited from buying alcohol. Just as she could not buy

1 alcohol, plaintiffs here, on the No Fly List, are legally
2 prohibited from boarding planes.

3 Second, Your Honor, the plaintiffs have shown the
4 required connection between government injury to their
5 reputation and the alteration in legal status. Here, the
6 same action caused both. The defendants' placement of the
7 plaintiffs' names on the No Fly List both smear them as
8 suspected terrorists, since it's undisputed that that is a
9 list of suspected terrorists, and it legally prevented them
10 from flying. Where the same action causes both stigma and
11 plus, the plaintiffs have shown the required connection.

12 Your Honor, the defendants' principal argument that
13 plaintiffs haven't satisfied the plus factor is they haven't
14 shown a deprivation of a fundamental right to interstate
15 travel or a separate and independent liberty interest in
16 travel. And the Ninth Circuit's decision in *Humphries* and
17 in *Miller* makes clear that an alteration in legal status is
18 sufficient.

19 Plaintiffs are not required to show the extinguishment
20 of a separate and independent right. Although, you know, we
21 argue that they have here with the liberty interest in
22 travel.

23 In *Humphries*, the plaintiffs in that case were placed
24 on a list of child abusers that was disseminated to certain
25 government agencies. It didn't even result in their denial

1 of a license or a benefit. It simply was consulted by
2 certain government agencies and would have been if they
3 applied for a license or a benefit, and the Ninth Circuit
4 found that that possibility, that mere consultation of a
5 list containing those stigmatizing statements, satisfied the
6 plus factors.

7 But here the plaintiffs have shown far more. They are
8 legally unable to board planes, and there is no dispute that
9 persons on the No Fly List are denied boarding on planes,
10 and that the plaintiffs were each individually denied
11 boarding on planes.

12 Finally, Your Honor, is the defendant -- defendants
13 rely on *Green v. TSA* to argue that because the plaintiffs in
14 that case failed to show the required plus factor, that the
15 plaintiffs in this case have failed to do so, as well.

16 But, as I mentioned before, all of the plaintiffs in
17 that case were able to fly.

18 What they challenge is extra security screening. And
19 while there may be some question whether being permitted to
20 fly while being screened additionally prior to boarding,
21 whether that satisfies the alteration and legal status test,
22 there should be no serious dispute that people who are
23 legally prohibited from boarding planes have satisfied the
24 plus factor.

25 Your Honor, those are the points that I wanted to make

1 with respect to those two liberty interest claims.

2 Would you like to --

3 THE COURT: Were you or one of your colleagues
4 going to address the balance, then, against the government's
5 interests in security --

6 MS. CHOUDHURY: My colleague will address that.

7 THE COURT: All right. Thank you very much.

8 And the 25 minutes that was allocated to you has been
9 used. That sounds fair in the end.

10 All right. Next? Mr. Risner, is it?

11 MR. RISNER: Yes.

12 THE COURT: Good morning.

13 MR. RISNER: Good morning, Your Honor. I want to
14 start by talking about plaintiffs' first theory, that notion
15 that there's been a deprivation of a liberty interest. I
16 think the question is what -- what is the liberty interest
17 in travel, and the cases that -- we obviously have decades
18 of cases that have looked and interpreted the concept of
19 liberty interest covering a range of issues, but when they
20 talk about travel, they're talking about a deprivation of a
21 liberty interest in interstate or international travel. And
22 the plaintiffs' cases also overwhelmingly talk about the
23 deprivation of the ability to use a passport, whether a
24 revocation or suspension or denial. And there is a very
25 significant difference between the revocation or denial of

1 the ability to use a passport and the alleged inclusion on
2 the No Fly List.

3 The Supreme Court recognized that in the *Aptheker* case
4 when it talked about the fact that the deprivation of a
5 passport was a severe restriction that imposed a prohibition
6 against worldwide travel and actually recognized that the
7 laws in place made it a crime for a U.S. citizen to travel
8 outside the Western Hemisphere or to Cuba without a
9 passport. That's a very serious deprivation that's not
10 present here.

11 What we have in this case is the alleged inclusion on
12 the No Fly List, which controls one method of travel. It
13 does not deprive an individual of all ability to travel
14 internationally or in interstate travel and --

15 THE COURT: So just explain to me and the
16 plaintiffs how that works, then. How is it a person, like
17 one of the plaintiffs who's been denied boarding in the
18 manner that they've encountered, being overseas and the
19 like, unless they're extraordinarily wealthy and have weeks
20 and months of time to get from port A back to the U.S., how
21 is that not literally the practical equivalent of not having
22 a passport?

23 MR. RISNER: It's not the practical equivalent of
24 not having a passport, because the passport actually denies
25 the ability or right to --

1 THE COURT: Effectively, plaintiffs are asserting
2 they have been denied that right because all they get is
3 "no" at the gate and nothing more.

4 MR. RISNER: Well, I think that for this question,
5 the liberty interest question, we have to separate the
6 notice arguments and the process arguments. I think that
7 this issue --

8 THE COURT: So let -- let's do that.

9 MR. RISNER: Yeah.

10 THE COURT: They're told no. That is asserted to
11 be the practical equivalent of not having the passport.
12 They're treated exactly the same as the person who doesn't
13 have the passport, in that they're not permitted to get on
14 the aircraft.

15 MR. RISNER: For that -- that might be an
16 equivalent for air travel. I certainly agree to that.

17 THE COURT: That's what we're talking about here
18 is not flying; not not walking or boating or swimming or
19 whatever. This is an air travel problem; right?

20 MR. RISNER: Exactly. And I don't think that
21 there is a suggestion that there is a liberty interest in
22 air travel itself. We have to consider the broader context
23 of what the interest in travel, whether interstate or
24 international, actually is. And so the availability of
25 alternative means is relevant.

1 THE COURT: So tell me what those are, please.

2 MR. RISNER: So the alternative means that are
3 available, as the plaintiffs' cases -- plaintiffs'
4 situations in this case demonstrate, there are available
5 alternatives through travel by land and travel by sea. And
6 you can look at the plaintiffs allegations in this case and
7 recognize that several of them were returned to the United
8 States through alternate means. They were not by air.
9 Mr. Persaud, Mr. Washburn, and Mr. Knaeble have returned by
10 alternate means; whether by land or by sea.

11 Of course we're not suggesting that there is not a
12 convenience in air travel. That's certainly the case. And
13 I think that the Ninth Circuit addressed that in *Gilmore*.
14 It is a different legal construct to look at fundamental
15 rights or liberty interests, but the Ninth Circuit in that
16 case accepted the plaintiff's allegations that air travel is
17 a necessity and not replacement by other forms of
18 transportation.

19 But, that said, it's just one means of transportation.
20 There are still other ways that these plaintiffs have
21 shown -- I think it's important to recognize that none of
22 the plaintiffs -- largely, this case concerns international
23 travel for these plaintiffs' circumstances, but none of the
24 plaintiffs who've wished to return to the United States have
25 been denied the ability to do that.

1 THE COURT: Well, only after filing of a lawsuit
2 and only after engaging in enormous effort.

3 MR. RISNER: I'm not sure that factually they all
4 filed a lawsuit first.

5 THE COURT: Fair enough. But only after engaging
6 in this kind of process. It's not as if they could just
7 dial up TSC and say: Oh, please, I'm stuck here in Yemen.
8 I do want to get home to my family or my job or whatever.

9 MR. RISNER: In fact, there is a process that
10 we've described that several of the plaintiffs have gone
11 through in which the government works with U.S. citizens who
12 have trouble returning to the United States. And, in this
13 case in particular, in addition to Mr. Persaud,
14 Mr. Washburn, and Mr. Knaeble, several of the plaintiffs
15 have flown to the United States -- that's alleged in the
16 declarations -- that they've worked with the government to
17 provide that assistance that Mr. Ghaleb, Mr. Latif, and
18 Mr. Muthanna have returned to the United States by air.

19 Additional plaintiffs have actually refused that
20 assistance, because they don't like the fact that the
21 government will not guarantee their ability to travel in the
22 future. But there is -- there is not a deprivation of all
23 means of travel, and I think that what we're talking about
24 in the passport context, it is, I think, dramatically
25 different.

1 I do want to point to *Green*, because I think *Green* is
2 instructive, while on the stigma-plus claim primarily, it's
3 instructive on this issue, as well, because the Court
4 recognizes there is no right to travel without impediments
5 and that burdens on a single form of transportation that
6 aren't unreasonable don't give rise to a right, and that's
7 what's happening here.

8 I think that air travel is unique. That is true in
9 convenience, as the Ninth Circuit recognized. And that's
10 also true because of the tremendous threat from terrorist
11 attacks. But the deprivation of an individual's ability to
12 fly but not take alternative means of transportation does
13 not give rise to a liberty interest, absent some allegation
14 that has denied them a right to reenter the country, which
15 is not the case here, or has denied them the right to
16 present at a port of entry and enter, which is not the case
17 here.

18 I want to briefly address the notion of the -- that CBP
19 is somehow responsible for denying boarding on ships. The
20 plaintiffs have pointed to the declaration of Mr. Muthanna
21 who says that he was denied boarding on a ship by the vessel
22 operator at the recommendation of CBP. And plaintiffs say
23 that that fact that it was the operator's decision doesn't
24 matter. But I think it of course matters that it was the
25 operator's decision to board or not board particular

1 individuals.

2 The No Fly List is designed to protect air travel, and
3 that is the set of allegations we're working from here. And
4 I think that you can look at Mr. Persaud's claims and in his
5 declaration and then also in the complaint he alleges he was
6 able to return by ship. So the fact that an individual
7 operator might make an adverse determination on boarding is
8 not attributable to -- not -- not the responsibility of CBP,
9 let alone the defendant before the Court right now.

10 I also want to address the stigma-plus claims. The
11 different theory obviously. Where I think that the
12 plaintiffs have --

13 THE COURT: Can I clarify that the defendants
14 agree there is a stigma to be associated with denial of
15 boarding because of the No Fly List association?

16 MR. RISNER: We don't dispute, for purposes of
17 this motion, the stigma claim -- the stigma component of the
18 claim is satisfied. But where the plaintiffs have gone
19 wrong is on the plus part of this claim, and I think that
20 there's -- there no suggestion there's a balancing of the
21 two. They're really independent criteria that both have to
22 be met.

23 The plaintiffs have not articulated a plus, in that
24 they have not articulated a right or status that was
25 previously recognized by law that has been altered. And I

1 think that *Humphries* actually speaks to that. In *Humphries*,
2 as counsel indicated, you have parents that were identified
3 in the Child Abuse Registry, and there were consequences for
4 the loss of rights that were provided by the State in that
5 case.

6 The listing on the Child Abuse Registry in California
7 was used by the California state government in its
8 consideration of eligibility for state benefits, like
9 employment, state-issued licenses, and adoption. It was
10 also used by other states, as well. But in that case you
11 have benefits or status that are afforded by state law to
12 all individuals, employment, licenses, adoption, and so on,
13 and then taken back through this plus. That's not the case
14 here. You don't have a legal status offering a right or
15 status to fly by federal law that is then taken back by the
16 plus.

17 I think that the plaintiffs' reliance on *Miller* is a
18 bit odd, because in that case the Court actually found that
19 there was no change in state law that would give rise to a
20 plus.

21 In *Miller* you had noncustodial grandparents who were
22 claiming rights to -- rights -- liberty interest as
23 grandparents to their grandchildren. The grandfather in
24 that case was placed in the child abuse index, and the Court
25 found that there was no stigma-plus, because there was no

1 deprivation of a liberty interest that directly affected
2 plaintiffs' rights under the existing law.

3 And I think that that's what you have here. You don't
4 have the federal or state government conferring rights to
5 everyone and then taking them back from certain individuals
6 on a plus.

7 THE COURT: Everyone has the right to go to the
8 airport with their papers and documentations and ticket and
9 boarding pass to present themselves. You go through the
10 screening and hopefully board the aircraft, but those who
11 are on the list don't get to go there. Why is that argument
12 you're making -- how does that reconcile with the reality?
13 Everybody has the right to travel unless the TSC has taken
14 it away.

15 MR. RISNER: I don't think that -- I think that
16 the difference is not everyone has that right. That right
17 has not been provided by the federal government. That
18 distinguishes this case from a lot of the liberty interests
19 we're talking about.

20 THE COURT: Where does it come from, then? It's
21 just a function of commerce or what?

22 MR. RISNER: I think that's probably a better way
23 of looking at it. I think that's not a -- this is not a
24 case where you have employment benefits or some kind of
25 financial or assistance benefits provided by a state. It's

1 not a case where you have employment that's provided by a
2 state, where if a state gives someone something and then
3 wants to take it back, there's a deprivation of this
4 interest in that thing that's been given.

5 THE COURT: But, I mean, it's the government and
6 not United Airlines or Alaska Airlines denying boarding.
7 It's the government telling the boarding agent as a matter
8 of law, you are not to let this person on board.

9 MR. RISNER: I think --

10 THE COURT: If the government has that right or
11 that power to restrict that access, how can you say there
12 wasn't something there that was government-originated or
13 just inherent in the natural right of human beings that --
14 that it preexisted and that it is now being taken away?

15 MR. RISNER: Well, I think that the *Paul v. Davis*
16 from the Supreme Court addresses that question. I mean,
17 that's sort of a seminal case on stigma-plus, and *Paul*
18 says -- that case says that -- in that case the police put
19 Davis's name on a flier that was distributed to 800
20 merchants that described him as a shoplifter. As a result
21 of that, Paul was -- sorry, Davis was alleging that
22 shoplifters were denying him the opportunity to shop -- I'm
23 sorry -- not shoplifters -- merchants were denying him the
24 opportunity to shop. That's obviously an opportunity or a
25 right, to use the analogy, that is afforded to all

1 individuals.

2 THE COURT: How is that any different than a right
3 to board an aircraft, then? I mean, if a merchant has a
4 store open for people to come in and shop and now the
5 government has interfered with that by labeling Mr. Davis,
6 what's different than all the airlines having the same
7 opportunity competitively to entice you to fly with them or
8 whatever only -- only to have the government prevent your
9 boarding the aircraft? Why is that any different?

10 MR. RISNER: I think that's right. I think in
11 *Paul* they found there was no plus in that case. So that
12 analogy, I think, would hold.

13 THE COURT: Okay.

14 MR. RISNER: There's not a loss of the status
15 that's being given.

16 THE COURT: Because there's not a fundamental
17 right to go shopping at the A & P or what?

18 MR. RISNER: No, it's not that there's not a
19 fundamental right -- and that's a different analysis that
20 sort of ignored the stigma part --

21 THE COURT: I should not have --

22 MR. RISNER: -- or liberty interest. I guess it's
23 a different, I guess, question there. The difference is
24 it's not a right or a status that's recognized under federal
25 or state law.

1 I think that the *Green* case speaks a little bit, too.
2 I think that it is actually analogous that obviously the
3 deprivation of allegedly being included on the No Fly List
4 is -- is qualitatively different than being delayed boarding
5 on its own, but in *Green*, the reasoning of the Court is
6 still -- is still on point, because it recognized there was
7 no plus when somebody was denied the ability to travel
8 without impediments.

9 THE COURT: Except the impediment there was
10 solved. After an hour's worth of screening, the passenger
11 was reinstated to the same status as everybody else. And to
12 the extent there was any stigma, it's mitigated. He's on
13 the aircraft, so he must be okay.

14 MR. RISNER: I'm not sure if that really would
15 dissipate the stigma. The -- the plus was changed. I
16 certainly recognize that. But the *Green* court also
17 recognized that as a matter of law, under the stigma-plus
18 claims, that there was no plus associated with a burden on a
19 single mode of transportation. That's what you have here.

20 Again, you're really coming back to a plus that
21 attaches, if at all -- which I don't think there's a plus
22 here -- but if there is one, it's a plus that attaches only
23 to a single mode of transportation.

24 THE COURT: Which is effectively, say the
25 plaintiffs, the only mode of transportation.

1 You know, this argument that you can take a boat just
2 seems wrong. It seems fundamentally wrong to assume that
3 that has any -- any meaningful access for a person who needs
4 to get from here to the other side of the world, say, for a
5 family medical emergency or for a brief vacation to go home
6 to see ailing grandparents.

7 This -- I'm just really having trouble with the idea
8 that a person in Portland, Oregon, is not significantly
9 burdened by being prevented from flying internationally
10 because maybe they can get on a vessel that in weeks and
11 maybe months and tens of thousands of dollars can get them
12 to a point after someone has already died or after an
13 important family event has occurred.

14 I'm troubled with the fundamental assertion you're
15 making that this travel right, whatever it's for, isn't
16 significantly burdened by the No Fly List, because you can
17 maybe get a boat or a rocket ship, for that matter. I don't
18 know.

19 MR. RISNER: I don't know what the record will say
20 about rocket ships, but I want to -- I think I'll point to
21 two things to sort of try to respond to your question. The
22 first is the analysis in *Gilmore*, which accepts this
23 allegation as the starting point that air travel is, in the
24 Ninth Circuit's word, a necessity. But, at the same time,
25 it's one method of travel. I don't know of a -- of any case

1 that's recognized as a liberty interest in one form of
2 travel. And the plaintiffs haven't pointed to one, to my
3 knowledge. I don't know of a -- any legal support for the
4 notion that a convenience is determinative in this arena.

5 THE COURT: That's my point, Counsel. To call it
6 convenience is really, I think, marginalizing the argument.
7 I don't think you can fairly say it's just a matter of
8 inconvenience. It's hugely expensive, it's hugely
9 time-consuming, and who knows what other impediments exist
10 between, say, the Port of Portland and some other place on
11 the other side of the world; how many other authorities a
12 person might have to encounter from here. To say it's
13 merely inconvenient, I think, undermines the point of what
14 the plaintiffs are arguing.

15 And it -- to me, their argument deserves more credit
16 than that. And it -- I think it's not sufficient to simply
17 say all forms of transportation have been denied the
18 plaintiffs, because, effectively, I don't see that this
19 record shows any practical alternative to a ticket on an
20 aircraft to get from here to the other side of the world for
21 whatever reason a person lawfully would want to travel.

22 MR. RISNER: I would just point back to the
23 declarations in this case of the individuals who have
24 returned, whether by air or by other means, that that has
25 happened.

1 THE COURT: Am I wrong in resisting that -- the
2 comfort you're trying to give me? Because these people
3 didn't just get to get on an aircraft. I mean, there was a
4 lot of effort each had to go to to be permitted to come back
5 or to get to wherever they were going. I'm having trouble
6 accepting the solace you're offering that they get to come
7 home eventually.

8 MR. RISNER: I think I would just maybe end this
9 point by just pointing to the -- whether it is a matter of
10 convenience or something greater than that, has to be
11 grounded in a constitutional construct of what the liberty
12 interest is. And I think that even if that's true --

13 THE COURT: What is it? What is the liberty
14 interest around being able to travel out of the country to
15 an important event or even a less important one, but I don't
16 want to bother our argument now with, "I want to go on
17 vacation." What if a person needs to travel for important
18 reasons we would all recognize; the death of a loved one,
19 the birth of a child, some important matter that any human
20 being would want to encourage? And what if a person having
21 once been denied boarding and having gone through a process
22 where nothing is resolved in any explicit way, the person
23 then goes to the trouble to make an air reservation and buy
24 a very expensive ticket to go, hopefully, to say the last
25 goodbyes to a dear family member and then is again denied

1 boarding?

2 What right -- isn't there some basic problem with this
3 notion that the person would continue and repeatedly be
4 denied boarding for that sort of --

5 MR. RISNER: I'm not sure why the person would
6 continually need to do it, but I think that that gets to the
7 balancing, and we're happy to talk about that. Maybe the
8 second part, but --

9 THE COURT: Okay. I want to make sure I haven't
10 just misunderstood you.

11 So let's take a hypothetical where a person has a
12 family member overseas and there is a time-sensitive reason
13 to get there, like the person is -- overseas is a family
14 member and very ill. So the traveler wants to go and is
15 denied boarding and is told, as I'm -- as I said is
16 undisputed here, "You're on the No Fly List. We can't let
17 you get on the aircraft." The person investigates shipping
18 options -- we don't have things like, you know, transporter
19 rooms from Star Trek -- I mean, the only other option is by
20 water, really -- and can't get there in time. So the person
21 tries again. You want to know why? Why would they try
22 again? Because it's important to be there at the death bed.
23 So they buy another ticket, and they're denied again.

24 I don't think the why should they try again is really a
25 productive line of inquiry. The issue is shouldn't they

1 have the right to get on the aircraft to go for some
2 important purpose, if not an unimportant purpose, and if
3 they're denied, shouldn't they have the means to resolve the
4 issue affirmatively so that when the next relative is ill
5 and dying they can plan five months in advance to get on
6 some freighter? I don't know. The idea that this isn't
7 important is really troubling me.

8 MR. RISNER: I want to be clear when I say -- when
9 I asked the question about them trying again, I think that
10 gets back to the beginning of your colloquy with plaintiffs'
11 counsel that if there is a liberty interest here, the
12 government's suggestion is not that an individual in that
13 situation is entitled to no process.

14 The government's position is that the process that
15 they're currently provided is adequate under due process,
16 and, so, in that sense --

17 THE COURT: I guess that we're drifting to the
18 process part.

19 MR. RISNER: Right. Yeah.

20 THE COURT: But, to me, they're inextricably
21 intertwined, these issues, because the sufficiency of the
22 process is only important if you have some interest, and
23 you're contending there isn't one, and I'm challenging that
24 at the most basic level.

25 How can there not be a right to travel to go see a

1 relative dying?

2 MR. RISNER: I think that in that I would just
3 point back to *Gilmore*, which recognized that it was talking
4 about one method of travel, which was air travel, and it
5 referred to it as a necessity. But, in that case, it was a
6 fundamental right inquiry, but there wasn't a right to do
7 that.

8 And, obviously, if you're not able to -- to exercise a
9 right to air travel in that situation, when it is recognized
10 by the Ninth Circuit to be the most convenient way, the
11 alternative will be less convenient, but I don't know of a
12 liberty interest that attaches to a method of travel because
13 it's the most convenient.

14 THE COURT: Well, you're right there isn't any
15 case that explicitly addresses it and you're right that the
16 Ninth Circuit case framed the issue, as you've noted,
17 because they didn't have to. But what I'm saying is I think
18 we have to confront that issue here.

19 It's not reasonable to say air travel is merely a
20 convenience in this world, in this time, and so if your
21 argument rises or falls on it's a mere convenience, I find
22 that response quite unsatisfactory. There has to be more to
23 the definition of what this means than it's merely
24 inconvenient.

25 MR. RISNER: And I think it's not -- I'm not

1 suggesting that the line is drawn merely at convenience.

2 THE COURT: Where is it drawn?

3 MR. RISNER: I think the question is do they still
4 have the ability to engage in this type of interstate or
5 international travel.

6 THE COURT: Why should any rationale court -- I
7 hope we're all on the rationale side. Why should any
8 neutral -- any arbiter of this reach a conclusion that there
9 is any alternative to air travel in today's world for these
10 kinds of issues, given the record that I have? I mean,
11 maybe once in many weeks, after a lot of money, someone can
12 get from point A to point B.

13 MR. RISNER: On that precise question, I think
14 that's what the Ninth Circuit recognized in *Gilmore*. While
15 it was a different legal analysis, the question was, was
16 there an alternative means of travel? The fact that it was
17 going to be much more convenient or, you know, much better
18 to use this method I don't think was dispositive for
19 *Gilmore*, and it shouldn't be dispositive here.

20 THE COURT: So your counsel --

21 MR. RISNER: So there was an alternative.

22 THE COURT: Your counsel is assume -- assume that
23 there is another method?

24 MR. RISNER: I don't think Your Honor has to
25 assume it, because you can look at Mr. Persaud's

1 declaration, you can look at Mr. Washburn's declaration, and
2 you can look at Mr. Knaeble's declaration.

3 THE COURT: And see that they eventually got there
4 from here somehow?

5 MR. RISNER: Or whichever way they're going,
6 right.

7 THE COURT: Right. Or got here from there?

8 MR. RISNER: Right. You can look at the
9 declarations of the individuals who did return to the United
10 States with the assistance of the government, but I think
11 that it's just not accurate to say it's actually a
12 constitutionally protected liberty interest that attaches
13 when we're talking about one method of travel.

14 THE COURT: All right. So give maybe another look
15 at this from the perspective of other cases that have
16 recognized similar rights or not recognized similar rights,
17 since we've obviously beat *Gilmore* and have gone around that
18 bush many times. Help me with the analogy to understand why
19 the defendants' position is legally correct that there
20 should not be recognized here in this case, and maybe the
21 first time, a right to travel in 2013 internationally by
22 air.

23 MR. RISNER: Are you asking about just the liberty
24 interest claim or the stigma-plus argument?

25 THE COURT: Either one. And give me some case

1 analysis from another perspective that I can analogize to
2 this to understand why it should not be regarded as a right,
3 even though -- well --

4 MR. RISNER: It should not be regarded as a right
5 because of all the cases that reject that argument on a
6 passport theory. A passport actually denies someone the
7 ability to travel internationally, either by air or by ship
8 or by land. That is a more serious deprivation.

9 THE COURT: What is the process that attaches to a
10 passport revocation, as opposed to denying boarding on an
11 aircraft?

12 MR. RISNER: A lot.

13 THE COURT: It's a lot different; right?

14 MR. RISNER: I'll certainly say it's a lot
15 different. I think that takes us into the process argument,
16 too, which I'm happy to --

17 THE COURT: But if your point is that passport
18 revocation is permitted because -- why? There's a right
19 that -- you have the passport. It's been taken away. Now
20 we have a hearing about it and a process. And if denying
21 boarding on an international flight is the equivalent, in
22 practical terms, of not having a passport, why isn't the
23 same kind of process then due and why isn't it treated the
24 same way, from your perspective?

25 MR. RISNER: I just don't think that the predicate

1 is accurate.

2 THE COURT: The premise that it's the equivalent.

3 MR. RISNER: I don't think it is the equivalent,
4 right.

5 THE COURT: Why?

6 MR. RISNER: Because of the availability of
7 alternative means.

8 THE COURT: So we're back to the boat?

9 MR. RISNER: I think that's right. I think that
10 is the major distinction.

11 THE COURT: What is the record with respect to
12 that availability? Because I made all kinds of hyperbolic
13 references here, what is the actual record as to the
14 availability of alternate means today to an international
15 traveler denied boarding?

16 MR. RISNER: The record, if on the -- with respect
17 to the boat, is that Mr. Persaud was able to take a ship to
18 enter the United States. That's in his declaration, which
19 is docket 91-13 at paragraph 9. The record indicates that
20 Mr. Muthanna alleges that he was not permitted to board a
21 boat from Philadelphia to Belgium. He indicates that the
22 operator of that commercial vessel, the private operator,
23 denied him the right to boat at the recommendation of CBP.
24 That's in his declaration at docket 91-27, paragraph 20.

25 I think that's the -- the record on that issue.

1 THE COURT: Okay.

2 MR. RISNER: And then we get to the question of
3 whether or not it's accurate that it doesn't matter that the
4 operator made a decision.

5 THE COURT: I -- I've been interrupting you, and I
6 don't want you to not have the chance to finish up what
7 you've needed to make a point. Even though we're at about
8 25 minutes, go ahead, and I'll try to resist the urge to
9 interrupt you again.

10 MR. RISNER: I think you've walked me through all
11 my points.

12 THE COURT: Is there anything else you wanted to
13 say before we wrap and take a short recess?

14 MR. RISNER: On the issue of the liberty interest,
15 no.

16 THE COURT: What about the plus? You already
17 covered there wasn't a right there that was -- preceded the
18 stigma.

19 MR. RISNER: Right. I think *Green* speaks to --
20 while factually different, *Green's* legal analysis speaks to
21 this case quite accurately.

22 Nothing further.

23 THE COURT: Shall I assume, as a matter of
24 undisputed fact, for purpose of these motions only, the
25 interruption in travel, as asserted by each of the

1 plaintiffs in their declaration, since the defendants did
2 not refute them -- and here I'm not getting at the -- all of
3 the associated burden that the declarants have described,
4 but simply the fact of denial of boarding and the fact of
5 the assertion that that was because they were on a No Fly
6 List -- may I assume that is undisputed for purposes of
7 these motions?

8 MR. RISNER: The fact that the individuals were
9 denied boarding is undisputed. I think that what we think
10 are immaterial allegations are the allegations of certain
11 government employees told them or certain airline employees
12 told them the circumstances for that. But the fact that
13 they were denied boarding on an aircraft to or from the
14 United States is not disputed.

15 THE COURT: So you've asserted the immateriality
16 of the assertion for the reason why they were denied
17 boarding. May I assume that it is undisputed that each
18 plaintiff was directed to the TSC process to deal with a
19 non-boarding issue?

20 MR. RISNER: Yes. Each of the individuals in this
21 case filed a DHS TRIP redress request and received a
22 response from the agency.

23 THE COURT: Were they directed to do that?

24 MR. RISNER: You know, I don't think there are
25 allegations in the record for each of the plaintiffs -- I

1 don't want to overstate it -- as to who told them how to go
2 about that process. But it's not disputed that they did go
3 about that process.

4 THE COURT: Regardless whether defendants contend
5 it's material or immaterial, defendants have not
6 controverted on these motions, the plaintiffs' assertions
7 that they were denied boarding and they were told they were
8 denied boarding in one form or another because they were on
9 the so-called No Fly List.

10 MR. RISNER: I don't think that all the plaintiffs
11 make the last allegation as to exactly why they were denied
12 boarding or what they were told. What we -- what I mean
13 when I say that I think some of the allegations are
14 immaterial -- I think we'll probably get to this next part,
15 but the government does not confirm whether a particular
16 individual is or is not on the No Fly List.

17 THE COURT: All right. That's your choice.

18 On summary judgment, with these declarations, though, I
19 have them unrefuted. And that's your choice not to have
20 refuted them?

21 MR. RISNER: That's correct. We have not
22 responded to the factual allegations in any of the
23 declarations.

24 THE COURT: I think --

25 MR. RISNER: I think that's accurate. With the

1 exception of the Coppola declaration, which we filed. To
2 the extent that addresses any of the issues, then obviously
3 those issues, we think, are material.

4 THE COURT: All right. Let's take a 15-minute
5 recess, please, everyone. Thank you.

6 (A recess was taken.)

7 DEPUTY COURTROOM CLERK: All rise.

8 THE COURT: Thank you, everyone. Please be
9 seated.

10 Before we continue, I wanted to go back to what we were
11 discussing just before the break.

12 Mr. Risner, you can stay where you are. *Gilmore* and
13 *Green* were not cases that involved international travel on
14 their facts; right?

15 MR. RISNER: I think that's correct.

16 THE COURT: So when the Court was noting the
17 alternative to air traveling within the Continental United
18 States, there's obviously available cars, trains, bicycles,
19 and other modes of transportation. Why should one import
20 that statement, the quote to which you were referring, from
21 cases that don't involve international travel, to this case?

22 MR. RISNER: I think because the other means are
23 still available. They're -- in *Gilmore*, the Court
24 recognized that air travel was a much better alternative.
25 It accepted the allegations that air travel was a much

1 better alternative. That is what's alleged here; that there
2 are other means that are -- that it's not that they're less
3 convenient. They're much less convenient in certain cases,
4 but the analysis is still the same. It's still available.

5 I want to just -- if I could sort of clarify one thing
6 from before, too; that when an individual is located outside
7 the United States and would want to return and would be
8 considering the possibility of boats, there's also an
9 alternative option of flying to another country that does
10 share land borders with the United States and then traveling
11 by land from there. And that's happened in these cases
12 here. It's not that boats are a necessity. There's the
13 opportunity to fly to --

14 THE COURT: Mexico.

15 MR. RISNER: -- a county like Mexico or somewhere
16 else in Latin America and then come on a land border. I'm
17 not suggesting that that is as convenient than flying
18 directly to the United States in any way, but it is an
19 available alternative. I think under *Gilmore* and *Green* that
20 that analysis is still appropriate.

21 THE COURT: Thank you for answering my question.

22 MR. RISNER: Thank you.

23 THE COURT: All right, Counsel, you may proceed.

24 MR. ARULANANTHAM: Thank you, Your Honor. I want
25 to clear up just a few small issues about the deprivation of

1 liberty, as well, and then spend the bulk of my time talking
2 about the notice and opportunity to be heard arguments,
3 Your Honor. But just briefly on the question about the
4 stigma claim and the discussion you were having with
5 government counsel about *Paul v. Davis*, I just wanted to
6 clarify that the distinction in *Davis* -- the reason why
7 there's no plus in that case, Your Honor, is because a
8 vendor is not required to check the list of, you know, a
9 known shoplifter. So it's not a mandatory constraint.

10 We're much more like *Wisconsin v. Constantineau*, which
11 is the case that preceded *Paul v. Davis*, where it's a ban on
12 buying alcohol. And buying alcohol is also a right
13 that's -- you know, it's just in commerce. It's just what
14 you were talking about, Your Honor, just like flying on a
15 plane, and it's illegal for our clients to board a
16 commercial aircraft.

17 The government counsel had also mentioned and you had
18 asked about cases about one form of travel, and I just
19 wanted to point to you driver's licenses, which it's
20 mentioned *Bell v. Burson* is the case, and it's on page 7 of
21 our reply. It's our reply in support of our summary
22 judgment motion.

