

EXHIBIT J

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION NUMBER
VS. 17-4540
DONALD J. TRUMP, ET AL.

THURSDAY, DECEMBER 14, 2017
COURTROOM 3B
PHILADELPHIA, PA 19106

BEFORE THE HONORABLE WENDY BEETLESTONE, ESQUIRE, J.

PRELIMINARY INJUNCTION HEARING

SUZANNE R. WHITE, RPR, FCRR, CM
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FIRST FLOOR U. S. COURTHOUSE
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PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,
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(THE CLERK OPENS COURT.)

THE COURT: WE ARE HERE IN THE MATTER OF
COMMONWEALTH OF PENNSYLVANIA VERSUS DONALD TRUMP; DONALD
WRIGHT, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES; STEVE MNUCHIN, UNITED STATES DEPARTMENT OF THE
TREASURY, RENE ALEXANDER ACOSTA, UNITED STATES
DEPARTMENT OF LABOR. THIS IS CASE NUMBER 17-4540.

TODAY WE HAVE A HEARING ON THE
COMMONWEALTH'S MOTION FOR A PRELIMINARY INJUNCTION.

LET ME TELL -- MOSTLY FOR THE FOLKS IN
THE COURTROOM, I HAVE ALREADY DETERMINED HOW THIS WILL
PROCEED. WE WILL BE WORKING FROM NOW UNTIL 6. IF THE
PARTIES FINISH BEFORE 6, THEN WE WILL FINISH BEFORE 6.

THE PARTIES HAVE REQUESTED OPENING
STATEMENTS. I HAVE ALLOWED THEM 15 MINUTES EACH FOR
OPENING STATEMENTS. THE PARTIES HAVE ALSO ASKED FOR
CLOSING STATEMENTS AND I HAVE ALLOWED THEM 15 MINUTES
EACH FOR CLOSING STATEMENTS.

IN THE INTERIM, IT IS MY VIEW THAT THIS
IS THE PLAINTIFF'S HEARING. I AM NOT GOING TO IMPOSE
ANY PARTICULAR RULES. I'M GOING TO ALLOW THEM TO DO
WHAT THEY THINK THEY NEED TO DO IN ORDER TO PROCEED.

WITH THAT, PLEASE CAN WE HAVE THE
INTRODUCTIONS ON THE PLAINTIFFS' SIDE, MOVING TO THE
DEFENSE SIDE.

2

1 APPEARANCES:

2 OFFICE OF THE ATTORNEY GENERAL
3 JONATHAN SCOTT GOLDMAN, ESQUIRE
4 NICOLE J. BOLAND, ESQUIRE
5 STRAWBERRY SQUARE, 16TH FLOOR
6 HARRISBURG, PA 17120

7 AND

8 MICHAEL J. FISCHER, ESQUIRE
9 NICOLE BROCK, ESQUIRE
10 21 S. 12TH STREET, 3RD FLOOR
11 PHILADELPHIA, PA. 19107

12 COUNSEL FOR THE COMMONWEALTH OF PENNSYLVANIA

13 UNITED STATES DEPARTMENT OF JUSTICE
14 CIVIL DIVISION
15 ETHAN PRICE DAVIS, ESQUIRE
16 950 PENNSYLVANIA AVENUE, NW
17 ROOM 3133
18 WASHINGTON, DC 20530

19 AND

20 U.S. DEPARTMENT OF JUSTICE
21 ELIZABETH L. KADE, ESQUIRE
22 JUSTIN MICHAEL SANDBERG, ESQUIRE
23 REBECCA M. KOPPLIN, ESQUIRE
24 BRIAN STIMSON, ESQUIRE
25 CHRISTOPHER HEALY, ESQUIRE
20 20 MASSACHUSETTS AVENUE, NW
21 WASHINGTON, DC 20530

22 COUNSEL FOR DONALD TRUMP, ET AL.

4

1 MR. GOLDMAN: YOUR HONOR, MY NAME IS
2 JONATHAN GOLDMAN, THE EXECUTIVE DEPUTY ATTORNEY GENERAL
3 FOR THE COMMONWEALTH OF PENNSYLVANIA IN CHARGE OF THE
4 CIVIL LAW DIVISION.

5 MS. BOLAND: GOOD MORNING, YOUR HONOR.
6 MY NAME IS NICOLE BOLAND. I'M THE DEPUTY ATTORNEY
7 GENERAL WITH THE OFFICE OF ATTORNEY GENERAL.

8 MR. FISCHER: GOOD MORNING, YOUR HONOR.
9 MY NAME IS MICHAEL FISCHER, DEPUTY ATTORNEY GENERAL WITH
10 THE OFFICE OF ATTORNEY GENERAL.

11 THE COURT: AND NICOLE BROCK, IS SHE
12 HERE?

13 MS. BROCK: YES, YOUR HONOR. I'M NICOLE
14 BROCK, DEPUTY ATTORNEY GENERAL FROM THE OFFICE OF
15 ATTORNEY GENERAL.

16 MR. DAVIS: GOOD MORNING, YOUR HONOR. I
17 AM ETHAN DAVIS. I'M A DEPUTY ASSISTANT ATTORNEY GENERAL
18 WITH THE U.S. DEPARTMENT OF JUSTICE.

19 MS. KADE: GOOD MORNING, YOUR HONOR. MY
20 NAME IS ELIZABETH KADE. I'M A TRIAL ATTORNEY WITH THE
21 DEPARTMENT OF JUSTICE.

22 MR. SANDBERG: GOOD MORNING, YOUR HONOR.
23 I'M JUSTIN SANDBERG. I'M A CHIEF TRIAL COUNSEL WITH THE
24 DEPARTMENT OF JUSTICE.

25 MR. HEALY: GOOD MORNING, YOUR HONOR. MY

1 NAME IS CHRISTOPHER HEALY. I'M A TRIAL ATTORNEY FOR THE
2 U.S. DEPARTMENT OF JUSTICE.

3 MS. KOPPLIN: GOOD MORNING, YOUR HONOR.
4 MY NAME IS REBECCA KOPPLIN. I'M ALSO A TRIAL ATTORNEY
5 WITH THE DEPARTMENT OF JUSTICE.

6 THE COURT: MR. GOLDMAN.

7 MR. GOLDMAN: MAY I APPROACH, YOUR HONOR?

8 THE COURT: YOU MAY.

9 MR. GOLDMAN: BEFORE I BEGIN, YOUR HONOR,
10 IF WE CAN CLARIFY ONE THING. I BELIEVE WE HAD SPOKEN
11 ABOUT ON THE PHONE IN CONFERENCE THAT WE WOULD EACH HAVE
12 A HALF-HOUR FOR OPENINGS AND A HALF-HOUR FOR CLOSINGS.

13 THE COURT: I DID NOT RECALL IT THAT WAY,
14 BUT IF THAT IS HOW YOU WANT TO USE YOUR TIME, THAT IS
15 FINE. YOU SHOULD OF COURSE ASSUME THAT I HAVE READ ALL
16 THE BRIEFS AND THAT I'M VERY FAMILIAR WITH THE ARGUMENTS
17 THAT YOU MADE IN YOUR BRIEFS AND ALSO THE ATTACHMENTS
18 THERETO. SO TO THE EXTENT THAT IT'S POSSIBLE THAT YOU
19 NOT REPEAT WHAT IS IN THOSE DOCUMENTS, THAT WOULD
20 PROBABLY BE A GOOD THING.

21 GO AHEAD.

22 MR. GOLDMAN: THANK YOU, YOUR HONOR. AS
23 I SAID, MY NAME IS JONATHAN GOLDMAN. I'M HERE FOR THE
24 COMMONWEALTH OF PENNSYLVANIA.

25 IF I MAY ASK THE COURT'S INDULGENCE,

1 FOLLOWING OUR CONFERENCE ON TUESDAY EVENING AT WHICH
2 YOUR HONOR URGED THE PARTIES NOT TO BRING LIVE WITNESSES
3 TO REPEAT THE ALLEGATIONS ALREADY MADE UNDER OATH IN
4 THEIR DECLARATIONS, THERE ARE OTHER FACTS THAT ARE
5 ALREADY IN THE RECORD, WE SIGNIFICANTLY RESTRUCTURED OUR
6 CASE. AND SEEKING TO FOLLOWING YOUR HONOR'S GUIDANCE,
7 WE REDUCED THE NUMBER OF WITNESSES FROM SIX TO LIKELY
8 THREE, AND WE SCALED BACK THE TESTIMONY OF THOSE
9 WITNESSES.

10 THE LAWYERS BESIDE ME AT COUNSEL TABLE
11 AND ALSO BACK THERE ARE MEMBERS OF THE TEAM. WE HAVE
12 ALL WORKED TOGETHER, AND HAD WE HAD ALL SIX WITNESSES
13 HERE, EVERYBODY WOULD HAVE HAD A WITNESS, A SPEAKING
14 ROLE HERE. SOME MEMBERS OF COUNSEL MAY NOT, BUT I JUST
15 WANTED TO ACKNOWLEDGE THEIR HARD WORK FOR THE COURT.

16 THIS CASE IS ABOUT TWO NEW REGULATIONS
17 PROMULGATED BY THE DEFENDANTS, THE RELIGIOUS EXEMPTION
18 RULE AND THE MORAL EXEMPTION RULE. THESE ARE EXEMPTIONS
19 TO THE CONTRACEPTIVE MANDATE UNDER THE AFFORDABLE CARE
20 ACT, WHICH IS THE LAW OF THE LAND. AND THEY ARE
21 INCREDIBLY BROAD. THEY ARE THE EXCEPTIONS THAT SWALLOW
22 THE RULE. THEY WERE PROMULGATED OUTSIDE THE CONSTRAINTS
23 OF THE ADMINISTRATIVE PROCEDURE ACT AND ON TOP OF
24 ALREADY EXISTING EXCEPTIONS, A RELIGIOUS EXCEPTION AND
25 ACCOMMODATION, WHICH WERE MUCH NARROWER IN SCOPE. THEY

1 REQUIRE MORE ACCOUNTABILITY. AND IN THE CASE OF THE
2 ACCOMMODATION, THEY REQUIRE AN EMPLOYER'S INSURER TO
3 STEP IN AND PROVIDE CONTRACEPTIVE CONFERENCE FOR WOMEN
4 IF THE EMPLOYER OPTS OUT. THESE NEW RULES DO NOT DO
5 THAT.

6 AS A RESULT OF THESE NEW RULES, WOMEN IN
7 PENNSYLVANIA AND ACROSS THE COUNTRY TOO WILL LOSE THEIR
8 INSURANCE COVERAGE FOR CONTRACEPTIVE CARE. THIS WILL
9 COST THE COMMONWEALTH TO SUFFER ECONOMIC DAMAGES AS IT'S
10 FORCED TO STEP INTO THE BREACH, AND -- UNDER THE CURRENT
11 LAWS, AND COVER THE COST OF ADDITIONAL CONTRACEPTIVE
12 CARE FOR THE ADDITIONAL WOMEN WHO WILL NEED IT. AND
13 WHERE WOMEN ARE NOT ABLE TO GET CONTRACEPTIVE COVERAGE
14 THROUGH THE COMMONWEALTH OR ELSEWHERE, THERE WILL BE AN
15 INCREASE IN UNINTENDED PREGNANCIES, WHICH WILL CAUSE THE
16 COMMONWEALTH FURTHER ECONOMIC HARM.

17 IN ADDITION TO THESE ECONOMIC HARMS, THE
18 NEW RULES WILL CAUSE WOMEN IN THIS COMMONWEALTH AND
19 BEYOND TO SUFFER ECONOMIC HARM AND MEDICAL HARM, WHICH
20 FOR SOME WOMEN MAY BE CATASTROPHIC.

21 ON TOP OF THIS, THE RULES PLAINLY VIOLATE
22 THE LAW, AS WE HAVE LAID OUT IN OUR MOTION. THE
23 COMMONWEALTH TODAY ASKS ONLY THAT THE COURT ENFORCE THE
24 LAW AND ISSUE A PRELIMINARY INJUNCTION TO MAINTAIN THE
25 STATUS QUO UNTIL WE CAN HAVE A FULL TRIAL.

1 THE COURT: MR. GOLDMAN, GIVEN THE
2 ADMONITION THAT A COURT SHOULD NOT REACH CONSTITUTIONAL
3 ISSUES WHEN IT CAN RESOLVE A MATTER ON STATUTORY CLAIMS,
4 ARE YOU, IN THE CONTEXT OF THIS PRELIMINARY INJUNCTION,
5 PURSUING THE CONSTITUTIONAL CLAIMS OR ARE YOU FOCUSING
6 YOUR EFFORTS ON THE APA PROCEDURAL AND SUBSTANTIVE
7 CLAIMS?

8 MR. GOLDMAN: WE ARE, AS WE DID ON OUR
9 BRIEF, YOUR HONOR, WE'RE FOCUSING ON ALL OF THE CLAIMS.
10 THE REASON WHY IS THIS -- AND TO BE VERY CLEAR, THE
11 PROCEDURAL APA CLAIMS ARE VALID AND THE DEFENDANTS
12 VIOLATED THE PROCEDURAL APA. IF YOU WERE TO ENJOIN THE
13 RULES BASED ON THAT, PRESUMABLY IT WOULD NOT BE VERY
14 EFFICIENT. PRESUMABLY THE DEFENDANTS WOULD GO BACK,
15 TAKE THE SAME RULES, PUT THEM UP FOR NOTICE AND COMMENT
16 FOR 30 DAYS, AND THEN WE WOULD BE RIGHT BACK HERE BEFORE
17 YOUR HONOR ON THE MORE SUBSTANTIVE CLAIMS.

18 THE COURT: WELL, YOU HAVE TWO APA
19 CLAIMS. ONE IS A PROCEDURAL CLAIM AND ONE IS A
20 SUBSTANTIVE CLAIM UNDER THE APA. I THINK WHAT YOU SAID
21 WOULD OCCUR IF I DETERMINED IT ONLY UNDER THE PROCEDURAL
22 PRONG. BUT IF I ALSO DECIDED IT UNDER THE SUBSTANTIVE
23 PRONG, WOULD THAT SAME ISSUE OCCUR?

24 MR. GOLDMAN: NO, YOUR HONOR. IF YOU
25 DECIDED IT UNDER THE SUBSTANTIVE APA CLAIM, YOU COULD

1 ACTUALLY GET TO ALL OF THE CONSTITUTIONAL ISSUES THROUGH
2 THE APA CLAIM BECAUSE IT WOULD SHOW THAT THE LAW -- THE
3 APA WAS SUBSTANTIVELY VIOLATED BECAUSE THE RULES VIOLATE
4 THE LAW ON THE CONSTITUTIONAL GROUNDS, NOT THE GROUNDS
5 WE LAID OUT.

6 THE COURT: OKAY. GO AHEAD.

7 MR. GOLDMAN: SO TO YOUR POINT, YOUR
8 HONOR, WE DO HAVE FIVE CLAIMS HERE AND WE ARE URGING
9 YOUR HONOR TO CONSIDER ALL FIVE OF THEM: EQUAL
10 PROTECTION, TITLE VII UNDER THE CIVIL RIGHTS ACT; AND
11 THE PREGNANCY DISCRIMINATION ACT ESTABLISHMENT CLAUSE;
12 AND THEN THE PROCEDURAL AND SUBSTANTIVE APA CLAIMS.

13 I KNOW YOU ARE WELL AWARE OF THE STANDARD
14 FOR AN INJUNCTION. IT'S LAID OUT ON PAGE 17 OF OUR
15 MOTION. AND WE BELIEVE, YOUR HONOR, THAT WE HAVE SOME
16 WITNESSES TODAY TO ADD PRIMARILY ADDITIONAL TESTIMONY
17 AND COLOR AND NUANCE. WE BELIEVE THAT YOUR HONOR IS IN
18 GOOD STEAD TO ISSUE AN INJUNCTION ALREADY, BASED ON THE
19 FINDINGS OF FACT AND THE FACTS THAT ARE IN OUR MOTION
20 AND OUR PAPERS.

21 AND IF I MAY, I WOULD LIKE TO LIST THOSE
22 OUT, SINCE THEY ARE ALREADY IN THE RECORD, UNLESS YOUR
23 HONOR WOULD PREFER ME TO MOVE ON.

24 THE COURT: GO AHEAD.

25 MR. GOLDMAN: IN THE RECORD, THE FACTS

1 THE RECORD. I KNOW THE RECORD. JUST SAY WHAT YOU NEED
2 TO SAY, AND I WILL BELIEVE YOU THAT IT'S IN THE RECORD.

3 MR. GOLDMAN: THANK YOU.

4 THE COURT: UNLESS OPPOSING COUNSEL SAYS
5 IT'S NOT IN THE RECORD, AND THEN WE WILL HAVE A LITTLE
6 FIGHT ON IT.

7 MR. GOLDMAN: FAIR ENOUGH.

8 COST IS A BARRIER TO ASSESSING
9 CONTRACEPTION CARE. BEFORE THE ACA'S CONTRACEPTION
10 MANDATE, PATIENTS WOULD NOT FILL THEIR CONTRACEPTIVE
11 PRESCRIPTIONS, OPTING INSTEAD TO ASK THEIR PHYSICIANS
12 FOR LESS EFFECTIVE BUT CHEAPER METHODS OF CONTRACEPTION
13 AT LEAST UP FRONT, ULTIMATELY NOT CHEAPER IN THE LONG
14 RUN. BEFORE THAT CONTRACEPTIVE MANDATE, PATIENTS WOULD
15 NOT FILL THEIR CONTRACEPTIVE PRESCRIPTIONS, OPTING
16 INSTEAD TO FAIL TO USE CONTRACEPTION SOMETIMES
17 ALTOGETHER BECAUSE OF THE COST. BEFORE THE ACA
18 CONTRACEPTIVE MANDATE, IUDS WERE ONE OF THE MOST
19 EXPENSIVE FORMS OF CONTRACEPTIVES FOR PATIENTS IN TERMS
20 OF THE INITIAL COST WHICH HAS TO BE PAID UP FRONT. AND
21 YET IUDS ARE A MUCH MORE EFFECTIVE METHOD OF
22 CONTRACEPTIVE CARE THAN ARE BIRTH CONTROL PILLS AND
23 OBVIOUSLY THAN ARE NOTHING.

24 THE CONTRACEPTION MANDATE HAS RESULTED IN
25 MORE WOMEN USING CONTRACEPTIVES GENERALLY AND MORE

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1 INCLUDE THE FOLLOWING. UNINTENDED PREGNANCY IS
2 PREVALENT IN THE UNITED STATES. THAT IS IN THE WEISMAN
3 DECLARATION AT PARAGRAPHS 22 THROUGH 23.

4 PREVENTING UNINTENDED PREGNANCY RESULTS
5 IN FINANCIAL SAVINGS FOR WOMEN. THAT IS IN THE WEISMAN
6 DECLARATION AT PARAGRAPHS 49 THROUGH 50 AND THE
7 STEINBERG DECLARATION AT PARAGRAPH 30.

8 UNINTENDED PREGNANCY IS A PREVENTABLE
9 HEALTH CONDITION FOR WOMEN, IN THE WEISMAN DECLARATION,
10 PARAGRAPHS 19 THROUGH 20, AND THE CHUANG DECLARATION AT
11 PARAGRAPHS 15 AND 41.

12 CONTRACEPTIVES ARE ALSO EFFECTIVE IN
13 PREVENTING UNINTENDED PREGNANCY. NOT ONLY IS THAT ON
14 TABLE 5-3 ON PAGE 106 OF THE COMMITTEE'S REPORT ITSELF,
15 IT'S ALSO IN THE WEISMAN DECLARATION AT PARAGRAPH 30,
16 THE CHUANG DECLARATION AT PARAGRAPHS 41 THROUGH 43, AND
17 THE STEINBERG DECLARATION AT PARAGRAPHS 30 AND THE BUTTS
18 DECLARATION AT PARAGRAPH 36.

19 WOMEN WHO FOREGO CONTRACEPTION OR USE
20 LESS EFFECTIVE CONTRACEPTION ARE AT RISK OF UNINTENDED
21 PREGNANCY. THAT IS ALREADY IN THE RECORD AT WEISMAN
22 DECLARATION, PARAGRAPH 48, CHUANG DECLARATION PARAGRAPH
23 39, STEINBERG DECLARATION PARAGRAPH 30, AND THE BUTTS
24 DECLARATION AT PARAGRAPH 58.

25 THE COURT: THERE IS NO NEED TO REFER TO

12

1 EFFECTIVE METHODS OF CONTRACEPTIVES SPECIFICALLY. MORE
2 WOMEN ARE USING IUDS, FOR EXAMPLE, THAN ORAL BIRTH
3 CONTROL PILLS OR NO METHOD OF CONTRACEPTION AT ALL, SUCH
4 THAT AFTER THE CONTRACEPTIVE MANDATE PATIENTS WERE FREE
5 TO MAKE CONTRACEPTIVE CHOICES PURELY ON THE BASIS OF
6 MEDICAL NEEDS, LISTENING TO THE RECOMMENDATIONS OF THEIR
7 DOCTORS, WITHOUT HAVING TO WEIGH THE COST OF CARE, WHICH
8 IS EXACTLY WHAT THE AFFORDABLE CARE ACT INTENDED. AND
9 AS A RESULT, AFTER THE CONTRACEPTIVE MANDATE, PATIENTS
10 HAD MADE MORE MEDICALLY INFORMED CONTRACEPTIVE CHOICES,
11 WHICH HAVE BEEN BETTER FOR THE HEALTH OF THEM AND THEIR
12 FAMILIES.

13 THE PENNSYLVANIA DEPARTMENT OF HEALTH AND
14 HUMAN SERVICES HAS ENCOURAGED THE USE OF LARCS,
15 LONG-ACTING CONTRACEPTION, AS POST PARTUM CONTRACEPTION
16 TO REDUCE THE RATE OF UNINTENDED PREGNANCIES BY CHANGING
17 ITS FEE FOR SERVICE PAYMENT POLICIES FOR HOSPITAL
18 PROVIDERS, A POLICY OF THE COMMONWEALTH.

19 MORE THAN 2.5 MILLION WOMEN IN
20 PENNSYLVANIA COULD BENEFIT FROM THE CONTRACEPTIVE CARE
21 MANDATE AND OVER 700,000 PENNSYLVANIANS HAVE ENROLLED IN
22 MEDICAID AS A RESULT OF THE EXPANSION UNDER THE
23 CONTRACEPTIVE CARE MANDATE.

24 THE DEPARTMENT OF INSURANCE ESTIMATES
25 THAT THE WOMEN IN PENNSYLVANIA WHO HAVE BENEFITED FROM

1 THE CONTRACEPTIVE CARE MANDATE HAVE SAVED OVER
 2 \$250 MILLION ANNUALLY, AND THOSE ARE JUST THE DOLLARS.
 3 THAT IS NOT THE HEALTH BENEFITS.
 4 HOWEVER, YOUR HONOR, PENNSYLVANIA HAS NO
 5 STATUTE OR REGULATION REQUIRING EMPLOYERS OFFERING PLANS
 6 REGULATED BY THE PENNSYLVANIA DEPARTMENT OF INSURANCE
 7 THAT OPT OUT OF THE CONTRACEPTIVE CARE MANDATE TO
 8 PROVIDE CONTRACEPTIVE COVERAGE TO ITS EMPLOYEES OR
 9 BENEFICIARIES. OTHER STATES MAY HAVE A LAW LIKE THAT.
 10 THIS ONE DOESN'T. AND SIMILARLY, PENNSYLVANIA HAS NO
 11 STATUTE OR REGULATION REQUIRING EMPLOYERS OFFERING PLANS
 12 REGULATED BY ERISA THAT OPT OUT TO PROVIDE CONTRACEPTIVE
 13 COVERAGE TO ITS EMPLOYEES OR BENEFICIARIES.

14 THEREFORE, DUE TO THE NEW RULES AND
 15 REGULATIONS, THESE EXEMPTIONS, WOMEN WILL LOSE
 16 CONTRACEPTIVE COVERAGE WHEN THEIR EMPLOYERS OPT OUT OF
 17 PROVIDING IT, OR IN SOME CASES THE EMPLOYERS OF THEIR
 18 SPOUSES THROUGH WHOM THEY HAVE COVERAGE. AS A RESULT
 19 SOME OF THESE WOMEN WILL FAIL TO USE CONTRACEPTIVES OR
 20 WILL USE LESS EFFECTIVE CONTRACEPTIVE METHODS DUE TO THE
 21 COST. WE HAVE SEEN THIS ALREADY.

22 MANY WOMEN WHOSE EMPLOYERS REFUSE TO
 23 PROVIDE COVERAGE FOR THEIR CONTRACEPTIVE COSTS WILL SEEK
 24 FINANCIAL ASSISTANCE THROUGH STATE GOVERNMENT PROGRAMS.
 25 THIS GETS TO THE ISSUE OF STATE HARM. THE AMOUNT OF

1 MONEY THE COMMONWEALTH SPENDS ON MEDICAID AND THE FAMILY
 2 PLANNING SERVICES PROGRAM IS CONTINGENT UPON ENROLLMENT
 3 SO THAT THE MORE PEOPLE HAVE TO HERE ENROLL IN THESE
 4 STATE PROGRAMS, THE MORE MONEY THE COMMONWEALTH MUST
 5 SPEND ON THEM. THE NEW RULES WILL IMPOSE ADDITIONAL
 6 ECONOMIC AND OTHER BURDENS ON FAMILY PLANNING CLINICS
 7 AROUND PENNSYLVANIA, AND THE COMMONWEALTH OF
 8 PENNSYLVANIA WILL BEAR MUCH OF THAT BURDEN. LOW INCOME
 9 WOMEN WHO ARE NOT ELIGIBLE FOR FUNDING THROUGH STATE
 10 GOVERNMENT PROGRAMS WILL BE FORCED TO CHOOSE BETWEEN
 11 PAYING OUT OF POCKET, IF THEY CAN, OR GOING WITHOUT
 12 CONTRACEPTION ALTOGETHER. WOMEN WHO STOP USING
 13 CONTRACEPTION ARE MORE LIKELY TO HAVE UNPLANNED
 14 PREGNANCIES AND TO REQUIRE ADDITIONAL MEDICAL ATTENTION.
 15 THESE THINGS ARE IN MANY WAYS TRUISMS.

16 BECAUSE PATIENTS WILL LOSE CONTRACEPTIVE
 17 COVERAGE UNDER THE NEW RULES, THEY WILL THEN MAKE LESS
 18 MEDICALLY SOUND CONTRACEPTIVE CHOICES AND THEREFORE THEY
 19 WILL BE HARMED.

20 MANY WOMEN WHO NO LONGER RECEIVE
 21 CONTRACEPTIVE COVERAGE WILL NOT ONLY FACE FINANCIAL HARM
 22 BUT WILL ALSO FACE MEDICAL HARM. AND AGAIN, SOME CASES
 23 YOU WILL HEAR AND IT'S ALREADY IN THE RECORD, THAT CAN
 24 BE CATASTROPHIC, EVEN FATAL HARM.

25 IN SUM, THE NEW RULES WILL HAVE A

1 NEGATIVE EFFECT ON THE HEALTH OF PENNSYLVANIA WOMEN.
 2 THAT IS IN ADDITION TO THE ECONOMIC HARM AND OTHER HARM
 3 TO THE COMMONWEALTH AS A WHOLE.
 4 THE COURT: MR. GOLDMAN, I JUST NEED
 5 TO -- I NEED TO ROLL YOU BACK TO THE VERY BEGINNING, AND
 6 THAT ISSUE IS STANDING. I THINK SOME OF THE BRIEFING IS
 7 ABOUT STANDING. AND THE QUESTION IS, DOES THE
 8 COMMONWEALTH HAVE STANDING TO CHALLENGE AN AFFIRMATIVE
 9 ACTION OF AN AGENCY, AND IF SO, WHAT IS YOUR SUPPORT FOR
 10 THAT POSITION?

11 MR. GOLDMAN: THE COMMONWEALTH ABSOLUTELY
 12 DOES HAVE THAT STANDING. IT IS STANDING BOTH IN TERMS
 13 OF REAL ECONOMIC HARM. IT HAS SUFFERED HARM AND WILL
 14 SUFFER HARM. AND THEN ALSO UNDER THE PARENS PATRIAE
 15 DOCTRINE WHERE IT IS ABLE TO ASSERT STANDING ON BEHALF
 16 OF ITS CITIZENS IN A MORE GLOBAL SENSE.

17 THE COURT: WHICH CASE ARE YOU RELYING ON
 18 OR WHICH SET OF CASES?

19 MR. GOLDMAN: FORGIVE ME, JUDGE. THE
 20 CASES ARE IN OUR BRIEF.

21 THE COURT: WHO IS THE STANDING ATTORNEY
 22 WHO DID THE ANALYSIS FOR THAT? WHY DON'T YOU COME UP
 23 AND TELL ME ABOUT THAT.

24 MR. FISCHER: THANK YOU, YOUR HONOR.

25 MR. GOLDMAN: MAY I STAND HERE, YOUR

1 HONOR?

2 THE COURT: YOU MAY.

3 MR. FISCHER: GOOD MORNING, YOUR HONOR.
 4 MICHAEL FISCHER FOR THE COMMONWEALTH.

5 AS MR. GOLDMAN SAID, THE COMMONWEALTH
 6 DOES HAVE STANDING, BOTH DIRECT STANDING AS A RESULT OF
 7 THE FINANCIAL HARM, AS WELL AS PARENS PATRIAE STANDING
 8 TO ASSERT ITS INTEREST IN PROTECTING THE HEALTH AND
 9 WELFARE OF ITS RESIDENTS. AS WE DISCUSSED IN OUR BRIEF,
 10 WE THINK MASSACHUSETTS VERSUS EPA IS A TEXTBOOK EXAMPLE
 11 OF WHEN A STATE CAN ASSERT STANDING BASED BOTH ON A
 12 DIRECT INJURY AS WELL AS A PARENS PATRIAE THEORY.

13 THE COURT: WASN'T MASSACHUSETTS A CASE
 14 INVOLVING INACTION RATHER THAN AFFIRMATIVE ACTION?

15 MR. FISCHER: IT WAS AN INACTION CASE,
 16 YOU ARE RIGHT. TEXAS VERSUS UNITED STATES IS AN ACTION
 17 CASE. NOW AS THE COURT INDICATED IN THE DIRECTION WE
 18 WERE SENT, THAT CASE WAS AFFIRMED BY AN EVENLY DIVIDED
 19 SUPREME COURT. SO IT IS NOT -- THE COURT'S DECISION IS
 20 NOT BINDING ON YOUR HONOR.

21 HOWEVER, THE FIFTH CIRCUIT'S DECISION WE
 22 THINK IS INSTRUCTIVE. THE FIFTH CIRCUIT LOOKED AT THE
 23 GOVERNMENT'S POLICY, THE DAPA PROGRAM IN THAT CASE THAT
 24 HAD BEEN IMPLEMENTED, DECIDED IT WOULD CAUSE THE STATE
 25 OF TEXAS AND OTHER STATES DIRECT FINANCIAL HARM, FOUND

1 THAT THAT WAS SUFFICIENT TO ESTABLISH STATE STANDING.
 2 THAT DECISION AGAIN WAS AFFIRMED BY AN EVENLY DIVIDED
 3 COURT. SO AT LEAST FOUR JUSTICES OF THE COURT AT THE
 4 TIME WERE CONVINCED THAT THE STATE DID HAVE STANDING.
 5 WE THINK THIS IS REALLY NO DIFFERENT FROM
 6 ANY OTHER STANDING ANALYSIS INVOLVING OTHER -- INVOLVING
 7 PRIVATE PLAINTIFFS, INVOLVING OTHER GOVERNMENT
 8 PLAINTIFFS. THE COMMONWEALTH HERE ALLEGES A DIRECT
 9 FINANCIAL HARM. THAT IS INJURY IN FACT. THAT IS
 10 TEXTBOOK INJURY IN FACT. IT IS CLEARLY TRACEABLE TO THE
 11 DEFENDANT'S ACTIONS. IT IS CLEARLY REDRESSABLE THROUGH
 12 RELIEF IN THIS COURT. SO WE BELIEVE IT'S FAIRLY CLEAR
 13 THAT WE SATISFY THE ELEMENTS OF STANDING UNDER A DIRECT
 14 THEORY.
 15 AND IN ADDITION, UNDER PARENS PATRIAE
 16 THEORY, THERE IS SOME, I WILL ADMIT, SOMEWHAT CONFUSING
 17 CASE LAW ON PARENS PATRIAE THEORY. BUT ONE THEME THAT
 18 EMERGES, AND THIS IS ACTUALLY DISCUSSED AT LENGTH IN THE
 19 DISTRICT COURT DECISION IN TEXAS VERSUS UNITED STATES,
 20 IS THAT WHERE A STATE IS ASSERTING ITS QUASI SOVEREIGN
 21 INTEREST IN PROTECTING THE HEALTH AND WELFARE OF ITS
 22 CITIZENS, IT MAY DO SO IN CHALLENGING FEDERAL AGENCY
 23 ACTION THAT IT ALLEGES IS IN VIOLATION OF A FEDERAL
 24 STATUTE. THAT IS WHAT WE ARE ALLEGING HERE.
 25 THERE ARE CASES GOING BACK TO I BELIEVE

1 MASSACHUSETTS VERSUS MELLON THAT SAY A STATE CANNOT
 2 ASSERT PARENS PATRIAE STANDING AGAINST THE FEDERAL
 3 GOVERNMENT IN CHALLENGING A FEDERAL STATUTE.
 4 THE COURT: WELL, IS THIS -- THIS CONCEPT
 5 CALLED SPECIAL SOLICITUDE?
 6 MR. FISCHER: YES.
 7 THE COURT: AND I HAVE TO SAY THAT THE
 8 CONCEPT OF SPECIAL SOLICITUDE IS, SHALL WE SAY, NOT AS
 9 CRYSTAL CLEAR AS IT COULD BE IN THE JURISPRUDENCE.
 10 MR. FISCHER: ABSOLUTELY.
 11 THE COURT: TELL ME, HOW DOES IT APPLY,
 12 WHEN DOES IT APPLY, HOW DO I USE IT?
 13 MR. FISCHER: IT APPLIES -- AND THE
 14 SPECIAL SOLICITUDE IS DISCUSSED IN MASSACHUSETTS VS.
 15 EPA, ALTHOUGH ACTUALLY, THE PHRASE APPEARS FIRST IN, I
 16 BELIEVE, THE D.C. CIRCUIT DECISION THAT WE CITED -- I
 17 APOLOGIZE, I FORGET THE NAME -- BUT AUTHORED BY THEN
 18 JUDGE SCALIA, WHERE HE TALKED AT LENGTH ABOUT PARENS
 19 PATRIAE STANDING AND QUASI-SOVEREIGN STANDING.
 20 THE ESSENCE OF SPECIAL SOLICITUDE, WE
 21 BELIEVE, IS THAT A STATE HAS -- THAT THE COURT SHOULD
 22 GIVE ADDITIONAL DEFERENCE TO STATES IN ANALYZING THE
 23 EXTENT OF ANY INJURY THAT IS SUFFERED TO WHETHER OR NOT
 24 THAT INJURY CONFERS STANDING.
 25 NOW, HERE -- FRANKLY, WE -- AS I SAID

1 EARLIER, I DON'T THINK IT'S NECESSARY TO EVEN RELY ON
 2 SPECIAL SOLICITUDE, BUT IN MASSACHUSETTS VERSUS EPA, THE
 3 COURT ESSENTIALLY SAID THE STATE OF MASSACHUSETTS,
 4 COMMONWEALTH OF MASSACHUSETTS, CAN ASSERT ITS INTEREST
 5 IN PROTECTING ITS CITIZENS FROM ENVIRONMENTAL HARM.
 6 THAT RESPONSIBILITY WAS ACTUALLY DELEGATED TO EPA.
 7 EPA, UNDER THE SUPREMACY CLAUSE, COULD
 8 PROHIBIT MASSACHUSETTS FROM ACTING. SO SINCE EPA HAD
 9 THAT RESPONSIBILITY, MASSACHUSETTS, BECAUSE IT SIMILARLY
 10 HAD A DUTY TO PROTECT ITS CITIZENS, COULD CHALLENGE
 11 EPA'S INACTION IN THAT CASE UNDER THIS THEORY THAT AS A
 12 SOVEREIGN STATE, IT COULD INITIATE LITIGATION TO PROTECT
 13 THE -- IN THAT CASE, THE INTEREST OF ITS CITIZENS, A
 14 CLEAN ENVIRONMENT AND PROTECTION FROM THE HARMFUL
 15 EFFECTS OF CLIMATE CHANGE.
 16 WE BELIEVE THAT DOES -- THAT EXPLAINS THE
 17 CONCEPT OF SPECIAL SOLICITUDE, THAT THERE IS ADDITIONAL
 18 DEFERENCE GIVEN TO A STATE WHEN IT'S ASSERTING AN
 19 INTEREST IN PROTECTING BOTH ITS OWN SOVEREIGN
 20 PREROGATIVES. THERE YOU HAD COASTLINE THAT
 21 MASSACHUSETTS ARGUED WAS BEING ERODED, AS WELL AS THE
 22 INTEREST OF ITS STATE -- INTEREST OF ITS RESIDENTS.
 23 THE COURT: SO IS THE SPECIAL SOLICITUDE,
 24 IS IT, FOR WANT OF A BETTER TERM, A GLOSS OVER THE
 25 STANDING INQUIRY THAT I MUST UNDERTAKE OR DOES IT IMPACT

1 ON ANY OF THE PRONGS OF THE STANDING ANALYSIS IN
 2 PARTICULAR?
 3 MR. FISCHER: YOUR HONOR, I BELIEVE -- I
 4 WOULD SAY THAT IT'S BOTH TO SOME EXTENT. IT IS A GLOSS,
 5 BUT I THINK IT IS PARTICULARLY DIRECTED TO THE INJURY
 6 PRONG. IT IS LESS RELEVANT TO I THINK THE CAUSATION AND
 7 REDRESSABILITY PRONGS, BUT IT DOES ALLOW THE
 8 COMMONWEALTH OR STATE TO ASSERT INJURIES THAT MAY BE IN
 9 SOME CASES, FOR A PRIVATE LITIGANT, WOULD NOT BE
 10 SUFFICIENT.
 11 IT'S HARD TO THINK OF AN ANALOGOUS
 12 SITUATION INVOLVING A PRIVATE LITIGANT TO MASSACHUSETTS
 13 VERSUS EPA, BUT IT SEEMS LIKE THE COURT IS SAYING THAT
 14 TO THE EXTENT THERE IS ANY AMBIGUITY OR DOUBT HERE ABOUT
 15 WHETHER THIS IS A SUFFICIENT INJURY, WE ARE GOING TO
 16 RECOGNIZE THE STATE'S SOVEREIGN PREROGATIVE AND
 17 QUASI-SOVEREIGN INTEREST IN PROTECTING ITS CITIZENS AND
 18 FIND THAT THERE IS SUFFICIENT INTEREST HERE.
 19 THE COURT: OKAY. THANK YOU,
 20 MR. FISCHER.
 21 MR. FISCHER: THANK YOU, YOUR HONOR.
 22 THE COURT: MR. GOLDMAN, YOU HAVE MORE
 23 TIME IF YOU WANT TO.
 24 MR. GOLDMAN: IF I MAY ASK MR. FISCHER TO
 25 STAY HERE FOR ONE MOMENT, BECAUSE I WOULD LIKE TO TRY TO

1 MARRY UP A LITTLE BIT MASSACHUSETTS V EPA WITH THE CASE
2 HERE.

3 THE COURT: OKAY.

4 MR. GOLDMAN: AND THAT IS MASSACHUSETTS
5 VERSUS EPA, THERE WAS A LAW PROTECTING THE ENVIRONMENT
6 WHICH ALSO PROTECTED THE CITIZENS OF MASSACHUSETTS. THE
7 AGENCIES FAILED TO ENFORCE THAT LAW IN A WAY THAT HARMED
8 MASSACHUSETTS. MASSACHUSETTS THEREFORE HAD STANDING.

9 SIMILARLY HERE, THERE IS A LAW THAT
10 PROTECTS WOMEN AND PEOPLE AROUND THE COUNTRY; THAT'S THE
11 AFFORDABLE CARE ACT AND THE CONTRACEPTIVE CARE MANDATE.
12 THAT ALSO PROTECTS THE CITIZENS OF PENNSYLVANIA, MEN AND
13 WOMEN, AND HERE, THE AGENCIES ARE NOT ENFORCING THE
14 CONTRACEPTIVE CARE ACT. AND IN FACT, THE REGULATIONS AT
15 ISSUE HERE HAVE UNDERMINED THE ACT, AND THAT IS -- IT'S
16 VERY MUCH ON PAR AND IT REINFORCES THE STANDING THAT THE
17 COMMONWEALTH HAS HERE.

18 THE COURT: OKAY, THANK YOU. PROCEED.

19 MR. GOLDMAN: SO ALL OF THAT IS ALREADY
20 IN THE RECORD, YOUR HONOR. AND AGAIN, WE BELIEVE YOUR
21 HONOR CAN SAFELY ISSUE AN INJUNCTION RIGHT NOW, AND IF
22 YOU ARE INCLINED TO DO THAT, WE WOULD SIT DOWN, BUT I
23 ASSUME WE WILL KEEP ARGUING OUR CASE.

24 ON TOP OF THAT, YOUR HONOR, WE ARE POISED
25 TO BRING THREE WITNESSES TO THE COURT TODAY. THE FIRST

1 IS DR. CAROL WEISMAN. SHE WILL ADD -- THERE'S A
2 DECLARATION IN THE RECORD, AS YOU WELL KNOW. SHE WILL
3 ADD ADDITIONAL PERSPECTIVE TODAY AS ONE OF ONLY 16
4 MEMBERS OF THE INSTITUTE OF MEDICINES COMMITTEE ON
5 PREVENTATIVE SERVICES FOR WOMEN THAT WAS CONVENED BY THE
6 HEALTH RESOURCES SERVICES ADMINISTRATION, THE HRSA, IN
7 CONNECTION WITH THE AFFORDABLE CARE ACT.

8 SHE WILL ALSO SPEAK ABOUT HER ROLE IN A
9 STUDY PERFORMED SINCE THE ACA HAS GONE INTO EFFECT THAT
10 DEMONSTRATES THAT THE CONTRACEPTIVE MANDATE HAS IN FACT
11 RESULTED IN WOMEN MAKING BETTER, SAFER, MORE EFFECTIVE
12 AND MORE COST-EFFECTIVE HEALTH CHOICES.

13 THE COURT: IN PENNSYLVANIA?

14 MR. GOLDMAN: YES, YOUR HONOR.

15 DR. SAMANTHA BUTTS WILL ALSO SPEAK TODAY,
16 YOUR HONOR. SHE HAS, AS YOU KNOW, HAS A DECLARATION IN
17 THIS CASE AS WELL. SHE IS GOING TO ADD ADDITIONAL
18 PERSPECTIVE AS A MEDICAL DOCTOR, TEACHER AND RESEARCHER
19 WHO USES A VARIETY OF CONTRACEPTIVES TO TREAT PATIENTS
20 AS PART OF HER PRACTICE, WHICH INCLUDES INFERTILITY,
21 HELPING WOMEN CONCEIVE.

22 AND YES, YOU WILL HEAR HOW SHE IS USING
23 CONTRACEPTIVES AS PART OF HER PRACTICE AT THE UNIVERSITY
24 OF PENNSYLVANIA SCHOOL OF MEDICINE IN WEST PHILADELPHIA.
25 AND SHE WILL ALSO PROVIDE TESTIMONY ABOUT HOW

1 HER ABILITY TO PRESCRIBE THE BEST CONTRACEPTIVE
2 PRESCRIPTIONS FOR PATIENTS CHANGED PRE AND POST
3 CONTRACEPTIVE CARE MANDATE AND WHAT THAT WILL MEAN THEN
4 FOR HOW WOMEN WILL BE HARMED UNDER THE NEW RULES AS
5 THEIR EMPLOYERS OPT OUT OF PROVIDING COVERAGE.

6 AND LAST, DR. CYNTHIA CHUANG WILL ALSO

7 TESTIFY TODAY.

8 THE COURT: CHUANG, T-U-O-N-G?

9 MR. GOLDMAN: I'M SORRY, IT'S

10 C-H-U-A-N-G.

11 THE COURT: OKAY.

12 MR. GOLDMAN: AND IT'S PRONOUNCED CHUANG.
13 SHE WILL ADD ADDITIONAL PERSPECTIVE AS A MEDICAL DOCTOR,
14 TEACHER AND RESEARCHER WHO TREATS PATIENTS AT THE
15 HERSHEY MEDICAL CENTER IN HERSHEY, PENNSYLVANIA.

16 SHE WILL ALSO PROVIDE SOME TESTIMONY
17 ABOUT SOME OF HER OWN RESEARCH THAT HAS DEMONSTRATED
18 THAT SINCE THE ACA'S CONTRACEPTIVE MANDATE HAS GONE INTO
19 EFFECT IT ALSO HAS IN FACT RESULTED IN WOMEN MAKING
20 BETTER, SAFER, MORE EFFECTIVE AND MORE COST-EFFECTIVE
21 HEALTH CHOICES.

22 WE WILL DO OUR BEST AS WE RAISE THEM TO
23 NOT BE DUPLICATIVE OF WHAT IS IN THE RECORD, AND YOU
24 HAVE MADE VERY CLEAR, YOUR HONOR, YOUR COUNSEL TO DO
25 THAT. WE HAVE RESTRUCTURED OUR WITNESS OUTLINES. WE DO

1 HAVE SOME LAYING OF FOUNDATION. IF AT ANY POINT YOU
2 FEEL LIKE YOU HAVE ALREADY HEARD THAT, BY ALL MEANS,
3 SHEPHERD US ALONG, AND WE WILL DO OUR BEST TO DO THAT TO
4 OURSELVES SO YOU DON'T HAVE TO.

5 THE COURT: I'M ASSUMING THAT THE
6 DEFENDANTS WILL NOT PUT YOU THROUGH THE PROCESS OF
7 SETTING FORTH A DEEP FOUNDATION FOR EVERYTHING THAT IS
8 TO BE ELICITED.

9 MS. KADE: YOUR HONOR, WE HAVE STIPULATED
10 TO THE ADMISSIBILITY OF EVERYTHING EXCEPT FOR THE
11 DEMONSTRATIVE EXHIBITS.

12 THE COURT: THANK YOU. OKAY.

13 MR. GOLDMAN: IN CONCLUSION, YOUR HONOR,
14 WE BELIEVE THAT YOU CAN ISSUE THIS INJUNCTION NOW. WE
15 HOPE THAT YOU WILL DO SO AS SOON AS YOUR HONOR IS READY,
16 AND WILL DO SO CONSIDERING ALL OF THE DIFFERENT CLAIMS
17 TO KEEP THE STATUS QUO IN PLACE AND PROTECT THE CITIZENS
18 OF THE COMMONWEALTH.

19 THE COURT: SO I UNDERSTAND THERE IS A
20 DATE BY WHICH PENNSYLVANIA THINKS IT WOULD BE USEFUL FOR
21 ME TO HAVE DECIDED THIS MATTER.

22 MR. GOLDMAN: THERE IS, YOUR HONOR. I
23 WOULD SAY BEYOND USEFUL, I WOULD SAY EVEN NECESSARY.
24 THAT DATE IS JANUARY 1ST, 2018. THE REASON WHY THAT
25 DATE IS IMPORTANT IS BECAUSE MANY ERISA HEALTHCARE PLANS

1 HAVE AN OPEN ENROLLMENT WHERE THE NEW PLANS START ON THE
2 FIRST OF THE YEAR. NOT ALL OF THEM, BUT MANY. SO THAT
3 WILL BE A -- WE BELIEVE A LARGE WINDOW WHERE POLICIES
4 WILL CHANGE, EMPLOYERS WILL START TAKING ADVANTAGE OF
5 THESE NEW RULES.

6 THE COURT: OKAY. SO YOU ARE SAYING THAT
7 BECAUSE THE EXEMPTIONS WERE PUT IN PLACE EFFECTIVE
8 IMMEDIATELY THAT WHILE THERE MAY BE NO CHANGE IN PLANS
9 RIGHT NOW, AS OF JANUARY THE 1ST, BECAUSE THERE IS THIS
10 OPEN ENROLLMENT PERIOD, IT IS LIKELY THAT THE PLANS WILL
11 CHANGE AT THAT POINT?

12 MR. GOLDMAN: CORRECT, YOUR HONOR. AND
13 BY THE WAY, IT IS CERTAINLY POSSIBLE THAT PLANS HAVE
14 ALREADY CHANGED IF APPROPRIATE NOTICE HAS BEEN GIVEN.
15 WE JUST DON'T KNOW THAT YET. WE HAVE NOT SEEN THAT YET.

16 THE COURT: OKAY. THANK YOU VERY MUCH.

17 MR. GOLDMAN: THANK YOU, YOUR HONOR.

18 THE COURT: DEFENSE.

19 MR. DAVIS: MAY I APPROACH, YOUR HONOR?

20 THE COURT: YOU MAY.

21 MR. DAVIS: GOOD MORNING, YOUR HONOR.

22 ETHAN DAVIS FOR THE UNITED STATES.

23 IF THERE IS ONE THEME WE WOULD ASK YOUR
24 HONOR TO KEEP IN MIND TODAY AS WE HEAR FROM THE
25 WITNESSES, IT IS THAT THIS COURT IS NOT WRITING ON A

1 BLANK SLATE. OVER THE PAST SIX YEARS, DOZENS OF
2 ENTITIES WITH RELIGIOUS AND MORAL OBJECTIONS HAVE SUED
3 OVER THE CONTRACEPTIVE COVERAGE REQUIREMENT.

4 THOSE LAWSUITS PRODUCED A PATCHWORK OF
5 PRELIMINARY AND PERMANENT INJUNCTIONS THROUGHOUT THE
6 UNITED STATES, MANY OF WHICH ARE STILL IN EFFECT TODAY.
7 THE SUPREME COURT ALSO WEIGHED IN ON THESE ISSUES FOUR
8 TIMES, FIRST IN HOBBY LOBBY, THEN IN LITTLE SISTERS,
9 THEN IN WHEATON COLLEGE, AND FINALLY IN ZUBIK.

10 AND THE FEDERAL GOVERNMENT HAS CHANGED
11 THE RULES GOVERNING CONTRACEPTIVE COVERAGE MULTIPLE
12 TIMES SINCE 2011. THERE IS A LOT OF WATER UNDER THE
13 BRIDGE AND THIS POINT MATTERS TO VIRTUALLY ALL OF THE
14 ISSUES IN THIS CASE.

15 FIRST ON STANDING. THE COMMONWEALTH'S
16 PAPERS GIVE THE IMPRESSION THAT THE NEW RULES ARE GOING
17 TO WITHDRAW CONTRACEPTIVE COVERAGE FROM MILLIONS OF
18 WOMEN WHO ARE CURRENTLY RECEIVING COVERAGE AND THAT THEY
19 ARE THE EXCEPTION THAT WILL SWALLOW THE RULE, BUT IT
20 SHOULD NOT ESCAPE YOUR NOTICE, YOUR HONOR, THAT NONE OF
21 THOSE MILLIONS OF WOMEN WHO WILL SUPPOSEDLY BE AFFECTED
22 BY THESE RULES IS A PLAINTIFF IN THIS CASE, NOR DID ANY
23 OF THEM SUBMIT A DECLARATION EXPLAINING THAT AN EMPLOYER
24 IS ABOUT TO DROP CONTRACEPTIVE COVERAGE.

25 AND WHY DON'T WE SEE ANY INDIVIDUALS IN

1 THIS CASE, YOUR HONOR? IT'S BECAUSE YOUR HONOR IS NOT
2 WRITING ON A BLANK SLATE. MANY AND MAYBE ALL OF THE
3 RELIGIOUS EMPLOYERS WHO OBJECT TO PROVIDING
4 CONTRACEPTIVE COVERAGE HAVE ALREADY SUED. MANY ARE
5 ALREADY PROTECTED BY INJUNCTIONS. SO EMPLOYEES WHO WORK
6 FOR THOSE RELIGIOUS ORGANIZATIONS HAVE NOT BEEN
7 RECEIVING CONTRACEPTIVE COVERAGE FOR YEARS.

8 TAKE THE LITTLE SISTERS AS AN EXAMPLE.
9 AS YOUR HONOR RECOGNIZED IN DENYING THE LITTLE SISTERS
10 MOTION TO INTERVENE, GRANTING AN INJUNCTION IN THIS CASE
11 WOULD NOT CHANGE THE FACT THAT THE LITTLE SISTERS ARE
12 NOT CURRENTLY PROVIDING CONTRACEPTIVE COVERAGE TO THEIR
13 EMPLOYEES.

14 THE COURT: WELL, I AGREE WITH YOU WITH
15 RESPECT TO THE RELIGIOUS EXEMPTION. QUITE CLEARLY THERE
16 HAS BEEN A LOT OF LITIGATION ABOUT THIS, BUT THE MORAL
17 EXEMPTION IS SOMETHING NEW, ISN'T IT?

18 MR. DAVIS: THE MORAL EXEMPTION IS NEW,
19 YOUR HONOR, BUT THERE'S ALSO BEEN LITIGATION OVER THAT.
20 THERE WAS A CASE HERE IN PENNSYLVANIA, THE REAL
21 ALTERNATIVES CASE, AND THERE WAS ALSO A CASE IN D.C.
22 CALLED MARCH FOR LIFE. SO I DON'T THINK THE LITIGATION
23 OVER THAT IS NEW.

24 THE COURT: WELL, BUT IN THE CONTEXT OF
25 THE AFFORDABLE CARE ACT, IT IS NEW, BECAUSE THE MORAL

1 EXEMPTION WAS ONLY ISSUED A FEW WEEKS AGO. SO THERE HAS
2 BEEN NO LITIGATION IN THE CONTEXT OF THE MORAL EXEMPTION
3 OR A MORAL EXEMPTION AS IT APPLIES TO THE ACA, CORRECT?

4 MR. DAVIS: I AGREE WITH THAT, YOUR
5 HONOR. THERE HAS BEEN DISCUSSIONS OF CONSCIENCE ISSUES
6 DURING THE RULEMAKINGS, BUT THERE HAS NOT BEEN
7 LITIGATION OVER THIS MORAL EXEMPTION RULE, THIS ONE THAT
8 WAS JUST PASSED IN 2017, UNTIL NOW.

9 THE COURT: SO I'M A LITTLE PUZZLED BY
10 WHAT THE MORAL EXEMPTION MEANS. HOW DOES ONE
11 DETERMINE -- WELL, A COUPLE OF QUESTIONS. HOW DOES AN
12 ENTITY DETERMINE THAT IT HAS A MORAL CONVICTION? HOW IS
13 THAT CONVICTION INSTANTIATED THROUGHOUT THE ENTIRE
14 ORGANIZATION? WHO MAKES -- IN OTHER WORDS, WHO MAKES
15 THE DETERMINATION? AND HOW DOES ONE DECIDE WHAT IS
16 MORAL AND WHAT IS NOT MORAL?

17 I UNDERSTAND IN THE CONTEXT OF RELIGION
18 THAT THERE ARE QUITE CLEAR MORAL PRECEPTS, BUT WE ARE A
19 COUNTRY WHERE, RIGHTLY OR WRONG, WHETHER YOU AGREE
20 WITH IT OR NOT, PEOPLE HAVE VERY DIFFERENT VIEWS ABOUT
21 WHAT MORALITY IS. SO HELP ME UNDERSTAND THE MORALITY
22 EXEMPTION IN THE CONTEXT OF THOSE QUESTIONS.

23 MR. DAVIS: SURE. YOUR HONOR, THE FIRST
24 THING I SAY ABOUT THAT IS THAT THE MORAL EXEMPTION RULE
25 DOES NOT APPLY TO PUBLICLY TRADED COMPANIES, UNLIKE THE

1 RELIGIOUS EXEMPTION RULE, SO WE ARE TALKING ONLY ABOUT
 2 CLOSELY-HELD ENTITIES. SO IN TERMS OF DECIDING WHO CAN
 3 ASSERT THE MORAL CLAIM, I THINK IT WOULD JUST BE THE
 4 OWNERS OF A CLOSELY-HELD ORGANIZATION OR A NONPROFIT.
 5 THE COURT: ARE YOU POSITIVE OF THAT?
 6 MR. DAVIS: YES, YOUR HONOR.
 7 THE COURT: OKAY.
 8 MR. DAVIS: THAT'S NOT TRUE FOR
 9 RELIGIOUS.
 10 THE COURT: I'LL HAVE TO REREAD THE MORAL
 11 EXEMPTION, BECAUSE I THOUGHT IT SAID SOMETHING CONTRARY
 12 TO THAT.
 13 MR. DAVIS: IT DOES NOT, YOUR HONOR.
 14 THE COURT: I WILL TAKE A LOOK AT IT.
 15 MR. DAVIS: SO THE ONLY QUESTION IS WHO
 16 CAN ASSERT IT. I THINK THAT WOULD BE JUST THE SAME
 17 PEOPLE WHO CAN ASSERT THE CLAIM IN A CONTEXT OF THE
 18 RELIGIOUS EXEMPTION, WHICH WOULD BE THE OWNERS OF THE
 19 CLOSELY HELD COMPANY OF WHOEVER RUNS A NONPROFIT. SO
 20 THAT'S THAT QUESTION.
 21 AS TO YOUR OTHER QUESTION ABOUT WHAT DOES
 22 IT LOOK LIKE TO ASSERT THIS KIND OF CLAIM, I THINK IT
 23 LOOKS VERY SIMILAR TO WHAT HAPPENS WITH A RELIGIOUS
 24 EXEMPTION. I MEAN, THE EMPLOYER WILL JUST ASSERT A
 25 SINCERELY-HELD MORAL CONVICTION, AND THEN THAT EMPLOYER

1 IS EXEMPT.
 2 I WILL SAY I DOUBT THAT THIS WILL BE
 3 WIDELY USED, BECAUSE AS THE RULES POINT OUT, PROVIDING
 4 CONTRACEPTIVE COVERAGE IS COST NEUTRAL. SO THERE REALLY
 5 WOULDN'T BE A REASON TO ASSERT THIS UNLESS AN EMPLOYER
 6 ACTUALLY DID HAVE A SINCERE --
 7 THE COURT: WELL, WHAT IF A -- WHAT IF
 8 THE CEO OF THE COMPANY HAD A SINCERELY-HELD MORAL
 9 CONVICTION THAT WOMEN SHOULD REMAIN AT HOME AND THAT --
 10 AND MADE A DETERMINATION, THEREFORE, NOT TO PROVIDE
 11 CONTRACEPTIVE SERVICES IN THE INSURANCE PLAN OF THE
 12 COMPANY IN ORDER TO IMPOSE HIS NORMATIVE CONSTRUCT ON
 13 HIS WORKFORCE, BUT THE BOARD OF DIRECTORS DOES NOT AGREE
 14 WITH THAT. IN FACT, THEY BELIEVE THAT THERE IS A MORAL
 15 IMPERATIVE THAT WOMEN BE ALLOWED TO MAKE THEIR OWN
 16 CHOICES. HOW DO YOU DETERMINE, ONE, WHAT IS AN
 17 APPROPRIATE MORAL CONVICTION, AND TWO, WHO PREVAILS IN
 18 THAT CONTEXT?
 19 MR. DAVIS: WELL, A COUPLE OF ANSWERS TO
 20 THAT, YOUR HONOR. THE FIRST IS THAT I THINK GENERAL
 21 PRINCIPLES OF CORPORATE LAW WOULD ANSWER THE QUESTION
 22 ABOUT WHO IS ENTITLED TO ADVANCE THAT KIND OF OBJECTION
 23 ON BEHALF OF THE COMPANY. BUT IF YOUR HONOR'S
 24 HYPOTHETICAL POSES A SITUATION WHERE THE EMPLOYER
 25 ACTUALLY DOES NOT HAVE A SINCERE OBJECTION, IT'S REALLY

1 A PRETEXT FOR COVERING --
 2 THE COURT: NO, I'M NOT SUGGESTING IT'S A
 3 PRETEXT. THE CEO REALLY DOES BELIEVE, AS A MORAL
 4 MATTER, THAT WOMEN SHOULD STAY AT HOME.
 5 MR. DAVIS: BUT THE CEO DOES NOT HAVE A
 6 MORAL OBJECTION TO PROVIDING CONTRACEPTIVE COVERAGE.
 7 THE REAL OBJECTION IS TO -- THE REAL --
 8 THE COURT: HE HAS A MORAL OBJECTION TO
 9 PROVIDING COVERAGE BECAUSE HE THINKS THAT WOMEN SHOULD
 10 STAY AT HOME AND HE BELIEVES THAT WOMEN SHOULD STAY AT
 11 HOME -- IF THEY ARE PREGNANT ALL THE TIME, THEY ARE
 12 GOING TO STAY AT HOME.
 13 MR. DAVIS: YOUR HONOR, AGAIN, I THINK --
 14 THE COURT: DON'T BUCK THE HYPOTHETICAL.
 15 JUST ANSWER THE QUESTION.
 16 MR. DAVIS: UNDER THAT HYPOTHETICAL, YOUR
 17 HONOR, I ASSUME THAT EMPLOYEES WOULD COMPLAIN ABOUT IT
 18 TO IRS OR TREASURY OR LABOR, AND THE LABOR DEPARTMENT
 19 DOES HAVE A ROLE IN POLICING THE SINCERITY OF
 20 RELIGIOUS -- OR NOT -- NOT THE SINCERITY.
 21 THE COURT: SO THE DEPARTMENT OF LABOR
 22 WOULD BE POLICING THE MORAL CONVICTIONS OF AN ENTITY?
 23 MR. DAVIS: NO. THE DEPARTMENT OF LABOR
 24 COULD CONCEIVABLY, IN THAT CIRCUMSTANCE, ASK WHETHER A
 25 PARTICULAR -- POLICE THAT KIND OF SITUATION TO A DEGREE.

1 IT PROBABLY WOULDN'T --
 2 THE COURT: SO WHO WOULD BE POLICING
 3 WHETHER A MORAL CONVICTION IS APPROPRIATELY HELD?
 4 MR. DAVIS: I THINK, AGAIN, IT WOULD
 5 DEPEND ON THE CIRCUMSTANCES. IF AN EMPLOYEE WERE TO SAY
 6 TO THE GOVERNMENT THAT THERE IS NOT IN FACT A SINCERE
 7 MORAL OBJECTION TO PROVIDING CONTRACEPTIVE COVERAGE,
 8 THAT IN FACT, WHAT IS GOING ON HERE IS IT'S
 9 DISCRIMINATION AGAINST WOMEN, AND THAT IS -- THEN I
 10 THINK THAT THE LABOR DEPARTMENT COULD INVESTIGATE THAT.
 11 THE COURT: SO THE LABOR DEPARTMENT WOULD
 12 HAVE TO BE DETERMINING WHAT A MORAL CONVICTION --
 13 WHETHER A MORAL CONVICTION IS APPROPRIATE OR NOT?
 14 MR. DAVIS: I WOULD NOT PUT IT THAT
 15 BROADLY, YOUR HONOR. I WOULD SAY IF THERE IS A -- AS
 16 LONG AS THERE IS A SINCERE MORAL OBJECTION TO PROVIDE
 17 CONTRACEPTIVE COVERAGE, THEN THAT EMPLOYER IS EXEMPT,
 18 PERIOD. AND ONLY IF THAT --
 19 THE COURT: WELL, YOU ARE STILL BUCKING
 20 THE HYPOTHETICAL. IF THERE IS A MORAL CONVICTION RULE
 21 OUT THERE, SOMEONE IS GOING TO HAVE TO DETERMINE WHETHER
 22 IT IS AN APPROPRIATE MORAL CONVICTION OR NOT, CORRECT?
 23 MR. DAVIS: NO, I DON'T AGREE WITH THAT,
 24 YOUR HONOR.
 25 THE COURT: SO IS IT JUST SORT OF A

1 FREE-FLOATING CONCEPT THAT EVERYBODY DECIDES THEMSELVES
2 AND NOBODY POLICES IT?

3 MR. DAVIS: YOUR HONOR, I WOULDN'T CALL
4 IT A FREE-FLOATING CONCEPT THAT IS TOTALLY UNPOLICED. I
5 WOULD SAY THAT, LIKE THE RELIGIOUS EXEMPTION, THE ONLY
6 QUESTION THAT IS ASKED IS WHETHER AN EMPLOYER HAS A
7 SINCERE RELIGIOUS OR MORAL OBJECTION TO PROVIDING
8 CONTRACEPTIVE COVERAGE, AND IF THAT IS TRUE, THEN THAT
9 EMPLOYER IS EXEMPT.

10 THE COURT: OKAY. SO WHAT YOU'RE TELLING
11 ME IS IF THE CEO SAYS I HAVE A SINCERE MORAL CONVICTION
12 TO NOT PROVIDE CONTRACEPTIVES TO WOMEN BECAUSE I WANT
13 THEM TO STAY AT HOME, THAT IS FINE?

14 MR. DAVIS: I WOULD NOT SAY THAT IS FINE,
15 YOUR HONOR. I WOULD SAY THAT IN THAT CIRCUMSTANCE,
16 AGAIN, AN EMPLOYEE MIGHT COMPLAIN TO THE LABOR
17 DEPARTMENT AND THERE IS SOME ROLE FOR THE LABOR
18 DEPARTMENT --

19 THE COURT: THE LABOR DEPARTMENT, OKAY.

20 MR. DAVIS: WE CAN FOLLOW UP ON THAT.

21 THE COURT: MOVE ON.

22 MR. DAVIS: I WOULD SAY, RETURNING TO
23 STANDING, YOUR HONOR, BECAUSE THE LITTLE SISTERS ARE
24 PROTECTED BY THE ZUBIK INJUNCTION WHICH PROHIBITS THE
25 FEDERAL GOVERNMENT FROM ENFORCING THE MANDATE AGAINST

1 THEM. THE SAME IS TRUE OF MANY OTHER RELIGIOUS
2 ORGANIZATIONS. AND THAT IS WHY THE ONLY SPECIFIC
3 EXAMPLE OF AN EMPLOYER WHO'S GOING TO DROP COVERAGE THAT
4 PENNSYLVANIA WAS ABLE TO GIVE WAS THE UNIVERSITY OF
5 NOTRE DAME, BUT AS THE COURT KNOWS, NOTRE DAME LATER
6 ANNOUNCED THAT ITS THIRD-PARTY ADMINISTRATOR WOULD
7 CONTINUE TO OFFER NO COST CONTRACEPTIVE COVERAGE.

8 I'M NOT SAYING THAT IT'S IMPOSSIBLE THAT
9 ANYONE WOULD EVER HAVE STANDING TO CHALLENGE THESE
10 RULES, YOUR HONOR. WHAT I'M SAYING IS THAT IT'S
11 PENNSYLVANIA'S BURDEN TO SHOW YOUR HONOR SOMEONE WHO IS
12 GOING TO LOSE COVERAGE, AND THEY HAVEN'T BEEN ABLE TO DO
13 THAT, EVEN AFTER CLAIMING THAT MILLIONS OF WOMEN COULD
14 BE AFFECTED BY THIS.

15 I SUSPECT YOU WILL HEAR TODAY FROM THE
16 COMMONWEALTH'S WITNESS ABOUT THEIR CONCERNS ABOUT THE
17 IMPACT THAT THE NEW RULES WILL HAVE ON WOMEN'S ACCESS TO
18 CONTRACEPTION. WE HAVE NOT DEPOSED THESE WITNESSES. WE
19 DON'T KNOW WHAT THEY ARE GOING TO SAY, BUT I URGE YOUR
20 HONOR TO LISTEN TO WHETHER ANY OF THEM CAN POINT TO A
21 SINGLE PENNSYLVANIA EMPLOYER OR ANY EMPLOYER OR A SINGLE
22 EMPLOYEE WHO IS GOING TO LOSE COVERAGE AS OF
23 JANUARY 1ST.

24 I WOULD ALSO LIKE TO TALK A LITTLE ABOUT
25 THE PARENS PATRIAE THEORY THAT CAME UP EARLIER. YOUR

1 HONOR, IT HAS BEEN WELL SETTLED SINCE MASSACHUSETTS
2 VERSUS MELLON, 1923, THAT A STATE CANNOT REPRESENT ITS
3 CITIZENS PARENS PATRIAE AGAINST THE FEDERAL GOVERNMENT.
4 AS MELLON EXPLAINED IT, IT HAS NO POWER -- IT IS NO PART
5 OF ITS DUTY OR POWER TO ENFORCE THEIR RIGHTS IN RESPECT
6 OF THEIR RELATIONS WITH THE FEDERAL GOVERNMENT. AND
7 THAT FIELD IS THE UNITED STATES AND NOT THE STATE WHICH
8 REPRESENTS THEM AS PARENS PATRIAE. THERE IS NO
9 EXCEPTION TO THAT RULE IN MELLON FOR CASES WHERE THE
10 STATE IS CHALLENGING A FEDERAL AGENCY ACTION INSTEAD OF
11 A STATUTE.

12 AND MASSACHUSETTS VERSUS EPA, YOUR HONOR,
13 THE SPECIAL SOLICITUDE DISCUSSION THAT WE HAD EARLIER, I
14 THINK THE BEST WAY TO UNDERSTAND THE SPECIAL SOLICITUDE
15 POINT IS THAT IT APPLIES WHEN THE STATE IS ABLE TO SHOW
16 AN INJURY TO ITS CONCRETE SOVEREIGN INTEREST. AND IN
17 MASSACHUSETTS VERSUS EPA, THAT WAS AN INJURY TO THE
18 TERRITORY OF THE STATE ITSELF. AND THAT IS WHAT THIS
19 CASE SAYS. I HAVE IT HERE. IT SAYS: GIVEN
20 MASSACHUSETTS STATE IN PROTECTING ITS QUASI SOVEREIGN
21 INTEREST, THE COMMONWEALTH IS ENTITLED TO SPECIAL
22 SOLICITUDE IN ITS STANDING ANALYSIS. I DON'T THINK WE
23 HAVE ANYTHING LIKE THAT HERE. WE DON'T HAVE ANY DAMAGE
24 TO THE STATE'S TERRITORY. ALL WE HAVE IS SPECULATION
25 THAT SOME EMPLOYERS WILL ULTIMATELY SHIFT FROM CURRENTLY

1 PROVIDING COVERAGE TO NOT PROVIDING COVERAGE.

2 THE COURT: LET ME TALK TO YOU ABOUT THE
3 TEXAS VERSUS UNITED STATES CASE IN THE CONTEXT OF
4 STANDING. SO IN THAT CASE THE SUPREME COURT CERTIFIED A
5 NUMBER OF ISSUES, INCLUDING WHETHER OR NOT TEXAS HAD
6 STANDING. AND THEN IT AFFIRMED BY AN EQUALLY DIVIDED
7 COURT WITHOUT OPINION.

8 NOW ONE OF THE QUESTIONS THAT I ASKED YOU
9 TO LOOK AT IS, GIVEN SILLIMAN VERSUS HUDSON RIVER BRIDGE
10 COMPANY, WHICH I KNOW IS AN OLD CASE, 1861. DON'T TELL
11 ME IT'S OLD SO THEREFORE IT DOES NOT APPLY. WHAT IS THE
12 IMPACT IN YOUR VIEW OF SILLIMAN ON TEXAS VERSUS THE
13 UNITED STATES, PARTICULARLY THE STANDING ANALYSIS THAT
14 THE COURT IN TEXAS VERSUS UNITED STATES IN THE 5TH
15 CIRCUIT DID.

16 MR. DAVIS: YOUR HONOR, I THINK THAT
17 SINCE HUDSON BRIDGE, THE COURT HAS SAID REPEATEDLY THAT
18 AN AFFIRMANCE BY AN EQUALLY DIVIDED COURT IS NOT
19 ENTITLED TO PRECEDENTIAL WEIGHT.

20 THE COURT: WELL, EXCEPT SILLIMAN TALKED
21 ABOUT THE JURISDICTIONAL CONTEXT, WHICH IS WHY IT IS
22 DIFFERENT.

23 MR. DAVIS: I DON'T SEE ANY CASE SINCE
24 SILLIMAN THAT SAYS THAT THE JURISDICTIONAL CONTEXT WOULD
25 BE DIFFERENT, THAT SOMEHOW BECAUSE IT'S A JURISDICTIONAL

1 DECISION THAT THE COURT'S AFFIRMANCE WOULD BE ENTITLED
2 TO --
3 THE COURT: NO. I THINK THE POINT IS
4 THAT SILLIMAN WAS A JURISDICTIONAL DECISION. AND AS FAR
5 AS WE CAN FIND, THE ONLY ISSUE WHEN THERE WAS AN EQUALLY
6 DIVIDED COURT THAT CONCERNED A JURISDICTIONAL ANALYSIS.
7 SO EVEN THOUGH SUBSEQUENT CASES HAVE SAID GENERALLY
8 EQUALLY DIVIDED COURTS ARE NOT BINDING PRECEDENT,
9 SILLIMAN SUGGESTS THAT THERE IS THIS CARVEOUT IN THE
10 CONTEXT OF STANDING.

11 AND SO MY QUESTION TO YOU IS, DO I JUST
12 IGNORE SILLIMAN OR DO I SAY THAT IT IS TOO OLD OR DO I
13 SAY THAT SOMEHOW IT HAS BEEN MOOTED AT THIS POINT?

14 MR. DAVIS: YOUR HONOR, I WOULD SAY YOU
15 SHOULD READ SILLIMAN IN LIGHT OF THE CASES THAT CAME
16 LATER. AND THE CASES THAT CAME LATER SAID FLATLY,
17 WITHOUT CARVING OUT JURISDICTION OR ANYTHING ELSE, THOSE
18 CASES SAID AN AFFIRMANCE BY AN EQUALLY DIVIDED COURT IS
19 NOT ENTITLED TO PRECEDENTIAL EFFECT. I'M NOT AWARE -- I
20 HAVE NOT EXHAUSTIVELY LOOKED AT EVERY CASE SINCE 1861,
21 BUT I'M NOT AWARE OF ANY CASE SINCE THEN THAT HAS HELD
22 THAT A JURISDICTIONAL DECISION -- THAT AFFIRMANCE BY AN
23 EQUALLY DIVIDED COURT OF A JURISDICTIONAL DECISION IS
24 ENTITLED TO PRECEDENTIAL FORCE, OF THE SUPREME COURT.

25 THE CASES I WOULD CITE TO YOUR HONOR,

1 NEIL VERSUS BIGGERS, THAT'S N-E-I-L VERSUS
2 B-I-G-G-E-R-S, 409 U.S. 188 AT 192. THAT IS A 1972
3 SUPREME COURT DECISION.

4 AND ARKANSAS WRITERS' PROJECT VERSUS
5 RAGLAND, 481 U.S. 221. THAT'S A 1987 SUPREME COURT
6 DECISION THAT HELD: OF COURSE, AN AFFIRMANCE BY AN
7 EQUALLY DIVIDED COURT IS NOT ENTITLED TO ANY
8 PRECEDENTIAL WEIGHT.

9 THE COURT: I WILL TAKE A LOOK AT THOSE
10 CASES.

11 MOVE ON.

12 MR. DAVIS: I WOULD LIKE TO TALK A LITTLE
13 ABOUT THE PROCEDURAL APA ISSUE, YOUR HONOR.
14 HERE AGAIN, YOUR HONOR IS NOT WRITING ON
15 A BLANK SLATE. LIKE THE LAST ADMINISTRATION DID THREE
16 TIMES IN 2010, 2011 AND 2014, THE AGENCIES ISSUED THE
17 NEW RULES AS INTERIM FINAL RULES. LIKE THOSE PRIOR
18 IFRS, THREE SEPARATE LAWS PROVIDE STATUTORY AUTHORITY:
19 26 U.S.C. 9833; 29 U.S.C. --

20 THE COURT: ARE YOU TALKING ABOUT --
21 YOU'RE CONNECTING WITH THE ORIGINAL RELIGIOUS EXEMPTION,
22 THE SECOND RELIGIOUS EXEMPTION? IS THAT WHAT WE ARE
23 TALKING ABOUT HERE?

24 MR. DAVIS: NO, YOUR HONOR. WE ARE
25 TALKING ABOUT JUST THE BASIS OF STATUTORY AUTHORITY TO

1 DO THIS AS AN IFR INSTEAD OF THROUGH NOTICE AND COMMENT.
2 I THINK EVEN APART FROM THE APA, THERE ARE THREE
3 SEPARATE STATUTES THAT GIVE THE AGENCIES INDEPENDENT
4 AUTHORITY TO DO THIS.

5 THE COURT: OKAY.

6 MR. DAVIS: AND THOSE STATUTES SAY THAT
7 THE SECRETARY MAY PROMULGATE ANY INTERIM FINAL RULES AS
8 THE SECRETARY DETERMINES ARE APPROPRIATE. THAT IS THE
9 SAME AUTHORITY THAT THE PRIOR ADMINISTRATION RELIED ON
10 TO DO THESE AS INTERIM FINAL RULES, AND WE ARE RELYING
11 ON IT AS WELL.

12 IF YOUR HONOR DID NOT THINK THAT WAS
13 SUFFICIENT, THERE WAS ALSO GOOD CAUSE DIRECTLY UNDER THE
14 APA, AND THE D.C. CIRCUIT EXPRESSLY UPHELD ONE OF THE
15 LAST ADMINISTRATION'S CONTRACEPTIVE COVERAGE IFRS IN THE
16 PRIESTS FOR LIFE DECISION. AND THERE, LIKE HERE, THE
17 AGENCY MADE A GOOD CAUSE FINDING IN THE RULE THAT IT
18 ISSUED. THERE, LIKE HERE, THE IFR WAS MODIFYING
19 REGULATIONS THAT HAD RECENTLY BEEN ENACTED UNDER NOTICE
20 AND COMMENT RULE MAKING. THERE, LIKE HERE, THE ISSUES
21 THE IFR HAD ADDRESSED HAD ALREADY BEEN SUBJECTED TO
22 THOUSANDS AND THOUSANDS OF COMMENTS. THERE, LIKE HERE,
23 HHS EXPOSED ITS INTERIM FINAL RULE TO COMMENTS BEFORE
24 PERMANENT IMPLEMENTATION. AND THERE, LIKE HERE, THE
25 GOVERNMENT WAS -- THERE THE GOVERNMENT WAS RESPONDING TO

1 THE SUPREME COURT'S DECISION IN WHEATON COLLEGE. HERE
2 THE GOVERNMENT WAS RESPONDING TO THE SUPREME COURT'S
3 DECISION IN ZUBIK. THERE DELAY AND IMPLEMENTATION OF
4 THE RULE WOULD DELAY THE IMPLEMENTATION OF THE
5 ALTERNATIVE OPT-OUT FOR RELIGIOUS OBJECTORS. AND HERE
6 DELAY WOULD INTERFERE WITH THE IMPLEMENTATION OF THE
7 RELIGIOUS AND MORAL EXEMPTIONS. SO I THINK IF THERE WAS
8 GOOD CAUSE IN PRIESTS FOR LIFE, I THINK THERE IS GOOD
9 CAUSE HERE.

10 THE COURT: WELL, IN PRIESTS FOR LIFE,
11 THE NEW IFRS WERE PRETTY MUCH IDENTICAL TO PRIOR
12 REGULATIONS, WEREN'T THEY?

13 MR. DAVIS: I DON'T THINK THEY WERE
14 VIRTUALLY IDENTICAL, YOUR HONOR. THE IFR EXPANDED THE
15 WAY THE ACCOMMODATION COULD BE INVOKED.

