

1 IN THE UNITED STATES DISTRICT COURT OF
2 THE NORTHERN DISTRICT OF MISSISSIPPI
3 NORTHWESTERN DIVISION

4
5 CONSTANCE MCMILLEN,)
6 Plaintiff,)
7)
8 VS.) NO. 1:10CV61-D-D
9)
10 ITAWAMBA COUNTY SCHOOL)
11 DISTRICT, ET AL.,)
12 Defendants.)

13
14 BE IT REMEMBERED, that the
15 above-captioned cause came to be heard on this, the 22nd
16 day of March, 2010, before the Honorable GLEN DAVIDSON,
17 Judge presiding, when and where the following
18 proceedings were had to wit:

19
20 ALPHA REPORTING CORPORATION
21 Heather L. Deloach
22 236 Adams Avenue
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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

MS. CHRISTINE P. SUN
New York, New York

MS. KRISTY BENNETT
ACLU of Mississippi
Jackson, Mississippi

MS. ALYSSON LEIGH MILLS
Fishman Haygood
New Orleans, Louisiana

ON BEHALF OF THE DEFENDANT:

MR. BENJAMIN E. GRIFFITH
Griffith & Griffith
Cleveland, Mississippi

MS. MICHELE HORN FLOYD
Fulton, Mississippi

1 COURT REPORTING FIRM:

2

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8

9 I N D E X

10

11 WITNESS: PAGE

12 CONSTANCE MCMILLEN

13 Direct Examination

14 By Ms. Bennett 19

15 Cross Examination

16 By Mr. Griffith 33

17

18 TERESA MCNEESE

19 Direct Examination

20 By Mr. Griffith 35

21 Cross Examination

22 By Ms. Sun 41

23 Re-Direct Examination

24 By Mr. Griffith 56

1	TRAE WIYGUL	
2	Direct Examination	
3	By Mr. Griffith	57
4	Cross Examination	
5	By Ms. Bennett	64
6	EDDIE HOOD	
7	Direct Examination	
8	By Ms. Floyd	68
9	Cross Examination	
10	By Ms. Sun	75
11	Re-Direct Examination	
12	By Ms. Floyd	78
13	JIM KEITH	
14	Direct Examination	
15	By Mr. Griffith	80
16	Cross Examination	
17	By Ms. Sun	90
18	E X H I B I T S	
19	NO.	PAGE
20	EXHIBIT NO. P-1	28
21	EXHIBIT NO. P-2	45
22	EXHIBIT NO. P-3	47
23	EXHIBIT NO. P-4	49
24	EXHIBIT NO. D-1	62

1 PROCEEDINGS

2 THE COURT: Okay. You needed a conference
3 with the Court.

4 MS. BENNETT: Yes, Your Honor. Constance's
5 girlfriend obviously, you know, may be mentioned and
6 she's a minor. We want to just make sure that it's
7 understood that her name wouldn't be mentioned.

8 MR. GRIFFITH: Absolutely, we understand
9 that, Your Honor. That will be off limits for any
10 questions from us and that will remain confidential from
11 our standpoint.

12 THE COURT: Okay. I just wonder do you
13 think we ought to -- it might be good to establish a
14 ground rule and refer to her as Jane Doe or something.
15 I don't know.

16 MS. BENNETT: I've instructed Constance not
17 to refer to her by name. She can call her her
18 girlfriend.

19 THE COURT: Okay.

20 MS. BENNETT: It would be hard for her to
21 call her like Jane Doe.

22 THE COURT: Okay.

23 MS. BENNETT: I told her to be sure not to
24 use her name. That I would make sure that -- do you

1 want to establish something?

2 MS. SUN: I don't think her identity has
3 anything to do with any of the issues so I can't imagine
4 that her name is going to come up.

5 THE COURT: All right. Do we have any other
6 ground rules we need to post at this time?

7 MS. BENNETT: Are there witnesses expected
8 to testify?

9 MR. GRIFFITH: Excuse me?

10 MS. BENNETT: Are y'all calling any
11 witnesses?

12 MR. GRIFFITH: Yes.

13 THE COURT: Yeah, you need to establish a
14 record.

15 MR. GRIFFITH: We have all of the members of
16 the school board who has been served or processed. The
17 superintendent of education, the principal and assistant
18 principal and I believe one expert witness Jim Keith.
19 He's the general counsel for the Mississippi School
20 Board Association.

21 MS. SUN: Your Honor, we have an objection
22 to Mr. Keith's testimony. I don't believe that he's
23 offering anything but hearsay and he's also offering
24 expert opinions on things that are inappropriate.

1 Specifically the ultimate legal conclusion as to whether
2 there was a material disruption sufficient to justify
3 the censorship in this case. So we have an objection to
4 his testimony. I mean, he's clearly testifying about
5 matters that are not within his personal knowledge and
6 also offering opinions that are inappropriate for an
7 expert.

8 MR. GRIFFITH: May I respond?

9 THE COURT: Yes, sir.

10 MR. GRIFFITH: Your Honor, he is a qualified
11 witness and will be able to testify as an expert based
12 on his training, experience, specialized knowledge and
13 his education. He'll be confining himself to testimony
14 relating to the governance of school boards, the policy
15 and the decision-making process of school boards. He
16 will not be expressing any opinions that are legal
17 conclusions or legal opinions. He will not be
18 addressing the ultimate issue before this Court. But it
19 is an essential matter because the Plaintiffs are taking
20 issue with the action of the school board and
21 withdrawing its sponsorship of the prom.

22 They are challenging that as a sham decision
23 or a decision that's not honestly made. Because of that
24 it is essential for us to establish a record as to not

1 only the normality and the propriety of that decision
2 but how it reflects the policy judgments that must be
3 made by school board members. Particularly in light of
4 matters that they find as a fact are disruptive to the
5 educational process and the core mission of the public
6 school system which is to educate students.

7 MS. SUN: May I respond? With all respect
8 those opinions that he is offering are purely legal
9 opinions. There is no allegation that board procedures
10 weren't followed. I think the issue is whether that
11 decision was lawful or not and that is purely a legal
12 conclusion. We're not challenging the board's internal
13 policies or procedures. And as I've read his
14 declaration, he states that he has spoken to school
15 board members and, you know, purports to identify some
16 disruption that would occur. All of that is hearsay.
17 You know, if there are witnesses that can testify
18 personally to that, you know, those are -- that would be
19 appropriate.

20 MR. GRIFFITH: Your Honor, we will ask that
21 Mr. Keith as an expert be allowed to sit in the
22 courtroom to hear all of the testimony as well. We'll
23 lay a proper predicate for that testimony as the Court
24 knows under rule 702 and 703. The expert is permitted

1 to testify even on the basis of hearsay if it is data of
2 a type that's reasonably relied upon by experts in his
3 field.

4 THE COURT: Okay.

5 MR. GRIFFITH: Which we'll establish the
6 predicate for, Your Honor.

7 THE COURT: This Court has always ruled that
8 opinions of law are not admissible. Now, the only
9 exception is in a patent case. I've permitted lawyers
10 to testify that a patent is valid. Other than that I've
11 not permitted expert testimony as to questions of law.
12 Now, if he testifies to something else, then perhaps I
13 will. I don't want to rule in limine here on matters
14 that may or may not be relevant later on in the case.

15 MR. GRIFFITH: Your Honor, I really believe
16 that once we have a record more fully developed with the
17 lay witnesses and the board members that will testify
18 that it will be not only a matter that we can probably
19 all tractate and shorten the proceedings but it will
20 inform the expert's opinion and provide a real clear
21 basis for what he's opining. And that will not be legal
22 opinions. It will only relate to matters of governance
23 and the decision-making process. He's addressing the
24 process of school board members. Many of whom he's

1 actually been involved in the training of.

2 THE COURT: We'll reach that when we get to
3 it in the case. As far as him being in the courtroom,
4 he's an officer of the Court and he is an attorney, he
5 will be permitted to remain in the courtroom.

6 MR. GRIFFITH: Yes, sir.

7 THE COURT: Anything else?

8 MR. GRIFFITH: We do have members of the
9 school board and the superintendent as a party --

10 THE COURT: I think they can remain in the
11 courtroom.

12 MR. GRIFFITH: That's all that we have from
13 our standpoint.

14 MS. BENNETT: We don't have anything else,
15 Your Honor.

16 THE COURT: Off the record.

17 (WHEREUPON, A BRIEF RECESS WAS HELD.)

18 THE COURT: You may be seated. The Court
19 calls cause number 1:10CV61, Constance McMillen versus
20 Itawamba County School District, et al. The purpose of
21 this hearing today is a -- comes before the Court on the
22 Plaintiff's motion for a preliminary injunction pursuant
23 to Rule 65 of the Federal Rules of Civil Procedure. Are
24 the Plaintiffs ready to proceed?

1 MS. BENNETT: Yes, Your Honor.

2 THE COURT: Very well. I show appearing for
3 the Plaintiff Kristy Bennett, Christine P. Sun and
4 Alysson Leigh Mills; is that correct?

5 MS. SUN: Yes, Your Honor.

6 THE COURT: And I believe you also have
7 present with you in the courtroom paralegals Nikita
8 Thomas and --

9 MS. BENNETT: That's it, Your Honor.

10 THE COURT: Very well. And the Plaintiff,
11 of course, will remain at counsel table. For the
12 Defendant Mr. Benjamin E. Griffith from Cleveland,
13 Mississippi and Michele Horn Floyd.

14 MR. GRIFFITH: The Defendants are ready,
15 Your Honor.

16 THE COURT: Very well. We will address this
17 matter pursuant to authority that all of you agree with
18 in your submissions. That it's incumbent upon the
19 Plaintiff to establish by a preponderance of the
20 evidence, one, is a substantial likelihood that
21 Plaintiff will prevail on the merits. Two, a
22 substantial threat that Plaintiff will suffer
23 irreparable harm if the injunction is not granted.
24 Three, that the threatening injury to the Plaintiff if

1 the injunction is denied outweighs the threatened harm
2 to the Defendant if the injunction is granted and that
3 granting the preliminary injunction will not disturb the
4 the public interest. Do we all agree on those four
5 perquisites?

6 MS. BENNETT: Yes, Your Honor.

7 MR. GRIFFITH: Yes, Your Honor.

8 THE COURT: I take it you do because you
9 said so in your submissions to the Court. Now, I did
10 not ask you, do you wish to make a brief opening
11 statement?

12 MS. BENNETT: Yes, Your Honor. Just
13 briefly.

14 THE COURT: Can we limit that to 15 minutes
15 per side?

16 MS. BENNETT: Yes, Your Honor.

17 MR. GRIFFITH: Yes, Your Honor.

18 THE COURT: Very well. I'll hear from the
19 Plaintiff.

20 THE COURT: Move that podium to any position
21 you're comfortable with, Ms. Bennett.

22 MS. BENNETT: Thank you. This is fine, Your
23 Honor. May it please the Court, Your Honor, we are here
24 on this matter brought by Constance McMillen against the

1 Itawamba County School District regarding a violation of
2 her first amendment rights. Ms. McMillen has attended
3 Itawamba County schools her entire life and has been in
4 Itawamba Agricultural High School since 9th grade.

5 She was aware of a policy prohibiting her
6 from bringing her girlfriend to the prom and approached
7 school officials about clarifying that and asking
8 whether she would be allowed to bring her girlfriend to
9 the prom. She was told by school officials that she
10 could not bring her girlfriend to the prom. That her
11 date must be of the opposite sex. Constance then
12 contacted counsel and asked if we could help her in
13 attending the prom with her girlfriend.

14 On March 2, 2010, I sent a demand letter
15 along with Christine Sun and the Mississippi Safe
16 Schools Coalition asking that the school district revise
17 their policy prohibiting same sex couples from attending
18 prom and also asking that they allow Constance to wear a
19 tuxedo to prom if she so chose because she had also been
20 told that she would not be -- her girlfriend would not
21 be allowed to wear a tuxedo.

22 We gave the school district until March 10
23 to respond to our request. We did not receive a
24 response about Constance's request to attend the prom

1 with her girlfriend and wear a tuxedo except we received
2 a letter on March 9 indicating that the school board
3 needed more time to bring up the issue at the next
4 school board meeting which would have been March 22.

5 Then the following day or two days later,
6 the Itawamba County School District issued a statement
7 to the press that due to the alleged controversy raised
8 by Constance's demand letter that they were actually
9 going to cancel the prom. They cited a distraction to
10 the learning environment. Subsequently there the next
11 day we filed this instant action and the following week
12 we filed the current motion for preliminary injunction
13 seeking to stop Itawamba County School District from
14 canceling the prom and allow Constance to attend the
15 prom with her girlfriend and to wear a tuxedo.

16 In the Defendant's opposition to our motion,
17 they do not seem to be challenging the first amendment
18 protective speech issue. Rather they focus on the fact
19 that it was within their purview under the standard set
20 forth in *Tinker v Des Moines* that there was a material
21 disruption of the learning environment and that as such
22 they were within their rights to cancel the prom.

23 We will offer testimony that shows there
24 wasn't a disruption caused by Constance which is

1 required in order for them to be able to do that but
2 rather any disruption that came of this result came
3 after the actual cancellation of the prom. And we ask
4 that you'll find in favor of Constance and issue an
5 injunction against canceling the prom. Thank you, Your
6 Honor.

7 THE COURT: Very well. Mr. Griffith.

8 MR. GRIFFITH: Your Honor, the case before
9 this Court is really governed by the Canal Authority
10 Factors and that is what the proof I believe will be
11 directed to this morning. We believe the evidence will
12 show on behalf of the Defendants that there was not just
13 a distraction, there was a major disruption of the
14 educational process. The core educational admission of
15 the school was at risk.

16 There were not just perceptions but there
17 were obvious occurrences that were taking place with
18 students being completely distracted during classroom.
19 Teachers having to respond to questions. The entire
20 idea that a lesson plan being marginalized as this
21 reached a crescendo. This school board did what it was
22 responsibly mandated to do. And that is to adhere to
23 its core mission which is acting as fiduciaries for the
24 students to put the educational system at the forth

1 front and it did so.

2 It's decision was not to cancel a prom. The
3 decision was to stop sponsoring the prom at the school.
4 That had actually been under discussion, Your Honor, for
5 well over four years out of concerns primarily of
6 liability arising from the holding of school dances on
7 school property. Concerns over young students drinking
8 and driving and a multiple other concerns that reflected
9 very negatively on the continuation of holding a school
10 dance in this manner.

11 The Court is going to have before it
12 testimony from the Superintendent of Education who will
13 relate to the Court the incidents, the matters that were
14 observed by school board and school administration that
15 justified its decision. We have with us the board
16 attorney for the board of education who will actually
17 present the balance of the opening statement. I would
18 like for the Court to have her at this point come to the
19 podium and complete this very briefly.

20 THE COURT: Very well.

21 MR. GRIFFITH: Michelle.

22 MS. FLOYD: If it pleases the Court, Your
23 Honor, the American Civil Liberties Union will have you
24 believe that this is a lawsuit that has as its

1 foundation a violation of the constitutional rights of
2 one of our students due to bigotry and homophobia. That
3 is simply not the case. This is, in fact, a lawsuit
4 involving the Itawamba County Board of Education's
5 ability and duty to effectively educate its students and
6 to provide them with a safe learning environment. The
7 facts are straight forward.

8 The board was faced with a difficult
9 decision. It had a growing situation that was
10 escalating and jeopardizing the education of the
11 students of Itawamba County. They were presented with
12 facts that evidenced that classes were being disruptive
13 to the extent that teachers could not actually perform
14 their duties in their classroom. They were also
15 presented with issues of growing concerns of dressing
16 protest at the prom.

17 These new facts were coupled with the fact
18 that the board of education had been considering for
19 years the fact of not sponsoring the prom. Those facts
20 it had already contemplated were concerns over
21 liability. Teachers were taking away their time from
22 their classroom to actually prepare and decorate for the
23 prom. There were concerns over drinking and drug use,
24 and there were also the fact that other schools had

1 stopped sponsoring their proms. Many schools have
2 stopped sponsoring their proms and has allowed the
3 parents to do that.

4 Upon being presented with all of these
5 facts, the board did what it thought was best for the
6 Itawamba County School District. It made a difficult
7 decision to not host a prom but to, in fact, allow
8 parents to sponsor that prom. There's been a
9 misconception that it's been cancelled. That's not
10 true. They simply withdrew their sponsorship. This is
11 simply a case about the authority of the Itawamba County
12 School District to withdraw sponsorship of a social
13 event that it has absolutely no duty to host. Because
14 doing so is in the best interest of the educational
15 process of the Itawamba Agricultural High School.

16 It's my contention, Your Honor, that at the
17 end of the day after we have given all the testimony and
18 we've gone through the Canal Authority factors that the
19 Plaintiffs will be unable to prove those four factors
20 that are mandated in order for this Court to order a
21 temporary injunction. And we ask that that be denied.

22 THE COURT: Very well. Plaintiff will call
23 the first witness.

24 MS. BENNETT: Your Honor, the Plaintiff

1 calls Constance McMillen.

2 THE COURT: Very well. Ms. McMillen if
3 you'll come around and be sworn, please, ma'am.

4 CONSTANCE MCMILLEN,
5 having been first duly sworn, was examined and testified
6 as follows:

7 THE CLERK: Please take a seat in the
8 witness stand and state your name and address for the
9 record.

10 THE WITNESS: My name is Constance McMillen
11 and I live in Fulton.

12 THE CLERK: May we have your entire address?

13 THE WITNESS: Oh, 204 West Gray Street,
14 Fulton, Mississippi.

15 MS. BENNETT: You can lower that mic a
16 little so you don't have to talk up to it.

17 DIRECT EXAMINATION

18 BY MS. BENNETT:

19 Q Constance, we've established that you live
20 in Fulton. How long have you lived there?

21 A My entire life.

22 Q And is your family from there?

23 A Uh-huh (affirmative response).

24 Q You have to say yes.

1 A Yes.

2 Q You have to give a verbal response because
3 the court reporter is taking it down. Are you
4 nervous?

5 A Yes.

6 Q Have you attended school with the same kids
7 your entire life?

8 A Yes.

9 Q What are the kids at school that you go to
10 school with know about your sexual orientation?

11 A I mean, they know I've liked girls since the
12 8th grade.

13 Q Has there ever been any -- anything said to
14 you about liking girls?

15 A Not that I remember. I don't remember
16 anybody saying anything or being mean about it.

17 Q Okay. What --

18 THE COURT: Excuse me just one second. You
19 said no one has been mean to you about it.

20 THE WITNESS: No one has ever like said
21 anything but people have asked me if I like girls but --

22 THE COURT: Very well.

23 BY MS BENNETT:

24 Q What happened earlier this year that

1 prompted you to seek out the school officials about
2 attending prom with your girlfriend?

3 A I mean, I knew that there was a policy from
4 last year so I went to them.

5 Q What policy are you talking about?

6 A The policy for no same sex dates.

7 Q Okay.

8 A And so I went to them hoping that I could
9 talk to them and -- you know, because I thought maybe
10 they had the policy in place for a different reason and
11 maybe I could talk to them and them understand how it
12 made me feel and maybe change it.

13 Q How did it make you feel?

14 A I mean, it upset me because I felt like I
15 wasn't getting to go to prom because if I can't share
16 prom with my girlfriend who is special to me then I
17 didn't want to go to the prom anyway.

18 Q And what were you told about bringing your
19 girlfriend to prom?

20 A That it wouldn't be allowed.

21 Q And what did you do once you were informed
22 that it wasn't allowed?

23 A You know, I was upset, you know, but I had
24 been told that there was ways around it. That I could

1 get a boy to bring me and a boy bring my date. And, you
2 know, I was just going to let it go because I didn't
3 know what to do. I was very upset.

4 Q So what did you do about not knowing what to
5 do?

6 A I mean, I didn't do anything after the tux,
7 when I talked to them about the tux. That's when I
8 decided to call the ACLU.

9 Q What was the conversation about the tux?

10 A I was just told that it wasn't formal for a
11 girl to wear a tux. That boys wear tuxedos and girls
12 wear dresses.

13 THE COURT: Now, who told you this, please,
14 ma'am?

15 THE WITNESS: The vice principal.

16 THE COURT: The vice principal?

17 THE WITNESS: Uh-huh (affirmative
18 response).

19 BY MS BENNETT:

20 Q And what's his name?

21 A Coach Mitchell.

22 Q And did you hear that from anybody else
23 about the tuxedos?

24 A Well, after that I went to the principal

1 because he told me, Coach Mitchell, told me he didn't
2 know for sure but I could go he thought -- I could go to
3 the principal. So I went to the principal and he told
4 me basically the same thing. And I mean, I was
5 explaining to him how it made me feel, and he was like,
6 well, I mean, if you want to, you can go over my head to
7 the superintendent because if she says you can then I'll
8 let you.

9 Q Was this in relation to wearing a tux?

10 A Yes. And so I went to her, but I mean I
11 told him I didn't want to do that.

12 Q How did you reach out to the
13 superintendent?

14 A I called her.

15 Q And what did you tell her you wanted to talk
16 about?

17 A Well, actually first I talked to an attorney
18 and then the superintendent.

19 Q Which attorney?

20 A Ms. Michelle Floyd.

21 THE COURT: Just I'm having trouble
22 understanding you. What was the attorney's name?

23 THE WITNESS: Ms. Michelle Floyd.

24 THE COURT: Very well.

1 BY MS BENNETT:

2 Q And she directed you to talk to the
3 superintendent?

4 A She said that she would talk to the
5 superintendent and get back with me but the
6 superintendent called me that day.

7 Q What did you tell Michelle Floyd that you
8 wanted to talk about?

9 A About the tux situation and about the same
10 sex date.

11 Q The superintendent what's her name?

12 A Ms. McNeese.

13 Q Teresa McNeese?

14 A Uh-huh (affirmative response).

15 Q So she called you back?

16 A Right. And she told me that she would talk
17 to the school board about it.

18 Q And did she get back with you?

19 A She did.

20 Q And what did she convey to you at that
21 point?

22 A She told me that the girls had to wear
23 dresses or that -- she told me that the girls had to --
24 they could wear pants when I was talking to her. And

1 then later that day Mr. Wiygul told me that she just
2 said that girls had to wear dresses because she had
3 talked to the school board. And so I was like -- I
4 asked her about the same sex date thing and she said
5 because it was policy, I mean.

6 Q And what did you do at that point?

7 A I was in school. I was upset.

8 Q And after that what did you do?

9 A I called my mom and she knew someone that
10 could get me in touch with Sarah Young with the ACLU.
11 So I got in touch with her and I was very upset and I
12 just asked her if there was anything that could be
13 done.

14 Q And subsequently that resulted in us writing
15 the demand letter?

16 A Right.

17 Q After we sent the demand letter to the
18 school district on March 2, describe how the school was,
19 how it was when you went to school.

20 A I mean, no one like really said anything to
21 me. I mean, I wasn't -- it wasn't a big deal. Like a
22 lot of people didn't really even know about it, you
23 know. I mean, I'm sure like in a day or two it got
24 around, but I mean, no one really -- no one really knew

1 about it. No one asked me about it or anything.

2 Q And did that continue for the next week and
3 a half before the prom was cancelled?

4 A It did.

5 Q Was there any -- in the classes that you
6 attended was anything out of the ordinary?

7 A No. I mean, I had a teacher ask me about it
8 like the day before the 10th or whatever so I mean that
9 was really the only thing that was said about it at
10 school so --

11 Q Were students at school surprised about your
12 request?

13 A I mean, no. I mean, they -- I had told them
14 that I was talking to the principal. I mean, my friends
15 I had told them that I was talking to the principal and
16 them about bringing the same sex date and wearing a tux.
17 And they had -- you know, I told them what they said and
18 most of the kids thought it was ridiculous that the --
19 that they weren't going to let it happen, you know. But
20 I never -- at that point when I told them, I never knew
21 I was going to call the ACLU. I was just upset about
22 it.

23 Q How did you find out that prom was
24 cancelled?

1 A A reporter.

2 Q A reporter contacted you?

3 A Right.

4 Q And how -- did you go to school after you
5 found out that prom was cancelled?

6 A I did.

7 Q And how was school at that point?

8 A It was hostile. I actually wound up leaving
9 that day because there was so many people -- so many
10 like dirty looks and people whispering when I walked by
11 and stuff like that because most people felt like I had
12 caused the prom to get cancelled. You know, a lot of
13 people didn't like me very much.

14 Q What did you think would happen when the
15 demand letter was sent on your behalf?

16 A Well, I thought that -- I thought maybe the
17 school like maybe they didn't know that they weren't
18 supposed to do that. Maybe they thought that they could
19 or something. And I thought that maybe whenever the
20 demand letter was sent they would realize. It had like
21 court cases in it. I thought maybe they would realize
22 and then change it because it was the right thing to do
23 and that's what I thought.

24 Q Did you see a copy of the demand letter?

1 A I did.

2 MS. BENNETT: Your Honor, may I show the
3 demand letter to her to have her verify it?

4 THE COURT: Yes, ma'am, yes.

5 BY MS BENNETT:

6 Q Does that appear to be the letter that was
7 sent on your behalf?

8 A Yes.

9 Q And I'll show you it's actually a two-page
10 letter. Does that appear to be the letter that was
11 sent?

12 A It is.

13 MS. BENNETT: Your Honor, may we have the
14 demand letter entered as Exhibit 1 to this hearing?

15 THE COURT: Any objection?

16 MR. GRIFFITH: No objection, Your Honor.

17 THE COURT: It will be admitted as P-1, as
18 Plaintiff's Exhibit No. 1.

19 (WHEREUPON, THE ABOVE-MENTIONED
20 DOCUMENT WAS MARKED AS PLAINTIFF'S
21 EXHIBIT NO. 1 TO THE TESTIMONY OF THE
22 WITNESS AND IS ATTACHED HERETO.)

23 THE CLERK: Just put it on the table. Thank
24 you.

1 BY MS BENNETT:

2 Q How many days did you attend school after
3 the prom was cancelled?

4 A I went for half a day Thursday, but I didn't
5 go for a full day.

6 Q Was there school Friday?

7 A Uh-huh (affirmative response).

8 Q And then this past week y'all were on spring
9 break?

10 A Right. We were on spring break.

11 Q Are you aware of there being another prom
12 planned?

13 A Yes.

14 Q What do you know about that?

15 A I know that it's supposed to be at the
16 furniture market and that's all I know.

17 Q Have you received an invitation to that
18 prom?

19 A No.

20 Q Do you know when it is?

21 A No.

22 Q Do you know who is putting it on?

23 A I think it's -- I think someone kin to Alex
24 Miller maybe, but I'm not positive on that.

1 THE COURT: You say you have not received an
2 invitation?

3 THE WITNESS: No.

4 THE COURT: Very well.

5 BY MS BENNETT:

6 Q Why have you pursued this matter,
7 Constance?

8 A Because I feel like I have the right to go
9 to the prom just the same as someone who's straight and
10 I feel like -- I mean, I don't feel like I should have
11 to not go to prom just because I'm gay, you know, or
12 like go with someone else and not be able to enjoy being
13 there with a person that's special to me just because
14 I'm gay.

15 MS. BENNETT: Okay. May I have a moment,
16 Your Honor?

17 THE COURT: Yes, ma'am.

18 BY MS BENNETT:

19 Q Constance, what do you believe you would be
20 expressing if you got to go to the prom with your
21 girlfriend?

22 A That, you know, that's who I am.

23 Q And what do you mean by that?

24 A Like I don't understand what you're

1 asking.

2 Q Well, who are you? I mean, what is the
3 statement, this is who I am mean?

4 A Well, that I'm a lesbian and I mean, I have
5 a girlfriend. And that I'm equal to everyone. I mean,
6 I'm equal to people that are straight.

7 Q Okay. And by wearing a tuxedo, what would
8 that have to do --

9 A I mean, like I'm -- you know, I can wear
10 whatever but I felt comfortable wearing the tuxedo
11 because I didn't want anything fall out like in the
12 middle of the night and have to worry about all of that.
13 So, you know -- but I think that just because you're a
14 girl doesn't mean you have to dress feminine, and I
15 don't think you should -- I don't think they should put
16 gender laws on that.

17 MS. BENNETT: Okay. We tender the witness.

18 THE COURT: Let me ask just a few. I am
19 having trouble hearing her. You said at one point -- I
20 thought I heard you say I was told I could come with a
21 boy and my girlfriend could come with a boy. Now, did
22 somebody tell you that?

23 THE WITNESS: Yes.

24 THE COURT: Who told you that?

1 THE WITNESS: The vice-principal.

2 THE COURT: The vice-principal told you
3 that?

4 THE WITNESS: Uh-huh (affirmative
5 response).

6 THE COURT: Very well.

7 MS. BENNETT: Your Honor, may I ask a
8 follow-up question in relation to that?

9 THE COURT: Yes.

10 BY MS. BENNETT:

11 Q When you asked the superintendent about
12 whether that would be acceptable, what did she tell
13 you?

14 A She -- I mean, about the --

15 Q Attending with opposite sex dates and once
16 you got there --

17 A Yeah. Well, I asked -- I mean, she said
18 that it was okay and then I asked about dancing.
19 Because I mean, I didn't want to go and then have to
20 pretend like I wasn't with that person all night.

