

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,)
) Criminal Action
) No. 21-00175
Plaintiff,)
)
vs.)
)
ETHAN NORDEAN, JOSEPH R. BIGGS,) Washington, D.C.
ZACHARY REHL, ENRIQUE TARRIO and) March 15, 2023
DOMINIC J. PEZZOLA,) 1:38 p.m.
)
Defendants.)
)
* * * * *

TRANSCRIPT OF JURY TRIAL - DAY 48
AFTERNOON SESSION
BEFORE THE HONORABLE TIMOTHY J. KELLY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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I N D E XDirectCrossRed.WITNESSES FOR THE GOVERNMENT:

Nicole Miller

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EXHIBITS RECEIVED IN EVIDENCEPAGE

Government's Exhibit No. 447 (portions)

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Government's Exhibit No. 1140

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Government's Exhibit No. 1143

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Government's Exhibit No. 515-11

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Government's Exhibit No. 509B

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Defendant Nordean's Exhibit No. 109

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1 THE COURTROOM DEPUTY: We are back on the record
2 in Criminal Matter 21-175, United States of America versus
3 Ethan Nordean, et al.

4 THE COURT: All right. Let me just make one
5 scheduling point for the parties before we bring the witness
6 in and the jury in.

7 Ms. Harris informs me that one of the jurors has a
8 medical appointment that cannot -- something that can't be
9 moved the afternoon -- Tuesday afternoon, the 21st. So I
10 wanted to let everyone know that it looks like the 21st will
11 have to be a half day. So I wanted to let you all know
12 that. It's an appointment -- the person received a certain
13 type of treatment and it can't be moved. And in previous
14 months, apparently, it just had fallen in a way that it was
15 not a conflict. So Tuesday afternoon, just so you all know.

16 Yes, Mr. Roots.

17 MR. ROOTS: Yeah, your Honor. I have a Zoom
18 hearing tomorrow at -- well, 10:00 Mountain Time, which
19 would be, I guess, 12:00. So about 11:30 tomorrow I have a
20 Zoom hearing that could go a couple of hours in another
21 court in another state.

22 THE COURT: Well, I assume you're either moving it
23 or we'll proceed with only Mr. Metcalf here.

24 MR. ROOTS: If I have your permission, I'd like --
25 and Mr. Pezzola's permission -- to have Mr. Metcalf just

1 cover it.

2 THE COURT: Understood.

3 Mr. Pezzola, I saw you nod. But if you would just
4 say something into the microphone so there's a record.

5 DEFENDANT PEZZOLA: No problem with Mr. Roots not
6 being there for that time, your Honor.

7 THE COURT: Very well. Very well.

8 Thank you for informing me, Mr. Roots.

9 MR. ROOTS: Yes, sir.

10 THE COURT: All right. That's the only scheduling
11 thing I wanted to mention, at least at this point.

12 So let's bring back in -- well, let me also
13 just -- you know what? I think, again, we may save some
14 more time on the other end. Let me just indicate - there
15 were three things I had reserved on in the morning. Let me
16 just -- I had a chance to look at them again over lunch, and
17 so I'm going to just let you all know what my rulings are on
18 them now so the Government can adjust its presentation
19 however it needs to.

20 The first thing was Exhibit 510-48. There had
21 been an objection to -- well, Ms. Hernández objected to all
22 of it, but the part that I was focused on that I think was
23 not covered by prior rulings is the double hearsay within --
24 on the last entry of that.

25 And the Government had said: Well, we're not

1 using it for its truth. And they proffered a reason.

2 But I think, at the end of the day, the reason
3 they proffered it really depends on the truth of the fact
4 that Mr. Tarrio said that's not a good idea. So I think
5 that is double hearsay.

6 And so I think it's out -- it's out for that
7 purpose. I don't see how I can admit it. I think it is --
8 I think that double layer of hearsay is an issue. So I'm
9 going to exclude that last line. If the Government thinks
10 there's some use of the rest of that before that, it can use
11 everything else. Or if it thinks that just means the whole
12 exhibit is meaningless, you can just drop it from your
13 presentation completely.

14 Second was 512-19, which is one of the ones
15 Mr. Smith had objected to, at least as to all the things
16 before the last three entries.

17 Looking at this, I -- you know, what I had
18 expressed before was whether something could come in -- I
19 guess I had conflated in my own mind hearsay and relevance.
20 The only objection here, potentially, is not hearsay,
21 because the things here are not statements of -- I mean,
22 it's really an instruction: Don't post any video here on
23 social media and then: Be smart; we are now domestic
24 terrorists.

25 No one has -- I mean, I think both of those things

1 are not -- the first one is an instruction. The second one,
2 Be smart, is really an instruction too. The question of
3 whether -- you know, the "We are now domestic terrorists" is
4 a separate, I guess, animal. But it's not really a hearsay
5 objection. It's a 403 objection -- or a relevance
6 objection/403 objection.

7 And I do think the fact that someone on the Boots
8 on the Ground, whoever it was, is telling everyone else the
9 day after January 6th, Hey, don't post videos here, you
10 know, I think the domestic -- let's put it this way: I
11 think the "We are now domestic terrorists" is not being used
12 to literally mean we are domestic terrorists.

13 But in the context -- in the context, I think
14 these are relevant statements by someone on the Boots on the
15 Ground chat on January 7th, so I think -- I think they're
16 in. I think they're admissible, and I wouldn't exclude them
17 under 403.

18 MR. SMITH: Your Honor, can we be heard on the
19 hearsay point? Because, your Honor, I think if I heard your
20 Honor correctly, that this is relevant to the extent that
21 it's showing consciousness of guilt, that we are domestic
22 terrorists.

23 But --

24 THE COURT: Well --

25 MR. SMITH: Your Honor, I think the point -- the

1 response would be, that is only showing the point the
2 Government wants to make to the extent it is a true fact.

3 And we -- we go back to the kind of -- the acid
4 test, we've called it, of what hearsay is, is: Would you
5 need an opportunity to cross-examine someone about something
6 or is there nothing to cross-examine the declarant about?

7 So here, when someone says, "We are now domestic
8 terrorists," we would cross-examine them about: Is this
9 sincere? Are you referring to January 6th? Is that -- do
10 you mean we're domestic -- who do you mean by "we"? Were
11 you at the Capitol?

12 So, your Honor, if we have no opportunity to get
13 at what this person is talking about, we just have this
14 statement that is being used for its truth value. It -- if
15 it's not being used for its truth value, it has no
16 relevance. And we can't cross-examine the person.

17 THE COURT: Well, let me put it this way,
18 Mr. Smith: I know defense counsel in this case -- if the
19 test were, would you have the basis to cross-examine someone
20 about something, then we would not have admitted any
21 statement, because of -- because I know you all would find a
22 way to cross-examine someone about something.

23 But I do think that -- and I don't -- I hope no
24 one takes that in a pejorative way. I mean it literally and
25 sincerely.

1 But when coupled with the prior statement, it's
2 clearly -- you know, the point is, Don't post any video.
3 People are going to be looking for us. We embarrassed them
4 and they are looking for us.

5 So, again, I don't see how it's -- that someone on
6 the Boots on the Ground chat group is saying that the day
7 after January 7th, I don't understand why that is not
8 relevant.

9 MR. SMITH: Because -- I guess, your Honor,
10 because we don't -- number one, we don't know who this
11 person is. We don't know if they've ever communicated with
12 any of the Defendants. We don't know whether --

13 THE COURT: We actually do know that, because
14 Boots on the Ground is a chat group with the Defendants in
15 it.

16 But I know what you mean. I get what you're
17 saying.

18 MS. HERNANDEZ: He's not a tool.

19 MR. SMITH: Your Honor --

20 MS. HERNANDEZ: He's not been identified as a
21 tool. The person who says those things has not been
22 identified as a tool. I don't believe he was there on
23 January 6th.

24 THE COURT: It doesn't -- right. And I'm not --

25 MS. HERNANDEZ: I'm just saying --

1 THE COURT: My rule doesn't depend on that, but go
2 ahead.

3 MR. SMITH: Your Honor, "domestic terrorist" is a
4 legal label. It happens to be an inaccurate one. There is
5 no such thing. There is something as an international
6 terrorism designation. It gets cluttered together in
7 people's minds. You often see the press misreport on
8 something like this. It's confusing.

9 It's -- your Honor, if the tools theory is already
10 kind of pushing the boundaries of the Rules of Evidence, to
11 be including these things post-January 6th without any
12 further connection to the Defendants, with an inflammatory
13 phrase in all caps, "domestic terrorists," it -- it's unfair
14 to people who might not have read it.

15 THE COURT: I heard argument on this already this
16 morning. We don't need argument again.

17 But, Ms. Hernández, did you want to be heard on
18 something else?

19 MS. HERNANDEZ: No.

20 On this terrorism issue, your Honor, I would
21 remind the Court that I believe you prohibited one of the
22 defense counsel from using the term "terrorism" in opening
23 statement. I'm sorry. Treason. Treason. Which is six of
24 one, half a dozen of the other.

25 Because you thought it was -- it wasn't a charge.

1 It, you know, brought in -- it was too provocative, that
2 type of thing.

3 I think to say domestic terrorist is exactly the
4 same thing. It falls in the same category.

5 THE COURT: I recall -- well -- all right.
6 Mr. Pattis.

7 MR. PATTIS: I believe the Government has held in
8 reserve a potential rebuttal witness who might characterize
9 these Defendants as such. And they withdrew him as an
10 expert in their case in chief.

11 And so, you know, we're sculpting our case around
12 avoiding an opportunity for them to call that person, in
13 part because of that reason. Mr. Siegal. And, you know,
14 I'm not sure exactly what he would say in this case. I know
15 in other cases he has characterized groups that he regards
16 as far-right extremists as domestic terrorists.

17 I join in the remarks of my colleagues and say
18 that that appellation is loaded in this case and could --
19 would urge the Court to reconsider on 403 grounds.

20 THE COURT: Mr. Mulroe.

21 MR. MULROE: Your Honor, I don't think you need to
22 hear anything more on the merits from the Government.

23 I just want to note that we are burning so much of
24 the jury's time in this courtroom relitigating issues that
25 your Honor has decided. You heard argument on this at the

1 start of the day. You considered it over lunch. You
2 decided it. I just -- I don't think it's productive to
3 continue to hear from defense counsel on issues that have
4 already been put to bed.

5 THE COURT: I agree.

6 This is in.

7 The other -- the one other thing I reserved on is
8 the Government's opportunity -- was the Government asking me
9 to reconsider my ruling on a different exhibit?

10 MS. HERNANDEZ: I think it's a waste of time. I
11 think it's a waste of time to have the Government's
12 arguments reconsidered. I cite Mr. Mulroe.

13 MR. PATTIS: We might be burning a lot of the
14 jury's time.

15 THE COURT: Well, we're not going to burn much
16 time here.

17 So I'm -- I guess it's -- whether you consider
18 it -- I'm not going to reconsider or I've reconsidered and
19 I've come out the same way. So that's the way I'm coming
20 out.

21 I don't -- the Government had -- well, in any
22 event, the Government had proffered a couple of different
23 other reasons it should come in, including effect on the
24 listener, which I didn't -- I don't agree with for the
25 reasons we already, I think, talked about before. Because I

1 don't think the response from -- I think it was
2 Mr. Tarrio -- was a true response.

3 There were some other ways in which the Government
4 proffered it. But I think -- I'm not prepared to say, for
5 example, Mr. Ochs is a co-conspirator with no -- I mean,
6 I've certainly, at times, been frustrated with the defense
7 not having teed things up for timely resolution. Certainly
8 on this one, that, I don't think, has been teed up for
9 timely resolution.

10 And I think whatever relevance it might have is
11 outweighed on 403 grounds.

12 Ms. Hernández.

13 MS. HERNANDEZ: Your Honor, before lunch -- or
14 this morning, I told the Court that I disagreed with the
15 Court's reading of *Anderson versus United States*.

16 And I just want to quote from the Court's opinion
17 at Page 15 on December 14th of 2022, in which the Court
18 states, "Acts of one" -- quote, "Acts of one alleged
19 co-conspirator can be admitted into evidence against the
20 other co-conspirators if relevant to prove the existence of
21 the conspiracy." That's *Anderson versus United States*.

22 And the point I'm trying to make is *Anderson* held
23 that acts of one alleged co-conspirator can be used to prove
24 a conspiracy.

25 THE COURT: Right.

1 MS. HERNANDEZ: And the Court is extending that
2 beyond "acts" to words, which is the -- you know, the
3 challenge here is to --

4 THE COURT: Right.

5 MS. HERNANDEZ: -- statements that are not
6 co-conspirator statements. That was -- I mean, I wasn't
7 saying I don't agree with the Court's analysis. I'm just
8 saying even the Court recognized, in your own opinion,
9 although the Court did find that you could use statements --
10 *Anderson* itself talks about using acts to prove the
11 conspiracy.

12 That was the point I'm trying to make, which I
13 think distinguishes our arguments from this morning, or the
14 way the Court is ruling on these issues.

15 THE COURT: I'll have to go back and look, and
16 maybe I'm confusing *Anderson* with another case. But there
17 was at least another case that we had talked about that
18 said -- and there's no principled reason why this shouldn't
19 be the same -- right? -- that an act of one defendant can be
20 used -- could be, could be -- not every act, right? -- but
21 could be used by the jury to determine whether a conspiracy
22 exists.

23 Same principle: The state of mind of one
24 individual, obviously it's only relevant to that person's
25 state of mind. But if the jury considers it and agrees that

1 it reflects a particular state of mind of one Defendant,
2 that can be used to -- similarly for the jury to
3 understand whether -- to determine whether a conspiracy
4 exists.

5 MS. HERNANDEZ: Well, the distinction *Anderson*
6 drew is between acts and statements which, if they're
7 co-conspirator statements, then yes, they can be used fully.

8 But the whole notion that the law of evidence
9 makes a distinction between statements, say, motive or
10 whatever, hearsay and co-conspirator statements -- and I
11 think that's a distinction *Anderson* drew, that with acts you
12 don't have that -- you don't have to worry, because, if
13 someone acts, yes, that can be used to prove the conspiracy.
14 So that's --

15 THE COURT: Sure.

16 And again, the other distinction is, the
17 co-conspirator statement comes in sort of directly against
18 all --

19 MS. HERNANDEZ: Correct.

20 THE COURT: -- alleged co-conspirators. I'm not
21 suggesting anything different than that. I'm just saying
22 the jury can make use of that. It only goes to one
23 Defendant's state of mind. But the jury can make use of
24 that in determining whether a conspiracy existed.

25 MS. HERNANDEZ: Well, again, I don't disagree that

1 co-conspirator statements come in against all.

2 THE COURT: All right. If there's nothing
3 further, let's bring in the witness and the jury.

4 THE COURTROOM DEPUTY: Jury panel.

5 (Whereupon, the jury entered the courtroom at 1:57
6 p.m. and the following proceedings were had:)

7 THE COURT: Everyone may be seated.

8 Ladies and gentlemen, before we begin, just one
9 scheduling note, just so you all have advance notice: I
10 think we've talked about how this Friday we will sit for
11 half a day. And on Tuesday, Tuesday the 21st, we will only
12 sit half a day. So the first half of the day, not the
13 second half of the day on Tuesday.

14 Mr. Metcalf, you may proceed.

15 MR. METCALF: Thank you, your Honor.

16 (NICOLE MILLER, GOVERNMENT WITNESS, PREVIOUSLY SWORN.)

17 CONTINUED CROSS-EXAMINATION

18 BY MR. METCALF:

19 Q. Okay. So we got through a decent amount of ground
20 before lunch, and I promise I'll get you off the stand today
21 unless Mr. -- Attorney Kenerson has anything to do with
22 that.

23 So we first spoke about Mr. Pezzola and Greene
24 leaving the march somewhere between 11:15 to -- until that
25 picture, which was 12:50 and 41 seconds. Is that right?

1 A. Correct.

2 Q. And your notes that we spoke about make a reference to
3 Pezzola at 12:57 on the steps. Do you remember that?

4 A. I do.

5 Q. And you referenced a video in speaking about that. And
6 that's where Rehl and Pezzola are seen in the same frame
7 together. Do you remember that?

8 A. I believe so. My notes are gone, for what it's worth.

9 Q. I took them back.

10 A. Okay.

11 Q. So -- I gave you my only copy.

12 But do you remember referencing that video?

13 A. I believe so.

14 Q. Do you remember that video?

15 A. I believe so.

16 Q. Do you remember Mr. Pezzola actually running? It seems
17 like he's running quickly. Right?

18 A. He's moving towards where the second breach happens.

19 Yes.

20 Q. He's going quicker than everybody else. Right?

21 A. I know he's moving forward.

22 Q. Is he moving fast forward --

23 A. I would need to see the video again --

24 Q. -- or fastly forward?

25 A. -- to clarify that.

1 Q. Okay.

2 THE COURT: Please, folks, only one person can
3 speak at a time for the court reporter's sake.

4 BY MR. METCALF:

5 Q. Now, before that video, the only other time you remember
6 seeing Mr. Pezzola during that march is somewhere between
7 10:00 a.m. until approximately 11:15ish is when we saw him
8 in that march. Right?

9 A. Correct.

10 Q. So between 10:00 a.m. to 11:15, it's fair to say Pezzola
11 was a part of the marching group. Right?

12 A. Yes.

13 Q. And then somewhere in that immediate timeframe after
14 that, Mr. Pezzola was not there because him and Greene left?

15 A. I believe so. Yes.

16 Q. And your notes of specific important parts talk about,
17 first, at 11:21, the march approaching First Street,
18 Northwest, and the Peace Monument. Right?

19 A. I don't have them in front of me. But if you're reading
20 them, yes. I believe so.

21 Q. Okay. And then do you remember mentioning the food
22 trucks?

23 A. Yes.

24 Q. And then you remember mentioning lining up near the food
25 trucks?

1 A. Yes.

2 Q. Then, 12:47, walking towards the Peace Monument at First
3 Street?

4 A. Yes.

5 Q. And then 12:50 is when you would say that they arrived.
6 Right?

7 A. Yes.

8 Q. And then after that is the first -- the first fence was
9 breached. Right?

10 A. Correct.

11 Q. And then that video -- I mean, that picture of
12 Mr. Greene and Mr. Pezzola showed them at 12:50 and 41
13 seconds, so 20 seconds away from 12:51, approaching that
14 area where they would have arrived and the first breach
15 would have been. Is that fair to say?

16 A. Yes.

17 Q. So it seems as if what we have just put together is
18 Mr. Pezzola and Mr. Greene arrived precisely at that time,
19 or a little bit after that time, that the first breach
20 happened. Is that fair to say?

21 A. They arrived at the Peace Circle at the same time,
22 approximately, as the group did, as they were heading over
23 from the food trucks, which is 12:50.

24 Q. Okay. Or 12:51?

25 A. Correct.

1 Q. And then, from there, how long did it take for them to
2 walk towards where the first breach happened?

3 A. I don't have that answer, because I don't know how fast
4 they were moving, or slow.

5 Q. It could have been a couple of minutes?

6 A. Could have been.

7 Q. And that's -- a couple of minutes would be reasonable
8 from where they were at that picture to where the first
9 breach happens. Right?

10 A. Could have been.

11 Q. Okay. And during that -- so basically Mr. Pezzola is
12 not in communication, then, with any of these other
13 Defendants at 11:30 when they were speaking. Is that fair
14 to say?

15 A. Yes.

16 Q. At 11:45, he was not with them -- any of these other
17 Defendants. Is that fair to say?

18 A. Correct.

19 Q. 12:00, he was not there with these other Defendants.
20 Fair to say?

21 A. Correct.

22 Q. When they went down the stairs and there's that video of
23 them going down the stairs, and there's talks, he was not
24 there with any of these other Defendants. Is that fair to
25 say?

1 A. Correct.

2 Q. And that goes up -- on up until 12:56 or 12:57 when you
3 first see Mr. Pezzola in the same shot as Mr. Rehl. Is that
4 fair to say?

5 A. Yes.

6 Q. Okay. And then Mr. Pezzola entered around -- you had
7 him enter at 2:13, you said. Correct?

8 A. Yes.

9 MR. METCALF: Can we go back to Government's
10 Exhibit 113x, please.

11 BY MR. METCALF:

12 Q. Now, before we go back -- we go to this video, I want to
13 go back to the chats. We talked about the chats that
14 Mr. Pezzola was not in. He was not in any leadership chats.
15 Correct?

16 A. Correct.

17 Q. And you mentioned that Boots on the Ground was created
18 by Bertino. Correct?

19 A. Yes.

20 Q. And what other group chats do you know that Bertino
21 created?

22 A. I can't think of any, but I do know Boots on Ground.

23 Q. And do you know Mr. Bertino added Mr. Pezzola?

24 A. I believe so.

25 Q. And during the course of your investigation, your team's

1 investigation, it's fair to say that Mr. Pezzola was not
2 that active in any of these chats at all. Is that correct?

3 A. I believe so. But I'm not certain. That wasn't my
4 focus.

5 Q. Okay. But you did review them and you did make mention
6 of them. Right?

7 A. Yes.

8 Q. And he didn't really -- Mr. Pezzola didn't have any
9 communications, really, with any of the other Defendants.
10 Is that fair to say?

11 A. Before January 6th?

12 Q. Yes. Before January --

13 A. Like, the day of January 6th?

14 Q. No. From when he entered, which would be January 4th --

15 A. Okay.

16 Q. -- until January 6th, Mr. Pezzola literally spoke to
17 people about a hotel room, and that's it. Is that fair to
18 say?

19 MR. KENERSON: Objection. Scope.

20 THE COURT: Sustained.

21 BY MR. METCALF:

22 Q. Do you remember Mr. Pezzola -- withdrawn.

23 Mr. Pezzola did not have, really, any direct
24 communication with any of these other Defendants that you
25 could recall. Right?

1 A. January 6th or prior to?

2 Q. Prior to, up until January 6th.

3 MR. KENERSON: Objection. Scope.

4 THE COURT: Sustained.

5 BY MR. METCALF:

6 Q. On January 6th?

7 A. Not that I know of on January 6th.

8 Q. Okay. And he didn't have any direct communications with
9 Tarrio, for example. Correct?

10 A. On January 6th or before?

11 Q. I -- apparently I could just stay on January 6th. So
12 let's focus there. January 6th.

13 A. Not that I know of. No.

14 Q. Okay. Now I'm going to show you what has been marked as
15 113x. This is a video that we already spoke about.

16 MR. METCALF: Can we play this video, please.

17 (Whereupon, segments of Government's Exhibit No.
18 113x were published in open court.)

19 BY MR. METCALF:

20 Q. Now, this is what I referred to as Mr. Pezzola walking
21 around like a puppy dog -- a lost puppy dog after he
22 initially entered the building. Now --

23 MR. METCALF: Can we pause it here.

24 BY MR. METCALF:

25 Q. Mr. Pezzola -- this is approximately 12 minutes after he

1 entered the building. Correct?

2 A. Yes.

3 Q. He does walk around, but he ends up in the same spot
4 that he entered. Correct? Or near the same spot that he
5 entered?

6 A. Yes.

7 Q. Okay. And he's not with Mr. Greene. Right?

8 A. Correct.

9 Q. And he didn't enter the building with Mr. Greene.
10 Correct?

11 A. Correct.

12 Q. But he was still with Mr. Greene -- how can we say this?
13 From the 12:56 note that you have here until 1:30, is it
14 your understanding that he was still with Mr. Greene?

15 A. Yes.

16 Q. Okay. But then, once he entered the building, him and
17 Mr. Greene split off. Correct?

18 A. Yes.

19 Q. And then also around that same timeframe, around 1:30,
20 Mr. Pezzola was seen near Mr. Donohoe. Right?

21 A. Yes.

22 Q. Okay. And is he with Mr. Donohoe here in this video?

23 A. He is not.

24 Q. And before that -- before Mr. Pezzola was seen with
25 Mr. Donohoe, your investigation didn't show him

1 communicating directly with Mr. Donohoe at any time. Is
2 that fair to say?

3 A. Yes.

4 Q. In fact, Mr. Donohoe probably didn't even really know
5 who Mr. Pezzola was at that time that he was near
6 Mr. Pezzola on January 6th. Is that fair to say?

7 MR. KENERSON: Objection. Foundation,
8 speculation.

9 THE COURT: Sustained. Sustained as to
10 speculation.

11 MR. METCALF: Understood.

12 BY MR. METCALF:

13 Q. Did you -- did the course of your investigation --
14 similar to how you said that you spoke with Mr. Greene, did
15 you also speak with Mr. Donohoe?

16 A. I did.

17 Q. And throughout the course of you speaking with him and
18 investigating Mr. Donohoe, did you find anything at all that
19 led to any direct communications between Mr. Donohoe and
20 Mr. Pezzola?

21 MR. KENERSON: Objection. Hearsay.

22 THE COURT: Sustained.

23 MR. METCALF: I didn't ask for any statements. I
24 asked for any information.

25 THE COURT: Let me hear you at sidebar just

1 briefly.

2 (Whereupon, the following proceedings were had at
3 sidebar outside the presence of the jury:)

4 THE COURT: Mr. Kenerson, let me hear from you.

5 MR. KENERSON: I mean, I understood his question
6 as asking for based on conversations Mr. Donohoe, which I
7 think would be hearsay.

8 I don't know if he's asking for communication, but
9 again, outside of January 6th, we would make a scope
10 objection.

11 THE COURT: Right. I think Mr. Kenerson is right
12 that it's either calling for hearsay -- but even if it's not
13 calling for the statement, again, the -- any information, if
14 it's -- it would still be beyond the scope of this witness's
15 direct.

16 MR. METCALF: Your Honor, she has testified that
17 she's been a part of this case since March of 2021, right
18 after it happened.

19 And everything that she's done throughout the
20 course of this investigation led up to basically everything
21 that -- all the reasons why we're here today. The scope of
22 her testimony encompasses her investigations.

23 I'm asking a broad -- very broad question, not
24 based on conversations. I thought I changed it to "any
25 information during the course of your investigation, or your

1 group's investigation, that led to an understanding that
2 they directly communicated."

3 And I believe she's going to say there is nothing.
4 And I should be able to ask that.

5 THE COURT: Directly communicated on January 6th?

6 MR. METCALF: No. Any communications prior to
7 January 6th. Because Mr. Donohoe and Mr. Pezzola are seen
8 walking together. They introduced a whole montage of
9 Mr. Donohoe walking around with Mr. Pezzola. And
10 Mr. Donohoe is the one who is allegedly throwing the
11 bottles.

12 I have to be able to refute with one question that
13 he did not communicate prior to that point in time or prior
14 to January 6th. Because I have a good-faith basis that
15 Donohoe did not even know who Pezzola was and actually was
16 asking people at that time if Mr. Pezzola was even a member
17 or affiliated with the Proud Boys.

18 So I just want one question.

19 THE COURT: Why isn't it beyond the scope? I
20 mean, in fairness, I know all the Defendants don't -- would
21 rather it not be. But why isn't it beyond the scope for all
22 the reasons we've talked about in the past?

23 MR. METCALF: Because her entire investigation --
24 her -- her direct testimony does have to do with --
25 encompasses investigating all these men before January 6th.

1 THE COURT: Okay. The objection is sustained.

2 (Whereupon, the following proceedings were had in
3 open court:)

4 MR. METCALF: Your Honor, if I may, just one more
5 point. Can we go back to the phone real quick?

6 (Whereupon, the following proceedings were had at
7 sidebar outside the presence of the jury:)

8 MR. METCALF: Your Honor, she's already testified
9 that she spoke to Mr. Donohoe and Mr. Greene about their
10 involvement with the Proud Boys and their involvement with
11 January 6th prior to January 6th.

12 THE COURT: Right. She didn't testify to that on
13 direct, though. The Government didn't object to certain
14 other questions. That doesn't mean this isn't beyond the
15 scope.

16 MS. HERNANDEZ: She testified about the water
17 bottle --

18 THE COURT: I'm sorry. Who is speaking right now?
19 You may proceed, Mr. Metcalf.

20 MR. METCALF: I mean, your Honor, I accept your
21 ruling. I just wanted to do just one broad question. I
22 thought that I should be entitled to refute, just with one
23 question, the allegations of assault on police officers and
24 Mr. Pezzola's presence next to that man at that time. I
25 would just ask that that be considered relevant and not

1 beyond the scope based on those allegations.

2 THE COURT: We've had, again, a witness who --
3 this was a question for a prior witness who testified as to
4 all these communications, whether phone or everything else,
5 leading up to January 6th.

6 I'm going to sustain as to scope.

7 MR. METCALF: Thank you.

8 (Whereupon, the following proceedings were had in
9 open court:)

10 BY MR. METCALF:

11 Q. So at this time, Mr. Pezzola is not with Mr. Donohoe.
12 Is that correct?

13 A. Correct.

14 Q. And you're not of the belief that Mr. Donohoe activated
15 Mr. Pezzola to act in the manner that he's acting as
16 depicted in this video. Is that correct?

17 MR. KENERSON: Objection. Vague. "Activated"?
18 Calls for speculation, conclusion.

19 THE COURT: Sustained as to vagueness at least.

20 BY MR. METCALF:

21 Q. In this video, do you have any reason to believe that
22 Mr. Pezzola knows the individuals that I just circled?

23 A. I believe they were in the marching group. But outside
24 of that, no.

25 Q. How about these individuals right here?

1 A. No.

2 Q. So there's no reason to believe that Mr. Pezzola, in his
3 wandering around, activated these men to come in the
4 building at that time?

5 MR. KENERSON: Objection. Vague. "Activated."

6 MR. METCALF: Your Honor, do you want me to do a
7 speaking objection or can I be heard?

8 THE COURT: It's just sustained as to the word
9 "activated" in terms of vagueness.

10 BY MR. METCALF:

11 Q. Did Mr. Pezzola signal to any of these men to get them
12 to come into the building?

13 A. Not that I'm aware of.

14 Q. Did Mr. Pezzola have any communications with any of
15 these men that would allow or have these men come into the
16 building at this time?

17 A. Not that I know of.

18 Q. Same question for these men over here: Did Mr. Pezzola
19 signal them to come into the building?

20 A. Not that I know of.

21 Q. Did Mr. Pezzola signal or speak to this man about
22 stepping on what he's stepping on here and coming into the
23 building?

24 A. Not that I know of.

25 MR. METCALF: I ask that we now show the witness

1 exhibit -- Government's Exhibit 115.

2 (Whereupon, segments of Government's Exhibit No.
3 115 were published in open court.)

4 BY MR. METCALF:

5 Q. This is the same area that we just spoke about
6 approximately -- almost 20 minutes later. Right? Or 30
7 minutes later, actually? 28 minutes later, so 2:25 to 2:53.

8 A. Yes.

9 Q. And Mr. Pezzola is already out -- has already left the
10 Capitol grounds at this point. Correct?

11 A. He's left the building. Yes.

12 Q. Okay. And there's nothing from your investigation that
13 shows that Mr. Pezzola had any communication with all those
14 people who circled here about them entering this building.
15 Is that correct?

16 A. Not that I'm aware of.

17 Q. And Mr. Pezzola had no communication with any of these
18 people about any of their actions that are depicted in this
19 video. Is that correct?

20 A. Not that I know of.

21 Q. Not even this guy that I just circled?

22 A. Not that I know of.

23 Q. None of these guys that I just circled are Proud Boys,
24 from what you could tell. Correct?

25 A. This one is. This is Rehl, Giddings, Healion and Vy.

1 MR. METCALF: Can we stop here.

2 I wonder if I'm going to clear your screen. I
3 did. Okay.

4 BY MR. METCALF:

5 Q. So you're talking about this area right here. Correct?

6 A. Yes.

7 Q. And in Mr. Pezzola exiting out here, he did not run into
8 them coming in here. Is that correct?

9 A. I don't know if he did or did not.

10 Q. You didn't find anything that would indicate that they
11 did. Is that correct?

12 A. Correct.

13 Q. And you didn't find anything that would indicate that
14 Mr. Pezzola had any communication with any of these people
15 at all that I'm circling here?

16 A. Not that I'm aware of.

17 MR. METCALF: I ask that we show the witness 1 --
18 Government's Exhibit 127 and that we go to 46 seconds to 102
19 seconds.

20 MR. KENERSON: Sorry. What was that?

21 MR. METCALF: 46 seconds to 102 seconds. I'm
22 asking that this video starts at 46 seconds and that we play
23 it until one minute and 2 seconds.

24 (Whereupon, segments of Government's Exhibit No.
25 127 were published in open court.)

1 BY MR. METCALF:

2 Q. You see Mr. Pezzola in this video. Right?

3 A. I do.

4 Q. And the timeframe is 2:22. Is that accurate?

5 A. Yes.

6 Q. So this is where he was before he went back down to
7 where he was -- where he basically exited from?

8 A. Correct.

9 Q. And this is where he was before he went back down to
10 where I referred to him as lost and wandering around like a
11 puppy dog. Do you remember that?

12 A. I do.

13 Q. So this is about -- approximately two minutes prior or
14 three minutes prior to that video. Is that fair to say?

15 A. Yes.

16 MR. METCALF: Can we stop the video there. The
17 video just stopped at 1:21. I ask that we go back to 46
18 seconds.

19 (Whereupon, segments of Government's Exhibit No.
20 127 were published in open court.)

21 BY MR. METCALF:

22 Q. Same scenario here: Is Mr. Pezzola with anybody at this
23 point in time?

24 MR. METCALF: Can we stop there.
25

1 BY MR. METCALF:

2 Q. Is Mr. Pezzola talking to anybody at this specific time?

3 A. It appears like he's talking potentially on the radio,
4 the earpiece, but not to people around him.

5 Q. And he's also holding a phone. Is that accurate?

6 A. You'd have to back it up. It looks like he's holding
7 onto kind of --

8 MR. METCALF: Can we back up just a little bit,
9 please, maybe to 50 seconds.

10 (Whereupon, segments of Government's Exhibit No.
11 127 were published in open court.)

12 MR. METCALF: How about fast-forward to 55
13 seconds.

14 (Whereupon, segments of Government's Exhibit No.
15 127 were published in open court.)

16 MR. METCALF: Keep playing.

17 (Whereupon, segments of Government's Exhibit No.
18 127 were published in open court.)

19 MR. METCALF: We can pause here.

20 BY MR. METCALF:

21 Q. Do you have any indication that Mr. Pezzola was on the
22 phone with Mr. Tarrio at this time?

23 A. I do not.

24 Q. Do you have any indication that Mr. Pezzola ever made a
25 phone call with Mr. Tarrio this entire day?

1 A. I do not.

2 Q. Do you have any indication that there was actually even
3 any ability for anybody to communicate with earphones on
4 this day?

5 A. Re-ask your question.

6 Q. Okay. So I will -- that was a little bit confusing.

7 You've heard that there were different types of
8 indications that people's phone service was shut down that
9 day, have you not?

10 A. I've heard that people had problems placing calls
11 because of the volume of phone calls and text messages that
12 were there.

13 Q. And those problems were a substantial amount of
14 problems. Is that correct?

15 A. I believe so.

16 Q. And during the course of your investigation, were you
17 ever able to tell that people, specifically these
18 Defendants, were actually communicating with each other on
19 an earphone set? Do you have any evidence to show that they
20 actually did communicate?

21 A. Not that I know of, but that also wasn't my specific
22 focus.

23 Q. Okay. Understood.

24 Now, do you have -- Mr. Pezzola, he's not with
25 Mr. Greene at this point. Correct?

1 A. Correct.

2 Q. He's not with Mr. Donohoe at this point. Correct?

3 A. Correct.

4 Q. He's nowhere near Mr. Rehl at this point. Correct?

5 A. Correct.

6 Q. So at 12:57, he runs past Mr. Rehl, or where they could
7 be captured in the same frame, and then Mr. Rehl is seen in
8 the same area a half an hour after -- well, I'm going to
9 dice up these questions.

10 Mr. Pezzola runs past Mr. Rehl at 12:57 where, if
11 a picture was taken, they would be in the same frame. Is
12 that accurate?

13 A. So Mr. Pezzola has left the building at 2:37.

14 Q. I'm going back even further that. 12:57.

15 A. Oh, I thought you said 2:57.

16 Q. So when Mr. Pezzola is, in my opinion, running up the
17 stairs, he runs past Mr. Rehl and, at a certain point in
18 time -- it's 12:57 and 30 seconds, according to your
19 notes -- Mr. Pezzola and Mr. Rehl could be seen in the same
20 shot. Is that accurate?

21 A. Yes.

22 Q. And that's if someone took a picture and freezed it at
23 that point in time. Is that fair to say?

24 A. Yes.

25 Q. It's also fair to say that Mr. Pezzola could have ran

1 right past Mr. Rehl and never even really spoke with him
2 after that. Is that fair to say?

3 A. So after that, they end up at the second barricade
4 breach near each other.

5 Q. Okay. But did they speak -- is there any indication
6 that Mr. Pezzola and Mr. Rehl were speaking with each other?

7 A. Not that I can think of.

8 Q. Okay. And then Mr. Pezzola ends up -- that point that
9 you're speaking about, Mr. Pezzola ends up leaving that
10 point and entering through that window at 2:13 that we spoke
11 about on these other recent videos. Is that accurate? The
12 other videos that we just spoke about, that's where
13 Mr. Pezzola entered at 2:13?

14 A. Correct.

15 Q. And then we have Mr. Pezzola here. And when he entered,
16 he's not with Mr. Greene, he's not with Mr. Donohoe and he's
17 not with Mr. Rehl. Is that fair to say?

18 A. Correct.

19 Q. He's not with any of these Defendants. Is that fair to
20 say?

21 A. Correct.

22 Q. There's no indication that he's calling any of these
23 Defendants around that time, or throughout this whole day.
24 Is that fair to say?

25 A. Correct.

1 Q. And now we have him up here at 2:22. He is not with
2 Mr. Greene, Mr. Donohoe, Mr. Rehl or any of the Defendants
3 at this point in time. Is that fair to say?

4 A. Yes.

5 Q. And then he leaves and goes back down.

6 MR. METCALF: Can we go back to 113x.

7 (Whereupon, segments of Government's Exhibit No.
8 113x were published in open court.)

9 BY MR. METCALF:

10 Q. He leaves and goes back down to this area. Correct?

11 A. He does.

12 Q. And this is at 2:25. Correct?

13 A. Yes.

14 Q. And he's not with anybody again at this point in time.
15 He's by himself?

16 A. Correct.

17 Q. And he still has the shield in his hands?

18 A. He does.

19 Q. And then we spoke about him giving back the shield.

20 MR. METCALF: Can we go to Government Exhibit 114.

21 (Whereupon, segments of Government's Exhibit No.
22 114 were published in open court.)

23 BY MR. METCALF:

24 Q. Which -- by the way, why did you fight me on Mr. Pezzola
25 giving back the shield to the Capitol Police? You agree

1 that he gave the shield back to the police. Right?

2 A. He did.

3 Q. Okay. So this is now at 2:35. Mr. Pezzola is giving
4 the shield back to the police, and then, in somewhat of a
5 structured fashion, they leave the building at that point in
6 time. Right?

7 A. He does.

8 MR. METCALF: Can we go to Government Exhibit 447,
9 please.

10 THE COURTROOM DEPUTY: 447 is not in, but 447A is.

11 MR. METCALF: H?

12 THE COURTROOM DEPUTY: A, as in apple, as in --
13 but not -- just 447 is not in.

14 MR. METCALF: Your Honor, could I just have one
15 second with Attorney Kenerson, please?

16 THE COURT: Yes, sir.

17 (Mr. Metcalf confers with Mr. Kenerson privately.)

18 MR. METCALF: Your Honor, at this time, I ask for
19 Government Exhibit 447, specifically ten minutes and 18
20 seconds to ten minutes and 37 seconds, to be admitted as
21 evidence.

22 MR. KENERSON: No objection.

23 THE COURT: It will be admitted. And permission
24 to publish it.

25 (Whereupon, portions of Government's Exhibit No.

1 447 were entered into evidence.)

2 MR. METCALF: Thank you, your Honor.

3 Can we go to ten minutes and 18 seconds, please.

4 (Whereupon, segments of Government's Exhibit No.

5 447 were published in open court.)

6 BY MR. METCALF:

7 Q. Now, you testified briefly a couple of times about Ray

8 Epps. That's Ray Epps right there. Correct?

9 A. Correct.

10 Q. Now, Ray Epps specifically went to the left ear of Ryan

11 Samsel before Ryan Samsel breached the first barrier. Is

12 that fair to say?

13 A. Yes.

14 Q. And we're talking seconds before Ryan Samsel turned his

15 hat around and breached the first barrier. Is that fair to

16 say?

17 A. I'd need to see the video to see if it was before he

18 turned his hat around or not; but it was within seconds

19 before the barricade. Yes.

20 Q. Forget about the hat. Okay. All right.

21 So let's play from here. I want you to focus on

22 who you know to be Ray Epps.

23 (Whereupon, segments of Government's Exhibit No.

24 447 were published in open court.)

25 MR. METCALF: Can we pause the video right here.

1 BY MR. METCALF:

2 Q. Do you see this hat right there?

3 A. I do.

4 Q. And you see Ray Epps right there?

5 A. I do.

6 Q. Okay. Let's keep focusing on that. It's going to be --
7 the camera is going to move, so just bear with me here.

8 MR. METCALF: Can we play.

9 (Whereupon, segments of Government's Exhibit No.
10 447 were published in open court.)

11 MR. METCALF: Can we pause.

12 BY MR. METCALF:

13 Q. Who do you know this man to be?

14 A. Dominic Pezzola.

15 MR. METCALF: Let's keep playing.

16 (Whereupon, segments of Government's Exhibit No.
17 447 were published in open court.)

18 BY MR. METCALF:

19 Q. That's Ray Epps. Right?

20 A. It is.

21 MR. METCALF: Stop right here, please.

22 BY MR. METCALF:

23 Q. Ray Epps is here.

24 Pezzola. Do you see his hand there? The circle
25 down here? I'll clear it.

1 A. I need you to back up the video to confirm that's
2 Pezzola.

3 Q. Let's go two more seconds.

4 A. Okay.

5 MR. METCALF: Can we press play, please.

6 (Whereupon, segments of Government's Exhibit No.
7 447 were published in open court.)

8 MR. METCALF: Stop.

9 BY MR. METCALF:

10 Q. Do you see right there?

11 A. Yes.

12 Q. That's Dominic Pezzola. Correct?

13 A. It is.

14 MR. METCALF: Let's keep playing.

15 (Whereupon, segments of Government's Exhibit No.
16 447 were published in open court.)

17 MR. METCALF: Stop.

18 BY MR. METCALF:

19 Q. You saw Mr. Epps speaking to Mr. Pezzola at that point
20 in time. Correct?

21 A. I see Mr. Epps's arm go out.

22 MR. METCALF: Let's keep playing.

23 (Whereupon, segments of Government's Exhibit No.
24 447 were published in open court.)

25 MR. METCALF: Okay. Let's stop. Let's go back to

1 ten minutes and 18 seconds.

2 BY MR. METCALF:

3 Q. Now that you've seen what I'm referring to, let's
4 rewatch this.

5 (Whereupon, segments of Government's Exhibit No.
6 447 were published in open court.)

7 BY MR. METCALF:

8 Q. I want you to focus on those two people.

9 MR. METCALF: So let's play it straight through
10 from 10:18 to 10:37.

11 (Whereupon, segments of Government's Exhibit No.
12 447 were published in open court.)