23 And driver's license revocations are subject to due
24 process protections. And, obviously, you can take a bus and
25 you can walk and you can do many other things. Nonetheless,

1 it is a deprivation of liberty in which you have a liberty
2 interest in being able to drive, and therefore it does
3 trigger due process protections, even though it's not
4 impossible to go from one place to another without a car.

5 Just a couple of other short things regarding your
6 questions about the record, Your Honor. Your hypothetical
7 about a person who's going to visit a family member who's
8 dying is very close to the facts of Salah Ahmed, which, I
9 apologize, maybe that's why you mentioned it, Your Honor. I
10 just wanted to make it clear his brother's funeral is
11 happening in the Middle East and he can't go. And it really
12 trivializes this case to compare that to *Gilmore*, you know;
13 a man who refused to give his ID at the airport.

14 You know, Mr. Ahmed would have gladly given his ID and
15 gone through the security screening. All of our plaintiffs
16 would have gone through the security screening in order to
17 be with their wives or parents, or, you know, whatever it
18 is, and obviously that is a very serious deprivation of
19 liberty.

20 There was also a question about the special
21 arrangements under which people were returning to the U.S.
22 That did happen after -- in every case of these 13 people
23 after the complaint was filed and after the preliminary
24 injunction was filed. And in each of those it was made
25 clear that it's a one-time waiver that allows these people

1 to come here. It does not mean that they can fly now.

2 You know, in fact, Steven Washburn, he didn't take the
3 waiver, but he got through the U.S. by taking five flights
4 and ended up in Mexico. He got imprisoned in Mexico,
5 because Mexico shares, you know, the information with the
6 United States -- we presume that's why. He eventually made
7 it here. But his wife is in Ireland, and he can't go back,
8 because he can't afford the money to take a cruise ship to
9 get back to Ireland.

10 And so when the government counsel says, "Well, why
11 aren't other people taking that waiver," they're worried
12 about that exact thing. If you look at, for example,
13 Ms. Rana's declaration, she has a small child, and she's
14 with her husband in Pakistan. Her parents are in the U.S.
15 She would like to take her child -- to bring her child to
16 see their grandparents, but, if she does and takes a waiver,
17 then she's going to separate her child from the child's dad,
18 and she may not ever be able to get back. She doesn't know
19 how she'll be able to get back to see the father.

20 So the fact that there's a one-time waiver that was
21 allowed for some plaintiffs does not do much to minimize the
22 deprivation of liberty that we're talking about.

23 I think the last thing I wanted to say before we get to
24 the notice issues, Your Honor, is, just, there is in the
25 record -- there are at least some places where it is

1 impossible to travel. We don't think we have to show that.
2 We think it's a very serious deprivation of liberty, even
3 if, you know, the only way to travel is to, you know, hire a
4 team from the America's Cup and sail a boat to Hawaii, you
5 know, which is what Amir Meshal would have to do to see his
6 brother and sister-in-law in Hawaii.

7 But even if you leave that aside, there are some
8 places -- Muthanna is the plaintiff -- there's a
9 declaration -- he cannot get to Yemen. It's actually
10 impossible for him to get there. And I'm sure there must be
11 other places in the world. You know, I'm sort of
12 speculating; but, like, South Africa or, you know, India.
13 There must be places where it's actually impossible to
14 actually get there without -- without taking a plane.

15 Your Honor, you had mentioned at the outset that in
16 your view it's difficult to separate the question of
17 liability from the question of remedy, and I struggle with
18 that.

19 THE COURT: Only in the sense that it seems to me
20 that when you're speaking of degrees of rights or the extent
21 to which a deprivation is significant, fundamental,
22 constitutional, that discussion, that sliding scale,
23 necessarily implicates what the consequence is, and this
24 opportunity to address the problem, I think, is as a, at
25 least a practical matter, if not a legal one, fundamentally

1 tied up with what the right is. Because a right without a
2 remedy, I think we can all agree, in the context of just
3 common parlance, isn't a right at all.

4 That's the only reason I connected the two.

5 MR. ARULANANTHAM: I think we agree with that,
6 Your Honor, in the sense that if there were no way -- it was
7 actually impossible to do anything more than what the
8 government is doing now, by way of notice and opportunity to
9 be heard, then could you rule for them on the summary
10 judgment motion, and there's no further question to be
11 addressed.

12 But our view is that the -- that the Court -- well,
13 what we're asking the Court to do today, or at this stage,
14 is declare the existing redress system unconstitutional,
15 insufficient, and to set certain basic parameters for what
16 an adequate hearing process -- redress process would look
17 like. And then the details of that process we would ask be
18 filled out in briefing on the remedy, and that -- that's the
19 process, Your Honor, that district court in the *Kindhearts*
20 litigation did -- it was our litigation -- there's actually
21 two published opinions. There's a published opinion
22 finding -- it's the 647 F. Supp 2d opinion. It's an opinion
23 finding violations. And then there's a separate one, the
24 710, is a -- is a separate opinion after the Court obviously
25 took further briefing, which is about what remedies are

1 available. It's also the approach, for whatever it's worth,
2 that the Supreme Court recommended -- the plurality, you
3 know, the four justices recommended in *Hamdi*, the enemy
4 combatant detention case.

5 So we think it has a logic here, Your Honor, in part,
6 because the government -- let's say the Court holds, as we
7 hope you will, Your Honor, that notice and a complete
8 statement of reasons -- I'll get into this -- you know, and
9 a hearing is required, then the government has not had an
10 opportunity to say anything at all about what the content of
11 that should be, and obviously we would also like the
12 opportunity to say much more about it than we have in our
13 briefs.

14 So the basic parameters that we -- that we believe are
15 required by the due process clause, Your Honor, post
16 deprivation notice, so you don't need to tell people when
17 you place them on the list, but after they've gone to the
18 airport and haven't been able to get on the plane and in
19 most case have been -- well, in all cases have been told,
20 and usually by an FBI agent, that they're on the No Fly
21 List, at that point they're entitled to a notice that that
22 is, in fact, the case, and then a complete statement of
23 reasons, which would mean enough information that would
24 allow them, Your Honor, to contest the facts, the facts that
25 the government contends are sufficient to put them on this

1 list, and the application of those facts, enough to be able
2 to contest the application of those facts to a standard and
3 then an in-person hearing before a neutral decision-maker
4 where they -- their credibility can be assessed, because, at
5 the end of the day, the government -- well, at this stage of
6 the litigation they won't even confirm or deny it; but,
7 presumably, either they'll say they're not on the list or
8 they will confirm that they're viewed that these people are
9 associated with terrorism or related to terrorism or
10 terrorism suspects and, for that reason, a threat to
11 aviation security.

12 All of our clients have said in sworn declarations that
13 that's not true.

14 There's going to have to be a credibility assessment
15 that has to be made at some level, and that's going to
16 require some kind of hearing before a neutral
17 decision-maker.

18 Now, Your Honor, we don't -- we realize that's for
19 several aspects of due process that we're asking to be set,
20 and this stage of the case is the basic parameters, but
21 we're not writing on a clean slate. Most obviously
22 Judge Graber's opinion in the Ninth Circuit and *Al Haramain*
23 sets out almost all of what I just set out, which is our
24 view.

25 And I -- I want to take a little time to talk about *Al*

1 *Haramain*, because I think -- you know, it's February of last
2 year, Ninth Circuit opinion, on a very close subject, and
3 that case involved the seizure of property. So it's not a
4 liberty case. It's only a property case. But it's a
5 seizure of all the properties of an organization that is
6 sending money abroad.

7 And I also want to note, Your Honor, that one of the
8 board members is the prominent -- one of the board members
9 of the organization, who is living in Saudi Arabia, is a
10 specially designated global terrorist. The government has
11 designated him as such, and he has not challenged that
12 designation.

13 And the government says: We can't give any notice. We
14 can't give any reasons or show any evidences as to why
15 they've done this because that would create security
16 problems to give information to these people about why we
17 have done this, and the disclosure of this would necessarily
18 require disclosing classified information. So it's very,
19 very similar arguments to the arguments the government is
20 making here.

21 Of course the Ninth Circuit rejects that and holds it's
22 unconstitutional and says, in this property case, right, at
23 a minimum, a true and complete statement of the reasons has
24 to be provide with enough information to rebut the factual
25 errors, in which they say could clear up very

1 straightforward mistakes and then determine if the charges
2 are correctly applied. Which, you know, if you -- if you
3 translate to that here, it would mean we have to know why
4 the government says our clients are a threat to aviation
5 security. You know, sufficient so that they actually can't
6 ever board an aircraft.

7 The Ninth Circuit also --

8 THE COURT: Would it be sufficient in this
9 hypothetical process for the government simply to declare
10 that the person no longer is on the list, as opposed to having
11 to make disclosures?

12 MR. ARULANANTHAM: Yes. Absolutely, Your Honor.

13 And when you go -- our clients are scared to go to the
14 airport, because, you know, they've been through this and in
15 some cases multiple times. Agents swarm them and all the
16 people around see it, "Oh, my God, we've caught the person
17 who was about to blow up the plane." So to be told, "You
18 are no longer on the No Fly List," and then they can go
19 about their lives would be a huge, huge benefit for our
20 clients. Definitely.

21 Your Honor, the *Al Haramain* decision relies extensively
22 on *Kindhearts*. It cites it multiple times. And although
23 the question in *Al Haramain* is not addressed about whether a
24 hearing is required, I'm not sure why that is, but there's
25 no discussion about it one way or the other in the opinion.

1 There's extensive citations to *Kindhearts*, and *Kindhearts* --
2 and *Kindhearts* required it. It requires a prompt,
3 meaningful hearing at which the evidence can be assessed.

4 As I said, I think our deprivation of liberty on this
5 record is much more significant than the property
6 deprivation in *Al Haramain*. So I think, you know, in our
7 view, there's a floor. The government's DHS TRIP process is
8 way below that floor, way below the floor that's being
9 discussed in *Kindhearts* and *Al Haramain*. We think
10 that's -- we're entitled to more than what is present in
11 those cases.

12 Now, the government's, sort of, central argument
13 against the notice is that their -- their litigation
14 position is that they cannot confirm or deny anyone is on
15 the list. I stress it's a litigation decision, because
16 there's no dispute that, in fact, our clients have been told
17 that they were on the No Fly List.

18 Ms. Choudhury covered this a little bit, but I just
19 wanted to say it's footnote -- because there's some
20 ambiguity, I think, in the exchange here. It's footnote 47
21 and 48 in opposition to the government's motion for summary
22 judgment.

23 THE COURT: So plaintiffs' opposition 47, 48?

24 MR. ARULANANTHAM: Yes. Thank you, Your Honor.

25 Those two footnotes you can see all the paragraph

1 citations to the declaration. In four of those cases an FBI
2 agent is trying to recruit one of our clients to be an
3 informant. So the FBI agent says, "You're on the No Fly
4 List. We can help you with that if you can work with us."
5 It really, I think, undermines the strength of the
6 government's position, because it's a matter of convenience
7 in that the government does, in fact, disclose this
8 information when it's helpful for the government to do so.

9 Beyond that, I just think, from a common sense
10 approach, it's sort of hard to take seriously, right, that
11 you go to the airport and -- I mean, how many reasons can
12 there be for why you're denied boarding? You don't even get
13 to the security screening in the situation. The first time
14 you give your ID, that sort of sets off the whole thing, and
15 agents come and swarm you, and they take you to a room, and
16 they interrogate you for hours. The notion that this person
17 is not tipped off that the government is, you know,
18 suspecting them of something is just preposterous,
19 Your Honor.

20 So, you know, like Ibraheim Mashal, you know, he's an
21 honorably discharged marine. He's trying to go to Seattle
22 to meet his dog training clients. You can read the account
23 of it in the declaration. Dozens of agents come in and
24 swarm him. The idea that it would tip him off to tell him
25 that he's on the No Fly List, it doesn't make any sense.

1 And we don't seek pre-deprivation notice. For a person
2 who hasn't gone through that notice, we don't see it.

3 The other point that's worth mentioning on this is
4 there's a global entry program that DHS runs, which allows
5 you to escape some of the security screening measures. And
6 if you -- there's just -- this is Exhibit A, actually, to
7 the Choudhury -- my co-counsel -- her declaration,
8 Docket 91-17. And you can read this thing -- the policy
9 there. If you apply -- it lists off, I think it's five
10 reasons, for why you can be denied. And there's only a few
11 reasons. You know, if you lie on your application, you can
12 be denied. If you have a criminal history or a Customs
13 history where you've been -- you violated the Customs's
14 rules, you can be denied. And then one of the reasons you
15 can be denied is basically that they can't confirm that
16 you're -- you know, safe on -- you know, not on any
17 watchlist.

18 So another reason is if you're not admissible to the
19 U.S. Well, our clients were all U.S. citizens, so that's
20 not an issue. It's not hard to figure out, right, that if
21 you're not one of these things, that might be a reason for
22 your denial.

23 Apart from that, Your Honor, of course, many people go
24 through the global entry program, and they do get, you know,
25 accepted into it, and then they can fly without having to go

1 through whatever procedures it exempts you from.

2 Well, all of them know they're not on the No Fly List;
3 right? So if you're a suspected terrorist and you apply for
4 global entry and you get through, then you know that the
5 government, in fact, doesn't have you on its watchlist.

6 So the notion that they can't confirm or deny can't be
7 reconciled with the fact that they have a program. One of
8 the conditions of entry into is that you be confirmed as not
9 being on a watchlist.

10 I had mentioned earlier the point on the notice issue
11 that the government's position cannot be squared with the
12 property cases that I was talking about, so I won't
13 reiterate all of that, but *Al Haramain*, *Kindhearts*, the D.C.
14 Circuit's decision in the *NCRI* decision, National Council of
15 Resistance of Iran, actually holds that pre-deprivation
16 notice is required for the designation of a charity as a
17 terrorist organization. And then there's *GETE*, G-E-T-E,
18 which is the INS property seizures case. It says there has
19 to be an exact statement of reasons. There has to be a
20 citation to the relevant statute or regulation. Obviously,
21 that's because that statute or regulation gives the criteria
22 that the government is applying to take away their property.

23 And although it's not a national security case, it gets
24 cited in *Al Haramain*, and the Court says, "We think this
25 case is applicable. We haven't seen any explanation to why

1 it's not applicable."

2 And then the last thing I'll say on notice, Your Honor,
3 is I really think the government is stretching to find
4 authority to uphold what is essentially a zero notice
5 policy. Their policy is zero notice. Cannot confirm and
6 cannot deny.

7 There's certainly no Ninth Circuit case that even comes
8 close to that proposal. You know, they can't suspend you
9 from school, they can't shut off the power if you have
10 subsidized utilities without giving you some notice. And
11 the government's cases on this are all cases where people
12 had no due process rights.

13 So, like, *Hunt* is a FOIA case, and obviously there's no
14 constitutional right to the government's evidence. It's
15 just a matter of statute. It cites the case of *Jifry* which
16 is about -- it's a D.C. Circuit case. It's about airline
17 pilots who are abroad, who are trying to fly abroad, and
18 haven't even been in the U.S. for a number of years. And
19 every case involving due process rights requires some amount
20 of notice.

21 The second thing that we were talking about was a
22 complete statement of reasons. And, as I mentioned, it's
23 enough to -- it has to be enough so we can clear up factual
24 mistakes. We believe that and our clients have stated that
25 none of them are threats to aviation security, so they

1 needed to have a chance to prove that by seeing why the
2 government thinks that's not true.

3 And the second thing is to determine the application of
4 those facts to whatever legal standard the government is
5 applying. And you will hear from Ms. Siemion about the
6 issues concerning the problems with the government's
7 auditing process for the DHS TRIP system; but, you know,
8 it's our position -- the plaintiffs' position is that
9 whatever -- whatever the situation is with all the auditing
10 system, as a matter of law, when you have a completely
11 one-sided process, it produces error.

12 That's actually what the Ninth Circuit said in *Al*
13 *Haramain*. They cited the Ninth Circuit -- prior Ninth
14 Circuit decision *ADC v. Reno*. Those are both national
15 security cases. They say something like you'd be hard
16 pressed to design a system that was more likely to produce
17 error than one where there's only one side. Right?

18 And related to that, Your Honor, the -- you know, the
19 government says, "Well, you can seek judicial review of the
20 DHS determination." Right? But what good is the judicial
21 review if you never knew what the evidence was? What do we
22 get to put in the record for the appellate court to review
23 if we never even had a chance to show that the reasons that
24 were given about our clients weren't true. So that's why
25 there has to be a statement of reasons.

1 And as for there being an in-person hearing with a
2 neutral decision-maker -- I think I mentioned that at the
3 beginning -- but because credibility is so important, there
4 has to be an actual hearing where somebody has a chance to
5 testify. And this is actually -- I think some of our best
6 authority for this is actually in the *DeNueva* decision,
7 which I know you were discussing earlier in the day. But
8 there the Ninth Circuit says under no circumstances has the
9 Supreme Court permitted a deprivation of life, liberty, or
10 property without any hearing whatsoever. That's the
11 government's position; that they can do all these things and
12 there's no hearing. You never get to hear what is against
13 you. You never get to confront it in any way. You never
14 get to give any testimony to convince any judge who's
15 actually neutral in some way that you're not a threat; that
16 you're not going to do anything bad at the airport. There's
17 no opportunity to make those statements. And we think that
18 that's not the law.

19 And, as I said, *Kindhearts*, even for property, says you
20 need a prompt and meaningful hearing. And here surely we
21 need it, as well.

22 And the last thing, in particular, that I wanted to
23 discuss was about the problems arising from classified or
24 sensitive information.

25 But does the Court have any questions on anything else

1 before we get there?

2 THE COURT: No. Thank you. Go ahead.

3 MR. ARULANANTHAM: The government says -- I mean,
4 there's sort of two big reasons I think they're saying why
5 this is all impossible, which is what I think they have to
6 win in order to stop the case today. Any other process,
7 anything more, is impossible.

8 In fact, the one thing that the Glomar explains about,
9 they can't confirm or deny any of this, and I think that's
10 wrong, for the reasons I said.

11 The other -- the other argument the government says is
12 that any process no matter what you do, anything more that
13 you provide is going to implicate, necessarily, disclosure
14 of classified information, which would threaten national
15 security. Right?

16 I guess the first thing we were -- sort of funny to ask
17 the judge this, but don't prejudge, in the sense that don't
18 decided today that you know for certain that there is no way
19 to deal with all those problems when we don't even know what
20 those problems are going to look like.

21 As you said, Your Honor, it might be that some of the
22 clients -- the only notice they're going to say is you're
23 not on the No Fly List. If that's true, then it would be a
24 shame not to afford them at least the relief that would be
25 permitted because of a hypothetical concern that there may

1 be classified information, which, in fact, there isn't, that
2 would bar them from having any kind of notice obligation.

3 Now, the other -- the other particular authority I
4 wanted to point out on the beginning on this is that *Al*
5 *Haramain*, in that context, property instruction --
6 classified information should be dealt with on a
7 case-by-case basis. Right? On a case-by-case basis. Look
8 at the particular problem and see, in this particular case,
9 with this particular evidence, what is it that can be done?

10 I think that the Ninth Circuit, although obviously the
11 holding of the Ninth Circuit in this case was all about
12 jurisdiction, I do think there's that last line in the
13 opinion where they say, you know, "We're -- we're the
14 district court. We'll deal with sensitive intelligence
15 information in this case," and they cite CIPA, the
16 Classified Information Procedures Act.

17 So I think it's -- if the Court thought it was
18 impossible to litigate this case, there's no way to do it,
19 in light of the fact that there could be classified
20 information involving some of the plaintiffs.

21 THE COURT: That's really not a plausible concern.
22 I mean, clearly, there are procedures that deal with
23 classified information, statutory and constitutional, but
24 those are driven by the nature of the underlying proceeding.

25 So in a criminal case, where there's a constitutional

1 right to confront and if the accuser's data is classified,
2 then one has to deal with it.

3 So there are ways to do it. It's obviously
4 extraordinarily cumbersome. And if you're dealing with a
5 population of all the travelers who want to board aircraft
6 to travel to or from the United States or over air space,
7 you're dealing with a universe much larger than
8 the -- the -- that subset of people who are ever accused of
9 criminal conduct based on classified information. But
10 that -- that goes into the burden of -- of a balancing
11 process later.

12 But you needn't worry that I am assuming that every
13 case will require disclosure of classified information under
14 circumstances that can't be addressed. I just don't know
15 how. But then that's not really for the judicial branch to
16 worry about.

17 If there was a need to reconstruct the process that
18 exists, surely it's not going to be this judicial officer
19 who reconstructs it. It would have to be turned back to
20 those with authority to do it.

21 MR. ARULANANTHAM: Well, Your Honor, let me say a
22 few things about that.

23 THE COURT: Keeping track of the time, however,
24 because there are many of you still wishing to speak and
25 only about 50 minutes left, so --

1 MR. ARULANANTHAM: Okay. Let me just say, then,
2 obviously, as you say, there are various different
3 alternatives, and those are discussed in the decisions.
4 With respect to what happens at that next stage, though, and
5 if the Court determines that, today or in a ruling coming
6 shortly, that there has to be --

7 THE COURT: How about in a ruling coming
8 eventually?

9 MR. ARULANANTHAM: -- some opportunity to be
10 heard, right, then we can then brief the question about
11 declassification and --

12 THE COURT: All I was trying to do is to assure
13 you that I make no assumptions that the fact that the
14 government's decisions about people on the No Fly List may
15 be based on classified information requires one result or
16 another. It just is what it is, and we'll have to deal with
17 each important issue as it arises if the case proceeds past
18 these motions.

19 MR. ARULANANTHAM: All right. Well, then I think
20 the only last thing I wanted to say, Your Honor, was that
21 the government -- we're only talking about a burden for
22 these 13 people, in the sense that these people have been
23 unable to fly for a number of years, and, you know, they
24 seek relief that this Court has jurisdiction to grant for
25 them.

1 Obviously, the contours of any ruling that Your Honor
2 makes, the government will have to conform to the legal
3 requirements in such a ruling, and, as applied to other
4 people, they can do whatever they believe to create an
5 administrative system that complies with the due process
6 ruling that this Court makes.

7 But as for these 13 people, that's the question of
8 burden that -- that -- or that's the -- you know, we just
9 want relief for them, you know, with respect to this Court's
10 handling of whatever classified information will come.

11 THE COURT: So you're not purporting or suggesting
12 at all that this is some kind of class action or some kind
13 of effort to broaden the process for anyone other than
14 these 13?

15 MR. ARULANANTHAM: That's right, Your Honor.

16 THE COURT: Okay.

17 MR. ARULANANTHAM: The very last thing I'll say is
18 that if the government feels that whatever information is
19 arising is information that they don't want to turn over,
20 they can always do what they already did for the plaintiffs
21 in this case when they gave them these one-time waivers and
22 brought them back to the country and said, "You have to fly
23 out of a U.S. air carrier. You'll have a couple days'
24 notice." I presume they're putting a marshal on the
25 airplane to go with them. So if there's ever a situation

1 where it's just impossible for them to provide a fair
2 process in a hearing, it is not as though their hands are
3 tied. And they can always do what they already said they
4 did, and, in fact, did, when faced with a preliminary
5 injunction that was going to -- you know, that we -- we were
6 litigating to win the right of our clients to come back
7 home.

8 Unless the Court has further questions --

9 THE COURT: Well, not that I should take the time
10 to raise right now.

11 Thank you, Counsel. I appreciate that.

12 MR. ARULANANTHAM: Thank you, Your Honor.

13 THE COURT: Ms. Siemion, I guess you're next on
14 the ordered agenda that you all have provided.

15 You may proceed.

16 MS. SIEMION: Good morning, Your Honor. This is
17 Rita Siemion. I represent The Constitution Project in this
18 case. Thank you for the opportunity to participate today.

19 THE COURT: Ms. Siemion --

20 MS. SIEMION: The Constitution Project -- (phone
21 transmission unintelligible.)

22 THE COURT: Ms. Siemion?

23 MS. SIEMION: Yes.

24 THE COURT: We're having trouble, first, with the
25 quality of your transmission. So before you get in any

1 further into your argument, I need to --

2 MS. SIEMION: Okay.

3 THE COURT: -- get to -- you're on a speakerphone?

4 MS. SIEMION: I am. Let me see if --

5 THE COURT: Can you pick up a handset, please?

6 MS. SIEMION: Is this better?

7 THE COURT: It is better. Just read a sentence to
8 us of some kind, so we can test the quality of what we're
9 hearing.

10 MS. SIEMION: Well, what I was about to say is
11 that The Constitution Project recognizes the important rules
12 of the watchlist, including the No Fly List, by protecting
13 national security.

14 THE COURT: That helps. So we need two more
15 things from you. First, you need to speak --

16 MS. SIEMION: Okay. And --

17 THE COURT: Hold on, please. You need to speak
18 slower and more distinctly. You've chosen to participate
19 this way. It's a burden to listen to you right now, unless
20 you speak slower and more distinctly. So please try to keep
21 that in mind.

22 MS. SIEMION: I apologize. I'll try to speak very
23 slowly.

24 THE COURT: Go ahead.

25 MS. SIEMION: So The Constitution Project accepts

1 that some individuals on the No Fly List actually belong
2 there. But the data, which I will discuss, demonstrate that
3 there is also a high risk of being included on the list in
4 error. And this case that is before you is about providing
5 a meaningful opportunity to correct that error.

6 There are two issues that I would like to address
7 today, in addition to answering any questions that the Court
8 may have.

9 THE COURT: Go ahead.

10 MS. SIEMION: The first issue I would like to
11 address is the type of error that is at issue in this case
12 and to clarify why changes in watchlisting procedures, cited
13 by the defendants, do not address or correct this particular
14 kind of error.

15 And then the second point that I would like to address,
16 just briefly, is why post-deprivation process would not give
17 rise to national security concerns that were cited by the
18 defendants.

19 Now, turning to the first issue, The Constitution
20 Project is concerned about the high risk of erroneous
21 deprivations that are presented by the error-ridden No Fly
22 List.

23 Multiple government audits, which we cited in our
24 brief, have found that the data in the terrorist screening
25 database and the No Fly and Selectee List are housed by that

1 database is grossly inaccurate and the risks of being
2 included as a result of error is extremely high.

3 Now, I want to be clear that this risk of
4 over-inclusion is distinct from the problem known as a
5 misidentification. A misidentification occurs when someone
6 who is not actually on the list mistakenly triggers a match
7 to the list during screening because they have similar
8 biographic information to someone who is actually on the
9 list. This is the Ted Kennedy type of problem.

10 But misidentifications are not the type of error
11 alleged in this case. The plaintiffs assert that they are
12 actually on the list, but they're on the list as a result of
13 mistake or error or insufficient evidence. This type of
14 error does not address or correct by the recent developments
15 that were cited by defendants. And those two developments
16 are secure flight program and the watchlisting guidance from
17 2010.

18 Now, the May 2012 report by the Government
19 Accountability Office addresses both of these two types of
20 changes, and it reveals that neither of these address the
21 risk of being placed on the No Fly List in error.

22 The GAO report provides an overview of the secure
23 flight program and it explains its purpose, which is to
24 review the number of individuals who are misidentified as
25 being on the No Fly List, the type of problem I just

1 described earlier.

2 The goal is to make it easier to match individuals
3 correctly.

4 So what the secure program does is it collects
5 biographic information from travelers, all travelers, such
6 as their date of birth and their gender, makes it easier for
7 computer algorithms and analysts to make a correct match.
8 The -- this program is completely irrelevant for individuals
9 who are actually on the list.

10 Now, the second and actually the main focus of the 2012
11 report by the GAO is the impact of this 2010 watchlisting
12 guidance, and it explains that the purpose of this guidance
13 was to address the hold in the watchlisting nomination
14 policies that led to not putting Abdulmutallab, who was
15 convicted of committing the attempted attack of Northwest
16 Flight 253, but of him not actually being on the No Fly
17 List.

18 The changes were meant to address was the problem of
19 under-inclusion. And to address those weaknesses, the
20 guidance actually broadened the criteria for nominating
21 individuals for the list, which makes the risk of
22 over-inclusion higher, not lower.

23 Now, the 2012 report reached two overarching
24 conclusions. First, that broadening the criteria resulted
25 in a massive influx of data and that the Terrorist Screening

1 Center, the National Counterterrorism Center, and the
2 various nominating agencies were overwhelmed by this massive
3 influx, and those agencies expressed serious concerns about
4 the increasing volume information -- volumes of information
5 and their ability to process that information in a timely
6 manner.

7 The report also describes that there's a massive
8 initiative at this time in which thousands of individuals
9 were upgraded from the database to the terrorist screening
10 database, or from the terrorist screening database up to the
11 No Fly List or the Selectee List.

12 And as a result of this initiative, the number of U.S.
13 persons on the No Fly List more than doubled and the number
14 of U.S. persons on the Selectee List increased by
15 10 percent.

16 Now, we know also from testimony of the former
17 Terrorist Screening Center director, which was cited in the
18 defendants' brief, that some of the individuals were
19 upgraded to this list because of the troubling criteria,
20 including being from a particular country.

21 Now, the second conclusion in this 2012 report was that
22 there was no single entity that was responsible for
23 assessing the government-wide impact of these changes and
24 how U.S. citizens were being affected or to determine the
25 overall level of errors that were occurring.

1 Both of these conclusions in the 2012 report suggest an
2 increase in error, not improvements in the risk of error.
3 And this report does not address any improvements in the
4 over-inclusion problem or they said the causes of error
5 details in the previous audit were fixed.

6 Now, the previous audit, there are two that are
7 relevant here. One was the 2009 DOJ OIG audit of the FBI's
8 nomination practices and the other was a 2007 audit of the
9 Terrorist Screening Center itself.

10 Now, the 2009 audit found very troubling problems with
11 the FBI's nomination practices to the No Fly List and the
12 terrorist screening database. The audit found that
13 watchlist nominations were inaccurate and incomplete and
14 that the FBI failed to modify Washington's records, as they
15 were required to do, when new information became available.
16 But the FBI failed to remove subjects from the watchlist for
17 months or even years when they were required to do so and
18 that they failed to remove 8 percent of the record after a
19 case was closed at all, just meaning that the individuals
20 remained on the list even though investigations of those
21 individuals were closed.

22 And then, most disturbingly, the 2009 report found that
23 there was a general lack of understanding among FBI agents
24 in the field regarding the requirements for updating
25 watchlist records and the entire watchlisting process.

1 Now, the earlier report, the 2007 report, is the one
2 that specifically details the inaccuracies in the No Fly
3 List itself. And what that report describes is a one-time
4 special project review of the No Fly List that the TSC
5 conducted. And in that review the TSC determined that at
6 the time there were 71,872 records on the No Fly List and
7 that somewhere between 38 percent and 52 percent of those
8 records should not have been on the No Fly List at all.

9 Now, there's a range of a percentage here, because both
10 the numerator and denominator are moving targets, because
11 the database is changing and the records were being added
12 and removed during that time. But, in any event, we know
13 that that is an extremely high error rate, and those are
14 over-inclusions records and individuals that are on the No
15 Fly List who should not be on the No Fly List.

16 Now, those numbers show that the procedures that were
17 used -- from both those reports, that the procedures that
18 are used to nominate records from the No Fly List for
19 inclusion, modification, or removal is alarmingly
20 inaccurate, and the process to correct these errors -- you
21 know, first of all, that process is to correct only certain
22 types of errors. And the report also shows that the process
23 took six months or more to complete.

24 So I want to be clear that the suggestion that the No
25 Fly List is sort of updated daily for accuracy is really not

1 correct.

2 Now, the plaintiffs have already addressed why as a
3 matter of law the risk of error is too high. But what the
4 factual record shows is that, just as a question of fact,
5 the risk of error is too high. And there's nothing that has
6 been pointed to by defendants that dispute that this risk of
7 error is high.

8 Now, DHS TRIP is not sufficient to correct the risk of
9 error that I just described because it does not provide even
10 the two most basic elements that are mandated by the
11 procedure of due process, which plaintiffs have already
12 discussed today, notice of the government's reasons for its
13 actions, and the opportunity to respond to those reasons.

14 The opportunity to simply guess at the factual basis
15 for the action of putting someone on a No Fly List is not a
16 substitute for actual notice. And without adequate notice
17 individuals do not have the opportunity to clear up
18 misunderstandings or correct factual errors or to rebut
19 erroneous inferences.

20 Now, the need to provide meaningful notice and the
21 opportunity to be heard relates to my second point, which is
22 that both of these two core requirements of due process can
23 be provided to individuals who have been denied boarding
24 without harming national security.

25 Now plaintiffs have already addressed this, so I will

1 only touch on it briefly; but The Constitution Project
2 recognizes in its report that pre-deprivation notice,
3 individuals who do not know that they are on the watchlist
4 could undermine the purpose of the watchlist or it could be
5 detrimental to national security.

6 But The Constitution Project is concerned about the
7 expected secrecy in defendants' overly broad position,
8 described by plaintiffs, that can never, under any
9 circumstance, confirm or deny that a person is on the No Fly
10 List, even after that person has already been denied
11 boarding, would harm national security.

12 Now, on this point in our brief we cited the decision
13 by the District Court of the Northern District of Illinois
14 in the *Rahman* case, and -- which is authority for the Court
15 and was reversed by the Second Circuit on entirely unrelated
16 grounds. And we cited this case because the government
17 there presented identical national security concerns, and
18 the Court provided a very detailed analysis explaining why
19 each and every one of those concerns simply do not apply in
20 the situation that we have here where plaintiffs are seeking
21 post-deprivation notice and they have already been tipped
22 off that they are under government scrutiny.