21 Q And what did she say about the dancing?

22 A She asked me not to push buttons, and I
23 mean, basically like if we slow dance together and
24 someone is uncomfortable about that, someone gets

1 uncomfortable and complains, we could get kicked out for
2 that.

3 MS. BENNETT: We tender the witness, Your
4 Honor.

5 THE COURT: Very well.

6 MR. GRIFFITH: May I proceed, Your Honor?

7 THE COURT: Yes, sir.

8 CROSS EXAMINATION

9 BY MR. GRIFFITH:

10 Q Good morning, Ms. McMillen.

11 A Good morning.

12 Q Did you, in fact, buy a ticket to the
13 prom?

14 A I did.

15 Q I want to show you what you just referred to
16 earlier, and that was the decision I believe you put it
17 to cancel the prom?

18 A Uh-huh (affirmative response).

19 MR. GRIFFITH: I'm not able to get it to
20 zoom.

21 BY MR. GRIFFITH:

22 Q Ms. McMillen, I'm trying to get this up to a
23 level that it can be read. Do you see that?

24 A Uh-huh (affirmative response).

1 Q Do you see where this is the Exhibit that
2 accompanied the response to the board of education?

3 A Yes.

4 Q Can you read that first full paragraph where
5 it cites the board has adopted the following statement.

6 A Due to the distraction to the educational
7 process caused by recent events, the Itawamba County
8 School District has decided to not host a prom at
9 Itawamba Agricultural High School this year. It is our
10 hope that private citizens will organize an event for
11 the juniors and seniors; however, at this time we feel
12 it is in the best interest of the Itawamba County School
13 District after taking into consideration the education,
14 safety and wellbeing of our students that the Itawamba
15 County School District not host a junior, senior prom at
16 Itawamba Agricultural High School. We sincerely
17 apologize for any inconvenience this causes anyone.

18 Q Thank you. In that was there any reference
19 in canceling the prom or was it simply no longer
20 sponsoring it?

21 A They cancelled the prom that the school was
22 hosting.

23 Q And you got that information from a
24 reporter?

1 A Right.

2 MR. GRIFFITH: No further questions, Your
3 Honor.

4 THE COURT: Any redirect?

5 MS. BENNETT: No redirect, Your Honor.

6 THE COURT: Ms. McMillen, you may stand
7 down. You may return to the table.

8 MS. BENNETT: Your Honor, the Plaintiff rest
9 at this point in time.

10 THE COURT: Very well. The Plaintiff rest.
11 Will the Defendant have any witnesses?

12 MR. GRIFFITH: Yes, Your Honor. The
13 Defendant will call Ms. Teresa McNeese, the
14 superintendent of education.

15 THE COURT: Very well.

16 TERESA MCNEESE,
17 having first been duly sworn, was examined and testified
18 as follows:

19 THE CLERK: Please take a seat in the
20 witness stand and state your name and address for the
21 record.

22 THE WITNESS: My name is Teresa McNeese and
23 my address is 605 South Cumming Street, Fulton,
24 Mississippi.

1 MR. GRIFFITH: May I proceed, Your Honor?

2 THE COURT: Yes, sir.

3 DIRECT EXAMINATION

4 BY MR. GRIFFITH:

5 Q Ms. McNeese, very briefly will you give the
6 Court the benefit of your educational background and
7 your training and your current position?

8 A Yes, sir. I'm a 1977 graduate of Itawamba
9 High School and a 1979 graduate of Itawamba Community
10 College and then in 1981 University of Mississippi with
11 a bachelor's degree. And then in 1984 an Ole Miss
12 graduate with a master's degree in education. I've been
13 in education and served as a teacher and a coach and an
14 administrator in Pasadena, Texas; Senatobia,
15 Mississippi; Mooreville, Mississippi. Been a principal
16 at Fairview. That is in the Itawamba County School
17 District. And then in the fall of 2007, I was elected
18 Superintendent of Education, and I took office in
19 January of 2008.

20 Q What is your relationship, Ms. McNeese, to
21 the Board of Education of Itawamba County?

22 A My job is to be their advisor in matters, to
23 make recommendations to them and then, of course, on
24 their vote and recommendation, then I implement those

1 policies or rules within our schools.

2 Q The issue that I'm asking you about relates
3 to the disposition or how the school prom was to be
4 handled this year. What was the decision of the board
5 of education regarding the prom and why was it made?

6 A Yes, sir. After a period of time which
7 Mr. Wiygul and I, Mr. Trae Wiygul, the high school
8 principal at Itawamba High School, we had been
9 discussing this matter for a couple of years, just about
10 liability issues that -- that seem to come about from
11 schools hosting proms and the time taken out of class
12 for students to decorate and teachers and so forth.
13 That it was becoming such a distraction and becoming
14 such a liability that we had been discussing the fact of
15 no longer hosting the prom. But with the events of the
16 media and the press, you know, just we were being
17 hounded every day. Our students being hounded every
18 day. That we just felt like the best thing for us to do
19 was to withdraw our sponsorship.

20 Q Could you specifically tell Judge Davidson
21 what actions took place that constituted hounding or
22 disruption or distraction of the educational process
23 that you observed?

24 A Yes, sir. I've had -- I had parents call me

1 that said, you know, news media had contacted their
2 children via their cell phone asking for statements.
3 This is before we had made any decisions. You know,
4 children talking about it in the classrooms, things that
5 were being done that was just causing our teachers not
6 to have school, which our motto in our school is bell to
7 bell instruction. And we were having a hard time of
8 having bell to bell instruction.

9 We have state test right around the corner
10 that our high school students are required to pass to be
11 able to graduate. And we were not able to have school.
12 And it is my duty as the superintendent obviously to
13 provide a safe and orderly environment at our schools
14 that is conducive to learning and we felt like we were
15 losing that.

16 Q What is and what was at that time the core
17 mission of Itawamba County with regard to education?

18 A It is to provide a quality education for
19 every student.

20 Q What effect, if any, was there upon that
21 core mission by the distractions and the disruption that
22 you've described?

23 A We just felt like that we were not able to
24 instruct our students as they were needing, you know,

1 the full bell to bell instruction of our -- of our
2 instructors.

3 Q In making the decision that the board of
4 education made, first of all were you present during
5 that board meeting --

6 A Yes, sir.

7 Q -- on March 10?

8 A Yes, sir.

9 Q In making that decision, what alternatives
10 were open to the board of education? What could they
11 have decided?

12 A I don't know if I understand your
13 question.

14 Q In terms of cancellation altogether or
15 simply withdrawal of sponsorship or any other type of
16 decisions, what alternatives were open to them?

17 A Well, obviously, it was almost a no-win
18 situation either way. We knew that if we continued on
19 the course that we were in it was just going to be, you
20 know, just a snow ball rolling down hill. That we were
21 losing control of our education process at the school,
22 so we knew that we had to make a decision. It had come
23 to that point where we knew it was no longer something
24 that we could not address.

1 Q What precedent did the board of education
2 have from other schools nearby regarding the holding of
3 proms and how they were sponsored?

4 A Yes. We had spoken, you know, through my
5 affiliation with other superintendents and advice from
6 other school districts that they no longer hosted a prom
7 through their school district. They allowed the private
8 citizens, parents to do that, and there are several who
9 do not host the prom.

10 Q Specifically can you give us an example?

11 A I know Lee County doesn't. I probably know
12 more than that. I think some of our schools may just
13 host a sit-down dinner for those students who are in
14 that particular grade and don't have a dance per se.

15 Q In withdrawing its sponsorship of the prom,
16 what direction or detail directives, if any, did the
17 school board give to parents or any parents' group or
18 were there any specific directions on how to do it,
19 where to do and when to do it?

20 A No, sir. We asked -- you know, I had a few
21 parents who had told me that they would be interested in
22 helping with a prom if the school district chose to
23 withdraw their sponsorship. But we told them, you know,
24 we would not want to be a guiding light in that. We

1 wanted that to be totally parent directed.

2 Q As of this date, what is the status of the
3 plans that are underway for the prom?

4 A My last contact that someone actually talked
5 to me said that it was going to be at the Tupelo
6 Furniture Market and that it would be open to all
7 students. You know, they're not sending out
8 invitations. I think they basically just say, we're
9 having a dance and, you know, it's available to all
10 students. So I don't think there was an invitation per
11 se being sent out.

12 MR. GRIFFITH: Your Honor, may I confer with
13 counsel briefly?

14 THE COURT: Yes, sir.

15 BY MR. GRIFFITH:

16 Q One final question, Ms. McNeese. Do you
17 know where the Mantachie school is and whether it is
18 within Itawamba County and was one of the schools at
19 which proms were to be handled in a different way?

20 A Yes, sir. It is one of the schools that's
21 in the Itawamba County School District, and they no
22 longer host their prom. The parents host it.

23 MR. GRIFFITH: No further questions, Your
24 Honor.

1 THE COURT: Cross examination.

2 CROSS EXAMINATION

3 BY MS. SUN:

4 Q Good morning, Ms. McNeese.

5 A Good morning.

6 Q I just have a few questions for you. Let me
7 show you the February 5 e-mail. Do you recognize this
8 document?

9 A Yes, ma'am.

10 Q What is it?

11 A It's the Itawamba High School's regulations
12 for their prom.

13 Q Do you see where it says that the 2010
14 Itawamba High School junior, senior prom will be held
15 Friday April 2 in the IAHS commons?

16 A Yes, ma'am.

17 Q Where is the IAHS commons?

18 A It is the cafeteria area at the high
19 school.

20 Q Do you see below where there's some
21 paragraphs about the payments and what dates they're
22 due?

23 A Uh-huh, uh-huh, Yes.

24 Q And it says that payments must be made by

1 February 5 or at the absolutely latest March 5?

2 A Yes.

3 Q To your knowledge was the school collecting
4 money from students to attend the prom during that
5 time?

6 A Yes, ma'am.

7 Q And do you see that below there's some
8 criteria about the dates that students may bring?

9 A That's correct.

10 Q And so it is the policy of Itawamba County
11 High School District that prom dates must be of the
12 opposite sex?

13 A It is not a county policy.

14 Q Okay.

15 A That is not a policy for the county school
16 district. That is the rules of that particular high
17 school.

18 Q Do you believe that that policy is
19 appropriate?

20 A Those rules?

21 Q Yes.

22 A Yes.

23 Q Specifically the policy that the date must
24 be of the opposite sex?

1 A If you're referring to the rules, yes.
2 Because that -- that rule has been in effect 20 years,
3 and it has nothing to do with same sex. It is to do
4 with control of the prom situation.

5 Q So to the best of your knowledge up until
6 March 10 when the school board made that announcement --

7 A Uh-huh.

8 Q -- was the high school fully intending to
9 hold a prom at the IAHS commons?

10 A Yes, ma'am.

11 MS. SUN: Your Honor, may I have this e-mail
12 entered into evidence?

13 THE COURT: Pardon?

14 MS. SUN: May I have this e-mail entered
15 into evidence, this flyer that I just showed the
16 witness?

17 THE COURT: Any objection?

18 MR. GRIFFITH: No objection, Your Honor

19 THE COURT: There's no objection. It will
20 be admitted as P-2.

21 (WHEREUPON, THE ABOVE-MENTIONED
22 DOCUMENT WAS MARKED AS PLAINTIFF'S
23 EXHIBIT NO. 2 TO THE TESTIMONY OF THE
24 WITNESS AND IS ATTACHED HERETO.)

1 BY MS. SUN:

2 Q Let me show you what's been marked as
3 Exhibit A to this hearing. Do you recognize Exhibit
4 A?

5 A Yes, ma'am.

6 Q I'm sorry. It's Exhibit P-1.

7 A I recognize it.

8 THE COURT: Right. It's into evidence as
9 P-1.

10 BY MS. SUN:

11 Q I'm sorry. Do you recall receiving this
12 letter?

13 A Yes.

14 Q Let me show you the second page. Do you see
15 the last sentence where it states that we would
16 appreciate a response by March 10, 2010, so that we may
17 determine whether we will have to pursue our legal
18 options?

19 A Yes, ma'am.

20 Q So is it your understanding that by this
21 letter that the ACLU on behalf of the Plaintiff was
22 giving the school board until March 10 to respond to
23 this letter?

24 A Yes, ma'am.

1 Q And on March 10 that's the same day that the
2 school board decided to in your words withdraw
3 sponsorship of the prom?

4 A Yes.

5 Q Let me show you what was attached to
6 Defendant's opposition papers. Do you recognize this
7 document?

8 A Yes, I do.

9 Q And what is this?

10 A This is a notice of our special board
11 meeting that we were having that morning or afternoon.
12 I'm sorry.

13 Q And this was held on March 10, 2010?

14 A That's correct.

15 Q The same date that a response was called for
16 in the March 2 letter?

17 A Yes.

18 Q Do you see where it says that there will be
19 a meeting to discuss matters involving perspective
20 litigation?

21 A Yes.

22 Q Am I correct in understanding that the
23 perspective litigation was the litigation threatened by
24 the ACLU in this March 2 letter?

1 A Yes.

2 MS. SUN: Your Honor, may I introduce this
3 as an Exhibit to this hearing?

4 THE COURT: Yes, you may. Well, I ask is
5 there any objection?

6 MR. GRIFFITH: No, objection, Your Honor.

7 THE COURT: There's no objections. It will
8 be admitted.

9 THE CLERK: Plaintiff's Exhibit 3.

10 THE COURT: It will be P-3.

11 (WHEREUPON, THE ABOVE-MENTIONED
12 DOCUMENT WAS MARKED AS PLAINTIFF'S
13 EXHIBIT NO. 3 TO THE TESTIMONY OF THE
14 WITNESS AND IS ATTACHED HERETO.)

15 BY MS. SUN:

16 Q I'm going to show you another document. Do
17 you recognize this document?

18 A Yes, I do.

19 Q What is this document?

20 A This is the statement that the school board
21 voted on as a response to the distractions we were
22 having.

23 Q I see. Was this document provided to the
24 media?

1 A Yes.

2 Q In fact, it was publicized directly by the
3 school board to the media?

4 A Yes.

5 THE COURT: Let's see for the record what's
6 that number, Ms. Long, the Exhibit.

7 THE CLERK: I can't see it.

8 THE COURT: I think it's P-2.

9 THE CLERK: Oh, I see it. Yes, sir, it is
10 P-2.

11 THE COURT: P-2.

12 MR. GRIFFITH: That's not in evidence. I
13 believe --

14 THE COURT: Okay. I'm sorry. You want to
15 offer it into evidence?

16 MS. SUN: Yes.

17 THE COURT: I thought it was received.

18 MS. SUN: No. I believe that it was shown
19 to Ms. McNeese.

20 MS. BENNETT: No. Constance.

21 MS. SUN: Oh, I'm sorry. To the Plaintiff
22 by Defense Counsel.

23 THE COURT: If it's not in evidence, it's
24 admitted as P-4.

1 MR. GRIFFITH: No objection, Your Honor.

2 THE CLERK: P-4.

3 (WHEREUPON, THE ABOVE-MENTIONED

4 DOCUMENT WAS MARKED AS PLAINTIFF'S

5 EXHIBIT NO. 4 TO THE TESTIMONY OF THE

6 WITNESS AND IS ATTACHED HERETO.)

7 BY MS. SUN:

8 Q I'm sorry. Just one last question about
9 this document. Do you see in the second paragraph the
10 sentence starting, it is our hope --

11 A Uh-huh (affirmative response).

12 Q It is our hope that private citizens will
13 organize an event for the juniors and seniors?

14 A Yes.

15 Q Was it your intent to encourage private
16 citizens to organize a private prom?

17 A We would hope they would. Our parents
18 usually are very good at sponsoring things.

19 Q So it's correct that the school board was
20 encouraging private citizens to host a prom for the
21 juniors and seniors?

22 A Yes.

23 Q You mentioned in your testimony that there
24 was some disruptions that purportedly occurred, and I

1 want to ask you some questions about those disruptions.
2 You mentioned that there were some students who were
3 contacted by the media about the story. Did those phone
4 calls occur before or after March 10?

5 A Before.

6 Q Did any occur after March 10?

7 A Yes.

8 Q So the cancellation of the prom didn't stop
9 that alleged disruption from occurring?

10 MR. GRIFFITH: Object to the form of the
11 question as it refers to cancellation of the prom and
12 that did not occur, Your Honor.

13 THE COURT: Well --

14 MS. SUN: I will try to rephrase.

15 THE COURT: Try to rephrase, yes.

16 BY MS. SUN:

17 Q The school board's withdrawal of its
18 sponsorship in your words, that did not stop the
19 disruption you claim that occurred through media
20 contacting students; isn't that correct?

21 A No, it did not stop it.

22 Q In fact, weren't there -- wasn't there more
23 media interest after the school board's March 10
24 announcement?

1 A Yes.

2 Q You mentioned that some students were
3 talking in class and that was disruptive to the
4 educational environment. Do you remember that
5 testimony?

6 A Yes.

7 Q Isn't it fair to say that students talk in
8 class all of the time about issues not related to
9 school?

10 A Yes.

11 Q They talk about dating, sports, all sorts of
12 things?

13 A Yes.

14 Q And aren't there rules at school that allow
15 teachers to reprimand students for talking in class?

16 A Yes.

17 Q And there's certainly nothing about the
18 Plaintiff's request that prevented teachers or the
19 school from reprimanding or punishing students who were
20 being disruptive in class?

21 A No.

22 Q Thank you.

23 A I know the principal had had several
24 conversations with his faculty, you know, to let's stay

1 on the object of having school. And I know he had that
2 conversation several times. Now, as far as the day to
3 day, I'm not at the school every day.

4 Q Right. So you don't actually have any
5 personal knowledge of the alleged disruption that
6 happened at school?

7 A Not besides secondhand information.

8 Q Thank you. Do you recall receiving the
9 March 2 letter from Plaintiff?

10 A Yes.

11 Q Between the time of that March 2 letter and
12 the March 10 announcement to the media about its
13 withdrawal of the sponsorship of the prom, did school
14 get cancelled, did school go on? I'm sorry. Did school
15 occur between March 2 and March 10 except for the
16 weekends?

17 A Yes.

18 Q There was no cancellation of any classes as
19 far as you know?

20 A No.

21 Q How about after March 10, has there been any
22 cancellation of classes or school days?

23 A No.

24 Q You mentioned that there had been growing

1 concerns about the prom in general and whether the
2 school should continue to host the prom. Do you
3 remember that testimony?

4 A Yes.

5 Q What exactly were those concerns again?

6 A As far as -- ask that question.

7 Q I'm sorry. I want to get a sense of what --
8 what exactly were the ongoing concerns about the school
9 organizing the prom?

10 A You know, number one, you have a liability
11 issue. Students, you know, underage drinking and
12 unfortunately drug use. So you have those issues that
13 are liability issues. And then you have the issue of
14 students who are coming out of classes to decorate for
15 the prom, who, you know, you're not having good quality
16 classroom time because you're using all of that time to
17 do preparations for the prom. And like I said, we've
18 got state wide test coming up. This is probably the
19 more critical time to be having classroom instruction
20 than any time.

21 Q Sure. But up until March 10, the school to
22 your knowledge was fully intending on hosting the prom
23 at IAHS commons?

24 A Yes.

1 Q I just want to make sure I have your
2 testimony clear. The disruptions that you mentioned
3 were telephone calls to students, some talking in class.
4 That's it as far as you know?

5 A E-mails, phone calls, yes.

6 Q Those were e-mails to you and other school
7 board members?

8 A And students. And I mean, just -- just
9 about everyone involved in the day-to-day operation,
10 yes.

11 Q Well, let me ask you about the e-mails to
12 you and to other administrators. Is it your testimony
13 that it's inappropriate for concerned citizens and
14 parents to contact you by telephone and e-mail?

15 A I am -- I'm very open to people contacting
16 me. In fact, that's why I sat down with Constance for
17 an hour and talked to her about this situation that was
18 at hand, but, you know, some of the e-mails and phone
19 calls were very polite and very professional and others
20 were pretty abusive.

21 Q Sure.

22 A And I know as a public official, I have to
23 accept some of that, but I think there's a line that has
24 been crossed.

1 Q Constance was not the author of any of the,
2 quote, unquote, abusive e-mails?

3 A Absolutely not. Constance has been very
4 respectful and very well spoken in any of our
5 conversations.

6 Q And those e-mails is it fair to say that
7 there have been e-mails before and after the March 10
8 decision by the school board to withdraw hosting the
9 prom?

10 A Yes.

11 Q And, in fact, haven't there been more
12 e-mails since the school board announced to the media
13 that it was withdrawing its hosting of the prom?

14 A Yes.

15 Q And so that decision to not host the prom
16 hasn't ceased that -- those alleged disruptive
17 activities?

18 A No.

19 Q And despite those e-mails, the school board
20 presumably is continuing to operate normally as a school
21 board would?

22 A We feel like we had to make the best
23 decision for our students. And, you know, sometimes you
24 make decisions that are not popular, but you still have

1 to make the ones that you feel are best for the -- just
2 not the students of Itawamba High School, but the
3 students of our whole county school district.

4 Q Sure. And you're continuing -- the school
5 board along with yourself are continuing to operate on a
6 normal basis?

7 A We're trying.

8 Q I'm sorry. Is that a yes?

9 A That is a yes.

10 Q Thank you. Are there any other
11 disruption -- I'm sorry. Are there any other disruptive
12 activities that you can recall?

13 A No.

14 MS. SUN: I have nothing further, Your
15 Honor.

16 THE COURT: Very well. Any redirect?

17 MR. GRIFFITH: Briefly, Your Honor. May I
18 proceed?

19 THE COURT: Yes, sir.

20 RE-DIRECT EXAMINATION

21 BY MR. GRIFFITH:

22 Q Ms. McNeese, the decision of the board of
23 education was made on March 10, 2010, not to host the
24 prom?

1 A Yes, sir.

2 Q Is that correct?

3 A Yes, sir.

4 Q The day of the week was Wednesday, was it
5 not?

6 A Yes, sir.

7 Q What additional days was school held after
8 the 10th of March up until day?

9 A The 11th and 12th which is Thursday and
10 Friday.

11 Q And what happened the following week, this
12 entire past week, Monday through Friday March 15 through
13 19?

14 A The school was on spring break.

15 Q Closed?

16 A Yes.

17 MR. GRIFFITH: No further questions, Your
18 Honor.

19 THE COURT: Very well. You may stand down,
20 please, ma'am. You can return to Counsel table. The
21 Defendant may call your next witness.

22 MR. GRIFFITH: Yes, Your Honor. Defendant
23 calls as its next witness Mr. Trae Wiygul, principal of
24 the high school.

1 THE COURT: Mr. Wiygul, if you'll come up
2 and be sworn, please, sir.

3 TRAE WIYGUL,
4 having first been duly sworn, was examined and testified
5 as follows:

6 THE CLERK: Please take a seat in the
7 witness stand and state your name and address for the
8 record.

9 THE WITNESS: My name is Trae Wiygul. I'm a
10 principal at Itawamba Agricultural High School. My
11 address is 100 Hope Drive, Mantachie, Mississippi
12 38855.

13 DIRECT EXAMINATION

14 BY MR. GRIFFITH:

15 Q Mr. Wiygul, would you please give us the
16 benefit briefly of your educational background and your
17 training?

18 A Yes, sir. I'm a 1991 graduate of Itawamba
19 Agricultural High School. I got my bachelor's degree at
20 Mississippi State University in 1996. Master's from Ole
21 Miss in education and leadership. Started my teaching
22 career at Mooreville High School, and I spent four years
23 there before taking a job at Dorsey Attendance Center
24 which is in the Itawamba County School District in 2000.

1 I served as assistant principal and coach and teacher
2 there for two years. In 2002, I took over the
3 principal. I served as principal for Dorsey Attendance
4 Center for four years before moving to Itawamba
5 Agricultural High School for the last four years. The
6 first two years served as assistant principal and
7 athletic director, and I've been principal for the last
8 year and a half.

9 Q Mr. Wiygul, what discussions have taken
10 place in which you've participated during the last
11 several years over continuation of the school's
12 sponsorship of the annual prom?

13 A For the last -- you know, I've been four
14 years. Before that I was at a Dorsey which is a K-H.
15 We have no issues with the prom. We had several
16 discussions on how easy it would be to, you know, pass
17 that burden on to our parents. And we knew of several
18 schools in the surrounding area, Lee County Schools,
19 Mantachie had passed on the sponsorship of the prom to
20 the parents. It would just relieve a burden off of us
21 as administrators and the school, the school district
22 simply because, you know, we're talking about drinking,
23 drugs, issues like that.

24 Major issue we have at school is the time

1 spent out of the classroom which I think I had four
2 junior sponsors and four senior sponsors that are all
3 teachers. Their job is decorating. That's taking two
4 or three days to work on getting the prom ready. Those
5 students that are helping with the prom, they're out of
6 the classroom. That's a major issue.

7 Who's being brought to the prom by
8 perspective students. We have almost close to -- a
9 little over 200 that would be attending the prom. You
10 know, they're bringing 200 dates. We don't know the
11 background of some of those dates and that concerned us
12 very much as well.

13 Q As of March 10, the date of the decision of
14 the Board of Education to no longer sponsor the prom,
15 what direct contact did you receive by way of e-mail
16 from individuals relating to the board of education and
17 the issues that were before the board regarding the
18 upcoming prom?

19 A After March 10?

20 Q Yeah, before the decision was actually made.

21 A Before the decision was actually made --

22 Q On March 10 to no longer sponsor the prom.

23 A Yes, sir.

24 Q Did you receive any e-mails from other

1 individuals, persons in the community regarding the
2 school board or you?

3 A Not before that I recall. I'd have to go
4 back and look and see.

5 Q As of March 11, can you state whether or not
6 you have received a significant number of e-mails at
7 that point?

8 A Yes, sir. I'm getting bombarded by e-mails
9 that are 90 percent negative, 10 percent positive. Just
10 a rough estimate.

11 Q Would you characterize what the negative
12 e-mails --

13 A I've been called every name known to man,
14 negative names. I've been called a bigot, a homophobic,
15 several curse words. I've printed some of those off and
16 gave to our school board attorney. It's been pretty
17 rough.

18 MR. GRIFFITH: Your Honor, I have before me
19 a collection of just a sampling of those e-mails. I'm
20 going to hand them to opposing counsel. I'd like to
21 have these marked as Exhibit 1 for the Defendants a
22 collective Exhibit consisting of exemplary e-mails from
23 and after March 10.

24 THE COURT: Well, hand them to Counsel.

1 MS. BENNETT: Your Honor, we object to the
2 introduction of these e-mails as not being relevant
3 unless any of them are actually from Constance. But
4 otherwise this doesn't go to show that Ms. McMillen's
5 actions caused a disruption in the school. They all
6 occurred after the board ceased to sponsor the prom.
7 And so, you know, these would be relevant to whether the
8 school board actions caused a disruption but not whether
9 or not Ms. McMillen's action caused the disruption.

10 MR. GRIFFITH: May it please the Court,
11 these are actually dated on the date of the decision
12 which was that night and these are earlier than that.
13 Some are on that or after and they all refer to the
14 disruption and the distractions of the educational
15 process at school.

16 THE COURT: Let's mark them for
17 identification.

18 MR. GRIFFITH: Yes, Your Honor.

19 (WHEREUPON, THE ABOVE-MENTIONED
20 DOCUMENT WAS MARKED AS DEFENDANT'S
21 EXHIBIT NO. 1 TO THE TESTIMONY OF THE
22 WITNESS AND IS ATTACHED HERETO.)

23 THE COURT: And let the Court review and see
24 what they are. Marked for identification.

1 these e-mails, but now, Mr. Wiygul are these people
2 complaining about the current status of the prom?

3 THE WITNESS: Most of them talk about
4 canceling the prom. A lot of them I do not read because
5 it's just like a form -- it looks like a form letter to
6 me. So I just kind of read the first one and delete the
7 majority of them. And a lot of them is in support of
8 Constance and allowing her to bring her girlfriend to
9 the prom. A lot of them, you know, just talks about how
10 stupid of a decision we made as far as the school
11 district.

12 THE COURT: Okay. Let's mark it for
13 identification.

14 MR. GRIFFITH: May I confer with Counsel,
15 Your Honor?

16 THE COURT: Yes, sir.

17 MR. GRIFFITH: Your Honor, no further
18 questions of this witness.

19 THE COURT: Okay. Plaintiff may cross
20 examine Mr. Wiygul.

21 MS. BENNETT: May I proceed, Your Honor?

22 THE COURT: Yes, you may.

23 CROSS EXAMINATION

24 BY MS BENNETT:

1 Q Mr. Wiygul, are you aware of who is
2 collecting the proceeds for the prom that was planned on
3 April 2?

4 A Yes, ma'am.

5 Q Do you know what happened to those proceeds
6 for tickets after the decision was made for the school
7 to not host the prom?

8 A We refunded those back to the students.

9 Q You talked about receiving these some 4,000
10 e-mails, correct, since the school board issued its
11 statement about not hosting the prom? Did any of
12 that -- how did those e-mails impact the educational
13 process?