13 BY MR. METCALF:

14 Q. Ray Epps is next to Mr. Pezzola. Correct?

15 A. Yes.

16 Q. Do you see what -- Mr. Epps appears to be talking? Do
17 you see Dom turn?

18 MR. METCALF: Can we pause.

19 BY MR. METCALF:

20 Q. Did you see Mr. Pezzola somewhat turn his head over to
21 Ray Epps's direction?

22 A. I did.

23 Q. And did -- it seemed like Mr. Epps was speaking. Fair
24 to say?

25 A. Yes.

1 Q. And he pointed towards the Capitol at that point in
2 time. Is that fair to say?

3 A. I saw his arm go out.

4 Q. And it was in the direction of where the Capitol is. Is
5 that fair to say?

6 A. Yes.

7 Q. Okay. So now -- throughout the course of you being
8 involved in this whole scenario, March 2021, I asked you if
9 you ever actually investigated somebody who is not a member
10 of the Proud Boys. So I'm going to ask it a little bit more
11 broad.

12 Since such time, have you investigated anybody who
13 was not a Proud Boy or associated with the Proud Boys?

14 A. So cases are open on individuals who were there on
15 January 6th from different field offices within the FBI. My
16 investigation has specifically been focused around
17 January 6th, the incidents of January 6th, pertaining to the
18 leading, planning of what occurred.

19 Q. With regards to the Proud Boys. Correct?

20 A. With regards to these Defendants.

21 Q. And these Defendants are the Proud Boys. Correct?

22 A. They are part of the Proud Boys. Yes.

23 Q. And have you investigated anybody else who was not part
24 of the Proud Boys or affiliated with the Proud Boys
25 throughout the course of your duties and roles with your

1 assignment? Yes or no.

2 A. So again, when you use the term "investigated," it's --
3 it's not a "yes" or "no" answer.

4 Q. Okay. So do you have anybody -- we went through the
5 whole target of an investigation scenario. If someone is
6 the main focus of -- if someone is the main focus of who you
7 were looking to say committed a specific crime, what would
8 you refer to that person as?

9 A. A subject of an investigation.

10 Q. Okay. Do you have any subjects of an investigation who
11 are not Proud Boys or affiliated with the Proud Boys as your
12 duties and responsibilities for this investigation?

13 A. So there are people within this investigation that have
14 been interviewed, potential --

15 MR. METCALF: Your Honor, I'm going --

16 THE WITNESS: I'm trying to answer your question.

17 MR. METCALF: -- to ask her to stop real quick.

18 BY MR. METCALF:

19 Q. I'm just asking about you. You specifically, not other
20 members of your team or anyone else who's affiliated with
21 the investigation. You specifically.

22 Do you have any subjects of an investigation
23 regarding January 6th that involved someone who was not a
24 Proud Boy member or associated with the Proud Boys? And I'm
25 asking you to say yes or no or you can't answer.

1 A. I can't answer that in a yes or no.

2 Q. Okay. So can you think of -- how about this: You
3 indicated today that Shannon Rusch was not a Proud Boy and
4 he was someone who was in the marching -- with the marching
5 group. Do you remember testifying to that this morning?

6 A. Yes. But he met up with them at the food trucks.

7 Q. Okay. But do you remember two days ago testifying that
8 Shannon Rusch was a Proud Boy?

9 A. I don't know that I ever testified he was, in fact, a
10 Proud Boy.

11 Q. Okay. Two days ago, you said that he was -- and
12 testified that he was a Proud Boy. If you did say that,
13 were you mistaken then or were you mistaken today?

14 A. If I did say that -- and, again, I don't recall saying
15 that he was officially a Proud Boy -- then I was mistaken.

16 Q. Okay. So this is -- I guess we have to let the
17 transcripts dictate that one.

18 Special Agent Miller, I thank you for your
19 service. Thank you very much.

20 THE COURT: Redirect from Mr. Kenerson.

21 REDIRECT EXAMINATION

22 BY MR. KENERSON:

23 Q. Good afternoon, Special Agent.

24 A. Good afternoon.

25 Q. Let me ask you a couple of questions about the 1776

1 Returns document and Jeremy Bertino. Okay?

2 A. Okay.

3 Q. When you first spoke to Jeremy Bertino, was it close in
4 time or far away in time from when the FBI first found that
5 document in Mr. Tarrio's phone?

6 A. Close in time.

7 Q. And I think you testified -- Mr. Smith asked you some
8 questions and Mr. Jauregui asked you some questions about
9 what you said to Mr. Bertino.

10 Did you describe for us the process you used that
11 led you to believe that Tarrio had a hand in creating that
12 document?

13 A. Yes. So the document was seen in his phone, that it was
14 sent to him to from Ms. Erica, which is a lady friend of
15 his. And there are text messages exchanged between the two,
16 I want to say on December 27th or 28th, where she's
17 referencing creating something.

18 I can't remember what Tarrio's responses were.
19 But she ends up sending him the document on December 30th.

20 On January 1st, he Googles the Winter Palace. And
21 then a message is sent to Bertino on January 6th where --
22 again, I can't remember the specifics as to what Mr. Bertino
23 said, but Tarrio's response was, The Winter Palace.

24 MR. KENERSON: Ms. Rohde, if we can bring up
25 Government's Exhibit 1140, please, just for the witness.

1 BY MR. KENERSON:

2 Q. All right, Special Agent. I think -- was this a copy of
3 something that Mr. Jauregui showed you?

4 A. It is.

5 Q. And can you tell us what this is?

6 A. So this would have been from Tarrio's phone. It would
7 have showed when he Googled the Winter Palace. There's a
8 time and date stamp on it.

9 MR. KENERSON: Move for the admission of 1140.

10 MR. JAUREGUI: Judge, my only objection is that
11 it's different than the one I showed her. It doesn't have
12 the date on it. The one I showed her had a date of March
13 14th.

14 THE COURT: Let's go to sidebar.

15 (Whereupon, the following proceedings were had at
16 sidebar outside the presence of the jury:)

17 THE COURT: It had a date -- the date that the
18 search was done or another date?

19 MR. JAUREGUI: Yes, your Honor. It had a date of
20 March 14th of the extraction report. I can show it to your
21 Honor if you'd like.

22 MR. KENERSON: I represent, as an officer of the
23 Court, that the March 14th date, at least as results from
24 Mr. Jauregui, is because he asked for a copy of anything we
25 may introduce. This is -- the current vision is an HTML

1 version to ensure whatever I said to Mr. Jauregui, he'd be
2 able to PDF this. I think that's the date I printed the
3 PDF.

4 THE COURT: It's just the date you were produced
5 the document. That doesn't matter.

6 MR. JAUREGUI: Well, it's the date that the
7 Government produced this report. And this is not the report
8 that she saw in her system. That's the issue. If your
9 Honor recalls, when I questioned her, she said that this was
10 not the report that she saw, that she actually reviewed it
11 in her internal FBI system, some kind of weird Cellebrite
12 report. But it was not this report that she based her
13 testimony on.

14 I was actually trying to ask her about this. She
15 rejected me. She said: No, this is not the extraction
16 report that I had seen before.

17 THE COURT: Right. Mr. Kenerson, what do you say
18 to that?

19 MR. KENERSON: Well, right. We don't have the
20 full extraction of Mr. Tarrio's phone here. She was saying
21 she was looking at the full extraction. I think what she
22 just testified to is that this is a report from that
23 extraction, which is what it purports to be.

24 THE COURT: A report from the extraction?

25 MR. KENERSON: Right.

1 THE COURT: Was there any objection other than the
2 March date, which -- I don't see how that can really be an
3 objection, Mr. Jauregui.

4 MR. JAUREGUI: Judge, my issue is that this report
5 was created by the Government attorneys in this case. It
6 was not the report of the extraction that she actually
7 reviewed and that she based her testimony on.

8 THE COURT: Mr. Kenerson?

9 MR. JAUREGUI: Judge, I don't think she can
10 recognize this document or testify it's fair and accurate as
11 to what she actually saw in her FBI system.

12 THE COURT: I think she just did.

13 What she testified is: This would have been from
14 Tarrío's phone. It would have shown when he Googled.
15 There's a date and time.

16 I think you haven't gotten her to say it's fair
17 and accurate. But I think if you can lay that predicate,
18 I'll admit it. But I think you'll have to lay that
19 predicate --

20 MR. KENERSON: Sure. Thank you.

21 THE COURT: -- that she knows -- even if this
22 isn't something she originally looked at, if she can
23 describe what it is and that's it's fair and accurate.

24 MR. KENERSON: Thank you.

25 (Whereupon, the following proceedings were had in

1 open court:)

2 BY MR. KENERSON:

3 Q. Special Agent, I think you said you -- when Mr. Jauregui
4 was asking you questions that -- about a version of this
5 document, that you had reviewed the data directly from the
6 extraction of Mr. Tarrio's phone. Was that your testimony?

7 A. It was.

8 Q. This exhibit that we have in front of you, 1140, does
9 that fairly and accurately depict the data in the phone as
10 you saw it?

11 A. Yes.

12 MR. KENERSON: More for admission of 1140.

13 THE COURT: It will be admitted. And permission
14 to publish.

15 (Whereupon, Government's Exhibit No. 1140 was
16 entered into evidence.)

17 BY MR. KENERSON:

18 Q. All right. Special Agent, can you just orient the jury
19 to what we're looking at here?

20 A. So this would have been a Cellebrite extraction from the
21 phone. Where it says, value, the Winter Palace, that's what
22 was looked up. Timestamp is when the search was conducted,
23 so that would be January 1st, 2021, at 12:50:14 a.m. And it
24 was from Chrome.

25 Q. Thank you.

1 Now, you also testified about Mr. Tarrio creating,
2 modifying or accessing the document on January 2nd or
3 thereabouts.

4 Do you remember that testimony?

5 A. I do.

6 Q. And tell us about that, that date -- I know you said you
7 would need to verify the date. But the date of
8 approximately January 2nd, where did you get that date from?

9 A. So that was more recently found. That was probably
10 located maybe two weeks ago or so while I was reviewing
11 Tarrio's information before testifying. It says, created,
12 modified, accessed. Again, I'm not an expert in this at
13 all.

14 But what that --

15 MR. JAUREGUI: Objection, Judge. She's not an
16 expert. She's not qualified to testify to that.

17 MR. KENERSON: It's not an expert opinion.

18 MR. JAUREGUI: It's exactly an expert opinion.

19 THE COURT: Hold on one second.

20 The objection is sustained.

21 MR. KENERSON: May we be heard?

22 THE COURT: Yes.

23 (Whereupon, the following proceedings were had at
24 sidebar outside the presence of the jury:)

25 MR. KENERSON: Your Honor, I think -- I believe --

1 I'm happy to clarify this. She has just testified to the
2 metadata in the phone. That is not an expert opinion. She
3 looks at what's in the phone, clicks on the metadata.
4 That's what it says.

5 MR. JAUREGUI: Judge -- Judge, not to mention that
6 it's a discovery violation that she just found that -- found
7 out about this two weeks ago and we had no idea. We're
8 being ambushed and blindsided by it right now.

9 THE COURT: Wait a minute. She found it two weeks
10 ago. You're not being blindsided by it now.

11 But go ahead.

12 MR. JAUREGUI: No. That they found out about it
13 two weeks ago. We just heard about this yesterday. She
14 already testified for hours that she's not a computer
15 expert, she's not a forensic expert, so she can't be
16 testifying as to whether the document was actually seen or
17 not. They -- a computer said it wasn't.

18 THE COURT: The problem is, the Government didn't
19 go into this on direct. This came up on cross. You all
20 crossed her on it. And you had all the opportunity and, in
21 fact, that's how this even came up.

22 So the Government can -- no. She can testify as
23 to this. It's not an expert conclusion. And the reason
24 we're even here is because you all crossed her -- you all
25 went into this and she testified the way she did. You all

1 could have done whatever you wanted with her on it at that
2 point. And frankly, you sort of did.

3 So I think she can -- this is classic redirect.

4 MR. JAUREGUI: Your Honor, my only concern is that
5 this is newly discovered evidence of which the defense had
6 no knowledge of whatsoever. We did not know that she
7 discovered just two weeks ago some kind of new information
8 as to the 1776 document. The Government never informed us
9 of this.

10 THE COURT: Well, when did they inform you of it?

11 MR. JAUREGUI: Right now.

12 THE COURT: Mr. Kenerson?

13 MR. KENERSON: First of all, the defense has
14 Tarrio's phone. This document's in his phone. That's where
15 she found it, number one.

16 Number two, the Court was correct: This did not
17 come out on the direct of Special Agent Miller, but on
18 cross. In fact, we objected to their going into it on
19 cross. The Court allowed it. So I don't see how this is
20 not proper redirect.

21 THE COURT: Especially if, given -- if you had the
22 information, Mr. Jauregui. I mean, I hear what you're
23 saying. But I think they get to do this.

24 MR. JAUREGUI: Judge, if the Government would have
25 given me a heads-up last night that they had new information

1 from two weeks ago, I could have crossed her on it.

2 THE COURT: But it's not new information. You had
3 the information.

4 MR. JAUREGUI: I did not, your Honor. None of us
5 did.

6 THE COURT: Mr. Kenerson was saying you had the
7 phone and all of this information.

8 MR. JAUREGUI: Judge, we've all had the phone from
9 the beginning of the case. But their own expert said that
10 the document was never accessed.

11 Now they're saying that two weeks ago they have
12 new information that the file was accessed. We did not have
13 that information.

14 THE COURT: No. Information that they recently --
15 that they identified that they have and that you have.
16 Correct?

17 Mr. Kenerson, is that correct?

18 MR. KENERSON: That's my understanding. They had
19 the same document that we did. This is a different version
20 of the 1776 Returns document from Mr. Tarrío's phone.

21 The opinion on the previous one was about the
22 version in Telegram. This is a different investigation.
23 Kate Cain said --

24 THE COURT: Mr. Jauregui, if you want to -- I
25 don't want to burn any more time here. If you want to argue

1 to me that you didn't have this -- the Government is saying
2 you had it. So we can take that up later. But the
3 Government gets to do this for now.

4 MR. JAUREGUI: Yes, sir.

5 (Whereupon, the following proceedings were had in
6 open court:)

7 BY MR. KENERSON:

8 Q. All right, Special Agent Miller. Can you tell us about
9 where you got the document on the date of approximately
10 January 2nd?

11 A. I got it from Enrique Tarrío's phone. And it would have
12 been in the evening hours.

13 Q. And when you say you got it from Mr. Tarrío's phone,
14 tell us about that process.

15 A. While reviewing Enrique Tarrío's phone, I found the 1776
16 document. Underneath that, it says, created, modified or
17 accessed. There's a timestamp of, I want to say -- it's,
18 like, 9:30 p.m., roughly.

19 And then within an hour or -- not an hour --
20 within a minute and a half of creating, modifying or
21 accessing that document, there's a place to Ethan Nordean --
22 a phone call to Ethan Nordean.

23 Q. And do you remember reading an email from Examiner Cain
24 when Mr. Jauregui was questioning you?

25 A. I do.

1 Q. Was this before or after that email?

2 A. This would have been after.

3 Q. Now, you testified on cross-examination you're not a
4 computer forensic expert. Correct?

5 A. Correct.

6 Q. Did you tell Kate Cain about this document you found?

7 A. I personally did not, but one of the members of my team
8 did. Yes.

9 Q. Are you aware of any disagreement with your analysis?

10 MR. PATTIS: Objection. Hearsay.

11 THE COURT: Sustained there.

12 MS. HERNANDEZ: Objection, your Honor. Could we
13 have a sidebar, please?

14 (Whereupon, the following proceedings were had at
15 sidebar outside the presence of the jury:)

16 MS. HERNANDEZ: Your Honor, I wanted to clarify
17 whether she -- her testimony was that she looked at Tarrío's
18 phone. We don't have Mr. Tarrío's phone. The Court may
19 recall that after Special Agent Cain testified, we asked to
20 see the phone, so we've been trying to discuss -- because
21 there's information on the phones themselves that can get --
22 that can be accessed that is not available on these reports
23 that we got.

24 So if she's getting this information from the
25 phone, then the basis of this cross-examination -- of this

1 redirect, that we had the same information she had, is not
2 accurate.

3 THE COURT: I'll -- look, the question of what you
4 had we'll take up afterwards, number one. I don't mean
5 after her testimony is completed; at a break or whatever
6 before it's complete.

7 Mr. Kenerson, you might want to clarify whether --
8 exactly whether she meant the phone or an extraction from
9 the phone. But the question of whether you had this, maybe
10 it opens her up to recross. I don't know. But we'll take
11 that up separately.

12 MS. HERNANDEZ: Thank you, your Honor.

13 (Whereupon, the following proceedings were had in
14 open court:)

15 BY MR. KENERSON:

16 Q. Agent Miller, to be clear, when you say you looked at
17 Mr. Tarrío's phone, was that the physical phone or an
18 extraction?

19 A. An extraction.

20 Q. Do you remember being asked some questions by Mr. Smith
21 about a CHS report and your Lync messages with another agent
22 about whether he was present? Do you remember those
23 questions?

24 A. I do.

25 Q. How close physically did you sit to that other agent at

1 that point in time?

2 A. Fairly close. Maybe five desks apart, roughly.

3 Q. And the conversations you were having with your team at
4 that point, were those only over the Lync system?

5 A. They were not.

6 Q. Did you also have in-person conversations?

7 A. I did.

8 Q. You were also asked a few questions by Mr. Pattis about
9 whether you knew certain people in the videos were
10 confidential human sources. Do you remember those
11 questions?

12 A. I do.

13 Q. You also testified about how source reporting can go
14 into a different case file than kind of an investigative
15 file. Do you remember testifying about that?

16 A. I do.

17 Q. Does reporting that winds up in a case file have
18 identifying information as to the source in question?

19 A. It does not. It just has a number.

20 Q. Do you personally have the ability to search the entire
21 FBI system where the CHS information with identifying
22 information is stored?

23 MR. PATTIS: Objection. Speculative. May we be
24 heard, Judge?

25 (Whereupon, the following proceedings were had at

1 sidebar outside the presence of the jury:)

2 MR. PATTIS: She doesn't personally have the
3 ability, but she could ask. So it's a meaningless question.

4 THE COURT: Mr. Kenerson, are you going to ask her
5 if she asked?

6 MR. KENERSON: I think Mr. Pattis covered that
7 plenty on his cross.

8 MR. PATTIS: I didn't, actually. I said she
9 doesn't -- whether she personally has the ability to do so.
10 She doesn't.

11 MR. KENERSON: The testimony on cross was: You
12 don't know whether this person was a CHS. You don't know
13 whether this person was a CHS, and you didn't bother to find
14 out. So that was the cross.

15 MR. PATTIS: And because she didn't bother to ask.
16 So to say she personally -- that she does have the ability
17 to do it is a meaningless question.

18 THE COURT: No. It's not a meaningless question.
19 I think it provides context to the prior answer. So --

20 MR. PATTIS: Are we going to be able to reopen on
21 cross on that?

22 THE COURT: No, because you already got her to say
23 she didn't bother to do it.

24 MR. PATTIS: And so -- well, I stand by -- if
25 you're going to agree -- it's late in the day. I don't want

1 to argue these issues. But the fact that --

2 THE COURT REPORTER: Counsel, please slow down for
3 the record.

4 MR. PATTIS: I'm getting impatient. I'm sorry.

5 She didn't have the ability do just about anything
6 in the FBI without cooperation from others. To ask her,
7 Does she have the personal ability to enter the FBI, no.
8 She needs a key. Does she have the ability to call somebody
9 on another phone? No. She needs the phone. She can't --
10 it's meaningless. And at this point, it's mere trickery and
11 bad faith.

12 THE COURT: I don't think that's right.

13 I think I'm going to let you ask the question,
14 Mr. Kenerson.

15 (Whereupon, the following proceedings were had in
16 open court:)

17 BY MR. KENERSON:

18 Q. Agent Miller, do you personally have the ability to
19 search the entire system where the CHSS have the identifying
20 information in them?

21 MR. PATTIS: Objection. Vague, Judge. The FBI is
22 a team effort.

23 THE COURT: Overruled.

24 THE WITNESS: I do not.

25

1 BY MR. KENERSON:

2 Q. Are there reasons not everyone in the FBI has access to
3 all source reporting?

4 MS. HERNANDEZ: Objection.

5 THE COURT: Overruled.

6 THE WITNESS: Yes.

7 BY MR. KENERSON:

8 Q. What are some of those reasons?

9 A. To protect the identity of the source.

10 Q. Why is it important to protect the identity of the
11 sources?

12 A. Because if they were known, they likely wouldn't provide
13 information.

14 Q. You were also asked some questions about Kenny Lizardo.
15 Do you remember those questions?

16 A. I do.

17 Q. Mr. Pattis asked you, before it got to Kenny Lizardo,
18 whether you knew anyone who was a source who marched with
19 the group from the Washington Monument. Do you remember
20 those questions.

21 A. I do.

22 Q. Did Mr. Lizardo march with the group from the Washington
23 Monument?

24 A. No.

25 Q. And I think you testified on direct -- excuse me -- on

1 cross -- sorry. Let me start that question over.

2 You testified both on direct and cross about the
3 Proud Boys group winding up at the food trucks. Right?

4 A. I did.

5 Q. Did Mr. Lizardo -- was he present at the food trucks?

6 A. For a period of time, yes.

7 Q. Do you know where he went after?

8 A. Back to his hotel.

9 Q. Did the FBI recover surveillance footage from the
10 Phoenix Hotel for January 6th?

11 A. We did.

12 MR. ROOTS: Objection as to leading.

13 THE COURT: Sustained as to leading.

14 MR. KENERSON: One-attorney rule, please.

15 THE COURT: Very well.

16 Mr. Metcalf, you'll -- you'll be handling this
17 witness.

18 You may proceed, Mr. Kenerson.

19 BY MR. KENERSON:

20 Q. Did the FBI recover any surveillance video from hotels
21 from January 6th?

22 A. We did.

23 MR. KENERSON: Can we bring up briefly Nordean 301
24 at three hours, six minutes and eight seconds.

25 (Whereupon, segments of Defendant Nordean's

1 Exhibit 301 were published in open court.)

2 BY MR. KENERSON:

3 Q. Special Agent, is this the photo of -- or the still
4 shot, anyway, of Mr. Lizardo you identified yesterday?

5 A. It is.

6 Q. And can you just describe what he is wearing in this?

7 A. A black beanie cap, a black sweater, a pair of pants,
8 dark pants, and a blue bandanna around his neck, and
9 sunglasses.

10 Q. Thank you.

11 MR. KENERSON: If we could have, Ms. Rohde, just
12 for the witness at this point, Exhibit 1143.

13 (Whereupon, Government's Exhibit No. 1143 was
14 published to the witness only.)

15 BY MR. KENERSON:

16 Q. What type of footage are we looking at here?

17 A. Interior footage from a hotel.

18 MR. KENERSON: And if we could go forward,
19 Ms. Rohde, to -- the timestamp on the top is at 13:05 and
20 55:00 seconds. And if we could play from -- well, go back.
21 13:05:50.

22 (Whereupon, segments of Government's Exhibit No.
23 1143 were published for the witness only.)

24 MR. KENERSON: Pause right here, Ms. Rohde.

25

1 BY MR. KENERSON:

2 Q. The person who just walked in, how does that person
3 compare in appearance to the person we just saw?

4 A. The same.

5 MR. KENERSON: Move for admission of 1143 from
6 13:05:50 through about 13:05 -- about ten seconds from
7 there.

8 MR. JAUREGUI: Judge, I would just object.
9 Outside the scope of cross.

10 THE COURT: Overruled.

11 This will be admitted.

12 (Whereupon, Government's Exhibit No. 1143 was
13 entered into evidence.)

14 MR. KENERSON: Seek permission to publish.

15 THE COURT: Permission granted.

16 (Whereupon, segments of Government's Exhibit No.
17 1143 were published in open court.)

18 BY MR. KENERSON:

19 Q. Can you circle the individual that you just said was the
20 same?

21 A. (Witness complies.)

22 Q. Thank you.

23 MR. KENERSON: If we could just play it for the
24 next few seconds, Ms. Rohde.

25 (Whereupon, segments of Government's Exhibit No.

1 1143 were published in open court.)

2 MR. KENERSON: Thank you. Take that down.

3 For the record, that was at 13:06:03 on the
4 counter that we stopped.

5 BY MR. KENERSON:

6 Q. Now, Mr. Jauregui asked you a couple of questions about
7 Mr. Lizardo having been a confidential human source prior to
8 January 6th.

9 Do you remember those questions?

10 A. I do.

11 Q. And have you had a chance to review any of Mr. Lizardo's
12 reporting?

13 MR. JAUREGUI: Judge, I'd object. That's hearsay.
14 I couldn't get into it. And scope.

15 THE COURT: Well, the current question is not
16 objectionable, so I'll overrule it there. But we'll see
17 where we're headed.

18 BY MR. KENERSON:

19 Q. Have you reviewed any of his reporting?

20 A. Not in detail.

21 Q. Do you recall whether he made any reports to his --

22 MR. JAUREGUI: Objection.

23 THE COURT: I can't hear the question.

24 Mr. Kenerson, you can ask the question.

25

1 BY MR. KENERSON:

2 Q. Do you recall whether he made any reports to his
3 handlers prior to January 6th?

4 A. Yes.

5 Q. Do you remember how far before January 6th?

6 MR. JAUREGUI: Objection, your Honor. Hearsay.

7 THE COURT: Let me -- let me just hear the
8 parties.

9 (Whereupon, the following proceedings were had at
10 sidebar outside the presence of the jury:)

11 THE COURT: Mr. Jauregui, first of all, I know
12 you're going to object as to hearsay. And I will sustain
13 your objection if we're talking about anything about the
14 content here.

15 And I assume, Mr. Kenerson, you're not going to
16 elicit any content. Correct?

17 MR. KENERSON: So I was actually building to it.
18 Happy to give the Court a proffer right now.

19 THE COURT: Let's do this here.

20 MR. KENERSON: So what Mr. Jauregui tried to go
21 into yesterday, that was hearsay, unquestionably. It was a
22 report of what he said to this agent some year and a half
23 after the event.

24 We are talking about pre-event reporting. And we
25 are talking about pre-event reporting where the question

1 was, He went to December 14th; he went to December 12th; he
2 went to January 6th. And he was a source at that point in
3 time.

4 Now, obviously, we are not at closing. I don't
5 know what defense is going to argue. But they have
6 certainly made noise arguing along the lines of there were
7 confidential human sources within the Proud Boys. There
8 were confidential human sources within the Proud Boys and no
9 one saw a conspiracy here.

10 What his actual reporting was, which we would
11 offer as not for the truth, but given that expected
12 argument, the fact -- what it was said was that he saw that
13 Proud Boys and right-wing extremist groups were losing faith
14 in law enforcement and he was worried something extreme was
15 going to happen.

16 THE COURT: Well, I mean, Mr. Kenerson, first of
17 all, this would have been something -- it would have been
18 helpful to tee this up beforehand. And --

19 MR. KENERSON: Frankly -- I didn't mean to cut the
20 Court off. I'm sorry.

21 THE COURT: It's okay. Go ahead.

22 MR. KENERSON: So anyway --

23 THE COURT: It would have been something that
24 would be helpful. Can you go into another topic for a
25 little bit and --

1 MR. KENERSON: That's fine. I'm happy to go to
2 another topic.

3 What I would say on that front is that I didn't
4 know what questions Mr. Jauregui was going to ask until this
5 morning, and those are the ones that, in my view, open the
6 door.

7 THE COURT: Move on to another topic. When we
8 take a break, we'll try to deal with this on the other side
9 of the break.

10 MR. KENERSON: Thank you.

11 (Whereupon, the following proceedings were had in
12 open court:)

13 BY MR. KENERSON:

14 Q. All right. We'll come back to that topic, Special
15 Agent.

16 You were asked a number of questions about the
17 amount of time you spent reviewing videos and messages.

18 Do you remember those questions?

19 A. I do.

20 Q. And Mr. Pattis asked you a number of questions about
21 your ability to identify people in kind of what he called
22 panoramas. Do you remember those questions?

23 A. I do.

24 Q. Are you confident in your ability to make those
25 identifications?

1 MS. HERNANDEZ: Objection.

2 THE COURT: Overruled.

3 THE WITNESS: I am.

4 BY MR. KENERSON:

5 Q. Can you tell us about the work -- what, if any, work you
6 did to get to the point where you feel comfortable in those
7 identifications?

8 A. I reviewed the video time and time and time again.
9 Additionally, I made flashcards of the individuals and
10 studied them.

11 Q. What about identification of voices?

12 A. Listened -- or reviewed multiple devices to where audio
13 messages are on the actual devices I have reviewed for the
14 Defendants, and also listened to public-facing podcast that
15 they're participating in.

16 Q. And Ms. Hernández asked you about -- a couple of
17 questions about your identification of Mr. Rehl's voice a
18 couple of different times. Correct?

19 A. She did.

20 Q. Are you confident in that identification?

21 MS. HERNANDEZ: I'm sorry, your Honor. I couldn't
22 hear the question.

23 BY MR. KENERSON:

24 Q. Are you confident in that identification?

25 MS. HERNANDEZ: Objection.

1 THE COURT: Overruled.

2 MS. HERNANDEZ: May I -- your Honor, may I be
3 heard?

4 (Whereupon, the following proceedings were had at
5 sidebar outside the presence of the jury:)

6 MS. HERNANDEZ: That calls for a conclusion. That
7 calls for a conclusion of an opinion, her opinion, whether
8 she's confident.

9 My questions went -- I asked questions about her
10 response where she said "consistent with."

11 THE COURT: Right. You all tried to sow doubt in
12 whether she was sure of her identification.

13 MS. HERNANDEZ: I used her words, your Honor. And
14 I compared it to other times. But the question, is she
15 confident, is an opinion she's giving us. That's not a
16 fact.

17 That's an opinion. Her opinion. That's
18 irrelevant whether she's confident or not confident.

19 THE COURT: It's irrelevant whether she's
20 confident her testimony is accurate?

21 MS. HERNANDEZ: On -- in the manner in which I
22 cross-examined on this point, yes. And of course, if the
23 Court may recall, she also through my cross-examination --
24 she claimed to have seen a video which turned out to be
25 mistaken.

1 So whether -- her view of whether she's confident
2 or not is not relevant. The question -- and the question of
3 voice identification will be for the jury, not her. She's
4 not an expert on voice identification. She's just someone
5 who went to the phones and evidence and can identify. I'm
6 just objecting to the question of whether she's confident.
7 That's not relevant.

8 THE COURT: I overrule that objection.

9 (Whereupon, the following proceedings were had in
10 open court:)

11 BY MR. KENERSON:

12 Q. Special Agent, are you confident in your identification
13 of Mr. Rehl's voice?

14 A. I am.

15 Q. Mr. Pattis and a couple other counsel asked you about
16 identifying people as being a part of the marching group as
17 opposed to giving their names.

18 Do you remember those questions?

19 A. I do.

20 Q. Approximately how many people were in the marching
21 group?

22 A. 50 to 100.

23 Q. Do you know all of them?

24 A. I do not.

25 Q. Do you know some of them?

1 A. I do.

2 Q. Approximately how many? Five? Ten? Dozens? Hundreds?

3 A. I probably know 40 to 50.

4 Q. Any problems recognizing them?

5 A. No.

6 Q. Now, you were asked a couple of questions about your
7 investigation and knowing whether people were Proud Boys or
8 affiliated with Proud Boys. Do you remember all those
9 questions?

10 A. I do.

11 Q. Since you transitioned, you know, away from what you
12 were doing just post-January 6th, are you investigating
13 January 6th writ large in terms of all thousands of people
14 who were there?

15 A. I am not.

16 Q. What was your investigative focus?

17 A. The planning -- what happened on January 6th, the
18 planning and how that event ended up happening.

19 Q. And how did that affect how you spent your time going
20 through videos?

21 A. Pertaining to that.

22 Q. I'm going to ask you a few questions about specific
23 videos the defense asked you about. Okay?

24 A. Sure.

25 Q. Mr. Smith asked you some questions about Pam Hemphill.

1 Do you remember those?

2 A. I do.

3 Q. And specifically about an interaction with Ethan Nordean
4 and him nodding on some steps on the east side of the
5 Capitol. Do you remember those questions?

6 A. I do.

7 MR. KENERSON: I'm going to ask Ms. Rohde if we
8 could bring up Government Exhibit 1000.

9 And if we could go to 13 minutes and 40 seconds.

10 (Whereupon, segments of Government's Exhibit No.
11 1000 were published in open court.)

12 BY MR. KENERSON:

13 Q. Is this the same clip you discussed with Mr. Smith?

14 A. It is.

15 MR. KENERSON: And if we could -- we'll play it
16 all the way through. And I'll ask you a couple other
17 questions.

18 (Whereupon, segments of Government's Exhibit No.
19 1000 were published in open court.)

20 MR. KENERSON: Pause right there.

21 BY MR. KENERSON:

22 Q. Did we just hear a female voice say: Take the Capitol?

23 A. Yes.

24 Q. Does she say: Check out the Capitol?

25 A. I need to hear it one more time.

1 MR. KENERSON: Play it again.

2 MS. HERNANDEZ: Objection. Leading.

3 THE COURT: Sustained.

4 MR. KENERSON: Can we -- I'm going to ask if we
5 can turn the speaker towards the witness and turn the volume
6 up. Apologies if this gets too loud.

7 THE COURT: We'll allow you to do that, but let's
8 make sure it's not too loud.

9 BY MR. KENERSON:

10 Q. And at the beginning of this, Special Agent, on direct,
11 I believe that you testified that you had reviewed the
12 transcripts?

13 A. I have.

14 Q. Okay. And they're accurate so far as you know?

15 A. They are.

16 MR. KENERSON: Ms. Rohde, if we could go -- did we
17 go back to 13:41? Yes, we did. Could we play, please.

18 (Whereupon, segments of Government's Exhibit No.
19 1000 were published in open court.)

20 MR. KENERSON: Stop right there, please.

21 BY MR. KENERSON:

22 Q. Did you hear what was just said?

23 A. "Ethan, let's fucking doing it."

24 Q. What is was a male voice or a female voice?

25 A. Male.

1 Q. Thank you.

2 (Whereupon, segments of Government's Exhibit No.
3 1000 were published in open court.)

4 MR. KENERSON: Pause again.

5 BY MR. KENERSON:

6 Q. Did you hear what the female voice said?

7 A. "Take the Capitol."

8 Q. Thank you.

9 So did the female voice say: Let's go check out
10 the Capitol?

11 A. She did not.

12 MR. KENERSON: Can we play back up. Go back,
13 please.

14 (Whereupon, segments of Government's Exhibit No.
15 1000 were published in open court.)

16 MR. KENERSON: Stop right there.

17 BY MR. KENERSON:

18 Q. So Mr. Smith asked you some questions about whether
19 Mr. Nordean was nodding at the same time or a different time
20 as the female speaker. Do you remember those questions?

21 A. I do.

22 Q. Has he started nodding at this point?

23 A. He has.

24 MR. KENERSON: At 13:50 -- can we play again,
25 please.

1 (Whereupon, segments of Government's Exhibit No.
2 1000 were published in open court.)

3 BY MR. KENERSON:

4 Q. So he starts nodding at about the same time as the
5 female speaker. Correct?

6 MR. SMITH: Leading.

7 THE COURT: Sustained.

8 BY MR. KENERSON:

9 Q. When does he start nodding in relation to the female
10 speaker?

11 A. About the same time as the female speaker.

12 Q. And did we see words other than that prior to the female
13 speaker starting to speak?

14 A. We did.

15 MR. KENERSON: If we could keep playing.

16 (Whereupon, segments of Government's Exhibit No.
17 1000 were published in open court.)

18 BY MR. KENERSON:

19 Q. And did you hear what Mr. Fonticoba said after
20 Ms. Hemphill spoke?

21 A. "You have to leave. You can't walk with us."

22 Q. Thank you.

23 MR. KENERSON: Can we go to Nordean 316 at two
24 minutes and 30 seconds, please.

25 (Whereupon, segments of Defendant Nordean's

1 Exhibit 316 were published in open court.)

2 MR. PATTIS: Timestamp again, please?

3 MR. KENERSON: Two minutes and 30 seconds.

4 MR. PATTIS: Thank you.

5 BY MR. KENERSON:

6 Q. Do you remember testifying about this scene on
7 cross-examination with Mr. Smith?

8 A. I do.

9 Q. And do you see anyone that you recognize here? Who is
10 that?

11 A. Dominic Pezzola.

12 Q. Do you recognize where on the Capitol grounds this is?

13 A. The Ulysses Grant memorial.

14 Q. And is that on the demonstrative behind you?

15 A. It's not.

16 Q. Can you tell us where it is in relation to the end of
17 that map?

18 A. It's going to be to the left.

19 Q. Thank you.

20 MR. KENERSON: If we can just play for --

21 MR. SMITH: Objection. That's not the Grant
22 Memorial.

23 THE COURT: Overruled. That's not an objection.

24 MR. KENERSON: Can we play?

25 (Whereupon, segments of Defendant Nordean's

1 Exhibit 316 were published in open court.)

2 MR. KENERSON: Thank you. We can stop there.

3 BY MR. KENERSON:

4 Q. Now, you were asked a few questions about interactions
5 between Ryan Samsel and a man named Ray Epps at the Peace
6 Circle. Do you remember those questions?

7 A. I do.

8 MR. KENERSON: Can we have Exhibit 427, please.

9 (Whereupon, segments of Government's Exhibit No.
10 427 were published in open court.)

11 BY MR. KENERSON:

12 Q. Can you -- do you see Mr. Samsel on here?

13 A. I do.

14 Q. Can you circle him?

15 A. (Witness complies.)

16 Q. We can clear that off.

17 Do you see an individual you've identified as Ray
18 Epps in the frame here at all?

19 A. I do not.

20 MR. KENERSON: Can we play.

21 (Whereupon, segments of Government's Exhibit No.
22 427 were published in open court.)

23 MR. KENERSON: Pause right here.

24 BY MR. KENERSON:

25 Q. What did you just see Mr. Samsel do?

1 A. Pull the fence and shake it.

2 Q. Do we see Mr. Epps in frame yet?

3 A. We do not.

4 MR. KENERSON: Can we play again.

5 (Whereupon, segments of Government's Exhibit No.
6 427 were published in open court.)

7 MR. KENERSON: Pause right here at 42 seconds.

8 BY MR. KENERSON:

9 Q. Did we see Mr. Epps yet?

10 A. Not yet.

11 Q. What's Mr. Samsel's posture towards police?

12 A. Stand-offish.

13 MR. KENERSON: Can we play again.

14 (Whereupon, segments of Government's Exhibit No.
15 427 were published in open court.)

16 MR. KENERSON: Stop at 46 seconds.

17 BY MR. KENERSON:

18 Q. Now we see Mr. Epps. Correct?

19 A. We do.

20 Q. Okay. Mr. Smith also asked you about how many Proud
21 Boys you saw in some frames of this video. Do you remember
22 those questions?

23 A. I do.

24 Q. And does this video show the breach of Peace Circle from
25 a given angle?

1 A. This video particularly?

2 Q. Yeah. It shows one angle of the breach?

3 A. Correct.

4 MR. KENERSON: Ms. Rohde, if we could go to
5 Exhibit 1001 at ten minutes and five seconds.

6 (Whereupon, segments of Government's Exhibit No.
7 1001 were published in open court.)

8 BY MR. KENERSON:

9 Q. Can you remind us why Mr. Rehl's face is in this one?

10 A. This video was recovered from his phone.

11 MR. KENERSON: If we could play until 10:15,
12 Ms. Rohde.

13 (Whereupon, segments of Government's Exhibit No.
14 1001 were published in open court.)

15 MS. HERNANDEZ: Objection, your Honor.

16 THE COURT: This is in evidence?

17 (Whereupon, the following proceedings were had at
18 sidebar outside the presence of the jury:)

19 MS. HERNANDEZ: I don't understand what the
20 Government is going to do with this video. But this is a
21 video that keeps his -- this, quote-unquote, "transcript" up
22 for very many minutes.

23 THE COURT: Right. I've already overruled this
24 objection. Correct? This is in evidence.

25 MS. HERNANDEZ: Well, but what is the purpose of

1 it? Because it goes well beyond the scope of cross, if it's
2 about my questions of the witness. If it's about something
3 else, then --

4 THE COURT: You haven't articulated an objection
5 yet.

6 MS. HERNANDEZ: It's beyond the scope.

7 THE COURT: Well, if anything is within the scope,
8 it's what happened on the day of January 6th on video in the
9 Capitol grounds.

10 Mr. Kenerson, tell me what --

11 MS. HERNANDEZ: We crossed --

12 THE COURT: You have crossed on that topic.

13 Mr. Kenerson, what's the relevance? What are you
14 about to do?

15 MR. KENERSON: What I just asked was whether she
16 was able to identify Proud Boys. And specifically, we're
17 going to ask her to do that on the same breach.

18 THE COURT: You may proceed.

19 MS. HERNANDEZ: Again, your Honor, I object to
20 this particular video.

21 (Whereupon, the following proceedings were had in
22 open court:)

23 MR. KENERSON: Ms. Rohde, if we can play this
24 until about ten minutes and 15 seconds, please.

25 (Whereupon, segments of Government's Exhibit No.

1 1001 were published in open court.)

2 MR. KENERSON: Actually, stop right there. Back
3 up about two seconds. Apologies, Ms. Rohde.

4 BY MR. KENERSON:

5 Q. All right. Now, Special Agent, how does this compare
6 timewise to the video we just saw that Mr. Smith had asked
7 you some questions about?

8 A. It's about the same time.

9 Q. And pausing here at 10:15, do you see any members of the
10 marching group here?

11 A. I do.

12 Q. Can you circle them?

13 A. (Witness complies.)

14 Q. Thank you.

15 MR. KENERSON: Ms. Rohde, if we can slow this down
16 to quarter speed and play it, please. That works. And if
17 we can just play for the next couple of seconds.

18 (Whereupon, segments of Government's Exhibit No.
19 1001 were published in open court.)

20 MR. KENERSON: Stop right about here.

21 BY MR. KENERSON:

22 Q. Do you see any more?

23 A. I do.

24 Q. Can you circle them.

25 A. (Witness complies.)

1 Q. Thank you.

2 MR. KENERSON: If we could play until about 10:20.

3 MS. HERNANDEZ: So again, your Honor, objection.

4 Under D.C. Circuit case law, the transcript is not evidence.

5 And these questions are not about the information.

6 THE COURT: It's overruled.

7 (Whereupon, segments of Government's Exhibit No.

8 1001 were published in open court.)

9 MR. KENERSON: Pause right here.

10 BY MR. KENERSON:

11 Q. That -- I'm going to circle this person in a black

12 hoodie and a skull -- with a skull on the back of it.

13 Do you remember Mr. Smith asking you whether he

14 was a Proud Boy in that same video we were just talking

15 about?

16 A. I do.

17 MR. KENERSON: If we could play this until ten

18 minutes and 27 seconds.

19 (Whereupon, segments of Government's Exhibit No.

20 1001 were published in open court.)

21 MR. KENERSON: If we could pause right here.

22 BY MR. KENERSON:

23 Q. Any members of the marching group in frame now?

24 A. Yes. This one, this one, and one just moved out of

25 frame but he was -- there's three.

1 Q. Thank you.

2 MR. KENERSON: Play again.

3 (Whereupon, segments of Government's Exhibit No.
4 1001 were published in open court.)

5 MR. KENERSON: Pause right here.

6 BY MR. KENERSON:

7 Q. Do you see any members of the marching group here?

8 A. (Witness indicates.)

9 Q. Thank you.

10 MR. KENERSON: If we could go back a little bit in
11 this exhibit, Ms. Rohde. Six minutes and 29 seconds.

12 (Whereupon, segments of Government's Exhibit No.
13 1001 were published in open court.)