23 There's not a single national security concern that has
24 been raised in this case that would be implicated that is
25 not already triggered by the denial of boarding itself,

1 which is why post-deprivation notice, which is what it's got
2 here, may be provided consistent with the national security
3 purposes of the watchlist.

4 Now, notice of the factual basis for including an
5 individual on the No Fly List and an opportunity to respond
6 to that basis can also be provided without raising national
7 security concerns the defendants have raised, such as
8 jeopardizing classified and sensitive information.

9 Now plaintiffs have also touched on this, as well, but
10 The Constitution Project is very concerned about foreclosing
11 cases that should otherwise proceed, rather than proceeding
12 on a case-by-case basis, as the Ninth Circuit has said that
13 this Court should in protecting classified and sensitive
14 information, using the wide range of tools that are
15 available to this Court.

16 Both the Supreme Court and the Ninth Circuit have
17 plainly stated that district courts have both the authority
18 and the expertise to handle this type of information.

19 And if there are no further questions, those are the
20 only points I hoped to address today.

21 You know, The Constitution Project urges the Court to
22 find that the No Fly List procedures, as they stand today,
23 present too high of a risk of erroneous deprivation, hold as
24 a matter of law, but also, for the reasons I explained, is a
25 matter of undisputed facts, and we urge the Court to ensure

1 that Americans who find themselves on this No Fly List in
2 error are not denied the most basic requirements of
3 procedural due process.

4 THE COURT: Thank you, Ms. Siemion. I appreciate
5 your participation.

6 Mr. Risner?

7 Folks, just, in the interest of time, I'm going to note
8 that you're probably not going to have the opportunity to
9 make these wrap-up closing arguments you planned for. We'll
10 just go through the merits part and you'll have to leave me
11 with your advocacy on those main points.

12 Go ahead, sir.

13 MR. RISNER: Thank you, Your Honor. I want to
14 start with what you started the hearing with and then what
15 plaintiffs' counsel started with, which is what could be
16 seen as the question between liability and a remedy phase,
17 and I want to just emphasize that the -- these questions
18 need to be addressed now on some level, because the very
19 question of the third factor in the *Mathews* balancing are
20 what are the governmental interests at issue in this case
21 and what are the governmental interests at issue in what
22 additional procedures could exist or could be applied. And
23 I think that it's essential that plaintiffs really own the
24 consequences of what they're really asking for in this case
25 and that the Court weigh those consequences when it's

1 looking at whether the process that's been offered now is
2 appropriate and whether the balancing that's been undertaken
3 on the due process is -- is appropriately satisfied.

4 I think that there's a -- I think plaintiffs' counsel
5 said something rather tremendous, which is that if the
6 government doesn't want to disclose the complete reasons it
7 could simply remove someone from the No Fly List. And I
8 think that --

9 THE COURT: No, that was my question to them. If,
10 for example, a process was pursued and the government, for
11 whatever reason, determined it was no longer necessary to
12 allow -- to maintain a person on the list, they could simply
13 disclose that, and that would then moot the issue as to that
14 particular person. But, as I understand the process, as
15 it's been described over the life of this case, even that
16 would not be disclosed to a plaintiff; that they've been
17 removed in the list.

18 MR. RISNER: It wouldn't be. I think there are
19 two things going on there. The first is whether or not, as
20 the process is completed, if an individual is on the No Fly
21 List and the government determines he does not need to be or
22 no longer needs to be on the No Fly List, would the
23 government take that action? Would that process be
24 available to the plaintiffs? It would be already, because
25 the process, as it goes on, would entail --

1 THE COURT: But of course the only way -- the only
2 way the plaintiff would know that is to go to the trouble of
3 buying a new ticket and showing up and taking their chances
4 to see if they're going to make it through or not. Right?

5 MR. RISNER: That's essentially true, and I think,
6 for the reasons I want to talk about in a minute for why the
7 government does not officially disclose whether someone is
8 on the list, that is essential. But I think that what
9 plaintiffs were saying is it's slightly different, which is
10 that if the -- if the government is required to disclose the
11 reasons for someone's inclusion -- let's say the government
12 believes that is appropriate and they're going to keep the
13 person on the No Fly List, plaintiffs' position is that the
14 government must provide a complete -- complete reasons for
15 that listing. And if the government does not want to
16 disclose that information, given the nature of the
17 information, they could simply remove the person from the
18 list. A person --

19 THE COURT: Or they could send, as counsel says, a
20 marshal with that person so they can fly in reasonable
21 security.

22 MR. RISNER: Every time that anyone on the No Fly
23 List that the government did not want to disclose classified
24 information to, every time that person went to fly the
25 government would have to undertake extraordinary proceedings

1 in order to make that happen.

2 That, I think, fails to account for --

3 THE COURT: What do you mean by that?

4 MR. RISNER: The very nature of having to
5 assign -- if that were -- if that were the remedy here, the
6 very nature of having to undertake those proceedings would
7 be, I think, tremendously burdensome to have to accommodate
8 the travel of someone who has appropriately been determined
9 to be on the No Fly List in order to avoid the disclosure of
10 classified information.

11 THE COURT: But, Counsel, your premise is that the
12 underlying designation is appropriate. And that's a premise
13 that's not yet subject to challenge in any way feasible.

14 So what counsel's point was is this: If there is a
15 right and the government's interests in security are such
16 that the process plaintiffs propose or assert they're
17 entitled to cannot be provided without other very serious
18 implications, there are less onerous methods to protect the
19 national interests and permit the flying, such as when a
20 United States marshal accompanies a person in custody. I
21 mean, we do this quite regularly in our judicial system.
22 People get escorted for travel, and it isn't extraordinary.
23 It's just done.

24 I'm not suggesting that a United States citizen should
25 have to have the companionship of an assigned marshal, but

1 what I'm saying is you were mischaracterizing the
2 plaintiffs' point.

3 MR. RISNER: I respectfully -- I don't -- I don't
4 think that's the case. I think that what we're talking
5 about here are allegations by individuals who allege they
6 were included on the No Fly List. What we're talking about
7 are procedures and a process that exists that is made
8 available to everyone that alleges they were denied or
9 delayed boarding on a flight. That obviously extends to
10 people who are properly on the No Fly List. And under
11 plaintiffs' construct of the government having to provide
12 the list of those reasons to people who are properly on the
13 No Fly List, that forces the government into making a
14 decision. It will either disclose classified information,
15 under court order, or -- as a matter of just process, or it
16 will have to remove those persons from the No Fly List, or
17 it will have to undertake what I think are actually quite
18 extraordinary circumstances. What we're getting into here
19 is a real rebalancing of how the government has determined
20 it is best to protect the national security with respect to
21 air travel. I think that --

22 THE COURT: Could I ask you a clarifying point
23 before you move on? Is it a fact that every placement on
24 the No Fly List is based on classified information?

25 MR. RISNER: TSC is not aware of any individual

1 included on the No Fly List, where the basis for the
2 inclusion of that individual does not include classified
3 information.

4 THE COURT: So it's fair for me to assume the
5 former, for purposes of this analysis, that a person does
6 not get on the list, in the absence of some classified
7 information.

8 MR. RISNER: I don't want to say that as a matter
9 of the watchlisting guidelines that that couldn't happen;
10 but, as a practical matter, we're talking about the
11 inclusion of individuals where the basis of the inclusion is
12 classified information. And I think that that is really
13 significant here.

14 Of course, like the -- I think that the -- of course
15 every court has recognized that there's no compelling
16 interest greater than the security of the nation and the
17 threats to air travel posed by terrorism are a paramount
18 uniqueness and importance to the government in attempting to
19 protect air travel within, to, and from the United States.

20 And this is an area of national security where the
21 government's conclusions about how best to administer a
22 watchlisting system, as required by Congress, are entitled
23 to significant deference from a court that is not to put
24 itself in the position of having to reweigh these interests.

25 THE COURT: You're not looking at someone who

1 wishes to take from the Executive or the Legislative Branch
2 the serious responsibilities they have undertaken for
3 national security.

4 I'm trying to understand, though, what -- what
5 the -- what the universe of these potential options might
6 be, because I -- I continue to believe that is connected to
7 the notion of what -- what's at the heart of this problem.

8 So remind me, please, what agency or what part of the
9 federal government actually developed this process, DHS
10 TRIP, that the government here or the defendants here assert
11 is sufficient, to the extent there's any right implicated.

12 MR. RISNER: The DHS TRIP is a process provided --
13 part of Homeland Security that applies to -- or it offers a
14 redress procedure for individuals in a wide range of
15 circumstances. One of which is --

16 THE COURT: Was that --

17 MR. RISNER: I'm sorry.

18 THE COURT: I'm sorry. It was that agency that
19 developed this process?

20 MR. RISNER: That developed DHS TRIP, as required
21 by Congress. That's correct.

22 THE COURT: And did Congress provide any oversight
23 to the DHS TRIP mechanism and bless it in any way?

24 MR. RISNER: So Congress has, by statute, required
25 DHS to implement a -- establish a timely and fair process

1 for individuals identified.

2 THE COURT: That wasn't my question.

3 MR. RISNER: I'm sorry. I just wanted to --
4 sorry.

5 THE COURT: My question is once the process was
6 established by the Department of Homeland Security, has
7 there been -- does the record show any congressional
8 oversight or actual approval of this process in the manner
9 in which it's currently being executed?

10 MR. RISNER: Well, Congress has done nothing since
11 enactment of that statute in 2004 and the establishment of
12 DHS TRIP in 2007, which I think is -- should be taken as
13 a -- a real indication that Congress is not upset about the
14 process that exists, but has approved it.

15 THE COURT: You know, in light of revelations over
16 the last couple of weeks, one might not make that argument,
17 so I'm confident about what Congress is aware of and what
18 Congress is not aware of. So my question is quite serious.
19 There has not been any congressional study or review, that
20 you know of, of the manner in which DHS has chose to
21 implement the congressional direction. Is that right?

22 MR. RISNER: I don't know if that's quite
23 accurate. Congress has hearings. Timothy Healy, the
24 previous director of the TSC, has appeared before Congress,
25 as Ms. Siemion noted, and the parties have -- I think the

1 defendants have attached his testimony.

2 The OIGs, multiple agencies, and the GAO, have issued
3 reports on these, and we walked through some of those.
4 Those are congressional reports, but I don't think it's
5 accurate to say there hasn't been any oversight over the
6 process as it exists, but I just want to -- I take your
7 point very seriously, obviously, but I want to be clear that
8 DHS TRIP, this process, has been known. It's been known
9 since it was established, and the -- and what happens in
10 that process is not -- is not a secret. It's been
11 outlined in our declaration.

12 THE COURT: It's neither confirmed or denied;
13 right?

14 MR. RISNER: Well, it is confirmed how the process
15 works, and I think that if Congress were unhappy with that
16 process, then Congress could do something differently, but
17 it hasn't. And I think that it's important to look at what
18 that process is, as it exists, because there is a redress
19 process available, and it culminates in judicial review that
20 is made available to individuals who believe they have
21 improperly --

22 THE COURT: Tell me about that judicial review.
23 You know, in the history of this case, particularly, and in
24 light of the circuit's view of that avenue of relief, as
25 expressed in this case, particularly, what is it an

1 appellate court would review and have available for review
2 in the event one of the plaintiffs sought that option?

3 MR. RISNER: If an individual is unsatisfied with
4 the results of the DHS TRIP process as it relates to a
5 delayed or denied boarding, they can submit a petition for
6 review, challenging that determination that comes from TSA,
7 and that petition for review would lead the government to
8 file a record in that case.

9 THE COURT: What kind of record would be before an
10 appellate court?

11 MR. RISNER: The Court would receive a record of
12 the information that -- well, let me break it down. It
13 depends on if the person is on the No Fly List. If the
14 person is not on the No Fly List, then it would be a short
15 record.

16 THE COURT: Let's assume it's one of these
17 plaintiffs and let's assume each has pursued the DHS process
18 and got the neither confirmed nor denied routine response,
19 took a chance, bought a ticket, went back to the airport,
20 got denied again; tried it again, assume I'm on the list
21 here and I'm not going to get anywhere and I don't have any
22 process, so now I want to appeal, let's say that person
23 appeals, what would the appellate court have?

24 MR. RISNER: Assuming that person is on the No Fly
25 List, when they submit that petition, they would receive a

1 record of the information that the agency relied on in
2 determining they were appropriately maintained on the No Fly
3 List.

4 THE COURT: And that might, and likely would,
5 include classified information?

6 MR. RISNER: It would. It would be provided to
7 the Court of Appeals ex parte and in camera.

8 THE COURT: Under CIPA?

9 MR. RISNER: It would not -- it would not be
10 provided under CIPA. CIPA is a statute that applies only to
11 criminal proceedings. It's a different authority of the
12 Court of Appeals to take ex parte and in camera information,
13 including --

14 THE COURT: Where is that authority? What's the
15 source of that authority?

16 MR. RISNER: The Court of Appeals have recognized
17 that there's an inherent authority to accept this
18 information.

19 THE COURT: Because Congress laid at their feet
20 the -- the obligation to review this, so they -- they
21 conclude we've got to have something, so they say, "Bring us
22 your ex parte sealed record"; right?

23 MR. RISNER: I'm not sure it comes from Congress
24 as a determination in the statute, but I think that's
25 essentially right.

1 THE COURT: So the Court of Appeals would have an
2 ex parte sealed record to review on its own, without the
3 benefit of advocacy by the party affected. Is that right?

4 MR. RISNER: That's correct. That is a procedure
5 that would happen. And I want to emphasize, for purposes of
6 due process, I think that, first of all, I'm not sure
7 plaintiffs are satisfied by that procedure, but I think it's
8 important that we acknowledge that it exists.

9 THE COURT: I'm not sure a court would be
10 satisfied with that procedure. That's why I'm trying to
11 understand what it involves.

12 MR. RISNER: And that was my second point.

13 THE COURT: So, tell me, a Court of Appeals, then,
14 gets this sealed ex parte communication, presumably with the
15 kinds of assurances that would support the accuracy of the
16 information, perhaps declarations of government agents,
17 perhaps something to authenticate that which is presented on
18 a one-sided basis. What is the court supposed to do with
19 that, in terms of testing its reliability or evaluating it,
20 as the Court is supposed to presume all of that is true and
21 then just evaluate that as an unchallenged assertion of true
22 facts, or what?

23 MR. RISNER: The Court would look at that evidence
24 and apply the watchlisting guidelines for criteria for
25 inclusion on the No Fly List and determine if the agency's

1 action was appropriate. And I think that that is a
2 procedure that the Ninth Circuit, in *Meridian*, recognized is
3 appropriate.

4 In *Meridian*, the Ninth Circuit said that ex parte
5 review of the government's dispositive filing can adequately
6 balance the government and private interests, because the
7 private interests as a litigant are satisfied by the
8 decision of an impartial district judge.

9 Similarly, the D.C. Circuit in *Jifry* reaches largely
10 the same conclusion. It said that an individual was
11 afforded independent de novo review of the entire
12 administrative record by the agency and an ex parte review
13 by the Court of Appeals, and, in light of the governmental
14 interests in that case and the sensitivity of the
15 information, substitute procedural safeguards may be
16 practicable, but, in any event, were unnecessary.

17 And I think that *Jifry* is in some ways a closely
18 analogous case. As I think counsel indicated, *Jifry*
19 concerned two individuals who were denied airmen
20 certificates and were identified as national security
21 concerns, and the Court of Appeals received a record from
22 the agency that supported the revocations and determined
23 that on ex parte review that that was sufficient to satisfy
24 due process.

25 THE COURT: So is the defendants' position here,

1 fundamentally, that each of the plaintiffs should appeal to
2 the Court of Appeals in the area where they live and have a
3 Court of Appeals review ex parte and under seal whatever it
4 is the government has or doesn't have? Is that your view of
5 what process they should be following if they're not
6 satisfied with not knowing?

7 MR. RISNER: I've never encouraged anyone to
8 appeal; but, yeah, essentially that is right. That is an
9 availability as part of the process. If you wanted to look
10 at process as a whole, which I think due process requires --

11 THE COURT: I'm not talking about the process as a
12 whole. I'm talking about the process that each of the 13
13 asserts they're entitled to. You're saying that they should
14 go to a court of appeals and present their cause there
15 individually for a court of appeals to review it ex parte.

16 MR. RISNER: That is -- that's correct. That is
17 the judicial review that is available, is the culmination of
18 the process available to someone who believes they are
19 improperly included on the No Fly List, and that judicial
20 review helps demonstrate that the government's balancing of
21 interests here is proper and that the process available
22 satisfies due process.

23 THE COURT: And at the risk of opening an old
24 wound, I've thought we went there once in this case, albeit
25 on a jurisdictional concern, but it didn't seem, to me, like

1 the Ninth Circuit thought it was in a position to evaluate
2 the status of these plaintiffs. I mean, it sounded, to me,
3 as I read the opinion, the Court was quite blunt about the
4 fact that there needs to be something done at a trial court
5 before the Court of Appeals can do anything.

6 So how am I to deal with this appeal to an appellate
7 court process argument in the context of what's been
8 remanded here when the plaintiffs say really they have no
9 process?

10 MR. RISNER: Well, they -- I think -- I want to
11 walk through this case and then talk about some of the other
12 cases that exist in the Ninth Circuit, but in -- in this
13 case, the Ninth Circuit was looking at the procedural due
14 process claim and the substantive due process claim and
15 indicated that the procedural claim should be here.

16 On the substantive claim, the government's argument was
17 that 46 -- sorry, 49 USC 46110 provided exclusive
18 jurisdiction for the Court of Appeals, and the Court of
19 Appeals disagreed with that and indicated that the district
20 court would have jurisdiction over such a claim when it was
21 brought against TSC or FBI.

22 The Court of Appeals has not in that case, or in
23 *Ibrahim*, or in any other case I'm aware of indicated that
24 the Court of appeals would not have jurisdiction over a
25 petition for review under 46110 challenging TSA's

1 determination as the ultimate decision-maker in the judicial
2 review of the redress -- I'm sorry, the DHS TRIP process.

3 THE COURT: Has that happened? Has that happened?

4 MR. RISNER: It has. It's happening right now in
5 the *Arjmand* case, which we've cited -- identified in the
6 briefs, where an individual filed a petition for review of
7 the Court of Appeals with the Ninth Circuit and the
8 government has filed an ex parte record in that case.

9 That's the procedure that will be available to plaintiffs
10 here or other individuals who believe they've been
11 improperly included on the No Fly List.

12 THE COURT: Do I need to concern -- be concerned
13 with the existence of that process, as I evaluate the
14 plaintiffs' argument that the DHS TRIP process is inadequate
15 fundamentally and I should use the Court's authority to
16 require something to happen?

17 MR. RISNER: I think, yes, we have to consider the
18 availability of judicial review and considering whether the
19 current process is adequate. That is essential. It might
20 not be the judicial review that plaintiffs seek, but the
21 availability of review by an impartial judiciary is, of
22 course, meaningful and fundamental to what due process
23 requires.

24 As far as what else plaintiffs think should be
25 required, then we have to look at what are the governmental

1 interests in those issues and why can those additional
2 processes not be provided consistent with those interests.
3 And now we're talking about notice and a complete reason
4 of -- complete reasons for inclusion on the list. And
5 that's why we went directly into the significant government
6 interests in not disclosing, officially, status on the No
7 Fly List and not disclosing the reasons underlying inclusion
8 when that information is classified or otherwise sensitive.

9 I want to make clear that the cases that the plaintiffs
10 are talking about are dramatically different than this case
11 for two different reasons. First, they have very weak
12 government interests compared to this. This is about the
13 government's protection, about national security, and how to
14 protect air travelers. And the plaintiffs are pointing to
15 cases where the due process question is looking at a
16 deprivation of monetary benefits, where the government's
17 interest in the issues might be administrative burdens.
18 They're looking at cases like *Guantanamo* habeas petitions
19 where the courts are talking about involuntarily confinement
20 of individuals; a private interest that is much greater than
21 what we have here. And they're looking at cases where the
22 government has already disclosed an individual's status.
23 That's a fundamental distinction between this and the
24 *Al Haramain* litigation. *Al Haramain* is a case about
25 blocking of assets by OFAC, by Office of Foreign Assets

1 Control, the Department of Treasury, and designations under
2 that statutory authority are made public to allow for
3 effective administration of the blocking by financial
4 institutions.

5 This, by contrast, is not made public in this case,
6 where whether an individual is officially included on the No
7 Fly List or not. And the deprivation that counsel talked
8 about in *Al Haramain* is very different, because in blocking
9 cases like *Al Haramain*, the entity is being deprived of the
10 use of its property. The entity that's designated cannot
11 pay an electric bill without a license from the government.
12 That is a fundamentally different deprivation, as the courts
13 have -- have concluded, that I think makes this case quite
14 different than *Al Haramain* and different than *Kindhearts* and
15 other cases like it.

16 What plaintiffs are ultimately asking, though, is for
17 disclosure of reasons. I don't think a confirming status is
18 really what they're talking about. They want to know the
19 reasons for someone's alleged inclusion on the No Fly List.
20 And on that issue, like I said, the information is already
21 provide to the Court of Appeals, which *Meridian* and the
22 Ninth Circuit recognized is adequate to respect due process.
23 And, given the type of information at issue, whether its
24 classified or SSI or LES, there is a tremendous governmental
25 interest in not being required to disclose that information

1 to someone.

2 I recognize that plaintiffs have alleged that they are
3 of no concern to the government, but it's important to
4 emphasize that the processes they're talking about and the
5 processes that they should be more openly advocating for,
6 consistent with their position, those processes would be
7 extended to everyone who's a U.S. citizen who is on the No
8 Fly List properly. And the government has a tremendous
9 interest in not being required to disclose the reasons for
10 someone's inclusion. That would disclose the sources and
11 methods that the government uses in obtaining that
12 information. It would discourage agencies from sharing that
13 information, and, of course, it would be inconsistent with
14 the well-recognized authority of the Executive to determine
15 access to classified information.

16 I think on that point you can look to the *NCRI* case
17 that plaintiffs cited to where the Court recognized that the
18 strong interest of the government in protecting against the
19 disclosure of classified information clearly affects the
20 nature of the due process which must be afforded, because
21 the disclosure of classified information is within the
22 privilege and prerogative of the Executive, and we do not
23 intend to compel a breach in the security which that branch
24 is charged to protect.

25 So I don't think it's realistic to say that the

1 government should simply provide the information or remove
2 someone from the No Fly List as an alternative. I don't
3 think that accounts for the significant government interests
4 that are at issue in this case.

5 THE COURT: Yet, the government's argument here,
6 defendants' argument here, doesn't seem to account for the
7 plaintiffs' rights. I absolutely respect the point you're
8 making around national security, but it seems that the
9 argument defendants are making stops there and refuses to
10 acknowledge what we've spent all morning talking about; that
11 this is not just a matter of convenience.

12 I'm -- I'm quite troubled that the defendants don't go
13 beyond the point that all of the interests weigh in favor of
14 the government. There seems to be an unwillingness to
15 acknowledge there could be a middle ground or a way to
16 respect the government's security burdens and what the
17 plaintiffs seek, which is traveling, unless there really is
18 a good reason, tested in a fair process, to prevent them
19 from doing it.

20 MR. RISNER: Respectfully, Your Honor, I don't
21 think that's quite right, because I think that, first of
22 all, we have to separate the, sort of, two issues here. One
23 is the existence of protected liberty interests and the
24 second is --

25 THE COURT: Let's assume --

1 MR. RISNER: Right. Right. Exactly.

2 THE COURT: Please assume, and I haven't gotten
3 there, but for me to make sense out of your argument, I need
4 you to assume that there is a protection. And what I'm
5 pointing you to, Counsel, is the fact that you seem to wish
6 to stop the analysis at the point that the government has
7 this very valid, important interest and not to go beyond it
8 to what to do with the plaintiffs' rights in the face of
9 that interest.

10 MR. RISNER: And I think that -- I understand
11 that. And, of course, if you determine there's a liberty
12 interest, then we get to the second part, which is the
13 balancing under *Mathews*. And if there wasn't a liberty
14 interest, we wouldn't have to talk about the process, as
15 counsel accurately said.

16 But if Your Honor finds that there is, then we look at
17 what the process is. And the private interest is one factor
18 to be considered. I completely recognize that. At the same
19 time you can have a liberty interest where you were
20 completely deprived of a significant liberty interest, but
21 there would be no additional process required, because the
22 governmental interest is that strong or because --
23 and/or -- sorry -- and/or because the existing processes
24 were already sufficient to provide due process for the
25 deprivation of that interest.

1 THE COURT: And there you are relying on the Court
2 of Appeals as a means to review the underlying reasons
3 and -- and only that?

4 MR. RISNER: No, Your Honor, it's not only that.
5 It begins with the criterion that are applied by the agency
6 for watchlisting. It then goes to the regular audits and
7 reviews that the agency does for the accuracy of the list.
8 It then goes to DHS TRIP and the redresses available. And
9 then it goes to the Court of Appeals for determination by an
10 impartial court about the person's inclusion on the No Fly
11 List.

12 THE COURT: What data is there about such appeals
13 to the Court of Appeals? How many cases have there been?

14 MR. RISNER: There have been very few, Your Honor.
15 I think in the Ninth Circuit the one I'm familiar with in
16 this type of -- the way it's derived is *Arjmand*.

17 THE COURT: Is there any record of these
18 decisions? Are they recorded on Westlaw? Is there any way
19 for the Court to find out what -- what use there's been made
20 of the appellate court process and its results?

21 MR. RISNER: I'm not aware of a decision I can
22 point you to, Your Honor. I think one of the challenges
23 that will arise in this context is that because an
24 individual is not publicly -- it's not confirmed that the
25 person is not on the No Fly List, there would not be a

1 robust public explanation of --

2 THE COURT: Surely, there would be a case; right?

3 MR. RISNER: -- a review. Right. I don't
4 know -- I don't know of an authority for a case that has
5 actually reached that point of merits determination.

6 THE COURT: Surely, the Department of Justice
7 knows, if it's litigated in an appellate court, a case by a
8 traveler appealing.

9 MR. RISNER: And I can just point you to *Arjmand*
10 as a case that's going on now. I don't have authority for a
11 case that's actually gone through that process yet or not.

12 THE COURT: Can you find out?

13 MR. RISNER: If there's a case I'm not aware of,
14 I'll find out.

15 THE COURT: Well, what I need to know is whether
16 there's only one case ever, the one you're naming, or
17 whether there have been others where travelers have used
18 this process, made a petition to an appellate court, and an
19 appellate court has actually reviewed it. I don't know if
20 that's classified, too, or not, but to the -- I would think
21 that the fact that a person files something in an appellate
22 court is not, itself, classified.

23 MR. RISNER: Certainly.

24 THE COURT: The filing wouldn't be classified, and
25 the disposition of affirmed, denied, or something, would not

1 be classified.

2 MR. RISNER: Certainly.

3 THE COURT: Can you check and can you file in the
4 record here something that tells me the results of your
5 efforts?

6 MR. RISNER: Certainly we'll do that.

7 THE COURT: And really what I'm after is just some
8 sense of the accessibility of that process. That's the
9 inference I'll draw from it. But how many travelers have
10 actually filed such petitions? Are there -- is there any
11 public record of them in their disposition?
12 Something -- something that helps me deal with it, I'd
13 appreciate that.

14 MR. RISNER: Okay. I'll be happy to address that.

15 THE COURT: Sorry. Sorry to redirect you.

16 MR. RISNER: No.

17 THE COURT: We're running out of time. I need you
18 to be able to finish up what you have to do and give
19 plaintiffs one more chance. But, folks, you know, sands are
20 running through the hourglass, and I turn into a pumpkin
21 pretty quickly here.

22 So go ahead, Mr. Risner.

23 MR. RISNER: Your Honor, I don't think I have
24 anything more to add to what I said. I just want to
25 emphasize that we have to look at what the additional

1 process would actually entail and what are the governmental
2 interests in that process and -- and what are the interests
3 in what that process would add as to what is already in
4 place.

5 THE COURT: So, fundamentally, the defendants'
6 premise is the person in the shoes of any one of the
7 plaintiffs with, the facts that I need to assume are true
8 for purposes of these motions, may never know the real
9 reasons, because -- real reasons for being on a No Fly List,
10 because that would implicate such a national security
11 interest that those reasons never could be disclosed to that
12 traveler, and the only process that traveler should be
13 permitted to pursue to its ultimate conclusion would be the
14 one already in existence, which culminates in a Court of
15 Appeals ex parte process, where the traveler is never given
16 an opportunity to challenge even the truth of the underlying
17 assertions.

18 MR. RISNER: The information in that situation
19 would not be able to be disclosed because of a classified or
20 otherwise sensitive nature of that information and that --

21 THE COURT: Even if it's wrong?

22 MR. RISNER: That is --

23 THE COURT: Pardon me. Ladies, if you wish to be
24 here, you need to please control yourselves.

25 MR. RISNER: Given sensitivity and the interests

1 at issue that the government has in protecting classified
2 information and in protecting air travel to, from, within
3 the United States, the courts would find that the government
4 has adequately balanced the private interest in this issue
5 with the government's interests when it's developed the
6 process as it exists, including the opportunity to submit
7 redress petitions to the agency and the opportunity to have
8 independent judicial review of that redress petition and the
9 individual's alleged inclusion on the No Fly List.

10 THE COURT: Ms. Siemion has pointed to data and
11 reports that continue to call into question the accuracy of
12 the information that you're pointing to as fundamental to
13 what you're contending is a sufficient process. Did you
14 want to address her assertions?

15 MR. RISNER: If I can just briefly address it, I
16 think what Ms. Siemion has done is kind of walk you through
17 a series of generalities about reports that largely predate
18 the plaintiffs' allegations in this case. She has told you
19 that misidentifications are not relevant to the question
20 before the Court and then their briefing has relied on the
21 OIG's statement about that very issue when they say things
22 like the OIG for DOJ found that 38 percent of the records
23 were incorrectly included in the list, there -- that report
24 is talking about the TSDB as it existed in 2007. The OIG
25 goes on to say -- and something not cited or mentioned today

1 by TCP -- that when the OIG did a separate review of the No
2 Fly List, it found virtually no errors.

3 I think that what they've done -- what TSC has done,
4 respectfully, is not really address the issue that we're
5 talking about here, and I don't think that the citations to
6 these old reports really captures what the government has
7 done to change the process, to improve the guidelines, and
8 to strengthen the quality controls that are available for
9 DHS TRIP and for the TSDB and the No Fly List.

10 I'm happy to address any particular questions you have
11 about the presentation, but I think I'm otherwise content to
12 rest on that.

13 THE COURT: Thank you.

14 MR. RISNER: Thank you.

15 THE COURT: I appreciate it.

16 All right. Final comments by the government -- or, I'm
17 sorry, plaintiffs?

18 MS. CHOUDHURY: Your Honor, just three brief
19 points. The government's interests in this case are
20 serious, Your Honor, but so are the private interests at
21 stake, and the government's argument has shown how stark and
22 extreme their position is.

23 The plaintiffs object to the categorical denial of
24 notice and process, and DHS TRIP and the judicial review
25 under DHS TRIP doesn't satisfy the most basic due process

1 safeguard.

2 As Your Honor noted, that process is wholly ex parte.
3 There is no way for the plaintiffs -- for somebody
4 contesting their placement on a list of suspected terrorists
5 that bans them from flying. There's no way for them to
6 contest the specific evidence or any of the reasons
7 underlying the government's decision. And, for that reason,
8 that process inherently renders a situation where innocent
9 people are left on the list.

10 The government -- my second point, Your Honor, points
11 to the *Arjmand* docket. If you look up the record in that
12 case, it's simply a declaration from the government setting
13 forth its Glomar position; that it can provide none of the
14 information, none of the reasons, none of the evidence
15 underlying those reasons to the petitioner in that case.
16 And what you have, again, is an ex parte process that
17 doesn't let the plaintiffs contest or correct any of the
18 misinformation, misunderstandings, or lack of information
19 that the government is relying upon in making that decision.

20 That process doesn't satisfy the most basic procedural
21 due process safeguards of notice or an opportunity to be
22 heard.

23 Finally, Your Honor, the Ninth Circuit's holding in
24 this case made clear that review under 49 USC 46110, from an
25 appeal of a DHS TRIP determination letter, is not a process

1 that let's the petitioner challenge and contest the
2 decisions of the decision-maker at issue, and that is the
3 Terrorist Screening Center. That system is one that is run
4 by TSA through DHS. They are messengers in that system.
5 And what is lacking is an opportunity to be heard before the
6 actual decision-maker who's rendering a decision in the
7 case.

8 So review under 46110, although the defendants might
9 want to point to it as something that would satisfy due
10 process, is anything but. And this -- the Ninth Circuit's
11 earlier decision in this case makes that clear.

12 Thank you, Your Honor.

13 THE COURT: One final point to clarify here. On
14 these motions, are plaintiffs relying at all on the
15 allegations of bill of attainder that are in the third
16 amended complaint?

17 MS. CHOUDHURY: Not in these --

18 THE COURT: Not in these motions?

19 MS. CHOUDHURY: Not in the procedural due process
20 claim.

21 THE COURT: What about the APA claim?

22 MS. CHOUDHURY: So, Your Honor, we do still
23 advance an APA claim. And for -- there are two separate
24 prospect claims. The first is that under 706(2)(B) of the
25 APA, the bar against agency action that is contrary to

1 constitutional law for the very same reasons that the DHS
2 TRIP system in defendants' action violating the due process
3 clause, they also violate that bar, an unconstitutional
4 agency action.