16 THE COURT: WELL, BUT THEY DIDN'T MAKE
17 SIGNIFICANT CHANGES IN THE LAW, DID THEY?

18 MR. DAVIS: WELL, I DON'T KNOW IF I WOULD
19 EVEN DESCRIBE THIS AS A MORE SIGNIFICANT CHANGE THAN THE
20 ONE AT ISSUE, PRIESTS FOR LIFE, YOUR HONOR.

21 THE COURT: SO YOU WOULD SAY THAT THE
22 RELIGIOUS EXEMPTION AND THE MORAL EXEMPTIONS ARE NOT
23 SIGNIFICANT CHANGES.

24 MR. DAVIS: I WOULD NOT SAY IT THAT WAY,
25 YOUR HONOR. I WOULD SAY THEY ARE ARGUABLY NOT MORE

1 SIGNIFICANT THAN THE CHANGE AT ISSUE IN THE IFR THAT WAS
 2 RESPONDING TO WHEATON COLLEGE. THAT IS BECAUSE, LIKE I
 3 HAVE DISCUSSED, THERE IS NO INDICATION HERE THAT ANYONE
 4 IS GOING TO LOSE CONTRACEPTIVE COVERAGE AS A RESULT OF
 5 THESE NEW RULES. BACK THEN IT WAS A -- THERE WAS A
 6 RELATIVELY SIGNIFICANT CHANGE TO THE RULES TO EXPAND THE
 7 WAY THAT THE ENTITIES COULD INVOKE THE ACCOMMODATION.
 8 BUT I WOULD SAY EVEN IF YOUR HONOR DOES
 9 NOT SEE IT THAT WAY AND THINKS THAT THIS CHANGE IS MORE
 10 SIGNIFICANT THAN THE ONE BACK IN 2014, THAT IS ONLY ONE
 11 OF THE FACTORS IN THE PRIESTS FOR LIFE DECISION.
 12 THE COURT: WELL, THE OTHER ONE WAS GOOD
 13 CAUSE. BUT IN PRIESTS FOR LIFE I THINK THE COURT MADE A
 14 DETERMINATION THAT THERE WAS GOOD CAUSE AND THUS SAID --
 15 PUTTING ASIDE WHETHER THERE WAS -- THEY WERE IDENTICAL
 16 OR WHETHER THERE WAS A SIGNIFICANT CHANGE, THEN SAID IT
 17 WAS APPROPRIATE. BUT IN THIS CASE I HAVE TO -- ARE
 18 YOU -- DO YOU AGREE THAT I HAVE TO MAKE A THRESHOLD
 19 DETERMINATION OF GOOD CAUSE BEFORE I CAN GET INTO THE
 20 SAME SPACE THAT PRIESTS FOR LIFE -- THE PRIESTS FOR LIFE
 21 COURT WAS OR IS IT YOUR VIEW THAT I DON'T HAVE TO MAKE
 22 THAT DETERMINATION OF GOOD CAUSE BEFORE GOING ALONG WITH
 23 THE HOLDING IN THAT CASE?
 24 MR. DAVIS: YOUR HONOR, IF I UNDERSTAND
 25 THE QUESTION CORRECTLY, I THINK THAT ALL OF THOSE --

1 THESE FACTORS WE HAVE BEEN DISCUSSING GO TO WHETHER OR
 2 NOT THERE WAS GOOD CAUSE TO DO THE IFR IN THAT CASE AS
 3 AN IFR INSTEAD OF THROUGH NOTICE AND COMMENT. I THINK
 4 THE SIGNIFICANCE OF THE CHANGE IS ALL UNDER THAT HEADING
 5 OF WHETHER OR NOT THERE IS GOOD CAUSE. I WOULD SAY YOU
 6 DON'T EVEN HAVE TO REACH THE GOOD CAUSE ISSUE AT ALL IN
 7 OUR VIEW BECAUSE OF THE SEPARATE BASES OF STATUTORY
 8 AUTHORITY. BUT IN THE EVENT YOU WERE TO REACH THE GOOD
 9 CAUSE ISSUE, I THINK IF YOU READ THAT PART OF THAT -- OF
 10 THE D.C. CIRCUIT'S DECISION, I THINK WE ARE ALMOST ON
 11 ALL FOURS WITH IT HERE.
 12 THE COURT: GO AHEAD.
 13 MR. DAVIS: I WOULD LIKE TO MOVE TO THE
 14 STATUTORY AUTHORITY FOR THE EXEMPTIONS.
 15 THE COURT: GO AHEAD.
 16 MR. DAVIS: YOUR HONOR, IN OUR VIEW WE
 17 HAVE THREE SEPARATE BASES OF STATUTORY AUTHORITY.
 18 THE FIRST IS THE AFFORDABLE CARE ACT
 19 ITSELF. HERE AGAIN, YOUR HONOR IS NOT WRITING ON A
 20 BLANK SLATE. THIS IS THE SOURCE OF AUTHORITY THAT THE
 21 LAST ADMINISTRATION USED TO CRAFT THE ORIGINAL RELIGIOUS
 22 EMPLOYER EXEMPTION. THE STATUTE IS A BROADLY WORDED
 23 DELEGATION OF AUTHORITY TO THE AGENCIES. IT PROVIDES
 24 THAT COVERED GROUP HEALTH PLANS SHALL PROVIDE -- OR
 25 SHALL COVER WHATEVER HRSA SPECIFIES IN ITS GUIDELINES.

1 THE BREADTH OF THE STATUTE IS APPARENT
 2 WHEN COMPARED TO THE OTHER THREE SUBSECTIONS OF THAT
 3 STATUTE. THOSE SUBSECTIONS ADDRESS EVIDENCE BASED ITEMS
 4 OF SERVICES, IMMUNIZATIONS AND SERVICES FOR CHILDREN,
 5 ADDRESS GUIDELINES THAT WERE ALREADY IN EXISTENCE AT THE
 6 TIME THE AFFORDABLE CARE ACT WAS ENACTED. AND
 7 SUBSECTION (A)(4) WAS A GRANT OF AUTHORITY TO DEVELOP
 8 GUIDELINES THAT DID NOT ALREADY EXIST.
 9 AND ON PAGE 23 OF ITS BRIEF, PENNSYLVANIA
 10 ARGUES THAT NOTHING IN THE LANGUAGE OF THE ACA OR ITS
 11 LEGISLATIVE HISTORY SUGGESTS THAT CONGRESS INTENDED TO
 12 GIVE DEFENDANTS OR ANY AGENCY BLANKET AUTHORITY TO
 13 PERMIT EMPLOYEES TO OPT-OUT. IF THAT IS TRUE, THE
 14 ORIGINAL EXEMPTION FOR CHURCHES HAS TO FALL AS WELL,
 15 WHICH WOULD EXPOSES CHURCHES AND HOUSES OF WORSHIP TO
 16 THE MANDATE FOR THE FIRST TIME. AND THAT RESULT WOULD
 17 IMPERIL THE MANDATE ITSELF BECAUSE WE KNOW FROM HOBBY
 18 LOBBY THAT IT IMPOSES A SUBSTANTIAL BURDEN.
 19 SO PENNSYLVANIA ALSO ARGUES THAT THE
 20 RULES CONFLICT WITH THE PURPOSE OF THE STATUTE, WHICH IS
 21 TO INCREASE COVERAGE FOR PREVENTIVE SERVICES. AND THAT
 22 ARGUMENT WOULD ALSO WIPE AWAY THE ORIGINAL CHURCH
 23 EXEMPTION. IT'S ALSO INCONSISTENT WITH THE BEST
 24 EVIDENCE OF A STATUTE'S PURPOSE, WHICH IS ITS TEXT. AND
 25 THE ACA DOES NOT REQUIRE GROUP HEALTH PLANS TO COVER

1 CONTRACEPTION. IT DOES NOT MENTION CONTRACEPTION.
 2 INSTEAD IT DELEGATES AUTHORITY TO THE AGENCIES TO DECIDE
 3 WHAT KINDS OF PREVENTIVE SERVICES SHOULD BE COVERED.
 4 THE COURT: WELL, THE CONTRACEPTIVE
 5 MANDATE WAS ADOPTED. WELL, THE HRSA ADOPTED THE
 6 INSTITUTE'S RECOMMENDATION IN AUGUST OF 2011. AND THE
 7 CONTRACEPTIVE MANDATE WAS ENACTED OR PROMULGATED UNDER
 8 THE AUTHORITY GIVEN BY THE ACA TO THE AGENCY. SO IN
 9 THIS CASE DOES THE -- DO THE EXEMPTIONS, THE MORAL AND
 10 RELIGIOUS EXEMPTIONS, IMPACT ON THE CONTRACEPTIVE
 11 MANDATE? DON'T THEY CARVE OUT EXCEPTIONS TO THE
 12 CONTRACEPTIVE MANDATE? SO YOU HAVE AN AGENCY CARVING
 13 OUT EXCEPTIONS TO AN AGENCY'S RULES.
 14 MR. DAVIS: THAT'S CORRECT.
 15 THE COURT: THAT IS CORRECT.
 16 MR. DAVIS: YES.
 17 THE COURT: WHAT AUTHORITY IS THERE FOR
 18 AN AGENCY TO CARVE OUT AN EXCEPTION TO AN AGENCY'S
 19 PREVIOUSLY PROMULGATED RULES?
 20 MR. DAVIS: YOUR HONOR, I THINK IT IS
 21 JUST GENERAL REGULATORY AUTHORITY THAT ALL AGENCIES HAVE
 22 TO CHANGE THEIR RULES, CARVE OUT EXEMPTIONS TO THEM. I
 23 THINK THE STATUTES THAT I MENTIONED EARLIER PROVIDE THAT
 24 AUTHORITY. I THINK IT'S JUST INHERENT IN THE APA THAT
 25 AGENCIES HAVE THAT ABILITY. AND I THINK IF THE QUESTION

1 IS WHETHER THERE IS STATUTORY AUTHORITY FOR AGENCIES TO
2 DO THAT, I WOULD JUST POINT YOUR HONOR AGAIN TO THE ACA,
3 42 U.S.C. 300 GG-13(A)(4), WHICH PROVIDES DISCRETION, A
4 BROAD GRANT OF DISCRETION FOR THE AGENCIES TO DEVELOP
5 RULES GOVERNING WHAT TYPES OF PREVENTIVE SERVICES WILL
6 BE COVERED AND WHO WILL BE COVERED BY THEM. THERE IS
7 NOTHING IN THAT STATUTE THAT PROHIBITS THE AGENCY FROM
8 DOING THAT.

9 AND HERE I WOULD LIKE TO ADDRESS ANOTHER
10 ONE OF YOUR HONOR'S QUESTIONS, WHICH IS WHETHER THE
11 AGENCIES ARE ENTITLED TO DEFERENCE IN INTERPRETING THE
12 AFFORDABLE CARE ACT. THE ANSWER TO THAT QUESTION IS
13 YES. IT'S CLEAR THAT CONGRESS HAS DELEGATED TO THE
14 AGENCIES THE AUTHORITY TO MAKE RULES CARRYING THE FORCE
15 OF LAW IN THIS CONTEXT AND THE AGENCIES WERE EXERCISING
16 THAT AUTHORITY IN CRAFTING THESE RULES.

17 THE COURT: BUT IF THE INTERPRETATION
18 CONFLICTS WITH THE STATUTE'S PLAIN LANGUAGE, IT IS NOT
19 ENTITLED TO JUDICIAL DEFERENCE, CORRECT?

20 MR. DAVIS: THAT'S CORRECT. BUT HERE I
21 DON'T THINK THAT IS TRUE HERE, TO BE CLEAR, YOUR HONOR.
22 I THINK THE STATUTE IS A BROAD GRANT OF AUTHORITY.
23 THERE IS NOTHING IN IT THAT PROHIBITS THE AGENCIES FROM
24 DOING THIS.

25 THE COURT: I UNDERSTAND.

1 MR. DAVIS: THE SECOND BASIS OF STATUTORY
2 AUTHORITY FOR THESE EXEMPTIONS, YOUR HONOR, IS RFRA.

3 THE COURT: BEFORE YOU GO INTO THAT, AS I
4 UNDERSTAND IT, YOU ARE NOT MAKING AN ARGUMENT WITH
5 RESPECT TO THE MORAL EXEMPTION UNDER RFRA. YOUR RFRA
6 ARGUMENT IS FOCUSED SOLELY ON THE RELIGIOUS EXEMPTION.

7 MR. DAVIS: THAT'S CORRECT, YOUR HONOR.
8 AND THE SOURCE OF STATUTORY AUTHORITY FOR THE MORAL
9 EXEMPTION IS THE ACA.

10 AS I SAID, THE SECOND BASIS OF STATUTORY
11 AUTHORITY FOR THE EXEMPTIONS IS RFRA. HERE YOU DON'T
12 HAVE TO INCLUDE THAT RFRA ACTUALLY REQUIRES THE
13 EXEMPTIONS. BECAUSE EVEN IF RFRA DOES NOT REQUIRE THEM,
14 RFRA AUTHORIZES THE RELIGIOUS EXEMPTION. AND AGAIN ON
15 THIS POINT, YOUR HONOR, YOU ARE NOT WRITING ON A BLANK
16 SLATE. WE KNOW FROM HOBBY LOBBY AND YEARS OF LITIGATION
17 THAT THE UNADORNED MANDATE IMPOSES A SUBSTANTIAL BURDEN.
18 THE AGENCIES HAVE DISCRETION IN DETERMINING HOW TO
19 ALLEVIATE THAT BURDEN, AND IN EXERCISING THAT
20 DISCRETION, THE AGENCIES REASONABLY DECIDED TO RESPOND
21 WITH AN EXEMPTION RATHER THAN AN ACCOMMODATION.

22 THE COURT: WELL, LET ME ASK YOU A
23 QUESTION. DOES ANY OF THE AGENCIES HERE HAVE ANY
24 SPECIFIC EXPERTISE WITH RESPECT TO RFRA?

25 MR. DAVIS: YOUR HONOR, WE ARE NOT

1 ARGUING THAT THE AGENCIES ARE ENTITLED TO CHEVRON
2 DEFERENCE UNDER RFRA WRIT LARGE. WE DO THINK THAT THE
3 AGENCIES ARE ENTITLED TO DEFERENCE ON SOME OF THE
4 SUBSIDIARY QUESTIONS THAT TRIGGER THEIR EXPERTISE, SUCH
5 AS WHETHER THERE IS A COMPELLING INTEREST UNDER RFRA. A
6 LOT OF THOSE ISSUES ACTUALLY INVOLVE INTERPRETATIONS OF
7 THE AFFORDABLE CARE ACT AND THEY FALL SQUARELY WITHIN
8 THE AGENCY'S TECHNICAL EXPERTISE. BUT RFRA IS A
9 GENERALLY APPLICABLE STATUTE LIKE THE FREEDOM OF
10 INFORMATION ACT OR OTHERS THAT ARE NOT GENERALLY
11 CONSIDERED TO CONFER CHEVRON DEFERENCE.

12 AND BACK TO MY POINT ABOUT RFRA
13 AUTHORIZING THE AGENCIES TO DO THIS, THE SUPREME COURT
14 HAS RECOGNIZED THAT AN ENTITY FACED WITH CONFLICTING
15 LEGAL OBLIGATIONS SHOULD BE AFFORDED SOME LEEWAY. SO IN
16 THE RICCI VERSUS DESTEFANO CASE IN THE SUPREME COURT,
17 THE CITY OF NEW HAVEN ADMINISTERED AN EXAM FOR
18 FIREFIGHTERS. THE EXAM PRODUCED RACIALLY DISPARATE
19 RESULTS. THE MINORITY FIREFIGHTERS TOLD THE CITY THAT
20 IF IT CERTIFIED THE RESULTS, THEY WOULD SUE THE CITY FOR
21 VIOLATING TITLE VII'S DISPARATE IMPACT PROVISION. AND
22 THE WHITE FIREFIGHTERS TOLD THE CITY THAT IF IT DID NOT
23 CERTIFY THE RESULTS, THEY WOULD SUE THE CITY FOR
24 VIOLATING TITLE VII'S DISPARATE TREATMENT PROVISION. SO
25 THE CITY WAS CAUGHT BETWEEN THE DISPARATE IMPACT

1 PROVISION ON THE ONE HAND AND THE DISPARATE TREATMENT
2 PROVISION ON THE OTHER HAND. INSTEAD OF REQUIRING THE
3 CITY TO HIT A PERFECT BULLSEYE IN BETWEEN THOSE TWO
4 STATUTES, THE SUPREME COURT GAVE SOME LEEWAY. IT HELD
5 THAT AN EMPLOYER MAY ENGAGE IN INTENTIONAL
6 DISCRIMINATION FOR THE ASSERTED PURPOSE OF AVOIDING OR
7 REMEDYING AN UNINTENTIONAL DISPARATE IMPACT IF THE
8 EMPLOYER HAS A STRONG BASIS IN EVIDENCE TO BELIEVE THAT
9 IT WILL BE SUBJECT TO DISPARATE IMPACT LIABILITY IF IT
10 FAILS TO TAKE THE RISK CONSCIOUS DISCRIMINATORY ACTION.
11 SO THE SAME IS TRUE HERE.

12 THE COURT: SO YOU ARE TAKING -- YOU ARE
13 BORROWING LAW FROM THE DISCRIMINATORY -- DISCRIMINATION
14 JURISPRUDENCE THAT PERTAINS TO A MUNICIPALITY AND
15 APPLYING IT TO -- WHICH IS A STATE ENTITY, AND APPLYING
16 IT TO A FEDERAL AGENCY THAT FALLS UNDER THE EXECUTIVE
17 FUNCTION, IS THAT CORRECT?

18 MR. DAVIS: I WOULD NOT PUT IT LIKE THAT.
19 AGAIN, YOUR HONOR --

20 THE COURT: WELL, THAT IS WHAT YOU ARE
21 DOING, WHETHER YOU PUT IT LIKE THAT OR NOT. SO THE
22 QUESTION IS WHY WOULD YOU TAKE -- WHY WOULD YOU BORROW
23 FROM ONE LINE OF JURISPRUDENCE WHICH HAS NOTHING TO DO
24 WITH WHAT WE ARE TALKING ABOUT HERE. AND IF YOU ARE
25 GOING TO DO THAT, YOU HAVE TO PROVIDE ME WITH SOME

1 PRETTY STRONG RATIONALE BACKED UP BY APPLICABLE
2 PRECEDENT, SO THAT MEANS THIRD CIRCUIT OR SUPREME COURT
3 PRECEDENT, TO TELL ME THAT THAT IS APPROPRIATE.

4 MR. DAVIS: YOUR HONOR, I THINK IF YOU
5 LOOK AT THE REASONING OF THIS CASE --

6 THE COURT: NO, I -- NO, NO. YOU CAN
7 TAKE ANY KIND OF LOGICAL SYLLOGISM IN PRETTY MUCH ANY
8 CASE IN THE LAW AND JUST SAY WELL, IT APPLIES HERE. BUT
9 THAT IS NOT WHAT WE DO WHEN WE ANALYZE CASE LAW. WHAT
10 WE DO IS TAKE A LOOK AT THE JURISPRUDENCE AND DETERMINE
11 WHETHER IT IS APPROPRIATE TO APPLY A PARTICULAR SET OF
12 JURISPRUDENCE IN ONE CONTEXT WHEN IT HAS BEEN DEVELOPED
13 IN ANOTHER CONTEXT.

14 SO WHAT I NEED IF YOU WANT TO MAKE THAT
15 COMPARISON IS TO DRAW A JURISPRUDENTIAL LINE BETWEEN THE
16 CASE -- THE NEW HAVEN CASE THAT YOU MENTIONED, WHICH
17 CONCERNS DISCRIMINATION, AND THE CASE HERE --
18 DISCRIMINATION IN THE CONTEXT OF A STATE ENTITY TO HERE,
19 WHICH CONCERNS AN AGENCY'S DETERMINATION AS TO WHETHER
20 IT CAN OR CANNOT ENACT A PARTICULAR REGULATION. IF YOU
21 CAN DRAW -- IF YOU CAN DRAW THAT CONNECTION, FINE, I'M
22 HAPPY TO CONSIDER IT. BUT YOU CAN'T JUST SAY IT.

23 MR. DAVIS: YOUR HONOR, I RESPECTFULLY
24 DISAGREE WITH HOW YOU CHARACTERIZE THAT. I THINK IT IS
25 APPROPRIATE IN REASONING ON THE BASIS OF CASES NOT TO

1 USE CASES IN THE EXACT SAME CONTEXT BUT INSTEAD TO USE
2 REASON BY ANALOGY TO CASES THAT MAY INVOLVE A DIFFERENT
3 CONTEXT, IN THAT CASE, THE MUNICIPALITY INSTEAD OF THE
4 FEDERAL GOVERNMENT. BUT STILL THE GENERAL LEGAL
5 PRINCIPLE THAT THAT CASE RECOGNIZES, THAT AN ENTITY
6 FACED WITH CONFLICTING LEGAL OBLIGATIONS SHOULD BE
7 AFFORDED SOME LEEWAY. AND THAT PRINCIPLE FROM THAT CASE
8 APPLIES EQUALLY HERE. EVEN THOUGH IT IS IN A DIFFERENT
9 CONTEXT IN THAT CASE, IT'S THE SAME THING HERE.

10 THE EXEMPTION RECOGNIZES THE REALITY THAT
11 THE AGENCIES WOULD LIKELY BE SUBJECT TO UNDER RFRA.
12 WELL, IT COULD BE SUBJECT TO LIABILITY UNDER RFRA THAT
13 THE AGENCIES CHOSE THE ACCOMMODATIONS THAT -- BUT EVEN
14 IF YOUR HONOR IS NOT PERSUADED BY THAT POSITION, WHICH I
15 --

16 THE COURT: I CAN TELL YOU I'M NOT
17 PERSUADED BY THAT.

18 MR. DAVIS: I UNDERSTAND, YOUR HONOR.
19 THE OTHER BASIS FOR STATUTORY AUTHORITY HERE IS THAT
20 RFRA DOES REQUIRE THE RELIGIOUS RULE, EVEN IF YOU THINK
21 IT DOES NOT AUTHORIZE IT. AND HERE THE AGENCIES HAVE
22 CONCLUDED THAT REQUIRING OBJECTING ENTITIES TO CHOOSE
23 BETWEEN THE MANDATE, THE ACCOMMODATION, OR PENALTIES FOR
24 NONCOMPLIANCE IMPOSES A SUBSTANTIAL BURDEN IN THE
25 AGENCY'S VIEW THE ACCOMMODATION, THE PREVIOUS

1 ACCOMMODATION WAS NOT ENOUGH TO ALLEVIATE THAT
2 SUBSTANTIAL BURDEN BECAUSE MANY ENTITIES OBJECTED TO THE
3 ACT OF SUBMITTING A SELF-CERTIFICATION FORM. THOSE
4 ENTITIES SINCERELY BELIEVE THAT SUBMITTING THE FORM MADE
5 THEM COMPLICIT IN PROVIDING CONTRACEPTIVE COVERAGE.
6 EVEN IF A COURT WERE TO DISAGREE WITH THAT BELIEF, HOBBY
7 LOBBY PROHIBITS QUESTIONING IT, AND AS THE SUPREME COURT
8 EXPLAINED, I BELIEVE, IMPLICATES A DIFFICULT AND
9 IMPORTANT QUESTION OF RELIGION AND MORAL PHILOSOPHY THAT
10 COURTS SHOULD NOT BE WADING INTO.

11 ON COMPELLING INTEREST, THE AGENCIES HAVE
12 NOW TAKEN THE POSITION THAT THE MANDATE DOES NOT SERVE A
13 COMPELLING GOVERNMENT INTEREST. AND THIS GOES TO THE
14 LAST OF YOUR HONOR'S QUESTIONS, WHICH I PREVIOUSLY
15 ADDRESSED. EVEN THOUGH THE AGENCIES DON'T GET CHEVRON
16 DEFERENCE UNDER RFRA, ON THE SUBSIDIARY QUESTIONS UNDER
17 RFRA, I THINK THEY DO ON THE COMPELLING INTEREST ISSUE,
18 AND THAT IS BECAUSE THE COMPELLING INTEREST ISSUE IS
19 TIED IN PART TO THE AGENCY'S INTERPRETATION OF THE
20 AFFORDABLE CARE ACT AND IT GOES RIGHT TO THE AREAS WHERE
21 THE AGENCIES HAVE DEFERENCE.

22 AND BEFORE I GO FURTHER, YOUR HONOR, I
23 JUST WANT TO MAKE SURE I'M NOT GOING OVER TIME.

24 THE COURT: NO, I THINK YOU ARE
25 ACTUALLY -- YOU STARTED ABOUT EIGHT MINUTES PAST AND IT

1 IS NOW 20 MINUTES TO, SO YOU ARE EXACTLY ON TIME. I
2 THINK I DID GIVE THE OTHER SIDE A LITTLE BIT MORE. SO
3 IF YOU HAVE ANYTHING ELSE YOU NEED TO SAY, FEEL FREE.

4 MR. DAVIS: I'LL JUST SAY THAT ON THE
5 COMPELLING INTEREST ISSUE, THE AGENCIES MADE A VARIETY
6 OF DIFFERENT CONCLUSIONS IN A WELL-REASONED PART OF THE
7 RULE THAT SPANS SEVERAL PAGES. AND FIRST CONGRESS DID
8 NOT MANDATE THAT CONTRACEPTION BE COVERED AT ALL. AS AN
9 INTERPRETATION OF THE AFFORDABLE CARE ACT, THAT IS
10 ENTITLED TO DEFERENCE. SECOND, CONGRESS EXPRESSLY
11 DECIDED NOT TO APPLY THE PREVENTIVE SERVICES REQUIREMENT
12 TO GRANDFATHER PLANS COVERING TENS OF MILLIONS OF
13 EMPLOYEES.

14 THE COURT: LET ME TALK TO YOU ABOUT
15 THOSE GRANDFATHERED HEALTH PLANS. I THINK ONE OF THE
16 REASONS THAT WERE GIVEN IN THE IFRS FOR BYPASSING THE
17 NOTICE AND COMMENT RULE MAKING WAS, I THINK IT WAS:
18 DELAYING AVAILABILITY OF THE EXEMPTION WOULD ALSO
19 INCREASE THE COST OF HEALTH INSURANCE BECAUSE GROUPS
20 WITH GRANDFATHERED HEALTH PLANS WISH TO MAKE CHANGES TO
21 THEIR HEALTH PLANS THAT WILL REDUCE THE COST OF
22 INSURANCE COVERAGE FOR THEIR BENEFICIARIES OR POLICY
23 HOLDERS BUT WHICH COULD CAUSE THE PLANS TO LOSE
24 GRANDFATHERED STATUS.

25 DO YOU RECALL THAT --

1 MR. DAVIS: YES, YOUR HONOR.
 2 THE COURT: -- RATIONALE?
 3 SO THERE WERE 54,000 COMMENTS, AND I
 4 THINK YOU PROVIDED THEM TO US. WE HAVE THEM IN THE
 5 RECORD. SO IN ORDER TO MAKE SURE THAT THAT WAS BACKED
 6 UP BY THE RECORD, BECAUSE IT WAS JUST A BOLD STATEMENT,
 7 IT WAS A CONCLUSION, WE SEARCHED ALL THOSE 54,000
 8 COMMENTS, AND WE COULD NOT LOCATE A SINGLE COMMENT THAT
 9 REFERENCED A GRANDFATHERED HEALTH PLAN. SO WE WONDER IS
 10 THERE ANY WAY THAT THEY COULD POSSIBLY BE IN THE
 11 COMMENTS UNDER A DIFFERENT TERMINOLOGY THAN
 12 GRANDFATHERED HEALTH PLAN.
 13 MR. DAVIS: IF YOUR HONOR DOES NOT MIND,
 14 WE WILL GET BACK TO YOU ON THAT QUESTION.
 15 THE COURT: WELL, IF YOU COULD, I
 16 THINK -- I'M SURE YOU HAVE SOMEONE THAT CAN DO IT NOW,
 17 BUT IF YOU COULD GET BACK TO ME BEFORE THE END OF THE
 18 DAY. WHAT I WOULD LIKE YOU TO DO IS TO SEARCH THE
 19 54,000 COMMENTS AND TELL ME -- AND PROVIDE ME A LIST OF
 20 THE CASE -- OF THE INSTANCES IN WHICH THERE WAS SOME
 21 COMMENTARY FROM A GRANDFATHERED HEALTH PLAN WHICH
 22 SUGGESTED THAT THEY WISH TO MAKE CHANGES TO THEIR HEALTH
 23 PLANS IN A FASTER FASHION THAN WOULD OTHERWISE BE THE
 24 CASE. I THINK YOU CAN DO THAT OVER LUNCH AND GET BACK
 25 TO ME.

1 MR. DAVIS: YES.
 2 THE COURT: OKAY. ANYTHING ELSE?
 3 MR. DAVIS: I WILL STOP THERE, YOUR
 4 HONOR.
 5 THE COURT: OKAY. SO WHAT WE ARE GOING
 6 TO DO NOW -- ARE YOU NOW READY TO GO TO YOUR WITNESSES?
 7 MR. GOLDMAN: I AM, YOUR HONOR.
 8 THE COURT: WELL, I THINK WE SHOULD TAKE
 9 A QUICK BREAK IN ORDER TO GET EVERYONE SORTED. WE WILL
 10 BE BACK HERE IN TEN MINUTES, SO THAT IS JUST ABOUT EIGHT
 11 MINUTES TO.
 12 THE CLERK: ALL RISE.
 13 (BREAK TAKEN.)
 14 THE COURT: ARE YOU READY TO GO?
 15 MR. GOLDMAN: YES, YOUR HONOR. MAY I
 16 APPROACH?
 17 THE COURT: YOU MAY APPROACH. AND THE
 18 WITNESS MAY TAKE THE WITNESS STAND.
 19 (CAROL WEISMAN, COMMONWEALTH'S WITNESS,
 20 SWORN.)
 21 THE CLERK: STATE AND SPELL YOUR FULL
 22 NAME FOR THE RECORD, PLEASE.
 23 THE WITNESS: CAROL WEISMAN, C-A-R-O-L
 24 W-E-I-S-M-A-N.
 25 DIRECT EXAMINATION

1 BY MR. GOLDMAN:
 2 Q. WHERE ARE YOU FROM, DR. WEISMAN?
 3 A. ORIGINALLY FROM PITTSBURGH, PENNSYLVANIA.
 4 Q. AND WHAT DO YOU DO FOR A LIVING?
 5 A. I'M A PROFESSOR AT THE PENN STATE COLLEGE OF
 6 MEDICINE.
 7 Q. AND IF I MAY, YOU HAVE AN EXHIBIT BINDER BEFORE
 8 YOU.
 9 MR. DAVIS: AND, YOUR HONOR, IF I
 10 UNDERSTAND YOUR RULES, YOU WOULD LIKE THE EXHIBITS MOVED
 11 INTO EVIDENCE BEFORE THE WITNESS IS QUESTIONED?
 12 THE COURT: IT DOES NOT REALLY MATTER
 13 BECAUSE WE DON'T HAVE A JURY, SO JUST DO IT -- IT WOULD
 14 BE BETTER IF YOU DID NOT QUESTION HER.
 15 BUT HAVE YOU STIPULATED TO EVERYTHING?
 16 MS. KADE: EVERYTHING EXCEPT FOR
 17 DEMONSTRATIVE.
 18 THE COURT: OKAY. SO CAN WE JUST
 19 STIPULATE THAT EXHIBITS 1 THROUGH -- WHICH ONE IS THE
 20 DEMONSTRATIVE?
 21 MS. KADE: IT IS 18, YOUR HONOR.
 22 THE COURT: CAN WE JUST STIPULATE AT THIS
 23 POINT THAT EVERYTHING EXCEPT EXHIBIT 18 IS ADMITTED?
 24 MR. GOLDMAN: YES, YOUR HONOR.
 25 MS. KADE: YES, YOUR HONOR.

1 THE COURT: THEY ARE ALL ADMITTED, AND
 2 THEREFORE YOU DO NOT HAVE TO LAY A FOUNDATION OR
 3 AUTHENTICATION.
 4 (GOVERNMENT EXHIBIT 18 ADMITTED INTO
 5 EVIDENCE.)
 6 BY MR. GOLDMAN:
 7 Q. IF YOU WOULD TURN, DR. WEISMAN, TO TAB 4, WHICH
 8 WOULD BE EXHIBIT 4.
 9 DO YOU KNOW WHAT THAT DOCUMENT IS?
 10 A. YES. THAT IS MY CV.
 11 Q. AND IF YOU WOULD JUST FLIP THROUGH IT BRIEFLY.
 12 CAN YOU CONFIRM THAT THE CONTENTS OF THAT ARE ACCURATE?
 13 A. YES.
 14 Q. AND EXHIBIT 3 OF THE TAB, IF YOU CAN FLIP
 15 THROUGH THAT.
 16 A. YES.
 17 Q. ARE YOU FAMILIAR WITH THAT DOCUMENT?
 18 A. YES. THAT IS MY DECLARATION.
 19 Q. AND IF YOU COULD REVIEW THAT BRIEFLY AND IF YOU
 20 CAN CONFIRM IF YOU ARE COMFORTABLE WITH THE STATEMENTS
 21 CONTAINED THERE?
 22 A. YES, I AM.
 23 Q. I WOULD LIKE TO ASK YOU BRIEFLY ABOUT YOUR
 24 EDUCATION. WHERE DID YOU GO TO COLLEGE -- AND BY THE
 25 WAY, YOUR HONOR, IF YOU WOULD PREFER US NOT TO GO

1 THROUGH THIS, WE CAN STIPULATE OVER IT.
 2 THE COURT: I DON'T NEED IT.
 3 DO YOU NEED IT?
 4 MS. KADE: NO, YOUR HONOR.
 5 THE COURT: WE DON'T NEED IT.
 6 BY MR. GOLDMAN:
 7 Q. I MAY ASK SOME TARGETED QUESTIONS IN THERE, IF I
 8 MAY. WHAT WAS THE FOCUS OF YOUR ACADEMIC WORK AT
 9 WELLESLEY AND THEN JOHNS HOPKINS UNIVERSITY?
 10 A. I STUDIED SOCIOLOGY.
 11 Q. AND WAS THERE A FOCUS WITHIN THAT?
 12 A. AT THE UNDERGRADUATE LEVEL, NOT REALLY AT THE
 13 GRADUATE LEVEL, I BECAME INTERESTED IN GENDER RELATED
 14 ISSUES.
 15 Q. AND DID THAT INCLUDE HEALTHCARE AT THAT TIME?
 16 A. YES.
 17 Q. YOU ARE NOT A MEDICAL DOCTOR, ARE YOU?
 18 A. I AM NOT.
 19 MR. DAVIS: YOUR HONOR, MAY I HAVE
 20 PERMISSION TO LEAD FOR SOME OF THESE FOUNDATIONAL
 21 QUESTIONS.
 22 THE COURT: ARE YOU OKAY WITH THAT?
 23 MS. KADE: UNTIL I SEE WHAT THE QUESTIONS
 24 ARE, YOUR HONOR, I'M NOT SURE, BUT AT THIS POINT, YES.
 25 THE COURT: OKAY. PERMISSION TO LEAD FOR

1 THE MOMENT -- I'M SORRY, WHAT IS YOUR NAME?
 2 MS. KADE: ELIZABETH, YOUR HONOR.
 3 THE COURT: ELIZABETH WHAT?
 4 MS. KADE: KADE.
 5 THE COURT: THE MOMENT MS. KADE OBJECTS,
 6 THEN WE MAY HAVE TO CHANGE TASKS.
 7 BY MR. GOLDMAN:
 8 Q. AM I CORRECT THAT YOU -- AFTER YOU GOT YOUR
 9 PH.D. FROM JOHNS HOPKINS, YOU WORKED AS AN ASSOCIATE
 10 RESEARCH SCIENTIST THERE?
 11 A. YES.
 12 Q. AND WHY DID YOU CHOOSE TO WORK AT JOHNS HOPKINS
 13 UNIVERSITY?
 14 A. I WAS OFFERED A FACULTY POSITION IN WHICH I
 15 COULD CONDUCT RESEARCH AS WELL AS TEACH AT THE GRADUATE
 16 LEVEL.
 17 Q. AND DID THEY HAVE A PRETTY GOOD PROGRAM?
 18 A. OH, THEY HAVE THE TOP PROGRAM IN PUBLIC HEALTH
 19 IN THE COUNTRY.
 20 Q. DID YOU WORK IN THE -- YOU WORKED IN RESEARCH
 21 HEALTH SERVICES. AT THE TIME YOU JOINED JOHNS HOPKINS
 22 UNIVERSITY, DID THAT INCLUDE THE FIELD OF WOMEN'S
 23 HEALTHCARE?
 24 A. THE FIELD OF HEALTH SERVICES RESEARCH WAS JUST
 25 BEING ESTABLISHED AT THAT TIME. IT'S AN

1 INTERDISCIPLINARY FIELD, PEOPLE FROM DIFFERENT TRAINING
 2 BACKGROUNDS STUDYING HOW HEALTHCARE IS DELIVERED, THE
 3 COST OF CARE, THE QUALITY OF CARE. AND I BECAME
 4 INVOLVED WITH THOSE RESEARCHERS SPECIFICALLY TO LOOK AT
 5 WOMEN'S HEALTHCARE.
 6 Q. IS IT FAIR TO SAY THAT YOU PLAYED A PART IN THE
 7 CREATION OF WOMEN'S HEALTHCARE AS A FIELD WITHIN
 8 RESEARCH HEALTH SERVICES?
 9 A. YES.
 10 Q. AND YOU WORKED AT JOHNS HOPKINS UNIVERSITY FOR
 11 24 YEARS?
 12 A. YES.
 13 Q. AND I'M NOT GOING TO ASK YOU ABOUT YOUR
 14 PROMOTIONS DURING THAT TIME, BUT GENERALLY SPEAKING, CAN
 15 YOU DESCRIBE THE WORK THAT YOU DID WHILE AT JOHNS
 16 HOPKINS UNIVERSITY?
 17 A. I DESIGNED AND LED A NUMBER OF RESEARCH PROJECTS
 18 ON DIFFERENT TOPICS. I TAUGHT MASTERS LEVEL STUDENTS.
 19 I SUPERVISED DOCTORAL STUDENTS, ESPECIALLY IN THEIR
 20 DISSERTATION PROJECTS, AND I CO-LED A COUPLE OF ACADEMIC
 21 PROGRAMS.
 22 Q. AND IS ALL THAT TEACHING WORK? DID YOU ALSO DO
 23 RESEARCH DURING THAT TIME?
 24 A. YES, RESEARCH WAS A GREAT PART OF MY
 25 RESPONSIBILITIES.

1 Q. AND DID YOU ALSO GIVE PRESENTATIONS AND MAKE
 2 PUBLICATIONS AS WELL?
 3 A. YES.
 4 Q. SO AFTER JOHNS HOPKINS UNIVERSITY YOU WENT TO
 5 UNIVERSITY OF MICHIGAN AFTER 24 YEARS?
 6 A. CORRECT.
 7 Q. AND THEN YOU WENT TO PENN STATE COLLEGE OF
 8 MEDICINE, CORRECT?
 9 A. CORRECT.
 10 Q. AND WHEN DID YOU GO TO PENN STATE COLLEGE OF
 11 MEDICINE?
 12 A. IN 2003, SO I HAVE BEEN THERE 15 YEARS.
 13 Q. AND IS THAT YOUR CURRENT JOB?
 14 A. YES.
 15 Q. WHAT IS YOUR POSITION THERE?
 16 A. A DISTINGUISHED PROFESSOR OF PUBLIC HEALTH
 17 SCIENCES AND OBSTETRICS AND GYNECOLOGY IN THE COLLEGE OF
 18 MEDICINE.
 19 Q. AND YOU ARE NOT A DOCTOR?
 20 A. I AM NOT.
 21 Q. A MEDICAL DOCTOR.
 22 A. NOT A PHYSICIAN.
 23 Q. ARE THERE MANY NON-DOCTORS WHO ARE DISTINGUISHED
 24 PROFESSORS IN THAT PROGRAM WITHIN THE MEDICAL SCHOOL?
 25 A. YES. MEDICAL SCHOOLS TYPICALLY HAVE M.D.'S AND

1 PH.D.'S ON FACULTY.
2 Q. WHAT IS THE FOCUS OF YOUR WORK AT PENN STATE?
3 A. AGAIN, THE FOCUS OF MY WORK IS CONDUCTING
4 RESEARCH ON WOMEN'S HEALTHCARE TOPICS. I ALSO TEACH
5 MASTERS LEVEL STUDENTS, PARTICULARLY IN THE MPH PROGRAM,
6 AND DOCTORAL STUDENTS IN THE DOCTOR OF PUBLIC HEALTH
7 PROGRAM.
8 I ALSO SPEND PART OF MY TIME AS ASSOCIATE
9 DEAN FOR FACULTY AFFAIRS.
10 Q. DO YOU, IN ADDITION TO TEACHING AND RESEARCHING,
11 DO YOU PUBLISH ARTICLES?
12 A. YES.
13 Q. AND GIVE PRESENTATIONS?
14 A. YES.
15 Q. IN THE CONTEXT OF YOUR RESEARCH, ARE THOSE
16 CLINICAL INVESTIGATIONS?
17 A. SOMETIMES THEY ARE CLINICAL INVESTIGATIONS,
18 SOMETIMES THEY ARE POPULATION-BASED STUDIES. SO IT'S A
19 VARIETY OF DIFFERENT KINDS OF STUDIES.
20 Q. AND WHEN IT IS A CLINICAL INVESTIGATION, DO YOU
21 EVER SERVE AS WHAT'S CALLED AN INVESTIGATOR IN THOSE
22 STUDIES?
23 A. YES.
24 Q. WHAT IS AN INVESTIGATOR? WHAT METHODS DOES AN
25 INVESTIGATOR USE?

1 A. AN INVESTIGATOR IS RESPONSIBLE FOR OVERSEEING
2 THE CONDUCT OF A RESEARCH PROJECT. THE METHODS THAT WE
3 USE CAN BE QUITE DIVERSE. THE RESEARCH I DO SOMETIMES
4 INVOLVES SURVEY RESEARCH, IN WHICH WE ASK PEOPLE
5 QUESTIONS IN A SYSTEMATIC WAY. SOMETIMES IT INVOLVES
6 ANALYSIS OF HEALTH CLAIMS DATA TO LOOK AT COST OF CARE.
7 SOMETIMES WE TEST INTERVENTIONS TO SEE IF THEY WORK WITH
8 PATIENTS OR OTHERS.
9 Q. IS IT FAIR TO SAY THAT WHEN DO YOU THAT KIND OF
10 WORK, THE WORK YOU DO IS BASED ON SCIENCE AND EVIDENCE?
11 A. YES.
12 Q. HAVE ANY OF THE INVESTIGATIONS THROUGHOUT YOUR
13 CAREER BEEN RELATED TO CONTRACEPTIVE USE?
14 A. YES.
15 Q. YOU DON'T HAVE TO COUNT. I KNOW YOUR RÉSUMÉ IS
16 VERY EXTENSIVE, BUT CAN YOU ESTIMATE ROUGHLY HOW MANY
17 INVESTIGATIONS HAVE INVOLVED CONTRACEPTIVE USE?
18 A. WELL, I ESTIMATE I HAVE DONE OVER 40 PROJECTS IN
19 MY CAREER, AND I WOULD SAY A THIRD TO A HALF OF THEM
20 HAVE TO DO WITH WOMEN'S REPRODUCTIVE HEALTH GENERALLY.
21 Q. AND HAVE YOU AUTHORED ANY PUBLICATIONS
22 SPECIFICALLY RELATING TO ACCESS TO CONTRACEPTIVE CARE?
23 A. YES.
24 Q. CAN YOU GIVE SOME EXAMPLES OF SPECIFIC AREAS IN
25 WHICH YOU HAVE PUBLISHED ARTICLES RELATED TO

1 CONTRACEPTIVE CARE?
2 A. YES. SO I'VE CONDUCTED STUDIES OF ADOLESCENTS'
3 CONTRACEPTIVE DECISION-MAKING. I HAVE CONDUCTED WORK ON
4 WOMEN'S RECEIPT OF CONTRACEPTIVE COUNSELING IN THE
5 CONTEXT OF MANAGED CARE PLANS. I HAVE CONDUCTED STUDIES
6 IN INTEGRATION OF REPRODUCTIVE HEALTH SERVICES INTO
7 WOMEN'S PRIMARY CARE SETTINGS, AND I HAVE CONDUCTED
8 STUDIES OF WOMEN'S PRECONCEPTION HEALTHCARE, WHICH
9 INCLUDES CONTRACEPTIVE USE BUT NOT EXCLUSIVELY.
10 AND THEN MORE RECENTLY I HAVE BEEN
11 INVOLVED IN SOME STUDIES LOOKING AT WOMEN'S
12 CONTRACEPTIVE BEHAVIOR FOLLOWING THE AFFORDABLE CARE
13 ACT.
14 Q. SO IS IT FAIR TO SAY THAT YOU ARE FAMILIAR WITH
15 THE AFFORDABLE CARE ACT?
16 A. YES.
17 Q. AND HAVE YOU TAUGHT, RESEARCHED, WRITTEN AND
18 GIVEN PRESENTATIONS ON IT?
19 A. I HAVE.
20 Q. AND ARE YOU ALSO FAMILIAR WITH THE CONTRACEPTIVE
21 MANDATE CONTAINED IN THE AFFORDABLE CARE ACT?
22 A. YES.
23 Q. AND HAVE YOU TAUGHT, RESEARCHED, WRITTEN AND
24 GIVEN PRESENTATIONS ABOUT THAT AS WELL?
25 A. YES.

1 Q. HAS ANY OF THE SCHOLARLY WORK YOU HAVE DONE ON
2 THIS TOPIC RELATED TO PEOPLE IN PENNSYLVANIA?
3 A. YES.
4 Q. AND HAS ANY OF THE SCHOLARLY WORK YOU'VE
5 PERFORMED ON THIS TOPIC ALSO RELATED TO PEOPLE OUTSIDE
6 OF PENNSYLVANIA AS WELL?
7 A. YES, BOTH NATIONAL STUDIES AND SOME STUDIES IN
8 PENNSYLVANIA.
9 Q. AM I CORRECT THAT YOU WERE CHOSEN AS ONE OF ONLY
10 16 MEMBERS OF THE INSTITUTE OF MEDICINE'S COMMITTEE ON
11 PREVENTATIVE SERVICES FOR WOMEN THAT WAS CONVENED BY THE
12 HEALTH RESOURCES SERVICES ADMINISTRATION IN CONNECTION
13 WITH THE AFFORDABLE CARE ACT?
14 A. YES.
15 MR. GOLDMAN: YOUR HONOR, IF I MAY AT
16 THIS TIME, I WOULD LIKE TO PROFFER THIS WITNESS, DR.
17 CAROL WEISMAN, BASED ON HER KNOWLEDGE, EDUCATION,
18 EXPERIENCE AND TRAINING, AS AN EXPERT IN THE AREA OF
19 PREVENTATIVE MEDICAL CARE FOR WOMEN, INCLUDING
20 CONTRACEPTIVE CARE.
21 THE COURT: ANY OBJECTIONS?
22 MS. KADE: YOUR HONOR, WE OBJECT UNDER
23 FEDERAL RULE 26(A) REQUIRES DISCLOSURE OF EXPERT
24 TESTIMONY UNDER FEDERAL RULE 702, 703, AND 705. THE
25 PLAINTIFF HAS NOT PROVIDED US WITH THE REQUIRED

1 DISCLOSURE OF THIS PERSON AS AN EXPERT OR THE SUBJECT
 2 MATTER ON WHICH THE WITNESS IS EXPECTED TO PRESENT
 3 EXPERT TESTIMONY.
 4 MR. GOLDMAN: OBVIOUSLY, YOUR HONOR, THIS
 5 IS THE CONTEXT OF AN INJUNCTION PROCEEDING. THERE HAVE
 6 NOT BEEN ANY DEPOSITIONS, THERE'S NO TIME FOR THAT. AND
 7 IN FACT, MUCH OF DR. WEISMAN'S CONTENT OF HER TESTIMONY
 8 HAS BEEN DISCLOSED IN THE FORM OF HER DECLARATION WHICH
 9 IS ATTACHED TO OUR MOTION OVER A MONTH AGO.
 10 MS. KADE: YOUR HONOR, THEY WERE NOT
 11 DISCLOSED AS AN EXPERT TESTIMONY.
 12 THE COURT: OKAY. I OVERRULE YOUR
 13 OBJECTION. SHE IS ADMITTED AS AN EXPERT IN PREVENTATIVE
 14 MEDICAL CARE INCLUDING CONTRACEPTION. IS THAT WHAT YOU
 15 WANTED?
 16 MR. GOLDMAN: YES, YOUR HONOR. AND JUST
 17 FOR THE RECORD, COUNSEL HAD OBJECTED TO DR. WEISMAN AS
 18 AN EXPERT, SO IT SEEMS THAT THEY MUST HAVE KNOWN FROM
 19 THE DECLARATION THAT SHE WAS BEING OFFERED AS AN EXPERT.
 20 THE COURT: YOU JUST WON, YOU DIDN'T HAVE
 21 TO MAKE AN ARGUMENT.
 22 MR. GOLDMAN: I'M SORRY?
 23 THE COURT: YOU JUST WON, YOU DIDN'T HAVE
 24 TO MAKE ANOTHER ARGUMENT.
 25 MR. GOLDMAN: THANK YOU, YOUR HONOR. I

1 UNDERSTAND.
 2 THE COURT: IT'S OVER.
 3 BY MR. GOLDMAN:
 4 Q. WHAT IS THE INSTITUTE OF MEDICINE?
 5 THE COURT: MS. KADE, WHAT'S UP?
 6 MS. KADE: YOUR HONOR, TO THE EXTENT THAT
 7 THIS EXPERT TESTIMONY IS GOING TO BE OFFERED IN ORDER TO
 8 DETERMINE THE CORRECTNESS OR WISDOM OF THE AGENCY'S
 9 DECISION, IT SHOULD NOT BE PERMITTED, AND THAT IS A
 10 QUOTE FROM ASARCO V EPA AT 1160. IT'S A 9TH CIRCUIT
 11 1980 DECISION THAT THE COURT REFERRED TO IN HER MOTION
 12 IN LIMINE THAT WAS ISSUED YESTERDAY.
 13 THE COURT: OKAY, YOUR OBJECTION IS
 14 TAKEN.
 15 GO AHEAD.
 16 BY MR. GOLDMAN:
 17 Q. WHAT IS THE INSTITUTE OF MEDICINE AND WHAT DO
 18 THEY DO?
 19 A. THE INSTITUTE OF MEDICINE IS NOW CALLED THE
 20 NATIONAL ACADEMY OF MEDICINE AND IT IS A NONGOVERNMENTAL
 21 PRIVATE GROUP OF MEDICAL AND SCIENTIFIC EXPERTS WHO
 22 CONDUCT STUDIES AND PROVIDE RECOMMENDATIONS TO
 23 GOVERNMENT AND POLICYMAKERS AND OTHERS, WHEN ASKED.
 24 Q. AND THIS SPECIFIC COMMITTEE THAT YOU WERE ONE OF
 25 16 MEMBERS OF, WHAT WAS THE PURPOSE OF THAT COMMITTEE?

1 A. THAT COMMITTEE WAS CHARGED WITH MAKING
 2 RECOMMENDATIONS TO THE DEPARTMENT OF HEALTH AND HUMAN
 3 SERVICES FOR SPECIFIC PREVENTIVE SERVICES FOR WOMEN THAT
 4 WERE NOT MENTIONED IN THE AFFORDABLE CARE ACT BUT MIGHT
 5 HAVE SUBSTANTIAL EVIDENCE TO SUPPORT THEIR PROVISION AS
 6 PART OF WOMEN'S PREVENTIVE CARE.
 7 Q. AND WAS THE PURPOSE OF THAT COMMITTEE, WAS IT
 8 LIMITED TO RECOMMENDATIONS INVOLVING CONTRACEPTIVE CARE
 9 OR WAS IT BROADER THAN THAT?
 10 A. OH, NO. OUR CHARGE WAS TO SCAN THE EXISTING
 11 RECOMMENDATIONS FOR WOMEN'S PRIMARY CARE AND WHAT WE
 12 KNEW OF THE SCIENTIFIC LITERATURE AROUND SPECIFIC
 13 PREVENTIVE SERVICES AND MAKE RECOMMENDATIONS FOR WHAT
 14 OUGHT TO BE INCLUDED IN ROUTINE PREVENTIVE CARE FOR
 15 WOMEN IN GENERAL.
 16 Q. AND DID THE COMMITTEE ULTIMATELY ISSUE
 17 RECOMMENDATIONS?
 18 A. YES, WE ISSUED EIGHT RECOMMENDATIONS.
 19 Q. AND HOW MANY OF THEM, IF ANY, INVOLVED
 20 CONTRACEPTIVE CARE?
 21 A. ONE OF THE EIGHT.
 22 Q. DID THE COMMITTEE ULTIMATELY ISSUE A REPORT WITH
 23 ITS RECOMMENDATIONS?
 24 A. YES.
 25 Q. I WOULD LIKE TO TURN YOUR ATTENTION TO

1 EXHIBIT 5, IT SHOULD BE TAB 5 IN YOUR BINDER, AND ASK IF
 2 YOU HAVE EVER SEEN THIS DOCUMENT BEFORE?
 3 A. YES, THIS IS THE REPORT OF THE COMMITTEE.
 4 Q. AND THAT IS ALREADY IN EVIDENCE. THROUGHOUT
 5 YOUR TESTIMONY, I MAY BE REFERRING TO IT BRIEFLY.
 6 IF YOU COULD FIRST, WOULD YOU TURN TO
 7 PAGE 223 OF THE REPORT. IT IS APPENDIX C. AND IT
 8 GOES -- THAT SECTION GOES THROUGH PAGE 230.
 9 A. YES, I'M THERE.
 10 Q. ARE THOSE THE BIOGRAPHIES OF THE PEOPLE ON THE
 11 COMMITTEE?
 12 A. YES, THEY ARE.
 13 Q. IF YOU'D TURN TO THE LAST PAGE, ON PAGE 230, THE
 14 LAST BIOGRAPHY, IS THAT YOUR BIOGRAPHY?
 15 A. YES.
 16 Q. DO YOU KNOW WHY YOU WERE LAST?
 17 A. IT IS ALPHABETICAL. I THINK EXCEPT FOR THE
 18 CHAIR, SHE IS FIRST.
 19 Q. UNDERSTOOD.
 20 IN FORMING ITS RECOMMENDATIONS, WHAT WAS
 21 THE COMMITTEE ASKED TO CONSIDER?
 22 A. WE WERE ASKED FIRST TO SCAN THE SOURCES OF
 23 PREVENTIVE CARE GUIDELINES THAT ARE NAMED IN THE
 24 AFFORDABLE CARE ACT. THOSE INCLUDE THE U.S. PREVENTIVE
 25 SERVICES TASK FORCE RECOMMENDATIONS, THE ADVISORY

1 COMMITTEE ON IMMUNIZATION PRACTICE RECOMMENDATIONS AND
 2 THE BRIGHT FUTURES RECOMMENDATIONS.
 3 AND WE WERE ASKED TO LOOK FOR GAPS: IS
 4 THERE ANY ASPECT OF WOMEN'S PREVENTIVE CARE THAT IS NOT
 5 COVERED ALREADY BY THOSE EXISTING GUIDELINES. AND THEN
 6 WE WERE ASKED TO REVIEW THE SCIENTIFIC LITERATURE AND
 7 LISTEN TO SOME EXPERT TESTIMONY AND COME TO SOME
 8 CONCLUSIONS ABOUT WHAT SERVICES IN ADDITION TO THOSE
 9 ALREADY COVERED IN THOSE THREE SOURCES OUGHT TO BE PART
 10 OF WOMEN'S ROUTINE PREVENTIVE CARE.
 11 Q. WAS THE COMMITTEE ASKED TO CONSIDER COSTS?
 12 A. NO. WE WERE IN FACT SPECIFICALLY TOLD NOT TO
 13 CONSIDER COSTS.
 14 Q. DID THE COMMITTEE, AS PART OF ITS STUDY AND
 15 RECOMMENDATION, DID IT FOCUS AT ALL ON THE ISSUE OF
 16 UNINTENDED PREGNANCY?
 17 A. YES, THAT WAS ONE OF THE TOPIC AREAS IDENTIFIED
 18 AS A GAP BECAUSE IT WAS NOT ADDRESSED IN EXISTING
 19 GUIDELINES.
 20 Q. DO YOU KNOW ROUGHLY HOW COMMON UNINTENDED
 21 PREGNANCY IS IN WOMEN?
 22 A. UNINTENDED PREGNANCY IN THE UNITED STATES IS
 23 QUITE PREVALENT. AT THE TIME THE COMMITTEE WAS MEETING,
 24 49 PERCENT OF ALL U.S. PREGNANCIES WERE UNINTENDED, AND
 25 THAT MEANS THEY WERE EITHER MISTIMED OR NOT WANTED BY

1 THE WOMAN AT THE TIME THAT SHE BECAME PREGNANT.
 2 Q. YOU SAID THAT IT WAS 49 PERCENT AT THE TIME THE
 3 COMMITTEE MET. DO YOU KNOW IF IT HAS CHANGED TODAY?
 4 A. IT CHANGED. IT WENT UP TO 51 PERCENT IN 2008,
 5 AND THEN SINCE 2008, IT HAS DECLINED. IT IS NOW AT
 6 45 PERCENT.
 7 Q. AND IS THAT -- THE 45 PERCENT NUMBER, IS THAT AS
 8 OF TODAY? DO YOU KNOW WHEN THAT NUMBER --
 9 A. THAT IS AS OF 2011. THERE IS ALWAYS A GAP
 10 BETWEEN DATA COLLECTION AND WHEN WE KNOW THE EXACT
 11 RATES. SO THAT IS THE MOST RECENT DATA THAT WE HAVE.
 12 Q. AM I CORRECT THAT IN 2011 THAT 45 PERCENT NUMBER
 13 HAD GONE DOWN BEFORE THE CONTRACEPTIVE CARE MANDATE WENT
 14 INTO EFFECT?
 15 A. CORRECT.
 16 Q. DO YOU KNOW WHY THE 45 -- THE NUMBER DECREASED
 17 BEFORE THE CONTRACEPTIVE CARE MANDATE?
 18 A. THERE WAS AN ARTICLE PUBLISHED IN THE NEW
 19 ENGLAND JOURNAL OF MEDICINE IN 2016 BY FINER AND ZOLNA
 20 THAT ANALYZED THAT DECLINE IN THE UNINTENDED PREGNANCY
 21 RATE FROM THE HIGH OF 51 PERCENT TO 45 PERCENT, AND IT
 22 ATTRIBUTED THE DECLINE TO IMPROVED ACCESS TO
 23 CONTRACEPTION AND WOMEN USING MORE EFFECTIVE
 24 CONTRACEPTION.
 25 Q. BUT HOW WAS THAT SO GIVEN THAT THAT WAS BEFORE

1 THE CONTRACEPTIVE CARE MANDATE WENT INTO EFFECT?
 2 A. BECAUSE IN THAT PERIOD OF TIME, INCREASING
 3 NUMBERS OF EMPLOYER-BASED PLANS AND OTHER PLANS WERE
 4 BEGINNING TO COVER CONTRACEPTION AS A RESULT, IT'S MY
 5 UNDERSTANDING, OF STATE LEGISLATION AND CASES INVOLVING
 6 DISCRIMINATION IN PRESCRIPTION DRUG COVERAGE.
 7 Q. SO THEN INCREASED ACCESS TO CONTRACEPTION
 8 LOWERED THE RATE OF UNINTENDED PREGNANCY?
 9 A. THAT WAS THE INTERPRETATION OF THESE AUTHORS,
 10 YES.
 11 Q. IS AN UNINTENDED PREGNANCY A BAD THING? DOES IT
 12 MATTER?
 13 A. UNINTENDED PREGNANCY HAS A NUMBER OF NEGATIVE
 14 CONSEQUENCES. TO BEGIN WITH, 42 PERCENT OF UNINTENDED
 15 PREGNANCIES RESULT IN ABORTION. OF THOSE PREGNANCIES
 16 THAT CONTINUE, THERE IS A LOT OF EVIDENCE OF NEGATIVE
 17 HEALTH CONSEQUENCES FOR THE WOMEN AND FOR THE BABIES.
 18 WOMEN, FOR EXAMPLE, CAN BECOME DEPRESSED
 19 DURING AN UNINTENDED PREGNANCY. THEY MIGHT NOT HAVE
 20 GONE INTO THE PREGNANCY WITH OPTIMAL HEALTH STATUS. FOR
 21 EXAMPLE, A DIABETIC WOMAN WHO HAS AN UNINTENDED
 22 PREGNANCY MIGHT NOT HAVE HAD HER GLUCOSE LEVELS UNDER
 23 CONTROL AT THE TIME THAT SHE BECAME PREGNANT, LEADING TO
 24 POTENTIAL CONSEQUENCES DURING THE PREGNANCY.
 25 UNINTENDED PREGNANCIES OFTEN RESULT IN

1 DELAYED ENTRY INTO PRENATAL CARE BECAUSE THE WOMAN WAS
 2 NOT EXPECTING TO BECOME PREGNANT, MAY NOT HAVE REALIZED
 3 SHE WAS PREGNANT IN TIME TO GET OPTIMAL PRENATAL CARE.
 4 THERE ARE ALSO A NUMBER OF STUDIES THAT
 5 SHOW THAT BABIES BORN OF UNINTENDED PREGNANCIES ARE MORE
 6 LIKELY TO BE BORN PRETERM OR WITH LOW BIRTH WEIGHT.
 7 AND IN ADDITION TO THE HEALTH
 8 CONSEQUENCES, UNINTENDED PREGNANCIES ARE KNOWN TO BE
 9 DISRUPTIVE OF WOMEN'S PLANS FOR EDUCATION, FOR WORK, AND
 10 FOR SPACING THEIR CHILDREN, AND THEREFORE, CAN HAVE
 11 NEGATIVE ECONOMIC CONSEQUENCES FOR THE WOMAN AND HER
 12 FAMILY.
 13 Q. SO WHO IS AT RISK FOR HAVING AN UNINTENDED
 14 PREGNANCY?
 15 A. SO REALLY, ANY WOMAN OF REPRODUCTIVE CAPACITY
 16 WHO IS HAVING SEXUAL RELATIONS WITH MEN IS AT RISK OF AN
 17 UNINTENDED PREGNANCY.
 18 Q. ARE THERE SOME WHO ARE MORE IMPACTED THAN
 19 OTHERS? ARE THERE CERTAIN RISK GROUPS?
 20 A. UNINTENDED PREGNANCIES TEND TO BE MORE COMMON IN
 21 YOUNGER WOMEN AND LOW INCOME WOMEN AND WOMEN WITH LOWER
 22 EDUCATIONAL LEVELS.
 23 Q. AM I AT RISK FOR UNINTENDED PREGNANCY?
 24 A. NO, YOU ARE NOT.
 25 Q. SORRY, I'M A LAWYER, BUT WHY IS THAT?

1 A. BECAUSE YOU ARE NOT A WOMAN.
 2 Q. SO?
 3 A. YOU DO NOT HAVE THE CAPACITY TO BECOME PREGNANT.
 4 Q. AND CAN UNINTENDED PREGNANCY BE ADDRESSED
 5 THROUGH MEDICAL CARE AND PREVENTIVE MEDICAL SERVICES?
 6 A. YES. 95 PERCENT OF UNINTENDED PREGNANCIES OCCUR
 7 IN WOMEN WHO ARE EITHER NOT USING CONTRACEPTION OR ARE
 8 USING CONTRACEPTION INCONSISTENTLY. AND WE HAVE VERY
 9 EFFECTIVE CONTRACEPTIVE METHODS AVAILABLE TODAY.
 10 Q. LET ME TAKE A BRIEF STEP ASIDE FOR A MOMENT AND
 11 ASK YOU YOUR SPECIFIC ROLE ON THE COMMITTEE. DID YOU
 12 HAVE A SPECIFIC FOCUS WITHIN THE COMMITTEE?
 13 A. NO. AS A MEMBER OF THE COMMITTEE, I
 14 PARTICIPATED IN ALL OF THE COMMITTEE DISCUSSIONS AND
 15 DELIBERATIONS. AND WHAT WE DID WAS IDENTIFY SOME KEY
 16 TOPICS FOR FURTHER INVESTIGATION AND BROKE UP INTO
 17 SUBGROUPS TO INVESTIGATE THOSE TOPICS.
 18 Q. WERE YOU PART OF ONE OF THOSE SUBGROUPS OR ONE
 19 OR MORE?
 20 A. I WAS PART OF TWO SUBGROUPS, ONE OF WHICH WAS
 21 THE SUBGROUP ON CONTRACEPTION AND UNINTENDED PREGNANCY.
 22 Q. WHAT WAS THE OTHER?
 23 A. IT WAS A SUBGROUP ON PRECONCEPTION CARE.
 24 Q. ROUGHLY HOW MANY MEMBERS OF THE COMMITTEE WERE
 25 ON THE SUBGROUP INVOLVING CONTRACEPTION?

1 A. I DON'T REALLY REMEMBER. I WOULD SAY THREE TO
 2 FIVE.
 3 Q. AND WAS THERE A ROBUST DISCUSSION ON THE ISSUE
 4 OF PREVENTATIVE CARE RECOMMENDATIONS ABOUT
 5 CONTRACEPTION?
 6 A. OH, YES.
 7 Q. WERE ANY NEGATIVE SIDE EFFECTS OF CONTRACEPTION
 8 CONSIDERED?
 9 A. OH, YES. WE CONSIDERED ALL OF THE LITERATURE
 10 BOTH ON EFFECTIVENESS OF CONTRACEPTION, SIDE EFFECTS OF
 11 CONTRACEPTION, OTHER BENEFITS OF TAKING CONTRACEPTION
 12 THAN PREVENTING PREGNANCY, BECAUSE ALL OF THOSE FACTORS
 13 ARE IMPORTANT IN DECISIONS ABOUT USING CONTRACEPTION.
 14 Q. AND IS CONTRACEPTION, IN FACT, EFFECTIVE AT
 15 PREVENTING UNINTENDED PREGNANCY?
 16 A. YES, IT IS.
 17 Q. I WOULD LIKE TO DIRECT YOU BACK TO THE REPORT AT
 18 EXHIBIT 5 TO PAGE 105. THAT'S TABLE 5.3. AND I'M GOING
 19 TO PUT THAT UP ON THE ELMO IF YOU'LL GIVE ME ONE QUICK
 20 MOMENT. BUT MY FIRST QUESTION IS, ARE YOU FAMILIAR WITH
 21 THIS TABLE?
 22 A. YES. IT'S PAGE 106.
 23 Q. 106. I'M SORRY.
 24 A. YES, I AM. THAT IS IT.
 25 Q. I WAS HOPING YOU COULD BRIEFLY WALK US THROUGH

1 THAT CHART AND EXPLAIN IT TO US.
 2 A. SURE. SO THESE ARE DATA FROM CONTRACEPTIVE
 3 TECHNOLOGY, WHICH IS THE DEFINITIVE SOURCE ABOUT
 4 CONTRACEPTIVE EFFECTIVENESS USED BY PHYSICIANS.
 5 AND THESE ARE THE DATA OF AVAILABLE -- ON
 6 CONTRACEPTIVE EFFECTIVENESS AT THE TIME THAT THE
 7 COMMITTEE WAS MEETING. AND WHAT THIS DOES IS SHOW ALL
 8 OF THE METHODS OF CONTRACEPTION AVAILABLE AT THE TIME
 9 INCLUDING NONE, AT THE TOP. AND THEN IT DESCRIBES THE
 10 EFFECTIVENESS OF EACH CONTRACEPTIVE METHOD BASED ON
 11 DATA. AND THE WAY EFFECTIVENESS OF CONTRACEPTION IS
 12 LOOKED AT IS BY LOOKING AT FAILURES, WHICH MEANS THE
 13 NUMBER OF PREGNANCIES THAT OCCUR IN A YEAR WITH USE OF
 14 THAT CONTRACEPTIVE METHOD.
 15 SO THERE ARE TWO COLUMNS IN THE TABLE,
 16 THERE IS ONE CALLED TYPICAL USE AND ONE CALLED PERFECT
 17 USE. PERFECT USE IS IN A PERFECT WORLD WHERE PEOPLE
 18 DON'T MAKE MISTAKES. SO WHAT WE REALLY LOOK AT IS THE
 19 TYPICAL USE COLUMN, WHICH IS BASED ON DATA OF ACTUAL
 20 BEHAVIOR AND OUTCOMES OF PEOPLE USING CONTRACEPTION.
 21 AND WHAT THIS COLUMN SHOWS YOU IS THE NUMBER OF EXPECTED
 22 PREGNANCIES IN A YEAR PER 100 WOMEN USING THAT METHOD
 23 UNDER THE CONDITIONS OF TYPICAL USE.
 24 Q. SORRY. GO ON.
 25 A. SO IF NO CONTRACEPTION IS USED, WHICH IS THE TOP

1 ROW, WE WOULD EXPECT TO SEE 85 WOMEN BECOME PREGNANT IN
 2 A YEAR.
 3 Q. SO THEN IF WITHDRAWAL WAS USED, AM I CORRECT
 4 THAT YOU WOULD EXPECT TO SEE 27 WOMEN GET PREGNANT
 5 WITHIN ONE YEAR IF THE WITHDRAWAL METHOD WAS USED?
 6 A. CORRECT. AND THEN GOING DOWN THE COLUMN, WE GET
 7 TO THE MOST EFFECTIVE METHODS OF CONTRACEPTION TOWARD
 8 THE BOTTOM. AT THE VERY BOTTOM ARE MALE AND FEMALE
 9 STERILIZATION, BUT JUST ABOVE THAT ARE IMPLANTS AND
 10 INTRAUTERINE DEVICES, WHICH RESULT IN ONE LESS THAN ONE
 11 PREGNANCY PER YEAR.
 12 Q. IF I UNDERSTAND THIS CHART CORRECTLY, UNDER
 13 INTRAUTERINE DEVICES -- AND THAT IS AN IUD, RIGHT,
 14 THAT'S THE SAME THING?
 15 A. CORRECT.
 16 Q. THERE IS ONE CALLED A MIRENA IUD. THAT LOOKS
 17 LIKE OUT OF 100 WOMEN WHO ARE USING THAT IN A YEAR,
 18 THERE WOULD BE A .2 CHANCE OF GETTING PREGNANT, CORRECT?
 19 A. CORRECT.
 20 Q. AND THAT IS ACTUALLY LESS THAN FEMALE
 21 STERILIZATION, CORRECT --
 22 A. YES.
 23 Q. -- ON THE CHART?
 24 A. THAT IS CORRECT.
 25 Q. AND IMPLANTED, WHAT IS THAT?

1 A. THAT IS THE IMPLANT. THAT IS A HORMONAL
 2 CONTRACEPTIVE THAT IS IMPLANTED UNDER THE SKIN.
 3 Q. THERE THAT IS OUT OF A HUNDRED WOMEN, YOU WOULD
 4 HAVE .05?
 5 A. RIGHT. THE BOTTOM LINE IS WITH THESE MOST
 6 EFFECTIVE METHODS AT THE BOTTOM, YOU WOULD EXPECT TO SEE
 7 LESS THAN ONE PREGNANCY IN A YEAR OF USE.
 8 Q. AND --
 9 A. OUT OF 100 WOMEN.
 10 Q. SO THE ONES AT THE BOTTOM, ARE THEY PRESCRIPTION
 11 CONTRACEPTIVES?
 12 A. ALL OF THE METHODS OF CONTRACEPTION ARE
 13 PRESCRIPTION METHODS WITH THE EXCEPTION OF SPERMICIDES,
 14 WITHDRAWAL, FERTILITY AWARENESS METHODS, AND THE SPONGE
 15 AND THE CONDOM. ALL THE OTHERS ARE PRESCRIPTION
 16 METHODS.
 17 Q. AND NONE I ASSUME ALSO?
 18 A. AND NONE, YES. THANK YOU.
 19 Q. AM I CORRECT, FOR STERILIZATION YOU WOULD NEED A
 20 PRESCRIPTION? IS THAT CONSIDERED A PRESCRIPTION?
 21 A. WELL, YES. IT IS A SURGICAL PROCEDURE, SO IT
 22 HAS TO BE PROVIDED BY A HEALTHCARE PROFESSIONAL WHO
 23 AGREES TO PROVIDE THE SERVICE.
 24 Q. GIVEN THE STUDIES -- SORRY. GIVEN THE COMMITTEE
 25 STUDY OF CONTRACEPTION, INCLUDING NEGATIVE HEALTH

1 EFFECTS AND EFFICACY AS YOU EXPLAINED FROM THAT TABLE,
 2 DID THE COMMITTEE MAKE ANY RECOMMENDATION REGARDING
 3 CONTRACEPTION?
 4 A. THE COMMITTEE RECOMMENDED THAT ALL FDA, THAT IS
 5 FOOD AND DRUG ADMINISTRATION, APPROVED CONTRACEPTIVES
 6 SHOULD BE PROVIDED AS PART OF WOMEN'S PREVENTIVE CARE,
 7 ALONG WITH COUNSELING REGARDING CONTRACEPTION.
 8 Q. WHAT WAS THE COSTS TO WOMEN SUPPOSED TO BE FOR
 9 THIS EXPANDED CARE?
 10 A. WELL, THE COMMITTEE DID NOT DISCUSS THE COST TO
 11 WOMEN, BUT WE WERE MAKING RECOMMENDATIONS TO THE
 12 DEPARTMENT OF HEALTH AND HUMAN SERVICES THAT WOULD THEN
 13 DECIDE WHETHER TO ADOPT THESE RECOMMENDATIONS, WHICH WE
 14 KNEW WOULD THEN MEAN IF THEY WERE ADOPTED THAT THEY
 15 WOULD BECOME PART OF WOMEN'S PREVENTIVE CARE WITHOUT
 16 COST SHARING UNDER THE AFFORDABLE CARE ACT.
 17 Q. I WANT TO MAKE SURE I UNDERSTAND THAT CORRECTLY.
 18 DID I UNDERSTAND YOU TO SAY THAT BY MAKING THE
 19 RECOMMENDATIONS THAT THE FULL RANGE OF THIS
 20 CONTRACEPTIVE CARE BE MADE AVAILABLE, INHERENT IN THE
 21 RECOMMENDATIONS THAT WOULD BE RECOMMENDED WITHOUT
 22 ADDITIONAL COSTS TO WOMEN?
 23 A. WHAT THE COMMITTEE WAS ASKED TO DO WAS RECOMMEND
 24 EFFECTIVE PREVENTIVE SERVICES FOR WOMEN THAT OUGHT TO BE
 25 PART OF ROUTINE PREVENTIVE CARE. SO WE DETERMINED THAT

1 CONTRACEPTION IS HIGHLY EFFECTIVE AT PREVENTING
 2 UNINTENDED PREGNANCY, WHICH IS A MAJOR WOMEN'S HEALTH
 3 PROBLEM, AND THEREFORE OUGHT TO BE PART OF PREVENTIVE
 4 CARE.
 5 Q. ARE YOU AWARE WHETHER OR NOT THE COST OF
 6 CONTRACEPTION AFFECTS WOMEN'S USE OF CONTRACEPTION?
 7 A. YES.
 8 Q. AND HOW DOES THAT WORK?
 9 A. PRIOR TO THE AFFORDABLE CARE ACT, SOME WOMEN HAD
 10 CONTRACEPTIVE COVERAGE, SOME DID NOT. THOSE WHO DID
 11 HAVE CONTRACEPTIVE COVERAGE ALWAYS HAD COST SHARING, SO
 12 THAT MEANS IF THEY WERE IN AN EMPLOYER-BASED OR OTHER
 13 PRIVATE HEALTH PLAN, THEY EITHER PAID A CO-PAY FOR
 14 CONTRACEPTIONS, CONTRACEPTIVE SERVICES SUCH AS
 15 STERILIZATION WOULD BE APPLIED TO THEIR DEDUCTIBLE. SO
 16 TYPICALLY WOMEN WOULD HAVE TO PAY SOMETHING OUT OF
 17 POCKET FOR THEIR CONTRACEPTIVE SERVICES.
 18 Q. CO-PAYS ARE GENERALLY PRETTY SMALL, RIGHT?
 19 A. THAT DEPENDS ON THE HEALTH PLAN, AND IT ALSO
 20 WOULD DEPEND ON THE NATURE OF THE CONTRACEPTION BEING
 21 USED. IF IT IS A MONTHLY METHOD LIKE ORAL
 22 CONTRACEPTIVES, THAT MEANS THERE WOULD BE A CO-PAY EVERY
 23 TIME A PRESCRIPTION WAS REFILLED. THERE IS AN ABUNDANT
 24 BODY OF LITERATURE SHOWING THAT EVEN VERY SMALL CO-PAYS
 25 AS SMALL AS \$6 CAN DISCOURAGE PEOPLE FROM USING HEALTH

1 SERVICES.
 2 Q. DO I UNDERSTAND THAT RIGHT, THAT EVEN A \$6
 3 CO-PAY COULD MAKE WOMEN OR CAUSE SOME WOMEN TO NOT USE
 4 CONTRACEPTION THAT WAS PRESCRIBED BY THEIR DOCTOR THAT
 5 THEY WOULD USE OTHERWISE?
 6 A. YES.
 7 MS. KADE: OBJECTION, LEADING.
 8 THE COURT: SUSTAINED.
 9 GO AHEAD. REASK THE QUESTION.
 10 BY MR. GOLDMAN:
 11 Q. IS -- SO WHAT COULD BE THE EFFECT OF EVEN A
 12 SMALL \$6 CO-PAY?
 13 A. A SMALL \$6 CO-PAY TO A LOW INCOME WOMAN COULD
 14 MEAN THAT SHE DIDN'T HAVE -- WOULD NOT HAVE THE MONEY TO
 15 RENEW A PRESCRIPTION FOR BIRTH CONTROL PILLS, FOR
 16 EXAMPLE.
 17 Q. SO BASED ON THE CHART THEN ON PAGE 106 OF
 18 TABLE 5.3, IS THAT IF A WOMAN HAD A \$6 CO-PAY, DID NOT
 19 RENEW THE PRESCRIPTION AND DID NOT USE CONTRACEPTION, AM
 20 I RIGHT THAT HER RATE OF UNINTENDED PREGNANCY WITHIN ONE
 21 YEAR WOULD GO TO AN 85 PERCENT CHANCE?
 22 A. WELL, IF SHE USED ORAL CONTRACEPTIVES
 23 INCONSISTENTLY BECAUSE SHE DID NOT RENEW A PRESCRIPTION
 24 OR IF SHE DISCONTINUED USE OF ORAL CONTRACEPTIVES
 25 BECAUSE SHE COULD NOT AFFORD TO RENEW HER PRESCRIPTIONS,

1 HER RISK OF UNINTENDED PREGNANCY WOULD INCREASE, YES.
 2 Q. TO 85 PERCENT IF NO CONTRACEPTION WAS USED?
 3 A. THAT I DON'T KNOW.
 4 Q. I WOULD LIKE TO REFER YOU TO PAGE 107 ON THE
 5 CHART, SPECIFICALLY THE LAST FULL PARAGRAPH.
 6 A. YES.
 7 Q. I'M GOING TO PLACE THAT UP ON THE ELMO. I WOULD
 8 LIKE YOU TO TAKE A MOMENT TO READ THAT PARAGRAPH. AND
 9 IF I MAY, I WILL SORT OF READ IT ALONG WITH YOU:
 10 ALTHOUGH IT IS BEYOND THE SCOPE OF THE COMMITTEE'S
 11 CONSIDERATION, IT SHOULD BE NOTED THAT CONTRACEPTION IS
 12 HIGHLY COST EFFECTIVE. THE DIRECT MEDICAL COSTS OF
 13 UNINTENDED PREGNANCY IN THE UNITED STATES WAS ESTIMATED
 14 TO BE NEARLY 5 BILLION IN 2002 WITH COST SAVINGS DUE TO
 15 CONTRACEPTIVE USE ESTIMATED TO BE AT 19.3 BILLION. THEN
 16 IT SAYS IN PARENTHESES TRUSSELL 2007.
 17 WHAT DOES THAT REFER TO?
 18 A. WELL, THAT REFERS TO A STUDY OF THE POTENTIAL
 19 SAVINGS IN PUBLIC AND PRIVATE DOLLARS TO AVERTING
 20 UNINTENDED PREGNANCIES AT THE NATIONAL LEVEL.
 21 Q. SO THAT IS A CITATION TO BACK UP THE PREMISE?
 22 A. CORRECT. TRUSSELL IS THE AUTHOR, YES.
 23 Q. AND THEN IT SAYS: THE COST EFFECTIVENESS OF
 24 FAMILY PLANNING IS ALSO DOCUMENTED IN AN EVALUATION OF
 25 FAMILY PACT, CALIFORNIA'S 1115 MEDICAID FAMILY PLANNING

1 WAIVER PROGRAM. THE UNINTENDED PREGNANCIES AVERTED IN
 2 THIS PROGRAM IN 2002 WOULD HAVE COST THE STATE
 3 \$1.1 BILLION WITHIN TWO YEARS AND \$2.2 BILLION WITHIN
 4 FIVE YEARS FOR PUBLIC SECTOR HEALTH AND SOCIAL SERVICES
 5 THAT OTHERWISE WOULD HAVE BEEN NEEDED.
 6 AND IS THAT ANOTHER CITATION TO PROVE
 7 THAT PREMISE?
 8 A. YES. THAT IS A STATE LEVEL STUDY.
 9 Q. SO YOU HAD TOLD THE COURT THAT YOU WERE
 10 INSTRUCTED TO NOT CONSIDER COSTS, AND YET THIS PARAGRAPH
 11 SEEMS TO TALK ABOUT COSTS, AND I WAS WONDERING WHY THAT
 12 IS?
 13 A. THE COMMITTEE DECIDED, SINCE THERE WAS A BODY OF
 14 LITERATURE ASSESSING THE COST EFFECTIVENESS OF
 15 CONTRACEPTION, TO PUT THE INFORMATION INTO OUR REPORT
 16 FOR THE DECISION-MAKERS WHO WERE GOING TO LOOK AT THE
 17 REPORT AND DECIDE WHETHER TO APPROVE THE RECOMMENDATIONS
 18 OR NOT. WE WANTED THE INFORMATION TO BE AVAILABLE TO
 19 THE DECISION-MAKERS.
 20 Q. IF I MAY DIRECT YOU TO PAGE 109. I WOULD LIKE
 21 TO, IF I MAY, DIRECT YOU TO THAT MIDDLE PARAGRAPH?
 22 A. DESPITE INCREASES?
 23 Q. YES, THAT IS THE ONE.
 24 THAT PARAGRAPH ALSO TALKS ABOUT COSTS,
 25 DOESN'T IT?