14 BY MR. KENERSON:

15 Q. Do you remember -- I think you testified this was
16 Mr. Biggs earlier?

17 A. Correct.

18 MR. KENERSON: Ms. Rohde, if we could play this at
19 normal speed.

20 (Whereupon, segments of Government's Exhibit No.
21 1001 were published in open court.)

22 MR. KENERSON: If we could pause right here.

23 BY MR. KENERSON:

24 Q. Do you see anyone whispering in Mr. Biggs's ear there?

25 A. I did not.

1 MR. KENERSON: If we can go, same exhibit, to
2 eight minutes and 29 seconds.

3 (Whereupon, segments of Government's Exhibit No.
4 1001 were published in open court.)

5 MR. KENERSON: Go forward just a few frames,
6 Ms. Rohde. Right there.

7 BY MR. KENERSON:

8 Q. And I think you identified that person as Ethan Nordean.
9 Right?

10 A. I did.

11 MR. KENERSON: If we could just play forward from
12 here, Ms. Rohde.

13 (Whereupon, segments of Government's Exhibit No.
14 1001 were published in open court.)

15 MR. KENERSON: Pause right there.

16 BY MR. KENERSON:

17 Q. Did we see anyone whispering in Mr. Nordean's ear?

18 A. We did not.

19 MR. KENERSON: Could we have 492E, as in elephant,
20 please.

21 (Whereupon, segments of Government's Exhibit No.
22 492E were published in open court.)

23 MR. KENERSON: Pausing here -- well, actually, can
24 we go to seven seconds first.

25

1 BY MR. KENERSON:

2 Q. I think Mr. Pattis asked you about that individual. Do
3 you remember that?

4 A. I do.

5 MR. KENERSON: Could we go back to the beginning,
6 Ms. Rohde.

7 BY MR. KENERSON:

8 Q. Right here, this shot at the very beginning, do you see
9 anyone from the marching group in this photograph?

10 A. I do.

11 Q. Can you circle them?

12 A. (Witness complies.)

13 Q. Thank you.

14 MR. KENERSON: Can we play.

15 (Whereupon, segments of Government's Exhibit No.
16 492E were published in open court.)

17 MR. KENERSON: Pause here.

18 BY MR. KENERSON:

19 Q. I think Mr. Pattis had asked you about that individual
20 and that individual. Do you remember that?

21 A. I think so.

22 Q. Well, do you recognize the person I've drawn the arrow
23 to?

24 A. I do.

25 Q. Who is that?

1 A. William Pepe.

2 Q. And what about that guy?

3 A. Anthony Martinez.

4 Q. And who are William Pepe and Anthony Martinez?

5 A. New York Proud Boys.

6 Q. And can you describe what Mr. Martinez is doing right
7 now?

8 A. It appears his hands are up in the air.

9 Q. What about Mr. Pepe?

10 A. Same.

11 MR. KENERSON: Can we go to 11:40 of this same
12 exhibit -- excuse me. Back to 1001, Ms. Rohde.

13 (Whereupon, segments of Government's Exhibit No.
14 1001 were published in open court.)

15 MR. KENERSON: 11:40, please.

16 THE COURT: Mr. Kenerson, let me pause.

17 Let me ask Madam Court Reporter, is it time for a
18 break?

19 THE COURT REPORTER: Anytime you want, Judge.

20 THE COURT: Let's press pause here for ten minutes
21 and give our court reporter a little break.

22 And we'll be back in ten minutes.

23 (Whereupon, the jury exited the courtroom at 3:21
24 p.m. and the following proceedings were had:)

25 THE COURT: You may step down, Agent.

1 And everyone may be seated.

2 THE COURT: Mr. Smith, I saw you with your hand
3 up.

4 MR. SMITH: Thank you, your Honor.

5 Your Honor knows that the 1776 Returns document is
6 one of the central points of contestation [sic] in this trial.

7 THE COURT REPORTER: "Contention"?

8 MR. SMITH: Argument, contention.

9 So on redirect, the Government has elicited new
10 information from the witness about records showing when
11 Tarrio accessed or modified the document and new information
12 regarding call records between Tarrio and Nordean.

13 The witness testified that Mr. Tarrio called
14 Mr. Nordean one minute later, she said, as reflected in the
15 new information that came out, in direct.

16 Your Honor, the information shows it was not one
17 minute, 30 minutes; it was not an hour. It was over an hour
18 and 30 minutes later.

19 So we are just notifying the Court right now that
20 we are seeking recross of the witness on the new information
21 that was elicited.

22 THE COURT: Well, again, like we discussed at
23 sidebar, I think the question is whether -- not whether the
24 information is new in terms of what's been elicited, but
25 whether you all had whatever information she's been

1 discussing.

2 And so I think, during the break -- I
3 understand -- Mr. Jauregui, what -- let me put it this way:
4 I know the parties could probably at least benefit from
5 discussing this during the break. And so I'll hear you on
6 it on the other side of that. But I do think, if this is
7 information you all had, then, you know, the Government gets
8 to rebut it.

9 And Mr. Smith, to your point, I mean, that that's
10 not the Grant Circle, look, if the witness -- it's not an
11 objection to say, The witness is testifying as to A when
12 that's not true.

13 You know, if you want to in closing say, Goodness
14 gracious, she couldn't even get -- it's the Grant Circle or
15 the Peace Circle, that's fine. But I'm not going to have
16 you blurting out "The witness is wrong" in the middle of her
17 testimony.

18 MR. SMITH: Your Honor, may I just make one more
19 statement --

20 THE COURT: Sure.

21 MR. SMITH: -- for the record? This is a hugely
22 significant error because the 1776 Returns document is a
23 suggestion of a plan for the conspiracy. Calling someone --
24 having Mr. Tarrio call Mr. Nordean one minute after the
25 Government is asserting he accessed the document is highly

1 significant.

2 Your Honor, I'm going to quote from the D.C.
3 Circuit in *United States against O'Neal*, 844 F3d. 271. It's
4 a D.C. case from 2016: A party has a right, and not merely
5 a discretionary privilege, to recross-examination, quote,
6 "where new matter is brought out on redirect examination,"
7 end quote.

8 So your Honor, we think the standard is whether
9 new matter has been brought out.

10 The new matter -- this isn't a question of what
11 was produced in discovery; it's what information was
12 elicited. The new matter, your Honor, is two pieces, two
13 exhibits. The one exhibit is call records from Mr. Tarrio
14 to Mr. Nordean. And the other new exhibit is something that
15 the witness indicated she just came across a couple of weeks
16 ago, which is data indicating when Mr. Tarrio accessed or
17 modified the record.

18 So, your Honor, this is hugely important. And we
19 also think, in terms of scheduling, this is so important,
20 your Honor, we would just call the witness back. So if
21 we're going to call the witness back and make them the first
22 defense witness, does it make sense to have her come in
23 multiple times or just do this?

24 THE COURT: Let me just raise this other point,
25 which is just this issue of this new information you're

1 saying I think came out on her cross.

2 MR. SMITH: So, your Honor, I looked this up,
3 actually.

4 THE COURT: All right.

5 MR. SMITH: So, your Honor, it is the case that
6 she blurted out during Nordean's cross; and I challenged her
7 on whether she had proof that Mr. Tarrio created the
8 document.

9 And she started citing some facts. And she did
10 say: And I believe he called Nordean one minute later.

11 The new information, your Honor, is the parties
12 did not have call records and the data to indicate what she
13 was referring to.

14 That is the new information. And the cross is
15 simply to show her the information in the records. One
16 question: Here is the record you referred to. You said one
17 minute later. This shows over an hour later.

18 That is the entire piece of cross-examination --
19 recross-examination, your Honor.

20 THE COURT: I understand.

21 MR. SMITH: And if we have to call her back,
22 what --

23 THE COURT: Right. I get that point.

24 What's the Government's view on this? Before I
25 truly live up to what I've -- what I said I was going to do,

1 and that is give our valiant court reporter a ten-minute
2 break.

3 MR. KENERSON: So just on that point -- I
4 understand there's other things discussed on the other side
5 of the break as well.

6 I agree with the Court, and it sounds like
7 Mr. Smith has conceded, that this came out on
8 cross-examination. This is not new on redirect.

9 So this is all within the scope of
10 cross-examination elicited by Mr. Smith. There is no need
11 for recross here whatsoever. The fact that Mr. Smith, in
12 the course of what has been so far about -- I'm not sure
13 what time I got up; somewhere between 30 and 45 minutes of
14 redirect -- was able to figure all this out shows they had
15 the information.

16 MR. SMITH: Your Honor, if --

17 THE COURT: Can I just ask, what's the
18 Government's -- I mean, you have now -- is the Government's
19 view, then, that the defense should just call her in their
20 case to be able to say, Look, actually, you testified a
21 minute; the actual answer is an hour?

22 MR. KENERSON: I think -- I want to look at the
23 records. It might be something that we are willing to do on
24 our redirect, talk to Mr. Smith over the break. I just --
25 you know, I'm not foreclosing that as a possibility.

1 MR. JAUREGUI: Judge, Jauregui --

2 THE COURT: I should give Mr. Jauregui a --

3 MR. JAUREGUI: -- for Tarrio. Thank you, Judge.

4 THE COURT: -- word in edgewise.

5 MR. JAUREGUI: Judge, we've known from the very
6 beginning of this case that the 1776 document was
7 significant. And --

8 THE COURT: That doesn't cut the way you're going
9 to argue, I think.

10 MR. JAUREGUI: Well, let me tell you. Before we
11 even went to trial, we've been in communication with the
12 Government, asking about the document. And I'm going to
13 look up for the -- I'm going to look for the emails now
14 during the break.

15 And we've asked them multiple times whether our
16 client actually read the document and whether or not they
17 actually had any proof that he read the document, or any
18 evidence to that effect.

19 And the whole time, the answer was no, that there
20 was no proof that he actually opened the document, that he
21 actually read the document.

22 At no point was there any information or any
23 evidence whatsoever that he edited the document, that he
24 looked at the document, nothing. Even their own computer
25 forensic expert, Dubrowski, said he did not open the

1 document.

2 THE COURT: Except, when Mr. Smith crossed him --
3 crossed her, and she said what she said.

4 MR. JAUREGUI: Well, and she says that she found
5 out about that two weeks ago.

6 THE COURT: Okay.

7 MR. JAUREGUI: Okay. Judge, the Government should
8 have told us two weeks ago that they have new information,
9 it's discovery, that the document had been accessed, had
10 been reviewed, had been edited by our client. It would have
11 been extremely helpful in preparation for this
12 cross-examination.

13 We've been surprised. We've been ambushed,
14 basically, by this witness.

15 THE COURT: But you had all the information.
16 There's no information she's testifying about that didn't --
17 I get your point that you didn't notice it. But everything
18 she's -- no?

19 MR. JAUREGUI: No. We didn't have that
20 information.

21 THE COURT: Well, I think that's something for the
22 parties to discuss, then.

23 Mr. Kenerson.

24 MR. KENERSON: Can I ask one favor of the Court
25 over the ten-minute break, if you're able to?

1 I will confess, with the objections that were
2 going on, I did not hear the witness's answer in real-time
3 that she just gave on the time period. Some of my teammates
4 think she may have actually testified to an hour and a half.
5 I would just ask the Court to look at the realtime.

6 THE COURT: I'll -- I don't think -- I'll have to
7 come back on the bench and do that. But you can all confer
8 about this.

9 I do think -- look, if Mr. Smith is right that
10 it's a minute and not an hour, or whatever the discrepancy
11 is, I do think it probably behooves -- however we proceed,
12 it probably does behoove the Government to just correct it.

13 MR. KENERSON: Agreed.

14 THE COURT: So -- so, you know, that is a separate
15 question from the other question, but --

16 Yes, Mr. Roots.

17 MR. ROOTS: This was a huge point at the end of
18 the Dubrowski cross. I asked one of the last questions, and
19 it was a -- became such a joke. I said: I think everybody
20 has asked this question, but for the sixth time, you have no
21 information that Mr. Tarrio ever opened this document.
22 Correct?

23 Dubrowski said: Correct.

24 Then, on redirect, the Government redirected
25 Dubrowski and said: Okay -- and there was a funny joke;

1 everyone in the courtroom laughed -- you have no information
2 that Tarrio ever opened this. Correct?

3 Correct.

4 And here we are. They've sandbagged us. They
5 bring in this new startling claim. And we don't have a
6 right to -- to recross?

7 THE COURT: To be clear, the only reason we are
8 where we are is because cross-examination brought this out.
9 So I don't want to hear the first thing about this being
10 sandbagging or the Government did this to us.

11 But I --

12 MR. KENERSON: I would note -- sorry.

13 THE COURT: But I do think -- and that doesn't
14 answer the question exactly of how it gets resolved. But to
15 say it was sandbagging when the Government didn't elicit it
16 on direct is really a stretch.

17 MR. KENERSON: Not only didn't elicit it -- and I
18 said this at sidebar, but I think it bears repeating again,
19 in response to Mr. Roots, who -- again, I would ask the
20 Court to enforce one attorney -- but we objected when
21 defense tried to go down this road. This wasn't even a
22 strategic, "Let's let this play out." We objected.

23 THE COURT: So it's my fault, Mr. Kenerson.

24 (Laughter.)

25 MR. KENERSON: No. My point is -- the Court

1 didn't know --

2 MR. PATTIS: We make our 19th motion for a
3 mistrial, Judge.

4 MR. KENERSON: We -- the allegations of
5 sandbagging are absolutely unfounded. This was not anything
6 we sought. This was not anything that we attempted to bring
7 out through this witness. This was in response to
8 cross-examination by Mr. Smith on an area outside of the
9 witness's direct examination.

10 MR. SMITH: Your Honor, we would just say that
11 when we were asking the witness about her factual basis in
12 March 2022 for saying that Tarrío created the document, it
13 is nonresponsive to say what she discovered two weeks ago.
14 So we did not open the door. It is a nonresponsive answer.
15 And that was what launched the thousand ships we are
16 fighting about right now.

17 THE COURT: In any event -- but, regardless, it
18 wasn't something the Government elicited on direct.

19 I've got to give her a break. We'll be back in
20 ten minutes.

21 MS. HERNANDEZ: For the record, your Honor, I've
22 had my hand up through this whole argument.

23 THE COURT: You've been heard many, many times.

24 (Thereupon a recess was taken, after which the
25 following proceedings were had:)

1 THE COURTROOM DEPUTY: We're back on the record in
2 Criminal Matter 21-175, United States of America versus
3 Ethan Nordean, et al.

4 THE COURT: All right. Let me, before we -- I
5 want to put one thing on the record because it's so much --
6 so much of this is the basis for a lot of the evidence I've
7 been admitting. And we've had several back-and-forths about
8 it today.

9 And that is the *Anderson* case. I want to make a
10 couple of things clear about how I read *Anderson*. That's
11 417 U.S. 211. It's a Supreme Court case from 1974.

12 In that case, we've discussed -- as we've
13 discussed many times, the Supreme Court distinguished
14 co-conspirator statements under Rule 801(d)(2)(E) on the one
15 hand and nonhearsay evidence of a conspiracy on the other.

16 I'm sorry. I need everyone not to be speaking
17 when I'm speaking. It's not complicated.

18 The co-conspirator rule only matters if a
19 co-conspirator's statement is, A, being offered for the
20 truth of the matter asserted in the statement; and, B, if
21 the Government seeks to admit that statement for its truth
22 against all the co-conspirators.

23 As the *Anderson* court said, quote: "The
24 requirement that out-of-court declarations by a
25 co-conspirator be shown to have been made while the

1 conspiracy charged was still in progress and in furtherance
2 thereof arises only because the declaration would otherwise
3 be hearsay," closed quote.

4 But -- and this is what we've been talking
5 about -- the Court also said, quote: "The ongoing
6 conspiracy requirement," closed quote, which is the aspect
7 of the rule on which Ms. Hernández objects on many
8 occasions, is, quote, "inapplicable to evidence such as that
9 of acts of alleged co-conspirators which would not otherwise
10 be hearsay," closed quote.

11 Some such, quote, "acts of one alleged
12 co-conspirator could be admitted into evidence against the
13 other conspirators if relevant to prove the existence of the
14 conspiracy even though they might have occurred after the
15 conspiracy ended," closed quote.

16 From there, I think *Anderson* does not support
17 Ms. Hernández's argument that this principle, to the extent
18 she's making this argument, is limited to physical acts of a
19 co-conspirator, but not statements.

20 In that case, the Court applied this principle to
21 the out-of-court statements of two co-conspirators.
22 Specifically, two co-conspirators had allegedly testified
23 falsely in an election contest related to the charged
24 conspiracy after the conspiracy ended.

25 The Court explained that the obvious question was

1 whether the out-of-court statements of these conspirators
2 were hearsay.

3 And then, because the Court concluded that it was
4 plain that the statements were not being offered for the
5 truth of the matter asserted and the point of the
6 prosecutors introducing the statements was simply to prove
7 that the statements were made, they held that -- the Court
8 held that the prior testimony was admissible simply if
9 relevant in some way to prove the conspiracy charged.

10 So I think in this way *Anderson* really is on all
11 fours with the sort of evidence the Government has proffered
12 and I have admitted here.

13 Sure, some of these statements, if offered for
14 their truth, would fall under the co-conspirator rule, and
15 those statements must have been made while the conspiracy
16 was underway. But any statement, even those made by
17 co-conspirators before, during or after the end of the
18 conspiracy that is offered for a nonhearsay purpose is
19 admissible, quote, "simply if relevant in some way to prove
20 the conspiracy charged," closed quote.

21 As I've said many times during my many evidentiary
22 rulings in this case, that is why I've allowed in many of
23 the statements we're dealing with here.

24 All right. So that's *Anderson*.

25 What -- you know, I also was thinking over the

1 break about this issue where we left off. Before I muse
2 about it, Mr. Kenerson, does the Government plan to just
3 correct this?

4 MR. KENERSON: So -- essentially. So what --
5 Mr. Smith and I looked at some records. I think
6 Mr. McCullough was looking at some records, and I don't know
7 if Mr. Smith has been able to finalize his review of the
8 records. I think, as Mr. Jauregui has noted in objecting to
9 some other exhibits, the AT&T reports, there are multiple of
10 them.

11 So whatever -- what I have told Mr. Smith, and
12 what we will stick by, is whatever the records say we will
13 stipulate to. I just don't know if it's going to be worked
14 out before the witness is off the stand on redirect.

15 MR. SMITH: And, your Honor, that's fine with us.
16 And I'll just say, candidly, when I walked up to
17 Mr. Kenerson about this date, it was in UTC. So I was -- so
18 there's a date I was going to approach him with -- the
19 relevant date at issue is January 2nd. And then we
20 subtracted UTC time to get to -- I'm not going to get down
21 into the weeds. But it looks like the date I was referring
22 to is the wrong date.

23 So I need a minute to figure out the UTC
24 calculations. And then, if I'm wrong, then I'll just tell
25 the Government and the Court that I was wrong.

1 THE COURT: One way or the other, it won't be a
2 need -- I mean, we'll clarify -- we'll enter -- I mean, the
3 Government, it sounds like, would enter into a stipulation,
4 so it would be conclusive regardless --

5 MR. SMITH: We've okay with that. Thank you, your
6 Honor.

7 THE COURT: Mr. Pattis.

8 MR. PATTIS: May I have a moment with Mr. Kenerson
9 before the jury returns on an unrelated issue that may come
10 up? I should have -- I just got some information at the
11 break that I wanted to share with him.

12 THE COURT: I understand. You will have that
13 opportunity.

14 Let me just -- can we also just discuss one other
15 matter, since hopefully it will come up, which is just
16 the -- the information you wanted -- we skipped over it,
17 Mr. Kenerson.

18 Let me just say, I -- you know, I think trying
19 to -- you know, it is -- let me put it this way: I think
20 it's often the argument that, "No, no, Judge; it's not for
21 the truth of the matter asserted" is a time-honored
22 tradition to try to have evidence be admitted.

23 But the -- what you proffered to me, Mr. Kenerson,
24 is a pretty big issue in the case, maybe even -- I mean, I
25 know we've been talking about the 1776 document as an

1 important piece of evidence. But the concept of what the
2 group's disposition toward the police was and all the
3 rest -- and so I don't see how you separate the value in
4 what you proffered to me from -- how you separate whatever
5 evidentiary value it has that that was said from the truth
6 of the matter asserted.

7 MR. KENERSON: So what I was getting at, and I
8 think that -- I think, one, it can, and I think the jury
9 can -- and I think the jury can with an instruction.

10 I understand the Court's inclination the other
11 way.

12 But one thing I would say is that certainly based
13 on proffers to date about the relevance of the CHS, we
14 expect defense to argue at the end of the case the
15 Government had all of these CHSs; none of them reported
16 any -- you've heard no evidence that they reported anything
17 concerning to the Government; you've heard no evidence they
18 reported anything about a conspiracy.

19 So if the Court is not inclined to let this in, I
20 think the Court should be precluding those arguments once we
21 get to closing.

22 THE COURT: You know, you -- I mean, but also you
23 could call -- you know, these are people that you could make
24 a decision to call.

25 MR. KENERSON: Well, but so -- if -- that is true.

1 But so I think the distinction there is that, even
2 then, if we were to call this person, what he reports to the
3 FBI is still hearsay, so -- if it is hearsay. Our position
4 is it's not. But assuming the Court is correct that it's
5 hearsay, we call this person to the stand. What he reports
6 to the FBI is still hearsay.

7 So it's a -- it's either hearsay or it's not. And
8 our position is that it's not. But -- so I'm not sure that
9 calling him changes that calculus if what we want out of it
10 is the fact that it was reported.

11 THE COURT: Yeah. I mean, I guess that's right,
12 although you'd have the witness -- the witness would take
13 the stand presumably -- not just that particular -- any
14 witness that this could be relevant to, and would say -- I
15 mean, I think the difference is, the witness would testify:
16 Yes, I -- you know, I had concerns A, B and C. Then when
17 you get to, "And did you report it," well, he's already --
18 he or she would have already testified as to the substance
19 of it.

20 And so the marginal -- then you can separate,
21 Well, look, it's already -- these things are already in
22 evidence. The mere fact that the person reported it doesn't
23 really -- maybe whatever limited value that has on top of
24 what's already been in evidence is sort of -- doesn't move
25 the needle very much.

1 But here, we don't even have that -- we don't have
2 that substantive "Here were my concerns leading up to it" to
3 be just sort of in evidence subject to cross-examination and
4 all the rest. All we would have is -- you know, you'd be
5 bootstrapping all of this in without the person being
6 subject to cross about the substance of it.

7 MR. KENERSON: I understand the distinction the
8 Court is making there.

9 If I heard the Court's original ruling correctly,
10 I think -- what I heard the Court saying is that the jury
11 won't be able to separate the animosity, growing animosity
12 towards the police from kind of the factual issues in the
13 case.

14 What we would, I suppose, offer as a potential
15 solution to that particular issue is to elicit solely that
16 the person reported that they had concerns between December
17 12th and January 6th without getting any more specific than
18 that.

19 THE COURT: Let me hear from -- Ms. Hernández,
20 I'll hear from you.

21 MS. HERNANDEZ: So just for the record, yesterday,
22 when I tried to ask one question of a statement made by a
23 CHS, which I believed was present sense impression, because
24 he was describing the event of January 6th
25 contemporaneously, the Government objected on hearsay

1 grounds and we were not allowed to get into it.

2 So the fact that the Government is now seeking to
3 elicit all this information that another CHS supposedly said
4 to their handlers, it just makes no sense. Because I tried
5 to get one item in; present sense impression, objected to.
6 And the Court upheld the objection.

7 And so there was another instance where we were --
8 our ability to bring out someone's -- all the information
9 about the CHS was prohibited.

10 And the Court indicated that the witness -- the
11 CHS was available to us to bring in even though, you know,
12 that's never -- because of Fifth Amendment and other
13 reasons, that's never a done deal. And in this case, one
14 would think that a CHS that's working for the Government is
15 also available to --

16 THE COURT: In this particular instance, I think
17 that person is going to be available.

18 MS. HERNANDEZ: You mean the person the Government
19 is seeking to elicit information about or our person?

20 THE COURT: We can -- let's just table that
21 discussion for a moment.

22 Mr. Kenerson.

23 MR. KENERSON: If I may just respond briefly:

24 I believe that our objection to the text message
25 Ms. Hernández wanted to introduce yesterday was twofold.

1 There was a hearsay component to it, but also foundation.
2 And I think foundation is ultimately what the Court upheld.

3 THE COURT: Oh, that's right. It was foundation.

4 MS. HERNANDEZ: But that -- the witness had
5 identified -- the witness --

6 THE COURT: Right.

7 MS. HERNANDEZ: -- Nicole Miller, identified the
8 person on the screen as a CHS. Anyway --

9 THE COURT: Right. Right.

10 MS. HERNANDEZ: Your Honor, I also want a
11 continuing objection to the Government putting up -- under
12 D.C. Circuit case law, a transcript is not evidence.

13 THE COURT: Right.

14 MS. HERNANDEZ: They have -- if the Court would
15 allow me.

16 THE COURT: Right.

17 MS. HERNANDEZ: Today, the examination had nothing
18 to do with the statement. They used it to point out
19 different people in the scene, supposedly in reference to
20 Mr. Smith's cross-examination.

21 The Government has got to find itself a different
22 video to play or has to take out that transcript portion.
23 Because that transcript portion is one phrase that takes ten
24 seconds, 12 seconds. And they have a video that runs for I
25 don't know how many minutes that they continue to put

1 up something that is not evidence under D.C. Circuit case
2 law.

3 And beyond that, it's contested.

4 THE COURT: My understanding where we left that
5 the last time was you said, I'm speaking -- where we left --
6 look, they weren't using the -- the reason I overruled the
7 objection was they weren't using it for that purpose. And
8 my understanding was that you had already been saying, where
9 we left off with that exhibit, that I'm talking to the
10 Government about --

11 MS. HERNANDEZ: It can't go back to the jury.

12 THE COURT: Right.

13 MS. HERNANDEZ: But this is -- they continue to
14 use it in the middle of trial.

15 THE COURT: I'm not saying I necessarily agree
16 with that. But it struck -- the way you presented it to me
17 was: Oh, we're going to work something out on that.

18 MS. HERNANDEZ: I never know whether we're going
19 to work it out. I told the Court, because I have notified
20 them so that, come jury time, I don't want them to say --
21 I'm just letting them know. That's number one.

22 But the point is, it is a -- it is a ten-second
23 statement, and they have attached this transcript, which is
24 not evidence, to the item. I think it's wrong that they use
25 it even when they're -- even when the questioning is about

1 the statement. But it's just wholly improper when the
2 question is not about the statement.

3 They have enough technological knowledge to either
4 play that video without that -- that statement is not part
5 and parcel of the video. That statement is something that
6 they've added to the video.

7 So I'm just continuing to object, particularly in
8 this instance. I understand the Court says they can do it
9 if they're talking about the statement. But here, they went
10 on and on talking about people and this and that and the
11 other thing. That's just wholly improper, and the
12 Government well knows it. And it's beneath them to do it
13 this way, your Honor.

14 THE COURT: Look, it's already in evidence.
15 And anyway, I overruled the objection.

16 MS. HERNANDEZ: The transcript cannot be in
17 evidence, your Honor. The transcript is inadmissible under
18 D.C. Circuit case law. It can be used as an aid to the
19 jury, but it's inadmissible as evidence.

20 THE COURT: All right. Look, what's the
21 Government -- since Ms. Hernández raised this, what's the
22 Government's position on that exact issue?

23 MR. KENERSON: Ms. Hernández raised it when she
24 told us that she wanted -- didn't want the transcripts to go
25 back to the jury.

1 So we had planned to research the issue and be
2 prepared to argue it at the time we argued what exhibits go
3 back to the jury. So we've not researched it.

4 I will say it has been admitted into evidence. As
5 the Court noted at the time, Ms. Hernández did not lodge an
6 objection to the length of time it was up there until we
7 were in the middle of the Government's direct.

8 She'd had the exhibit for quite some time at that
9 point.

10 And it is -- to the extent, if she's correct, that
11 it's an aid to the jury, it was just as worthy of it being
12 an aid to the jury when that portion of it played on
13 redirect as it was on direct.

14 THE COURT: Right. That's why I overruled the
15 objection. And we'll table the other question.

16 Mr. Jauregui.

17 MS. HERNANDEZ: I raised the issue in a pretrial
18 motion, by the way, your Honor.

19 THE COURT: All right. Mr. Jauregui.

20 MR. JAUREGUI: Thank you, your Honor.

21 Judge, I did confer with the Government during the
22 break about the 1776 document.

23 They informed me that the information she's
24 testifying comes from somewhere in Tarrio's phone
25 extraction, but they don't know specifically where it is

1 now. I think they're working on it.

2 I think it probably surprised them as much as it
3 surprised us. I'm assuming it's the same phone extraction
4 that we've had all along. It's the same phone extraction
5 that Computer Forensic Examiner Cain looked at and reached
6 that conclusion that the 1776 document was never opened or
7 accessed by my client.

8 So I think it's a surprise to both camps. But
9 right now, as we sit here, they can't even point to what the
10 heck she's talking about.

11 So I would ask that your Honor strike her entire
12 testimony as to the 1776 document. She's not a computer
13 forensic expert. She's not qualified to testify as to the
14 metadata and whether or not a document was actually opened,
15 accessed or edited.

16 It could have been created in the cache of the
17 Chrome browser for all we know. And she said repeatedly
18 over and over again that she's not qualified to testify to
19 that.

20 THE COURT: You know, this also could be, to some
21 degree -- I know we've had -- before we go on, let me also
22 say, I should -- as I was thinking about this over the
23 break, you know, I've policed, as the Defendants know, the
24 scope objection pretty strictly in the case.

25 And that's why the Government objected. I was

1 trying to remember. And then the reason I let whichever --
2 I guess it was Mr. Smith -- go into this is you all had
3 identified this potential issue with her credibility. And I
4 thought, you know, that as Mr. Smith's briefing made clear,
5 credibility is always, you know, within the scope. And you
6 all had identified this as something she had done with
7 Mr. Bertino that went to her credibility. So that's why I
8 let you do it. And here we are.

9 MR. JAUREGUI: Judge, I'm glad you brought that
10 up, because she was lying to Bertino, and she just found out
11 about the document two weeks ago. So it goes -- I mean, she
12 had no basis to lie to him then.

13 THE COURT: But if she -- you have -- I guess my
14 point is this: If she's -- her testimony is, "I discovered
15 this two weeks ago." You have what -- I mean, do you want
16 to argue -- I mean, whether she was lying or mistaken or
17 acting on a hunch, you all can argue that. It seems to me
18 that's the record and you can argue it.

19 Now, as it turned out, she did this -- she saw
20 this two weeks ago, or whatever it was. And, you know, I
21 think -- I do think we might have -- it strikes me that,
22 like, the electronic records show whatever they show. I
23 mean, we might run into kind of a best evidence problem,
24 maybe, if nobody can find this and we've got her testimony
25 hanging out here about that.

1 But let me hear from the Government on it.

2 I haven't heard -- I mean, depending on how this
3 plays out, I don't know -- I still don't know that you get
4 redirect out of it. But let me hear from -- let me at least
5 hear from Mr. McCullough.

6 THE COURT REPORTER: Sorry, Judge. Recross, you
7 meant to say?

8 THE COURT: I meant recross. You're correct. The
9 record should reflect what I actually said, though, not what
10 I meant to say.

11 But -- yes, Mr. McCullough.

12 MR. McCULLOUGH: Your Honor, we believe that we
13 should get moving here and just make use of the jury's time.

14 I will say for the record that I have been able to
15 identify the document; I have been able to identify what I
16 believe is the metadata that Special Agent Miller is
17 referring to. The metadata refers to a modify and last
18 access time of 9:25 p.m. Eastern Time on January 2nd. We've
19 examined the telephone records with Mr. Smith, which he and
20 I conferred about. And there was a call placed at 9:26 p.m.
21 on January 2nd from Enrique Tarrío to Ethan Nordean.

22 So it does appear to comport with what Special
23 Agent Miller is referring to. I don't think that this is
24 the time or place to kind of debate that, given what we've
25 talked about.

1 Look, the records say what they say. And so -- I
2 just -- I think that's where we are. The records say what
3 they say. We should move on with the witness here.

4 THE COURT: I want to move on with the witness.
5 But of course the question -- if I excuse her, I mean, it
6 does -- when her testimony wraps up, the question of whether
7 there's recross or some dispute is meaningful.

8 If you all are going to just -- if -- what the
9 parties have said before, if you all are going to stipulate
10 as to whatever the fact is in the records, then we don't
11 have to worry about this one way or the other. Is that
12 still the case?

13 MR. SMITH: Your Honor, I think the first half of
14 what Mr. McCullough said, we think is right right now; in
15 other words, we were wrong about the phone records, the
16 one-minute point.

17 But then, your Honor, on the point that this
18 Cellebrite extraction that was shown to the witness
19 establishes that the 1776 document itself was modified,
20 accessed or -- what was the other option? Modified,
21 accessed or opened, your Honor, we don't know if that -- we
22 haven't heard from any witness who's competent to testify
23 about this issue, that that means that that document was
24 opened as opposed to some other function on Mr. Tarrion's
25 phone.

1 I haven't seen that yet, your Honor. So I'm not
2 willing to say at this -- that this -- at this exact moment,
3 yes, that that means we can establish a one-minute
4 difference between a phone call from Tarrio to Nordean and
5 access of the 1776 Returns document. That was the
6 testimony.

7 THE COURT: She testified to this on cross and
8 again now -- I mean, on cross, and again now, that she saw
9 this thing and -- the report and it said what it said.

10 MR. SMITH: Your Honor, we're just trying to -- I
11 know it's complicated to explain this technical issue to
12 your Honor when your Honor is sitting up there and we're
13 down here. But I'm just saying, it's not as simple as
14 looking at a record. There is a technical piece to this, to
15 understanding exactly what this means, what the 9:25:22 p.m.
16 time period that Mr. McCullough just referenced means.

17 It's not as -- it doesn't -- we don't have any
18 document saying, Mr. Nordean accessed the 1776 Returns
19 document at this point. So there is a technical question
20 here that we can't -- and your Honor said we had this
21 forever. But we --

22 THE COURT: No, no. That's not what I'm going to
23 say. What I am going to say is -- so maybe this means --
24 whatever this means, the point that I need -- the reason
25 we're burning time outside the jury's presence is because I

1 want to know whether this is a reason for her to be
2 recrossed. And I guess my point is, I don't think it is.
3 Maybe you're shaking your head --

4 MR. SMITH: No. I think your Honor is correct.
5 The stipulation point that Mr. McCullough I think has just
6 read, if the parties can agree that -- that at 9:25:22 p.m.
7 Mr. Tarrío accessed the document, then -- or didn't access
8 the document --

9 THE COURT: Or whatever the three things --

10 MR. SMITH: A stipulation would work.

11 THE COURT: All right.

12 MR. SMITH: Right?

13 MR. JAUREGUI: For the record, Tarrío is not
14 agreeing to any kind of stipulation as to whether or not he
15 accessed, edited, opened any document whatsoever.

16 And I want to have Miller available in our case in
17 chief if we need to re-call her.

18 THE COURT: So, look, again, given that she's not
19 an expert -- first of all, I'm sure the Government -- if I
20 were to order -- if I were to allow her testimony, the
21 Government would make her available. I think the problem
22 is, she's not an expert. She's reading from something. So
23 I'm not sure -- I mean, I understand you want to counter
24 this however you want to counter it. But I think, at this
25 point, given where we are and given her technical knowledge,

1 it's not through her.

2 MR. JAUREGUI: I agree, Judge. You're right. I
3 agree. And we may have to call a computer forensic expert
4 just for this purpose, but --

5 THE COURT: Or maybe you can come to an agreement
6 about what the records mean and you can stipulate to it.

7 MR. JAUREGUI: Yes, sir.

8 THE COURT: And it may mean, you know, A, B or C
9 happened.

10 I mean, one of the three things is, like,
11 opened -- right? -- or viewed or something like that. And,
12 you know, to be honest, given the evidence that's in, I'm
13 not sure it's -- I understand "created" and "modified" are
14 different animals. But I don't know that it moves the
15 needle that much for the jury to think he accessed it, given
16 the other evidence.

17 Mr. Pattis, you're looking quizzical.

18 MR. PATTIS: Well, we're going to seek to call
19 Ms. Miller, but for different reasons than the expert issue,
20 and I don't want to cloud this issue any further. So I
21 mean -- and we'll make that application at the appropriate
22 time.

23 THE COURT: All right. So let's --

24 MR. PATTIS: May I have a moment with Mr. Kenerson
25 on a different issue?

1 THE COURT: Yes. That's right. I promised you
2 that.

3 I'm going to give them that moment.

4 (Counsel confer privately.)

5 MR. PATTIS: Thank you, Judge.

6 MR. KENERSON: I think what is -- we moved off
7 topics, but I think what is still outstanding is our
8 request, offer, however you want to term, to elicit
9 something more limited about what Mr. Lizardo reported.

10 THE COURT: So I've got to say, I just think that
11 the question of -- like I said, I think at least it's --
12 even if we get over the hump of what the Government is
13 saying and say that there's a limited value in -- some sort
14 of limited value in admitting this just for -- there's some
15 value to the fact that it was said as opposed to the truth
16 of the matter asserted. You know, I think then you still
17 have a -- I think I have a 403 issue there, given how
18 important that information is to the case.

19 The question of a more limited -- something more
20 limited, again, I'm not going -- I mean, I'm not going to
21 rule on the fly that you can do that. We've got --

22 How much more do you have with her on other things
23 other than that?

24 MR. KENERSON: Not very much. I hope to be done
25 in the next 45 minutes.

1 THE COURT: All right. Well, let's put it this
2 way. We'll go until you're done and we can pick up a
3 discussion then if we need to, or I'll think about it
4 overnight.

5 I mean, it's a very -- and maybe even the
6 parties -- look, maybe even this is another thing that the
7 parties could think about whether there's something that you
8 could elicit that serves everyone's purpose. Maybe that's
9 not the right way to put it. But I do think that the
10 full-blown question of exactly what he reported is something
11 that I think, even assuming there is some value in the fact
12 of its reporting, it just gets swallowed up in the truth of
13 that -- of what he's reporting.

14 And given the importance of that to the case, that
15 I'm going to definitely rule out.

16 All right. So let's bring the witness back.
17 Let's bring the jury back. We'll get as far as we can here.

18 THE COURTROOM DEPUTY: Jury panel.

19 (Whereupon, the jury entered the courtroom at 4:22
20 p.m. and the following proceedings were had:)

21 THE COURT: Everyone may be seated.

22 Welcome back, ladies and gentlemen.

23 Mr. Kenerson, you may proceed.

24 MR. KENERSON: Thank you, your Honor.

25 Ms. Rohde, if we could bring up 1001 at 11:40,

1 please.

2 BY MR. KENERSON:

3 Q. While that's coming up, Special Agent Miller, do you
4 remember some questions by Mr. Metcalf about Mr. Pezzola's
5 presence in the marching group?

6 A. Yes.

7 Q. Okay. I think he showed you a photo that you had said
8 the metadata associated with it was taken at 12:55 and zero
9 p.m.?

10 A. Correct.

11 MR. KENERSON: Ms. Rohde, if we can play this for
12 the next few seconds, please.

13 (Whereupon, segments of Government's Exhibit No.
14 1001 were published in open court.)

15 MR. KENERSON: Pause right here.

16 BY MR. KENERSON:

17 Q. And who is that in the front? Who's just highlighted?

18 A. Dominic Pezzola.

19 Q. And what's the timestamp up at the top of the screen?

20 A. 12:54 to 12:55 p.m.

21 Q. All right. Now, your notes that you mentioned that you
22 wrote down, did you write down every single little thing
23 you'd be testifying to?

24 A. I did not.

25 Q. And so -- Mr. Pezzola, I think you testified, was not in

1 the marching group for some period of time. Is that right?

2 A. Correct.

3 Q. All right. But by 12:50, he was in the vicinity of the
4 Peace Circle?

5 A. Yes.

6 Q. And at 12:54, he was right here?

7 A. Correct.

8 Q. And how close is he to other members of the marching
9 group at this point?

10 A. Very close.

11 MR. KENERSON: Could we have --

12 MS. HERNANDEZ: Objection. Best evidence, your
13 Honor.

14 THE COURT: Overruled.

15 MR. KENERSON: Can we have 492G, as in gamma,
16 please. And if we can go to four minutes, Ms. Rohde.

17 (Whereupon, segments of Government's Exhibit No.
18 492G were published in open court.)

19 BY MR. KENERSON:

20 Q. I think you testified with Mr. Nordean about some of the
21 scenes here. Do you remember that?

22 A. I do.

23 Q. Or -- excuse me -- Mr. Smith on behalf of Mr. Nordean.

24 And I think one of the things he asked you was
25 whether you were able to see Mr. Nordean's hand. Do you

1 remember that question?

2 A. I believe so, yes.

3 Q. Okay. Are you able to see Mr. Nordean's hand on here?

4 A. I am.

5 Q. Can you circle it?

6 A. (Witness complies.)

7 Q. Thank you.

8 For the record, you're indicating the nongloved
9 hand with a thumb over on top of the railing. Correct?

10 A. Correct.

11 MR. KENERSON: Can we play, please.

12 (Whereupon, segments of Government's Exhibit No.
13 492G were published in open court.)

14 BY MR. KENERSON:

15 Q. From this video, are you able to -- can you see if
16 Mr. Nordean is having any problems balancing?

17 A. It does not appear so.

18 MR. KENERSON: Thank you, Ms. Rohde. We can stop
19 here.

20 Can we go to 445B, as in boy, x. And we can go to
21 a minute 13, Ms. Rohde.

22 (Whereupon, segments of Government's Exhibit No.
23 445Bx were published in open court.)

24 MR. KENERSON: And can we go just a few frames
25 forward. That's good.

1 (Whereupon, segments of Government's Exhibit No.
2 445Bx were published in open court.)

3 BY MR. KENERSON:

4 Q. Do you remember Mr. Smith asking you some questions
5 about that can in Mr. Nordean's hand?

6 A. Yes.

7 MR. KENERSON: Ms. Rohde, if we could back this up
8 to a minute ten and just play from here.

9 (Whereupon, segments of Government's Exhibit No.
10 445Bx were published in open court.)

11 MR. KENERSON: Pause right there.

12 BY MR. KENERSON:

13 Q. Were you able to hear anything as that camera panned?

14 A. I was.

15 Q. What was that?

16 A. It sounded like maybe the crushing of a can or something
17 hitting the ground.

18 Q. Thank you.

19 MR. KENERSON: Can we go to Exhibit 201, please.

20 (Whereupon, segments of Government's Exhibit No.
21 201 were published in open court.)

22 BY MR. KENERSON:

23 Q. And do you remember Mr. Pattis asking you some questions
24 about this, drawing some circles on here?

25 A. I do.

1 Q. And the -- I think one of the things he asked you about
2 is the fact that you drew more circles with him than you had
3 done on direct. Do you remember him asking you those
4 questions?

5 A. I do.

6 Q. Do you recall the exact question you were asked on
7 direct before drawing the circles?

8 A. I do not.

9 MR. KENERSON: Ms. Rohde, if we could have, just
10 for the witness --

11 BY MR. KENERSON:

12 Q. Well, would it refresh your memory to see a transcript?

13 A. Yes.

14 MR. KENERSON: If we could have, just for the
15 witness, the March 7th transcript from the p.m. at Page
16 12346.

17 And if we could scroll down, please.

18 BY MR. KENERSON:

19 Q. Special Agent, if you can just take a look -- I'll
20 direct your attention right around here. Feel free to look
21 at any portion of the transcript you want. Let me know if
22 your memory has been refreshed.