14 A How they impacted my educational process, I
15 have to go through every one of them to find out if any
16 of them is school related. I get several e-mails from
17 our curriculum coordinator, our Title 1 federal program
18 coordinator, all different schools. And, you know, when
19 you've got 125 every hour, you've got to go through
20 every single one of them to find out which one is
21 relevant to your job or which one is relevant to the
22 situation that's going on.

23 Q So that makes your job more difficult. Do
24 you know how they've impacted the actual classroom

1 lessons?

2 A No, ma'am.

3 Q Do you know if they've impacted the actual
4 classroom lessons at all?

5 A These e-mails should not impact the
6 classroom. Those are to me.

7 Q And you're actually in the high school,
8 right, every day?

9 A Every day.

10 Q And after the demand letter was sent by
11 someone on March 2, did you receive a copy of that
12 demand letter?

13 A Yes.

14 Q Are you aware of any classes not being held
15 or lessons not being conveyed?

16 A All classes were held. That afternoon we
17 met with the teachers. I had a faculty meeting. I told
18 them that basically we were -- a letter was sent. I
19 said we are not to talk about this potential litigation
20 in our classrooms. We're not to allow our students to
21 talk about this. And several of my teachers told me at
22 that time, you know, we have to -- it's hard to start a
23 class for having to get them back in the fold of
24 learning.

1 Q Were your teachers able to do that?

2 A They were able to address it but, you know,
3 it was common thing.

4 Q So the school administrator, you and
5 teachers were able to work out any students talking in
6 class about the issues?

7 A Yes.

8 Q And you mentioned the fact that there had
9 been discussions about the distraction that the prom
10 caused overall about decorating, taking teachers away
11 from the class or students away from the class. Are
12 there other events that take teachers or students away
13 from class for decorating at times?

14 A For decorating?

15 Q Yeah, like pep rallies or --

16 A Teachers don't decorate for pep rallies.

17 Q But students do miss class to decorate for
18 pep rallies?

19 A Sometimes.

20 Q Were you at the school board on March 10?

21 A Yes, ma'am.

22 Q Did these issues about decorations come
23 up?

24 A The issue of what we're talking about here

1 today is the main issue.

2 Q So at the board meeting y'all actually
3 talked about the demand letter that had been received
4 and how the board wanted to respond to it?

5 A Yes, ma'am.

6 MS. BENNETT: May I have a moment, Your
7 Honor?

8 THE COURT: Yes. Let me ask one question
9 here, and this may prompt further question from you and
10 Mr. Griffin. Mr. Wiygul, the memo dated February the
11 5th, 2010, which is in evidence as --

12 MS. BENNETT: P-1, Your Honor.

13 THE COURT: -- P-1 apparently initiated by
14 Sandy Prestage and Sundra Sabine. Now, who are these
15 people?

16 THE WITNESS: Those are junior and senior
17 sponsors.

18 THE COURT: They're teachers with the
19 school?

20 THE WITNESS: Yes, sir.

21 THE COURT: Very well.

22 MS. BENNETT: May I have a moment, Your
23 Honor?

24 THE COURT: Yes.

1 MS. BENNETT: Your Honor, we tender the
2 witness.

3 THE COURT: Very well. Any redirect?

4 MR. GRIFFITH: No redirect, Your Honor. We
5 call our next witness Mr. Eddie Hood.

6 THE COURT: Okay. Just a moment.
7 Mr. Wiygul, you may take a seat and Mr. Hood.

8 EDDIE HOOD,
9 having first been duly sworn, was examined and testified
10 as follows:

11 THE CLERK: Just take a seat in the witness
12 stand and state your name and address for the record.

13 THE WITNESS: Okay. Eddie Hood, 2115 Walker
14 Levy Road, Fulton, Mississippi.

15 MS. FLOYD: May I proceed?

16 THE COURT: Yes, ma'am.

17 DIRECT EXAMINATION

18 BY MS. FLOYD:

19 Q Mr. Hood, can you please state your
20 relationship with the Itawamba County School District?

21 A I've been a school board member for the
22 first district for -- this will be the 18th year.

23 Q And as a school board member, do you hold
24 any offices?

1 A I'm chairman of the board.

2 Q How many of those years have you been
3 chairman?

4 A Probably half.

5 Q What is your current employment?

6 A With AllState Insurance.

7 Q And what is your educational background?

8 A Graduate of IHS in 1969 and several
9 insurance courses since then.

10 Q Mr. Hood, did you help participate in the
11 board's decision to stop hosting the prom?

12 A Sure did.

13 Q Prior to that decision being made, had you
14 received any statements from anyone that were negative
15 about the situation that was going on?

16 A I had received several statements. I sure
17 had.

18 Q Can you surmise any of those?

19 A The statements were of the concern of what
20 were we going to do to make it a safe environment at the
21 school and continue it to host the prom, you know and
22 not let that interfere with what we were doing in the
23 every day education process. That was the concern on
24 the parents that were calling me and talking to me.

1 Q As your tenure on the board, has this been
2 the first year that it's actually been discussed that
3 the Itawamba County School District might stop hosting
4 the high school prom?

5 A It had discussed it before. We just didn't
6 follow through like we should have.

7 Q How many years do you think it's been being
8 discussed?

9 A I know over the last four or five years it's
10 been discussed.

11 Q And you've participated in those
12 discussions? You had personal knowledge of that?

13 A Yes, I did.

14 Q And what are your concerns of the school
15 district and it hosting the prom?

16 A My concern is, you know, we want to have
17 school. We are in the business of school, you know and
18 educating our children. We should have got out of the
19 prom business several years ago. We did not. We run
20 into a situation now where we see it is causing
21 disruption. And we want to move on and we want our
22 children to go to school, get an education, let our
23 teachers teach and do the things that we should do in a
24 school district.

1 Q Do you know of other schools that no longer
2 host their prom?

3 A I do. According to the local media, there
4 was a article in the Tupelo Journal and probably about
5 75 percent of schools according to them do not host a
6 prom. Some do have dinners, some have recognition
7 ceremonies but most of the ones that I know don't.
8 That's the way I understand it now.

9 Q So it's your understanding that the majority
10 of the schools in Mississippi do not host the prom?

11 A According to the article in the Tupelo Daily
12 Journal some couple of weeks ago, yes.

13 Q Are there any other high schools in Itawamba
14 County?

15 A There are. There are two more.

16 Q And do either of those host their prom?

17 A No.

18 Q Have you been contacted by Mr. Wiygul, Trae
19 Wiygul, or spoke to him at any time about disruptions in
20 the classroom?

21 A I sure have.

22 Q Were any of those prior to March the 10th?

23 A Yes, they were.

24 Q Since March the 10th, have you also received

1 communications through media and people of interest?

2 A I sure have.

3 Q And what have those been like?

4 A Been just bombarded with e-mails. You know,
5 the situation. Why are we doing it. Just bombarded
6 like Mr. Wiygul said.

7 Q And is it your opinion that those people
8 think that this prom was cancelled because Constance is
9 a lesbian?

10 A Correct.

11 Q And is that the reason the prom was not
12 hosted?

13 A No, it's not.

14 Q And would you reiterate why it is that we
15 chose not to host the prom?

16 A We chose not to host the prom and get to the
17 business of the school. Most of those e-mails let me
18 say have come around the world not knowing the whole
19 situation. You know, that's been most of the e-mails.

20 Q People that you would characterize as
21 knowing the whole situation, how have those responses
22 been?

23 A Very positive.

24 Q Mr. Hood, to your knowledge is there

1 actually a prom?

2 A As far as I know, yes, there are.

3 Q And that's been the word in the community?

4 A Yes, it is.

5 Q Do you know where?

6 A Tupelo Furniture Market is my

7 understanding.

8 Q And do you have a relative who would

9 actually attend that prom?

10 A I do.

11 Q And she is? I'm not asking for any names.

12 A Granddaughter.

13 Q Granddaughter. And it's her understanding

14 there's a prom?

15 A Yes, it is.

16 Q How did she get word of that? Do you know

17 if it was the media?

18 A The media first of all said that the prom

19 was cancelled which, of course, was wrong. Then they

20 got word at school I think maybe through the other

21 students talking that there is a prom, you know. It's

22 just not sponsored by the school district anymore.

23 Q Has she received an invitation to that

24 prom?

1 A No invitation. It's all just strictly --
2 the tickets are available.

3 MS. FLOYD: May I speak with Counsel,
4 please?

5 THE COURT: Yes, ma'am.

6 BY MS. FLOYD:

7 Q Mr. Hood, has this in any way affected your
8 place of employment?

9 A It has. Because of e-mails that we receive.
10 First of all I've got an old e-mail address on the
11 district web site. It was an AllState e-mail address
12 which now is a different e-mail address. And so they
13 picked up that I worked for AllState so they called the
14 corporate office and several threats about me and then
15 it got down to threats to our local offices and my local
16 staff.

17 Q What type of threats?

18 A According to the -- our attorneys and our HR
19 director I spoke with --

20 THE COURT: Just a moment.

21 MS. BENNETT: Your Honor, we object. The
22 issue of whether or not Mr. Hood received threats to his
23 work e-mail is not relevant to whether there was a
24 disruption in the school.

1 THE COURT: Objection sustained. We're
2 concerned about disruption at school.

3 BY MS. FLOYD:

4 Q Were you afraid that those type of
5 disruptions and type of e-mails that you were getting
6 would carry over into the school setting?

7 A I was afraid of that.

8 MS. FLOYD: No further questions, Your
9 Honor.

10 THE COURT: Very well. You may cross
11 examine.

12 CROSS EXAMINATION

13 BY MS. SUN:

14 Q Good morning, Mr. Hood.

15 A Good morning.

16 Q I just have a couple of questions about your
17 testimony.

18 A Yes, ma'am.

19 Q You mentioned that you've received e-mails
20 and other types of communications to you as a school
21 board member?

22 A Right.

23 Q Is it your testimony that as a public school
24 official that it's inappropriate for citizens to e-mail

1 you about decisions that the school board makes?

2 A Did you say is it inappropriate?

3 Q Right.

4 A No, it's not inappropriate at all.

5 Q And, in fact, I presume this is not the
6 first e-mail that you've received --

7 A Sure.

8 Q -- as a school board member?

9 A That's correct.

10 Q And I know you're a school board member, but
11 do you have any role in terms of directly educating
12 students at Itawamba High School?

13 A Just as a school board member.

14 Q Between March 2 and March 10, have you
15 visited school grounds?

16 A Yes. I was at school a couple of times. I
17 was trying to think, you know, because we do visit
18 periodically. I was at school some during those times.
19 Not for a long period of time, but I did visit the
20 school, yes.

21 Q Was the school operating normally?

22 A It was operating normally but it was --
23 yes.

24 Q Okay. At any time did the school board

1 consider allowing Constance to bring her girlfriend to
2 the prom?

3 A We agreed to follow the rules that were set
4 out for the prom and that we would stick strictly to the
5 rules.

6 Q At no point did the school board consider
7 actually allowing Constance to bring her girlfriend to
8 the prom?

9 A Not to my knowledge. Strictly by the rules.

10 Q What about her request to wear a tuxedo to
11 the prom, was there at any time consideration by the
12 school board to allow her to wear a tuxedo to the prom?

13 A Not by the board, no, ma'am.

14 Q Was it the school board's decision that
15 female students could not wear tuxedos to the prom?

16 A Yes. We did decide that according to the
17 rules of the prom.

18 Q And it's also school board policy that
19 students cannot bring opposite sex dates to the prom?

20 A No. It's not a school board policy. That's
21 a policy -- it's a rule for the prom at IHS. It's not a
22 school board policy.

23 Q But the school board agreed with that
24 policy -- I'm sorry, agreed with that rule?

1 A We did.

2 MS. SUN: May I have a moment, Your Honor?

3 THE COURT: Yes, ma'am.

4 MS. SUN: Your Honor, I have no further
5 questions. Thank you.

6 THE COURT: Very well.

7 MS. FLOYD: May I proceed?

8 THE COURT: Yes, you may.

9 RE-DIRECT EXAMINATION

10 BY MS. FLOYD:

11 Q Mr. Hood, you were asked about the rule of
12 the high school about all dates had to be of the
13 opposite sex. Do you know how long that's been a rule
14 at Itawamba Agricultural High School?

15 A As far as I know for years. I've talked to
16 teachers that sponsored the prom years ago, and it was
17 in place then so it's been in place for years.

18 Q Do you know the history behind that?

19 A It is trying to keep actually a bunch of
20 boys or a bunch of girls getting together and having a
21 party and making it a party, not a prom. And that was
22 to hold down the disruption, was the whole content of
23 the rule.

24 Q Did it have anything to do with lesbian or

1 gay issues of any kind?

2 A Never.

3 MS. FLOYD: No further questions, Your
4 Honor.

5 THE COURT: Okay. Does the Plaintiff wish
6 to ask any further questions relative to her last
7 question about how long this rule has been in effect?

8 MS. SUN: No, Your Honor.

9 THE COURT: Very well. You're excused. You
10 may call your next witness.

11 MR. GRIFFITH: The Defendant calls the final
12 witness Mr. Jim Keith.

13 THE COURT: Okay.

14 MS. SUN: Your Honor, we maintain the
15 objection to the testimony. I think we've heard from
16 the folks who are directly involved with school
17 administration. It's not clear to me at all.

18 THE COURT: Let's swear him in and put him
19 on the witness stand.

20 JIM KEITH,
21 having first been duly sworn, was examined and testified
22 as follows:

23 THE CLERK: Take a seat in the witness stand
24 and state your name and address for the record.

1 THE WITNESS: I'm Jim Keith. I'm an
2 attorney. I actually practice law in Jackson,
3 Mississippi, and my home address is 289 Trey Crossing,
4 Ridgeland, Mississippi.

5 DIRECT EXAMINATION

6 BY MR. GRIFFITH:

7 Q Mr. Keith, would you give the Court the
8 benefit of your background, training, education and
9 experience as they relate to school boards in the state
10 of Mississippi including this board of education?

11 A Okay. First of all I have an undergraduate
12 degree in electrical engineering from Mississippi State.
13 I practiced in that field for about eight years in
14 Miami, Chicago -- or excuse me -- Atlanta and New York.
15 Went back to law school in 1979 and got a degree from
16 the University of Mississippi School of Law. Started
17 practicing in 1982, and the very first year I started
18 practicing in our school law area, education and
19 employment law.

20 And I've been practicing in the educational
21 arena since 19 -- well, 1982. In fact, 98 percent of my
22 practice is in the field of educational law, advising
23 school boards, working with school boards. Actually a
24 school board attorney for ten school districts, the

1 Mississippi School Board Association, the Mississippi
2 High School Activity Association. And then I consult
3 with over a hundred school districts on any given day.
4 This year being one of the more active years.

5 Q Mr. Keith, what occasion have you had to
6 interact with and even provide training for the members
7 of the board of education at Itawamba County?

8 A Well, as legal counsel for the School Board
9 Association for at least the last ten years, I've been
10 part of the state mandated legal training for all school
11 board members in the state of Mississippi. Every school
12 board member elected or appointed must go through
13 mandated training, mandated by the legislature including
14 the Mississippi School Board Association. And my
15 component of that is about a three-hour component of
16 advising the school board members on how to make legally
17 founded decisions, governance, implementation of policy,
18 things of that nature. In other words how do they
19 function as a school board member.

20 These are lay members who are not paid a lot
21 of money to provide a substantial amount of their time
22 to deal with some very, very controversial issues. And
23 so that training is something that school board members
24 have to go through before they can ever start

1 functioning fully as a school board member. In fact,
2 there's a statute that says if they do not go through
3 that training, they are removed from office.

4 Q What expertise do you have, Mr. Keith, in
5 the areas of school policies, governance and decision
6 making by a school board such as the Itawamba County
7 Board of Education?

8 A Well, 27, almost 28 years now I've been
9 advising school board members on how they govern through
10 policy. Talking with them about policy, policy
11 development procedures. How to govern when you don't
12 have a clear policy. How to govern when you have gray
13 areas or difficult areas or controversial areas.
14 There's just no easy decision by school board members
15 anymore. It's a very difficult position for them to
16 have to cover the range of issues any one of which can
17 require -- or to result in litigation. Other issues as
18 well.

19 Obviously, in today's world student
20 performance, accountability, all of those issues are
21 things that they have to concentrate on in order to
22 carry out their mandated statutory requirements under
23 the Mississippi Legislative Law, Mississippi statute.
24 It's a very difficult job for them to do that and so

1 I've been spending about 27 years trying to help school
2 board members to effectively carry out their duties.

3 Q In preparation for your testimony today,
4 what information have you gathered and what type of data
5 have you accumulated that would be of the type that is
6 usually and regularly relied upon by experts in your
7 field?

8 THE COURT: Just a moment. Have you
9 finished with his qualifications?

10 MR. GRIFFITH: Yes, Your Honor.

11 THE COURT: Ms. Sun, do you wish to voir
12 dire him on his qualifications? Do you want to ask him
13 any questions? If not -- and I don't know what a lawyer
14 can testify to other than the law.

15 MR. GRIFFITH: That's always the question,
16 Your Honor. He's only testifying as to governance and
17 decision-making process and the entire area of school
18 policy, not on the questions of law. On the regularity
19 of the decision-making process in this particular
20 case.

21 THE COURT: Ms. Sun, do you wish to do any
22 voir dire to his qualifications?

23 MS. SUN: Your Honor, I don't have any
24 objection to his qualifications as an attorney. I

1 object to his testimony as a whole because the things
2 that he's testifying about are not at issue in this
3 case. We have no concern about the regularity of how
4 this decision was made. We contest its
5 constitutionality, and to the extent that he's going to
6 offer his opinion as a school board attorney about the
7 constitutionality of their actions, we think that's
8 completely inappropriate.

9 THE COURT: Let me ask you this, Mr. Keith.
10 Have you ever testified before as an expert witness?

11 THE WITNESS: No, sir

12 THE COURT: Well, this Court will not permit
13 him to testify as to questions of law.

14 MR. GRIFFITH: Yes, sir.

15 THE COURT: And I don't know what else a
16 lawyer -- I don't know what else he can testify to
17 except his opinion relative to the law.

18 MR. GRIFFITH: If I can proceed, I believe I
19 can establish that.

20 THE COURT: Very well.

21 BY MR. GRIFFITH:

22 Q Very specifically, Mr. Keith. I will not be
23 asking you nor will you give legal opinions, okay.

24 A Correct.

1 Q And that was our understanding at the very
2 beginning?

3 A Absolutely. I was never asked to do that.

4 Q What were you asked to do?

5 A I was asked to look at the decision-making
6 process that this board went through to try to make a
7 decision in the best interest of the school system. As
8 you know or as I've just stated, boards typically govern
9 by policy. Unfortunately, you can't have a policy for
10 every single issue that comes before a school board.

11 So the training that is provided to school
12 board members and this is sound, not only in just pure
13 governance but legality and everything else is to ask
14 yourself this real simple question. Is the decision
15 that I'm about to make how is it going to impact student
16 performance because in today's no child left behind,
17 student's performance, accountability, budget issues,
18 these are all decisions that school board members have
19 to address every time they meet.

20 Bottom line is our decision, how is it going
21 to impact on student performance. And that's what we
22 ask school boards to do in terms of their responsibility
23 under the statute. I think it's consistent with the law
24 as well, I mean, in making decisions based on that

1 preface.

2 Q And what was the decision-making process in
3 this case?

4 A I talked to every single board member. I
5 talked to the superintendent. I talked to the principal
6 and assistant principal and it appears to me I was
7 informed that the deliberative process was the process
8 by which they debated this issue, talked about this
9 issue and made a decision that in their estimation
10 because of the distractions they felt like that their
11 decision to withdraw sponsorship of the prom was what
12 was necessary to get to that basic issue of student
13 performance.

14 Q In your affidavit that you submitted in
15 conjunction with the response of the Defendants, can you
16 state whether or not you have set forth with specificity
17 those distractions and disruptions?

18 A Yes. Well, I was told that there were a lot
19 of distractions, a lot of distractions in the classroom.
20 One of the things that we deal with every day is that we
21 have a very limited amount of time to work with students
22 in a classroom environment. Our board members know
23 that. And what we encourage board members to do is to
24 make sure that their decisions don't impact on that

1 learning environment. Make sure that whatever decision
2 they make enhances that learning environment.

3 And with all of these distractions, with the
4 telephone calls, the e-mails, the discussions in the
5 classroom, the board had the opinion -- reflected the
6 decision, decided that they needed to simply turn down
7 the rhetoric to be able to get back to the business of
8 educating children. And they felt like that in their
9 estimation withdrawal of sponsorship of the prom would
10 enable them to get back to the business of educating
11 kids and get away from some of these issues that were
12 upsetting this process.

13 Q Two questions. First is the data that
14 you've relied upon to reach that conclusion the type of
15 data that is usually relied upon by experts in the field
16 of school policies and school decision making and
17 governance?

18 A Well, it has to be. I mean, obviously, the
19 information that we get as an advisor to boards is
20 information that they hear. You know, they're community
21 members. They do hear from the community. Some board
22 members are elected, some are appointed. Regardless of
23 how they get to that position, they receive a tremendous
24 amount of information from all sides of every issue.

1 And they get controversial decisions that come before
2 them that are thrown in their lap all the time.

3 And as advisor to boards, again that's my
4 advice for them every time. You weigh all of the
5 information you have. You weigh the input. And then if
6 you don't have something that says this is the A, B, C
7 way to decide something, what is the impact my decision
8 is going to have on student learning, what is it going
9 to have on those kids and their ability to be educated
10 in our school system. If every school board member
11 concentrates on that, we would certainly get away from a
12 lot of these things that do distract us today.

13 Q How did this decision meet those objectives?

14 A And this decision met those objections,
15 particular parameters.

16 Q My final question to you, Mr. Keith is, can
17 you state whether or not the March 10, 2010, decision of
18 the Itawamba County Board of Education was consistent or
19 inconsistent with the core educational mission of
20 education in Itawamba County?

21 A Well, based on the input that I've had from
22 the board members and the administration, I think it was
23 they simply have to make a decision. It may not be a
24 popular decision. But their decision reflecting what

1 their primary mission is and that's education of the
2 students. That's what school board members ought to be
3 about all of the time. Sometimes they're not, but,
4 obviously, I think in this case they were.

5 Q Mr. Keith, based on your knowledge, your
6 experience and your expertise in this field of school
7 policy and decision making, what alternatives were open
8 to the Itawamba County Board of Education?

9 A Well, I think in this case once it reached a
10 point where they had to make a decision, if they wanted
11 to get back to educating students and that primary focus
12 of how is my decision going to impact learning, I don't
13 think they had much of a choice but to do what they
14 did.

15 MR. GRIFFITH: Your Honor, may I confer with
16 Counsel briefly? No further questions, Your Honor.

17 THE COURT: Do you want to ask any
18 questions, Ms. Sun?

19 MS. SUN: Your Honor, I'm struggling a
20 little bit because I believe that this testimony is
21 exactly what defense Counsel said it wasn't going to be.

22 MR. GRIFFITH: Objection, Your Honor.
23 Unless Counsel is going to make a speech to the Court,
24 we object extremely to that type of situation --

1 THE COURT: Well, here's the situation. The
2 man was never tendered as an expert. I never accepted
3 his testimony as an expert. The Court -- of course,
4 this is a non-jury matter and I can weigh this
5 testimony.

6 MR. GRIFFITH: Yes, sir.

7 THE COURT: But it appears to the Court that
8 the appropriate witness to testify in areas of education
9 would be an experienced school superintendent or a dean
10 of a school of education. Not a lawyer. You can give
11 me the law in your argument and briefs. That's the way
12 I look to the law, but he's made some assumptions. I'm
13 going to let you cross examine for what it's worth.

14 MR. GRIFFITH: Thank you, Your Honor.

15 THE COURT: Again, I say in a non-jury
16 setting.

17 CROSS EXAMINATION

18 BY MS. SUN:

19 Q As a school board attorney, do you also
20 instruct school board members that they must uphold the
21 constitutional rights of their students?

22 A Sure.

23 Q That includes their free speech rights?

24 A Sure.

1 Q Their right to equal protection?

2 A Sure. All of the constitutional
3 protections.

4 Q Right. And that's part of what a school
5 board must do as part of its duties is to uphold the
6 constitutional rights?

7 A Absolutely. They -- sure, sure, they ought
8 to be able to do that or should do it.

9 Q You mentioned in your declaration that you
10 have been involved in some controversial cases where
11 there was a lot of emotion in the community?

12 A Absolutely.

13 Q One of the examples I think you gave was --

14 A Bishop Knox versus Jackson County School
15 District involving prayer over the intercom.

16 Q Right. And that was a case involving a
17 school district terminating a principal who had allowed
18 school prayer?

19 A That's correct. I represented the school
20 district in that case. He was terminated initially. It
21 was later changed to a suspension.

22 Q You supported the school district's decision
23 however if you terminated or suspend their principal?

24 A Well, I was their lawyer.

1 Q Right. So you supported that decision?

2 A That's correct.

3 Q And I take it that that decision by the
4 school board also caused a lot of emotional response in
5 the community, a lot of controversy?

6 A It was absolutely. We did have quite a bit
7 of disruption in the classrooms.

8 Q Did you advise the school board at the time
9 to reverse its decision to terminate or suspend the
10 principal?

11 A Well, again, I was their attorney giving
12 them legal advice on what their legal options were. I
13 did not -- I don't recall giving them advice to make a
14 decision to reverse it or whatever. They made the final
15 decision. I just simply told them what I thought the
16 law was.

17 Q And you understood at that time that the
18 school board had a responsibility to uphold its
19 constitutional obligations despite the controversial and
20 the emotional nature of that decision?

21 A That is correct.

22 MS. SUN: I have no further questions.

23 MR. GRIFFITH: Your Honor, for the record
24 during our direct, we tendered the witness. Counsel

1 chose not to voir dire. At this time I reiterate our
2 request that this witness be accepted as an expert in
3 the field of school policy, governance and the
4 decision-making process of the school board in
5 Mississippi. Not matters of law. Matters of
6 administrative importance that relate to the functioning
7 of the school in accordance with the core educational
8 mission.

9 MS. SUN: Your Honor, Plaintiffs will renew
10 their objection to the relevancy of his testimony.

11 THE COURT: The objection is sustained.
12 Court is of the opinion that in a field of education the
13 appropriate expert would be an experienced school
14 superintendent or dean of a school of education. That's
15 the ruling of the Court.

16 MR. GRIFFITH: Thank you, Your Honor.

17 THE COURT: You may stand down.

18 MR. GRIFFITH: Your Honor, we have no
19 further testimony on behalf of this witness.

20 THE COURT: Does the Plaintiff have any
21 cross?

22 MS. BENNETT: No, Your Honor. No rebuttal.

23 THE COURT: That concludes the presentation
24 of proof. Now, I realize that time is of the essence in

1 this matter, and I think I received the Defendant's
2 brief over the weekend. It was submitted late Friday, I
3 believe.

4 MR. GRIFFITH: Yes, sir.

5 THE COURT: And I don't know -- does the
6 Plaintiff wish to respond to anything in the Defendant's
7 brief?

8 MS. BENNETT: Your Honor, I mean we could
9 respond in a closing statement to the Court.

10 THE COURT: That's my question. If we could
11 and if you people feel comfortable with this, I'd rather
12 hear a closing argument or closing statement from you.
13 Ordinarily in a non-jury setting, I give the parties
14 some time, three days, five days, ten days to submit
15 written responses or written submissions after the
16 presentation of proof. But I think in this case if we
17 can have oral argument and not have written submissions
18 to prolong the matter any further than it's been because
19 time is of the essence. Why don't we -- I was thinking
20 recess for lunch and come back at one o'clock and
21 present closing arguments.

22 MS. BENNETT: That will be perfectly okay
23 with the Plaintiff.

24 THE COURT: Is that satisfactory?

1 MR. GRIFFITH: That will be fine.

2 THE COURT: How much time do you want to
3 present those closing arguments?

4 MS. BENNETT: Twenty minutes, Your Honor.

5 MR. GRIFFITH: Your Honor, I've always said
6 no souls are saved after 20 minutes. So 20 at max.

7 THE COURT: That's satisfactory then we'll
8 recess until one o'clock. We'll reconvene at one
9 o'clock, and I'll hear your final arguments at that
10 time.

11 (WHEREUPON, A BRIEF RECESS WAS HELD.)

12 THE COURT: You may be seated. Plaintiff
13 may present a closing statement for the Court.

14 MS. BENNETT: May I proceed, Your Honor?

15 THE COURT: Yes, ma'am, you may.

16 OPENING STATEMENTS

17 MS. BENNETT: Your Honor, the Plaintiff's
18 burden and request to this Court to issue a preliminary
19 injunction in this matter consist of establishing a
20 substantial likelihood that she will prevail upon the
21 merits. The Plaintiff has met this burden as the
22 Defendants have not offered any evidence to contradict
23 that the speech or expression that Ms. McMillen intended
24 to make by attending the prom with her same sex

1 girlfriend was not protected under the first amendment.

2 Rather their only argument in responding to
3 this is that the entire process, the demand letter and
4 the subsequent decision of the school board to not host
5 a prom, caused a material disruption to the learning
6 environment and the school process. However, all of the
7 witnesses proffered by the Defendants have admitted that
8 there was no disruption to the learning process.