1 A. YES, IT DOES.
 2 Q. AND WITHOUT READING THE WHOLE THING BECAUSE I
 3 KNOW THE COURT HAS IT, DOES THAT TALK ABOUT WHAT YOU
 4 WERE JUST TELLING THE COURT BEFORE ABOUT THE EFFECT OF
 5 CO-PAYMENTS IN AFFECTING WOMEN'S CONTRACEPTIVE CHOICES?
 6 A. YES. AND IT SPECIFICALLY POINTS OUT TOWARD THE
 7 BOTTOM OF THE PARAGRAPH THAT IT WAS KNOWN AT THE TIME
 8 BECAUSE OF RECENT STUDIES THAT COST SHARING WAS A
 9 BARRIER TO WOMEN CHOOSING THE MOST EFFECTIVE FORMS OF
 10 CONTRACEPTION, THE IUD'S AND THE IMPLANTS.
 11 Q. AND AM I CORRECT THAT THERE ARE CITATIONS TO
 12 EVIDENCE IN THIS PARAGRAPH AS WELL, TO HUDMAN AND
 13 O'MALLEY, A 2003, I ASSUME IT'S A PAPER; TRIVEDI,
 14 ET AL., 2008; AND THEN A RECENT STUDY CONDUCTED BY
 15 KAISER PERMANENTE?
 16 A. CORRECT.
 17 Q. WAS ALL THAT OBJECTIVE EVIDENCE THAT THE
 18 COMMITTEE BASED ITS FINDINGS ON?
 19 A. YES. THIS EVIDENCE DOES NOT HAVE TO DO WITH THE
 20 EFFECTIVENESS OF CONTRACEPTION. THIS EVIDENCE HAS TO DO
 21 WITH HOW WOMEN'S CONTRACEPTIVE CHOICES MIGHT BE AFFECTED
 22 IF COST SHARING WERE ELIMINATED.
 23 Q. I WANT TO TURN YOUR ATTENTION TO SORT OF THE
 24 FINALIZATION OF THE REPORT. BEFORE THE COMMITTEE
 25 FINALIZED ITS REPORT, DID ANYONE NOT ON THE COMMITTEE

1 REVIEW IT?
 2 A. YES. WHEN THE COMMITTEE HAD FORMALIZED ITS
 3 FINAL DRAFT OF THE REPORT, IT WAS REVIEWED BY A GROUP OF
 4 OUTSIDE EXPERTS WHOSE NAMES ARE LISTED IN THIS DOCUMENT.
 5 DO YOU KNOW THE PAGE?
 6 Q. I DO. IF I MAY DIRECT YOU AND THE COURT TO THE
 7 BEGINNING OF ROMAN -- SMALL ROMAN 7 THROUGH SMALL ROMAN
 8 8.
 9 THE COURT: WHAT PAGES ARE WE ON?
 10 THE WITNESS: ROMAN NUMERAL 7 AND 8, AT
 11 THE VERY BEGINNING.
 12 BY MR. GOLDMAN:
 13 Q. SO ARE THERE APPROXIMATELY 11 OUTSIDE REVIEWERS
 14 WHO REVIEWED THIS --
 15 A. YES.
 16 Q. -- REPORT.
 17 I WOULD ALSO LIKE TO DIRECT YOU TO
 18 PAGE 231 OF THE REPORT, IF I MAY. IT'S APPENDIX D.
 19 IT'S ENTITLED DISSENT AND RESPONSE. DO YOU SEE THAT?
 20 A. YES.
 21 Q. AM I CORRECT THAT A MEMBER OF THE COMMITTEE
 22 DISSENTED FROM THE REPORT?
 23 A. YES.
 24 Q. DO YOU KNOW WHY -- WAS THAT PERSON A MR. SASSO
 25 OR DR. SASSO MAYBE?

1 A. YES. DR. LO SASSO.
 2 Q. DO YOU KNOW WHY HE DISSENTED?
 3 A. DR. LO SASSO IS AN ECONOMIST, AND AS HIS DISSENT
 4 DESCRIBES, HIS MAIN OBJECTION TO THE REPORT WAS THAT HE
 5 WOULD HAVE PREFERRED THAT THE COMMITTEE CONSIDER COSTS
 6 AND COST EFFECTIVENESS IN MAKING ITS RECOMMENDATIONS.
 7 HE ALSO WOULD HAVE PREFERRED THAT THE
 8 COMMITTEE HAD MORE TIME, AND HE CRITICIZES THE
 9 COMMITTEE'S DECISION-MAKING AS BEING NOT EVIDENCE-BASED.
 10 MS. KADE: OBJECTION, YOUR HONOR. THE
 11 QUESTION DOES NOT NECESSARILY ASK FOR HEARSAY BUT THE
 12 ANSWER HAS PROVIDED HEARSAY.
 13 THE COURT: SUSTAINED. I WILL NOT TAKE
 14 THAT INTO ACCOUNT.
 15 BY MR. GOLDMAN:
 16 Q. DID THAT DISSENT, WAS THAT FOCUSED ON ONE OF THE
 17 EIGHT RECOMMENDATIONS INVOLVING CONTRACEPTION OR DID IT
 18 APPLY TO THE ENTIRE COMMITTEE REPORT?
 19 A. THE DISSENT APPLIED TO THE ENTIRE REPORT.
 20 Q. AND WHAT, IF ANYTHING, DID YOU THINK OF
 21 DR. LOSASSO'S DISSENT?
 22 A. WELL, I AND THE OTHER COMMITTEE MEMBERS
 23 DISAGREED WITH THE DISSENT.
 24 Q. AND WHY IS THAT?
 25 A. WELL, ON THE FIRST POINT, WE HAD SPECIFICALLY

1 BEEN TOLD IN OUR CHARGE THAT OUR JOB WAS NOT TO CONSIDER
 2 COST EFFECTIVENESS OF THESE SERVICES BUT TO LOOK ONLY AT
 3 EFFECTIVENESS, IN OTHER WORDS, DO THEY IMPROVE HEALTH.
 4 AND OF COURSE, THE AMOUNT OF TIME THAT
 5 THE COMMITTEE HAD TO WORK WAS OUT OF OUR CONTROL, AND WE
 6 FELT THAT WE HAD BEEN VERY EVIDENCE BASED IN OUR
 7 DELIBERATIONS.
 8 MS. KADE: YOUR HONOR, WE OBJECT TO THE
 9 EXTENT THAT DR. WEISMAN IS SPEAKING FOR ANYONE OTHER
 10 THAN HERSELF.
 11 THE COURT: SUSTAINED.
 12 BY MR. GOLDMAN:
 13 Q. IF I MAY DIRECT YOU TO PAGE 235, A FEW PAGES IN
 14 AT THE BOTTOM, IT SAYS "RESPONSE TO DISSENTING
 15 STATEMENT."
 16 DO YOU SEE THAT?
 17 A. YES.
 18 Q. AND THERE ARE A BUNCH OF NAMES AT THE TOP.
 19 WHO ARE THOSE PEOPLE?
 20 A. THOSE ARE ALL THE MEMBERS OF THE COMMITTEE OTHER
 21 THAN DR. LO SASSO, AND THAT IS OUR RESPONSE TO HIS
 22 DISSENT.
 23 Q. YOUR NAME IS LAST AGAIN, HUH?
 24 A. YEP.
 25 Q. SO WHAT HAPPENED TO THIS REPORT AFTER THE

1 COMMITTEE WAS FINISHED WITH IT?
 2 A. THE COMMITTEE'S REPORT WENT TO THE DEPARTMENT OF
 3 HEALTH AND HUMAN SERVICES, WHO ACCEPTED THE
 4 RECOMMENDATIONS.
 5 Q. ALL EIGHT OF THEM?
 6 A. YES.
 7 Q. IF YOU KNOW, WHEN YOU SAY THAT HRSA ACCEPTED THE
 8 RECOMMENDATIONS, DO YOU KNOW IF THAT HAD ANY EFFECT ON
 9 THE AFFORDABLE CARE ACT?
 10 A. IT IS MY UNDERSTANDING THAT WHEN THE DEPARTMENT
 11 OF HEALTH AND HUMAN SERVICES ACCEPTED THESE
 12 RECOMMENDATIONS, THEY THEN BECAME PART OF THE AFFORDABLE
 13 CARE ACT DESIGNATED PREVENTIVE SERVICES TO BE COVERED
 14 WITHOUT COST SHARING.
 15 Q. AND THAT IS THE LAW THEN, CORRECT?
 16 A. THAT IS MY UNDERSTANDING.
 17 Q. I'D LIKE TO TURN YOUR ATTENTION NOW TO THE RULES
 18 WHICH ARE AT ISSUE IN THIS PARTICULAR MATTER. ARE YOU
 19 GENERALLY FAMILIAR WITH THESE NEW RULES?
 20 THE COURT: BEFORE YOU GO THERE,
 21 MR. GOLDMAN. IF YOU ARE GOING TO GET INTO THIS EITHER
 22 LATER ON WITH THIS WITNESS OR WITH ANOTHER WITNESS,
 23 PLEASE STOP ME. I WANT TO FOCUS IN ON PENNSYLVANIA. IS
 24 THAT SOMETHING THAT YOU INTEND TO RAISE WITH THIS
 25 WITNESS LATER ON?

1 MR. GOLDMAN: IT IS IN SOME WAY, BUT IF
 2 YOUR HONOR HAS QUESTIONS --
 3 THE COURT: WELL, LET'S TALK ABOUT -- YOU
 4 TALKED ABOUT DATA, AND YOU SAID, I THINK, THAT THE
 5 LATEST DATA YOU COULD GET WAS 2011 BECAUSE THE DATA
 6 TAKES SOME TIME TO ROLL IN, CORRECT?
 7 THE WITNESS: THE DATA ON UNINTENDED
 8 PREGNANCIES?
 9 THE COURT: UNINTENDED PREGNANCIES, OKAY.
 10 SO HAVE YOU, EITHER IN THIS CONTEXT OR OUTSIDE OF THIS
 11 CONTEXT, LOOKED INTO DATA WITH RESPECT TO UNINTENDED
 12 PREGNANCIES IN PENNSYLVANIA?
 13 THE WITNESS: YES.
 14 THE COURT: AND TELL ME THE PERCENTAGE.
 15 WHAT IS THE PERCENTAGE OF UNINTENDED PREGNANCIES IN
 16 PENNSYLVANIA?
 17 THE WITNESS: IT'S CLOSE TO THE NATIONAL
 18 AVERAGE. IT MIGHT BE A LITTLE BIT LOWER, AND I CANNOT
 19 REMEMBER THE CURRENT NUMBER.
 20 THE COURT: FAIR TO SAY SOMEWHERE BETWEEN
 21 45 AND 49 PERCENT?
 22 THE WITNESS: THE NATIONAL RATE CURRENTLY
 23 IS 45 PERCENT. WE ARE A LITTLE BIT LOWER IN
 24 PENNSYLVANIA.
 25 THE COURT: SO SOMEWHERE BETWEEN 40 AND

1 45 PERCENT?
2 THE WITNESS: I THINK SO.
3 THE COURT: AND WHEN YOU SAY YOU THINK
4 SO, WHAT DEGREE OF CERTAINTY DO YOU BRING TO THAT "I
5 THINK SO"?
6 THE WITNESS: PRETTY CERTAIN. THE
7 GUTTMACHER INSTITUTE PUBLISHES THE STATE-BY-STATE DATA.
8 SO IT WOULD BE EASY TO CHECK ON.
9 THE COURT: IS THERE ANY POSSIBILITY THAT
10 IT IS BELOW 40 PERCENT?
11 THE WITNESS: IT COULD BE IN THE HIGH
12 THIRTIES, I'M NOT TOTALLY SURE.
13 THE COURT: SO IF I WERE TO SAY IT'S
14 SOMEWHERE BETWEEN 35 PERCENT AND 45 PERCENT, THAT WOULD
15 BE ABOUT RIGHT?
16 THE WITNESS: YES.
17 THE COURT: OKAY. HAVE YOU DONE ANY
18 RESEARCH INTO THE COSTS OF UNINTENDED PREGNANCIES IN
19 PENNSYLVANIA?
20 THE WITNESS: I HAVE INVESTIGATED
21 ESTIMATES OF COSTS, BUT NOT RECENTLY.
22 THE COURT: OKAY. AND WHAT ABOUT HAVE
23 YOU INVESTIGATED THE IMPACT OF PROVIDING NO COST
24 CONTRACEPTION TO WOMEN IN PENNSYLVANIA?
25 THE WITNESS: YES.

1 THE COURT: TELL ME ABOUT THAT.
2 THE WITNESS: SO WE AT PENN STATE DID A
3 RECENT STUDY OF A COHORT OF PRIVATELY-INSURED WOMEN WHO
4 HAD EMPLOYER-BASED HEALTH INSURANCE IN PENNSYLVANIA, AND
5 IN A TWO-YEAR PERIOD FOLLOWING THE PASSAGE OF THE
6 AFFORDABLE CARE ACT, WHICH MEANT THAT THEY ALL HAD
7 CO-PAY -- NO CO-PAYS FOR CONTRACEPTION, THEIR USE OF
8 IUD'S AND IMPLANTS, WHICH ARE THE MOST EFFECTIVE
9 REVERSIBLE FORMS OF CONTRACEPTION, MORE THAN DOUBLED.
10 THE COURT: SO LOOKING AT YOUR CHART THAT
11 SHOWED THE EFFECTIVENESS OF VARIOUS FORMS OF
12 CONTRACEPTION, IUD'S ARE --
13 MR. GOLDMAN: PAGE 106, AND IT IS ON THE
14 ELMO, YOUR HONOR.
15 THE COURT: WHERE DOES IT SAY -- I DON'T
16 SEE THE WORDS IUD.
17 THE WITNESS: INTRAUTERINE DEVICES, SIX
18 LINES UP.
19 THE COURT: OKAY. SO DEPENDING ON
20 WHETHER IT'S PARAGARD OR MIRENA --
21 THE WITNESS: CORRECT.
22 THE COURT: -- IT'S EITHER -- UNDER
23 "TYPICAL USE," IT'S EITHER .8 OR .20.
24 THE WITNESS: CORRECT.
25 THE COURT: AND --

1 THE WITNESS: AND THE IMPLANT IS RIGHT
2 BELOW THAT.
3 THE COURT: OKAY. WAS THERE ANY
4 INDICATION, WAS THERE ANY CONTROL DATA SHOWING WHAT
5 THESE WOMEN HAD USED PRIOR TO USING IUD'S?
6 THE WITNESS: YES, WE KNEW THAT FROM THE
7 STUDY, AND MOST OF THEM HAD BEEN USING BIRTH CONTROL
8 PILLS, BUT SOME HAD BEEN USING NOTHING OR A COMBINATION.
9 THE COURT: WHEN YOU SAY "MOST," DO YOU
10 RECALL APPROXIMATELY HOW MANY PERCENTAGE WERE USING
11 BIRTH CONTROL PILLS?
12 THE WITNESS: NO, I DON'T.
13 THE COURT: BUT THERE IS A DISTINCTION --
14 I LOOK AT THE BIRTH CONTROL PILLS, IS THAT -- WHERE DO I
15 FIND THAT?
16 THE WITNESS: SO THAT IS THE "COMBINED
17 PILL AND PROGESTIN-ONLY PILL" WHICH WOULD PRODUCE EIGHT
18 PREGNANCIES PER YEAR OUT OF 100 WOMEN.
19 THE COURT: SO THERE IS A REDUCTION IN --
20 TO THE EXTENT YOU CAN HAVE A .2 PREGNANCY, EITHER YOU
21 ARE PREGNANT OR YOU ARE NOT PREGNANT, BUT IT IS, WHAT, A
22 7.2 REDUCTION --
23 THE WITNESS: YEAH. I MEAN, ESTIMATING,
24 IT'S ALMOST AN EIGHTFOLD INCREASE, SLIGHTLY LESS THAN
25 THAT RISK.

1 THE COURT: IF ONE WERE TO USE BIRTH
2 CONTROL RATHER THAN IUD'S?
3 THE WITNESS: CORRECT.
4 THE COURT: SO LOOKING AT --
5 THE WITNESS: IN REDUCING THE RISK.
6 THE COURT: REDUCING THE RISK BY ABOUT
7 EIGHT PERCENT IF ONE WERE TO USE INTRAUTERINE DEVICES.
8 THE WITNESS: CORRECT.
9 THE COURT: SO WHY -- DID YOU REACH ANY
10 CONCLUSIONS AS TO WHY THESE WOMEN WOULD MOVE TO USING
11 IUD'S RATHER THAN OTHER FORMS OF BIRTH CONTROL?
12 THE WITNESS: YES. BECAUSE HISTORICALLY,
13 COST HAS BEEN A BARRIER TO ADOPTING THESE MOST EFFECTIVE
14 METHODS BECAUSE THE UPFRONT COST OF GETTING AN IUD OR AN
15 IMPLANT IS CONSIDERABLE. AN IUD CAN COST UP TO A
16 THOUSAND DOLLARS, WHEN YOU CONSIDER THE COST OF THE
17 DEVICE ITSELF AND THE VISIT TO HAVE THE DEVICE
18 IMPLANTED. AND AN IMPLANT I BELIEVE COSTS UP TO \$500 UP
19 FRONT, AND MANY WOMEN SIMPLY DON'T HAVE THAT KIND OF
20 MONEY TO PAY OUT OF POCKET.
21 THE COURT: YOU INDICATED THAT THIS STUDY
22 WAS PERFORMED RECENTLY. HOW RECENTLY?
23 THE WITNESS: BETWEEN 2012 AND 2014.
24 THE COURT: AND WHAT WAS THE COHORT OF
25 WOMEN IN THE STUDY?

1 THE WITNESS: IT WAS ABOUT -- OVER 900
2 PRIVATELY-INSURED WOMEN IN PENNSYLVANIA.

3 THE COURT: AND YOU AND WHO ELSE DID THE
4 STUDY?

5 THE WITNESS: COLLEAGUES AT PENN STATE
6 COLLEGE OF MEDICINE, DR. CYNTHIA CHUANG AND OTHERS.

7 THE COURT: WAS IT PUBLISHED?

8 THE WITNESS: SOME RESULTS FROM THAT
9 STUDY HAVE BEEN PUBLISHED. THE RESULT I JUST CITED TO
10 YOU HAS NOT YET BEEN PUBLISHED BECAUSE THAT PAPER IS
11 STILL IN PREPARATION.

12 THE COURT: IF YOU WANT TO FOLLOW UP ON
13 THE QUESTIONS I HAVE ASKED IN THIS PARTICULAR AREA, FEEL
14 FREE IF YOU THINK I'VE MISSED SOMETHING.

15 MR. GOLDMAN: I THOUGHT YOU DID AN
16 EXCELLENT JOB.

17 THE COURT: WELL, I APPRECIATE IT.
18 BY MR. GOLDMAN:

19 Q. IF I MAY, THE STUDY YOU JUST SPOKE ABOUT
20 CONCERNED ONLY WOMEN IN PENNSYLVANIA.

21 HAVE YOU BEEN INVOLVED IN ANOTHER STUDY
22 OF LATE INVOLVING -- BASED ON CLAIMS DATA WITH A LARGER
23 COHORT OF WOMEN, NOT JUST IN PENNSYLVANIA BUT AROUND THE
24 COUNTRY?

25 A. YES. WE HAVE JUST RECENTLY CONCLUDED A NATIONAL

1 STUDY OF PRIVATELY-INSURED WOMEN USING A HEALTH CLAIMS
2 DATABASE CALLED MARKETSCAN. AND WE WERE ABLE TO LOOK AT
3 TRENDS IN CONTRACEPTIVE USE FROM 2006 THROUGH 2014. AND
4 AS PART OF THAT ANALYSIS, WE FIRST OF ALL LOOKED AT
5 COSTS TO WOMEN, WHICH DECLINED PRECIPITOUSLY TO ZERO,
6 BASICALLY, AFTER THE AFFORDABLE CARE ACT MANDATE WENT
7 INTO EFFECT.

8 WE ALSO LOOKED AT THE METHODS OF
9 CONTRACEPTION THAT THEY USED OVER THIS TIME PERIOD, AND
10 WE WERE ABLE TO SHOW THAT AFTER THE AFFORDABLE CARE ACT
11 MANDATE WENT INTO EFFECT, THERE WAS A SIGNIFICANT
12 INCREASE IN THE USE OF IUD'S AND IMPLANTS AMONG THESE
13 INSURED WOMEN.

14 Q. AND THAT STUDY WAS BASED ON CLAIMS DATA?

15 A. CORRECT.

16 Q. IS CLAIMS DATA A RELIABLE WAY TO STUDY THIS SORT
17 OF THING?

18 A. SOME PEOPLE THINK IT'S THE MOST RELIABLE WAY TO
19 STUDY THE USE OF PRESCRIPTION MEDICATIONS IN GENERAL
20 BECAUSE EVERY TIME A PRESCRIPTION IS PROVIDED THERE IS A
21 CLAIM GENERATED, AND SO IT IS A GOOD WAY TO FOLLOW
22 PATTERNS OF PRESCRIBING AND USE OF MEDICATIONS.

23 Q. AND WHAT STATES WAS THE CLAIMS DATA FROM THE
24 STUDY FROM, IF YOU KNOW?

25 A. IT'S A NATIONAL DATABASE, SO EMPLOYER-BASED

1 INSURERS FROM ALL OVER THE COUNTRY PUT THEIR CLAIMS INTO
2 THIS DATABASE. AND I THINK IT IS MOST STATES BUT I
3 CAN'T SAY DEFINITELY.

4 Q. DO YOU KNOW IF PENNSYLVANIA WAS ONE OF THE
5 STATES INCLUDED?

6 A. YES, IT WAS.

7 Q. IF I MAY TAKE YOU TO THE RULES NOW THAT ARE AT
8 ISSUE BEFORE THE COURT. AND I WILL -- I DON'T THINK WE
9 HAVE TO LOOK AT THEM SPECIFICALLY HERE, BUT I WOULD LIKE
10 TO NOTE THAT THE RELIGIOUS EXEMPTION RULE IS MARKED AND
11 ADMITTED AS EXHIBIT 1. THE MORAL EXEMPTION RULE IS
12 EXHIBIT 2.

13 I KNOW THEY ARE LONG, BUT HAVE YOU HAD
14 OCCASION TO READ THE RELIGIOUS EXEMPTION RULE?

15 A. YES.

16 Q. AND DO YOU BELIEVE YOU UNDERSTAND IT?

17 A. I UNDERSTAND PARTS OF IT.

18 Q. DO YOU UNDER -- DO YOU BELIEVE YOU UNDERSTAND IT
19 SO FAR AS IT WOULD AFFECT WOMEN'S CONTRACEPTIVE CARE?

20 A. YES.

21 Q. DO YOU -- HAVE YOU ALSO SIMILARLY READ THE MORAL
22 EXEMPTION RULE?

23 A. YES.

24 Q. AND DO YOU SIMILARLY BELIEVE THAT YOU UNDERSTAND
25 IT AS IT WOULD IMPACT WOMEN'S CONTRACEPTIVE CHOICES?

1 A. YES.

2 Q. IN YOUR CAPACITY AS AN EXPERT IN THE FIELD OF
3 PREVENTIVE MEDICAL CARE FOR WOMEN, INCLUDING
4 CONTRACEPTIVE CARE, DO YOU HAVE AN OPINION TO A
5 REASONABLE DEGREE OF CERTAINTY AS TO THE LIKELY EFFECT
6 OF THE RULES ON THE HEALTH OF WOMEN IN PENNSYLVANIA?

7 A. YES.

8 Q. AND WHAT IS THAT OPINION?

9 A. THESE RULES OPEN UP THE OPPORTUNITY FOR MORE
10 EMPLOYERS TO OPT OUT OF CONTRACEPTIVE COVERAGE WITHOUT
11 CO-PAYS BY WOMEN. AND WE KNOW FROM A LARGE BODY OF
12 RESEARCH INVOLVING USE OF HEALTHCARE IN GENERAL AND
13 CONTRACEPTION IN PARTICULAR THAT EVEN VERY SMALL CO-PAYS
14 CAN DISCOURAGE USE.

15 SO IF WOMEN WHO HAVE HAD CO-PAYS UNDER
16 THE AFFORDABLE CARE ACT WERE -- SUDDENLY HAD THAT
17 BENEFIT REMOVED, I FEEL BASED ON WHAT I KNOW OF THIS
18 LITERATURE THAT WE WOULD SEE MORE WOMEN FAILING TO RENEW
19 THEIR PILL PRESCRIPTIONS, NOT OPTING FOR A MORE
20 EFFECTIVE METHOD THAT WOULD HAVE HIGHER UPFRONT COSTS,
21 AND AS A RESULT OF THAT, WE WOULD EXPECT TO SEE AN
22 INCREASE IN THE UNINTENDED PREGNANCY RATE AND MORE
23 ABORTIONS.

24 Q. DID THAT OPINION YOU SO CLEARLY EXPRESSED, DOES
25 THAT ALSO HOLD TRUE FOR WOMEN OUTSIDE OF PENNSYLVANIA

1 AND AROUND THE COUNTRY?

2 A. YES.

3 Q. DO YOU HOLD ALL OF YOUR OPINIONS THAT YOU HAVE

4 SHARED WITH THE COURT TODAY WITHIN A REASONABLE DEGREE

5 OF CERTAINTY FOR AN EXPERT IN PREVENTIVE MEDICAL CARE

6 FOR WOMEN, INCLUDING CONTRACEPTIVE CARE?

7 A. YES.

8 MR. GOLDMAN: YOUR HONOR, IF I MAY HAVE

9 ONE MOMENT TO CONSULT WITH MY CO-COUNSEL.

10 THE COURT: YES.

11 MR. GOLDMAN: YOUR HONOR, NOTHING FURTHER

12 WITH THIS WITNESS.

13 THE COURT: MS. KADE.

14 MS. KADE: THANK YOU, YOUR HONOR.

15 PERMISSION TO APPROACH, YOUR HONOR.

16 THE COURT: YOU MAY.

17 MS. KADE: THANK YOU, YOUR HONOR.

18 CROSS EXAMINATION

19 BY MS. KADE:

20 Q. DR. WEISMAN, GOOD MORNING.

21 A. GOOD MORNING.

22 Q. MY NAME IS ELIZABETH KADE. HOW ARE YOU DOING

23 THIS MORNING?

24 A. GOOD, THANKS.

25 Q. FIRST, WHAT DOCUMENTS DID YOU REVIEW IN ORDER TO

1 PROVIDE YOUR DECLARATION -- TO PREPARE YOUR DECLARATION?

2 A. MY CV, AND I REREAD THE IOM COMMITTEE REPORT,

3 AND RE-FAMILIARIZED MYSELF WITH SOME OF THE REFERENCES

4 IN THAT REPORT.

5 Q. IS THAT EVERYTHING?

6 A. I BELIEVE SO.

7 Q. AND WHO DID YOU MEET WITH IN ORDER TO PREPARE

8 YOUR DECLARATION?

9 A. I SPOKE ON THE PHONE WITH JONATHAN AND NICOLE.

10 THAT'S IT.

11 THE COURT: AND BY JONATHAN AND NICOLE,

12 YOU MEAN JONATHAN GOLDMAN AND NICOLE BOLAND?

13 THE WITNESS: YES.

14 THE COURT: THANK YOU. MAKING SURE THE

15 RECORD IS CLEAN.

16 BY MS. KADE:

17 Q. TURNING TO YOUR DECLARATION, LOOKING AT

18 PARAGRAPH 44, YOU HAVE TESTIFIED THAT IT IS YOUR OPINION

19 THAT THE NEW RULES WILL CAUSE IMMEDIATE AND IRREVERSIBLE

20 HARM BECAUSE THEY WILL CAUSE WOMEN TO LOSE PREVENTIVE

21 CONTRACEPTIVE CARE UNDER THEIR EMPLOYER GROUP --

22 I APOLOGIZE. YOU TESTIFIED THAT IT IS

23 YOUR OPINION THAT THE NEW RULES WILL CAUSE IMMEDIATE AND

24 IRREVERSIBLE HARM BECAUSE THEY WILL CAUSE WOMEN TO LOSE

25 PREVENTIVE CONTRACEPTION CARE UNDER THEIR EMPLOYER GROUP

1 HEALTH PLANS, CORRECT?

2 A. YES.

3 Q. DO YOU KNOW HOW MANY RELIGIOUS EMPLOYERS ARE

4 CURRENTLY PROTECTED BY INJUNCTION?

5 A. I DO NOT. I HAVE SEEN AN ESTIMATE THAT 10

6 PERCENT OF NONPROFITS HAVE CLAIMED THE EXEMPTION UNDER

7 THE EXISTING RULES.

8 Q. SO THIS IS BEFORE THE NEW RULES THAT JUST WENT

9 INTO EFFECT. CORRECT?

10 A. YES, CORRECT.

11 Q. DO YOU -- AND SO YOU KNOW THAT THE EMPLOYERS

12 THAT ARE PROTECTED BY INJUNCTIONS ARE NOT CURRENTLY

13 PROVIDING CONTRACEPTIVE COVERAGE, CORRECT?

14 A. YES.

15 Q. DO YOU KNOW ABOUT THE 2016 ZUBIK INJUNCTION?

16 A. ONLY IN VERY GENERAL TERMS. I AM NOT A LAWYER.

17 Q. I APPRECIATE THAT, THANK YOU.

18 DO YOU HAVE ANY REASON TO DOUBT THAT

19 THERE WAS ANOTHER INJUNCTION IN 2016 THAT WE'RE

20 REFERRING TO COLLECTIVELY AS THE ZUBIK INJUNCTION?

21 A. NO.

22 Q. DO YOU KNOW THAT THE ENTITIES PROTECTED BY THE

23 ZUBIK INJUNCTION ARE ALSO NOT CURRENTLY PROVIDING

24 CONTRACEPTIVE COVERAGE?

25 A. YES.

1 Q. WHEN WAS THE "MY NEW OPTIONS" STUDY THAT YOU

2 WERE REFERRING TO EARLIER, WHEN WAS THAT CONDUCTED?

3 A. THAT WAS CONDUCTED IN 2012 -- 2012 THROUGH 2014.

4 Q. CAN YOU IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA

5 WHO HAS LOST COVERAGE AS A RESULT OF THE NEW RULES?

6 A. NO.

7 Q. CAN YOU IDENTIFY A SINGLE WOMAN IN THE UNITED

8 STATES WHO HAS LOST COVERAGE AS A RESULT OF THE NEW

9 RULES?

10 A. NO.

11 Q. YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS AN

12 EXPERT ON INSURANCE MARKETPLACES, RIGHT?

13 A. CORRECT.

14 Q. AND YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS

15 AN EXPERT ON THE GOVERNMENT'S DECISION-MAKING PROCESS

16 UNDER THE ADMINISTRATIVE PROCEDURE ACT, CORRECT?

17 A. CORRECT.

18 Q. I WANT TO TURN TO ANOTHER PARAGRAPH IN YOUR

19 DECLARATION, PARAGRAPH 22. YOU HAVE TESTIFIED THAT IT

20 IS YOUR OPINION THAT THE NEW RULES ARE NOT BASED UPON

21 SOUND SCIENTIFIC OR EMPIRICAL EVIDENCE; IS THAT RIGHT?

22 A. CORRECT.

23 Q. AND HAVE YOU READ THE RULES THAT ARE AT ISSUE IN

24 THIS CASE IN THEIR ENTIRETY?

25 A. YES, ALTHOUGH I FOCUSED ON THE SECTIONS HAVING

1 TO DO WITH CONTRACEPTION EFFECTIVENESS AND THE IOM
2 REPORT.

3 Q. HAVE YOU READ ALL OF THE EVIDENCE THAT THE RULES
4 RELY UPON AND CITE?

5 A. I WOULD NOT SAY ALL OF IT, BUT SOME OF IT.

6 Q. I'M GOING TO TURN TO A SPECIFIC PAGE, 47804 OF
7 THE FEDERAL REGISTER, SO THIS IS EXHIBIT 1, AND IT
8 SHOULD BE PAGE 46 OF THAT EXHIBIT.

9 A. WHAT TAB IS THAT?

10 Q. IT IS THE FIRST TAB. I'M ALSO GOING TO PUT IT
11 ON THE ELMO FOR EVERYONE.

12 THIS IS TAB 1, PAGE 47804 OF THE FEDERAL
13 REGISTER.

14 A. GOT IT.

15 Q. YOU HAVE SERVED ON THE EDITORIAL BOARD OF
16 WOMEN'S HEALTH ISSUES SINCE 1990, CORRECT?

17 A. CORRECT.

18 Q. SO WOULD YOU SAY THAT IS A PUBLICATION THAT IS
19 GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY?

20 A. YES.

21 Q. AND THE RULES SAY -- I'M LOOKING AT THE FIRST --
22 START OF THE FIRST FULL PARAGRAPH THAT STARTS WITH
23 "SIMILARLY" ON THE LEFT-HAND SIDE: SIMILARLY, AT A
24 STUDY INVOLVING OVER 8,000 WOMEN BETWEEN 2012 AND 2015
25 CONDUCTED TO DETERMINE WHETHER CONTRACEPTIVE COVERAGE

1 UNDER THE MANDATE CHANGED CONTRACEPTIVE USE PATTERNS,
2 THE GUTTMACHER INSTITUTE CONCLUDED THAT WE HAVE OBSERVED
3 NO CHANGES IN CONTRACEPTIVE USE PATTERNS AMONG SEXUALLY
4 ACTIVE WOMEN. AND THAT CITES FOOTNOTE 31, WHICH IS AN
5 ARTICLE ENTITLED: DID CONTRACEPTIVE USE HABITS CHANGE
6 AFTER THE AFFORDABLE CARE ACT? A DESCRIPTIVE ANALYSIS,
7 WHICH WAS PUBLISHED IN THE MAY TO JUNE 2017 ISSUE OF
8 WOMEN'S HEALTH ISSUES; IS THAT CORRECT?

9 A. YES.

10 Q. YOU WERE ON THE COMMITTEE THAT PRODUCED THE 2011
11 IOM REPORT, CORRECT?

12 A. YES.

13 Q. SO LOOKING JUST BELOW WHERE THE REFERENCE TO
14 PARAGRAPH 31, THE SENTENCE THAT STARTS WITH "WITH," THE
15 RULES SAY: WITH RESPECT TO TEENS, THE SANTELLI AND
16 MELNIKAS STUDY CITED BY IOM IN 2011 OBSERVES THAT
17 BETWEEN 1960 AND 1990 AS CONTRACEPTIVE USE INCREASED,
18 TEEN SEXUAL ACTIVITY OUTSIDE OF MARRIAGE LIKEWISE
19 INCREASED, ALTHOUGH THE STUDY DID NOT ASSERT A CAUSAL
20 RELATIONSHIP. IS THAT CORRECT?

21 A. YES.

22 Q. THE NATIONAL INSTITUTES OF HEALTH IS A
23 ORGANIZATION THAT IS GENERALLY ACCEPTED IN THE
24 SCIENTIFIC COMMUNITY; IS THAT CORRECT?

25 A. YES.

1 Q. THE RULES ALSO CITE IN THIS MIDDLE PARAGRAPH,
2 JUST AGAIN, CONTRACEPTION'S ASSOCIATION, BUT I WILL
3 START READING FROM THE SECOND SENTENCE IN THAT
4 PARAGRAPH: THE RULES SAY, IN 2013, THE NATIONAL
5 INSTITUTES OF HEALTH INDICATED IN FUNDING OPPORTUNITY
6 ANNOUNCEMENT FOR THE DEVELOPMENT OF NEW CLINICALLY
7 USEFUL FEMALE CONTRACEPTIVE PRODUCTS --

8 THE COURT: I'M SORRY. I'M NOT FOLLOWING
9 YOU. WHERE ARE YOU IN THIS PARAGRAPH?

10 MS. KADE: I'M SORRY, YOUR HONOR. I'M IN
11 THE MIDDLE COLUMN, THE PARAGRAPH THAT STARTS WITH
12 CONTRACEPTION'S ASSOCIATION.

13 THE COURT: GOT IT.

14 MS. KADE: AND IN 2013, THE NATIONAL
15 INSTITUTES OF HEALTH.

16 THE COURT: OKAY.

17 BY MS. KADE:

18 Q. SO THEY INDICATED THAT HORMONAL CONTRACEPTIVES
19 HAVE THE DISADVANTAGE OF HAVING MANY UNDESIRABLE SIDE
20 EFFECTS, ARE ASSOCIATED WITH ADVERSE EVENTS, AND OBESE
21 WOMEN ARE AT HIGHER RISK FOR SERIOUS COMPLICATIONS SUCH
22 AS DEEP VENOUS THROMBOSIS; IS THAT CORRECT?

23 A. YES.

24 Q. JAMA PSYCHIATRY IS A PUBLICATION THAT IS
25 GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY,

1 CORRECT?

2 A. YES.

3 Q. IT'S PUBLISHED BY THE AMERICAN MEDICAL
4 ASSOCIATION?

5 A. CORRECT.

6 Q. IT IS PEER REVIEWED?

7 A. YES.

8 Q. I'M GOING TO FOCUS EVERYONE'S ATTENTION TO
9 FOOTNOTE 39. I REALIZE THE FONT IS GETTING SMALLER.
10 BUT FOOTNOTE 39 CITES A 2016 JAMA PSYCHIATRY PUBLICATION
11 ON THE ASSOCIATION OF HORMONAL CONTRACEPTION WITH
12 DEPRESSION; IS THAT CORRECT?

13 A. YES.

14 Q. I WANT TO TURN TO THE 2011 IOM REPORT. THE 2011
15 IOM REPORT DID NOT STUDY THE EFFECT OF RELIGIOUS
16 EXEMPTIONS, CORRECT?

17 A. CORRECT.

18 Q. AND THE 2011 IOM REPORT DID NOT STUDY THE EFFECT
19 OF MORAL EXEMPTIONS, CORRECT?

20 A. YES.

21 Q. AND THE IOM PANEL DID NOT INVITE ANY SPEAKERS TO
22 TESTIFY CONCERNING EXEMPTIONS FROM THE MANDATE, CORRECT?

23 A. CORRECT.

24 MS. KADE: THANK YOU, DR. WEISMAN.

25 THANK YOU, YOUR HONOR. I HAVE NOTHING

1 FURTHER.
2 THE COURT: OKAY. THANK YOU VERY MUCH.
3 DO YOU HAVE ANY RECROSS?
4 MR. GOLDMAN: VERY BRIEFLY, IF I MAY
5 APPROACH, YOUR HONOR.
6 RECROSS EXAMINATION
7 BY MR. GOLDMAN:
8 Q. COUNSEL ASKED YOU IF YOU HAD READ ALL OF THE
9 SOURCES CITED IN THE COMMITTEE'S REPORT. I WANT TO ASK
10 YOU, ARE YOU FAMILIAR WITH ALL OF THE SOURCES CITED IN
11 THE COMMITTEE'S REPORT, SPECIFICALLY IN THE AREA OF
12 CONTRACEPTION?
13 A. I AM FAMILIAR WITH REFERENCES 30 AND 31.
14 Q. I'M SORRY, DR. WEISMAN. I BELIEVE COUNSEL WAS
15 REFERRING TO THE COMMITTEE'S REPORT AND NOT THE FEDERAL
16 REGISTER.
17 A. WELL, I'M CONFUSED BECAUSE SHE ASKED ABOUT BOTH.
18 THE COURT: AS I UNDERSTAND IT, THE
19 QUESTION WAS ABOUT HAVE YOU READ THE FEDERAL REGISTER.
20 YOU SAID YES, I HAVE AND I FOCUSED ON THE CONTRACEPTIVE
21 AND PREVENTIVE CARE COMPONENTS.
22 THE WITNESS: YES.
23 BY MR. GOLDMAN:
24 Q. ARE YOU FAMILIAR WITH THE SOURCES THAT COUNSEL
25 ASKED YOU ABOUT?

1 A. YES. MOST OF THEM.
2 Q. AND DO YOU AGREE WITH THEM FOR THE PREMISES THEY
3 ARE CITED FOR HERE?
4 A. NO.
5 Q. AND WHY IS THAT?
6 A. BECAUSE I THINK THEY ARE SELECTIVE COMMENTS
7 WHICH DO NOT FULLY REFLECT THE BODY OF EVIDENCE THAT IS
8 AVAILABLE. DO YOU WANT ME TO SAY MORE?
9 Q. PLEASE. GO ON.
10 A. SO THE FIRST REFERENCE THAT I WAS ASKED ABOUT
11 WAS THIS FOOTNOTE 31, BEARAK AND JONES FOOTNOTE, THE
12 PUBLICATION FROM THE GUTTMACHER INSTITUTE. AND IT IS
13 CORRECT THAT THE ABSTRACT FOR THAT ARTICLE SAYS WE
14 OBSERVE NO CHANGES IN CONTRACEPTIVE USE PATTERNS AMONG
15 SEXUALLY ACTIVE WOMEN, BUT THAT STUDY FOUND AN
16 IMPROVEMENT IN CONTRACEPTIVE USE, AN INCREASED USE OF
17 CONTRACEPTION AMONG YOUNG WOMEN WHO WERE NOT SEXUALLY
18 ACTIVE IN THE LAST MONTH, WHICH SUGGESTS THAT YOUNGER
19 WOMEN WERE RESPONSIBLY -- MORE RESPONSIBLY USING
20 CONTRACEPTION IN THAT STUDY. THAT IS NOT NOTED HERE.
21 Q. AND HOW ABOUT THE OTHER SOURCES?
22 A. SO THE SANTELLI REFERENCE WHICH COMES NEXT
23 REGARDING TEEN PREGNANCIES, SANTELLI AND CO-AUTHORS JUST
24 PUBLISHED A PAPER IN 2016 SHOWING THAT TEEN PREGNANCIES
25 HAVE DECLINED MORE RECENTLY AND THAT THERE HAS BEEN NO

1 CONCOMITANT INCREASE IN SEXUAL ACTIVITY AMONG TEENS.
2 Q. DO YOU HAVE ANY OTHER EXAMPLES OF REASONS WHY
3 YOU DISAGREE WITH THE CONCLUSIONS DRAWN FROM THE STUDIES
4 THAT WERE CITED?
5 A. WELL, THE POINT ABOUT RISKS OF HORMONAL
6 CONTRACEPTION AND THE POINT ABOUT RISK OF DEPRESSION IN
7 CONTRACEPTIVE USE, I WOULD SAY THAT THE IMPLICATION IS
8 THAT THIS IS SOMETHING NEW OR IMPORTANT, WHEN, IN FACT,
9 THE MEDICAL COMMUNITY IS AWARE OF SIDE EFFECTS OF ALL
10 KINDS OF CONTRACEPTION, AND THAT IS TAKEN INTO ACCOUNT
11 IN COUNSELING WOMEN ABOUT THE APPROPRIATENESS OF THE
12 METHODS THAT THEY CHOOSE, AND IT'S ANOTHER REASON WHY
13 THE INSTITUTE OF MEDICINE COMMITTEE RECOMMENDED THAT ALL
14 METHODS BE MADE AVAILABLE TO WOMEN SO THAT THEY CAN
15 OPTIMALLY CHOOSE A METHOD THAT IS APPROPRIATE FOR THEM.
16 Q. AND, IN FACT, YOU TESTIFIED BEFORE THAT THE
17 COMMITTEE TOOK NEGATIVE EFFECTS OF CONTRACEPTION INTO
18 ACCOUNT IN MAKING ITS RECOMMENDATIONS, CORRECT?
19 A. YES.
20 Q. IF I MAY, ARE YOU FAMILIAR WITH A NEW REPORT
21 INVOLVING MODERN HORMONAL CONTRACEPTION THAT WAS
22 PERFORMED IN DANISH WOMEN THAT WAS RECENTLY IN THE FRONT
23 PAGE -- IN THE NEW YORK TIMES?
24 A. YES.
25 Q. AND CAN YOU TELL US ABOUT THAT STUDY?

1 A. THAT STUDY WAS JUST PUBLISHED, AND IT'S BASED ON
2 A LARGE SAMPLE OF DANISH WOMEN, AND IT FOUND A 1.2
3 RELATIVE RISK FOR BREAST CANCER AMONG WOMEN WHO USED
4 HORMONAL METHODS OF CONTRACEPTION OVER TIME. WHAT THIS
5 STUDY CONTRIBUTES IS THAT IT OBSERVED WOMEN WHO WERE
6 USING THE MORE MODERN HORMONAL METHODS OF CONTRACEPTION
7 AS OPPOSED TO OLDER ONES, BUT ITS FINDING OF A SMALL
8 ELEVATED RISK FOR BREAST CANCER ASSOCIATED WITH USE OF
9 HORMONAL METHODS IS NOT NEW. THAT HAS BEEN KNOWN FOR
10 SOME TIME BASED ON STUDIES OF THE OLDER HORMONAL
11 METHODS. AND IT IS TAKEN INTO ACCOUNT IN COUNSELING
12 WOMEN ABOUT THE RISKS AND SIDE EFFECTS OF CONTRACEPTION.
13 AND IT NEEDS TO BE BALANCED AGAINST OTHER STUDIES THAT
14 SHOW HORMONAL METHODS OF CONTRACEPTION TO BE PROTECTIVE,
15 THAT IS TO REDUCE THE RISKS OF OTHER CANCERS, OVARIAN
16 CANCER, ENDOMETRIAL CANCER AND COLORECTAL CANCER. SO
17 THERE ARE -- THERE IS A BALANCING REQUIRED IN MAKING A
18 DECISION ABOUT A CONTRACEPTIVE CHOICE.
19 MS. KADE: YOUR HONOR, WITH THIS ANSWER,
20 WE APPEAR TO BE BEYOND THE SCOPE OF CROSS.
21 THE COURT: WELL, I DON'T THINK WE ARE,
22 BECAUSE YOU TALKED SPECIFICALLY ABOUT THOSE IMPACTS OF
23 CONTRACEPTION.
24 BUT I DO THINK YOU SHOULD MOVE ON BECAUSE
25 THIS IS NOT A FOCUS OF MY CONCERN.

1 MR. GOLDMAN: NOTHING FURTHER, YOUR
2 HONOR.
3 THE COURT: OKAY. LET ME TALK TO YOU
4 ABOUT A FOCUS OF MY CONCERN. I WANT YOU -- YOU SAID YOU
5 HAD READ THE GUTTMACHER INSTITUTE STUDY SET FORTH IN
6 FOOTNOTE 31.
7 THE WITNESS: BEARAK AND JONES, YES.
8 THE COURT: RIGHT. YOU ALSO TOLD ME
9 ABOUT A STUDY WHICH IS CURRENTLY UNPUBLISHED THAT YOU
10 PERFORMED. I WANT TO COMPARE AND CONTRAST THEM TO SEE
11 WHETHER WE ARE TALKING ABOUT APPLES AND ORANGES OR JUST
12 APPLES.
13 SO THE GUTTMACHER INSTITUTE STUDY WAS TO
14 DETERMINE WHETHER CONTRACEPTIVE COVERAGE UNDER THE
15 MANDATE CHANGED CONTRACEPTIVE USAGE PATTERNS. WAS THAT
16 THE SAME PROPOSITION THAT YOU WERE ANALYZING IN YOUR
17 STUDY?
18 THE WITNESS: YES, ALTHOUGH OUR STUDY
19 LOOKED AT BOTH COSTS AND CONTRACEPTIVE USE PATTERNS.
20 THE COURT: AND DO YOU KNOW WHEN -- THIS
21 IS -- THIS IS WOMEN BETWEEN 2012 AND 2015 IN THIS
22 GUTTMACHER STUDY, IS THAT CORRECT?
23 WELL, THAT IS WHAT IT SAYS HERE.
24 THE WITNESS: THAT IS -- YES.
25 THE COURT: SO WHEN WAS YOUR STUDY DONE,

1 WHAT COHORT? WHAT WAS THE TIME FRAME OF YOURS?
2 THE WITNESS: THE PENNSYLVANIA STUDY?
3 THE COURT: YES.
4 THE WITNESS: 2012 THROUGH 2014.
5 THE COURT: AND HERE IT SAYS THE
6 GUTTMACHER FOLKS DID 8,000 WOMEN. AND YOU TOLD ME YOU
7 HAD HOW MANY WOMEN?
8 THE WITNESS: IN OUR PENNSYLVANIA STUDY,
9 900-SOME.
10 THE COURT: SO DO YOU KNOW WHETHER IN
11 THOSE 8,000 WOMEN THERE WERE ANY PENNSYLVANIA WOMEN?
12 THE WITNESS: I DON'T, BECAUSE THESE WERE
13 TWO SURVEYS DONE BY THE GUTTMACHER INSTITUTE, AND I
14 DON'T KNOW HOW THEY SELECTED THOSE PARTICIPANTS.
15 THE COURT: WHAT IS THE GUTTMACHER
16 INSTITUTE?
17 THE WITNESS: THE GUTTMACHER INSTITUTE IS
18 A PRIVATE NOT-FOR-PROFIT RESEARCH INSTITUTE THAT FOCUSES
19 ON REPRODUCTIVE HEALTH ISSUES IN THE UNITED STATES AND
20 GLOBALLY.
21 THE COURT: IS IT AFFILIATED WITH ANY
22 POLITICAL VIEWPOINT?
23 THE WITNESS: NO.
24 THE COURT: DO YOU KNOW WHETHER THIS
25 PAPER, THE BEARAK AND JONES PAPER WAS PEER REVIEWED?

1 THE WITNESS: YES, IT WAS.
2 THE COURT: WHAT I HAVE BEEN TRYING TO
3 ESTABLISH WAS SIMILARITIES AND DIFFERENCES. ARE THERE
4 ANY DIFFERENCES THAT I HAVE NOT IDENTIFIED AT THIS POINT
5 BETWEEN YOUR STUDY AND THE GUTTMACHER INSTITUTE STUDY
6 APART FROM THE CONCLUSION AS SET FORTH IN THE FEDERAL
7 REGISTER AS MODIFIED BY YOUR TESTIMONY WITH RESPECT TO
8 THE CONCLUSION?
9 THE WITNESS: I DON'T THINK SO.
10 THE COURT: OKAY. THANK YOU.
11 BY MR. GOLDMAN:
12 Q. VERY BRIEFLY. IS THIS GUTTMACHER INSTITUTE
13 STUDY, DO YOU KNOW IF THIS WAS BASED ON CLAIMS DATA IN
14 THE WAY THE OTHER STUDY YOU SPOKE ABOUT?
15 A. IT WAS NOT. IT WAS BASED ON SURVEY DATA.
16 Q. AND IS THERE A DIFFERENCE IN RELIABILITY BETWEEN
17 SURVEY DATA AND CLAIMS DATA?
18 A. THERE ARE THOSE WHO THINK THAT SURVEY DATA ARE
19 LESS RELIABLE IN STUDYING CONTRACEPTIVE USE PATTERNS
20 BECAUSE PEOPLE HAVE RECALL PROBLEMS AND MAY NOT RESPOND
21 ACCURATELY. BUT HAVING SAID THAT, OUR MOST DEFINITIVE
22 SOURCE OF INFORMATION ABOUT CONTRACEPTIVE USE AND
23 UNINTENDED PREGNANCY IS THE NATIONAL SURVEY OF FAMILY
24 GROWTH WHICH IS AN ONGOING NATIONAL SURVEY OF WOMEN
25 ACROSS THE COUNTRY CONDUCTED BY THE FEDERAL GOVERNMENT.

1 Q. AND YOU HAD REFERRED BEFORE WHEN WE WERE
2 SPEAKING TO A NATIONAL STUDY INCLUDING PENNSYLVANIA
3 WOMEN THAT WAS BASED ON CLAIMS DATA?
4 A. CORRECT.
5 Q. AND HOW DO THE FINDINGS YOU HAVE FOUND FROM THAT
6 STUDY COMPARE WITH THE GUTTMACHER INSTITUTE STUDY?
7 A. SO THE GUTTMACHER STUDY WAS NOT LOOKING AT
8 COSTS. I BELIEVE IT WAS ONLY LOOKING AT CONTRACEPTIVE
9 USE PATTERNS. OUR STUDY LOOKED AT BOTH, BUT WE FOUND,
10 AS I MENTIONED BEFORE, A STATISTICALLY SIGNIFICANT
11 INCREASE IN USE OF IUD'S AND IMPLANTS IN THE YEARS
12 FOLLOWING THE AFFORDABLE CARE ACT. AND UNLIKE THE
13 GUTTMACHER STUDY, WE HAD DATA BEFORE THE AFFORDABLE CARE
14 ACT WENT INTO EFFECT AND AFTER THE AFFORDABLE CARE ACT
15 WENT INTO EFFECT. THEIR DATA ARE ALL POST, POST
16 AFFORDABLE CARE ACT.
17 MR. GOLDMAN: NOTHING FURTHER, YOUR
18 HONOR, UNLESS YOU HAVE ANYTHING ELSE.
19 THE COURT: I HAVE NOTHING.
20 ANY RECROSS?
21 MS. KADE: NO, YOUR HONOR. JUST FOR THE
22 RECORD, WE WOULD RENEW OUR OBJECTION TO THE EXPERT
23 TESTIMONY TO THE EXTENT IT IS BEING OFFERED TO DETERMINE
24 THE CORRECTNESS OF THE WISDOM OF THE AGENCY'S DECISION
25 IN THIS APA CASE, YOUR HONOR.

1 THE COURT: YES, I UNDERSTAND.
 2 YOU CAN LEAVE THE BENCH. THANK YOU.
 3 WE WILL TAKE A BRIEF BREAK, AND WE WILL
 4 BE BACK IN TEN MINUTES.
 5 THE CLERK: ALL RISE.
 6 (WITNESS EXCUSED.)
 7 (BREAK TAKEN.)
 8 MR. GOLDMAN: THE COMMONWEALTH WOULD LIKE
 9 TO CALL DR. SAMANTHA BUTTS TO THE STAND, PLEASE.
 10 MAY I APPROACH, YOUR HONOR.
 11 THE COURT: YOU MAY.
 12 SWEAR THE WITNESS.
 13 THE CLERK: PLEASE RAISE YOUR RIGHT HAND
 14 AND STATE YOUR NAME FOR THE RECORD.
 15 THE WITNESS: SAMANTHA BUTTS.
 16 (DR. SAMANTHA BUTTS, COMMONWEALTH'S
 17 WITNESS, SWORN.)
 18 THE CLERK: STATE AND SPELL YOUR FULL
 19 NAME FOR THE RECORD, PLEASE.
 20 THE WITNESS: FIRST NAME IS
 21 S-A-M-A-N-T-H-A. LAST NAME IS BUTTS, B-U-T-T-S.
 22 DIRECT EXAMINATION
 23 BY MR. GOLDMAN:
 24 Q. WILL YOU PLEASE STATE YOUR NAME FOR THE RECORD,
 25 DR. BUTTS?

1 A. SAMANTHA BUTTS.
 2 Q. AND WHAT DO YOU DO FOR A LIVING?
 3 A. I AM AN OBSTETRICIAN GYNCOLOGIST. I SPECIALIZE
 4 IN THE AREA OF REPRODUCTIVE ENDOCRINOLOGY AND
 5 INFERTILITY.
 6 Q. THERE IS A WITNESS EXHIBIT BINDER IN FRONT OF
 7 YOU. IF I COULD DIRECT YOU TO EXHIBITS 8 AND 9 WHICH
 8 ARE ALREADY ADMITTED INTO EVIDENCE, I'D LIKE YOU JUST TO
 9 LOOK AT THOSE AND TELL ME IF YOU RECOGNIZE THEM, AND ASK
 10 YOU WHAT THEY ARE?
 11 A. THESE ARE MY DECLARATIONS PURSUANT TO THIS CASE.
 12 Q. AND THE WAY THE COPY IS ON TAB 9, IF YOU LOOK TO
 13 THE BACK OF THAT FIRST PAGE, WHAT IS THAT DOCUMENT?
 14 A. THIS LOOKS LIKE MY CURRICULUM VITAE.
 15 Q. OKAY. THE QUESTIONS ARE NOT HARD. I JUST
 16 WANTED YOU TO IDENTIFY.
 17 ARE YOU ABLE TO BRIEFLY LOOK THROUGH
 18 THOSE DOCUMENTS AND JUST CONFIRM IF THERE ARE ANY
 19 INACCURACIES IN THEM OR IF YOU BELIEVE THEY ARE
 20 ACCURATE?
 21 A. THE DOCUMENTS LOOK ACCURATE AND CURRENT.
 22 Q. THANK YOU.
 23 I WANTED TO ASK YOU BRIEFLY ABOUT YOUR
 24 EDUCATION. WHERE DID YOU GO TO COLLEGE?
 25 A. I WENT TO HARVARD COLLEGE.

1 Q. AND WHEN DID YOU GRADUATE?
 2 A. IN 1994.
 3 Q. AND WHAT DID YOU DO AFTER THAT?
 4 A. I WENT TO MEDICAL SCHOOL, ALSO AT HARVARD.
 5 Q. AND WHEN DID YOU GRADUATE FROM THERE?
 6 A. IN 1998.
 7 Q. DID YOU DO A RESIDENCY AFTER THAT?
 8 A. I DID. I DID A RESIDENCY IN OBSTETRICS AND
 9 GYNCOLOGY AT THE UNIVERSITY OF PENNSYLVANIA.
 10 Q. AND DURING WHAT YEARS DID YOU DO YOUR RESIDENCY?
 11 A. FROM 1992 -- PARDON ME, 1998 TO 2002.
 12 Q. AND DID YOU DO A FELLOWSHIP ALSO?
 13 A. I DID A SUBSPECIALTY FELLOWSHIP IN REPRODUCTIVE
 14 ENDOCRINOLOGY AND INFERTILITY FROM 2002 UNTIL 2005, ALSO
 15 AT THE UNIVERSITY OF PENNSYLVANIA.
 16 Q. SO YOU'VE USED THE PHRASE REPRODUCTIVE
 17 ENDOCRINOLOGY AT LEAST TWICE.
 18 A. YES.
 19 Q. WHAT DOES THAT MEAN?
 20 A. SO REPRODUCTIVE ENDOCRINOLOGY IS THE FIELD OF
 21 MEDICINE THAT INVESTIGATES HOW HORMONES AFFECT
 22 REPRODUCTIVE FUNCTIONING AND DISORDERS IN WOMEN.
 23 Q. DO YOU HAVE ANY OTHER RELEVANT EDUCATION HERE
 24 TODAY?
 25 A. I RECEIVED A MASTERS IN CLINICAL EPIDEMIOLOGY

1 AND BIOSTATISTICS AT THE UNIVERSITY OF PENNSYLVANIA
 2 DURING MY FELLOWSHIP IN REPRODUCTIVE ENDOCRINOLOGY.
 3 Q. HOW MANY YEARS WAS THAT MASTERS PROGRAM?
 4 A. THREE YEARS, 2003 UNTIL 2006.
 5 Q. ARE YOU BOARD CERTIFIED?
 6 A. I AM BOARD CERTIFIED BOTH IN GENERAL OBSTETRICS
 7 AND GYNCOLOGY AND IN REPRODUCTIVE ENDOCRINOLOGY AND
 8 INFERTILITY.
 9 Q. WAS THE REPRODUCTIVE ENDOCRINOLOGY AND
 10 FERTILITY, IS THAT PART OF YOUR BOARD CERTIFICATION OR
 11 IS THAT A SUBSPECIALTY?
 12 A. IT'S SUBSPECIALTY BOARD CERTIFICATION.
 13 Q. I WOULD LIKE TO ASK YOU BRIEFLY ABOUT YOUR
 14 CURRENT WORK. WHERE DO YOU CURRENTLY WORK?
 15 A. I AM ON -- I WORK AT THE UNIVERSITY OF
 16 PENNSYLVANIA HOSPITAL AS A REPRODUCTIVE ENDOCRINOLOGIST
 17 THERE, AND I'M ON THE FACULTY OF THE MEDICAL SCHOOL AT
 18 THE UNIVERSITY OF PENNSYLVANIA.
 19 MR. GOLDMAN: YOUR HONOR, JUST IN THE
 20 INTEREST OF TIME FOR THESE BACKGROUND QUESTIONS, MAY I
 21 ASK FOR PERMISSION TO LEAD?
 22 THE COURT: YOU CAN GO AHEAD, AND IF YOU
 23 ARE GOING TO OBJECT -- AT A POINT YOU FEEL IT IS
 24 OBJECTIONABLE, YOU'RE GOING TO GET UP AND TELL ME.
 25 MS. KADE: THANK YOU, YOUR HONOR.

1 BY MR. GOLDMAN:
2 Q. AT THE UNIVERSITY OF PENNSYLVANIA MEDICAL SCHOOL
3 AND HOSPITAL, DO YOU WORK AS A DOCTOR?
4 A. YES.
5 Q. DO YOU ALSO WORK AS A PROFESSOR?
6 A. I DO.
7 Q. DO YOU ALSO DO CLINICAL RESEARCH?
8 A. I DO.
9 Q. DO YOU ALSO PUBLISH ARTICLES AND SPEAK?
10 A. I DO.
11 Q. GENERALLY SPEAKING, WHAT KIND OF DOCTOR ARE YOU?
12 WHAT DO YOU DO FOR YOUR PATIENTS?
13 A. I SEE PATIENTS WHO COME FOR THE EVALUATION OF
14 INFERTILITY, SO HAVING DIFFICULTY ACHIEVING A PREGNANCY.
15 IN THE REPRODUCTIVE ENDOCRINE COMPONENT OF WHAT I DO, I
16 SEE WOMEN WHO SUFFER FROM A VARIETY OF DISORDERS,
17 INCLUDING DISORDERS OF MENSTRUATION, CHRONIC PELVIC PAIN
18 AND OTHER REPRODUCTIVE DISORDERS THAT I TREAT.
19 Q. IN YOUR FERTILITY WORK, YOU ACTUALLY HELP WOMEN
20 HAVE BABIES?
21 A. THAT'S CORRECT.
22 Q. IN YOUR ROLE AS PROFESSOR, IS YOUR TITLE
23 ASSOCIATE PROFESSOR?
24 A. YES.
25 Q. AND ARE YOU TENURED?

1 A. YES, I AM.
2 Q. AND DO YOU TEACH AND RESEARCH AS PART OF THAT
3 ROLE AS PROFESSOR?
4 A. I DO.
5 Q. WHO DO YOU TEACH?
6 A. I TEACH MEDICAL STUDENTS, RESIDENTS IN
7 OBSTETRICS AND GYNECOLOGY, AND FELLOWS TRAINING IN
8 REPRODUCTIVE ENDOCRINOLOGY AND INFERTILITY.
9 Q. I WILL COME BACK TO YOUR MEDICAL PRACTICE WITH
10 PATIENTS, BUT YOUR PROFESSORIAL DUTIES, ROUGHLY HOW MANY
11 HOURS A WEEK DOES THAT TAKE?
12 A. APPROXIMATELY 5 TO 10 HOURS PER WEEK.
13 Q. MOVING ON TO YOUR WORK AS A CLINICAL RESEARCHER,
14 ROUGHLY HOW MANY HOURS A WEEK DOES THAT TAKE?
15 A. THERE IS OVERLAP WITH MY RESPONSIBILITIES AS AN
16 ASSOCIATE PROFESSOR, BUT I WOULD SAY APPROXIMATELY 5 TO
17 10 HOURS PER WEEK, WITH SOME OVERLAP BETWEEN THEM.
18 Q. SO THAT NUMBER INCLUDES THE OVERLAP, CORRECT?
19 A. CORRECT.
20 Q. HAS ANY OF YOUR RESEARCH BEEN FUNDED BY GRANTS?
21 A. YES.
22 Q. AND COULD YOU NAME A FEW OF THE GRANTS YOU HAVE
23 BEEN FUNDED BY?
24 A. I HAVE BEEN FUNDED BY THE NATIONAL INSTITUTES OF
25 HEALTH, THE NATIONAL INSTITUTES OF ENVIRONMENTAL HEALTH

1 SERVICES, AND OTHER FOUNDATIONS AND INTRAMURAL SOURCES
2 AT THE UNIVERSITY OF PENNSYLVANIA.
3 MR. GOLDMAN: YOUR HONOR, I'M GOING TO
4 SKIP OVER QUESTIONS ABOUT HER -- THE DOCTOR'S CURRENT
5 PROJECTS AND PUBLICATIONS, SINCE THEY ARE IN THE RECORD,
6 BUT I JUST WANTED TO POINT OUT THAT THEY ARE AVAILABLE.
7 BY MR. GOLDMAN:
8 Q. BUT I WOULD LIKE TO FOCUS ON YOUR WORK AS A
9 MEDICAL DOCTOR. ROUGHLY HOW MANY HOURS A WEEK DO YOU
10 WORK?
11 A. ROUGHLY 50 TO 70 HOURS PER WEEK IS THE RANGE.
12 Q. AND WHY IS THERE THAT RANGE?
13 A. THERE IS A RANGE THAT DEPENDS ON PROCEDURES THAT
14 I ALSO DO. I FAILED TO MENTION BEFORE THAT AS PART OF
15 MY WORK I ALSO DO SURGICAL PROCEDURES FOR WOMEN, AND I
16 ALSO TAKE CALL ON AN APPROXIMATELY MONTHLY BASIS. SO
17 THAT REQUIRES WORK AT NIGHTS AND ON THE WEEKENDS WHEN I
18 AM ON CALL.
19 Q. AND THAT 50 TO 70 HOURS A WEEK, THAT IS ON TOP
20 OF YOUR TEACHING AND RESEARCH?
21 A. CORRECT.
22 Q. DO YOU PRESCRIBE CONTRACEPTION WHEN YOU TREAT
23 YOUR PATIENTS?
24 A. I DO.
25 Q. AND ARE YOU FAMILIAR WITH THE AFFORDABLE CARE

1 ACT?
2 A. I AM.
3 Q. ARE YOU FAMILIAR WITH THE CONTRACEPTIVE MANDATE
4 THAT IS PART OF THE AFFORDABLE CARE ACT?
5 A. YES.
6 Q. ARE YOU FAMILIAR WITH THE NEW MORAL EXEMPTION
7 RULE AND RELIGIOUS EXEMPTION RULE --
8 A. I AM.
9 Q. -- WHICH ARE AT ISSUE BEFORE THE COURT TODAY?
10 MR. GOLDMAN: BEFORE I PROCEED FURTHER,
11 YOUR HONOR, I WOULD LIKE TO PROFFER THIS WITNESS, DR.
12 SAMANTHA BUTTS, BASED ON HER KNOWLEDGE, EDUCATION,
13 TRAINING AND EXPERIENCE, AS AN EXPERT IN THE AREA OF
14 WOMEN'S REPRODUCTIVE HEALTH.
15 THE COURT: ANY OBJECTION?
16 MS. KADE: YES, YOUR HONOR. WE OBJECT
17 FOR FAILURE TO DISCLOSE AS AN EXPERT AS WELL AS TO HER
18 EXPERT TESTIMONY TO THE EXTENT IT IS BEING OFFERED TO
19 DETERMINE THE CORRECTNESS OR WISDOM OF THE AGENCY'S
20 DECISION IN THIS ACA CASE, YOUR HONOR.
21 THE COURT: I UNDERSTAND.
22 IS THE SCOPE AS NARROW OR -- THAN
23 DESCRIBED BY MS. KADE OR IS IT --
24 MR. GOLDMAN: THE TESTIMONY WILL BE ABOUT
25 WHAT SHE HAS SEEN IN HER OWN PRACTICE AS IT APPLIES TO

1 WOMEN'S REPRODUCTIVE HEALTH.
 2 THE COURT: OKAY. SO SHE IS NOT GOING TO
 3 TESTIFY SPECIFICALLY ABOUT WHETHER OR NOT THE TWO
 4 EXEMPTIONS ARE APPROPRIATE?
 5 MR. GOLDMAN: NO.
 6 THE COURT: OKAY. SO THAT IS ONE OF YOUR
 7 OBJECTIONS, CORRECT?
 8 MS. KADE: YES, YOUR HONOR.
 9 THE COURT: AND THE OTHER ONE I OVERRULE.
 10 MS. KADE: THANK YOU, YOUR HONOR.
 11 THE COURT: GO AHEAD.
 12 BY MR. GOLDMAN:
 13 Q. RETURNING TO YOUR PATIENT WORK, DOCTOR, WHERE DO
 14 YOU -- WHERE DO YOUR PATIENTS COME FROM?
 15 A. MY PATIENTS -- I HAVE A DIVERSE PATIENT
 16 POPULATION. THEY COME FROM MANY SOURCES. MANY ARE
 17 SELF-REFERRED. SOME ARE REFERRED FROM OTHER PHYSICIANS
 18 IN THE HEALTH SYSTEM AND SOME ARE EMPLOYEES IN THE
 19 UNIVERSITY OF PENNSYLVANIA -- AT THE UNIVERSITY OF
 20 PENNSYLVANIA, BUT THEY COME FROM MANY SOURCES.
 21 Q. DO PATIENTS COME TO SEE YOU FROM AROUND THE
 22 WORLD?
 23 A. YES.
 24 Q. DO YOU ALSO SERVE AS A WEST PHILADELPHIA
 25 COMMUNITY HOSPITAL DOCTOR?

1 A. I DO.
 2 Q. AND YOU ALSO HAVE PATIENTS WHO ARE STUDENTS AND
 3 PROFESSORS AT PENN, CORRECT?
 4 A. YES.
 5 Q. ROUGHLY HOW MANY PATIENTS DO YOU SEE A YEAR?
 6 A. APPROXIMATELY 1500 PATIENTS PER YEAR, AND THERE
 7 CAN BE SOME VARIATION WHERE THAT IS CONCERNED.
 8 Q. ARE THOSE INDIVIDUAL PATIENTS OR PATIENT VISITS?
 9 A. WHEN I CALCULATE BOTH INDIVIDUAL PATIENTS THAT I
 10 SEE FROM A VARIETY OF SOURCES IN MY OWN PATIENT
 11 PRACTICE, WORKING IN OUR GROUP INFERTILITY PRACTICE,
 12 TAKING CALL AND DOING SURGICAL PROCEDURES, THAT NUMBER
 13 REPRESENTS INDIVIDUAL PATIENTS.
 14 Q. AND DOES THAT NUMBER INCLUDE THE SURGERIES THAT
 15 YOU PERFORM?
 16 A. IT DOES.
 17 Q. IT DOES. AND DOES IT INCLUDE PATIENTS YOU WOULD
 18 SEE WHEN YOU WERE ON CALL?
 19 A. IT DOES.
 20 Q. AND DOES IT INCLUDE PATIENTS YOU WOULD SEE IN
 21 CONNECTION WITH YOUR TEACHING OF RESIDENTS AND FELLOWS?
 22 A. IT DOES.
 23 Q. HAVE YOU KEPT UP THIS PACE OF SEEING PATIENTS
 24 OVER THE MORE THAN 12 YEARS YOU HAVE BEEN SEEING
 25 PATIENTS?

1 A. GENERALLY, WITH SOME VARIATION FROM
 2 YEAR TO YEAR, YES.
 3 Q. I WOULD LIKE TO ASK YOU A LITTLE BIT MORE ABOUT
 4 YOUR SPECIFIC MEDICAL PRACTICE. YOU MENTIONED THAT YOU
 5 TREAT WOMEN FOR DISORDERS OF MENSTRUATION, CHRONIC
 6 PELVIC PAIN AND PREMATURE OVARIAN FAILURE; IS THAT
 7 CORRECT?
 8 A. THAT IS CORRECT.
 9 Q. CAN YOU DESCRIBE BRIEFLY WHAT IS A DISORDER OF
 10 MENSTRUATION?
 11 A. THE DISORDERS OF MENSTRUATION THAT I SEE INCLUDE
 12 MENSTRUATION THAT IS EXCESSIVELY HEAVY, EXCESSIVELY
 13 FREQUENT OR IRREGULAR IN FREQUENCY. AND SO THIS CAN
 14 SIGNIFICANTLY IMPACT QUALITY OF LIFE, AND TO THE EXTENT
 15 AND THE DEGREE OF THE CHRONICITY OF THE CONDITION CAN
 16 SIGNIFICANTLY IMPACT HEALTH OUTCOMES, RISKS AND SEVERE
 17 CONDITIONS FOR A WOMAN, AND IMPACT HER ABILITY TO BE A
 18 PRODUCTIVE MEMBER OF THE WORKFORCE IF SHE IS IMPAIRED IN
 19 HER ABILITY TO DO THAT BECAUSE SHE NEEDS TO ATTEND TO
 20 THE SERIOUS MEDICAL DISORDER.
 21 Q. FORGIVE ME, DOCTOR, I WOULD BE LYING IF I TOLD
 22 YOU I HAD FIRSTHAND KNOWLEDGE OF WHAT THIS MEANS. AND
 23 YOU ARE USING WORDS LIKE CHRONICITY.
 24 CAN YOU TELL ME IN PRACTICAL TERMS HOW
 25 THESE DISORDERS AFFECT WOMEN? WHAT DOES IT MEAN FOR

1 THEM IF YOU HAVE A MENSTRUATION DISORDER?
 2 A. SO WHAT IT MEANS IS THAT A WOMAN HAS A MENSTRUAL
 3 PERIOD THAT IS SIGNIFICANTLY MORE LONG IN DURATION OR
 4 HEAVIER IN VOLUME THAN WE CONSIDER TO BE NORMAL, AND
 5 THIS CAN OBVIOUSLY BE INCREDIBLY JARRING AND UPSETTING
 6 FOR A PATIENT AND CREATE AN IMPACT ON QUALITY OF LIFE.
 7 BUT TO THE EXTENT THAT THAT PROBLEM LASTS
 8 FOR A SIGNIFICANT AMOUNT OF TIME, IT CAN LEAD TO CHRONIC
 9 PROBLEMS, ONE OF THE MOST SEVERE OF WHICH IS MODERATE TO
 10 SEVERE ANEMIA, WHICH CAN ALSO LEAD TO SIGNIFICANT
 11 PROBLEMS FOR A PATIENT. IN THE MOST SEVERE CASE, SEVERE
 12 ANEMIA CAN REQUIRE A PATIENT TO NEED TO BE HOSPITALIZED
 13 AND RECEIVE A BLOOD TRANSFUSION.
 14 Q. HAVE YOU EVER HAD TO PERFORM A BLOOD TRANSFUSION
 15 ON A PATIENT WITH MENSTRUATION DISORDER?
 16 A. YES.
 17 Q. AND ROUGHLY HOW MANY TIMES IN YOUR CAREER --
 18 A. IN MY CAREER, I WOULD SAY AT LEAST 50 TIMES.
 19 Q. AND DOES THIS SORT OF THING CAUSE WOMEN TO LOSE
 20 WORK?
 21 A. YES.
 22 Q. SORRY, HAVE TO MISS WORK?
 23 A. YES.
 24 Q. CAN IT AFFECT THEIR JOBS?
 25 A. YES.