5 Separate and apart from that claim, plaintiffs bring an
6 arbitrary and capricious standard claim under section
7 706(2)(A). And Congress, in three different provisions,
8 directed defendants, directed the Executive, to create a
9 redress system that is, quote, fair, and, quote, lets
10 individuals identified as a threat correct errors in
11 underlying information, supporting their placement on a
12 watchlist.

13 That is Congress's directive. And the two parts of
14 that directive that are important are the fair part and the
15 part that the individual who is identified as a threat has a
16 chance to correct any erroneous information.

17 Those directives were given to the Executive, with
18 discretion, and the Executive chose to use that discretion
19 to create a process that is both unfair and does not permit
20 error correction.

21 The record that shows for the very same reasons that
22 the process violates the due process clause also shows that
23 it's unfair and doesn't permit error correction as directed
24 by Congress, and that satisfies the State Farm standard.

25 The government can't show a rational connection between

1 that directive from Congress and the TRIP system that is
2 actually implemented as the only redress system for people
3 who are denied or deprived boarding on the No Fly List.

4 THE COURT: Is that a bill of attainder argument
5 or is that an APA argument?

6 MS. CHOUDHURY: It's a straight APA argument.

7 THE COURT: I was just wanting to know if I needed
8 to address bill of attainder, too.

9 MS. CHOUDHURY: No, you do not.

10 THE COURT: Okay.

11 MS. CHOUDHURY: Thank you.

12 THE COURT: Thank you. Bill of attainder for
13 another day.

14 Well, what a morning. There is much to do here.

15 Mr. Risner, I'd appreciate that additional filing in
16 due course. You know, a couple of weeks, or so, would be
17 helpful. Not that I will be ready in that amount of time.
18 I just think it would be helpful. If it's going to take you
19 much longer than that, let us know what will be a reasonable
20 time. I think it will be a useful data point to have in the
21 record here for purposes of understanding your last
22 argument.

23 I'm taking these motions under advisement, and I'll do
24 what I can with what you've given me, and my own analysis
25 and decision will issue when I'm finished with that process.

1 I can't give you any estimate of that. It's, as you
2 know, a very difficult problem. So if, in the meantime, you
3 manage to figure out a way to resolve these 13 plaintiffs'
4 concerns, you should. I invite that continued discussion,
5 in any event.

6 Thank you, everyone. We're in recess on this matter.

7 (Oral argument concluded.)

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C E R T I F I C A T E

I certify, by signing below, that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Erwin

Jill L. Erwin, RMR, RDR, CRR
Official Court Reporter

Date: July 2, 2013

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1	90017 [1] 2/7 91-13 [1] 46/19 91-27 [1] 46/24 97204 [2] 2/16 3/10 97240 [1] 2/10	addresses [4] 34/16 42/15 50/2 76/19 addressing [1] 11/23 adequate [5] 41/15 56/16 81/16 99/19 101/22 adequately [2] 96/5 109/4 administer [1] 89/21 administration [1] 101/3 administrative [3] 72/5 96/12 100/17 admissible [1] 63/18 adoption [2] 32/9 32/12 advance [2] 41/5 112/23 adverse [1] 31/7 advised [1] 8/14 advisement [1] 114/23 advocacy [2] 84/11 95/3 advocating [1] 102/5 affected [3] 33/1 78/24 95/3 affects [1] 102/19 affidavits [1] 14/20 affirmatively [1] 41/4 affirmed [2] 12/6 106/25 afford [2] 54/8 68/24 afforded [4] 32/11 34/25 96/11 102/20 affords [1] 12/1 Africa [1] 55/12 after [15] 29/1 29/2 29/5 36/10 37/12 37/12 43/11 53/22 53/23 53/23 56/24 57/17 79/18 82/10 107/7 40/23 40/24 41/9 47/9 93/20 93/20 111/16 against [10] 16/5 16/19 17/23 25/4 26/6 61/13 67/12 98/21 102/18 112/25 agencies [6] 23/25 24/2 78/2 78/3 92/2 102/12 agency [11] 48/22 90/8 90/18 94/1 96/12 96/22 105/5 105/7 109/7 112/25 113/4 agency's [1] 95/25 agenda [1] 73/14 agent [4] 34/7 57/20 62/2 62/3 agents [5] 60/15 62/15 62/23 79/23 95/16 agree [5] 10/10 27/16 31/14 56/2 56/5 ahead [8] 12/16 21/2 47/8 68/2 74/24 75/9 84/12 107/22
10 percent [1] 78/15 10-750 [1] 4/8 1000 [1] 3/9 10004 [2] 2/5 2/13 114 [1] 22/14 125 [2] 2/4 2/12 13 [8] 9/17 46/19 53/22 71/22 72/7 72/14 97/12 115/3 1313 [1] 2/7 15-minute [1] 50/4 1600 [2] 2/15 2/16 17 [1] 63/8 18th [2] 2/4 2/12 1988 [2] 12/11 12/18	A	Ahlan [1] 2/6 Ahmed [3] 13/21 53/8 53/14 ailing [1] 37/6 air [32] 15/23 16/24 18/2 20/2 27/16 27/19 27/22 28/8 28/12 28/16 29/18 30/8 31/2 37/23 38/24 39/23 42/4 42/9 42/19 43/9 44/22 45/7 50/17 50/24 50/25 70/6 72/23 88/21 89/17 89/19 100/14 109/2 aircraft [16] 13/13 15/23 27/14 33/10 35/3 35/9 36/13 38/20 39/3 40/17 41/1 45/11 48/13 52/16 60/6 70/5 airline [3] 14/21 48/11 65/16 airlines [3] 34/6 34/6 35/6 airmen [1] 96/19 airplane [1] 72/25 airport [8] 21/17 33/8 53/13 57/18 60/14 62/11 67/16 93/19 akin [1] 18/18 al [17] 1/4 1/7 58/22 58/25 60/21 60/23 61/6 61/9 64/13 64/24 66/12 69/4 100/24 100/24 101/8 101/9 101/14 Al Haramain [1] 100/24 alarmingly [1] 80/19 Alaska [1] 34/6 albeit [1] 97/24 alcohol [4] 22/25 23/1 52/12 52/12 alcoholic [1] 22/24 algorithms [1] 77/7
2	Abdirahm [1] 13/25 Abdulmutallab [1] 77/14 Abe [1] 21/16 ability [17] 12/19 13/16 17/17 17/23 20/6 20/18 25/23 26/1 26/13 26/25 28/25 29/21 30/11 36/7 43/4 45/7 78/5 able [20] 7/18 7/23 13/10 18/24 19/11 19/12 19/16 19/23 24/17 31/6 39/14 42/8 46/17 53/2 54/18 54/19 57/18 58/1 107/18 108/19 about [105] above [1] 116/4 above-entitled [1] 116/4 abroad [3] 59/6 65/17 65/17 absence [2] 5/19 89/6 absent [1] 30/13 absolutely [2] 60/12 103/7 Abudullatif [1] 16/11 abuse [3] 32/3 32/6 32/24 abusers [1] 23/24 accept [1] 94/17 accepted [3] 28/16 50/25 63/25 accepting [1] 39/6 accepts [2] 37/22 74/25 access [5] 9/19 17/2 34/11 37/3 102/15 accessibility [1] 107/8 accommodate [1] 87/7 accompanies [1] 87/20 account [3] 62/22 87/2 103/6 Accountability [1] 76/19 accounts [1] 103/3 accuracy [4] 80/25 95/15 105/7 109/11 accurate [6] 44/11 46/1 47/3 49/25 91/23 92/5 accurately [2] 47/21 104/15 accused [1] 70/8 accuser's [1] 70/1 acknowledge [4] 18/21 95/8 103/10 103/15 acknowledged [1] 8/9 ACLU [2] 2/6 2/9 Act [2] 16/3 69/16 action [11] 12/19 16/16 23/6 23/10 72/12 81/15 85/23 96/1 112/25 113/2 113/4 actions [1] 81/13 actual [5] 46/13 67/4 81/16 91/8 112/6 actually [40] 5/24 21/4 22/20 26/6 26/24 27/24 29/19 32/1 32/18 36/2 44/11 45/6 55/9 55/13 55/14 56/7 56/20 60/5 63/6 64/15 66/12 67/5 67/6 67/15 75/1 76/6 76/8 76/12 77/9 77/10 77/16 77/20 88/17 90/9 106/5 106/11 106/19 107/10 108/1 114/2 ADC [1] 66/14 add [2] 107/24 108/3 added [1] 80/11 addition [2] 29/13 75/7 additional [6] 29/19 84/22 100/1 104/21 107/25 114/15 additionally [1] 24/20	
20 [4] 1/7 2/20 2/23 46/24 2001 [1] 2/24 20010 [1] 3/4 2004 [2] 16/3 91/11 2007 [4] 79/8 80/1 91/12 109/24 2009 [3] 79/7 79/10 79/22 2010 [2] 76/17 77/11 2012 [5] 76/18 77/10 77/23 78/21 79/1 2013 [3] 1/7 44/21 116/9 20530 [1] 2/21 22 [1] 17/2 25 [2] 25/8 47/8 253 [1] 77/16 27 [1] 46/24 2d [1] 56/22	3	
3	30 [1] 21/17 301 [1] 3/9 326-8191 [1] 3/11 326-8350 [1] 7/25 38 percent [2] 80/7 109/22 3:10-CV-750-BR [1] 1/5	
4	40585 [1] 2/9 46 -- sorry [1] 98/17 46110 [4] 98/17 98/25 111/24 112/8 47 [2] 61/20 61/23 48 [2] 61/21 61/23 49 [3] 22/14 98/17 111/24	
5	50 [1] 70/25 503 [2] 3/11 7/25 52 percent [1] 80/7	
6	637 [1] 3/3 647 [1] 56/22	
7	706 [2] 112/24 113/7 71,872 [1] 80/6 710 [1] 56/24 750 [1] 4/8	
8	8 percent [1] 79/18 800 [1] 34/19 8191 [1] 3/11 8350 [1] 7/25 888 [1] 2/15	

<p>A</p> <p>Ali [1] 13/21</p> <p>all [76]</p> <p>allegation [3] 30/13 37/23 49/11</p> <p>allegations [12] 28/6 28/16 31/3 48/10 48/10 48/25 49/13 49/22 50/25 88/5 109/18 112/15</p> <p>allege [2] 19/10 88/5</p> <p>alleged [8] 26/1 26/11 29/15 51/1 76/11 101/19 102/2 109/9</p> <p>allegedly [1] 36/3</p> <p>alleges [3] 31/5 46/20 88/8</p> <p>alleging [1] 34/21</p> <p>allocated [1] 25/8</p> <p>allow [3] 57/24 85/12 101/2</p> <p>allow -- to [1] 85/12</p> <p>allowed [1] 54/21</p> <p>allows [2] 53/25 63/4</p> <p>almost [1] 58/23</p> <p>alone [1] 31/9</p> <p>along [1] 8/7</p> <p>already [16] 37/12 47/16 72/20 73/3 81/2 81/11 81/25 82/10 82/21 82/25 85/24 100/22 101/20 104/24 108/3 108/14</p> <p>also [30] 7/25 8/7 8/21 14/16 15/24 15/25 16/25 25/22 30/10 31/5 31/10 32/10 36/16 51/8 52/12 52/17 53/20 57/1 57/11 59/7 60/7 75/3 78/7 78/16 80/22 83/6 83/9 83/24 113/3 113/22</p> <p>alter [1] 15/10</p> <p>alteration [4] 22/20 23/5 23/17 24/21</p> <p>altered [3] 22/7 22/9 31/25</p> <p>altering [1] 11/16</p> <p>alternate [3] 28/8 28/10 46/14</p> <p>alternative [17] 15/1 20/8 27/25 28/2 30/12 38/19 42/11 43/9 43/16 43/21 46/7 50/17 50/24 51/1 51/9 51/19 103/2</p> <p>alternatives [2] 28/5 71/3</p> <p>although [5] 23/20 60/22 64/23 69/10 112/8</p> <p>always [2] 72/20 73/3</p> <p>am [5] 7/11 39/1 70/12 74/4 98/6</p> <p>ambiguity [1] 61/20</p> <p>amended [1] 112/16</p> <p>Amendment [1] 12/5</p> <p>America [1] 51/16</p> <p>America's [1] 55/4</p> <p>American [3] 2/3 2/9 2/11</p> <p>Americans [1] 84/1</p> <p>AMICUS [1] 3/1</p> <p>Amir [1] 55/5</p> <p>among [1] 79/23</p> <p>amount [3] 19/17 65/19 114/17</p> <p>analogize [1] 45/1</p> <p>analogous [2] 36/2 96/18</p> <p>analogy [3] 34/25 35/12 44/18</p> <p>analysis [12] 18/14 35/19 37/22 43/15 45/1 47/20 51/4 51/20 82/18 89/5 104/6 114/24</p> <p>analysts [1] 77/7</p> <p>analyze [1] 6/16</p> <p>and -- and [2] 105/3 108/2</p> <p>and -- which [1] 82/14</p> <p>and/or [1] 104/23</p> <p>and/or -- sorry [1] 104/23</p> <p>Angeles [1] 2/7</p> <p>ANNA [1] 1/15</p> <p>another [11] 4/15 40/23 43/23 44/14 45/1 49/8 51/9 53/4 63/18 71/16 114/13</p> <p>answer [2] 19/8 20/24</p> <p>answering [2] 51/21 75/7</p> <p>any [74]</p> <p>any -- any [1] 37/3</p> <p>anyone [5] 10/4 61/14 72/13 86/22 97/7</p> <p>anything [11] 15/11 47/12 56/7 57/10 67/16 67/25 68/7 68/12 98/5 107/24 112/10</p> <p>anywhere [1] 93/21</p>	<p>APA [5] 112/21 112/23 112/25 114/5 114/6</p> <p>apart [3] 21/7 63/23 113/5</p> <p>apologize [2] 53/9 74/22</p> <p>appeal [5] 93/22 97/1 97/8 98/6 111/25</p> <p>appealing [1] 106/8</p> <p>appeals [24] 93/23 94/7 94/12 94/16 95/1 95/13 96/13 96/21 97/2 97/3 97/14 97/15 98/5 98/18 98/19 98/22 98/24 99/7 101/21 105/2 105/9 105/12 105/13 108/15</p> <p>Appeals received [1] 96/21</p> <p>appear [1] 5/23</p> <p>APPEARANCES [1] 2/1</p> <p>appeared [1] 91/24</p> <p>Appearing [1] 3/2</p> <p>appellate [10] 66/22 93/1 93/10 93/23 98/6 105/20 106/7 106/18 106/19 106/21</p> <p>applicable [3] 18/3 64/25 65/1</p> <p>application [4] 58/1 58/2 63/11 66/3</p> <p>applied [6] 18/2 24/3 60/2 72/3 84/22 105/5</p> <p>applies [2] 90/13 94/10</p> <p>apply [5] 18/14 63/9 64/3 82/19 95/24</p> <p>applying [2] 64/22 66/5</p> <p>appreciate [6] 6/21 73/11 84/4 107/13 110/15 114/15</p> <p>approach [2] 57/1 62/10</p> <p>appropriate [6] 51/20 85/2 86/12 87/12 96/1 96/3</p> <p>appropriately [3] 85/3 87/8 94/2</p> <p>approval [1] 91/8</p> <p>approved [1] 91/14</p> <p>approximately [1] 21/17</p> <p>Aptheker [2] 20/14 26/3</p> <p>Arab [1] 16/14</p> <p>Arabia [2] 14/2 59/9</p> <p>arbiter [1] 43/8</p> <p>arbitrary [1] 113/6</p> <p>are [142]</p> <p>are -- that [1] 51/2</p> <p>area [2] 89/20 97/2</p> <p>aren't [3] 19/23 30/6 54/11</p> <p>arena [1] 38/4</p> <p>argue [4] 9/4 17/11 23/21 24/13</p> <p>argues [1] 10/14</p> <p>arguing [1] 38/14</p> <p>argument [34] 1/13 4/6 5/12 5/14 11/3 21/1 21/5 23/12 33/11 37/1 38/6 38/15 39/16 42/21 44/24 45/5 45/15 61/12 68/11 74/1 91/16 98/7 98/16 99/14 103/5 103/6 103/9 104/3 110/21 114/4 114/5 114/6 114/22 115/7</p> <p>arguments [7] 8/5 27/6 27/6 52/2 59/19 59/19 84/9</p> <p>arise [1] 105/23</p> <p>arises [1] 71/17</p> <p>arising [2] 67/23 72/19</p> <p>Arjmand [4] 99/5 105/16 106/9 111/11</p> <p>around [8] 6/3 6/23 8/9 8/13 39/14 44/17 60/16 103/8</p> <p>arrangements [1] 53/21</p> <p>articulated [2] 31/23 31/24</p> <p>Arulanantham [1] 2/6</p> <p>as [132]</p> <p>aside [1] 55/7</p> <p>ask [3] 56/17 68/16 88/22</p> <p>asked [2] 41/9 52/18</p> <p>asking [5] 44/23 56/13 58/19 84/24 101/16</p> <p>aspects [1] 58/19</p> <p>assert [6] 12/23 17/21 20/5 76/11 87/16 90/10</p> <p>asserted [4] 6/23 27/10 47/25 48/15</p> <p>asserting [1] 27/1</p> <p>assertion [5] 6/15 37/14 48/5 48/16 95/21</p> <p>assertions [4] 6/17 49/6 108/17 109/14</p> <p>asserts [1] 97/13</p> <p>assessed [2] 58/4 61/3</p> <p>assessing [1] 78/23</p> <p>assessment [1] 58/14</p>	<p>assets [2] 100/25 100/25</p> <p>assign [1] 87/5</p> <p>assign -- if [1] 87/5</p> <p>assigned [1] 87/25</p> <p>assistance [4] 29/17 29/20 33/25 44/10</p> <p>associated [5] 5/1 31/14 36/18 48/3 58/9</p> <p>association [1] 31/15</p> <p>assume [18] 6/7 8/12 8/16 37/2 43/22 43/22 43/25 47/23 48/6 48/17 89/4 93/16 93/17 93/20 103/25 104/2 104/4 108/7</p> <p>assuming [2] 70/12 93/24</p> <p>assumptions [1] 71/13</p> <p>assurance [1] 6/2</p> <p>assurances [1] 95/15</p> <p>assure [1] 71/12</p> <p>attached [1] 92/1</p> <p>attaches [5] 36/21 36/22 42/12 44/12 45/9</p> <p>attack [1] 77/15</p> <p>attacks [1] 30/11</p> <p>attainder [4] 112/15 114/4 114/8 114/12</p> <p>attempted [1] 77/15</p> <p>attempting [1] 89/18</p> <p>attesting [1] 14/20</p> <p>attributable [1] 31/8</p> <p>audio [2] 4/11 5/7</p> <p>audit [6] 79/5 79/6 79/7 79/8 79/10 79/12</p> <p>auditing [2] 66/7 66/9</p> <p>audits [2] 75/23 105/6</p> <p>authenticate [1] 95/17</p> <p>authorities [1] 38/11</p> <p>authority [16] 20/14 65/4 67/6 69/3 70/20 82/14 83/17 94/11 94/14 94/15 94/17 99/15 101/2 102/14 106/4 106/10</p> <p>availability [7] 27/24 46/6 46/12 46/14 97/9 99/18 99/21</p> <p>available [21] 20/9 28/3 28/4 50/18 50/23 51/4 51/19 57/1 79/15 83/15 85/24 88/8 92/19 92/20 93/1 97/17 97/18 97/21 99/9 105/8 110/8</p> <p>Ave [2] 2/20 2/23</p> <p>avenue [3] 2/15 3/9 92/24</p> <p>aviation [3] 58/11 60/4 65/25</p> <p>avoid [1] 87/9</p> <p>aware [6] 88/25 91/17 91/18 98/23 105/21 106/13</p> <p>away [4] 33/14 34/14 45/19 64/22</p> <p>AYMAN [2] 1/4 21/18</p>
B		
<p>back [22] 7/20 7/22 26/20 32/13 32/15 33/5 34/3 36/20 38/22 39/4 41/10 42/3 46/8 50/10 54/7 54/9 54/18 54/19 70/19 72/22 73/6 93/19</p> <p>bad [1] 67/16</p> <p>badge [1] 22/1</p> <p>balance [2] 25/4 96/6</p> <p>balanced [1] 109/4</p> <p>balancing [7] 31/20 40/7 70/10 84/19 85/2 97/20 104/13</p> <p>ban [5] 11/13 15/17 15/20 17/17 52/11</p> <p>banned [2] 10/1 10/16</p> <p>banning [2] 11/6 17/17</p> <p>bans [5] 13/12 15/25 16/23 17/1 111/5</p> <p>bar [3] 69/2 112/25 113/3</p> <p>based [4] 21/9 70/9 71/15 88/24</p> <p>basic [10] 5/16 40/2 41/24 56/15 57/14 58/20 81/10 84/2 110/25 111/20</p> <p>basically [1] 63/15</p> <p>basis [9] 69/7 69/7 81/14 83/4 83/6 83/12 89/1 89/11 95/18</p> <p>be [166]</p> <p>beat [1] 44/17</p> <p>became [1] 79/15</p> <p>because [81]</p> <p>bed [1] 40/22</p> <p>been [49] 5/24 8/13 10/15 13/17 19/24 24/2 25/8 25/15 26/17 27/2 28/25 31/25 33/17 34/4 38/17</p>		

<p>B</p> <p>been... [34] 39/21 45/19 47/5 57/18 57/19 57/19 60/14 61/16 63/13 65/18 71/22 80/8 81/6 81/23 82/10 82/21 82/24 85/1 85/2 85/15 85/16 87/8 91/7 91/19 92/5 92/8 92/8 92/10 98/7 99/10 105/13 105/14 105/19 106/17</p> <p>been -- does [1] 91/7</p> <p>been -- well [1] 57/19</p> <p>been -- you [1] 63/13</p> <p>before [22] 1/15 4/9 11/23 17/16 24/16 31/9 47/13 50/10 50/11 51/6 54/23 58/3 58/16 68/1 73/25 75/4 88/23 91/24 93/9 98/5 109/20 112/5</p> <p>begin [2] 4/9 8/24</p> <p>beginning [3] 41/10 67/3 69/4</p> <p>begins [1] 105/5</p> <p>behalf [1] 8/24</p> <p>being [31] 10/15 18/7 19/16 19/16 24/19 24/20 26/18 34/14 35/15 36/3 36/4 37/9 39/14 39/20 53/2 61/8 64/9 67/1 75/3 76/1 76/21 76/25 77/16 78/20 78/24 80/11 91/9 101/9 101/25 102/9 108/9</p> <p>beings [1] 34/13</p> <p>Belgium [1] 46/21</p> <p>believe [6] 57/14 65/24 72/4 90/6 92/20 99/10</p> <p>believes [2] 86/12 97/18</p> <p>Bell [1] 52/20</p> <p>belong [2] 9/23 75/1</p> <p>below [3] 61/8 61/8 116/2</p> <p>benefit [4] 24/1 24/3 60/19 95/3</p> <p>benefits [5] 32/8 32/11 33/24 33/25 100/16</p> <p>best [4] 9/7 67/5 88/20 89/21</p> <p>better [7] 7/21 33/22 43/17 50/24 51/1 74/6 74/7</p> <p>between [7] 23/4 25/25 38/10 80/7 84/16 100/23 113/25</p> <p>beyond [3] 62/9 103/13 104/7</p> <p>bicycles [1] 50/18</p> <p>big [1] 68/4</p> <p>bill [5] 101/11 112/15 114/4 114/8 114/12</p> <p>biographic [2] 76/8 77/5</p> <p>birth [2] 39/19 77/6</p> <p>bit [5] 6/14 9/13 32/18 36/1 61/18</p> <p>bless [1] 90/23</p> <p>blocking [3] 100/25 101/3 101/8</p> <p>blogging [1] 4/24</p> <p>blow [1] 60/17</p> <p>blunt [1] 98/3</p> <p>board [19] 8/15 19/12 19/12 19/16 19/21 19/23 22/13 24/8 30/25 30/25 33/10 34/8 35/3 46/20 52/15 59/8 59/8 60/6 70/5</p> <p>boarding [60]</p> <p>boat [7] 37/1 37/17 46/8 46/17 46/21 46/23 55/4</p> <p>boating [1] 27/18</p> <p>boats [2] 51/8 51/12</p> <p>border [3] 16/9 16/16 51/16</p> <p>borders [1] 51/10</p> <p>both [13] 23/6 23/7 23/10 31/21 66/14 76/19 79/1 80/9 80/17 81/22 83/16 83/17 113/19</p> <p>bother [1] 39/16</p> <p>bought [1] 93/19</p> <p>Box [1] 2/9</p> <p>Boyer [1] 7/17</p> <p>Boyer's [1] 8/1</p> <p>BR [1] 1/5</p> <p>branch [3] 70/15 90/1 102/23</p> <p>breach [1] 102/23</p> <p>break [2] 50/11 93/12</p> <p>brief [9] 10/14 15/13 16/21 37/5 71/10 75/24 78/18 82/12 110/18</p> <p>briefing [3] 56/18 56/25 109/20</p> <p>briefly [5] 30/18 52/3 75/16 82/1 109/15</p> <p>briefs [3] 22/2 57/13 99/6</p> <p>bring [5] 17/21 18/5 54/15 94/21 113/5</p> <p>Brittain [2] 15/12 19/4</p> <p>broad [3] 2/4 2/12 82/7</p>	<p>broaden [1] 72/13</p> <p>broadened [1] 77/20</p> <p>broadening [1] 77/24</p> <p>broader [2] 12/24 27/22</p> <p>brother [1] 55/6</p> <p>brother's [1] 53/10</p> <p>brought [4] 17/18 19/9 72/22 98/21</p> <p>BROWN [1] 1/15</p> <p>bulk [1] 52/1</p> <p>burden [6] 36/18 48/3 70/10 71/21 72/8 74/19</p> <p>burdened [2] 37/9 37/16</p> <p>burdens [6] 6/5 14/3 18/13 30/5 100/17 103/16</p> <p>burdensome [1] 87/7</p> <p>Burson [1] 52/20</p> <p>bus [1] 52/24</p> <p>bush [1] 44/18</p> <p>businesses [1] 9/20</p> <p>buy [3] 22/25 39/23 40/23</p> <p>buying [4] 22/25 52/12 52/12 86/3</p>	<p>changed [1] 36/15</p> <p>changes [4] 75/12 76/20 77/18 78/23</p> <p>changing [1] 80/11</p> <p>charged [1] 102/24</p> <p>charges [1] 60/1</p> <p>charity [1] 64/16</p> <p>check [2] 52/8 107/3</p> <p>child [9] 23/24 32/3 32/6 32/24 39/19 54/13 54/15 54/15 54/17</p> <p>child's [1] 54/17</p> <p>children [1] 9/18</p> <p>choice [3] 12/8 49/17 49/19</p> <p>chose [2] 91/20 113/18</p> <p>chosen [2] 14/23 74/18</p> <p>Choudhury [7] 2/11 8/25 9/1 9/2 9/8 61/18 63/7</p> <p>CIPA [4] 69/15 94/8 94/10 94/10</p> <p>Circuit [42] 12/10 12/18 13/8 15/13 17/25 18/23 20/7 20/16 22/5 22/8 22/17 24/3 28/13 28/15 30/9 42/10 42/16 43/14 58/22 59/2 59/21 60/7 65/7 65/16 66/12 66/13 66/14 67/8 69/10 69/11 82/15 83/12 83/16 96/2 96/4 96/9 98/1 98/12 98/13 99/7 101/22 105/15</p> <p>circuit's [12] 14/4 17/14 19/4 20/12 20/15 22/12 23/16 37/24 64/14 92/24 111/23 112/10</p> <p>circumstance [1] 82/9</p> <p>circumstances [6] 28/23 48/12 67/8 70/14 88/18 90/15</p> <p>citation [1] 64/20</p> <p>citations [3] 61/1 62/1 110/5</p> <p>cite [3] 15/12 16/21 69/15</p> <p>cited [12] 64/24 66/13 75/12 75/17 75/23 76/15 78/17 82/12 82/16 99/5 102/17 109/25</p> <p>cites [2] 60/22 65/15</p> <p>citizen [3] 26/7 87/24 102/7</p> <p>citizens [4] 9/17 29/11 63/19 78/24</p> <p>civil [5] 2/3 2/9 2/11 2/20 4/8</p> <p>claim [25] 11/6 11/23 17/18 17/21 18/5 19/11 21/6 21/7 22/19 30/2 31/17 31/18 31/19 44/24 52/4 98/14 98/14 98/15 98/16 98/20 112/20 112/21 112/23 113/5 113/6</p> <p>claiming [1] 32/22</p> <p>claims [7] 6/10 7/5 25/1 31/4 31/10 36/18 112/24</p> <p>clarification [2] 6/7 8/8</p> <p>clarify [5] 31/13 51/5 52/6 75/12 112/13</p> <p>clarifying [1] 88/22</p> <p>class [1] 72/12</p> <p>classified [34] 59/18 67/23 68/14 69/1 69/6 69/16 69/19 69/23 70/1 70/9 70/13 71/15 72/10 83/8 83/13 86/23 87/10 88/14 88/24 89/2 89/6 89/12 94/5 100/8 101/24 102/15 102/19 102/21 106/20 106/22 106/24 107/1 108/19 109/1</p> <p>classmates [1] 21/25</p> <p>clause [3] 57/15 113/3 113/22</p> <p>clean [1] 58/21</p> <p>clear [18] 10/20 13/8 22/8 22/17 23/17 41/8 51/25 53/10 53/25 59/25 65/23 76/3 80/24 81/17 92/7 100/9 111/24 112/11</p> <p>clearly [4] 12/18 15/13 69/22 102/19</p> <p>clients [14] 9/17 52/15 58/12 60/4 60/13 60/20 61/16 62/2 62/22 63/19 65/24 66/24 68/22 73/6</p> <p>close [5] 12/8 16/22 53/8 59/2 65/8</p> <p>closed [2] 79/19 79/21</p> <p>closely [1] 96/17</p> <p>closing [1] 84/9</p> <p>co [1] 63/7</p> <p>co-counsel [1] 63/7</p> <p>cognizable [2] 11/19 22/19</p> <p>colleague [1] 25/6</p> <p>colleagues [1] 25/3</p> <p>collects [1] 77/4</p> <p>colloquy [1] 41/10</p> <p>combatant [1] 57/4</p> <p>come [11] 9/5 33/20 35/4 39/4 39/6 51/16 54/1</p>
	<p>C</p> <p>C-B-P [1] 16/8</p> <p>CA [1] 2/7</p> <p>California [3] 2/6 32/6 32/7</p> <p>call [7] 7/17 7/18 7/20 7/22 7/23 38/5 109/11</p> <p>called [3] 14/17 19/25 49/9</p> <p>camera [2] 94/7 94/12</p> <p>can [73]</p> <p>can't [20] 4/18 14/1 19/21 40/16 40/20 53/11 54/7 54/8 59/13 59/14 60/5 63/15 64/6 64/6 65/8 65/9 68/9 70/14 113/25 115/1</p> <p>cannot [12] 6/20 13/19 13/21 13/22 13/25 55/9 61/14 64/11 65/5 65/6 87/17 101/10</p> <p>capricious [1] 113/6</p> <p>captains [1] 16/17</p> <p>captures [1] 110/6</p> <p>car [1] 53/4</p> <p>care [1] 9/19</p> <p>carrier [1] 72/23</p> <p>cars [1] 50/18</p> <p>case [131]</p> <p>case-by-case [3] 69/7 69/7 83/12</p> <p>cases [34] 18/3 18/4 18/5 20/3 20/7 20/13 25/17 25/18 25/22 28/3 44/15 45/5 50/13 50/21 51/3 51/11 52/18 57/19 60/15 61/11 62/1 64/12 65/11 65/11 66/15 83/11 98/12 100/9 100/15 100/18 100/21 101/9 101/15 105/13</p> <p>cases -- plaintiffs' [1] 28/3</p> <p>categorical [1] 110/23</p> <p>categorically [1] 9/22</p> <p>caught [1] 60/16</p> <p>cause [2] 97/14 116/4</p> <p>caused [1] 23/6</p> <p>causes [2] 23/10 79/4</p> <p>CBP [5] 16/3 30/18 30/22 31/8 46/23</p> <p>CBP's [1] 16/1</p> <p>Center [5] 78/1 78/1 78/17 79/9 112/3</p> <p>central [1] 61/12</p> <p>certain [10] 15/2 23/24 24/2 33/5 48/10 48/11 51/3 56/15 68/18 80/21</p> <p>certainly [9] 10/10 27/16 28/12 36/16 45/14 65/7 106/23 107/2 107/6</p> <p>certificates [1] 96/20</p> <p>certified [3] 3/6 3/8 116/6</p> <p>certify [1] 116/2</p> <p>challenge [5] 17/17 24/18 87/13 108/16 112/1</p> <p>challenged [2] 19/13 59/11</p> <p>challenges [1] 105/22</p> <p>challenging [3] 41/23 93/6 98/25</p> <p>chambers [3] 7/15 7/17 7/25</p> <p>chance [7] 47/6 66/1 66/23 67/4 93/19 107/19 113/16</p> <p>chances [1] 86/3</p> <p>change [2] 32/19 110/7</p>	