9 Principal Wiygul who is personally at the
10 high school admitted that the e-mails that he received,
11 which were actually after the point where the school
12 chose not to host the prom, did not disrupt the class.
13 He testified that after receiving the demand letter he
14 had a meeting with faculty and instructed them to make
15 sure that the students got back on track in the
16 classroom so that did, in fact, occur. That the
17 teachers were able to manage the classrooms.

18 There were claims about the prom being a
19 distraction itself, but these were issues based on prior
20 discussions about canceling or no longer having a prom.
21 And Principal Wiygul testified that at the board meeting
22 that was called on March 10 the discussion was how to
23 respond to the demand letter sent by us on behalf of
24 McMillen.

1 MS. BENNETT: It's in our brief. It's in
2 our table contents and that's at 1276.

3 THE COURT: That's sufficient.

4 MS. BENNETT: So it's our contention that
5 there has been a showing by the Plaintiff that there's
6 substantial likelihood that she will succeed on the
7 merits. In addition to there being no evidence of a
8 disruption, the Defendants are contending that by
9 withdrawing their sponsorship of the prom made this
10 issue mute.

11 In the case of Act Up v. Walt, which is also
12 referred to in our motion for preliminary injunction,
13 our memorandum. There was a situation where there was a
14 group Act Up that was protesting the governor's speech.
15 This is actually a district court case, and because
16 there was a fear about the group sitting in the gallery
17 of the capital to hear the governor's address to the
18 commonwealth, the gallery was closed to all public. It
19 wasn't closed to just the Act Up members but to all
20 public.

21 And in that case there was also an argument
22 made by the State that they closed it down because they
23 had a fear of a possible disruption, and the Court there
24 held that there was no compelling government interest at

1 stake because there was no reasonable basis for fearing
2 that the governor's speech would be disrupted. And
3 there they found that even if a compelling interest
4 existed to restrict the speech, and that would be the
5 members of Act Up sitting in the gallery, their mere
6 presence in the gallery by itself sent a message to the
7 legislature that they were watching, they were present.

8 That even if there was an interest
9 protecting against disruption, that the government there
10 did not use the narrowest means possible in trying to
11 prevent the disruption. And that's likewise the case
12 here. I mean, if they're arguing that they decided to
13 withdraw sponsorship of the prom solely to quell
14 disruption, we argue that that's not the least
15 restrictive means for trying to combat any disruption
16 that may have occurred which we believe that there's no
17 evidence of any disruption.

18 The Court went on to say in the Act Up case
19 that the closing of the gallery in response to the fear
20 apparently unsubstantiated by the state that members of
21 Act Up would disrupt the governor's state of the
22 commonwealth address is a spitting image of an improper
23 prior restraint in an attempt to suppress speech prior
24 to publication or dissemination.

1 And they also quote Southeastern Promotions
2 v. Conrad, a US Supreme Court case which stated that all
3 the prior restrictions had this in common. They gave
4 public officials the power to deny use of a forum in
5 advance of actual expression. And it's our intention
6 that that's exactly what the school board did in this
7 case. They closed the public forum to prevent Ms.
8 McMillen from expressing herself as a lesbian and from
9 keeping her from being able to attend the prom with her
10 girlfriend and wearing a tuxedo.

11 The witnesses for the Defendant testified
12 that their main concern at the board meeting was to
13 address the demand letter. Well, if their response to
14 Ms. McMillen's assertions that her ability to attend the
15 prom with her girlfriend and wear a tuxedo were
16 protected by the first amendment and their response was
17 to close down that forum, then that's actually a prior
18 restraint against Ms. McMillen expressing herself as
19 protected by the first amendment.

20 And by foreclosing her from her attending
21 the prom and shutting down that forum, they have caused
22 Ms. McMillen irreparable injury. And that's the second
23 factor in granting preliminary injunctive relief. That
24 the plaintiff must suffer irreparable injury, and I

1 think it's pretty undisputed that the laws to first
2 amendment rights in and of itself a irreparable injury.
3 And there's a number of citations that I can give for
4 that but that seems consistently held throughout all of
5 the cases.

6 The third factor in whether or not the Court
7 should grant a preliminary injunction weighs the injury
8 that may be suffered whether the threatened injuries to
9 Plaintiff outweighs any threatened harm to the
10 Defendants. As far as we can tell, Your Honor, the
11 Defendants have not indicated that there would be any
12 harm suffered by them if they went forward with the prom
13 and allowed Ms. McMillen to attend with her girlfriend
14 and wear a tuxedo.

15 In fact, Ms. McMillen testified she's been
16 attending school with these same students for all of her
17 life. They all know of her preference for girls is the
18 way I think she put it. And so the students themselves
19 wouldn't be surprised if she shows up at the prom with
20 her girlfriend. Up until March 10, the school was
21 preparing for a prom.

22 The memo that's been introduced into
23 evidence about how you can purchase tickets for the prom
24 and setting forth the rules prohibiting dates of the

1 opposite sex was issued on February 5. So it wasn't
2 until Ms. McMillen chose to demand her rights under the
3 first amendment that the prom was cancelled. So putting
4 it back on at this point would not pose any harm to the
5 school and Ms. McMillen's denial of her first amendment
6 rights and the violation of her rights certainly
7 outweighs any harm that may exist on the behalf of the
8 Defendants.

9 And the fourth factor to consider in
10 determining whether or not to grant the preliminary
11 injunction is the public's interest. And Courts have
12 consistently held that it's within the public's interest
13 to protect rights guaranteed under the constitution.
14 That was held in the Butts case and in other cases.

15 Your Honor, I'd also like to refer you to
16 the Fricke case which is a Road Island District Court
17 case. It's 4910 SF 381 and this was cited in 1980.
18 Just if there's any question as to whether these rights
19 of Ms. McMillen to attend the prom with her girlfriend
20 and to wear a tuxedo were protected under the first
21 amendment. The Court in the Fricke case addresses the
22 same issue. It was a male in that case that wanted to
23 attend prom with his male -- with a male. And the Court
24 there found that he granted preliminary injunction and

1 allowed Mr. Fricke to attend prom with his date.

2 THE COURT: This case is a bit different in
3 that the prom had not been cancelled or sponsorship
4 withdrawn.

5 MS. BENNETT: Right. And that would be the
6 difference in the Fricke case, but we think that the Act
7 Up case addresses the issue of closing down a public
8 forum just to prevent a person from being able to
9 express themselves that would be protected under the
10 first amendment. And that being the case, then Ms.
11 McMillen has met all four factors that must be
12 considered when seeking injunctive relief.

13 We also propose, Your Honor, if you feel
14 like that you cannot grant an injunction providing that
15 the prom to go on, that in the alternative we ask for a
16 declaration that in preventing Ms. McMillen from
17 attending the prom with her girlfriend in the memo that
18 was published from the school setting forth that dates
19 must be of the opposite sex was a violation of her first
20 amendment rights. May I have a moment?

21 THE COURT: Yes.

22 MS. BENNETT: And, Your Honor, may I just
23 add that there was some contention I think by
24 Superintendent McNeese that the rule about same sex

1 dates being of the opposite sex was not geared toward
2 same sex couples. But the uncontroverted evidence is
3 that Superintendent McNeese told Ms. McMillen that being
4 at the prom with her girlfriend could push people's
5 buttons or make them uncomfortable and as well the board
6 met to address how to respond to her demand letter
7 setting forth her rights. And their response was to
8 close down the forum. And that's all, Your Honor.
9 Thank you.

10 THE COURT: Uh-huh (affirmative response)

11 MS. FLOYD: May I proceed, Your Honor?

12 THE COURT: Yes, ma'am.

13 MS. FLOYD: Your Honor, Mr. Griffith and I
14 are going to bifurcate this closing statement.

15 THE COURT: Very well.

16 MS. FLOYD: I will begin. Your Honor, it's
17 the Plaintiff's contention in this case that there's
18 been a constitutional violation of Constance McMillen's
19 rights. The requested relief here, however, is that
20 this Court mandate the Itawamba County School District
21 to conduct a social event, to hold the prom.

22 There is no constitutional rights to have a
23 prom or to even attend a prom. As the evidence was put
24 forth to this Court, it is estimated that 75 percent of

1 the school directs in this state do not host proms.
2 Even within our own school district, the Itawamba County
3 School District, the Mantachie High School does not host
4 its own prom. It is a parent sponsored event.

5 However, Your Honor, the board of education
6 does have a legal obligation under state law to educate
7 its students and to do that in a controlled environment.
8 It also has the authority and the duty and authorize the
9 use of its building and have gatherings under
10 regulations prescribed by the board. Your Honor, this
11 was a growing situation of the Itawamba County School
12 District received a demand letter by the American Civil
13 Liberties Union that was dated March the 2nd.

14 On March the 9th a reply was sent to them
15 for them to not to expect a reply to that demand letter
16 until after tonight's board meeting. This matter kept
17 growing, kept getting concerns and calls to the
18 superintendent and the principal that disruptions were
19 occurring at the school. That the board had no other
20 alternative but to hold a special meeting to discuss
21 this matter, and they did that on March 10.

22 At that meeting it was discussed with them
23 lengthy about all types of disruptions that had gone on
24 in the educational process at Itawamba Agricultural High

1 School. Based upon that information given to them in
2 that meeting and the history that they had wanted to get
3 out of the prom business so to speak anyway, this board,
4 our board of education, made a content mutual decision
5 to not host the Itawamba Agricultural High School prom.

6 In opening statement Counsel opposite
7 alleged that it was this controversy that -- this
8 controversy was that distraction. That is not the case,
9 Your Honor. The distractions that are alluded to in the
10 notice that was sent out by the Itawamba County School
11 District are distractions to the educational process.
12 That is our paramount goal is to make sure that our
13 children are educated.

14 They also took into consideration the fact
15 that they felt very comfortable that a social event
16 would be held and that all students would be allowed to
17 go. Ms. McMillen had already purchased a ticket to the
18 prom that was being hosted and was actually going to be
19 allowed to attend that. There was no question about her
20 attendance to that prom. We saw no evidence or no
21 belief to feel that she would not also be allowed to
22 attend the other prom, the other social event.

23 It was alluded to on the stand that she had
24 not received an invitation to that additional social

1 event. But, Your Honor, no one has received
2 invitations. It's my understanding it's still in the
3 planning process and there will not be invitations
4 anyway. It's an open affair. The Itawamba County
5 School District weighed all factors presented to it, and
6 its primary motive of educating the children led it to
7 the belief that it had absolutely no other alternative
8 but not to host this event. It was in a no-win
9 situation.

10 If we continued hosting it, we were going to
11 have disruptions at school. If we didn't host it, we
12 were going to have disruptions at school. But by not
13 hosting it, at least we took away from ourselves the
14 potential liability that comes with hosting a prom. And
15 in doing that it helped -- it will help protect the
16 Itawamba County School District and all of its taxpayers
17 from future ramifications of anything that could happen
18 as the result of liabilities that happen at a prom such
19 as drug abuse, alcohol abuse, accidents that happen at
20 proms.

21 Your Honor, I will now turn this over to
22 Mr. Griffith and allow him to complete the closing.

23 THE COURT: Very well.

24 MR. GRIFFITH: May it please the Court?

1 THE COURT: Yes, sir.

2 MR. GRIFFITH: Your Honor, the Court has
3 before it a very heavy issue to deal with and I'm not
4 going to belabor the point, but the Canal Authority
5 decision will control this Court's decision. In Canal
6 Authority, as the Court is aware, there were the four
7 factors that have -- this Court has dealt with. Every
8 Article 3 Judge who has been on the bench for any period
9 of time has dealt with.

10 In this case we submit that those four
11 factors must be carried by the Plaintiff by a clear
12 showing and that clear showing requires the burden of
13 persuasion. And the burden of persuasion has not been
14 carried in this case. Here's why. The Plaintiff has to
15 prove that she is likely to prevail on the merits. Her
16 claim is that her constitutional rights has been
17 violated by the actions of the school board in deciding
18 no longer to host the school prom.

19 Just look at that in its isolated form.
20 That is asking this Court to find that there is an
21 irreparable harm in the violation of a fundamental
22 constitutional right to have a prom. Your Honor, that
23 is not an established constitutional right in this case.
24 We submit that there is no first amendment liberty, a no

1 first amendment associational right, no first amendment
2 right whatsoever associated with the decision by the
3 school board to withdraw its sponsorship of the prom.

4 Now, I've looked in vain, but I have found
5 what I believe is probably the best guidance for the
6 Court. And I'm trying to help the Court as an officer
7 of the Court. I have looked at the whole area of the
8 burden of establishing when a content mutual
9 ordinance -- here I'm looking at the March 10, 2010,
10 decision to withdraw sponsorship of the prom -- when you
11 have a content mutual ordinance what level of scrutiny
12 and what is the constitutional scrutiny that you should
13 give that.

14 The best case that I've found -- I got this
15 for the Court and I will have Counsel a cite to it as
16 well. It's United States versus O'Brien decision, 391
17 US 367. This O'Brien standard --

18 THE COURT: 391.

19 MR. GRIFFITH: 391 US 367.

20 THE COURT: Very well.

21 MR. GRIFFITH: It's a 1968 decision. It
22 says good law has been cited repeatedly by the Supreme
23 Court in this Court and by the Fifth Circuit. A content
24 mutual ordinance will withstand constitutional scrutiny.

1 And that's what this Court is called up to do with the
2 March 10 decision of the school board if these four
3 factors are shown. That the ordinance is within the
4 constitutional power of the Court -- of the government.
5 In this case the government is the elected board of
6 education of Itawamba County.

7 Their action was to take a step that they
8 considered to be necessary by reason of a disruption of
9 the core educational process in the county. They've
10 made that decision. It is faithfully valid. The Court
11 has heard from the very best sources which are the
12 superintendent, school board members, their own
13 reactions before and after the decision. There was
14 clearly a detriment in an undermining of the educational
15 process.

16 Secondly, that it furthers an important and
17 substantial governmental interest. What could be a
18 purer and a clearer showing of a governmental interest
19 that is substantial that one that seeks to uphold the
20 core education program in the county. You've heard from
21 the superintendent. Ms. McNeese made it so clear that
22 this was a case in which the decision had to be made.
23 Other members of the school board, other teachers,
24 principals are making it clear that there was no other

1 alternative at this stage in their judgement.

2 The third factor under O'Brien, the
3 government interest is unrelated to the suppression of
4 free speech. This came straight from the witness stand.
5 Every witness that was asked about the March 10 decision
6 made it clear that our decision was rounded upon an
7 understanding and the fact finding of disruption,
8 disruption of the educational process. That evidence
9 has not been contradicted, Your Honor.

10 The fourth factor in the O'Brien is the
11 incidental restriction on expressive conduct if there is
12 any. It's no greater than necessary to further the
13 governmental interest. We submit that there's not even
14 an incidental restriction on the -- any of the
15 expression of speech or any expressive conduct or action
16 by the Plaintiff in this case.

17 If the Court will allow me, I will hand this
18 to the Courtroom Deputy. Turning Your Honor to the
19 factor in the Canal Authority decision that the
20 Plaintiff has to show by clear evidence that she's
21 likely to prevail on the merits. We do not believe that
22 there is a constitutional right to hold a school prom.
23 And this decision by the school board is not going to
24 have constitutional ramifications.

1 There is a place and a time for an Article 3
2 Court to exercise its equitable power and this Court has
3 done so judicially over the years. I've seen those
4 cases and I've actually had to rely on many of those
5 decisions. This is not that kind of case, Your Honor.
6 The second Canal Authority factor is that the Plaintiff
7 will not suffer irreparable harm.

8 I recall and ask the Court to recall as well
9 the testimony of the Plaintiff herself. Of course, she
10 bought a ticket to the prom. The question was, in the
11 purchasing of ticket, did she after that make inquiry
12 about attending the alternate prom or social event that
13 was to be held. That is still in the works and to be
14 sponsored by parents. Has she made any inquiry. Her
15 testimony was I wasn't invited. Your Honor, no one has
16 been invited.

17 There are not invitations being sent. This
18 is put on by parents as an alternative on a non-school,
19 non-governmental context to have the party, the banquet,
20 the dance that will be held, and there's been no showing
21 that the Plaintiff is excluded, singled out or otherwise
22 stigmatized and prevented from attending that. She
23 simply has not inquired and asked about attending.
24 There has been no showing of that.

1 The other factor under Canal Authority I
2 think is one that a lot of times gets a little bogged
3 down in analysis. This Court's own Canal Authority
4 decisions I think have been the clearest to me. The
5 Plaintiff's claim of injury has to be shown to outweigh
6 the governmental interest of the school board in
7 deciding that they did. Well, there's not been a
8 showing of that effect.

9 The Plaintiff still has the opportunity to
10 attend this social event, and that's what it is. It's a
11 social event. It's important in a sense, but it doesn't
12 have constitutional ramifications to it. It is not a
13 social event with constitutional contours. It is a
14 social event, period, but it is attended by in this case
15 severe and growing and escalating factors of disruption
16 and dishevelment and actually undermining of the
17 educational process as by found the very people that
18 know best as this Court knows the educators themselves.

19 The fourth factor in the Canal Authority
20 analysis is the public interest must outweigh any
21 potential harm to the Defendant. Well, this is very,
22 very serious, Your Honor. What we have is the
23 Defendant, the board of education, has withdrawn its
24 sponsorship of a prom. It has done that pursuant to the

1 statutory authorization that it has under Mississippi
2 law. There's no question about it acting pursuant to
3 state law and state authority to do so.

4 Other schools have already done so out of
5 concerns mainly over liability exposure. We cited in
6 our brief to the Court, in our response, in our
7 memorandum of authority two or three need this city
8 court plan's act decision dealing with lawsuits against
9 schools and schools board attended upon or related to
10 social functions. It does happen. It is a legitimate
11 factor to take into account in this case.

12 We go further than that, though, in it's a
13 case where the Plaintiff doesn't just have to carry a
14 burden of proof. She has to carry a burden of
15 persuasion on every one of these four elements. We
16 respectfully submit that she has not done so. This is a
17 case in which Canal Authority required that showing.
18 It's a case in which not two or three have to be shown
19 and the fourth one can slide by. There has not been
20 that adequate showing.

21 Now, I go all the way back to the Palmer
22 versus Thompson case. This was one that was cited in
23 our brief. Palmer versus Thompson, citation is 403 US
24 217, 403 US 217 fully cited is page 235. Your Honor,

1 this is where the City of Jackson had found to have
2 violated the constitutional rights of African Americans
3 by having a segregated public swimming pool system.
4 Several for whites but one for African Americans. That
5 was declared unconstitutional.

6 The Jackson government, the government of
7 the city of Jackson, simply closed all of the swimming
8 pools. I can't tell you I would agree with that type of
9 decision, but I can tell you what the Supreme Court of
10 the United States said. They said it is difficult or
11 impossible for any Court to determine the sole or
12 dominant motivation behind the choices of a group of
13 legislators. They were talking about the city board,
14 the Jackson mayor and the board of aldermen.

15 There is an element of futility and this
16 addresses this Article 3 Court's power. There's an
17 element of futility in a judicial attempt to invalidate
18 a law because of the bad motives of its supporters.
19 Many people castigated the Palmer versus Thompson
20 decision that was handed down. Many of us because this
21 was in 1971 on the cuffs of a bunch of us going into
22 constitutional law in law school, but it is the law of
23 the land.

24 It is a case that our own Supreme Court has

1 said we cannot go behind motives of legislators and say,
2 well, you did this for the wrong reason or we think your
3 stated reason is not so. And we're going to make you do
4 it over again or have some other rule in its place. I
5 think the Palmer versus Thompson case although dealing
6 with the 14th amendment issue dealing with
7 constitutional rights that are of a very broad and very
8 distinct admission still is dealing with constitutional
9 rights.

10 It is analogist in the sense that it does
11 provide some guidance to this Court in the area of what
12 a governmental body can or should be forced to do,
13 forced to do. In this case we're dealing with that very
14 sensitive area of federalism with the power of the
15 federal Court represented by Article 3 Court is being
16 invited by the Plaintiffs to be operated upon and act
17 toward a local government body, a board of education.

18 I respectfully submit, Your Honor, this is
19 not the type of invitation this Court should accept.
20 The Plaintiffs are asking this Court to step in and
21 become involved in a minutia of how to conduct a school
22 prom, where it's going to be, where the decorations
23 might be, when it's going to be held, under what
24 circumstances it will be held, whether there will be

1 cheerleaders, whether there will be music, how loud it
2 will be.

3 Now, Your Honor, I do admit that if it was
4 going to be held in New Orleans they may need some
5 judicial oversight. And several of us agreed with that
6 earlier. But seriously this is a case that I do not
7 believe the Court should accept the Plaintiff's
8 invitation to become involved in the morass of issues
9 that are purely local in nature, purely resolvable by
10 the government local body in its wisdom. And for better
11 or for worse that wisdom is not a wisdom that's been
12 exercised with any animus, with any intent or any effect
13 of violating the first amendment associational rights of
14 this Plaintiff.

15 Let me close by pointing out that in the
16 Tinker case, Tinker versus Des Moines, an Independent
17 Community School District case. This is our famous
18 decision back in the 1970s where the students at the Des
19 Moines Independent Community School District wore
20 swastikas. They were protesting against the Vietnam
21 war, and it was a really hot decision at the time. It
22 was a hot summer when that case came down. I still
23 remember it. But that is a case -- and its cite is 393
24 US at page 514 where I'm quoting from, 393 US at 514.

1 THE COURT: The Justice Fortas wrote it?

2 MR. GRIFFITH: Yes, sir. This is back when
3 the senate judiciary committee was letting selections of
4 justices go through and not being held up. We say that
5 the Plaintiff's first amendment rights have not been
6 violated by the board of education's March 10 decision.
7 And that decision stands as a non-constitutional
8 dimension in the local government decision.

9 But the school board may regulate speech
10 where school officials can -- and I'm quoting from the
11 case -- reasonably forecast substantial disruption of or
12 material interference with school activities. That's
13 the Tinker decision. We all know -- and I've cited it
14 in every first amendment case I've had, you don't leave
15 constitutional rights at the school house door. Of
16 course, you don't.

17 In this case the constitutional rights of
18 the public has not been abridged, they have not been
19 limited, they have not been violated by the action of
20 the board of education in making its decision on good
21 evidence, on evidence that it felt was a reasonable
22 forecast of disruption to the core educational program,
23 the core educational service, the core educational
24 meaning of what they do in the school. And that is to

1 provide education to the students in the best possible
2 atmosphere available.

3 When this Court made the decision that it
4 did, it did so not in violation of any constitutional
5 rights but as an exercise soundly and reasonably and
6 based on facts of its best collective judgment as a
7 licensed school board. We respectfully submit in all
8 fairness to this Plaintiff this is not a case that
9 should be one involving adjudication of violation of
10 constitutional rights. The simple reason is the
11 Plaintiff has failed to carry her burden of persuasion
12 by clear evidence, a clear showing that every one of the
13 Canal Authority factors, the ones I've just gone over,
14 every one have been established and shown as they have
15 not been.

16 We respectfully ask the Court at this stage
17 not to grant the motion for preliminary injunction on
18 that ground. I think the Court is on solid footing in
19 doing so and that this matter be dismissed at the
20 preliminary injunction stage. Thank you, Your Honor.

21 THE COURT: Okay. The Plaintiff may
22 respond.

23 MS. BENNETT: May I proceed, Your Honor?

24 THE COURT: Yes, ma'am.

1 MS. BENNETT: Your Honor, obviously, you
2 heard the testimony. I think it's pretty clear that the
3 Defendants have not shown that the classes were
4 disrupted, that any lessons were cancelled as the result
5 of Ms. McMillen sending a demand letter asking that her
6 rights under the constitution be respected.

7 In Butts v Dallas Independent School
8 District, the Fifth Circuit took up whether or not --
9 what was the constitutional right, and they said that we
10 believe that the Supreme Court declared a constitutional
11 right which school authorities must nurture and protect,
12 not extinguish unless they found the circumstances
13 allowed them no practical alternative.

14 And that's essentially what the school
15 district is arguing here. That they had no practical
16 alternative in what they did by withdrawing their
17 sponsorship of the prom. But the Butts case goes on to
18 state, there must be some inquiry and establishment of
19 substantial fact to buttress the determination. And
20 that's what the Defendants have failed to do here.

21 And they've made a lot of allegations about
22 e-mails coming in and phone calls, but there's been no
23 testimony from any teachers or any students that they
24 weren't able to get their lessons and that the classroom

1 was interrupted. In fact, they testified to the
2 contrary. As a school administrator, Mr. Wiygul was
3 able to handle the situation by talking to the teachers
4 and asking them to insure that their classes continued.

5 All of the Defendants' witnesses testified
6 that the contact they received from outside sources be
7 it e-mail, phone calls, whatever it may be,
8 substantially increased after they issued their press
9 statement that they were withdrawing their sponsorship
10 of the prom.

11 Your Honor, I think you have to consider in
12 this case what the Defendants are arguing. They're
13 arguing that in order to avoid Ms. McMillen's
14 constitutional right to take her girlfriend to prom,
15 they could withdraw their sponsorship. And that's
16 essentially saying that any time a government violates
17 someone's rights before the event that if they just
18 cancel the event then those constitutional violations
19 don't have to be addressed.

20 The school district clearly issued a
21 memorandum to all students advising them of the prom and
22 setting forth the rules which the chairman of the board
23 said they were going to uphold and enforce. So there's
24 an acknowledgement here that there were rights at stake.

1 And if they can get out of violating Ms.
2 McMillen's rights by denying her the opportunity to
3 attend prom with her girlfriend simply by canceling it.
4 I mean, governments all over the country could start
5 canceling things when students or regular citizens raise
6 rights under the constitution when the event itself
7 hasn't actually taken place.

8 It is as if Ms. McMillen is being penalized
9 because she went through the proper channels, she raised
10 these issues before the event for them to argue that the
11 cancellation of the prom or the withdrawing of
12 sponsorship is a content neutral.

13 I mean, it's clearly belied by the fact that
14 they met strictly -- they met solely to address Ms.
15 McMillen's demand letter and their response to her was
16 rather than let you attend with your girlfriend and wear
17 a tuxedo, we're not going to have a prom. And I think
18 that's what the Defendant fails to acknowledge that, you
19 know, by pulling out the public forum that was available
20 to Ms. McMillen, they denied her the opportunity for
21 expressing herself as a lesbian and attending prom in
22 genderial clothing of her choice.

23 And going back to the Act Up case, I mean,
24 that's exactly what the Court there find. There

1 supposedly because -- they argue there it was content
2 neutral because the gallery that was closed to the Act
3 Up members was closed to all public. Therefore, it
4 didn't affect just those who were seeking to make an
5 expression by being present but rather all public who
6 would have come to the gallery to watch the governor's
7 address were denied access.

8 But the Court there still found that that
9 acted as a prior restraint on those members' ability to
10 express themselves, and that's exactly what the school
11 district has done here. So if they say that it is not
12 within the Court's purview to order them to put on a
13 social event, then we contend that what they did was
14 violate Ms. McMillen's rights not only through their
15 policy of requiring dates be of the opposite sex and
16 that dress at the prom had to be gender specific but
17 also in restraining her speech through a prior
18 restriction by canceling the prom.

19 You know, it's also important to note that
20 they cited distractions and Ms. Floyd talked about
21 distractions, but they still haven't shown who caused
22 the distractions. And as I stated earlier in the Boyd
23 case -- in the Holloman case there is indication that
24 you have to show it is the speaker that caused the

1 disruption or the distractions not outside forces, not
2 community.

3 I mean, if you let the community dictate
4 what you do and your government, I mean, that is given
5 way to a Heckler's veto which both the Court, the
6 Supreme Court in Tinker and Terminello addressed saying
7 that, you know, they cannot condone a Heckler's veto in
8 our society. Because if views are unpopular, obviously,
9 there might be a reaction to that.

10 But that's the whole point of the first
11 amendment. It's supposed to be to allow people to
12 express themselves without being worried about how other
13 people are going to perceive it. We're not saying
14 there's any fundamental right to have a prom. Rather
15 what we're saying is that they shouldn't be able to
16 censor Ms. McMillen's speech by simply canceling the
17 prom.

18 And while the Counsel opposite went through
19 saying that the board said that -- the board made a
20 reasonable decision based on the fact that they found a
21 disruption. I mean, just because they say there was a
22 disruption doesn't mean that there was a disruption. I
23 mean, that's a finding that Your Honor must make whether
24 there was, in fact, an inquiry made and whether there

1 was the establishment of substantial facts to buttress
2 that determination that there was a disruption.

3 And the witnesses that have testified here
4 today have not indicated that there was any disruption
5 to the actual classroom and learning environment. And
6 the other thing that the Defendants focused on is this
7 private prom. There was testimony by Superintendent
8 McNeese that they encouraged parents to put on this
9 private prom and the private prom is open to everybody.

10 But there's been no real testimony about how
11 students are going to be made aware of the private prom.
12 I mean, is the school district now saying that they're
13 going to insure that Ms. McMillen is invited to this
14 private prom and that she be allowed to bring her
15 girlfriend and wear a tuxedo. I mean, I don't think
16 that they're going to step out that far.