1 Q. TURNING TO THE DISORDERS OF CHRONIC PELVIC PAIN,
2 ROUGHLY HOW MANY WOMEN FACE THIS TYPE OF DISORDER?
3 A. SO IT'S BEEN SUGGESTED THAT UP TO 10 PERCENT OF
4 PATIENT VISITS TO THE GYNECOLOGIST HAVE TO DO WITH
5 CHRONIC PELVIC PAIN. THERE ARE A NUMBER OF CAUSES OF
6 CHRONIC PELVIC PAIN, BUT IT IS SOMETHING THAT I SEE
7 COMMONLY IN MY PRACTICE BECAUSE IT'S SOMETHING THAT IS
8 REFERRED TO ME ON A REGULAR BASIS.
9 Q. AND IS THAT THE SAME AS ENDOMETRIOSIS?
10 A. ENDOMETRIOSIS IS A COMMON CAUSE OF CHRONIC
11 PELVIC PAIN AND SEVERE PAIN WITH PERIODS. THEY ARE VERY
12 SIMILAR THINGS.
13 Q. ARE THERE TYPES OF CHRONIC PELVIC PAIN THAT ARE
14 NOT CAUSED BY ENDOMETRIOSIS?
15 A. THERE ARE SOME, AND WE SEE THOSE NOT UNCOMMONLY
16 AS WELL, BUT ENDOMETRIOSIS IS ONE OF THE MOST COMMON.
17 Q. IN PLAIN LANGUAGE, HOW DOES CHRONIC PELVIC PAIN
18 AFFECT THE REAL LIVES OF WOMEN WHO SUFFER FROM THAT
19 DISORDER?
20 A. SO I SEE PATIENTS WHO HAVE SEVERE DEBILITATING
21 PELVIC PAIN, EITHER WITH THEIR PERIODS OR OUTSIDE OF
22 THEIR PERIODS. WHEN PATIENTS COME TO SEE ME, IT'S
23 USUALLY DEBILITATING TO THE POINT THAT OVER-THE-COUNTER
24 MEDICATIONS HAVE NOT HELPED THEM AND THEY ARE LOOKING
25 FOR ADDITIONAL LEVELS OF ASSESSMENT AND CARE. SO THESE

1 ARE WOMEN WHO SOMETIMES CANNOT GO TO WORK AND CANNOT
2 FUNCTION ALONG THEIR ACTIVITIES OF DAILY LIVING BECAUSE
3 THEY ARE DEBILITATED BY PAIN AND SOMETIMES CAN'T GET OUT
4 OF BED.
5 Q. I'M GOING TO RETURN TO YOUR TREATMENT OF THESE
6 DISORDERS, BUT I WANTED TO FIRST ASK YOU ABOUT THE
7 DISORDER OF PREMATURE OVARIAN FAILURE. WHAT IS THAT?
8 A. IT'S A DISORDER WHERE THERE IS PREMATURE
9 DEPLETION OF NORMAL OVARIAN FUNCTIONING RESULTING IN
10 SIGNIFICANTLY DECREASED PRODUCTION OF NORMAL FEMALE
11 HORMONES THAT THE OVARIES ARE SUPPOSED TO PRODUCE, AND
12 SIGNIFICANTLY DECREASED ODDS OF BECOMING PREGNANT.
13 Q. IS THAT LIKE EARLY MENOPAUSE?
14 A. IT'S A SIMILAR CONDITION, YES.
15 Q. AND IF THERE IS AN AGE, ROUGHLY HOW OLD ARE YOUR
16 PATIENTS WHO SUFFER FROM PREMATURE OVARIAN FAILURE?
17 A. THE STRICT DEFINITION MEANS THAT THE ONSET OF
18 SYMPTOMS ARE HAPPENING BEFORE THE AGE OF 40. I SEE
19 PATIENTS WHO SUFFER FROM THIS DISEASE ANYWHERE FROM
20 THEIR 20S, 30S AND UP TO THE AGE OF 40.
21 Q. AND ROUGHLY HOW COMMON IS PREMATURE OVARIAN
22 FAILURE?
23 A. IT AFFECTS APPROXIMATELY ONE PERCENT OF WOMEN.
24 Q. SO IT'S ONE OUT OF A HUNDRED WOMEN?
25 A. CORRECT.

1 Q. AND IS THAT ONE OUT OF A HUNDRED WOMEN IN
2 PENNSYLVANIA OR IN THE COUNTRY OR --
3 A. THAT IS A NATIONAL PREVALENCE.
4 Q. AND AM I CORRECT THAT WITH THAT DISORDER,
5 WOMEN'S OVARIES DON'T PRODUCE ESTROGEN?
6 A. THAT'S CORRECT.
7 Q. CAN THEY STILL GET PREGNANT?
8 A. THEY HAVE A DIMINISHED ODDS OF BECOMING PREGNANT
9 BUT THEY CAN STILL ACHIEVE A PREGNANCY IN SOME CASES.
10 Q. WHAT HAPPENS TO WOMEN WHOSE OVARIES DO NOT
11 PRODUCE ESTROGEN?
12 A. SO IF A WOMAN IS DIAGNOSED WITH THIS DISEASE IN
13 HER 20S, FOR INSTANCE, AND WE KNOW THAT THE AVERAGE AGE
14 OF NATURAL MENOPAUSE WHEN THESE CHANGES ARE SUPPOSED TO
15 HAPPEN IS 51 YEARS OLD, THAT MEANS THAT SHE CAN STAND TO
16 EXPERIENCE 30 YEARS OF HER ADULT LIFE WITHOUT ONE OF THE
17 MOST CRITICAL HORMONES THAT HER BODY PRODUCES.
18 SO THE SHORT-TERM CONSEQUENCES OF THAT
19 ARE SIGNIFICANT IMPAIRMENT OF QUALITY OF LIFE; HOT
20 FLASHES, NIGHT SWEATS AND SYMPTOMS OF LOW ESTROGEN.
21 SOME OF THE MORE SERIOUS LONG-TERM CONSEQUENCES INCLUDE
22 INCREASED RISK OF CARDIOVASCULAR DISEASE. WHEN WOMEN
23 ARE PREMATURELY DEPRIVED OF ESTROGEN, INCREASED RISK OF
24 BONE LOSS AND HIP FRACTURE. AND THOSE ARE TWO OF THE
25 MOST COMMON SERIOUS CONSEQUENCES THAT WE SEE.

1 Q. CAN WOMEN WHO SUFFER FROM LOSS OF ESTROGEN DIE
2 FROM THAT?
3 A. WELL, I WOULD ARGUE THAT SINCE HEART DISEASE AND
4 HEART ATTACK IS THE NUMBER ONE KILLER OF WOMEN AND ALL
5 AMERICANS, ANYTHING THAT PUTS YOU AT GREATER RISK OF
6 EXPERIENCING THAT INCREASES YOUR RISK OF DEATH.
7 Q. IN ADDITION TO THOSE THREE CATEGORIES OF
8 DISORDERS, YOU ALSO TREAT INFERTILITY, CORRECT?
9 A. YES.
10 Q. I THINK WE ALL KNOW GENERALLY WHAT THAT IS, NOT
11 TO YOUR DEGREE OF KNOWLEDGE, BUT I WOULD JUST LIKE TO
12 INCLUDE THAT IN THE CONVERSATION.
13 SO HOW DO YOU TREAT YOUR PATIENTS WITH
14 THOSE THREE DISORDERS AND THE PATIENTS SUFFERING FROM
15 INFERTILITY?
16 A. SO FOR THE PATIENTS WE DESCRIBED, THE THREE
17 DISORDERS OF ABNORMAL MENSTRUATION, CHRONIC PELVIC PAIN,
18 SEVERE PAIN WITH PERIODS AND PREMATURE OVARIAN FAILURE,
19 THERE ARE INDICATIONS FOR ALL THREE OF THOSE TO
20 INCORPORATE HORMONAL CONTRACEPTION TO MANAGE THOSE
21 DISORDERS AND TO MITIGATE SOME OF THE ASSOCIATED RISKS
22 THAT WE TALKED ABOUT THAT ARE ASSOCIATED WITH THEM.
23 Q. WHEN YOU SAY HORMONAL CONTRACEPTION, DOES THAT
24 MEAN THE BIRTH CONTROL PILL OR CAN THAT ALSO REFER TO
25 IUD'S?

1 A. IT REFERS TO BOTH.
 2 Q. AND DO YOU ALSO USE CONTRACEPTIVES ON PATIENTS
 3 WHO SUFFER FROM INFERTILITY?
 4 A. WE INTEGRATE HORMONAL CONTRACEPTION TO HELP WITH
 5 THE PROTOCOLS THAT ARE BUILT INTO THE TREATMENTS THAT WE
 6 OFFER. IT HELPS MANAGE THE CYCLES THAT WE BUILD FOR
 7 PATIENTS WHEN WE ARE DOING TREATMENTS LIKE IN VITRO
 8 FERTILIZATION, FOR INSTANCE.
 9 Q. I FEEL LIKE I'M A LITTLE BIT IN A SCIENCE CLASS.
 10 IT'S OKAY, IT'S BEEN A WHILE, BUT I'M GETTING THERE.
 11 WHEN YOU TREAT WOMEN WITH -- WHO ARE
 12 SUFFERING FROM INFERTILITY WITH CONTRACEPTIVES, TO ME
 13 THAT SEEMS COUNTERINTUITIVE.
 14 A. WE USE THE MEDICATIONS TO ACHIEVE SEVERAL THINGS
 15 WITH THE INFERTILITY TREATMENTS THAT WE HAVE TO OFFER.
 16 IN A CERTAIN POPULATION OF WOMEN, IT HELPS CREATE A
 17 SAFER PROCESS FOR THE PATIENT, SO BIRTH CONTROL PILLS,
 18 WE TAKE ADVANTAGE OF SOME OF THEIR NONCONTRACEPTIVE
 19 BENEFITS TO HELP PERFORM INFERTILITY TREATMENTS IN A WAY
 20 THAT IS -- ENHANCES THE SAFETY AND EFFICACY OF THOSE
 21 TREATMENTS OVERALL.
 22 IT HELPS US WITH THE TIMING OF INITIATING
 23 THOSE TREATMENTS AS WELL. IT CAN ALSO HELP IN CERTAIN
 24 WOMEN WHO HAVE ENDOMETRIOSIS, WHICH IS ONE OF THE
 25 CONDITIONS I MENTIONED. IT CAN HELP THOSE WOMEN WITH

1 CONTROLLING SOME OF THEIR SYMPTOMS PRIOR TO TREATMENT
 2 AND MAY IN SOME WOMEN INCREASE THE LIKELIHOOD THAT THOSE
 3 TREATMENTS WILL WORK FOR THEM.
 4 Q. SO WHEN YOU PRESCRIBE CONTRACEPTIVES TO THESE
 5 CATEGORIES OF YOUR PATIENTS, FOR SOME PATIENTS DO YOU
 6 PRESCRIBE THEM PURELY TO PREVENT PREGNANCY?
 7 A. YES.
 8 Q. AND IN OTHERS, DO YOU PRESCRIBE THEM NOT AT ALL
 9 TO PREVENT PREGNANCY?
 10 A. THAT IS CORRECT.
 11 Q. THAT MIGHT BE, FOR EXAMPLE, SOMEONE WHO IS
 12 POSTMENOPAUSAL BUT HAS CHRONIC PELVIC PAIN?
 13 A. SOMETHING LIKE THAT, YES.
 14 Q. AND ARE THERE TIMES WHEN YOU PRESCRIBE
 15 CONTRACEPTION FOR BOTH PURPOSES, TO PREVENT PREGNANCY
 16 BUT ALSO FOR NONPREGNANCY-PREVENTION PURPOSES?
 17 A. YES.
 18 Q. GENERALLY SPEAKING, WHAT TYPES OF CONTRACEPTIVES
 19 DO YOU PRESCRIBE TO YOUR PATIENTS?
 20 A. THE CONTRACEPTIVES THAT I USE MOST REGULARLY
 21 INCLUDE THE ORAL CONTRACEPTIVE PILL AND THE MIRENA
 22 INTRAUTERINE DEVICE.
 23 Q. I WOULD LIKE TO ASK YOU ABOUT YOUR EXPERIENCE IN
 24 PRESCRIBING CONTRACEPTIVES TO YOUR PATIENTS.
 25 DO YOU HAVE EXPERIENCE PRESCRIBING

1 CONTRACEPTIVES TO YOUR PATIENTS BEFORE THE AFFORDABLE
 2 CARE ACT AND ITS CONTRACEPTIVE MANDATE WERE THE LAW?
 3 A. YES.
 4 Q. HAVE YOU ALSO PRESCRIBED CONTRACEPTIVES TO
 5 PATIENTS SINCE THE AFFORDABLE CARE ACT AND ITS
 6 CONTRACEPTIVE MANDATE BECAME THE LAW?
 7 A. YES.
 8 Q. SO YOU HAVE EXPERIENCE IN BOTH WORLDS, PRE-ACA
 9 AND POST?
 10 A. YES, I DO.
 11 Q. HAVE YOU SEEN ANY DIFFERENCES IN YOUR PRACTICE
 12 OF PRESCRIBING CONTRACEPTIVES TO PATIENTS DURING THESE
 13 TWO TIME PERIODS?
 14 A. I HAVE EXPERIENCED THAT, YES.
 15 Q. AND CAN YOU DESCRIBE FIRST, WHAT IT WAS LIKE
 16 PRESCRIBING CONTRACEPTIVES BEFORE THE CONTRACEPTIVE
 17 MANDATE WAS IN PLACE?
 18 A. SO PRIOR TO THE MANDATE, THERE WAS FAR LESS
 19 CERTAINTY ABOUT PATIENT ABILITY TO ACCESS SOME OF THESE
 20 TREATMENTS FOR THE STATED PURPOSES WE DISCUSSED, DUE TO
 21 CONCERN ABOUT AFFORDABILITY AND COVERAGE AND WHETHER
 22 PATIENTS WOULD BE ABLE TO GET ACCESS ON THAT BASIS.
 23 Q. SO AM I CORRECT THAT AS A DOCTOR, YOU WOULD
 24 ACCESS THE PATIENTS' NEEDS --
 25 A. YES.

1 Q. -- MEDICAL NEEDS, AND THEN YOU WOULD PRESCRIBE
 2 THE BEST MEDICATION FOR THEM AND THEIR CONDITION; IS
 3 THAT RIGHT?
 4 A. THAT'S CORRECT.
 5 MS. KADE: OBJECTION, LEADING.
 6 THE COURT: SUSTAINED. ASK THE QUESTION
 7 AGAIN.
 8 BY MR. GOLDMAN:
 9 Q. HOW WOULD YOU -- HOW DO YOU CHOOSE WHICH KIND OF
 10 PRESCRIPTION TO PRESCRIBE TO PATIENTS?
 11 A. SO I PERFORM A THOROUGH AND COMPREHENSIVE
 12 EVALUATION OF THE PATIENT'S SYMPTOMS AND THE
 13 UNDERPINNINGS FOR THEIR CONDITION. I CONSIDER THE
 14 INDIVIDUAL CHARACTERISTICS OF THE PATIENT IN TERMS OF
 15 PRIOR ASSESSMENTS, PRIOR TREATMENTS, WHAT HAS WORKED,
 16 WHAT HAS NOT WORKED, AND ANY SPECIFIC RISK THEY MAY HAVE
 17 FOR ANY MEDICAL TREATMENT THAT I MAY OFFER.
 18 AND I INDIVIDUALIZE THE CARE FOR THEIR
 19 PARTICULAR UNIQUE SET OF DIAGNOSES AND NEEDS, MAKING THE
 20 BEST DECISION THAT I CAN IN CONSULTATION WITH THE
 21 PATIENT.
 22 Q. PRE-ACA, ONCE YOU DO YOUR ANALYSIS AND YOU MAKE
 23 YOUR PRESCRIPTION OF THE BEST MEDICATION FOR A PATIENT,
 24 WERE PATIENTS ALWAYS FILLING IT?
 25 A. NOT ALWAYS.

1 Q. WERE THERE TIMES WHEN THEY WOULD COME BACK TO
2 YOU AND ASK YOU FOR A DIFFERENT PRESCRIPTION OR NO
3 PRESCRIPTION?

4 MS. KADE: OBJECTION, LEADING.

5 THE COURT: SUSTAINED. REASK THE
6 QUESTION IN A NONLEADING WAY.
7 BY MR. GOLDMAN:

8 Q. WHEN PATIENTS WOULD NOT FILL THE PRESCRIPTION
9 YOU GAVE THEM, WHAT WOULD HAPPEN?

10 A. WE WOULD -- I WOULD TRY TO GET AN UNDERSTANDING
11 OF THE LACK OF COMPLIANCE FROM MY PERSPECTIVE OF NOT
12 TAKING OR FILLING THE PRESCRIPTION, AND IN GETTING TO
13 THE BOTTOM OF THIS, FOR MANY PATIENTS IT HAD TO DO WITH
14 SIGNIFICANT COSTS AND INAFFORDABILITY OF THOSE
15 TREATMENTS.

16 Q. AND DID THAT REASONING TAKE PLACE WHEN YOU
17 PRESCRIBED ORAL BIRTH CONTROL PILLS?

18 A. IN SOME CASES, YES.

19 Q. CAN YOU ESTIMATE ROUGHLY WHAT PERCENTAGE OF YOUR
20 PATIENTS WOULD REFUSE A PRESCRIPTION FOR ORAL BIRTH
21 CONTROL PILLS PRE-ACA?

22 A. IN MY EXPERIENCE DURING THAT TIME, MY ESTIMATE
23 WOULD BE ROUGHLY 10 TO 20 PERCENT OF PATIENTS WOULD HAVE
24 A FINANCIAL BARRIER TO THOSE TYPES OF PRESCRIPTIONS.

25 Q. AND HOW ABOUT WHEN YOU WOULD PRESCRIBE AFTER

1 YOUR ANALYSIS IUD'S, WHAT WAS THE PERCENTAGE OF YOUR
2 PATIENTS WHO WOULD REJECT THAT PRESCRIPTION?

3 A. IT WAS APPROXIMATELY AT LEAST 30 PERCENT.

4 Q. IS THAT BECAUSE IUDS ARE MORE EXPENSIVE THAN
5 BIRTH CONTROL PILLS?

6 A. IT HAS TO DO WITH THE COSTS, TOTAL COSTS AROUND
7 THE IUD DEVICE AND THE INSERTION, WHICH HAS A
8 SIGNIFICANT ONE-TIME UP-FRONT COST WHICH, WHEN COMPARED
9 TO THE INTERVAL COST OF THE BIRTH CONTROL PILL, IS
10 SIGNIFICANTLY GREATER. BUT BECAUSE THE IUD THAT I
11 PRESCRIBE REGULARLY, THE MIRENA, LASTS FOR FIVE YEARS,
12 WHEN YOU EXTEND THAT ONE-TIME COST OVER FIVE YEARS, IT
13 ACTUALLY ENDS UP BECOMING LESS EXPENSIVE, ESPECIALLY IF
14 YOU COMPARE IT TO SOME PREPARATIONS WHERE THERE IS A
15 MONTHLY COST THAT, OVER TIME, CAN BE SIGNIFICANTLY
16 ADDITIVE.

17 Q. SO I WOULD LIKE TO DIG INTO THAT JUST A LITTLE
18 BIT MORE.

19 YOU SAID THAT A MIRENA LASTS FIVE YEARS?

20 A. YES.

21 Q. AND WHAT IS THE UP-FRONT COST?

22 A. ALL FEES, THE DEVICE AND THE INSERTION, CAN BE
23 ANYWHERE FROM ABOUT 800 TO \$1,000.

24 Q. AND AFTER THE DEVICE IS PURCHASED AND INSERTED
25 FOR 800 TO \$1,000, ARE THERE ANY FURTHER COSTS OVER THE

1 FIVE-YEAR LIFE OF THE MIRENA IUD?

2 A. IF THE PATIENT HAS NO ISSUES AND DECIDES TO KEEP
3 THE DEVICE IN PLACE FOR FIVE YEARS, THERE ARE NO
4 ADDITIONAL COSTS.

5 Q. BY CONTRAST, THE ORAL BIRTH CONTROL PILL, YOU
6 HAD SAID THAT IS A MONTHLY PRESCRIPTION?

7 A. YES.

8 Q. ROUGHLY HOW MUCH DOES THAT COST?

9 A. IT DEPENDS, OBVIOUSLY, ON THE PREPARATION. YOU
10 KNOW, THERE ARE SOME PATIENTS WHO CAN PAY ON AVERAGE \$30
11 PER MONTH OR MORE FOR A MONTHLY PRESCRIPTION. SO YOU
12 CAN SEE HOW OVER TIME THE NUMBERS CAN CHANGE.

13 Q. SO ROUGHLY -- \$30 A MONTH IS ROUGHLY, ROUGHLY
14 \$360 A YEAR?

15 A. YES.

16 Q. AND THEN OVER FIVE YEARS, WHICH IS THE TERM OF
17 THE MIRENA IUD, IT WOULD COST ROUGHLY FIVE TIMES THAT?

18 A. YES.

19 Q. AND THAT IS ROUGHLY \$1,800, IS THAT CORRECT?

20 A. YES.

21 Q. SO WHICH OF THOSE DEVICES IS MORE EFFECTIVE, OR
22 PRESCRIPTION IS MORE EFFECTIVE?

23 A. THE INTRAUTERINE DEVICE IS A MORE EFFECTIVE
24 CONTRACEPTIVE AND CAN BE MORE EFFECTIVE IN TERMS OF
25 MANAGING HEAVY MENSTRUAL PERIODS FOR SOME WOMEN COMPARED

1 HEAD TO HEAD TO THE BIRTH CONTROL PILL.

2 Q. AM I CORRECT THEN TO UNDERSTAND YOU CORRECTLY
3 THAT BECAUSE OF THE COST, WOMEN END UP PAYING MORE MONEY
4 FOR LESS GOOD CARE?

5 A. THAT IS POTENTIALLY THE CASES FOR SOME WOMEN,
6 YES.

7 MR. GOLDMAN: COURT'S INDULGENCE, YOUR
8 HONOR.

9 (PAUSE.)

10 BY MR. GOLDMAN:

11 Q. WHEN YOU -- STRIKE THAT.

12 SO ALL THAT WAS BEFORE THE ACA. AFTER
13 THE ACA AND THE CONTRACEPTIVE MANDATE WENT INTO EFFECT,
14 DID ANYTHING CHANGE?

15 A. YES. SIGNIFICANT NOTABLE CHANGE IN MY OWN
16 PRACTICE I CAN SPEAK TO WITH THE MOST AUTHORITY IN
17 ACCESS TO THE IUD BASED ON AFFORDABILITY OF THE IUD.

18 Q. AFTER THE ACA, HOW OFTEN DID YOUR PATIENTS PUSH
19 BACK ON YOUR PRESCRIPTIONS TO THEM?

20 A. FOR BOTH FORMS OR FOR EITHER?

21 Q. EITHER.

22 A. OKAY. FAR LESS. I CAN, YOU KNOW, TRY TO GIVE
23 YOU A NUMBER IN TERMS OF THE ESTIMATE, BUT I'M VERY
24 HARD-PRESSED TO THINK OF A PATIENT THAT I HAVE MANAGED
25 IN RECENT MEMORY FOR WHOM I HAVE RECOMMENDED A MIRENA

1 IUD WHO HAS HAD DIFFICULTY ACQUIRING IT.
 2 Q. LET ME MAKE SURE I UNDERSTAND THAT. SINCE THE
 3 ACA WENT INTO EFFECT, YOU CANNOT THINK OF A SINGLE
 4 PATIENT WHO HAS REJECTED YOUR PRESCRIPTION OF A MIRENA
 5 IUD?
 6 A. I CAN'T THINK OF ONE THAT EASILY COMES TO
 7 MEMORY.
 8 Q. AND BEFORE THE ACA, ROUGHLY 30 PERCENT WERE
 9 REJECTING THE MIRENA?
 10 A. YES.
 11 Q. DO YOU TREAT PATIENTS FOR WHOM IT IS DANGEROUS
 12 TO GET PREGNANT?
 13 A. I DO.
 14 Q. WHAT HAPPENS TO THEM IF THEY GET PREGNANT
 15 ANYWAY?
 16 A. WELL, THERE ARE A VARIETY OF DISORDERS FOR WHICH
 17 PREGNANCY CAN BE INCREDIBLY COMPLICATED IF YOU GO INTO
 18 PREGNANCY WITH THOSE DISORDERS. THEY CAN BECOME MORE
 19 SEVERE AND POTENTIALLY LIFE-THREATENING TO A WOMAN WHO
 20 BECOMES PREGNANT IF SHE CARRIES THAT DISORDER INTO
 21 PREGNANCY.
 22 Q. I WOULD LIKE TO TURN YOUR ATTENTION TO THE
 23 RULES, AND THEY ARE -- I DON'T THINK WE HAVE TO GO
 24 THROUGH THEM SPECIFICALLY, BUT IF YOU'D LIKE TO LOOK AT
 25 THEM, THEY ARE IN YOUR EXHIBIT BINDER. THE RELIGIOUS

1 EXEMPTION RULE IS MARKED AS EXHIBIT 1 AND THE MORAL
 2 EXEMPTION RULE I BELIEVE IS EXHIBIT 2.
 3 ARE YOU GENERALLY FAMILIAR WITH THESE NEW
 4 RULES THAT ARE AT ISSUE IN THIS PROCEEDING?
 5 A. YES.
 6 Q. AND I KNOW IT'S A LONG DOCUMENT, BUT HAVE YOU
 7 READ THE RELIGIOUS EXEMPTION RULE?
 8 A. I HAVE.
 9 Q. AND DO YOU BELIEVE YOU UNDERSTAND THAT RULE
 10 INSOFAR AS IT WOULD AFFECT PATIENTS LIKE THE ONES YOU
 11 TREAT IN PENNSYLVANIA?
 12 A. I BELIEVE I DO.
 13 Q. AND THE MORAL EXEMPTION RULE IS SIMILARLY LONG,
 14 BUT HAVE YOU READ IT?
 15 A. YES.
 16 Q. DO YOU BELIEVE YOU UNDERSTAND IT AND CAN
 17 UNDERSTAND THE IMPACT IT MIGHT HAVE ON THE PATIENTS YOU
 18 TREAT?
 19 A. I DO.
 20 Q. IN YOUR CAPACITY AS AN EXPERT IN WOMEN'S
 21 REPRODUCTIVE HEALTH, DO YOU HAVE AN OPINION TO A
 22 REASONABLE DEGREE OF CERTAINTY AS TO WHETHER THESE SAME
 23 RULES WOULD AFFECT THE REPRODUCTIVE HEALTH OF WOMEN IN
 24 PENNSYLVANIA.
 25 MS. KADE: OBJECTION, YOUR HONOR. THIS

1 GOES BEYOND THE SCOPE OF HER EXPERTISE. WE ARE NOW
 2 GETTING INTO STATISTICS.
 3 THE COURT: THAT WAS THE BASIS OF YOUR
 4 OBJECTION, ESSENTIALLY. THE OBJECTION THAT YOU LODGED
 5 AT BEGINNING INCORPORATES, I THINK, THE OBJECTION YOU
 6 ARE MAKING NOW.
 7 MS. KADE: WELL, MY CURRENT OBJECTION IS
 8 TO HIS CURRENT QUESTION AND WHAT HE IS ASKING FOR, WHICH
 9 IS A STATISTICAL QUESTION ASKING FOR A STATISTICAL
 10 ANSWER, AND SHE HAS NOT BEEN QUALIFIED AS THAT TYPE OF
 11 AN EXPERT, YOUR HONOR.
 12 THE COURT: SUSTAINED.
 13 MR. GOLDMAN: IF I MAY RESPOND TO THAT,
 14 YOUR HONOR, I DON'T ACTUALLY THINK THAT IS WHAT I'M
 15 ASKING FOR.
 16 THE COURT: THAT IS -- OKAY. SO WHY
 17 DON'T YOU ASK THE QUESTION AGAIN SO THAT WE CAN MAKE
 18 SURE IT IS NOT WHAT YOU --
 19 MR. GOLDMAN: SURE.
 20 BY MR. GOLDMAN:
 21 Q. YOU'VE TESTIFIED BASED ON YOUR EXPERIENCE THAT
 22 BEFORE THE AFFORDABLE CARE ACT WOMEN WERE NOT UNIFORMLY
 23 ACCEPTING YOUR PRESCRIPTION CARE, CORRECT?
 24 A. CORRECT.
 25 Q. AND THEN YOU ALSO TESTIFIED THAT AFTER THE

1 AFFORDABLE CARE ACT, THAT YOU CAN'T RECALL A SINGLE
 2 PATIENT WHO HAS REFUSED A PRESCRIPTION FOR AN IUD,
 3 CORRECT?
 4 A. BASED ON -- BASED ON AFFORDABILITY ISSUES, YES.
 5 Q. AND I BELIEVE YOU TESTIFIED THAT THE BASIS FOR
 6 THE CHANGES THAT -- POST-ACA CONTRACEPTIVE MANDATE, YOUR
 7 PATIENTS HAVE COVERAGE SO THEY DON'T HAVE TO PAY OUT OF
 8 POCKET FOR THESE PRESCRIPTIONS, CORRECT?
 9 A. YES.
 10 Q. UNDER THE RULES AS YOU UNDERSTAND THEM, DO YOU
 11 BELIEVE THE RULES WILL CHANGE THE NUMBER OF WOMEN IN
 12 PENNSYLVANIA WHO HAVE CONTRACEPTIVE CARE COVERAGE?
 13 MS. KADE: OBJECTION, YOUR HONOR. AGAIN,
 14 SINCE SHE HAS NO PERSONAL KNOWLEDGE OF ANY OF HER
 15 PATIENTS THAT ARE AFFECTED BY THE NEW RULES, THIS IS
 16 ASKING FOR STATISTICAL PREDICTION.
 17 THE COURT: IF YOU CAN ANSWER THE
 18 QUESTION WITHOUT A STATISTICAL PREDICTION, YOU ARE FREE
 19 TO ANSWER.
 20 THE WITNESS: I CAN ANSWER THIS QUESTION
 21 SPEAKING TO MY EXPERIENCE OVER 12 YEARS OF PRACTICING
 22 WOMEN'S HEALTH IN MY CURRENT POSITION AND MY EXPERIENCE
 23 OF MORE DIFFICULT ACCESS AND UTILIZATION PRIOR TO THE
 24 MANDATE, AND MY SENSE THAT ANY THREAT TO ACCESS BASED ON
 25 RULES SUCH AS THESE MAY CHALLENGE THAT ACCESS AGAIN IN

1 WAYS THAT I PERSONALLY HAVE EXPERIENCE WITH IN MY
 2 PATIENT POPULATION.
 3 BY MR. GOLDMAN:
 4 Q. SO BASED ON THAT EXPERIENCE THAT YOU DESCRIBED,
 5 DO YOU HAVE AN OPINION AS TO THE RULES WHICH ALLOW MORE
 6 EXEMPTIONS TO THE MANDATORY COVERAGE, WHAT EFFECT THEY
 7 WOULD HAVE ON WOMEN IN PENNSYLVANIA?
 8 MS. KADE: SAME OBJECTION, YOUR HONOR.
 9 TO THE EXTENT THAT SHE IS BEING ASKED TO PROVIDE HER
 10 SENSE OF WHAT MIGHT HAPPEN NOT BASED ON ANY ACTUAL WOMEN
 11 IN PENNSYLVANIA THAT SHE KNOWS ABOUT, IS OUTSIDE THE
 12 SCOPE OF HER EXPERTISE.
 13 THE COURT: OVERRULED.
 14 YOU CAN ANSWER.
 15 THE WITNESS: SO I JUST WANT TO MAKE SURE
 16 I UNDERSTAND THE QUESTION ONE MORE TIME. SPEAK TO THE
 17 CONSEQUENCES OF THE EXEMPTIONS?
 18 BY MR. GOLDMAN:
 19 Q. SURE. THE RULES WHICH CREATE EXEMPTIONS TO
 20 CARE, WHAT EFFECT IF ANY DO YOU BELIEVE THEY WILL HAVE
 21 ON WOMEN IN PENNSYLVANIA?
 22 A. MY SENSE IS THAT IT WILL MAKE AN IMPACT
 23 NEGATIVELY ON THE ABILITY OF WOMEN TO ACCESS THESE
 24 TREATMENTS, AND IN SO DOING LIMIT OUR ABILITY TO TREAT
 25 THE TYPES OF DISORDERS THAT I HAVE DISCUSSED WHICH

1 WILL -- COULD INCREASE PAIN AND SUFFERING FOR WOMEN WHO
 2 HAVE THOSE DISORDERS, WORSENING OF SOME OF THE SERIOUS
 3 MEDICAL CONSEQUENCES OF THOSE DISORDERS, AND RESULT IN
 4 UNINTENDED PREGNANCIES IN GENERAL. AND TO THE EXTENT
 5 THAT SOME OF THOSE UNINTENDED PREGNANCIES ARE IN WOMEN
 6 WITH VERY SERIOUS MEDICAL DISORDERS FOR WHOM PREGNANCY
 7 MAY BE CONTRA -- EXCUSE ME, PREGNANCY MAY BE RELATIVELY
 8 OR ABSOLUTELY CONTRAINDICATED, THAT CAN INCREASE RISKS
 9 IN A LIFE-THREATENING WAY FOR SOME WOMEN.
 10 Q. PATIENTS MAY DIE?
 11 A. YES.
 12 Q. DOES THAT OPINION HOLD, IF YOU HAVE ONE, FOR
 13 WOMEN OUTSIDE OF PENNSYLVANIA AS WELL BECAUSE OF THE
 14 RULES?
 15 MS. KADE: YOUR HONOR, WE ARE SO FAR
 16 OUTSIDE THIS WITNESS' EXPERTISE, WE CONTINUE TO OBJECT
 17 TO THIS LINE OF QUESTIONING.
 18 THE COURT: SUSTAINED.
 19 MR. GOLDMAN: NOTHING FURTHER.
 20 THE COURT: YOUR WITNESS.
 21 MS. KADE: THANK YOU, YOUR HONOR.
 22 CROSS-EXAMINATION
 23 BY MS. KADE:
 24 Q. GOOD MORNING, DR. BUTTS.
 25 A. GOOD MORNING.

1 Q. MY NAME IS ELIZABETH KADE.
 2 A. HELLO.
 3 Q. FIRST, WHAT DOCUMENTS DID YOU REVIEW IN ORDER TO
 4 PREPARE YOUR DECLARATION?
 5 A. TO PREPARE THE DECLARATION I REVIEWED MY OWN
 6 CURRICULUM VITAE. THAT WAS THE PRIMARY DOCUMENT THAT I
 7 REVIEWED AND -- PRIMARILY, YES.
 8 Q. WAS THERE ANYTHING ELSE YOU CAN REMEMBER RIGHT
 9 NOW?
 10 A. OFF THE TOP OF MY HEAD, NO OTHER DOCUMENTS.
 11 Q. WHO DID YOU MEET WITH IN ORDER TO PREPARE YOUR
 12 DECLARATION?
 13 A. I MET WITH COUNSEL SITTING BEFORE ME FROM THE
 14 ATTORNEY GENERAL'S OFFICE TO DISCUSS PROCESS AND THE
 15 DECLARATION.
 16 Q. ANYBODY ELSE?
 17 A. NO.
 18 Q. TURNING TO YOUR DECLARATION, YOU HAVE TESTIFIED
 19 IN PARAGRAPH 53 OF YOUR DECLARATION THAT --
 20 THE COURT: CAN YOU JUST TELL ME WHAT TAB
 21 THAT IS AGAIN?
 22 MS. KADE: SURE, I BELIEVE IT IS TAB 8.
 23 THE COURT: I SEE IT. 8, YES.
 24 BY MS. KADE:
 25 Q. I'M AT PARAGRAPH 53, WHICH IS PAGE 9 OF 35 AT

1 THE TOP, IF THAT IS HELPFUL, AND PAGE 8 AT THE BOTTOM?
 2 A. OKAY.
 3 Q. SO YOU HAVE TESTIFIED THAT AS A RESULT OF THE
 4 RULES, SOME WOMEN WILL LOSE COVERAGE, INSURANCE
 5 COVERAGE, FOR PREVENTIVE CONTRACEPTIVE CARE, CORRECT?
 6 A. YES.
 7 Q. DO YOU KNOW HOW MANY RELIGIOUS EMPLOYERS ARE
 8 CURRENTLY PROTECTED BY INJUNCTION?
 9 A. I DO NOT.
 10 Q. DO YOU KNOW THAT THOSE EMPLOYERS THAT HAVE
 11 INJUNCTIONS ARE NOT CURRENTLY PROVIDING CONTRACEPTIVE
 12 COVERAGE?
 13 A. I DO NOT.
 14 Q. ARE YOU AWARE OF THE 2016 ZUBIK INJUNCTION?
 15 A. I'M NOT AWARE OF THAT INJUNCTION.
 16 Q. DO YOU KNOW THAT ENTITIES PROTECTED BY THAT
 17 INJUNCTION ARE NOT CURRENTLY PROVIDING CONTRACEPTIVE
 18 COVERAGE THEN?
 19 A. AGAIN, NOT FAMILIAR WITH THAT CASE.
 20 Q. DO YOU KNOW THAT THERE WERE EXEMPTIONS TO THE
 21 MANDATE BEFORE THE NEW RULE WENT INTO EFFECT?
 22 A. CAN YOU REPHRASE THAT QUESTION?
 23 Q. ARE YOU AWARE THAT EVEN BEFORE THE NEW RULES
 24 WENT INTO EFFECT, CERTAIN EMPLOYERS WERE NOT REQUIRED TO
 25 PROVIDE CONTRACEPTIVE COVERAGE PURSUANT TO THE MANDATE

1 BECAUSE THEY FELL UNDER ANY ONE OF A NUMBER OF
 2 EXEMPTIONS, LIKE THEY WERE A GRANDFATHERED PLAN, THEY
 3 WERE A CHURCH PLAN, SOMETHING LIKE THAT?
 4 A. I AM AWARE OF THAT PHENOMENON TO AN EXTENT.
 5 Q. NONE OF YOUR PATIENTS HAS HAD TO ASK FOR A
 6 CHEAPER FORM OF CONTRACEPTION SINCE THE MANDATE WENT
 7 INTO EFFECT?
 8 A. I'M NOT SURE THAT THAT IS WHAT I TESTIFIED.
 9 MY TESTIMONY WAS THAT SINCE THE MANDATE
 10 WENT INTO EFFECT, THERE HAS BEEN OVERALL MUCH BROADENED
 11 ACCESS AND FAR LESS PUSHBACK AGAINST ACCESSING THESE
 12 TREATMENTS BASED PURELY ON AFFORDABILITY.
 13 Q. SO SOME OF YOUR PATIENTS HAVE STILL ASKED FOR A
 14 CHEAPER FORM OF CONTRACEPTION SINCE THE MANDATE WENT
 15 INTO EFFECT?
 16 A. I CAN RECALL SOME, BASED ON SOME OF THE
 17 INDIVIDUAL VARIATION IN COVERAGE IN TERMS OF GENERIC
 18 FORMS OF THE BIRTH CONTROL PILL OR VERSUS BRAND NAMES,
 19 BUT IN GENERAL AND ON BALANCE, THIS HAS BEEN FAR LESS OF
 20 A PROBLEM POST MANDATE THAN PRE MANDATE.
 21 Q. SO POST MANDATE, IN A POST MANDATE WORLD, WERE
 22 ANY OF THE PATIENTS THAT YOU HAD THAT WERE PUSHING BACK
 23 ON COST CONCERNS, WERE ANY OF THEM CONCERNED ABOUT THIS
 24 BECAUSE OF A DIFFERENCE IN CONTRACEPTIVE COVERAGE FROM
 25 THEIR INSURANCE BECAUSE OF AN EXEMPTION?

1 A. I DON'T THINK WE HAD THAT LEVEL OF CONVERSATION,
 2 AND I CAN'T -- I COULD NOT SPEAK TO THAT SPECIFICALLY.
 3 Q. SO YOU ALSO WOULD NOT KNOW IF ANY OF THEM WERE
 4 CONCERNED BECAUSE THEIR EMPLOYER WAS SUBJECT TO AN
 5 INJUNCTION?
 6 A. I HAVE -- I DO NOT KNOW.
 7 Q. DR. BUTTS, CAN YOU IDENTIFY A SINGLE WOMAN IN
 8 PENNSYLVANIA WHO HAS LOST CONTRACEPTIVE COVERAGE AS A
 9 RESULT OF THE NEW RULES?
 10 A. AS A RESULT OF THE NEW RULES. I CANNOT IDENTIFY
 11 A SPECIFIC INDIVIDUAL PERSON AT THIS MOMENT.
 12 Q. AND CAN YOU IDENTIFY A SINGLE WOMAN IN THE
 13 UNITED STATES WHO HAS LOST COVERAGE AS A RESULT OF THE
 14 NEW RULES?
 15 A. NOT AT THIS MOMENT, NO.
 16 Q. SO JUST LOOKING BACK AT YOUR DECLARATION,
 17 LOOKING AT PARAGRAPH 54 OF YOUR DECLARATION, YOU CANNOT
 18 IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHOSE COST OF
 19 CONTRACEPTIVE CARE WILL RISE AS A RESULT OF THE RULES,
 20 RIGHT?
 21 A. NOT A SPECIFIC INDIVIDUAL PERSON AT THIS
 22 MOVEMENT IN TIME, NO.
 23 Q. AND LOOKING AT PARAGRAPH 55, YOU CANNOT IDENTIFY
 24 A SINGLE WOMAN IN PENNSYLVANIA WHO WILL HAVE THIS
 25 BARRIER TO WOMEN'S ACCESS TO AND USE OF THE

1 CONTRACEPTIVE THAT IS MEDICALLY RECOMMENDED FOR THEM?
 2 A. WELL, I CAN'T IDENTIFY AT THIS MOMENT, BUT I
 3 THINK CERTAINLY A CONCERN AS A PROVIDER IS THE
 4 POTENTIALLY EXPANDING NATURE OF THESE BARRIERS. SO THE
 5 REASON THAT I CAN'T IDENTIFY SOMEBODY TODAY DOES NOT
 6 MEAN THAT IT MAY NOT BE APPLICABLE TO FUTURE PATIENTS.
 7 Q. BUT AGAIN, SITTING HERE TODAY, YOU CAN'T
 8 IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS LOST
 9 COVERAGE AS A RESULT OF THE NEW RULES, RIGHT?
 10 A. NOT AT THIS MOMENT.
 11 Q. AND SO ALL OF THE HARMS THAT YOU DESCRIBE IN
 12 PARAGRAPHS 54 THROUGH 58 OF YOUR DECLARATION, YOU CANNOT
 13 IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO WILL SUFFER
 14 THOSE HARMS, CORRECT?
 15 A. AS I SAID BEFORE --
 16 MR. GOLDMAN: OBJECTION, YOUR HONOR. THE
 17 QUESTION IS A QUESTION ABOUT WHETHER THE DOCTOR CAN
 18 IDENTIFY SOMETHING THAT HAS NOT HAPPENED YET. IT'S
 19 IMPOSSIBLE TO ANSWER.
 20 THE COURT: SUSTAINED.
 21 BY MS. KADE:
 22 Q. DR. BUTTS, FOR ALL OF THE HARMS THAT YOU LIST IN
 23 PARAGRAPHS 54 THROUGH 58, YOU CANNOT IDENTIFY A SINGLE
 24 WOMAN IN PENNSYLVANIA WHO HAS CURRENTLY SUFFERED ANY OF
 25 THOSE HARMS, CORRECT?

1 A. I'M JUST LOOKING AT THE DOCUMENT AS I CONSIDER
 2 MY ANSWER TO YOUR QUESTION.
 3 MR. GOLDMAN: OBJECTION, YOUR HONOR.
 4 SORRY IT'S LATE, BUT IT'S VAGUE BECAUSE IT'S NOT CLEAR
 5 IF COUNSEL IS ASKING AS A RESULT OF THE RULES OR IN
 6 GENERAL PEOPLE HAVE SUFFERED THOSE CONSEQUENCES.
 7 THE COURT: WELL, THE PROBLEM IS IT'S
 8 COMPOUND. IF ALL OF THE AREAS LISTED IN PARAGRAPH 53,
 9 54 THROUGH 58 -- THAT IS A LOT OF AREAS.
 10 MS. KADE: I'M HAPPY TO WALK THROUGH THEM
 11 INDIVIDUALLY, YOUR HONOR.
 12 THE COURT: GO AHEAD.
 13 MS. KADE: OKAY.
 14 BY MS. KADE:
 15 Q. OKAY. SO LOOKING AT PARAGRAPH 54, YOU CAN'T
 16 IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHOSE COSTS FOR
 17 CONTRACEPTIVE CARE HAS RISEN, CORRECT?
 18 MR. GOLDMAN: OBJECTION. AGAIN, HAS
 19 RISEN AT ALL OR AS A RESULT OF ANYTHING ELSE?
 20 MS. KADE: AS A RESULT OF THE NEW RULES,
 21 CORRECT?
 22 THE WITNESS: NO.
 23 BY MS. KADE:
 24 Q. AND IN PARAGRAPH 55, YOU CANNOT IDENTIFY A
 25 SINGLE WOMAN IN PENNSYLVANIA WHO HAS HAD A BARRIER TO

1 WOMEN'S ACCESS TO AND USE OF CONTRACEPTIVES THAT IS
 2 MEDICALLY RECOMMENDED FOR THEM AS A RESULT OF THE NEW
 3 RULES, CORRECT?
 4 A. NO.
 5 Q. AND IN PARAGRAPH 56, YOU CANNOT IDENTIFY A
 6 SINGLE WOMAN IN PENNSYLVANIA WHO HAS FACED FINANCIAL
 7 HARM OR HAS FACED MEDICAL HARM AS A RESULT OF THE NEW
 8 RULES, CORRECT?
 9 A. NO.
 10 Q. AND IN PARAGRAPH 57, YOU CAN'T IDENTIFY A SINGLE
 11 WOMAN IN PENNSYLVANIA WHO HAS HAD DISRUPTIONS OF THEIR
 12 MEDICAL TREATMENT AS A RESULT OF THE NEW RULES, CORRECT?
 13 A. CORRECT.
 14 Q. AND IN PARAGRAPH 58, YOU CANNOT IDENTIFY A
 15 SINGLE WOMAN IN PENNSYLVANIA WHO HAS FACED UNINTENDED
 16 PREGNANCY AND OTHER ADVERSE MEDICAL CONSEQUENCES AS A
 17 RESULT OF THESE NEW RULES, CORRECT?
 18 A. CORRECT.
 19 Q. SO ZOOMING OUT A LITTLE BIT TO CONTRACEPTIVES IN
 20 GENERAL, CONTRACEPTIVES ARE USED BY BOTH MEN AND WOMEN,
 21 CORRECT?
 22 A. YES.
 23 Q. ARE YOU AWARE THAT SOME EMPLOYERS ONLY HAVE
 24 SINCERE RELIGIOUS OR MORAL OBJECTIONS TO JUST A SUBSET
 25 OF THE RANGE OF AVAILABLE BIRTH CONTROL METHODS?

1 MR. GOLDMAN: OBJECTION, YOUR HONOR. I
 2 DON'T KNOW HOW THE WITNESS WOULD KNOW WHETHER SOMEONE'S
 3 OBJECTION IS SINCERE OR NOT.
 4 THE COURT: SUSTAINED. SUSTAINED. IT'S
 5 ALSO BEYOND THE SCOPE.
 6 BY MS. KADE:
 7 Q. DR. BUTTS, THE COST OF PREGNANCIES THAT USE
 8 PRENATAL CARE, THOSE ARE TYPICALLY COVERED BY INSURANCE;
 9 IS THAT RIGHT?
 10 A. YES.
 11 Q. AND THAT COVERAGE DOES NOT VARY DEPENDING ON
 12 WHETHER IT IS AN INTENDED OR UNINTENDED PREGNANCY,
 13 RIGHT?
 14 A. WHETHER -- YOU ARE ASKING ME WHETHER INSURANCE
 15 COVERAGE VARIES WHETHER THE PERSON INTENDED OR DID NOT
 16 INTEND TO BECOME PREGNANT?
 17 Q. CORRECT.
 18 MR. GOLDMAN: JUDGE, IF I MAY OBJECT, I
 19 BELIEVE THIS IS BEYOND THE SCOPE OF THE DIRECT.
 20 THE COURT: SUSTAINED.
 21 MS. KADE: IT IS WITHIN THE SCOPE OF HER
 22 DECLARATION. SHE TALKS ABOUT THE COSTS OF UNINTENDED
 23 PREGNANCIES.
 24 THE COURT: WHERE IS -- POINT ME TO THAT.
 25 MS. KADE: PARAGRAPH 58: SOME OF THESE

1 WOMEN WILL FACE UNINTENDED PREGNANCY AND OTHER ADVERSE
 2 MEDICAL CONSEQUENCES, AND THE COST OF THESE UNINTENDED
 3 PREGNANCIES IS THE BASIS OF --
 4 THE COURT: WAIT, WAIT, STOP.
 5 MS. KADE: I APOLOGIZE.
 6 THE COURT: WHICH PARAGRAPH ARE YOU
 7 READING?
 8 MS. KADE: IN PARAGRAPH 58, DR. BUTTS
 9 SAYS: SOME OF THESE WOMEN WILL FACE UNINTENDED
 10 PREGNANCIES AND OTHER ADVERSE MEDICAL CONSEQUENCES.
 11 THE COURT: THAT IS ALL IT SAYS.
 12 MS. KADE: AND THE HARM THAT PLAINTIFFS
 13 ARE ALLEGING IN THEIR COMPLAINT IS -- THE COST OF
 14 UNINTENDED PREGNANCIES IS ONE OF THEIR ALLEGATIONS.
 15 THE COURT: YOUR QUESTION WAS ABOUT
 16 INSURANCE COVERAGE.
 17 MS. KADE: MY NEXT QUESTION IS GOING TO
 18 BE ABOUT THE COST OF COVERING UNINTENDED PREGNANCIES ARE
 19 COVERED BY AN EMPLOYEE'S HEALTH PLAN. SO IT WOULD NOT
 20 BE BORNE BY THE STATE, YOUR HONOR.
 21 MR. GOLDMAN: YOUR HONOR, THIS GOES FAR
 22 BEYOND THE DIRECT OR THE DECLARATION.
 23 THE COURT: SUSTAINED. MOVE ON.
 24 BY MS. KADE:
 25 Q. DR. BUTTS, HAVE YOU READ THE RULES THAT ARE AT

1 ISSUE IN THIS CASE IN THEIR ENTIRETY?
 2 A. I HAVE REVIEWED THE RULES, YES.
 3 Q. HAVE YOU READ ALL OF THE EVIDENCE THAT THE RULES
 4 RELY UPON?
 5 A. CAN YOU CLARIFY THAT QUESTION?
 6 Q. SO THE RULES CITE DIFFERENT EVIDENCE AND STUDIES
 7 THROUGHOUT THE RULES. HAVE YOU READ ALL OF THOSE
 8 STUDIES?
 9 A. NO.
 10 Q. AND YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS
 11 AN EXPERT ON INSURANCE MARKETPLACES, RIGHT?
 12 A. NO, I HAVE NOT.
 13 Q. AND YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS
 14 AN EXPERT ON THE GOVERNMENT'S DECISION-MAKING PROCESS
 15 UNDER THE ADMINISTRATIVE PROCEDURE ACT, RIGHT?
 16 A. NO, I HAVE NOT.
 17 Q. THANK YOU, DR. BUTTS.
 18 MS. KADE: THANK YOU, YOUR HONOR.
 19 THE WITNESS: THANK YOU.
 20 THE COURT: ANY REDIRECT?
 21 MR. GOLDMAN: YES, YOUR HONOR.
 22 REDIRECT EXAMINATION
 23 BY MR. GOLDMAN:
 24 Q. DR. BUTTS, IF -- SINCE THE RULES WENT INTO
 25 EXISTENCE, IF A PATIENT CAME TO YOU AND TOLD YOU THAT

1 THEY COULD NOT AFFORD THE PRESCRIPTION YOU GAVE THEM,
 2 WOULD YOU NECESSARILY KNOW THAT IT WAS BECAUSE THEY LOST
 3 COVERAGE UNDER THE RULES?
 4 A. I WOULD NOT NECESSARILY KNOW THAT WITHOUT A
 5 SIGNIFICANT INVESTIGATION INTO THE REASON FOR THE LOSS,
 6 WHICH USUALLY INVOLVES SOMEBODY WITH EXPERTISE IN
 7 BILLING AND COVERAGE TO HELP WITH THAT INVESTIGATION.
 8 Q. DO YOU KNOW IF A PATIENT WHO CAME TO YOU WOULD
 9 EVEN KNOW THAT THE REASON THEIR PRESCRIPTION ALL OF A
 10 SUDDEN HAD A CO-PAY WAS BECAUSE OF THESE NEW RULES?
 11 A. I'M NOT SURE THEY WOULD.
 12 Q. YOU AGREED WITH COUNSEL THAT CONTRACEPTIVES ARE
 13 USED FOR BOTH MEN AND WOMEN. ARE PRESCRIPTION
 14 CONTRACEPTIVES USED BY BOTH MEN AND WOMEN?
 15 A. NO. JUST WOMEN.
 16 Q. THE WOMEN WHO -- AGAIN, ONLY IF YOU KNOW, WHO
 17 CAME BACK TO YOU POST ACA, OR MAY HAVE, WHO HAD CONCERNS
 18 AND HAD TO REJECT THEIR PRESCRIPTIONS, DO YOU KNOW IF
 19 THOSE WOMEN WERE PRIVATELY INSURED?
 20 A. POST ACA OR --
 21 Q. YES.
 22 A. POST ACA WITH CONCERNS. I BELIEVE, AGAIN, TO
 23 THE BEST OF MY RECOLLECTION THAT MANY WERE.
 24 Q. DO YOU KNOW THE PERCENT OF WOMEN WHO SUFFER FROM
 25 UNINTENDED PREGNANCY IN PENNSYLVANIA?

1 A. I BELIEVE THAT NUMBER IS 53 PERCENT.
 2 Q. AND DO YOU KNOW IF THAT IS HIGHER OR LOWER THAN
 3 THE NATIONAL AVERAGE?
 4 A. ACCORDING TO DATA FROM THE GUTTMACHER INSTITUTE,
 5 WHICH IS A CLEARINGHOUSE FOR INFORMATION ABOUT
 6 REPRODUCTIVE HEALTH AND PREGNANCY, IT IS HIGHER, AS THE
 7 NUMBER IN THE UNITED STATES IS 45 PERCENT.
 8 Q. AND IS THAT INFORMATION AVAILABLE ON THE WEBSITE
 9 OF THE GUTTMACHER INSTITUTE?
 10 A. IT IS.
 11 Q. ONE OTHER LAST LINE OF QUESTIONING I JUST WANT
 12 TO CLARIFY.
 13 COUNSEL ASKED YOU WHAT YOU REVIEWED PRIOR
 14 TO YOUR TESTIMONY. IN ADDITION TO YOUR RÉSUMÉ, DID YOU
 15 ALSO REVIEW YOUR PATIENT RECORDS?
 16 A. I REVIEWED MY PATIENT RECORDS IN AN ATTEMPT TO
 17 GET AN UNDERSTANDING OF PRACTICE PATTERNS OVER TIME AND
 18 FLUCTUATIONS, BASED ON THE NATURE OF THIS CASE.
 19 Q. AND DID YOU LOOK AT THOSE PATIENT RECORDS FOR A
 20 TIME PERIOD BEFORE THE AFFORDABLE CARE ACT?
 21 A. I DID.
 22 Q. DID YOU ALSO LOOK AT THE RECORDS FOR AFTER THE
 23 AFFORDABLE CARE ACT?
 24 A. I DID.
 25 Q. DID YOU NOTICE ANY TRENDS WITH RESPECT TO WHAT

1 PRESCRIPTIONS PATIENTS WERE FILLING?
 2 A. SO THE DATA THAT I CAN SPEAK TO WITH THE MOST --
 3 IN THE MOST DEPTH WOULD PERTAIN TO THE MIRENA IUD. AND
 4 I CAN TELL YOU, IN MY OWN INDIVIDUAL PRACTICE, WHICH I
 5 THINK REFLECTS OTHERS, BUT I CERTAINLY CANNOT SPEAK TO
 6 ANYONE ELSE'S PRACTICE WITH AS MUCH ACCURACY AS MY OWN,
 7 IN MY OWN PRACTICE, PRIOR TO THE ACA AND AFTER, THERE
 8 HAS BEEN A FIVEFOLD INCREASE IN THE NUMBER OF MIRENA
 9 IUD'S I HAVE INSERTED INTO -- INSERTED IN PATIENTS IN MY
 10 PRACTICE. SO A SIGNIFICANTLY ELEVATED INCREASE OVER
 11 TIME.
 12 Q. SO PRE AND POST ACA, THE NUMBER OF PATIENTS WHO
 13 HAVE HAD A MIRENA IUD IMPLANTED INCREASED FIVE TIMES?
 14 A. YES, IN MY PRACTICE.
 15 Q. AND HAVE YOUR PRESCRIBING PRACTICES CHANGED
 16 SIGNIFICANTLY OVER THOSE YEARS?
 17 A. MY MANAGEMENT OF THE CONDITIONS FOR WHICH I
 18 UTILIZE THIS TREATMENT HAS NOT CHANGED, NOR HAS THE
 19 EVIDENCE SUPPORTING THE USE OF A MIRENA IUD FOR THESE
 20 TREATMENTS. THE BULK OF THE EVIDENCE SUPPORTING THIS AS
 21 AN EXCELLENT AND OUTSTANDING TREATMENT FOR CHRONIC
 22 PELVIC PAIN AND HAVING MENSTRUAL BLEEDING WAS WELL
 23 ESTABLISHED PRIOR TO THE MANDATE. SO MY PRACTICE
 24 APPROACH AND THE EVIDENCE WERE ESTABLISHED WELL BEFORE
 25 THE MANDATE.

1 Q. SO TO WHAT DO YOU ATTRIBUTE THIS FIVEFOLD
 2 INCREASE IN YOUR PATIENTS WHO ARE NOW USING MIRENA IUD'S
 3 MORE EFFECTIVE FORM OF BIRTH CONTROL SINCE THE ACA WENT
 4 INTO EFFECT?
 5 A. OF COURSE, IT CAN BE MULTIFACTORIAL. I THINK
 6 ONE OF THE FACTORS THAT WE HAVE TO CONSIDER AS
 7 INCREDIBLY INFLUENTIAL IS THE ACCESS GRANTED TO WOMEN TO
 8 UTILIZE THIS TREATMENT AS A BYPRODUCT OF THE MANDATE.
 9 Q. COST?
 10 A. YES. SIGNIFICANT REDUCTION, ELIMINATION OF
 11 COSTS SUCH THAT WOMEN CAN NOW GET ACCESS TO SOMETHING
 12 THAT I HAVE ALWAYS HAD IN MY MIND TO UTILIZE FOR THEIR
 13 CARE, JUST HAVE A GREATER ABILITY TO DO SO.
 14 Q. DO YOU KNOW IF THAT IS THE PRIMARY REASON FOR
 15 THE FIVEFOLD INCREASE, DO YOU KNOW?
 16 A. I MEAN, AGAIN, I THINK IT IS CERTAINLY
 17 MULTIFACTORIAL, BUT IN MY OPINION, BASED ON THE THINGS I
 18 MENTIONED ABOUT MY APPROACH TO CARE FOR THESE PATIENTS
 19 AND THE EVIDENCE, NOT SIGNIFICANTLY CHANGING SINCE THE
 20 MANDATE, I WOULD HAVE TO CONCEDE THAT THE MANDATE IS A
 21 PRIMARY DRIVING FORCE FOR THE FIVEFOLD INCREASED
 22 UTILIZATION OF MIRENA IUDS IN MY PRACTICE.
 23 MR. GOLDMAN: NOTHING FURTHER, YOUR
 24 HONOR.
 25 THE COURT: OKAY. ONE QUESTION, I HAVE

1 ONE QUESTION. WHAT PERCENTAGE OF YOUR PATIENTS ARE FROM
2 PENNSYLVANIA?

3 THE WITNESS: THE MAJORITY. IF I COULD
4 GIVE YOU A NUMBER, I WOULD SAY PROBABLY 80 PERCENT OR
5 MORE.

6 THE COURT: OKAY. THANK YOU, YOU CAN
7 LEAVE THE STAND.

8 THE WITNESS: THANK YOU.
9 (WITNESS EXCUSED.)

10 THE COURT: IT IS NOW 12:30, WHICH IS A
11 PERFECT TIME FOR LUNCH. WHAT WE WILL DO IS WE WILL HAVE
12 LUNCH BREAK FOR AN HOUR AND WE WILL BE BACK AT 1:30, AND
13 WHEN WE COME BACK, I UNDERSTAND THAT YOU HAVE BEEN DOING
14 THE RESEARCH ON THE GRANDFATHERING. I HAVE SEEN YOU
15 RUNNING AROUND.

16 MR. HEALY: APOLOGIZE FOR THE RUNNING
17 AROUND.

18 THE COURT: NOT A PROBLEM. I'M HAPPY TO
19 SEE THAT YOU'RE DOING IT. SO I WILL TALK TO YOU AFTER
20 THE THIRD AND FINAL WITNESS FROM THE COMMONWEALTH.
21 THANK YOU.

22 THE CLERK: ALL RISE.
23 (LUNCHEON BREAK TAKEN.)

24 MS. BOLAND: OUR NEXT WITNESS IS CYNTHIA
25 CHUANG.

1 MR. GOLDMAN: YOUR HONOR, IF I MAY
2 ADDRESS A QUICK PROCEDURAL MATTER WITH THE COURT. MAY I
3 APPROACH, YOUR HONOR?

4 THE COURT: YOU MAY.

5 MR. GOLDMAN: I HAVE A DOCUMENT THAT I
6 WOULD LIKE TO BE ABLE TO PASS UP TO YOUR HONOR. THIS IS
7 A DOCUMENT THAT IS CITED IN OUR COMPLAINT WITH A
8 HYPERLINK AT PARAGRAPH 99.

9 THE COURT: OKAY.

10 MR. GOLDMAN: SO THE COMMONWEALTH WOULD
11 LIKE TO MOVE THIS DOCUMENT INTO EVIDENCE ALONG WITH THE
12 ATTACHMENT WHICH IS PART OF THE ARTICLE. WE APPROACHED
13 THE GOVERNMENT DURING BREAK, AND I BELIEVE THEY WILL
14 STIPULATE TO THE AUTHENTICITY AND ADMISSIBILITY OF THE
15 ARTICLE, BUT NOT TO THE ATTACHMENT.

16 THE COURT: WHAT DO YOU THINK THE
17 ATTACHMENT IS?

18 MR. GOLDMAN: THE ARTICLE SAYS THAT IT IS
19 A LEAKED COPY OF THE RULES, THE DRAFT RULES THAT ARE
20 BEFORE US NOW.

21 THE COURT: SO LET ME -- LET'S ASSUME --
22 LET ME HEAR FROM YOU JUST ON THE
23 PROCEDURAL MATTER OF WHAT YOU'RE OBJECTING TO HERE. YOU
24 ARE OKAY WITH THE ARTICLE BUT NOT THE ATTACHMENT?

25 MS. KADE: THANK YOU, YOUR HONOR. YES.

1 THE ATTACHMENT, WE WERE JUST HANDED THIS, YOU KNOW,
2 125-PAGE DOCUMENT, SO WE ARE NOT ABLE TO STIPULATE AS TO
3 THE AUTHENTICITY OF IT AT THIS POINT, BUT WE ALSO ARE
4 NOT ABLE TO STIPULATE TO THE ADMISSIBILITY OF IT BECAUSE
5 IT'S CLEARLY LABELED CONFIDENTIAL DRAFT AND COVERED BY
6 PRIVILEGES. SO WE ARE NOT ABLE TO STIPULATE TO EITHER
7 THE AUTHENTICITY OR THE ADMISSIBILITY AT THIS POINT.

8 THE COURT: I ACCEPT THAT YOU ARE NOT
9 ABLE TO DO IT. I'M NOT SURE WHETHER YOU ARE RIGHT WITH
10 RESPECT TO THE CONFIDENTIALITY AND DRAFT, THAT COMPONENT
11 OF WHAT YOU JUST SAID.

12 SO WHAT IS THE POINT OF THIS IN THE
13 CONTEXT OF THIS PRELIMINARY INJUNCTION HEARING? I MEAN,
14 IT'S NOT THE REGULATIONS. I DON'T KNOW WHAT IT IS. AND
15 THEN THERE IS A VOX ARTICLE. SO HOW DOES IT PERTAIN TO
16 WHAT WE ARE DOING HERE?

17 MR. GOLDMAN: RIGHT. SO -- AND THIS IS
18 PART OF THE REASON WHY WE STATED IT IN OUR COMPLAINT, WE
19 CITED IT. SO THIS -- IT'S A PUBLIC DOCUMENT NOW, NO
20 MATTER WHAT IT SAYS ON IT. WE DIDN'T CHANGE IT. IT IS
21 EXACTLY WHAT WAS ATTACHED TO THE ARTICLE, BUT IT
22 PURPORTS TO BE A DRAFT OF THE REGULATIONS WHICH WAS
23 LEAKED. IT IS -- I HAVE NOT LINED IT UP AGAINST THE
24 ACTUAL FINAL REGULATIONS, BUT THEY ARE REMARKABLY
25 SIMILAR. AND SO IF YOU ARE LOOKING AT WHAT THE AGENCIES

1 WERE DOING IN TERMS OF RULE MAKING AND CONSIDERATION,
2 YOU CAN LOOK -- WELL, AT THIS MOMENT IN TIME, THIS IS
3 WHAT PURPORTS TO BE A DRAFT. LATER IN TIME, THERE IS
4 THESE -- THERE HAS BEEN NO -- THERE WERE NO DRAFT RULES
5 PUT FORTH FOR COMMENT, FOR NOTICE OR COMMENT. SO YOU
6 CAN LOOK AT WHAT CHANGES, IF ANY, TOOK PLACE BETWEEN
7 THIS POINT IN TIME, THE ARTICLE IS MAY 31, AND WHEN THE
8 RULES WERE ACTUALLY PROMULGATED.

9 THE COURT: THAT IS AN INTERESTING
10 EXERCISE, BUT I STILL DON'T UNDERSTAND WHY IT IS
11 RELEVANT HERE, BECAUSE YOUR POINT IS THAT THE NEW RULES
12 WERE ISSUED WITHOUT NOTICE AND COMMENT AND WITHOUT GOOD
13 CAUSE. SO HOW DOES -- HOW DOES THIS -- I MEAN, ASSUMING
14 THAT THIS IS A DRAFT VERSION OF THE RULES ISSUED SOME
15 MONTHS BEFORE THE FINAL VERSION WAS ISSUED, HOW DOES IT
16 IMPACT ON WHAT WE ARE DOING HERE TODAY, WHICH IS
17 DECIDING THE PRELIMINARY INJUNCTION MOTION?

18 MR. GOLDMAN: COURT'S INDULGENCE, YOUR
19 HONOR, JUST TO CLARIFY.

20 (PAUSE.)

21 MR. GOLDMAN: YES, SO THE BEARAK ARTICLE
22 FROM THE GUTTMACHER INSTITUTE WAS A FOOTNOTE TO THE
23 RULES IN THE IFRS, AND THE GOVERNMENT IS TAKING THE
24 POSITION THAT THE RULES HAVE RELIED HEAVILY ON THIS
25 ARTICLE, WHICH IS IN THE FOOTNOTE OF THE FINAL.

1 THE ISSUE HERE IS, IN THIS DRAFT, IT'S
 2 NOT IN HERE BUT THE RULES ARE THE SAME.
 3 THE COURT: OKAY. WELL, I DON'T THINK I
 4 CAN ADMIT THE ATTACHMENT BECAUSE WE DON'T KNOW WHERE IT
 5 CAME FROM, WE DON'T -- IT SAYS "DRAFT" ON IT. IT SAYS
 6 "DEPARTMENT OF THE TREASURY" BUT IT CERTAINLY DOES NOT
 7 LOOK LIKE THE FORM THE RULES USUALLY TAKE. I DON'T KNOW
 8 WHETHER ONCE THE DOCUMENT IS FINISHED IN THE AGENCY IT
 9 THEN GOES OFF TO SOME DEPARTMENT AND GETS TRANSFORMED
 10 INTO WHAT THE RULES USUALLY LOOK LIKE, SO I JUST DON'T
 11 KNOW WHAT IT IS. WE DON'T HAVE ANYONE HERE TO TELL US
 12 WHAT IT IS, SO I CAN'T ADMIT THAT.
 13 AND I THINK THAT THE GOVERNMENT HAS NOT
 14 OBJECTED TO THE ARTICLE BEING ADMITTED, CORRECT?
 15 MS. KADE: CORRECT, YOUR HONOR.
 16 THE COURT: I'M HAPPY TO ADMIT THE
 17 ARTICLE, BUT I HAVE TO TELL YOU, I DON'T THINK I'M GOING
 18 TO RELY ON IT BECAUSE IT'S A NEWSPAPER ARTICLE SAYING
 19 THINGS THAT I -- THERE IS JUST NO TESTIMONY TO DETERMINE
 20 WHETHER IT IS IN FACT THE CASE.
 21 MR. GOLDMAN: I UNDERSTAND. MAY I JUST
 22 TRY ONE OTHER LINE AND THEN --
 23 THE COURT: GO AHEAD.
 24 MR. GOLDMAN: AND THAT IS JUST THAT WE
 25 DON'T KNOW -- WE ARE NOT SAYING THAT THIS IS IN FACT A

1 DRAFT OF THE RULES AT THAT TIME. THIS IS JUST WHATEVER
 2 THE ARTICLE SAID.
 3 THE COURT: I UNDERSTAND. SO WE ARE JUST
 4 GOING TO -- WE WILL PUT IT IN THE RECORD IN THE LIMITED
 5 WAY THAT IT IS. WE WILL PUT IT IN THE RECORD, BUT I CAN
 6 TELL YOU NOW THAT I WON'T BE RELYING ON IT.
 7 MR. GOLDMAN: FAIR ENOUGH, YOUR HONOR.
 8 THE COURT: OKAY. YOUR NEXT WITNESS.
 9 MS. BOLAND: MAY I APPROACH?
 10 THE COURT: YOU MAY.
 11 MS. BOLAND: GOOD AFTERNOON, YOUR HONOR.
 12 IT'S NICOLE BOLAND AGAIN FROM THE COMMONWEALTH, AND WE
 13 CALL DR. CYNTHIA CHUANG.
 14 MS. KOPPLIN: YOUR HONOR, WE WOULD OBJECT
 15 TO THIS WITNESS AS CUMULATIVE.
 16 THE COURT: OKAY. HOLD ON A SEC AND LET
 17 ME -- BEFORE YOU DO, LET ME JUST HAVE HER SWORN.
 18 (CYNTHIA CHUANG, COMMONWEALTH'S WITNESS,
 19 SWORN.)
 20 THE CLERK: PLEASE STATE AND SPELL YOUR
 21 NAME FOR THE RECORD.
 22 THE WITNESS: CHUANG IS SPELLED
 23 C-H-U-A-N-G.
 24 THE COURT: OKAY. BEFORE I ADDRESS YOUR
 25 OBJECTION, GIVE ME IN A NUTSHELL WHAT YOU INTEND TO

1 ELICIT FROM THIS WITNESS.
 2 MS. BOLAND: SURE, YOUR HONOR.
 3 DR. CHUANG WAS ACTUALLY THE LEAD AUTHOR ON THE "MY NEW
 4 OPTIONS" STUDY THAT DR. WEISMAN PREVIOUSLY TESTIFIED
 5 ABOUT, SO SHE CAN OFFER ADDITIONAL INFORMATION ABOUT
 6 THAT STUDY. AND WE ALSO HAVE A DEMONSTRATIVE EXHIBIT
 7 REFLECTING THOSE FINDINGS.
 8 THE COURT: IS THE "MY NEW" STUDY THE
 9 PENNSYLVANIA STUDY THAT WEISMAN TALKED ABOUT?
 10 MS. BOLAND: YES.
 11 THE COURT: OKAY. THE ONE THAT IS NOT
 12 PUBLISHED YET.
 13 MS. BOLAND: CORRECT, YOUR HONOR. AND
 14 DR. CHUANG IS ACTUALLY THE LEAD, AND THERE'S A FEW
 15 POINTS TO CLARIFY WITH RESPECT TO THE PRIOR TESTIMONY.
 16 AND ALSO, DR. CHUANG IS A PRACTICING PHYSICIAN SO SHE
 17 HAS THE CLINICAL PERSPECTIVE THAT DR. WEISMAN DID NOT
 18 OFFER PREVIOUSLY.
 19 THE COURT: OKAY. DO YOU INTEND TO GO
 20 OVER ALL THE FACTS THAT YOU HAVE ALREADY GONE OVER WITH
 21 PROFESSOR WEISMAN?
 22 MS. BOLAND: REGARDING THE "MY NEW
 23 OPTIONS" STUDY?
 24 THE COURT: YES.
 25 MS. BOLAND: TO A SMALL DEGREE, JUST FOR

1 CLARIFICATION OF SOME DATES OF THE STUDY. SHE IS MORE
 2 PREPARED TO SPEAK TO MORE OF THE DETAILS OF THE STUDY.
 3 I WON'T GO IN DEPTH AND REPEAT EVERYTHING THAT
 4 DR. WEISMAN SAID, BUT JUST A VERY GENERAL OVERVIEW OF
 5 THE STUDY AND JUST TO CLARIFY THE TIME FRAMES OF THE
 6 STUDY FOR THE RECORD.
 7 THE COURT: OKAY. WHAT IS YOUR
 8 RATIONALE FOR --
 9 MS. KOPPLIN: YOUR HONOR, AS PLAINTIFFS'
 10 COUNSEL ALLUDES TO, THE TESTIMONY WOULD BE HIGHLY
 11 DUPLICATIVE OF WHAT PROFESSOR WEISMAN AND DR. BUTTS HAVE
 12 ALREADY TESTIFIED TO. BASED ON THE WITNESS'
 13 DECLARATION, SHE REACHES MANY OF THE SAME CONCLUSIONS
 14 AND RELIES ON MUCH OF THE SAME EVIDENCE.
 15 SPECIFICALLY I WOULD POINT YOU TOWARDS,
 16 IN THE THIRD CIRCUIT, ROBERT V STETSON SCHOOL INC.,
 17 THAT'S 256 F.3D 159, WHERE THE EXCLUSION OF AN EXPERT
 18 WAS UPHELD ON CUMULATIVE GROUNDS WHEN TWO OTHER EXPERTS
 19 HAD ALREADY TESTIFIED AT LENGTH ON THE SAME ISSUE.
 20 THE COURT: OKAY. I UNDERSTAND THAT
 21 PRECEDENT, BUT, YOU KNOW, THERE IS NO REASON WHY IT
 22 APPLIES HERE. AND WE ARE ALL HERE, WE ARE ALL FRIENDS
 23 HERE. YOU KNOW, WE MIGHT AS WELL JUST GO FOR IT. WE
 24 DON'T HAVE A JURY SO THEY CAN'T BE PREJUDICED BY WHAT WE
 25 ARE ABOUT TO HEAR. IT'S ONLY ME.

1 OKAY. GO AHEAD.
 2 MS. BOLAND: THANK YOU, YOUR HONOR.
 3 DIRECT EXAMINATION
 4 BY MS. BOLAND:
 5 Q. JUST A FEW HOUSEKEEPING MATTERS TO START OFF.
 6 DR. CHUANG, WILL YOU KINDLY REFER TO
 7 TAB 6 IN THE BINDER?
 8 A. YES.
 9 Q. CAN YOU IDENTIFY THAT DOCUMENT FOR THE COURT,
 10 PLEASE?
 11 A. YES, THAT IS MY DECLARATION.
 12 Q. WILL YOU JUST KINDLY FLIP THROUGH AND TELL US IF
 13 IT APPEARS TO BE COMPLETE AND ACCURATE?
 14 A. YES.
 15 Q. GREAT. I WOULD LIKE TO POINT YOU NOW TO TAB 7.
 16 WILL YOU KINDLY IDENTIFY THAT DOCUMENT FOR THE COURT?
 17 A. YES, THAT IS MY CV.
 18 Q. AND WILL YOU KINDLY JUST FLIP THROUGH AND
 19 CONFIRM THAT IT IS COMPLETE AND ACCURATE.
 20 A. YES.
 21 Q. GREAT. THANK YOU, DOCTOR.
 22 SO THE COURT HAS YOUR CV TO CONSIDER.
 23 I'M NOT GOING TO REVIEW EVERYTHING ON IT BUT I DO WANT
 24 TO HIGHLIGHT A FEW POINTS.
 25 TO START OFF, WHO'S YOUR EMPLOYER?

1 A. I WORK AT THE PENN STATE HERSHEY MEDICAL CENTER.
 2 Q. AND HOW ARE YOU EMPLOYED AT PENN STATE HERSHEY?
 3 A. I'M A PHYSICIAN THERE. I'M A GENERAL INTERNIST.
 4 I'M CHIEF OF THE DIVISION OF GENERAL INTERNAL MEDICINE
 5 AND I'M A PROFESSOR OF MEDICINE AND PUBLIC HEALTH
 6 SCIENCES.
 7 Q. SO YOU ARE A PRACTICING DOCTOR AND A PROFESSOR?
 8 A. CORRECT.
 9 Q. DO YOU ALSO CONDUCT RESEARCH?
 10 A. I DO.
 11 Q. ARE YOU FAMILIAR WITH THE CONTRACEPTIVE MANDATE?
 12 A. YES, I AM.
 13 Q. WHAT IS YOUR UNDERSTANDING OF THE CONTRACEPTIVE
 14 MANDATE?
 15 A. THE MANDATE SAYS THAT FOR MOST PRIVATELY INSURED
 16 WOMEN, THAT CONTRACEPTION -- FDA-APPROVED CONTRACEPTION
 17 WOULD BE COVERED WITH NO OUT-OF-POCKET COSTS.
 18 Q. AND HAVE YOU RESEARCHED THE CONTRACEPTIVE
 19 MANDATE AS PART OF YOUR WORK?
 20 A. YES, I HAVE.
 21 Q. AND BEFORE WE GET INTO THAT RESEARCH, JUST A
 22 COUPLE OF QUESTIONS ON YOUR BACKGROUND. WILL YOU JUST
 23 VERY BRIEFLY DESCRIBE YOUR EDUCATIONAL BACKGROUND FOR
 24 THE COURT?
 25 A. SURE. I COMPLETED MY UNDERGRADUATE TRAINING AT

1 THE UNIVERSITY OF MICHIGAN, WHERE I GRADUATED WITH
 2 HONORS. I THEN SPENT A YEAR LIVING IN NORTHERN
 3 CALIFORNIA WHERE I WORKED IN A FAMILY PLANNING CLINIC
 4 FOR A YEAR, PROVIDING REPRODUCTIVE HEALTHCARE SERVICES
 5 AT A FAMILY PLANNING CLINIC.
 6 I THEN STARTED MEDICAL SCHOOL AT NEW YORK
 7 UNIVERSITY, AND FOLLOWING MY MEDICAL DEGREE, I COMPLETED
 8 MY INTERNAL MEDICINE RESIDENCY TRAINING AT TEMPLE
 9 HOSPITAL HERE IN PHILADELPHIA AS WELL AS MY CHIEF
 10 RESIDENCY. THAT WAS IN 2001, AND THEN FOLLOWING THAT, I
 11 DID A GENERAL INTERNAL MEDICINE FELLOWSHIP AT BOSTON
 12 UNIVERSITY. I DID A GENERAL INTERNAL MEDICAL
 13 FELLOWSHIP, WHICH INCLUDED A MASTERS OF EPIDEMIOLOGY AS
 14 WELL AS A RESIDENCY IN PREVENTIVE MEDICINE.
 15 Q. DID YOU CONDUCT RESEARCH AS PART OF YOUR
 16 FELLOWSHIP?
 17 A. I DID. THE PRIMARY PURPOSE OF THE FELLOWSHIP
 18 WAS RESEARCH TRAINING, YES.
 19 Q. AND WHAT WAS THE FOCUS OF YOUR RESEARCH?
 20 A. I HAD ALREADY HAD A STRONG INTEREST IN WOMEN'S
 21 HEALTH AND REPRODUCTIVE HEALTHCARE. THE PRIMARY FOCUS
 22 OF MY RESEARCH THERE WAS EMERGENCY CONTRACEPTION.
 23 Q. THANK YOU, DOCTOR.
 24 I CAN SEE FROM YOUR RÉSUMÉ THAT YOU'VE
 25 AUTHORED NUMEROUS SCHOLARLY ARTICLES. DO YOU MIND

1 GIVING THE JUDGE JUST A BALLPARK IDEA OF HOW MANY
 2 SCHOLARLY ARTICLES YOU HAVE WRITTEN THROUGHOUT YOUR
 3 CAREER?
 4 A. I BELIEVE THERE'S 70 PUBLICATIONS RIGHT NOW.
 5 Q. HAVE YOU AUTHORED ANY PUBLICATIONS REGARDING
 6 CONTRACEPTION?
 7 A. YES, THAT'S -- PROBABLY THE MAJORITY OF THE
 8 PUBLICATIONS ARE ABOUT CONTRACEPTION.
 9 Q. AND CAN YOU JUST KINDLY GIVE SOME EXAMPLES OF
 10 SOME OF THE TOPICS THAT WOULD INCLUDE?
 11 A. YEAH, SURE. SO LIKE I SAID, WHEN I STARTED IN
 12 MY FELLOWSHIP TRAINING, THE BULK OF ARTICLES AROUND THAT
 13 TIME WERE ABOUT EMERGENCY CONTRACEPTION. FOLLOWING
 14 THAT, WHEN I CAME TO PENN STATE, MY FOCUS TURNED TOWARD
 15 UNINTENDED PREGNANCY AND CONTRACEPTIVE USE IN WOMEN WITH
 16 CHRONIC MEDICAL CONDITIONS.
 17 THERE IS ALSO SOME PUBLICATIONS ABOUT
 18 GESTATIONAL WEIGHT GAIN DURING PREGNANCY, AND THEN MORE
 19 RECENTLY, MY PUBLICATIONS ARE ABOUT CONTRACEPTIVE
 20 BEHAVIOR AND REPRODUCTIVE LIFE PLANNING AS A TOOL TO
 21 ASSIST WITH CONTRACEPTIVE DECISION-MAKING.
 22 Q. AND ARE SOME OF THOSE ARTICLES SPECIFICALLY
 23 ABOUT THE CONTRACEPTIVE MANDATE?
 24 A. SEVERAL OF THEM ARE IN THE CONTEXT OF THE
 25 CONTRACEPTIVE MANDATE, YES.