23 A. It has.

24 Q. Thank you.

25 MR. KENERSON: We can take the exhibit down and go

1 back to 201, please.

2 Ms. Harris, could we have the screen back to the
3 jury for 201.

4 THE COURT: Permission to publish is granted.

5 BY MR. KENERSON:

6 Q. Now, were you asked to identify every member of the
7 marching group?

8 A. I was not.

9 Q. Thank you.

10 Do you remember Mr. Smith also asking you some
11 questions about whether Mr. Nordean took some specific
12 actions in relation to Mr. Pezzola's shield theft,
13 Mr. Donohoe's water bottle assault and a couple others?

14 MR. METCALF: Objection as to form.

15 THE COURT: Overruled.

16 BY MR. KENERSON:

17 Q. Do you remember being asked those questions?

18 A. I do.

19 Q. All right. Was Mr. Nordean a leader or a follower of
20 the group that marched to the Capitol?

21 A. I heard "objection," but --

22 MR. SMITH: No objection.

23 THE WITNESS: Leader.

24 BY MR. KENERSON:

25 Q. What about the group that marched from the food trucks

1 to the Peace Circle?

2 A. A leader.

3 Q. What about -- was he near the front or the back of the
4 group that first crossed the barriers?

5 A. Front.

6 Q. And near the front or the back of the group that first
7 went through the breached black fence?

8 A. Front.

9 MR. McCULLOUGH: Could we go to Exhibit 145C, as
10 in cat, x, please.

11 BY MR. KENERSON:

12 Q. While that's coming up, do you remember Ms. Hernández
13 asking you some questions about interactions between
14 Mr. Rehl and a man named Zack Johnson?

15 A. Yes.

16 MR. KENERSON: All right. If we can go to two
17 minutes, please, Ms. Rohde.

18 And if we could zoom in on the bottom right.

19 (Whereupon, segments of Government's Exhibit No.
20 145Cx were published in open court.)

21 BY MR. KENERSON:

22 Q. All right. Is this about the timeframe Ms. Hernández
23 was asking you about?

24 A. Yes.

25 Q. Do you see Mr. Rehl on here?

1 A. Yes. (Witness indicates.)

2 Q. Thank you.

3 MR. KENERSON: Ms. Rohde, if we could go back to
4 about a minute 25, please. And start playing until about a
5 minute 30, please.

6 (Whereupon, segments of Government's Exhibit No.
7 145Cx were published in open court.)

8 MR. KENERSON: Stopping right there.

9 BY MR. KENERSON:

10 Q. Do you recognize anyone on the screen now? Let me know
11 if we should play further.

12 A. I do.

13 Q. Who?

14 A. Do you want me to name all of them? Or -- this is
15 Johnson.

16 Q. Yes.

17 A. Gray.

18 MS. HERNANDEZ: Your Honor, objection. This goes
19 beyond the scope of my cross-examination.

20 (Whereupon, the following proceedings were had at
21 sidebar outside the presence of the jury:)

22 MS. HERNANDEZ: The only question I asked, which
23 she agreed to, was what Mr. Rehl was doing, not who was in
24 the area, because her -- she originally said to me that
25 Mr. Rehl had high-fived or otherwise congratulated people.

1 So the fact that this is happening was not challenged.

2 MR. KENERSON: So we're not -- I mean,
3 Ms. Hernández, let me play the next 30 seconds. Mr. Rehl
4 will walk up and he will wind up next to Mr. Johnson and
5 they will have -- they have an interaction. It's not a
6 fist-bump or a high-five, but they will have an interaction.
7 To the extent there was the impression left that this
8 witness was essentially mistaken or inventing a memory, I
9 think this rebuts that.

10 MS. HERNANDEZ: Absolutely not, your Honor. The
11 question was only as to a fist-bump or a hug or -- it was
12 not that they were in the area or that they knew each other.
13 So it is exactly beyond the scope and it's going to leave a
14 false impression.

15 THE COURT: I'm going to overrule the objection.

16 (Whereupon, the following proceedings were had in
17 open court:)

18 MR. KENERSON: Ms. Rohde, if we could let this
19 play for a few more seconds.

20 BY MR. KENERSON:

21 Q. Before it plays, Special Agent, I'm going to direct your
22 attention towards the bottom screen just to the right of
23 center as we look at it.

24 (Whereupon, segments of Government's Exhibit No.
25 145Cx were published in open court.)

1 MR. KENERSON: Pause right there.

2 BY MR. KENERSON:

3 Q. Do you see Mr. Rehl?

4 A. I do.

5 Q. Can you circle him?

6 A. (Witness complies.)

7 Q. Thank you.

8 Where is Mr. Johnson?

9 A. (Witness indicates.)

10 Q. Thank you.

11 MR. KENERSON: If we could let this play.

12 (Whereupon, segments of Government's Exhibit No.
13 145Cx were published in open court.)

14 BY MR. KENERSON:

15 Q. Did we just witness any sort of interaction between
16 those two?

17 MS. HERNANDEZ: Objection. Leading.

18 THE COURT: Overruled.

19 THE WITNESS: We did.

20 BY MR. KENERSON:

21 Q. What did we see?

22 A. We saw Mr. Rehl go next to Mr. Johnson. It appears as
23 if they look at each other. What is said is unknown. And
24 it looks like their arms kind of touch one another.

25 MS. HERNANDEZ: Objection, your Honor. The video

1 speaks for itself.

2 THE COURT: Overruled.

3 BY MR. KENERSON:

4 Q. Ms. Hernández also asked you about Rehl's interaction
5 with Mr. Pezzola. Do you remember those questions?

6 A. I do.

7 MR. KENERSON: Could we bring up Exhibit 401G, as
8 in gamma, please.

9 (Whereupon, segments of Government's Exhibit No.
10 401G were published in open court.)

11 BY MR. KENERSON:

12 Q. Do you recognize this photo?

13 A. I do. It was recovered from Zachary Rehl's phone.

14 Q. And do you still have the metadata in front of you?

15 A. I do.

16 Q. When was this taken?

17 A. 1:13:07 p.m.

18 Q. And do you recognize any of the individuals in the
19 foreground of the photo?

20 A. I do. Dominic Pezzola, Matthew Greene.

21 Q. Thank you.

22 MR. KENERSON: Could we go to Exhibit 425, please.

23 BY MR. KENERSON:

24 Q. While that's coming up, Mr. Pattis asked you some
25 questions --

1 MS. HERNANDEZ: Objection with respect to the
2 last -- it, again, misstates the evidence, your Honor.

3 THE COURT: I'm sorry. Ms. Hernández.

4 (Whereupon, the following proceedings were had at
5 sidebar outside the presence of the jury:)

6 THE COURT: How does it misstate the evidence?

7 MS. HERNANDEZ: The question was whether they had
8 an interaction. The fact that these people appear on a
9 video that Mr. Rehl took doesn't mean that he had any
10 interaction with them. To the contrary, what it shows is
11 there was no interaction. Otherwise, he wouldn't be able to
12 be taking a video from afar.

13 THE COURT: I'm sorry. I just --

14 MS. HERNANDEZ: I know you weren't --

15 THE COURT: What was the question? It was:
16 Ms. Hernández also asked you about Mr. Rehl's interaction
17 with Mr. Pezzola. Do you remember those questions?

18 MS. HERNANDEZ: Right. So then -- now he shows a
19 video in which my client -- which he claims came from my
20 client's phone -- which shows just a crowd. It doesn't show
21 any interaction between Mr. Rehl and those people or anybody
22 else.

23 THE COURT: Okay. So what's the objection?

24 MS. HERNANDEZ: He claimed that that is to
25 contradict the statement that I elicited from her in which

1 she said that she had not seen any interaction between
2 Mr. Rehl and Pezzola.

3 Any it wasn't --

4 THE COURT: The question was: And do you
5 recognize any of the individual in the foreground of the
6 photo?

7 I do.

8 MS. HERNANDEZ: Right. But my cross-examination
9 to her was: Did you see any interaction between Mr. Rehl
10 and Mr. Pezzola?

11 That was my cross-examination. And she said no.

12 So now he elicits this to show -- I don't know
13 what. It's beyond the scope. It doesn't show an
14 interaction.

15 THE COURT: He didn't say it did. He said: Do
16 you recognize any of the individuals in the photo?

17 MS. HERNANDEZ: Correct. But it's beyond the
18 scope. The issue on -- the issue on cross-examination was
19 interaction, not whether they were somewhere in the vicinity
20 of the Capitol on that day.

21 THE COURT: Mr. Kenerson?

22 MR. KENERSON: I mean, to use one of the favorite
23 phrases of this trial, that's slicing the bologna pretty
24 thin to say Mr. Rehl deciding to take a photo of Mr. Pezzola
25 moments after he stole a shield when he was walking right in

1 front of Mr. Rehl doesn't count as interaction. We are
2 not --

3 MS. HERNANDEZ: Can I --

4 MR. KENERSON: We are not suggesting it's anything
5 more than the fact he took a photo of him. That's it.

6 MS. HERNANDEZ: Can I --

7 MR. KENERSON: He's asked the question. She's
8 already given the answer. So we had to move on.

9 MS. HERNANDEZ: It's good to see Mr. Kenerson
10 makes decisions in this court. But I did not bring out --
11 so I've made my objection, your Honor. The Court can rule.

12 THE COURT: The objection is overruled.

13 (Whereupon, the following proceedings were had in
14 open court:)

15 MR. KENERSON: 425, please.

16 (Whereupon, segments of Government's Exhibit No.
17 425 were published in open court.)

18 BY MR. KENERSON:

19 Q. Do you remember being asked some questions about this by
20 Mr. Pattis?

21 A. Yes.

22 Q. And specifically about individuals in here, whether you
23 recognize some of those individuals. Do you remember being
24 asked those questions?

25 A. I do.

1 MR. KENERSON: All right. Can we go to a minute
2 and five seconds, please. And if we could, I think, just
3 let this play.

4 (Whereupon, segments of Government's Exhibit No.
5 425 were published in open court.)

6 MR. KENERSON: Pause right here.

7 BY MR. KENERSON:

8 Q. Do you remember Mr. Pattis asked you about that person
9 in the camouflage and helmet?

10 A. I do.

11 Q. And did you recognize him from your video review?

12 A. I did.

13 Q. Can you tell where in the video review you have seen
14 him?

15 A. He was at the Washington Monument. He was with them the
16 entire time of the march. He was with them at the First
17 Street -- the first breach. And he is climbing through the
18 window.

19 Q. Thank you.

20 MR. KENERSON: Can we have Exhibit 499A, please.

21 (Whereupon, segments of Government's Exhibit No.
22 499A were published in open court.)

23 BY MR. KENERSON:

24 Q. While this is coming up, do you remember being asked
25 some questions by Mr. Metcalf about Mr. Pezzola giving back

1 a riot shield?

2 A. Correct. Well, after this. But yes.

3 Q. Yes. After this.

4 (Whereupon, segments of Government's Exhibit No.
5 499A were published in open court.)

6 BY MR. KENERSON:

7 Q. So 499A, is Mr. Pezzola in possession of the shield
8 right now?

9 A. He is.

10 Q. Have you seen any evidence that he offered it to any of
11 these police officers at this point?

12 A. He did not.

13 MR. KENERSON: And could we go to 114, please.

14 And, Ms. Rohde, if we can go to 22 seconds.

15 (Whereupon, segments of Government's Exhibit No.
16 114 were published in open court.)

17 BY MR. KENERSON:

18 Q. And do you remember testifying about this scene with
19 Mr. Metcalf?

20 A. I do.

21 Q. Do you see Mr. Pezzola on here?

22 A. I do.

23 Q. Circle him.

24 A. (Witness complies.)

25 MR. KENERSON: If we can play, Ms. Rohde, until 29

1 seconds.

2 (Whereupon, segments of Government's Exhibit No.
3 114 were published in open court.)

4 MR. KENERSON: Stop right there.

5 BY MR. KENERSON:

6 Q. Are you able to see Mr. Pezzola's face right there?

7 A. Can I see his face? Yes.

8 Q. What was his demeanor?

9 A. He wasn't happy.

10 Q. And this is -- is this before or after the shield had
11 been returned to the police department?

12 A. This is after.

13 MR. KENERSON: Ms. Rohde, if we can play again.

14 (Whereupon, segments of Government's Exhibit No.
15 114 were published in open court.)

16 MR. KENERSON: Pause right there.

17 BY MR. KENERSON:

18 Q. Did you just see Mr. Pezzola do something?

19 A. I did.

20 Q. What did he do?

21 A. He turned around and blew smoke in the direction of the
22 officers.

23 Q. Do you remember being asked some questions about
24 Mr. Nordean in the Rotunda and whether you saw a flag in his
25 possession?

1 A. I do.

2 MR. KENERSON: Could we go to 167x, please. And,
3 Ms. Rohde, if we can go to three minutes and 25 seconds.
4 And if we can let this play briefly.

5 (Whereupon, segments of Government's Exhibit No.
6 167x were published in open court.)

7 MR. KENERSON: Stopping right there.

8 BY MR. KENERSON:

9 Q. The woman in the red hat, do you recognize her?

10 A. I do.

11 Q. And how did she factor into your testimony on direct?

12 A. She was with them. She entered with Joseph Biggs.

13 Q. Okay. And then did she, after that, spend any time with
14 Mr. Nordean?

15 A. She did.

16 MR. KENERSON: Can we play, Ms. Rohde, from here.

17 (Whereupon, segments of Government's Exhibit No.
18 167x were published in open court.)

19 MR. KENERSON: Pause right now.

20 BY MR. KENERSON:

21 Q. Do you see anything in that woman's right arm?

22 A. I do. She has a coat and she had her phone up.

23 Q. Can you describe how the coat is positioned relative to
24 her arm?

25 A. It's hanging over, so just draped over her arm.

1 Q. And in terms of time, is this before or after the
2 POW/MIA flag came down?

3 A. This is before.

4 MR. KENERSON: Can we go to Exhibit 181, please.
5 And if we could go to just a couple of minutes into this
6 exhibit, please.

7 (Whereupon, segments of Government's Exhibit No.
8 181 were published in open court.)

9 BY MR. KENERSON:

10 Q. Now, do you see the POW/MIA flag?

11 A. I do.

12 Q. Based on your review of the video, were you able to
13 determine whether that woman we just saw was in the vicinity
14 of the POW/MIA flag at the time you testified Mr. Nordean
15 was?

16 A. She is.

17 Q. Thank you.

18 MR. KENERSON: Can we go to Exhibit 250, please.
19 If we can go to a minute and ten seconds.

20 (Whereupon, segments of Government's Exhibit No.
21 250 were published in open court.)

22 BY MR. KENERSON:

23 Q. Do you recognize the woman in the middle of the screen
24 right here?

25 A. I do. It's the same woman.

1 Q. All right. And if you could describe -- do you see
2 something in her right arm?

3 A. I do. The jacket is now folded up, being held close to
4 her body with her right hand.

5 MR. KENERSON: And can we -- if we can slow it
6 down to about quarter speed and then just play the next
7 couple of seconds, please.

8 (Whereupon, segments of Government's Exhibit No.
9 250 were published in open court.)

10 MR. KENERSON: If we could pause right there.

11 BY MR. KENERSON:

12 Q. How does how she's holding the jacket here compare to
13 how she was holding it in the previous video we saw?

14 A. Before, it was draped over her arm, very relaxed. Here,
15 it looks like she has a good grip on it and is hanging onto
16 it tight.

17 MR. KENERSON: Can we go to Exhibit 183, please,
18 and go to about 30 seconds. And just play from here.

19 (Whereupon, segments of Government's Exhibit No.
20 183 were published in open court.)

21 BY MR. KENERSON:

22 Q. Can you remind us who that woman is who just came on the
23 screen walking backwards?

24 A. The same woman from the last video and the video before.

25 Q. And -- now, all the way from the left with the flag over

1 his shoulders, who is that?

2 A. Ethan Nordean.

3 Q. Thank you.

4 (Whereupon, segments of Government's Exhibit No.
5 183 were published in open court.)

6 MR. KENERSON: We can pause here.

7 BY MR. KENERSON:

8 Q. Do you remember being asked about some chats and the
9 dates various people were invited to those chats?

10 A. Yes.

11 MS. MOORE: Ms. Rohde, can we have 505-10, which I
12 believe is already in evidence.

13 THE COURTROOM DEPUTY: It's not in evidence.

14 MR. KENERSON: You know what? Try 11. See
15 if 505-11 is.

16 THE COURTROOM DEPUTY: Yes. 11 is in.

17 (Whereupon, segments of Government's Exhibit No.
18 505-11 were published in open court.)

19 MR. KENERSON: Scroll to the top, please.

20 BY MR. KENERSON:

21 Q. The name at the top --

22 MR. JAUREGUI: Judge, I'm going to object. This
23 is outside the scope.

24 MR. KENERSON: May we be heard?

25 (Whereupon, the following proceedings were had at

1 sidebar outside the presence of the jury:)

2 MR. JAUREGUI: Judge, I'd ask that it be taken
3 down.

4 THE COURTROOM DEPUTY: (Complies.)

5 MR. KENERSON: I understand why Mr. Tarrio is
6 making the objection. The reason --

7 MR. JAUREGUI: Do you?

8 MR. KENERSON: The reason we're doing this is
9 because Mr. Metcalf elicited a lot of information from the
10 agent about whether Mr. Pezzola did or didn't join the
11 Ministry of Self-Defense. And they settled on at least the
12 4th or something along those lines. This is the 3rd.

13 MR. JAUREGUI: I would object. It's outside the
14 scope. I tried to get stuff that he was even closer to him
15 on January 5th and was shut down immediately.

16 THE COURT: But it's not -- I let Mr. Metcalf go
17 into the issue of this -- when he joined. And that's all
18 they're doing here, is clarifying when he joined. So I'm
19 going to allow them to do that.

20 MR. JAUREGUI: Yes, sir.

21 (Whereupon, the following proceedings were had in
22 open court:)

23 BY MR. KENERSON:

24 Q. So 505-11, what's the date of this chat?

25 A. January 3rd, 2021.

1 Q. Do you recognize who Spazzo Second is?

2 A. That's Dominic Pezzola.

3 Q. So at least as of January 3rd, Mr. Pezzola is in this
4 particular chat?

5 A. Yes.

6 MR. KENERSON: And can we also have 509-23.
7 Ms. Rohde, if we can scroll down.

8 (Whereupon, segments of Government's Exhibit No.
9 509-23 were published in open court.)

10 BY MR. KENERSON:

11 Q. All right. Do you remember being asked by Mr. Jauregui
12 when Enrique Tarrio joined the MOSD leaders chat?

13 A. Yes.

14 Q. All right. Do you see a message at 9:20:27 here?

15 A. I do.

16 Q. Can you read that?

17 A. Noble Beard the Immortal, which is Bertino, invited
18 Enrique Florida Proud Boy, which is Tarrio.

19 MR. KENERSON: And, Ms. Rohde, if you could scroll
20 all the way back up to the top.

21 BY MR. KENERSON:

22 Q. What is the date of that exhibit?

23 A. January 5th, 2021.

24 Q. And remind us what the New MOSD chat is.

25 A. The leaders chat.

1 MR. KENERSON: Can we have 515-11, just for the
2 witness, please.

3 BY MR. KENERSON:

4 Q. Do you recognize this?

5 A. I do.

6 Q. And do you also remember some conversation with
7 Mr. Nordean -- excuse me -- Mr. Smith about whether there
8 was any relationship between AJ Fischer and Ethan Nordean?

9 A. Yes.

10 Q. And do you recognize this as a chat from a group
11 Mr. Nordean participated in?

12 A. Yes.

13 MR. KENERSON: Move for admission of 515-11.

14 MR. SMITH: No objection.

15 THE COURT: It will be admitted. And permission
16 to publish.

17 (Whereupon, Government's Exhibit No. 515-11 was
18 entered into evidence.)

19 BY MR. KENERSON:

20 Q. What's the date of this chat?

21 A. January 14th, 2021.

22 Q. And what's the first message from Rufio Panman?

23 A. At 11:59 p.m., Rufio Panman, which is Nordean, says:
24 Let's plan a trip to Florida, all of us. Spend some time on
25 the water and check out some property and businesses.

1 Q. And continue reading, please.

2 A. At 12:04:04 a.m., Prewriteout and Gravy says: Let's do.

3 At 12:01:30 a.m., Planet says: Let's do that.

4 8:58:25 a.m., Paul Rae says: Let's definitely do
5 that.

6 At 11:04:49 a.m., Rufio Panman, which is Nordean:
7 I'll put 10,000 to 15,000 in on a small bar or restaurant
8 with you guys and run it, if you guys are interested in
9 being business partners.

10 He then says: Buy something already standing.

11 And: I can make killer cocktails, fish tacos,
12 chicken sandwiches, burgers, et cetera. My sauces are bomb
13 as hell. I made my parents a fuck ton of money with my
14 recipes. I've got it all written down, too.

15 Paul Rae responds: Sounds like you need to come
16 down so we can do some shopping.

17 Nordean sends something, contents blank.

18 Paul Rae responds: Yeah. I'll start looking
19 around.

20 To which AJ Fourth Degree 1776Z, to the third
21 power -- and some numbers -- says: Fuck, yeah.

22 And AJ Fourth Degree is AJ Fischer.

23 Q. Thank you.

24 MS. HERNANDEZ: Objection. Hearsay as to
25 Mr. Rehl.

1 THE COURT: Overruled.

2 MR. KENERSON: Can we have, just for the witness,
3 603-31, please.

4 BY MR. KENERSON:

5 Q. Do you recognize what's on your screen?

6 A. I do.

7 Q. Whose Parler account is that from?

8 A. Joseph Biggs's.

9 Q. Do you recognize any of people in there?

10 A. I do. This is AJ Fischer. This is the woman who
11 entered with Joseph Biggs and who was later seen with
12 Nordean. And then you have Nordean and Biggs.

13 MR. KENERSON: Move for admission of 603-31.

14 MR. SMITH: No objection.

15 THE COURTROOM DEPUTY: It's already in.

16 MR. KENERSON: Is it? Okay. Already in.

17 603-31. Can we have it published to the jury,
18 please.

19 THE COURT: Permission to publish.

20 MR. KENERSON: And I'll clear off the arrows.

21 (Whereupon, segments of Government's Exhibit No.
22 603-31 were published in open court.)

23 BY MR. KENERSON:

24 Q. Can you tell us who is who again?

25 A. Fisher. The woman who entered the Capitol with Joseph

1 Biggs and later seen with Nordean. Nordean. Biggs.

2 Q. Thank you.

3 What's the date of this post?

4 A. December 13th, 2020.

5 Q. Mr. Smith also asked you about some chats where some
6 folks mentioned a plan. At 4:25 p.m.: There is no plan.
7 We should say so, and so on.

8 Do you remember those chats?

9 A. I do.

10 MR. KENERSON: Can we have 512-11, which I believe
11 is in evidence.

12 (Whereupon, segments of Government's Exhibit No.
13 512-11 were published in open court.)

14 BY MR. KENERSON:

15 Q. January 6th, 2021, Boots on Ground?

16 A. Yes.

17 MR. KENERSON: Can we scroll down, Ms. Rohde,
18 please.

19 BY MR. KENERSON:

20 Q. Can you read the message from Charles Donohoe at
21 3:38:47?

22 A. We are regrouping with a second force.

23 Q. Is that before or after the chats you discussed with
24 Mr. Nordean about no plan?

25 A. That is after.

1 Q. Are you sure?

2 A. Which one are you talking about?

3 Q. Is this one before or after the chats you talked about
4 with Nordean? Do you remember?

5 A. I don't remember.

6 MR. KENERSON: Can we have, just for the
7 witness --

8 BY MR. KENERSON:

9 Q. Would seeing those chats refresh your memory?

10 A. It would.

11 MR. KENERSON: Can we go to Nordean 109, Page 138.

12 MR. SMITH: It might be 137.

13 MR. KENERSON: 137. Thank you.

14 THE WITNESS: Got it.

15 MR. KENERSON: So these are actually in evidence.
16 So can we actually put these in front of the jury?

17 THE COURT: If there's no objection.

18 MR. SMITH: No objection.

19 MR. KENERSON: Nordean 109, Page 138.

20 THE COURTROOM DEPUTY: I don't have it in
21 evidence. I have it as ID'd.

22 MR. SMITH: It might be Page 137.

23 MR. KENERSON: Sorry. It is. I keep saying 138.
24 It is actually reflecting 137.

25 THE COURT: Ms. Harris, is that in evidence?

1 THE COURTROOM DEPUTY: No. I just have it ID'd.

2 THE COURT: All right. So --

3 MS. HERNANDEZ: I'm sorry, your Honor. I can't
4 see what --

5 MR. SMITH: We have no objection to it being moved
6 into evidence.

7 THE COURT: I understand.

8 So it will be admitted, and permission to --

9 MS. HERNANDEZ: I don't know what's being offered,
10 your Honor. I'm sorry.

11 THE COURT: It's all right.

12 MS. HERNANDEZ: No objection.

13 THE COURT: It will be admitted and permission to
14 publish.

15 (Whereupon, Defendant Nordean's Exhibit No. 109
16 was entered into evidence.)

17 BY MR. KENERSON:

18 Q. All right. I think you testified with Mr. Smith that
19 these were three hours ahead. So the first one is at 4:38
20 p.m.?

21 A. Yes.

22 Q. Okay. So the last --

23 MR. KENERSON: Can we go back to the last exhibit?

24 BY MR. KENERSON:

25 Q. Mr. Donohoe's statement is at -- that we just read -- is

1 at 3:38. Correct?

2 A. Correct. So that's before.

3 Q. Got it. So Mr. Donohoe's statement is before --

4 A. The chat we just saw.

5 Q. Yes.

6 A. Yes.

7 Q. Thank you.

8 You were already asked about an after-action
9 report. Do you remember that?

10 A. I do.

11 Q. And I think you said you don't know what they were
12 talking about, but an after-action report could refer to
13 something you do after and talk about it. Right?

14 A. Correct.

15 Q. Would there be a need for an after-action report if
16 there was no plan?

17 A. Probably not.

18 MR. PATTIS: Objection. Argumentative.

19 MR. JAUREGUI: And speculation, Judge.

20 THE COURT: Sustained.

21 BY MR. KENERSON:

22 Q. All right. You were asked some questions -- well, all
23 right.

24 You were asked a number of questions about whether
25 Mr. Tarrio had contact with individuals on the ground. Do

1 you remember that?

2 A. I do.

3 Q. Okay.

4 MR. KENERSON: Ms. Rohde, if we could have up,
5 just for the witness, the extraction from Mr. Nordean's
6 phone for Exhibit 509.

7 Ms. Rohde, if you could scroll down just for the
8 witness, please.

9 BY MR. KENERSON:

10 Q. Do you recognize this?

11 A. I do.

12 Q. What is it?

13 A. It looks like the chat from Nordean's phone.

14 Q. Thank you.

15 And what name is Mr. Tarrio listed under here?

16 A. Enrique Florida PB.

17 MR. KENERSON: Ms. Rohde, if you could just do a
18 search, a control-F, for Enrique Florida PB, please. And
19 scroll to the next one, please.

20 MR. METCALF: Mr. Kenerson, this is 509?

21 MR. KENERSON: Yes.

22 MR. METCALF: Thank you.

23 BY MR. KENERSON:

24 Q. Now, to orient you, you see the time is in UTC plus zero
25 here?

1 A. I do.

2 Q. So five hours ahead. Do you see a message on
3 January 6th?

4 A. I do.

5 Q. Was any content recovered?

6 A. No.

7 MR. KENERSON: Go to the next one.

8 BY MR. KENERSON:

9 Q. Do you see a second message?

10 A. I do.

11 MR. KENERSON: Ms. Rohde, if we can go to the next
12 one.

13 BY MR. KENERSON:

14 Q. Do you see a third message?

15 A. I do.

16 Q. Does that one have a word in it?

17 A. It says: "This."

18 Q. Up until now, were any of the messages we recovered --
19 did they have any words in them?

20 A. They did not.

21 MR. KENERSON: Could we go to the next one.

22 BY MR. KENERSON:

23 Q. Another message from January 6th?

24 A. Yes.

25 Q. Any content recovered?

1 A. No.

2 MR. KENERSON: Next one.

3 BY MR. KENERSON:

4 Q. Another message from January 6th?

5 A. Yes. No content.

6 MR. KENERSON: Next one, please.

7 BY MR. KENERSON:

8 Q. Another message from January 6th?

9 A. Yes. No content.

10 MR. KENERSON: Next message, please.

11 BY MR. KENERSON:

12 Q. Another message from Enrique on January 6th?

13 A. Yes. No content.

14 MR. KENERSON: Next one, please.

15 BY MR. KENERSON:

16 Q. Do you see another message from Enrique on January 6th?

17 A. Correct. No content.

18 MR. KENERSON: Next one, please.

19 BY MR. KENERSON:

20 Q. Do you see another message from Enrique on January 6th?

21 A. I do. No content.

22 MR. KENERSON: Next one, please.

23 BY MR. KENERSON:

24 Q. Do you see another message from Enrique on January 6th?

25 A. I do. No content.

1 Q. And this was which chat again?

2 A. This was the leaders chat.

3 Q. And remind us, were there members of the leaders on the
4 ground on January 6th?

5 A. There were.

6 Q. And with the exception of the word "this," were any of
7 the contents of those messages recovered from this phone?

8 A. No.

9 MR. KENERSON: Can we go to 500-84, please.

10 BY MR. KENERSON:

11 Q. Special Agent, do you remember testifying about this
12 chat?

13 A. I do.

14 Q. And remind us again what Skull and Bones is.

15 A. It's the elders chat.

16 Q. And do you see Mr. Nordean up at the top? Was he in
17 this chat?

18 A. He is.

19 Q. Was he on the ground on January 6th?

20 A. He was.

21 Q. Were there any other members of this chat on the ground
22 on January 6th?

23 A. Not that I -- Nick Ochs.

24 Q. Mr. Ochs?

25 A. Yes.

1 Q. Okay.

2 MR. KENERSON: And if we could scroll --

3 MS. HERNANDEZ: Your Honor, objection as to
4 Mr. Rehl. He has no access to this particular chat group.

5 THE COURT: Overruled. But can I have counsel at
6 sidebar for one quick moment.

7 (Whereupon, the following proceedings were had at
8 sidebar outside the presence of the jury:)

9 THE COURT: Mr. Kenerson, I wanted to let you
10 know, we can go until 5:15 today. So if that affects your
11 pace or how you're planning to proceed -- I wanted everybody
12 to know. I should have let you know before. But you now
13 know that.

14 MR. KENERSON: I appreciate that. It will affect
15 my pace -- it would have affected it, but I'm past that
16 point.

17 MS. HERNANDEZ: Your Honor, the Government is
18 introducing a number of these exhibits which are hearsay as
19 to my client. It could have been teed up so we could have
20 resolved them. The one before about the conversations with
21 various -- between Mr. Nordean and various of the marching
22 group people sometime days, a week or longer, after
23 January 6th, I don't think it's co-conspirator statements at
24 all.

25 THE COURT: This exhibit we're looking at now is

1 already -- was already in evidence, I believe.

2 MS. HERNANDEZ: I'm talking about an earlier
3 exhibit that the Court overruled. I mean, he's been
4 introducing a number of these exhibits that are hearsay, and
5 he could have teed them up if he was going to introduce
6 them.

7 The other thing: These questions about these
8 missing messages, your Honor, this is from one phone and one
9 phone alone. If -- so it can leave the impression that
10 everybody deleted calls. That's not accurate.

11 THE COURT: That's not true. But we have to
12 assume the jury can look at evidence and understand it.

13 Mr. Pattis?

14 MR. PATTIS: If Mr. Kenerson isn't going to
15 finish, can you let us go? I've been counting the minutes
16 all afternoon. Can we get ready to go? I'm asking.
17 Compassionate...

18 THE COURT: You're asking for compassionate
19 release?

20 MR. PATTIS: Yes.

21 MR. METCALF: Yes.

22 THE COURT: Unfortunately, I have to deny your
23 request.

24 MR. PATTIS: Understood.

25 THE COURT: Mr. Kenerson, you may continue.

1 MR. KENERSON: Thank you.

2 (Whereupon, the following proceedings were had in
3 open court:)

4 MR. KENERSON: Before we get to this exhibit --

5 MR. SMITH: I'm sorry, your Honor. If we can --

6 (Whereupon, the following proceedings were had at
7 sidebar outside the presence of the jury:)

8 THE COURT: I'm sorry. Back to the phones -- back
9 to sidebar for one moment.

10 MR. SMITH: Your Honor, we're noting that we
11 believe this is the chat that Mr. Kenerson introduced a
12 video through. And I'm just assuming that Mr. Kenerson is
13 not doing that again. But I'm not exactly sure if this is
14 the one. But your Honor can see a black screen.

15 MR. KENERSON: This is the exhibit -- we're not
16 doing it. I can cut this off.

17 MR. SMITH: Your Honor, I think Mr. Kenerson
18 elicited that Mr. Nordean is on this chat, but he's not
19 actually on this. He's not -- there is no chat from him on
20 this one. So that's why I'm trying to understand what
21 the -- that was the testimony, whether Mr. Nordean was on
22 this chat. She said yes. If your Honor looks at this,
23 there is no chat from Nordean.

24 THE COURT: At the top, his photograph is there.

25 The jury has been around this a million times.

1 You may proceed, Mr. Kenerson.

2 (Whereupon, the following proceedings were had in
3 open court:)

4 MR. KENERSON: Can we actually have, before we get
5 to this, Exhibit 509B, as in boy, which is the extraction
6 from Mr. Rehl's phone of the MOSD leaders chat.

7 BY MR. KENERSON:

8 Q. And do you see that on your screen, Special Agent?

9 A. I do.

10 Q. Do you recognize it?

11 A. I do.

12 Q. What is it?

13 A. The extraction from Zachary Rehl's phone.

14 MR. KENERSON: And, Ms. Rohde, if we can scroll
15 down to a chat from January 6th, 2021, at 4:21:39 p.m. UTC
16 minus five.

17 BY MR. KENERSON:

18 Q. Do you see a chat there at that time?

19 A. I do.

20 Q. Who is it from?

21 A. Tarrio.

22 Q. And is there an attachment?

23 A. There is.

24 MR. KENERSON: Your Honor, I would move for the
25 admission of this chat and the attachment.

1 MS. HERNANDEZ: Your Honor, what is the
2 attachment?

3 THE COURT: What do you mean by "attachment,"
4 Mr. Kenerson? Just so I understand.

5 MR. KENERSON: The audio file that is attached.

6 THE COURT: Without objection, it will be
7 admitted.

8 (Whereupon, Government's Exhibit No. 509B was
9 entered into evidence.)

10 THE COURTROOM DEPUTY: You said 509B, as in boy,
11 Mr. Kenerson?

12 MR. KENERSON: Yes.

13 MR. JAUREGUI: Judge, if we could just clarify as
14 to the time of the attachment.

15 THE COURT: Mr. Kenerson, you can proceed.

16 BY MR. KENERSON:

17 Q. Special Agent, what time, according to the report in
18 front of you, was this message sent?

19 A. 4:21:39 p.m. UTC minus five.

20 Q. So that's 4:21:39 p.m. here on the -- East Coast Time?

21 A. Yes.

22 MR. KENERSON: Ms. Rohde, if we could play the
23 attachment, please.

24 (Whereupon, segments of Government's Exhibit
25 Number 509B were published in open court.)

1 BY MR. KENERSON:

2 Q. Were you able to hear that?

3 A. I heard: "It was actually, uh, Capitol" -- but turn it
4 up a little, if you don't mind.

5 (Whereupon, segments of Government's Exhibit No.
6 509B were published in open court.)

7 THE WITNESS: "It was actually, uh, Capitol
8 Police."

9 And that's Enrique Tarrio's voice.

10 BY MR. KENERSON:

11 Q. And that was sent to MOSD leaders at the time you just
12 testified to?

13 A. Correct.

14 Q. Thank you.

15 MR. KENERSON: If we could now go to 500-84.

16 BY MR. KENERSON:

17 Q. All right. I think you testified that Mr. Nordean was
18 in this chat. Correct?

19 A. Yes.

20 Q. This chat generally, Skull and Bones?

21 A. Yes.

22 Q. And Mr. Ochs as well?

23 A. Yes.

24 MR. KENERSON: All right. Can we -- Ms. Rohde, if
25 we can go to the -- scroll down to the messages sent at

1 2:40:55 and 2:41:02.

2 BY MR. KENERSON:

3 Q. Can you read the messages sent --

4 MR. SMITH: Objection to the testimony about
5 Nordean in this chat. His phone was off. Misstates the
6 testimony --

7 MR. KENERSON: Objection to counsel --

8 MR. SMITH: Misstates the testimony.

9 THE COURT: Mr. -- Mr. Smith, there are no
10 speaking objections, as you know.

11 MS. HERNANDEZ: Continuing objection to the Skull
12 and Bones exhibits with respect to Mr. Rehl.

13 THE COURT: Mr. Kenerson, you may proceed.

14 MR. KENERSON: Thank you.

15 BY MR. KENERSON:

16 Q. Special Agent Miller, can you read us the messages --
17 the two messages Enrique Tarrio sent, starting at 2:40:55,
18 to a chat group that included two people on the ground on
19 January 6th?

20 A. Sure. 2:40:55, Enrique Florida PB, which is Tarrio,
21 says: Make no mistake.

22 Followed by: We did this.

23 Q. Thank you.

24 MR. KENERSON: Nothing further.

25 THE COURT: All right. Ladies and gentlemen, it's

1 5:05. We're going to break for the evening.

2 Agent, you may step down. Thank you for your
3 testimony.

4 (Witness excused.)

5 THE COURT: And we'll see you tomorrow morning at
6 9:00.

7 (Whereupon, the jury exited the courtroom at 5:06
8 p.m. and the following proceedings were had:)

9 THE COURT: Everyone may be seated.

10 Mr. Pattis, I'm now going to grant your motion for
11 compassionate release.

12 MR. PATTIS: Thank you, sir.

13 THE COURT: So just a couple of followup things
14 before we break: Thinking about it some more, Mr. Kenerson,
15 I do think I'm right on the issue of the substance of the
16 CHS's reports. The difference is, of course -- your point
17 was, well, it would be hearsay either way.

18 But not really. Right? Because if he testifies,
19 you know, I observed A and I felt B and all the rest, that
20 would just be him testifying. And then the question of, and
21 did you report all that to the FBI, that would not be --
22 that last question is not hearsay because it's not --
23 there's no truth being -- I guess the truth would be, did
24 you report it?

25 But it has no content.

1 And here, there's no way around what you want to
2 do is -- that substance.

3 So if the parties think that there's something you
4 all can agree to that suits everyone's purpose -- I'm
5 skeptical of that -- but you all can let me know. But I
6 think that's the right ruling on that, number one.

7 On the two things that are sort of then a little
8 bit dangling, based on what we had today, we've got this
9 time of the call issue which sounds like, one way or the
10 other, the parties will agree on whatever the records say
11 and stipulate to whatever they say on that.

12 I think that -- if that's the way we proceed, that
13 seems pretty straightforward.

14 And then there is this other issue about whatever
15 this stuff has said -- Mr. Jauregui, you, at one point, came
16 out of the box and said her testimony on that should be
17 stricken.

18 You know, I don't -- and where we left off was you
19 all were trying to research what, in fact, the records say.

20 So I think that's -- I mean, I -- I'm bringing
21 this up now because I don't know how -- I mean, we don't
22 know what the records say and I don't know how you all want
23 to resolve that.

24 It seems to me -- I don't know. So I think she
25 should be -- if the defense wants her available tomorrow for

1 some reason, I mean, maybe she needs to be available. It
2 may be that -- so I think you all just need to think about
3 how you want to resolve it.

4 It's an odd circumstance that she -- she testified
5 as to the content of records -- when we last left off, I
6 think, we didn't really know what the records said.

7 So I just think that's an open question about how
8 you want to -- how you all want to resolve that one way or
9 the other. And it may be then the answer is: Yes. We're
10 going to call someone in our case to say whatever we think
11 this means. I don't know enough to know.

12 MR. JAUREGUI: Judge, I'll have a better idea once
13 the Government sends me what they have.

14 THE COURT: Okay.

15 MR. JAUREGUI: And I'll -- we'll work on it
16 together this evening. We can have an answer for your Honor
17 tomorrow.

18 THE COURT: All right. Yes. I'm not really
19 suggesting that in any event -- it doesn't feel like --
20 however the -- forget the parties. However you think we
21 should proceed, I don't think recross is the answer in any
22 event. So -- but I think -- so if you agree to that, then I
23 guess I can release her. But I think how exactly we address
24 it is still an open question, in my mind, anyway.

25 MR. JAUREGUI: I think you're right, your Honor.

1 I just -- I'm not informed right now. I don't know what
2 they have and I'd like to have an opportunity to take a look
3 at it.

4 THE COURT: Okay. I think that's at least fair.

5 So we'll see everyone at 9:00 tomorrow.

6 Motion granted, Mr. Pattis.

7 (Proceedings concluded.)

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CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby
certify that the foregoing constitutes a true and accurate
transcript of my stenographic notes, and is a full, true,
and complete transcript of the proceedings produced to the
best of my ability.