17 So really whether or not there's a private
18 prom shouldn't factor into whether this forum has been
19 denied to Ms. McMillen. And according to Ms. McMillen
20 herself all she knows is what she's heard through the
21 case that it will be at the Tupelo Furniture Market.
22 She doesn't know when it is, you know, what day, what
23 time. She hasn't heard anything about it, and she
24 doesn't expect to.

1 And finally we don't think there's any
2 question in this case about what the motive was behind
3 the school district's decision to withdraw its
4 sponsorship of the prom. I mean, they've testified they
5 met to address the issues raised in Ms. McMillen's
6 demand letter, and their response to Ms. McMillen's
7 assertions that she had a constitutional right to bring
8 her girlfriend as a date and to wear a tuxedo was to
9 remove the forum all together.

10 And that's a viewpoint based censorship and
11 a prior restriction on Ms. McMillen's speech. And,
12 therefore, we believe that we've met the burden for
13 proving the likelihood of success on the merits as well
14 as the other factors required in granting a preliminary
15 injunction. But, again, in the alternative, I believe
16 Ms. McMillen would be satisfied with the declaration
17 that her rights were violated by the school removing the
18 forum and denying her the right to attend the prom with
19 her girlfriend and to wear a tuxedo.

20 THE COURT: Let me ask you, when you make
21 this alternative prayer --

22 MS. BENNETT: Your Honor, we would not be
23 opposed to consolidating this as a bench trial and you
24 making a finding on the merits. I believe the Defense

1 argued some of the issues on the merits. And so we
2 would not be opposed to that at this point in time.

3 THE COURT: What do you say to that?

4 MR. GRIFFITH: Your Honor, I think at this
5 stage this is a preliminary injunction hearing, and I
6 responded properly to the Canal Authority factors --

7 THE COURT: Yes, sir.

8 MR. GRIFFITH: -- which necessarily require
9 me to address everything that I did. So I'm not really
10 following her logic, and I certainly don't believe
11 that's what the law says. If it will help the Court, we
12 will do whatever you direct.

13 THE COURT: Well, I just -- it appears to
14 the Court that it's late -- at a late stage that this is
15 raised for the first time.

16 MR. GRIFFITH: It's a little bit like a
17 kabuki deal, what do we do now. And it's a change in
18 belief that is a reflection of what Counsel thinks about
19 the merits of the case. That's what's going on. I
20 don't believe that this is a time to get in the middle
21 of the stream and change boats, and I believe that's
22 what's occurred.

23 MS. BENNETT: We're not in any way, Your
24 Honor, trying to change. We fully believe we're

1 entitled to injunctive relief. Most of the issues,
2 testimony has been offered by the Defendants and,
3 therefore, it was something we proposed. But,
4 obviously, Your Honor, if you feel it's inappropriate at
5 this time, I certainly will --

6 THE COURT: Well, ordinarily, when you
7 combine a preliminary injunction, it's done
8 beforehand --

9 MR. GRIFFITH: Yes, Your Honor.

10 MS. BENNETT: Yes, Your Honor.

11 THE COURT: Anything further?

12 MS. BENNETT No, Your Honor. Thank you.

13 THE COURT: I will review the authoritative
14 citings, the submissions to the Court and the evidence
15 that's been been presented here today and issue a
16 written opinion just as promptly as I possibly can.

17 MR. GRIFFITH: Thank you, Your Honor.

18 MS. BENNETT: Thank you, Your Honor.

19 THE COURT: And when we're all doing our
20 work electronically, it will be done quickly.

21 MR. GRIFFITH: Yes, sir.

22 THE COURT: Okay. Very well. Court is
23 adjourned.

24

<p style="text-align: center;">A</p> <p>ability 17:5 89:9 101:14 124:9</p> <p>able 7:11 15:1 30:12 33:19 38:11,11,23 67:1,2,5 88:7 92:8 97:17 101:9 104:8 121:24 122:3 125:15</p> <p>above-captioned 1:15</p> <p>ABOVE-MENTION... 28:19 44:21 47:11 49:3 62:19</p> <p>abridged 119:18</p> <p>absolutely 5:8 18:13 43:1 55:3 86:3 92:7 92:12 93:6 108:7</p> <p>abuse 108:19,19</p> <p>abusive 54:20 55:2</p> <p>accept 54:23 117:19 118:7</p> <p>acceptable 32:12</p> <p>accepted 91:2 94:2</p> <p>access 124:7</p> <p>accidents 108:19</p> <p>accompanied 34:2</p> <p>accordance 94:7</p> <p>according 72:3,5,11 75:18 78:16 126:19</p> <p>account 115:11</p> <p>accountability 83:20 86:17</p> <p>accumulated 84:5</p> <p>acknowledge 123:18</p> <p>acknowledgement 122:24</p> <p>ACLU 2:10 22:8 25:10 26:21 45:21 46:24</p> <p>act 99:11,14,19 100:5 100:18,21 104:6 115:8 117:16 123:23 124:2</p> <p>acted 124:9</p> <p>acting 15:23 115:2</p> <p>action 7:20 14:11 62:9 111:7 112:15 119:19</p> <p>actions 37:21 62:5,8 85:7 109:17</p> <p>active 82:4</p> <p>activities 55:17 56:12 119:12</p> <p>Activity 82:2</p> <p>actual 15:3 65:24 66:3 98:21,22 101:5 126:5</p> <p>actually 10:1 14:8 16:4 16:16 17:13,22 23:17 27:8 28:9 41:4 52:4 60:20,21 62:3,11 66:7 68:2 71:2 74:1,9 78:7 79:19 81:2,23 97:11 99:15 101:17 107:18 113:4 114:16</p>	<p>123:7</p> <p>Adams 1:22 3:5</p> <p>add 104:23</p> <p>addition 99:7</p> <p>additional 57:7 107:24</p> <p>address 11:16 19:8,12 35:20,23 39:24 58:7 58:11 67:2 69:12 75:10,11,12 80:24 81:3 86:19 98:9 99:17 100:22 101:13 105:6 123:14 124:7 127:5 128:9</p> <p>addressed 122:19 125:6</p> <p>addresses 103:21 104:7 116:16</p> <p>addressing 7:18 9:23</p> <p>adequate 115:20</p> <p>adhere 15:22</p> <p>adjourned 129:23</p> <p>adjudication 120:9</p> <p>administration 16:14 80:17 89:22</p> <p>administrative 94:6</p> <p>administrator 36:14 67:4 122:2</p> <p>administrators 54:12 59:21</p> <p>admissible 9:8</p> <p>admission 15:14 117:8</p> <p>admit 118:3</p> <p>admitted 28:17 44:20 47:8 48:24 97:7,10</p> <p>adopted 34:5</p> <p>advance 101:5</p> <p>advice 40:5 89:4 93:12 93:13</p> <p>advise 93:8</p> <p>advising 81:22 82:16 83:9 122:21</p> <p>advisor 36:22 88:19 89:3</p> <p>affair 108:4</p> <p>affect 124:4</p> <p>affected 75:7</p> <p>affidavit 87:14</p> <p>affiliation 40:5</p> <p>affirmative 19:23 22:17 24:14 29:7 32:4 33:18,24 49:11 105:10</p> <p>afraid 76:4,7</p> <p>African 116:2,4</p> <p>after 15:3 18:17 22:6 22:24 25:8,17 27:4 29:2 34:13 37:6 50:4 50:6,23 52:21 55:7 57:7 60:19 61:23 62:6,13 65:6 66:10 95:15 96:6 97:11,13</p>	<p>106:16 111:13 113:11 122:8</p> <p>afternoon 46:11 66:16</p> <p>again 53:5 89:3 91:15 93:11 117:4 127:15</p> <p>against 12:24 15:5 100:9 101:18 115:8 118:20</p> <p>ago 71:19 72:12 79:16</p> <p>agree 11:17 12:4 116:8</p> <p>agreed 78:3,23,24 98:8 118:5</p> <p>Agricultural 13:4 18:15 34:9,16 58:10 58:19 59:5 79:14 106:24 107:5</p> <p>al 1:11 10:20</p> <p>alcohol 108:19</p> <p>aldermen 116:14</p> <p>Alex 29:23</p> <p>allegation 8:9</p> <p>allegations 121:21</p> <p>alleged 14:7 50:9 52:5 55:16 107:7</p> <p>allow 13:18 14:14 18:7 51:14 66:20 78:12 108:22 112:17 125:11</p> <p>allowed 8:21 13:8,21 18:2 21:20,22 40:7 92:17 102:13 104:1 107:16,19,21 121:13 126:14</p> <p>allowing 64:8 78:1,7</p> <p>AllState 70:6 75:11,13</p> <p>alluded 107:9,23</p> <p>almost 39:17 60:8 83:8</p> <p>along 13:15 56:5</p> <p>ALPHA 1:20 3:3</p> <p>already 17:20 107:17 115:4</p> <p>also 6:23 7:6 11:6 13:18,19 17:14,24 72:24 78:18 91:19 93:4 98:6,8 99:11,21 101:1 103:15 104:13 106:8 107:14,21 124:17,19</p> <p>alternate 113:12</p> <p>alternative 104:15 106:20 108:7 112:1 113:18 121:13,16 127:15,21</p> <p>alternatives 39:9,16 90:7</p> <p>although 117:5</p> <p>altogether 39:14</p> <p>always 9:7 84:15 96:5</p> <p>Alysson 2:13 11:4</p> <p>am 30:22 31:3,18 46:22 54:15</p>	<p>amendment 13:2 14:17 97:1 101:16,19 102:2 103:3,5,21 104:10,20 109:24 110:1,1 117:6 118:13 119:5,14 125:11</p> <p>American 16:23 106:12</p> <p>Americans 116:2,4</p> <p>amount 82:21 87:21 88:24</p> <p>analogue 117:10</p> <p>analysis 114:3,20</p> <p>animus 118:12</p> <p>announced 55:12</p> <p>announcement 44:6 50:24 52:12</p> <p>annual 59:12</p> <p>another 29:11 47:16</p> <p>anybody 20:16 22:22</p> <p>anymore 74:22 83:15</p> <p>anyone 34:17 70:14</p> <p>anything 6:3,23 10:7 10:14 20:13,16,21 22:6 25:12,20 26:1,6 31:11 79:24 95:6 108:17 126:23 129:11</p> <p>anyway 21:17 107:3 108:4</p> <p>apologize 34:17</p> <p>apparently 68:13 100:20</p> <p>appear 28:6,10</p> <p>appearing 11:2</p> <p>appears 87:6 91:7 128:13</p> <p>appointed 82:12 88:22</p> <p>appreciate 45:16</p> <p>approach 63:2</p> <p>approached 13:6</p> <p>appropriate 8:19 43:19 91:8 94:13 98:18</p> <p>Approximately 63:18</p> <p>April 42:15 65:3</p> <p>area 42:18 59:18 81:18 84:17 110:7 117:11 117:14</p> <p>areas 83:5,13,13,13 91:8</p> <p>arena 81:21</p> <p>aren't 51:14</p> <p>argue 100:14 123:10 124:1</p> <p>argued 128:1</p> <p>arguing 100:12 121:15 122:12,13</p> <p>argument 91:11 95:12 95:17 97:2 99:21</p> <p>arguments 95:21 96:3 96:9</p>	<p>arising 16:6</p> <p>around 19:3 21:24 25:24 38:9 73:18</p> <p>article 72:4,11 109:8 113:1 116:16 117:15</p> <p>ask 8:20 12:10 15:3 18:21 26:7 31:18 32:7 47:4 50:1 53:6 54:11 63:21 68:8 80:6 84:12 85:9 86:13,22 90:17 104:15 113:8 120:16 127:20</p> <p>asked 13:12 20:21 25:4 25:12 26:1 32:11,17 32:18,22 40:20 79:11 86:3,4,5 112:5 113:23</p> <p>asking 13:7,16,18 31:1 37:2 38:2 74:11 85:23 109:20 117:20 121:5 122:4</p> <p>assertions 101:14 127:7</p> <p>assistant 6:17 59:1,6 87:6</p> <p>associated 110:2</p> <p>Association 6:20 82:1,2 82:9,14</p> <p>associational 110:1 118:13</p> <p>assumptions 91:12</p> <p>athletic 59:7</p> <p>Atlanta 81:14</p> <p>atmosphere 120:2</p> <p>attached 28:22 44:24 46:5 47:14 49:6 62:22</p> <p>attempt 100:23 116:17</p> <p>attend 13:24 14:14 29:2 43:4 74:9 101:9 101:14 102:13 103:19,23 104:1 105:23 107:19,22 114:10 123:3,16 127:18</p> <p>attendance 58:23 59:3 107:20</p> <p>attended 13:2 20:6 26:6 114:14 115:9</p> <p>attending 13:13,17 21:2 32:15 60:9 96:24 101:20 102:16 104:17 113:12,22,23 123:21</p> <p>attorney 10:4 16:16 23:17,19 61:16 81:2 81:24 84:24 85:6 91:19 93:11</p> <p>attorneys 75:18</p> <p>attorney's 23:22</p>
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<p>author 55:1 authoritative 129:13 authorities 121:11 authority 11:17 15:9 18:11,18 106:8 109:4 109:6 112:19 113:6 114:1,3,19 115:3,7 115:17 120:13 128:6 authorization 115:1 authorize 106:8 available 41:9 75:2 120:2 123:19 Avenue 1:22 3:5 avoid 122:13 aware 13:5 29:11 65:1 66:14 98:6 109:6 126:11 away 17:21 67:10,11 67:12 88:11 89:11 108:13</p> <hr/> <p style="text-align: center;">B</p> <p>B 4:18 89:6 bachelor's 36:11 58:19 back 24:5,15,18 61:4 65:8 66:23 81:15 88:7,10 90:11 95:20 97:15 103:4 115:21 118:18 119:2 123:23 background 36:6 58:16 60:11 70:7 81:8 bad 116:18 balance 16:17 ball 39:20 banquet 113:19 based 7:11 86:24 89:21 90:5 97:19 107:1 120:6 125:20 127:10 basic 87:12 basically 23:4 32:23 41:8 66:18 basis 9:1,21 56:6 100:1 because 7:19,23 12:8 13:19 18:13 20:2 21:9,14,15 22:2 23:1 23:7 25:2,5 27:9,11 27:22 30:8,11,13 31:11,13 32:19 44:2 53:16 59:22 64:4 73:8 75:9 77:17 85:1 86:16 87:10 90:20 95:18 99:15,22 100:1 116:18,20 123:9 124:1,2 125:8,21 become 117:21 118:8 becoming 37:13,13 before 1:16 7:18 10:21 15:8 16:11 26:3,8 38:3 50:4,5 55:7 58:23 59:4,14 60:17 60:20,21 61:3,18</p>	<p>71:5 82:24 85:10 86:10 89:1 109:3 111:13 122:17 123:10 beforehand 129:8 begin 105:16 beginning 86:2 behalf 2:4,17 15:12 27:15 28:7 45:21 94:19 97:23 103:7 behind 79:18 86:16 116:12 117:1 127:2 being 10:3 15:18,20 17:12 18:4 20:16 29:11 30:12 37:16,17 38:5 41:11 51:20 60:7 62:2 66:14,15 70:13 71:7 82:4 97:18 99:7 101:9 104:8,10 105:1,3 107:18 113:17 117:15 119:4 123:8 124:5 125:12 belabor 109:4 belied 123:13 belief 107:21 108:7 128:18 believe 6:18,22 9:15 11:6 15:10,11 16:24 30:19 33:16 43:18 48:13,18 85:18 90:20 95:3 100:16 110:5 112:21 118:7 121:10 127:12,15,24 128:10 128:20,21,24 bell 38:6,7,8,8 39:1,1 below 42:20 43:7 bench 109:8 127:23 benefit 36:6 58:16 81:8 Benjamin 2:19 11:12 besides 52:7 best 18:5,14 34:12 37:18 44:5 55:22 56:1 86:7 110:5,14 111:11 114:18 120:1 120:6 better 118:10 between 52:11,15 77:14 bifurcate 105:14 big 25:21 bigot 61:14 bigotry 17:2 Bishop 92:14 bit 90:20 93:6 104:2 128:16 boards 7:14,15 81:9,23 81:23 86:8,22 88:19 89:3 board's 8:12 50:17,23 70:11 78:14</p>	<p>boats 128:21 body 117:12,17 118:10 bogged 114:2 bombarded 61:8 73:4,5 both 125:5 Bottom 86:20 bought 113:10 boy 22:1,1 31:21,21 Boyd 124:22 boys 22:11 79:20 break 29:9,10 57:14 brief 10:17 12:10 95:2 95:7 96:11 99:1 115:6,23 briefly 12:13 16:19 36:5 41:13 56:17 58:16 90:16 briefs 91:11 bring 13:8,10 14:3 22:1 22:1 43:8 64:8 78:1,7 78:19 126:14 127:7 bringing 13:6 21:18 26:16 60:10 brought 12:24 60:7 budget 86:17 building 106:9 bunch 79:19,20 98:2 116:21 burden 59:17,20 96:18 96:21 109:12,13 110:8 115:14,14 120:11 127:12 business 71:17,19 73:17 88:7,10 107:3 buttons 32:22 105:5 buttress 121:19 126:1 Butts 103:14 121:7,17 buy 33:12</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 5:1 89:6 cafeteria 42:18 call 5:17,21 18:22 22:8 26:21 35:13 37:24 57:21 69:5 80:10 called 23:14 24:6,15 25:9 46:15 61:13,14 75:13 97:22 98:2,9 111:1 calling 6:10 70:24 calls 10:19 19:1 50:4 54:3,5,19 57:23 80:11 88:4 106:17 121:22 122:7 came 1:15 15:2,2 112:4 118:22 can 5:17 8:17 9:18 10:10 12:14 19:15 23:6,7 31:9 33:23 34:4 40:10 56:12 57:20 61:5 63:6</p>	<p>69:19 70:18 82:24 83:16 84:14 85:16,18 85:19 87:15 89:16 91:4,10 95:17 98:22 102:3,10,23 115:19 116:9 117:12 119:10 123:1 129:16 Canal 15:9 18:18 109:4 109:5 112:19 113:6 114:1,3,19 115:17 120:13 128:6 cancel 14:9,22 16:2 33:17 122:18 canceled 14:14 15:5 34:19 64:4 97:20 123:3,5 124:18 125:16 cancellation 15:3 39:14 50:8,11 52:18,22 123:11 cancelled 18:9 26:3,24 27:5,12 29:3 34:21 52:14 73:8 74:19 103:3 104:3 121:4 cannot 78:19 104:14 117:1 125:7 can't 6:3 21:15 48:7 86:9 116:8 capital 99:17 career 58:22 carried 109:11,14 carry 76:6 83:22 84:2 115:13,14 120:11 cases 27:21 92:10 102:5 103:14 113:4 castigated 116:19 cause 1:15 10:19 caused 14:24 27:12 34:7 62:5,8,9 67:10 93:4 97:5 98:14 101:21 124:21,24 causes 34:17 causing 38:5 71:20 ceased 55:16 62:6 cell 38:2 cancel 125:16 canceling 7:3 127:10 Center 58:23 59:4 ceremonies 72:7 certainly 51:17 89:11 103:6 128:10 129:5 chairman 70:1,3 98:5,5 122:22 challenging 7:22 8:12 14:17 change 21:12 27:22 128:17,21,24 changed 92:21 channels 123:9 characterize 61:11 73:20</p>	<p>cheerleaders 118:1 Chicago 81:14 child 86:16 children 38:2,4 71:18 71:22 88:8 107:13 108:6 choice 90:13 123:22 choices 116:12 chose 13:19 40:22 73:15,16 94:1 97:12 103:2 Christine 2:6 11:3 13:15 circuit 98:15 110:23 121:8 circumstances 117:24 121:12 citation 98:20,22,23 115:23 citations 102:3 cite 110:15 118:23 cited 14:9 103:17 110:22 115:5,22,24 119:13 124:20 cites 34:5 citings 129:14 citizens 34:10 40:8 49:12,16,20 54:13 76:24 123:5 city 115:7 116:1,7,13 Civil 10:23 16:23 106:12 claim 50:19 109:16 114:5 claims 97:18 clarifying 13:7 class 37:11 51:3,8,15 51:20 54:3 66:23 67:6,11,11,13,17 97:12 classes 17:12 26:5 52:18,22 53:14 66:14 66:16 98:4,7 121:3 122:4 classroom 15:18 17:14 17:22 53:16,19 60:1 60:6 65:24 66:4,6 72:20 87:19,22 88:5 97:16 98:4 121:24 126:5 classrooms 38:4 66:20 93:7 97:17 clear 9:20 54:2 80:17 83:12 109:11,12 111:21,24 112:6,20 120:12,12 121:2 clearer 111:18 clearest 114:4 clearly 7:4 111:14 122:20 123:13 CLERK 19:7,12 28:23</p>
--	---	--	---	--

<p>35:19 47:9 48:7,9 49:2 58:6 69:11 80:23 Cleveland 2:21 11:12 close 60:8 101:17 105:8 118:15 closed 57:15 99:18,19 99:22 101:7 116:7 124:2,3 closing 95:9,12,12,21 96:3,13 100:19 104:7 105:14 108:22 clothing 123:22 coach 22:21 23:1 36:13 59:1 Coalition 13:16 collecting 43:3 65:2 collection 61:19 collective 61:22 120:6 College 36:10 combat 100:15 combine 129:7 come 6:4 16:18 19:3 31:20,21 37:10 39:22 58:1 67:22 73:18 89:1 95:20 124:6 comes 10:21 86:10 108:14 comfortable 12:21 31:10 95:11 107:15 coming 53:14,18 121:22 committee 119:3 common 67:3 101:3 commons 42:15,17 44:9 53:23 commonwealth 99:18 100:22 communications 63:16 73:1 76:20 community 36:9 61:1 74:3 88:20,21 92:11 93:5 118:17,19 125:2 125:3 compelling 99:24 100:3 complaining 64:2 complains 33:1 complete 16:19 108:22 completely 15:18 85:8 component 82:15,15 concentrate 83:21 concentrates 89:11 concern 70:19,23 71:16 85:3 101:12 concerned 54:13 60:11 76:2 concerns 16:5,7,8 17:15,20,23 53:1,5,8 71:14 106:17 115:5 concludes 94:23 conclusion 7:1 8:12</p>	<p>88:14 conclusions 7:17 condone 125:7 conductive 38:14 conduct 105:21 112:11 112:15 117:21 confer 41:12 64:14 90:15 conference 5:2 confidential 5:10 confining 7:13 conjunction 87:15 Conrad 101:2 consider 78:1,6 103:9 122:11 consideration 34:13 78:11 98:11 107:14 considered 104:12 111:8 considering 17:18 consist 96:19 consistent 86:23 89:18 consistently 102:4 103:12 consisting 61:22 consolidating 127:23 Constance 1:5 3:12 5:16 10:19 12:24 13:11,18 14:14,24 15:4 19:1,4,10,19 30:7,19 48:20 54:16 55:1,3 62:3 64:8 73:8 78:1,7 105:18 Constance's 5:4 13:24 14:8 98:9 constituted 37:21 constitution 103:13 121:6 123:6 constitutional 17:1 91:21 92:2,6 93:19 105:18,22 109:16,22 109:23 110:12,24 111:4 112:22,24 114:12,13 116:2,22 117:7,8 119:15,17 120:4,10 121:9,10 122:14,18 127:7 constitutionality 85:5,7 consult 82:2 contact 41:4 54:14 60:15 122:6 contacted 13:12 27:2 38:1 50:3 72:18 contacting 50:20 54:15 contemplated 17:20 contend 124:13 contending 99:8 content 79:22 107:4 110:8,11,23 123:12 124:1 contention 18:16 99:4</p>	<p>104:23 105:17 contents 99:2 contest 85:4 context 113:19 continuation 16:9 59:11 continue 26:2 53:2 63:15 70:21 98:4 continued 39:18 108:10 122:4 continuing 55:20 56:4 56:5 98:7 contours 114:13 contradict 96:22 contradicted 112:9 contrary 122:2 control 39:21 44:4 109:5 controlled 106:7 controversial 82:22 83:13 89:1 92:10 93:19 controversy 14:7 93:5 107:7,8 conversation 22:9 52:2 conversations 51:24 55:5 convey 24:20 conveyed 66:15 coordinator 65:17,18 copy 27:24 66:11 core 8:5 15:14,23 38:16 38:21 89:19 94:7 111:9,20 119:22,23 119:23 corner 38:9 corporate 75:14 CORPORATION 1:20 3:3 correct 11:4 43:9 46:14 46:22 49:19 50:20 57:2 65:10 73:10 77:9 85:24 92:19 93:2,21 could 13:10,12 17:13 21:8,11,24 23:2,2 24:24 25:10,12 27:18 31:20,21 33:1 37:20 39:10,24 78:15 95:8 95:10 98:3,24 105:4 108:17 111:17 122:15 123:4 counsel 6:19 11:11 13:12 41:13 48:22 57:20 61:20,24 64:14 75:3 82:8 90:16,21 90:23 93:24 107:6 110:15 125:18 128:18 country 123:4 county 1:10 10:20 13:1</p>	<p>13:3 14:6,13 17:4,11 18:6,11 34:7,12,15 36:16,21 38:17 40:11 41:18,21 43:10,13,15 56:3 58:24 59:18 69:20 71:3 72:14 82:7 83:6 89:18,20 90:8 92:14 105:20 106:2,11 107:10 108:4,16 111:6,9,20 couple 37:9 72:12 76:16 77:16 coupled 17:17 couples 13:17 105:2 course 11:11 36:23 39:19 63:24 74:19 91:3 113:9 119:16 courses 70:9 courtroom 8:22 10:3,5 10:11 11:7 112:18 Courts 103:11 Court's 109:5 114:3 116:16 124:12 cover 83:16 crescendo 15:21 criteria 43:8 critical 53:19 cross 3:15,21 4:4,9,16 33:8 42:1,2 64:19,23 76:10,12 91:13,17 94:21 crossed 54:24 Crossing 81:3 cuffs 116:21 Cumming 35:23 current 14:12 36:7 64:2 70:5 curriculum 65:17 course 61:15</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:9 5:1 Daily 72:11 Dallas 121:7 dance 16:10 32:23 40:14 41:9 113:20 dances 16:6 dancing 32:18,21 data 9:1 84:4 88:13,15 date 13:11 22:1 24:10 25:4 26:16 41:2 43:23 46:15 60:13 62:11 104:1 127:8 dated 62:11 68:10 106:13 dates 21:6 32:15 42:21 43:8,11 60:10,11 78:19 79:12 102:24 104:18 105:1 124:15 dating 51:11 Davidson 1:16 37:20</p>	<p>day 1:16 14:5,11 18:17 24:6 25:1,23 26:8 27:9 29:4,5 37:17,18 46:1 52:2,3,3 57:4,8 63:17 66:8,9 70:23 82:3 87:20 126:22 days 14:5 29:2 52:22 57:7 60:4 95:14,14 95:14 day-to-day 54:9 deal 25:21 82:22 87:20 109:3 128:17 dealing 115:8 117:5,6,8 117:13 dealt 109:7,9 dean 91:9 94:14 debated 87:8 decide 78:16 89:7 decided 22:8 34:8 39:11 46:2 88:6 100:12 deciding 109:17 114:7 decisions 38:3 39:16 55:24 77:1 82:17 86:18,24 87:24 89:1 113:5 114:4 decision-making 7:15 9:23 84:17,19 86:5 87:2 94:4 declaration 8:14 92:9 104:16 127:16 declared 116:5 121:10 decorate 17:22 37:12 53:14 67:16,17 decorating 60:3 67:10 67:13,14 decorations 67:22 117:22 Defendant 2:17 11:12 12:2 35:11,13 57:21 57:22 80:11 101:11 114:21,23 123:18 Defendants 1:12 11:14 15:12 61:21 87:15 96:22 97:7 98:12 99:8 102:10,11 103:8 121:3,20 122:5,12 126:6 129:2 Defendant's 14:16 46:6 62:20 95:1,6 defense 48:22 90:21 127:24 degree 36:11,12 58:19 81:12,15 delete 64:6 deliberative 87:7 Deloach 1:21 3:4 demand 13:14 14:8 25:15,17 27:15,20,24 28:3,14 66:10,12 68:3 97:3,13,23 98:9</p>
--	--	---	---	---