1 Q. AND ARE ALL THOSE PUBLICATIONS THE PRODUCT OF
 2 RESEARCH THAT YOU'VE PERSONALLY CONDUCTED?
 3 A. YES.
 4 Q. AND SEPARATE FROM THAT WORK, DO YOU ALSO SERVE
 5 AS A PEER REVIEWER FOR ARTICLES IN OTHER PUBLICATIONS?
 6 A. YES. I AM FREQUENTLY ASKED TO PEER REVIEW FOR
 7 JOURNALS. I'M ON THE EDITORIAL BOARD OF A JOURNAL
 8 CALLED WOMEN'S HEALTH ISSUES, SO I REVIEW FOR THEM
 9 REGULARLY. AND I'M ALSO FREQUENTLY ASKED BY OTHER
 10 JOURNALS TO REVIEW, USUALLY AROUND TOPICS RELATED TO
 11 WOMEN'S HEALTH OR PREVENTIVE HEALTHCARE.
 12 Q. I NOTICE FROM YOUR CV THAT YOU ARE AN
 13 INVESTIGATOR. AND WHAT DOES IT MEAN TO BE AN
 14 INVESTIGATOR?
 15 A. IT MEANS YOU ARE A RESEARCHER.
 16 Q. AND HOW ARE YOUR PROJECTS FUNDED WHEN YOU DO
 17 INVESTIGATIONS?
 18 A. SO RESEARCH CAN BE FUNDED IN ANY NUMBER OF WAYS.
 19 THEY CAN BE FUNDED THROUGH THE FEDERAL GOVERNMENT LIKE
 20 THROUGH THE NATIONAL INSTITUTES OF HEALTH OR THE CDC,
 21 FOR EXAMPLE. THERE'S ALSO SOME NONFEDERAL AGENCIES LIKE
 22 PCORI, WHICH IS THE PATIENT-CENTERED OUTCOMES RESEARCH
 23 INSTITUTE WHERE SOME OF MY WORK WAS BEEN FUNDED, AS WELL
 24 AS THE NIH. IT CAN BE FUNDED BY PRIVATE FOUNDATIONS.
 25 IT CAN BE FUNDED ALSO BY INSTITUTIONS, BUT SO --

1 ACADEMIC INSTITUTIONS.
 2 Q. ABOUT HOW MANY PROJECTS HAVE YOU BEEN INVOLVED
 3 IN AS AN INVESTIGATOR THROUGHOUT YOUR CAREER?
 4 A. I THINK ABOUT 20.
 5 Q. AND HAVE THOSE PROJECTS BEEN FUNDED BY GRANTS?
 6 A. YES, THOSE ARE ALL THE ONES THAT ARE FUNDED.
 7 Q. DO YOU HAVE ANY OFFICIAL ROLES AT HERSHEY WITH
 8 REGARD TO RESEARCH?
 9 A. LIKE I MENTIONED EARLIER, I'M THE CHIEF OF THE
 10 DIVISION OF GENERAL INTERNAL MEDICINE SO I OVERSEE ALL
 11 ASPECTS OF THE DIVISION, INCLUDING THE RESEARCH
 12 ACTIVITIES IN THE DIVISION.
 13 PRIOR TO BECOMING DIVISION CHIEF TWO
 14 YEARS AGO, I WAS THE ASSOCIATE DIRECTOR FOR RESEARCH FOR
 15 THE DIVISION. I'M ALSO THE RESEARCH DIRECTOR FOR THE
 16 PENN STATE BIRCWH PROGRAM. BIRCWH STANDS FOR BUILDING
 17 INTERDISCIPLINARY RESEARCH CAREERS IN WOMEN'S HEALTH,
 18 WHICH IS AN NIH-FUNDED PROGRAM TO HELP PROVIDE SUPPORT
 19 FOR JUNIOR INVESTIGATORS TRYING TO BUILD THEIR CAREERS
 20 IN WOMEN'S HEALTH RESEARCH.
 21 Q. HAVE ANY OF YOUR PROJECTS INVOLVED THE IMPACT OF
 22 THE CONTRACEPTIVE MANDATE?
 23 A. YES.
 24 Q. CAN YOU TELL US ABOUT A PROJECT TO THAT EFFECT?
 25 A. SURE. SO THE PROJECT THAT WAS REFERRED TO

1 EARLIER, THE "MY NEW OPTIONS" STUDY, IS A STUDY THAT WAS
 2 FUNDED BY PCORI, THE PATIENT-CENTERED OUTCOMES RESEARCH
 3 INSTITUTE. AND THE "MY NEW OPTIONS" STUDY WAS A
 4 TWO-YEAR STUDY WHERE WE LOOKED AT THE EFFECT OF
 5 WEB-BASED CONTRACEPTIVE INTERVENTIONS TO SEE IF THEY
 6 HELPED WOMEN WITH THEIR CONTRACEPTIVE DECISION-MAKING.
 7 Q. OKAY. WE WILL DISCUSS THAT PROJECT A LITTLE BIT
 8 MORE AT LENGTH IN A FEW MINUTES.
 9 I WANTED TO TURN NOW TO YOUR MEDICAL
 10 PRACTICE. IN ADDITION TO YOUR WORK AS A PROFESSOR, YOU
 11 TESTIFIED THAT YOU ALSO MAINTAIN AN ACTIVE MEDICAL
 12 PRACTICE; IS THAT RIGHT, DOCTOR?
 13 A. CORRECT.
 14 Q. WHERE IS YOUR PRACTICE LOCATED?
 15 A. I PRACTICE AT THE HERSHEY MEDICAL CENTER, AT THE
 16 INTERNAL MEDICINE EAST CLINIC, WHICH IS LOCATED AT 35
 17 HOPE DRIVE IN HERSHEY.
 18 Q. AND WHAT KIND OF PRACTICE DO YOU HAVE?
 19 A. IT'S AN INTERNAL MEDICINE PRACTICE, SO IT'S
 20 ADULT PRIMARY CARE. MY PRACTICE HAS MOSTLY WOMEN
 21 PATIENTS, AND SO ADULT WOMEN.
 22 Q. HOW LONG HAVE YOU BEEN PRACTICING MEDICINE?
 23 A. WELL, I GRADUATED FROM MEDICAL SCHOOL 20 YEARS
 24 AGO, SO 20 YEARS.
 25 Q. AND ARE CONTRACEPTIVES PART OF YOUR MEDICAL

1 PRACTICE?
 2 A. YES.
 3 Q. HOW SO?
 4 A. ANY TIME I HAVE A FEMALE PATIENT WHO'S OF
 5 REPRODUCTIVE AGE WHO'S CAPABLE OF PREGNANCY, IT'S A PART
 6 OF EVERY VISIT TO DISCUSS WHAT HER DESIRES ARE AROUND
 7 PREGNANCY OR -- EITHER ACHIEVING PREGNANCY OR AVOIDING
 8 PREGNANCY, AND SO OBVIOUSLY, CONTRACEPTION BECOMES AN
 9 IMPORTANT PART OF THAT CONVERSATION.
 10 Q. THANK YOU.
 11 MS. BOLAND: AT THIS TIME, YOUR HONOR, I
 12 WOULD LIKE TO OFFER DR. CHUANG AS AN EXPERT IN THE AREAS
 13 OF PREVENTATIVE MEDICAL CARE FOR WOMEN, INCLUDING
 14 CONTRACEPTIVE CARE.
 15 MS. KOPPLIN: WE WOULD OBJECT TO THAT,
 16 YOUR HONOR.
 17 THE COURT: REASON?
 18 MS. KOPPLIN: FIRST, FOR THE SAME REASONS
 19 AS THE OTHER EXPERTS. THIS EXPERT WAS NOT DISCLOSED TO
 20 US AS REQUIRED BY FEDERAL RULE OF CIVIL PROCEDURE 26(A)
 21 OR FEDERAL RULES OF EVIDENCE 702, 703 AND 705. AND
 22 SECOND, FOR THE SAME AS THE OTHER EXPERTS, IT'S IMPROPER
 23 TO ADMIT EXPERT EVIDENCE TO THE EXTENT THAT IT IS BEING
 24 USED TO DETERMINE THE CORRECTNESS OR WISDOM OF AN
 25 AGENCY'S DECISION IN AN APA CASE.

1 THE COURT: ARE YOU GOING TO USE HER --
2 IS SHE GOING TO ISSUE AN OPINION ON THE CORRECTNESS OF
3 THE AGENCY IN COMING UP WITH THE EXEMPTIONS?

4 MS. BOLAND: NO, YOUR HONOR.

5 THE COURT: SO THAT PARTICULAR OBJECTION
6 IS MOOT, I THINK, AND THEN WITH RESPECT TO THE RULE 26
7 OBJECTION, OVERRULING YOU ON THAT ONE.

8 GO AHEAD.

9 BY MS. BOLAND:

10 Q. DR. CHUANG, SINCE CONTRACEPTIVES PLAY A ROLE IN
11 YOUR PRACTICE, DO YOU COUNSEL PATIENTS REGARDING
12 CONTRACEPTIVE OPTIONS?

13 A. YES, I DO.

14 Q. AND WHAT ARE SOME CONSIDERATIONS THAT GO INTO
15 RECOMMENDING A PARTICULAR CONTRACEPTION?

16 A. WELL, THERE IS MANY THINGS TO CONSIDER, AND SO,
17 LIKE I MENTIONED EARLIER, IF A WOMAN IS INTENDING TO
18 BECOME PREGNANT OR TRYING TO AVOID PREGNANCY AND WHAT
19 HER TIMING IS FOR THAT; WHEN DOES SHE THINK SHE MIGHT
20 WANT TO BE PREGNANT IN THE FUTURE.

21 I CERTAINLY ALSO ASK HER ABOUT HER
22 EXPERIENCE WITH PRIOR CONTRACEPTIVE METHODS IN THE PAST;
23 WHAT HAS WORKED WELL OR NOT WORKED WELL FOR HER
24 PERSONALLY. CERTAINLY CONSIDERING HER HEALTH SITUATION,
25 IF SHE HAS ANY CHRONIC MEDICAL ISSUES, OTHER MEDICATIONS

1 SHE IS TAKING THAT MAY AFFECT THE SAFETY OF ANY
2 CONTRACEPTIVE METHODS, THAT IS OBVIOUSLY VERY IMPORTANT
3 TO DISCUSS.

4 SIDE EFFECTS OF DIFFERENT CONTRACEPTIVE
5 METHODS, WHAT A PARTICULAR WOMAN IS WILLING TO TOLERATE
6 OR NOT TOLERATE IN TERMS OF SIDE EFFECTS. AND ALSO
7 JUST, YOU KNOW, HER OWN PERSONAL PREFERENCE. WOMEN
8 SOMETIMES HAVE VERY STRONG OPINIONS ABOUT WHAT KIND OF
9 METHODS THEY WANT TO USE OR NOT USE, AND THOSE ARE VERY
10 IMPORTANT PARTS OF THE DECISION FOR HER.

11 Q. AND DO -- THE EFFECTIVENESS OF A PARTICULAR
12 CONTRACEPTION, DOES THAT PLAY INTO YOUR COUNSELING HOW
13 EFFECTIVE A PARTICULAR METHOD OF CONTRACEPTION IS?

14 A. ABSOLUTELY. BUT INTERESTINGLY, IT CAN VARY FROM
15 WOMAN TO WOMAN. THERE ARE SOME WOMEN WHO ARE WILLING TO
16 TOLERATE LESS EFFECTIVE METHODS BECAUSE OF ALL THE OTHER
17 CONSIDERATIONS THAT SHE HAS. BUT YES, TALKING ABOUT
18 CONTRACEPTIVE EFFECTIVENESS IS VERY IMPORTANT.

19 Q. AND WHAT ARE THE MOST EFFECTIVE FORMS OF
20 CONTRACEPTION?

21 A. SURE. SO THE MOST EFFECTIVE REVERSIBLE METHODS
22 ARE WHAT WE COMMONLY CALL LARCS, L-A-R-C-S, WHICH STANDS
23 FOR LONG-ACTING REVERSIBLE CONTRACEPTIVE. THE LARCS
24 INCLUDE THE CONTRACEPTIVE IMPLANT, WHICH IS A ROD THAT
25 GETS IMPLANTED ON THE INNER PART OF THE ARM, AS WELL AS

1 THE INTRAUTERINE DEVICE OR THE IUD.

2 Q. THEY ARE THE MOST EFFECTIVE. AND THEN WHAT
3 WOULD YOU SAY WOULD BE THE NEXT LEVEL DOWN?

4 A. RIGHT. SO THE LARCS ARE THE HIGHEST TIER OF
5 EFFICACY. THE NEXT TIER DOWN ARE OTHER HORMONAL
6 METHODS, SO THAT INCLUDES THE BIRTH CONTROL PILL, THE
7 BIRTH CONTROL PATCH, THE CONTRACEPTIVE VAGINAL RING, THE
8 CONTRACEPTIVE INJECTABLE OR DEPO-PROVERA. THAT WOULD BE
9 IN THE NEXT TIER OF EFFECTIVENESS. AND THEN THE LOWEST
10 TIER OF EFFECTIVENESS ARE METHODS SUCH AS WITHDRAWAL,
11 NATURAL FAMILY PLANNING, BARRIER METHODS SUCH AS
12 CONDOMS. THOSE ARE IN THE LOWEST TIER OF EFFECTIVENESS.

13 Q. DO YOU USE ANY PARTICULAR TEACHING TOOLS IN
14 COUNSELING PATIENTS REGARDING THE VARIOUS METHODS?

15 A. I COMMONLY USE -- THERE IS A CHART THAT IS
16 AVAILABLE ON THE CDC WEBSITE. SO I USUALLY HAVE THAT
17 HANDY IN MY EXAMINATION ROOM SO WE CAN LOOK AT THE
18 EFFECTIVENESS TOGETHER.

19 Q. THANK YOU, DOCTOR.

20 I WOULD LIKE TO POINT YOU TO TAB 17 OF
21 THE BINDER.

22 A. OKAY.

23 Q. WILL YOU KINDLY IDENTIFY THAT DOCUMENT.

24 A. YEAH, THIS IS THE CDC CHART I WAS JUST REFERRING
25 TO.

1 Q. ALL RIGHT, DOCTOR. JUST VERY BRIEFLY, IF YOU
2 CAN WALK THROUGH WHAT THIS CHART REFLECTS.

3 A. SURE. SO THE CHART IS ORGANIZED IN THREE ROWS
4 SEPARATED BY THOSE BLACK LINES, SO AT THE VERY TOP ROW,
5 THOSE ARE THE MOST EFFECTIVE METHODS, THE HIGHEST TIER.
6 SO THAT IS WHERE THE LARCS ARE. YOU CAN SEE THE
7 CONTRACEPTIVE IMPLANT AND THE IUD UP THERE, AND YOU CAN
8 SEE THEIR EFFECTIVENESS RATES THERE. IT IS LISTED AS
9 LESS THAN ONE PREGNANCY PER 100 WOMEN PER YEAR. THEY
10 ARE LINED UP RIGHT NEXT TO THE PERMANENT STERILIZATION
11 METHODS. YOU MIGHT BE INTERESTED TO SEE THAT THE
12 IMPLANT AND THE IUD ARE ACTUALLY MORE EFFECTIVE THAN
13 THOSE PERMANENT STERILIZATION METHODS.

14 THE NEXT TIER AFTER THAT IS WHERE YOU SEE
15 THE SHOT, THE PILL, THE PATCH, THE RING, AND THOSE ARE
16 THE ONES THAT ARE THE NEXT LEVEL EFFECTIVENESS, SO YOU
17 CAN SEE ON THE LEFT SIDE OF THE CHART IT SAYS 6 TO 12
18 PREGNANCIES PER 100 WOMEN IN A YEAR. WOMEN ARE OFTEN
19 SURPRISED THAT THE PILL IS ASSOCIATED WITH THAT MANY
20 PREGNANCIES.

21 AND THEN IN THE LOWEST TIER AT THE BOTTOM
22 ARE THAT -- THE BARRIER METHODS WE TALKED ABOUT BEFORE,
23 THE CONDOMS, WITHDRAWAL, SPERMICIDE AND THE NATURAL
24 FAMILY PLANNING METHOD.

25 Q. ARE SOME CONTRACEPTIVES MORE EXPENSIVE THAN

1 OTHERS?

2 A. YES. IT SO HAPPENS THAT THE MOST EFFECTIVE
3 METHODS, SO THE LARCS AT THE TOP ROW, ARE THE MOST
4 EXPENSIVE METHODS, AND THEN THE SECOND TIER AND THEN THE
5 LOWEST TIER.

6 Q. THANK YOU, DOCTOR.

7 DO CONTRACEPTIVES ALSO PLAY A ROLE IN
8 PLANNING CHILDREN?

9 A. YEAH. SO I THINK CONTRACEPTION CAN BE VERY
10 HELPFUL, IMPORTANT IN HELPING WOMEN TIME THEIR
11 PREGNANCIES AND THE SPACING BETWEEN THEIR PREGNANCIES,
12 SO THERE ARE SEVERAL GUIDELINES THAT SUGGEST THAT WOMEN
13 SHOULD WAIT AT LEAST 18 MONTHS AFTER THE BIRTH OF A
14 CHILD BEFORE GETTING PREGNANT AGAIN, AND THAT IS BECAUSE
15 MORE CLOSELY-SPACED PREGNANCIES ARE ASSOCIATED WITH
16 PRE-TERM BIRTH AND LOW BIRTH WEIGHT. SO BEING ABLE TO
17 CONTROL THE SPACING OF THE PREGNANCIES CAN BE VERY
18 IMPORTANT.

19 BUT AS IMPORTANT IS ALLOWING WOMEN TO BE
20 EMPOWERED TO COMPLETE THEIR GOALS IN LIFE, SO BE ABLE TO
21 FINISH SCHOOL, BE ABLE TO ACHIEVE THEIR JOB AND CAREER
22 GOALS, REACH THEIR FINANCIAL GOALS SO THEY CAN HAVE
23 THEIR CHILDREN WHEN THEY FEEL FINANCIALLY STABLE. SO I
24 THINK BEING ABLE TO HAVE THE CHILDREN, THE NUMBER OF
25 CHILDREN THEY WANT AND WHEN IT'S RIGHT FOR THEM IS VERY

1 IMPORTANT, AND WITHOUT CONTRACEPTION, THEY WOULD NOT BE
2 ABLE TO DO THAT.

3 Q. DO MOST OF YOUR PATIENTS HAVE HEALTH INSURANCE?

4 A. YES. MY PRACTICE IN HERSHEY IS A MOSTLY INSURED
5 POPULATION, YES.

6 Q. PRIOR TO THE CONTRACEPTIVE CARE MANDATE, WAS
7 COST SOMETHING THAT YOU COUNSELED ABOUT IN THE
8 CONVERSATION ABOUT CONTRACEPTION?

9 A. YES. SO WHEN I WOULD PULL OUT THIS CHART, I
10 WOULD ALSO TALK ABOUT THE COSTS OF THE DIFFERENT METHODS
11 AND OBVIOUSLY FOR SOME WOMEN, THERE WERE SOME METHODS
12 THAT WE COULD NOT TALK ABOUT BEYOND COSTS BECAUSE THEY
13 WERE COST-PROHIBITIVE.

14 Q. AND SINCE THE AFFORDABLE CARE ACT, DO YOU STILL
15 COUNSEL YOUR PRIVATELY-INSURED PATIENTS REGARDING COSTS?

16 A. I'M ABLE TO TELL WOMEN WHO HAVE PRIVATE HEALTH
17 INSURANCE THAT THEIR HEALTH INSURANCE COVERS ALL THE
18 FDA-APPROVED METHODS WITH NO OUT-OF-POCKET COSTS, SO I'M
19 ABLE TO PUT THIS CHART IN FRONT OF THEM AND REASSURE
20 THEM THAT THEY WOULD HAVE NO CO-PAYS OR DEDUCTIBLES AND
21 WE CAN TALK ABOUT THE DIFFERENT METHODS WITHOUT COSTS.

22 Q. IN YOUR EXPERIENCE IN YOUR PRACTICE PRIOR TO THE
23 CONTRACEPTIVE MANDATE, DID YOU HAVE ANY EXPERIENCE WHERE
24 PATIENTS WOULD RETURN TO YOU AND DECIDE NOT TO CHOOSE
25 THE CONTRACEPTION THAT YOU RECOMMENDED OR TO FORGO

1 CONTRACEPTION ALTOGETHER BECAUSE OF COST?

2 A. YES, ABSOLUTELY. THERE WERE MANY OCCASIONS I
3 CAN THINK OF WHERE A WOMAN MIGHT REALLY DESIRE TO GET AN
4 IUD BUT IT WAS COST PROHIBITIVE SO SHE WOULD HAVE TO
5 CHOOSE A DIFFERENT METHOD.

6 Q. HAVE YOU EXPERIENCED THAT PHENOMENON WITH ANY
7 PATIENTS SINCE THE CONTRACEPTIVE MANDATE,
8 PRIVATELY-INSURED PATIENTS?

9 A. NO, I HAVE NOT.

10 Q. WHAT DO YOU DO WHEN YOU ENCOUNTER A WOMAN WHO
11 DOES NOT HAVE INSURANCE AND IS NEEDING CONTRACEPTIVE
12 CARE?

13 A. IN OUR PRACTICE WE HAVE A SOCIAL WORKER, WE HAVE
14 A FINANCIAL DEPARTMENT AT THE HERSHEY MEDICAL CENTER, SO
15 IF SOMEONE IS UNINSURED, I AM ABLE TO REFER THEM TO
16 THOSE SERVICES. IF THE PATIENT QUALIFIES FINANCIALLY,
17 THEY MAY BE ABLE TO HELP THAT PATIENT APPLY FOR MEDICAID
18 OR FIND OTHER ASSISTANCE, BUT IF THE PATIENT DOES NOT
19 QUALIFY FOR MEDICAID OR IS UNABLE TO OBTAIN INSURANCE IN
20 ANY OTHER WAY, I PERSONALLY WOULD REFER THAT PERSON TO
21 PLANNED PARENTHOOD OR A FEDERALLY-QUALIFIED HEALTH
22 CENTER FOR THEM TO RECEIVE THEIR CONTRACEPTIVE SERVICES.

23 THE COURT: DID YOU SAY
24 FEDERALLY-QUALIFIED HEALTH CENTER?

25 THE WITNESS: YEAH.

1 BY MS. BOLAND:

2 Q. OKAY, DOCTOR. I WOULD NOW LIKE TO TURN YOUR
3 ATTENTION TO THE "MY NEW OPTIONS" STUDY, WHICH WAS
4 REFERENCED BEFORE. CAN YOU TELL US GENERALLY ABOUT THIS
5 STUDY? I UNDERSTAND YOU BEGAN TO EXPLAIN, BUT IF YOU
6 CAN TELL THE COURT EXACTLY WHAT WERE THE PARAMETERS OF
7 THE STUDY AND WHAT WAS YOUR GOAL IN CONDUCTING THE
8 STUDY?

9 A. SURE. SURE. SO THE "MY NEW OPTIONS" STUDY WAS
10 FUNDED THROUGH PCORI, THE PATIENT-CENTERED OUTCOMES
11 RESEARCH INSTITUTE. WE RECEIVED FUNDING IN THE FALL OF
12 2013 AND WE STARTED RECRUITING THE RESEARCH PARTICIPANTS
13 IN THE SPRING OF 2014. IT WAS A TWO-YEAR STUDY, SO IT
14 RAN UNTIL THE MIDDLE OF 2016.

15 THE PURPOSE OF THE STUDY WAS TO RECRUIT
16 REPRODUCTIVE-AGE WOMEN WHO ARE PRIVATELY INSURED, AND WE
17 RECRUITED PRIVATELY-INSURED WOMEN BECAUSE WE WANTED THEM
18 TO HAVE COVERAGE FOR CONTRACEPTION. AND WE RECRUITED
19 THEM AND THEY WERE RANDOMIZED INTO THREE DIFFERENT
20 GROUPS IN ORDER TO SEE DIFFERENT -- AND SOME OF THE
21 GROUPS RECEIVED CERTAIN WEB-BASED COUNSELING
22 INTERVENTIONS TO SEE IF IT WOULD HELP THEM WITH THEIR
23 CONTRACEPTIVE DECISION-MAKING.

24 Q. OKAY. AND SO TO CLARIFY, THE TIME FRAME FOR
25 THIS STUDY WAS 2014 THROUGH 2016?

1 A. THAT'S CORRECT.
 2 Q. SO IF DR. WEISMAN TESTIFIED EARLIER IT WAS 2012
 3 THROUGH 2014, WAS THAT MISTAKEN?
 4 A. THAT WAS MISTAKEN, YES.
 5 Q. OKAY. AND WHAT DID YOU FIND AS A RESULT OF THIS
 6 STUDY?
 7 A. YES, SO WE ACTUALLY FOUND THAT OUR WEB-BASED
 8 INTERVENTIONS DID NOT MAKE A DIFFERENCE; THEY DID NOT
 9 PARTICULARLY HELP WOMEN OR CHANGE WOMEN IN THEIR
 10 CONTRACEPTIVE DECISION-MAKING. HOWEVER, WE WERE ABLE TO
 11 TAKE THE OPPORTUNITY TO SEE THAT WE WERE ABLE TO FOLLOW
 12 THESE WOMEN FROM PENNSYLVANIA OVER THE COURSE OF TWO
 13 YEARS, AND AS A PARTICIPANT IN THE STUDY, THEY COMPLETED
 14 A LOT OF SURVEYS FOR US AND THE SURVEYS HAD A LOT OF
 15 QUESTIONS ABOUT CONTRACEPTIVE USE AND BEHAVIOR. SO WE
 16 WERE ABLE TO SEE WHAT WOMEN REPORTED THEY WERE DOING
 17 ABOUT CONTRACEPTION AT THE BEGINNING OF THE STUDY,
 18 THROUGHOUT THE STUDY, AND AT THE END OF THE STUDY.
 19 Q. AND THE CONTRACEPTIVE MANDATE WAS ALREADY IN
 20 PLACE --
 21 MS. KOPPLIN: YOUR HONOR, I'M SORRY, WE
 22 WOULD OBJECT TO THIS LINE OF QUESTIONING. WE HAVE NOT
 23 HAD ANY DISCLOSURE ABOUT THE METHODOLOGY THAT WAS USED
 24 IN THIS STUDY OR WHERE THIS DATA CAME FROM.
 25 THE COURT: OVERRULED.

1 ARE YOU GOING TO TALK ABOUT THAT?
 2 MS. BOLAND: YES.
 3 BY MS. BOLAND:
 4 Q. WILL YOU SPEAK TO THE METHODOLOGY BEHIND THIS
 5 STUDY, PLEASE, DR. CHUANG?
 6 A. SURE. THIS WAS A RANDOMIZED TRIAL. WE
 7 RECRUITED -- YOU WANT TO HEAR THE DETAILS OF THE
 8 RECRUITMENT METHODS? OKAY.
 9 SO WE PARTNERED WITH HIGHMARK, A PRIVATE
 10 INSURANCE PROVIDER. FOR THE REASON I STATED EARLIER, WE
 11 WERE SPECIFICALLY INTERESTED IN RECRUITING PRIVATELY
 12 INSURED WOMEN WHO LIVED IN THE STATE OF PENNSYLVANIA,
 13 AND SO WE SENT OUT INVITATIONS TO WOMEN WHO HAD HEALTH
 14 INSURANCE, WERE BETWEEN THE AGES OF 18 AND 40, AND
 15 INVITED THEM TO PARTICIPATE IN THE STUDY.
 16 AND FOR WOMEN WHO CONSENTED, ENROLLED IN
 17 THE STUDY, THEY COMPLETED A SURVEY AT THE BEGINNING OF
 18 THE STUDY AND THEY WERE RANDOMIZED INTO ONE OF THREE
 19 GROUPS. ONE GROUP WAS A CONTROL GROUP; THEY DID NOT GET
 20 ANY PARTICULAR INTERVENTION AT ALL. AND THE OTHER TWO
 21 GROUPS WERE TWO DIFFERENT GROUPS WHERE THEY WOULD SEE
 22 TWO DIFFERENT TYPES OF WEBSITES THAT PROVIDED
 23 INFORMATION ABOUT CONTRACEPTION TO SEE IF THOSE WEBSITES
 24 WOULD HELP THEM WITH THEIR DECISION-MAKING.
 25 HOWEVER AT THE END OF THE STUDY, AT THE

1 END OF THE TWO YEARS, WE FOUND THAT ALL THREE GROUPS
 2 BEHAVED SIMILARLY AND THERE WAS NO DIFFERENCE BETWEEN
 3 THE GROUPS THAT GOT THE WEBSITE INTERVENTION AND THE
 4 GROUP THAT DID NOT. SO UNFORTUNATELY FOR ME, WE DIDN'T
 5 SEE ANY DIFFERENCES WITH OUR WEBSITE INTERVENTION, BUT
 6 WE WERE ABLE TO SEE WHAT THE CONTRACEPTIVE BEHAVIORS
 7 WERE AMONGST THE WOMEN WHO WERE PARTICIPATING IN THE
 8 STUDY.
 9 AND I DON'T THINK I SAID BEFORE, THERE
 10 WERE 984 WOMEN WHO WERE IN THE STUDY.
 11 Q. AND WHAT DID YOU LEARN THAT THE CONTRACEPTIVE
 12 BEHAVIORS WERE OVER THIS PERIOD OF TIME FOR ALL THREE
 13 GROUPS INCLUDING THE CONTROL GROUP, RIGHT?
 14 A. SURE. YES. SO WE WERE ABLE TO SEE WHAT TYPES
 15 OF CONTRACEPTIVE METHODS WERE BEING USED THROUGHOUT THE
 16 STUDY. SO IN THE BEGINNING OF THE STUDY, THERE WERE
 17 RELATIVELY FEW WOMEN USING LARCS, THE LONG-ACTING
 18 REVERSIBLE CONTRACEPTIVES. THERE WERE ABOUT 8 PERCENT
 19 OF WOMEN USING LARCS, AND BY THE END OF THE STUDY THERE
 20 WERE ALMOST 18 PERCENT OF WOMEN USING LARCS IN THE
 21 STUDY. AND SO WE THOUGHT THAT WAS AN INTERESTING
 22 FINDING.
 23 Q. DOCTOR, I WOULD LIKE TO POINT YOU TO TAB 18 IN
 24 THE BINDER.
 25 A. OKAY.

1 Q. WILL YOU PLEASE IDENTIFY THIS DOCUMENT FOR THE
 2 COURT?
 3 A. SURE. THIS IS A RESULTS TABLE THAT IS TAKEN
 4 FROM SOME OF OUR -- TAKEN FROM A PRESENTATION THAT WE
 5 HAD DONE PRESENTING THE "MY NEW OPTIONS" STUDY AT A
 6 NATIONAL CONFERENCE.
 7 Q. THANK YOU. IF YOU PUT --
 8 MS. KOPPLIN: YOUR HONOR -- I'M SORRY --
 9 WE WOULD OBJECT. WHAT IS THE SOURCE OF THIS DATA?
 10 THE COURT: WELL, WHY DON'T YOU -- OFFER
 11 OF PROOF. WHAT IS THE SOURCE OF DATA?
 12 MS. BOLAND: DR. CHUANG HERSELF DRAFTED
 13 THIS CHART AND SHE PUT IN THE DATA HERSELF. SHE HAS
 14 ALREADY TESTIFIED AS TO THE METHODOLOGY BEHIND IT. THIS
 15 IS JUST PUTTING HER TESTIMONY IN CHART FORM TO
 16 DEMONSTRATE FOR THE COURT.
 17 THE COURT: SO MS. -- MS. CHUANG, DID YOU
 18 CREATE THIS FOR THIS PARTICULAR PROCEEDING OR YOU
 19 CREATED IT FOR THE STUDY?
 20 THE WITNESS: I CREATED IT FOR THE STUDY.
 21 THIS TABLE IS ACTUALLY TAKEN FROM A PRESENTATION WE DID
 22 AT THE SOCIETY OF GENERAL INTERNAL MEDICINE MEETING BACK
 23 IN THE SPRING. I ALSO GAVE A PRESENTATION AT THE
 24 SOCIETY FOR FAMILY PLANNING MEETING, AND THIS TABLE WAS
 25 TAKEN FROM THOSE PRESENTATIONS.

1 THE COURT: AND THE DATA INCLUDED IN THE
2 TABLE IS TAKEN FROM WHERE?
3 THE WITNESS: THIS IS FROM THE "MY NEW
4 OPTIONS" RESULTS.
5 THE COURT: OKAY. OVERRULED.
6 GO AHEAD.
7 BY MS. BOLAND:
8 Q. IF YOU FLIP TO THE NEXT PAGE, CAN YOU JUST TELL
9 US WHAT THAT IS?
10 A. THAT IS ANOTHER TABLE FROM THE SAME
11 PRESENTATIONS.
12 Q. REFLECTING THE SAME DATA?
13 A. YES.
14 Q. IS IT JUST REPACKAGED A DIFFERENT WAY?
15 A. YES. SO THE FIRST TABLE SHOWS THE CONTRACEPTIVE
16 TYPES THAT ARE USED IN THE STUDY DIVIDED INTO THE FOUR
17 CATEGORIES THAT ARE SIMILAR TO THOSE TIERS THAT WE
18 LOOKED AT ON THE CDC WEBSITE. SO THE FIRST ROW IS
19 LARCS, THE SECOND ROW IS OTHER PRESCRIPTION METHODS,
20 THIRD ROW IS NONPRESCRIPTION METHODS, AND THE LAST ROW
21 IS NO METHOD. THE SECOND TABLE REALLY IS THE SAME DATA
22 BUT IT'S JUST LOOKING AT WOMEN WHO WERE ON ANY
23 CONTRACEPTIVE METHOD AT ALL VERSUS NO METHOD. SO IN THE
24 SECOND TABLE, IT JUST REALLY COLLAPSES THOSE FIRST THREE
25 ROWS INTO ONE ROW, SO IT IS REALLY SHOWING THE SAME DATA

1 IN TWO DIFFERENT FORMATS.
2 Q. AND I THINK YOU JUST TESTIFIED THAT YOU SAW A
3 STATISTICAL JUMP FROM THE NUMBER OF WOMEN USING LARCS AT
4 THE BEGINNING OF THE STUDY TO THE NUMBER OF WOMEN USING
5 LARCS AT THE END OF THE STUDY. IS THAT REFLECTED
6 SOMEWHERE ON THESE DOCUMENTS?
7 A. SO I'M LOOKING AT TABLE 1, AND SO IN THAT FIRST
8 ROW WHERE IT SAYS LARCS, AND THEN IF YOU LOOK AT THE
9 NEXT COLUMN WHERE IT SAYS BASELINE, THAT IS THE
10 BEGINNING OF THE STUDY WHERE THERE ARE 984 WOMEN
11 ENROLLED IN THE STUDY.
12 SO 83 WOMEN AT THE BEGINNING OF THE
13 STUDY, WHICH WAS 8.4 PERCENT OF THE SAMPLE, AT THAT TIME
14 WERE USING LARCS. AND THEN IF YOU GO OVER TO THE NEXT
15 ROW, WHERE IT SAYS 24 MONTHS, THERE WERE 130 WOMEN OUT
16 OF 727 WOMEN USING LARCS AT THE END OF THE STUDY, WHICH
17 WAS 17.9 PERCENT.
18 IF YOU LOOK AT THE NEXT TWO ROWS, THERE
19 ARE REALLY NO DIFFERENCES. IF YOU LOOK AT THE
20 PERCENTAGES OF OTHER PRESCRIPTION METHODS IT WAS
21 49.7 PERCENT BOTH AT BASELINE AND 24 MONTHS. AND THEN
22 IN THE THIRD ROW, NOT MUCH DIFFERENCE EITHER IN THE
23 NONPRESCRIPTION METHOD. BUT THEN IF YOU LOOK AT THE
24 LAST ROW, THE NO-METHOD ROW, YOU WILL SEE THAT BASELINE
25 THERE WERE 11.5 PERCENT OF WOMEN NOT USING ANY METHOD

1 AND THAT HAD DROPPED TO 5.1 PERCENT BY THE END OF THE
2 STUDY.
3 AND THEN IN THE THIRD COLUMN WHERE IT
4 SAYS P VALUE. THE P VALUE IS OUR TEST OF STATISTICAL
5 SIGNIFICANCE, AND IN BIOMEDICAL RESEARCH WE GENERALLY
6 ACCEPT A P VALUE OF LESS THAN .05 TO INDICATE
7 STATISTICAL SIGNIFICANCE. SO THE P VALUE WE HAD FOR
8 THESE RESULTS WAS LESS THAN .001, WHICH SHOWS THAT THERE
9 WAS A STATISTICALLY SIGNIFICANT CHANGE IN THESE NUMBERS
10 THAT I JUST REVIEWED.
11 Q. AND JUST A COUPLE OF POINTS OF CLARIFICATION.
12 IT LOOKS LIKE ALTHOUGH THE PERCENTAGE IS THE SAME FOR
13 OTHER PRESCRIPTION METHODS, THE NUMBER OF -- THE OTHER
14 NUMBER CHANGED. CAN YOU EXPLAIN WHAT WE ARE SEEING HERE
15 AND WHY THE PERCENTAGE IS THE SAME BUT THE NUMBER OF
16 PEOPLE DIFFERS?
17 A. SURE. SO I WILL TAKE YOU BACK UP TO THE HEADER
18 ROW WHERE IT SAYS BASELINE, N EQUALS 984, AND 24 MONTHS,
19 N EQUALS 727. SO IT MIGHT SEEM PECULIAR THAT THERE WAS
20 SUCH A DIFFERENT -- A DROP IN THE NUMBERS BETWEEN THE
21 BEGINNING AND THE END OF THE STUDY.
22 HOWEVER, WE JUST INCLUDED WOMEN IN THE
23 STUDY WHO WERE ACTIVELY TRYING TO AVOID PREGNANCY. SO I
24 SHOULD HAVE MENTIONED BEFORE WHEN I WAS DESCRIBING THE
25 STUDY THAT WE ENROLLED WOMEN WHO SAID THEY WERE TRYING

1 TO AVOID PREGNANCY FOR THE NEXT YEAR.
2 OVER THE COURSE OF THE TWO-YEAR STUDY,
3 WOMEN CHANGED THEIR MIND AND SOME WOMEN THEN DECIDED
4 THEY WERE TRYING TO GET PREGNANT. AND SO THOSE WOMEN
5 WERE NO LONGER COUNTED BECAUSE THEY DIDN'T HAVE AN
6 INDICATION TO USE BIRTH CONTROL ANYMORE. SO THAT IS WHY
7 THERE WAS ONLY 727 WOMEN AT 24 MONTHS.
8 THERE WERE SOME OTHER REASONS THAT WOMEN
9 WERE EXCLUDED TOO. THERE WERE SOME WHO GOT A
10 HYSTERECTOMY DURING THAT TIME FRAME OR THEY GOT THEIR
11 TUBAL STERILIZATION DURING THAT TIME FRAME, SO THAT
12 ACCOUNTED FOR SOME OF THE REDUCED NUMBERS AS WELL.
13 Q. DOES THE FACT THAT SOME WOMEN DROPPED OUT, DID
14 THAT AFFECT THE RELIABILITY OF YOUR FINDINGS?
15 A. NO, BECAUSE THAT IS ACCOUNTED FOR WHEN YOU DO
16 THE STATISTICAL TEST AND GENERATE THE P VALUE. IT
17 CONSIDERS THE SAMPLE SIZE NUMBER.
18 Q. SO WHAT IS YOUR OPINION WITH A REASONABLE DEGREE
19 OF CERTAINTY AS TO WHY WOMEN CHANGED THEIR BEHAVIOR OVER
20 THIS TIME FRAME?
21 A. WELL, WHAT I CAN SAY IS THAT THE STUDY, SINCE WE
22 STARTED THE STUDY IN 2014, IT OCCURRED PRETTY SHORTLY
23 AFTER THE CONTRACEPTIVE MANDATE WENT INTO EFFECT. WE
24 DIDN'T SEE AN EFFECT OF OUR STUDY INTERVENTION AND
25 REALLY THE ONLY OTHER THING THAT WAS GOING ON AT THE

1 TIME WAS THIS CHANGE IN CONTRACEPTIVE -- IN THE
 2 CONTRACEPTIVE MANDATE.
 3 SO MY HYPOTHESIS WOULD BE THAT WHAT WE
 4 ARE SEEING IS THE CHANGE IN CONTRACEPTIVE BEHAVIOR THAT
 5 COULD HAVE RESULTED FROM THE CONTRACEPTIVE MANDATE.
 6 Q. AND IS THAT CONSISTENT WITH OTHER RESEARCH OUT
 7 THERE, TO YOUR KNOWLEDGE?
 8 A. YEAH. ACTUALLY THERE HAS BEEN SEVERAL OTHER
 9 STUDIES IN THE LITERATURE THAT HAVE SHOWN THAT SINCE THE
 10 CONTRACEPTIVE MANDATE, WE DO KNOW THAT OUT-OF-POCKET
 11 COSTS FOR WOMEN HAVE GONE DOWN SINCE THE CONTRACEPTIVE
 12 MANDATE. THERE'S BEEN SOME STUDIES TO SHOW THAT THERE
 13 MAY BE SOME CHANGES IN METHODS THAT WOMEN ARE CHOOSING
 14 WITH MORE LARCS BEING USED. SO I THINK THIS IS
 15 CONSISTENT WITH THOSE OTHER STUDIES.
 16 Q. IS THIS CONSISTENT WITH YOUR EXPERIENCE IN YOUR
 17 OWN PRACTICE IN TERMS OF WOMEN'S DECISION-MAKING AFTER
 18 THE MANDATE WAS PUT IN PLACE?
 19 A. WELL, I CAN SAY THAT I CERTAINLY HAD SOME
 20 PATIENTS WHO, AFTER LEARNING ABOUT THE MANDATE, HAVE
 21 RETHOUGHT THEIR CONTRACEPTIVE DECISION-MAKING. SOME OF
 22 THEM THAT HAS HELPED THEM CHANGE THEIR MIND. I HAVE HAD
 23 SOME WOMEN WHO WERE PREVIOUSLY NOT USING A METHOD OR
 24 USING A LESS-EFFECTIVE METHOD THAT HAVE THEN CHOSEN TO
 25 USE A MORE-EFFECTIVE METHOD, WHETHER THAT BE A LARC OR

1 PILL OR SOMETHING ELSE, YES.
 2 Q. IN YOUR OPINION, DOCTOR, HAS THE CONTRACEPTIVE
 3 MANDATE BENEFITED WOMEN?
 4 A. YES, I THINK IT HAS.
 5 Q. AND FOR WHAT REASON?
 6 A. I THINK BECAUSE IT HAS ALLOWED WOMEN TO HAVE
 7 THAT FULL RANGE OF CHOICES THAT ARE ON THAT CDC CHART WE
 8 LOOKED AT. SO INSTEAD OF ONLY HAVING A COUPLE OF THOSE
 9 AVAILABLE TO WOMEN TO CONSIDER, THEY HAVE THE WHOLE
 10 SPECTRUM OF CHOICES TO CONSIDER, AND IT GIVES THE
 11 PATIENT A LOT MORE FREEDOM TO TALK WITH THEIR PROVIDER
 12 ABOUT WHAT METHODS ARE REALLY BEST SUITED FOR THEM AS AN
 13 INDIVIDUAL. WHEN THEY CONSIDER WHAT THEIR OWN HEALTH
 14 CONDITIONS ARE, WHAT THEIR OWN PREFERENCES ARE, WHAT
 15 SIDE EFFECTS ARE OKAY OR NOT OKAY FOR THEM, IT REALLY
 16 ALLOWS THEM TO CONSIDER THE FULL SET OF OPTIONS.
 17 Q. HAVE YOU HAD THE OPPORTUNITY TO READ THE
 18 RELIGIOUS AND MORAL EXEMPTION RULES AT ISSUE IN THIS
 19 CASE?
 20 A. YES, I HAVE READ THEM.
 21 Q. WHAT DO YOU BELIEVE THE IMPACT OF THOSE RULES
 22 WILL BE ON PRIVATELY-INSURED WOMEN -- ON SOME
 23 PRIVATELY-INSURED WOMEN IN PENNSYLVANIA?
 24 MS. KOPPLIN: OBJECTION, YOUR HONOR.
 25 THIS IS NOT AN OPINION THAT IS GOING TO BE -- THAT THERE

1 IS ANY EVIDENCE IT'S GOING TO BE THE PRODUCT OF RELIABLE
 2 PRINCIPLES AND METHODS BY THE WITNESS.
 3 THE COURT: OVERRULED.
 4 THE WITNESS: I --
 5 THE COURT: WHAT YOU KNOW FROM YOUR
 6 EXPERIENCE.
 7 THE WITNESS: SURE. SO BASED ON MY
 8 EXPERIENCE, I WOULD IMAGINE THAT IT WOULD BE SIMILAR TO
 9 BEFORE THE CONTRACEPTIVE MANDATE WHEN CONTRACEPTIVE
 10 COUNSELING HAD TO INCLUDE COSTS. SO I WOULD IMAGINE
 11 THAT WOULD BE THE CASE AGAIN.
 12 BY MS. BOLAND:
 13 Q. IS IT YOUR OPINION THAT COST IS A BARRIER TO
 14 ACCESS TO CONTRACEPTIVE CARE, OR CAN BE A BARRIER TO
 15 CONTRACEPTIVE CARE?
 16 A. YES, I HAVE SEEN THAT BE THE CASE.
 17 Q. AND IN YOUR OPINION, WHAT WILL HAPPEN IF WOMEN
 18 FORGO CONTRACEPTIVE CARE BECAUSE OF COST?
 19 A. I THINK THAT IF WOMEN CAN'T CHOOSE FROM THE FULL
 20 SET OF OPTIONS, THEY MAY BE MORE LIKELY TO CHOOSE THE
 21 LESS EXPENSIVE OPTIONS, WHICH ARE, UNFORTUNATELY, THE
 22 LESS EFFECTIVE OPTIONS. AND SO MY FEAR WOULD BE THAT WE
 23 WOULD SEE A RISE IN UNINTENDED PREGNANCIES AND
 24 CONCOMITANTLY A RISE IN ABORTIONS.
 25 Q. THANK YOU, DR. CHUANG.

1 MS. BOLAND: BEAR WITH ME ONE MOMENT,
 2 YOUR HONOR.
 3 THE COURT: OKAY.
 4 BY MS. BOLAND:
 5 Q. TWO POINTS FOR CLARIFICATION, DOCTOR. EARLIER I
 6 ASKED YOU ABOUT THE MOST EXPENSIVE METHODS OF
 7 CONTRACEPTION. SPEAKING IN TERMS OF UP-FRONT COST, WHAT
 8 IS THE MOST EXPENSIVE METHOD OF CONTRACEPTION?
 9 A. THE LARCS ARE THE MOST EXPENSIVE WITH UP-FRONT
 10 COSTS, BECAUSE YOU HAVE TO PAY FOR THE DEVICE AND THE
 11 INSERTION FEE ALL AT ONCE UP FRONT.
 12 Q. IN REGARD TO THE "MY NEW OPTIONS" STUDY, WHY WAS
 13 THERE A DELAY IN THE CHANGES OVER TIME IF THE MANDATE
 14 WENT INTO EFFECT IN 2012? IN OTHER WORDS, WHY WASN'T IT
 15 INSTANTANEOUS THAT YOU WOULD SEE CHANGES IN WOMEN'S
 16 BEHAVIOR?
 17 A. WELL, A COUPLE OF THINGS.
 18 WOMEN MAY NOT HAVE BEEN AWARE OF THE
 19 CHANGES IN THEIR CONTRACEPTIVE COVERAGE RIGHT AWAY. IN
 20 FACT, I HAD PATIENTS COME TO ME AND SAY, OH, I THINK
 21 THEY MADE A MISTAKE AT THE PHARMACY, THEY DID NOT CHARGE
 22 ME A CO-PAY THIS MONTH. SO THEY DID NOT REALIZE THAT
 23 THERE WAS A CHANGE IN POLICY. SO THAT IS NUMBER ONE.
 24 SECONDLY, YOU KNOW, WOMEN DON'T RUSH TO
 25 THE DOCTOR EVERY DAY, SO THEY MIGHT -- MOST WOMEN WHO

1 ARE HEALTHY REPRODUCTIVE-AGE WOMEN MIGHT ONLY SEE THEIR
2 PHYSICIAN ONCE A YEAR, SO PROBABLY JUST THE TIMING OF
3 WHEN THEY WERE SEEING THEIR PROVIDERS AND MAKING CHANGES
4 IN THEIR CONTRACEPTION IS WHAT I WOULD GUESS.

5 MS. BOLAND: THANK YOU VERY MUCH, DOCTOR.
6 I HAVE NO FURTHER QUESTIONS.

7 THE COURT: MS. KOPPLIN.

8 MS. KOPPLIN: YOUR HONOR, MAY I APPROACH?

9 THE COURT: YOU MAY.

10 CROSS-EXAMINATION

11 BY MS. KOPPLIN:

12 Q. GOOD AFTERNOON. DR. CHUANG, MY NAME IS REBECCA
13 KOPPLIN. I'M JUST GOING TO ASK YOU A COUPLE QUESTIONS.

14 HOW ARE YOU DOING?

15 A. GOOD, THANK YOU.

16 Q. DR. CHUANG, WHAT DOCUMENTS DID YOU CONSIDER IN
17 PREPARING YOUR DECLARATION? COULD YOU LIST THE
18 DOCUMENTS?

19 A. I'M NOT SURE WHAT TYPES OF DOCUMENTS YOU MIGHT
20 BE REFERRING TO.

21 Q. LET'S SAY ALL TYPES OF DOCUMENTS.

22 A. WELL, BEING A PRIMARY CARE PROVIDER AND BEING A
23 RESEARCHER IN THIS FIELD AND A LECTURER IN THIS AREA,
24 THE DECLARATION INCLUDED YEARS OF READING MANY
25 SCIENTIFIC ARTICLES AND DOING YEARS OF RESEARCH AND THE

1 BODY OF KNOWLEDGE THAT HAS ACCUMULATED FROM THAT.

2 Q. OTHER THAN THE GENERAL BODY OF KNOWLEDGE YOU HAD
3 WHEN YOU STARTED WORKING AND PREPARING THE DECLARATION,
4 WHAT SPECIFIC SOURCES DID YOU SEEK OUT AND REVIEW?

5 A. I'M NOT SURE I UNDERSTAND THE QUESTION.

6 Q. FOR EXAMPLE, DID YOU READ THE RULES WHEN YOU
7 WERE PREPARING YOUR DECLARATION?

8 A. AT THE TIME THAT I PREPARED MY DECLARATION --
9 I'M ACTUALLY -- I CANNOT PRECISELY REMEMBER IF I HAD
10 ALREADY READ THE RULES AT THE TIME OF THE DECLARATION.

11 Q. SO YOU DO NOT RECALL IF YOU HAD READ THE RULES
12 OR NOT WHEN YOU WROTE YOUR DECLARATION?

13 A. I DO NOT RECALL.

14 Q. DID YOU READ ANY OF THE ARTICLES THAT ARE CITED
15 IN THE RULES?

16 A. IN READING -- WHEN I DID READ THE RULES, A LOT
17 OF THE ARTICLES ARE COMMONLY-CITED ARTICLES IN FAMILY
18 PLANNING LITERATURE, SO MANY OF THEM I WAS ALREADY
19 FAMILIAR WITH AND SINCE SOME OF THEM I READ SUBSEQUENT
20 TO READING THE RULES, BUT I DID NOT READ EVERY SINGLE
21 ONE OF THEM, NO.

22 Q. DO YOU RECALL ANY OTHER THINGS THAT YOU WOULD
23 HAVE LOOKED AT IN PREPARING YOUR DECLARATION, FOR
24 EXAMPLE, NEWSPAPER ARTICLES, BLOG POSTS?

25 A. I WOULD NOT HAVE REFERRED TO THE LAY PRESS FOR

1 MY INFORMATION, NO.

2 Q. DO YOU RECALL IN PARTICULAR ANY STUDIES THAT YOU
3 READ OTHER THAN THOSE CITED IN THE RULES?

4 A. I CONSIDER AS PART OF MY DAILY WORK TO BE
5 READING RESEARCH ARTICLES ABOUT CONTRACEPTION, SO YES, I
6 READ ARTICLES ON A NEAR-DAILY BASIS ABOUT THIS FIELD.

7 Q. SURE. MY QUESTION WAS IF YOU RECALLED IN
8 PARTICULAR ANY ARTICLES THAT YOU READ TO PREPARE FOR THE
9 DECLARATION?

10 A. SURE. I HAVE READ MANY ARTICLES IN THE LAST
11 COUPLE OF WEEKS, PERHAPS MAYBE MORE FREQUENCY THAN USUAL
12 BECAUSE I KNEW THAT I WOULD BE HERE TODAY.

13 Q. SURE. IF YOU RECALL ANY IN PARTICULAR, WHO WAS
14 THE AUTHOR OF THAT STUDY AND WHAT WAS ITS TITLE?

15 A. SO I KNOW, FOR EXAMPLE, THAT YOU GUYS HAVE THE
16 BEARAK AND JONES ARTICLES, SO I HAVE READ -- I READ THAT
17 AGAIN IN PREPARATION FOR TODAY. THERE ARE SEVERAL OTHER
18 ARTICLES THAT -- AS I MENTIONED BEFORE, THERE'S OTHER
19 RESEARCH THAT HAS DOCUMENTED A -- CHANGES IN
20 CONTRACEPTIVE BEHAVIOR AND UPTAKE OF MORE EFFECTIVE
21 METHODS, SO I READ, REVIEWED SOME OF THOSE ARTICLES.

22 THERE WAS AN ARTICLE BY LYDIA PACE THAT WAS PUBLISHED IN
23 HEALTH AFFAIRS LAST YEAR. THERE WAS ANOTHER ARTICLE
24 PUBLISHED IN HEALTH AFFAIRS LAST YEAR REGARDING THE SAME
25 TOPIC. THERE IS AN ARTICLE BY KAVANAUGH AND COLLEAGUES

1 THAT WAS PUBLISHED IN CONTRACEPTION THIS YEAR THAT ALL
2 RELATE TO INCREASES IN MORE EFFECTIVE CONTRACEPTIVE USE
3 FOLLOWING THE CONTRACEPTIVE MANDATE. THOSE ARE ALL
4 ARTICLES THAT I REREAD RECENTLY IN PREPARATION FOR THIS.

5 Q. WHO DID YOU MEET WITH TO PREPARE FOR YOUR
6 DECLARATION?

7 A. I MET WITH THE LAWYERS HERE.

8 Q. ANYONE ELSE?

9 A. NO.

10 Q. SO YOU ARE HERE TODAY TO TESTIFY ABOUT THE NEW
11 EXEMPTION TO THE CONTRACEPTIVE COVERAGE MANDATE,
12 CORRECT?

13 A. YES.

14 Q. NOW, BEFORE THESE NEW EXEMPTIONS EXISTED, YOU
15 ARE AWARE THAT THERE WERE SOME GRANDFATHERED PLANS THAT
16 WERE ALREADY EXEMPT FROM THE COVERAGE MANDATE?

17 A. YES.

18 Q. AND YOU'RE AWARE THAT SOME OF THESE PLANS WERE
19 THEREFORE NOT PROVIDING COVERAGE FOR CONTRACEPTIVES?

20 A. COULD YOU REPEAT THAT? SORRY.

21 Q. SO YOU WOULD AGREE WITH ME THAT BECAUSE SOME OF
22 THESE PLANS WERE GRANDFATHERED, THOSE PLANS WERE NOT
23 PROVIDING COVERAGE FOR CONTRACEPTIVES?

24 A. YES.

25 Q. DO YOU HAVE AN IDEA OF HOW MANY OF THOSE PLANS

1 THERE WERE IN PENNSYLVANIA?

2 A. I DO NOT PRECISELY KNOW THE NUMBER, BUT I KNOW

3 THE NUMBER HAS BEEN DECLINING WITH EVERY YEAR.

4 Q. BUT YOU COULD NOT EVEN GIVE ME AN ESTIMATE OF A

5 NUMBER?

6 A. I KNOW AT THE TIME THE CONTRACEPTIVE MANDATE

7 WENT INTO PLACE, I RECALL THAT MAYBE THE NUMBER OF

8 GRANDFATHERED PLANS WAS AROUND 20 PERCENT, AND I

9 UNDERSTAND THAT IT HAS DECLINED IN EVERY YEAR SINCE

10 THEN, BUT I DON'T KNOW WHAT THE PRECISE NUMBER IS NOW.

11 Q. AND YOU ARE AWARE THAT PRIOR TO THE CURRENT

12 EXEMPTIONS, THERE WAS ALREADY AN EXEMPTION FOR HOUSES OF

13 WORSHIP?

14 A. YES.

15 Q. AND SO THEREFORE THERE WERE SOME HOUSES OF

16 WORSHIP THAT WERE NOT PROVIDING CONTRACEPTIVE COVERAGE?

17 A. CORRECT.

18 Q. ARE YOU AWARE ABOUT HOW MANY OF THOSE THERE WERE

19 IN PENNSYLVANIA?

20 A. NO, I DON'T KNOW HOW MANY.

21 Q. AND YOU ARE AWARE THAT PRIOR TO THIS LITIGATION,

22 THERE WAS OTHER LITIGATION CHALLENGING THE CONTRACEPTIVE

23 MANDATE, AND AS A RESULT OF THAT, SOME ENTITIES OBTAINED

24 INJUNCTIONS SO THEY DID NOT HAVE TO PROVIDE

25 CONTRACEPTION COVERAGE, CORRECT?

1 A. SO IF YOU ARE REFERRING TO ACCOMMODATIONS, YES,

2 I'M FAMILIAR WITH THAT.

3 Q. AND DO YOU KNOW HOW MANY OF THOSE ACCOMMODATED

4 ENTITIES WERE IN PENNSYLVANIA?

5 A. NO, I DO NOT KNOW. I DO KNOW THAT THE COMPANIES

6 THAT WERE INVOLVED, LIKE HOBBY LOBBY, ARE PENNSYLVANIA

7 COMPANIES, BUT I DO NOT KNOW BEYOND THAT HOW MANY ARE

8 FROM PENNSYLVANIA.

9 Q. SO I'M LOOKING AT YOUR DECLARATION NOW, WHICH IS

10 AT TAB 6 IN THE BINDER. AT PARAGRAPH 31, YOU STATED

11 THAT: SINCE THE ACA HAS PASSED, NO PATIENT HAS

12 CONTACTED ME TO ASK FOR A DIFFERENT, CHEAPER METHOD OF

13 CONTRACEPTION THAN THE ONE I HAD PRESCRIBED DUE TO THE

14 COST UNDER PRIVATE INSURANCE PLANS.

15 DID I READ THAT CORRECTLY?

16 A. YOU DID.

17 Q. SO YOU WOULD AGREE WITH ME THEN THAT SINCE THE

18 ACA PASSED, NONE OF YOUR PATIENTS ASKED FOR CHEAPER

19 METHODS OF CONTRACEPTION EVEN THOUGH ALL OF THESE

20 EXEMPTIONS THAT WE JUST TALKED ABOUT WERE IN EXISTENCE?

21 A. THAT'S RIGHT.

22 Q. NOW, LET'S TURN TO THE NEW EXEMPTIONS THAT ARE

23 AT ISSUE HERE. THE NEW EXEMPTIONS ARE FOR ENTITIES WITH

24 SINCERE RELIGIOUS AND MORAL OBJECTIONS, CORRECT?

25 A. CORRECT.

1 Q. BUT YOU ARE NOT AWARE OF ANY EMPLOYERS IN

2 PENNSYLVANIA THAT HAVE INVOKED THE NEW EXEMPTIONS SO

3 FAR, CORRECT?

4 A. I'M NOT AWARE, NO.

5 Q. SO YOU ARE NOT AWARE OF ANY INDIVIDUALS IN

6 PENNSYLVANIA WHO HAVE LOST THEIR CONTRACEPTIVE COVERAGE

7 DUE TO THE NEW EXEMPTIONS?

8 A. NO, I'M NOT. I DON'T KNOW.

9 Q. AND NOT JUST IN PENNSYLVANIA, BUT YOU ARE NOT

10 AWARE OF ANY PEOPLE NATIONALLY EITHER WHO HAVE LOST

11 COVERAGE BECAUSE OF THE EXEMPTION?

12 A. I'M NOT AWARE OF ANY, NO.

13 Q. AND YOU DON'T KNOW OF ANY PEOPLE EITHER IN

14 PENNSYLVANIA OR IN THE ENTIRE COUNTRY WHO WILL LOSE

15 COVERAGE, LIKE THEIR PLANS HAVE ALREADY ANNOUNCED THAT

16 THEY ARE GOING TO CHANGE, FOR EXAMPLE?

17 A. NO.

18 Q. LOOKING AT YOUR DECLARATION AT PARAGRAPH 23, YOU

19 STATED: SOME OF MY PATIENTS ALSO WORK FOR AND RECEIVE

20 THEIR HEALTH INSURANCE THROUGH CATHOLIC SCHOOLS AND

21 OTHER INSTITUTIONS WHICH MIGHT SEEK TO ELIMINATE

22 CONTRACEPTIVE COVERAGE THROUGH THEIR EMPLOYER-SPONSORED

23 PLANS UNDER THE NEW RELIGIOUS AND MORAL EXEMPTIONS.

24 DID I READ THAT CORRECTLY?

25 A. YES, YOU DID.

1 Q. SO NOW HERE TODAY IN DECEMBER, YOU STILL CAN'T

2 IDENTIFY ANY ACTUAL PATIENTS WHO WILL LOSE COVERAGE,

3 CORRECT?

4 A. I HAVE PATIENTS WHO ARE EMPLOYED OR -- AND HAVE

5 HAD PATIENTS WHO HAVE BEEN EMPLOYED AT THESE

6 INSTITUTIONS, SO THEY MAY ALREADY NOT HAVE COVERAGE.

7 Q. DO YOU KNOW OF ANY THAT HAVE ALREADY LOST

8 COVERAGE?

9 A. NOT AS A RESULT OF THE NEW RULES, NO.

10 Q. SO ALTHOUGH YOU DO HAVE SOME PATIENTS WHO ARE

11 EMPLOYED AT THESE, AS OF RIGHT NOW YOU DON'T KNOW ANY OF

12 THEM WHO ARE ACTUALLY GOING TO LOSE THEIR COVERAGE

13 BECAUSE OF THE NEW RULES?

14 A. THEY MAY ALREADY HAVE NOT HAD COVERAGE, BUT I DO

15 NOT KNOW OF ANY PATIENTS WHO MAY BE LOSING COVERAGE.

16 Q. RIGHT. AND YOU DO KNOW OF ANY PATIENTS WHOSE

17 SITUATION IS CHANGING FOR THE WORSE BECAUSE OF THE

18 RULES?

19 A. I DO NOT KNOW INDIVIDUALS IN THAT CASE RIGHT

20 NOW, NO.

21 Q. NOW, IN PARAGRAPH 34, YOU STATED THAT: AS A

22 RESULT OF THESE RULES, SOME WOMEN WILL LOSE

23 CONTRACEPTIVE -- SORRY -- SOME WOMEN WILL LOSE INSURANCE

24 COVERAGE FOR PREVENTATIVE CONTRACEPTIVE CARE.

25 DID I READ THAT CORRECTLY?

1 A. YES.

2 Q. BUT AS OF TODAY, YOU CAN'T IDENTIFY ANY ACTUAL

3 WOMEN WHO HAVE LOST COVERAGE BECAUSE OF THE NEW RULES,

4 CORRECT?

5 A. CORRECT.

6 Q. IN PARAGRAPH 35, REFERRING TO THESE WOMEN WHO

7 WOULD LOSE COVERAGE, YOU STATED: AS A RESULT THEIR

8 COSTS FOR CONTRACEPTIVE CARE WILL RISE.

9 DID I READ THAT CORRECTLY?

10 A. YES.

11 Q. BUT STILL WE CAN'T IDENTIFY ANY ACTUAL WOMEN WHO

12 COSTS HAVE RISEN BECAUSE OF THE EXEMPTION?

13 A. NO.

14 Q. AND IN PARAGRAPH 36, YOU STATED THAT: UNDER THE

15 NEW RULES, COSTS WILL AGAIN BECOME A BARRIER TO WOMEN'S

16 ACCESS TO AND USE OF THE CONTRACEPTIVE THAT IS MEDICALLY

17 RECOMMENDED FOR THEM.

18 BUT TODAY YOU CAN'T IDENTIFY ANY ACTUAL

19 WOMEN WHO ARE EXPERIENCING SUCH A BARRIER BECAUSE OF THE

20 NEW RULES, CORRECT?

21 A. CORRECT.

22 Q. AND IN PARAGRAPH 37, REFERRING TO THE SAME

23 WOMEN, YOU STATED THAT THEY WOULD FACE MEDICAL HARM, BUT

24 AS OF TODAY, YOU CAN'T IDENTIFY ANY ACTUAL WOMEN WHO ARE

25 FACING THAT MEDICAL HARM BECAUSE OF THE RULES, CORRECT?

1 A. CORRECT.

2 Q. AND IN PARAGRAPH 38, REFERRING TO THESE SAME

3 WOMEN, YOU STATED THAT THERE WOULD BE A DISRUPTION OF

4 THESE PATIENTS' MEDICAL TREATMENT, BUT AS OF TODAY, WE

5 DON'T KNOW -- YOU DON'T KNOW OF ANY ACTUAL WOMEN WHOSE

6 MEDICAL TREATMENT HAS BEEN DISRUPTED BY THE RULES,

7 CORRECT?

8 A. CORRECT.

9 Q. IN PARAGRAPH 39, YOU STATED THAT: SOME OF THESE

10 WOMEN WILL FACE UNINTENDED PREGNANCIES AND OTHER ADVERSE

11 MEDICAL CONSEQUENCES, BUT AS OF TODAY, YOU DON'T KNOW OF

12 ANY ACTUAL WOMEN WHO ARE FACING UNINTENDED PREGNANCIES

13 OR OTHER ADVERSE MEDICAL CONSEQUENCES BECAUSE OF THE

14 RULES, CORRECT?

15 A. CORRECT.

16 Q. AND IN PARAGRAPH 45, YOU STATED THAT YOU

17 BELIEVED AN INJUNCTION OF THE RULES IS NECESSARY TO

18 PREVENT IMMEDIATE AND IRREPARABLE HARM TO WOMEN IN

19 PENNSYLVANIA AND AROUND THE COUNTRY WHO WILL LOSE

20 ONGOING PREVENTATIVE CARE COVERAGE UNDER THEIR GROUP

21 HEALTH PLANS DUE TO THE RULES, BUT AS OF TODAY, YOU

22 DON'T KNOW OF ANY ACTUAL WOMEN WHO HAVE LOST THEIR

23 ONGOING PREVENTATIVE CARE COVERAGE DUE TO THE RULES,

24 CORRECT?

25 A. IT SAY "PREVENTIVE," NOT "PREVENTATIVE," BUT

1 OTHERWISE, CORRECT.

2 Q. APOLOGIES. THANK YOU.

3 HAVE YOU HEARD FROM -- I'M SORRY. IN

4 YOUR MEDICAL PRACTICE, DO YOU PRACTICE WITH OTHER

5 DOCTORS?

6 A. I DO.

7 Q. HAVE YOU HEARD FROM ANY OF THEM THAT LIKE THEY

8 DON'T -- HAVE YOU LEARNED THROUGH ANY OTHER MEANS ABOUT

9 ANY OTHER PATIENTS IN YOUR PRACTICE WHO MIGHT HAVE THIS

10 PROBLEM?

11 A. I HAVE NOT HAD THOSE CONVERSATIONS WITH MY

12 COLLEAGUES.

13 Q. HAVE YOU LEARNED, FOR EXAMPLE, THROUGH CALLS

14 FROM PHARMACIES OR PHARMACISTS ABOUT ANY PATIENTS WHO

15 ARE HAVING PROBLEMS GETTING THEIR PRESCRIPTIONS BECAUSE

16 OF THE NEW RULES?

17 MS. BOLAND: OBJECTION, CALLS FOR

18 HEARSAY.

19 THE COURT: SUSTAINED.

20 MS. KOPPLIN: IF I MIGHT CONFER WITH MY

21 COLLEAGUES FOR JUST A MOMENT, YOUR HONOR.

22 (PAUSE.)

23 MS. KOPPLIN: THANK YOU FOR YOUR

24 TESTIMONY.

25 YOUR HONOR, NO FURTHER QUESTIONS.

1 THE COURT: ANY REDIRECT?

2 MS. BOLAND: NO REDIRECT, YOUR HONOR.

3 THE COURT: THANK YOU VERY MUCH. YOU ARE

4 EXCUSED.

5 OKAY. WHAT I THINK WHAT WE WILL DO NOW

6 IF YOU ARE READY, YOU ARE UP. TELL US WHAT YOU FOUND.

7 MR. HEALY: PERMISSION TO APPROACH, YOUR

8 HONOR?

9 THE COURT: YES. AND YOU ARE MR. HEALY.

10 MR. HEALY: CHRISTOPHER HEALY.

11 THE COURT: OKAY.

12 MR. HEALY: THANK YOU, YOUR HONOR. I

13 APOLOGIZE AGAIN FOR THE SCRAMBLING BACK AND FORTH.

14 THE COURT: NOT A PROBLEM. I THINK I

15 ASKED YOU TO DO IT. YOU WERE PERFECTLY WITHIN YOUR

16 RIGHTS.

17 MR. HEALY: SO I LOOKED INTO THE AGENCY'S

18 RATIONALE BEHIND THE STATEMENT YOUR HONOR READ FROM THE

19 BENCH THIS MORNING, WHICH I BELIEVE, IF I HAVE IT

20 CORRECT, I PUT ON THE SCREEN HERE.

21 THE COURT: WHAT ARE WE LOOKING AT HERE?

22 MR. HEALY: THIS IS THE STATEMENT I

23 BELIEVE -- IF YOU COULD CONFIRM FOR ME, THE STATEMENT

24 THAT YOU READ FROM THE BENCH THIS MORNING THAT WAS: AS

25 REFLECTED IN LITIGATION PERTAINING TO THE MANDATE --

1 THE COURT: YES.

2 MR. HEALY: -- THEY WISH TO MAKE CHANGES

3 TO THEIR HEALTH PLANS THAT WILL REDUCE THE COST OF

4 INSURANCE COVERAGE FOR THE BENEFICIARIES, ET CETERA.

5 SO THIS STATEMENT READS: AS REFLECTED IN

6 LITIGATION PERTAINING TO THE MANDATE, SOME ENTITIES ARE

7 IN GRANDFATHERED HEALTH PLANS THAT DO NOT COVER

8 CONTRACEPTION. THEY WISH TO MAKE CHANGES TO THEIR

9 HEALTH PLANS THAT WILL REDUCE THE COST OF INSURANCE

10 COVERAGE FOR THEIR BENEFICIARIES OR POLICYHOLDERS BUT

11 WHICH WOULD CAUSE THE PLANS TO LOSE GRANDFATHERED

12 STATUS. THEY ARE REFRAINING FROM MAKING THOSE CHANGES

13 AND THEREFORE ARE CONTINUING TO INCUR AND PASS ON HIGHER

14 INSURANCE COSTS TO PREVENT THE MANDATE FROM APPLYING TO

15 THEIR PLANS IN VIOLATION OF THEIR CONSCIENCES.

16 THE COURT: SO WHEN I ASKED YOU -- I SAID

17 WE HAD GONE THROUGH 58,000 COMMENTS, AND WE HAD PUT IN

18 THE WORD "GRANDFATHER" OR "GRANDFATHERED" AND HAVE FOUND

19 NOTHING THAT WENT DIRECTLY TO THAT FINDING. SO WHAT YOU

20 WERE GOING TO DO WAS FIND ME -- PERHAPS THERE WAS A

21 DIFFERENT WORD THAT WAS USED IN THE COMMENTS.

22 MR. HEALY: SO THOSE 54,000 COMMENTS THAT

23 YOUR HONOR MENTIONED WERE COMMENTS WITH REGARD TO THE

24 2016 REQUEST FOR INFORMATION, WHICH HAD TO DO WITH WAYS

25 THAT THE DEPARTMENT MIGHT AMEND THE ACCOMODATION, NOT

1 THE GRANDFATHERED HEALTH PLANS, SO THAT MAY HAVE BEEN

2 THE REASON.

3 WE'VE ASKED THE AGENCY, AND THE AGENCY

4 POINTED OUT TWO PARTICULAR PREVIOUS COURT CASES THAT THE

5 AGENCY RELIED ON. AS THEY MENTION IN THE RULE -- THEY

6 WROTE -- THEN IT SAYS: AS REFLECTED IN LITIGATION

7 PERTAINING TO THE MANDATE.

8 SO THOSE TWO CASES THAT THE AGENCY --

9 THE COURT: WHICH CASES ARE THOSE?

10 MR. HEALY: THOSE ARE THE DIOCESE OF FORT

11 WAYNE VERSUS SEBELIUS. THAT'S 988 F.SUPP.2D 958. AND

12 ALSO ARCHDIOCESE OF ATLANTA. SO ARCHDIOCESE OF ATLANTA,

13 THIS IS THE COMPLAINT FROM THAT CASE. THAT IS CASE

14 NUMBER 1:12-CV-3489 IN THE NORTHERN DISTRICT OF GEORGIA.

15 I APOLOGIZE THAT I DON'T HAVE A FEDERAL CITATION FOR

16 THAT, BUT THAT IS THE CASE NUMBER.

17 AND THIS IS FROM THE COMPLAINT IN THAT

18 CASE. IT SAYS: BASED ON THE LEGAL OPINION OF COUNSEL,

19 PLAINTIFFS BELIEVE THAT THE ATLANTA PLAN AND SAVANNAH

20 PLAN CURRENTLY MEET THE AFFORDABLE CARE ACT'S DEFINITION

21 OF GRANDFATHERED PLAN. AND LATER ON: PLAINTIFFS WILL

22 LOSE THEIR GRANDFATHERED STATUS IN THE NEAR FUTURE FOR

23 REASONS THAT CANNOT BE AVOIDED --

24 THE COURT: WHICH CASE IS THIS?

25 MR. HEALY: THIS IS THE ARCHDIOCESE OF

1 ATLANTA CASE.

2 THE COURT: WHAT DATE WAS THIS DOCUMENT

3 YOU ARE SHOWING ME?

4 MR. HEALY: THAT WAS FROM 2012.

5 THE COURT: SINCE THE CONTRACEPTIVE

6 MANDATE -- SINCE THE NEW IFR HAS BEEN PUT INTO PLACE,

7 HAVE THESE FOLKS CHANGED THEIR PLAN?

8 MR. HEALY: I'M NOT AWARE WHETHER THESE

9 FOLKS HAVE CHANGED THEIR PLAN.

10 THE SECOND CASE THAT THE AGENCY RELIED ON

11 IS THIS, WHICH IS THE DIOCESE OF FORT WAYNE CASE, WHICH

12 HAS THIS HIGHLIGHTED PORTION HERE ON THE SCREEN. MAYBE

13 I CAN ZOOM OUT SO EVERYONE CAN SEE IT. THIS WAS ONE OF

14 THE PREVIOUS CHALLENGES TO THE CONTRACEPTIVE COVERAGE

15 MANDATE. IT SAYS THAT -- THIS IS FROM THE COURT'S

16 OPINION IN THAT CASE FROM THE NORTHERN DISTRICT OF

17 INDIANA.

18 THE COURT: WHAT IS THE CITE?

19 MR. HEALY: THAT WAS THE ONE I READ

20 BEFORE FROM 2013. AND THAT SAYS: CURRENTLY THE

21 DIOCESAN HEALTH PLAN ALSO MEETS THE ACA'S DEFINITION OF

22 A GRANDFATHERED PLAN AND INCLUDES A STATEMENT IN PLAN

23 MATERIALS PROVIDED TO PARTICIPANTS OR BENEFICIARIES THAT

24 IT BELIEVES IS A GRANDFATHERED PLAN AS IT IS REQUIRED TO

25 MAINTAIN ITS GRANDFATHERED STATUS. BUT IN ORDER TO

1 MAINTAIN ITS GRANDFATHERED STATUS, THE DIOCESE FORGOES

2 APPROXIMATELY \$180,000 A YEAR IN INCREASED PREMIUMS SO

3 THAT IT CAN PROTECT CATHOLIC CHARITIES FROM THE

4 CONTRACEPTIVE MANDATE.

5 ABSENT MAINTAINING ITS GRANDFATHERED

6 STATUS AT A GREAT EXPENSE, THE ONLY OTHER OPTIONS WOULD

7 BE EITHER, ONE, SPONSOR A PLAN THAT WOULD PROVIDE THE

8 EMPLOYEES OF CATHOLIC CHARITIES WITH ACCESS TO FREE

9 CONTRACEPTION, ABORTION, INDUSTRY PRODUCTS,

10 STERILIZATION, AND RELATED COUNSELING; OR TWO, NO LONGER

11 EXTEND ITS PLAN TO CATHOLIC CHARITIES, SUBJECTING IT TO

12 MASSIVE FINES IF IT DOES NOT CONTRACT WITH ANOTHER

13 INSURANCE PROVIDER THAT WILL PROVIDE THE OBJECTIONABLE

14 COVERAGE.

15 THE COURT: DO WE KNOW WHETHER THE

16 PLAINTIFF IN THIS CASE HAS -- SUBSEQUENT TO THE

17 ENACTMENT OF THE NEW -- RATHER THE ISSUANCE OF THE NEW

18 IFRS HAS CHANGED THEIR PLAN?

19 MR. HEALY: I DO NOT KNOW THAT THEY HAVE.

20 THE COURT: SO APART FROM THESE TWO

21 CASES, THAT IS -- THAT IS WHAT YOU GOT?

22 MR. HEALY: THERE MAY BE OTHER COMMENTS.

23 WE HAD LOOKED THROUGH AS MANY OF THEM AS WE COULD IN THE

24 TIME WE HAD. HOWEVER, WE HAVE IDENTIFIED NO PARTICULAR

25 COMMENTS. THAT SAID, ALTHOUGH THESE TWO CASES WERE NOT

1 IN THE ADMINISTRATIVE RECORD, IT'S NOT GENERALLY THE
2 PRACTICE TO INCLUDE PRIOR COURT CASES IN ADMINISTRATIVE
3 RECORDS. HOWEVER -- BASICALLY BECAUSE OF THE FACT THAT
4 THEY ARE ALREADY JUDICIALLY NOTICEABLE. HOWEVER, THEY
5 WERE CITED IN THE RULES AND IT WAS SOMETHING THAT THE
6 AGENCY RELIED ON.