Dated this 15th day of March, 2023.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the
District of Columbia
333 Constitution Avenue, Northwest
Washington, D.C. 20001
(202) 354-3269

/	11:15ish [1] - 19:7	15th [1] - 167:10	27th [1] - 48:16	445Bx [3] - 124:23, 125:2, 125:10
	11:21 [1] - 19:17	167x [3] - 139:2, 139:6, 139:18	28 [1] - 32:7	447 [15] - 4:10, 40:8, 40:10, 40:13, 40:19, 41:1, 41:5, 41:24, 42:10, 42:17, 43:7, 43:16, 43:24, 44:6, 44:12
	11:30 [2] - 5:19, 21:13	1776 [14] - 47:25, 55:8, 56:20, 57:15, 90:5, 91:22, 95:6, 104:25, 112:22, 113:6, 113:12, 116:19, 117:5, 117:18	28th [1] - 48:16	447A [1] - 40:10
	11:40 [3] - 89:11, 89:15, 121:25	1776Z [1] - 146:20	29 [3] - 86:11, 87:2, 137:25	45 [2] - 94:13, 120:25
0	11:45 [1] - 21:16	18 [3] - 40:19, 41:3, 44:1	2:13 [3] - 22:7, 38:10, 38:13	46 [5] - 33:18, 33:21, 33:22, 34:17, 81:16
06511 [1] - 2:7	11:59 [1] - 145:23	181 [2] - 140:4, 140:8	2:22 [2] - 34:4, 39:1	48 [1] - 1:11
1	12 [2] - 24:25, 109:24	183 [3] - 141:17, 141:20, 142:5	2:25 [2] - 32:7, 39:12	492E [3] - 87:19, 87:22, 88:16
	12346 [1] - 126:16	1974 [1] - 100:11	2:35 [1] - 40:3	492G [3] - 123:15, 123:18, 124:13
	127 [6] - 33:18, 33:25, 34:20, 35:11, 35:15, 35:18	19th [1] - 99:2	2:37 [1] - 37:13	499A [4] - 136:20, 136:22, 137:5, 137:7
	12:00 [2] - 5:19, 21:19	1:13:07 [1] - 132:17	2:40:55 [3] - 162:1, 162:17, 162:20	49th [1] - 2:15
	12:01:30 [1] - 146:3	1:21 [1] - 34:17	2:41:02 [1] - 162:1	4:21:39 [3] - 159:15, 160:19, 160:20
	12:04:04 [1] - 146:2	1:30 [2] - 25:13, 25:19	2:53 [1] - 32:7	4:22 [1] - 121:19
	12:47 [1] - 20:2	1:38 [1] - 1:7	2:57 [1] - 37:15	4:25 [1] - 148:6
	12:50 [5] - 17:25, 20:5, 20:12, 20:23, 123:3	1:57 [1] - 17:5	2nd [6] - 53:2, 53:8, 57:10, 103:19, 115:18, 115:21	4:38 [1] - 150:19
	12:50:14 [1] - 52:23	1st [2] - 48:20, 52:23	3	4th [2] - 23:14, 143:12
	12:51 [2] - 20:13, 20:24	2	30 [10] - 32:6, 37:18, 78:24, 79:3, 90:17, 90:18, 94:13, 129:5, 130:3, 141:18	5
	12:54 [2] - 122:20, 123:6	2 [1] - 33:23	301 [2] - 64:23, 65:1	50 [3] - 35:9, 73:22, 74:3
	12:55 [2] - 122:8, 122:20	20 [2] - 20:13, 32:6	30th [1] - 48:19	500-84 [2] - 155:9, 161:15
	12:56 [2] - 22:2, 25:13	20001 [2] - 3:4, 167:14	316 [3] - 78:23, 79:1, 80:1	505-10 [1] - 142:11
	12:57 [6] - 18:3, 22:2, 37:6, 37:10, 37:14, 37:18	20005 [1] - 2:4	33012 [1] - 2:15	505-11 [3] - 142:15, 142:18, 143:24
	12th [2] - 69:1, 107:17	201 [4] - 125:19, 125:21, 127:1, 127:3	333 [2] - 3:3, 167:14	509 [2] - 152:6, 152:20
	13 [2] - 75:9, 124:21	2016 [1] - 92:4	354-3269 [2] - 3:4, 167:15	509-23 [2] - 144:6, 144:9
	137 [4] - 149:12, 149:13, 149:22, 149:24	202 [2] - 3:4, 167:15	37 [1] - 40:20	509B [6] - 4:12, 159:5, 160:8, 160:10, 160:25, 161:6
	138 [3] - 149:11, 149:19, 149:23	2020 [1] - 148:4	383 [1] - 2:6	510-48 [1] - 6:20
	13:05 [2] - 65:19, 66:6	2021 [8] - 27:17, 45:8, 52:23, 143:25, 144:23, 145:21, 148:15, 159:15	3:21 [1] - 89:23	512-11 [2] - 148:10, 148:13
	13:05:50 [2] - 65:21, 66:6	2022 [2] - 14:17, 99:12	3:38 [1] - 151:1	512-19 [1] - 7:14
	13:06:03 [1] - 67:3	2023 [2] - 1:7, 167:10	3:38:47 [1] - 148:21	515-11 [4] - 4:11, 145:1, 145:13, 145:17
	13:41 [1] - 76:17	20530 [1] - 1:20	3rd [3] - 143:12, 143:25, 144:3	55 [1] - 35:12
	13:50 [1] - 77:24	20777 [1] - 2:9	4	555 [1] - 1:19
	13th [1] - 148:4	209 [1] - 2:12	40 [2] - 74:3, 75:9	55:00 [1] - 65:20
	1420 [1] - 2:3	21-00175 [1] - 1:4	401G [2] - 132:7, 132:10	59047 [1] - 2:21
	145C [1] - 128:9	21-175 [2] - 5:2, 100:2	403 [5] - 8:5, 8:17, 12:19, 14:11, 120:17	5:05 [1] - 163:1
	145Cx [4] - 128:20, 129:7, 130:25, 131:13	211 [1] - 100:11	41 [2] - 17:25, 20:12	5:06 [1] - 163:7
	14th [6] - 14:17, 49:13, 49:20, 49:23, 69:1, 145:21	21st [3] - 5:9, 5:10, 17:11	417 [1] - 100:11	5:15 [1] - 156:10
	15 [3] - 1:7, 14:17, 83:24	22 [1] - 137:14	42 [1] - 81:7	5th [2] - 143:15, 144:23
	15,000 [1] - 146:7	25 [2] - 129:4, 139:3	425 [4] - 132:22, 135:15, 135:17, 136:5	
	153rd [1] - 2:12	250 [3] - 140:18, 140:21, 141:9	427 [5] - 80:8, 80:10, 80:22, 81:6, 81:15	
		27 [1] - 85:18	445B [1] - 124:20	
		271 [1] - 92:3		

6	52:23, 146:2, 146:3, 146:4, 146:6 ability [13] - 36:3, 60:20, 61:3, 61:9, 61:16, 62:5, 62:7, 62:8, 62:18, 70:21, 70:24, 108:8, 167:7 able [21] - 28:4, 28:12, 36:17, 50:2, 61:20, 83:16, 94:14, 94:20, 96:25, 103:7, 107:11, 115:14, 115:15, 123:25, 124:3, 124:15, 125:13, 133:11, 138:6, 140:12, 161:2 absolutely [2] - 99:5, 130:10 accept [1] - 29:20 access [5] - 63:2, 115:18, 117:5, 118:7, 156:4 accessed [17] - 53:12, 56:10, 56:12, 57:17, 58:22, 90:11, 91:25, 92:16, 96:9, 113:7, 113:15, 116:20, 116:21, 117:18, 118:7, 118:15, 119:15 accessing [2] - 53:2, 57:21 according [2] - 37:18, 160:17 account [1] - 147:7 accurate [13] - 34:4, 35:5, 37:12, 37:20, 38:11, 51:10, 51:17, 51:23, 59:2, 72:20, 76:14, 157:10, 167:4 accurately [1] - 52:9 acid [1] - 9:3 act [3] - 15:19, 15:20, 30:15 acting [2] - 30:15, 114:17 Action [1] - 1:3 action [3] - 151:8, 151:12, 151:15 actions [2] - 32:18, 127:12 activated [5] - 30:14, 30:17, 31:3, 31:5, 31:9 active [1] - 23:2 Acts [2] - 14:18 acts [9] - 14:23, 15:2, 15:10, 16:6, 16:11, 16:13, 101:9, 101:11, 101:18	actual [3] - 69:10, 71:13, 94:21 added [2] - 22:23, 111:6 additionally [1] - 71:9 address [1] - 165:23 adjust [1] - 6:18 admissible [3] - 8:16, 102:8, 102:19 admission [6] - 49:9, 52:12, 66:5, 145:13, 147:13, 159:25 admit [3] - 7:7, 51:18, 100:21 admitted [14] - 9:20, 14:19, 40:20, 40:23, 52:13, 66:11, 101:12, 102:12, 104:22, 112:4, 145:15, 150:8, 150:13, 160:7 admitting [2] - 100:7, 120:14 advance [1] - 17:9 afar [1] - 133:12 affect [2] - 74:19, 156:14 affected [1] - 156:15 affects [1] - 156:10 affiliated [5] - 28:17, 45:24, 46:11, 46:20, 74:8 after-action [3] - 151:8, 151:12, 151:15 afternoon [6] - 5:9, 5:15, 47:23, 47:24, 157:16 AFTERNOON [1] - 1:12 afterwards [1] - 59:4 Agent [25] - 47:18, 47:23, 49:2, 52:3, 52:18, 55:17, 57:8, 58:19, 59:16, 62:18, 65:3, 70:15, 73:12, 76:10, 84:5, 89:25, 115:16, 115:23, 122:3, 126:19, 130:21, 155:11, 159:8, 160:17, 162:16 agent [5] - 59:21, 59:25, 68:22, 143:10, 163:2 ago [16] - 47:7, 47:11, 53:10, 54:7, 54:10, 54:13, 55:7, 56:1, 56:11, 92:16, 96:5, 96:8, 99:13, 114:11, 114:15, 114:20	agree [13] - 13:5, 13:24, 15:7, 39:25, 61:25, 94:6, 110:15, 118:6, 119:2, 119:3, 164:4, 164:10, 165:22 agreed [2] - 97:13, 129:23 agreeing [1] - 118:14 agreement [1] - 119:5 agrees [1] - 15:25 ahead [5] - 11:2, 54:11, 69:21, 150:19, 153:2 aid [3] - 111:18, 112:11, 112:12 air [1] - 89:8 AJ [5] - 145:8, 146:20, 146:22, 147:10 al [2] - 5:3, 100:3 allegations [3] - 29:23, 30:1, 99:4 alleged [5] - 14:18, 14:23, 16:20, 101:9, 101:11 allegedly [2] - 28:10, 101:22 allow [5] - 31:15, 76:7, 109:15, 118:20, 143:19 allowed [3] - 55:19, 102:22, 108:1 almost [1] - 32:6 alone [1] - 157:9 ambushed [2] - 54:8, 96:13 Amendment [1] - 108:12 America [2] - 5:2, 100:2 AMERICA [1] - 1:3 amount [3] - 17:19, 36:13, 70:17 analysis [2] - 15:7, 58:9 Anderson [13] - 14:15, 14:21, 14:22, 15:10, 15:16, 16:5, 16:11, 100:9, 100:10, 100:23, 101:16, 102:10, 102:24 angle [2] - 81:25, 82:2 animal [1] - 8:4 animals [1] - 119:14 animosity [2] - 107:11 answer [15] - 21:3, 46:3, 46:16, 46:25,	47:1, 61:19, 94:21, 95:19, 97:2, 98:14, 99:14, 135:8, 165:9, 165:16, 165:21 Anthony [2] - 89:3, 89:4 anytime [1] - 89:19 anyway [5] - 65:4, 69:22, 109:8, 111:15, 165:24 apart [1] - 60:2 apologies [2] - 76:6, 84:3 appear [3] - 115:22, 124:17, 133:8 appearance [1] - 66:3 APPEARANCES [1] - 2:1 aPPEARANCES [1] - 1:15 appellation [1] - 12:18 apple [1] - 40:12 application [1] - 119:21 applied [1] - 101:20 appointment [2] - 5:8, 5:12 appreciate [1] - 156:14 approach [1] - 103:18 approaching [2] - 19:17, 20:13 appropriate [1] - 119:21 area [8] - 20:14, 32:5, 33:5, 37:8, 39:10, 99:8, 129:24, 130:12 argue [9] - 56:25, 62:1, 69:5, 95:9, 105:14, 112:2, 114:16, 114:17, 114:18 argued [1] - 112:2 arguing [1] - 69:6 argument [9] - 11:15, 11:16, 12:25, 69:12, 90:8, 99:22, 101:17, 101:18, 104:20 argumentative [1] - 151:18 arguments [3] - 13:12, 15:13, 105:20 arises [1] - 101:2 arm [7] - 43:21, 45:3, 139:21, 139:24,
7				
7166 [1] - 2:9 7th [3] - 8:15, 10:7, 126:15				
8				
801(d)(2)(E) [1] - 100:14 844 [1] - 92:3 8:58:25 [1] - 146:4				
9				
909 [1] - 1:23 99 [1] - 2:18 9:00 [2] - 163:6, 166:5 9:20:27 [1] - 144:14 9:25 [1] - 115:18 9:25:22 [2] - 117:15, 118:6 9:26 [1] - 115:20 9:30 [1] - 57:18				
A				
a.m [7] - 19:7, 19:10,				

<p>139:25, 141:2, 141:14 arms [1] - 131:24 arrived [4] - 20:5, 20:14, 20:18, 20:21 arrow [1] - 88:22 arrows [1] - 147:20 articulated [1] - 83:4 aspect [1] - 101:6 assault [2] - 29:23, 127:13 asserted [5] - 100:20, 102:5, 104:21, 105:6, 120:16 asserting [1] - 91:25 assignment [1] - 46:1 associated [3] - 45:13, 46:24, 122:8 assume [3] - 5:22, 68:15, 157:12 assuming [4] - 106:4, 113:3, 121:11, 158:12 AT&T [1] - 103:9 attached [2] - 110:23, 160:5 attachment [6] - 159:22, 159:25, 160:2, 160:3, 160:14, 160:23 attempted [1] - 99:6 attention [2] - 126:20, 130:22 attorney [2] - 64:14, 98:20 Attorney [2] - 17:21, 40:15 ATTORNEYS [1] - 1:18 attorneys [1] - 51:5 audio [2] - 71:12, 160:5 available [8] - 58:22, 108:11, 108:15, 108:17, 118:16, 118:21, 164:25, 165:1 Avenue [3] - 2:18, 3:3, 167:14 avoiding [1] - 12:12 aware [4] - 31:13, 32:16, 33:16, 58:9</p>	<p>bad [1] - 62:11 balancing [1] - 124:16 bandanna [1] - 65:8 bar [1] - 146:7 barricade [2] - 38:3, 41:19 barrier [2] - 41:11, 41:15 barriers [1] - 128:4 based [8] - 27:6, 27:24, 30:1, 50:12, 51:7, 105:12, 140:12, 164:8 basis [6] - 9:19, 28:14, 58:25, 99:11, 100:6, 114:12 beanie [1] - 65:7 bear [1] - 42:7 Beard [1] - 144:17 bears [1] - 98:18 became [1] - 97:19 bed [1] - 13:4 BEFORE [1] - 1:12 beforehand [1] - 69:18 begin [1] - 17:8 beginning [5] - 56:9, 76:10, 88:5, 88:8, 95:6 behalf [1] - 123:23 behind [1] - 79:14 behoove [1] - 97:12 behooves [1] - 97:11 belief [1] - 30:14 bench [1] - 97:7 beneath [1] - 111:12 benefit [1] - 91:4 Bertino [11] - 22:18, 22:20, 22:23, 48:1, 48:3, 48:9, 48:21, 48:22, 114:7, 114:10, 144:17 best [3] - 114:23, 123:12, 167:7 better [1] - 165:12 between [19] - 16:6, 16:9, 17:24, 19:6, 19:10, 26:19, 48:15, 80:5, 90:12, 94:13, 107:16, 117:4, 128:13, 131:15, 133:21, 134:1, 134:9, 145:8, 156:21 beyond [13] - 15:2, 27:14, 28:19, 28:21, 29:14, 30:1, 83:1, 83:6, 110:3, 129:19, 130:13, 134:13, 134:17</p>	<p>big [1] - 104:24 BIGGS [2] - 1:6, 2:3 Biggs [6] - 86:16, 139:12, 147:11, 147:12, 148:1 Biggs's [2] - 86:24, 147:8 bit [7] - 20:19, 35:8, 36:6, 45:10, 69:25, 86:10, 164:8 black [5] - 65:7, 85:11, 128:7, 158:14 blank [1] - 146:17 blew [1] - 138:21 blindsided [2] - 54:8, 54:10 blown [1] - 121:10 blue [1] - 65:8 blurted [1] - 93:6 blurting [1] - 91:16 body [1] - 141:4 bologna [1] - 134:23 bomb [1] - 146:12 Bones [3] - 155:14, 161:20, 162:12 Boots [7] - 8:7, 8:14, 10:6, 10:14, 22:17, 22:22, 148:15 bootstrapping [1] - 107:5 bother [3] - 61:13, 61:15, 61:23 bottle [2] - 29:17, 127:13 bottles [1] - 28:11 bottom [2] - 128:18, 130:22 boundaries [1] - 11:10 box [1] - 164:16 Boy [9] - 45:13, 46:24, 47:3, 47:8, 47:10, 47:12, 47:15, 85:14, 144:18 boy [3] - 124:20, 159:5, 160:10 Boys [22] - 28:17, 29:10, 32:23, 45:10, 45:13, 45:19, 45:21, 45:22, 45:24, 46:11, 46:24, 64:3, 69:7, 69:8, 69:13, 74:7, 74:8, 81:21, 83:16, 89:5 breach [10] - 18:18, 20:14, 20:19, 21:2, 21:9, 38:4, 81:24, 82:2, 83:17, 136:17 breached [4] - 20:9, 41:11, 41:15, 128:7</p>	<p>break [19] - 59:5, 70:8, 70:9, 89:18, 89:21, 91:2, 91:5, 94:2, 94:5, 94:24, 95:14, 96:25, 99:19, 103:1, 104:11, 112:22, 113:23, 163:1, 163:14 briefing [1] - 114:4 briefly [5] - 27:1, 41:7, 64:23, 108:23, 139:4 bring [15] - 5:5, 6:12, 17:3, 48:24, 64:23, 75:8, 98:5, 99:6, 108:8, 108:11, 121:16, 121:17, 121:25, 132:7, 135:10 bringing [1] - 164:20 broad [4] - 27:23, 29:21, 45:11 Broadway [1] - 1:23 brought [5] - 12:1, 92:6, 92:9, 98:8, 114:9 browser [1] - 113:17 building [14] - 24:22, 25:1, 25:9, 25:16, 31:4, 31:12, 31:16, 31:19, 31:23, 32:11, 32:14, 37:13, 40:5, 68:17 bump [2] - 130:6, 130:11 burgers [1] - 146:12 burn [2] - 13:15, 56:25 burning [3] - 12:23, 13:13, 117:25 business [1] - 146:9 businesses [1] - 145:25 buy [1] - 146:10 BY [151] - 3:1, 17:18, 19:4, 22:11, 23:21, 24:5, 24:19, 24:24, 26:12, 30:10, 30:20, 31:10, 32:4, 33:4, 34:1, 34:21, 35:1, 35:20, 39:9, 39:23, 41:6, 42:1, 42:12, 42:18, 42:22, 43:9, 43:18, 44:2, 44:7, 44:13, 44:19, 46:18, 47:22, 49:1, 52:2, 52:17, 57:7, 59:15, 62:17, 63:1, 63:7, 64:19, 65:2, 65:15, 66:1, 66:18, 67:5, 67:18, 68:1, 70:13,</p>	<p>71:4, 71:23, 73:11, 75:12, 75:21, 76:9, 76:21, 77:5, 77:17, 78:3, 78:8, 78:18, 79:5, 80:3, 80:11, 80:24, 81:8, 81:17, 82:8, 84:4, 84:21, 85:10, 85:22, 86:6, 86:14, 86:23, 87:7, 87:16, 88:1, 88:7, 88:18, 122:2, 122:16, 123:19, 124:14, 125:3, 125:12, 125:22, 126:11, 126:18, 127:5, 127:16, 127:24, 128:11, 128:21, 129:9, 130:20, 131:2, 131:14, 131:20, 132:3, 132:11, 132:23, 135:18, 136:7, 136:23, 137:6, 137:17, 138:5, 138:17, 139:8, 139:20, 140:9, 140:22, 141:11, 141:21, 142:7, 142:20, 143:23, 144:10, 144:21, 145:3, 145:19, 147:4, 147:23, 148:14, 148:19, 149:8, 150:17, 150:24, 151:21, 152:9, 152:23, 153:8, 153:13, 153:22, 154:3, 154:7, 154:11, 154:15, 154:19, 154:23, 155:10, 159:7, 159:17, 160:16, 161:1, 161:10, 161:16, 162:2, 162:15</p>
B				C
<p>B.A [1] - 1:16 back-and-forths [1] - 100:7 backwards [1] - 141:23</p>				
				<p>cache [1] - 113:16 Cain [5] - 56:23, 57:23, 58:6, 58:19, 113:5 calculations [1] - 103:24 calculus [1] - 106:9 camera [2] - 42:7, 125:13 camouflage [1] - 136:9 camp [1] - 113:8 candidly [1] - 103:16 cannot [2] - 5:8,</p>

<p>111:16 cap [1] - 65:7 Capitol [17] - 9:11, 32:10, 39:25, 45:1, 45:4, 75:5, 75:22, 75:24, 77:7, 77:10, 79:12, 83:9, 127:20, 134:20, 147:25, 161:3, 161:7 caps [1] - 11:13 captured [1] - 37:7 CARMEN [1] - 2:8 case [35] - 9:18, 12:10, 12:11, 12:14, 12:18, 15:16, 15:17, 27:17, 51:5, 56:9, 60:14, 60:17, 85:4, 92:4, 93:5, 94:20, 95:6, 100:9, 100:11, 100:12, 101:20, 102:22, 104:24, 105:14, 107:13, 108:13, 109:12, 110:1, 111:18, 113:24, 116:12, 118:16, 120:18, 121:14, 165:10 cases [2] - 12:15, 45:14 cat [1] - 128:10 category [1] - 12:4 Celebrite [3] - 50:11, 52:20, 116:18 center [1] - 130:23 central [1] - 90:6 certain [5] - 5:12, 23:3, 29:13, 37:17, 60:9 certainly [4] - 14:6, 14:7, 69:6, 105:12 CERTIFICATE [1] - 167:1 certify [1] - 167:4 cetera [1] - 146:12 challenge [1] - 15:3 challenged [2] - 93:6, 130:1 chance [2] - 6:16, 67:11 changed [1] - 27:24 changes [1] - 106:9 characterize [1] - 12:8 characterized [1] - 12:15 charge [1] - 11:25 charged [4] - 101:1, 101:23, 102:9, 102:20 Charles [1] - 148:20 chat [32] - 8:15, 10:6,</p>	<p>10:14, 143:24, 144:4, 144:12, 144:24, 144:25, 145:10, 145:20, 151:4, 152:13, 155:1, 155:2, 155:12, 155:15, 155:17, 155:21, 156:4, 158:11, 158:18, 158:19, 158:22, 158:23, 159:6, 159:15, 159:18, 159:25, 161:18, 161:20, 162:5, 162:18 chats [12] - 22:13, 22:14, 22:20, 23:2, 142:8, 142:9, 148:5, 148:8, 148:23, 149:3, 149:9 check [3] - 75:24, 77:9, 145:25 chicken [1] - 146:12 chief [2] - 12:10, 118:17 Chrome [2] - 52:24, 113:17 CHS [11] - 59:21, 60:21, 61:12, 61:13, 105:13, 107:23, 108:3, 108:9, 108:11, 108:14, 109:8 CHS's [1] - 163:16 CHSs [2] - 62:19, 105:15 Circle [8] - 20:21, 80:6, 81:24, 91:10, 91:14, 91:15, 123:4, 128:1 circle [10] - 42:24, 66:19, 80:14, 84:12, 84:24, 85:11, 88:11, 124:5, 131:5, 137:23 circled [4] - 30:22, 32:14, 32:21, 32:23 circles [3] - 125:24, 126:2, 126:7 circling [1] - 33:15 Circuit [5] - 85:4, 92:3, 109:12, 110:1, 111:18 circumstance [1] - 165:4 cite [1] - 13:12 citing [1] - 93:9 claim [1] - 98:5 claimed [2] - 72:24, 133:24 claims [1] - 133:19 clarify [6] - 18:25, 54:1, 58:16, 59:7,</p>	<p>104:2, 160:13 clarifying [1] - 143:18 classic [1] - 55:3 clear [8] - 33:2, 42:25, 59:16, 80:16, 98:7, 100:10, 114:4, 147:20 clearly [1] - 10:2 clicks [1] - 54:3 client [5] - 95:16, 96:10, 113:7, 133:19, 156:19 client's [1] - 133:20 climbing [1] - 136:17 clip [1] - 75:13 close [7] - 48:3, 48:6, 59:25, 60:2, 123:8, 123:10, 141:3 closed [5] - 101:3, 101:6, 101:10, 101:15, 102:20 closer [1] - 143:14 closing [3] - 69:4, 91:13, 105:21 cloud [1] - 119:20 cluttered [1] - 11:6 co [23] - 14:5, 14:19, 14:20, 14:23, 15:6, 16:7, 16:10, 16:17, 16:20, 17:1, 100:14, 100:18, 100:19, 100:22, 100:25, 101:9, 101:12, 101:19, 101:21, 101:22, 102:14, 102:17, 156:23 co-conspirator [15] - 14:5, 14:19, 14:23, 15:6, 16:7, 16:10, 16:17, 17:1, 100:14, 100:18, 100:25, 101:12, 101:19, 102:14, 156:23 co-conspirator's [1] - 100:19 co-conspirators [7] - 14:20, 16:20, 100:22, 101:9, 101:21, 101:22, 102:17 Coast [1] - 160:20 coat [2] - 139:22, 139:23 cocktails [1] - 146:11 colleagues [1] - 12:17 COLUMBIA [2] - 1:1, 1:19 Columbia [2] - 3:2,</p>	<p>167:13 comfortable [1] - 71:6 coming [7] - 13:19, 31:22, 33:8, 122:3, 128:12, 132:24, 136:24 committed [1] - 46:7 communicate [3] - 28:13, 36:3, 36:20 communicated [3] - 10:11, 28:2, 28:5 communicating [2] - 26:1, 36:18 communication [7] - 21:12, 23:24, 27:8, 32:13, 32:17, 33:14, 95:11 communications [6] - 23:9, 24:8, 26:19, 28:6, 30:4, 31:14 compare [3] - 66:3, 84:5, 141:12 compared [1] - 72:14 compassionate [2] - 157:18, 163:11 compassionate.. [1] - 157:17 competent [1] - 116:22 complete [2] - 59:6, 167:6 completed [1] - 59:5 completely [1] - 7:13 complicated [2] - 100:17, 117:11 complies [9] - 66:21, 80:15, 84:13, 84:25, 88:12, 124:6, 131:6, 137:24, 143:4 component [1] - 109:1 comport [1] - 115:22 Computer [1] - 113:5 computer [6] - 54:14, 54:17, 58:4, 95:24, 113:12, 119:3 conceded [1] - 94:7 concept [1] - 105:1 concern [1] - 55:4 concerning [1] - 105:17 concerns [3] - 106:16, 107:2, 107:16 concluded [2] - 102:3, 166:7 conclusion [5] - 30:18, 54:23, 72:6, 72:7, 113:6 conclusive [1] -</p>	<p>104:4 conducted [1] - 52:22 confer [3] - 97:7, 112:21, 120:4 conferred [1] - 115:20 confers [1] - 40:17 confess [1] - 97:1 confident [11] - 70:24, 71:20, 71:24, 72:8, 72:15, 72:18, 72:20, 73:1, 73:6, 73:12 confidential [4] - 60:10, 67:7, 69:7, 69:8 confirm [1] - 43:1 conflated [1] - 7:19 conflict [1] - 5:15 confusing [3] - 11:8, 15:16, 36:6 congratulated [1] - 129:25 Connecticut [1] - 2:7 connection [1] - 11:12 CONOR [1] - 1:17 consciousness [1] - 8:21 consider [1] - 13:17 considered [2] - 13:1, 29:25 considers [1] - 15:25 consistent [1] - 72:10 conspiracy [21] - 14:21, 14:24, 15:11, 15:21, 16:3, 16:13, 16:24, 69:9, 91:23, 100:15, 101:1, 101:6, 101:14, 101:15, 101:24, 102:9, 102:15, 102:18, 102:20, 105:18 conspirator [15] - 14:5, 14:19, 14:23, 15:6, 16:7, 16:10, 16:17, 17:1, 100:14, 100:18, 100:25, 101:12, 101:19, 102:14, 156:23 conspirator's [1] - 100:19 conspirators [9] - 14:20, 16:20, 100:22, 101:9, 101:13, 101:21, 101:22, 102:1, 102:17 constitutes [1] -</p>
---	--	--	--	--

<p>167:4 Constitution [2] - 3:3, 167:14 CONT'D [1] - 2:1 contact [1] - 151:25 contemporaneous y [1] - 107:25 content [12] - 68:14, 68:16, 153:5, 153:25, 154:5, 154:9, 154:13, 154:17, 154:21, 154:25, 163:25, 165:5 contention [2] - 90:7, 90:8 contents [2] - 146:17, 155:7 contest [1] - 101:23 contested [1] - 110:3 contestation [1] - 90:6 context [3] - 8:13, 61:19 continue [5] - 13:3, 109:25, 110:13, 146:1, 157:25 CONTINUED [1] - 17:17 continuing [3] - 109:11, 111:7, 162:11 contradict [1] - 133:25 contrary [1] - 133:10 control [1] - 152:18 control-F [1] - 152:18 conversation [1] - 145:6 conversations [5] - 27:6, 27:24, 60:3, 60:6, 156:20 cooperation [1] - 62:6 copy [3] - 18:11, 49:2, 49:24 correct [87] - 16:19, 18:1, 19:9, 20:10, 20:25, 21:18, 21:21, 22:1, 22:7, 22:15, 22:16, 22:18, 23:2, 24:9, 25:1, 25:4, 25:8, 25:10, 25:11, 25:17, 30:12, 30:13, 30:16, 32:10, 32:15, 32:19, 32:24, 33:5, 33:8, 33:11, 33:12, 34:8, 36:14, 36:25, 37:1, 37:2, 37:3, 37:4, 37:5, 38:14, 38:18, 38:21, 38:25, 39:10, 39:12, 39:16, 41:8, 41:9, 43:12, 43:20, 44:14,</p>	<p>45:19, 45:21, 55:16, 56:16, 56:17, 58:4, 58:5, 68:16, 71:18, 78:5, 81:18, 82:3, 82:24, 86:17, 97:12, 97:22, 98:2, 98:3, 103:3, 106:4, 112:10, 115:8, 118:4, 122:10, 123:2, 123:7, 124:9, 124:10, 134:17, 137:2, 151:1, 151:2, 151:14, 154:17, 161:13, 161:18 Correct [1] - 97:23 correctly [2] - 8:20, 107:9 counsel [8] - 9:18, 11:22, 13:3, 62:2, 73:15, 120:4, 156:5, 162:7 count [1] - 135:1 counter [3] - 67:4, 118:23, 118:24 counting [1] - 157:15 couple [19] - 5:20, 13:22, 21:5, 21:7, 41:7, 47:25, 67:6, 71:16, 71:18, 73:15, 74:6, 75:16, 84:17, 92:15, 100:10, 127:13, 140:5, 141:7, 163:13 coupled [1] - 10:1 course [12] - 22:25, 26:13, 26:17, 27:20, 27:25, 36:16, 45:7, 45:25, 72:22, 94:12, 116:5, 163:16 COURT [213] - 1:1, 5:4, 5:22, 6:2, 6:7, 6:10, 8:24, 9:17, 10:13, 10:24, 11:1, 11:15, 12:5, 12:20, 13:5, 13:15, 14:25, 15:4, 15:15, 16:15, 16:20, 17:2, 17:7, 19:2, 23:20, 24:4, 26:9, 26:22, 26:25, 27:4, 27:11, 28:5, 28:19, 29:1, 29:12, 29:18, 30:2, 30:19, 31:8, 40:16, 40:23, 47:20, 49:14, 49:17, 50:4, 50:17, 50:24, 51:1, 51:8, 51:12, 51:21, 52:13, 53:19, 53:22, 54:9, 54:18, 55:10, 55:12, 55:21, 56:2, 56:6, 56:14, 56:24, 58:11, 59:3,</p>	<p>61:4, 61:18, 61:22, 62:2, 62:12, 62:23, 63:5, 64:13, 64:15, 66:10, 66:15, 67:15, 67:23, 68:7, 68:11, 68:19, 69:16, 69:21, 69:23, 70:7, 71:2, 72:1, 72:11, 72:19, 73:8, 76:3, 76:7, 78:7, 79:23, 82:16, 82:23, 83:4, 83:7, 83:12, 83:18, 85:6, 89:16, 89:19, 89:20, 89:25, 90:2, 90:7, 90:22, 91:20, 92:24, 93:4, 93:20, 93:23, 94:17, 95:2, 95:4, 95:8, 96:2, 96:6, 96:15, 96:21, 97:6, 97:14, 98:7, 98:13, 98:23, 99:17, 99:23, 100:4, 104:1, 104:7, 104:12, 105:22, 106:11, 107:19, 108:16, 108:20, 109:3, 109:6, 109:9, 109:13, 109:16, 110:4, 110:12, 110:15, 111:14, 111:20, 112:14, 112:19, 113:20, 114:13, 115:6, 115:8, 116:4, 117:7, 117:22, 118:9, 118:11, 118:18, 119:5, 119:8, 119:23, 120:1, 120:10, 121:1, 121:21, 123:14, 127:4, 127:15, 130:15, 131:18, 132:2, 133:3, 133:6, 133:13, 133:15, 133:23, 134:4, 134:15, 134:21, 135:12, 143:16, 145:15, 147:1, 147:19, 149:17, 149:25, 150:2, 150:7, 150:11, 150:13, 151:20, 156:5, 156:9, 156:25, 157:11, 157:18, 157:22, 157:25, 158:8, 158:24, 160:3, 160:6, 160:15, 162:9, 162:13, 162:25, 163:5, 163:9, 163:13, 165:14, 165:18, 166:4 Court [48] - 3:1, 3:2, 11:21, 12:19, 14:14, 14:17, 15:1, 15:8, 15:9, 15:14, 49:23,</p>	<p>55:16, 55:19, 58:18, 68:18, 69:20, 72:23, 89:17, 90:19, 94:6, 96:24, 97:5, 98:20, 98:25, 100:11, 100:13, 101:5, 101:20, 101:25, 102:3, 102:7, 103:25, 105:19, 105:20, 106:4, 107:8, 107:10, 108:6, 108:10, 109:2, 109:14, 110:19, 111:8, 112:5, 135:11, 157:3, 167:12, 167:13 court [103] - 5:21, 19:3, 24:18, 29:3, 30:9, 32:3, 33:25, 34:20, 35:11, 35:15, 35:18, 39:8, 39:22, 41:5, 41:24, 42:10, 42:17, 43:7, 43:16, 43:24, 44:6, 44:12, 52:1, 57:6, 59:14, 62:16, 65:1, 66:17, 67:1, 70:12, 73:10, 75:11, 75:19, 76:19, 77:3, 77:15, 78:2, 78:17, 79:1, 80:1, 80:10, 80:22, 81:6, 81:15, 82:7, 82:14, 83:22, 84:1, 84:19, 85:8, 85:20, 86:4, 86:13, 86:21, 87:4, 87:14, 87:22, 88:16, 89:14, 89:21, 94:1, 100:23, 100:24, 101:21, 102:1, 122:14, 123:18, 124:13, 124:23, 125:2, 125:10, 125:21, 128:20, 129:7, 130:17, 130:25, 131:13, 132:10, 135:10, 135:14, 135:17, 136:5, 136:22, 137:5, 137:16, 138:3, 138:15, 139:6, 139:18, 140:8, 140:21, 141:9, 141:20, 142:5, 142:18, 143:22, 144:9, 147:22, 148:13, 158:3, 159:3, 160:25, 161:6 Court's [5] - 14:15, 14:16, 15:7, 105:10, 107:9 COURTROOM [13] - 5:1, 17:4, 40:10, 40:12, 100:1, 121:18,</p>	<p>142:13, 142:16, 143:4, 147:15, 149:20, 150:1, 160:10 courtroom [6] - 12:24, 17:5, 89:23, 98:1, 121:19, 163:7 cover [1] - 6:1 covered [2] - 6:23, 61:6 created [9] - 22:17, 22:21, 51:5, 53:11, 57:16, 93:7, 99:12, 113:16, 119:13 creating [4] - 48:11, 48:17, 53:1, 57:20 credibility [3] - 114:3, 114:5, 114:7 crime [1] - 46:7 Criminal [3] - 1:3, 5:2, 100:2 CROSS [1] - 17:17 cross [41] - 9:5, 9:6, 9:8, 9:16, 9:19, 9:22, 54:19, 55:18, 55:19, 58:3, 58:25, 61:7, 61:11, 61:14, 61:21, 64:1, 64:2, 66:9, 72:22, 72:23, 79:7, 83:1, 93:1, 93:6, 93:14, 93:18, 94:8, 94:10, 96:12, 97:18, 98:8, 99:8, 107:3, 107:6, 109:20, 117:7, 117:8, 129:19, 134:8, 134:11, 134:18 Cross [1] - 4:3 cross-examination [16] - 58:3, 58:25, 72:23, 79:7, 93:18, 94:8, 94:10, 96:12, 98:8, 99:8, 107:3, 109:20, 129:19, 134:8, 134:11, 134:18 CROSS-EXAMINATION [1] - 17:17 cross-examine [6] - 9:5, 9:6, 9:8, 9:16, 9:19, 9:22 cross-examined [1] - 72:22 crossed [8] - 54:20, 54:24, 56:1, 83:11, 83:12, 96:2, 96:3, 128:4 crowd [1] - 133:20 CRR [3] - 3:1, 167:3, 167:12 crushing [1] - 125:16 current [2] - 49:25,</p>
---	---	--	---	--

67:15 cut [3] - 69:19, 95:8, 158:16	1:8, 10:12, 10:14, 11:12, 12:9, 21:13, 21:17, 21:19, 21:24, 23:9, 23:24, 28:20, 36:18, 38:19, 38:23, 39:2, 45:20, 45:21, 71:14, 113:23 defense [13] - 9:18, 11:22, 13:3, 14:6, 55:5, 55:13, 69:5, 74:23, 92:22, 94:19, 98:21, 105:14, 164:25 Defense [1] - 143:11 definitely [2] - 121:15, 146:4 Degree [2] - 146:20, 146:22 degree [1] - 113:21 deleted [1] - 157:10 demeanor [1] - 138:8 demonstrative [1] - 79:14 deny [1] - 157:22 department [1] - 138:11 depict [1] - 52:9 depicted [2] - 30:16, 32:18 DEPUTY [13] - 5:1, 17:4, 40:10, 40:12, 100:1, 121:18, 142:13, 142:16, 143:4, 147:15, 149:20, 150:1, 160:10 describe [6] - 48:10, 51:23, 65:6, 89:6, 139:23, 141:1 describing [1] - 107:24 designation [1] - 11:6 desks [1] - 60:2 detail [1] - 67:20 determine [3] - 15:21, 16:3, 140:13 determining [1] - 16:24 devices [2] - 71:12, 71:13 dice [1] - 37:9 dictate [1] - 47:17 difference [3] - 106:15, 117:4, 163:16 different [16] - 13:9, 13:22, 16:21, 36:7, 45:15, 49:11, 56:19, 56:22, 60:14, 71:18, 77:19, 109:19, 109:21, 119:14, 119:19, 119:25	Direct [1] - 4:3 direct [22] - 23:23, 24:8, 26:19, 27:15, 28:24, 29:13, 54:19, 55:17, 63:25, 64:2, 76:10, 90:15, 98:16, 99:9, 99:18, 112:7, 112:13, 126:3, 126:7, 126:20, 130:21, 139:11 direction [3] - 44:21, 45:4, 138:21 directly [5] - 16:17, 26:1, 28:2, 28:5, 52:5 disagree [1] - 16:25 disagreed [1] - 14:14 disagreement [1] - 58:9 discovered [4] - 55:5, 55:7, 99:13, 114:14 discovery [3] - 54:6, 92:11, 96:9 discrepancy [1] - 97:10 discretionary [1] - 92:5 discuss [3] - 58:20, 96:22, 104:14 discussed [6] - 75:13, 90:22, 94:4, 100:12, 100:13, 148:23 discussing [2] - 91:1, 91:5 discussion [2] - 108:21, 121:3 disposition [1] - 105:2 dispute [1] - 116:7 distinction [6] - 16:5, 16:9, 16:11, 16:16, 106:1, 107:7 distinguished [1] - 100:13 distinguishes [1] - 15:13 district [1] - 167:13 DISTRICT [4] - 1:1, 1:1, 1:13, 1:19 District [3] - 3:2, 3:2, 167:13 document [50] - 48:1, 48:5, 48:12, 48:13, 48:19, 50:5, 51:10, 52:5, 53:2, 54:16, 55:8, 56:10, 56:19, 56:20, 57:9, 57:16, 57:21, 58:6, 90:5, 90:11, 91:22,	91:25, 93:8, 95:6, 95:12, 95:16, 95:17, 95:20, 95:21, 95:23, 95:24, 96:1, 96:9, 97:21, 99:12, 104:25, 112:22, 113:6, 113:12, 113:14, 114:11, 115:15, 116:19, 116:23, 117:5, 117:18, 117:19, 118:7, 118:8, 118:15 document's [1] - 55:14 dog [3] - 24:21, 34:11 Dom [1] - 44:17 domestic [12] - 7:23, 8:3, 8:10, 8:11, 8:12, 8:21, 9:7, 9:10, 11:3, 11:13, 12:3, 12:16 DOMINIC [1] - 1:7 Dominic [6] - 42:14, 43:12, 79:11, 122:18, 132:20, 144:2 done [8] - 27:19, 49:18, 55:1, 108:13, 114:6, 120:24, 121:2, 126:3 Donohoe [20] - 25:20, 25:22, 25:25, 26:1, 26:4, 26:15, 26:18, 26:19, 27:6, 28:7, 28:9, 28:10, 28:15, 29:9, 30:11, 30:14, 37:2, 38:16, 39:2, 148:20 Donohoe's [3] - 127:13, 150:25, 151:3 door [2] - 70:6, 99:14 double [3] - 6:23, 7:5, 7:8 doubt [1] - 72:11 down [31] - 21:22, 21:23, 34:6, 34:9, 36:8, 39:5, 39:10, 42:25, 62:2, 67:2, 84:15, 89:25, 98:21, 103:20, 117:13, 122:22, 126:17, 126:25, 140:2, 141:6, 143:3, 143:15, 144:7, 146:14, 146:16, 148:17, 152:7, 159:15, 161:25, 163:2 dozen [1] - 11:24 dozens [1] - 74:2 draped [2] - 139:25, 141:14 drawing [2] - 125:24,	126:7 drawn [1] - 88:22 drew [3] - 16:6, 16:11, 126:2 Drive [1] - 2:21 drop [1] - 7:12 Dubrowski [4] - 95:25, 97:18, 97:23, 97:25 during [12] - 19:6, 21:11, 22:25, 27:25, 36:16, 91:2, 91:5, 93:6, 95:14, 102:17, 102:21, 112:21 duties [2] - 45:25, 46:12
D			E	
D.C [11] - 1:6, 1:20, 2:4, 3:4, 85:4, 92:2, 92:4, 109:12, 110:1, 111:18, 167:14 dangling [1] - 164:8 dark [1] - 65:8 data [4] - 52:5, 52:9, 92:16, 93:12 date [28] - 49:8, 49:12, 49:17, 49:18, 49:19, 49:23, 50:2, 50:4, 50:6, 51:2, 51:15, 53:6, 53:7, 53:8, 57:9, 103:17, 103:18, 103:19, 103:21, 103:22, 105:13, 143:24, 144:22, 145:20, 148:3 Dated [1] - 167:10 dates [1] - 142:9 DAVID [1] - 1:22 DAY [1] - 1:11 days [3] - 47:7, 47:11, 156:22 deal [2] - 70:8, 108:13 dealing [1] - 102:23 debate [1] - 115:24 December [7] - 14:17, 48:16, 48:19, 69:1, 107:16, 148:4 decent [1] - 17:19 decided [2] - 12:25, 13:2 deciding [1] - 134:24 decision [1] - 105:24 decisions [1] - 135:10 declarant [1] - 9:6 declaration [1] - 101:2 declarations [1] - 100:24 Defendant [6] - 4:13, 16:1, 64:25, 78:25, 79:25, 150:15 defendant [1] - 15:19 DEFENDANT [6] - 1:22, 2:2, 2:8, 2:11, 2:17, 6:5 Defendant's [1] - 16:23 Defendants [20] -			ear [3] - 41:10, 86:24, 87:17 earphone [1] - 36:19 earphones [1] - 36:3 earpiece [1] - 35:4 east [1] - 75:4 East [2] - 2:21, 160:20 Eastern [1] - 115:18 edgewise [1] - 95:4 edited [4] - 95:23, 96:10, 113:15, 118:15 Edwards [1] - 167:12 EDWARDS [2] - 3:1, 167:3 effect [2] - 13:23, 95:18 effort [1] - 62:22 eight [2] - 64:24, 87:2 either [5] - 5:22, 27:12, 106:7, 111:3, 163:17 elders [1] - 155:15 election [1] - 101:23 electronic [1] - 114:22 elephant [1] - 87:19 Eleventh [1] - 1:20 elicit [8] - 68:16, 98:15, 98:17, 107:15, 108:3, 108:19, 120:8, 121:8 elicited [9] - 90:9, 90:21, 90:24, 92:12, 94:10, 99:18, 133:25, 143:9, 158:18 elicits [1] - 134:12 email [2] - 57:23, 58:1	