<p>101:13 103:2 105:6 106:12,15 121:5 123:15 127:6 denial 103:5 denied 12:1 18:21 123:20 124:7 126:19 deny 101:4 denying 123:2 127:18 Deputy 112:18 Des 14:20 118:16,18 describe 25:18 described 38:22 63:12 DESCRIPTION 4:19 despite 55:19 93:19 detail 40:16 determination 121:19 126:2 determine 45:17 116:11 determining 103:10 detriment 111:14 developed 9:16 development 83:11 dictate 125:3 didn't 21:17 22:2,6 23:1,11 25:22 27:13 27:17 29:4 31:11 32:19 50:8 71:5 108:11 124:4 difference 104:6 different 21:10 41:19 65:18 75:12 104:2 difficult 17:8 18:6 65:23 83:13,15,24 116:10 dimension 119:8 dinner 40:13 dinners 72:6 dire 84:12,22 94:1 direct 3:13,19 4:2,7,14 19:17 36:3 58:13 60:15 69:17 81:5 93:24 128:12 directed 15:11 24:2 41:1 direction 40:16 directions 40:18 directives 40:16 directly 48:2 77:11 80:16 director 59:7 75:19 directs 106:1 dirty 27:10 discipline 98:18 discuss 46:19 106:20 discussed 71:2,5,8,10 106:22 discussing 37:9,14 discussion 16:4 97:22 discussions 59:9,16 67:9 71:12 88:4</p>	<p>97:20 dishevelment 114:16 dismissed 120:19 disposition 37:3 disrupt 97:12 100:21 disrupted 100:2 121:4 disruption 7:2 8:16 14:21,24 15:2,13 37:22 38:21 50:9,19 52:5 56:11 62:5,8,9 62:14 71:21 75:24 76:2 79:22 93:7 97:5 97:8 98:15 99:8,23 100:9,11,14,15,17 111:8 112:7,8 114:15 119:11,22 125:1,21 125:22,22 126:2,4 disruptions 49:24 50:1 54:2 72:19 76:5 87:17 98:12 106:18 106:23 108:11,12 disruptive 8:4 17:12 51:3,20 55:16 56:11 dissemination 100:24 distinct 117:8 distract 89:12 distracted 15:18 distraction 14:9 15:13 34:6 37:13,22 67:9 97:19 107:8 distractions 38:21 47:21 62:14 87:10,17 87:19,19 88:3 98:12 107:9,11 124:20,21 124:22 125:1 districts 40:6 81:24 82:3 district's 92:22 127:3 disturb 12:3 DIVISION 1:3 document 28:20 42:8 44:22 46:7 47:12,16 47:17,19,23 49:4,9 62:20 documents 63:7 Doe 5:14,21 does 28:6,10 80:5 94:20 95:5 106:3,6 115:10 117:10 doesn't 31:14 40:11 62:4 114:11 115:13 125:22 126:22,24 doing 18:14 70:22 73:5 108:15 120:19 129:19 dominant 116:12 done 25:13 38:5 113:3 114:24 115:4,16 124:11 129:7,20 don't 5:15 6:2,22 9:13 10:14 19:16 20:15</p>	<p>30:10,24 31:15,15 39:12 40:14 41:10 52:4 60:10 67:16 72:7 83:11 84:13,23 85:15,16 87:24 89:6 90:12 93:13 95:5,19 98:21 119:14,16 122:19 126:15 127:1 128:10,20 door 119:15 Dorsey 58:23 59:3,14 down 20:3 35:7 39:20 54:16 57:19 75:15 79:22 88:6 94:17 99:22 101:17,21 104:7 105:8 114:3 116:20 118:22 dress 31:14 124:16 dresses 22:12 24:23 25:2 dressing 17:15 drinking 16:7 17:23 53:11 59:22 Drive 58:11 driving 16:8 drug 17:23 53:12 108:19 drugs 59:23 due 14:7 17:2 34:6 42:22 duly 19:5 35:17 58:4 69:9 80:21 during 15:18 39:4 43:4 59:10 77:18 93:24 duties 17:14 84:2 92:5 duty 17:5 18:13 38:12 106:8 D-1 4:24 63:6</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:1,1,19 3:9 4:18 5:1 5:1 11:12 earlier 20:24 33:16 62:12 118:6 124:22 easy 59:16 83:14 Eddie 4:6 69:5,8,13 educate 8:6 17:5 106:6 educated 89:9 107:13 educating 71:18 77:11 88:8,10 90:11 108:6 education 6:17 7:13 16:12,16 17:10,18 34:2,13 35:14 36:12 36:13,18,21 37:5 38:17,18 39:4,10,21 40:1 56:23 58:21 60:14,16 70:23 71:22 81:8,10,18 82:7 83:7 89:18,20 90:1,8 91:8 91:10 94:12,14 106:5 107:4 111:6,20</p>	<p>114:23 117:17 119:20 120:1 educational 8:5 15:14 15:14,24 18:14 34:6 36:6 37:22 51:4 58:16 62:14 65:12,14 70:7 81:20,22 89:19 94:7 106:24 107:11 111:9,14 112:8 114:17 119:22,23,23 education's 17:4 119:6 educators 114:18 effect 38:20 44:2 80:7 114:8 118:12 effectively 17:5 84:2 eight 81:13 either 39:18 72:16 elected 36:17 82:12 88:22 111:5 electrical 81:12 electronically 129:20 element 116:15,17 elements 115:15 else 9:12 10:7,14 22:22 30:12 85:15,16 86:13 emotion 92:11 emotional 93:4,20 employment 70:5 75:8 81:19 enable 88:10 encourage 49:15 87:23 encouraged 126:8 encouraging 49:20 end 18:17 enforce 122:23 engineering 81:12 enhances 88:2 enjoy 30:12 entered 28:14 44:12,14 entire 13:3 15:19 19:12 19:21 20:7 57:12 84:17 97:3 entitled 129:1 environment 14:10,21 17:6 38:13 51:4 70:20 87:22 88:1,2 97:6 106:7 126:5 equal 31:5,6 92:1 equitable 113:2 escalating 17:10 114:15 essence 94:24 95:19 essential 7:19,24 essentially 121:14 122:16 establish 5:13 6:1,13 7:24 9:5 11:19 85:19 established 19:19 109:23 120:14 establishing 96:19 110:8</p>	<p>establishment 121:18 126:1 estimate 61:10 estimated 105:24 estimation 87:9 88:9 et 1:11 10:20 even 9:1 25:22 82:6 98:11 100:3,8 105:23 106:2 112:13 event 18:13 34:10 49:13 105:21 106:4 107:15,22 108:1,8 113:12 114:10,11,13 114:14 122:17,18 123:6,10 124:13 events 34:7 37:15 67:12 ever 20:13,20 82:24 85:10 every 37:17,17 38:19 52:3 61:13 63:17 65:15,19,20 66:8,9 70:23 82:11 86:10,19 87:4,20 88:24 89:4 89:10 109:7 112:5 115:15 119:14 120:12,14 everybody 126:9 everyone 31:5 54:9 everything 86:13 128:9 evidence 11:20 15:11 44:12,15 45:8 48:12 48:15,23 68:11 96:22 98:3,14 99:7 100:17 102:23 105:2,23 107:20 112:8,20 119:21,21 120:12 129:14 evidenced 17:12 exactly 53:5,8 90:21 101:6 123:24 124:10 examination 3:13,15 3:19,21,23 4:2,4,7,9 4:11,14,16 19:17 33:8 36:3 42:1,2 56:20 58:13 64:23 69:17 76:12 79:9 81:5 91:17 examine 64:20 76:11 91:13 examined 19:5 35:17 58:4 69:9 80:21 example 40:10 examples 92:13 except 14:1 52:15 85:17 exception 9:9 excluded 113:21 excuse 6:9 20:18 81:14 excused 80:9 exemplary 61:22</p>
---	--	--	--	---

<p>exercise 113:2 120:5 exercised 118:12 Exhibit 4:20,21,22,23 4:24 28:14,18,21 34:1 44:23 45:3,3,6 47:3,9,13 48:6 49:5 61:21,22 62:21 63:6 exist 103:7 existed 100:4 expect 106:15 126:24 expected 6:7 experience 7:12 81:9 90:6 experienced 91:9 94:13 expert 6:18,24 7:7,11 8:21,24 9:11 85:10 91:2,3 94:2,13 expertise 83:4 90:6 experts 9:2 84:6 88:15 expert's 9:20 explaining 23:5 exposure 115:5 express 104:9 124:10 125:12 expressing 7:16 30:20 101:8,18 123:21 expression 96:23 101:5 112:15 124:5 expressive 112:11,15 extent 17:13 85:5 extinguish 121:12 extremely 90:24 e-mail 42:7 44:11,14 54:14 60:15 75:10,11 75:12,23 76:24 77:6 122:7 e-mails 54:5,6,11,18 55:2,6,7,12,19 60:24 61:6,8,12,19,22 62:2 63:10 64:1 65:10,12 65:16 66:5 73:4,17 73:19 75:9 76:5,19 88:4 97:10 98:2 121:22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faced 17:8 fact 8:4 14:18 17:3,17 17:19,24 18:7 33:12 37:14 48:2 50:22 54:16 55:11 67:8 77:5 81:21 83:1 97:16 102:15 107:14 112:7 121:19 122:1 123:13 125:20,24 factor 101:23 102:6 103:9 112:2,10,19 113:6 114:1,19 115:11 126:18 factors 15:10 18:18,19 104:11 108:5 109:7</p>	<p>109:11 111:3 114:15 120:13 127:14 128:6 facts 17:7,12,17,19 18:5 120:6 126:1 faculty 51:24 66:17 97:14 failed 120:11 121:20 fails 123:18 fair 51:7 55:6 fairness 120:8 Fairview 36:16 faithfully 111:10 fall 31:11 36:17 family 19:22 famous 118:17 far 10:3 52:2,19 53:6 54:4 64:10 74:2 79:15 102:10 126:16 favor 15:4 fear 99:16,23 100:19 fearing 100:1 February 42:7 43:1 68:10 103:1 federal 10:23 65:17 117:15 federalism 117:14 feel 21:12,13 23:5 30:8 30:10,10 34:11 55:22 56:1 95:11 104:13 107:21 129:4 felt 21:14 27:11 31:10 37:18 38:14,23 87:10 88:8 107:15 119:21 female 78:15 feminine 31:14 few 31:18 40:20 42:6 fiduciaries 15:23 field 9:3 81:13,22 84:7 88:15 90:6 94:3,12 Fifth 110:23 121:8 filed 14:11,12 final 41:16 80:11 89:16 93:14 96:9 finally 127:1 find 8:4 15:4 26:23 65:15,20 109:20 123:24 finding 112:7 125:23 127:24 fine 12:22 96:1 finished 84:9 FIRM 3:1 first 13:2 14:17 18:23 19:5 23:17 34:4 35:17 39:4 58:4 59:6 64:6 69:9,22 71:2 74:18 75:10 77:6 80:21 81:11,17 88:13 97:1 101:16,19 102:1 103:3,5,20 104:10,19 109:24 110:1,1</p>	<p>118:13 119:5,14 125:10 128:15 Fishman 2:14 five 71:9 95:14 Floyd 2:23 4:8,12 11:13 16:22 23:20,23 24:7 69:15,18 75:3,6 76:3,8 79:7,10 80:3 105:11,13,16 124:20 flyer 44:15 focus 14:18 90:11 focused 126:6 fold 66:23 folks 80:16 follow 71:6 78:3 followed 8:10 following 1:17 14:5,11 34:5 57:11 128:10 follows 19:6 35:18 58:5 69:10 80:22 follow-up 32:8 footing 120:18 forced 117:12,13 forces 125:1 forecast 119:11,22 foreclosing 101:20 form 50:10 64:5,5 109:19 formal 22:10 Fortas 119:1 forth 14:20 15:24 37:12 87:16 98:13 102:24 104:18 105:7 105:24 122:22 forum 101:4,7,17,21 104:8 105:8 123:19 126:18 127:9,18 forward 17:7 102:12 found 27:5 100:3 103:24 110:4,14 114:17 116:1 121:12 124:8 125:20 foundation 17:1 founded 82:17 four 12:4 16:5 18:19 58:22 59:4,5,13 60:1 60:2 71:9 104:11 109:6,10 111:2 115:15 fourth 103:9 112:10 114:19 115:19 free 91:23 112:4 Fricke 103:16,21 104:1 104:6 Friday 29:6 42:15 57:10,12 95:2 friends 26:14 front 16:1 full 29:5 34:4 39:1 fully 9:16 44:8 53:22 83:1 115:24 128:24</p>	<p>Fulton 2:24 19:11,14 19:20 35:23 69:14 function 82:19 functioning 83:1 94:6 functions 115:10 fundamental 109:21 125:14 furniture 29:16 41:6 74:6 126:21 further 35:2 41:23 56:14 57:17 64:17 68:9 76:8 79:4 80:3,6 90:16 93:22 94:19 95:18 112:12 115:12 129:11 further 111:16 futility 116:15,17 future 108:17</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 5:1 gallery 99:16,18 100:5 100:6,19 124:2,6 gathered 84:4 gatherings 106:9 gave 13:22 61:16 92:13 101:3 gay 30:11,14 80:1 geared 105:1 gender 31:16 124:16 genderial 123:22 general 6:19 53:1 get 10:2 22:1 24:5,18 25:10 27:12 33:1,19 33:22 52:14 53:7 65:16 66:23 71:22 73:16 74:16 87:12 88:7,10,11,19,23 89:1,11 90:11 98:22 98:24 107:2 121:24 123:1 128:20 gets 32:24 114:2 getting 21:15 60:4 61:8 76:5 79:20 106:17 girl 22:11 31:14 girlfriend 5:5,18 13:6,8 13:10,13,20 14:1,15 21:2,16,19 30:21 31:5,21 64:8 78:1,7 97:1 101:10,15 102:13,20 103:19 104:17 105:4 122:14 123:3,16 126:15 127:8,19 girls 20:11,14,21 22:11 24:22,23 25:2 79:20 102:17 give 20:2 36:5 40:10,17 58:15 81:7 85:23 91:10 95:13 102:3 110:13</p>	<p>given 18:17 82:3 107:1 125:4 giving 45:22 93:11,13 GLEN 1:16 go 20:9 21:15,17 22:2 23:2,2,6 27:4 29:5 30:8,11,12,20 32:19 52:14 61:3 62:4 65:15,19 71:22 82:12 82:24 83:2 104:15 107:17 115:12,21 117:1 119:4 goal 107:12 goes 121:17 going 6:4 14:9 16:11 22:2 26:19,21 39:19 41:5 47:16 61:20 65:22 70:15,20 85:5 86:15,20 89:8,8 90:12,21,23 91:13 105:14 107:18 108:10,12 109:4 112:23 116:21 117:3 117:22,23 118:4 122:23 123:17,23 125:13 126:11,13,16 128:19 gone 18:18 106:23 120:13 good 5:13 33:10,11 42:4,5 49:18 53:15 76:14,15 110:22 119:20 got 25:11,23 30:20 32:16 34:23 53:18 58:19 65:19,19 71:18 74:20 75:10,15 81:15 97:15 110:14 govern 83:9,11,12 86:8 governance 7:14 9:22 82:17 83:5 84:16 86:13 88:17 94:3 governed 15:9 government 99:24 100:9 111:4,5 112:3 116:6,6 117:17 118:10 119:8 122:16 125:4 governmental 111:17 111:18 112:13 114:6 117:12 governments 123:4 governor's 99:14,17 100:2,21 124:6 grade 13:4 20:12 40:14 graduate 36:8,9,12 38:11 58:18 70:8 Granddaughter 74:12 74:13 grant 102:7 103:10 104:14 120:17</p>
--	--	---	---	---

<p>granted 11:23 12:2 103:24</p> <p>granting 12:3 101:23 127:14</p> <p>gray 19:13 83:12</p> <p>greater 112:12</p> <p>Griffin 68:10</p> <p>ground 5:14 6:6 120:18</p> <p>grounds 77:15</p> <p>group 40:17 99:14,16 116:12</p> <p>growing 17:9,15 52:24 106:11,17 114:15</p> <p>guaranteed 103:13</p> <p>guidance 110:5 117:11</p> <p>guiding 40:24</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>H 4:18</p> <p>half 26:3 29:4 59:8 70:4</p> <p>hand 54:18 61:20,24 112:17</p> <p>handed 116:20</p> <p>handing 63:5</p> <p>handle 122:3</p> <p>handled 37:4 41:19</p> <p>happen 26:19 27:14 108:17,18,19 115:10</p> <p>happened 20:24 52:6 57:11 65:5</p> <p>hard 5:20 38:7 66:22</p> <p>Harland 98:15</p> <p>harm 11:23 12:1 102:9 102:12 103:4,7 109:21 113:7 114:21</p> <p>hasn't 55:16 123:7 126:23</p> <p>haven't 55:11 124:21</p> <p>having 15:19 19:5 23:21 31:19 35:17 38:7,8 41:9 46:11 47:22 52:1 53:15,19 58:4 66:23 69:9 79:20 80:21 97:20 116:3</p> <p>Haygood 2:14</p> <p>he 7:10,15,17 8:8,14,14 9:12 10:4,4 23:1,1,2 23:3,5 52:1 85:16 92:20 97:10,13,13 98:6,8 103:24</p> <p>head 23:6</p> <p>hear 8:22 12:18 22:22 88:20,21 95:12 96:9 99:17</p> <p>heard 1:15 31:20 80:15 111:11,20 121:2 126:20,23</p> <p>hearing 10:21 28:14 31:19 45:3 47:3</p>	<p>128:5</p> <p>hearsay 6:23 8:16 9:1</p> <p>Heather 1:21 3:4</p> <p>heavy 109:3</p> <p>Heckler's 125:5,7</p> <p>held 10:17 42:14 46:13 57:7 66:14,16 96:11 99:24 102:4 103:12 103:14 107:16 113:13,20 117:23,24 118:4 119:4</p> <p>help 13:12 70:10 84:1 108:15 110:6 128:11</p> <p>helped 108:15</p> <p>helping 40:22 60:5</p> <p>here 9:13 12:23 67:24 68:9 100:12 105:19 110:9 121:15,20 122:24 124:11 126:3 129:15</p> <p>HERETO 28:22 44:24 47:14 49:6 62:22</p> <p>here's 91:1 109:14</p> <p>herself 98:14 101:8,18 113:9 123:21 126:20</p> <p>He'll 7:13</p> <p>he's 6:19,22,23 7:4 9:21,23,24 10:4 84:16 85:2,5 91:12</p> <p>high 13:4 18:15 34:9,16 36:9 37:7,8 38:10 42:11,14,18 43:11,16 44:8 56:2 57:24 58:10,19,22 59:5 66:7 71:4 72:13 77:12 79:12,14 82:2 97:10 106:3,24 107:5</p> <p>hill 39:20</p> <p>him 10:3 23:5,11 72:19 80:18,18 84:12,12 85:13 108:22</p> <p>himself 7:13</p> <p>his 7:4,5,12,13 8:13 9:2 22:20 51:24 75:22 84:9,12,22,24 85:1,6 85:17 91:3 94:10 103:23 104:1</p> <p>history 79:18 107:2</p> <p>hold 44:9 69:23 79:22 105:21 106:20 112:22</p> <p>holding 16:6,9 40:2</p> <p>Holloman 98:15 124:23</p> <p>home 81:3</p> <p>homophobia 17:2</p> <p>homophobic 61:14</p> <p>honestly 7:23</p> <p>Honorable 1:16</p> <p>Hood 4:6 69:5,7,8,13 69:19 70:10 73:24</p>	<p>75:7,22 76:14 79:11 98:5</p> <p>hope 34:10 49:10,12,17 58:11</p> <p>hoping 21:8</p> <p>Horn 2:23 11:13</p> <p>host 18:7,13 34:8,15 40:9,13 41:22,22 49:20 53:2 55:15 56:23 65:7 70:21 72:2,5,10,16 73:15 73:16 97:4,12 106:1 106:3 107:5 108:8,11 109:18</p> <p>hosted 40:6 73:12 107:18</p> <p>hostile 27:8</p> <p>hosting 34:22 37:11,15 53:22 55:8,13 65:11 70:11 71:3,15 108:10 108:13,14</p> <p>hot 118:21,22</p> <p>hounded 37:17,17</p> <p>hounding 37:21</p> <p>hour 54:17 65:19</p> <p>house 119:15</p> <p>how 8:2 19:20 21:11,13 23:5,12 25:18,19 26:23 27:4,7 29:2 37:3 40:3,18 52:21 59:16 63:18 64:9 65:12,14,24 68:4 70:2 71:7 73:21 74:16 79:13 80:7 82:16,18 83:9,11,12 85:3 86:15,20 88:23 89:13 90:12 96:2 97:22 102:23 105:6 117:21 118:1 125:12 126:10</p> <p>however 34:11 92:23 97:6 105:19 106:5</p> <p>HR 75:18</p> <p>hundred 82:3</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>IAHS 42:15,17 44:9 53:23</p> <p>idea 15:20</p> <p>identification 62:17,24 63:6 64:13</p> <p>identify 8:15 63:6</p> <p>identity 6:2</p> <p>IHS 70:8 78:21</p> <p>image 100:22</p> <p>imagine 6:3</p> <p>impact 65:12 66:5 86:15,21 87:24 89:7 90:12</p> <p>impacted 65:14,24 66:3</p> <p>implement 36:24</p>	<p>implementation 82:17</p> <p>importance 94:6</p> <p>important 111:16 114:11 124:19</p> <p>impossible 116:11</p> <p>improper 100:22</p> <p>inappropriate 6:24 7:6 54:13 76:24 77:2,4 85:8 129:4</p> <p>incidental 112:11,14</p> <p>incidents 16:13</p> <p>includes 91:23</p> <p>including 81:10 82:13</p> <p>inconsistent 89:19</p> <p>inconvenience 34:17</p> <p>increased 122:8</p> <p>incumbent 11:18</p> <p>Independent 118:16,19 121:7</p> <p>indicated 98:6 102:11 126:4</p> <p>indicating 14:2</p> <p>indication 124:23</p> <p>individuals 60:16 61:1</p> <p>inform 9:20</p> <p>information 34:23 52:7 84:4 88:19,20,24 89:5 107:1</p> <p>informed 21:21 87:7</p> <p>initially 92:20</p> <p>initiated 68:13</p> <p>injunction 10:22 11:23 12:1,2,3 14:12 15:5 18:21 96:19 99:12 102:7 103:11,24 104:14 120:17,20 127:15 128:5 129:7</p> <p>injunctive 101:23 104:12 129:1</p> <p>injuries 102:8</p> <p>injury 11:24 101:22,24 102:2,7 114:5</p> <p>input 89:5,21</p> <p>inquired 113:23</p> <p>inquiry 113:11,14 121:18 125:24</p> <p>instant 14:11</p> <p>instruct 38:24 91:20</p> <p>instructed 5:16 97:14</p> <p>instruction 38:7,8 39:1 53:19</p> <p>instructors 39:2</p> <p>insurance 70:6,9</p> <p>insure 122:4 126:13</p> <p>intended 96:23</p> <p>intending 44:8 53:22</p> <p>intent 49:15 118:12</p> <p>intention 101:5</p> <p>interact 82:6</p> <p>intercom 92:15</p> <p>interest 12:4 18:14</p>	<p>34:12 50:23 73:1 86:7 99:24 100:3,8 103:11,12 111:17,18 112:3,13 114:6,20</p> <p>interested 40:21</p> <p>interfere 70:22</p> <p>interfered 98:17</p> <p>interference 119:12</p> <p>internal 8:12</p> <p>interrupted 122:1</p> <p>into 34:13 44:12,15 45:8 48:15 71:20 76:6 98:11 102:22 107:14 115:11 116:21 126:18</p> <p>introduce 47:2</p> <p>introduced 102:22</p> <p>introduction 62:2</p> <p>invalidate 116:17</p> <p>invitation 29:17 30:2 41:10 74:23 75:1 107:24 117:19 118:8</p> <p>invitations 41:8 108:2 108:3 113:17</p> <p>invited 113:15,16 117:16 126:13</p> <p>involved 10:1 54:9 80:16 92:10 117:21 118:8</p> <p>involving 17:4 46:19 92:15,16 120:9</p> <p>irreparable 11:23 101:22,24 102:2 109:21 113:7</p> <p>Island 103:16</p> <p>isn't 50:20 51:7</p> <p>isolated 109:19</p> <p>issue 7:18,20 8:10 14:3 14:18 15:4 37:2 53:11,13 59:24 60:6 67:24 68:1 75:22 85:2 86:10 87:8,9,12 88:24 96:18 99:10 103:22 104:7 109:3 117:6 129:15</p> <p>issued 14:6 65:10 103:1 122:8,20</p> <p>issues 6:3 17:15 37:10 51:8 53:12,13 59:15 59:23 60:17 67:6,22 80:1 82:22 83:16,17 83:20 86:17 88:11 97:19 118:8 123:10 127:5 128:1 129:1</p> <p>its 7:21 15:23 16:15,24 17:5 40:15 50:17 52:12 55:13 57:23 65:10 85:4 92:5 93:9 93:18 106:4,7,9 108:6,16 109:19 110:3 113:2 114:23</p>
---	---	--	---	---

116:18 117:4 118:10 118:23 119:20 120:6 127:3 itself 97:19 100:6 102:2 123:6 I'd 61:3,20 95:11 103:15 I'll 12:18 23:7 28:9 96:9 I'm 23:21 25:23 29:24 30:11,14 31:4,5,6,9 33:19,22 36:8 37:2 45:6,11 46:12 47:16 48:14,21 49:8 52:3 52:14 53:7 54:15 56:8,11 58:9,18 61:8 61:19 63:5 70:1 74:11 78:24 81:1,1 86:15 90:19 91:12 109:3 110:6,9 118:24 119:10 128:9 I've 5:16 8:13 9:9,10 20:11 36:12 37:24 59:7,13 61:13,14,15 63:24 69:21 75:10 79:15 81:20 82:9 83:8 84:1 86:8 89:21 96:5 110:4,14 113:3 113:4 119:13,14 120:13	Keith 4:13 6:18 8:21 80:12,20 81:1,7 82:5 83:4 85:9,22 89:16 90:5 Keith's 6:22 kept 106:16,17 kicked 33:1 kids 20:6,9 26:18 88:11 89:9 kin 29:23 kind 64:6 80:1 113:5 knew 21:3 25:9,24 26:20 39:18,22,23 59:17 knowing 22:4 73:18,21 knowledge 7:5,12 43:3 44:5 52:5 53:22 71:12 73:24 78:9 90:5 known 61:13 knows 8:24 114:18 126:20 Knox 92:14 Kristy 2:9 11:3 K-H 59:14	led 108:6 Lee 40:11 59:18 left 86:16 legal 7:1,16,17 8:8,11 9:21 45:17 82:8,10 85:23 93:12,12 106:6 legality 86:13 legally 82:16 Legislative 83:23 legislators 116:13 117:1 legislature 82:13 100:7 legitimate 115:10 Leigh 2:13 11:4 lengthy 106:23 lesbian 31:4 73:9 79:24 101:8 123:21 lesson 15:20 lessons 66:1,4,15 98:3 98:7 121:4,24 let 22:2 23:8 26:19 31:18 42:6 45:2,14 46:5 54:11 62:23 63:21 68:8 70:22 71:22 73:17 85:9 91:13 118:15 123:16 125:3 127:20 letter 13:14 14:2,8 25:15,17 27:15,20,24 28:3,6,10,10,14 45:12,21,23 46:16,24 52:9,11 64:5 66:10 66:12,18 68:3 97:3 97:13,23 98:10 101:13 105:6 106:12 106:15 121:5 123:15 127:6 letting 119:3 let's 48:5 51:24 62:16 64:12 80:18 level 33:23 110:11 Levy 69:14 liabilities 108:18 liability 16:6 17:21 37:10,14 53:10,13 108:14 115:5 Liberties 16:23 106:13 liberty 109:24 licensed 120:7 life 13:3 19:21 20:7 102:17 lay 8:23 9:17 82:20 leadership 58:21 learning 14:10,21 17:6 38:14 66:24 88:1,2 89:8 90:12 97:5,8 126:5 least 82:9 100:14 108:13 leave 119:14 leaving 27:8	73:3,6 87:10 88:8 103:15 104:14 128:16 liked 20:11 likelihood 11:20 96:20 99:6 127:13 likely 109:15 112:21 likewise 100:11 liking 20:14 limine 9:13 limit 12:14 limited 87:21 119:19 limits 5:9 line 54:23 86:20 litigation 46:20,23,23 66:19 83:17 little 19:16 60:9 90:20 114:2 128:16 live 19:11,19 lived 19:20 local 72:3 75:15,15 117:17 118:9,10 119:8 logic 128:10 long 19:20 48:6 77:19 79:13 80:7 longer 34:19 37:15 39:23 40:6 41:22 60:14,22 72:1 97:20 109:18 look 61:4 86:5 91:12 109:19 looked 110:4,7 looking 110:9 looks 27:10 64:5 losing 38:15 39:21 lot 25:22 27:12 64:4,7,9 82:20 87:18,19 89:12 92:11 93:4,5 114:2 121:21 loud 118:1 Louisiana 2:15 lower 19:15 lunch 95:20	make 5:6,24 12:10 21:13 36:23 39:22 54:1 55:22,24 56:1 70:20 82:16 86:6,15 87:24 88:1,2 89:23 90:10,23 93:13 96:24 97:14 105:5 107:12 113:11 117:3 124:4 125:23 127:20 makes 65:23 77:1 making 39:3,9 79:21 83:6 86:24 88:16 90:7 111:24 119:20 127:24 male 103:22,23,23 man 61:13 91:2 manage 97:17 mandate 105:20 mandated 15:22 18:20 82:10,13,13 83:22 manner 16:10 Mantachie 41:17 58:11 59:19 106:3 many 9:24 18:1 27:9,9 29:2 63:18 70:2 71:7 113:4 116:19,20 marginalized 15:20 mark 62:16 64:12 marked 28:20 44:22 45:2 47:12 49:4 61:21 62:20,24 63:5 market 29:16 41:6 74:6 126:21 master's 36:12 58:20 material 7:2 14:20 97:5 119:12 materially 98:17 matter 7:19 9:18 11:17 12:24 30:6 37:9 91:4 95:1,18 96:19 106:16 106:21 120:19 matters 7:5 8:4 9:13,22 16:13 36:22 46:19 94:5,5 max 96:6 maybe 21:9,11,12 27:16,17,18,19,21 29:24 74:20 mayor 116:14 ma'am 19:3 22:14 28:4 30:17 42:9,16 43:6 44:10 45:5,19,24 57:20 65:4 66:2 67:21 68:5 69:16 75:5 76:18 78:13 79:3 96:15 105:12 120:24 McMillen 1:5 3:12 10:19 12:24 13:2 19:1,2,4,10 33:10,22 35:6 96:23 97:24
J Jackson 2:11 81:2 92:14 116:1,6,7,14 Jane 5:14,21 January 36:19 jeopardizing 17:10 Jim 4:13 6:18 80:12,20 81:1 job 36:22 58:23 60:3 65:21,23 83:24 Journal 72:4,12 Judge 1:17 37:20 109:8 judgement 112:1 judgment 120:6 judgments 8:2 judicial 116:17 118:5 judicially 113:3 judiciary 119:3 junior 34:15 42:14 60:2 68:16 juniors 34:11 49:13,21 Justice 119:1 justices 119:4 justified 16:15 justify 7:2	L L 1:21 3:4 land 116:23 lap 89:2 last 21:4 41:4 45:15 49:8 59:5,7,10,13 71:9 80:6 82:9 late 95:2 128:14,14 later 9:14 14:5 25:1 92:21 latest 43:1 law 9:8,11 81:2,15,16 81:18,19,22 83:23 84:14,18 85:13,17 86:23 91:11,12 93:16 94:5 106:6 110:22 115:2,3 116:18,22,22 116:22 128:11 lawful 8:11 laws 31:16 102:1 lawsuit 16:24 17:3 lawsuits 115:8 lawyer 84:13 85:16 91:10 92:24 lawyers 9:9 lay 8:23 9:17 82:20 leadership 58:21 learning 14:10,21 17:6 38:14 66:24 88:1,2 89:8 90:12 97:5,8 126:5 least 82:9 100:14 108:13 leave 119:14 leaving 27:8	letter 13:14 14:2,8 25:15,17 27:15,20,24 28:3,6,10,10,14 45:12,21,23 46:16,24 52:9,11 64:5 66:10 66:12,18 68:3 97:3 97:13,23 98:10 101:13 105:6 106:12 106:15 121:5 123:15 127:6 letting 119:3 let's 48:5 51:24 62:16 64:12 80:18 level 33:23 110:11 Levy 69:14 liabilities 108:18 liability 16:6 17:21 37:10,14 53:10,13 108:14 115:5 Liberties 16:23 106:13 liberty 109:24 licensed 120:7 life 13:3 19:21 20:7 102:17 lay 8:23 9:17 82:20 leadership 58:21 learning 14:10,21 17:6 20:21 21:14 23:5 25:3,20,21,23 26:8 27:10,11,11,13,17,20 30:8,10,10,12,24 31:9,11 32:20,23 37:18 38:14,23 53:17 55:22 59:23 61:20 64:5,5 67:15 71:6	M made 7:23 8:3 18:6 21:12 23:5 37:5 38:3 39:4 42:24 44:6 56:23 60:20,21 64:10 65:6 70:13 85:4 87:9 91:12 93:14 99:9,22 107:4 111:10,21,22 112:6 113:14 120:3 121:21 125:19,24 126:11 main 68:1 101:12 mainly 115:5 maintain 80:14 major 15:13 59:24 60:6 majority 64:7 72:9	
K kabuki 128:17 keep 79:19 keeping 101:9	least 82:9 100:14 108:13 leave 119:14 leaving 27:8			