7 THE COURT: SO TO THE EXTENT THAT THIS
8 ISSUE, THE GRANDFATHER HEALTH PLANS WANTING TO MAKE
9 CHANGES AND NOT LOSE THEIR GRANDFATHER STATUS, TO THE
10 EXTENT THAT THAT WAS A UNDERLYING RATIONALE FOR THE NEW
11 IFRS, WE HAVE TWO PLANS RIGHT NOW? TWO COURT CASES THAT
12 YOU HAVE BEEN UNABLE TO IDENTIFY, WHICH WARRANTED THE
13 CONCLUSION THAT THERE WAS GOOD LAW?

14 MR. HEALY: YES, THAT IS CORRECT, YOUR
15 HONOR, AND WE ARE HAPPY TO CONTINUE LOOKING THROUGH
16 OTHER COMMENTS THAT HAVE COME SINCE THEN. WE HAD AN
17 OPEN COMMENT PERIOD THAT ENDED ON DECEMBER 5TH.
18 HOWEVER, AT THIS TIME WE HAVE NOT BEEN ABLE TO IDENTIFY
19 FURTHER COMMENTS.

20 THE COURT: WELL, I THINK THAT THE ISSUE
21 IS WHAT COMMENTS HAD COME IN AT THE TIME THE NEW IFRS
22 WERE ISSUED, BECAUSE THAT WAS THE REASON THAT THE
23 AGENCIES WERE SAYING THEY HAD GOOD CAUSE WAS BECAUSE OF
24 THOSE. SO TO THE EXTENT THAT THINGS HAVE HAPPENED
25 SUBSEQUENTLY, I DON'T THINK IT'S RELEVANT TO MY

1 ANALYSIS.

2 MR. HEALY: THAT MAKES SENSE. THAT'S
3 CORRECT, YOUR HONOR.

4 THE COURT: OKAY. LET'S TAKE A BRIEF
5 BREAK AND THEN -- DID YOU WANT HALF AN HOUR TO CLOSE OR
6 15 MINUTES TO CLOSE?

7 MR. FISCHER: YOUR HONOR, HALF AN HOUR,
8 ALTHOUGH I WILL TRY NOT TO TAKE ALL OF IT.

9 MR. DAVIS: I THINK HALF AN HOUR IS FINE.
10 I WILL ALSO TRY NOT TO TAKE ALL OF IT.

11 THE COURT: OKAY. WE'RE DOING VERY WELL.
12 IT'S ONLY QUARTER TO 3. I HAD GIVEN YOU UNTIL 6 SO WE
13 CAN PROBABLY GET OUT EARLIER THAN WE ANTICIPATED.

14 THE CLERK: ALL RISE.
15 (BREAK TAKEN.)

16 THE COURT: WHO'S DOING CLOSINGS FOR THE
17 COMMONWEALTH?

18 MR. FISCHER: YOUR HONOR, I'M GOING TO DO
19 CLOSING FOR THE COMMONWEALTH.

20 THE COURT: OKAY.

21 MR. FISCHER: GOOD AFTERNOON, YOUR HONOR.

22 THE COURT: GOOD AFTERNOON.

23 MR. FISCHER: I THINK IT IS IMPORTANT TO
24 START BY REMEMBERING EXACTLY WHAT WE ARE CHALLENGING AND
25 WHAT WE ARE NOT CHALLENGING IN THESE PROCEEDINGS.

1 MR. DAVIS SAID IN THE BEGINNING THAT
2 THESE RULES WERE NOT ISSUED ON A BLANK SLATE, AND THAT
3 IS ABSOLUTELY CORRECT. A LOT HAS HAPPENED IN THIS AREA
4 BEFORE WE GET TO THIS POINT.

5 WE ARE NOT CHALLENGING THE ORIGINAL
6 EXEMPTION FOR CHURCHES AND CLOSELY-RELATED INSTITUTIONS.
7 WE ARE NOT CHALLENGING THE ACCOMMODATION PROCESS THAT
8 WAS ORIGINALLY CREATED AND THEN EXPANDED AS A RESULT OF
9 THE SUPREME COURT'S HOBBY LOBBY DECISION.

10 WHAT WE ARE CHALLENGING ARE TWO RULES
11 THAT ARE SWEEPING IN THEIR SCOPE. THERE ARE A LOT OF
12 CONCERNS WE HAD ABOUT THESE RULES, BUT THERE ARE THREE
13 ASPECTS IN PARTICULAR THAT I WANT TO FOCUS ON.

14 THE FIRST IS THAT FOR THE FIRST TIME, THE
15 RELIGIOUS EXEMPTION RULE ALLOWS PUBLICLY-TRADED
16 COMPANIES TO OPT OUT OF THE CONTRACEPTIVE MANDATE. THAT
17 WAS NEVER THE CASE BEFORE. THERE IS A LIMITED
18 JUSTIFICATION FOR THAT DECISION IN THE RULES, AND IT
19 POTENTIALLY THREATENS CONTRACEPTIVE COVERAGE FOR A
20 SIGNIFICANT NUMBER OF WOMEN.

21 THE SECOND FACTOR THAT I'D LIKE TO
22 MENTION IS THAT AS A RESULT OF THESE TWO RULES, THE
23 ACCOMMODATION PROCESS IS NOW OPTIONAL.

24 THE COURT: IS NOW WHAT?

25 MR. FISCHER: OPTIONAL. THERE IS NO

1 REQUIREMENT THAT COMPANIES THAT WISH TO OPT OUT NOTIFY
2 THEIR INSURANCE COMPANY OR THEIR THIRD-PARTY
3 ADMINISTRATOR OF THEIR DECISION SO THAT THEIR EMPLOYEES
4 CAN GET COVERAGE. SO AS A RESULT OF THAT, WOMEN
5 EMPLOYED BY THE COMPANIES THAT ARE CURRENTLY USING THAT
6 PROCESS FACE A LOSS OF COVERAGE.

7 AND THEN FINALLY, THE THIRD ISSUE I WOULD
8 LIKE TO TOUCH ON, WHICH YOUR HONOR DISCUSSED EARLIER, IS
9 THE MORAL EXEMPTION. THE MORAL EXEMPTION IS INCREDIBLY
10 VAGUE, DOES NOT DEFINE EXACTLY WHAT'S MEANT BY A
11 SINCERELY-HELD MORAL BELIEF, AND AS I THINK YOUR HONOR'S
12 QUESTIONING REFLECTED, OPENS UP ALL SORTS OF POTENTIAL
13 PROBLEMS OF HOW DO FEDERAL AGENCIES DETERMINE WHETHER A
14 BELIEF IS SINCERELY HELD, WHAT THE NATURE OF THE BELIEF
15 IS, WHAT BELIEFS DO QUALIFY TO ALLOW SOMEBODY TO OPT
16 OUT, WHAT BELIEFS MAY NOT QUALIFY. SO I THINK THAT RULE
17 BY ITSELF IS SIGNIFICANTLY PROBLEMATIC.

18 WHAT WE ARE SEEKING AS A RESULT OF THIS
19 IS AN INJUNCTION THAT WOULD ESSENTIALLY TAKE US BACK TO
20 THE STATUS QUO BEFORE THESE RULES WERE ISSUED, BACK TO
21 OCTOBER 5TH OF THIS YEAR.

22 IT IS OUR HOPE THAT AS A RESULT, AT THE
23 VERY LEAST, THE AGENCIES WILL FOLLOW THE CORRECT PROCESS
24 IF THEY TRY TO DO THIS AGAIN, BECAUSE WHAT WE HAVE HERE
25 IS A FLAWED PROCESS THAT PRODUCED A FLAWED RESULT.

1 WE THINK IT IS CLEAR THAT THE AGENCY HAS
2 VIOLATED THE PROCEDURAL REQUIREMENTS OF THE APA AND CAME
3 UP WITH A RESULT THAT VIOLATES THE SUBSTANTIVE
4 REQUIREMENTS OF THE APA, IS ARBITRARY AND CAPRICIOUS,
5 VIOLATES THE AFFORDABLE CARE ACT, AND HAS OTHER
6 SIGNIFICANT PROBLEMS.

7 THE COURT: LET ME FOLLOW UP WITH YOU ON
8 THAT ONE.

9 WHEN YOUR COLLEAGUE OPENED, I ASKED HIM
10 WHETHER -- THERE CLEARLY IS A DISTINCTION BETWEEN THE
11 CLAIMS THAT ARE BROUGHT UNDER THE APA AND THE CLAIMS
12 THAT ARE THE CONSTITUTIONAL CLAIMS.

13 THE FISCHER: YES, THAT'S CORRECT.

14 THE COURT: AND AS YOU KNOW, WHEN A COURT
15 CAN REACH A STATUTORY CLAIM RATHER THAN A CONSTITUTIONAL
16 CLAIM, THE ADMONITION AT ALL LEVELS ALL OF THE WAY UP TO
17 THE SUPREME COURT AND THE THIRD CIRCUIT IS THAT THE
18 COURT SHOULD NOT REACH THE CONSTITUTIONAL ISSUES BUT
19 SHOULD PROCEED WITH THE PROCEDURAL ISSUES.

20 SO IF I WERE TO PROCEED WITH THE
21 PROCEDURAL ISSUES ALONE, AND ASSUMING THAT I WOULD DO IT
22 UNDER BOTH THE PROCEDURAL COMPONENT, THE NOTICE OF
23 COMMENT, AND THE SUBSTANTIVE COMPONENT, THE LACK OF GOOD
24 CAUSE, WHAT KIND OF INJUNCTION WOULD THE COMMONWEALTH BE
25 LOOKING FOR?

1 IN THOSE CIRCUMSTANCES, I THINK YOUR
2 COLLEAGUE SAID IF IT WAS ONLY THE PROCEDURAL, THEY WOULD
3 JUST GO BACK AND GO THROUGH THE PROCEDURE AND STILL HAVE
4 THE SAME RULES.

5 SO WHAT INJUNCTION WOULD YOU BE ASKING
6 FOR IN THOSE LIMITED CIRCUMSTANCES?

7 MR. FISCHER: WE WOULD BE SEEKING AN
8 INJUNCTION PREVENTING THEM FROM ENFORCING THESE RULES,
9 AND OUR HOPE IS THAT, PARTICULARLY IF THERE IS A
10 SUBSTANTIVE COMPONENT TO YOUR HONOR'S RULING, IT WOULD
11 BE TAKEN BY THE AGENCIES -- AGENCIES AS AN INDICATION
12 THAT THE NEXT RULE THEY COME OUT WITH BETTER EITHER HAVE
13 MORE SUBSTANTIVE SUPPORT BEHIND IT OR ADDRESS THESE
14 ISSUES DIFFERENTLY, PARTICULARLY THE THREE THAT I
15 MENTIONED.

16 THE COURT: SO HOW DOES THAT ISSUE -- HOW
17 IS THAT ISSUE LINED UP IN AN ORDER? BECAUSE YOU ARE
18 NOT, YOU HAVE NOT ASKED FOR A MANDATORY INJUNCTION, YOU
19 HAVE NOT ASKED ME TO TELL THEM TO DO RULES IN A
20 PARTICULAR WAY, SO HOW WOULD AN ORDER LOOK THAT DEALS
21 WITH THE GOOD CAUSE COMPONENT IF I WERE TO RULE IN THAT
22 WAY.

23 MR. FISCHER: AN ORDER COULD SIMPLY
24 PRECLUDE THEM FROM ENFORCING THESE TWO SPECIFIC RULES,
25 WHICH WOULD THEN REQUIRE THEM TO, AT THE VERY LEAST, GO

1 THROUGH THE PROCESS AGAIN, AND DEPENDING ON WHAT COMES
2 OUT OF THAT PROCESS, WE MAY BE BACK HERE AGAIN. OUR
3 HOPE WOULD BE THAT THEY WOULD COME UP WITH A DIFFERENT
4 RESULT.

5 BUT I DON'T BELIEVE THERE IS ANYTHING
6 THIS COURT CAN DO TO ENJOIN THE NEXT RULE. AND, YOU
7 KNOW, MAYBE WE ARE BACK HERE. I HOPE THAT IS NOT THE
8 CASE. HOPEFULLY THEY WILL GET THE MESSAGE AND MAKE SOME
9 CHANGES TO THE RULES THAT ADDRESS THE REAL ISSUES.

10 BUT I THINK THAT THE INJUNCTION WE HAVE
11 REQUESTED IS OF THESE TWO RULES AS THEY ARE CURRENTLY
12 MADE.

13 THE COURT: OKAY.

14 MR. FISCHER: SO LET ME TALK A LITTLE
15 MORE ABOUT THE PROCEDURAL VIOLATION OF THE APA. THE
16 GOVERNMENT HAS ARGUED THAT THEY HAVE STATUTORY AUTHORITY
17 TO WAIVE NOTICE AND COMMENT. WE ADDRESS THIS IN OUR
18 BRIEFS. THE APA IS VERY CLEAR ABOUT THIS. SECTION 559
19 SAYS: SUBSEQUENT STATUTE MAY NOT HOLD -- MAY NOT BE
20 HELD TO SUPERSEDE OR MODIFY THIS SUBCHAPTER, AND SEVERAL
21 OTHERS, EXCEPT TO THE EXTENT IT DOES SO EXPRESSLY.

22 AND THE D.C. DISTRICT COURT IN COALITION
23 FOR PARITY VERSUS SEBELIUS LOOKED AT THE VERY SAME
24 AUTHORITY THAT THE AGENCIES ARE RELYING ON HERE,
25 ANALYZED IT UNDER SECTION 549 OF THE APA, AND SAID IT

1 CLEARLY DOES NOT EXPRESSLY MODIFY THE REQUIREMENTS OF
2 THE APA.

3 THE SECOND -- THE LANGUAGE THEY ARE
4 RELYING ON IS SIMPLY A GENERAL GRANT THAT SAYS: THE
5 SECRETARY MAY PROMULGATE ANY INTERIM FINAL RULES AS THE
6 SECRETARY DETERMINES ARE APPROPRIATE TO CARRY OUT THIS
7 PART.

8 NOTHING ABOUT WAIVING NOTICE AND COMMENT,
9 NOTHING ABOUT PREEMPTING THE APA. GIVEN THE CLEAR
10 REQUIREMENT IN THE APA THAT MODIFICATIONS HAVE TO BE
11 DONE EXPRESSLY, WE THINK IT'S CLEAR THAT THAT DOES NOT
12 GIVE THEM THE AUTHORITY THEY CLAIM IT DOES.

13 WE ALSO THINK IT IS FAIRLY CLEAR THEY
14 DON'T HAVE GOOD CAUSE. THE GOOD CAUSE ARGUMENT, AS I
15 UNDERSTAND, IS ESSENTIALLY, WELL, THERE IS A LOT OF
16 LITIGATION GOING ON. WE WANT TO WRAP IT UP, SO WE WANT
17 THESE RULES TO BE EFFECTIVE IMMEDIATELY.

18 NOW, IT IS INTERESTING, THEY HAVE ARGUED
19 THAT MANY OF THE PLAINTIFFS IN THOSE CASES ARE PROTECTED
20 BY INJUNCTIONS, WHICH IS TRUE. SO IF THE ARGUMENT IS --
21 THE ARGUMENT IS WE NEED TO PROTECT THESE PEOPLE
22 IMMEDIATELY, WELL, BY THEIR OWN ADMISSION, MANY OF THEM
23 ALREADY DO HAVE PROTECTION.

24 WE TALKED EXTENSIVELY IN OUR BRIEF ABOUT
25 THE THIRD CIRCUIT'S DECISION IN UNITED STATES VERSUS

1 REYNOLDS BECAUSE IT SQUARELY REJECTS THE ARGUMENT THAT
2 RESOLVING UNCERTAINTY IS AN ADEQUATE JUSTIFICATION FOR
3 ISSUING IFRS. THE THIRD CIRCUIT THERE SAID VERY CLEARLY
4 THAT THERE IS ALWAYS UNCERTAINTY IN THE RULEMAKING
5 PROCESS, AND PARTICULARLY IF AN IFR IS ISSUED AS THIS
6 ONE WAS, WITH A REQUEST FOR SUBSTANTIVE COMMENTS AND THE
7 STATEMENT FROM THE AGENCY THAT THEY MAY BE MAKING
8 FURTHER CHANGES TO THE RULE. THERE IS SIMPLY NO
9 CERTAINTY THAT IS ACHIEVED AS A RESULT OF THAT.

10 AND FINALLY, I THINK THERE IS AN ARGUMENT
11 THAT THEY MADE A FEW TIMES, WHICH IS THAT, WELL, IFR'S
12 WERE ISSUED EARLIER IN APPLYING THE AFFORDABLE CARE ACT
13 WOMEN'S HEALTH AMENDMENT, SO IT IS OKAY THIS TIME.

14 BUT I THINK IF THE COURT LOOKS BACK TO
15 PRIESTS FOR LIFE, WHICH ADDRESSED THE PRIOR IFR THAT
16 THEY ARE TALKING ABOUT, THE SPECIFIC IFR THAT THEY CITED
17 TO YOU, WHICH IS AVAILABLE AT 79 FEDERAL REGISTER 51092,
18 WAS ISSUED FOLLOWING THE WHEATON COLLEGE DECISION, WHICH
19 CAME RIGHT AFTER HOBBY LOBBY.

20 ON THE SAME DAY, THE AGENCIES ISSUED A
21 NOTICE OF PROPOSED RULEMAKING CALLED THE HOBBY LOBBY --
22 AND AN IFR THAT WAS BASED ON WHEATON COLLEGE. HERE IS
23 WHAT THE WHEATON COLLEGE IFR SAID: THESE INTERIM FINAL
24 REGULATIONS PROVIDED AN ALTERNATIVE PROCESS THAT AN
25 ELIGIBLE ORGANIZATION MAY USE TO PROVIDE NOTICE OF ITS

1 RELIGIOUS OBJECTIONS TO PROVIDING CONTRACEPTIVE COVERAGE
2 WHILE PRESERVING PARTICIPANTS' AND BENEFICIARIES' ACCESS
3 TO COVERAGE OF THE FULL RANGE OF FDA-APPROVED
4 CONTRACEPTIVES.

5 ALL THAT DID IS IT SAID, UNDER THE
6 ACCOMMODATION BEFORE, YOU HAD TO PROVIDE NOTICE TO YOUR
7 INSURANCE COMPANY OR YOUR THIRD-PARTY ADMINISTRATOR.
8 THE COURT IN WHEATON COLLEGE ESSENTIALLY SAID, YOU WILL
9 HAVE TO ALSO LET THEM PROVIDE NOTICE TO HHS, AND THEN
10 YOU DO THE LEGWORK AND CONTACT THE THIRD-PARTY
11 ADMINISTRATOR OR INSURANCE COMPANY.

12 SO ALL THIS REGULATION DID IS IT
13 ESSENTIALLY IMPLEMENTED WHAT THE COURT DIRECTED. IT
14 SAID, WE ARE GOING TO CREATE ANOTHER PROCESS WHERE YOU
15 CAN SEND THE FORM TO US. THAT IS A FAR CRY FROM THE
16 SWEEPING CHANGES THAT ARE AT ISSUE IN THIS CASE.

17 YOUR HONOR, I WOULD LIKE TO GET INTO THE
18 SUBSTANTIVE APA DISCUSSION A LITTLE BIT BECAUSE I THINK
19 THAT IS IN MANY WAYS THE MOST IMPORTANT -- YOU KNOW, ONE
20 OF THE MOST IMPORTANT ISSUES IN THIS CASE.

21 YOUR HONOR HAD ASKED ABOUT CHEVRON
22 DEFERENCE AND WHETHER THAT APPLIED HERE. CHEVRON DOES
23 NOT APPLY EITHER TO THEIR INTERPRETATION OF THE
24 AFFORDABLE CARE ACT OR TO THEIR INTERPRETATION OF RFRA.

25 WITH RESPECT TO RFRA, I THINK COUNSEL

1 CONCEDED EARLIER THAT -- THAT THEY DO NOT GET CHEVRON
2 DEFERENCE UNDER RFRA, AND CERTAINLY IN THE HOBBY LOBBY
3 DECISION, THERE WAS NOT EVEN A MENTION OF CHEVRON OR
4 WHETHER THE GOVERNMENT'S INTERPRETATION OF RFRA WAS
5 ENTITLED TO --

6 THE COURT: SO STEP ZERO ON RFRA.

7 MR. FISCHER: YES, IT'S A ZERO ON RFRA.

8 AND ACTUALLY, I BELIEVE IT'S STEP ZERO ON THE ACA TOO.

9 AND I WOULD REFER TO --

10 THE COURT: SO -- WELL, WHY IT WOULD BE
11 STEP 1 BUT YOU WOULD BE ARGUING THAT THEY HAVE TAKEN
12 ULTRA VIRES ACTIONS UNDER STEP 1?

13 MR. FISCHER: I BELIEVE IT COULD BE

14 FRANKLY ANY OF THE STEPS, I THINK. BUT I JUST WANT TO
15 START AT STEP ZERO AND SAY THE SUPREME COURT DECISION IN
16 KING VERSUS BURWELL I THINK IS A GOOD EXAMPLE. THAT WAS
17 THE CASE INVOLVING THE LANGUAGE IN THE ACA ABOUT TAX
18 CREDITS BEING AVAILABLE TO PEOPLE WHO PURCHASED HEALTH
19 COVERAGE ON AN EXCHANGE RUN BY THE STATE. AND THE
20 QUESTION WAS WHETHER THAT APPLIED TO THE HEALTHCARE.GOV
21 OR BY THE FEDERAL GOVERNMENT.

22 CHIEF JUSTICE ROBERTS REJECTED THE
23 ARGUMENT THAT CHEVRON DEFERENCE APPLIED, AND HIS
24 REASONING WAS -- WAS THIS: THE TAX CREDITS ARE AMONG
25 THE ACT'S KEY REFORMS INVOLVING BILLIONS OF DOLLARS IN

1 SPENDING EACH YEAR AND AFFECTING THE PRICE OF HEALTH
2 INSURANCE FOR MILLIONS OF PEOPLE. WHETHER THOSE CREDITS
3 ARE AVAILABLE UNDER FEDERAL EXCHANGES IS THUS A QUESTION
4 OF DEEP ECONOMIC AND POLITICAL SIGNIFICANCE THAT IS
5 CENTRAL TO THE STATUTORY SCHEME. HAD CONGRESS WISHED TO
6 ASSIGN THAT QUESTION TO AN AGENCY, IT SURELY WOULD HAVE
7 DONE SO EXPRESSLY. IT IS ESPECIALLY UNLIKELY THAT
8 CONGRESS WOULD HAVE DELEGATED THIS DECISION TO THE IRS,
9 WHICH HAS NO EXPERTISE IN CRAFTING HEALTH INSURANCE
10 POLICY OF THIS SORT.

11 NOW HERE, THE STATUTE HAS A CLEAR
12 DELEGATION OF AUTHORITY TO IDENTIFY APPROPRIATE
13 PREVENTIVE SERVICES. THAT IS TO THE HEALTH RESOURCES
14 AND SERVICE ADMINISTRATION. HRSA HAS SIGNIFICANT
15 EXPERTISE ON PREVENTIVE MEDICINE, ON INCREASING ACCESS
16 TO HEALTHCARE, ON PROMOTING HEALTHCARE FOR UNDERSERVED
17 COMMUNITIES. THERE IS NO EXPERTISE THERE IN DEFINING
18 EXEMPTIONS FOR EXISTING MANDATORY REQUIREMENTS.

19 IN FACT, THAT ACTUALLY RUNS COUNTER TO
20 THEIR MISSION. THEIR MISSION IS TO INCREASE ACCESS TO
21 HEALTHCARE. SO IT STRAINS CREDULITY TO SAY THAT
22 CONGRESS WOULD HAVE DELEGATED TO HRSA THE RESPONSIBILITY
23 TO INTERPRET THIS PROVISION IN A WAY THAT ALLOWED FOR
24 SIGNIFICANT EXEMPTIONS.

25 REGARDLESS, IF WE DO GET INTO THE CHEVRON

1 FRAMEWORK, THE GOVERNMENT NEEDS TO IDENTIFY THE LANGUAGE
2 IN THE ACA THAT THEY ARE INTERPRETING AND WHAT THEIR
3 INTERPRETATION IS SO THE COURT CAN ASSESS WHETHER THEIR
4 INTERPRETATION IS PRECLUDED BY THE LANGUAGE, AND IF NOT,
5 WHETHER IT'S REASONABLE.

6 AS I READ THE GOVERNMENT'S ARGUMENTS,
7 THEY REFER TO THE SECTION WHICH WE REFER TO. IT SAYS:
8 A GROUP HEALTH PLAN AND HEALTH INSURANCE ISSUER OFFERING
9 GROUP OR INDIVIDUAL HEALTH INSURANCE COVERAGE SHALL, AT
10 A MINIMUM, PROVIDE COVERAGE FOR AND SHALL NOT IMPOSE ANY
11 CAUTIONARY REQUIREMENTS FOR -- AND THEN SUBSECTION 4 IS:
12 WITH RESPECT TO WOMEN, SUCH ADDITIONAL PREVENTIVE CARE
13 AND SCREENINGS NOT DESCRIBED IN PARAGRAPH 1 AS PROVIDED
14 FOR IN COMPREHENSIVE GUIDELINES SUPPORTED BY THE HRSA.

15 THE ONLY ARGUMENT I HAVE HEARD FROM THE
16 GOVERNMENT AS TO HOW THEY ARE INTERPRETING THAT UNDER
17 CHEVRON IS THAT SOMEHOW THE USE OF THE WORD "AS" BEFORE
18 "PROVIDED FOR" IMPLIES THAT HRSA -- AND THEIR QUOTE IS:
19 MAY DETERMINE NOT ONLY THE SERVICES COVERED BUT THE
20 MANNER OR REACH OF THAT COVERAGE.

21 AND THEN THEY GO ON TO SAY: THE AGENCIES
22 READ THE STATUTE TO AUTHORIZE THEM TO CRAFT OR MODIFY
23 EXEMPTIONS FOR ANY CONTRACEPTIVE COVERAGE MANDATE AND
24 THAT REASONABLE CONSTRUCTION MUST PREVAIL. AND THAT
25 PUTS A LOT OF -- THE WORD "AS" IS DOING A LOT OF WORK

1 THERE. THAT IS THE INTERPRETATION THEY COME UP WITH.
2 HRSA HAS NO EXPERTISE IN THIS AREA AND
3 THERE IS SIMPLY NO WAY THAT I CAN SEE THAT THAT LANGUAGE
4 CAN REASONABLY BE READ TO SAY HRSA OR THE AGENCIES UNDER
5 WHICH HRSA IS WORKING CAN CREATE THESE SIGNIFICANT
6 CARVE-OUTS.

7 THE COURT: SORRY, GO ON.

8 MR. FISCHER: NO.

9 THE COURT: SO I ASKED THE GOVERNMENT --
10 THE DEFENSE -- YOU ARE BOTH THE GOVERNMENT -- WHETHER --
11 JUST TO TALK ME THROUGH THIS NOTION THAT THERE IS THE --
12 THE ACA SAYS TO HRSA: PROVIDES SOME GUIDELINES. THE
13 GUIDELINES THAT ARE CREATED ON THE CONTRACEPTIVE
14 MANDATE. AND THEN THE RULES, THE NEW IFR'S, ARE CREATED
15 AS AN EXCEPTION TO THE GUIDELINES, SO IT'S AN AGENCY
16 MODIFYING A GUIDELINE OR A RULE OF AN AGENCY.
17 AND I THINK THE RESPONSE OF THE
18 DEFENDANTS WAS PERFECTLY FINE, IT HAPPENS ALL THE TIME.
19 SO CAN YOU RESPOND TO THAT PARTICULAR POINT AND TELL
20 ME -- IT SEEMS A LITTLE ODD, AND TELL ME WHETHER IT'S
21 JUST ODD OR WHETHER THERE IS SOMETHING PROBLEMATIC ABOUT
22 IT.

23 MR. FISCHER: WE BELIEVE IT'S SERIOUSLY
24 PROBLEMATIC. THE AGENCY CANNOT MODIFY GUIDELINES IN A
25 WAY THAT CONFLICTS WITH THE STATUTORY DIRECTION THAT

1 CREATED THOSE GUIDELINES, AND THE DELEGATION WAS TO HRSA
2 AND IT WAS TO HRSA FOR A REASON, BECAUSE THEY HAVE
3 EXPERTISE IN IDENTIFYING PREVENTIVE MEDICINE.

4 THERE HAS BEEN A LOT OF DISCUSSION ABOUT
5 HOW CONTRACEPTIVE COVERAGE IS NOT SPECIFICALLY MENTIONED
6 IN THE ACA. WELL, I DON'T THINK WE WANT CONGRESS TO
7 IDENTIFY THE SPECIFIC PREVENTIVE CARE THAT INSURANCE
8 COMPANIES MUST PROVIDE. CONGRESS, I BELIEVE, MADE A
9 WISE DECISION THAT THAT DECISION WAS GOING TO BE
10 DELEGATED TO HRSA, WHICH HAS EXPERTISE AND THEN COULD
11 MODIFY THE SERVICES THAT IT RECOMMENDED ON AN AS-NEEDED
12 BASIS, AS MEDICINE CHANGED, AS SCIENTIFIC ADVANCES MOVED
13 US FORWARD.

14 SO THE IDEA THAT AN AGENCY CAN SIMPLY
15 TAKE A GRANT OF AUTHORITY THAT IS FAIRLY CLEARLY LIMITED
16 TOWARD IDENTIFYING THE SERVICES THAT HAVE TO BE PROVIDED
17 AND BLOW THAT UP INTO, WELL, WE CAN CREATE ENTIRE
18 EXEMPTIONS, BROAD EXEMPTIONS FROM THIS RULE THAT SAYS --
19 AND I REFER BACK TO THE PREFATORY LANGUAGE IN 42 U.S.C.
20 30GG-13, WHICH SAYS PROVIDERS OF HEALTH COVERAGE SHALL,
21 AT A MINIMUM, PROVIDE COVERAGE AND SHALL NOT IMPOSE ANY
22 COST SHARING REQUIREMENTS FOR. THAT LANGUAGE IS ABOUT
23 AS MANDATORY AS YOU CAN GET.

24 AND THEN IT LISTS THE FOUR THINGS. AT
25 THE VERY BOTTOM IS THE WOMEN'S HEALTH AMENDMENT. THE

1 GOVERNMENT SOMEHOW READS THE LANGUAGE IN THE WOMEN'S
2 HEALTH AMENDMENT TO APPLY BACK TO THE MANDATORY LANGUAGE
3 IN THE BEGINNING AND ALLOW HRSA, WHICH AGAIN, HAS NO
4 EXPERTISE HERE, TO CREATE BROAD EXEMPTIONS FROM IT.

5 WE THINK THAT SIMPLY CAN'T BE SQUARED
6 WITH LANGUAGE OF THE STATUTE, AND IN ADDITION, FLIES
7 DIRECTLY IN THE FACE OF THE PURPOSE OF THE WOMEN'S
8 HEALTH AMENDMENT, WHICH WAS INTENDED TO IMPROVE WOMEN'S
9 ACCESS TO PREVENTIVE CARE.

10 THE GOVERNMENT ALSO RELIES A LOT ON THE
11 EXISTENCE OF GRANDFATHER PLANS. I THINK YOUR HONOR
12 DISCUSSED THAT. THERE IS VERY LITTLE EVIDENCE IN THE
13 RECORD THAT GRANDFATHERED PLANS ARE CLAMORING FOR THE
14 ABILITY TO CHANGE, AND THIS -- THE CONTRACEPTIVE MANDATE
15 IS SOMEHOW BLOCKING THEM.

16 BUT ALSO, AS YOU HEARD FROM DR. CHUANG,
17 THE NUMBER OF GRANDFATHER PLANS CONTINUES TO DECLINE.
18 IT WAS LIMITED TO BEGIN WITH. AND THE FACT THAT
19 CONGRESS MADE WHAT APPARENTLY WAS A NECESSARY COMPROMISE
20 TO GET THE ACA PASSED DOES NOT UNDERMINE THE ARGUMENT
21 THAT THE CONTRACEPTIVE COVERAGE HERE SERVES A COMPELLING
22 AND IMPORTANT GOVERNMENT INTEREST.

23 I ALSO THINK IT IS IMPORTANT TO REMEMBER
24 THAT THE ACA DOES NOT HAVE A CONSCIENCE CLAUSE. ONE WAS
25 PROPOSED AND IT WAS REJECTED. THROUGHOUT THE RULES, THE

1 ARGUMENT THE GOVERNMENT MAKES IS, WELL, OTHER STATUTES
2 HAVE THEM SO WE CAN RELY ON THAT HERE. THAT IS SIMPLY
3 NOT THE CASE. YOU CAN'T TAKE LANGUAGE FROM ANOTHER
4 STATUTE AND APPLY IT WHERE IT DOES NOT EXIST.

5 AND WHAT'S MORE IS THE FACT THAT CONGRESS
6 REJECTED IT IS A PRETTY GOOD INDICATION THAT CONGRESS
7 DOES NOT BELIEVE THERE IS AN IMPLICIT CONSCIENCE CLAUSE
8 THAT IS ALREADY THERE.

9 NOW, IN THEIR BRIEFING, AND THE
10 GOVERNMENT TO SOME EXTENT THE RULES SAID ALL OF THIS IS
11 REQUIRED UNDER RFRA, THAT WE'RE ALL THIS -- EXCEPT FOR
12 THE MORAL EXCEPTION, WHICH IS NOT A LAW REQUIRED UNDER
13 RFRA.

14 AGAIN, THAT IS A MUCH BROADER READING OF
15 RFRA THAN ANY COURT HAS EVER ADOPTED. AT THE VERY
16 LEAST, I'M NOT AWARE OF ANY DECISION HOLDING THAT RFRA
17 APPLIES TO PUBLICLY-TRADED COMPANIES. I THINK IN SOME
18 WAYS THE IDEA THAT A PUBLICLY-TRADED COMPANY COULD
19 ENGAGE IN THE FREE EXERCISE OF RELIGION IS A LITTLE
20 QUESTIONABLE. CERTAINLY THE SUPREME COURT HAS NEVER
21 HELD THAT.

22 AND FOR THE AGENCIES TO UNILATERALLY SAY
23 WE THINK THIS IS WHAT RFRA MEANS I THINK GOES WELL
24 BEYOND THE SCOPE OF THEIR AUTHORITY. THEY HAVE ALSO
25 DECIDED APPARENTLY THAT THE CONTRACEPTIVE MANDATE DOES

1 NOT SERVE A COMPELLING INTEREST.

2 WELL, FIVE JUSTICES IN THE SUPREME COURT
3 IN HOBBY LOBBY SEEM TO DISAGREE. THE FOUR CENTERS
4 CLEARLY SAID THAT IT SERVES A COMPELLING INTEREST, AND
5 JUSTICE KENNEDY DISCUSSED THE COMPELLING INTEREST, NEVER
6 ACTUALLY SAID SPECIFICALLY "I BELIEVE IT SERVES A
7 COMPELLING GOVERNMENT INTEREST," BUT MADE IT PRETTY
8 CLEAR THAT THAT WAS HIS BELIEF. AND FRANKLY, THE
9 MAJORITY IN HOBBY LOBBY NEVER EVEN QUESTIONED THAT.
10 THEY JUST ASSUMED IT FOR PURPOSES OF THE OPINION.

11 SO THE IDEA THAT RFRA SOMEHOW REQUIRES
12 WHAT THE GOVERNMENT IS DOING, THAT IT REQUIRES APPLYING
13 THIS TO PUBLICLY-TRADED COMPANIES, THAT IT REQUIRES
14 MAKING THE ACCOMMODATION PROCESS OPTIONAL IS NOT
15 SUPPORTED BY ANY OF THE CASE LAW THAT IS RELEVANT HERE.
16 AND IT'S NOT SUPPORTED BY A FAIR READING OF THE STATUTE.

17 AND I THINK TO SEE THAT THAT IS THE CASE,
18 WE DON'T NEED TO LOOK ANY FURTHER THAN THE ZUBIK
19 DECISION, WHERE THE SUPREME COURT CLEARLY STRUGGLED WITH
20 APPLYING RFRA IN THE CONTEXT OF AN ENTITY WHO DID OBJECT
21 TO THE ACCOMMODATION PROCESS. IF THE GOVERNMENT WAS
22 CORRECT AND THIS WAS A SLAM DUNK UNDER RFRA, ZUBIK WOULD
23 HAVE BEEN AN EASY DECISION FOR THE SUPREME COURT.

24 IT WAS NOT. ZUBIK EMPHASIZED THE NEED TO
25 BALANCE WHAT IT SAW AS LEGITIMATE EXERCISE OF RELIGION

1 AND THE NEEDS OF WOMEN AND THE COMPELLING GOVERNMENT
2 INTEREST IN SERVING AND PROVIDING ACCESS TO CARE --
3 WELL, ZUBIK DID NOT SPECIFICALLY FIND THAT IT WAS A
4 COMPELLING INTEREST, BUT I THINK THE FACT THAT THAT
5 DECISION CAME OUT THE WAY IT DID IS A SIGN -- IS A CLEAR
6 INDICATION THAT RFRA SIMPLY DOES NOT SAY WHAT THE
7 GOVERNMENT HERE BELIEVES IT SAYS.

8 I THINK -- I'M HAPPY TO COME BACK TO THE
9 CONSTITUTIONAL CLAIMS. I WOULD ALSO LIKE TO GET INTO
10 THE HARM THAT PENNSYLVANIA WILL SUFFER, BECAUSE I THINK
11 THAT IS IMPORTANT AS WELL. IT GOES BOTH TO THE
12 IRREPARABLE INJURY PRONG OF THE INJUNCTION AS WELL AS
13 STANDING THAT THE COMMONWEALTH HAS IN THIS CASE.

14 THERE HAS BEEN A LOT OF QUESTIONING TODAY
15 SUGGESTING, WELL, THE COMMONWEALTH CAN'T POINT TO ANY
16 SPECIFIC EMPLOYER WHO IS GOING TO TAKE ADVANTAGE OR WHO
17 HAS ANNOUNCED THEY ARE TAKING ADVANTAGE OF THIS.
18 WELL --

19 THE COURT: WELL, ALSO, THEY CAN'T POINT
20 TO ANY PARTICULAR WOMAN. SO TELL ME WHY -- GIVE ME A
21 RESPONSE TO THAT.

22 MR. FISCHER: WELL, THAT IS A FUNCTION IN
23 MANY RESPECTS OF THE WAY THE RULES ARE DRAFTED. THE
24 RULES ARE DRAFTED SO THAT EMPLOYERS CAN DO THIS QUIETLY.
25 THERE IS NO REQUIREMENT TO NOTIFY HHS. THERE'S NO

1 REQUIREMENT TO MAKE A PUBLIC ANNOUNCEMENT. THERE IS NOT
2 EVEN A REQUIREMENT TO CLEARLY COMMUNICATE TO ALL PLAN
3 MEMBERS WE ARE DROPPING YOUR CONTRACEPTION COVERAGE.

4 AN EMPLOYER CAN DO THIS BY SIMPLY
5 INCLUDING IN THE SUMMARY OF BENEFITS OF COVERAGE THAT
6 THEY PROVIDE ON AN ANNUAL BASIS, THAT WE ALL GET, AND
7 PROBABLY MOST OF US DON'T NECESSARILY READ THAT
8 THOROUGHLY. AS LONG AS SOMEWHERE IN THAT DOCUMENT THERE
9 IS AN INDICATION THAT CONTRACEPTION COVERAGE IS NOT
10 PROVIDED AND THAT DOCUMENT IS PROVIDED 30 DAYS PRIOR TO
11 THE START OF THE PLAN YEAR, THAT SATISFIES THE NOTICE
12 REQUIREMENTS.

13 SO THE IDEA THAT SOMEHOW WE WOULD KNOW
14 ABOUT THIS, THAT IT WOULD BE WIDESPREAD KNOWLEDGE WHO IS
15 OPTING OUT, IS NOT CONSISTENT WITH THE WAY THE RULES ARE
16 WRITTEN. NOW, THEY COULD HAVE WRITTEN THE RULES IN SUCH
17 A WAY THAT IT WOULD BE CLEAR HOW MANY COMPANIES ARE
18 TAKING ADVANTAGE, HOW MANY WOMEN ARE AFFECTED. THEY
19 COULD HAVE REQUIRED -- THIS IS HHS -- THEY COULD HAVE
20 REQUIRED NOTICE TO STATE REGULATORS. THEY DID NOT.

21 AND HERE WE ARE IN A SITUATION WHERE IT
22 IS EXTREMELY DIFFICULT FOR ANYONE TO ESTIMATE EXACTLY
23 HOW MANY WOMEN ARE AFFECTED. IN FACT, THE GOVERNMENT
24 CONCEDES THAT. THEY SAY THEY DON'T EVEN KNOW HOW MANY
25 WOMEN ARE AFFECTED BY THE CURRENT ACCOMMODATION PROCESS.

1 THE ONLY NUMBERS THEY COME UP WITH ARE BASED ON THE
2 COMPANIES THAT HAVE NOTIFIED HHS UNDER THAT SPECIFIC
3 OPTION, AS WELL AS SOME COMPANIES THAT ARE SELF-INSURERS
4 WHERE THE THIRD-PARTY ADMINISTRATOR HAS BEEN IN CONTACT
5 WITH HHS.

6 NOW, DESPITE NOT FULLY KNOWING HOW MANY
7 PEOPLE USE THE ACCOMMODATION, THEY DO TRY TO COME UP
8 WITH ESTIMATES IN THE RULES AS TO HOW MANY WOMEN WILL BE
9 AFFECTED. THEY ESTIMATE THAT OVER 1 MILLION INDIVIDUALS
10 ARE COVERED BY PLANS THAT CURRENTLY USE THE
11 ACCOMMODATION PROCESS. AND THEY GET THAT DOWN TO AN
12 ESTIMATE OF ROUGHLY 32,000 WOMEN NATIONWIDE WHO MAY LOSE
13 COVERAGE -- WHO WILL LOSE COVERAGE AS A RESULT OF THESE
14 RULES.

15 NOW, WE BELIEVE THAT THERE ARE PROBLEMS
16 WITH THE WAY THEY ESTIMATED THOSE NUMBERS, BUT
17 REGARDLESS, THEIR OWN ESTIMATES TELL YOU THAT LARGE
18 NUMBERS OF WOMEN WILL BE AFFECTED, AND THAT WILL INCLUDE
19 LARGE NUMBERS OF WOMEN HERE IN PENNSYLVANIA. AS WE
20 DETAIL IN OUR BRIEF, MANY OF THE PLAINTIFFS IN THESE
21 CASES WERE PENNSYLVANIA ENTITIES.

22 YOU HAVE SEEN EVIDENCE OR YOU HAVE SEEN
23 ARGUMENTS IN SOME OF THE AMICUS BRIEFS ABOUT HOW THIS
24 RULE WILL AFFECT WOMEN IN DIFFERENT STATES ACROSS THE
25 COUNTRY. I BELIEVE IN THE AMICUS BRIEFS SUBMITTED BY

1 WHERE THERE IS A STATE LAW THAT WOULD REQUIRE THEIR
2 EMPLOYER TO CONTINUE COVERING CONTRACEPTION. SO THE
3 HARM IN PENNSYLVANIA WILL BE MORE SIGNIFICANT THAN IT IS
4 IN SOME OTHER STATES LIKE NEW YORK AND MASSACHUSETTS,
5 CALIFORNIA, WHERE THEY DO HAVE CONTRACEPTION PARITY
6 STATUTES.

7 SO THE RESULT OF ALL OF THIS IS THAT
8 WOMEN WILL LOSE COVERAGE, THERE WILL BE COSTS IMPOSED ON
9 THE STATE BECAUSE SIGNIFICANT NUMBERS OF THESE WOMEN
10 WILL BE ELIGIBLE FOR STATE-FUNDED PROGRAMS OR WILL GO TO
11 CLINICS THAT RECEIVE STATE FUNDING, AND ULTIMATELY THE
12 STATE AND OTHER ENTITIES WILL BE PAYING THOSE COSTS.

13 AGAIN, THAT IS NOT SOMETHING WE ARE JUST
14 SPECULATING ABOUT. THERE IS EVIDENCE IN THE RECORD
15 ABOUT HOW THOSE PROGRAMS WORK AND IT'S ALSO REFLECTED IN
16 THE GOVERNMENT'S RULES. WHEN THEY ARGUE THAT THE RULES
17 WILL NOT IMPOSE A SIGNIFICANT IMPACT ON WOMEN, ONE OF
18 THE POINTS THEY MAKE IS, WELL, THERE ARE ALL THESE OTHER
19 PROGRAMS OUT THERE, ALL THESE OTHER STATE-FUNDED
20 PROGRAMS, STATE AND FEDERAL GOVERNMENT-FUNDED PROGRAMS
21 THAT CAN PROVIDE COVERAGE, AND THEY POINT SPECIFICALLY
22 TO TITLE 10 CLINICS.

23 SO EVEN THE GOVERNMENT ACKNOWLEDGES THAT
24 THERE WILL BE A SHIFT FROM EMPLOYERS TO PUBLICLY-FUNDED
25 PROGRAMS AS A RESULT OF THESE RULES.

1 THE OTHER STATES, THERE WAS AN ESTIMATE THAT OVER HALF A
2 MILLION WOMEN IN PENNSYLVANIA WHO CURRENTLY RECEIVE
3 EMPLOYER-SPONSORED COVERAGE WOULD BE ELIGIBLE FOR
4 STATE-FUNDED PROGRAMS IF THEY LOST THEIR COVERAGE AND
5 THEREFORE COULD WIND UP POSING A DIRECT COST TO THE
6 STATES.

7 AND YOU HAVE ALSO HEARD TESTIMONY FROM
8 OUR EXPERTS ABOUT THEIR EXPERIENCE WITH THE AFFORDABLE
9 CARE ACT, WHAT THAT HAS MEANT TO PENNSYLVANIA WOMEN, AND
10 THEREFORE WHAT THEY BELIEVE WILL HAPPEN IF WOMEN ARE
11 DENIED COVERAGE.

12 SO BECAUSE OF THIS 30-DAY OPTION THAT
13 ALLOWS AN EMPLOYER TO -- AN EMPLOYER OR ANY PLAN ENTITY,
14 ANY PLAN SPONSOR TO MODIFY OR ELIMINATE ITS
15 CONTRACEPTIVE BENEFITS AT THE BEGINNING OF A PLAN YEAR
16 WITH ONLY 30 DAYS' NOTICE, THAT IS WHY WE BELIEVE AN
17 INJUNCTION BY JANUARY 1ST IS IMPORTANT. JANUARY 1ST IS
18 THE START OF THE PLAN YEAR FOR MANY EMPLOYERS, AND
19 THEREFORE WE BELIEVE ON THAT DAY MANY WOMEN WILL BE AT A
20 RISK OF LOSING THEIR COVERAGE.

21 PENNSYLVANIA IS ACTUALLY IN A UNIQUE
22 SITUATION AS WELL, BECAUSE UNLIKE A LOT OF OTHER STATES,
23 WE DO NOT HAVE A CONTRACEPTIVE PARITY STATUTE. SO WOMEN
24 WHO ARE COVERED BY FULLY-INSURED PLANS THAT ARE NOT
25 REGULATED UNDER ERISA DO NOT HAVE A FALLBACK OPTION

1 FINALLY, YOUR HONOR, IN GETTING INTO
2 PENNSYLVANIA ENTITIES THAT MAY TAKE ADVANTAGE OF THE
3 EXEMPTION, WE HAVE INCLUDED IN EXHIBIT 20, WHICH IS IN
4 THE RECORD, A SUBSET OF DOCUMENTS FROM A FOIA REQUEST
5 THAT WAS A MADE OF THE GOVERNMENT, OF THE FEDERAL
6 AGENCIES, AND WHAT THESE DOCUMENTS ARE ARE SOME OF THE
7 NOTICES TO HHS AND SUBSEQUENT RESPONSES ABOUT ENTITIES,
8 AND MOST OF THE ONES IN EXHIBIT 20 ARE PENNSYLVANIA
9 ENTITIES, ENTITIES THAT WERE USING THE ACCOMMODATION
10 PROCESS.

11 NOW, AS I SAID EARLIER, THE GOVERNMENT
12 DOES NOT KNOW EVERYBODY WHO USES THE ACCOMMODATION
13 PROCESS BECAUSE NOT EVERYBODY NOTIFIES THE GOVERNMENT,
14 BUT HERE ARE SOME OF THE EXAMPLES OF PENNSYLVANIA
15 ENTITIES THAT HAVE USED THE ACCOMMODATION PROCESS, WHICH
16 AS A RESULT OF THESE RULES IS NOW OPTIONAL, AND IT'S
17 CERTAINLY A REASONABLE INFERENCE THAT ENTITIES THAT HAVE
18 A SINCERELY-HELD RELIGIOUS OBJECTION TO PROVIDING
19 CONTRACEPTIVE COVERAGE WILL CHOOSE, IF GIVEN THE
20 OPPORTUNITY, TO OPT OUT ENTIRELY RATHER THAN TO
21 PARTICIPATE IN A PROCESS WHICH SOME ENTITIES HAVE
22 ARGUED -- AND THIS HAS BEEN THE SUBJECT OF ZUBIK
23 LITIGATION -- SOME ENTITIES HAVE ARGUED NEVERTHELESS
24 STILL IMPOSES A SUBSTANTIAL BURDEN ON THEIR RELIGIOUS
25 BELIEFS.

1 SO FOR ALL OF THOSE REASONS, WE THINK IT
2 IS FAIRLY CLEAR THAT THE RULES VIOLATE THE APA. THEY
3 ARE ARBITRARY AND CAPRICIOUS, THEY ARE INCONSISTENT WITH
4 THE AFFORDABLE CARE ACT AND THE PROCESS THAT WAS
5 FOLLOWED WAS NOT LEGITIMATE, AND BECAUSE OF THAT HARM,
6 BECAUSE OF THAT ILLEGALITY, SUBSTANTIAL INJURY WILL
7 OCCUR IN THE COMMONWEALTH.

8 I WANT TO RETURN TO JUST ONE ISSUE ON
9 STANDING BEFORE I WILL CONCLUDE, BUT THE COURT ASKED
10 EARLIER ABOUT THE EXTENT OF PENNSYLVANIA'S INJURY AND
11 HOW, AS A STATE, PENNSYLVANIA CAN BRING THIS ACTION. WE
12 THINK IT IS FAIRLY CLEAR THAT MASSACHUSETTS VS. EPA
13 CONTROLS AND ALLOWS THE COMMONWEALTH TO BRING AN ACTION
14 CHALLENGING THE DECISIONS HERE IN THE FEDERAL
15 GOVERNMENT. THE COURT POINTED OUT THAT THAT WAS THE
16 CASE INVOLVING INACTION RATHER THAN ACTION, BUT IN MANY
17 WAYS THIS CASE, ALTHOUGH IT IS CHALLENGING THE SPECIFIC
18 REGULATIONS THAT WERE ISSUED, ULTIMATELY IS ABOUT THE
19 GOVERNMENT CHOOSING NOT TO ENFORCE THE REQUIREMENTS OF
20 THE AFFORDABLE CARE ACT AND THE CONTRACEPTIVE MANDATE
21 AGAINST ENTITIES THAT OBJECT. AS A RESULT OF THESE
22 RULES, THOSE LAWS, THOSE REQUIREMENTS WILL NO LONGER BE
23 ENFORCED.

24 WHAT IS MORE, I DON'T THINK THAT FOR
25 STANDING ANALYSIS PURPOSES THERE IS A SIGNIFICANT

1 DIFFERENCE BETWEEN ACTION AND INACTION. EITHER WAY,
2 PENNSYLVANIA'S HARMED, PENNSYLVANIA'S RESIDENTS ARE
3 HARMED, THE COMMONWEALTH'S QUASI-SOVEREIGN INTEREST IN
4 PROTECTING THE HEALTH AND SAFETY OF ITS RESIDENTS IS
5 GOING TO BE HARMED, AND FOR ALL OF THOSE REASONS, WE
6 BELIEVE THAT THE COMMONWEALTH DOES HAVE STANDING IN THIS
7 CASE.

8
9 THE COURT: OKAY, I THINK YOUR COLLEAGUE
10 WANTS YOU TO TELL ME ONE MORE THING.

11 MR. FISCHER: YOUR HONOR, I APOLOGIZE. I
12 DO NOT BELIEVE I RESERVED ANY TIME FOR REBUTTAL. WOULD
13 THAT BE POSSIBLE? IF I HAVE TIME LEFT --

14 THE COURT: THAT IS FINE.

15 MR. FISCHER: OKAY.

16 THE COURT: AS I SAID, IT'S ME AND YOU.
17 THERE IS NO ONE HERE SO IT'S FINE. WE HAVE UNTIL
18 6 O'CLOCK SO LET'S --

19 MR. FISCHER: SO -- YEAH.

20 THE COURT: ARE YOU DONE NOW?

21 MR. FISCHER: I JUST HAVE ONE MORE --

22 THE COURT: GO AHEAD.

23 MR. FISCHER: ON THIS QUESTION OF WHETHER
24 THE COMMONWEALTH WILL BE HARMED, IT REALLY COMES DOWN TO
25 COMMON SENSE. WHAT THE GOVERNMENT IS SAYING IS THAT

1 DESPITE THESE SWEEPING NEW RULES THAT THEY ARGUE ARE SO
2 IMPORTANT THAT THEY HAVE TO BE IMPLEMENTED IMMEDIATELY
3 TO PROTECT PEOPLE THAT ARE SUFFERING, NEVERTHELESS,
4 NOBODY IN PENNSYLVANIA IS GOING TO BE HARMED BECAUSE NO
5 EMPLOYER IS GOING TO TAKE ADVANTAGE OF THEM.

6 NOW THAT JUST DEFIES LOGIC. IT IS FAIRLY
7 CLEAR THAT THERE WILL BE WOMEN ACROSS THE COUNTRY AND IN
8 PENNSYLVANIA, BASED ON THEIR OWN ESTIMATES, BASED ON
9 PRIOR LITIGATION, BASED ON SOME OF THE DOCUMENTS IN THE
10 RECORD, THERE WILL BE WOMEN WHO ARE HARMED. THAT WILL
11 CAUSE HARM TO THE COMMONWEALTH, AND CLEARLY WE BELIEVE
12 THAT THAT NOT ONLY GIVES US STANDING, BUT ALSO
13 ESTABLISHES INJURY FOR PURPOSES OF OUR INJUNCTION.

14 THANK YOU, YOUR HONOR.

15 THE COURT: THANK YOU.

16 WHO WILL BE ARGUING ON BEHALF OF THE
17 DEFENDANTS?

18 MR. DAVIS: I WILL, YOUR HONOR.

19 MAY I APPROACH, YOUR HONOR?

20 THE COURT: YOU MAY.

21 MR. DAVIS: IF YOUR HONOR WOULD INDULGE
22 ME AT THE BEGINNING, I WOULD LIKE TO MAKE A RECORD ON
23 CERTAIN EVIDENTIARY ISSUES. SPECIFICALLY WE WOULD LIKE
24 TO MOVE TO STRIKE THE TESTIMONY OF DRS. WEISMAN, BUTTS
25 AND CHUANG TO THE EXTENT THEY TESTIFIED ABOUT THE IMPACT

1 OF THE NEW RULES ON WOMEN'S ACCESS.

2 THE COURT: THE HORSE HAS LEFT THE BARN
3 ON THAT. YOU HAD AN OPPORTUNITY, YOU HAD A LAWYER WHO
4 WAS HANDLING THAT ISSUE. I RULED.

5 MR. DAVIS: YOUR HONOR, CERTAIN THINGS
6 CAME UP THROUGH THE TESTIMONY AFTER THE OBJECTION WAS
7 MADE THAT I'D JUST LIKE TO PUT ON THE RECORD, IF YOU
8 DON'T MIND.

9 THE COURT: I RULED AGAINST YOU. I DO
10 MIND. YOU DON'T GET TO HAVE A SECOND BITE AT THE APPLE.

11 GO AHEAD. THIS IS NOW THE CLOSING
12 ARGUMENT PORTION OF THE PROCEEDING.

13 MR. DAVIS: OKAY. ON STANDING, YOUR
14 HONOR, YOU HEARD FROM DRS. WEISMAN, BUTTS AND CHUANG
15 THAT THEY ARE NOT AWARE OF A SINGLE INDIVIDUAL WHO WILL
16 BE AFFECTED BY THE NEW RULES AND THEY ARE NOT AWARE OF A
17 SINGLE EMPLOYER WHO WILL BE TAKING ADVANTAGE OF THE NEW
18 RULES. I THINK IT WOULD BE EXTRAORDINARY TO GRANT AN
19 INJUNCTION THAT WOULD NOT BENEFIT A SINGLE IDENTIFIABLE
20 INDIVIDUAL. I THINK THAT TESTIMONY WAS VERY TELLING.

21 THE COURT: IF THEY HAD BEEN ABLE TO
22 IDENTIFY ONE PERSON, WOULD YOUR RESPONSE HAVE BEEN
23 DIFFERENT?

24 MR. DAVIS: YOUR HONOR, I THINK IT MIGHT
25 HAVE BEEN DIFFERENT WITH RESPECT TO STANDING BUT NOT

1 WITH RESPECT TO IRREPARABLE INJURY. I THINK IRREPARABLE
2 INJURY REQUIRES SOME SORT OF DAMAGE MORE THAN A MINOR
3 AMOUNT, AND IT WOULD NOT BE DIFFERENT IN A SENSE -- WITH
4 RESPECT TO STANDING, IN THE SENSE THAT THEY WOULD ALSO
5 HAVE TO SHOW THAT THAT EMPLOYEE WOULD ACTUALLY QUALIFY
6 FOR A STATE-FUNDED PROGRAM AND WOULD ACTUALLY GO SEEK
7 COVERAGE FROM THAT STATE-FUNDED PROGRAM. SO IF THEY
8 COULD SHOW ALL OF THAT, MAYBE IT WOULD CHANGE THE
9 STANDING ANALYSIS.

10 THE COURT: WELL, LET'S FOCUS IN ON
11 STANDING THEN.

12 SO I'M LOOKING AT FEDERAL REGISTER 82-197
13 AND THERE IS A SECTION, THE RELIGIOUS EXEMPTION. IT'S
14 THE DISCUSSION OF THE PEOPLE WHO WOULD BE IMPACTED OR
15 THE WOMEN WHO WOULD BE IMPACTED. IT SAYS: BASED ON OUR
16 LIMITED INFORMATION FROM THE LITIGATION AND
17 ACCOMMODATION NOTICES, WE EXPECT THAT THE OVERLAP IS
18 SIGNIFICANT. NEVERTHELESS, IN ORDER TO ESTIMATE THE
19 POSSIBLE EFFECTS OF THESE RULES WE ASSUME THERE IS NO
20 OVERLAP BETWEEN THESE TWO NUMBERS AND THEREFORE -- AND
21 HERE IS THE IMPORTANT PART -- THAT THESE INTERIM FINAL
22 RULES WOULD AFFECT THE CONTRACEPTIVE COSTS OF
23 APPROXIMATELY 31,700 WOMEN.

24 SO I THINK THAT YOUR RULES ALONE SUGGEST
25 THAT -- WELL, THEY DON'T SUGGEST, THEY SAY THAT 31,700

1 WOMEN WILL BE AFFECTED. AM I READING THAT CORRECTLY?
2 MR. DAVIS: YOUR HONOR, THE RULES
3 ESTIMATE THAT SOME WOMEN WILL BE AFFECTED BY THIS. THAT
4 ESTIMATE STANDARD IS LOWER THAN THE CERTAINLY IMPENDING
5 STANDARD NECESSARY TO SHOW STANDING. IN A COURTROOM, I
6 THINK THE STANDARD IS CERTAINLY IMPENDING, REASONABLY
7 CERTAIN, AND I THINK THAT IS WHAT THEY FAILED TO SHOW
8 HERE. AND AGAIN, YOU'D THINK THAT --

9 THE COURT: SO INSTEAD OF STEPPING AWAY
10 FROM MY QUESTION, ANSWER MY QUESTION. SO IN THE
11 REGULATIONS THERE IS A STATEMENT IS THAT THESE INTERIM
12 FINAL RULES WOULD AFFECT THE CONTRACEPTIVE COSTS OF
13 APPROXIMATELY 31,700 WOMEN. IS THAT A CORRECT STATEMENT
14 OF WHAT THE RULES SAY?

15 MR. DAVIS: YOUR HONOR, I DON'T HAVE THAT
16 STATEMENT RIGHT IN FRONT OF ME. I ASSUME YOUR HONOR IS
17 READING IT CORRECTLY.

18 THE COURT: SO GIVEN THE FACT THAT THE
19 RULES THEMSELVES HAVE SAID 31,700 WOMEN WILL BE -- THE
20 COST OF SEVEN -- 31,700 WOMEN WILL BE AFFECTED, HOW DOES
21 THAT IMPACT HERE ON THE STANDING ANALYSIS?

22 MR. DAVIS: AGAIN, YOUR HONOR, IN THE
23 CONTEXT OF THE RULES, THAT IS AN ESTIMATE. THAT IS NOT
24 A BLANKET STATEMENT THAT 31,000 WOMEN ARE DEFINITELY
25 GOING TO BE AFFECTED BY THESE RULES. I FUNDAMENTALLY

1 DISAGREE WITH THE IDEA THAT THAT IS AN IRONCLAD
2 PREDICTION OF WHAT WILL HAPPEN. THAT IS AN ESTIMATE.
3 THE RULES IN OTHER PLACES SAY THAT
4 THEY -- THAT IT'S -- THIS ENDEAVOR IS FRAUGHT WITH
5 UNCERTAINTY, IT'S NOT CLEAR WHAT EFFECT THESE WILL HAVE,
6 THAT MANY EMPLOYERS ARE ALREADY PROTECTED BY
7 INJUNCTIONS. I DON'T THINK THERE IS ANY WAY TO READ
8 THAT STATEMENT AS AN IRONCLAD PREDICTION THAT THIS IS
9 WHAT WILL HAPPEN.

10 THE COURT: GO AHEAD.

11 MR. DAVIS: I WOULD ALSO LIKE TO -- YOU
12 ALSO HEARD, ALSO ON THE STANDING QUESTION, YOUR HONOR,
13 YOU HEARD FROM THE WITNESSES THAT ACCESS TO
14 CONTRACEPTIVE COVERAGE HAS INCREASED IN THE YEAR AFTER
15 THE AFFORDABLE CARE ACT, THAT NO LONGER ARE THEY
16 BEING -- ARE DOCTORS BEING ASKED ABOUT COST-FREE
17 CONTRACEPTION. I JUST WANTED TO POINT OUT THAT THIS NEW
18 WORLD THAT THEY ARE TALKING ABOUT AFTER THE AFFORDABLE
19 CARE ACT IS A WORLD WHERE EVERY KNOWN RELIGIOUS OBJECTOR
20 WAS ALREADY EXEMPT. IT WAS ALREADY NOT PROVIDING
21 CONTRACEPTIVE COVERAGE, SO IT'S NOT CLEAR THEN WHY THESE
22 NEW RULES WOULD RETURN US BACK TO THE WORLD OF THE
23 PRE-ACA ERA.

24 I'D ALSO LIKE TO RETURN TO WHAT WE TALKED
25 ABOUT EARLIER THIS MORNING, YOUR HONOR, ON THE MORAL

1 OBJECTORS WHO COULD -- WHETHER OR NOT THERE IS A WAY TO
2 POLICE SINCERITY IN THAT CONTEXT. JUST TO ELABORATE ON
3 WHAT I SAID EARLIER, IT'S POSSIBLE FOR AN EMPLOYEE OF A
4 COMPANY WHO BELIEVES THAT HER EMPLOYER IS IMPROPERLY
5 ASSERTING A MORAL OBJECTION TO FILE A COMPLAINT UNDER
6 ERISA WITH THE DEPARTMENT OF LABOR. LABOR HAS THE
7 AUTHORITY TO ENFORCE UNDER ERISA.

8 LABOR ALSO HAS THE AUTHORITY TO REFER TO
9 THE TREASURY DEPARTMENT, FOR IRS TO INVESTIGATE THE
10 COMPANY FOR FAILING TO PAY EXCISE TAXES, IN OTHER WORDS
11 FOR FAILING TO COMPLY WITH THE MANDATE. AND SINCE
12 SINCERITY IS AN ELEMENT OF THE EXEMPTION, THAT WOULD BE
13 A LIVE ENFORCEMENT ISSUE IN THIS CONTEXT.

14 AND I ALSO ADD THAT AN EMPLOYEE IN THAT
15 CONTEXT WOULD CONCEIVABLY HAVE A TITLE VII REMEDY
16 AVAILABLE AGAINST HER EMPLOYER.

17 I WOULD ALSO, ALTHOUGH I KNOW YOUR HONOR
18 WAS NOT ENAMORED WITH THIS ARGUMENT, I WOULD JUST LIKE
19 TO ADD JUST A COUPLE OF QUICK WORDS ON THE RICCI VERSUS
20 DESTEFANO ARGUMENT. YOUR HONOR HAD EXPRESSED CONCERN
21 THAT THAT CASE WAS NOT SUFFICIENTLY ON ALL FOURS WITH
22 THIS CASE BECAUSE IT INVOLVED A CITY AND NOT THE FEDERAL
23 GOVERNMENT FOR OTHER REASONS. IF IT GIVES YOU ANY
24 SOLACE, YOUR HONOR, THERE ARE -- THERE IS AN ANALOGOUS
25 PRINCIPLE IN THE CONTEXT OF CHEVRON DEFERENCE THAT MAY

1 BE CLOSER TO THIS CASE.
 2 AND THERE IS A SUPREME COURT CASE CALLED
 3 SCIALABBA, S-C-I-A-L-A-B-B-A, VERSUS CUELLAR DE OSORIO,
 4 C-U-E-L-L-A-R D-E O-S-O-R-I-O, 134 S.CT 2191: WHEN AN
 5 AGENCY THUS RESOLVES STATUTORY TENSION, ORDINARY
 6 PRINCIPLES OF ADMINISTRATIVE DEFERENCE REQUIRE US TO
 7 DEFER.
 8 ANOTHER CASE -- I WILL GIVE YOU THE CITE
 9 IN A SECOND -- SAYS THAT WHEN A STATUTORY SCHEME
 10 CONTAINS A FUNDAMENTAL AMBIGUITY ARISING FROM THE
 11 DIFFERENT MANDATES OF TWO PROVISIONS, IT IS APPROPRIATE
 12 TO LOOK TO THE IMPLEMENTING AGENCY'S EXPERT
 13 INTERPRETATION.
 14 SO I THINK THAT MIGHT BE CLOSER TO WHAT
 15 YOUR HONOR WAS LOOKING FOR.
 16 THE COURT: THAT IS BETTER.
 17 MR. DAVIS: AND THAT CASE IS NATIONAL
 18 ASSOCIATION OF HOMEBUILDERS VERSUS DEFENDERS OF
 19 WILDLIFE. 551 U.S. 644-666.
 20 THE COURT: SCIALABBA, WHAT YEAR WAS
 21 SCIALABBA?
 22 MR. DAVIS: I NEGLECTED TO WRITE DOWN THE
 23 YEAR. I THOUGHT I HAD THAT.
 24 ONE SECOND, YOUR HONOR. I WILL GET THAT
 25 FOR YOU.

1 THE COURT: OKAY.
 2 MR. DAVIS: 2014.
 3 THE COURT: 2014.
 4 MR. DAVIS: YES.
 5 THE COURT: OKAY. I WILL TAKE A LOOK AT
 6 THAT CASE.
 7 MR. DAVIS: I WOULD LIKE TO RESPOND TO A
 8 FEW THINGS THAT MY COLLEAGUE ON THE OTHER SIDE JUST
 9 SAID. HE SUGGESTED THAT RECOGNITION OF MORAL OBJECTIONS
 10 IS UNPRECEDENTED, IF I HEARD HIM CORRECTLY. THAT IS NOT
 11 TRUE. MORAL OBJECTIONS HAVE BEEN STANDARD IN THE LAW
 12 FOR QUITE A LONG TIME. IN FACT, PENNSYLVANIA HAS ITS
 13 OWN CONSCIENCE CLAUSE PERMITTING MEDICAL PROFESSIONALS
 14 TO OPT OUT OF PROVIDING ABORTIONS, FOR EXAMPLE, AND
 15 THERE HAS BEEN THE CONSCIENCE CLAUSE EXEMPTING
 16 CONSCIENTIOUS OBJECTORS FROM THE DRAFT.
 17 I WOULD ALSO LIKE TO ADDRESS THE KING
 18 VERSUS BURWELL ISSUE THAT CAME UP, YOUR HONOR, IN THE
 19 CONTEXT OF WHETHER OR NOT THE AGENCY'S INTERPRETATION IS
 20 ENTITLED TO -- OF THE AFFORDABLE CARE ACT IS ENTITLED TO
 21 CHEVRON DEFERENCE. YOUR HONOR, IN KING VERSUS BURWELL
 22 THE COURT HELD THAT WHETHER TAX CREDITS ARE AVAILABLE ON
 23 FEDERAL EXCHANGES IS A MAJOR QUESTION, THAT IT WOULD BE
 24 INCONCEIVABLE THAT CONGRESS WOULD HAVE DELEGATED THAT TO
 25 THE -- IMPLICITLY DELEGATED THAT TO THE AGENCIES.

1 SO KING WAS ABOUT IMPLICIT DELEGATIONS
 2 BUT THIS CASE IS ABOUT AN EXPLICIT DELEGATION OF
 3 AUTHORITY AT 42 U.S.C. 300GG-13(A)(4).
 4 ANOTHER POINT I'D LIKE TO CLARIFY THAT
 5 CAME UP WAS THE QUESTION ABOUT WHETHER THE AGENCIES HAVE
 6 AUTHORITY TO CREATE EXEMPTIONS FROM THE GUIDELINES,
 7 WHICH WE DISCUSSED EARLIER. I JUST WANTED TO CLARIFY
 8 THAT THE EXEMPTIONS THEMSELVES ARE IN THE HRSA
 9 GUIDELINES, SO IT'S NOT LIKE THESE RULES ARE CREATING
 10 EXEMPTIONS TO HRSA'S GUIDELINES; THE GUIDELINES
 11 THEMSELVES SPELL OUT THE RELIGIOUS AND MORAL EXEMPTIONS.
 12 AND THAT IS TRUE NOT ONLY OF THESE RULES
 13 OF THE GUIDELINES IN 2016, IT'S ALSO TRUE OF THE
 14 GUIDELINES IN 2011, WHEN THE LAST ADMINISTRATION DID THE
 15 RELIGIOUS EMPLOYER EXEMPTION. THE HRSA GUIDELINES THERE
 16 THEMSELVES INCORPORATED THE EXEMPTION, SO I DON'T THINK
 17 THIS QUESTION ABOUT WHETHER AGENCIES CAN CREATE
 18 EXCEPTIONS TO THE GUIDELINES IS REALLY PRESENTED HERE.
 19 THERE WAS ALSO A REFERENCE TO ALL OF THE
 20 PENNSYLVANIA ENTITIES THAT ARE USING THE ACCOMMODATION.
 21 I JUST POINT OUT THERE, YOUR HONOR, THAT THERE IS NO
 22 INDICATION THAT ANY OF THOSE ENTITIES ARE GOING TO
 23 SWITCH FROM USING THE ACCOMMODATION TO USING THE
 24 EXEMPTION. IT MAY BE, LIKE FOR MANY ENTITIES, THAT THE
 25 ACCOMMODATION SATISFIES THEIR RELIGIOUS EXEMPTIONS AND

1 THEY WON'T SWITCH TO ANYTHING ELSE.
 2 AND, FINALLY, YOUR HONOR, I THINK THIS
 3 POINT ABOUT HOW -- ON IRREPARABLE INJURY, ABOUT HOW THE
 4 EXCLUSION MUST BE CLEAR ON THE FACE OF THE PLAN DOCUMENT
 5 AND THAT IS WHY MAYBE THESE WITNESSES DID NOT KNOW ABOUT
 6 ANYONE WHO KNEW ABOUT ANYONE WHO WAS GOING TO LOSE
 7 CONTRACEPTIVE COVERAGE, WELL, THERE IS ALSO A
 8 REQUIREMENT THAT AN EMPLOYER WHO PLANS TO TAKE THIS
 9 EXEMPTION NOTIFY ITS EMPLOYEES 30 DAYS BEFOREHAND AND
 10 SEND OUT A PLAN DOCUMENT THAT -- WHERE THE EXCLUSION OF
 11 COVERAGE IS APPARENT FROM THE FACE OF THE PLAN DOCUMENT.
 12 AND WE HAVE HEARD NOTHING ABOUT ANY OF THOSE NOTICES
 13 BEING SENT OUT. NO WITNESS HAS TESTIFIED THAT THEY ARE
 14 AWARE OF ANY OF THOSE NOTICES. AND YOU WOULD THINK IF
 15 THIS IMPACT WAS GOING TO BE AS WIDESPREAD AS THE
 16 COMMONWEALTH SUGGESTS, WE WOULD HAVE HEARD SOME INKLING
 17 OF THAT. AND THE FACT IS THAT WE HAVE NOT.
 18 SO I JUST -- THE LAST POINT I WOULD JUST
 19 LIKE TO MAKE, YOUR HONOR, IS THAT AGAIN, YOU ARE NOT
 20 WRITING ON A BLANK SLATE HERE. THERE IS A LOT OF WATER
 21 UNDER THE BRIDGE. THERE IS A LOT OF EXISTING
 22 PRELIMINARY INJUNCTIONS AND PERMANENT INJUNCTIONS OUT
 23 THERE THAT HAVE MEANT THAT THE STATE OF THE WORLD BEFORE
 24 THESE NEW RULES CAME OUT WERE THAT MOST, MAYBE EVEN ALL
 25 OF THE EMPLOYERS WHO OBJECTED TO PROVIDING CONTRACEPTIVE

1 COVERAGE WERE EXEMPT FROM THIS REQUIREMENT ALREADY. SO
2 THERE IS NOT -- IT'S NOT CLEAR WHAT IMPACT AN INJUNCTION
3 WOULD HAVE. AND IN THAT CIRCUMSTANCE, IT'S BLACK-LETTER
4 LAW THAT THE AGENCY SHOULD STAY ITS HAND -- OR THE COURT
5 SHOULD STAY ITS HAND. IT'S BLACK-LETTER LAW THAT THE
6 COURT SHOULD STAY ITS HAND.

7 YOUR HONOR, ON ONE MORE ISSUE, ON THE
8 APA, I JUST WOULD LIKE TO ADD THAT THIS CASE IS SUPPOSED
9 TO BE LIMITED TO THE ADMINISTRATIVE RECORD, AND THAT
10 WHILE I RECOGNIZE WHAT YOUR HONOR SAID ABOUT SOME OF
11 THESE WITNESSES' TESTIMONY --

12 THE COURT: I DON'T THINK THAT IS THE
13 CASE. IF YOU READ MY ORDER ON THE MOTION IN LIMINE,
14 THAT IS NOT THE CASE.

15 MR. DAVIS: WELL --

16 THE COURT: DID YOU READ THE ORDER ON
17 MOTION IN LIMINE?

18 MR. DAVIS: I DID, YOUR HONOR.

19 THE COURT: THEREFORE, THE CASE IS NOT
20 SUPPOSED TO BE DECIDED ON THE ADMINISTRATIVE RECORD
21 ONLY.

22 MR. DAVIS: YOUR HONOR, I'M RESPECTFULLY
23 DISAGREEING WITH YOUR HONOR'S MOTION.

24 THE COURT: YOU CAN SAY THAT YOU BELIEVE
25 THAT THAT IS THE CASE, BUT I DON'T THINK YOU CAN SAY

1 SUPPOSED TO, BECAUSE THERE IS AN ORDER OF THIS COURT
2 WHICH PARTICULARLY DESCRIBES WHAT RECORD THIS DECISION
3 IS BEING MADE ON. DO YOU UNDERSTAND THAT?

4 MR. DAVIS: FAIR ENOUGH, YOUR HONOR. I
5 WILL PHRASE IT DIFFERENTLY. I BELIEVE THAT THIS CASE
6 SHOULD BE DECIDED ON THE BASIS OF THE ADMINISTRATIVE
7 RECORD. I DON'T BELIEVE THAT THE COURT'S RULING ON THE
8 MOTION IN LIMINE WAS CORRECT. I THINK THAT THE WITNESS
9 TESTIMONY IN THIS CASE WENT FAR BEYOND THE
10 ADMINISTRATIVE RECORD. I THINK IT WENT INTO QUESTIONING
11 THE CORRECTNESS AND WISDOM OF THE AGENCY'S DECISION. I
12 THINK IT'S BLACK-LETTER LAW THAT THAT STUFF IS NOT
13 PROPER.

14 THE COURT: MOVE ON. THAT WAS ON A
15 MOTION IN LIMINE. WE ARE DOING THE CLOSING IN THIS CASE
16 RIGHT NOW.

17 MR. DAVIS: YOUR HONOR, THAT IS ALL I
18 HAVE, UNLESS YOU HAVE FURTHER QUESTIONS.

19 THE COURT: I HAVE NO FURTHER QUESTIONS.
20 REBUTTAL.

21 MR. FISCHER: THANK YOU, YOUR HONOR. I
22 WILL TRY TO KEEP THIS BRIEF.

23 THE DISCUSSION THAT WE ARE HAVING ABOUT
24 THE MORAL EXEMPTION I THINK IS A GOOD METAPHOR FOR ALL
25 THE PROBLEMS WITH BOTH RULES. THE FACT THAT WE ARE NOW

1 IN POSITION WHERE WE ARE HAVING A DEBATE ABOUT WHETHER
2 THE DEPARTMENT OF LABOR SHOULD BE INVESTIGATING WHETHER
3 EMPLOYERS' PROFESSED MORAL BELIEFS ARE SINCERE OR NOT,
4 AND THEY FEEL AN EMPLOYEE DENIED CONTRACEPTIVE COVERAGE
5 HAS TO FILE A TITLE VII CLAIM BECAUSE HER EMPLOYER, AS
6 THE COURT HYPOTHESIZED, MAY DECIDE THAT HE OBJECTS TO
7 WOMEN BEING IN THE WORKFORCE AND HE IS GOING TO DENY
8 CONTRACEPTIVE COVERAGE AS A RESULT OF THAT. I THINK
9 THAT IS A WORLD WE DON'T WANT TO BE IN.