<p>C</p> <p>come... [4] 62/15 62/23 72/10 73/6 comes [3] 65/7 93/6 94/23 comfort [1] 39/2 coming [3] 36/20 71/5 71/7 comment [1] 8/11 comments [1] 110/16 commerce [2] 33/21 52/13 commercial [4] 15/22 20/2 46/22 52/16 committing [1] 77/15 common [2] 56/3 62/9 communication [2] 5/6 95/14 community [1] 4/25 companionship [1] 87/25 compare [1] 53/12 compared [1] 100/12 compel [1] 102/23 compelling [1] 89/15 competitively [1] 35/7 complaint [3] 31/5 53/23 112/16 complete [11] 19/1 57/7 57/22 59/23 65/22 80/23 85/6 86/14 86/14 100/3 100/4 completed [1] 85/20 completely [5] 13/12 66/10 77/8 104/18 104/20 complies [1] 72/5 component [1] 31/17 computer [1] 77/7 conceivable [1] 15/20 concept [1] 25/18 concern [6] 68/25 69/21 82/23 97/25 99/12 102/3 concern -- be [1] 99/12 concerned [8] 6/12 8/18 17/15 75/20 82/6 83/10 96/19 99/12 concerning [2] 8/5 66/6 concerns [9] 7/7 28/22 75/17 78/3 82/17 82/19 83/7 96/21 115/4 conclude [1] 94/21 concluded [2] 101/13 115/7 conclusion [4] 43/8 78/21 96/10 108/13 conclusions [3] 77/24 79/1 89/21 conditions [1] 64/8 conduct [2] 9/19 70/9 conducted [1] 80/5 conference [3] 7/19 7/20 7/23 conferring [1] 33/4 confident [1] 91/17 confinement [1] 100/19 confirm [10] 14/24 49/15 58/6 58/8 61/14 63/15 64/6 65/5 68/9 82/9 confirmation [1] 8/8 confirmed [5] 64/8 92/12 92/14 93/18 105/24 confirming [1] 101/17 conform [1] 72/2 conformed [1] 116/5 confront [3] 42/18 67/13 70/1 Congress [17] 89/22 90/21 90/22 90/24 91/10 91/13 91/17 91/18 91/23 91/24 92/15 92/16 94/19 94/23 113/7 113/24 114/1 Congress's [1] 113/13 congressional [5] 16/4 91/7 91/19 91/21 92/4 connected [2] 56/4 90/6 connection [5] 7/16 11/16 23/4 23/11 113/25 consequence [1] 55/23 consequences [3] 32/3 84/24 84/25 consider [2] 27/22 99/17 consideration [1] 32/8 considered [1] 104/18 considering [2] 51/8 99/18 consistent [4] 12/24 83/2 100/2 102/6 Constantineau [2] 22/23 52/10 constitution [10] 12/1 73/17 73/20 74/11 74/25 75/19 82/1 82/6 83/10 83/21 constitutional [6] 39/11 55/22 65/14 69/23 69/25</p>	<p>113/1 constitutionally [1] 44/12 constraint [1] 52/9 construct [3] 28/14 39/11 88/11 consultation [1] 24/4 consulted [1] 24/1 consuming [1] 38/9 containing [1] 24/5 contend [8] 6/18 6/20 7/2 9/25 10/11 10/18 16/15 49/4 contending [2] 41/23 109/13 contends [1] 57/25 content [2] 57/10 110/11 contention [1] 10/10 contentions [2] 6/3 6/19 contest [5] 57/24 58/2 111/6 111/17 112/1 contested [1] 14/12 contesting [1] 111/4 context [6] 27/22 29/24 56/2 69/5 98/7 105/23 Continental [1] 50/17 continually [1] 40/6 continue [4] 40/3 50/10 90/6 109/11 continued [1] 115/4 contours [1] 72/1 contrary [2] 11/11 112/25 contrast [2] 15/14 101/5 control [2] 101/1 108/24 controlling [1] 22/5 controls [2] 26/12 110/8 controverted [1] 49/6 convenience [11] 5/7 28/12 30/9 38/4 38/6 39/10 42/20 42/21 43/1 62/6 103/11 convenient [7] 42/10 42/11 42/13 43/17 51/3 51/3 51/17 convicted [1] 77/15 convince [1] 67/14 Coppola [1] 50/1 core [1] 81/22 correct [20] 10/3 44/19 49/21 50/15 75/5 75/13 76/14 77/7 80/20 80/21 81/1 81/8 81/18 90/21 95/4 97/16 111/17 113/10 113/16 116/3 correction [2] 113/20 113/23 correctly [3] 7/12 60/2 77/3 could [26] 6/18 6/19 10/3 10/6 15/20 22/11 22/18 22/25 29/6 51/5 56/9 59/25 69/19 82/4 82/4 84/15 84/22 84/22 85/7 85/12 86/17 86/19 88/22 92/16 103/15 108/11 couldn't [1] 89/9 Council [1] 64/14 counsel [21] 5/9 5/14 32/2 38/5 41/11 43/20 43/22 51/23 52/5 52/17 54/10 63/7 73/11 84/15 85/4 86/19 87/11 96/18 101/7 104/5 104/15 counsel's [1] 87/14 counsels' [1] 8/5 Counterterrorism [1] 78/1 country [5] 30/14 39/14 51/9 72/22 78/20 county [1] 51/15 couple [5] 5/16 53/5 72/23 91/16 114/16 course [12] 5/17 28/11 30/24 59/21 63/23 86/1 89/14 89/14 99/22 102/13 104/11 114/16 court [93] Court -- well [1] 56/12 Court's [4] 19/3 20/13 72/9 99/15 Courthouse [1] 3/9 courts [4] 83/17 100/19 101/12 109/3 covered [2] 47/17 61/18 covering [1] 25/19 create [4] 59/15 72/4 113/8 113/19 credibility [3] 58/4 58/14 67/3 credit [1] 38/15 crime [1] 26/7 criminal [4] 63/12 69/25 70/9 94/11 criteria [6] 31/21 64/21 77/20 77/24 78/19 95/24</p>	<p>113/1 criterion [1] 105/5 critically [1] 12/6 cross [4] 4/6 6/14 6/17 13/22 CRR [2] 3/6 116/9 cruise [1] 54/8 CSR [1] 3/6 Cuba [1] 26/8 culminates [2] 92/19 108/14 culmination [1] 97/17 cumbersome [1] 70/4 Cup [1] 55/4 current [1] 99/19 currently [2] 41/15 91/9 custody [1] 87/20 Customs [3] 16/9 16/16 63/12 Customs's [1] 63/13 CV [1] 1/5</p>
<p>D</p>		
<p>D-E-N-I-E-V-A [1] 12/16 D.C [3] 64/13 65/16 96/9 dad [1] 54/17 daily [1] 80/25 damages [1] 6/22 data [7] 70/1 75/2 75/24 77/25 105/12 109/10 114/20 database [7] 75/25 76/1 78/9 78/10 78/10 79/12 80/11 date [2] 77/6 116/9 Davis [6] 34/15 34/21 35/5 52/5 52/6 52/11 Davis's [1] 34/19 day [3] 58/5 67/7 114/13 days' [1] 72/23 DC [3] 2/21 2/24 3/4 de [7] 15/7 15/11 15/13 15/18 19/4 19/6 96/11 deal [9] 20/4 48/18 68/19 69/14 69/22 70/2 71/16 98/6 107/12 dealing [2] 70/4 70/7 dealt [1] 69/6 dear [1] 39/25 death [2] 39/18 40/22 decades [2] 12/3 25/17 decided [1] 68/18 decision [35] 16/15 17/14 18/17 19/3 19/4 20/12 20/15 20/16 22/12 22/16 23/16 30/23 30/25 47/4 58/3 58/17 60/21 61/15 64/14 64/14 66/14 67/2 67/6 82/12 88/14 96/8 99/1 105/21 111/7 111/19 112/2 112/6 112/6 112/11 114/25 decision-maker [6] 58/3 58/17 67/2 99/1 112/2 112/6 decisions [5] 12/3 71/3 71/14 105/18 112/2 declarants [1] 48/3 declaration [16] 30/20 31/5 44/1 44/1 44/2 46/18 46/24 48/1 50/1 54/13 55/9 62/1 62/23 63/7 92/11 111/12 declarations [12] 5/21 5/24 14/9 14/20 14/24 29/16 38/23 44/9 49/18 49/23 58/12 95/16 declare [2] 56/14 60/9 declassification [1] 71/11 deeply [2] 11/10 21/14 defendant [2] 24/12 31/9 defendant -- defendants [1] 24/12 defendants [33] 1/8 2/18 6/20 9/16 9/21 9/25 10/3 10/9 10/18 11/5 11/13 14/11 16/15 17/10 22/2 22/7 22/9 24/12 31/13 48/1 49/4 49/5 75/13 75/18 76/15 81/6 83/7 90/10 92/1 103/9 103/12 112/8 113/8 defendants' [11] 10/8 21/10 23/6 23/12 44/19 78/18 82/7 96/25 103/6 108/5 113/2 deference [1] 89/23 Definitely [1] 60/20 definition [1] 42/23 degrees [1] 55/20 delayed [3] 36/4 88/9 93/5 demonstrate [3] 28/4 75/2 97/20</p>		

<p>D</p> <p>denial [10] 18/14 20/1 23/25 25/24 25/25 31/14 48/4 63/22 82/25 110/23</p> <p>denied [50] 5/22 6/5 8/18 14/14 14/15 16/12 21/13 21/18 21/20 21/23 24/9 24/10 26/17 27/2 28/25 30/14 30/15 30/21 36/7 38/17 39/21 39/25 40/4 40/15 40/23 41/3 46/15 46/23 48/9 48/13 48/16 49/7 49/8 49/11 62/12 63/10 63/12 63/14 63/15 81/23 82/10 84/2 88/8 92/12 93/5 93/18 93/20 96/19 106/25 114/3</p> <p>denies [2] 26/24 45/6</p> <p>DeNieva [10] 12/10 13/8 14/7 18/5 18/14 18/18 18/24 20/15 20/17 67/6</p> <p>denominator [1] 80/10</p> <p>deny [9] 14/24 16/6 22/15 58/6 61/14 64/6 65/6 68/9 82/9</p> <p>denying [7] 16/20 30/19 34/6 34/22 34/23 45/10 45/20</p> <p>departing [1] 16/5</p> <p>Department [5] 2/19 2/22 91/6 101/1 106/6</p> <p>depends [1] 93/13</p> <p>depravations [1] 15/14</p> <p>deprivation [45] 13/3 15/7 15/9 15/11 16/11 17/4 17/12 17/23 18/11 18/20 19/20 20/9 23/14 25/15 25/20 25/23 26/4 26/9 29/22 30/11 33/1 34/3 36/3 45/8 51/25 53/1 53/18 54/22 55/2 55/21 57/16 61/4 61/6 63/1 64/15 67/9 75/16 82/2 82/21 83/1 83/23 100/16 101/7 101/12 104/25</p> <p>deprivations [2] 19/5 75/21</p> <p>deprive [1] 26/13</p> <p>deprived [5] 10/15 10/21 101/9 104/20 114/3</p> <p>deprives [4] 8/6 11/14 12/20 13/6</p> <p>derived [1] 105/16</p> <p>described [7] 29/10 34/20 48/3 77/1 81/9 82/8 85/15</p> <p>describes [2] 78/7 80/3</p> <p>deserves [1] 38/15</p> <p>design [1] 66/16</p> <p>designated [3] 59/10 59/11 101/10</p> <p>designation [3] 59/12 64/16 87/12</p> <p>designations [1] 101/1</p> <p>designed [1] 31/2</p> <p>detailed [1] 82/18</p> <p>details [3] 56/17 79/5 80/2</p> <p>detention [1] 57/4</p> <p>determination [8] 31/7 66/20 93/6 94/24 99/1 105/9 106/5 111/25</p> <p>determinative [1] 38/4</p> <p>determine [6] 60/1 66/3 78/24 95/25 102/14 104/11</p> <p>determined [5] 80/5 85/11 87/8 88/19 96/22</p> <p>determines [2] 71/5 85/21</p> <p>determining [1] 94/2</p> <p>detrimental [1] 82/5</p> <p>developed [4] 90/9 90/19 90/20 109/5</p> <p>developments [2] 76/14 76/15</p> <p>DHS [26] 10/9 48/21 61/7 63/4 66/7 66/20 81/8 90/9 90/12 90/20 90/23 90/25 91/12 91/20 92/8 93/4 93/17 99/2 99/14 105/8 110/9 110/24 110/25 111/25 112/4 113/1</p> <p>dial [1] 29/7</p> <p>Diaz [1] 2/8</p> <p>did [15] 7/22 17/21 20/12 44/9 48/1 49/2 53/22 56/20 72/20 73/4 73/4 86/23 90/22 109/13 110/1</p> <p>didn't [12] 17/15 17/16 17/25 19/1 19/10 20/11 20/16 23/25 39/3 42/17 54/2 97/25</p> <p>died [1] 37/12</p> <p>difference [3] 25/25 33/16 35/23</p> <p>different [27] 10/17 17/19 19/21 20/7 28/14 29/25 31/11 35/2 35/6 35/9 35/19 35/23 36/4 43/15 45/13 45/15 47/20 71/2 86/9 94/11 100/10 100/11 101/8 101/12 101/14 101/14 113/7</p> <p>differently [1] 92/16</p> <p>difficult [4] 6/15 6/16 55/16 115/2</p>	<p>difficulty [5] 7/24 13/11 14/6 18/25 20/19</p> <p>digitally [1] 116/5</p> <p>Diplomate [1] 3/7</p> <p>directed [5] 48/18 48/23 113/8 113/8 113/23</p> <p>direction [1] 91/21</p> <p>directive [4] 16/4 113/13 113/14 114/1</p> <p>directives [1] 113/17</p> <p>directly [3] 33/1 51/18 100/5</p> <p>director [2] 78/17 91/24</p> <p>disagreed [1] 98/19</p> <p>discharged [1] 62/21</p> <p>disclose [11] 62/7 85/6 85/13 86/7 86/10 86/16 86/23 88/14 101/25 102/9 102/10</p> <p>disclosed [4] 85/16 100/22 108/11 108/19</p> <p>disclosing [3] 59/18 100/6 100/7</p> <p>disclosure [7] 59/17 68/13 70/13 87/9 101/17 102/19 102/21</p> <p>disclosures [1] 60/11</p> <p>disconnected [1] 7/22</p> <p>discourage [1] 102/12</p> <p>discretion [2] 113/18 113/18</p> <p>discuss [3] 20/12 67/23 75/2</p> <p>discussed [4] 21/3 61/9 71/3 81/12</p> <p>discussing [2] 50/11 67/7</p> <p>discussion [4] 52/4 55/22 60/25 115/4</p> <p>disposition [2] 106/25 107/11</p> <p>dispositive [3] 43/18 43/19 96/5</p> <p>dispute [12] 11/25 18/9 19/15 19/19 21/10 22/2 22/3 24/8 24/22 31/16 61/16 81/6</p> <p>disputed [4] 5/20 6/3 48/14 49/2</p> <p>disseminated [1] 23/24</p> <p>dissipate [1] 36/15</p> <p>distance [1] 14/5</p> <p>distinct [1] 76/4</p> <p>distinction [3] 46/10 52/6 100/23</p> <p>distinctly [2] 74/18 74/20</p> <p>distinguishes [1] 33/18</p> <p>distributed [1] 34/19</p> <p>district [11] 1/1 1/2 1/16 3/9 56/19 69/14 82/13 82/13 83/17 96/8 98/19</p> <p>disturbingly [1] 79/22</p> <p>DIVISION [2] 1/3 2/20</p> <p>do [58] 9/3 10/11 11/12 17/11 19/23 22/2 22/11 22/11 22/18 22/18 24/15 27/8 28/25 29/8 30/1 40/6 42/6 43/3 48/23 52/25 54/21 55/5 56/7 56/13 62/8 63/24 66/21 67/11 67/16 68/12 69/12 69/18 70/3 70/20 71/12 72/4 72/20 73/3 75/13 79/15 79/17 81/17 82/3 82/19 87/3 87/21 92/16 95/18 98/5 99/12 102/22 104/8 107/6 107/18 112/22 114/9 114/14 114/23</p> <p>docket [4] 46/19 46/24 63/8 111/11</p> <p>Docket 91-17 [1] 63/8</p> <p>doctrine [3] 11/19 21/9 22/22</p> <p>doctrines [1] 11/11</p> <p>documentations [1] 33/8</p> <p>does [29] 5/23 5/25 13/2 15/2 15/4 26/13 30/12 33/12 33/20 49/15 51/9 53/2 54/1 54/16 54/21 62/7 67/25 76/14 77/4 79/3 81/9 85/21 86/7 86/15 89/2 89/5 91/7 105/7 113/19</p> <p>doesn't [19] 11/8 11/9 15/10 16/17 20/9 20/21 27/12 30/23 47/3 54/18 62/25 64/5 85/6 97/4 103/6 110/25 111/17 111/20 113/23</p> <p>dog [1] 62/22</p> <p>doing [2] 56/8 103/19</p> <p>DOJ [2] 79/7 109/22</p> <p>dollars [1] 37/11</p> <p>don't [60]</p> <p>done [12] 6/19 6/20 59/15 59/17 69/9 87/23 91/10 98/4 109/16 110/3 110/3 110/7</p> <p>doubled [1] 78/13</p> <p>down [3] 9/13 12/14 93/12</p> <p>Dozens [1] 62/23</p> <p>draconian [4] 11/7 13/7 15/18 18/21</p>	<p>dramatically [2] 29/24 100/10</p> <p>draw [1] 107/9</p> <p>drawn [2] 43/1 43/2</p> <p>drifting [1] 41/17</p> <p>drive [1] 53/2</p> <p>driven [1] 69/24</p> <p>driver's [2] 52/19 52/23</p> <p>drunkard [1] 22/24</p> <p>due [43] 11/8 12/1 12/22 12/25 13/9 15/15 15/20 17/12 17/12 17/22 20/11 20/20 41/15 45/23 52/23 53/3 57/15 58/19 65/12 65/19 72/5 81/11 81/22 84/3 85/3 95/6 96/24 97/10 97/22 98/13 98/14 99/22 100/15 101/22 102/20 104/24 110/25 111/21 112/9 112/19 113/2 113/22 114/16</p> <p>Dulles [2] 12/2 20/14</p> <p>during [2] 76/7 80/12</p> <p>dyving [3] 41/5 42/1 53/8</p> <p>E</p> <p>each [16] 5/17 6/4 14/16 14/22 24/10 39/4 47/25 48/17 48/20 48/25 53/24 71/17 82/19 93/17 97/1 97/12</p> <p>earlier [5] 64/10 67/7 77/1 80/1 112/11</p> <p>easier [2] 77/2 77/6</p> <p>East [1] 53/11</p> <p>eats [1] 12/9</p> <p>edit [1] 4/21</p> <p>effective [1] 101/3</p> <p>effectively [4] 18/7 27/1 36/24 38/18</p> <p>effort [3] 29/2 39/4 72/13</p> <p>efforts [1] 107/5</p> <p>either [5] 11/18 44/25 45/7 58/7 88/14</p> <p>either they'll [1] 58/7</p> <p>electric [1] 101/11</p> <p>electronic [1] 4/11</p> <p>elements [1] 81/10</p> <p>eligibility [1] 32/8</p> <p>eliminate [1] 15/4</p> <p>Elis [1] 21/24</p> <p>else [5] 36/11 47/12 51/16 67/25 99/24</p> <p>email [2] 8/1 8/1</p> <p>emergency [1] 37/5</p> <p>Emirates [1] 16/14</p> <p>emphasize [4] 84/17 95/5 102/4 107/25</p> <p>employees [2] 48/11 48/11</p> <p>employment [4] 32/9 32/12 33/24 34/1</p> <p>enactment [1] 91/11</p> <p>encounter [1] 38/12</p> <p>encountered [3] 5/22 6/6 26/18</p> <p>encourage [1] 39/20</p> <p>encouraged [1] 97/7</p> <p>end [3] 25/9 39/8 58/5</p> <p>ended [1] 54/4</p> <p>enemy [1] 57/3</p> <p>engage [2] 14/4 43/4</p> <p>engaging [2] 29/2 29/5</p> <p>enormous [1] 29/2</p> <p>enough [8] 11/1 17/8 29/5 57/23 58/1 59/24 65/23 65/23</p> <p>ensure [1] 83/25</p> <p>entail [2] 85/25 108/1</p> <p>enter [2] 30/16 46/18</p> <p>entice [1] 35/7</p> <p>entire [2] 79/25 96/11</p> <p>entirely [2] 11/9 82/15</p> <p>entitle [1] 15/15</p> <p>entitled [10] 10/9 10/19 14/7 41/13 57/21 61/10 87/17 89/22 97/13 116/4</p> <p>entitles [2] 12/21 15/19</p> <p>entity [3] 78/22 101/9 101/10</p> <p>entry [5] 30/16 63/4 63/24 64/4 64/8</p> <p>equally [1] 18/14</p> <p>equating [2] 18/6 18/8</p> <p>equivalent [7] 26/21 26/23 27/11 27/16 45/21 46/2</p>
--	---	---

<p>E</p> <p>equivalent... [1] 46/3</p> <p>ERIC [1] 1/7</p> <p>erroneous [6] 13/2 17/23 75/20 81/19 83/23 113/16</p> <p>error [23] 66/11 66/17 75/4 75/5 75/11 75/14 75/21 76/2 76/10 76/13 76/14 76/21 79/2 79/2 79/4 80/13 81/3 81/5 81/7 81/9 84/2 113/20 113/23</p> <p>error-ridden [1] 75/21</p> <p>errors [7] 59/25 78/25 80/20 80/22 81/18 110/2 113/10</p> <p>Erwin [3] 3/6 116/8 116/9</p> <p>escape [1] 63/5</p> <p>escorted [1] 87/22</p> <p>essential [3] 84/23 86/8 99/19</p> <p>essentially [4] 65/4 86/5 94/25 97/8</p> <p>establish [2] 7/4 90/25</p> <p>established [4] 12/18 22/21 91/6 92/9</p> <p>establishing [1] 11/12</p> <p>establishment [1] 91/11</p> <p>estimate [1] 115/1</p> <p>et [2] 1/4 1/7</p> <p>Europe [2] 16/13 16/14</p> <p>evaluate [3] 95/21 98/1 99/13</p> <p>evaluating [1] 95/19</p> <p>even [33] 8/15 10/1 15/11 15/13 15/20 17/1 17/5 17/6 19/4 19/11 20/15 23/25 39/12 39/15 45/3 47/7 53/3 55/2 55/7 58/6 62/12 65/7 65/18 66/23 67/19 68/19 79/17 79/20 81/9 82/10 85/15 108/16 108/21</p> <p>event [9] 6/13 7/3 7/24 37/13 39/15 80/12 93/2 96/16 115/5</p> <p>eventually [4] 39/7 44/3 54/6 71/8</p> <p>ever [5] 54/18 60/6 70/8 72/25 106/16</p> <p>every [8] 53/22 65/19 70/12 82/19 86/22 86/24 88/23 89/15</p> <p>everybody [2] 33/13 36/11</p> <p>everyone [9] 4/4 33/5 33/7 33/16 50/5 50/8 88/8 102/7 115/6</p> <p>evidence [8] 61/3 65/14 66/21 69/9 76/13 95/23 111/6 111/14</p> <p>evidences [1] 59/14</p> <p>ex [14] 94/7 94/12 94/22 95/2 95/14 96/4 96/12 96/23 97/3 97/15 99/8 108/15 111/2 111/16</p> <p>exact [2] 54/12 64/19</p> <p>exactly [5] 7/14 27/12 27/20 49/11 104/1</p> <p>example [2] 54/12 85/10</p> <p>Except [1] 36/9</p> <p>exception [1] 50/1</p> <p>exchange [1] 61/20</p> <p>exclusive [1] 98/17</p> <p>executed [1] 91/9</p> <p>Executive [6] 90/1 102/14 102/22 113/8 113/17 113/18</p> <p>exempts [1] 64/1</p> <p>exercise [1] 42/8</p> <p>Exhibit [1] 63/6</p> <p>exist [3] 38/9 84/22 98/12</p> <p>existed [1] 109/24</p> <p>existence [3] 99/13 103/23 108/14</p> <p>existing [3] 33/2 56/14 104/23</p> <p>exists [8] 20/1 70/18 88/7 91/14 92/6 92/18 95/8 109/6</p> <p>expected [1] 82/7</p> <p>expensive [2] 38/8 39/24</p> <p>experiences [1] 21/25</p> <p>expertise [1] 83/18</p> <p>explain [1] 26/15</p> <p>explained [1] 83/24</p> <p>explaining [1] 82/18</p> <p>explains [3] 68/8 76/23 77/12</p> <p>explanation [2] 64/25 106/1</p> <p>explicit [1] 39/22</p> <p>explicitly [3] 14/21 18/23 42/15</p>	<p>express [1] 16/20</p> <p>expressed [2] 78/3 92/25</p> <p>extended [1] 102/7</p> <p>extends [1] 88/9</p> <p>extensive [1] 61/1</p> <p>extensively [1] 60/21</p> <p>extent [5] 7/8 36/12 50/2 55/20 90/11</p> <p>extinguishment [1] 23/19</p> <p>extra [2] 19/13 24/18</p> <p>extraordinarily [2] 26/19 70/4</p> <p>extraordinary [3] 86/25 87/22 88/18</p> <p>extreme [2] 10/2 110/22</p> <p>extremely [2] 76/2 80/13</p> <p>F</p> <p>face [1] 104/8</p> <p>faced [1] 73/4</p> <p>fact [40] 5/20 5/25 6/3 6/5 6/8 6/11 13/14 14/12 14/20 15/10 19/13 22/1 26/4 29/9 29/20 30/23 31/6 43/16 47/24 48/4 48/4 48/8 48/12 54/2 54/20 57/22 61/16 62/7 64/5 64/7 68/8 69/1 69/19 71/13 73/4 81/4 88/23 98/4 104/5 106/21</p> <p>factor [7] 22/4 22/9 23/13 24/14 24/24 84/19 104/17</p> <p>factors [1] 24/6</p> <p>facts [16] 6/1 8/11 13/14 14/12 14/24 15/25 50/14 53/8 57/24 57/24 58/1 58/2 66/4 83/25 95/22 108/7</p> <p>factual [8] 8/12 49/22 59/24 65/23 81/4 81/14 81/18 83/4</p> <p>factually [2] 29/3 47/20</p> <p>failed [5] 24/14 24/15 79/14 79/16 79/18</p> <p>fails [1] 87/2</p> <p>fair [19] 11/1 11/12 11/20 13/2 14/8 15/4 15/8 17/9 17/22 19/5 21/8 25/9 29/5 73/1 89/4 90/25 103/18 113/9 113/14</p> <p>fairly [1] 38/7</p> <p>falls [1] 42/21</p> <p>familiar [1] 105/15</p> <p>family [8] 13/22 29/8 37/5 37/13 39/25 40/12 40/13 53/7</p> <p>far [3] 19/6 24/7 99/24</p> <p>Farel [1] 2/22</p> <p>Farm [1] 113/24</p> <p>fashion [2] 6/13 21/21</p> <p>fashioned [1] 6/19</p> <p>father [1] 54/19</p> <p>favor [2] 7/5 103/13</p> <p>FBI [7] 57/20 62/1 62/3 79/14 79/16 79/23 98/21</p> <p>FBI's [2] 79/7 79/11</p> <p>feasible [1] 87/13</p> <p>February [1] 59/1</p> <p>federal [6] 2/23 32/15 33/4 33/17 35/24 90/9</p> <p>feel [1] 21/14</p> <p>feels [1] 72/18</p> <p>feet [1] 94/19</p> <p>felt [1] 21/21</p> <p>few [4] 51/25 63/10 70/22 105/14</p> <p>field [1] 79/24</p> <p>Fifth [2] 2/15 12/5</p> <p>figure [2] 63/20 115/3</p> <p>file [2] 93/8 107/3</p> <p>filed [8] 29/4 48/21 50/1 53/23 53/24 99/6 99/8 107/10</p> <p>files [1] 106/21</p> <p>filing [4] 29/1 96/5 106/24 114/15</p> <p>filled [1] 56/18</p> <p>final [3] 16/1 110/16 112/13</p> <p>Finally [2] 24/12 111/23</p> <p>financial [2] 33/25 101/3</p> <p>find [9] 17/6 42/21 65/3 83/22 84/1 105/19 106/12 106/14 109/3</p> <p>finding [4] 6/22 19/1 56/22 56/23</p> <p>finds [1] 104/16</p> <p>finish [2] 47/6 107/18</p>	<p>finished [1] 114/25</p> <p>first [24] 5/19 6/10 7/5 10/14 11/22 11/25 22/6 25/14 29/4 37/22 44/21 62/13 68/16 73/24 74/15 75/10 75/19 77/24 80/21 85/19 95/6 100/11 103/21 112/24</p> <p>five [5] 12/3 21/24 41/5 54/3 63/9</p> <p>fixed [1] 79/5</p> <p>flier [1] 34/19</p> <p>flight [9] 13/20 13/24 15/17 21/18 45/21 76/16 76/23 77/16 88/9</p> <p>flights [5] 14/11 16/24 17/7 20/2 54/3</p> <p>floor [5] 2/4 2/12 61/7 61/8 61/8</p> <p>flown [1] 29/15</p> <p>fly [118]</p> <p>flying [9] 10/16 23/10 27/18 37/9 51/9 51/17 52/14 87/19 111/5</p> <p>focus [2] 20/3 77/10</p> <p>FOIA [1] 65/13</p> <p>folks [2] 84/7 107/19</p> <p>follow [1] 7/3</p> <p>following [1] 97/5</p> <p>footnote [2] 61/19 61/20</p> <p>footnotes [1] 61/25</p> <p>forces [1] 88/13</p> <p>foreclosing [1] 83/10</p> <p>foregoing [1] 116/2</p> <p>foreign [3] 17/2 17/2 100/25</p> <p>form [4] 30/5 38/1 49/8 52/18</p> <p>format [2] 4/21 7/24</p> <p>former [2] 78/16 89/5</p> <p>forms [2] 28/17 38/17</p> <p>forth [1] 111/13</p> <p>forward [1] 7/8</p> <p>found [11] 20/17 24/4 32/18 32/25 35/11 75/24 79/10 79/12 79/22 109/22 110/2</p> <p>Foundation [2] 2/6 2/11</p> <p>four [4] 9/17 11/22 57/3 62/1</p> <p>fourth [2] 16/22 17/10</p> <p>framed [1] 42/16</p> <p>free [1] 5/10</p> <p>freedom [1] 12/6</p> <p>freighter [1] 41/6</p> <p>front [2] 21/23 21/24</p> <p>function [1] 33/21</p> <p>fundamental [14] 17/20 18/1 18/3 20/4 23/14 28/14 35/16 35/19 37/14 42/6 55/21 99/22 100/23 109/12</p> <p>fundamentally [6] 37/2 55/25 97/1 99/15 101/12 108/5</p> <p>funeral [1] 53/10</p> <p>funny [1] 68/16</p> <p>further [6] 47/22 56/10 56/25 73/8 74/1 83/19</p> <p>future [1] 29/22</p> <p>G</p> <p>G-E-T-E [1] 64/17</p> <p>GAO [3] 76/22 77/11 92/2</p> <p>gate [1] 27/3</p> <p>gave [1] 72/21</p> <p>gender [1] 77/6</p> <p>general [2] 4/9 79/23</p> <p>generalities [1] 109/17</p> <p>genuine [1] 5/20</p> <p>Georgia [1] 13/21</p> <p>get [48] 5/15 7/22 8/22 26/20 27/2 27/13 29/8 33/11 37/4 37/10 37/11 37/17 38/20 39/3 39/3 39/5 39/6 40/13 40/17 40/20 41/1 41/5 43/12 47/2 49/14 54/9 54/18 54/19 54/23 55/9 55/10 55/14 57/8 57/18 62/12 63/24 64/4 66/22 67/12 67/13 67/14 68/1 73/25 74/3 87/22 89/6 93/21 104/12</p> <p>GETE [1] 64/17</p> <p>gets [4] 40/6 41/10 64/23 95/14</p> <p>getting [2] 48/2 88/18</p> <p>Ghaleb [1] 29/17</p> <p>Gilmore [15] 17/14 17/14 17/25 20/3 20/9 28/13</p>
---	---	--