<p>98:14 101:8,18,22 102:13,15 103:2,19 104:11,16 105:3 107:17 121:5 123:8 123:20 126:13,19,19 127:16</p> <p>McMillen's 62:4,9 101:14 103:5 105:18 122:13 123:2,15 124:14 125:16 127:5 127:6,11</p> <p>McNeese 3:18 24:12,13 35:13,16,22 36:5,20 41:16 42:4 48:19 56:22 98:1 104:24 105:3 111:21 126:8</p> <p>mean 7:4 20:11,16,19 21:3,14 22:6 23:4,6 23:10 25:5,20,21,23 25:24 26:7,8,13,13 26:14 30:10,23 31:2 31:3,4,5,9,14 32:14 32:17,19,23 54:8 86:24 88:18 95:8 100:12 123:4,13,23 125:3,4,21,22,23 126:12,15 127:4</p> <p>meaning 119:24 means 100:10,15 media 37:16 38:1 47:24 48:3 50:3,19,23 52:12 55:12 72:3 73:1 74:17,18</p> <p>meet 86:19 89:13 meeting 14:4 39:5 46:11,19 66:17 68:2 97:14,21 98:8,8 101:12 106:16,20,22 107:2</p> <p>member 69:21,23 76:21 77:8,10,13 82:12,19 83:1 87:4 89:10</p> <p>members 6:15 8:3,15 9:17,24 10:8 54:7 82:6,11,16,20,23 83:9,14 84:2 86:12 86:18 87:22,23 88:21 88:22 89:22 90:2 91:20 99:19 100:5,20 111:12,23 124:3,9</p> <p>memo 68:10 102:22 104:17</p> <p>memorandum 99:13 115:7 122:21</p> <p>Memphis 1:23 3:6 mentioned 5:5,7 49:23 50:2 51:2 52:24 54:2 67:8 76:19 92:9</p> <p>mere 100:5 merits 11:21 96:21</p>	<p>99:7 109:15 112:21 127:13,24 128:1,19</p> <p>message 100:6 met 66:17 89:14 96:21 104:11 105:6 123:14 123:14 127:5,12</p> <p>Miami 81:14 mic 19:15 Michele 2:23 11:13 Michelle 16:21 23:20 23:23 24:7</p> <p>middle 31:12 128:20 might 5:13 71:3 117:23 125:9</p> <p>Miller 29:24 Mills 2:13 11:4 minor 5:6 minutes 12:14 96:4,6 minutia 117:21 misconception 18:9 miss 36:11 58:21 67:17 missed 98:5 mission 8:5 15:23 38:17,21 89:19 90:1 94:8</p> <p>Mississippi 1:2 2:10,11 2:21,24 6:19 11:13 13:15 19:14 35:24 36:10,15,15 58:11,20 69:14 72:10 81:3,4 81:10,12,16 82:1,1 82:11,14 83:23,23 94:5 115:1</p> <p>Mitchell 22:21 23:1 Moines 14:20 118:16 118:19</p> <p>mom 25:9 moment 30:15 68:6,22 69:6 75:20 79:2 84:8 104:20</p> <p>Monday 57:12 money 43:4 82:21 Mooreville 36:15 58:22 morass 118:8 more 9:16 14:3 40:12 50:22 53:19 55:11 65:23 72:15 82:4</p> <p>morning 15:11 33:10 33:11 42:4,5 46:11 76:14,15</p> <p>most 26:18 27:11 64:3 72:7 73:17,19 129:1</p> <p>motion 10:22 14:12,16 99:12 120:17</p> <p>motivation 116:12 motive 108:6 127:2 motives 116:18 117:1 motto 38:6 move 12:20 71:21 moving 59:4 much 27:13 60:12</p>	<p>90:13 96:2 multiple 16:8 music 118:1 must 8:2 13:11 42:24 43:11,23 82:12 91:20 92:5 98:16 101:24 104:11,19 109:11 114:20 121:11,18 125:23</p> <p>mute 99:10 mutual 107:4 110:8,11 110:24</p> <p>my 18:16 19:10,21 21:16 22:1 23:6 25:9 26:14 31:21 35:22,23 36:22 38:12 40:4 41:4 58:9,10,19,21 65:14 66:21 71:16 74:6 75:15 78:9 81:3 81:21 82:14 89:3,7 89:16 90:12 95:10 108:2</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1 3:9 5:1 name 5:7,17,24 6:4 19:8,10 22:20 23:22 24:11 35:20,22 58:7 58:9 61:13 69:12 80:24</p> <p>names 61:14 74:11 narrowest 100:10 nature 82:18 93:20 118:9</p> <p>nearby 40:2 necessarily 128:8 necessary 87:12 111:8 112:12</p> <p>need 6:6,13 115:7 118:4</p> <p>needed 5:2 14:3 88:6 needing 38:24 negative 61:9,11,14 70:14</p> <p>negatively 16:9 nervous 20:4 neutral 123:12 124:2</p> <p>never 26:20,20 80:2 86:3 91:2,2</p> <p>new 2:7,7,15 17:17 81:14 118:4</p> <p>news 38:1 next 14:3,10 26:2 57:21 57:23 69:5 80:10</p> <p>night 31:12 32:20 62:12</p> <p>Nikita 11:7 non-constitutional 119:7 non-governmental 113:19</p>	<p>non-jury 91:4,15 95:13 non-school 113:18 nor 85:23 normal 56:6 normality 8:1 normally 55:20 77:21 77:22</p> <p>NORTHERN 1:2 NORTHWESTERN 1:3</p> <p>note 124:19 nothing 44:3 51:17 56:14</p> <p>notice 46:10 107:10 now 9:8,12 12:9 22:13 31:21 52:2 63:24 64:1 68:14 71:20 72:8 75:12 83:8 94:24 108:21 110:4 115:21 118:3 126:12 128:17</p> <p>no-win 39:17 108:8 number 10:19 48:6 53:10 61:6 102:3 nurture 121:11</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 5:1 object 50:10 52:1 62:1 75:21 85:1 90:24</p> <p>objection 6:21 7:3 28:15,16 44:17,18,19 47:5,6 49:1 76:1 80:15 84:24 90:22 94:10,11</p> <p>objections 47:7 89:14 objectives 89:13 obligation 106:6 obligations 93:19 observed 16:14 37:23 obvious 15:17 obviously 5:5 38:12 39:17 83:19 88:18 90:4 121:1 125:8 129:4</p> <p>occasion 82:5 occur 8:16 50:4,6,12 52:15 97:16 occurred 49:24 50:19 62:6 100:16 128:22 occurrences 15:17 occurring 50:9 106:19 off 5:9 10:16 59:20 61:15</p> <p>offer 14:23 48:15 85:6 offered 96:22 129:2 offering 6:23,23 7:6 8:8 office 36:18 75:14 83:3 officer 10:4 110:6 offices 69:24 75:15 official 54:22 76:24</p>	<p>officials 13:7,9 21:1 101:4 119:10</p> <p>Oh 19:13 48:9,21 okay 5:2,12,19,22 9:4 20:17 21:7 30:15 31:7,17 32:18 43:14 48:14 64:12,19 69:6 69:13 77:24 80:5,13 81:11 85:23 95:22 120:21 129:22</p> <p>old 75:10 Ole 36:11 58:20 once 9:16 21:21 32:15 90:9</p> <p>one 6:18 11:20 17:2 20:18,19,20 25:20,24 25:24 26:1 31:19 41:16,18,20 49:8 53:10 64:6 65:15,20 65:20,21 68:8 82:4 83:16 87:20 92:13 95:20 96:8,8 108:1 111:19 113:15 114:2 115:15,19,22 116:4 120:9,12,14</p> <p>ones 56:1 72:7 120:13 ongoing 53:8 only 8:1 9:8,18,22 26:9 84:16 86:12 97:2 124:14</p> <p>open 39:10,16 41:6 54:15 90:7 108:4 126:9</p> <p>opening 12:10 16:17 96:16 107:6</p> <p>operate 55:20 56:5 operated 117:16 operating 77:21,22 operation 54:9 98:18 opining 9:21 opinion 9:20 73:7 85:6 85:17 88:5 94:12 129:16</p> <p>opinions 6:24 7:6,16,17 8:8,9 9:8,22 85:23 opportunity 114:9 123:2,20</p> <p>opposed 127:23 128:2 opposing 61:20 opposite 13:11 32:15 43:12,24 78:19 79:13 103:1 104:19 105:1 107:6 124:15 125:18</p> <p>opposition 14:16 46:6 options 45:18 93:12 oral 95:17 order 15:1 18:20,20 83:21 122:13 124:12 orderly 38:13 ordinance 110:9,11,24 111:3</p>
---	---	---	--	---

<p>ordinarily 95:13 129:6 ordinary 26:6 organize 34:10 49:13 49:16 organizing 53:9 orientation 20:10 Orleans 2:15 118:4 other 6:5 9:10 16:8 17:24 39:15 40:2,5,6 54:6,12 56:10,11 60:24 67:12 72:1,13 74:20 76:20 82:18 83:17 84:14 103:14 106:19 107:22,22 108:7 111:23,23,24 114:1 115:4 117:4 125:12 126:6 127:14 others 54:19 otherwise 62:4 113:21 ought 5:13 90:2 92:7 ourselves 108:13 out 16:5 21:1 23:12 26:6,23 27:5 31:11 33:1 37:11 41:7,11 53:14 60:1,5 65:15 65:20 67:5 71:18 78:4 83:22 84:2 107:3,10 113:21 115:4 118:15 123:1 123:19 126:16 outside 63:11 122:6 125:1 outweigh 114:5,20 outweighs 12:1 102:9 103:7 over 16:5,7 17:20,23 23:6 59:2,11 60:9 63:20 71:9 76:6 82:3 92:15 95:2 108:21 113:3 115:5 117:4 120:13 123:4 overall 67:10 oversight 118:5 own 106:2,4 111:12 114:3 116:24 O'Brien 110:16,17 112:2,10 o'clock 95:20 96:8,9</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 2:1,1,6 5:1 11:3 page 3:11 4:19 45:14 98:22 115:24 118:24 paid 82:20 Palmer 115:21,23 116:19 117:5 pants 24:24 papers 46:6 paragraph 34:4 49:9 paragraphs 42:21 paralegals 11:7</p>	<p>parameters 89:15 paramount 107:12 Pardon 44:13 parent 41:1 106:4 parents 18:3,8 37:24 40:8,17,17,21 41:22 49:17 54:14 59:17,20 70:24 98:2 113:14,18 126:8 part 82:10 92:4,5 participate 70:10 participated 59:10 71:11 particular 40:14 43:16 84:19 89:15 Particularly 8:3 parties 95:13 party 10:9 79:21,21 113:19 Pasadena 36:14 pass 38:10 59:16 passed 59:19 past 29:8 57:12 patent 9:9,10 payments 42:21,24 penalized 123:8 people 20:21 25:22 27:9,10,11,13 31:6 54:15 63:11 64:1 68:15 73:1,7,20 95:11 114:17 116:19 125:11,13 people's 105:4 pep 67:15,16,18 per 12:15 40:14 41:10 perceive 125:13 percent 61:9,9 72:5 81:21 105:24 perceptions 15:16 perfectly 95:22 perform 17:13 performance 83:20 86:16,17,21 87:13 perhaps 9:12 period 37:6 77:19 109:8 114:14 periodically 77:18 permit 85:12 permitted 8:24 9:9,11 10:5 perquisites 12:5 person 30:13 32:20 104:8 personal 7:5 52:5 71:12 personally 8:18 97:9 persons 61:1 perspective 46:19,23 60:8 persuasion 109:13,13 115:15 120:11</p>	<p>phone 3:7 38:2 50:3 54:5,18 121:22 122:7 picked 75:13 place 15:17 21:10 37:21 59:10 75:8 79:17,17 98:7 113:1 117:4 123:7 plaintiff 1:6 2:4 11:3 11:10,19,21,22,24 12:19 18:22,24 35:8 35:10 45:21 48:21 52:9 64:19 80:5 94:20 95:6,23 96:12 96:21 99:5 101:24 102:9 109:11,14 112:16,20 113:6,9,21 114:9 115:13 118:14 120:8,11,21 Plaintiffs 7:19 10:24 18:19 94:9 117:16,20 Plaintiff's 10:22 28:18 28:20 44:22 47:9,12 49:4 51:18 96:17 105:17 114:5 118:7 119:5 plan 15:20 planned 29:12 65:2 planning 108:3 plans 41:3 plan's 115:8 please 12:23 19:3,7 22:13 35:19 57:20 58:2,6,15 62:10 69:19 75:4 108:24 pleases 16:22 podium 12:20 16:19 point 16:18 24:21 25:6 26:20 27:7 31:19 35:9 39:23 61:7 78:6 90:10 97:11 98:3 103:4 109:4 125:10 128:2 pointing 118:15 policies 8:13 37:1 83:5 88:16 policy 7:14 8:2 13:5,17 21:3,5,6,10 25:5 43:10,13,15,18,23 78:18,20,21,22,24 82:17 83:10,10,10,12 84:18 86:9,9 90:7 94:3 124:15 polite 54:19 pool 116:3 pools 116:8 popular 55:24 89:24 pose 103:4 position 12:20 36:7 83:15 88:23 positive 29:24 61:9 73:23</p>	<p>possible 99:23 100:10 120:1 possibly 129:16 post 6:6 potential 66:19 108:14 114:21 power 101:4 111:4 113:2 116:16 117:14 practical 121:13,15 practice 81:2,22 practiced 81:13 practicing 81:17,18,20 prayer 92:15,18 127:21 precedent 40:1 predicate 8:23 9:6 preface 87:1 preference 102:17 preliminary 10:22 12:3 14:12 96:18 99:12 101:23 102:7 103:10 103:24 120:17,20 127:14 128:5 129:7 preparation 84:3 preparations 53:17 prepare 17:22 preparing 102:21 preponderance 11:19 prescribed 106:10 presence 100:6 present 11:7 16:17 39:4 95:21 96:3,13 100:7 124:5 presentation 94:23 95:16 presented 17:11,15 18:4 108:5 129:15 presiding 1:17 press 14:7 37:16 122:8 Prestage 68:14 presumably 55:20 presume 77:5 pretend 32:20 pretty 54:20 61:16 102:1 121:2 prevail 11:21 96:20 109:15 112:21 prevent 100:11 101:7 104:8 prevented 51:18 113:22 preventing 104:16 primarily 16:5 primary 90:1,11 108:6 principal 6:17,18 22:15 22:16,24 23:3,3 26:14,15 36:15 37:8 51:23 57:23 58:10 59:1,3,3,6,7 87:5,6 92:17,23 93:10 97:9 97:21 106:18 principals 111:24</p>	<p>printed 61:15 prior 70:13 72:22 97:19 100:23,23 101:3,17 124:9,17 127:11 private 34:10 40:7 49:12,15,16,20 126:7 126:9,9,11,14,17 probably 9:18 40:11 53:18 70:4 72:4 110:5 Procedure 10:23 procedures 8:9,13 83:11 proceed 10:24 33:6 36:1 56:18 64:21 69:15 79:7 85:18 96:14 105:11 120:23 proceedings 1:18 9:19 proceeds 65:2,5 process 7:15 8:5 9:23 9:24 15:14 18:15 34:7 37:22 39:21 62:15 65:13,14 70:23 84:17,19 86:6 87:2,7 87:7 88:12 94:4 97:3 97:6,8 106:24 107:11 108:3 111:9,15 112:8 114:17 processed 6:16 professional 54:19 proffered 97:7 98:13 program 65:17 111:20 119:22 prohibiting 13:5,17 102:24 prolong 95:18 Promotions 101:1 prompt 68:9 prompted 21:1 promptly 129:16 proms 18:1,2 37:11 40:3 41:19 106:1 108:20 proof 15:10 94:24 95:16 115:14 proper 8:23 123:9 properly 128:6 property 16:7 propose 104:13 proposed 129:3 propriety 8:1 protect 103:13 108:15 121:11 protected 97:1 101:16 101:19 103:20 104:9 protecting 100:9 protection 92:1 protections 92:3 protective 14:18 protest 17:16</p>
---	---	---	---	--

<p>protesting 99:14 118:20</p> <p>prove 18:19 109:15</p> <p>provide 9:20 17:6 38:13,18 82:6,21 117:11 120:1</p> <p>provided 47:23 86:11</p> <p>providing 104:14</p> <p>proving 127:13</p> <p>public 8:5 12:4 54:22 76:23 99:18,20 101:4 101:7 104:7 114:20 116:3 119:18 123:19 124:3,5</p> <p>publication 100:24</p> <p>publicized 48:2</p> <p>public's 103:11,12</p> <p>published 104:18</p> <p>pulling 123:19</p> <p>punishing 51:19</p> <p>purchase 102:23</p> <p>purchased 107:17</p> <p>purchasing 113:11</p> <p>pure 86:12</p> <p>purely 8:8,11 118:9,9</p> <p>purser 111:18</p> <p>purportedly 49:24</p> <p>purports 8:15</p> <p>purpose 10:20</p> <p>pursuant 10:22 11:17 115:2</p> <p>pursue 45:17</p> <p>pursued 30:6</p> <p>pursuit 114:24</p> <p>purview 14:19 124:12</p> <p>push 32:22 105:4</p> <p>put 15:24 28:23 31:15 33:16 80:18 98 98:13 102:18 105:23 113:18 124:12 126:8</p> <p>putting 29:22 103:3</p> <p>P-1 4:20 28:17 45:6,9 68:12,13</p> <p>P-2 4:21 44:20 48:8,10 48:11</p> <p>P-3 4:22 47:10</p> <p>P-4 4:23 48:24 49:2</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifications 84:9,12 84:22,24</p> <p>qualified 7:10</p> <p>quality 38:18 53:15</p> <p>quell 100:13</p> <p>question 32:8 39:13 41:16 49:8 50:11 53:6 68:8,9 80:7 84:15 86:14 89:16 95:10 103:18 107:19 113:10 115:2 127:2</p> <p>questions 5:10 9:11</p>	<p>15:19 35:2 41:23 42:6 50:1 57:17 64:18 76:8,16 79:5 80:3,6 84:13,18 85:13 88:13 90:16,18 93:22</p> <p>quickly 129:20</p> <p>quite 93:6</p> <p>quote 55:2 101:1</p> <p>quoting 118:24 119:10</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 2:1 5:1</p> <p>raise 123:5</p> <p>raised 14:7 123:9 127:5 128:15</p> <p>rallies 67:15,16,18</p> <p>ramifications 108:17 112:24 114:12</p> <p>range 83:16</p> <p>rather 14:18 15:2 95:11 97:2 123:16 124:5 125:14</p> <p>reach 10:2 23:12 88:14</p> <p>reached 15:21 90:9</p> <p>reaction 125:9</p> <p>reactions 111:13</p> <p>read 8:13 33:23 34:4 64:4,6</p> <p>ready 10:24 11:14 60:4</p> <p>real 9:20 86:14 126:10</p> <p>realize 27:20,21 94:24</p> <p>really 9:15 15:9 25:20 25:22,24,24 26:9 118:21 126:17 128:9</p> <p>reason 21:10 73:11 111:8 117:2,3 120:10</p> <p>reasonable 100:1 119:21 125:20</p> <p>reasonably 9:2 119:11 120:5</p> <p>rebuttal 94:22</p> <p>recall 45:11 52:8 56:12 61:3 93:13 113:8,8</p> <p>receive 13:23 60:15,24 63:15 66:11 75:9 88:23</p> <p>received 14:1 29:17 30:1 48:17 61:6 63:10,19 68:3 70:14 70:16 72:24 74:23 75:22 76:19 77:6 95:1 97:10 98:2 106:12 107:24 108:1 122:6</p> <p>receiving 45:11 52:8 65:9 97:13</p> <p>recent 34:7</p> <p>recess 10:17 95:20 96:8 96:11</p> <p>recognition 72:6</p>	<p>recognize 42:7 45:3,7 46:6 47:17</p> <p>recommendation 36:24</p> <p>recommendations 36:23</p> <p>reconvene 96:8</p> <p>record 6:14 7:24 9:16 10:16 19:9 35:21 48:5 58:8 69:12 80:24 93:23</p> <p>redirect 35:4,5 56:16 69:3,4</p> <p>refer 5:14,17 62:13 103:15</p> <p>reference 34:18</p> <p>referred 33:15 99:12</p> <p>referring 44:1</p> <p>refers 50:11</p> <p>reflected 16:8 88:5</p> <p>reflecting 89:24</p> <p>reflection 128:18</p> <p>reflects 8:2</p> <p>refunded 65:8</p> <p>regard 38:17</p> <p>regarding 13:1 37:5 40:2 60:17 61:1</p> <p>Regardless 88:22</p> <p>regular 123:5</p> <p>regularity 84:18 85:3</p> <p>regularly 84:6</p> <p>regulate 119:9</p> <p>regulations 42:11 106:10</p> <p>reiterate 73:14 94:1</p> <p>relate 9:22 16:13 81:9 94:6</p> <p>related 51:8 65:16 115:9</p> <p>relates 37:2</p> <p>relating 7:14 60:16</p> <p>relation 23:9 32:8</p> <p>relationship 36:20 69:20</p> <p>relative 74:8 80:6 85:17</p> <p>relevancy 94:10</p> <p>relevant 9:14 62:2,7 65:21,21 75:23</p> <p>relied 9:2 84:6 88:14 88:15</p> <p>relief 101:23 104:12 105:19 129:1</p> <p>relieve 59:20</p> <p>rely 113:4</p> <p>remain 5:10 10:5,10 11:11</p> <p>remember 20:15,15 51:4 53:3 118:23</p> <p>REMEMBERED 1:14</p> <p>remove 127:9</p> <p>removed 83:3</p>	<p>removing 127:17</p> <p>renew 94:9</p> <p>repeatedly 110:22</p> <p>rephrase 50:14,15</p> <p>reply 106:14,15</p> <p>reporter 20:3 27:1,2 34:24</p> <p>REPORTING 1:20 3:1 3:3</p> <p>represented 92:19 117:15</p> <p>reprimand 51:15</p> <p>reprimanding 51:19</p> <p>request 13:23,24 26:12 51:18 78:10 94:2 96:18</p> <p>requested 105:19</p> <p>require 83:17 128:8</p> <p>required 15:1 38:10 115:17 127:14</p> <p>requirements 83:22 98:18</p> <p>requires 109:12</p> <p>requiring 124:15</p> <p>resolvable 118:9</p> <p>respect 8:7</p> <p>respected 121:6</p> <p>respectful 55:4</p> <p>respectfully 115:16 117:18 120:7,16</p> <p>respond 7:8 8:7 13:23 15:19 45:22 68:4 95:6,9 97:23 105:6 120:22</p> <p>responded 128:6</p> <p>responding 97:2</p> <p>response 13:24 19:23 20:2 22:18 24:14 29:7 32:5 33:18,24 34:2 45:16 46:15 47:21 49:11 87:15 93:4 100:19 101:13 101:16 105:7,10 115:6 123:15 127:6</p> <p>responses 73:21 95:15</p> <p>responsibility 86:22 93:18</p> <p>responsibly 15:22</p> <p>rest 35:8,10</p> <p>restraining 124:17</p> <p>restraint 100:23 101:18 124:9</p> <p>restrict 100:4</p> <p>restriction 112:11,14 124:18 127:11</p> <p>restrictions 101:3</p> <p>restrictive 100:15</p> <p>result 15:2 83:17 108:18 121:4</p> <p>resulted 25:14</p> <p>return 35:7 57:20</p>	<p>reverse 93:9,14</p> <p>review 62:23 129:13</p> <p>revise 13:16</p> <p>Re-Direct 3:23 4:11 56:20 79:9</p> <p>rhetoric 88:7</p> <p>Ridgeland 81:4</p> <p>ridiculous 26:18</p> <p>right 6:5 24:16 25:16 27:3,22 29:10 30:8 35:1 38:9 45:8 52:4 66:8 76:22 77:3 92:1 92:4,16 93:1 104:5 109:22,23 110:1,2 112:22 121:9,11 122:14 125:14 127:7 127:18</p> <p>rights 13:2 14:22 17:1 91:21,23 92:6 102:2 103:2,6,6,13,18 104:20 105:7,19,22 109:16 116:2 117:7,9 118:13 119:5,15,17 120:5,10 121:6 122:17,24 123:2,6 124:14 127:17</p> <p>risk 15:15</p> <p>Road 69:14 103:16</p> <p>role 77:11</p> <p>rolling 39:20</p> <p>rough 61:10,17</p> <p>rounded 112:6</p> <p>rule 5:14 8:24 9:13 10:23 44:2 78:21,24 79:11,13,23 80:7 104:24 117:4</p> <p>ruled 9:7</p> <p>rules 6:6 10:23 37:1 43:16,20 44:1 51:14 78:3,5,9,17 102:24 122:22</p> <p>ruling 94:15</p> <p>run 71:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 4:18 5:1</p> <p>Sabine 68:14</p> <p>safe 13:15 17:6 38:13 70:20</p> <p>safety 34:14</p> <p>said 12:9 20:13,19,20 24:4 25:2,4,20 26:9 26:17 31:19 32:17 38:1 41:5 53:17 66:19 73:6 74:18 90:21 96:5 116:10,10 117:1 121:9 122:23 125:19</p> <p>same 13:17 20:6 21:6 23:4 24:9 25:4 26:16 30:9 44:3 46:1,15</p>
--	---	---	---	--