10 THE RELIGIOUS FREEDOM RESTORATION ACT
11 ADDRESSED THE TENSION INHERENT IN THAT ISSUE IN THE
12 CONTEXT OF RELIGIOUS BELIEFS AND STRUCK A BALANCE WHERE
13 COURTS GENERALLY DO NOT GET INTO THE SINCERITY OF
14 BELIEFS, NOR SHOULD THEY. WHAT THEY CAN LOOK AT IS
15 WHETHER THOSE BELIEFS OR THE EXERCISE OF THOSE BELIEFS
16 IS SUBSTANTIALLY BURDENED BY GOVERNMENT PROGRAMS. THAT
17 IS WHERE RFRA STRUCK THE BALANCE. WHAT WE HAVE NOW IS
18 TWO RULES FROM THE GOVERNMENT THAT WOULD ESSENTIALLY
19 UPSET THAT BALANCE AND PUT EMPLOYEES AT THE WHIM OF THE
20 MORAL BELIEFS, WHATEVER THEY MAY BE, OF THEIR EMPLOYERS.
21 AND I THINK THE GOVERNMENT IS SUGGESTING AT LEAST THAT
22 AN EMPLOYER WHO HAD A MORAL BELIEF THAT WOMEN SHOULD NOT
23 BE IN THE WORKFORCE, THAT THAT WOULD NOT BE A
24 SINCERELY-HELD OR LEGITIMATE MORAL BELIEF. THERE IS
25 NOTHING IN THE RULES THAT SAYS THAT. THERE IS NOTHING

1 IN THE RULES THAT LIMITS THE TYPES OF MORAL BELIEFS THAT
2 AN ENTITY CAN PROFESS.

3 I WOULD LIKE TO THINK THAT HAD THIS GONE
4 THROUGH THE RIGHT PROCESS, THERE WOULD HAVE BEEN SOME
5 THOUGHT GIVEN TO THAT AND MAYBE THERE WOULD HAVE BEEN A
6 DIFFERENT RESULT AND WE WOULD NOT HAVE THIS SWEEPING
7 EXEMPTION, WE WOULD NOT HAVE THE PUBLICLY-TRADED COMPANY
8 OPTION UNDER THE RELIGIOUS EXEMPTION RULE, AND WE WOULD
9 NOT HAVE THE PROVISION MAKING THE ACCOMMODATION
10 OPTIONAL. I THINK IN SOME WAYS THOSE ARE ALL THE
11 RESULTS OF A FLAWED PROCESS AS I SAID THAT LED TO A
12 FLAWED RESULT, BUT I ALSO THINK THAT BECAUSE THE RESULT
13 IS SO FLAWED, IT IS IMPORTANT TO GET THAT ON THE RECORD
14 AND MAKE CLEAR THAT IF WE ARE FORTUNATE, IF THE COURT
15 DOES GRANT AN INJUNCTION AND THE GOVERNMENT GOES BACK TO
16 THE DRAWING BOARD, ONE WOULD HOPE THAT THEY WOULD COME
17 UP -- IF THEY DECIDE THERE'S A NEED FOR FURTHER RULE
18 MAKING, ONE WOULD HOPE THAT THEY WOULD COME UP WITH A
19 RULE THAT IS MUCH NARROWER THAN THIS, THAT DOES NOT
20 ALLOW FOR SUCH SWEEPING OBJECTIONS, THAT IS MUCH MORE
21 JUSTIFIABLE UNDER THE AFFORDABLE CARE ACT AND UNDER
22 RFRA.

23 THE GOVERNMENT SAID -- TURNING BRIEFLY TO
24 THE HARM, AGAIN, THE GOVERNMENT HAS SAID WELL, EVERY
25 KNOWN RELIGIOUS OBJECTOR IS EXEMPT. NOW, THAT IS SIMPLY

1 NOT THE CASE.

2 RELIGIOUS -- MANY RELIGIOUS OBJECTORS ARE
3 STILL OPERATING UNDER THE ACCOMMODATION PROCESS UNDER
4 WHICH THEIR EMPLOYEES DO GET HEALTH COVERAGE. AND, IN
5 FACT, EVEN IF YOU LOOK AT WHAT IS REFERRED TO AS THE
6 ZUBIK INJUNCTION, THE ORDER FROM THE SUPREME COURT, THE
7 COURT DID NOT SAY YOUR EMPLOYEES DO NOT GET COVERAGE.
8 WHAT THEY SAID IS, HHS NOW KNOWS BY VIRTUE OF THIS
9 LITIGATION YOU OBJECT, SO THEY CAN GO AHEAD AND ARRANGE
10 FOR COVERAGE, AND THEY CAN'T FINE YOU FOR NOT PROVIDING
11 THE NOTICE. NOW, SOME OF THOSE ENTITIES ARE COVERED BY
12 CHURCH PLANS, WHICH IS A SIDE ISSUE, AND THEIR
13 EMPLOYERS -- THEIR EMPLOYEES MAY NOT BE GETTING
14 COVERAGE. BUT CERTAINLY TO STAY THAT ALL KNOWN
15 RELIGIOUS OBJECTORS ARE EXEMPT IS NOT CONSISTENT WITH
16 THE RECORD IN THIS CASE.

17 YOUR HONOR, THE GOVERNMENT COUNSEL HAS
18 TALKED A LITTLE BIT ABOUT THE NEED TO DEFER TO THEIR
19 INTERPRETATION AND CITED THE TWO CASES. IN THOSE CASES
20 IT SOUNDS LIKE AT LEAST THERE WAS LEGITIMATE TENSION IN
21 ONE OR AMBIGUITY IN ANOTHER THAT ALLOWED THE GOVERNMENT
22 TO SAY WE ARE ADOPTING A REASONABLE INTERPRETATION.
23 HERE THERE SIMPLY ISN'T. THERE'S NOT A BASIS FOR
24 READING INTO THE WOMEN'S HEALTH AMENDMENT THIS BROAD
25 AUTHORITY TO CARVE OUT EXEMPTIONS FROM WHAT IS A CLEAR

1 MANDATORY OBLIGATION THAT CONGRESS PASSED THAT THESE
2 PLAN SPONSORS HAVE TO PROVIDE AND HAVE TO NOT IMPOSE
3 COST SHARING REQUIREMENTS FOR THE NECESSARY PREVENTIVE
4 MEDICINE AS DEFINED BY HRSA, THIS IDEA THAT HR -- THE
5 GUIDELINES INCLUDE THE EXEMPTIONS. WELL, THE AGENCIES
6 PROMULGATE THE EXEMPTIONS AND THEN THEY GIVE HRSA THE
7 AUTHORITY, AND THEY APPEAR ON THE WEB PAGE. SO I DON'T
8 THINK IT'S THE CASE THAT HRSA IS EXERCISING ITS
9 INDEPENDENT AUTHORITY TO IMPLEMENT THESE GUIDELINES --
10 OR IMPLEMENT THESE EXCEPTIONS.

11 YOUR HONOR, LET'S RETURN TO THE THREE
12 MOST PROBLEMATIC ASPECTS THAT I MENTIONED IN THE
13 BEGINNING. THE MORAL EXEMPTION RULE IS SIMPLY NOT
14 SUPPORTED BY THE RECORD. THIS EXPANSION OF PUBLICLY
15 TRADED COMPANY IS NOT SUPPORTED. AND THE RENDERING OF
16 THE ACCOMMODATION PROCESS OPTIONAL REALLY DOES THREATEN
17 TO TAKE AWAY COVERAGE FOR MANY WOMEN WHO WORK FOR
18 RELIGIOUS EMPLOYERS BUT WHO ARE NONETHELESS GETTING
19 CONTRACEPTIVE COVERAGE TODAY.

20 AND WITH RESPECT TO ALL OF THESE IN SOME
21 WAY, AT LEAST CERTAINLY THE MORAL EXEMPTION AND THE
22 PUBLIC-TRADED COMPANY EXPANSION, THE GOVERNMENT'S
23 RESPONSE IS, WELL, WE JUST DON'T THINK THAT MANY PEOPLE
24 ARE GOING TO TAKE ADVANTAGE OF IT. THAT IN SOME WAYS IS
25 KIND OF A PERFECT EXAMPLE OF ARBITRARY AND CAPRICIOUS

1 RULEMAKING. TO ALLOW FOR A SUCH SWEEPING EXEMPTION, BUT
2 THEN TO SAY WE ARE DOING THIS BECAUSE WE DON'T ACTUALLY
3 THINK THERE IS MUCH DEMAND FOR IT, WE DON'T THINK THERE
4 IS MUCH NEED FOR IT, THAT IS SIMPLY NOT HOW THE AGENCY
5 RULEMAKING PROCESS IS SUPPOSED TO WORK AND IT'S NOT THE
6 KIND OF RESULT THAT IS ENTITLED TO DEFERENCE OR ENTITLED
7 TO BE AFFIRMED BY A COURT.

8 AND FOR ALL OF THOSE REASONS WE BELIEVE
9 THE RULES ARE ILLEGAL, THAT THEY WILL CAUSE IRREPARABLE
10 HARM TO THE COMMONWEALTH, TO THE COMMONWEALTH'S
11 RESIDENTS. PUBLIC INTEREST STRONGLY FAVORS AN
12 INJUNCTION HERE, AND WE WOULD ASK THE COURT TO GRANT THE
13 COMMONWEALTH'S MOTION. THANK YOU.

14 THE COURT: OKAY. AS I SAID AT THE
15 BEGINNING OF THIS HEARING, I CONSIDERED ALL THE
16 BRIEFINGS SUBMITTED BY THE PARTIES WITH RESPECT TO THIS
17 PRELIMINARY INJUNCTION, INCLUDING THE COMMONWEALTH'S
18 MOTION FOR PRELIMINARY INJUNCTION AND ITS SUPPORTING
19 EXHIBITS, THE DEFENDANT'S RESPONSE IN OPPOSITION TO THE
20 MOTION FOR PRELIMINARY INJUNCTION, AND THE
21 COMMONWEALTH'S REPLY. I HAVE ALSO CONSIDERED THE
22 ADMINISTRATIVE RECORD SUBMITTED BY THE DEFENDANTS. I
23 ALSO WISH TO THANK THE AMICI FOR SUBMITTING THEIR
24 THOUGHTFUL BRIEFS IN THIS CASE.

25 BASED ON THESE DOCUMENTS AND AS WELL AS

1 THE DOCUMENTS I HAVE RECEIVED AT TODAY'S HEARING, THE
2 TESTIMONY I HAVE HEARD AT TODAY'S HEARING, AND THE
3 ARGUMENT I HAVE HEARD, I WILL BE ABLE TO ISSUE AN
4 OPINION IN THE TIME SCALE REQUESTED BY PENNSYLVANIA,
5 WHICH IS PRIOR TO THE BEGINNING OF THE YEAR, AND WILL
6 ENDEAVOR TO GET THAT OPINION OUT AS SOON AS POSSIBLE.

7 THANK YOU. ANYTHING ELSE?

8 MR. FISCHER: NOTHING FURTHER FROM THE
9 COMMONWEALTH, YOUR HONOR.

10 MR. DAVIS: NOTHING FURTHER, YOUR HONOR.

11 MR. GOLDMAN: YOUR HONOR, I'M SORRY. YOU
12 HAD SUGGESTED ON TUESDAY EVENING THAT YOU WANTED
13 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

14 THE COURT: BASED ON WHAT I HAVE READ AND
15 WHAT I HAVE, I DON'T NEED YOU TO DO THAT. I WILL -- WE
16 WILL BE ABLE TO DO THAT INTERNALLY. I THINK YOU WERE
17 VERY CLEAR IN YOUR BRIEFS, AND I APPRECIATE THAT FROM
18 ALL SIDES. SO TO THE EXTENT THAT MY PREVIOUS ORDER
19 INDICATES A TIME FOR POST-HEARING BRIEFING AND
20 POST-HEARING SUBMISSION OF FINDINGS OF FACT, I'M
21 ABROGATING THAT PORTION IN MY ORDER. IT IS NOT
22 NECESSARY THAT YOU DO THAT. SO INSTEAD OF HAVING TO GO
23 HOME RIGHT NOW AND START WRITING, YOU CAN, I DON'T KNOW,
24 GO AND HAVE A DRINK OR SOMETHING.

25 ALL COUNSEL: THANK YOU, YOUR HONOR.

1 (HEARING CONCLUDED.)

2
3 I CERTIFY THAT THE FOREGOING IS A CORRECT
4 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
5 ABOVE-ENTITLED MATTER.

6
7
8 DATE OFFICIAL COURT REPORTER
9 SUZANNE R. WHITE
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23
24
25

1 INDEX PAGE

2
3 WITNESSES DIRECT CROSS REDIRECT RECROSS

4 CAROL WEISMAN

5 BY MR. GOLDMAN 55 -- 105 --

6 BY MS. KADE -- 97 -- --

7
8 SAMANTHA BUTTS

9 BY MR. GOLDMAN 113 -- 152 --

10 BY MS. KADE -- 146 -- --

11
12 CYNTHIA CHUANG

13 BY MS. BOLAND 165 -- -- --

14 BY MS. KOPPLIN -- 193 -- --

<div>\$</div>	<div>17 [2] - 9:14, 175:20 17-4540 [2] - 1:4, 3:7 17.9 [1] - 186:17 17120 [1] - 2:4 18 [7] - 55:21, 55:23, 56:4, 177:13, 182:14, 183:20, 183:23 1861 [2] - 36:10, 37:20 188 [1] - 38:2 19 [1] - 10:10 19.3 [1] - 81:15 19106 [2] - 1:9, 1:21 19107 [1] - 2:7 192 [1] - 38:2 1923 [1] - 35:2 193 [1] - 254:14 1960 [1] - 102:17 1972 [1] - 38:2 1980 [1] - 66:11 1987 [1] - 38:5 1990 [2] - 101:16, 102:17 1992 [1] - 115:11 1994 [1] - 115:2 1998 [2] - 115:6, 115:11 1:12-CV-3489 [1] - 206:14 1:30 [1] - 157:12 1ST [5] - 24:24, 25:9, 34:23, 230:17</div>	<div>2012 [9] - 92:23, 100:3, 101:24, 109:21, 110:4, 181:2, 192:14, 207:4 2013 [4] - 103:4, 103:14, 180:12, 207:20 2014 [12] - 38:16, 41:10, 92:23, 94:3, 100:3, 110:4, 180:13, 180:25, 181:3, 188:22, 242:2, 242:3 2015 [2] - 101:24, 109:21 2016 [10] - 70:19, 99:15, 99:19, 104:10, 106:24, 144:14, 180:14, 180:25, 205:24, 243:13 2017 [3] - 1:8, 28:8, 102:7 2018 [1] - 24:24 20530 [2] - 2:13, 2:18 20S [2] - 126:20, 127:13 21 [1] - 2:7 215)627-1882 [1] - 1:21 2191 [1] - 241:4 22 [2] - 10:3, 100:19 221 [1] - 38:5 223 [1] - 68:7 23 [3] - 10:3, 43:9, 199:18 230 [2] - 68:8, 68:13 231 [1] - 84:18 235 [1] - 86:13 24 [6] - 59:11, 60:5, 186:15, 186:21, 187:18, 188:7 256 [1] - 164:17 26 [2] - 38:19, 173:6 26(A) [2] - 64:23, 172:20 27 [1] - 76:4 29 [1] - 38:19</div>	<div>300GG-13(A)(4) [1] - 243:3 30GG-13 [1] - 223:20 30S [1] - 126:20 31 [7] - 102:4, 102:14, 105:13, 106:11, 109:6, 160:7, 198:10 31,000 [1] - 238:24 31,700 [5] - 237:23, 237:25, 238:13, 238:19, 238:20 3133 [1] - 2:12 32,000 [1] - 229:12 34 [1] - 200:21 35 [4] - 89:14, 143:25, 171:16, 201:6 36 [2] - 10:18, 201:14 37 [1] - 201:22 38 [1] - 202:2 39 [4] - 10:23, 104:9, 104:10, 202:9 3B [1] - 1:9 3RD [1] - 2:7</div>	<div>51 [3] - 70:4, 70:21, 127:15 51092 [1] - 217:17 53 [4] - 143:19, 143:25, 148:8, 154:1 54 [5] - 146:17, 147:12, 147:23, 148:9, 148:15 54,000 [4] - 53:3, 53:7, 53:19, 205:22 549 [1] - 215:25 55 [3] - 146:23, 148:24, 254:5 551 [1] - 241:19 559 [1] - 215:18 56 [1] - 149:5 57 [1] - 149:10 58 [7] - 10:24, 147:12, 147:23, 148:9, 149:14, 150:25, 151:8 58,000 [1] - 205:17 5TH [3] - 36:14, 209:17, 212:21</div>
<div>0</div>				
<div>001 [1] - 187:8 05 [2] - 77:4, 187:6</div>				
<div>1</div>	<div>2 [4] - 76:18, 91:20, 95:12, 138:2 2.2 [1] - 82:3 2.5 [1] - 12:19 20 [11] - 2:18, 10:10, 52:1, 90:23, 133:23, 170:4, 171:23, 171:24, 197:8, 232:3, 232:8 2001 [1] - 167:10 2002 [4] - 81:14, 82:2, 115:11, 115:14 2003 [3] - 60:12, 83:13, 116:4 2005 [1] - 115:14 2006 [2] - 94:3, 116:4 2007 [1] - 81:16 2008 [3] - 70:4, 70:5, 83:14 2010 [1] - 38:16 2011 [12] - 26:12, 38:16, 44:6, 70:9, 70:12, 88:5, 102:10, 102:16, 104:14, 104:18, 243:14</div>	<div>3 [2] - 56:14, 210:12 30 [12] - 8:16, 10:7, 10:15, 10:17, 10:23, 105:13, 127:16, 134:3, 137:8, 228:10, 230:16, 244:9 30-DAY [1] - 230:12 300 [1] - 45:3</div>	<div>4 [3] - 56:7, 56:8, 221:11 40 [6] - 62:18, 88:25, 89:10, 126:18, 126:20, 182:14 409 [1] - 38:2 41 [2] - 10:11, 10:16 42 [4] - 45:3, 71:14, 223:19, 243:3 43 [1] - 10:16 44 [1] - 98:18 45 [11] - 70:6, 70:7, 70:12, 70:16, 70:21, 88:21, 88:23, 89:1, 89:14, 154:7, 202:16 46 [1] - 101:8 47804 [2] - 101:6, 101:12 48 [1] - 10:22 481 [1] - 38:5 49 [4] - 10:6, 69:24, 70:2, 88:21 49.7 [1] - 186:21</div>	<div>6 [13] - 3:12, 3:13, 79:25, 80:2, 80:12, 80:13, 80:18, 165:7, 176:17, 198:10, 210:12, 234:18 601 [1] - 1:20 644-666 [1] - 241:19</div>
	<div>2</div>		<div>6</div>	
			<div>7 [3] - 84:7, 84:10, 165:15 7.2 [1] - 91:22 70 [3] - 119:11, 119:19, 168:4 700,000 [1] - 12:21 702 [2] - 64:24, 172:21 703 [2] - 64:24, 172:21 705 [2] - 64:24, 172:21 727 [3] - 186:16, 187:19, 188:7 79 [1] - 217:17</div>	
	<div>3</div>	<div>5</div>	<div>8</div>	
		<div>5 [6] - 68:1, 74:18, 81:14, 118:12, 118:16 5-3 [1] - 10:14 5.1 [1] - 187:1 5.3 [2] - 74:18, 80:18 50 [4] - 10:6, 119:11, 119:19, 124:18</div>	<div>8 [8] - 84:8, 84:10, 90:23, 114:7, 143:22, 143:23, 144:1, 183:18 8,000 [3] - 101:24, 110:6, 110:11 8.4 [1] - 186:13 80 [1] - 157:4</div>	

<p>800 [2] - 134:23, 134:25</p> <p>82-197 [1] - 237:12</p> <p>83 [1] - 186:12</p> <p>85 [3] - 76:1, 80:21, 81:2</p>	<p>31:17, 34:16, 34:24, 36:2, 36:21, 38:13, 38:20, 38:23, 38:25, 47:12, 48:24, 51:25, 52:14, 54:10, 56:23, 59:13, 63:24, 69:8, 74:4, 74:13, 75:3, 82:11, 82:24, 83:3, 83:4, 88:3, 88:4, 89:15, 89:22, 90:1, 92:6, 93:1, 93:19, 99:15, 105:17, 105:19, 105:25, 106:10, 106:21, 107:5, 107:6, 107:11, 107:25, 108:12, 108:18, 108:22, 109:4, 109:9, 109:11, 111:14, 111:22, 114:23, 116:13, 119:4, 120:24, 121:3, 123:3, 126:6, 128:22, 130:23, 131:19, 131:21, 133:25, 134:23, 141:11, 145:23, 147:17, 150:22, 151:15, 151:18, 154:5, 156:18, 163:5, 163:9, 164:25, 168:8, 168:13, 168:17, 168:19, 168:23, 170:2, 170:4, 170:24, 173:21, 174:8, 174:17, 176:22, 178:7, 178:8, 178:10, 178:12, 178:21, 180:4, 181:15, 181:17, 181:23, 182:1, 182:23, 183:18, 189:20, 190:12, 192:6, 195:5, 195:6, 196:10, 197:18, 198:20, 203:8, 203:14, 211:12, 215:15, 215:18, 216:8, 216:9, 216:24, 217:16, 218:21, 219:17, 222:21, 223:4, 223:22, 228:14, 229:23, 230:8, 231:14, 231:15, 232:7, 233:10, 233:18, 235:25, 239:16, 239:18, 239:25, 243:1,</p>	<p>243:2, 243:5, 243:17, 244:3, 244:5, 244:6, 244:12, 245:10, 246:23, 247:1, 249:18</p> <p>ABOVE [2] - 76:9, 253:5</p> <p>ABOVE-ENTITLED [1] - 253:5</p> <p>ABROGATING [1] - 252:21</p> <p>ABSENT [1] - 208:5</p> <p>ABSOLUTELY [6] - 15:11, 18:10, 142:8, 174:14, 179:2, 211:3</p> <p>ABSTRACT [1] - 106:13</p> <p>ABUNDANT [1] - 79:23</p> <p>ACA [34] - 11:17, 22:9, 28:3, 43:10, 43:25, 44:8, 45:2, 46:9, 120:20, 131:8, 132:22, 133:21, 136:12, 136:13, 136:18, 137:3, 137:8, 140:6, 153:17, 153:20, 153:22, 155:7, 155:12, 156:3, 198:11, 198:18, 219:8, 219:17, 221:2, 222:12, 223:6, 224:20, 224:24, 239:23</p> <p>ACA'S [3] - 11:9, 23:18, 207:21</p> <p>ACADEMIC [3] - 57:8, 59:20, 170:1</p> <p>ACADEMY [1] - 66:20</p> <p>ACCEPT [2] - 159:8, 187:6</p> <p>ACCEPTED [6] - 87:3, 87:7, 87:11, 101:19, 102:23, 103:25</p> <p>ACCEPTING [1] - 139:23</p> <p>ACCESS [27] - 34:17, 62:22, 70:22, 71:7, 131:19, 131:22, 131:24, 136:17, 140:23, 140:24, 140:25, 141:23, 145:11, 146:25, 149:1, 156:7, 156:11, 191:14, 201:16, 208:8, 218:2, 220:15, 220:20, 224:9,</p>	<p>227:2, 236:1, 239:13</p> <p>ACCESSING [1] - 145:11</p> <p>ACCOMMODATED [1] - 198:3</p> <p>ACCOMMODATION [26] - 6:25, 7:2, 40:15, 41:7, 46:21, 50:23, 50:25, 51:1, 211:7, 211:23, 218:6, 226:14, 226:21, 228:25, 229:7, 229:11, 232:9, 232:12, 232:15, 237:17, 243:20, 243:23, 243:25, 248:9, 249:3, 250:16</p> <p>ACCOMMODATIONS [2] - 50:13, 198:1</p> <p>ACCOMODATION [1] - 205:25</p> <p>ACCORDING [1] - 154:4</p> <p>ACCOUNT [4] - 85:14, 107:10, 107:18, 108:11</p> <p>ACCOUNTABILITY [1] - 7:1</p> <p>ACCOUNTED [2] - 188:12, 188:15</p> <p>ACCUMULATED [1] - 194:1</p> <p>ACCURACY [1] - 155:6</p> <p>ACCURATE [5] - 56:12, 114:20, 114:21, 165:13, 165:19</p> <p>ACCURATELY [1] - 111:21</p> <p>ACHIEVE [3] - 127:9, 129:14, 177:21</p> <p>ACHIEVED [1] - 217:9</p> <p>ACHIEVING [2] - 117:14, 172:7</p> <p>ACKNOWLEDGE [1] - 6:15</p> <p>ACKNOWLEDGES [1] - 231:23</p> <p>ACOSTA [1] - 3:6</p> <p>ACQUIRING [1] - 137:1</p> <p>ACROSS [4] - 7:7, 111:25, 229:24, 235:7</p> <p>ACT [59] - 6:20, 6:23, 9:10, 9:11, 12:8, 21:11, 21:14, 21:15, 22:7, 27:25, 42:18,</p>	<p>43:6, 45:12, 47:7, 47:10, 51:3, 51:20, 52:9, 63:13, 63:15, 63:21, 64:13, 67:4, 68:24, 78:16, 79:9, 87:9, 87:13, 90:6, 94:6, 94:10, 96:16, 100:16, 102:6, 112:12, 112:14, 112:16, 120:1, 120:4, 131:2, 131:5, 139:22, 140:1, 152:15, 154:20, 154:23, 178:14, 213:5, 217:12, 218:24, 230:9, 233:4, 233:20, 239:15, 239:19, 242:20, 247:10, 248:21</p> <p>ACT'S [2] - 206:20, 219:25</p> <p>ACTING [4] - 12:15, 19:8, 174:23, 183:17</p> <p>ACTION [11] - 1:3, 15:9, 16:14, 16:16, 17:23, 35:10, 48:10, 233:11, 233:13, 233:16, 234:1</p> <p>ACTIONS [2] - 17:11, 219:12</p> <p>ACTIVE [4] - 102:4, 106:15, 106:18, 171:11</p> <p>ACTIVELY [1] - 187:23</p> <p>ACTIVITIES [2] - 126:2, 170:12</p> <p>ACTIVITY [2] - 102:18, 107:1</p> <p>ACTUAL [11] - 75:19, 141:10, 159:24, 200:2, 201:2, 201:11, 201:18, 201:24, 202:5, 202:12, 202:22</p> <p>ACTUALLY [29] - 9:1, 17:18, 18:15, 19:6, 30:6, 30:25, 46:12, 47:6, 51:25, 76:20, 117:19, 134:13, 139:14, 160:8, 163:3, 163:14, 176:12, 181:7, 184:21, 189:8, 194:9, 200:12, 219:8, 220:19, 226:6, 230:21, 237:5, 237:6, 251:2</p> <p>ADD [8] - 9:16, 22:1,</p>
9				
<p>9 [3] - 114:7, 114:12, 143:25</p> <p>900 [1] - 93:1</p> <p>900-SOME [1] - 110:9</p> <p>95 [1] - 73:6</p> <p>950 [1] - 2:12</p> <p>958 [1] - 206:11</p> <p>97 [1] - 254:6</p> <p>9833 [1] - 38:19</p> <p>984 [3] - 183:10, 186:10, 187:18</p> <p>988 [1] - 206:11</p> <p>99 [1] - 158:8</p> <p>9TH [1] - 66:10</p>				
A				
<p>A(4) [1] - 43:7</p> <p>ABILITY [9] - 23:1, 44:25, 123:17, 123:19, 131:19, 141:23, 141:24, 156:13, 224:14</p> <p>ABLE [32] - 7:13, 15:15, 34:4, 34:12, 35:15, 94:2, 94:10, 114:17, 131:22, 158:6, 159:2, 159:4, 159:6, 159:9, 177:16, 177:20, 177:21, 177:24, 178:2, 178:16, 178:19, 179:15, 179:17, 181:10, 181:11, 181:16, 183:6, 183:14, 209:18, 236:21, 252:3, 252:16</p> <p>ABNORMAL [1] - 128:17</p> <p>ABORTION [2] - 71:15, 208:9</p> <p>ABORTIONS [3] - 96:23, 191:24, 242:14</p> <p>ABOUT [164] - 5:11, 6:16, 15:7, 15:23, 18:18, 20:14, 22:8, 22:25, 23:17, 26:24, 27:16, 28:20, 28:24, 29:1, 29:21, 30:22,</p>				

22:3, 22:17, 23:13,
240:14, 240:19,
245:8
ADDITION [10] - 7:17,
15:2, 17:15, 61:10,
69:8, 72:7, 128:7,
154:14, 171:10,
224:6
ADDITIONAL [15] -
7:11, 7:12, 9:16,
14:5, 14:14, 18:22,
19:17, 22:3, 22:17,
23:13, 78:22,
125:25, 135:4,
163:5, 221:12
ADDITIVE [1] - 134:16
ADDRESS [9] - 43:3,
43:5, 45:9, 158:2,
162:24, 214:13,
215:9, 215:17,
242:17
ADDRESSED [6] -
39:21, 51:15, 69:18,
73:4, 217:15, 247:11
ADEQUATE [1] -
217:2
ADMINISTERED [1] -
47:17
ADMINISTRATION [8]
- 22:6, 38:15, 39:9,
42:21, 64:12, 78:5,
220:14, 243:14
ADMINISTRATION 'S
[1] - 39:15
ADMINISTRATIVE
[11] - 6:23, 100:16,
152:15, 209:1,
209:2, 241:6, 245:9,
245:20, 246:6,
246:10, 251:22
ADMINISTRATOR [5]
- 34:6, 212:3, 218:7,
218:11, 229:4
ADMISSIBILITY [4] -
24:10, 158:14,
159:4, 159:7
ADMISSION [1] -
216:22
ADMIT [5] - 17:16,
161:4, 161:12,
161:16, 172:23
ADMITTED [7] - 55:23,
56:1, 56:4, 65:13,
95:11, 114:8, 161:14
ADMONITION [2] -
8:2, 213:16
ADOLESCENTS ' [1] -
63:2
ADOPT [1] - 78:13
ADOPTED [4] - 44:5,

78:14, 225:15
ADOPTING [2] -
92:13, 249:22
ADULT [3] - 127:16,
171:20, 171:21
ADVANCE [1] - 30:22
ADVANCES [1] -
223:12
ADVANTAGE [9] -
25:4, 129:18,
227:16, 227:17,
228:18, 232:2,
235:5, 236:17,
250:24
ADVERSE [6] -
103:20, 149:16,
151:1, 151:10,
202:10, 202:13
ADVISORY [1] - 68:25
AFFAIRS [3] - 61:9,
195:23, 195:24
AFFECT [12] - 95:19,
115:21, 123:25,
124:24, 125:18,
138:10, 138:23,
174:1, 188:14,
229:24, 237:22,
238:12
AFFECTED [14] -
26:21, 34:14, 83:21,
140:15, 228:18,
228:23, 228:25,
229:9, 229:18,
236:16, 238:1,
238:3, 238:20,
238:25
AFFECTING [2] - 83:5,
220:1
AFFECTS [2] - 79:6,
126:23
AFFILIATED [1] -
110:21
AFFIRMANCE [5] -
36:18, 37:1, 37:18,
37:22, 38:6
AFFIRMATIVE [2] -
15:8, 16:14
AFFIRMED [4] - 16:18,
17:2, 36:6, 251:7
AFFORD [2] - 80:25,
153:1
AFFORDABILITY [4] -
131:21, 136:17,
140:4, 145:12
AFFORDABLE [50] -
6:19, 12:8, 21:11,
22:7, 27:25, 42:18,
43:6, 45:12, 47:7,
51:20, 52:9, 63:12,
63:15, 63:21, 64:13,

67:4, 68:24, 78:16,
79:9, 87:9, 87:12,
90:6, 94:6, 94:10,
96:16, 102:6,
112:12, 112:13,
112:14, 112:16,
119:25, 120:4,
131:1, 131:5,
139:22, 140:1,
154:20, 154:23,
178:14, 206:20,
213:5, 217:12,
218:24, 230:8,
233:4, 233:20,
239:15, 239:18,
242:20, 248:21
AFFORDED [2] -
47:15, 50:7
AFTER [30] - 12:4,
12:9, 34:13, 58:8,
60:4, 60:5, 86:25,
94:6, 94:10, 102:6,
112:14, 115:3,
115:7, 133:25,
134:24, 136:12,
136:18, 139:25,
154:22, 155:7,
157:19, 176:14,
177:13, 188:23,
189:17, 189:20,
217:19, 236:6,
239:14, 239:18
AFTERNOON [4] -
162:11, 193:12,
210:21, 210:22
AGAIN [41] - 14:22,
17:2, 21:20, 31:13,
32:4, 33:16, 38:14,
42:19, 45:2, 46:14,
48:19, 61:3, 86:23,
103:2, 132:7,
139:17, 140:13,
140:25, 143:21,
144:19, 147:7,
148:18, 153:16,
153:22, 156:16,
162:12, 177:14,
191:11, 195:17,
201:15, 204:13,
212:24, 215:1,
215:2, 224:3,
225:14, 231:13,
238:8, 238:22,
244:19, 248:24
AGAINST [10] - 18:2,
32:9, 33:25, 35:3,
108:13, 145:11,
159:23, 233:21,
236:9, 240:16
AGE [7] - 126:15,

126:18, 126:20,
127:13, 172:5,
180:16, 193:1
AGENCIES [44] - 21:7,
21:13, 38:16, 39:3,
42:23, 44:2, 44:21,
44:25, 45:1, 45:4,
45:11, 45:14, 45:15,
45:23, 46:18, 46:20,
46:23, 47:1, 47:3,
47:13, 50:11, 50:13,
50:21, 51:11, 51:15,
51:21, 52:5, 159:25,
169:21, 209:23,
212:13, 212:23,
214:11, 215:24,
217:20, 221:21,
222:4, 225:22,
232:6, 242:25,
243:5, 243:17, 250:5
AGENCY [28] - 15:9,
17:22, 35:10, 39:17,
43:12, 44:8, 44:12,
44:18, 45:7, 48:16,
161:8, 173:3, 206:3,
206:5, 206:8,
207:10, 209:6,
213:1, 217:7, 220:6,
222:15, 222:16,
222:24, 223:14,
241:5, 245:4, 251:4
AGENCY 'S [14] -
44:13, 44:18, 47:8,
49:19, 50:25, 51:19,
66:8, 112:24,
120:19, 172:25,
204:17, 241:12,
242:19, 246:11
AGES [1] - 182:14
AGO [4] - 28:1, 65:9,
170:14, 171:24
AGREE [9] - 27:14,
28:4, 28:19, 30:13,
32:23, 41:18, 106:2,
196:21, 198:17
AGREED [1] - 153:12
AGREES [1] - 77:23
AHEAD [18] - 5:21,
9:6, 9:24, 42:12,
42:15, 66:15, 80:9,
116:22, 121:11,
148:12, 161:23,
165:1, 173:8, 185:6,
234:22, 236:11,
239:10, 249:9
AIDED [1] - 1:24
AL [3] - 1:5, 2:19,
83:14
ALEXANDER [1] - 3:6
ALL [113] - 5:15, 6:12,

8:9, 9:1, 9:9, 12:3,
21:19, 24:2, 24:16,
25:2, 26:13, 27:2,
31:11, 35:24, 41:25,
42:4, 42:6, 42:11,
44:21, 52:8, 53:7,
54:12, 56:1, 59:22,
69:15, 69:24, 73:14,
74:9, 74:12, 75:7,
77:12, 77:15, 78:4,
83:17, 86:20, 87:5,
90:6, 94:4, 95:1,
97:3, 101:3, 101:5,
105:8, 105:10,
107:9, 107:13,
112:15, 113:5,
128:4, 128:10,
128:19, 130:8,
134:22, 136:12,
147:11, 147:22,
148:8, 148:19,
151:11, 152:3,
152:7, 153:9,
157:22, 163:20,
164:22, 169:1,
170:6, 170:10,
174:16, 176:1,
178:17, 182:20,
183:1, 183:12,
185:23, 192:11,
193:21, 196:1,
196:3, 198:19,
210:8, 210:10,
210:14, 212:12,
213:16, 218:5,
218:12, 222:18,
225:10, 225:11,
228:2, 228:6, 231:7,
231:18, 231:19,
233:1, 234:5, 237:8,
240:21, 243:19,
244:24, 246:17,
246:24, 248:10,
249:14, 250:20,
251:8, 251:15,
252:18, 252:25
ALLEGATIONS [2] -
6:3, 151:14
ALLEGES [2] - 17:8,
17:23
ALLEGING [2] -
17:24, 151:13
ALLEViate [2] -
46:19, 51:1
ALLOW [7] - 3:21,
20:7, 141:5, 212:15,
224:3, 248:20, 251:1
ALLOWED [6] - 3:15,
3:17, 30:15, 190:6,
220:23, 249:21

ALLOWING [1] -
177:19

ALLOWS [4] - 190:16,
211:15, 230:13,
233:13

ALLUDES [1] - 164:10

ALMOST [3] - 42:10,
91:24, 183:20

ALONE [2] - 213:21,
237:24

ALONG [6] - 24:3,
41:22, 78:7, 81:9,
126:2, 158:11

ALPHABETICAL [1] -
68:17

ALREADY [42] - 3:11,
6:3, 6:5, 6:24, 9:18,
9:22, 10:21, 13:21,
14:23, 21:19, 24:2,
25:14, 27:4, 27:5,
39:21, 43:5, 43:8,
68:4, 69:5, 69:9,
114:8, 163:20,
164:12, 164:19,
167:20, 181:19,
184:14, 194:10,
194:18, 196:16,
197:12, 199:15,
200:6, 200:7,
200:14, 209:4,
216:23, 225:8,
239:6, 239:20, 245:1

ALSO [115] - 3:16, 5:4,
5:17, 6:11, 8:22,
10:12, 10:15, 14:22,
15:14, 21:6, 21:12,
22:8, 22:15, 22:25,
23:6, 23:16, 23:19,
26:7, 27:19, 27:21,
34:24, 39:13, 43:19,
43:22, 43:23, 52:18,
59:22, 60:1, 61:4,
61:8, 63:20, 64:5,
72:4, 77:17, 79:19,
81:24, 82:24, 84:17,
85:7, 94:8, 95:21,
96:25, 99:23,
101:10, 103:1,
109:8, 115:4,
115:12, 115:14,
117:5, 117:7, 117:9,
119:14, 119:15,
119:16, 121:24,
122:2, 124:10,
128:8, 128:24,
129:2, 129:23,
130:16, 131:4,
139:25, 146:3,
150:5, 154:15,
154:22, 159:3,

163:6, 163:16,
166:9, 168:17,
169:4, 169:9,
169:21, 169:25,
170:15, 171:11,
173:21, 174:6,
177:7, 178:10,
184:23, 199:19,
206:12, 207:21,
210:10, 216:13,
218:9, 224:10,
224:16, 224:23,
225:24, 227:9,
227:19, 230:7,
231:15, 235:12,
237:4, 239:11,
239:12, 239:24,
240:8, 240:14,
240:17, 242:17,
243:13, 243:19,
244:7, 248:12,
251:21, 251:23

ALTERNATIVE [2] -
40:5, 217:24

ALTERNATIVES [1] -
27:21

ALTHOUGH [11] -
18:15, 81:10,
100:25, 102:19,
109:18, 187:12,
200:10, 208:25,
210:8, 233:17,
240:17

ALTOGETHER [3] -
11:17, 14:12, 179:1

ALWAYS [6] - 70:9,
79:11, 132:24,
132:25, 156:12,
217:4

AM [33] - 3:20, 4:17,
54:7, 56:22, 57:18,
58:8, 60:20, 64:9,
70:12, 72:23, 74:24,
76:3, 77:19, 80:19,
83:11, 84:21, 99:16,
105:13, 114:3,
116:6, 116:15,
118:1, 119:18,
120:2, 120:8, 127:4,
131:23, 136:2,
145:4, 166:12,
169:6, 179:15, 238:1

AMBIGUITY [3] -
20:14, 241:10,
249:21

AMEND [1] - 205:25

AMENDMENT [5] -
217:13, 223:25,
224:2, 224:8, 249:24

AMERICAN [1] - 104:3

AMERICANS [1] -
128:5

AMICI [1] - 251:23

AMICUS [2] - 229:23,
229:25

AMONG [7] - 94:12,
102:3, 106:14,
106:17, 107:1,
108:3, 219:24

AMONGST [1] - 183:7

AMOUNT [4] - 13:25,
86:4, 124:8, 237:3

AN [205] - 7:2, 7:14,
9:14, 9:18, 15:8,
15:9, 16:15, 16:16,
16:18, 17:2, 19:18,
20:11, 21:21, 25:1,
26:23, 27:8, 27:10,
28:11, 30:5, 30:16,
31:22, 32:5, 32:22,
33:6, 33:16, 34:3,
35:16, 35:17, 36:6,
36:10, 36:18, 37:5,
37:18, 37:22, 38:6,
39:1, 42:3, 44:12,
44:13, 44:18, 46:4,
46:21, 47:14, 47:17,
48:5, 48:7, 49:19,
50:5, 52:8, 55:7,
58:9, 58:25, 61:21,
61:24, 62:1, 64:18,
65:1, 65:5, 65:11,
65:13, 65:18, 65:19,
65:21, 70:18, 71:11,
71:19, 71:21, 72:13,
72:16, 76:13, 79:12,
79:23, 80:21, 81:24,
85:3, 91:24, 92:14,
92:15, 92:18, 93:15,
96:2, 96:4, 96:21,
97:5, 99:5, 100:11,
100:15, 102:4,
106:15, 106:16,
111:24, 114:3,
118:15, 119:16,
120:13, 120:17,
124:6, 126:15,
133:10, 138:20,
138:21, 139:11,
140:2, 141:5,
141:22, 145:4,
145:25, 146:4,
150:12, 151:19,
152:11, 152:14,
154:16, 154:17,
155:21, 157:12,
160:9, 164:17,
169:12, 169:13,
170:3, 170:18,
171:11, 171:19,

172:8, 172:12,
172:24, 172:25,
173:2, 179:3,
183:21, 188:5,
188:24, 190:12,
190:25, 195:22,
195:25, 196:25,
197:4, 197:12,
202:17, 209:16,
210:5, 210:7, 210:9,
212:19, 214:7,
214:11, 214:17,
214:20, 214:23,
217:2, 217:5,
217:10, 217:22,
217:24, 219:19,
220:6, 222:15,
222:16, 223:11,
223:14, 225:7,
226:20, 226:23,
228:4, 228:6, 228:9,
229:11, 230:1,
230:13, 230:16,
233:13, 236:3,
236:18, 238:23,
239:1, 239:2, 239:8,
240:3, 240:12,
240:14, 240:24,
241:4, 243:2, 244:8,
245:2, 246:1, 247:4,
247:22, 248:2,
248:15, 251:11,
252:3

ANALOGOUS [2] -
20:11, 240:24

ANALOGY [1] - 50:2

ANALYSIS [15] -
15:22, 17:6, 20:1,
35:22, 36:13, 37:6,
62:6, 94:4, 102:6,
132:22, 134:1,
210:1, 233:25,
237:9, 238:21

ANALYZE [1] - 49:9

ANALYZED [2] -
70:20, 215:25

ANALYZING [2] -
18:22, 109:16

AND [1047] - 2:5, 2:14,
3:4, 3:17, 4:11, 5:12,
5:16, 5:17, 6:6, 6:8,
6:11, 6:12, 6:18,
6:20, 6:23, 6:24, 7:1,
7:3, 7:7, 7:10, 7:11,
7:12, 7:18, 7:19,
7:24, 8:6, 8:10, 8:11,
8:15, 8:16, 8:19, 9:8,
9:10, 9:12, 9:15,
9:17, 9:19, 9:20,
9:21, 10:6, 10:10,

10:11, 10:16, 10:17,
10:23, 11:2, 11:5,
11:20, 11:22, 11:25,
12:8, 12:11, 12:13,
12:21, 13:2, 13:10,
13:14, 14:1, 14:6,
14:7, 14:14, 14:18,
14:22, 14:23, 15:2,
15:5, 15:7, 15:9,
15:13, 15:14, 15:23,
16:8, 16:25, 17:15,
17:18, 17:21, 18:7,
18:13, 18:19, 19:14,
20:6, 20:16, 20:17,
21:4, 21:10, 21:11,
21:12, 21:13, 21:14,
21:15, 21:16, 21:20,
21:21, 22:12, 22:18,
22:22, 22:25, 23:2,
23:3, 23:6, 23:12,
23:14, 23:20, 23:23,
24:3, 24:16, 24:17,
25:12, 26:2, 26:5,
26:9, 26:10, 26:13,
26:18, 26:25, 27:2,
27:21, 28:15, 28:16,
29:25, 30:9, 30:10,
30:17, 31:10, 31:18,
32:9, 32:18, 33:2,
33:8, 33:17, 34:2,
34:12, 35:6, 35:7,
35:12, 35:16, 35:18,
36:6, 37:4, 37:11,
37:16, 38:4, 38:16,
39:1, 39:6, 39:10,
39:14, 39:16, 39:20,
39:22, 39:24, 40:3,
40:5, 40:7, 40:22,
41:9, 41:14, 42:3,
43:4, 43:6, 43:9,
43:15, 43:16, 43:21,
43:24, 44:6, 44:9,
44:25, 45:6, 45:9,
45:15, 46:8, 46:14,
46:16, 46:19, 47:7,
47:12, 47:21, 48:1,
48:14, 48:15, 48:24,
49:8, 49:10, 49:17,
50:7, 50:21, 51:7,
51:8, 51:9, 51:13,
51:18, 51:20, 51:22,
51:25, 52:7, 52:17,
53:3, 53:8, 53:19,
53:24, 54:17, 54:21,
55:4, 55:7, 55:9,
56:1, 56:11, 56:14,
56:19, 56:24, 57:9,
57:11, 57:15, 58:12,
58:17, 59:3, 59:10,
59:13, 59:17, 59:20,
59:22, 60:1, 60:7,

60:10, 60:13, 60:17, 60:19, 60:25, 61:6, 61:10, 61:13, 61:20, 62:10, 62:19, 62:21, 63:7, 63:10, 63:17, 63:20, 63:23, 64:4, 64:7, 64:18, 64:24, 65:6, 65:16, 66:9, 66:17, 66:20, 66:21, 66:22, 66:23, 66:24, 67:2, 67:7, 67:11, 67:13, 67:16, 67:19, 68:1, 68:4, 68:7, 69:1, 69:3, 69:5, 69:6, 69:7, 69:14, 69:24, 70:5, 70:7, 70:10, 70:19, 70:21, 70:23, 71:3, 71:5, 71:17, 72:7, 72:9, 72:10, 72:11, 72:21, 73:4, 73:5, 73:8, 73:10, 73:14, 73:15, 73:16, 73:21, 74:3, 74:14, 74:18, 75:1, 75:5, 75:7, 75:9, 75:11, 75:16, 75:20, 75:21, 76:6, 76:8, 76:9, 76:13, 76:20, 76:25, 77:8, 77:14, 77:15, 77:17, 77:18, 78:1, 78:5, 78:12, 79:3, 79:8, 79:19, 80:19, 81:8, 81:19, 81:23, 82:3, 82:4, 82:6, 82:10, 82:11, 82:17, 83:2, 83:6, 83:10, 83:11, 83:12, 83:14, 84:6, 84:10, 84:19, 85:3, 85:6, 85:8, 85:20, 85:22, 85:24, 86:4, 86:5, 86:18, 86:21, 87:3, 87:11, 87:15, 88:4, 88:14, 88:18, 88:21, 88:25, 89:3, 89:14, 89:22, 90:4, 90:8, 90:13, 90:25, 91:1, 91:7, 91:17, 92:17, 92:18, 92:19, 92:23, 92:24, 93:3, 93:6, 94:2, 94:3, 94:9, 94:12, 94:14, 94:21, 94:22, 94:23, 95:2, 95:8, 95:10, 95:16, 95:24, 96:8, 96:11, 96:12, 96:21, 96:22, 97:1, 98:2, 98:3, 98:7, 98:9, 98:11, 98:12, 98:19, 98:23, 99:11, 100:14, 100:23, 101:1,	101:4, 101:7, 101:21, 101:24, 102:4, 102:15, 102:17, 103:14, 103:20, 104:18, 104:21, 105:13, 105:15, 105:20, 105:21, 106:2, 106:5, 106:11, 106:12, 106:21, 106:23, 106:25, 107:6, 107:10, 107:12, 107:16, 107:25, 108:1, 108:2, 108:11, 108:12, 108:13, 108:16, 109:7, 109:10, 109:11, 109:19, 109:20, 109:21, 110:5, 110:6, 110:13, 110:19, 110:25, 111:3, 111:5, 111:16, 111:17, 111:20, 111:22, 112:1, 112:5, 112:11, 112:12, 112:14, 113:3, 113:14, 113:18, 114:2, 114:4, 114:7, 114:9, 114:12, 114:18, 114:21, 115:1, 115:3, 115:5, 115:8, 115:10, 115:12, 115:14, 115:22, 116:1, 116:7, 116:9, 116:17, 116:22, 116:24, 117:3, 117:9, 117:18, 117:25, 118:2, 118:7, 118:8, 118:22, 119:1, 119:5, 119:12, 119:15, 119:17, 119:19, 119:20, 119:25, 120:7, 120:13, 121:9, 121:18, 122:2, 122:6, 122:12, 122:14, 122:17, 122:20, 122:21, 123:6, 123:13, 123:14, 123:15, 123:16, 123:17, 123:22, 124:4, 124:5, 124:6, 124:13, 124:17, 124:19, 125:9, 125:11, 125:15, 125:24, 125:25,	126:1, 126:3, 126:11, 126:15, 126:20, 126:21, 127:1, 127:4, 127:13, 127:20, 127:24, 128:3, 128:4, 128:14, 128:18, 128:21, 129:2, 129:20, 130:2, 130:8, 130:14, 130:21, 131:2, 131:5, 131:9, 131:15, 131:21, 132:1, 132:2, 132:11, 132:12, 132:16, 132:18, 132:19, 132:22, 133:2, 133:12, 133:14, 133:16, 133:25, 134:7, 134:21, 134:22, 134:24, 135:2, 135:16, 135:19, 135:24, 136:13, 137:8, 137:19, 137:23, 138:1, 138:6, 138:9, 138:13, 138:16, 139:8, 139:10, 139:25, 140:5, 140:22, 140:23, 140:24, 141:24, 142:1, 142:3, 142:4, 143:7, 143:14, 144:1, 145:11, 145:19, 146:2, 146:12, 146:23, 146:25, 147:11, 148:24, 149:1, 149:5, 149:10, 149:14, 149:16, 149:20, 150:11, 151:1, 151:2, 151:10, 151:12, 152:6, 152:10, 152:13, 152:25, 153:7, 153:13, 153:14, 153:18, 154:2, 154:6, 154:8, 154:17, 154:19, 155:3, 155:7, 155:12, 155:15, 155:21, 155:22, 155:24, 156:19, 157:12, 157:20, 158:13, 158:14, 159:5, 159:10, 159:14, 159:17, 159:25, 160:1, 160:7, 160:12, 160:23, 161:9,	161:13, 161:22, 161:24, 162:12, 162:16, 162:20, 163:6, 163:13, 163:14, 163:16, 164:3, 164:5, 164:11, 164:14, 164:22, 165:12, 165:13, 165:18, 165:19, 166:2, 166:5, 166:7, 166:18, 166:21, 167:7, 167:10, 167:19, 167:21, 168:9, 168:15, 168:18, 168:20, 168:22, 169:1, 169:4, 169:9, 169:13, 169:16, 170:5, 171:3, 171:18, 171:21, 171:25, 172:8, 172:21, 173:6, 173:14, 173:16, 173:18, 174:6, 174:9, 174:11, 174:19, 175:2, 175:9, 176:7, 176:12, 176:15, 176:21, 176:23, 177:4, 177:11, 177:14, 177:16, 177:21, 177:25, 178:1, 178:11, 178:14, 178:19, 178:20, 178:24, 179:11, 180:7, 180:12, 180:16, 180:18, 180:19, 180:20, 180:24, 181:5, 181:13, 181:14, 181:15, 181:18, 181:19, 182:13, 182:14, 182:16, 182:18, 182:20, 183:2, 183:3, 183:9, 183:11, 183:19, 183:21, 184:13, 184:24, 185:1, 185:20, 186:2, 186:7, 186:8, 186:14, 186:21, 187:1, 187:3, 187:5, 187:11, 187:15, 187:18, 187:21, 188:3, 188:4, 188:16, 188:24, 189:6, 190:5, 190:10, 190:18, 191:2, 191:17,	191:22, 191:23, 192:10, 192:20, 193:3, 193:22, 193:23, 193:25, 194:3, 194:4, 194:19, 195:14, 195:16, 195:20, 195:25, 196:18, 197:8, 197:11, 197:15, 197:21, 197:23, 198:3, 198:24, 199:9, 199:13, 199:19, 199:20, 199:23, 200:4, 200:16, 201:14, 201:16, 201:22, 202:2, 202:10, 202:16, 202:18, 202:19, 204:9, 204:13, 205:13, 205:17, 205:18, 206:3, 206:11, 206:17, 206:19, 206:21, 207:20, 207:22, 208:10, 209:5, 209:9, 209:15, 210:5, 210:24, 211:2, 211:6, 211:8, 211:18, 212:7, 212:11, 213:2, 213:4, 213:5, 213:11, 213:14, 213:17, 213:21, 213:23, 214:3, 214:9, 215:1, 215:6, 215:8, 215:17, 215:20, 215:22, 215:25, 216:8, 217:5, 217:6, 217:10, 217:22, 218:2, 218:9, 218:10, 218:22, 219:2, 219:8, 219:9, 219:15, 219:19, 219:23, 220:1, 220:4, 220:14, 221:2, 221:4, 221:8, 221:10, 221:11, 221:13, 221:18, 221:21, 221:23, 221:24, 222:2, 222:14, 222:17, 222:19, 222:20, 223:1, 223:2, 223:10, 223:17, 223:19, 223:21, 223:24, 224:3, 224:6, 224:14, 224:18, 224:22, 224:25, 225:4,
--	--	---	--	---

225:5, 225:9, 225:22, 226:4, 226:8, 226:16, 226:17, 226:22, 227:1, 227:2, 228:6, 228:10, 228:21, 229:11, 229:18, 230:4, 230:7, 230:9, 230:18, 231:4, 231:11, 231:12, 231:15, 231:20, 231:21, 232:6, 232:7, 232:8, 232:16, 232:22, 233:3, 233:4, 233:5, 233:10, 233:13, 233:20, 234:1, 234:4, 234:5, 234:16, 235:7, 235:11, 235:25, 236:14, 236:16, 237:3, 237:6, 237:13, 237:16, 237:20, 238:7, 238:8, 240:11, 240:14, 240:22, 241:2, 241:17, 242:14, 243:11, 243:12, 243:25, 244:2, 244:5, 244:9, 244:12, 244:14, 244:17, 244:22, 245:3, 245:9, 246:11, 247:4, 247:7, 247:12, 247:19, 247:21, 248:5, 248:6, 248:8, 248:14, 248:15, 248:21, 249:4, 249:9, 249:10, 249:12, 249:19, 250:2, 250:6, 250:7, 250:15, 250:20, 250:21, 250:25, 251:5, 251:8, 251:12, 251:18, 251:20, 251:25, 252:2, 252:5, 252:13, 252:14, 252:17, 252:19, 252:23, 252:24 ANEMIA [2] - 124:10, 124:12 ANNOUNCED [3] - 34:6, 199:15, 227:17 ANNOUNCEMENT [2] - 103:6, 228:1 ANNUAL [1] - 228:6 ANNUALLY [1] - 13:2 ANOTHER [17] - 45:9,	49:13, 65:24, 82:6, 87:22, 93:21, 99:19, 100:18, 107:12, 185:10, 195:23, 208:12, 218:14, 225:3, 241:8, 243:4, 249:21 ANSWER [13] - 30:21, 31:15, 45:12, 85:12, 108:19, 139:10, 140:17, 140:19, 140:20, 141:14, 147:19, 148:2, 238:10 ANSWERS [1] - 30:19 ANTICIPATED [1] - 210:13 ANY [129] - 3:21, 17:6, 18:23, 20:1, 20:14, 24:1, 26:22, 26:25, 34:20, 34:21, 35:23, 36:23, 37:21, 38:7, 39:7, 43:12, 46:23, 49:7, 53:10, 62:12, 62:21, 64:1, 64:4, 64:21, 65:6, 67:19, 69:4, 72:15, 74:7, 78:2, 87:8, 89:9, 89:17, 91:3, 91:4, 92:9, 99:18, 104:21, 105:3, 107:2, 110:11, 110:21, 111:4, 112:20, 114:18, 115:23, 118:20, 120:15, 131:11, 132:16, 132:17, 134:25, 140:14, 140:24, 141:10, 141:20, 145:1, 145:22, 145:23, 146:3, 147:24, 152:20, 154:25, 160:6, 168:5, 169:18, 170:7, 170:21, 172:4, 173:25, 174:1, 175:13, 178:23, 179:6, 179:20, 181:23, 182:20, 183:5, 185:22, 186:25, 191:1, 194:14, 194:22, 195:2, 195:8, 195:13, 199:1, 199:5, 199:10, 199:12, 199:13, 200:2, 200:7, 200:11, 200:15, 200:16, 201:2, 201:11, 201:18, 201:24,	202:5, 202:12, 202:22, 203:7, 203:8, 203:9, 203:14, 204:1, 216:5, 219:14, 221:10, 221:23, 223:21, 225:15, 225:16, 226:15, 226:18, 227:15, 227:20, 230:13, 230:14, 234:12, 239:7, 240:23, 243:22, 244:12, 244:14 ANYBODY [1] - 143:16 ANYMORE [1] - 188:6 ANYONE [10] - 34:9, 41:3, 83:25, 86:9, 155:6, 161:11, 196:8, 228:22, 244:6 ANYTHING [13] - 35:23, 37:17, 52:3, 54:2, 85:20, 112:18, 128:5, 136:14, 143:8, 148:19, 215:5, 244:1, 252:7 ANYWAY [1] - 137:15 ANYWHERE [2] - 126:19, 134:23 APA [27] - 8:6, 8:11, 8:12, 8:18, 8:20, 8:25, 9:2, 9:3, 9:12, 38:13, 39:2, 39:14, 44:24, 112:25, 172:25, 213:2, 213:4, 213:11, 215:15, 215:18, 215:25, 216:2, 216:9, 216:10, 218:18, 233:2, 245:8 APART [3] - 39:2, 111:6, 208:20 APOLOGIES [1] - 203:2 APOLOGIZE [7] - 18:17, 98:22, 151:5, 157:16, 204:13, 206:15, 234:11 APPARENT [2] - 43:1, 244:11 APPARENTLY [2] - 224:19, 225:25 APPEAR [2] - 108:20, 250:7 APPEARANCES [1] - 2:1 APPEARS [2] - 18:15, 165:13 APPENDIX [2] - 68:7,	84:18 APPLE [1] - 236:10 APPLES [2] - 109:11, 109:12 APPLICABLE [3] - 47:9, 49:1, 147:6 APPLIED [5] - 79:15, 85:19, 218:22, 219:20, 219:23 APPLIES [8] - 18:13, 28:3, 35:15, 49:8, 50:8, 120:25, 164:22, 225:17 APPLY [11] - 18:11, 18:12, 28:25, 36:11, 49:11, 52:11, 85:18, 179:17, 218:23, 224:2, 225:4 APPLYING [6] - 48:15, 205:14, 217:12, 226:12, 226:20 APPRECIATE [3] - 93:17, 99:17, 252:17 APPROACH [14] - 5:7, 25:19, 54:16, 54:17, 97:15, 105:5, 113:10, 155:24, 156:18, 158:3, 162:9, 193:8, 204:7, 235:19 APPROACHED [1] - 158:12 APPROPRIATE [14] - 25:14, 30:17, 32:13, 32:22, 39:8, 41:17, 49:3, 49:11, 49:25, 107:15, 121:4, 216:6, 220:12, 241:11 APPROPRIATELY [1] - 32:3 APPROPRIATENES S [1] - 107:11 APPROVE [1] - 82:17 APPROVED [4] - 78:5, 166:16, 178:18, 218:3 APPROXIMATELY [11] - 84:13, 91:10, 118:12, 118:16, 119:16, 122:6, 126:23, 134:3, 208:2, 237:23, 238:13 ARBITRARY [3] - 213:4, 233:3, 250:25 ARCHDIOCESE [3] - 206:12, 206:25 ARE [441] - 3:2, 6:4, 6:11, 6:18, 6:20,	6:21, 7:13, 8:4, 8:5, 8:8, 8:11, 9:8, 9:13, 9:19, 9:22, 10:12, 10:20, 11:21, 11:22, 11:23, 12:2, 13:2, 14:9, 14:13, 14:15, 15:17, 15:20, 16:16, 17:24, 17:25, 20:15, 21:13, 21:22, 21:24, 25:6, 26:6, 26:16, 26:18, 26:19, 27:4, 27:11, 28:18, 29:1, 29:5, 31:11, 32:19, 33:23, 34:19, 37:8, 38:20, 38:22, 38:24, 39:2, 39:8, 39:10, 40:22, 40:25, 41:17, 42:10, 45:11, 46:4, 46:15, 46:25, 47:1, 47:3, 47:10, 48:12, 48:20, 48:24, 51:24, 52:1, 54:5, 54:6, 54:14, 55:2, 56:1, 56:12, 56:17, 56:20, 57:17, 57:22, 57:24, 60:19, 60:23, 61:15, 61:17, 61:18, 63:14, 63:20, 68:10, 68:12, 68:23, 72:4, 72:5, 72:8, 72:18, 72:19, 72:24, 73:1, 73:7, 74:13, 74:20, 75:2, 75:5, 75:15, 76:8, 76:9, 76:17, 77:10, 77:12, 77:15, 79:5, 79:18, 83:11, 84:4, 84:9, 84:13, 86:18, 86:19, 86:20, 87:18, 87:21, 88:23, 90:8, 90:12, 91:21, 95:7, 95:13, 97:22, 99:3, 99:12, 99:23, 100:20, 100:23, 103:9, 103:20, 103:21, 105:10, 105:24, 106:3, 106:6, 107:20, 108:17, 108:21, 109:11, 111:3, 111:18, 112:15, 114:8, 114:10, 114:11, 114:15, 114:17, 114:18, 114:19, 116:5, 116:23, 117:11, 117:25, 119:5, 119:6, 119:25, 120:3, 120:6, 120:9, 121:4, 121:16, 121:17, 121:18, 122:2, 122:8,
---	--	---	---	--

123:23, 125:5,
125:11, 125:13,
125:15, 125:24,
126:1, 126:3,
126:11, 126:15,
126:18, 127:14,
127:19, 127:23,
127:24, 128:19,
128:22, 129:5,
129:7, 129:11,
130:14, 134:4,
134:25, 135:3,
135:10, 137:16,
137:23, 137:25,
138:3, 138:4, 139:1,
139:6, 140:15,
140:18, 142:5,
142:15, 144:7,
144:11, 144:14,
144:17, 144:23,
149:20, 149:23,
150:8, 150:14,
151:6, 151:13,
151:18, 151:25,
153:12, 153:13,
156:2, 157:1,
158:19, 158:24,
159:2, 159:3, 159:6,
159:8, 159:9,
159:16, 159:24,
159:25, 160:16,
161:2, 161:25,
162:3, 164:22,
164:25, 166:2,
166:7, 166:11,
168:8, 168:19,
168:22, 168:24,
169:1, 169:12,
169:15, 169:16,
170:6, 171:25,
172:6, 173:1,
173:14, 174:9,
174:15, 174:19,
174:22, 175:2,
175:4, 175:5,
175:10, 175:12,
176:5, 176:6,
176:10, 176:12,
176:15, 176:16,
176:18, 176:22,
176:25, 177:3,
177:12, 177:15,
180:16, 182:1,
185:16, 185:17,
186:10, 186:19,
187:14, 189:4,
189:13, 190:7,
190:12, 190:14,
190:15, 191:21,
192:9, 193:1,
193:14, 194:14,

194:17, 195:17,
196:3, 196:10,
196:15, 197:11,
197:18, 197:21,
198:1, 198:6, 198:7,
198:22, 198:23,
199:1, 199:5, 199:9,
199:16, 200:4,
200:10, 200:12,
201:19, 201:24,
202:12, 203:15,
204:3, 204:6, 204:9,
204:21, 205:6,
205:12, 205:13,
206:9, 206:10,
207:3, 209:4,
209:15, 210:24,
210:25, 211:5,
211:7, 211:10,
211:11, 211:12,
212:5, 212:18,
213:11, 213:12,
214:17, 215:7,
215:11, 215:24,
216:3, 216:6,
216:19, 217:16,
218:14, 218:16,
219:24, 220:3,
221:2, 221:16,
222:10, 222:13,
222:14, 224:13,
227:17, 227:23,
227:24, 228:3,
228:15, 228:17,
228:18, 228:21,
228:23, 228:25,
229:1, 229:3,
229:10, 229:15,
230:10, 230:24,
231:13, 231:18,
232:6, 232:8,
232:14, 233:3,
234:2, 234:20,
235:1, 235:3,
235:10, 236:15,
236:16, 238:24,
239:6, 239:15,
239:16, 239:18,
240:24, 242:22,
243:8, 243:9,
243:20, 243:22,
244:13, 244:19,
246:15, 246:23,
246:25, 247:1,
247:3, 248:10,
248:14, 249:2,
249:11, 249:15,
249:22, 250:18,
250:24, 251:2, 251:9
AREA [8] - 64:18,
93:13, 105:11,

114:4, 120:13,
193:23, 211:3, 222:2
AREAS [6] - 51:20,
62:24, 69:17, 148:8,
148:9, 172:12
ARGUABLY [1] -
40:25
ARGUE [3] - 128:3,
231:16, 235:1
ARGUED [5] - 19:21,
215:16, 216:18,
232:22, 232:23
ARGUES [2] - 43:10,
43:19
ARGUING [4] - 21:23,
47:1, 219:11, 235:16
ARGUMENT [18] -
43:22, 46:4, 46:6,
65:21, 65:24,
216:14, 216:20,
216:21, 217:1,
217:10, 219:23,
221:15, 224:20,
225:1, 236:12,
240:18, 240:20,
252:3
ARGUMENTS [3] -
5:16, 221:6, 229:23
ARISING [1] - 241:10
ARKANSAS [1] - 38:4
ARM [1] - 174:25
AROUND [14] - 14:7,
21:10, 67:12, 93:23,
97:1, 121:21, 134:6,
157:15, 157:17,
168:12, 169:10,
172:6, 197:8, 202:19
ARRANGE [1] - 249:9
ARTICLE [19] - 70:18,
102:5, 106:13,
158:12, 158:15,
158:18, 158:24,
159:15, 159:21,
160:7, 160:21,
160:25, 161:14,
161:17, 161:18,
162:2, 195:22,
195:23, 195:25
ARTICLES [21] -
61:11, 62:25, 117:9,
167:25, 168:2,
168:12, 168:22,
169:5, 193:25,
194:14, 194:17,
194:24, 195:5,
195:6, 195:8,
195:10, 195:16,
195:18, 195:21,
196:4
AS [279] - 5:22, 7:6,

7:9, 7:22, 8:8, 12:9,
12:15, 12:22, 13:18,
15:3, 16:5, 16:6,
16:7, 16:9, 16:12,
16:17, 18:8, 18:9,
18:25, 19:11, 19:21,
22:2, 22:3, 22:16,
22:17, 22:18, 22:20,
22:23, 23:4, 23:13,
23:22, 24:15, 25:9,
25:24, 27:8, 27:9,
28:3, 29:21, 30:3,
31:3, 32:15, 32:16,
34:5, 34:22, 35:4,
35:8, 37:4, 37:5,
38:17, 39:1, 39:7,
39:10, 39:11, 40:19,
41:4, 42:2, 43:14,
46:3, 46:10, 47:5,
49:19, 51:7, 52:8,
58:9, 58:15, 59:7,
60:2, 61:8, 61:21,
63:24, 64:6, 64:9,
64:18, 65:1, 65:11,
65:13, 65:17, 65:19,
67:5, 69:14, 69:18,
70:7, 70:9, 71:4,
73:13, 78:1, 78:6,
79:14, 79:25, 83:12,
85:3, 85:9, 92:10,
94:4, 95:11, 95:19,
95:25, 96:2, 96:5,
96:21, 99:20, 100:5,
100:8, 100:11,
100:14, 102:17,
103:22, 105:18,
108:7, 111:6, 111:7,
112:10, 116:16,
117:3, 117:5,
117:22, 118:2,
118:3, 118:13,
118:15, 119:8,
119:14, 120:13,
120:17, 120:22,
120:25, 121:24,
125:9, 125:16,
129:23, 131:23,
138:1, 138:10,
138:20, 138:22,
139:10, 140:10,
140:25, 141:5,
142:13, 144:3,
146:8, 146:10,
146:13, 146:19,
147:3, 147:9,
147:15, 148:1,
148:5, 148:19,
148:20, 149:2,
149:7, 149:12,
149:16, 152:10,
152:13, 154:6,

155:6, 155:20,
156:6, 156:8, 159:2,
162:15, 164:9,
164:23, 166:19,
167:9, 167:13,
167:14, 167:15,
168:20, 169:5,
169:23, 169:24,
170:3, 171:10,
172:12, 172:19,
172:20, 172:22,
174:25, 175:10,
175:11, 176:8,
177:19, 181:5,
181:13, 184:14,
188:12, 188:19,
190:12, 195:4,
195:18, 197:23,
200:9, 200:11,
200:21, 201:2,
201:7, 201:24,
202:4, 202:11,
202:21, 204:24,
205:5, 206:5, 206:6,
207:24, 208:23,
211:8, 211:22,
212:4, 212:11,
212:18, 212:22,
213:14, 214:11,
215:11, 216:5,
216:14, 217:5,
217:9, 221:6,
221:13, 221:16,
221:17, 221:25,
222:15, 223:11,
223:12, 223:23,
224:16, 226:25,
227:11, 227:12,
228:8, 229:3, 229:8,
229:13, 229:19,
230:22, 231:25,
232:11, 232:16,
233:11, 233:21,
234:16, 239:8,
244:15, 247:5,
247:8, 248:11,
249:5, 250:4,
251:14, 251:25,
252:6
AS-NEEDED [1] -
223:11
ASARCO [1] - 66:10
ASIDE [2] - 41:15,
73:10
ASK [29] - 5:25, 11:11,
20:24, 25:23, 31:24,
46:22, 56:23, 57:7,
59:13, 62:4, 68:1,
73:11, 85:11, 105:9,
114:9, 114:23,
116:13, 116:21,

123:3, 126:6,
130:23, 132:6,
133:2, 139:17,
145:5, 173:21,
193:13, 198:12,
251:12
ASKED [32] - 3:16,
33:6, 36:8, 66:23,
68:21, 68:22, 69:3,
69:6, 69:11, 78:23,
93:13, 105:8,
105:17, 105:25,
106:10, 141:9,
145:13, 154:13,
169:6, 169:9, 192:6,
198:18, 204:15,
205:16, 206:3,
213:9, 214:18,
214:19, 218:21,
222:9, 233:9, 239:16
ASKING [7] - 139:8,
139:9, 139:15,
140:16, 148:5,
150:14, 214:5
ASKS [1] - 7:23
ASPECT [1] - 69:4
ASPECTS [3] -
170:11, 211:13,
250:12
ASSERT [13] - 15:15,
16:8, 16:11, 18:2,
19:4, 20:8, 29:3,
29:16, 29:17, 29:22,
29:24, 30:5, 102:19
ASSERTED [1] - 48:6
ASSERTING [3] -
17:20, 19:18, 240:5
ASSESS [1] - 221:3
ASSESSING [2] -
11:8, 82:14
ASSESSMENT [1] -
125:25
ASSESSMENTS [1] -
132:15
ASSIGN [1] - 220:6
ASSIST [1] - 168:21
ASSISTANCE [2] -
13:24, 179:18
ASSISTANT [1] - 4:17
ASSOCIATE [5] -
58:9, 61:8, 117:23,
118:16, 170:14
ASSOCIATED [6] -
103:20, 108:8,
128:21, 128:22,
176:19, 177:15
ASSOCIATION [5] -
103:2, 103:12,
104:4, 104:11,
241:18

ASSUME [8] - 5:15,
21:23, 31:17, 77:17,
83:13, 158:21,
237:19, 238:16
ASSUMED [1] -
226:10
ASSUMING [3] - 24:5,
160:13, 213:21
AT [253] - 6:1, 6:10,
10:3, 10:6, 10:7,
10:10, 10:15, 10:16,
10:17, 10:18, 10:20,
10:21, 10:24, 11:13,
12:3, 16:22, 17:3,
17:18, 18:18, 21:14,
22:23, 23:14, 24:1,
25:11, 29:14, 30:9,
31:4, 31:10, 31:12,
33:13, 36:9, 37:13,
37:20, 38:2, 38:9,
40:20, 41:1, 42:6,
43:5, 49:5, 49:10,
52:8, 55:5, 55:22,
57:8, 57:12, 57:15,
57:24, 58:12, 58:15,
58:21, 58:25, 59:4,
59:10, 59:15, 61:2,
62:6, 63:11, 64:15,
66:10, 69:15, 69:23,
70:1, 70:2, 70:5,
71:23, 72:13, 72:16,
72:23, 74:14, 74:17,
75:6, 75:8, 75:9,
75:12, 75:18, 76:8,
77:6, 77:10, 79:1,
81:15, 81:20, 82:16,
83:7, 84:10, 86:2,
86:14, 86:18, 87:18,
90:2, 90:10, 91:14,
92:4, 93:5, 94:2,
94:4, 94:8, 95:7,
95:9, 98:17, 100:23,
101:21, 101:23,
103:21, 109:19,
111:4, 112:7, 112:8,
112:9, 114:9, 115:4,
115:9, 115:15,
115:17, 116:1,
116:15, 116:17,
116:23, 117:2,
119:2, 119:17,
120:9, 121:19,
122:3, 124:18,
128:5, 130:8, 134:3,
137:24, 138:4,
139:5, 143:25,
144:1, 146:11,
146:15, 146:16,
146:17, 146:21,
146:23, 147:2,
147:10, 148:1,

148:15, 148:19,
151:25, 154:19,
154:22, 157:12,
158:8, 159:3, 159:7,
159:25, 160:2,
160:6, 162:1,
164:19, 166:1,
166:2, 166:25,
167:5, 167:6, 167:8,
167:11, 170:7,
171:4, 171:8,
171:15, 171:16,
172:11, 175:17,
176:4, 176:21,
177:3, 177:13,
179:14, 181:17,
181:18, 182:17,
182:20, 182:25,
184:5, 184:22,
184:23, 185:18,
185:22, 185:23,
186:3, 186:5, 186:7,
186:8, 186:12,
186:13, 186:16,
186:18, 186:19,
186:21, 186:23,
188:7, 188:25,
190:8, 190:18,
192:11, 192:21,
194:8, 194:10,
194:23, 197:6,
198:9, 198:10,
198:23, 199:18,
200:5, 200:11,
204:21, 208:6,
209:18, 209:21,
212:22, 213:16,
214:25, 215:23,
217:17, 218:16,
219:15, 221:9,
223:21, 223:24,
225:15, 230:15,
230:19, 235:22,
236:10, 237:12,
242:5, 243:3,
247:14, 247:19,
247:21, 249:5,
249:20, 250:21,
251:14, 252:1, 252:2
ATLANTA [4] -
206:12, 206:19,
207:1
ATTACHED [2] - 65:9,
159:21
ATTACHMENT [6] -
158:12, 158:15,
158:17, 158:24,
159:1, 161:4
ATTACHMENTS [1] -
5:17

ATTACK [1] - 128:4
ATTEMPT [1] - 154:16
ATTEND [1] - 123:19
ATTENTION [7] -
14:14, 67:25, 83:23,
87:17, 104:8,
137:22, 180:3
ATTORNEY [14] - 2:2,
4:2, 4:6, 4:7, 4:9,
4:10, 4:14, 4:15,
4:17, 4:20, 5:1, 5:4,
15:21, 143:14
ATTRIBUTE [1] -
156:1
ATTRIBUTED [1] -
70:22
AUGUST [1] - 44:6
AUTHENTICATION [1] -
56:3
AUTHENTICITY [3] -
158:14, 159:3, 159:7
AUTHOR [3] - 81:22,
163:3, 195:14
AUTHORED [4] -
18:17, 62:21,
167:25, 168:5
AUTHORITY [38] -
38:18, 38:25, 39:4,
39:9, 42:8, 42:14,
42:17, 42:20, 42:23,
43:7, 43:12, 44:2,
44:8, 44:17, 44:21,
44:24, 45:1, 45:14,
45:16, 45:22, 46:2,
46:8, 46:11, 50:19,
136:16, 215:16,
215:24, 216:12,
220:12, 223:15,
225:24, 240:7,
240:8, 243:3, 243:6,
249:25, 250:7, 250:9
AUTHORIZE [2] -
50:21, 221:22
AUTHORIZES [1] -
46:14
AUTHORIZING [1] -
47:13
AUTHORS [2] - 71:9,
106:23
AVAILABILITY [1] -
52:18
AVAILABLE [17] -
73:9, 75:5, 75:8,
78:20, 82:18, 106:8,
107:14, 119:6,
149:25, 154:8,
175:16, 190:9,
217:17, 219:18,
220:3, 240:16,
242:22

AVENUE [2] - 2:12,
2:18
AVERAGE [4] - 88:18,
127:13, 135:10,
154:3
AVERTED [1] - 82:1
AVERTING [1] - 81:19
AVOID [3] - 173:18,
187:23, 188:1
AVOIDED [1] - 206:23
AVOIDING [2] - 48:6,
172:7
AWARE [26] - 9:13,
37:19, 37:21, 79:5,
107:9, 144:14,
144:15, 144:23,
145:4, 149:23,
192:18, 196:15,
196:18, 197:11,
197:18, 197:21,
199:1, 199:4, 199:5,
199:10, 199:12,
207:8, 225:16,
236:15, 236:16,
244:14
AWARENESS [1] -
77:14
AWAY [4] - 43:22,
192:19, 238:9,
250:17

B

B-U-T-T-S [1] - 113:21
BABIES [3] - 71:17,
72:5, 117:20
BACK [39] - 6:8, 6:11,
8:14, 8:16, 15:5,
17:25, 41:5, 41:10,
47:12, 53:14, 53:17,
53:24, 54:10, 74:17,
81:21, 113:4,
114:13, 118:9,
133:1, 136:19,
145:22, 146:16,
153:17, 157:12,
157:13, 184:22,
187:17, 204:13,
212:19, 212:20,
214:3, 215:2, 215:7,
217:14, 223:19,
224:2, 227:8,
239:22, 248:15
BACKED [2] - 49:1,
53:5
BACKGROUND [3] -
116:20, 166:22,
166:23
BACKGROUNDS [1] -
59:2