<p>emails ^[1] - 95:13</p> <p>embarrassed ^[1] - 10:3</p> <p>encompasses ^[2] - 27:22, 28:25</p> <p>end ^[8] - 6:14, 7:2, 38:3, 79:16, 92:7, 97:17, 102:17, 105:14</p> <p>ended ^[3] - 74:18, 101:15, 101:24</p> <p>ends ^[4] - 25:3, 38:8, 38:9, 48:19</p> <p>enforce ^[1] - 98:20</p> <p>enforcement ^[1] - 69:14</p> <p>Enrique ^[14] - 57:11, 57:15, 115:21, 144:12, 144:18, 152:16, 152:18, 154:12, 154:16, 154:20, 154:24, 161:9, 162:17, 162:20</p> <p>ENRIQUE ^[1] - 1:7</p> <p>ensure ^[1] - 50:1</p> <p>enter ^[5] - 22:7, 25:9, 62:7, 104:2, 104:3</p> <p>entered ^[20] - 17:5, 22:6, 23:14, 24:22, 25:1, 25:4, 25:5, 25:16, 38:13, 38:15, 41:1, 52:16, 66:13, 121:19, 139:12, 145:18, 147:11, 147:25, 150:16, 160:9</p> <p>entering ^[2] - 32:14, 38:10</p> <p>entire ^[7] - 28:23, 35:25, 60:20, 62:19, 93:18, 113:11, 136:16</p> <p>entitled ^[1] - 29:22</p> <p>entries ^[1] - 7:16</p> <p>entry ^[1] - 6:24</p> <p>Epps ^[16] - 41:8, 41:10, 41:22, 42:4, 42:19, 42:23, 43:19, 44:14, 44:16, 44:23, 80:5, 80:18, 81:2, 81:9, 81:18</p> <p>Epps's ^[2] - 43:21, 44:21</p> <p>Erica ^[1] - 48:14</p> <p>ERIK ^[1] - 1:17</p> <p>error ^[1] - 91:22</p> <p>especially ^[1] - 55:21</p> <p>ESQ ^[12] - 1:16, 1:17, 1:17, 1:18, 1:22, 2:2, 2:5, 2:8, 2:11, 2:14, 2:17, 2:20</p> <p>essentially ^[2] - 103:4, 130:8</p>	<p>establish ^[1] - 117:3</p> <p>establishes ^[1] - 116:19</p> <p>et ^[3] - 5:3, 100:3, 146:12</p> <p>Ethan ^[10] - 5:3, 57:21, 57:22, 75:3, 76:23, 87:8, 100:3, 115:21, 142:2, 145:8</p> <p>ETHAN ^[1] - 1:6</p> <p>evening ^[3] - 57:12, 163:1, 165:16</p> <p>event ^[9] - 13:22, 68:23, 68:24, 68:25, 74:18, 99:17, 107:24, 165:19, 165:22</p> <p>EVIDENCE ^[1] - 4:9</p> <p>Evidence ^[1] - 11:10</p> <p>evidence ^[52] - 14:19, 16:8, 36:19, 40:21, 41:1, 52:16, 55:5, 66:13, 73:5, 82:16, 82:24, 85:4, 95:18, 95:23, 100:6, 100:15, 101:8, 101:12, 102:11, 104:22, 105:1, 105:16, 105:17, 106:22, 106:24, 107:3, 109:12, 110:1, 110:24, 111:14, 111:17, 111:19, 112:4, 114:23, 119:12, 119:16, 123:12, 133:2, 133:6, 137:10, 142:12, 142:13, 145:18, 148:11, 149:15, 149:21, 149:25, 150:6, 150:16, 157:1, 157:12, 160:9</p> <p>evidentiary ^[2] - 102:21, 105:5</p> <p>exact ^[3] - 111:22, 117:2, 126:6</p> <p>exactly ^[10] - 12:3, 12:14, 53:18, 59:8, 98:14, 117:15, 121:10, 130:13, 158:13, 165:23</p> <p>examination ^[21] - 58:3, 58:25, 72:23, 79:7, 92:5, 92:6, 93:18, 93:19, 94:8, 94:10, 96:12, 98:8, 99:8, 99:9, 107:3, 109:17, 109:20, 129:19, 134:8, 134:11, 134:18</p> <p>EXAMINATION ^[2] -</p>	<p>17:17, 47:21</p> <p>examine ^[6] - 9:5, 9:6, 9:8, 9:16, 9:19, 9:22</p> <p>examined ^[2] - 72:22, 115:19</p> <p>Examiner ^[2] - 57:23, 113:5</p> <p>example ^[2] - 14:5, 24:9</p> <p>except ^[1] - 96:2</p> <p>exception ^[1] - 155:6</p> <p>exchanged ^[1] - 48:15</p> <p>exclude ^[2] - 7:9, 8:16</p> <p>excuse ^[5] - 63:25, 89:12, 116:5, 123:23, 145:7</p> <p>excused ^[1] - 163:4</p> <p>Exhibit ^[116] - 4:10, 4:10, 4:11, 4:11, 4:12, 4:13, 6:20, 22:10, 24:17, 32:1, 32:2, 33:18, 33:24, 34:19, 35:10, 35:14, 35:17, 39:7, 39:20, 39:21, 40:8, 40:19, 40:25, 41:4, 41:23, 42:9, 42:16, 43:6, 43:15, 43:23, 44:5, 44:11, 48:25, 52:15, 65:1, 65:12, 65:13, 65:22, 66:12, 66:16, 66:25, 75:8, 75:10, 75:18, 76:18, 77:2, 77:14, 78:1, 78:16, 79:1, 80:1, 80:8, 80:9, 80:21, 81:5, 81:14, 82:5, 82:6, 82:13, 83:25, 84:18, 85:7, 85:19, 86:3, 86:12, 86:20, 87:3, 87:13, 87:21, 88:15, 89:13, 122:13, 123:17, 124:12, 124:22, 125:1, 125:9, 125:19, 125:20, 128:9, 128:19, 129:6, 130:24, 131:12, 132:7, 132:9, 132:22, 135:16, 136:4, 136:20, 136:21, 137:4, 137:15, 138:2, 138:14, 139:5, 139:17, 140:4, 140:7, 140:18, 140:20, 141:8, 141:17, 141:19, 142:4, 142:17, 144:8,</p>	<p>145:17, 147:21, 148:12, 150:15, 152:6, 159:5, 160:8, 160:24, 161:5</p> <p>exhibit ^[19] - 7:12, 13:9, 32:1, 52:8, 86:11, 87:1, 89:12, 92:13, 92:14, 110:9, 112:8, 126:25, 140:6, 144:22, 150:23, 156:25, 157:3, 158:4, 158:15</p> <p>exhibits ^[6] - 92:13, 103:9, 112:2, 156:18, 157:4, 162:12</p> <p>EXHIBITS ^[1] - 4:9</p> <p>existed ^[1] - 16:24</p> <p>existence ^[2] - 14:20, 101:13</p> <p>exists ^[2] - 15:22, 16:4</p> <p>exited ^[3] - 34:7, 89:23, 163:7</p> <p>exiting ^[1] - 33:7</p> <p>expect ^[1] - 105:14</p> <p>expected ^[1] - 69:11</p> <p>expert ^[18] - 12:10, 53:12, 53:16, 53:17, 53:18, 54:2, 54:15, 54:23, 56:9, 58:4, 73:4, 95:25, 113:13, 118:19, 118:22, 119:3, 119:19</p> <p>explain ^[1] - 117:11</p> <p>explained ^[1] - 101:25</p> <p>expressed ^[1] - 7:18</p> <p>extending ^[1] - 15:1</p> <p>extent ^[5] - 8:20, 9:2, 101:17, 112:10, 130:7</p> <p>extraction ^[19] - 49:20, 50:15, 50:20, 50:21, 50:23, 50:24, 51:6, 52:6, 52:20, 59:8, 59:18, 59:19, 112:25, 113:3, 113:4, 116:18, 152:5, 159:5, 159:13</p> <p>extreme ^[1] - 69:14</p> <p>extremely ^[1] - 96:11</p> <p>extremist ^[1] - 69:13</p> <p>extremists ^[1] - 12:16</p>	<p>facing ^[1] - 71:14</p> <p>fact ^[22] - 7:3, 8:7, 9:2, 26:4, 47:9, 54:21, 55:18, 62:1, 69:12, 72:16, 94:11, 106:10, 106:22, 108:2, 116:10, 120:15, 121:11, 126:2, 130:1, 133:8, 135:5, 164:19</p> <p>factor ^[1] - 139:11</p> <p>facts ^[1] - 93:9</p> <p>factual ^[2] - 99:11, 107:12</p> <p>fair ^[30] - 19:10, 20:15, 20:20, 21:13, 21:17, 21:20, 21:24, 22:4, 23:1, 23:10, 23:17, 26:2, 26:6, 34:14, 37:23, 37:25, 38:2, 38:17, 38:19, 38:24, 39:3, 41:12, 41:15, 44:23, 45:2, 45:5, 51:10, 51:16, 51:23, 166:4</p> <p>fairly ^[2] - 52:9, 60:2</p> <p>fairness ^[1] - 28:20</p> <p>faith ^[3] - 28:14, 62:11, 69:13</p> <p>fall ^[1] - 102:14</p> <p>fallen ^[1] - 5:14</p> <p>falls ^[1] - 12:4</p> <p>false ^[1] - 130:14</p> <p>falsely ^[1] - 101:23</p> <p>far ^[6] - 12:16, 48:4, 68:5, 76:14, 94:12, 121:17</p> <p>far-right ^[1] - 12:16</p> <p>fashion ^[1] - 40:5</p> <p>fast ^[3] - 18:22, 21:3, 35:12</p> <p>fast-forward ^[1] - 35:12</p> <p>fastly ^[1] - 18:24</p> <p>fault ^[1] - 98:23</p> <p>favor ^[1] - 96:24</p> <p>favorite ^[1] - 134:22</p> <p>FBI ^[14] - 45:15, 48:4, 50:11, 51:11, 60:21, 62:6, 62:7, 62:21, 63:2, 64:9, 64:20, 106:3, 106:6, 163:21</p> <p>felt ^[1] - 163:19</p> <p>female ^[9] - 75:22, 76:24, 77:6, 77:9, 77:20, 78:5, 78:9, 78:11, 78:12</p> <p>fence ^[3] - 20:8, 81:1, 128:7</p> <p>few ^[8] - 60:8, 66:24,</p>
				F
				F3d ^[1] - 92:3
				face ^[3] - 82:9, 138:6, 138:7

<p>74:22, 80:4, 87:5, 122:12, 124:24, 130:19 field [1] - 45:15 Fifth [1] - 108:12 fight [1] - 39:24 fighting [1] - 99:16 figure [2] - 94:14, 103:23 file [5] - 56:12, 60:14, 60:15, 60:17, 160:5 finalize [1] - 103:7 fine [3] - 70:1, 91:15, 103:15 finish [1] - 157:15 First [4] - 2:6, 19:17, 20:2, 136:16 first [29] - 6:20, 8:1, 17:12, 17:23, 19:17, 20:8, 20:14, 20:19, 21:2, 21:8, 22:3, 41:11, 41:15, 48:3, 48:4, 55:13, 68:11, 69:16, 87:24, 92:21, 98:9, 116:13, 118:19, 128:4, 128:6, 136:17, 145:22, 150:19 Fischer [3] - 145:8, 146:22, 147:10 fish [1] - 146:11 Fisher [1] - 147:25 fist [2] - 130:6, 130:11 fist-bump [2] - 130:6, 130:11 five [8] - 60:2, 74:2, 82:5, 130:6, 136:2, 153:2, 159:16, 160:19 fived [1] - 129:25 flag [5] - 138:24, 140:2, 140:10, 140:14, 141:25 flashcards [1] - 71:9 Floor [3] - 1:20, 2:6, 2:18 Florida [7] - 2:13, 2:15, 144:18, 145:24, 152:16, 152:18, 162:20 fly [1] - 120:21 focus [8] - 23:4, 24:12, 36:22, 41:21, 44:8, 46:6, 74:16 focused [2] - 6:22, 45:16 focusing [1] - 42:6 folded [1] - 141:3 folks [2] - 19:2, 148:6 followed [1] - 162:22</p>	<p>follower [1] - 127:19 following [33] - 17:6, 27:2, 29:2, 29:6, 30:8, 49:15, 51:25, 53:23, 57:5, 58:14, 59:13, 60:25, 62:15, 68:9, 70:11, 72:4, 73:9, 82:17, 83:21, 89:24, 99:25, 121:20, 129:20, 130:16, 133:4, 135:13, 142:25, 143:21, 156:7, 158:2, 158:6, 159:2, 163:8 followup [1] - 163:13 Fonticoba [1] - 78:19 food [7] - 19:21, 19:24, 20:23, 47:6, 64:3, 64:5, 127:25 footage [3] - 64:9, 65:16, 65:17 FOR [9] - 1:1, 1:16, 1:19, 1:22, 2:2, 2:8, 2:11, 2:17, 4:5 force [1] - 148:22 foreclosing [1] - 94:25 foregoing [1] - 167:4 foreground [2] - 132:19, 134:5 forensic [5] - 54:15, 58:4, 95:25, 113:13, 119:3 Forensic [1] - 113:5 forever [1] - 117:21 forget [2] - 41:20, 165:20 form [1] - 127:14 forths [1] - 100:7 forward [8] - 18:21, 18:22, 18:24, 35:12, 65:18, 87:5, 87:11, 124:25 foundation [4] - 26:7, 109:1, 109:2, 109:3 four [1] - 123:16 fours [1] - 102:11 Fourth [3] - 1:19, 146:20, 146:22 frame [7] - 18:6, 37:7, 37:11, 80:18, 81:2, 85:23, 85:25 frames [3] - 81:21, 87:5, 124:24 frankly [2] - 55:2, 69:19 free [1] - 126:20 frozen [1] - 37:22 Friday [1] - 17:10</p>	<p>friend [1] - 48:14 front [12] - 19:19, 52:8, 70:3, 122:17, 128:3, 128:5, 128:6, 128:8, 132:14, 135:1, 149:16, 160:18 frustrated [1] - 14:6 fuck [2] - 146:13, 146:21 fucking [1] - 76:23 full [4] - 50:20, 50:21, 121:10, 167:5 full-blown [1] - 121:10 fully [1] - 16:7 function [1] - 116:24 funny [1] - 97:25 furtherance [1] - 101:1</p>	<p>105:15, 105:17, 107:25, 108:2, 108:14, 108:18, 109:11, 109:21, 110:10, 111:12, 111:21, 112:21, 113:25, 115:1, 118:19, 118:21, 120:12, 156:17, 165:13 Government's [100] - 4:10, 4:10, 4:11, 4:11, 4:12, 13:8, 13:11, 22:9, 24:17, 32:1, 32:2, 33:18, 33:24, 34:19, 35:10, 35:14, 35:17, 39:7, 39:21, 40:25, 41:4, 41:23, 42:9, 42:16, 43:6, 43:15, 43:23, 44:5, 44:11, 48:25, 52:15, 65:13, 65:22, 66:12, 66:16, 66:25, 75:10, 75:18, 76:18, 77:2, 77:14, 78:1, 78:16, 80:9, 80:21, 81:5, 81:14, 82:6, 82:13, 83:25, 84:18, 85:7, 85:19, 86:3, 86:12, 86:20, 87:3, 87:13, 87:21, 88:15, 89:13, 93:24, 94:18, 111:22, 112:7, 122:13, 123:17, 124:12, 124:22, 125:1, 125:9, 125:20, 128:19, 129:6, 130:24, 131:12, 132:9, 135:16, 136:4, 136:21, 137:4, 137:15, 138:2, 138:14, 139:5, 139:17, 140:7, 140:20, 141:8, 141:19, 142:4, 142:17, 144:8, 145:17, 147:21, 148:12, 160:8, 160:24, 161:5 gracious [1] - 91:14 Grant [4] - 79:13, 79:21, 91:10, 91:14 grant [1] - 163:10 granted [3] - 66:15, 127:4, 166:6 Gravy [1] - 146:2 gray [1] - 129:17 Greene [15] - 17:23, 19:14, 20:12, 20:18, 25:7, 25:9, 25:12,</p>	<p>25:14, 25:17, 26:14, 29:9, 36:25, 38:16, 39:2, 132:20 grip [1] - 141:15 Ground [7] - 8:8, 8:15, 10:6, 10:14, 22:17, 22:22, 148:15 ground [7] - 17:19, 125:17, 151:25, 155:4, 155:19, 155:21, 162:18 grounds [6] - 12:19, 14:11, 32:10, 79:12, 83:9, 108:1 group [28] - 10:6, 10:14, 19:11, 20:22, 22:20, 30:23, 47:5, 63:19, 63:22, 64:3, 73:16, 73:21, 84:10, 85:23, 86:7, 88:9, 122:5, 123:1, 123:9, 127:7, 127:20, 127:25, 128:4, 128:6, 145:10, 156:4, 156:22, 162:18 group's [2] - 28:1, 105:2 groups [2] - 12:15, 69:13 growing [1] - 107:11 guess [12] - 5:19, 7:19, 8:4, 10:9, 13:17, 47:16, 106:11, 114:2, 114:13, 118:2, 163:23, 165:23 guilt [1] - 8:21 guy [2] - 32:21, 89:2 guys [3] - 32:23, 146:8</p>
G				
<p>gamma [2] - 123:15, 132:8 generally [1] - 161:20 gentlemen [3] - 17:8, 121:22, 162:25 Giddings [1] - 32:25 given [13] - 55:21, 55:25, 69:11, 81:25, 115:24, 118:18, 118:25, 119:12, 119:15, 120:17, 121:14, 135:8 glad [1] - 114:9 good-faith [1] - 28:14 Goodness [1] - 91:13 Googled [2] - 49:7, 51:14 Googles [1] - 48:20 GOVERNMENT [3] - 1:16, 4:5, 17:16 Government [58] - 6:18, 6:25, 7:9, 9:2, 12:7, 12:22, 13:8, 13:21, 13:22, 14:3, 29:13, 39:20, 40:8, 40:19, 50:7, 51:5, 54:18, 54:22, 55:8, 55:24, 57:1, 57:3, 75:8, 82:20, 90:9, 91:7, 91:25, 95:12, 96:7, 97:12, 97:24, 98:10, 98:15, 99:18, 100:21, 102:11, 103:2, 103:25, 104:3,</p>				
H				
<p>half [11] - 5:11, 11:24, 17:11, 17:12, 17:13, 37:8, 57:20, 68:22, 97:4, 116:13 hand [10] - 42:24, 48:11, 90:2, 99:22, 100:15, 123:25, 124:3, 124:9, 125:5, 141:4 handlers [2] - 68:3, 108:4 handling [1] - 64:16 hands [2] - 39:17, 89:8 hanging [3] - 114:25, 139:25, 141:15 happy [4] - 54:1,</p>				

68:18, 70:1, 138:9 Harris [3] - 5:7, 127:2, 149:25 HASSAN [2] - 2:11, 2:11 hat [5] - 41:15, 41:18, 41:20, 42:2, 139:9 Haven [1] - 2:7 head [2] - 44:20, 118:3 headed [1] - 67:17 heading [1] - 20:22 heads [1] - 55:25 heads-up [1] - 55:25 Healion [1] - 32:25 hear [23] - 12:22, 13:3, 26:25, 27:4, 55:22, 67:23, 68:7, 71:22, 75:22, 75:25, 76:22, 77:6, 78:19, 91:5, 97:2, 98:9, 107:19, 107:20, 115:1, 115:4, 115:5, 125:13, 161:2 heard [22] - 8:18, 8:19, 11:15, 11:17, 12:25, 31:7, 36:7, 36:10, 53:21, 54:13, 60:24, 72:3, 99:23, 105:16, 105:17, 107:9, 107:10, 115:2, 116:22, 127:21, 142:24, 161:3 hearing [2] - 5:18, 5:20 hearsay [32] - 6:23, 7:5, 7:8, 7:19, 7:20, 8:4, 8:19, 9:4, 16:10, 26:21, 27:7, 27:12, 58:10, 67:13, 68:6, 68:12, 68:21, 101:3, 101:10, 102:2, 106:3, 106:5, 106:6, 106:7, 107:25, 109:1, 146:24, 156:18, 157:4, 163:17, 163:22 heck [1] - 113:10 held [5] - 12:7, 14:22, 102:7, 102:8, 141:3 hell [1] - 146:13 helmet [1] - 136:9 helpful [3] - 69:18, 69:24, 96:11 Hemphill [2] - 74:25, 78:20 hereby [1] - 167:3 HERNANDEZ [70] - 2:8, 10:18, 10:20,	10:25, 11:19, 13:10, 14:13, 15:1, 15:5, 16:5, 16:19, 16:25, 29:16, 58:12, 58:16, 59:12, 63:4, 71:1, 71:21, 71:25, 72:2, 72:6, 72:13, 72:21, 76:2, 82:15, 82:19, 82:25, 83:6, 83:11, 83:19, 85:3, 99:21, 107:21, 108:18, 109:4, 109:7, 109:10, 109:14, 109:17, 110:11, 110:13, 110:18, 111:16, 112:17, 123:12, 129:18, 129:22, 130:10, 131:17, 131:25, 133:1, 133:7, 133:14, 133:18, 133:24, 134:8, 134:17, 135:3, 135:6, 135:9, 146:24, 150:3, 150:9, 150:12, 156:3, 156:17, 157:2, 160:1, 162:11 Hernández [16] - 6:21, 11:17, 14:12, 71:16, 101:7, 107:19, 108:25, 111:21, 111:23, 112:5, 128:12, 128:22, 130:3, 132:4, 133:3, 133:16 Hernández's [1] - 101:17 Hialeah [1] - 2:15 high [2] - 129:25, 130:6 high-five [1] - 130:6 high-fived [1] - 129:25 Highland [1] - 2:9 highlighted [1] - 122:17 highly [1] - 91:25 himself [1] - 39:15 hitting [1] - 125:17 hold [1] - 53:19 holding [4] - 35:5, 35:6, 141:12, 141:13 Hollow [1] - 2:9 honest [1] - 119:12 Honor [96] - 5:17, 6:6, 8:18, 8:19, 8:20, 8:25, 9:12, 10:9, 10:19, 11:3, 11:9, 11:20, 12:21, 12:25, 14:13, 17:15, 27:16, 29:4, 29:8, 29:20,	31:6, 40:14, 40:18, 41:2, 46:15, 49:19, 49:21, 50:9, 53:25, 55:4, 56:4, 58:12, 58:16, 59:12, 68:6, 71:21, 72:2, 72:13, 82:15, 83:19, 85:3, 90:4, 90:5, 90:16, 91:18, 92:2, 92:8, 92:12, 92:18, 92:20, 93:2, 93:5, 93:11, 93:19, 94:16, 99:10, 99:21, 103:15, 104:6, 109:10, 111:13, 111:17, 112:18, 112:20, 113:11, 115:12, 116:13, 116:17, 116:21, 117:1, 117:10, 117:12, 117:20, 118:4, 121:24, 123:13, 129:18, 130:10, 131:25, 133:2, 135:11, 150:3, 150:10, 156:3, 156:17, 157:8, 158:5, 158:10, 158:14, 158:17, 158:22, 159:24, 160:1, 165:16, 165:25 HONORABLE [1] - 1:12 honored [1] - 104:21 hoodie [1] - 85:12 hope [2] - 9:23, 120:24 hopefully [1] - 104:15 Hotel [1] - 64:10 hotel [3] - 23:17, 64:8, 65:17 hotels [1] - 64:20 hour [9] - 37:8, 57:19, 90:17, 93:17, 94:21, 97:4, 97:10 hours [6] - 5:20, 54:14, 57:12, 64:24, 150:19, 153:2 HTML [1] - 49:25 hug [1] - 130:11 huge [1] - 97:17 hugely [2] - 91:21, 92:18 HULL [2] - 2:2, 2:3 human [4] - 60:10, 67:7, 69:7, 69:8 hump [1] - 120:12 hunch [1] - 114:17 hundreds [1] - 74:2	I ID'd [2] - 149:21, 150:1 idea [3] - 7:4, 54:7, 165:12 identification [8] - 71:11, 71:17, 71:20, 71:24, 72:12, 73:3, 73:4, 73:12 identifications [2] - 70:25, 71:7 identified [10] - 10:20, 10:22, 56:15, 65:4, 80:17, 87:8, 109:5, 109:7, 114:3, 114:6 identify [6] - 70:21, 73:5, 83:16, 115:15, 127:6 identifying [4] - 60:18, 60:21, 62:19, 73:16 identity [2] - 63:9, 63:10 II [1] - 2:17 immediate [1] - 19:13 immediately [1] - 143:15 Immortal [1] - 144:17 impatient [1] - 62:4 importance [1] - 121:14 important [6] - 19:16, 63:10, 92:18, 92:19, 105:1, 120:18 impression [5] - 107:23, 108:5, 130:7, 130:14, 157:9 improper [2] - 111:1, 111:11 IN [1] - 4:9 in-person [1] - 60:6 inaccurate [1] - 11:4 inadmissible [2] - 111:17, 111:19 inapplicable [1] - 101:8 incidents [1] - 45:17 inclination [1] - 105:10 inclined [1] - 105:19 included [1] - 162:18 including [2] - 11:11, 13:23 indicate [4] - 6:14, 33:10, 33:13, 93:12 indicated [3] - 47:3,	92:15, 108:10 indicates [3] - 86:8, 129:1, 131:9 indicating [2] - 92:16, 124:8 indication [5] - 35:21, 35:24, 36:2, 38:5, 38:22 indications [1] - 36:8 individual [7] - 15:24, 66:19, 80:17, 88:2, 88:19, 88:20, 134:5 individuals [9] - 30:22, 30:25, 45:14, 71:9, 132:18, 134:16, 135:22, 135:23, 151:25 inflammatory [1] - 11:12 inform [1] - 55:10 information [51] - 26:24, 27:13, 27:25, 53:11, 55:7, 55:22, 55:25, 56:2, 56:3, 56:7, 56:12, 56:13, 56:14, 58:21, 58:24, 59:1, 60:18, 60:21, 60:22, 62:20, 63:13, 85:5, 90:10, 90:11, 90:15, 90:16, 90:20, 90:24, 90:25, 91:7, 92:11, 92:25, 93:11, 93:14, 93:15, 94:15, 95:22, 96:8, 96:15, 96:16, 96:20, 97:21, 98:1, 104:10, 104:16, 108:3, 108:8, 108:19, 112:23, 120:18, 143:9 informed [3] - 55:8, 112:23, 166:1 informing [1] - 6:8 informs [1] - 5:7 instance [3] - 108:7, 108:16, 111:8 instruction [4] - 7:22, 8:1, 8:2, 105:9 interaction [15] - 75:3, 130:5, 130:6, 131:15, 132:4, 133:8, 133:10, 133:11, 133:16, 133:21, 134:1, 134:9, 134:14, 134:19, 135:1 interactions [2] - 80:4, 128:13 interested [1] - 146:8 interior [1] - 65:17 internal [1] - 50:11 international [1] -
---	--	---	--	---

<p>11:5 interviewed ^[1] - 46:14 introduce ^[3] - 49:25, 108:25, 157:5 introduced ^[2] - 28:8, 158:11 introducing ^[3] - 102:6, 156:18, 157:4 inventing ^[1] - 130:8 investigated ^[4] - 45:9, 45:12, 45:23, 46:2 investigating ^[3] - 26:18, 28:25, 74:12 investigation ^[20] - 22:25, 23:1, 25:25, 26:13, 27:20, 27:25, 28:1, 28:23, 32:12, 36:16, 45:16, 46:5, 46:9, 46:10, 46:12, 46:13, 46:21, 46:22, 56:22, 74:7 investigations ^[1] - 27:22 investigative ^[2] - 60:14, 74:16 invited ^[2] - 142:9, 144:17 involved ^[2] - 45:8, 46:23 involvement ^[2] - 29:10 irrelevant ^[2] - 72:18, 72:19 issue ^[26] - 7:8, 11:20, 50:8, 51:4, 92:25, 103:1, 103:19, 104:9, 104:24, 107:15, 111:22, 112:1, 112:17, 114:3, 116:23, 117:11, 119:19, 119:20, 119:25, 120:17, 134:18, 143:17, 163:15, 164:9, 164:14 issues ^[5] - 12:24, 13:3, 15:14, 62:1, 107:12 item ^[2] - 108:5, 110:24 itself ^[4] - 15:10, 109:21, 116:19, 132:1 IV ^[1] - 2:2</p>	<p>January ^[72] - 8:9, 8:15, 9:9, 10:7, 10:23, 11:11, 23:11, 23:12, 23:13, 23:14, 23:16, 24:1, 24:2, 24:6, 24:7, 24:10, 24:11, 24:12, 26:6, 27:9, 28:5, 28:7, 28:14, 28:25, 29:11, 30:5, 45:15, 45:17, 46:23, 48:20, 48:21, 52:23, 53:2, 53:8, 57:10, 64:10, 64:21, 67:8, 68:3, 68:5, 69:2, 74:12, 74:13, 74:17, 83:8, 103:19, 107:17, 107:24, 115:18, 115:21, 143:15, 143:25, 144:3, 144:23, 145:21, 148:15, 153:3, 153:23, 154:4, 154:8, 154:12, 154:16, 154:20, 154:24, 155:4, 155:19, 155:22, 156:23, 159:15, 162:19 JASON ^[1] - 1:16 JAUREGUI ^[43] - 2:14, 2:14, 49:10, 49:19, 50:6, 51:4, 51:9, 53:15, 53:18, 54:5, 54:12, 55:4, 55:11, 55:24, 56:4, 56:8, 57:4, 66:8, 67:13, 67:22, 68:6, 95:1, 95:3, 95:5, 95:10, 96:4, 96:7, 96:19, 112:20, 114:9, 118:13, 119:2, 119:7, 142:22, 143:2, 143:7, 143:13, 143:20, 151:19, 160:13, 165:12, 165:15, 165:25 Jauregui ^[21] - 48:8, 49:3, 49:24, 50:1, 51:3, 52:3, 55:22, 56:24, 57:24, 67:6, 68:11, 68:20, 70:4, 91:3, 95:1, 95:2, 103:8, 112:16, 112:19, 144:11, 164:15 Jeremy ^[2] - 48:1, 48:3 JOHN ^[1] - 2:2 Johnson ^[5] - 128:14, 129:15, 130:4, 131:8, 131:22 join ^[2] - 12:17,</p>	<p>143:10 joined ^[3] - 143:17, 143:18, 144:12 joke ^[2] - 97:19, 97:25 Joseph ^[4] - 139:12, 147:8, 147:11, 147:25 JOSEPH ^[1] - 1:6 Judge ^[16] - 49:10, 53:15, 54:5, 60:24, 62:21, 89:19, 95:3, 95:5, 99:3, 104:20, 115:6, 119:2, 120:5, 143:2, 151:19, 160:13 JUDGE ^[1] - 1:13 judge ^[13] - 51:4, 51:9, 54:5, 55:24, 56:8, 66:8, 67:13, 95:1, 96:7, 112:21, 114:9, 142:22, 165:12 jurors ^[1] - 5:7 JURY ^[1] - 1:11 jury ^[47] - 5:6, 15:21, 15:25, 16:2, 16:22, 16:23, 17:3, 17:4, 17:5, 27:3, 29:7, 49:16, 52:18, 53:24, 58:15, 61:1, 68:10, 72:5, 73:3, 82:18, 89:23, 104:9, 105:8, 105:9, 107:10, 110:11, 110:20, 111:19, 111:25, 112:3, 112:11, 112:12, 119:15, 121:17, 121:18, 121:19, 127:3, 129:21, 133:5, 143:1, 147:17, 149:16, 156:8, 157:12, 158:7, 158:25, 163:7 jury's ^[4] - 12:24, 13:14, 115:13, 117:25</p>	<p>96:23, 98:23, 103:2, 103:17, 104:8, 104:17, 104:23, 108:22, 119:24, 121:23, 134:21, 135:9, 152:20, 156:9, 157:14, 157:25, 158:11, 158:12, 158:17, 159:1, 160:4, 160:11, 160:15, 162:13, 163:14 KENERSON ^[321] - 1:17, 23:19, 24:3, 26:7, 26:21, 27:5, 30:17, 31:5, 33:20, 40:22, 47:22, 48:24, 49:1, 49:9, 49:22, 50:19, 50:25, 51:20, 51:24, 52:2, 52:12, 52:17, 53:17, 53:21, 53:25, 55:13, 56:18, 57:7, 59:15, 61:6, 61:11, 62:17, 63:1, 63:7, 64:14, 64:19, 64:23, 65:2, 65:11, 65:15, 65:18, 65:24, 66:1, 66:5, 66:14, 66:18, 66:23, 67:2, 67:5, 67:18, 68:1, 68:17, 68:20, 69:19, 69:22, 70:1, 70:10, 70:13, 71:4, 71:23, 73:11, 75:7, 75:12, 75:15, 75:20, 75:21, 76:1, 76:4, 76:9, 76:16, 76:20, 76:21, 77:4, 77:5, 77:12, 77:16, 77:17, 77:24, 78:3, 78:8, 78:15, 78:18, 78:23, 79:3, 79:5, 79:20, 79:24, 80:2, 80:3, 80:8, 80:11, 80:20, 80:23, 80:24, 81:4, 81:7, 81:8, 81:13, 81:16, 81:17, 82:4, 82:8, 82:11, 83:15, 83:23, 84:2, 84:4, 84:15, 84:20, 84:21, 85:2, 85:9, 85:10, 85:17, 85:21, 85:22, 86:2, 86:5, 86:6, 86:10, 86:14, 86:18, 86:22, 86:23, 87:1, 87:5, 87:7, 87:11, 87:15, 87:16, 87:19, 87:23, 88:1, 88:5, 88:7, 88:14, 88:17, 88:18, 89:11, 89:15, 94:3, 94:22, 96:24, 97:13, 98:12, 98:17, 98:25,</p>	<p>99:4, 103:4, 105:7, 105:25, 107:7, 108:23, 111:23, 120:6, 120:24, 121:24, 122:2, 122:11, 122:15, 122:16, 123:11, 123:15, 123:19, 124:11, 124:14, 124:18, 124:24, 125:3, 125:7, 125:11, 125:12, 125:19, 125:22, 126:9, 126:11, 126:14, 126:18, 126:25, 127:5, 127:16, 127:24, 128:11, 128:16, 128:21, 129:3, 129:8, 129:9, 130:2, 130:18, 130:20, 131:1, 131:2, 131:11, 131:14, 131:20, 132:3, 132:7, 132:11, 132:22, 132:23, 134:22, 135:4, 135:7, 135:15, 135:18, 136:1, 136:6, 136:7, 136:20, 136:23, 137:13, 137:17, 137:25, 138:4, 138:5, 138:13, 138:16, 138:17, 139:2, 139:7, 139:8, 139:16, 139:19, 139:20, 140:4, 140:9, 140:18, 140:22, 141:5, 141:10, 141:11, 141:17, 141:21, 142:6, 142:7, 142:14, 142:19, 142:20, 142:24, 143:5, 143:8, 143:23, 144:6, 144:10, 144:19, 144:21, 145:1, 145:3, 145:13, 145:19, 147:2, 147:4, 147:13, 147:16, 147:20, 147:23, 148:10, 148:14, 148:17, 148:19, 149:6, 149:8, 149:11, 149:13, 149:15, 149:19, 149:23, 150:17, 150:23, 150:24, 151:21, 152:4, 152:9, 152:17, 152:21, 152:23, 153:7, 153:8, 153:11, 153:13, 153:21, 153:22, 154:2, 154:3, 154:6, 154:7, 154:10,</p>
J		K		
<p>jacket ^[2] - 141:3, 141:12</p>		<p>Kate ^[2] - 56:23, 58:6 keep ^[7] - 35:16, 42:6, 42:15, 43:14, 43:22, 78:15, 149:23 keeps ^[1] - 82:21 KELLY ^[1] - 1:12 Kenerson ^[46] - 17:21, 27:4, 27:11, 40:15, 40:17, 47:20, 50:17, 51:8, 55:12, 56:6, 56:17, 59:7, 61:4, 62:14, 64:18, 67:24, 68:15, 69:16, 83:10, 83:13, 89:16,</p>		

<p>154:11, 154:14, 154:15, 154:18, 154:19, 154:22, 154:23, 155:9, 155:10, 156:2, 156:14, 158:1, 158:4, 158:15, 159:4, 159:7, 159:14, 159:17, 159:24, 160:5, 160:12, 160:16, 160:22, 161:1, 161:10, 161:15, 161:16, 161:24, 162:2, 162:7, 162:14, 162:15, 162:24</p> <p>KENERSON [1] - 137:6</p> <p>Kenny [2] - 63:14, 63:17</p> <p>key [1] - 62:8</p> <p>killer [1] - 146:11</p> <p>kind [12] - 9:3, 11:10, 35:7, 50:11, 55:7, 60:14, 70:21, 107:12, 114:23, 115:24, 118:14, 131:24</p> <p>knowing [1] - 74:7</p> <p>knowledge [3] - 55:6, 111:3, 118:25</p> <p>known [2] - 63:12, 95:5</p> <p>knows [4] - 30:22, 51:21, 90:5, 111:12</p>	<p>leader [3] - 127:19, 127:23, 128:2</p> <p>leaders [6] - 144:12, 144:25, 155:2, 155:3, 159:6, 161:11</p> <p>leadership [1] - 22:14</p> <p>leading [8] - 30:5, 45:18, 64:12, 64:13, 76:2, 78:6, 107:2, 131:17</p> <p>least [11] - 6:11, 7:15, 15:17, 30:19, 49:23, 91:4, 115:4, 120:11, 143:11, 144:3, 166:4</p> <p>leave [4] - 40:5, 78:21, 130:13, 157:9</p> <p>leaves [2] - 39:5, 39:10</p> <p>leaving [2] - 17:24, 38:9</p> <p>led [4] - 26:19, 27:20, 28:1, 48:11</p> <p>left [14] - 19:14, 32:9, 32:11, 37:13, 41:10, 79:18, 103:1, 110:4, 110:5, 110:9, 130:7, 141:25, 164:18, 165:5</p> <p>legal [1] - 11:4</p> <p>length [1] - 112:6</p> <p>letting [1] - 110:21</p> <p>lie [1] - 114:12</p> <p>likely [1] - 63:12</p> <p>limited [7] - 101:18, 106:23, 120:9, 120:13, 120:14, 120:19, 120:20</p> <p>line [1] - 7:9</p> <p>lines [2] - 69:6, 143:12</p> <p>lining [1] - 19:24</p> <p>LISA [2] - 3:1, 167:3</p> <p>Lisa [1] - 167:12</p> <p>listed [1] - 152:15</p> <p>listened [2] - 71:12, 71:14</p> <p>listener [1] - 13:24</p> <p>literally [3] - 8:12, 9:24, 23:16</p> <p>live [1] - 93:25</p> <p>Livingston [1] - 2:21</p> <p>Lizardo [7] - 63:14, 63:17, 63:22, 64:5, 65:4, 67:7, 120:9</p> <p>Lizardo's [1] - 67:11</p> <p>LLC [1] - 2:5</p> <p>loaded [1] - 12:18</p> <p>located [1] - 53:10</p> <p>lodge [1] - 112:5</p>	<p>look [22] - 6:16, 15:15, 59:3, 91:10, 94:22, 95:13, 97:5, 97:9, 106:21, 110:6, 111:14, 111:20, 116:1, 118:18, 121:6, 126:19, 126:20, 130:23, 131:23, 157:12, 166:2</p> <p>Look [1] - 94:20</p> <p>looked [8] - 51:22, 52:22, 58:17, 59:16, 93:2, 95:24, 103:5, 113:5</p> <p>looking [12] - 7:17, 10:3, 10:4, 46:7, 50:21, 52:19, 65:16, 103:6, 117:14, 119:17, 146:18, 156:25</p> <p>looks [8] - 5:10, 35:6, 54:3, 103:21, 131:24, 141:15, 152:13, 158:22</p> <p>losing [1] - 69:13</p> <p>lost [2] - 24:21, 34:10</p> <p>loud [2] - 76:6, 76:8</p> <p>lunch [4] - 6:16, 13:1, 14:13, 17:20</p> <p>lying [2] - 114:10, 114:16</p> <p>Lync [2] - 59:21, 60:4</p>	<p>85:23, 86:7, 88:9, 122:5, 123:1, 123:8, 127:7, 156:21</p> <p>marginal [1] - 106:20</p> <p>marked [1] - 24:14</p> <p>Martinez [3] - 89:3, 89:4, 89:6</p> <p>Maryland [1] - 2:9</p> <p>Matter [2] - 5:2, 100:2</p> <p>matter [11] - 50:5, 92:6, 92:9, 92:10, 92:12, 100:20, 102:5, 104:15, 104:21, 105:6, 120:16</p> <p>matters [1] - 100:18</p> <p>Matthew [1] - 132:20</p> <p>McCullough [9] - 1:16, 103:6, 115:5, 115:11, 115:12, 116:14, 117:16, 118:5, 128:9</p> <p>McGUIRE [1] - 2:3</p> <p>mean [49] - 7:21, 7:25, 8:12, 9:10, 9:24, 10:16, 14:5, 15:6, 20:11, 27:5, 28:20, 29:14, 29:20, 55:22, 59:4, 69:16, 69:19, 91:9, 94:18, 104:2, 104:24, 105:22, 106:11, 106:15, 108:18, 114:11, 114:15, 114:16, 114:23, 115:2, 116:5, 117:8, 118:23, 119:6, 119:8, 119:10, 119:21, 120:20, 121:5, 130:2, 133:9, 134:22, 157:3, 160:3, 164:20, 164:21, 165:1</p> <p>meaningful [1] - 116:7</p> <p>meaningless [5] - 7:12, 61:3, 61:17, 61:18, 62:10</p> <p>means [8] - 7:11, 116:23, 117:3, 117:15, 117:16, 117:23, 117:24, 165:11</p> <p>meant [4] - 59:8, 115:7, 115:8, 115:10</p> <p>media [1] - 7:23</p> <p>medical [1] - 5:8</p> <p>member [4] - 28:16, 45:9, 46:24, 127:6</p> <p>members [8] - 46:20, 58:7, 84:9, 85:23, 86:7, 123:8, 155:3,</p>	<p>155:21</p> <p>memorial [1] - 79:13</p> <p>Memorial [1] - 79:22</p> <p>memory [4] - 126:12, 126:22, 130:8, 149:9</p> <p>men [6] - 28:25, 31:3, 31:11, 31:15, 31:18</p> <p>mention [3] - 6:11, 23:5, 54:5</p> <p>mentioned [3] - 22:17, 122:21, 148:6</p> <p>mentioning [2] - 19:21, 19:24</p> <p>mere [2] - 62:10, 106:22</p> <p>merely [1] - 92:4</p> <p>merits [1] - 12:22</p> <p>message [17] - 48:21, 108:24, 144:14, 145:22, 148:20, 153:2, 153:9, 153:14, 153:23, 154:4, 154:8, 154:10, 154:12, 154:16, 154:20, 154:24, 160:18</p> <p>messages [12] - 36:11, 48:15, 59:21, 70:17, 71:13, 153:18, 155:7, 157:8, 161:25, 162:3, 162:16, 162:17</p> <p>met [1] - 47:6</p> <p>metadata [7] - 54:2, 54:3, 113:14, 115:16, 115:17, 122:8, 132:14</p> <p>METCALF [84] - 2:17, 2:17, 17:15, 17:18, 19:4, 22:9, 22:11, 23:21, 24:5, 24:16, 24:19, 24:23, 24:24, 26:11, 26:12, 26:23, 27:16, 28:6, 28:23, 29:4, 29:8, 29:20, 30:7, 30:10, 30:20, 31:6, 31:10, 31:25, 32:4, 33:1, 33:4, 33:17, 33:21, 34:1, 34:16, 34:21, 34:24, 35:1, 35:8, 35:12, 35:16, 35:19, 35:20, 39:6, 39:9, 39:20, 39:23, 40:8, 40:11, 40:14, 40:18, 41:2, 41:6, 41:25, 42:1, 42:8, 42:11, 42:12, 42:15, 42:18, 42:21, 42:22, 43:5, 43:8, 43:9, 43:14, 43:17, 43:18, 43:22,</p>
<p>L</p>		<p>M</p>		
<p>label [1] - 11:4</p> <p>ladies [3] - 17:8, 121:22, 162:25</p> <p>lady [1] - 48:14</p> <p>Lake [1] - 2:21</p> <p>Lakes [1] - 2:13</p> <p>large [1] - 74:13</p> <p>last [13] - 6:24, 7:9, 7:16, 55:25, 97:18, 110:5, 115:17, 133:2, 141:24, 150:22, 150:23, 163:22, 165:5</p> <p>late [1] - 61:25</p> <p>laughed [1] - 98:1</p> <p>Laughter [1] - 98:24</p> <p>launched [1] - 99:15</p> <p>law [6] - 16:8, 69:14, 85:4, 109:12, 110:2, 111:18</p> <p>LAW [3] - 2:11, 2:14, 2:20</p> <p>lay [2] - 51:17, 51:18</p> <p>layer [1] - 7:8</p>		<p>Madam [1] - 89:17</p> <p>main [2] - 46:6</p> <p>male [2] - 76:24, 76:25</p> <p>man [5] - 29:24, 31:21, 42:13, 80:5, 128:14</p> <p>manner [2] - 30:15, 72:21</p> <p>map [1] - 79:17</p> <p>march [6] - 17:24, 19:6, 19:8, 19:17, 63:22, 136:16</p> <p>March [10] - 1:7, 27:17, 45:8, 49:12, 49:20, 49:23, 51:2, 99:12, 126:15, 167:10</p> <p>marched [3] - 63:18, 127:20, 127:25</p> <p>marching [15] - 19:11, 30:23, 47:4, 73:16, 73:20, 84:10,</p>		