<p>96:24 102:16 103:22 104:24 105:2 sampling 61:19 Sandy 68:14 Sarah 25:10 sat 54:16 satisfactory 95:24 96:7 satisfied 127:16 saved 96:6 saw 107:20 say 19:24 30:1 31:20 32:21 41:8 51:7 55:6 73:18 77:2 91:15 100:18 117:1 119:4 124:11 125:21 128:3 saying 20:16 122:16 125:6,13,15,19 126:12 says 23:7 42:13,24 46:18 83:2 89:6 110:22 128:11 schools 13:3,16 17:24 18:1 37:1,11 38:13 40:2,12 41:18,20 59:18,18 65:18 72:1 72:5,10,13 115:4,9,9 school's 42:11 59:11 scrutiny 110:11,12,24 se 40:14 41:11 seat 19:7 35:19 58:6 69:7,11 80:23 seated 10:18 96:12 second 20:18 45:14 49:9 101:22 113:6 secondhand 52:7 Secondly 111:16 see 27:24 33:23 34:1 42:13,20 43:7 45:14 46:18 47:23 48:5,7,9 49:9 61:4 62:23 71:20 seek 21:1 seeking 14:13 104:12 124:4 seeks 111:19 seem 14:17 37:10 seems 102:4 seen 63:24 113:3 segregated 116:3 selections 119:3 senate 119:3 Senatobia 36:14 sending 41:7 121:5 senior 34:15 42:14 60:2 68:16 seniors 34:11 49:13,21 sense 53:7 114:11 117:10 sensitive 117:14 sent 13:14 25:17 27:15 27:20 28:7,11 41:11</p>	<p>66:10,18 97:23 100:6 106:14 107:10 113:17 sentence 45:15 49:10 serious 114:22 seriously 118:6 served 6:16 36:13 59:1 59:3,6 service 119:23 set 14:19 78:3 87:16 setting 76:6 91:16 95:13 102:24 104:18 105:7 122:22 several 40:8 51:23 52:2 59:11,15,17 61:15 65:16 66:21 70:8,16 71:19 75:14 116:4 118:5 severe 114:15 sex 13:11,17 21:6 24:10 25:4 26:16 32:15 43:12,24 44:3 78:19 79:13 96:24 103:1 104:19,24 105:1,2 124:15 sexual 20:10 SF 103:17 sham 7:22 share 21:15 she's 5:6 102:15 112:20 126:20 shorten 9:19 should 30:10 31:15,15 53:2 66:5 71:6,18,23 92:8 102:7 110:12 117:12,19 118:7 120:9 shouldn't 125:15 126:18 show 11:2 15:12 28:2,9 33:15 42:7 45:2,14 46:5 47:16 62:4 112:20 124:24 showed 44:15 showing 98:16 99:5 109:12,12 111:18 113:20,24 114:8 115:17,20 120:12 shown 48:18 111:3 114:5 115:18 120:14 121:3 124:21 shows 14:23 102:19 shutting 101:21 side 12:15 sides 88:24 significant 61:6 simple 86:14 120:10 simply 17:3 18:10,11 34:19 39:15 59:22 88:6 89:23 93:15 113:23 116:7 123:3</p>	<p>125:16 since 13:4 20:11 55:12 65:10 70:9 72:24 81:21 sincerely 34:16 single 65:20 86:10 87:4 singled 113:21 sir 7:9 10:6 33:7 36:2,8 37:6,24 39:6,8 40:20 41:14,20 48:9 56:19 57:1,3,6 58:2,18 60:23 61:8 63:3,7,8 63:14,23 64:16 68:20 85:11,14 91:6 95:4 109:1 119:2 128:7 129:21 sit 8:21 site 75:11 sitting 99:16 100:5 situation 17:9 24:9 39:18 44:4 54:17 65:22 70:15 71:20 73:5,19,21 90:24 91:1 99:13 106:11 108:9 122:3 sit-down 40:13 slide 115:19 slow 32:23 snow 39:20 social 18:12 105:21 107:15,22,24 113:12 114:10,11,13,14 115:10 124:13 society 125:8 sole 116:11 solely 100:13 123:14 solid 120:18 some 8:15 40:12 42:20 43:7 49:24 50:1,2 51:2 54:3,18,23 60:11 61:15 62:13 65:9 72:6,6,12 77:18 82:22 88:11,21,22 91:12 92:10 95:14 98:2,16 104:23 117:4 117:11 118:4 121:18 128:1 somebody 31:22 someone 25:9 29:23 30:9,12 32:24,24 41:4 66:11 someone's 122:17 something 5:14 6:1 9:12 27:19 39:23 82:23 89:6,7 129:3 sometimes 55:23 67:19 90:3 sorry 45:6,11 46:12 48:14,21 49:8 52:14 53:7 56:8,11 78:24 sorts 51:11</p>	<p>souls 96:6 sound 86:12 soundly 120:5 sources 111:11 122:6 South 35:23 Southeastern 101:1 speak 75:3 107:3 speaker 98:16 124:24 special 21:16 30:13 46:10 106:20 specialized 7:12 specific 40:18 124:16 specifically 7:1 37:20 40:10 43:23 85:22 specificity 87:16 speech 14:18 90:23 91:23 96:23 99:14 100:2,4,23 112:4,15 119:9 124:17 125:16 127:11 spending 84:1 spent 58:22 60:1 spitting 100:22 spoke 72:19 75:19 spoken 8:14 40:4 55:4 sponsor 18:8 60:14,22 62:6 sponsored 40:3 74:22 79:16 106:4 113:14 sponsoring 16:3 17:19 18:1,2 34:20 49:18 sponsors 60:2,2 68:17 sponsorship 7:21 18:10 18:12 37:19 39:15 40:15,23 46:3 50:18 52:13 59:12,19 63:22 87:11 88:9 99:9 100:13 104:3 110:3 110:10 114:24 121:17 122:9,15 123:12 127:4 sports 51:11 spring 29:8,10 57:14 staff 75:16 stage 112:1 120:16,20 128:5,14 stake 100:1 122:24 stand 19:8 35:6,20 57:19 58:7 69:12 80:19,23 94:17 107:23 112:4 standard 14:19 110:17 standpoint 5:11 10:13 stands 119:7 start 66:22 82:24 123:4 started 58:21 81:16,17 starting 49:10 state 19:8 35:20 38:9 53:18 58:7,20 61:5 69:12,19 80:24 81:9 81:12 82:10,11 87:16</p>	<p>89:17 99:22 100:20 100:21 106:1,6 115:3 115:3 121:18 stated 86:8 98:1,16 101:2 117:3 124:22 statement 12:11 14:6 16:17 31:3 34:5 47:20 65:11 95:9,12 96:13 105:14 107:6 122:9 statements 38:2 70:14 70:16,19 96:16 states 1:1 8:14 45:15 110:16 116:10 status 41:2 64:2 statute 83:2,23 86:23 statutory 83:22 115:1 stay 51:24 step 111:7 117:20 126:16 stick 78:4 stigmatized 113:22 still 55:24 108:2 113:13 114:9 117:8 118:22 124:8,21 stop 14:13 16:3 50:8,18 50:21 70:11 71:3 stopped 18:1,2 story 50:3 straight 17:7 30:9 31:6 112:4 stream 128:21 Street 19:13 35:23 strictly 75:1 78:4,9 123:14 struggling 90:19 student 38:19 83:19 86:15,21 87:12 89:8 student's 86:17 stuff 27:11 stupid 64:10 submissions 11:18 12:9 95:15,17 129:14 submit 95:14 109:10,24 112:13 115:16 117:18 120:7 submitted 87:14 95:2 subsequent 97:4 subsequently 14:10 25:14 substantial 11:20,22 82:21 96:20 99:6 111:17,19 119:11 121:19 126:1 substantially 98:17 122:8 succeed 99:6 success 127:13 such 14:21 37:13,14 83:6 108:18 suffer 11:22 101:24</p>
---	--	--	---	---

<p>113:7 suffered 102:8,12 sufficient 7:2 99:3 summarized 63:12 summer 118:22 Sun 2:6 3:22 4:10,17 6:2,21 8:7 11:3,5 13:15 42:3 44:11,14 45:1,10 47:2,15 48:16,18,21 49:7 50:14,16 56:14 76:13 79:2,4 80:8,14 84:11 84:21,23 90:18,19 91:18 93:22 94:9 Sundra 68:14 superintendent 6:17 10:9 16:12 23:7,13 23:18 24:3,5,6,11 32:11 35:14 36:18 38:12 87:5 91:9 94:14 98:1 104:24 105:3 106:18 111:12 111:21 126:7 superintendents 40:5 support 64:7 supported 92:22 93:1 supporters 116:18 supposed 27:18 29:15 125:11 supposedly 124:1 suppress 100:23 suppression 112:3 Supreme 101:2 110:22 116:9,24 121:10 125:6 sure 5:6,23,24 23:2 25:23 53:21 54:1,21 56:4 70:12,16 72:21 73:2 77:7 87:24 88:1 91:22,24 92:2,7,7 97:15 107:12 surmise 70:18 surprised 26:11 102:19 surrounding 59:18 suspend 92:23 93:9 suspension 92:21 sustained 76:1 94:11 swastikas 118:20 swear 80:18 swimming 116:3,7 sworn 19:3,5 35:17 58:2,4 69:9 80:21 system 8:6 15:24 86:7 89:10 116:3</p> <hr/> <p style="text-align: center;">T</p> <p>T 4:18 table 11:11 28:23 35:7 57:20 99:2 take 12:8 19:7 35:19 58:6 67:12 69:7,11</p>	<p>80:23 93:3 98:11 111:7 115:11 122:14 taken 37:11 59:9 123:7 taking 7:19 15:17 17:21 20:3 34:13 58:23 60:3 67:10 98:7 talk 19:16 21:9,11 23:15 24:2,4,8,16 51:7,11 64:3 66:19 66:21 talked 22:7 23:17 25:3 41:4 54:17 65:9 68:3 79:15 87:4,5,5,8 124:20 talking 21:5 24:24 26:14,15 38:4 51:3 51:15 54:3 59:22 67:5,24 70:24 74:21 83:10 116:13 122:3 talks 64:9 taxpayers 108:16 teach 71:23 teacher 26:7 36:13 59:1 teachers 15:19 17:13 17:21 37:12 38:5 51:15,18 60:3 66:17 66:21 67:1,5,10,12 67:16 68:18 71:23 79:16 97:17 111:23 121:23 122:3 teaching 58:21 telephone 54:3,14 88:4 tell 23:15 24:7 31:22 32:12 37:20 102:10 116:8,9 temporary 18:21 ten 81:24 82:9 95:14 tender 31:17 33:3 69:1 tendered 91:2 93:24 Tennessee 1:23 3:6 tenure 71:1 Teresa 3:18 24:13 35:13,16,22 terminate 93:9 terminated 92:20,23 terminating 92:17 Terminello 125:6 terms 39:14 77:11 86:22 test 38:9 53:18 testified 19:5 35:17 58:4 69:9 80:21 85:10 97:13,21 101:11 102:15 122:1 122:5 126:3 127:4 testifies 9:12 testify 6:8 7:11 8:17 9:1 9:10,17 84:14 85:13 85:16 91:8</p>	<p>testifying 7:4 84:16 85:2 testimony 6:22 7:4,13 8:22,23 9:11 14:23 16:12 18:17 28:21 44:23 47:13 49:5,23 51:5 53:3 54:2,12 62:21 76:17,23 80:15 84:3 85:1 90:20 91:3 91:5 94:10,19 113:9 113:15 121:2,23 126:7,10 129:2 Texas 36:14 than 9:10 40:12 53:20 62:12 84:14 95:18 112:12 115:12 123:16 Thank 12:22 15:5 28:23 34:18 51:22 52:8 56:10 63:1 79:5 91:14 94:16 105:9 120:20 129:12,17,18 themselves 102:18 104:9 114:18 124:10 125:12 then 9:12 13:11 14:5 21:16 23:7,18 25:1 27:22 29:8 32:18,19 36:10,11,17,23,24 53:13 70:9 74:19 75:14 79:17 82:2 89:5 96:7 101:17 104:10 122:18 124:13 therefore 124:3 127:12 129:3 there's 18:8 42:20 43:7 44:19 47:7 51:17 54:23 74:14 83:2,14 99:5 100:16 102:3 103:18 105:17 112:13 113:20 114:7 115:2 116:16 121:22 122:23 125:14 126:10,17 127:1 these 17:17 18:4 61:21 62:2,7,11,12 64:1,1 65:9 66:5 67:22 68:14 82:20 86:18 88:3,11 89:12 97:19 102:16 103:18 111:2 115:15 123:10 they're 41:7 42:21 60:5 60:10 68:18 88:20 90:3 100:12 122:12 126:12,16 they've 65:24 66:3 111:9 121:21 127:4 thing 23:4 25:4 26:9 27:22 37:18 67:3 126:6</p>	<p>things 6:24 38:4 49:18 51:12 71:23 82:18 83:21 85:1 87:20 89:12 123:5 think 5:13 6:2 8:10 10:10 27:14 29:23,23 31:13,15,15 40:12 41:8,10 48:8 54:23 60:1 63:20 71:7 73:8 74:20 77:17 80:15 85:7 86:23 89:22 90:4,9,13 92:13 95:1 95:16 102:1,18 104:6 104:23 114:2,4 117:2 117:5 120:18 121:2 122:11 123:17 126:15 127:1 128:4 thinking 95:19 thinks 128:18 third 102:6 112:2 Thomas 11:8 Thompson 115:22,23 116:19 117:5 though 115:12 thought 18:5 21:9 23:2 26:18 27:16,16,18,19 27:21,23 31:20 48:17 93:15 threat 11:22 threatened 12:1 46:23 102:8,9 threatening 11:24 threats 75:14,15,17,22 three 11:24 60:4 95:14 115:7,18 three-hour 82:15 through 18:18 40:4,7 50:19 57:12,12 65:15 65:19 71:6 73:1 74:20 82:12,24 83:2 83:9 86:6 119:4 123:9 124:14,17 125:18 126:20 throughout 102:4 thrown 89:2 Thursday 29:4 57:9 ticket 33:12 107:17 113:10,11 tickets 65:6 75:2 102:23 time 6:6 14:3 17:21 34:11 35:9 37:6,11 38:7,16 43:5 51:8 52:11 53:16,16,19,20 59:24 66:22 72:19 77:19,24 78:11 82:21 86:19 87:21 89:2,4 90:3 93:8,17 94:1,24 95:14,19 96:2,10 109:9 113:1 118:21 122:16 126:23 128:2</p>	<p>128:15,20 129:5 times 52:2 67:13 77:16 77:18 114:2 Tinker 14:20 118:16,16 119:13 125:6 Title 65:17 today 10:21 63:19 68:1 84:3 89:12 126:4 129:15 today's 83:19 86:16 together 32:23 79:20 127:9 told 5:23 13:9,20 21:18 21:24 22:10,13 23:1 23:1,3,11 24:16,22 24:23 25:1 26:13,15 26:17,20 31:20,24 32:2 40:21,23 66:17 66:21 87:18 93:15 105:3 tonight's 106:16 took 36:18 37:21 59:2 107:14 108:13 121:8 total 63:18 totally 41:1 touch 25:10,11 toward 105:1 117:17 track 97:15 tractate 9:19 Trae 4:1 37:7 57:23 58:3,9 72:18 training 7:12 10:1 36:7 58:17 81:8 82:6,10 82:13,23 83:3 86:11 tremendous 88:23 Trey 81:3 trial 127:23 trouble 23:21 31:19 true 18:10 try 50:14,15 86:6 trying 33:22 56:7 77:17 79:19 84:1 100:10,15 110:6 128:24 Tupelo 41:5 72:4,11 74:6 126:21 turn 88:6 108:21 Turning 112:18 tux 22:6,7,9,11 23:9 24:9 26:16 tuxedo 13:19,21 14:1 14:15 31:7,10 78:10 78:12 101:10,15 102:14 103:20 123:17 126:15 127:8 127:19 tuxedos 22:11,23 78:15 Twenty 96:4 two 11:21 14:5 25:23 59:2,6 60:3 72:15 88:13 115:7,18 two-page 28:9</p>
---	---	---	--	--

<p>type 9:2 39:15 75:17 76:4,5 84:4,5 88:14 90:24 116:8 117:19</p> <p>types 76:20 106:23</p> <p>typically 86:8</p> <hr/> <p style="text-align: center;">U</p> <p>uh-huh 19:23 22:17 24:14 29:7 32:4 33:18,24 42:23,23 44:7 49:11 105:10</p> <p>ultimate 7:1,18</p> <p>unable 18:19</p> <p>uncomfortable 32:24 33:1 105:5</p> <p>unconstitutional 116:5</p> <p>uncontroverted 105:2</p> <p>under 8:24 14:19 16:4 83:22 86:23 97:1 103:2,13,20 104:9 106:6,9 112:2 114:1 115:1 117:23 121:6 123:6</p> <p>underage 53:11</p> <p>undergraduate 81:11</p> <p>undermining 111:14 114:16</p> <p>understand 5:8 21:11 30:24 39:12 72:8</p> <p>understanding 23:22 45:20 46:22 72:9 74:7,13 86:1 108:2 112:7</p> <p>understood 5:7 93:17</p> <p>underway 41:3</p> <p>undisputed 102:1</p> <p>unfortunately 53:12 86:9</p> <p>Union 16:23 106:13</p> <p>United 1:1 110:16 116:10</p> <p>University 36:10 58:20 81:16</p> <p>unless 62:3 90:23 121:12</p> <p>unpopular 125:8</p> <p>unquote 55:2</p> <p>unrelated 112:3</p> <p>unsubstantiated 100:20</p> <p>until 13:22 44:5 45:22 53:21 57:8 96:8 102:20 103:2 106:16</p> <p>up 6:4 14:3 19:16 27:8 33:22 44:5 53:18,21 57:8 58:1 67:23 75:13 99:11,14,19 100:5,18,21 102:19 102:20 104:7 111:1 119:4 121:8 123:23 124:3</p>	<p>upcoming 60:18</p> <p>uphold 91:20 92:5 93:18 111:19 122:23</p> <p>upon 9:2 11:18 18:4 38:20 84:6 88:14,15 96:20 107:1 112:6 115:9 117:16</p> <p>upset 21:14,23 22:3 25:7,11 26:21</p> <p>upsetting 88:12</p> <p>us 5:10 7:24 16:15 25:14 37:18 40:10 58:15 59:20 60:11 89:12 97:23 101:2 110:17,19 115:23,24 116:20,21 118:5,24 118:24</p> <p>use 5:24 17:23 53:12 100:10 101:4 106:9</p> <p>using 53:16</p> <p>usually 49:18 84:6 88:15</p> <hr/> <p style="text-align: center;">V</p> <p>v 14:20 98:15 99:11 101:2 121:7</p> <p>vain 110:4</p> <p>valid 9:10 111:10</p> <p>verbal 20:2</p> <p>verify 28:3</p> <p>versus 10:19 92:14 110:16 115:22,23 116:19 117:5 118:16</p> <p>veto 125:5,7</p> <p>via 38:2</p> <p>vice 22:15,16</p> <p>vice-principal 32:1,2</p> <p>Vietnam 118:20</p> <p>viewpoint 127:10</p> <p>views 125:8</p> <p>violate 124:14</p> <p>violated 109:17 116:2 119:6,19 127:17</p> <p>violates 122:16</p> <p>violating 118:13 123:1</p> <p>violation 13:1 17:1 103:6 104:19 105:18 109:21 120:4,9</p> <p>violations 122:18</p> <p>visit 77:17,19</p> <p>visited 77:15</p> <p>voir 84:11,22 94:1</p> <p>vote 36:24</p> <p>voted 47:21</p> <p>VS 1:8</p> <hr/> <p style="text-align: center;">W</p> <p>walked 27:10</p> <p>Walker 69:13</p> <p>Walt 99:11</p> <p>want 5:6 6:1 9:13</p>	<p>21:17 23:6,11 31:11 32:19 33:15 40:24 48:14 50:1 53:7 54:1 71:16,21,21 84:12 90:17 96:2</p> <p>wanted 23:15 24:8 41:1 68:4 90:10 103:22 107:2</p> <p>war 118:21</p> <p>wasn't 14:24 21:15,22 22:10 25:21,21 32:20 50:22 90:21 98:6 99:19 103:1 113:15</p> <p>watch 124:6</p> <p>watching 100:7</p> <p>way 39:18 41:19 60:15 72:8 75:7 89:7 91:11 102:18 115:21 125:5 128:23</p> <p>ways 21:24</p> <p>wear 13:18,21 14:1,15 22:11,11,12 24:22,24 25:2 31:9 78:10,12 78:15 101:15 102:14 103:20 123:16 126:15 127:8,19</p> <p>wearing 23:9 26:16 31:7,10 101:10</p> <p>web 75:11</p> <p>Wednesday 57:4</p> <p>week 14:11 26:2 29:8 57:4,11,12</p> <p>weekend 95:2</p> <p>weekends 52:16</p> <p>weeks 72:12</p> <p>weigh 89:4,5 91:4</p> <p>weighed 108:5</p> <p>weights 102:7</p> <p>wellbeing 34:14</p> <p>went 21:4,8 22:24 23:3 23:10 25:19 29:4 81:15 86:6 100:18 102:12 123:9 125:18</p> <p>weren't 8:10 26:19 27:17 50:22 121:24</p> <p>West 19:13</p> <p>we'll 8:22 9:5 10:2 96:7 96:8</p> <p>we're 8:12 41:8 56:7 59:22 66:20 67:24 76:1 117:3,13 123:17 125:13,15 128:23,24 129:19</p> <p>we've 18:18 19:19 53:17 80:15 127:12</p> <p>whatever 26:8 31:10 88:1 93:14 122:7 128:12</p> <p>whatsoever 110:2</p> <p>what's 22:20 24:11 45:2 48:5 63:5</p>	<p>128:19,22</p> <p>when 1:17 10:2 22:7,7 24:24 25:19 26:20 27:10,14 29:20 32:11 40:19 44:6 65:18 83:11,12 104:12 110:8,10 117:23 118:22 119:2 120:3 123:5,6 126:22 127:20 129:6,19</p> <p>whenever 27:19</p> <p>where 1:17 34:1,4 39:23 40:19 41:17 42:13,17,20 45:15 46:18 71:20 74:5 90:10 92:10 97:11 99:13 115:13 116:1 117:22,22 118:18,24 119:10</p> <p>WHEREUPON 10:17 28:19 44:21 47:11 49:3 62:19 96:11</p> <p>whether 7:1 8:10 13:8 32:12 41:17 45:17 53:1 61:5 62:7,8 75:22,23 87:16 89:17 102:6,8 103:10,18 117:24 118:1 121:8 125:23,24 126:17,18</p> <p>which 8:6 9:5 14:4,24 15:23 23:19 37:6 38:6 41:19 57:9 58:24 59:10,14 60:1 62:12 65:20,21 68:11 74:19 75:12 83:16 87:8 97:11 99:11 100:16 101:2 103:16 111:11,22 115:17,18 121:11 122:22 125:5 128:8</p> <p>while 125:18</p> <p>whispering 27:10</p> <p>whites 116:4</p> <p>who 6:16 16:12,16 21:16 22:13 29:22 30:22 31:2,3,24 40:8 40:13,21 50:2 51:19 53:14,15 65:1 68:14 74:8 80:16 82:20 92:17 97:9 109:8 124:4,5,21</p> <p>whole 56:3 73:18,21 79:22 85:1 110:7 125:10</p> <p>whom 9:24</p> <p>who's 30:9 60:7</p> <p>why 30:6 37:5 54:16 73:5,14 95:19 109:14</p> <p>wide 53:18</p> <p>wisdom 118:10,11,11</p> <p>wish 12:10 80:5 84:11</p>	<p>84:21 95:6</p> <p>wit 1:18</p> <p>withdraw 18:12 37:19 40:23 46:2 55:8 87:11 100:13 110:3 110:10 122:15 127:3</p> <p>withdrawal 39:15 50:17 52:13 88:9</p> <p>withdrawing 7:21 40:15 55:13 99:9 121:16 122:9 123:11</p> <p>withdrawn 63:22 104:4 114:23</p> <p>withdrew 18:10</p> <p>within 7:5 14:19,22 37:1 41:18 103:12 106:2 111:3 124:12</p> <p>without 125:12</p> <p>withstand 110:24</p> <p>witnesses 6:7,11 8:17 9:17 35:11 97:7 98:13 101:11 122:5 126:3</p> <p>Wiygul 4:1 25:1 37:7,7 57:23 58:1,3,9,15 59:9 64:1,20 65:1 68:10 69:7 72:18,19 73:6 97:9,21 122:2</p> <p>wonder 5:12</p> <p>word 74:3,16,20</p> <p>words 46:2 50:18 61:15 82:18</p> <p>wore 118:19</p> <p>work 60:4 67:5 75:23 87:21 129:20</p> <p>worked 75:13</p> <p>working 81:23</p> <p>works 113:13</p> <p>world 73:18 83:19</p> <p>worried 125:12</p> <p>worry 31:12</p> <p>worse 118:11</p> <p>worth 91:13</p> <p>wouldn't 5:7 21:20 102:19</p> <p>wound 27:8</p> <p>writing 25:14</p> <p>written 95:15,15,17 129:16</p> <p>wrong 74:19 117:2</p> <p>wrote 119:1</p> <hr/> <p style="text-align: center;">X</p> <p>X 3:9 4:18</p> <hr/> <p style="text-align: center;">Y</p> <p>Yeah 6:13 32:17 60:20 67:15</p> <p>year 20:24 21:4 34:9 37:4 59:8 69:22 71:2 81:17 82:4</p>
---	--	--	--	---

<p>years 16:5 17:19 37:9 44:2 58:22 59:2,4,5,6 59:11,14 70:2 71:7,9 71:19 79:15,16,17 81:13 82:4,9 83:8 84:1 113:3 York 2:7,7 81:14 young 16:7 25:10 yourself 56:5 86:14 you'll 15:4 19:3 58:1 you're 12:21 30:24 31:13 44:1 53:15,16 56:4 66:7 77:10 80:9 you've 38:22 59:10 65:19,19 71:11 76:19 77:6 88:14 111:20 y'all 6:10 29:8 68:2</p>	<p>2 13:14 25:18 42:15 44:23 46:16,24 52:9 52:11,15 65:3 66:11 77:14 2nd 106:13 20 44:2 96:6,6 200 60:9,10 2000 58:24 2002 59:2 2007 36:17 2008 36:19 2010 1:16 13:14 42:13 45:16 46:13 56:23 68:11 89:17 110:9 204 19:13 2115 69:13 217 115:24,24 22 14:4 22nd 1:15 235 115:24 236 1:22 3:5 27 83:8 84:1 28 4:20 83:8 289 81:3</p>	<p style="text-align: center;"><u>7</u></p> <p>702 8:24 703 8:24 75 4:10 72:5 105:24 78 4:12</p> <p style="text-align: center;"><u>8</u></p> <p>8th 20:12 80 4:15</p> <p style="text-align: center;"><u>9</u></p> <p>9 14:2 9th 13:4 106:14 90 4:17 61:9 901 1:24 3:7 98 81:21</p>		
<p style="text-align: center;"><u>Z</u></p> <p>zoom 33:20</p>	<p style="text-align: center;"><u>3</u></p> <p>3 47:9,13 109:8 113:1 116:16 117:15 33 3:16 35 3:20 367 110:17,19 381 103:17 38103 1:23 3:6 38855 58:12 391 110:16,18,19 393 118:23,24</p>			
<p style="text-align: center;"><u>1</u></p> <p>1 28:14,18,21 61:21 62:21 65:17 1:10CV61 10:19 1:10CV61-D-D 1:8 10 13:22 39:7 44:6 45:16,22 46:1,13 50:4,6,23 52:12,15 52:21 53:21 55:7 56:23 60:13,19,22 61:9,23 67:20 77:14 89:17 97:22 98:9 102:20 106:21 110:9 111:2 112:5 119:6 10th 26:8 57:8 72:22 72:24 100 58:11 11 61:5 11th 57:9 98:15 12th 57:9 125 65:19 1276 99:2 14th 117:6 15 12:14 57:12 18th 69:22 19 3:14 57:13 81:21 1968 110:21 1969 70:8 1970s 118:18 1971 116:21 1977 36:8 1979 36:9 81:15 1980 103:17 1981 36:10 1982 81:17,21 1984 36:11 1991 58:18 1996 58:20</p>	<p style="text-align: center;"><u>4</u></p> <p>4 49:5 4,000 63:20 65:9 403 115:23,24 41 3:22 45 4:21 47 4:22 49 4:23 4910 103:17</p> <p style="text-align: center;"><u>5</u></p> <p>5 42:7 43:1,1 103:1 5th 68:11 514 118:24,24 523-8974 1:24 3:7 56 3:24 57 4:3</p>			
<p style="text-align: center;"><u>2</u></p>	<p style="text-align: center;"><u>6</u></p> <p>605 35:23 62 4:24 64 4:5 65 10:23 68 4:8</p>			