<p>G</p> <p>Gilmore... [9] 37/22 42/3 43/14 43/19 44/17 50/12 50/23 51/19 53/12</p> <p>give [17] 7/15 15/9 30/6 30/13 32/19 39/2 44/14 44/25 53/13 59/13 59/14 59/16 62/14 67/14 75/16 107/18 115/1</p> <p>given [14] 4/12 6/1 7/21 34/4 35/15 43/10 53/14 66/24 86/16 101/23 108/15 108/25 113/17 114/24</p> <p>gives [5] 15/7 19/5 20/19 34/2 64/21</p> <p>giving [1] 65/10</p> <p>gladly [1] 53/14</p> <p>global [4] 59/10 63/4 63/24 64/4</p> <p>Glomar [2] 68/8 111/13</p> <p>go [40] 5/13 7/8 12/16 21/1 33/7 33/9 33/11 35/17 37/5 39/4 39/16 39/24 40/14 41/1 41/25 47/8 49/1 49/2 50/10 53/4 53/11 54/7 60/13 60/13 60/18 62/11 62/21 63/23 63/25 68/2 72/25 74/24 75/9 84/10 84/12 86/2 97/14 103/12 104/7 107/22</p> <p>go -- our [1] 60/13</p> <p>goal [1] 77/2</p> <p>God [1] 60/16</p> <p>goes [7] 39/23 70/10 85/25 105/6 105/8 105/9 109/25</p> <p>going [24] 4/12 8/14 25/4 39/5 43/17 44/5 53/7 54/17 58/14 58/15 67/16 68/13 68/20 68/22 70/18 73/5 84/7 84/8 85/19 86/4 86/12 93/21 106/10 114/18</p> <p>gone [9] 29/10 31/18 39/21 44/17 53/15 53/16 57/17 63/2 106/11</p> <p>Gonzales [1] 17/15</p> <p>good [7] 9/10 9/11 25/12 25/13 66/20 73/16 103/18</p> <p>goodbyes [1] 39/25</p> <p>Goss [2] 15/6 19/3</p> <p>got [8] 44/3 44/7 54/3 54/4 83/1 93/18 93/20 94/21</p> <p>gotten [1] 104/2</p> <p>government [101]</p> <p>government -- let's [1] 57/6</p> <p>government -- or [1] 110/16</p> <p>government -- we're [1] 71/21</p> <p>government -- well [1] 58/5</p> <p>government's [28] 6/24 25/4 41/12 41/14 61/7 61/12 61/21 62/6 64/11 65/11 65/14 66/6 67/11 71/14 81/12 87/15 89/21 96/5 97/20 98/16 100/13 100/16 103/5 103/16 109/5 110/19 110/21 111/7</p> <p>government-originated [1] 34/12</p> <p>government-wide [1] 78/23</p> <p>governmental [7] 84/20 84/21 96/13 99/25 101/24 104/22 108/1</p> <p>governments [2] 17/2 17/2</p> <p>Graber's [1] 58/22</p> <p>grandchildren [1] 32/23</p> <p>grandfather [1] 32/23</p> <p>grandparents [4] 32/21 32/23 37/6 54/16</p> <p>grant [1] 71/24</p> <p>great [5] 9/14 13/11 14/6 18/25 20/19</p> <p>greater [4] 18/10 39/10 89/16 100/20</p> <p>Green [13] 18/14 19/8 19/8 21/4 24/13 30/1 30/1 36/1 36/5 36/16 47/19 50/13 51/19</p> <p>Green's [1] 47/20</p> <p>grossly [1] 76/1</p> <p>ground [1] 103/15</p> <p>grounded [1] 39/11</p> <p>grounds [1] 82/16</p> <p>Guantanamo [1] 100/18</p> <p>guarantee [1] 29/21</p> <p>guard [1] 17/22</p> <p>guess [6] 35/22 35/23 41/17 68/16 73/13 81/14</p> <p>guidance [4] 76/16 77/12 77/12 77/20</p> <p>guidelines [3] 89/9 95/24 110/7</p>	<p>57/9 64/10 65/12 66/23</p> <p>Hamdi [1] 57/3</p> <p>handle [1] 83/18</p> <p>handling [1] 72/10</p> <p>hands [1] 73/2</p> <p>handset [1] 74/5</p> <p>Hansen [2] 15/12 19/4</p> <p>happen [5] 53/22 87/1 89/9 95/5 99/16</p> <p>happened [4] 38/25 51/11 99/3 99/3</p> <p>happening [3] 30/7 53/11 99/4</p> <p>happens [2] 71/4 92/9</p> <p>happy [5] 20/24 40/7 45/16 107/14 110/10</p> <p>Haramain [15] 58/22 59/1 60/21 60/23 61/6 61/9 64/13 64/24 66/13 69/5 100/24 100/24 101/8 101/9 101/14</p> <p>hard [3] 62/10 63/20 66/15</p> <p>harm [1] 82/11</p> <p>harming [1] 81/24</p> <p>has [88]</p> <p>hasn't [3] 63/2 92/5 92/17</p> <p>have [182]</p> <p>have -- have [1] 101/13</p> <p>haven't [9] 14/12 23/13 23/13 38/2 40/9 57/18 64/25 65/18 104/2</p> <p>having [18] 26/21 26/24 27/11 35/6 37/7 39/5 39/20 39/21 45/22 52/4 60/10 63/25 69/2 73/24 87/4 87/6 88/11 89/24</p> <p>Hawaii [2] 55/4 55/6</p> <p>he [26] 12/9 13/19 13/22 14/1 16/12 17/16 17/18 17/20 21/18 21/18 30/21 31/5 31/5 36/13 46/20 46/21 53/11 54/2 54/3 54/4 54/6 54/7 54/8 55/9 59/11 85/21</p> <p>he's [4] 36/12 62/20 62/21 62/25</p> <p>Healy [1] 91/23</p> <p>hear [4] 4/19 9/6 66/5 67/12</p> <p>heard [6] 52/2 56/9 71/10 81/21 111/22 112/5</p> <p>hearing [15] 45/20 56/16 57/9 58/3 58/16 60/24 61/3 67/1 67/4 67/10 67/12 67/20 73/2 74/9 84/14</p> <p>hearings [1] 91/23</p> <p>heart [2] 12/8 90/7</p> <p>heavily [1] 17/13</p> <p>heightens [1] 17/3</p> <p>held [5] 12/10 12/18 15/6 15/13 17/25</p> <p>help [2] 44/18 62/4</p> <p>helpful [5] 7/9 21/1 62/8 114/17 114/18</p> <p>helps [3] 74/14 97/20 107/12</p> <p>Hemisphere [1] 26/8</p> <p>her [10] 4/13 8/1 18/24 54/14 54/14 54/15 54/15 54/17 63/7 109/14</p> <p>here [74]</p> <p>high [8] 75/3 75/20 76/2 80/13 81/3 81/5 81/7 83/23</p> <p>higher [1] 77/22</p> <p>him [10] 34/20 34/22 34/23 46/23 55/10 59/11 62/24 62/24 62/24 77/16</p> <p>Hina [1] 2/3</p> <p>hire [1] 55/3</p> <p>his [17] 13/18 13/22 13/25 17/17 21/23 21/24 21/24 31/4 46/18 46/24 53/10 53/13 53/14 54/7 55/5 62/22 92/1</p> <p>history [3] 63/12 63/13 92/23</p> <p>hold [4] 35/12 74/17 77/13 83/23</p> <p>HOLDER [2] 1/7 4/7</p> <p>holding [2] 69/11 111/23</p> <p>holds [3] 57/6 59/21 64/15</p> <p>home [4] 29/8 37/5 39/7 73/7</p> <p>Homeland [2] 90/13 91/6</p> <p>Honor [72]</p> <p>Honor's [1] 19/8</p> <p>HONORABLE [1] 1/15</p> <p>honorably [1] 62/21</p> <p>hope [2] 43/7 57/7</p> <p>hoped [1] 83/20</p>	<p>hopefully [2] 33/10 39/24</p> <p>hoping [1] 5/16</p> <p>hour [2] 19/14 19/17</p> <p>hour's [1] 36/10</p> <p>hourglass [1] 107/20</p> <p>hours [1] 62/16</p> <p>housed [1] 75/25</p> <p>how [24] 8/14 11/7 26/16 26/16 26/20 33/12 34/11 35/2 38/11 41/25 49/1 54/19 62/11 70/15 71/7 78/24 88/19 89/21 92/14 98/6 100/13 105/13 107/9 110/21</p> <p>however [2] 15/17 70/23</p> <p>huge [2] 60/19 60/19</p> <p>hugely [2] 38/8 38/8</p> <p>human [2] 34/13 39/19</p> <p>Humphries [6] 22/12 22/16 23/16 23/23 32/1 32/1</p> <p>Hunt [1] 65/13</p> <p>husband [1] 54/14</p> <p>hyperbolic [1] 46/12</p> <p>hypothetical [4] 40/11 53/6 60/9 68/25</p> <p>I</p> <p>I -- I [2] 58/25 90/6</p> <p>I -- I've [1] 47/5</p> <p>I'd [4] 6/6 11/22 107/12 114/15</p> <p>I'll [12] 7/15 37/20 45/14 47/8 57/8 65/2 72/17 74/22 106/14 107/9 107/14 114/23</p> <p>I'm [56] 5/1 5/16 6/1 6/11 7/21 12/12 18/16 20/24 29/3 29/7 34/22 36/14 37/7 37/14 39/5 40/5 40/15 41/23 42/17 42/25 45/16 48/2 51/16 55/10 55/11 60/24 84/7 87/24 88/1 90/4 90/17 90/18 91/3 91/17 93/20 93/21 94/23 95/6 95/9 95/10 97/11 97/12 98/23 99/2 103/12 103/12 104/4 105/15 105/21 106/13 107/7 110/10 110/11 110/16 114/23 114/25</p> <p>I'm -- as [1] 40/15</p> <p>I'm -- I'm [1] 103/12</p> <p>I've [4] 4/12 47/5 97/7 97/24</p> <p>i.e [1] 14/16</p> <p>Ibrahim [1] 62/20</p> <p>Ibrahim [1] 98/23</p> <p>ID [3] 53/13 53/14 62/14</p> <p>idea [3] 37/7 41/6 62/24</p> <p>identical [1] 82/17</p> <p>identification [3] 17/16 17/19 18/1</p> <p>identified [6] 32/2 91/1 96/20 99/5 113/10 113/15</p> <p>ignored [1] 35/20</p> <p>ill [2] 40/14 41/4</p> <p>illegal [1] 52/15</p> <p>Illinois [1] 82/13</p> <p>immaterial [3] 48/10 49/5 49/14</p> <p>immateriality [1] 48/15</p> <p>impact [2] 77/11 78/23</p> <p>impacted [1] 20/5</p> <p>impartial [3] 96/8 99/21 105/10</p> <p>imparts [2] 13/7 15/4</p> <p>impediment [1] 36/9</p> <p>impediments [3] 30/4 36/8 38/9</p> <p>implement [3] 16/2 90/25 91/21</p> <p>implemented [1] 114/2</p> <p>implicate [2] 68/13 108/10</p> <p>implicated [2] 82/24 90/11</p> <p>implicates [1] 55/23</p> <p>implication [1] 11/2</p> <p>implications [1] 87/18</p> <p>import [1] 50/19</p> <p>importance [1] 89/18</p> <p>important [21] 8/15 8/22 12/7 28/21 37/13 39/15 39/15 39/17 39/19 40/22 41/2 41/7 41/22 67/3 71/17 74/11 92/17 95/8 102/3 104/7 113/14</p> <p>imposed [2] 18/18 26/5</p> <p>imposes [2] 14/13 18/19</p> <p>impossible [9] 53/4 55/1 55/10 55/13 56/7 68/5 68/7 69/18 73/1</p> <p>imprisoned [1] 54/4</p>
<p>H</p> <p>habeas [1] 100/18</p> <p>had [11] 19/11 20/17 32/21 39/4 52/17 52/17 55/15</p>		

I

improperly [3] 92/21 97/19 99/11
improve [1] 110/7
improvements [2] 79/2 79/3
in -- in [1] 98/12
in-person [2] 58/3 67/1
inaccuracies [1] 80/2
inaccurate [3] 76/1 79/13 80/20
inadequate [2] 10/11 99/14
inapplicable [1] 18/4
include [2] 89/2 94/5
included [9] 36/3 75/3 76/2 88/6 89/1 97/19 99/11 101/6 109/23
including [7] 9/17 16/19 74/12 78/20 83/4 94/13 109/6
inclusion [24] 10/21 11/14 13/5 13/12 16/23 21/10 26/1 26/11 76/4 77/19 77/22 79/4 80/19 86/11 89/2 89/11 89/11 95/25 100/4 100/7 101/19 102/10 105/10 109/9
inclusions [1] 80/14
incomplete [1] 79/13
inconsistent [1] 102/13
inconvenience [1] 38/8
inconvenient [2] 38/13 42/24
incorrectly [1] 109/23
increase [1] 79/2
increased [1] 78/14
increasing [1] 78/4
independent [8] 11/11 19/10 21/8 23/15 23/20 31/21 96/11 109/8
index [1] 32/24
India [1] 55/12
indicated [5] 32/2 96/18 98/15 98/19 98/23
indicates [2] 46/19 46/21
indication [1] 91/13
individual [16] 12/8 26/13 31/6 41/12 49/16 51/6 83/5 85/20 88/25 89/2 93/3 96/10 99/6 101/6 105/24 113/15
individual's [3] 30/11 100/22 109/9
individually [2] 24/10 97/15
individuals [32] 16/6 22/17 31/1 32/12 33/5 35/1 38/23 44/9 48/8 48/20 75/1 76/24 77/2 77/8 77/21 78/8 78/18 79/19 79/21 80/14 81/17 81/23 82/3 88/5 89/11 90/14 91/1 92/20 96/19 99/10 100/20 113/10
inextricably [1] 41/20
inference [1] 107/9
inferences [1] 81/19
influx [2] 77/25 78/3
informant [1] 62/3
information [64]
information -- volumes [1] 78/4
infringement [2] 13/10 18/17
infringes [1] 12/19
inherent [2] 34/13 94/17
inherently [1] 111/8
initiative [2] 78/8 78/12
injunction [2] 53/24 73/5
injures [1] 11/16
injury [1] 23/4
innocent [1] 111/8
inquiry [2] 40/25 42/6
INS [1] 64/18
instance [1] 5/19
instead [1] 5/7
institutions [1] 101/4
instruction [1] 69/5
instructive [2] 30/2 30/3
insufficient [2] 56/15 76/13
intelligence [2] 16/2 69/14
intend [1] 102/23
interest [64]
interests [31] 10/15 11/15 13/1 15/14 15/15 20/10

25/5 28/15 33/18 84/20 84/21 87/15 87/19 89/24 96/6 96/7 96/14 97/21 100/1 100/2 100/6 100/12 103/3 103/13 103/23 108/2 108/2 108/25 109/5 110/19 110/20
interfered [1] 35/5
international [9] 14/5 25/21 27/24 28/22 43/5 45/21 46/14 50/13 50/21
internationally [6] 13/11 18/25 26/14 37/9 44/21 45/7
internet [2] 4/24 5/5
interpreted [1] 25/18
interrogate [1] 62/16
interrupt [2] 10/6 47/9
interrupting [1] 47/5
interruption [2] 7/16 47/25
interstate [8] 14/5 17/20 20/4 23/14 25/21 26/14 27/23 43/4
intertwined [1] 41/21
invalidate [1] 17/18
investigates [1] 40/17
investigations [1] 79/20
invite [1] 115/4
invoke [1] 20/11
involuntarily [1] 100/19
involve [1] 50/21
involved [2] 50/13 59/3
involves [1] 95/11
involving [2] 65/19 69/20
Iran [1] 64/15
Ireland [3] 13/19 54/7 54/9
irrelevant [1] 77/8
is [473]
is -- is [2] 36/4 85/3
is -- should [1] 91/12
is -- there [1] 29/22
isn't [13] 6/3 10/8 10/24 37/15 40/2 41/6 41/23 42/14 45/22 45/23 56/3 69/1 87/22
issue [33] 5/20 6/3 7/6 8/21 17/5 17/19 27/7 30/3 40/25 41/4 42/16 42/18 46/25 47/14 48/19 63/20 64/10 71/17 75/10 75/11 75/19 84/20 84/21 85/13 101/20 101/23 103/4 109/1 109/4 109/21 110/4 112/2 114/25
issued [4] 12/3 16/2 32/9 92/2
issues [12] 25/19 41/21 43/10 50/2 50/3 51/25 54/24 66/6 75/6 100/1 100/17 103/22
it [212]
it -- I [1] 38/16
it's [117]
its [16] 16/5 19/1 22/16 32/7 36/5 64/5 76/23 81/12 82/2 95/2 95/19 101/10 101/23 105/20 108/13 111/13
itself [8] 17/8 22/22 27/22 79/9 80/3 82/25 89/24 106/22

J

Jahan [1] 2/11
jeopardizing [1] 83/8
Jifry [4] 65/15 96/9 96/17 96/18
Jill [3] 3/6 116/8 116/9
job [1] 29/8
jobs [1] 9/19
JR [1] 1/7
judge [5] 1/16 58/22 67/14 68/17 96/8
Judge Graber's [1] 58/22
judgment [7] 4/7 5/18 7/4 49/18 52/22 56/10 61/22
judicial [14] 66/19 66/20 70/15 70/18 87/21 92/19 92/22 97/17 97/19 99/1 99/18 99/20 109/8 110/24
judiciary [1] 99/21
July [1] 116/9
June [1] 1/7
jurisdiction [5] 69/12 71/24 98/18 98/20 98/24
jurisdictional [1] 97/25
jurisprudence [1] 12/25
just [72]

just -- if [1] 51/5
Justice [3] 2/19 2/22 106/6
justices [1] 57/3

K

Kariye [1] 13/25
keep [2] 74/20 86/12
Keeping [1] 70/23
Kennedy [1] 76/9
Kent [2] 12/2 20/14
Kenyon [1] 3/3
Kevin [1] 2/8
key [1] 19/2
kind [14] 4/11 5/5 5/6 29/6 33/24 45/23 58/16 69/2 72/12 72/12 74/8 75/14 93/9 109/16
Kindhearts [9] 56/19 60/22 61/1 61/1 61/2 61/9 64/13 67/19 101/14
kinds [3] 43/10 46/12 95/15
Knaeble [3] 21/19 28/9 29/14
Knaeble's [1] 44/2
knew [1] 66/21
know [77]
know -- I [1] 106/4
knowing [2] 6/18 97/6
knowledge [1] 38/3
known [4] 52/9 76/4 92/8 92/8
knows [2] 38/9 106/7

L

labeling [1] 35/5
labels [1] 21/12
lack [3] 6/24 79/23 111/18
lacking [1] 112/5
Ladies [1] 108/23
laid [1] 94/19
land [7] 13/23 28/5 28/10 45/8 51/10 51/11 51/16
laptop [3] 4/13 4/17 4/20
laptops [2] 5/4 5/9
largely [3] 28/22 96/9 109/17
larger [1] 70/7
last [11] 39/24 49/11 54/23 59/1 65/2 67/22 69/12 71/20 72/17 91/16 114/21
lasted [1] 19/14
late [1] 5/12
later [1] 70/11
LATIF [4] 1/4 4/7 21/18 29/17
Latin [1] 51/16
law [17] 17/11 22/5 22/14 31/25 32/11 32/15 32/19 33/2 34/8 35/25 36/17 55/6 66/10 67/18 81/3 83/24 113/1
lawfully [1] 38/21
laws [1] 26/7
lawsuit [3] 17/1 29/1 29/4
lead [1] 93/7
least [6] 6/8 7/2 16/25 54/25 55/25 68/24
leave [2] 55/7 84/10
leaves [2] 13/10 20/18
led [1] 77/14
left [3] 18/24 70/25 111/9
legal [15] 11/17 22/7 22/10 22/20 23/5 23/17 24/21 28/14 32/14 38/3 43/15 47/20 55/25 66/4 72/2
legally [7] 22/10 22/17 23/1 23/9 24/8 24/23 44/19
Legislative [1] 90/1
LES [1] 101/24
less [7] 19/14 19/17 39/15 42/11 51/2 51/3 87/18
lessen [2] 15/2 20/9
lesser [1] 18/19
let [11] 5/15 27/8 31/9 34/8 40/16 70/21 71/1 74/4 93/12 111/17 114/19
let -- let's [1] 27/8
let's [11] 8/24 27/8 40/11 50/4 57/6 86/11 93/16 93/17 93/22 103/25 112/1
lets [1] 113/9
letter [1] 111/25

L
level [5] 18/22 41/24 58/15 78/25 84/18
liability [5] 6/16 6/21 7/4 55/17 84/16
liberties [4] 2/3 2/9 2/11 13/3
liberty [61]
license [4] 24/1 24/3 52/23 101/11
licenses [3] 32/9 32/12 52/19
lie [1] 63/11
life [2] 67/9 85/15
light [5] 19/3 69/19 91/15 92/24 96/13
like [34] 4/16 6/6 8/7 9/5 11/22 13/1 25/2 26/16
 26/19 29/20 32/8 40/13 40/18 51/15 52/10 52/14
 54/15 55/12 56/17 57/11 62/20 65/13 66/15 68/20
 75/6 75/10 75/15 89/14 97/25 100/18 101/9 101/15
 101/20 109/22
likely [2] 66/16 94/4
Lily [1] 2/22
line [11] 7/10 7/20 7/20 7/22 18/3 18/4 18/4 20/3
 40/25 43/1 69/12
list [143]
listed [2] 13/12 22/10
listen [1] 74/19
listing [2] 32/6 86/15
lists [2] 17/3 63/9
literally [1] 26/21
litigant [1] 96/7
litigate [1] 69/18
litigated [1] 106/7
litigating [1] 73/6
litigation [7] 14/23 56/20 56/20 58/6 61/13 61/15
 100/24
little [6] 6/14 9/13 10/17 36/1 58/25 61/18
live [1] 97/2
livelihood [1] 12/7
lives [1] 60/19
living [1] 59/9
LLP [1] 2/14
located [1] 51/6
logic [1] 57/5
long [2] 14/5 60/10
longer [4] 60/18 85/11 85/22 114/19
look [20] 28/6 28/14 31/4 43/25 44/1 44/2 44/8
 44/14 54/12 56/16 68/20 69/7 92/17 95/23 97/9
 99/25 102/16 104/16 107/25 111/11
looked [1] 25/18
looking [7] 33/23 85/1 89/25 98/13 100/15 100/18
 100/21
Lopez [2] 15/6 19/3
Los [1] 2/7
loss [2] 32/4 35/14
lot [6] 33/18 39/4 43/11 45/12 45/13 45/14
loved [1] 39/18
lower [1] 77/22

M
made [18] 13/8 18/23 21/14 22/8 22/17 26/7 46/12
 47/4 53/24 54/6 58/15 88/7 92/20 101/2 101/5
 105/19 106/18 111/24
made -- was [1] 18/23
main [2] 77/10 84/11
maintain [1] 85/12
maintained [1] 94/2
major [1] 46/10
make [22] 5/13 6/4 11/22 24/25 31/7 39/23 40/9
 47/7 49/11 53/10 60/11 62/25 67/17 71/13 77/2
 77/7 84/9 86/4 87/1 91/16 100/9 104/3
maker [6] 58/3 58/17 67/2 99/1 112/2 112/6
makes [10] 6/4 19/2 22/19 23/17 72/2 72/6 77/6
 77/21 101/13 112/11
makes -- plaintiffs [1] 6/4
making [7] 33/12 37/15 59/20 88/13 103/8 103/9
 111/19
making -- how [1] 33/12

man [1] 53/13
manage [1] 115/3
mandated [1] 81/10
mandatory [1] 52/9
manner [4] 26/18 78/6 91/8 91/20
many [10] 19/22 38/11 43/11 44/18 52/25 62/11
 63/23 70/24 105/13 107/9
marginalizing [1] 38/6
margins [1] 6/23
marine [2] 21/16 62/21
marked [1] 21/25
marshal [4] 72/24 86/20 87/20 87/25
Mashal [2] 21/16 62/20
Massachusetts [2] 2/20 2/23
massive [3] 77/25 78/2 78/7
match [3] 76/6 77/2 77/7
material [3] 5/20 49/5 50/3
Mathews [2] 84/19 104/13
matter [25] 6/8 11/7 16/17 30/24 34/7 36/17 37/17
 38/7 39/9 39/19 47/3 47/23 55/25 62/6 65/15 66/10
 68/12 81/3 83/24 83/25 88/15 89/8 89/10 103/11
 115/6
matters [2] 16/18 30/24
may [25] 5/4 8/13 12/7 12/7 12/25 16/24 17/1 18/2
 18/10 18/19 19/15 19/18 24/19 48/6 48/17 51/23
 54/18 68/25 71/14 73/15 75/8 76/18 83/2 96/15
 108/8
May 2012 [1] 76/18
maybe [10] 10/7 37/10 37/11 37/17 39/8 40/7 43/11
 44/14 44/20 53/9
me [30] 5/15 5/23 6/15 8/8 26/15 28/1 38/15 39/2
 41/7 41/20 44/18 44/25 47/10 55/19 70/21 71/1
 74/4 84/10 89/4 90/8 92/22 93/12 95/13 97/25 98/2
 104/3 107/4 107/12 108/23 114/24
mean [16] 34/5 34/16 35/3 39/3 40/19 43/10 49/12
 54/1 57/23 60/3 62/11 68/3 69/22 87/3 87/21 98/2
meaning [1] 79/19
meaningful [6] 37/3 61/3 67/20 75/5 81/20 99/22
means [16] 27/25 28/2 28/8 28/10 28/19 29/23
 30/12 38/24 41/3 42/23 43/16 46/7 46/14 50/22
 51/2 105/2
meant [1] 77/18
meantime [1] 115/2
measures [1] 63/5
mechanism [1] 90/23
media [3] 4/15 4/23 5/3
medical [2] 9/19 37/5
meet [1] 62/22
meets [1] 14/3
member [5] 4/22 39/25 40/12 40/14 53/7
members [3] 5/3 59/8 59/8
mentioned [9] 24/16 52/17 52/20 53/9 55/15 64/10
 65/22 67/2 109/25
mentioning [1] 63/3
merchant [1] 35/3
merchants [2] 34/20 34/23
mere [2] 24/4 42/21
merely [4] 38/13 42/19 42/23 43/1
Meridian [3] 96/2 96/4 101/21
Merit [1] 3/7
merits [2] 84/10 106/5
Meshal [1] 55/5
message [1] 8/2
messengers [1] 112/4
met [1] 31/22
method [7] 26/12 37/25 42/4 42/12 43/18 43/23
 44/13
methods [2] 87/18 102/11
Mexico [6] 13/18 51/14 51/15 54/4 54/4 54/5
microphone [1] 9/13
middle [2] 53/11 103/15
might [15] 6/12 15/1 15/2 15/9 27/15 31/7 38/12
 63/21 68/21 90/5 91/16 94/4 99/19 100/17 112/8

miles [1] 13/23
military [3] 9/17 21/19 21/21
Miller [4] 22/16 23/17 32/17 32/21
mind [1] 74/21
mindful [1] 6/11
minimal [1] 15/10
minimis [6] 15/7 15/11 15/13 15/18 19/5 19/7
minimize [1] 54/21
minimum [1] 59/23
minute [2] 50/4 86/6
minutes [3] 25/8 47/8 70/25
mischaracterizing [1] 88/1
misidentification [2] 76/5 76/5
misidentifications [2] 76/10 109/19
misidentified [1] 76/24
misinformation [1] 111/18
mistake [1] 76/13
mistakenly [1] 76/6
mistakes [2] 60/1 65/24
misunderstandings [2] 81/18 111/18
misunderstood [1] 40/10
mitigated [1] 36/12
mode [4] 11/6 36/19 36/23 36/25
modes [3] 15/1 20/8 50/19
modification [1] 80/19
modify [1] 79/14
Mohamed [2] 13/25 21/24
moment [1] 7/18
monetary [1] 100/16
money [3] 43/11 54/8 59/6
monitoring [1] 8/2
months [5] 26/20 37/11 41/5 79/17 80/23
moot [1] 85/13
more [31] 6/18 8/13 13/18 14/3 15/8 15/9 15/21
 17/5 19/6 24/7 27/3 38/15 42/22 43/17 45/8 52/10
 56/7 57/12 61/5 61/10 66/16 68/7 68/12 74/14
 74/18 74/20 78/13 80/23 102/5 107/19 107/24
moreover [1] 16/12
morning [9] 7/6 7/9 9/10 9/11 25/12 25/13 73/16
 103/10 114/14
most [11] 21/12 41/24 42/10 42/13 57/19 58/21
 79/22 81/10 84/2 110/25 111/20
mother [1] 13/25
motion [7] 14/14 14/18 17/20 31/17 52/22 56/10
 61/21
motions [13] 4/6 6/9 6/14 6/17 8/23 47/24 48/7
 49/6 71/18 108/8 112/14 112/18 114/23
move [1] 88/23
moving [1] 80/10
Mr [17] 2/6 2/8 2/14 2/19 17/25 25/10 28/9 28/9
 29/13 29/14 29/17 31/4 43/25 44/2 46/17 50/12
 53/14
Mr. [11] 28/9 29/14 29/17 29/18 30/20 35/5 44/1
 46/20 84/6 107/22 114/15
Mr. Davis [1] 35/5
Mr. Ghaleb [1] 29/17
Mr. Muthanna [3] 29/18 30/20 46/20
Mr. Persaud [1] 28/9
Mr. Risner [3] 84/6 107/22 114/15
Mr. Washburn [1] 29/14
Mr. Washburn's [1] 44/1
Ms [13] 2/3 2/11 2/22 7/10 9/2 9/8 61/18 66/5 73/13
 84/4 91/25 109/10 109/16
Ms. [7] 4/13 7/17 8/1 8/25 54/13 73/19 73/22
Ms. Boyer [1] 7/17
Ms. Boyer's [1] 8/1
Ms. Choudhury [1] 8/25
Ms. Rana's [1] 54/13
Ms. Siemion [2] 73/19 73/22
Ms. Young [1] 4/13
much [15] 18/8 25/7 43/17 43/17 50/24 50/25 51/3
 52/10 54/21 57/12 61/5 70/7 100/20 114/14 114/19
multiple [6] 19/22 19/23 60/15 60/22 75/23 92/2

M
must [6] 13/2 36/13 55/10 55/13 86/14 102/20
Muthanna [5] 16/11 29/18 30/20 46/20 55/8
my [19] 17/10 25/6 29/8 29/8 38/2 38/5 47/11 51/21
 52/1 60/16 63/7 81/21 85/9 91/2 91/5 91/18 95/12
 111/10 114/24

N
name [3] 7/12 12/12 34/19
names [2] 21/10 23/7
naming [1] 106/16
nation [1] 89/16
national [22] 64/14 64/23 66/14 68/14 74/13 75/17
 78/1 81/24 82/5 82/11 82/17 82/23 83/2 83/6 87/19
 88/20 89/20 90/3 96/20 100/13 103/8 108/10
natural [1] 34/13
nature [6] 69/24 86/16 87/4 87/6 102/20 108/20
NCRI [2] 64/14 102/16
necessarily [3] 55/23 59/17 68/13
necessary [2] 12/7 85/11
necessity [4] 28/17 37/24 42/5 51/12
need [22] 5/14 6/12 8/22 12/14 40/6 57/16 67/20
 67/21 70/17 74/1 74/14 74/15 74/17 81/20 84/18
 85/21 99/12 104/3 106/15 107/17 108/7 108/24
needed [3] 47/7 66/1 114/7
needn't [1] 70/12
needs [4] 37/3 39/17 85/22 98/4
neither [3] 76/20 92/12 93/18
neutral [5] 43/8 58/3 58/16 67/2 67/15
never [10] 66/21 66/23 67/12 67/13 67/13 82/8
 97/7 108/8 108/11 108/15
new [5] 2/5 2/13 13/17 79/15 86/3
next [5] 25/10 41/4 49/14 71/4 73/13
Ninth [49] 12/10 12/17 13/8 14/3 15/13 17/14 17/25
 18/23 19/4 20/7 20/11 20/15 20/16 22/5 22/8 22/12
 22/17 23/16 24/3 28/13 28/15 30/9 37/24 42/10
 42/16 43/14 58/22 59/2 59/21 60/7 65/7 66/12
 66/13 66/13 67/8 69/10 69/11 83/12 83/16 96/2
 96/4 98/1 98/12 98/13 99/7 101/22 105/15 111/23
 112/10
no [162]
nominate [1] 80/18
nominating [2] 77/20 78/2
nomination [3] 77/13 79/8 79/11
nominations [1] 79/13
non [1] 48/19
non-boarding [1] 48/19
noncustodial [1] 32/21
none [6] 28/21 28/23 65/25 111/13 111/14 111/14
Nonetheless [1] 52/25
normal [2] 5/11 8/17
Northern [1] 82/13
Northwest [1] 77/15
not [223]
not -- I'm [1] 42/25
not -- is [1] 92/10
notably [1] 22/20
note [5] 4/14 4/20 5/10 59/7 84/7
note-taking [3] 4/14 4/20 5/10
noted [3] 42/16 91/25 111/2
notes [1] 5/4
nothing [5] 27/3 39/22 47/22 81/5 91/10
notice [32] 27/6 52/2 54/24 56/8 57/7 57/16 57/21
 59/13 61/13 63/1 63/2 64/10 64/16 65/2 65/4 65/5
 65/10 65/20 68/22 69/2 72/24 81/12 81/16 81/16
 81/20 82/2 82/21 83/1 83/4 100/3 110/24 111/21
noting [1] 50/16
notion [7] 25/14 30/18 38/4 40/3 62/16 64/6 90/7
novo [1] 96/11
now [38] 19/15 31/9 34/14 35/4 39/16 45/19 54/1
 56/8 58/18 61/12 69/3 73/10 74/19 75/19 76/3
 76/18 77/10 77/23 78/16 78/21 79/6 79/10 80/1
 80/9 80/16 81/2 81/8 81/20 81/25 82/12 83/4 83/9