<p>43:25, 44:2, 44:7, 44:9, 44:13, 44:18, 44:19, 46:15, 46:17, 46:18, 127:14, 152:20, 152:22, 157:21</p> <p>Metcalf [11] - 5:23, 5:25, 17:14, 29:19, 40:17, 64:16, 122:4, 136:25, 137:19, 143:9, 143:16</p> <p>Miami [1] - 2:13</p> <p>microphone [1] - 6:4</p> <p>middle [4] - 91:16, 110:14, 112:7, 140:23</p> <p>might [11] - 11:14, 12:8, 13:13, 14:10, 59:7, 94:23, 101:14, 114:21, 114:23, 149:12, 149:22</p> <p>MILLER [1] - 17:16</p> <p>Miller [13] - 4:6, 47:18, 55:17, 57:8, 59:16, 62:18, 109:7, 115:16, 115:23, 118:16, 119:19, 122:3, 162:16</p> <p>million [1] - 158:25</p> <p>mind [7] - 7:19, 15:23, 15:25, 16:1, 16:23, 161:4, 165:24</p> <p>minds [1] - 11:7</p> <p>Ministry [1] - 143:11</p> <p>Mink [1] - 2:9</p> <p>minus [2] - 159:16, 160:19</p> <p>minute [21] - 33:23, 54:9, 57:20, 90:14, 90:17, 91:24, 93:10, 93:17, 94:1, 94:21, 96:25, 97:10, 103:23, 116:16, 117:3, 124:21, 125:8, 129:4, 129:5, 136:1, 140:19</p> <p>minutes [35] - 21:5, 21:7, 24:25, 32:6, 32:7, 34:13, 34:14, 40:19, 40:20, 41:3, 44:1, 64:24, 75:9, 78:24, 79:3, 82:5, 82:22, 83:24, 85:18, 86:11, 87:2, 89:20, 89:22, 90:17, 90:18, 94:13, 99:20, 109:25, 120:25, 123:16, 128:17, 139:3, 140:5, 157:15</p> <p>misreport [1] - 11:7</p> <p>missing [1] - 157:8</p> <p>misstate [1] - 133:6</p>	<p>misstates [3] - 133:2, 162:5, 162:8</p> <p>mistake [1] - 162:21</p> <p>mistaken [6] - 47:13, 47:15, 72:25, 114:16, 130:8</p> <p>mistrial [1] - 99:3</p> <p>modified [7] - 53:12, 57:16, 90:11, 92:17, 116:19, 116:20, 119:13</p> <p>modify [1] - 115:17</p> <p>modifying [2] - 53:2, 57:20</p> <p>moment [7] - 104:8, 108:21, 117:2, 119:24, 120:3, 156:6, 158:9</p> <p>moments [1] - 134:25</p> <p>money [1] - 146:13</p> <p>montage [1] - 28:8</p> <p>Montana [1] - 2:21</p> <p>months [1] - 5:14</p> <p>Monument [5] - 19:18, 20:2, 63:19, 63:23, 136:15</p> <p>MOORE [2] - 1:18, 142:11</p> <p>morning [7] - 6:15, 11:16, 14:14, 15:13, 47:5, 70:5, 163:5</p> <p>MOSD [4] - 144:12, 144:24, 159:6, 161:11</p> <p>motion [4] - 99:2, 112:18, 163:10, 166:6</p> <p>motive [1] - 16:9</p> <p>Mountain [1] - 5:18</p> <p>move [11] - 42:7, 49:9, 66:5, 70:7, 106:24, 116:3, 116:4, 135:8, 145:13, 147:13, 159:24</p> <p>moved [5] - 5:9, 5:13, 85:24, 120:6, 150:5</p> <p>moves [1] - 119:14</p> <p>moving [6] - 5:22, 18:18, 18:21, 18:22, 21:4, 115:13</p> <p>MR [509] - 5:17, 5:24, 6:9, 8:18, 8:25, 10:9, 10:19, 11:3, 12:7, 12:21, 13:13, 17:15, 17:18, 19:4, 22:9, 22:11, 23:19, 23:21, 24:3, 24:5, 24:16, 24:19, 24:23, 24:24, 26:7, 26:11, 26:12, 26:21, 26:23, 27:5,</p>	<p>27:16, 28:6, 28:23, 29:4, 29:8, 29:20, 30:7, 30:10, 30:17, 30:20, 31:5, 31:6, 31:10, 31:25, 32:4, 33:1, 33:4, 33:17, 33:20, 33:21, 34:1, 34:16, 34:21, 34:24, 35:1, 35:8, 35:12, 35:16, 35:19, 35:20, 39:6, 39:9, 39:20, 39:23, 40:8, 40:11, 40:14, 40:18, 40:22, 41:2, 41:6, 41:25, 42:1, 42:8, 42:11, 42:12, 42:15, 42:18, 42:21, 42:22, 43:5, 43:8, 43:9, 43:14, 43:17, 43:18, 43:22, 43:25, 44:2, 44:7, 44:9, 44:13, 44:18, 44:19, 46:15, 46:17, 46:18, 47:22, 48:24, 49:1, 49:9, 49:10, 49:19, 49:22, 50:6, 50:19, 50:25, 51:4, 51:9, 51:20, 51:24, 52:2, 52:12, 52:17, 53:15, 53:17, 53:18, 53:21, 53:25, 54:5, 54:12, 55:4, 55:11, 55:13, 55:24, 56:4, 56:8, 56:18, 57:4, 57:7, 58:10, 59:15, 60:23, 61:2, 61:6, 61:8, 61:11, 61:15, 61:20, 61:24, 62:4, 62:17, 62:21, 63:1, 63:7, 64:12, 64:14, 64:19, 64:23, 65:2, 65:11, 65:15, 65:18, 65:24, 66:1, 66:5, 66:8, 66:14, 66:18, 66:23, 67:2, 67:5, 67:13, 67:18, 67:22, 68:1, 68:6, 68:17, 68:20, 69:19, 69:22, 70:1, 70:10, 70:13, 71:4, 71:23, 73:11, 75:7, 75:12, 75:15, 75:20, 75:21, 76:1, 76:4, 76:9, 76:16, 76:20, 76:21, 77:4, 77:5, 77:12, 77:16, 77:17, 77:24, 78:3, 78:6, 78:8, 78:15, 78:18, 78:23, 79:2, 79:3, 79:4, 79:5, 79:20, 79:21, 79:24, 80:2, 80:3, 80:8, 80:11, 80:20, 80:23,</p>	<p>80:24, 81:4, 81:7, 81:8, 81:13, 81:16, 81:17, 82:4, 82:8, 82:11, 83:15, 83:23, 84:2, 84:4, 84:15, 84:20, 84:21, 85:2, 85:9, 85:10, 85:17, 85:21, 85:22, 86:2, 86:5, 86:6, 86:10, 86:14, 86:18, 86:22, 86:23, 87:1, 87:5, 87:7, 87:11, 87:15, 87:16, 87:19, 87:23, 88:1, 88:5, 88:7, 88:14, 88:17, 88:18, 89:11, 89:15, 90:4, 90:8, 91:18, 91:21, 93:2, 93:5, 93:21, 94:3, 94:16, 94:22, 95:1, 95:3, 95:5, 95:10, 96:4, 96:7, 96:19, 96:24, 97:13, 97:17, 98:12, 98:17, 98:25, 99:2, 99:4, 99:10, 103:4, 103:15, 104:5, 104:8, 105:7, 105:25, 107:7, 108:23, 111:23, 112:20, 114:9, 115:12, 116:13, 117:10, 118:4, 118:10, 118:12, 118:13, 119:2, 119:7, 119:18, 119:24, 120:5, 120:6, 120:24, 121:24, 122:2, 122:11, 122:15, 122:16, 123:11, 123:15, 123:19, 124:11, 124:14, 124:18, 124:24, 125:3, 125:7, 125:11, 125:12, 125:19, 125:22, 126:9, 126:11, 126:14, 126:18, 126:25, 127:5, 127:14, 127:16, 127:22, 127:24, 128:9, 128:11, 128:16, 128:21, 129:3, 129:8, 129:9, 130:2, 130:18, 130:20, 131:1, 131:2, 131:11, 131:14, 131:20, 132:3, 132:7, 132:11, 132:22, 132:23, 134:22, 135:4, 135:7, 135:15, 135:18, 136:1, 136:6, 136:7, 136:20, 136:23, 137:6,</p>	<p>137:13, 137:17, 137:25, 138:4, 138:5, 138:13, 138:16, 138:17, 139:2, 139:7, 139:8, 139:16, 139:19, 139:20, 140:4, 140:9, 140:18, 140:22, 141:5, 141:10, 141:11, 141:17, 141:21, 142:6, 142:7, 142:14, 142:19, 142:20, 142:22, 142:24, 143:2, 143:5, 143:7, 143:8, 143:13, 143:20, 143:23, 144:6, 144:10, 144:19, 144:21, 145:1, 145:3, 145:13, 145:14, 145:19, 147:2, 147:4, 147:13, 147:14, 147:16, 147:20, 147:23, 148:10, 148:14, 148:17, 148:19, 149:6, 149:8, 149:11, 149:12, 149:13, 149:15, 149:18, 149:19, 149:22, 149:23, 150:5, 150:17, 150:23, 150:24, 151:18, 151:19, 151:21, 152:4, 152:9, 152:17, 152:20, 152:21, 152:22, 152:23, 153:7, 153:8, 153:11, 153:13, 153:21, 153:22, 154:2, 154:3, 154:6, 154:7, 154:10, 154:11, 154:14, 154:15, 154:18, 154:19, 154:22, 154:23, 155:9, 155:10, 156:2, 156:14, 157:14, 157:20, 157:21, 157:24, 158:1, 158:4, 158:5, 158:10, 158:15, 158:17, 159:4, 159:7, 159:14, 159:17, 159:24, 160:5, 160:12, 160:13, 160:16, 160:22, 161:1, 161:10, 161:15, 161:16, 161:24, 162:2, 162:4, 162:7, 162:8, 162:14, 162:15, 162:24, 163:12, 165:12,</p>
--	---	--	--	---

<p>165:15, 165:25 MS [70] - 10:18, 10:20, 10:25, 11:19, 13:10, 14:13, 15:1, 15:5, 16:5, 16:19, 16:25, 29:16, 58:12, 58:16, 59:12, 63:4, 71:1, 71:21, 71:25, 72:2, 72:6, 72:13, 72:21, 76:2, 82:15, 82:19, 82:25, 83:6, 83:11, 83:19, 85:3, 99:21, 107:21, 108:18, 109:4, 109:7, 109:10, 109:14, 109:17, 110:11, 110:13, 110:18, 111:16, 112:17, 123:12, 129:18, 129:22, 130:10, 131:17, 131:25, 133:1, 133:7, 133:14, 133:18, 133:24, 134:8, 134:17, 135:3, 135:6, 135:9, 142:11, 146:24, 150:3, 150:9, 150:12, 156:3, 156:17, 157:2, 160:1, 162:11 Mulroe [2] - 12:20, 13:12 MULROE [2] - 1:17, 12:21 multiple [4] - 71:12, 92:23, 95:15, 103:9 muse [1] - 103:1 must [1] - 102:15</p>	<p>117:24, 118:17, 121:3, 146:15, 151:15, 165:2 needle [2] - 106:25, 119:15 needs [4] - 6:19, 62:8, 62:9, 165:1 never [7] - 38:1, 55:8, 56:10, 108:12, 108:13, 110:18, 113:6 new [20] - 55:7, 55:25, 56:2, 56:12, 90:9, 90:11, 90:15, 90:20, 90:24, 92:6, 92:9, 92:10, 92:12, 92:14, 92:25, 93:11, 93:14, 94:8, 96:8, 98:5 New [7] - 1:24, 2:7, 2:19, 89:5, 144:24 newly [1] - 55:5 next [20] - 29:24, 44:14, 66:24, 84:17, 120:25, 122:12, 130:3, 130:4, 131:22, 141:6, 152:19, 153:7, 153:11, 153:21, 154:2, 154:6, 154:10, 154:14, 154:18, 154:22 NICHOLAS [1] - 1:22 Nick [1] - 155:23 Nicole [2] - 4:6, 109:7 NICOLE [1] - 17:16 night [1] - 55:25 Noble [1] - 144:17 nobody [1] - 114:24 noise [1] - 69:6 none [3] - 32:23, 56:4, 105:15 nongloved [1] - 124:8 nonhearsay [2] - 100:15, 102:18 nonresponsive [2] - 99:13, 99:14 NORDEAN [1] - 1:6 Nordean [47] - 5:3, 57:21, 57:22, 64:23, 75:3, 77:19, 78:23, 87:8, 90:12, 90:14, 91:24, 92:14, 93:10, 100:3, 115:21, 117:4, 117:18, 123:20, 123:23, 124:16, 127:11, 127:19, 138:24, 139:14, 140:14, 142:2, 145:7, 145:8, 145:11,</p>	<p>145:23, 146:6, 146:17, 147:12, 148:1, 148:24, 149:4, 149:11, 149:19, 155:16, 156:21, 158:18, 158:21, 158:23, 161:17, 162:5 nORDEAN [1] - 1:22 Nordean's [12] - 4:13, 64:25, 78:25, 79:25, 87:17, 93:6, 123:25, 124:3, 125:5, 150:15, 152:5, 152:13 normal [1] - 86:19 NORMAN [1] - 2:5 Northwest [6] - 1:19, 2:3, 2:12, 3:3, 19:18, 167:14 note [4] - 12:23, 17:9, 25:13, 98:12 noted [2] - 103:8, 112:5 notes [6] - 18:2, 18:8, 19:16, 37:19, 122:21, 167:5 nothing [7] - 9:6, 17:2, 28:3, 32:12, 95:24, 109:17, 162:24 notice [2] - 17:9, 96:17 notified [1] - 110:19 notifying [1] - 90:19 noting [1] - 158:10 notion [1] - 16:8 nowhere [1] - 37:4 number [12] - 10:10, 55:15, 55:16, 59:4, 60:19, 70:16, 70:20, 110:21, 151:24, 156:18, 157:4, 164:6 Number [1] - 160:25 numbers [1] - 146:21</p>	<p>27:10, 29:1, 30:17, 31:5, 31:7, 40:22, 49:10, 51:1, 51:3, 53:15, 53:20, 58:10, 58:12, 60:23, 62:21, 63:4, 64:12, 67:22, 68:6, 68:13, 71:1, 71:25, 73:8, 76:2, 79:21, 79:23, 82:15, 82:24, 83:4, 85:3, 91:11, 108:6, 108:24, 109:11, 110:7, 111:15, 112:6, 112:15, 113:24, 123:12, 127:14, 127:21, 127:22, 129:18, 130:15, 131:17, 131:25, 133:1, 133:23, 135:11, 135:12, 143:6, 145:14, 146:24, 147:14, 149:17, 149:18, 150:5, 150:12, 151:18, 156:3, 160:6, 162:4, 162:7, 162:11 objection/403 [1] - 8:6 objectionable [1] - 67:16 objections [2] - 97:1, 162:10 objects [1] - 101:7 observed [1] - 163:19 obvious [1] - 101:25 obviously [2] - 15:24, 69:4 occasions [1] - 101:8 occurred [2] - 45:18, 101:14 Ochs [4] - 14:5, 155:23, 155:24, 161:22 odd [1] - 165:4 OF [6] - 1:1, 1:3, 1:11, 1:19, 2:11, 2:20 offer [3] - 69:11, 107:14, 120:8 offered [6] - 100:19, 102:4, 102:13, 102:18, 137:10, 150:9 OFFICE [1] - 1:18 officer [1] - 49:22 officers [3] - 29:23, 137:11, 138:22 offices [1] - 45:15 OFFICES [2] - 2:11, 2:20</p>	<p>official [1] - 167:12 Official [1] - 3:1 officially [1] - 47:15 offish [1] - 81:12 often [2] - 11:7, 104:20 once [3] - 25:16, 105:20, 165:12 one [103] - 5:4, 5:7, 7:14, 7:25, 8:1, 9:24, 10:10, 11:4, 11:21, 11:24, 13:7, 14:8, 14:18, 14:23, 15:19, 15:23, 16:1, 16:22, 17:8, 19:2, 28:10, 28:12, 28:18, 29:4, 29:21, 29:22, 32:25, 33:23, 40:14, 47:17, 49:11, 49:12, 53:19, 55:15, 56:21, 58:7, 59:4, 64:14, 69:9, 75:25, 82:2, 82:9, 85:24, 90:6, 90:14, 90:16, 91:18, 91:24, 92:13, 93:10, 93:15, 93:16, 96:24, 97:18, 98:20, 100:5, 100:14, 101:11, 104:1, 104:14, 105:8, 105:12, 107:22, 108:5, 108:13, 109:23, 110:21, 116:11, 116:16, 117:3, 119:10, 123:24, 126:1, 131:24, 134:22, 149:2, 149:3, 150:19, 152:19, 153:7, 153:12, 153:16, 153:21, 154:2, 154:6, 154:14, 154:18, 154:22, 156:6, 156:20, 157:8, 158:9, 158:14, 158:20, 164:6, 164:9, 164:15, 165:8 one-attorney [1] - 64:14 one-minute [2] - 116:16, 117:3 ones [2] - 7:14, 70:5 ongoing [1] - 101:5 open [100] - 24:18, 29:3, 30:9, 32:3, 33:25, 34:20, 35:11, 35:15, 35:18, 39:8, 39:22, 41:5, 41:24, 42:10, 42:17, 43:7, 43:16, 43:24, 44:6, 44:12, 45:14, 52:1,</p>
N				
<p>NADIA [1] - 1:18 name [3] - 129:14, 142:21, 152:15 named [2] - 80:5, 128:14 names [1] - 73:17 NAYIB [2] - 2:11, 2:11 near [8] - 19:24, 25:4, 25:20, 26:5, 37:4, 38:4, 128:3, 128:6 necessarily [1] - 110:15 neck [1] - 65:8 need [18] - 9:5, 11:16, 12:21, 18:23, 41:17, 43:1, 53:7, 75:25, 94:10, 100:16, 103:23, 104:2,</p>	<p>NADIA [1] - 1:18 name [3] - 129:14, 142:21, 152:15 named [2] - 80:5, 128:14 names [1] - 73:17 NAYIB [2] - 2:11, 2:11 near [8] - 19:24, 25:4, 25:20, 26:5, 37:4, 38:4, 128:3, 128:6 necessarily [1] - 110:15 neck [1] - 65:8 need [18] - 9:5, 11:16, 12:21, 18:23, 41:17, 43:1, 53:7, 75:25, 94:10, 100:16, 103:23, 104:2,</p>	O		
<p>NADIA [1] - 1:18 name [3] - 129:14, 142:21, 152:15 named [2] - 80:5, 128:14 names [1] - 73:17 NAYIB [2] - 2:11, 2:11 near [8] - 19:24, 25:4, 25:20, 26:5, 37:4, 38:4, 128:3, 128:6 necessarily [1] - 110:15 neck [1] - 65:8 need [18] - 9:5, 11:16, 12:21, 18:23, 41:17, 43:1, 53:7, 75:25, 94:10, 100:16, 103:23, 104:2,</p>	<p>NADIA [1] - 1:18 name [3] - 129:14, 142:21, 152:15 named [2] - 80:5, 128:14 names [1] - 73:17 NAYIB [2] - 2:11, 2:11 near [8] - 19:24, 25:4, 25:20, 26:5, 37:4, 38:4, 128:3, 128:6 necessarily [1] - 110:15 neck [1] - 65:8 need [18] - 9:5, 11:16, 12:21, 18:23, 41:17, 43:1, 53:7, 75:25, 94:10, 100:16, 103:23, 104:2,</p>			
<p>NADIA [1] - 1:18 name [3] - 129:14, 142:21, 152:15 named [2] - 80:5, 128:14 names [1] - 73:17 NAYIB [2] - 2:11, 2:11 near [8] - 19:24, 25:4, 25:20, 26:5, 37:4, 38:4, 128:3, 128:6 necessarily [1] - 110:15 neck [1] - 65:8 need [18] - 9:5, 11:16, 12:21, 18:23, 41:17, 43:1, 53:7, 75:25, 94:10, 100:16, 103:23, 104:2,</p>	<p>NADIA [1] - 1:18 name [3] - 129:14, 142:21, 152:15 named [2] - 80:5, 128:14 names [1] - 73:17 NAYIB [2] - 2:11, 2:11 near [8] - 19:24, 25:4, 25:20, 26:5, 37:4, 38:4, 128:3, 128:6 necessarily [1] - 110:15 neck [1] - 65:8 need [18] - 9:5, 11:16, 12:21, 18:23, 41:17, 43:1, 53:7, 75:25, 94:10, 100:16, 103:23, 104:2,</p>	<p>O'Neal [1] - 92:3 object [8] - 29:13, 66:8, 67:13, 68:12, 83:19, 111:7, 142:22, 143:13 objected [8] - 6:21, 7:15, 55:18, 98:20, 98:22, 107:25, 108:5, 113:25 objecting [2] - 73:6, 103:8 objection [74] - 6:21, 7:20, 8:5, 8:6, 23:19, 24:3, 26:7, 26:21,</p>	<p>O'Neal [1] - 92:3 object [8] - 29:13, 66:8, 67:13, 68:12, 83:19, 111:7, 142:22, 143:13 objected [8] - 6:21, 7:15, 55:18, 98:20, 98:22, 107:25, 108:5, 113:25 objecting [2] - 73:6, 103:8 objection [74] - 6:21, 7:20, 8:5, 8:6, 23:19, 24:3, 26:7, 26:21,</p>	<p>O'Neal [1] - 92:3 object [8] - 29:13, 66:8, 67:13, 68:12, 83:19, 111:7, 142:22, 143:13 objected [8] - 6:21, 7:15, 55:18, 98:20, 98:22, 107:25, 108:5, 113:25 objecting [2] - 73:6, 103:8 objection [74] - 6:21, 7:20, 8:5, 8:6, 23:19, 24:3, 26:7, 26:21,</p>

<p>57:6, 59:14, 62:16, 65:1, 66:17, 67:1, 70:5, 70:12, 73:10, 75:11, 75:19, 76:19, 77:3, 77:15, 78:2, 78:17, 79:1, 80:1, 80:10, 80:22, 81:6, 81:15, 82:7, 82:14, 83:22, 84:1, 84:19, 85:8, 85:20, 86:4, 86:13, 86:21, 87:4, 87:14, 87:22, 88:16, 89:14, 95:25, 99:14, 122:14, 123:18, 124:13, 124:23, 125:2, 125:10, 125:21, 128:20, 129:7, 130:17, 130:25, 131:13, 132:10, 135:14, 135:17, 136:5, 136:22, 137:5, 137:16, 138:3, 138:15, 139:6, 139:18, 140:8, 140:21, 141:9, 141:20, 142:5, 142:18, 143:22, 144:9, 147:22, 148:13, 158:3, 159:3, 160:25, 161:6, 165:7, 165:24</p> <p>opened [9] - 95:20, 97:21, 98:2, 113:6, 113:14, 116:21, 116:24, 118:15, 119:11</p> <p>opening [1] - 11:22</p> <p>opens [1] - 59:10</p> <p>opinion [12] - 14:16, 15:8, 37:16, 53:17, 53:18, 54:2, 56:21, 72:7, 72:15, 72:17</p> <p>opportunity [7] - 9:5, 9:12, 12:12, 13:8, 54:20, 104:13, 166:2</p> <p>opposed [3] - 73:17, 116:24, 120:15</p> <p>option [1] - 116:20</p> <p>Orange [1] - 2:6</p> <p>order [1] - 118:20</p> <p>orient [2] - 52:18, 152:24</p> <p>original [1] - 107:9</p> <p>originally [2] - 51:22, 129:24</p> <p>otherwise [4] - 101:2, 101:9, 129:25, 133:11</p> <p>out-of-court [3] -</p>	<p>100:24, 101:21, 102:1</p> <p>outside [21] - 27:3, 27:9, 29:7, 30:23, 49:16, 53:24, 58:15, 61:1, 66:9, 68:10, 72:5, 82:18, 99:8, 117:25, 129:21, 133:5, 142:23, 143:1, 143:13, 156:8, 158:7</p> <p>outstanding [1] - 120:7</p> <p>outweighed [1] - 14:11</p> <p>overnight [1] - 121:4</p> <p>overrule [3] - 67:16, 73:8, 130:15</p> <p>overruled [19] - 62:23, 63:5, 66:10, 71:2, 72:1, 79:23, 82:23, 85:6, 110:6, 111:15, 112:14, 123:14, 127:15, 131:18, 132:2, 135:12, 147:1, 156:5, 157:3</p> <p>own [4] - 7:19, 15:8, 56:9, 95:24</p>	<p>parcel [1] - 111:5</p> <p>parents [1] - 146:13</p> <p>Park [1] - 2:18</p> <p>Parler [1] - 147:7</p> <p>part [8] - 6:22, 12:13, 19:11, 27:17, 45:22, 45:23, 73:16, 111:4</p> <p>participated [1] - 145:11</p> <p>participating [1] - 71:15</p> <p>particular [7] - 16:1, 83:20, 106:13, 107:15, 108:16, 144:4, 156:4</p> <p>particularly [2] - 82:1, 111:7</p> <p>parties [12] - 5:5, 68:8, 91:4, 93:11, 96:22, 116:9, 118:6, 121:6, 121:7, 164:3, 164:10, 165:20</p> <p>partners [1] - 146:9</p> <p>parts [1] - 19:16</p> <p>party [1] - 92:4</p> <p>past [6] - 28:22, 37:6, 37:10, 37:17, 38:1, 156:15</p> <p>PATTIS [25] - 2:5, 2:5, 12:7, 13:13, 58:10, 60:23, 61:2, 61:8, 61:15, 61:20, 61:24, 62:4, 62:21, 79:2, 79:4, 99:2, 104:8, 119:18, 119:24, 120:5, 151:18, 157:14, 157:20, 157:24, 163:12</p> <p>Pattis [17] - 12:6, 60:8, 61:6, 63:17, 70:20, 73:15, 88:2, 88:19, 104:7, 119:17, 125:23, 132:24, 135:20, 136:8, 157:13, 163:10, 166:6</p> <p>Paul [3] - 146:4, 146:15, 146:18</p> <p>pause [26] - 24:23, 35:19, 41:25, 42:11, 44:18, 65:24, 75:20, 77:4, 80:23, 81:7, 85:9, 85:21, 86:5, 86:22, 87:15, 88:17, 89:16, 89:20, 122:15, 125:11, 131:1, 136:6, 138:16, 139:19, 141:10, 142:6</p> <p>pausing [2] - 84:9, 87:23</p>	<p>PB [3] - 152:16, 152:18, 162:20</p> <p>PDF [2] - 50:2, 50:3</p> <p>Peace [8] - 19:18, 20:2, 20:21, 80:5, 81:24, 91:15, 123:4, 128:1</p> <p>pejorative [1] - 9:24</p> <p>people [28] - 10:3, 11:14, 23:17, 28:16, 32:14, 32:18, 33:14, 35:4, 36:10, 36:17, 44:8, 46:13, 60:9, 70:21, 73:16, 73:20, 74:7, 74:13, 105:23, 109:19, 111:10, 129:25, 133:8, 133:21, 142:9, 147:9, 156:22, 162:18</p> <p>people's [2] - 11:7, 36:8</p> <p>Pepe [3] - 89:1, 89:4, 89:9</p> <p>period [4] - 64:6, 97:3, 117:16, 123:1</p> <p>permission [11] - 5:24, 5:25, 40:23, 52:13, 66:14, 66:15, 127:4, 145:15, 147:19, 150:8, 150:13</p> <p>person [27] - 5:12, 9:13, 9:16, 10:11, 10:21, 12:12, 19:2, 46:8, 60:6, 61:12, 61:13, 66:2, 66:3, 85:11, 87:8, 88:22, 106:2, 106:5, 106:22, 107:5, 107:16, 108:17, 108:18, 108:19, 109:8, 136:8</p> <p>person's [1] - 15:24</p> <p>personal [1] - 62:7</p> <p>personally [6] - 58:7, 60:20, 61:2, 61:9, 61:16, 62:18</p> <p>pertaining [2] - 45:17, 74:21</p> <p>Pezzola [85] - 6:3, 17:23, 18:3, 18:6, 18:16, 19:6, 19:10, 19:14, 20:12, 20:18, 21:11, 22:3, 22:6, 22:14, 22:23, 23:1, 23:8, 23:16, 23:22, 23:23, 24:20, 24:25, 25:20, 25:24, 26:5, 26:6, 26:20, 28:7, 28:9, 28:15, 28:16, 30:11, 30:15, 30:22, 31:2, 31:11, 31:14,</p>	<p>31:18, 31:21, 32:9, 32:13, 32:17, 33:7, 33:14, 34:2, 34:22, 35:2, 35:21, 35:24, 36:24, 37:10, 37:13, 37:16, 37:19, 37:25, 38:6, 38:8, 38:9, 38:13, 38:15, 39:24, 40:3, 42:14, 42:24, 43:2, 43:12, 43:19, 44:14, 44:20, 79:11, 122:18, 122:25, 132:5, 132:20, 133:17, 134:2, 134:10, 134:24, 136:25, 137:7, 137:21, 138:18, 143:10, 144:2, 144:3</p> <p>PEZZOLA [3] - 1:7, 2:17, 6:5</p> <p>Pezzola's [5] - 5:25, 29:24, 122:4, 127:12, 138:6</p> <p>Phoenix [1] - 64:10</p> <p>phone [54] - 29:5, 30:4, 35:5, 35:22, 35:25, 36:8, 36:11, 48:5, 48:13, 49:6, 50:20, 51:14, 52:6, 52:9, 52:21, 54:2, 54:3, 55:14, 56:7, 56:8, 56:20, 57:11, 57:13, 57:15, 57:22, 58:18, 58:20, 58:25, 59:8, 59:9, 59:17, 62:9, 82:10, 112:24, 113:3, 113:4, 116:15, 116:25, 117:4, 132:13, 133:20, 139:22, 152:6, 152:13, 155:7, 157:8, 157:9, 159:6, 159:13, 162:5</p> <p>phones [3] - 58:21, 73:5, 158:8</p> <p>photo [8] - 65:3, 122:7, 132:12, 132:19, 134:6, 134:16, 134:24, 135:5</p> <p>photograph [2] - 88:9, 158:24</p> <p>phrase [2] - 11:13, 109:23</p> <p>phrases [1] - 134:23</p> <p>physical [2] - 59:17, 101:18</p> <p>physically [1] - 59:25</p> <p>pick [1] - 121:2</p> <p>picture [5] - 17:25, 20:11, 21:8, 37:11,</p>
	<p>P</p>	<p>P.A [2] - 2:11, 2:14</p> <p>P.C [2] - 2:3, 2:17</p> <p>p.m [20] - 1:7, 17:6, 57:18, 89:24, 115:18, 115:20, 117:15, 118:6, 121:20, 122:9, 122:20, 126:15, 132:17, 145:23, 148:6, 150:20, 159:15, 160:19, 160:20, 163:8</p> <p>pace [2] - 156:11, 156:15</p> <p>Page [5] - 14:17, 126:15, 149:11, 149:19, 149:22</p> <p>PAGE [1] - 4:9</p> <p>pair [1] - 65:7</p> <p>Palace [4] - 48:20, 48:23, 49:7, 52:21</p> <p>Pam [1] - 74:25</p> <p>panel [2] - 17:4, 121:18</p> <p>Panman [3] - 145:22, 145:23, 146:6</p> <p>panned [1] - 125:13</p> <p>panoramas [1] - 70:22</p> <p>pants [2] - 65:7, 65:8</p>		

<p>37:22 piece [3] - 93:18, 105:1, 117:14 pieces [1] - 92:12 place [2] - 57:21, 115:24 placed [1] - 115:20 placing [1] - 36:10 plain [1] - 102:4 Plaintiff [1] - 1:4 plan [7] - 91:23, 103:2, 145:24, 148:6, 148:24, 151:16 Planet [1] - 146:3 planned [1] - 112:1 planning [4] - 45:18, 74:17, 74:18, 156:11 play [46] - 24:16, 33:22, 41:21, 42:8, 43:5, 44:9, 65:20, 66:23, 75:15, 76:1, 76:17, 77:12, 77:24, 79:20, 79:24, 80:20, 81:4, 81:13, 82:11, 83:23, 84:16, 84:17, 85:2, 85:17, 86:2, 86:18, 87:11, 88:14, 98:22, 109:22, 111:4, 122:11, 124:11, 125:8, 129:11, 130:3, 130:19, 131:11, 136:3, 137:25, 138:13, 139:4, 139:16, 141:6, 141:18, 160:22 played [1] - 112:12 playing [6] - 35:16, 42:15, 43:14, 43:22, 78:15, 129:4 plays [2] - 115:3, 130:21 plenty [1] - 61:7 PLLC [1] - 1:22 plus [1] - 152:24 podcast [1] - 71:14 point [59] - 5:5, 6:11, 8:19, 8:25, 9:1, 10:2, 14:22, 15:12, 28:13, 29:5, 32:10, 34:23, 36:25, 37:2, 37:4, 37:17, 37:23, 38:8, 38:10, 39:3, 39:14, 40:5, 43:19, 45:1, 55:2, 60:1, 60:4, 62:10, 65:12, 69:2, 71:6, 72:22, 77:22, 91:9, 92:24, 93:23, 94:3, 95:22, 96:17, 97:17, 98:25, 102:5, 109:18, 110:22,</p>	<p>112:9, 113:9, 114:14, 116:16, 116:17, 117:19, 117:24, 118:2, 118:5, 118:25, 123:9, 137:11, 156:16, 163:16, 164:15 pointed [1] - 45:1 points [1] - 90:6 police [8] - 29:23, 40:1, 40:4, 81:11, 105:2, 107:12, 137:11, 138:11 Police [2] - 39:25, 161:8 policed [1] - 113:23 portion [4] - 109:22, 109:23, 112:12, 126:21 portions [2] - 4:10, 40:25 position [3] - 106:3, 106:8, 111:22 positioned [1] - 139:23 possession [2] - 137:7, 138:25 possibility [1] - 94:25 post [6] - 7:22, 8:9, 10:2, 11:11, 74:12, 148:3 post-January [2] - 11:11, 74:12 posture [1] - 81:11 potential [4] - 12:8, 46:14, 107:14, 114:3 potentially [2] - 7:20, 35:3 POW/MIA [3] - 140:2, 140:10, 140:14 power [1] - 146:21 pre [2] - 68:24, 68:25 pre-event [2] - 68:24, 68:25 precisely [1] - 20:18 precluding [1] - 105:20 predicate [2] - 51:17, 51:19 preparation [1] - 96:11 prepared [2] - 14:4, 112:2 presence [17] - 27:3, 29:7, 29:24, 49:16, 53:24, 58:15, 61:1, 68:10, 72:5, 82:18, 117:25, 122:5, 129:21, 133:5, 143:1,</p>	<p>156:8, 158:7 present [4] - 59:22, 64:5, 107:23, 108:5 presentation [2] - 6:18, 7:13 presented [1] - 110:16 press [3] - 11:7, 43:5, 89:20 presumably [1] - 106:13 pretrial [1] - 112:17 pretty [4] - 104:24, 113:24, 134:23, 164:13 previous [3] - 5:13, 56:21, 141:13 PREVIOUSLY [1] - 17:16 Preworkout [1] - 146:2 principle [3] - 15:23, 101:17, 101:20 principled [1] - 15:18 printed [1] - 50:2 privately [2] - 40:17, 120:4 privilege [1] - 92:5 problem [4] - 6:5, 54:18, 114:23, 118:21 problems [5] - 36:10, 36:13, 36:14, 74:4, 124:16 proceed [13] - 5:23, 17:14, 29:19, 64:18, 83:18, 97:11, 121:23, 156:11, 159:1, 160:15, 162:13, 164:12, 165:21 Proceedings [1] - 166:7 proceedings [34] - 17:6, 27:2, 29:2, 29:6, 30:8, 49:15, 51:25, 53:23, 57:5, 58:14, 59:13, 60:25, 62:15, 68:9, 70:11, 72:4, 73:9, 82:17, 83:21, 89:24, 99:25, 121:20, 129:20, 130:16, 133:4, 135:13, 142:25, 143:21, 156:7, 158:2, 158:6, 159:2, 163:8, 167:6 process [2] - 48:10, 57:14 produced [4] - 50:4, 50:7, 92:11, 167:6 productive [1] - 13:2 proffer [1] - 68:18</p>	<p>proffered [7] - 7:1, 7:3, 13:22, 14:4, 102:11, 104:23, 105:4 proffers [1] - 105:13 progress [1] - 101:1 prohibited [2] - 11:21, 108:9 promise [1] - 17:20 promised [1] - 120:1 proof [3] - 93:7, 95:17, 95:20 proper [1] - 55:20 property [1] - 145:25 prosecutors [1] - 102:6 protect [2] - 63:9, 63:10 Proud [31] - 28:17, 29:10, 32:23, 45:10, 45:13, 45:19, 45:21, 45:22, 45:24, 46:11, 46:24, 47:3, 47:8, 47:10, 47:12, 47:15, 64:3, 69:7, 69:8, 69:13, 74:7, 74:8, 81:20, 83:16, 85:14, 89:5, 144:18 prove [8] - 14:20, 14:23, 15:10, 16:13, 101:13, 102:6, 102:9, 102:19 provide [1] - 63:12 provides [1] - 61:19 provocative [1] - 12:1 public [1] - 71:14 public-facing [1] - 71:14 publish [7] - 40:24, 52:14, 66:14, 127:4, 145:16, 147:19, 150:14 published [83] - 24:18, 32:3, 33:25, 34:20, 35:11, 35:15, 35:18, 39:8, 39:22, 41:5, 41:24, 42:10, 42:17, 43:7, 43:16, 43:24, 44:6, 44:12, 65:1, 65:14, 65:23, 66:17, 67:1, 75:11, 75:19, 76:19, 77:3, 77:15, 78:2, 78:17, 79:1, 80:1, 80:10, 80:22, 81:6, 81:15, 82:7, 82:14, 84:1, 84:19, 85:8, 85:20, 86:4, 86:13, 86:21, 87:4, 87:14, 87:22, 88:16, 89:14, 122:14,</p>	<p>123:18, 124:13, 124:23, 125:2, 125:10, 125:21, 128:20, 129:7, 130:25, 131:13, 132:10, 135:17, 136:5, 136:22, 137:5, 137:16, 138:3, 138:15, 139:6, 139:18, 140:8, 140:21, 141:9, 141:20, 142:5, 142:18, 144:9, 147:17, 147:22, 148:13, 160:25, 161:6 pull [1] - 81:1 puppy [3] - 24:21, 34:11 purports [1] - 50:23 purpose [7] - 7:7, 82:25, 102:18, 110:7, 119:4, 121:8, 164:4 pushing [1] - 11:10 put [12] - 8:10, 9:17, 13:4, 20:17, 91:3, 100:5, 104:19, 109:25, 121:1, 121:9, 146:7, 149:16 putting [1] - 109:11</p>
Q				
<p>qualified [3] - 53:16, 113:13, 113:18 quarter [2] - 84:16, 141:6 questioned [1] - 50:9 questioning [2] - 57:24, 110:25 questions [56] - 29:14, 37:9, 47:25, 48:8, 52:4, 59:20, 59:23, 60:8, 60:11, 63:14, 63:15, 63:20, 67:6, 67:9, 70:4, 70:16, 70:18, 70:20, 70:22, 71:17, 72:9, 73:18, 74:6, 74:9, 74:22, 74:25, 75:5, 75:17, 77:18, 77:20, 80:4, 80:6, 81:22, 83:2, 84:7, 85:5, 97:18, 122:4, 125:4, 125:23, 126:4, 127:11, 127:17, 128:13, 132:5, 132:25, 133:17, 135:19, 135:24, 136:25, 138:23, 151:22, 151:24, 157:7</p>				