84/18 85/1 93/22 99/4 100/3 106/10
number [9] 4/8 5/20 7/16 7/25 65/18 71/23 76/24
 78/12 78/13
numbers [1] 80/16
numerator [1] 80/10
numerous [1] 12/3
Nusrat [1] 2/11
NW [3] 2/20 2/23 3/3
NY [2] 2/5 2/13

O
O'Hare [1] 21/17
object [1] 110/23
obligation [2] 69/2 94/20
obtaining [1] 102/11
obviously [21] 25/17 31/11 34/24 36/2 42/8 44/17
 50/2 50/18 52/24 53/18 56/24 57/11 58/21 64/20
 65/13 69/10 70/3 71/2 72/1 88/9 92/7
occurred [2] 6/6 37/13
occurring [1] 78/25
occurs [1] 76/5
ocean [1] 13/23
odd [1] 32/18
of -- complete [1] 100/4
of -- of [1] 70/10
of a [1] 37/25
OFAC [1] 100/25
off [6] 62/14 62/17 62/24 63/9 65/9 82/22
offered [1] 85/1
offering [2] 32/14 39/6
offers [1] 90/13
Office [2] 76/19 100/25
officer [1] 70/18
Official [1] 116/9
officially [3] 86/7 100/6 101/6
officials [4] 14/21 14/21 21/17 21/23
Oh [3] 7/21 29/7 60/16
OIG [4] 79/7 109/22 109/24 110/1
OIG's [1] 109/21
OIGs [1] 92/2
okay [13] 8/3 8/4 11/4 35/13 36/13 40/9 47/1 71/1
 72/16 74/2 74/16 107/14 114/10
old [2] 97/23 110/6
on -- you [1] 63/16
once [6] 6/6 22/10 39/21 43/11 91/5 97/24
one [65]
one-sided [2] 66/11 95/18
one-time [4] 53/25 54/20 72/21 80/3
onerous [1] 87/18
only [44] 4/14 5/4 5/4 7/6 11/10 13/11 14/6 16/23
 17/7 18/2 18/25 20/18 22/3 29/1 29/2 29/5 35/8
 35/8 36/22 36/25 40/19 41/22 47/24 55/3 55/19
 56/4 59/4 63/10 66/17 68/22 70/25 71/20 71/21
 80/21 82/1 83/20 86/1 86/1 94/10 105/3 105/4
 106/16 108/12 114/2
only -- only [1] 35/8
open [2] 4/2 35/4
opening [1] 97/23
openly [1] 102/5
operation [1] 22/13
operator [5] 30/22 31/7 46/22 46/22 47/4
operator's [2] 30/23 30/25
opinion [9] 56/21 56/22 56/22 56/24 58/22 59/2
 60/25 69/13 98/3
opinions [1] 56/21
opportunity [25] 34/22 34/24 34/24 35/7 51/13
 52/2 55/24 56/8 57/10 57/12 67/17 71/9 73/18 75/5
 81/13 81/14 81/17 81/21 83/5 84/8 108/16 109/6
 109/7 111/21 112/5
opposed [3] 10/12 45/10 60/10
opposition [2] 61/21 61/23
option [3] 40/19 51/9 93/2
options [2] 40/18 90/5
or evaluating [1] 95/19

oral [3] 1/3 4/6 11/7
order [7] 4/10 5/18 53/16 68/6 87/1 87/9 88/15
ordered [1] 73/14
OREGON [3] 1/2 1/8 37/8
Oregonian [1] 4/13
organization [3] 59/5 59/9 64/17
original [1] 116/5
originated [1] 34/12
other [37] 6/2 6/21 8/16 28/17 28/20 32/10 37/4
 38/9 38/10 38/11 38/11 38/20 38/24 40/19 44/15
 50/19 50/22 51/2 52/25 53/5 54/11 55/11 60/25
 63/3 68/6 68/11 68/11 69/3 69/3 72/3 72/13 79/8
 87/17 98/11 98/23 99/10 101/15
other -- the [2] 68/11 69/3
others [1] 106/17
otherwise [6] 22/11 22/18 83/11 100/8 108/20
 110/11
our [32] 9/16 15/12 16/21 21/12 39/16 52/15 52/21
 52/21 52/21 53/15 56/12 56/20 57/12 58/12 58/23
 60/4 60/13 60/19 61/4 61/6 61/16 62/2 63/19 65/24
 66/8 66/24 67/5 73/6 75/23 82/12 87/21 92/11
out [13] 39/14 56/18 58/23 58/23 63/20 69/4 72/23
 104/3 105/19 106/12 106/14 107/17 115/3
outlined [1] 92/11
outlined in [1] 92/11
outset [1] 55/15
outside [2] 26/8 51/6
over [15] 13/23 15/23 16/24 20/2 70/6 72/19 76/4
 77/22 79/4 80/14 85/15 91/15 92/5 98/20 98/24
over-inclusion [3] 76/4 77/22 79/4
over-inclusions [1] 80/14
overall [1] 78/25
overarching [2] 7/7 77/23
overly [1] 82/7
overrule [1] 20/16
overseas [3] 26/18 40/12 40/13
oversight [3] 90/22 91/8 92/5
overstate [1] 49/1
overstatement [2] 10/7 20/23
overview [1] 76/22
overwhelmed [1] 78/2
overwhelmingly [1] 25/22
own [6] 5/10 16/1 36/5 84/23 95/2 114/24

P
P.O [1] 2/9
page [1] 52/20
Pakistan [1] 54/14
paper [1] 5/8
papers [2] 8/17 33/8
paragraph [3] 46/19 46/24 61/25
parallel [2] 12/24 22/21
parameters [3] 56/15 57/14 58/20
paramount [1] 89/17
Pardon [1] 108/23
parents [3] 32/2 53/17 54/14
parlance [1] 56/3
part [15] 6/14 10/14 31/19 35/20 40/8 41/18 49/14
 57/5 84/10 90/8 90/13 97/9 104/12 113/14 113/15
parte [14] 94/7 94/12 94/22 95/2 95/14 96/4 96/12
 96/23 97/3 97/15 99/8 108/15 111/2 111/16
participate [2] 73/18 74/18
participation [1] 84/5
particular [13] 6/1 29/13 30/25 49/15 67/22 69/3
 69/8 69/8 69/9 75/13 78/20 85/14 110/10
particularly [2] 92/23 92/25
parties [1] 91/25
parties have [1] 91/25
parties' [1] 22/3
parts [1] 113/13
party [1] 95/3
pass [1] 33/9
passage [1] 16/6
passenger [1] 36/10

<p>P</p> <p>passengers [2] 16/4 16/19</p> <p>passport [20] 18/7 18/10 18/17 18/24 25/23 26/1 26/5 26/9 26/22 26/24 26/27 27/11 27/13 29/24 45/6 45/6 45/10 45/17 45/19 45/22</p> <p>past [2] 9/15 71/17</p> <p>Paul [6] 34/15 34/17 34/21 35/11 52/5 52/11</p> <p>pay [1] 101/11</p> <p>pen [1] 5/8</p> <p>people [28] 11/6 14/13 16/24 22/15 24/22 35/4 39/2 53/21 53/22 53/25 54/11 57/16 58/8 59/16 60/16 63/23 65/11 70/8 71/14 71/22 71/22 72/4 72/7 87/22 88/10 88/12 111/9 114/2</p> <p>percent [5] 78/15 79/18 80/7 80/7 109/22</p> <p>percentage [1] 80/9</p> <p>perhaps [2] 95/16 95/17</p> <p>period [1] 17/17</p> <p>permission [1] 4/12</p> <p>permit [3] 87/19 113/19 113/23</p> <p>permitted [9] 8/15 24/19 27/13 39/4 45/18 46/20 67/9 68/25 108/13</p> <p>Persaud [4] 21/22 28/9 29/13 46/17</p> <p>Persaud's [2] 31/4 43/25</p> <p>person [46] 12/22 13/8 13/10 15/15 17/15 26/16 27/12 34/8 37/3 37/8 38/12 38/21 39/17 39/20 39/22 40/3 40/5 40/11 40/13 40/17 40/20 53/7 58/3 60/10 60/16 62/16 63/1 67/1 82/9 82/10 85/12 85/14 86/13 86/17 86/18 86/20 86/24 87/20 89/5 93/13 93/14 93/22 93/24 105/25 106/21 108/6</p> <p>person's [3] 12/19 20/18 105/10</p> <p>persons [5] 13/13 24/9 78/13 78/14 88/16</p> <p>perspective [3] 44/15 45/1 45/24</p> <p>persuaded [1] 19/19</p> <p>petition [7] 93/5 93/7 93/25 98/25 99/6 106/18 109/8</p> <p>petitioner [2] 111/15 112/1</p> <p>petitions [3] 100/18 107/10 109/7</p> <p>phase [1] 84/16</p> <p>Philadelphia [1] 46/21</p> <p>phone [1] 73/20</p> <p>photographic [2] 4/11 5/6</p> <p>pick [1] 74/5</p> <p>pilgrimage [1] 14/1</p> <p>pilots [1] 65/17</p> <p>Pioneer [1] 2/15</p> <p>place [6] 10/3 26/7 38/10 53/4 57/17 108/4</p> <p>placed [5] 11/20 22/24 23/23 32/24 76/21</p> <p>placement [5] 13/15 23/6 88/23 111/4 113/11</p> <p>places [4] 54/25 55/8 55/11 55/13</p> <p>placing [1] 9/20</p> <p>plainly [1] 83/17</p> <p>plaintiff [17] 6/4 8/17 8/21 8/21 8/24 13/15 13/17 13/21 14/16 16/11 16/25 20/10 22/23 48/18 55/8 85/16 86/2</p> <p>plaintiff -- their [1] 13/15</p> <p>plaintiff's [1] 28/16</p> <p>plaintiffs [113]</p> <p>plaintiffs -- for [1] 111/3</p> <p>plaintiffs have [1] 31/12</p> <p>plaintiffs' [29] 6/10 6/25 8/5 13/16 14/9 20/10 21/10 23/7 25/14 25/22 28/3 28/3 28/23 32/17 33/2 41/10 49/6 61/23 66/8 84/15 85/4 86/13 88/2 88/11 99/14 103/7 104/8 109/18 115/3</p> <p>plan [1] 41/5</p> <p>plane [7] 11/13 14/2 17/16 52/15 55/14 57/18 60/17</p> <p>planes [10] 10/2 19/12 19/12 19/21 22/13 23/2 24/8 24/9 24/11 24/23</p> <p>planned [1] 84/9</p> <p>plausible [1] 69/21</p> <p>please [14] 4/4 4/18 6/7 7/17 28/1 29/7 50/5 50/8 74/5 74/17 74/20 90/8 104/2 108/24</p> <p>plurality [1] 57/2</p> <p>plus [35] 11/19 11/23 19/9 21/9 22/4 22/8 22/19</p>	<p>22/19 22/22 23/11 23/13 24/6 24/14 24/24 30/2 31/10 31/19 31/23 32/13 32/16 32/20 32/25 33/6 34/17 35/11 36/7 36/15 36/17 36/18 36/20 36/21 36/22 44/24 47/16 52/7</p> <p>podium [1] 9/6</p> <p>point [44] 8/20 14/18 14/25 16/22 17/10 21/4 30/1 36/6 37/12 37/20 37/23 38/5 38/13 38/22 39/9 42/3 43/12 43/12 45/17 47/7 52/19 57/21 63/3 64/10 69/4 75/15 81/21 82/12 87/14 88/2 88/22 92/7 95/12 102/16 103/7 103/13 104/6 105/22 106/5 106/9 111/10 112/9 112/13 114/20</p> <p>pointed [4] 30/20 38/2 81/6 109/10</p> <p>pointing [5] 18/13 39/9 100/14 104/5 109/12</p> <p>points [8] 11/22 14/10 24/25 47/11 83/20 84/11 110/19 111/10</p> <p>police [1] 34/18</p> <p>policies [1] 77/14</p> <p>policy [5] 17/19 18/2 63/8 65/5 65/5</p> <p>population [1] 70/5</p> <p>port [3] 26/20 30/16 38/10</p> <p>PORTLAND [8] 1/3 1/8 2/10 2/16 3/10 14/2 37/8 38/10</p> <p>posed [1] 89/17</p> <p>position [21] 10/2 10/8 10/8 11/10 14/23 41/14 44/19 61/14 62/6 64/11 66/8 66/8 67/11 82/7 86/13 89/24 96/25 98/1 102/6 110/22 111/13</p> <p>possibility [3] 14/25 24/4 51/8</p> <p>possible [2] 4/21 20/18</p> <p>post [4] 57/15 75/16 82/21 83/1</p> <p>post-deprivation [3] 75/16 82/21 83/1</p> <p>potential [1] 90/5</p> <p>power [2] 34/11 65/9</p> <p>practicable [1] 96/16</p> <p>practical [8] 18/12 26/21 26/23 27/11 38/19 45/22 55/25 89/10</p> <p>practices [2] 79/8 79/11</p> <p>pre [3] 63/1 64/15 82/2</p> <p>pre-deprivation [3] 63/1 64/15 82/2</p> <p>preceded [2] 47/17 52/11</p> <p>precise [1] 43/13</p> <p>predate [1] 109/17</p> <p>predicate [1] 45/25</p> <p>preexisted [1] 34/14</p> <p>preference [1] 9/4</p> <p>prejudge [1] 68/17</p> <p>preliminary [2] 53/23 73/4</p> <p>premise [5] 19/1 46/2 87/11 87/12 108/6</p> <p>premised [1] 5/19</p> <p>preposterous [1] 62/18</p> <p>prerogative [1] 102/22</p> <p>present [6] 26/10 30/16 33/9 61/10 83/23 97/14</p> <p>presentation [1] 110/11</p> <p>presentations [1] 5/17</p> <p>presented [3] 75/21 82/17 95/17</p> <p>Press [1] 5/2</p> <p>pressed [1] 66/16</p> <p>presumably [2] 58/7 95/14</p> <p>presume [3] 54/6 72/24 95/20</p> <p>pretty [2] 18/8 107/21</p> <p>prevail [1] 6/13</p> <p>prevent [2] 35/8 103/18</p> <p>prevented [3] 9/16 23/9 37/9</p> <p>Prevention [1] 16/3</p> <p>previous [3] 79/5 79/6 91/24</p> <p>previously [1] 31/25</p> <p>primarily [1] 30/2</p> <p>principal [1] 23/12</p> <p>principally [1] 11/6</p> <p>prior [2] 24/20 66/13</p> <p>private [8] 16/17 46/22 96/6 96/7 100/20 104/17 109/4 110/20</p> <p>privilege [1] 102/22</p> <p>probably [3] 33/22 49/14 84/8</p>	<p>problem [11] 27/19 40/2 55/24 69/8 76/4 76/9 76/25 77/18 79/4 90/7 115/2</p> <p>problems [6] 59/16 66/6 67/23 68/19 68/20 79/10</p> <p>procedural [15] 12/1 12/22 13/9 15/15 15/19 17/12 17/22 20/11 20/19 84/3 96/15 98/13 98/15 111/20 112/19</p> <p>procedure [9] 10/5 13/9 81/11 90/14 95/4 95/7 95/10 96/2 99/9</p> <p>procedure -- procedural [1] 13/9</p> <p>procedures [18] 11/13 11/20 13/2 14/8 15/5 15/8 17/9 17/22 21/9 64/1 69/16 69/22 75/12 80/16 80/17 83/22 84/22 88/7</p> <p>proceed [4] 8/5 51/23 73/15 83/11</p> <p>proceeding [3] 4/12 69/24 83/11</p> <p>proceedings [7] 1/14 4/1 7/17 86/25 87/6 94/11 116/3</p> <p>proceeds [1] 71/17</p> <p>process [150]</p> <p>processes [5] 100/2 102/4 102/5 102/6 104/23</p> <p>processing [1] 5/5</p> <p>produce [2] 19/6 66/16</p> <p>produces [1] 66/11</p> <p>productive [1] 40/25</p> <p>program [7] 63/4 63/24 64/7 76/16 76/23 77/4 77/8</p> <p>programmed [1] 5/14</p> <p>programming [1] 5/5</p> <p>Programs [1] 2/23</p> <p>prohibited [6] 13/20 13/24 14/11 22/25 23/2 24/23</p> <p>prohibition [1] 26/5</p> <p>project [10] 73/17 73/20 74/11 74/25 75/20 80/4 82/1 82/6 83/10 83/21</p> <p>prominent [1] 59/8</p> <p>prominent -- one [1] 59/8</p> <p>prompt [2] 61/2 67/20</p> <p>pronounced [1] 7/12</p> <p>proper [1] 97/21</p> <p>properly [3] 88/10 88/12 102/8</p> <p>properties [1] 59/5</p> <p>property [12] 15/15 59/3 59/4 59/22 61/5 64/12 64/18 64/22 67/10 67/19 69/5 101/10</p> <p>proposal [1] 65/8</p> <p>propose [1] 87/16</p> <p>prospect [1] 112/24</p> <p>protect [6] 31/2 87/18 88/20 89/19 100/14 102/24</p> <p>protected [6] 8/6 12/5 15/7 15/14 44/12 103/23</p> <p>protecting [5] 74/12 83/13 102/18 109/1 109/2</p> <p>protection [5] 12/1 16/9 16/16 100/13 104/4</p> <p>protections [2] 52/24 53/3</p> <p>prove [1] 66/1</p> <p>provide [17] 9/22 10/4 10/25 13/2 29/17 59/24 68/13 73/1 81/9 81/20 86/14 88/11 90/22 101/21 103/1 104/24 111/13</p> <p>provided [17] 5/15 32/4 33/17 33/25 34/1 41/15 73/14 81/23 82/18 83/2 83/6 87/17 90/12 94/6 94/10 98/17 100/2</p> <p>provides [1] 76/22</p> <p>providing [1] 75/4</p> <p>provisions [1] 113/7</p> <p>public [6] 21/20 21/21 101/2 101/5 106/1 107/11</p> <p>publicly [3] 21/13 21/25 105/24</p> <p>published [2] 56/21 56/21</p> <p>pull [1] 9/12</p> <p>pumpkin [1] 107/20</p> <p>purport [1] 20/16</p> <p>purportedly [1] 14/17</p> <p>purporting [1] 72/11</p> <p>purpose [9] 14/14 16/6 16/20 41/2 41/2 47/24 76/23 77/12 82/4</p> <p>purposes [8] 18/12 31/16 48/6 83/3 89/5 95/5 108/8 114/21</p> <p>pursuant [1] 16/3</p> <p>pursue [1] 108/13</p> <p>pursued [2] 85/10 93/17</p>
---	--	--

<p>P</p>	<p>reconcile [1] 33/12 reconciled [1] 64/7</p>	<p>report [15] 76/18 76/22 77/11 77/23 78/7 78/21 79/1 79/3 79/22 80/1 80/1 80/3 80/22 82/2 109/23</p>
<p>put [4] 34/18 57/25 66/22 89/23 putting [3] 72/24 77/14 81/15</p>	<p>reconstruct [1] 70/17 reconstructs [1] 70/19</p>	<p>REPORTER [6] 3/6 3/6 3/7 3/7 3/8 116/9 reports [6] 80/17 92/3 92/4 109/11 109/17 110/6</p>
<p>Q</p> <p>qualitatively [1] 36/4 quality [3] 73/25 74/8 110/8 question [33] 8/9 19/8 24/19 25/16 27/4 27/5 34/16 35/23 37/21 41/9 43/3 43/13 43/15 47/2 51/21 52/3 53/20 55/16 55/17 56/10 60/23 71/10 72/7 81/4 84/16 84/19 85/9 91/2 91/5 91/18 100/15 109/11 109/19 questions [10] 5/16 20/21 20/25 53/6 67/25 73/8 75/7 83/19 84/17 110/10 quickly [1] 107/21 quite [11] 20/12 42/22 47/21 87/21 88/17 91/18 91/22 98/3 101/13 103/12 103/21 quote [7] 12/20 14/6 18/24 22/11 50/20 113/9 113/9</p>	<p>record -- there [1] 54/25 recorded [1] 105/18 recording [2] 4/11 5/7 records [8] 79/14 79/25 80/6 80/8 80/11 80/14 80/18 109/22 recruit [1] 62/2 redirect [1] 107/15 redress [11] 10/4 48/21 56/14 56/16 90/14 92/18 99/2 109/7 109/8 113/9 114/2 redress -- I'm [1] 99/2 redresses [1] 105/8 reenter [1] 30/14 references [1] 46/13 referred [1] 42/5 referring [1] 50/20 Reform [1] 16/2 refuse [1] 10/4 refused [3] 9/22 29/19 53/13 refuses [1] 103/9 refute [1] 48/2 refuted [2] 5/24 49/20 regarded [2] 45/2 45/4 regarding [2] 53/5 79/24 Regardless [1] 49/4 Registered [2] 3/7 3/7 Registry [2] 32/3 32/6 regular [1] 105/6 regularly [1] 87/21 regulation [2] 64/20 64/21 regulations [2] 16/2 16/21 reinstated [1] 36/11 reiterate [2] 4/9 64/13 reject [1] 45/5 rejects [1] 59/21 rejoin [1] 7/23 related [2] 58/9 66/18 relates [2] 81/21 93/4 relative [3] 18/12 41/4 42/1 relevant [4] 27/25 64/20 79/7 109/19 reliability [1] 95/19 reliance [1] 32/17 relied [2] 94/1 109/20 relief [8] 6/12 6/22 7/3 12/24 68/24 71/24 72/9 92/24 relies [1] 60/21 religious [1] 14/1 rely [3] 17/10 17/13 24/13 relying [3] 105/1 111/19 112/14 remained [1] 79/20 remanded [1] 98/8 remarkably [1] 20/12 remedies [1] 56/25 remedy [6] 6/22 55/17 56/2 56/18 84/16 87/5 remind [1] 90/8 removal [1] 80/19 remove [6] 79/16 79/18 85/7 86/17 88/16 103/1 removed [2] 80/12 85/17 rendering [2] 22/17 112/6 renders [1] 111/8 Reno [1] 66/14 repeatedly [2] 12/4 40/3 replacement [1] 28/17 reply [3] 15/12 52/21 52/21</p>	<p>reprehensible [1] 21/12 represent [1] 73/17 representative [1] 4/15 reputation [4] 6/25 11/16 21/21 23/5 request [1] 48/21 require [4] 58/16 59/18 70/13 99/16 required [23] 10/24 15/10 22/14 23/4 23/11 23/19 24/14 52/8 57/9 57/15 60/24 61/2 64/16 79/15 79/17 86/10 89/22 90/20 90/24 99/25 101/25 102/9 104/21 requirements [4] 72/3 79/24 81/22 84/2 requires [7] 7/1 17/5 61/2 65/19 71/15 97/10 99/23 reservation [1] 39/23 resist [1] 47/8 Resistance [1] 64/15 resisting [1] 39/1 resolve [2] 41/3 115/3 resolved [1] 39/22 respect [10] 6/9 25/1 46/11 46/16 71/4 72/9 88/20 101/22 103/7 103/16 respectfully [4] 10/13 88/3 103/20 110/4 respectfully -- I [1] 88/3 respond [3] 37/21 81/13 83/5 responded [1] 49/22 response [3] 42/22 48/22 93/18 responsibilities [1] 90/2 responsibility [1] 31/8 responsible [2] 30/19 78/22 rest [1] 110/12 restrict [3] 11/9 12/25 34/11 restricted [1] 13/16 restriction [15] 11/7 13/7 15/3 15/18 17/4 17/7 18/10 18/18 18/21 19/2 19/6 19/18 20/6 20/17 26/5 restrictions [1] 14/13 restrictive [1] 15/21 restricts [1] 15/22 result [8] 16/15 16/16 23/25 34/20 71/15 76/2 76/12 78/12 resulted [1] 77/24 results [5] 17/7 20/1 93/4 105/20 107/4 return [4] 28/24 31/6 44/9 51/7 returned [4] 28/7 28/9 29/18 38/24 returning [2] 29/12 53/21 reveals [1] 76/20 revelations [1] 91/15 reversed [1] 82/15 review [36] 66/19 66/21 66/22 76/24 80/4 80/5 91/19 92/19 92/22 93/1 93/1 93/6 93/7 94/20 95/2 96/5 96/11 96/12 96/23 97/3 97/15 97/17 97/20 98/25 99/2 99/6 99/18 99/20 99/21 105/2 106/3 109/8 110/1 110/24 111/24 112/8 reviewed [1] 106/19 reviews [1] 105/7 revocation [8] 18/7 18/10 18/17 18/24 25/24 25/25 45/10 45/18 revocations [2] 52/23 96/22 reweigh [1] 89/24 ridden [1] 75/21 right [118] right -- isn't [1] 40/2 rights [15] 12/22 18/3 28/15 32/4 32/22 32/22 33/2 33/4 44/16 44/16 55/20 65/12 65/19 103/7 104/8 rise [11] 4/3 15/7 15/9 18/22 19/5 20/19 30/6 30/13 32/19 50/7 75/17 rises [1] 42/21 risk [12] 75/3 75/20 76/3 76/21 77/21 79/2 81/3 81/5 81/6 81/8 83/23 97/23 risks [1] 76/1 Risner [6] 2/19 25/10 50/12 84/6 107/22 114/15</p>
<p>R</p> <p>Rahman [1] 82/14 raise [1] 73/10 raised [3] 6/17 82/24 83/7 raising [1] 83/6 Rana's [1] 54/13 range [4] 25/19 80/9 83/14 90/14 rate [1] 80/13 rather [2] 83/11 85/5 rational [1] 113/25 rationale [2] 43/6 43/7 Ray [1] 21/19 Ray Knaeble [1] 21/19 Rayes [1] 12/10 RDR [2] 3/6 116/9 reach [1] 43/8 reached [2] 77/23 106/5 reaches [1] 96/9 read [4] 62/22 63/8 74/7 98/3 reads [1] 12/9 ready [1] 114/17 real [4] 88/19 91/13 108/8 108/9 realistic [1] 102/25 reality [1] 33/12 realize [1] 58/18 really [23] 31/21 36/14 36/20 37/7 38/6 40/20 40/24 41/7 53/11 62/5 65/3 69/21 70/15 80/25 84/23 84/24 89/12 98/8 101/18 103/17 107/7 110/4 110/6 realtime [2] 3/8 5/6 reason [14] 9/23 14/15 38/21 40/12 48/16 52/6 56/4 58/10 63/18 63/21 85/11 100/3 103/18 111/7 reasonable [3] 42/19 86/20 114/19 reasoning [3] 18/2 20/8 36/5 reasons [40] 21/4 22/6 39/18 57/8 57/23 59/14 59/23 62/11 63/10 63/11 63/14 64/19 65/22 66/23 66/25 68/4 68/10 81/12 81/13 83/24 85/6 86/6 86/11 86/14 88/12 100/4 100/7 100/11 101/17 101/19 102/9 105/2 108/9 108/9 108/11 111/6 111/14 111/15 113/1 113/21 rebalancing [1] 88/19 rebut [2] 59/24 81/18 receive [2] 93/11 93/25 received [2] 48/21 96/21 recent [1] 76/14 recess [4] 47/13 50/5 50/6 115/6 recognize [6] 28/7 28/21 36/16 39/18 102/2 104/18 recognized [23] 12/4 15/8 26/3 26/6 30/9 31/25 35/24 36/6 36/17 38/1 42/3 42/9 43/14 44/16 44/16 44/20 50/24 89/15 94/16 96/2 101/22 102/14 102/17 recognizes [3] 30/4 74/11 82/2 recommendation [2] 30/22 46/23 recommended [2] 57/2 57/3</p>		

R
Rita [2] 3/3 73/17
RMR [2] 3/6 116/9
robust [1] 106/1
rocket [2] 37/17 37/20
room [2] 3/9 62/15
rooms [1] 40/19
routine [1] 93/18
rule [1] 56/9
rules [2] 63/14 74/11
ruling [5] 71/5 71/7 72/1 72/3 72/6
run [1] 112/3
running [2] 107/17 107/20
runs [1] 63/4

S
safe [1] 63/16
safeguard [1] 111/1
safeguards [2] 96/15 111/21
said [21] 8/19 8/19 8/19 28/19 40/15 58/12 61/4
66/12 67/19 68/10 68/21 72/22 73/3 79/4 83/12
85/5 96/4 96/10 101/20 104/15 107/24
said -- what's [1] 8/19
sail [1] 55/4
sailing [2] 16/13 16/14
Salah [2] 13/21 53/8
same [15] 12/23 21/4 23/6 23/10 27/12 35/6 36/11
37/24 45/23 45/24 51/4 96/10 104/18 113/1 113/21
sand [1] 8/9
sands [1] 107/19
satisfied [9] 23/13 24/5 24/23 31/18 85/3 95/7
95/10 96/7 97/6
satisfies [5] 22/8 22/18 24/21 97/22 113/24
satisfy [4] 96/23 110/25 111/20 112/9
Saudi [2] 14/2 59/9
say [46] 6/11 6/15 7/4 29/7 30/22 34/11 36/24 37/4
37/19 38/7 38/10 38/12 38/17 39/24 41/8 42/19
44/11 45/14 47/13 49/13 54/23 57/6 57/10 57/12
58/7 59/25 61/19 65/2 66/15 68/22 69/13 70/21
71/1 71/2 71/20 72/17 74/10 86/11 89/8 92/5 93/22
94/21 98/8 102/25 109/21 109/25
saying [8] 10/18 18/13 18/16 42/17 68/4 86/9 88/1
97/13
says [16] 30/21 34/18 34/18 54/10 59/13 59/22
60/4 62/3 64/18 64/24 66/19 67/8 67/19 68/3 68/11
86/19
says -- I [1] 68/3
says -- that [1] 34/18
scale [1] 55/22
scared [1] 60/13
scenarios [1] 5/23
school [1] 65/9
scope [1] 5/17
Scott [1] 2/19
screened [3] 19/13 19/16 24/20
screening [17] 16/6 24/18 33/10 36/10 53/15 53/16
62/13 63/5 75/24 76/7 77/25 78/9 78/10 78/17 79/9
79/12 112/3
screens [3] 16/4 16/18 19/14
scrutiny [1] 82/22
sea [2] 28/5 28/10
seal [1] 97/3
sealed [3] 94/22 95/2 95/14
seated [2] 4/5 50/9
Seattle [1] 62/21
second [14] 13/4 23/3 40/8 65/21 66/3 75/15 77/10
78/21 81/21 82/15 95/12 103/24 104/12 111/10
secondarily [1] 19/16
secrecy [1] 82/7
secret [1] 92/10
Secretary [1] 20/14
section [1] 113/6
secure [3] 76/16 76/22 77/4

security [39] 6/25 21/17 21/23 24/18 25/5 53/15
53/16 58/11 59/15 60/5 62/13 63/5 64/23 65/25
66/15 68/15 74/13 75/17 81/24 82/5 82/11 82/17
82/23 83/2 83/7 86/21 87/15 88/20 89/16 89/20
90/3 90/13 91/6 96/20 100/13 102/23 103/8 103/16
108/10
see [16] 4/19 13/18 13/22 37/6 38/18 41/25 44/3
54/16 54/19 55/5 60/16 61/25 63/2 69/8 74/4 86/4
seeing [1] 66/1
seek [6] 12/24 63/1 66/19 71/24 99/20 103/17
seeking [3] 5/18 17/18 82/20
seem [3] 97/25 103/6 104/5
seems [7] 8/8 8/20 37/2 37/2 55/19 103/8 103/14
seen [2] 64/25 84/16
seizure [2] 59/3 59/5
seizures [1] 64/18
Selectee [3] 75/25 78/11 78/14
seminal [2] 22/21 34/17
send [2] 8/1 86/19
sending [1] 59/6
sense [10] 19/2 41/16 55/19 56/6 62/9 62/25 68/17
71/22 104/3 107/8
sensitive [7] 40/12 67/24 69/14 83/8 83/13 100/8
108/20
sensitivity [2] 96/14 108/25
sentence [1] 74/7
separate [14] 6/21 11/11 21/7 23/15 23/20 27/5
54/17 55/16 56/23 56/24 103/22 110/1 112/23
113/5
series [1] 109/17
serious [10] 24/22 26/9 45/8 53/18 55/2 78/3 87/17
90/2 91/18 110/20
seriously [2] 62/10 92/7
set [6] 6/1 9/6 31/3 56/15 58/19 58/23
sets [2] 58/23 62/14
setting [1] 111/12
several [4] 28/7 29/10 29/14 58/19
severe [4] 14/3 15/9 15/19 26/5
severely [1] 13/16
severity [2] 15/3 17/3
Shall [1] 47/23
shame [1] 68/24
Shamsi [1] 2/3
share [1] 51/10
shares [1] 54/5
sharing [1] 102/12
she [8] 7/20 22/25 54/13 54/15 54/16 54/18 54/18
109/18
she'll [2] 8/2 54/19
she's [3] 7/19 54/13 54/17
Sheikh [1] 13/25
shifting [1] 8/9
ship [9] 16/12 16/13 16/17 30/21 31/6 37/17 45/7
46/17 54/8
shipping [1] 40/17
ships [5] 16/1 16/4 16/20 30/19 37/20
shoes [1] 108/6
shop [3] 34/22 34/24 35/4
shoplifter [2] 34/20 52/9
shoplifters [2] 34/22 34/23
shopping [1] 35/17
short [3] 47/13 53/5 93/14
Shorthand [1] 3/6
shortly [1] 71/6
should [34] 4/10 7/23 8/4 8/12 8/16 8/18 24/22
35/21 40/24 43/6 43/7 44/20 45/2 45/4 50/19 57/11
69/6 73/9 80/8 80/15 83/11 83/13 87/24 91/12 97/1
97/5 97/13 98/15 99/15 99/24 102/5 103/1 108/12
115/4
shouldn't [3] 40/25 41/3 43/19
show [13] 14/4 16/3 17/16 17/25 21/8 23/19 24/14
55/1 59/14 66/23 80/16 91/7 113/25
showed [1] 22/3

showing [2] 13/4 86/3
shown [9] 14/10 22/7 22/9 23/3 23/11 23/14 24/7
28/21 110/21
shows [8] 13/4 15/24 16/12 38/19 80/22 81/4
113/21 113/22
shut [1] 65/9
side [6] 5/18 37/4 38/11 38/20 43/7 66/17
sided [2] 66/11 95/18
Siemion [13] 3/3 7/10 7/13 7/14 66/5 73/13 73/17
73/19 73/22 84/4 91/25 109/10 109/16
signature [3] 116/5 116/5 116/6
signed [1] 116/5
significant [8] 25/25 55/21 61/5 89/13 89/23 100/5
103/3 104/20
significantly [2] 37/8 37/16
signing [1] 116/2
similar [4] 44/16 44/16 59/19 76/7
Similarly [1] 96/9
simply [12] 17/5 24/1 38/16 48/4 60/9 81/14 82/19
85/7 85/12 86/17 103/1 111/12
since [6] 12/18 23/8 44/17 48/1 91/10 92/9
single [6] 9/23 30/5 36/19 36/23 78/22 82/23
sir [1] 84/12
sister [1] 55/6
sister-in-law [1] 55/6
situation [8] 41/13 42/9 62/13 66/9 72/25 82/20
108/18 111/8
situations [1] 28/4
six [1] 80/23
slate [1] 58/21
sliding [1] 55/22
slightly [1] 86/9
slow [1] 12/14
slower [2] 74/18 74/20
slowly [1] 74/23
small [2] 51/25 54/13
smear [1] 23/7
smeared [1] 21/11
so [103]
so-called [2] 14/17 49/9
solace [1] 39/6
solved [1] 36/10
some [44] 6/6 7/1 8/11 15/9 18/19 19/15 19/19
24/19 30/13 33/24 38/10 39/19 40/2 41/1 41/6
41/22 44/25 49/13 54/21 54/25 55/7 58/15 58/16
60/15 61/19 63/5 65/10 65/19 67/5 67/15 68/21
69/20 71/9 72/12 72/12 74/8 75/1 78/18 84/18 89/6
92/3 96/17 98/11 107/7
somebody [3] 36/7 67/4 111/3
somehow [2] 30/19 44/4
someone [15] 18/15 34/2 37/12 43/11 45/6 76/5
76/8 81/15 85/7 86/7 87/8 89/25 97/18 102/1 103/2
someone's [3] 86/11 101/19 102/10
something [20] 22/11 22/18 34/2 34/12 39/10
62/18 66/15 85/5 92/16 94/21 95/17 98/4 99/16
106/21 106/25 107/4 107/12 107/12 109/25 112/9
Something -- something [1] 107/12
somewhere [3] 8/7 51/15 80/7
son [1] 21/24
sorry [14] 12/12 12/15 34/21 34/23 90/17 90/18
91/3 91/4 98/17 99/2 104/23 107/15 107/15 110/17
sort [13] 34/17 35/20 37/21 40/4 51/5 55/11 61/12
62/10 62/14 68/4 68/16 80/25 103/22
sought [1] 93/2
sounded [1] 98/2
sounds [1] 25/9
source [1] 94/15
sources [1] 102/10
South [1] 55/12
Southern [1] 2/6
space [4] 15/23 16/24 20/2 70/6
speak [5] 70/24 74/15 74/17 74/20 74/22
speakerphone [1] 74/3