<p>quick [3] - 29:5, 46:17, 156:6</p> <p>quicker [1] - 18:20</p> <p>quickly [1] - 18:17</p> <p>quite [1] - 112:8</p> <p>quizzical [1] - 119:17</p> <p>quote [16] - 14:16, 14:18, 82:21, 92:2, 92:5, 92:7, 100:23, 101:3, 101:5, 101:6, 101:8, 101:10, 101:11, 101:15, 102:19, 102:20</p> <p>quote-unquote [1] - 82:21</p>	<p>98:7, 110:6, 114:1, 117:24, 118:1, 143:6, 143:8, 165:1</p> <p>reasonable [1] - 21:7</p> <p>reasons [8] - 13:23, 13:25, 27:21, 28:22, 63:2, 63:8, 108:13, 119:19</p> <p>rebut [1] - 91:8</p> <p>rebutts [1] - 130:9</p> <p>rebuttal [1] - 12:8</p> <p>received [1] - 5:12</p> <p>RECEIVED [1] - 4:9</p> <p>recent [1] - 38:11</p> <p>recently [2] - 53:9, 56:14</p> <p>recess [1] - 99:24</p> <p>recipes [1] - 146:14</p> <p>recognize [20] - 51:10, 79:9, 79:12, 88:22, 129:10, 132:12, 132:18, 134:5, 134:16, 135:23, 136:11, 139:9, 140:23, 144:1, 145:4, 145:10, 147:5, 147:9, 152:10, 159:10</p> <p>recognized [1] - 15:8</p> <p>recognizing [1] - 74:4</p> <p>reconsider [3] - 12:19, 13:9, 13:18</p> <p>reconsidered [2] - 13:12, 13:18</p> <p>record [17] - 5:1, 6:4, 62:3, 67:3, 91:21, 92:17, 93:16, 99:21, 100:1, 100:5, 107:21, 114:18, 115:9, 115:14, 117:14, 118:13, 124:8</p> <p>records [22] - 90:10, 90:12, 92:13, 93:12, 93:15, 94:23, 103:5, 103:6, 103:8, 103:12, 114:22, 115:19, 116:1, 116:2, 116:10, 116:15, 119:6, 164:10, 164:19, 164:22, 165:5, 165:6</p> <p>recover [2] - 64:9, 64:20</p> <p>recovered [6] - 82:10, 132:13, 153:5, 153:18, 153:25, 155:7</p> <p>recross [10] - 59:10, 90:20, 92:5, 93:19, 94:11, 98:6, 115:6, 115:8, 116:7, 165:21</p> <p>recross-</p>	<p>examination [2] - 92:5, 93:19</p> <p>recrossed [1] - 118:2</p> <p>red [1] - 139:9</p> <p>Red [1] - 4:3</p> <p>redirect [13] - 47:20, 55:3, 55:20, 59:1, 90:9, 92:6, 94:8, 94:14, 94:24, 97:24, 103:14, 112:13, 115:4</p> <p>REDIRECT [1] - 47:21</p> <p>redirected [1] - 97:24</p> <p>refer [2] - 46:8, 151:12</p> <p>reference [2] - 18:2, 109:19</p> <p>referenced [2] - 18:5, 117:16</p> <p>referencing [2] - 18:12, 48:17</p> <p>referred [3] - 24:20, 34:10, 93:16</p> <p>referring [6] - 9:9, 44:3, 93:13, 103:21, 115:17, 115:23</p> <p>refers [1] - 115:17</p> <p>reflect [1] - 115:9</p> <p>reflected [1] - 90:14</p> <p>reflecting [1] - 149:24</p> <p>reflects [1] - 16:1</p> <p>refresh [2] - 126:12, 149:9</p> <p>refreshed [1] - 126:22</p> <p>refute [2] - 28:12, 29:22</p> <p>regarding [2] - 46:23, 90:12</p> <p>regardless [2] - 99:17, 104:4</p> <p>regards [3] - 12:15, 45:19, 45:20</p> <p>regrouping [1] - 148:22</p> <p>Rehl [29] - 18:6, 22:3, 32:25, 37:4, 37:6, 37:7, 37:10, 37:17, 37:19, 38:1, 38:6, 38:17, 39:2, 128:14, 128:25, 129:23, 129:25, 130:3, 131:3, 131:22, 133:9, 133:21, 134:2, 134:9, 134:24, 135:1, 146:25, 156:4, 162:12</p> <p>REHL [2] - 1:7, 2:9</p> <p>Rehl's [8] - 71:17,</p>	<p>73:13, 82:9, 132:4, 132:13, 133:16, 159:6, 159:13</p> <p>rejected [1] - 50:15</p> <p>related [1] - 101:23</p> <p>relation [3] - 78:9, 79:16, 127:12</p> <p>relationship [1] - 145:8</p> <p>relative [1] - 139:23</p> <p>relaxed [1] - 141:14</p> <p>release [3] - 157:19, 163:11, 165:23</p> <p>relevance [6] - 7:19, 8:5, 9:16, 14:10, 83:13, 105:13</p> <p>relevant [13] - 8:14, 8:20, 10:8, 14:20, 15:24, 29:25, 73:2, 73:7, 101:13, 102:9, 102:19, 103:19, 106:14</p> <p>relitigating [1] - 12:24</p> <p>remarks [1] - 12:17</p> <p>remember [65] - 18:3, 18:7, 18:12, 18:14, 18:16, 19:5, 19:21, 19:24, 23:22, 34:11, 47:5, 47:7, 48:18, 48:22, 53:4, 57:23, 59:20, 59:22, 60:10, 60:15, 63:15, 63:19, 67:9, 68:5, 70:18, 70:22, 73:18, 74:8, 75:1, 75:5, 77:20, 79:6, 80:6, 81:21, 85:13, 86:15, 88:3, 88:20, 114:1, 122:4, 123:21, 124:1, 125:4, 125:23, 126:3, 127:10, 127:17, 128:12, 132:5, 133:17, 135:19, 135:23, 136:8, 136:24, 137:18, 138:23, 142:8, 144:11, 145:6, 148:8, 149:4, 149:5, 151:9, 152:1, 155:11</p> <p>remind [6] - 11:21, 82:9, 141:22, 144:24, 155:3, 155:14</p> <p>reopen [1] - 61:20</p> <p>repeatedly [1] - 113:17</p> <p>repeating [1] - 98:18</p> <p>report [21] - 49:20, 50:7, 50:10, 50:12, 50:16, 50:22, 50:24,</p>	<p>51:4, 51:6, 59:21, 68:22, 106:17, 117:9, 151:9, 151:12, 151:15, 160:17, 163:21, 163:24</p> <p>REPORTED [1] - 3:1</p> <p>reported [8] - 105:15, 105:16, 105:18, 106:10, 106:22, 107:16, 120:9, 121:10</p> <p>REPORTER [4] - 62:2, 89:19, 90:7, 115:6</p> <p>Reporter [3] - 3:1, 89:17, 167:12</p> <p>reporter [2] - 89:21, 94:1</p> <p>reporter's [1] - 19:3</p> <p>reporting [10] - 60:13, 60:17, 63:3, 67:12, 67:19, 68:24, 68:25, 69:10, 121:12, 121:13</p> <p>reports [7] - 58:22, 67:21, 68:2, 103:9, 106:2, 106:5, 163:16</p> <p>represent [1] - 49:22</p> <p>request [2] - 120:8, 157:23</p> <p>requirement [2] - 100:24, 101:6</p> <p>research [2] - 112:1, 164:19</p> <p>researched [1] - 112:3</p> <p>reserve [1] - 12:8</p> <p>reserved [2] - 6:15, 13:7</p> <p>resolution [2] - 14:7, 14:9</p> <p>resolve [3] - 164:23, 165:3, 165:8</p> <p>resolved [2] - 98:14, 156:20</p> <p>respect [2] - 133:1, 162:12</p> <p>respond [1] - 108:23</p> <p>responds [2] - 146:15, 146:18</p> <p>response [7] - 9:1, 14:1, 14:2, 48:23, 72:10, 98:19, 99:7</p> <p>responses [1] - 48:18</p> <p>responsibilities [1] - 46:12</p> <p>rest [4] - 7:10, 105:3, 107:4, 163:19</p> <p>restaurant [1] -</p>
R				
<p>radio [1] - 35:3</p> <p>Rae [3] - 146:4, 146:15, 146:18</p> <p>railing [1] - 124:9</p> <p>raise [1] - 92:24</p> <p>raised [3] - 111:21, 111:23, 112:17</p> <p>ran [1] - 37:25</p> <p>rather [1] - 28:21</p> <p>Ray [11] - 41:7, 41:8, 41:10, 41:22, 42:4, 42:19, 42:23, 44:14, 44:21, 80:5, 80:17</p> <p>RDR [3] - 3:1, 167:3, 167:12</p> <p>re [2] - 36:5, 118:17</p> <p>re-ask [1] - 36:5</p> <p>re-call [1] - 118:17</p> <p>reached [1] - 113:5</p> <p>read [11] - 11:14, 95:16, 95:17, 95:21, 100:10, 118:6, 144:16, 148:20, 150:25, 162:3, 162:16</p> <p>reading [5] - 14:15, 19:19, 57:23, 118:22, 146:1</p> <p>ready [1] - 157:16</p> <p>real [3] - 29:5, 46:17, 97:2</p> <p>real-time [1] - 97:2</p> <p>really [16] - 7:3, 7:22, 8:2, 8:4, 23:8, 23:9, 23:23, 26:4, 38:1, 51:2, 98:16, 102:10, 106:23, 163:18, 165:6, 165:18</p> <p>realtime [1] - 97:5</p> <p>reason [15] - 7:1, 7:2, 12:13, 15:18, 30:21, 31:2, 54:23,</p>				

<p>146:7 results [1] - 49:23 returned [1] - 138:11 returns [1] - 104:9 Returns [6] - 48:1, 56:20, 90:5, 91:22, 117:5, 117:18 review [6] - 23:5, 67:11, 103:7, 136:11, 136:13, 140:12 reviewed [9] - 50:10, 51:7, 52:5, 67:19, 71:8, 71:12, 71:13, 76:11, 96:10 reviewing [3] - 53:10, 57:15, 70:17 rewatch [1] - 44:4 right-wing [1] - 69:13 riot [1] - 137:1 Road [1] - 2:9 road [1] - 98:21 ROGER [2] - 2:20, 2:20 Rohde [44] - 48:24, 65:11, 65:19, 65:24, 66:24, 75:7, 76:16, 82:4, 82:12, 83:23, 84:3, 84:15, 86:11, 86:18, 87:6, 87:12, 88:6, 89:12, 121:25, 122:11, 123:16, 124:18, 124:21, 125:7, 126:9, 128:17, 129:3, 130:18, 137:14, 137:25, 138:13, 139:3, 139:16, 142:11, 144:7, 144:19, 148:17, 152:4, 152:7, 152:17, 153:11, 159:14, 160:22, 161:24 roles [1] - 45:25 room [1] - 23:17 Room [1] - 3:3 Roots [5] - 5:16, 6:5, 6:8, 97:16, 98:19 ROOTS [7] - 2:20, 2:20, 5:17, 5:24, 6:9, 64:12, 97:17 Rotunda [1] - 138:24 roughly [2] - 57:18, 60:2 Rufio [3] - 145:22, 145:23, 146:6 Rule [1] - 100:14 rule [8] - 11:1, 64:14, 100:18, 101:7, 102:14, 120:21,</p>	<p>121:15, 135:11 Rules [1] - 11:10 ruling [5] - 13:9, 15:14, 29:21, 107:9, 164:6 rulings [3] - 6:17, 6:23, 102:22 run [3] - 33:7, 114:23, 146:8 running [3] - 18:16, 18:17, 37:16 runs [4] - 37:6, 37:10, 37:17, 109:24 Rusch [2] - 47:3, 47:8 Ryan [4] - 41:10, 41:11, 41:14, 80:5</p> <p style="text-align: center;">S</p> <p>SABINO [1] - 2:14 sake [1] - 19:3 Samsel [6] - 41:11, 41:14, 80:5, 80:12, 80:25 Samsel's [1] - 81:11 sandbagged [1] - 98:4 sandbagging [3] - 98:10, 98:15, 99:5 sandwiches [1] - 146:12 saucers [1] - 146:12 save [1] - 6:13 saw [21] - 6:3, 19:7, 43:19, 45:3, 50:8, 50:10, 51:11, 52:10, 66:3, 69:9, 69:12, 81:21, 84:6, 90:2, 114:19, 117:8, 131:22, 138:24, 140:13, 141:13, 151:4 scenario [3] - 34:22, 45:8, 46:5 scene [3] - 79:6, 109:19, 137:18 scenes [1] - 123:21 scheduling [4] - 5:5, 6:10, 17:9, 92:19 scope [24] - 23:19, 24:3, 27:9, 27:14, 27:21, 28:19, 28:21, 29:15, 30:1, 30:6, 66:9, 67:14, 83:1, 83:6, 83:7, 94:9, 113:24, 114:5, 129:19, 130:13, 134:13, 134:18, 142:23, 143:14</p>	<p>screen [11] - 33:2, 109:8, 122:19, 127:2, 129:10, 130:22, 140:23, 141:23, 147:5, 158:14, 159:8 scroll [10] - 126:17, 142:19, 144:7, 144:19, 148:17, 152:7, 152:19, 156:2, 159:14, 161:25 sculpting [1] - 12:11 search [5] - 49:18, 52:22, 60:20, 62:19, 152:18 seated [4] - 17:7, 90:1, 121:21, 163:9 Second [1] - 144:1 second [10] - 7:14, 8:1, 17:13, 18:18, 38:3, 40:15, 53:19, 110:22, 148:22, 153:9 seconds [49] - 17:25, 20:13, 33:18, 33:19, 33:21, 33:22, 33:23, 34:18, 35:9, 35:13, 37:18, 40:20, 41:3, 41:14, 41:18, 43:3, 44:1, 64:24, 65:20, 66:6, 66:24, 75:9, 78:24, 79:3, 81:7, 81:16, 82:5, 83:24, 84:3, 84:17, 85:18, 86:11, 87:2, 87:24, 109:24, 122:12, 130:3, 130:19, 136:2, 137:14, 138:1, 139:3, 140:19, 141:7, 141:18 see [67] - 7:7, 10:5, 11:7, 18:23, 22:3, 34:2, 41:17, 42:2, 42:4, 42:24, 43:10, 43:21, 44:16, 44:17, 44:20, 51:2, 55:19, 58:20, 67:16, 78:12, 79:9, 80:12, 80:17, 80:25, 81:2, 81:9, 81:18, 84:9, 84:22, 86:7, 86:24, 87:17, 88:8, 105:3, 123:25, 124:3, 124:15, 126:12, 128:25, 131:3, 131:21, 134:9, 135:9, 137:21, 138:6, 138:7, 138:18, 139:21, 140:10, 141:1, 142:14, 144:14, 150:4, 152:24, 153:2, 153:9, 153:14, 154:16, 154:20, 154:24,</p>	<p>155:16, 158:14, 159:8, 159:18, 163:5, 166:5 seeing [2] - 19:6, 149:9 seek [2] - 66:14, 119:18 seeking [3] - 90:20, 108:2, 108:19 seeks [1] - 100:21 segments [81] - 24:17, 32:2, 33:24, 34:19, 35:10, 35:14, 35:17, 39:7, 39:21, 41:4, 41:23, 42:9, 42:16, 43:6, 43:15, 43:23, 44:5, 44:11, 64:25, 65:22, 66:16, 66:25, 75:10, 75:18, 76:18, 77:2, 77:14, 78:1, 78:16, 78:25, 79:25, 80:9, 80:21, 81:5, 81:14, 82:6, 82:13, 83:25, 84:18, 85:7, 85:19, 86:3, 86:12, 86:20, 87:3, 87:13, 87:21, 88:15, 89:13, 122:13, 123:17, 124:12, 124:22, 125:1, 125:9, 125:20, 128:19, 129:6, 130:24, 131:12, 132:9, 135:16, 136:4, 136:21, 137:4, 137:15, 138:2, 138:14, 139:5, 139:17, 140:7, 140:20, 141:8, 141:19, 142:4, 142:17, 144:8, 147:21, 148:12, 160:24, 161:5 Self [1] - 143:11 Self-Defense [1] - 143:11 sending [1] - 48:19 sends [2] - 146:17, 165:13 sense [4] - 92:22, 107:23, 108:4, 108:5 sent [7] - 48:14, 48:21, 160:18, 161:11, 161:25, 162:3, 162:17 separate [6] - 8:4, 97:14, 105:3, 105:4, 106:20, 107:11 separately [1] - 59:11</p>	<p>serves [1] - 121:8 service [2] - 36:8, 47:19 SESSION [1] - 1:12 set [1] - 36:19 settled [1] - 143:11 seven [1] - 87:24 several [1] - 100:7 shake [1] - 81:1 shaking [1] - 118:3 Shannon [2] - 47:3, 47:8 share [1] - 104:11 shield [10] - 39:17, 39:19, 39:25, 40:1, 40:4, 127:12, 134:25, 137:1, 137:7, 138:10 ships [1] - 99:15 shopping [1] - 146:16 shot [4] - 22:3, 37:20, 65:4, 88:8 shoulders [1] - 142:1 show [13] - 24:14, 25:25, 31:25, 33:17, 36:19, 49:20, 81:24, 93:15, 114:22, 133:20, 134:12, 134:13 showed [6] - 20:12, 49:3, 49:7, 49:11, 49:12, 122:7 showing [3] - 8:21, 9:1, 90:10 shown [3] - 51:14, 100:25, 116:18 shows [8] - 32:13, 82:2, 90:16, 93:17, 94:14, 133:10, 133:18, 133:20 shut [2] - 36:8, 143:15 sic [1] - 90:6 side [4] - 70:8, 75:4, 91:6, 94:4 sidebar [21] - 26:25, 27:3, 29:7, 49:14, 49:16, 53:24, 58:13, 58:15, 61:1, 68:10, 72:5, 82:18, 90:23, 98:18, 129:21, 133:5, 143:1, 156:6, 156:8, 158:7, 158:9 Siegal [1] - 12:13 signal [3] - 31:11, 31:19, 31:21 significant [3] - 91:22, 92:1, 95:7 similar [1] - 26:14 similarly [1] - 16:2</p>
--	--	--	--	---

<p>simple ^[1] - 117:13 simply ^[4] - 93:15, 102:6, 102:8, 102:19 sincere ^[1] - 9:9 sincerely ^[1] - 9:25 single ^[1] - 122:22 sit ^[4] - 17:10, 17:12, 59:25, 113:9 sitting ^[1] - 117:12 six ^[3] - 11:23, 64:24, 86:11 Sixth ^[1] - 2:18 sixth ^[1] - 97:20 skeptical ^[1] - 164:5 skipped ^[1] - 104:16 skull ^[2] - 85:12 Skull ^[3] - 155:14, 161:20, 162:11 slicing ^[1] - 134:23 slow ^[4] - 21:4, 62:2, 84:15, 141:5 small ^[1] - 146:7 smart ^[2] - 7:23, 8:2 SMITH ^[38] - 1:22, 1:22, 2:5, 8:18, 8:25, 10:9, 10:19, 11:3, 78:6, 79:21, 90:4, 90:8, 91:18, 91:21, 93:2, 93:5, 93:21, 94:16, 99:10, 103:15, 104:5, 116:13, 117:10, 118:4, 118:10, 118:12, 127:22, 145:14, 147:14, 149:12, 149:18, 149:22, 150:5, 158:5, 158:10, 158:17, 162:4, 162:8 Smith ^[32] - 7:15, 9:18, 48:7, 59:20, 74:25, 75:13, 77:18, 79:7, 81:20, 84:6, 85:13, 90:2, 91:9, 94:7, 94:10, 94:11, 94:24, 96:2, 97:9, 99:8, 103:5, 103:7, 103:11, 114:2, 115:19, 123:23, 125:4, 127:10, 145:7, 148:5, 150:18, 162:9 Smith's ^[2] - 109:20, 114:4 smoke ^[1] - 138:21 social ^[1] - 7:23 solely ^[1] - 107:15 solution ^[1] - 107:15 someone ^[16] - 8:7, 8:14, 9:5, 9:7, 9:19, 9:22, 10:5, 16:13, 37:22, 46:5, 46:6,</p>	<p>46:23, 47:4, 73:4, 91:23, 165:10 sometime ^[1] - 156:22 somewhat ^[2] - 40:4, 44:20 somewhere ^[6] - 17:24, 19:6, 19:13, 94:13, 112:24, 134:19 sorry ^[17] - 11:23, 29:18, 33:20, 62:4, 64:1, 69:20, 71:21, 98:12, 100:16, 115:6, 133:3, 133:13, 149:23, 150:3, 150:10, 158:5, 158:8 sort ^[8] - 16:17, 55:2, 102:11, 106:24, 107:3, 120:13, 131:15, 164:7 sought ^[1] - 99:6 sounded ^[1] - 125:16 sounds ^[4] - 94:6, 104:3, 146:15, 164:9 source ^[7] - 60:13, 60:18, 63:3, 63:9, 63:18, 67:7, 69:2 sources ^[4] - 60:10, 63:11, 69:7, 69:8 sow ^[1] - 72:11 Spazzo ^[1] - 144:1 speaker ^[6] - 76:5, 77:20, 78:5, 78:10, 78:11, 78:13 speaking ^[13] - 18:5, 21:13, 26:17, 29:18, 31:7, 38:6, 38:9, 43:19, 44:23, 100:16, 100:17, 110:5, 162:10 speaks ^[1] - 132:1 Special ^[21] - 47:18, 47:23, 49:2, 52:3, 55:17, 57:8, 58:19, 65:3, 70:14, 73:12, 76:10, 84:5, 115:16, 115:22, 122:3, 126:19, 130:21, 155:11, 159:8, 160:17, 162:16 special ^[1] - 52:18 specific ^[7] - 19:16, 35:2, 36:21, 46:7, 74:22, 107:17, 127:11 specifically ^[11] - 36:17, 40:19, 41:10, 45:16, 46:19, 46:21, 75:3, 83:16, 101:22, 112:25, 135:22 specifics ^[1] - 48:22 speculation ^[4] -</p>	<p>26:8, 26:10, 30:18, 151:19 speculative ^[1] - 60:23 speed ^[3] - 84:16, 86:19, 141:6 spend ^[2] - 139:13, 145:24 spent ^[2] - 70:17, 74:19 split ^[1] - 25:17 spot ^[2] - 25:3, 25:4 stairs ^[3] - 21:22, 21:23, 37:17 stamp ^[1] - 49:8 stand ^[6] - 17:20, 61:24, 81:12, 103:14, 106:5, 106:13 stand-offish ^[1] - 81:12 standard ^[1] - 92:8 standing ^[1] - 146:10 start ^[5] - 13:1, 64:1, 78:9, 129:4, 146:18 started ^[2] - 77:22, 93:9 starting ^[2] - 78:13, 162:17 startling ^[1] - 98:5 starts ^[2] - 33:22, 78:4 state ^[5] - 5:21, 15:23, 15:25, 16:1, 16:23 statement ^[22] - 9:14, 9:21, 10:1, 11:23, 16:17, 27:13, 91:19, 100:19, 100:20, 100:21, 102:16, 107:22, 109:18, 110:23, 111:1, 111:2, 111:4, 111:5, 111:9, 133:25, 150:25, 151:3 statements ^[22] - 7:21, 8:14, 15:5, 15:6, 15:9, 16:6, 16:7, 16:9, 16:10, 17:1, 26:23, 100:14, 101:19, 101:21, 102:1, 102:4, 102:6, 102:7, 102:13, 102:15, 102:23, 156:23 states ^[1] - 14:18 States ^[7] - 3:2, 5:2, 14:15, 14:21, 92:3, 100:2, 167:13 STATES ^[4] - 1:1, 1:3, 1:13, 1:18 stay ^[1] - 24:11</p>	<p>stenographic ^[1] - 167:5 step ^[2] - 89:25, 163:2 stepping ^[2] - 31:22 steps ^[2] - 18:3, 75:4 STEVEN ^[1] - 2:17 stick ^[1] - 103:12 still ^[14] - 25:12, 25:14, 27:14, 39:17, 65:3, 101:1, 106:3, 106:6, 115:3, 116:12, 120:7, 120:16, 132:14, 165:24 stipulate ^[4] - 103:13, 116:9, 119:6, 164:11 stipulation ^[4] - 104:3, 118:5, 118:10, 118:14 stole ^[1] - 134:25 stop ^[16] - 33:1, 34:16, 34:24, 42:21, 43:8, 43:17, 43:25, 46:17, 76:20, 77:16, 80:2, 81:16, 84:2, 84:20, 124:18, 138:4 stopped ^[2] - 34:17, 67:4 stopping ^[2] - 129:8, 139:7 stored ^[1] - 60:22 straight ^[1] - 44:9 straightforward ^[1] - 164:13 strategic ^[1] - 98:22 Street ^[8] - 1:19, 2:3, 2:6, 2:12, 2:15, 19:17, 20:3, 136:17 stretch ^[1] - 98:16 stricken ^[1] - 164:17 strictly ^[1] - 113:24 strike ^[1] - 113:11 strikes ^[1] - 114:21 struck ^[1] - 110:16 structured ^[1] - 40:5 studied ^[1] - 71:10 stuff ^[2] - 143:14, 164:15 subject ^[3] - 46:9, 107:3, 107:6 subjects ^[2] - 46:10, 46:22 substance ^[4] - 106:18, 107:6, 163:15, 164:2 substantial ^[1] - 36:13 substantive ^[1] - 107:2</p>	<p>subtracted ^[1] - 103:20 suggesting ^[3] - 16:21, 135:4, 165:19 suggestion ^[1] - 91:23 Suite ^[2] - 1:23, 2:12 suits ^[1] - 164:4 sunglasses ^[1] - 65:9 support ^[1] - 101:16 suppose ^[1] - 107:14 supposedly ^[2] - 108:3, 109:19 Supreme ^[2] - 100:11, 100:13 surprise ^[1] - 113:8 surprised ^[3] - 96:13, 113:2, 113:3 surveillance ^[2] - 64:9, 64:20 sustain ^[2] - 30:6, 68:12 sustained ^[14] - 23:20, 24:4, 26:9, 26:22, 29:1, 30:19, 31:8, 53:20, 58:11, 64:13, 76:3, 78:7, 151:20 swallowed ^[1] - 121:12 sweater ^[1] - 65:7 SWORN ^[1] - 17:16 system ^[6] - 50:8, 50:11, 51:11, 60:4, 60:21, 62:19</p>
T				
<p>table ^[2] - 108:20, 112:15 tacos ^[1] - 146:11 talks ^[2] - 15:10, 21:23 target ^[1] - 46:5 Tarrio ^[30] - 7:4, 14:2, 24:9, 35:22, 35:25, 48:11, 53:1, 90:11, 90:12, 90:13, 91:24, 92:13, 92:16, 93:7, 95:3, 97:21, 98:2, 99:12, 115:21, 117:4, 118:7, 118:13, 143:5, 144:12, 144:18, 151:25, 152:15, 159:21, 162:17, 162:20 TARRIO ^[2] - 1:7, 2:11</p>				

<p>Tarrio's [19] - 48:5, 48:18, 48:23, 49:6, 50:20, 51:14, 52:6, 53:11, 55:14, 56:20, 57:11, 57:13, 57:15, 58:17, 58:18, 59:17, 112:24, 116:24, 161:9</p> <p>team [4] - 46:20, 58:7, 60:3, 62:22</p> <p>team's [1] - 22:25</p> <p>teammates [1] - 97:3</p> <p>technical [4] - 117:11, 117:14, 117:19, 118:25</p> <p>technological [1] - 111:3</p> <p>tee [1] - 69:18</p> <p>teed [4] - 14:7, 14:8, 156:19, 157:5</p> <p>Telegram [1] - 56:22</p> <p>telephone [1] - 115:19</p> <p>ten [18] - 40:19, 40:20, 41:3, 44:1, 66:6, 74:2, 82:5, 83:24, 85:17, 89:20, 89:22, 94:1, 96:25, 99:20, 109:23, 110:22, 125:8, 140:19</p> <p>ten-minute [2] - 94:1, 96:25</p> <p>ten-second [1] - 110:22</p> <p>term [3] - 11:22, 46:2, 120:8</p> <p>terms [5] - 31:9, 74:13, 90:24, 92:19, 140:1</p> <p>terrorism [3] - 11:6, 11:20, 11:22</p> <p>terrorist [2] - 11:3, 12:3</p> <p>terrorists [8] - 7:24, 8:3, 8:11, 8:12, 8:22, 9:8, 11:13, 12:16</p> <p>test [2] - 9:4, 9:19</p> <p>testified [34] - 27:16, 29:8, 29:16, 30:3, 41:7, 47:9, 47:12, 48:7, 50:22, 51:13, 53:1, 54:1, 54:14, 54:25, 58:3, 58:19, 60:13, 63:25, 64:2, 76:11, 86:15, 90:13, 94:20, 97:4, 101:22, 106:18, 117:7, 122:25, 123:20, 140:14, 150:18, 161:12, 161:17, 165:4</p> <p>testifies [1] - 163:18</p>	<p>testify [8] - 29:12, 51:10, 53:16, 54:22, 106:15, 113:13, 113:18, 116:22</p> <p>testifying [13] - 47:5, 47:7, 53:11, 54:16, 60:15, 79:6, 91:11, 96:16, 112:24, 122:23, 137:18, 155:11, 163:20</p> <p>testimony [25] - 27:22, 28:24, 50:13, 51:7, 52:6, 53:4, 58:17, 59:5, 61:11, 72:20, 91:17, 102:8, 113:12, 114:14, 114:24, 116:6, 117:6, 118:20, 139:11, 158:21, 162:4, 162:6, 162:8, 163:3, 164:16</p> <p>text [3] - 36:11, 48:15, 108:24</p> <p>THE [243] - 1:1, 1:12, 1:16, 1:19, 1:22, 2:2, 2:8, 2:11, 2:17, 4:5, 5:1, 5:4, 5:22, 6:2, 6:7, 6:10, 8:24, 9:17, 10:13, 10:24, 11:1, 11:15, 12:5, 12:20, 13:5, 13:15, 14:25, 15:4, 15:15, 16:15, 16:20, 17:2, 17:4, 17:7, 19:2, 23:20, 24:4, 26:9, 26:22, 26:25, 27:4, 27:11, 28:5, 28:19, 29:1, 29:12, 29:18, 30:2, 30:19, 31:8, 40:10, 40:12, 40:16, 40:23, 46:16, 47:20, 49:14, 49:17, 50:4, 50:17, 50:24, 51:1, 51:8, 51:12, 51:21, 52:13, 53:19, 53:22, 54:9, 54:18, 55:10, 55:12, 55:21, 56:2, 56:6, 56:14, 56:24, 58:11, 59:3, 61:4, 61:18, 61:22, 62:2, 62:12, 62:23, 62:24, 63:5, 63:6, 64:13, 64:15, 66:10, 66:15, 67:15, 67:23, 68:7, 68:11, 68:19, 69:16, 69:21, 69:23, 70:7, 71:2, 71:3, 72:1, 72:11, 72:19, 73:8, 76:3, 76:7, 78:7, 79:23, 82:16, 82:23, 83:4, 83:7, 83:12, 83:18,</p>	<p>85:6, 89:16, 89:19, 89:20, 89:25, 90:2, 90:7, 90:22, 91:20, 92:24, 93:4, 93:20, 93:23, 94:17, 95:2, 95:4, 95:8, 96:2, 96:6, 96:15, 96:21, 97:6, 97:14, 98:7, 98:13, 98:23, 99:17, 99:23, 100:1, 100:4, 104:1, 104:7, 104:12, 105:22, 106:11, 107:19, 108:16, 108:20, 109:3, 109:6, 109:9, 109:13, 109:16, 110:4, 110:12, 110:15, 111:14, 111:20, 112:14, 112:19, 113:20, 114:13, 115:6, 115:8, 116:4, 117:7, 117:22, 118:9, 118:11, 118:18, 119:5, 119:8, 119:23, 120:1, 120:10, 121:1, 121:18, 121:21, 123:14, 127:4, 127:15, 127:23, 130:15, 131:18, 131:19, 132:2, 133:3, 133:6, 133:13, 133:15, 133:23, 134:4, 134:15, 134:21, 135:12, 142:13, 142:16, 143:4, 143:16, 145:15, 147:1, 147:15, 147:19, 149:14, 149:17, 149:20, 149:25, 150:1, 150:2, 150:7, 150:11, 150:13, 151:20, 156:5, 156:9, 156:25, 157:11, 157:18, 157:22, 157:25, 158:8, 158:24, 160:3, 160:6, 160:10, 160:15, 161:7, 162:9, 162:13, 162:25, 163:5, 163:9, 163:13, 165:14, 165:18, 166:4</p> <p>theft [1] - 127:12</p> <p>themselves [1] - 58:21</p> <p>theory [1] - 11:9</p> <p>thereabouts [1] - 53:3</p> <p>thereof [1] - 101:2</p> <p>Thereupon [1] -</p>	<p>99:24</p> <p>they've [3] - 10:11, 98:4, 111:6</p> <p>thin [1] - 134:24</p> <p>thinking [3] - 102:25, 113:22, 163:14</p> <p>thinks [2] - 7:9, 7:11</p> <p>third [2] - 146:20, 153:14</p> <p>thousand [1] - 99:15</p> <p>thousands [1] - 74:13</p> <p>three [9] - 6:15, 7:16, 34:14, 64:24, 85:25, 118:9, 119:10, 139:3, 150:19</p> <p>throughout [5] - 26:17, 27:19, 38:23, 45:7, 45:25</p> <p>throwing [1] - 28:10</p> <p>thumb [1] - 124:9</p> <p>tight [1] - 141:16</p> <p>time-honored [1] - 104:21</p> <p>timeframe [4] - 19:13, 25:19, 34:4, 128:22</p> <p>timely [2] - 14:7, 14:9</p> <p>timestamp [5] - 52:22, 57:17, 65:19, 79:2, 122:19</p> <p>timewise [1] - 84:6</p> <p>TIMOTHY [1] - 1:12</p> <p>today [8] - 17:20, 27:21, 47:3, 47:13, 100:8, 109:17, 156:10, 164:8</p> <p>together [5] - 11:6, 18:7, 20:17, 28:8, 165:16</p> <p>tomorrow [6] - 5:18, 5:19, 163:5, 164:25, 165:17, 166:5</p> <p>ton [1] - 146:13</p> <p>took [5] - 18:9, 37:22, 127:11, 133:9, 135:5</p> <p>tool [3] - 10:18, 10:21, 10:22</p> <p>tools [1] - 11:9</p> <p>top [9] - 65:19, 106:23, 122:19, 124:9, 142:19, 142:21, 144:20, 155:16, 158:24</p> <p>topic [5] - 69:24, 70:2, 70:7, 70:14, 83:12</p> <p>topics [1] - 120:7</p>	<p>touch [1] - 131:24</p> <p>toward [1] - 105:2</p> <p>towards [8] - 18:18, 20:2, 21:2, 45:1, 76:5, 81:11, 107:12, 130:22</p> <p>tradition [1] - 104:22</p> <p>transcript [13] - 82:21, 85:4, 109:12, 109:22, 109:23, 110:23, 111:16, 111:17, 126:12, 126:15, 126:21, 167:5, 167:6</p> <p>TRANSCRIPT [1] - 1:11</p> <p>transcripts [3] - 47:17, 76:12, 111:24</p> <p>transitioned [1] - 74:11</p> <p>treason [2] - 11:23</p> <p>treatment [1] - 5:13</p> <p>trial [4] - 90:6, 95:11, 110:14, 134:23</p> <p>TRIAL [1] - 1:11</p> <p>trickery [1] - 62:10</p> <p>tried [6] - 68:20, 72:11, 98:21, 107:22, 108:4, 143:14</p> <p>trip [1] - 145:24</p> <p>trucks [7] - 19:22, 19:25, 20:23, 47:6, 64:3, 64:5, 127:25</p> <p>true [7] - 9:2, 14:2, 91:12, 105:25, 157:11, 167:4, 167:5</p> <p>truly [1] - 93:25</p> <p>truth [15] - 7:1, 7:3, 9:14, 9:15, 69:11, 100:20, 100:21, 102:5, 102:14, 104:21, 105:5, 120:15, 121:12, 163:23</p> <p>try [3] - 70:8, 104:22, 142:14</p> <p>trying [10] - 14:22, 15:12, 46:16, 50:14, 58:20, 104:18, 114:1, 117:10, 158:20, 164:19</p> <p>Tuesday [5] - 5:9, 5:15, 17:11, 17:13</p> <p>turn [5] - 44:17, 44:20, 76:5, 161:3</p> <p>turned [5] - 41:14, 41:18, 72:24, 114:19, 138:21</p> <p>two [32] - 34:13, 43:3, 44:8, 47:7, 47:11, 48:15, 53:10,</p>
---	--	--	---	--

54:7, 54:9, 54:13, 55:7, 55:16, 56:1, 56:11, 78:23, 79:3, 84:3, 92:12, 96:5, 96:8, 99:13, 101:21, 101:22, 114:11, 114:15, 114:20, 128:16, 131:16, 162:17, 162:18, 164:7 twofold [1] - 108:25 type [3] - 5:13, 12:2, 65:16 types [1] - 36:7	82:21, 84:3, 89:8, 90:3, 93:2, 93:25, 94:13, 95:13, 99:22, 103:16, 104:10, 104:15, 107:2, 109:11, 110:1, 112:6, 114:10, 116:6, 117:12, 121:2, 121:12, 121:25, 122:3, 122:19, 125:7, 128:12, 130:4, 132:7, 132:24, 136:24, 139:22, 141:3, 144:20, 152:4, 153:18, 155:16, 156:19, 157:5, 161:4, 164:21 upheld [2] - 108:6, 109:2 urge [1] - 12:19 UTC [6] - 103:17, 103:20, 103:23, 152:24, 159:15, 160:19	111:4, 111:5, 111:6, 124:15, 131:25, 133:9, 133:12, 133:19, 136:11, 136:13, 140:12, 141:13, 141:24, 158:12 videos [7] - 8:9, 38:11, 38:12, 60:9, 70:17, 74:20, 74:23 view [4] - 70:5, 73:1, 93:24, 94:19 viewed [1] - 119:11 violation [1] - 54:6 vision [1] - 49:25 voice [10] - 71:17, 73:3, 73:4, 73:13, 75:22, 76:24, 77:6, 77:9, 161:9 voices [1] - 71:11 volume [2] - 36:11, 76:5 vs [1] - 1:5 Vy [1] - 32:25	West [1] - 2:15 whatsoever [4] - 55:6, 94:11, 95:23, 118:15 whichever [1] - 114:1 whispering [2] - 86:24, 87:17 whole [8] - 7:11, 16:8, 28:8, 38:23, 45:8, 46:5, 95:19, 99:22 wholly [2] - 111:1, 111:11 William [2] - 89:1, 89:4 willing [2] - 94:23, 117:2 wind [1] - 130:4 winding [1] - 64:3 window [2] - 38:10, 136:18 winds [1] - 60:17 wing [1] - 69:13 Winter [4] - 48:20, 48:23, 49:7, 52:21 withdrawn [1] - 23:22 withdrew [1] - 12:9 WITNESS [9] - 17:16, 46:16, 62:24, 63:6, 71:3, 127:23, 131:19, 149:14, 161:7 witness [53] - 5:5, 12:8, 17:3, 30:2, 30:3, 31:25, 33:17, 48:25, 64:17, 65:12, 65:14, 65:23, 76:5, 83:2, 86:8, 90:10, 90:13, 90:20, 91:10, 91:11, 91:16, 92:15, 92:20, 92:21, 92:22, 96:14, 99:7, 99:11, 103:14, 106:12, 106:14, 106:15, 108:10, 109:4, 109:5, 116:3, 116:4, 116:18, 116:22, 121:16, 126:10, 126:15, 129:1, 130:8, 131:9, 131:15, 145:2, 147:2, 149:7, 152:5, 152:8, 163:4 Witness [8] - 66:21, 80:15, 84:13, 84:25, 88:12, 124:6, 131:6, 137:24 witness's [3] - 27:14, 97:2, 99:9 WITNESSES [1] - 4:5	woman [8] - 139:9, 140:13, 140:23, 140:25, 141:22, 141:24, 147:10, 147:25 woman's [1] - 139:21 wonder [1] - 33:2 word [4] - 31:8, 95:4, 153:16, 155:6 words [5] - 15:2, 72:13, 78:12, 116:15, 153:19 works [1] - 84:16 worried [1] - 69:14 worry [2] - 16:12, 116:11 worth [1] - 18:8 worthy [1] - 112:11 wraps [1] - 116:6 writ [1] - 74:13 write [1] - 122:22 written [1] - 146:14 wrote [1] - 122:22
U				Y
U.S [1] - 100:11 ultimately [1] - 109:2 Ulysses [1] - 79:13 under [8] - 8:17, 85:4, 100:14, 102:14, 109:11, 110:1, 111:17, 152:15 underneath [1] - 57:16 understood [5] - 6:2, 26:11, 27:5, 36:23, 157:24 underway [1] - 102:16 unfair [1] - 11:13 unfortunately [1] - 157:22 unfounded [1] - 99:5 UNITED [4] - 1:1, 1:3, 1:13, 1:18 united [1] - 3:2 United [6] - 5:2, 14:15, 14:21, 92:3, 100:2, 167:13 unknown [1] - 131:23 unless [1] - 17:21 unquestionably [1] - 68:21 unquote [1] - 82:21 unrelated [1] - 104:9 up [78] - 14:7, 14:8, 19:24, 22:2, 24:2, 25:3, 27:20, 30:5, 35:6, 35:8, 37:9, 37:16, 38:3, 38:8, 38:9, 39:1, 43:1, 47:6, 48:19, 48:24, 52:22, 54:19, 54:21, 55:25, 57:2, 59:4, 59:10, 59:11, 60:17, 64:3, 64:23, 69:18, 74:18, 75:8, 76:6, 77:12,	V	W		Z
	vague [3] - 30:17, 31:5, 62:21 vagueness [2] - 30:19, 31:9 valiant [1] - 94:1 value [10] - 9:14, 9:15, 52:21, 105:3, 105:5, 106:23, 120:13, 120:14, 120:15, 121:11 various [3] - 142:9, 156:21 verify [1] - 53:7 version [4] - 50:1, 52:4, 56:19, 56:22 versus [4] - 5:2, 14:15, 14:21, 100:2 vicinity [3] - 123:3, 134:19, 140:13 video [54] - 7:22, 10:2, 18:5, 18:12, 18:14, 18:23, 19:5, 20:11, 21:22, 22:12, 24:15, 24:16, 25:22, 30:16, 30:21, 32:19, 33:22, 34:2, 34:14, 34:16, 34:17, 41:17, 41:25, 43:1, 64:20, 71:8, 72:24, 81:21, 81:24, 82:1, 82:10, 82:20, 82:21, 83:8, 83:20, 84:6, 85:14, 109:22, 109:24,	wait [1] - 54:9 walk [4] - 21:2, 25:3, 78:21, 130:4 walked [2] - 66:2, 103:16 walking [6] - 20:2, 24:20, 28:8, 28:9, 134:25, 141:23 wandering [2] - 31:3, 34:10 wants [2] - 9:2, 164:25 Washington [8] - 1:6, 1:20, 2:4, 3:4, 63:19, 63:22, 136:15, 167:14 waste [2] - 13:10, 13:11 water [3] - 29:16, 127:13, 145:25 ways [1] - 14:3 wearing [1] - 65:6 weeds [1] - 103:21 week [1] - 156:22 weeks [14] - 53:10, 54:7, 54:9, 54:13, 55:7, 56:1, 56:11, 92:15, 96:5, 96:8, 99:13, 114:11, 114:15, 114:20 weird [1] - 50:11 welcome [1] - 121:22		year [1] - 68:22 yesterday [5] - 54:13, 65:4, 68:21, 107:21, 108:25 York [5] - 1:24, 2:19, 89:5
				Z
				Zachary [2] - 132:13, 159:13 ZACHARY [1] - 1:7 Zack [1] - 128:14 zero [2] - 122:8, 152:24 Zoom [2] - 5:17, 5:20 zoom [1] - 128:18