S
speaking [1] 55/20
speaks [4] 32/1 36/1 47/19 47/20
speaks to [1] 47/19
special [2] 53/20 80/4
specially [1] 59/10
specific [1] 111/6
specifically [1] 80/2
speculating [1] 55/12
spend [1] 52/1
spent [1] 103/10
spouses [1] 9/18
squared [1] 64/11
squarely [1] 15/6
SSI [1] 101/24
St [1] 3/3
stage [4] 56/13 58/5 58/20 71/4
stake [1] 110/21
stand [2] 4/18 83/22
standard [4] 58/2 66/4 113/6 113/24
standards [1] 14/4
standing [1] 4/10
Star [1] 40/19
stark [1] 110/21
start [3] 9/19 25/14 84/14
started [2] 84/14 84/15
starting [2] 5/12 37/23
state [13] 20/15 32/4 32/7 32/8 32/9 32/11 32/19 33/4 33/25 34/2 34/2 35/25 113/24
state-issued [1] 32/9
stated [3] 18/23 65/24 83/17
statement [9] 8/11 50/20 57/8 57/22 59/23 64/19 65/22 66/25 109/21
statements [2] 24/5 67/17
states [27] 1/1 1/16 3/9 13/13 15/22 16/5 16/13 21/20 28/8 28/24 29/12 29/15 29/18 32/10 44/10 46/18 48/14 50/18 51/7 51/10 51/18 54/6 70/6 87/20 87/24 89/19 109/3
status [18] 11/17 22/7 22/10 22/20 23/5 23/17 24/21 31/24 32/11 32/14 32/15 35/14 35/24 36/11 98/2 100/6 100/22 101/17
statute [7] 64/20 64/21 65/15 90/24 91/11 94/10 94/24
statutory [2] 69/23 101/2
stay [1] 50/12
Stephen [1] 21/22
Steven [4] 2/14 13/17 21/19 54/2
stigma [21] 11/19 11/23 19/9 21/9 22/19 22/22 23/10 30/2 31/10 31/14 31/17 31/17 32/25 34/17 35/20 36/12 36/15 36/17 44/24 47/18 52/4
stigma-plus [12] 11/19 11/23 19/9 21/9 22/19 22/22 30/2 31/10 32/25 34/17 36/17 44/24
stigmatized [2] 21/14 22/23
stigmatizing [1] 24/5
still [10] 28/20 36/6 36/6 43/3 50/23 51/4 51/4 51/20 70/24 112/22
still -- is [1] 36/6
stipulated [2] 5/25 8/11
stop [2] 68/6 104/6
stopping [1] 8/20
stops [1] 103/9
store [1] 35/4
straight [1] 114/6
straightforward [1] 60/1
stranded [1] 13/17
Street [3] 2/4 2/7 2/12
strength [1] 62/5
strengthen [1] 110/8
stress [1] 61/15
stretching [1] 65/3
strong [2] 102/18 104/22
struggle [1] 55/17
stuck [1] 29/7

study [1] 91/19
subject [3] 52/23 59/2 87/13
subjects [1] 79/16
submit [3] 93/5 93/25 109/6
submitted [2] 14/19 15/24
subsequent [1] 12/3
subset [1] 70/8
subsidized [1] 65/10
substantive [2] 98/14 98/16
substitute [2] 81/16 96/15
subsumed [1] 8/10
such [10] 59/11 72/3 77/5 83/7 87/15 87/19 98/20 105/12 107/10 108/10
sufficiency [1] 41/21
sufficient [11] 18/22 23/18 38/16 57/25 60/5 60/8 81/8 90/11 96/23 104/24 109/13
suggest [1] 79/1
suggesting [5] 28/11 43/1 51/17 72/11 87/24
suggestion [5] 7/1 27/21 31/20 41/12 80/24
Suite [1] 2/16
summary [6] 4/7 5/18 49/18 52/21 56/9 61/21
Supp [1] 56/22
support [3] 38/3 52/21 95/15
supported [1] 96/22
supporting [1] 113/11
supposed [2] 95/18 95/20
Supreme [9] 12/4 15/6 19/3 20/13 26/3 34/16 57/2 67/9 83/16
sure [9] 29/3 36/14 40/5 40/9 55/10 60/24 94/23 95/6 95/9
surely [4] 67/20 70/18 106/2 106/6
surrounded [2] 21/16 21/22
suspected [9] 9/23 19/24 21/11 21/14 22/1 23/8 23/9 64/3 111/4
suspecting [1] 62/18
suspects [1] 58/10
suspend [1] 65/8
suspension [1] 25/24
SW [2] 2/15 3/9
swarm [3] 60/15 62/15 62/24
swimming [1] 27/18
sworn [2] 14/19 58/12
system [13] 56/14 66/7 66/10 66/16 72/5 87/21 89/22 112/3 112/4 113/2 113/9 114/1 114/2

T
take [25] 5/4 7/18 13/25 15/2 30/12 34/3 37/1 40/11 46/17 47/13 50/4 52/24 54/2 54/8 54/15 58/25 62/10 62/15 64/22 73/9 85/23 90/1 92/6 94/12 114/18
taken [7] 32/13 32/15 33/13 34/14 45/19 50/6 91/12
takes [2] 45/15 54/16
taking [9] 4/14 4/20 5/10 33/5 54/3 54/11 55/14 86/3 114/23
talk [7] 25/20 25/22 40/7 58/25 86/6 98/11 104/14
talked [2] 26/4 101/7
talking [26] 25/14 25/20 27/17 29/23 33/19 42/3 44/13 52/1 52/14 54/22 64/12 65/21 71/21 88/4 88/6 89/10 97/11 97/12 100/3 100/10 100/19 101/18 102/4 103/10 109/24 110/5
targets [1] 80/10
tarnished [1] 21/22
TCP [1] 110/1
team [1] 55/4
Ted [1] 76/9
telephone [2] 7/10 7/15
telephonically [1] 3/2
tell [5] 28/1 57/16 62/24 92/22 95/13
telling [1] 34/7
tells [1] 107/4
tens [1] 37/11
terms [2] 45/22 95/19
terrorism [5] 16/3 58/9 58/9 58/10 89/17
terrorist [13] 22/1 30/10 59/10 64/3 64/17 75/24

77/25 78/9 78/10 78/17 79/9 79/12 112/3
terrorists [7] 9/24 19/25 21/12 21/15 23/8 23/9 111/4
test [2] 24/21 74/8
tested [1] 103/18
testify [1] 67/5
testimony [3] 67/14 78/16 92/1
testing [1] 95/19
text [1] 4/21
than [29] 10/18 13/18 14/3 18/20 19/6 19/14 19/17 35/2 35/6 36/4 38/16 39/10 42/23 51/17 56/7 57/12 61/5 61/10 66/17 70/7 72/13 78/13 83/11 89/16 100/10 100/20 101/14 101/14 114/19
Thank [22] 4/4 9/14 12/17 25/7 50/5 50/8 51/21 51/22 51/24 61/24 68/2 73/11 73/12 73/18 84/4 84/13 110/13 110/14 112/12 114/11 114/12 115/6
that [883]
that -- I [1] 104/10
that -- in [1] 34/18
that -- that [2] 27/15 70/10
that -- that -- or [1] 72/8
that -- the [1] 39/1
that -- we [1] 25/17
that -- well [1] 93/12
that -- you [1] 45/19
that in [1] 37/10
that's [92]
that's -- we're [1] 61/10
the -- all [1] 48/2
the -- I [2] 89/14 106/20
the -- if [1] 86/10
the -- of [1] 89/14
the -- that [2] 30/18 56/12
the -- the [2] 6/4 46/25
the -- the -- that [1] 70/8
the -- the obligation [1] 94/20
The -- this [1] 77/8
the -- what [1] 90/5
the -- with [1] 46/16
the -- you [2] 66/18 72/8
The OIGs [1] 92/2
their [54] 5/4 6/14 6/19 6/25 7/1 7/4 9/18 9/19 9/19 10/8 10/14 11/3 11/15 11/16 11/16 13/15 14/23 15/4 17/12 17/23 20/6 21/21 22/2 22/7 22/9 23/4 23/25 29/21 32/23 33/8 38/15 48/1 50/14 53/17 54/16 58/4 60/19 61/13 61/13 64/22 65/5 73/2 77/6 77/6 78/5 86/3 94/19 97/14 102/6 107/11 109/20 110/22 111/4 113/11
their -- their [1] 61/13
them [48] 5/10 7/8 8/19 8/19 9/20 10/1 11/13 14/22 16/20 17/1 21/11 21/14 23/7 23/9 28/7 30/14 30/15 33/5 35/7 37/11 41/9 48/2 48/11 48/12 49/1 49/19 49/20 56/9 57/17 57/24 57/25 60/15 62/18 64/2 65/25 68/24 69/2 71/25 72/9 72/21 72/22 72/25 73/1 85/9 103/18 107/11 111/5 111/5
themselves [2] 33/9 84/1
then [56] 7/25 22/24 25/4 26/16 31/5 32/13 32/15 33/5 33/20 34/2 35/3 39/23 39/25 45/23 47/2 50/2 51/10 51/16 52/1 54/17 56/9 56/17 56/23 57/9 57/22 58/3 60/1 60/18 63/14 63/25 64/4 64/17 65/2 68/23 70/2 70/15 71/1 71/10 71/10 71/19 75/15 79/22 84/14 85/13 92/16 93/14 95/13 95/21 98/11 99/25 104/12 104/16 105/6 105/8 105/9 109/20
theory [6] 11/18 11/24 19/9 25/14 31/11 45/6
there [146]
there -- in [1] 22/16
there -- is [1] 107/10
there -- that [1] 109/23
there's [55] 4/15 7/16 11/25 25/15 31/20 31/20 34/3 35/14 35/16 35/18 36/21 45/18 50/18 51/8 51/12 52/7 54/20 55/8 56/10 56/20 56/21 56/23 58/14 60/24 61/1 61/7 61/16 61/19 63/4 63/6 63/10 64/17 65/7 65/13 66/17 67/12 67/16 68/4 69/12

T
there's... [16] 69/18 69/25 72/25 78/7 80/9 81/5
82/23 85/4 89/15 90/11 94/17 104/11 105/19
106/13 106/16 111/5
therefore [3] 12/21 14/7 53/2
thereof [1] 6/24
these [50] 6/9 6/9 7/17 8/23 8/23 14/3 21/25 28/20
28/23 39/2 41/21 43/9 47/24 48/7 49/6 49/18 51/11
53/22 53/25 58/8 59/16 63/21 67/11 71/18 71/22
71/22 72/7 72/14 72/21 76/19 76/20 78/23 79/1
80/20 81/22 84/9 84/17 89/24 90/5 92/3 93/16 98/2
105/17 108/8 110/6 112/14 112/17 112/18 114/23
115/3
these -- these [2] 6/9 8/23
these 13 [1] 72/14
they [136]
they -- I [1] 98/10
They -- the [1] 20/7
they -- their [1] 58/4
they should [1] 102/5
they'll [1] 58/7
they're [39] 8/14 8/14 8/18 11/20 19/24 25/20
26/19 27/10 27/12 27/13 31/21 40/23 41/3 41/15
41/20 44/5 50/23 51/2 51/3 54/11 57/20 57/21 58/7
58/8 64/2 68/4 68/22 72/24 76/12 84/24 86/4 86/12
87/16 97/5 97/13 100/18 100/21 101/18 102/4
They're -- in [1] 50/23
they've [9] 19/22 26/18 29/16 57/17 59/15 60/14
85/16 99/10 110/3
thing [14] 34/4 51/5 54/12 54/23 62/14 63/8 65/2
65/21 66/3 67/22 68/8 68/16 71/20 72/17
things [10] 37/21 40/18 52/25 53/5 63/21 67/11
70/22 74/15 85/19 109/21
think [147]
think -- I [1] 98/10
thinks [1] 66/2
third [6] 3/9 6/10 7/5 14/25 84/19 112/15
this [176]
This -- I'm [1] 37/7
this -- the [1] 112/10
those [58] 5/23 7/7 9/21 13/3 14/9 14/12 14/24
14/24 16/21 17/3 18/8 19/13 20/7 24/5 24/25 25/1
28/1 33/10 50/3 53/24 58/1 58/2 61/11 61/25 62/1
66/4 66/14 67/17 68/19 68/20 69/24 70/20 71/3
76/15 77/19 78/3 79/20 80/7 80/13 80/16 80/17
81/13 82/19 83/19 84/11 84/25 87/6 88/12 88/16
92/3 92/4 100/1 100/1 100/2 102/6 108/11 111/15
113/17
though [11] 10/1 10/18 45/3 47/7 49/18 53/3 71/4
73/2 79/20 90/4 101/16
though -- well [1] 45/3
thought [3] 69/17 97/24 98/1
thousands [3] 13/23 37/11 78/8
threat [6] 30/10 58/10 60/4 67/15 113/10 113/15
threaten [1] 68/14
threats [2] 65/25 89/17
three [5] 9/15 9/21 13/18 110/18 113/7
threshold [3] 6/8 8/20 8/23
through [23] 28/5 28/8 29/11 32/13 33/9 39/21
47/10 53/15 53/16 54/3 60/14 63/2 63/24 64/1 64/4
84/10 86/4 92/3 98/11 106/11 107/20 109/16 112/4
ticket [7] 8/17 33/8 38/19 39/24 40/23 86/3 93/19
tied [2] 56/1 73/3
time [30] 5/13 5/13 19/17 21/13 26/20 37/24 38/9
40/12 40/20 42/20 44/21 52/1 53/25 54/20 58/25
62/13 70/23 72/21 73/9 78/8 80/3 80/6 80/12 84/7
86/22 86/24 104/19 107/17 114/17 114/20
time-consuming [1] 38/9
time-sensitive [1] 40/12
timely [2] 78/5 90/25
times [5] 19/22 19/23 44/18 60/15 60/22
Timothy [1] 91/23
tip [1] 62/24

tip [1] 62/21
to -- it [1] 65/23
to -- not -- not [1] 31/8
to -- or [1] 90/13
to -- rights [1] 32/22
to -- to [1] 42/8
today [12] 6/12 46/14 56/13 68/6 68/18 71/5 73/18
75/7 81/12 83/20 83/22 109/25
today's [1] 43/9
told [14] 8/13 14/21 19/24 27/10 40/15 48/11 48/12
49/1 49/7 49/12 57/19 60/17 61/16 109/18
Tonkon [1] 2/14
too [9] 8/2 36/1 45/16 51/6 81/3 81/5 83/23 106/20
114/8
took [3] 56/25 80/23 93/19
tools [1] 83/14
Torp [1] 2/14
touch [1] 82/1
touched [1] 83/9
Tower [1] 2/15
track [1] 70/23
training [1] 62/22
trains [1] 50/18
transcript [4] 1/14 4/1 116/3 116/4
translate [1] 60/3
transmission [2] 73/21 73/25
transportation [11] 11/7 20/8 28/18 28/19 30/5
30/12 36/19 36/23 36/25 38/17 50/19
transporter [1] 40/18
travel [109]
traveler [6] 40/14 46/15 106/8 108/12 108/12
108/15
travelers [6] 70/5 77/5 77/5 100/14 106/17 107/9
traveling [5] 9/18 11/13 50/17 51/10 103/17
Treasury [1] 101/1
treated [2] 27/12 45/23
Trek [1] 40/19
tremendous [4] 30/10 85/5 101/24 102/8
tremendously [1] 87/7
trial [1] 98/4
tried [3] 19/22 19/23 93/20
tries [1] 40/21
trigger [2] 11/8 53/3
triggered [1] 82/25
triggers [1] 76/6
trip [22] 10/9 17/1 48/21 61/7 66/7 81/8 90/10
90/12 90/20 90/23 91/12 92/8 93/4 99/2 99/14
105/8 110/9 110/24 110/25 111/25 113/2 114/1
trips [1] 15/2
trivializes [1] 53/12
trouble [6] 29/12 37/7 39/5 39/23 73/24 86/2
troubled [2] 37/14 103/12
troubling [4] 11/10 41/7 78/19 79/10
true [13] 30/8 30/10 39/12 58/13 59/23 66/2 66/24
68/23 86/5 95/20 95/21 108/7 116/3
truth [1] 108/16
try [8] 5/13 6/22 37/21 40/21 40/24 47/8 74/20
74/22
trying [8] 39/2 41/9 62/2 62/21 65/17 71/12 90/4
95/10
TSA [6] 17/18 21/4 22/14 24/13 93/6 112/4
TSA's [1] 98/25
TSC [9] 29/7 33/13 48/18 80/4 80/5 88/25 91/24
98/21 110/3
TSDB [1] 109/24 110/9
turn [2] 72/19 107/20
turned [1] 70/19
turning [1] 75/19
two [25] 7/6 7/7 11/11 22/6 25/1 31/21 37/21 56/4
56/21 61/25 68/4 74/14 75/6 76/15 76/19 77/23
79/6 81/10 81/22 85/19 96/19 100/11 103/22
112/23 113/13
type [9] 43/4 75/11 76/9 76/10 76/13 76/25 83/18

101/23 105/16
types [2] 76/19 80/22
U
U.S [21] 2/19 2/22 9/17 10/3 15/23 16/24 20/2 26/7
26/20 29/11 53/21 54/3 54/14 63/19 63/19 65/18
72/23 78/12 78/14 78/24 102/7
ultimate [2] 99/1 108/13
ultimately [1] 101/16
unable [6] 13/18 22/10 22/13 22/18 24/8 71/23
unchallenged [1] 95/21
unconstitutional [3] 56/14 59/22 113/3
under [31] 11/18 17/19 17/21 19/9 22/5 22/14 33/2
35/24 36/17 41/15 51/19 53/21 67/8 70/13 77/19
82/8 82/22 88/10 88/15 94/8 94/10 97/3 98/25
101/1 104/13 110/25 111/24 112/8 112/24 113/6
114/23
under-inclusion [1] 77/19
underlying [8] 69/24 87/12 100/7 105/2 108/16
111/7 111/15 113/11
undermine [1] 82/4
undermines [2] 38/13 62/5
understand [9] 4/15 6/23 7/5 44/18 45/2 85/14
90/4 95/11 104/10
understanding [2] 79/23 114/21
undertake [3] 86/25 87/6 88/17
undertaken [2] 85/2 90/2
undisputed [17] 6/8 8/12 13/4 13/14 14/10 14/14
14/16 15/21 15/25 19/25 23/8 40/16 47/24 48/6
48/9 48/17 83/25
unfair [2] 113/19 113/23
unhappy [1] 92/15
unimportant [1] 41/2
unintelligible [1] 73/21
Union [3] 2/3 2/9 2/11
unique [1] 30/8
uniqueness [1] 89/18
UNITED [28] 1/1 1/16 3/9 13/13 15/22 16/5 16/13
16/14 21/20 28/7 28/24 29/12 29/15 29/18 34/6
44/9 46/18 48/14 50/17 51/7 51/10 51/18 54/6 70/6
87/20 87/24 89/19 109/3
universe [2] 70/7 90/5
university [1] 21/25
unless [6] 4/22 26/19 33/13 73/8 74/19 103/17
unnecessary [1] 96/16
unreasonable [1] 30/6
unrefuted [1] 49/19
unrelated [1] 82/15
unsatisfactory [1] 42/22
unsatisfied [1] 93/3
unwillingness [1] 103/14
up [18] 4/18 5/13 9/6 29/7 47/6 51/25 54/4 56/1
59/25 60/17 65/23 74/5 78/10 81/17 84/9 86/3
107/18 111/11
updated [1] 80/25
updating [1] 79/24
upgraded [2] 78/9 78/19
uphold [1] 65/4
upon [3] 12/19 20/17 111/19
upset [1] 91/13
urge [2] 47/8 83/25
urges [1] 83/21
us [5] 45/15 62/4 74/8 94/21 114/19
USC [3] 22/14 98/17 111/24
use [13] 4/13 4/16 5/4 5/10 22/14 25/23 26/1 34/25
43/18 99/15 101/10 105/19 113/18
used [7] 17/1 25/9 32/7 32/10 80/17 80/18 106/17
useful [1] 114/20
uses [1] 102/11
using [1] 83/14
usually [1] 57/20
utilities [1] 65/10

V
valid [1] 104/7
varies [1] 8/21
various [3] 5/22 71/2 78/2
vendor [1] 52/8
very [32] 6/16 7/9 25/7 25/24 26/9 39/24 40/14 53/8 53/18 55/2 59/2 59/18 59/19 59/25 72/17 74/22 79/10 82/18 83/10 84/18 87/4 87/6 87/17 92/7 100/11 101/8 104/7 105/14 109/21 113/1 113/21 115/2
vessel [3] 30/21 37/10 46/22
veteran [1] 21/16
veterans [3] 9/17 21/19 21/22
view [6] 55/16 56/12 58/24 61/7 92/24 97/4
viewed [1] 58/8
violate [1] 113/3
violated [1] 63/13
violates [1] 113/22
violating [1] 113/2
violation [2] 6/20 18/1
violations [1] 56/23
virtually [1] 110/2
visit [1] 53/7
volume [1] 78/4
volumes [1] 78/4

W
waiver [5] 53/25 54/3 54/11 54/16 54/20
waivers [1] 72/21
walk [3] 52/25 98/11 109/16
walked [2] 47/10 92/3
walking [1] 27/18
want [45] 4/9 15/2 17/15 25/13 29/8 30/1 30/18 31/10 37/20 38/21 39/16 39/16 39/20 40/9 40/21 41/8 47/6 49/1 51/5 51/7 51/24 58/25 59/7 70/5 72/9 72/19 76/3 80/24 84/13 84/17 85/6 86/6 86/15 86/23 89/8 92/6 92/7 93/22 95/5 98/10 100/9 101/18 107/24 109/14 112/9
wanted [13] 24/25 47/12 50/10 52/5 52/19 53/10 54/23 61/19 67/22 69/4 71/20 91/3 97/9
wanted to [1] 91/3
wanting [1] 114/7
wants [2] 34/3 40/14
was [110]
was -- sorry [1] 34/21
was dispositive [1] 43/18
Washburn [5] 13/17 21/19 28/9 29/14 54/2
Washburn's [1] 44/1
Washington [3] 2/21 2/24 3/4
Washington's [1] 79/14
wasn't [6] 16/15 34/12 42/6 47/17 91/2 104/13
watchlist [14] 16/7 16/18 22/15 63/17 64/5 64/9 74/12 79/13 79/16 79/25 82/3 82/4 83/3 113/12
watchlisting [9] 75/12 76/16 77/11 77/13 79/25 89/9 89/22 95/24 105/6
water [1] 40/20
way [28] 8/7 33/22 39/22 42/10 44/5 45/24 51/18 55/3 56/6 56/8 60/25 61/8 61/8 67/13 67/15 68/18 69/18 74/19 86/1 86/2 87/13 90/23 103/15 105/16 105/18 111/3 111/5 115/3
way -- it [1] 56/6
ways [4] 21/14 28/20 70/3 96/17
we [96]
we -- that [1] 57/14
we -- what [1] 49/12
we'll [6] 5/13 49/14 69/14 71/16 84/9 107/6
we're [32] 5/12 5/12 27/17 28/11 29/23 31/3 33/19 40/7 41/17 43/7 44/13 46/8 47/7 52/10 54/22 56/13 58/19 58/21 61/10 69/13 69/13 71/21 73/24 74/8 88/4 88/6 88/18 89/10 100/3 107/17 110/4 115/6
We're -- we're [1] 69/13
we've [6] 29/10 44/17 60/16 94/21 99/5 103/10
weak [1] 100/11

weakness [1] 77/19
wealthy [1] 26/19
wears [1] 12/9
weeks [5] 26/19 37/10 43/11 91/16 114/16
weigh [2] 84/25 103/13
well [34] 5/10 10/13 10/17 18/9 20/23 24/15 27/4 29/1 30/3 32/10 34/15 42/14 45/3 52/1 54/10 56/12 57/19 58/5 63/19 64/2 66/19 67/21 70/21 71/19 73/9 74/10 83/9 91/10 92/14 93/12 98/10 102/14 106/15 114/14
well-recognized [1] 102/14
went [4] 86/24 93/19 97/24 100/5
were [83]
were -- if [1] 87/5
were -- sort [1] 68/16
weren't [1] 66/24
West [1] 2/7
Western [1] 26/8
Westlaw [1] 105/18
what [146]
what -- what [3] 25/16 90/4 105/19
what -- what's [1] 90/7
what's [7] 8/19 30/7 35/6 51/1 90/7 94/14 98/7
whatever [16] 27/19 29/8 35/8 37/15 38/21 53/17 57/1 64/1 66/4 66/9 66/9 72/4 72/10 72/18 85/11 97/3
whatever -- whatever [1] 66/9
whatsoever [1] 67/10
when [41] 5/22 8/22 11/13 11/20 13/2 13/9 21/17 21/20 25/19 26/4 36/7 41/4 41/8 41/8 42/9 44/13 49/13 50/16 51/6 54/10 55/20 57/16 60/13 62/8 66/10 68/19 72/21 73/4 76/5 79/15 79/17 84/25 87/19 93/25 98/8 98/20 100/8 109/5 109/21 110/1 114/25
where [40] 22/23 23/10 31/11 31/18 33/20 33/24 34/1 34/2 39/22 40/11 43/2 50/12 52/11 54/25 55/13 58/4 63/13 65/11 66/17 67/4 69/13 69/25 73/1 82/20 89/1 89/11 89/20 94/14 97/2 99/6 100/15 100/16 100/19 100/21 101/6 102/17 104/19 106/17 108/15 111/8
wherever [1] 39/5
whether [28] 8/6 8/9 8/15 8/22 9/4 19/15 19/17 22/3 24/19 24/21 25/23 27/23 28/10 38/24 39/9 47/3 49/4 49/15 60/23 85/1 85/2 85/19 86/7 99/18 101/6 101/23 106/15 106/17
which [67]
whichever [1] 44/5
while [7] 15/8 19/15 24/19 24/20 30/2 43/14 47/20
who [44] 14/13 17/2 17/15 24/22 27/12 29/11 30/21 32/21 33/10 37/3 38/9 38/23 44/9 49/1 53/13 59/9 60/17 63/2 65/17 65/17 70/5 70/8 70/19 76/6 76/8 76/24 77/9 77/14 80/15 81/23 82/3 84/1 87/8 88/5 88/10 88/12 89/25 92/20 96/19 97/18 99/10 102/7 113/15 114/3
who's [6] 26/17 53/7 53/7 67/14 102/7 112/6
who've [1] 28/24
whole [4] 6/13 62/14 97/10 97/12
wholly [3] 10/10 18/4 111/2
why [43] 9/6 9/23 14/15 33/11 35/9 40/5 40/21 40/21 40/24 43/6 43/7 44/18 45/2 45/18 45/22 45/23 46/5 48/16 49/11 50/19 52/6 53/9 54/6 54/10 59/14 59/16 60/3 60/24 62/12 63/10 64/25 66/1 66/24 68/4 75/12 75/16 81/2 82/18 83/1 86/6 95/10 100/1 100/5
wide [3] 78/23 83/14 90/14
wife [3] 13/18 21/24 54/7
Wilker [1] 2/14
will [23] 5/14 5/16 25/6 29/21 37/19 42/11 57/7 58/8 66/5 70/13 72/2 72/10 75/2 81/25 88/14 88/16 88/17 99/9 105/23 114/17 114/19 114/20 114/25
win [2] 68/6 73/6
Wisconsin [2] 22/22 52/10
wish [2] 104/5 108/23

wished [1] 28/24
wishes [1] 90/1
wishing [1] 70/24
within [4] 50/17 89/19 102/21 109/2
without [21] 6/17 13/19 13/23 14/2 26/8 30/4 36/8 53/4 55/14 55/14 56/1 63/25 65/10 67/10 81/16 81/24 83/6 87/17 95/2 101/11 116/4
without -- without [1] 55/14
wives [1] 53/17
won't [3] 7/18 58/6 64/12
word [2] 5/4 37/24
words [3] 6/2 6/21 8/16
work [1] 62/4
worked [1] 29/16
working [1] 31/3
works [3] 26/16 29/11 92/15
world [6] 37/4 38/11 38/20 42/20 43/9 55/11
worldwide [1] 26/6
worried [1] 54/11
worry [2] 70/12 70/16
worth [3] 36/10 57/1 63/3
would [96]
wouldn't [3] 85/18 104/14 106/24
wound [1] 97/24
wrap [2] 47/13 84/9
wrap-up [1] 84/9
writing [1] 58/21
wrong [7] 17/11 31/19 37/2 37/2 39/1 68/10 108/21

Y
yeah [3] 27/9 41/19 97/8
year [1] 59/2
years [6] 9/16 9/21 13/18 65/18 71/23 79/17
Yemen [3] 13/22 29/7 55/9
yes [9] 7/11 9/9 14/19 25/11 48/20 60/12 61/24 73/23 99/17
yet [3] 87/13 103/5 106/11
York [2] 2/5 2/13
you [253]
you -- if [1] 60/2
you -- there's [1] 63/6
you'd [1] 66/15
you'll [3] 12/14 72/23 84/10
you're [36] 4/22 5/9 18/6 18/13 33/12 36/20 37/14 39/2 39/6 40/16 41/23 42/8 42/14 42/15 55/20 62/3 62/12 63/16 63/18 63/21 64/3 67/15 67/16 68/22 70/4 70/7 72/11 73/13 74/3 84/8 89/25 97/13 103/7 106/16 109/12 109/13
You're -- are [1] 18/6
you're -- you [1] 63/16
you've [7] 42/16 47/7 47/10 48/15 63/13 74/18 114/24
Young [1] 4/13
your [108]
Your Honor [60]
yourselves [1] 108/24

Z
zero [2] 65/4 65/5