<p>BAD [1] - 71:11</p> <p>BALANCE [5] - 145:19, 226:25, 247:12, 247:17, 247:19</p> <p>BALANCED [1] - 108:13</p> <p>BALANCING [1] - 108:17</p> <p>BALLPARK [1] - 168:1</p> <p>BARN [1] - 236:2</p> <p>BARRIER [12] - 11:8, 83:9, 92:13, 133:24, 146:25, 148:25, 175:11, 176:22, 191:13, 191:14, 201:15, 201:19</p> <p>BARRIERS [1] - 147:4</p> <p>BASED [52] - 8:13, 9:18, 16:11, 43:3, 61:18, 62:10, 64:17, 71:3, 75:10, 75:19, 79:12, 80:17, 83:18, 85:9, 86:6, 90:4, 93:22, 94:14, 94:25, 96:17, 100:20, 108:1, 108:10, 111:13, 111:15, 112:3, 120:12, 136:17, 139:21, 140:4, 140:24, 141:4, 141:10, 145:12, 145:16, 154:18, 156:17, 164:12, 171:5, 180:21, 181:7, 191:7, 206:18, 217:22, 229:1, 235:8, 235:9, 237:15, 251:25, 252:14</p> <p>BASELINE [4] - 186:9, 186:21, 186:24, 187:18</p> <p>BASES [2] - 42:7, 42:17</p> <p>BASICALLY [2] - 94:6, 209:3</p> <p>BASIS [18] - 12:5, 38:25, 46:1, 46:10, 48:8, 49:25, 50:19, 119:16, 125:8, 131:22, 139:3, 140:5, 151:3, 195:6, 223:12, 228:6, 246:6, 249:23</p> <p>BE [220] - 3:12, 5:20, 7:14, 7:20, 8:10, 8:13, 8:16, 11:20,</p>	<p>14:10, 14:19, 14:24, 18:9, 20:8, 20:9, 23:4, 23:23, 24:8, 24:20, 25:3, 25:8, 26:21, 29:3, 29:16, 29:18, 30:2, 30:5, 30:15, 31:22, 32:2, 32:12, 34:14, 36:25, 37:1, 40:15, 44:3, 45:6, 45:21, 47:15, 48:9, 50:6, 50:11, 50:12, 51:10, 52:8, 53:10, 53:23, 54:10, 55:14, 56:8, 62:3, 66:7, 66:9, 67:14, 68:1, 68:5, 69:9, 72:6, 72:8, 72:20, 73:4, 76:18, 77:22, 78:6, 78:8, 78:20, 78:21, 78:24, 79:3, 79:15, 79:22, 80:11, 81:11, 81:14, 81:15, 82:18, 83:21, 87:13, 88:18, 89:8, 89:11, 89:15, 101:8, 107:14, 108:13, 108:14, 108:20, 113:4, 120:24, 122:7, 123:17, 123:21, 124:4, 124:5, 124:12, 130:11, 131:22, 133:23, 134:15, 134:22, 135:24, 137:17, 142:7, 147:6, 151:18, 151:20, 156:5, 157:12, 158:6, 159:22, 160:3, 162:6, 164:10, 164:24, 165:13, 166:17, 169:13, 169:18, 169:19, 169:24, 169:25, 173:20, 175:3, 175:8, 176:11, 177:9, 177:17, 177:19, 177:20, 177:21, 178:1, 179:17, 189:3, 189:13, 189:25, 190:22, 190:25, 191:1, 191:8, 191:11, 191:14, 191:16, 191:20, 191:22, 193:20, 195:4, 195:12, 200:15, 202:3, 206:23, 208:7, 208:22, 213:24, 214:5, 214:7,</p>	<p>214:11, 215:2, 215:3, 215:19, 216:10, 216:17, 217:7, 219:10, 219:11, 219:13, 222:4, 223:9, 223:16, 224:5, 228:14, 228:17, 229:8, 229:18, 230:3, 230:19, 231:3, 231:8, 231:10, 231:12, 231:24, 233:22, 234:5, 234:13, 234:24, 235:2, 235:4, 235:7, 235:10, 235:16, 236:16, 236:17, 236:18, 237:3, 237:14, 237:15, 238:1, 238:3, 238:19, 238:20, 238:25, 240:12, 241:1, 241:14, 242:23, 243:24, 244:4, 244:15, 245:9, 245:20, 246:6, 247:2, 247:9, 247:20, 247:23, 249:13, 251:7, 252:3, 252:16</p> <p>BEAR [2] - 14:8, 192:1</p> <p>BEARAK [5] - 106:11, 109:7, 110:25, 160:21, 195:16</p> <p>BECAME [6] - 57:13, 59:3, 70:1, 71:23, 87:12, 131:6</p> <p>BECAUSE [108] - 9:2, 9:3, 11:17, 14:16, 19:9, 20:25, 24:25, 25:7, 25:9, 27:1, 27:25, 29:11, 30:3, 31:9, 33:12, 33:23, 36:25, 41:2, 42:7, 43:17, 46:13, 51:2, 51:18, 52:19, 53:6, 55:13, 69:18, 71:2, 72:1, 73:1, 74:12, 80:23, 80:25, 83:2, 83:8, 88:5, 92:12, 92:14, 93:10, 94:20, 98:20, 98:24, 105:17, 106:6, 108:22, 108:24, 110:12, 111:20, 123:19, 125:7, 126:2, 134:4, 134:10, 136:3, 142:13, 145:1, 145:24, 145:25,</p>	<p>146:4, 148:4, 153:2, 153:10, 159:4, 160:11, 161:4, 161:18, 174:16, 177:14, 178:12, 179:1, 180:17, 188:5, 188:15, 190:6, 191:18, 192:10, 195:12, 196:21, 199:11, 200:13, 200:17, 201:3, 201:12, 201:19, 201:25, 202:13, 203:15, 209:3, 209:22, 209:23, 212:24, 214:17, 217:1, 218:18, 223:2, 227:10, 230:12, 230:22, 231:9, 232:13, 233:5, 233:6, 235:4, 240:22, 246:1, 247:5, 248:12, 251:2</p> <p>BECOME [9] - 71:18, 72:2, 73:3, 76:1, 78:15, 137:18, 150:16, 173:18, 201:15</p> <p>BECOMES [2] - 137:20, 172:8</p> <p>BECOMING [4] - 126:12, 127:8, 134:13, 170:13</p> <p>BED [1] - 126:4</p> <p>BEEN [75] - 12:11, 16:24, 25:14, 27:6, 27:16, 27:19, 28:2, 28:5, 28:6, 34:12, 35:1, 37:13, 39:19, 39:21, 42:1, 49:12, 60:12, 62:13, 63:10, 65:6, 65:8, 82:5, 86:1, 86:6, 91:7, 91:8, 92:13, 93:9, 93:10, 93:21, 100:11, 100:14, 106:25, 108:9, 111:2, 118:20, 118:23, 118:24, 122:24, 125:3, 129:10, 139:10, 145:10, 145:19, 152:10, 152:13, 155:8, 157:13, 160:4, 169:23, 170:2, 170:5, 171:22, 189:8, 189:12, 192:18, 197:3, 200:5, 202:6,</p>	<p>206:1, 207:6, 209:12, 209:18, 223:4, 226:23, 227:14, 229:4, 232:22, 236:21, 236:22, 236:25, 242:11, 242:15, 248:4, 248:5</p> <p>BEETLESTONE [1] - 1:11</p> <p>BEFORE [65] - 1:11, 3:13, 5:9, 8:16, 11:9, 11:14, 11:17, 39:23, 41:19, 41:22, 46:3, 51:22, 53:17, 55:7, 55:11, 68:2, 70:13, 70:17, 70:25, 83:4, 83:24, 87:20, 95:8, 99:8, 107:16, 112:1, 112:10, 112:13, 119:14, 120:9, 120:10, 126:18, 131:1, 131:16, 136:12, 137:8, 139:22, 143:13, 144:21, 144:23, 147:15, 154:20, 155:24, 158:20, 160:15, 162:17, 162:24, 166:21, 176:22, 177:14, 180:4, 183:9, 187:24, 191:9, 195:18, 196:14, 207:20, 211:4, 211:17, 212:20, 218:6, 221:17, 233:9, 244:23</p> <p>BEFOREHAND [1] - 244:9</p> <p>BEGAN [1] - 180:5</p> <p>BEGIN [3] - 5:9, 71:14, 224:18</p> <p>BEGINNING [19] - 15:5, 71:4, 84:7, 84:11, 139:5, 181:17, 182:17, 183:16, 186:4, 186:10, 186:12, 187:21, 211:1, 224:3, 230:15, 235:22, 250:13, 251:15, 252:5</p> <p>BEHALF [3] - 15:15, 30:23, 235:16</p> <p>BEHAVED [1] - 183:2</p> <p>BEHAVIOR [8] - 63:12, 75:20, 168:20, 181:15, 188:19, 189:4,</p>
--	---	--	--	---

192:16, 195:20
BEHAVIORS [2] -
 183:6, 183:12
BEHIND [4] - 182:4,
 184:14, 204:18,
 214:13
BEING [22] - 19:21,
 58:25, 65:19, 79:20,
 85:9, 112:23,
 120:18, 141:9,
 161:14, 172:23,
 177:16, 177:24,
 183:15, 189:14,
 193:22, 219:18,
 239:16, 244:13,
 246:3, 247:7
BELIEF [7] - 51:6,
 212:11, 212:14,
 226:8, 247:22,
 247:24
BELIEFS [10] -
 212:15, 212:16,
 232:25, 247:3,
 247:12, 247:14,
 247:15, 247:20,
 248:1
BELIEVE [62] - 5:10,
 9:15, 9:17, 11:2,
 17:12, 17:25, 18:16,
 18:21, 19:16, 20:3,
 21:20, 24:14, 25:3,
 30:14, 31:3, 48:8,
 51:4, 51:8, 92:18,
 95:16, 95:18, 95:24,
 98:6, 105:14, 112:8,
 114:19, 138:2,
 138:9, 138:12,
 138:16, 140:5,
 140:11, 141:20,
 143:22, 150:19,
 153:22, 154:1,
 158:13, 168:4,
 190:21, 204:19,
 204:23, 206:19,
 215:5, 219:8,
 219:13, 222:23,
 223:8, 225:7, 226:6,
 229:15, 229:25,
 230:10, 230:16,
 230:19, 234:6,
 234:12, 235:11,
 245:24, 246:5,
 246:7, 251:8
BELIEVED [1] -
 202:17
BELIEVES [4] - 31:10,
 207:24, 227:7, 240:4
BELOW [3] - 89:10,
 91:2, 102:13
BENCH [3] - 113:2,

204:19, 204:24
BENEFICIARIES [6] -
 13:9, 13:13, 52:22,
 205:4, 205:10,
 207:23
BENEFICIARIES ' [1] -
 218:2
BENEFIT [3] - 12:20,
 96:17, 236:19
BENEFITED [2] -
 12:25, 190:3
BENEFITS [5] - 13:3,
 74:11, 129:19,
 228:5, 230:15
BESIDE [1] - 6:10
BEST [10] - 23:1,
 23:22, 24:3, 35:14,
 43:23, 132:2,
 132:20, 132:23,
 153:23, 190:12
BETTER [7] - 12:11,
 19:24, 22:11, 23:20,
 55:14, 214:12,
 241:16
BETWEEN [24] -
 14:10, 47:25, 48:3,
 49:15, 50:23, 70:10,
 88:20, 88:25, 89:14,
 92:23, 101:24,
 102:17, 109:21,
 111:5, 111:16,
 118:17, 160:6,
 177:11, 182:14,
 183:2, 187:20,
 213:10, 234:1,
 237:20
BEYOND [12] - 7:19,
 24:23, 81:10,
 108:20, 139:1,
 150:5, 150:19,
 151:22, 178:12,
 198:7, 225:24, 246:9
BIGGERS [2] - 38:1,
 38:2
BILLING [1] - 153:7
BILLION [4] - 81:14,
 81:15, 82:3
BILLIONS [1] - 219:25
BINDER [8] - 55:7,
 68:1, 114:6, 137:25,
 165:7, 175:21,
 183:24, 198:10
BINDING [2] - 16:20,
 37:8
BIOGRAPHIES [1] -
 68:10
BIOGRAPHY [2] -
 68:14
BIOMEDICAL [1] -
 187:5

BIOSTATISTICS [1] -
 116:1
BIRCH [2] - 170:16
BIRTH [26] - 11:22,
 12:2, 72:6, 80:15,
 91:7, 91:11, 91:14,
 92:1, 92:11, 128:24,
 129:17, 133:17,
 133:20, 134:5,
 134:9, 135:5, 136:1,
 145:18, 149:25,
 156:3, 175:6, 175:7,
 177:13, 177:16,
 188:6
BIT [11] - 21:1, 52:2,
 88:18, 88:23, 123:3,
 129:9, 134:18,
 149:19, 171:7,
 218:18, 249:18
BITE [1] - 236:10
BLACK [4] - 176:4,
 245:3, 245:5, 246:12
BLACK-LETTER [3] -
 245:3, 245:5, 246:12
BLANK [7] - 26:1,
 27:2, 38:15, 42:20,
 46:15, 211:2, 244:20
BLANKET [2] - 43:12,
 238:24
BLEEDING [1] -
 155:22
BLOCKING [1] -
 224:15
BLOG [1] - 194:24
BLOOD [2] - 124:13,
 124:14
BLOW [1] - 223:17
BOARD [8] - 30:13,
 101:15, 116:5,
 116:6, 116:10,
 116:12, 169:7,
 248:16
BODY [7] - 79:24,
 82:13, 96:11, 106:7,
 127:17, 194:1, 194:2
BOLAND [30] - 2:3,
 4:5, 4:6, 98:12,
 157:24, 162:9,
 162:11, 162:12,
 163:2, 163:10,
 163:13, 163:22,
 163:25, 165:2,
 165:4, 172:11,
 173:4, 173:9, 180:1,
 182:2, 182:3,
 184:12, 185:7,
 191:12, 192:1,
 192:4, 193:5,
 203:17, 204:2,
 254:13

BOLD [1] - 53:6
BONE [1] - 127:24
BORN [2] - 72:5, 72:6
BORNE [1] - 151:20
BORROW [1] - 48:22
BORROWING [1] -
 48:13
BOSTON [1] - 167:11
BOTH [24] - 15:12,
 16:6, 16:11, 19:19,
 20:4, 64:7, 74:10,
 105:17, 109:19,
 112:9, 116:6, 122:9,
 129:1, 130:15,
 131:8, 136:20,
 149:20, 153:13,
 153:14, 186:21,
 213:22, 222:10,
 227:11, 246:25
BOTTOM [11] - 76:8,
 77:5, 77:6, 77:10,
 83:7, 86:14, 133:13,
 144:1, 176:21,
 223:25
BRAND [1] - 145:18
BREACH [1] - 7:10
BREADTH [1] - 43:1
BREAK [9] - 54:9,
 54:13, 113:3, 113:7,
 157:12, 157:23,
 158:13, 210:5,
 210:15
BREAST [2] - 108:3,
 108:8
BRIAN [1] - 2:17
BRIDGE [4] - 26:13,
 36:9, 36:17, 244:21
BRIEF [10] - 8:9,
 15:20, 16:9, 43:9,
 73:10, 113:3, 210:4,
 216:24, 229:20,
 246:22
BRIEFING [3] - 15:6,
 225:9, 252:19
BRIEFINGS [1] -
 251:16
BRIEFLY [14] - 56:11,
 56:19, 56:23, 68:5,
 74:25, 105:4,
 111:12, 114:17,
 114:23, 116:13,
 123:9, 166:23,
 176:1, 248:23
BRIEFS [7] - 5:16,
 5:17, 215:18,
 229:23, 229:25,
 251:24, 252:17
BRIGHT [1] - 69:2
BRING [5] - 6:2,
 21:25, 89:4, 233:11,

233:13
BROAD [6] - 6:21,
 45:4, 45:22, 223:18,
 224:4, 249:24
BROADENED [1] -
 145:10
BROADER [2] - 67:9,
 225:14
BROADLY [2] - 32:15,
 42:22
BROCK [4] - 2:6, 4:11,
 4:13, 4:14
BROKE [1] - 73:16
BROUGHT [1] -
 213:11
BUCK [1] - 31:14
BUCKING [1] - 32:19
BUILD [2] - 129:6,
 170:19
BUILDING [1] - 170:16
BUILT [1] - 129:5
BULK [2] - 155:20,
 168:12
BULLSEYE [1] - 48:3
BUNCH [1] - 86:18
BURDEN [8] - 14:8,
 34:11, 43:18, 46:17,
 46:19, 50:24, 51:2,
 232:24
BURDENED [1] -
 247:16
BURDENS [1] - 14:6
BURWELL [3] -
 219:16, 242:18,
 242:21
BUT [161] - 5:14, 6:14,
 8:22, 11:12, 14:22,
 17:17, 18:17, 19:2,
 20:5, 20:7, 20:13,
 21:22, 25:2, 26:19,
 27:16, 27:19, 27:24,
 28:6, 28:18, 30:13,
 30:23, 31:5, 34:5,
 34:19, 37:21, 40:16,
 41:8, 41:13, 41:17,
 42:8, 45:17, 45:20,
 47:8, 49:8, 49:22,
 50:1, 50:4, 50:13,
 52:23, 53:17, 55:15,
 57:24, 59:14, 62:16,
 63:9, 67:4, 70:25,
 72:25, 74:20, 76:9,
 78:11, 85:11, 86:2,
 88:1, 89:21, 91:8,
 91:13, 91:21, 93:23,
 95:2, 95:9, 95:13,
 101:5, 103:2,
 104:10, 106:15,
 108:7, 108:24,
 111:21, 112:9,

<p>118:10, 118:16, 119:6, 119:8, 121:20, 124:7, 125:6, 125:16, 126:6, 127:9, 128:11, 129:10, 130:12, 130:16, 134:10, 136:23, 137:24, 138:6, 138:14, 145:19, 147:2, 147:7, 148:4, 155:5, 156:17, 158:15, 158:24, 159:3, 159:21, 159:24, 160:10, 161:2, 161:6, 161:17, 162:5, 164:4, 164:21, 165:23, 169:25, 174:14, 174:17, 177:19, 179:4, 179:18, 180:5, 183:5, 185:22, 186:23, 187:15, 194:20, 197:2, 197:4, 197:10, 198:7, 199:1, 199:9, 200:14, 201:2, 201:11, 201:18, 201:23, 202:4, 202:11, 202:21, 202:25, 205:10, 206:16, 207:25, 211:12, 213:18, 215:5, 215:10, 217:14, 219:11, 219:14, 221:19, 224:16, 226:7, 227:4, 229:16, 232:14, 233:9, 233:16, 235:12, 236:25, 243:2, 245:25, 248:12, 249:14, 250:18, 251:1</p> <p>BUTTS [22] - 10:17, 10:23, 22:15, 113:9, 113:15, 113:16, 113:21, 113:25, 114:1, 120:12, 142:24, 146:7, 147:22, 150:7, 151:8, 151:25, 152:17, 152:24, 164:11, 235:24, 236:14, 254:8</p> <p>BY [165] - 1:24, 1:24, 6:17, 12:16, 13:6, 13:12, 16:18, 17:2, 18:17, 22:5, 24:2, 24:20, 25:13, 26:22,</p>	<p>27:5, 28:9, 33:24, 34:14, 36:6, 36:18, 37:18, 37:22, 38:6, 44:8, 45:6, 49:1, 50:2, 50:14, 50:17, 53:6, 55:1, 56:6, 56:24, 57:6, 58:7, 64:11, 66:3, 66:16, 69:5, 69:25, 70:19, 75:4, 75:12, 77:22, 78:18, 80:4, 80:10, 83:14, 84:3, 84:12, 85:15, 86:12, 89:7, 92:6, 93:18, 96:11, 97:19, 98:11, 98:16, 99:4, 99:12, 99:22, 102:16, 103:17, 104:3, 105:7, 105:23, 110:13, 111:7, 111:11, 111:25, 113:23, 117:1, 118:20, 118:23, 118:24, 119:7, 120:23, 121:12, 125:14, 126:3, 132:8, 133:7, 135:5, 136:10, 139:20, 140:15, 141:3, 141:18, 142:23, 143:24, 144:8, 144:16, 147:21, 148:14, 148:23, 149:20, 150:6, 150:8, 151:19, 151:20, 151:24, 152:23, 153:14, 159:5, 164:24, 165:4, 169:9, 169:24, 169:25, 170:5, 171:2, 172:20, 173:9, 176:4, 180:1, 182:3, 183:19, 185:7, 187:1, 191:2, 191:12, 192:4, 193:11, 195:22, 195:25, 202:6, 210:24, 212:5, 212:10, 212:17, 214:11, 216:20, 216:22, 219:19, 219:21, 221:4, 221:14, 226:15, 226:16, 228:4, 228:25, 229:10, 229:25, 230:17, 230:24, 236:16, 238:3, 238:25, 239:6, 247:16, 249:8, 249:11, 250:4, 250:14,</p>	<p>251:7, 251:16, 251:22, 252:4, 254:5, 254:6, 254:9, 254:10, 254:13, 254:14</p> <p>BYPASSING [1] - 52:16</p> <p>BYPRODUCT [1] - 156:8</p> <p>C</p> <p>C-H-U-A-N-G [2] - 23:10, 162:23</p> <p>CALCULATE [1] - 122:9</p> <p>CALIFORNIA [2] - 167:3, 231:5</p> <p>CALIFORNIA'S [1] - 81:25</p> <p>CALL [8] - 33:3, 113:9, 119:16, 119:18, 122:12, 122:18, 162:13, 174:22</p> <p>CALLED [11] - 18:5, 27:22, 61:21, 66:19, 75:16, 76:16, 94:2, 169:8, 217:21, 241:2</p> <p>CALLS [2] - 203:13, 203:17</p> <p>CAME [16] - 34:25, 37:15, 37:16, 152:25, 153:8, 153:17, 161:5, 168:14, 181:24, 213:2, 217:19, 227:5, 236:6, 242:18, 243:5, 244:24</p> <p>CAN [155] - 3:23, 5:10, 7:25, 8:3, 14:11, 14:23, 16:11, 19:4, 21:21, 24:14, 29:2, 29:16, 29:17, 33:20, 34:20, 37:5, 41:19, 49:6, 49:20, 49:21, 50:16, 53:16, 53:24, 55:18, 55:22, 56:12, 56:14, 56:20, 57:1, 59:14, 62:3, 62:16, 62:24, 71:18, 72:10, 73:4, 79:25, 91:20, 92:15, 96:14, 100:4, 100:7, 107:14, 107:25, 113:2, 116:22, 122:7, 123:9, 123:13, 123:15, 123:24, 124:5, 124:8, 124:10, 124:12,</p>	<p>124:24, 127:7, 127:9, 127:15, 128:1, 128:24, 129:23, 129:25, 131:15, 132:20, 133:19, 134:15, 134:22, 135:10, 135:12, 135:24, 136:16, 136:22, 137:17, 137:18, 138:16, 139:17, 140:17, 140:20, 141:14, 142:8, 143:8, 143:20, 144:22, 145:16, 146:7, 146:12, 147:17, 152:5, 155:2, 155:4, 156:5, 156:11, 157:6, 160:2, 160:6, 161:4, 162:5, 163:5, 165:9, 167:24, 168:9, 169:18, 169:19, 169:24, 169:25, 170:24, 174:14, 175:17, 176:2, 176:6, 176:7, 176:17, 177:9, 177:17, 177:22, 178:21, 179:3, 180:4, 180:6, 185:8, 187:14, 188:21, 189:19, 191:14, 207:13, 208:3, 210:13, 212:4, 213:15, 215:6, 218:15, 221:3, 222:3, 222:4, 222:5, 222:19, 223:14, 223:17, 223:23, 225:2, 227:24, 228:4, 231:21, 233:11, 243:17, 245:24, 245:25, 247:14, 248:2, 249:9, 252:23</p> <p>CAN'T [24] - 49:22, 95:3, 126:3, 137:6, 140:1, 146:2, 147:2, 147:5, 147:7, 148:15, 149:10, 161:12, 164:24, 191:19, 200:1, 201:2, 201:11, 201:18, 201:24, 224:5, 225:3, 227:15, 227:19, 249:10</p> <p>CANCER [5] - 108:3, 108:8, 108:16</p> <p>CANCERS [1] -</p>	<p>108:15</p> <p>CANNOT [19] - 18:1, 35:2, 49:20, 88:18, 126:1, 137:3, 146:10, 146:17, 146:23, 147:12, 147:23, 148:24, 149:5, 149:14, 155:5, 194:9, 206:23, 222:24</p> <p>CAPABLE [1] - 172:5</p> <p>CAPACITY [4] - 72:15, 73:3, 96:2, 138:20</p> <p>CAPRICIOUS [3] - 213:4, 233:3, 250:25</p> <p>CARDIOVASCULAR [1] - 127:22</p> <p>CARE [131] - 6:19, 7:8, 7:12, 11:9, 11:22, 12:7, 12:8, 12:20, 12:23, 13:1, 13:7, 21:11, 21:14, 22:7, 23:3, 27:25, 42:18, 43:6, 45:12, 47:7, 51:20, 52:9, 59:3, 62:6, 62:22, 63:1, 63:5, 63:7, 63:12, 63:15, 63:21, 64:13, 64:19, 64:20, 65:14, 67:4, 67:6, 67:8, 67:11, 67:14, 67:20, 68:23, 68:24, 69:4, 69:10, 70:13, 70:17, 71:1, 72:1, 72:3, 73:5, 73:23, 74:4, 78:6, 78:9, 78:15, 78:16, 78:20, 78:25, 79:4, 79:9, 87:9, 87:13, 90:6, 94:6, 94:10, 95:19, 96:3, 96:4, 96:16, 97:5, 97:6, 98:21, 98:25, 102:6, 105:21, 112:12, 112:13, 112:14, 112:16, 119:25, 120:4, 125:25, 131:2, 131:5, 132:18, 136:4, 139:22, 139:23, 140:1, 140:12, 141:20, 144:5, 146:19, 148:17, 150:8, 154:20, 154:23, 156:13, 156:18, 171:20, 172:13, 172:14, 178:6, 178:14, 179:12, 191:14, 191:15, 191:18, 193:22,</p>
--	---	--	--	---

<p>200:24, 201:8, 202:20, 202:23, 206:20, 213:5, 217:12, 218:24, 221:12, 223:7, 224:9, 227:2, 230:9, 233:4, 233:20, 239:15, 239:19, 242:20, 248:21</p> <p>CAREER [7] - 62:13, 62:19, 124:17, 124:18, 168:3, 170:3, 177:21</p> <p>CAREERS [2] - 170:17, 170:19</p> <p>CAROL [6] - 22:1, 54:19, 54:23, 64:17, 254:4</p> <p>CARRIES [1] - 137:20</p> <p>CARRY [1] - 216:6</p> <p>CARRYING [1] - 45:14</p> <p>CARVE [5] - 44:11, 44:18, 44:22, 222:6, 249:25</p> <p>CARVE-OUTS [1] - 222:6</p> <p>CARVEOUT [1] - 37:9</p> <p>CARVING [2] - 37:17, 44:12</p> <p>CASE [103] - 3:7, 6:6, 6:16, 7:1, 15:17, 16:13, 16:15, 16:17, 16:18, 16:23, 17:17, 19:11, 19:13, 21:1, 21:23, 22:17, 26:14, 26:22, 27:1, 27:10, 27:20, 27:21, 35:19, 36:3, 36:4, 36:10, 36:23, 37:20, 37:21, 41:17, 41:23, 42:2, 44:9, 47:16, 49:5, 49:8, 49:9, 49:16, 49:17, 50:3, 50:5, 50:7, 50:9, 53:20, 53:24, 100:24, 112:25, 114:11, 120:20, 124:11, 144:19, 152:1, 154:18, 161:20, 172:25, 190:19, 191:11, 191:16, 200:19, 206:13, 206:16, 206:18, 206:24, 207:1, 207:10, 207:11, 207:16, 208:16, 211:17, 215:8, 218:16, 218:20, 219:17, 225:3, 226:15, 226:17,</p>	<p>227:13, 233:16, 233:17, 234:7, 240:21, 240:22, 241:1, 241:2, 241:8, 241:17, 242:6, 243:2, 245:8, 245:13, 245:14, 245:19, 245:25, 246:5, 246:9, 246:15, 249:1, 249:16, 250:8, 251:24</p> <p>CASES [31] - 13:17, 14:22, 15:18, 15:20, 17:25, 20:9, 35:9, 37:7, 37:15, 37:16, 37:18, 37:25, 38:10, 49:25, 50:1, 50:2, 71:5, 127:9, 133:18, 136:5, 206:4, 206:8, 206:9, 208:21, 208:25, 209:2, 209:11, 216:19, 229:21, 249:19</p> <p>CATASTROPHIC [2] - 7:20, 14:24</p> <p>CATEGORIES [3] - 128:7, 130:5, 185:17</p> <p>CATHOLIC [4] - 199:20, 208:3, 208:8, 208:11</p> <p>CAUGHT [1] - 47:25</p> <p>CAUSAL [1] - 102:19</p> <p>CAUSATION [1] - 20:6</p> <p>CAUSE [32] - 7:15, 7:18, 16:24, 39:13, 39:17, 40:8, 40:9, 41:13, 41:14, 41:19, 41:22, 42:2, 42:5, 42:6, 42:9, 52:23, 80:3, 98:19, 98:20, 98:23, 98:24, 124:19, 125:10, 160:13, 205:11, 209:23, 213:24, 214:21, 216:14, 235:11, 251:9</p> <p>CAUSED [1] - 125:14</p> <p>CAUSES [1] - 125:5</p> <p>CAUTIONARY [1] - 221:11</p> <p>CDC [5] - 169:20, 175:16, 175:24, 185:18, 190:7</p> <p>CENTER [6] - 23:15, 166:1, 171:15, 179:14, 179:22, 179:24</p> <p>CENTERED [3] - 169:22, 171:2,</p>	<p>180:10</p> <p>CENTERS [1] - 226:3</p> <p>CENTRAL [1] - 220:5</p> <p>CEO [4] - 30:8, 31:3, 31:5, 33:11</p> <p>CERTAIN [9] - 72:19, 89:6, 129:16, 129:23, 144:24, 180:21, 235:23, 236:5, 238:7</p> <p>CERTAINLY [15] - 25:13, 147:3, 155:5, 156:16, 161:6, 173:21, 173:24, 189:19, 219:2, 225:20, 232:17, 238:4, 238:6, 249:14, 250:21</p> <p>CERTAINTY [7] - 89:4, 96:5, 97:5, 131:19, 138:22, 188:19, 217:9</p> <p>CERTIFICATION [3] - 51:3, 116:10, 116:12</p> <p>CERTIFIED [4] - 36:4, 47:20, 116:5, 116:6</p> <p>CERTIFY [2] - 47:23, 253:3</p> <p>CETERA [1] - 205:4</p> <p>CHAIR [1] - 68:18</p> <p>CHALLENGE [4] - 15:8, 19:10, 34:9, 140:25</p> <p>CHALLENGES [1] - 207:14</p> <p>CHALLENGING [11] - 17:22, 18:3, 35:10, 197:22, 210:24, 210:25, 211:5, 211:7, 211:10, 233:14, 233:17</p> <p>CHANCE [2] - 76:18, 80:21</p> <p>CHANGE [28] - 19:15, 25:4, 25:8, 25:11, 27:11, 40:19, 41:1, 41:6, 41:9, 41:16, 42:4, 44:22, 58:6, 102:5, 135:12, 136:14, 136:15, 140:11, 159:20, 181:9, 187:9, 189:1, 189:4, 189:22, 192:23, 199:16, 224:14, 237:8</p> <p>CHANGED [16] - 23:2, 25:14, 26:10, 70:3, 70:4, 102:1, 109:15, 155:15, 155:18, 187:14, 188:3,</p>	<p>188:19, 207:7, 207:9, 208:18, 223:12</p> <p>CHANGES [22] - 40:17, 40:23, 52:20, 53:22, 102:3, 106:14, 127:14, 140:6, 160:6, 189:13, 192:13, 192:15, 192:19, 193:3, 195:19, 205:2, 205:8, 205:12, 209:9, 215:9, 217:8, 218:16</p> <p>CHANGING [3] - 12:16, 156:19, 200:17</p> <p>CHARACTERISTICS [1] - 132:14</p> <p>CHARACTERIZE [1] - 49:24</p> <p>CHARGE [4] - 4:3, 67:10, 86:1, 192:21</p> <p>CHARGED [1] - 67:1</p> <p>CHARITIES [3] - 208:3, 208:8, 208:11</p> <p>CHART [16] - 75:1, 76:12, 76:23, 80:17, 81:5, 90:10, 175:15, 175:24, 176:2, 176:3, 176:17, 178:9, 178:19, 184:13, 184:15, 190:7</p> <p>CHEAPER [6] - 11:12, 11:13, 145:6, 145:14, 198:12, 198:18</p> <p>CHECK [1] - 89:8</p> <p>CHEVRON [12] - 47:1, 47:11, 51:15, 218:21, 218:22, 219:1, 219:3, 219:23, 220:25, 221:17, 240:25, 242:21</p> <p>CHIEF [6] - 4:23, 166:4, 167:9, 170:9, 170:13, 219:22</p> <p>CHILD [1] - 177:14</p> <p>CHILDREN [6] - 43:4, 72:10, 177:8, 177:23, 177:24, 177:25</p> <p>CHOICE [1] - 108:18</p> <p>CHOICES [11] - 12:5, 12:10, 14:18, 22:12, 23:21, 30:16, 83:5, 83:21, 95:25, 190:7, 190:10</p>	<p>CHOOSE [11] - 14:10, 50:22, 58:12, 107:12, 107:15, 132:9, 178:24, 179:5, 191:19, 191:20, 232:19</p> <p>CHOOSING [3] - 83:9, 189:13, 233:19</p> <p>CHOSE [1] - 50:13</p> <p>CHOSEN [2] - 64:9, 189:24</p> <p>CHRISTOPHER [3] - 2:17, 5:1, 204:10</p> <p>CHRONIC [14] - 117:17, 123:5, 124:8, 125:1, 125:5, 125:6, 125:10, 125:13, 125:17, 128:17, 130:12, 155:21, 168:16, 173:25</p> <p>CHRONICITY [2] - 123:15, 123:23</p> <p>CHUANG [27] - 10:10, 10:16, 10:22, 23:6, 23:8, 23:12, 93:6, 157:25, 162:13, 162:18, 162:22, 163:3, 163:14, 163:16, 165:6, 172:12, 173:10, 182:5, 184:12, 184:17, 191:25, 193:12, 193:16, 224:16, 235:25, 236:14, 254:12</p> <p>CHURCH [3] - 43:22, 145:3, 249:12</p> <p>CHURCHES [3] - 43:14, 43:15, 211:6</p> <p>CIRCUIT [9] - 16:22, 18:16, 36:15, 39:14, 49:2, 66:10, 164:16, 213:17, 217:3</p> <p>CIRCUIT'S [3] - 16:21, 42:10, 216:25</p> <p>CIRCUMSTANCE [3] - 31:24, 33:15, 245:3</p> <p>CIRCUMSTANCES [3] - 32:5, 214:1, 214:6</p> <p>CITATION [3] - 81:21, 82:6, 206:15</p> <p>CITATIONS [1] - 83:11</p> <p>CITE [6] - 37:25, 101:4, 103:1, 152:6, 207:18, 241:8</p> <p>CITED [15] - 18:16, 93:9, 102:16, 105:9, 105:10, 106:3, 107:4, 158:7,</p>
---	--	---	---	---

<p>159:19, 194:14, 194:17, 195:3, 209:5, 217:16, 249:19</p> <p>CITES [2] - 102:4, 104:10</p> <p>CITIZENS [10] - 15:16, 17:22, 19:5, 19:10, 19:13, 20:17, 21:6, 21:12, 24:17, 35:3</p> <p>CITY [8] - 47:17, 47:19, 47:20, 47:22, 47:23, 47:25, 48:3, 240:22</p> <p>CIVIL [5] - 1:3, 2:11, 4:4, 9:10, 172:20</p> <p>CLAIM [12] - 8:19, 8:20, 8:25, 9:2, 29:3, 29:17, 29:22, 94:21, 213:15, 213:16, 216:12, 247:5</p> <p>CLAIMED [1] - 99:6</p> <p>CLAIMING [1] - 34:13</p> <p>CLAIMS [24] - 8:3, 8:5, 8:7, 8:9, 8:11, 8:17, 8:19, 9:8, 9:12, 24:16, 62:6, 93:22, 94:1, 94:14, 94:16, 94:23, 95:1, 111:13, 111:17, 112:3, 213:11, 213:12, 227:9</p> <p>CLAMORING [1] - 224:13</p> <p>CLARIFICATION [3] - 164:1, 187:11, 192:5</p> <p>CLARIFY [9] - 5:10, 152:5, 154:12, 160:19, 163:15, 164:5, 180:24, 243:4, 243:7</p> <p>CLASS [1] - 129:9</p> <p>CLAUSE [6] - 9:11, 19:7, 224:24, 225:7, 242:13, 242:15</p> <p>CLEAN [2] - 19:14, 98:15</p> <p>CLEAR [27] - 8:10, 17:12, 18:9, 23:24, 28:18, 45:13, 45:21, 148:4, 213:1, 215:18, 216:9, 216:11, 216:13, 220:11, 226:8, 227:5, 228:17, 233:2, 233:12, 235:7, 239:5, 239:21, 244:4, 245:2, 248:14, 249:25, 252:17</p>	<p>CLEARINGHOUSE [1] - 154:5</p> <p>CLEARLY [13] - 17:10, 17:11, 27:15, 96:24, 159:5, 213:10, 216:1, 217:3, 223:15, 226:4, 226:19, 228:2, 235:11</p> <p>CLERK [9] - 3:1, 54:12, 54:21, 113:5, 113:13, 113:18, 157:22, 162:20, 210:14</p> <p>CLIMATE [1] - 19:15</p> <p>CLINIC [3] - 167:3, 167:5, 171:16</p> <p>CLINICAL [7] - 61:16, 61:17, 61:20, 115:25, 117:7, 118:13, 163:17</p> <p>CLINICALLY [1] - 103:6</p> <p>CLINICS [3] - 14:6, 231:11, 231:22</p> <p>CLOSE [3] - 88:17, 210:5, 210:6</p> <p>CLOSELY [5] - 29:2, 29:4, 29:19, 177:15, 211:6</p> <p>CLOSELY-HELD [2] - 29:2, 29:4</p> <p>CLOSELY-RELATED [1] - 211:6</p> <p>CLOSELY-SPACED [1] - 177:15</p> <p>CLOSER [2] - 241:1, 241:14</p> <p>CLOSING [5] - 3:17, 3:18, 210:19, 236:11, 246:15</p> <p>CLOSINGS [2] - 5:12, 210:16</p> <p>CM [1] - 1:19</p> <p>CO [20] - 59:20, 79:13, 79:18, 79:22, 79:24, 80:3, 80:12, 80:13, 80:18, 83:5, 90:7, 96:11, 96:13, 96:15, 97:9, 106:23, 153:10, 178:20, 192:22</p> <p>CO-AUTHORS [1] - 106:23</p> <p>CO-COUNSEL [1] - 97:9</p> <p>CO-LED [1] - 59:20</p> <p>CO-PAY [9] - 79:13, 79:22, 80:3, 80:12, 80:13, 80:18, 90:7,</p>	<p>153:10, 192:22</p> <p>CO-PAYMENTS [1] - 83:5</p> <p>CO-PAYS [7] - 79:18, 79:24, 90:7, 96:11, 96:13, 96:15, 178:20</p> <p>COALITION [1] - 215:22</p> <p>COASTLINE [1] - 19:20</p> <p>COHORT [4] - 90:3, 92:24, 93:23, 110:1</p> <p>COLLAPSES [1] - 185:24</p> <p>COLLEAGUE [4] - 213:9, 214:2, 234:9, 242:8</p> <p>COLLEAGUES [4] - 93:5, 195:25, 203:12, 203:21</p> <p>COLLECTION [1] - 70:10</p> <p>COLLECTIVELY [1] - 99:20</p> <p>COLLEGE [15] - 26:9, 40:1, 41:2, 55:5, 56:24, 60:7, 60:10, 60:17, 93:6, 114:24, 114:25, 217:18, 217:22, 217:23, 218:8</p> <p>COLOR [1] - 9:17</p> <p>COLORECTAL [1] - 108:16</p> <p>COLUMN [6] - 75:19, 75:21, 76:6, 103:11, 186:9, 187:3</p> <p>COLUMNS [1] - 75:15</p> <p>COMBINATION [1] - 91:8</p> <p>COMBINED [1] - 91:16</p> <p>COME [22] - 15:22, 69:7, 117:13, 118:9, 121:14, 121:16, 121:20, 121:21, 125:22, 133:1, 157:13, 192:20, 209:16, 209:21, 214:12, 215:3, 222:1, 227:8, 229:1, 229:7, 248:16, 248:18</p> <p>COMES [4] - 106:22, 137:6, 215:1, 234:24</p> <p>COMFORTABLE [1] - 56:20</p> <p>COMING [1] - 173:3</p> <p>COMMENT [13] - 8:15, 39:1, 39:20, 42:3,</p>	<p>52:17, 53:8, 160:5, 160:12, 209:17, 213:23, 215:17, 216:8</p> <p>COMMENTARY [1] - 53:21</p> <p>COMMENTS [17] - 39:22, 39:23, 53:3, 53:8, 53:11, 53:19, 106:6, 205:17, 205:21, 205:22, 205:23, 208:22, 208:25, 209:16, 209:19, 209:21, 217:6</p> <p>COMMITTEE [44] - 22:4, 64:10, 66:24, 66:25, 67:1, 67:7, 67:16, 67:22, 68:3, 68:11, 68:21, 69:1, 69:11, 69:14, 69:23, 70:3, 73:11, 73:12, 73:13, 73:14, 73:24, 75:7, 77:24, 78:2, 78:4, 78:10, 78:23, 82:13, 83:18, 83:24, 83:25, 84:2, 84:21, 85:5, 85:8, 85:18, 85:22, 86:5, 86:20, 87:1, 98:2, 102:10, 107:13, 107:17</p> <p>COMMITTEE'S [7] - 10:14, 81:10, 85:9, 87:2, 105:9, 105:11, 105:15</p> <p>COMMON [7] - 69:20, 72:20, 125:10, 125:16, 126:21, 127:25, 234:25</p> <p>COMMONLY [4] - 125:7, 174:22, 175:15, 194:17</p> <p>COMMONLY-CITED [1] - 194:17</p> <p>COMMONWEALTH [42] - 1:3, 2:8, 3:3, 4:3, 5:24, 7:9, 7:14, 7:16, 7:18, 7:23, 12:18, 14:1, 14:4, 14:7, 15:3, 15:8, 15:11, 16:4, 16:5, 17:8, 19:4, 20:8, 21:17, 24:18, 35:21, 113:8, 157:20, 158:10, 162:12, 210:17, 210:19, 213:24, 227:13, 227:15, 233:7, 233:13, 234:6, 234:24, 235:11,</p>	<p>244:16, 251:10, 252:9</p> <p>COMMONWEALTH'S [11] - 3:9, 26:15, 34:16, 54:19, 113:16, 162:18, 234:3, 251:10, 251:13, 251:17, 251:21</p> <p>COMMUNICATE [1] - 228:2</p> <p>COMMUNITIES [1] - 220:17</p> <p>COMMUNITY [5] - 101:19, 102:24, 103:25, 107:9, 121:25</p> <p>COMPANIES [12] - 28:25, 198:5, 198:7, 211:16, 212:1, 212:5, 223:8, 225:17, 226:13, 228:17, 229:2, 229:3</p> <p>COMPANY [14] - 29:19, 30:8, 30:12, 30:23, 36:10, 212:2, 218:7, 218:11, 225:18, 240:4, 240:10, 248:7, 250:15, 250:22</p> <p>COMPARE [3] - 109:10, 112:6, 134:14</p> <p>COMPARED [3] - 43:2, 134:8, 135:25</p> <p>COMPARISON [1] - 49:15</p> <p>COMPELLING [13] - 47:5, 51:11, 51:13, 51:17, 51:18, 52:5, 224:21, 226:1, 226:4, 226:5, 226:7, 227:1, 227:4</p> <p>COMPLAIN [2] - 31:17, 33:16</p> <p>COMPLAINT [6] - 151:13, 158:7, 159:18, 206:13, 206:17, 240:5</p> <p>COMPLETE [3] - 165:13, 165:19, 177:20</p> <p>COMPLETED [4] - 166:25, 167:7, 181:13, 182:17</p> <p>COMPLIANCE [1] - 133:11</p> <p>COMPLICATED [1] - 137:17</p> <p>COMPLICATIONS [1]</p>
--	---	--	--	--

<p>- 103:21</p> <p>COMPLICIT [1] - 51:5</p> <p>COMPLY [1] - 240:11</p> <p>COMPONENT [6] - 117:15, 159:10, 213:22, 213:23, 214:10, 214:21</p> <p>COMPONENTS [1] - 105:21</p> <p>COMPOUND [1] - 148:8</p> <p>COMPREHENSIVE [2] - 132:11, 221:14</p> <p>COMPROMISE [1] - 224:19</p> <p>COMPUTER [2] - 1:24, 1:24</p> <p>COMPUTER-AIDED [1] - 1:24</p> <p>CONCEDE [1] - 156:20</p> <p>CONCEDED [1] - 219:1</p> <p>CONCEDES [1] - 228:24</p> <p>CONCEIVABLY [2] - 31:24, 240:15</p> <p>CONCEIVE [1] - 22:21</p> <p>CONCEPT [5] - 18:4, 18:8, 19:17, 33:1, 33:4</p> <p>CONCERN [5] - 108:25, 109:4, 131:21, 147:3, 240:20</p> <p>CONCERNED [5] - 37:6, 93:20, 122:7, 145:23, 146:4</p> <p>CONCERNING [1] - 104:22</p> <p>CONCERNS [7] - 34:16, 49:17, 49:19, 145:23, 153:17, 153:22, 211:12</p> <p>CONCLUDE [1] - 233:9</p> <p>CONCLUDED [4] - 50:22, 93:25, 102:2, 253:1</p> <p>CONCLUSION [5] - 24:13, 53:7, 111:6, 111:8, 209:13</p> <p>CONCLUSIONS [6] - 52:6, 69:8, 92:10, 107:3, 164:13, 252:13</p> <p>CONCOMITANT [1] - 107:1</p> <p>CONCOMITANTLY [1] - 191:24</p>	<p>CONCRETE [1] - 35:16</p> <p>CONDITION [5] - 10:9, 123:15, 126:14, 132:2, 132:13</p> <p>CONDITIONS [6] - 75:23, 123:17, 129:25, 155:17, 168:16, 190:14</p> <p>CONDOM [1] - 77:15</p> <p>CONDOMS [2] - 175:12, 176:23</p> <p>CONDUCT [5] - 58:15, 62:2, 66:22, 166:9, 167:15</p> <p>CONDUCTED [10] - 63:2, 63:3, 63:5, 63:7, 83:14, 100:2, 100:3, 101:25, 111:25, 169:2</p> <p>CONDUCTING [2] - 61:3, 180:7</p> <p>CONFER [2] - 47:11, 203:20</p> <p>CONFERENCE [4] - 5:11, 6:1, 7:3, 184:6</p> <p>CONFERS [1] - 18:24</p> <p>CONFIDENTIAL [1] - 159:5</p> <p>CONFIDENTIALITY [1] - 159:10</p> <p>CONFIRM [5] - 56:12, 56:20, 114:18, 165:19, 204:23</p> <p>CONFLICT [1] - 43:20</p> <p>CONFLICTING [2] - 47:14, 50:6</p> <p>CONFLICTS [2] - 45:18, 222:25</p> <p>CONFUSED [1] - 105:17</p> <p>CONFUSING [1] - 17:16</p> <p>CONGRESS [14] - 43:11, 45:13, 52:7, 52:10, 220:5, 220:8, 220:22, 223:6, 223:8, 224:19, 225:5, 225:6, 242:24, 250:1</p> <p>CONNECTING [1] - 38:21</p> <p>CONNECTION [4] - 22:7, 49:21, 64:12, 122:21</p> <p>CONSCIENCE [5] - 28:5, 224:24, 225:7, 242:13, 242:15</p> <p>CONSCIENCES [1] - 205:15</p>	<p>CONSCIENTIOUS [1] - 242:16</p> <p>CONSCIOUS [1] - 48:10</p> <p>CONSENTED [1] - 182:16</p> <p>CONSEQUENCES [16] - 71:14, 71:17, 71:24, 72:8, 72:11, 127:18, 127:21, 127:25, 141:17, 142:3, 148:6, 149:16, 151:2, 151:10, 202:11, 202:13</p> <p>CONSIDER [21] - 9:9, 49:22, 68:21, 69:11, 69:13, 82:10, 85:5, 86:1, 92:16, 124:4, 132:13, 148:1, 156:6, 165:22, 173:16, 190:9, 190:10, 190:13, 190:16, 193:16, 195:4</p> <p>CONSIDERABLE [1] - 92:15</p> <p>CONSIDERATION [2] - 81:11, 160:1</p> <p>CONSIDERATIONS [2] - 173:14, 174:17</p> <p>CONSIDERED [6] - 47:11, 74:8, 74:9, 77:20, 251:15, 251:21</p> <p>CONSIDERING [2] - 24:16, 173:24</p> <p>CONSIDERS [1] - 188:17</p> <p>CONSISTENT [5] - 189:6, 189:15, 189:16, 228:15, 249:15</p> <p>CONSTITUTIONAL [8] - 8:2, 8:5, 9:1, 9:4, 213:12, 213:15, 213:18, 227:9</p> <p>CONSTRAINTS [1] - 6:22</p> <p>CONSTRUCT [1] - 30:12</p> <p>CONSTRUCTION [1] - 221:24</p> <p>CONSULT [1] - 97:9</p> <p>CONSULTATION [1] - 132:20</p> <p>CONTACT [2] - 218:10, 229:4</p> <p>CONTACTED [1] - 198:12</p>	<p>CONTAINED [2] - 56:21, 63:21</p> <p>CONTAINS [1] - 241:10</p> <p>CONTENT [1] - 65:7</p> <p>CONTENTS [1] - 56:12</p> <p>CONTEXT [33] - 8:4, 27:24, 28:2, 28:17, 28:22, 29:17, 30:18, 36:3, 36:21, 36:24, 37:10, 45:15, 49:12, 49:13, 49:18, 50:1, 50:3, 50:9, 61:15, 63:5, 65:5, 88:10, 88:11, 159:13, 168:24, 226:20, 238:23, 240:2, 240:13, 240:15, 240:25, 242:19, 247:12</p> <p>CONTINGENT [1] - 14:2</p> <p>CONTINUE [5] - 34:7, 71:16, 142:16, 209:15, 231:2</p> <p>CONTINUES [1] - 224:17</p> <p>CONTINUING [1] - 205:13</p> <p>CONTRA [1] - 142:7</p> <p>CONTRACEPTION [115] - 10:19, 10:20, 11:9, 11:12, 11:16, 11:24, 12:3, 12:15, 14:12, 14:13, 34:18, 44:1, 52:8, 65:14, 70:23, 70:24, 71:4, 71:7, 73:7, 73:8, 73:21, 73:25, 74:5, 74:7, 74:10, 74:11, 74:13, 74:14, 75:8, 75:11, 75:20, 75:25, 76:7, 77:12, 77:25, 78:3, 78:7, 79:1, 79:6, 79:20, 80:4, 80:19, 81:2, 81:11, 82:15, 83:10, 83:20, 85:17, 89:24, 90:7, 90:9, 90:12, 94:9, 96:13, 98:25, 101:1, 104:11, 105:12, 106:17, 106:20, 107:6, 107:10, 107:17, 107:21, 108:4, 108:6, 108:12, 108:14, 108:23, 119:22, 128:20, 128:23, 129:4, 130:15,</p>	<p>145:6, 145:14, 166:16, 167:22, 168:6, 168:8, 168:13, 172:8, 173:15, 174:12, 174:13, 174:20, 177:9, 178:1, 178:8, 178:25, 179:1, 180:18, 181:17, 182:23, 192:7, 192:8, 193:4, 195:5, 196:1, 197:25, 198:13, 198:19, 205:8, 208:9, 228:3, 228:9, 231:2, 231:5, 239:17</p> <p>CONTRACEPTION 'S [2] - 103:2, 103:12</p> <p>CONTRACEPTIONS [1] - 79:14</p> <p>CONTRACEPTIVE [216] - 6:19, 7:3, 7:8, 7:11, 7:13, 11:10, 11:14, 11:15, 11:18, 11:22, 12:4, 12:5, 12:9, 12:10, 12:20, 12:23, 13:1, 13:7, 13:8, 13:12, 13:16, 13:20, 13:23, 14:16, 14:18, 14:21, 21:11, 21:14, 22:10, 23:1, 23:3, 23:18, 26:3, 26:11, 26:17, 26:24, 27:4, 27:7, 27:12, 30:4, 30:11, 31:6, 32:7, 32:17, 33:8, 34:7, 39:15, 41:4, 44:4, 44:7, 44:10, 44:12, 51:5, 62:13, 62:17, 62:22, 63:1, 63:3, 63:4, 63:9, 63:12, 63:20, 64:20, 67:8, 67:20, 70:13, 70:17, 71:1, 73:9, 75:2, 75:4, 75:6, 75:10, 75:14, 77:2, 78:20, 79:10, 79:11, 79:14, 79:17, 81:15, 83:5, 83:21, 94:3, 95:19, 95:25, 96:4, 96:10, 97:6, 98:21, 99:13, 99:24, 101:25, 102:1, 102:3, 102:5, 102:17, 103:7, 105:20, 106:14, 106:16, 107:7, 108:18, 109:14, 109:15, 109:19, 111:19, 111:22, 112:8, 120:3,</p>
---	--	--	--	---

130:21, 131:2,
131:6, 131:16,
135:24, 136:13,
140:6, 140:12,
144:5, 144:11,
144:17, 144:25,
145:24, 146:8,
146:19, 147:1,
148:17, 166:11,
166:13, 166:18,
168:15, 168:19,
168:21, 168:23,
168:25, 170:22,
171:5, 171:6,
172:14, 173:12,
173:22, 174:2,
174:4, 174:18,
174:23, 174:24,
175:7, 175:8, 176:7,
178:6, 178:23,
179:7, 179:11,
179:22, 180:23,
181:10, 181:15,
181:19, 183:6,
183:11, 183:15,
185:15, 185:23,
188:23, 189:1,
189:2, 189:4, 189:5,
189:10, 189:11,
189:21, 190:2,
191:9, 191:14,
191:15, 191:18,
192:19, 195:20,
196:2, 196:3,
196:11, 197:6,
197:16, 197:22,
199:6, 199:22,
200:23, 200:24,
201:8, 201:16,
207:5, 207:14,
208:4, 211:16,
211:19, 218:1,
221:23, 222:13,
223:5, 224:14,
224:21, 225:25,
230:15, 230:23,
232:19, 233:20,
237:22, 238:12,
239:14, 239:21,
244:7, 244:25,
247:4, 247:8, 250:19

CONTRACEPTIVES
[37] - 10:12, 11:19,
11:25, 12:1, 13:19,
22:19, 22:23, 33:12,
77:11, 78:5, 79:22,
80:22, 80:24,
103:18, 129:2,
129:12, 130:4,
130:18, 130:20,
130:24, 131:1,

131:4, 131:12,
131:16, 149:1,
149:19, 149:20,
153:12, 153:14,
171:25, 173:10,
176:25, 177:7,
183:18, 196:19,
196:23, 218:4

CONTRACT [1] -
208:12

CONTRAINDICATED
[1] - 142:8

CONTRARY [1] -
29:11

CONTRAST [2] -
109:10, 135:5

CONTRIBUTES [1] -
108:5

CONTROL [28] -
11:22, 12:3, 71:23,
80:15, 86:5, 91:4,
91:7, 91:11, 91:14,
92:2, 92:11, 128:24,
129:17, 133:17,
133:21, 134:5,
134:9, 135:5, 136:1,
145:18, 149:25,
156:3, 175:6, 175:7,
177:17, 182:19,
183:13, 188:6

CONTROLLING [1] -
130:1

CONTROLS [1] -
233:13

CONVENED [2] - 22:5,
64:11

CONVERSATION [4] -
128:12, 146:1,
172:9, 178:8

CONVERSATIONS [1]
- 203:11

CONVICTION [11] -
28:12, 28:13, 29:25,
30:9, 30:17, 32:3,
32:12, 32:13, 32:20,
32:22, 33:11

CONVICTIONS [1] -
31:22

CONVINCED [1] -
17:4

COPY [2] - 114:12,
158:19

CORPORATE [1] -
30:21

CORRECT [131] -
25:12, 28:3, 32:22,
44:14, 44:15, 45:19,
45:20, 46:7, 48:17,
58:8, 60:6, 60:8,
60:9, 64:9, 70:12,

70:15, 76:3, 76:6,
76:15, 76:18, 76:19,
76:21, 76:24, 77:19,
81:22, 83:11, 83:16,
84:21, 87:15, 88:6,
90:21, 90:24, 92:3,
92:8, 94:15, 99:1,
99:9, 99:10, 99:13,
100:13, 100:16,
100:17, 100:22,
101:16, 101:17,
102:8, 102:11,
102:20, 102:24,
103:22, 104:1,
104:5, 104:12,
104:16, 104:17,
104:19, 104:22,
104:23, 106:13,
107:18, 109:22,
112:4, 117:21,
118:18, 118:19,
119:21, 121:7,
122:3, 123:7, 123:8,
126:25, 127:4,
127:6, 128:8,
130:10, 131:23,
132:4, 135:19,
136:2, 139:23,
139:24, 140:3,
140:8, 144:5,
147:14, 147:25,
148:17, 148:21,
149:3, 149:8,
149:12, 149:13,
149:17, 149:18,
149:21, 150:17,
161:14, 161:15,
163:13, 166:8,
171:13, 181:1,
196:12, 197:17,
197:25, 198:24,
198:25, 199:3,
200:3, 201:4, 201:5,
201:20, 201:21,
201:25, 202:1,
202:7, 202:8,
202:14, 202:15,
202:24, 203:1,
204:20, 209:14,
210:3, 211:3,
212:23, 213:13,
226:22, 238:13,
246:8, 253:3

CORRECTLY [11] -
41:25, 76:12, 78:17,
136:2, 198:15,
199:24, 200:25,
201:9, 238:1,
238:17, 242:10

CORRECTNESS [6] -
66:8, 112:24,

120:19, 172:24,
173:2, 246:11

COST [64] - 7:9, 7:11,
11:8, 11:17, 11:20,
12:7, 13:21, 22:12,
23:20, 30:4, 34:7,
52:19, 52:21, 59:3,
62:6, 78:10, 78:16,
79:5, 79:11, 81:12,
81:14, 81:23, 82:2,
82:14, 83:8, 83:22,
85:6, 86:2, 87:14,
89:23, 92:13, 92:14,
92:15, 92:16, 134:8,
134:9, 134:12,
134:15, 134:21,
135:8, 135:17,
136:3, 145:23,
146:18, 150:7,
151:2, 151:13,
151:18, 156:9,
178:7, 178:13,
179:1, 179:4,
191:13, 191:18,
192:7, 198:14,
205:3, 205:9,
223:22, 230:5,
238:20, 239:16,
250:3

COST-EFFECTIVE [2]
- 22:12, 23:20

COST-FREE [1] -
239:16

COST-PROHIBITIVE
[1] - 178:13

COSTS [42] - 13:23,
69:11, 69:13, 78:8,
78:22, 81:12, 82:10,
82:11, 82:24, 85:5,
89:18, 89:21, 92:18,
94:5, 96:20, 109:19,
112:8, 133:14,
134:6, 134:25,
135:4, 148:16,
150:22, 156:11,
166:17, 178:10,
178:12, 178:15,
178:18, 178:21,
189:11, 191:10,
192:10, 201:8,
201:12, 201:15,
205:14, 231:8,
231:12, 237:22,
238:12

COULD [50] - 8:25,
12:20, 18:9, 19:7,
19:10, 19:12, 31:24,
32:10, 34:13, 40:15,
41:7, 50:12, 52:23,
53:8, 53:10, 53:15,

53:17, 56:19, 58:15,
68:6, 74:25, 80:3,
80:11, 80:13, 80:25,
88:5, 89:11, 114:7,
118:22, 142:1,
146:2, 153:1, 157:3,
178:12, 189:5,
193:17, 196:20,
197:4, 204:23,
208:23, 214:23,
219:13, 223:10,
225:18, 228:16,
228:19, 230:5,
237:8, 240:1

COUNSEL [23] - 2:8,
2:19, 4:23, 6:10,
6:14, 11:4, 23:24,
65:17, 97:9, 105:8,
105:14, 105:24,
143:13, 148:5,
153:12, 154:13,
164:10, 173:11,
178:15, 206:18,
218:25, 249:17,
252:25

COUNSELED [1] -
178:7

COUNSELING [9] -
63:4, 78:7, 107:11,
108:11, 174:12,
175:14, 180:21,
191:10, 208:10

COUNT [1] - 62:15

COUNTED [1] - 188:5

COUNTER [2] -
125:23, 220:19

COUNTERINTUITIVE
[1] - 129:13

COUNTRY [13] - 7:7,
21:10, 28:19, 58:19,
93:24, 95:1, 97:1,
111:25, 127:2,
199:14, 202:19,
229:25, 235:7

COUPLE [10] - 28:11,
30:19, 59:20,
166:22, 187:11,
190:8, 192:17,
193:13, 195:11,
240:19

COURSE [6] - 5:15,
38:6, 86:4, 156:5,
181:12, 188:2

COURT [382] - 1:1,
1:19, 3:1, 3:2, 4:11,
5:6, 5:8, 5:13, 6:15,
7:23, 8:1, 8:2, 8:18,
9:6, 9:24, 10:25,
11:4, 15:4, 15:17,
15:21, 16:2, 16:13,

16:17, 16:19, 17:3,
17:12, 17:19, 18:4,
18:7, 18:11, 18:21,
19:3, 19:23, 20:13,
20:19, 20:22, 21:3,
21:18, 21:25, 22:13,
23:8, 23:11, 24:5,
24:12, 24:19, 25:6,
25:16, 25:18, 25:20,
25:25, 26:7, 27:14,
27:24, 28:9, 29:5,
29:7, 29:10, 29:14,
30:7, 31:2, 31:8,
31:14, 31:21, 32:2,
32:11, 32:19, 32:25,
33:10, 33:19, 33:21,
34:5, 36:2, 36:4,
36:7, 36:14, 36:17,
36:18, 36:20, 37:3,
37:6, 37:18, 37:23,
37:24, 38:3, 38:5,
38:7, 38:9, 38:20,
39:5, 40:10, 40:16,
40:21, 41:12, 41:13,
41:21, 42:12, 42:15,
44:4, 44:15, 44:17,
45:17, 45:25, 46:3,
46:22, 47:13, 47:16,
48:4, 48:12, 48:20,
49:2, 49:6, 50:16,
51:6, 51:7, 51:24,
52:14, 53:2, 53:15,
54:2, 54:5, 54:8,
54:14, 54:17, 55:12,
55:18, 55:22, 56:1,
57:2, 57:5, 57:22,
57:25, 58:3, 58:5,
64:21, 65:12, 65:20,
65:23, 66:2, 66:5,
66:11, 66:13, 80:8,
82:9, 83:3, 83:4,
84:6, 84:9, 85:13,
86:11, 87:20, 88:3,
88:9, 88:14, 88:20,
88:25, 89:3, 89:9,
89:13, 89:17, 89:22,
90:1, 90:10, 90:15,
90:19, 90:22, 90:25,
91:3, 91:9, 91:13,
91:19, 92:1, 92:4,
92:6, 92:9, 92:21,
92:24, 93:3, 93:7,
93:12, 93:17, 95:8,
97:4, 97:10, 97:13,
97:16, 98:11, 98:14,
100:11, 100:14,
103:8, 103:13,
103:16, 105:2,
105:18, 108:21,
109:3, 109:8,
109:20, 109:25,

110:3, 110:5,
110:10, 110:15,
110:21, 110:24,
111:2, 111:10,
112:19, 113:1,
113:11, 116:22,
120:9, 120:15,
120:21, 121:2,
121:6, 121:9,
121:11, 132:6,
133:5, 139:3,
139:12, 139:16,
140:17, 141:13,
142:18, 142:20,
143:20, 143:23,
147:20, 148:7,
148:12, 150:4,
150:20, 150:24,
151:4, 151:6,
151:11, 151:15,
151:23, 152:10,
152:13, 152:20,
156:25, 157:6,
157:10, 157:18,
158:2, 158:4, 158:9,
158:16, 158:21,
159:8, 160:9, 161:3,
161:16, 161:23,
162:3, 162:8,
162:10, 162:16,
162:24, 163:8,
163:11, 163:19,
163:24, 164:7,
164:20, 165:9,
165:16, 165:22,
166:24, 172:17,
173:1, 173:5,
179:23, 180:6,
181:25, 184:2,
184:10, 184:16,
184:17, 185:1,
185:5, 191:3, 191:5,
192:3, 193:7, 193:9,
203:19, 204:1,
204:3, 204:9,
204:11, 204:14,
204:21, 205:1,
205:16, 206:4,
206:9, 206:24,
207:2, 207:5,
207:18, 208:15,
208:20, 209:2,
209:7, 209:11,
209:20, 210:4,
210:11, 210:16,
210:20, 210:22,
211:24, 213:7,
213:14, 213:17,
213:18, 214:16,
215:6, 215:13,
215:22, 217:14,

218:8, 218:13,
219:6, 219:10,
219:15, 221:3,
222:7, 222:9,
225:15, 225:20,
226:2, 226:19,
226:23, 227:19,
233:9, 233:15,
234:9, 234:14,
234:16, 234:20,
234:22, 235:15,
235:20, 236:2,
236:9, 236:21,
237:10, 238:9,
238:18, 239:10,
241:2, 241:16,
241:20, 242:1,
242:3, 242:5,
242:22, 245:4,
245:6, 245:12,
245:16, 245:19,
245:24, 246:1,
246:14, 246:19,
247:6, 248:14,
249:6, 249:7, 251:7,
251:12, 251:14,
252:14, 253:8
COURT'S [10] - 5:25,
16:19, 37:1, 40:1,
40:2, 136:7, 160:18,
207:15, 211:9, 246:7
COURTHOUSE [1] -
1:20
COURTROOM [3] -
1:9, 3:11, 238:5
COURTS [3] - 37:8,
51:10, 247:13
COVER [5] - 7:11,
42:25, 43:25, 71:4,
205:7
COVERAGE [131] -
7:8, 7:13, 13:8,
13:13, 13:16, 13:18,
13:23, 14:17, 14:21,
23:5, 26:3, 26:11,
26:17, 26:18, 26:24,
27:4, 27:7, 27:12,
30:4, 31:6, 31:9,
32:7, 32:17, 33:8,
34:3, 34:7, 34:12,
34:22, 36:1, 39:15,
41:4, 43:21, 51:5,
52:22, 71:6, 79:10,
79:11, 96:10, 99:13,
99:24, 100:5, 100:8,
101:25, 109:14,
131:21, 140:7,
140:12, 141:6,
144:4, 144:5,
144:12, 144:18,

144:25, 145:17,
145:24, 146:8,
146:13, 147:9,
150:11, 150:15,
151:16, 153:3,
153:7, 180:18,
192:19, 196:11,
196:16, 196:19,
196:23, 197:16,
197:25, 199:6,
199:11, 199:15,
199:22, 200:2,
200:6, 200:8,
200:12, 200:14,
200:15, 200:24,
201:3, 201:7,
202:20, 202:23,
205:4, 205:10,
207:14, 208:14,
211:19, 212:4,
212:6, 218:1, 218:3,
219:19, 221:9,
221:10, 221:20,
221:23, 223:5,
223:20, 223:21,
224:21, 228:3,
228:5, 228:9,
229:13, 230:3,
230:4, 230:11,
230:20, 231:8,
231:21, 232:19,
237:7, 239:14,
239:21, 244:7,
244:11, 245:1,
247:4, 247:8, 249:4,
249:7, 249:10,
249:14, 250:17,
250:19
COVERED [16] -
42:24, 44:3, 45:6,
52:8, 69:5, 69:9,
87:13, 150:8,
151:19, 159:5,
166:17, 221:19,
229:10, 230:24,
249:11
COVERING [4] - 31:1,
52:12, 151:18, 231:2
COVERS [1] - 178:17
CRAFT [2] - 42:21,
221:22
CRAFTING [2] - 45:16,
220:9
CREATE [10] - 124:6,
129:16, 141:19,
184:18, 218:14,
222:5, 223:17,
224:4, 243:6, 243:17
CREATED [6] -
184:19, 184:20,

211:8, 222:13,
222:14, 223:1
CREATING [1] - 243:9
CREATION [1] - 59:7
CREDITS [4] - 219:18,
219:24, 220:2,
242:22
CREDULITY [1] -
220:21
CRITICAL [1] - 127:17
CRITICIZES [1] - 85:8
CROSS [5] - 97:18,
108:20, 142:22,
193:10, 254:3
CROSS -
EXAMINATION [2] -
142:22, 193:10
CRY [1] - 218:15
CRYSTAL [1] - 18:9
CUELLAR [2] - 241:3,
241:4
CUMULATIVE [2] -
162:15, 164:18
CURRENT [11] - 7:10,
60:13, 88:19,
114:21, 116:14,
119:4, 139:7, 139:8,
140:22, 197:11,
228:25
CURRENTLY [19] -
26:18, 27:12, 35:25,
88:22, 99:4, 99:12,
99:23, 109:9,
116:14, 144:8,
144:11, 144:17,
147:24, 206:20,
207:20, 212:5,
215:11, 229:10,
230:2
CURRICULUM [2] -
114:14, 143:6
CV [5] - 56:10, 98:2,
165:17, 165:22,
169:12
CYCLES [1] - 129:6
CYNTHIA [6] - 23:6,
93:6, 157:24,
162:13, 162:18,
254:12

D

D.C [5] - 18:16, 27:21,
39:14, 42:10, 215:22
DAILY [3] - 126:2,
195:4, 195:6
DAMAGE [2] - 35:23,
237:2
DAMAGES [1] - 7:9
DAME [2] - 34:5

DANGEROUS [1] - 137:11
DANISH [2] - 107:22, 108:2
DAPA [1] - 16:23
DATA [36] - 62:6, 70:10, 70:11, 75:2, 75:5, 75:11, 75:19, 88:4, 88:5, 88:7, 88:11, 89:7, 91:4, 93:22, 94:14, 94:16, 94:23, 111:13, 111:15, 111:17, 111:18, 112:3, 112:13, 112:15, 154:4, 155:2, 181:24, 184:9, 184:11, 184:13, 185:1, 185:12, 185:21, 185:25
DATABASE [3] - 94:2, 94:25, 95:2
DATE [5] - 24:20, 24:24, 24:25, 207:2, 253:8
DATES [1] - 164:1
DAVIS [77] - 2:11, 4:16, 4:17, 25:19, 25:21, 25:22, 27:18, 28:4, 28:23, 29:6, 29:8, 29:13, 29:15, 30:19, 31:5, 31:13, 31:16, 31:23, 32:4, 32:14, 32:23, 33:3, 33:14, 33:20, 33:22, 36:16, 36:23, 37:14, 38:12, 38:24, 39:6, 40:13, 40:18, 40:24, 41:24, 42:13, 42:16, 44:14, 44:16, 44:20, 45:20, 46:1, 46:7, 46:25, 48:18, 49:4, 49:23, 50:18, 52:4, 53:1, 53:13, 54:1, 54:3, 55:9, 57:19, 210:9, 211:1, 235:18, 235:21, 236:5, 236:13, 236:24, 238:2, 238:15, 238:22, 239:11, 241:17, 241:22, 242:2, 242:4, 242:7, 245:15, 245:18, 245:22, 246:4, 246:17, 252:10
DAY [4] - 53:18, 192:25, 217:20, 230:19
DAYS [3] - 8:16,

228:10, 244:9
DAYS' [1] - 230:16
DC [2] - 2:13, 2:18
DE [2] - 241:3, 241:4
DEALS [1] - 214:20
DEAN [1] - 61:9
DEATH [1] - 128:6
DEBATE [1] - 247:1
DEBILITATED [1] - 126:3
DEBILITATING [2] - 125:20, 125:23
DECEMBER [3] - 1:8, 200:1, 209:17
DECIDE [7] - 28:15, 44:2, 78:13, 82:17, 178:24, 247:6, 248:17
DECIDED [11] - 8:22, 8:25, 16:24, 24:21, 46:20, 52:11, 82:13, 188:3, 225:25, 245:20, 246:6
DECIDES [2] - 33:1, 135:2
DECIDING [2] - 29:2, 160:17
DECISION [53] - 16:19, 16:21, 17:2, 17:19, 18:16, 37:1, 37:4, 37:22, 37:23, 38:3, 38:6, 39:16, 40:1, 40:3, 41:11, 42:10, 63:3, 66:9, 66:11, 82:16, 82:19, 85:9, 100:15, 108:18, 112:24, 120:20, 132:20, 152:14, 168:21, 171:6, 172:25, 174:10, 180:23, 181:10, 182:24, 189:17, 189:21, 211:9, 211:18, 212:3, 216:25, 217:18, 219:3, 219:15, 220:8, 223:9, 225:16, 226:19, 226:23, 227:5, 246:2, 246:11
DECISION-MAKERS [2] - 82:16, 82:19
DECISION-MAKING [11] - 63:3, 85:9, 100:15, 152:14, 168:21, 171:6, 180:23, 181:10, 182:24, 189:17, 189:21
DECISIONS [2] -

74:13, 233:14
DECLARATION [49] - 10:3, 10:6, 10:7, 10:9, 10:10, 10:15, 10:16, 10:17, 10:18, 10:22, 10:23, 10:24, 22:2, 22:16, 26:23, 56:18, 65:8, 65:19, 98:1, 98:8, 98:17, 100:19, 143:4, 143:5, 143:12, 143:15, 143:18, 143:19, 146:16, 146:17, 147:12, 150:22, 151:22, 164:13, 165:11, 193:17, 193:24, 194:3, 194:7, 194:8, 194:10, 194:12, 194:23, 195:9, 196:6, 198:9, 199:18
DECLARATIONS [2] - 6:4, 114:11
DECLINE [3] - 70:20, 70:22, 224:17
DECLINED [4] - 70:5, 94:5, 106:25, 197:9
DECLINING [1] - 197:3
DECREASED [3] - 70:16, 126:10, 126:12
DEDUCTIBLE [1] - 79:15
DEDUCTIBLES [1] - 178:20
DEEP [3] - 24:7, 103:22, 220:4
DEFENDANT'S [2] - 17:11, 251:19
DEFENDANTS [8] - 6:17, 8:11, 8:14, 24:6, 43:12, 222:18, 235:17, 251:22
DEFENDERS [1] - 241:18
DEFENSE [3] - 3:25, 25:18, 222:10
DEFER [2] - 241:7, 249:18
DEFERENCE [17] - 18:22, 19:18, 45:11, 45:19, 47:2, 47:3, 47:11, 51:16, 51:21, 52:10, 218:22, 219:2, 219:23, 240:25, 241:6, 242:21, 251:6
DEFIES [1] - 235:6
DEFINE [1] - 212:10

DEFINED [1] - 250:4
DEFINING [1] - 220:17
DEFINITELY [1] - 238:24
DEFINITION [3] - 126:17, 206:20, 207:21
DEFINITIVE [2] - 75:3, 111:21
DEFINITIVELY [1] - 95:3
DEGREE [10] - 31:25, 89:4, 96:5, 97:4, 123:15, 128:11, 138:22, 163:25, 167:7, 188:18
DELAY [4] - 40:3, 40:4, 40:6, 192:13
DELAYED [1] - 72:1
DELAYING [1] - 52:18
DELEGATED [7] - 19:6, 45:13, 220:8, 220:22, 223:10, 242:24, 242:25
DELEGATES [1] - 44:2
DELEGATION [4] - 42:23, 220:12, 223:1, 243:2
DELEGATIONS [1] - 243:1
DELIBERATIONS [2] - 73:15, 86:7
DELIVERED [1] - 59:2
DEMAND [1] - 251:3
DEMONSTRATE [1] - 184:16
DEMONSTRATED [1] - 23:17
DEMONSTRATES [1] - 22:10
DEMONSTRATIVE [4] - 24:11, 55:17, 55:20, 163:6
DENIED [2] - 230:11, 247:4
DENY [1] - 247:7
DENYING [1] - 27:9
DEPARTMENT [32] - 2:10, 2:15, 3:4, 3:5, 3:7, 4:18, 4:21, 4:24, 5:2, 5:5, 12:13, 12:24, 13:6, 31:18, 31:21, 31:23, 32:10, 32:11, 33:17, 33:18, 33:19, 67:2, 78:12, 87:2, 87:10, 161:6, 161:9, 179:14, 205:25, 240:6, 240:9, 247:2

DEPEND [2] - 32:5, 79:20
DEPENDING [3] - 90:19, 150:11, 215:1
DEPENDS [3] - 79:19, 119:13, 135:9
DEPLETION [1] - 126:9
DEPO [1] - 175:8
DEPO-PROVERA [1] - 175:8
DEPOSED [1] - 34:18
DEPOSITIONS [1] - 65:6
DEPRESSED [1] - 71:18
DEPRESSION [2] - 104:12, 107:6
DEPRIVED [1] - 127:23
DEPTH [2] - 155:3, 164:3
DEPUTY [5] - 4:2, 4:6, 4:9, 4:14, 4:17
DESCRIBE [6] - 40:19, 59:15, 123:9, 131:15, 147:11, 166:23
DESCRIBED [4] - 120:23, 128:16, 141:4, 221:13
DESCRIBES [3] - 75:9, 85:4, 246:2
DESCRIBING [1] - 187:24
DESCRIPTIVE [1] - 102:6
DESIGNATED [1] - 87:13
DESIGNED [1] - 59:17
DESIRE [1] - 179:3
DESIRES [1] - 172:6
DESPITE [3] - 82:22, 229:6, 235:1
DESTEFANO [2] - 47:16, 240:20
DETAIL [1] - 229:20
DETAILS [2] - 164:2, 182:7
DETERMINATION [6] - 28:15, 30:10, 41:14, 41:19, 41:22, 49:19
DETERMINE [14] - 28:11, 28:12, 30:16, 32:21, 49:10, 66:8, 101:25, 109:14, 112:23, 120:19, 161:19, 172:24, 212:13, 221:19

DETERMINED [3] - 3:11, 8:21, 78:25
DETERMINES [2] - 39:8, 216:6
DETERMINING [2] - 32:12, 46:18
DEVELOP [2] - 43:7, 45:4
DEVELOPED [1] - 49:12
DEVELOPMENT [1] - 103:6
DEVICE [10] - 92:17, 130:22, 134:7, 134:22, 134:24, 135:3, 135:23, 175:1, 192:10
DEVICES [5] - 76:10, 76:13, 90:17, 92:7, 135:21
DIABETIC [1] - 71:21
DIAGNOSED [1] - 127:12
DIAGNOSES [1] - 132:19
DID [122] - 5:13, 8:8, 15:22, 17:4, 26:22, 30:6, 36:15, 38:15, 39:12, 40:17, 43:8, 47:22, 52:2, 52:7, 55:14, 56:24, 57:15, 58:12, 58:17, 58:20, 58:22, 59:15, 59:22, 60:1, 60:10, 67:16, 67:22, 69:14, 69:15, 73:11, 73:15, 78:2, 78:10, 78:18, 79:10, 80:18, 80:19, 80:23, 83:25, 85:16, 85:17, 85:20, 90:2, 92:9, 93:3, 93:15, 96:24, 97:25, 98:7, 102:5, 102:19, 104:15, 104:18, 104:21, 110:6, 114:24, 115:1, 115:3, 115:5, 115:7, 115:8, 115:10, 115:12, 115:13, 133:16, 136:14, 136:18, 143:3, 143:11, 150:15, 154:14, 154:19, 154:21, 154:22, 154:24, 154:25, 163:17, 167:11, 167:12, 167:15, 167:17, 178:23, 179:23, 181:5, 181:8, 182:19, 183:4,

183:11, 184:17, 184:21, 188:13, 192:21, 192:22, 193:16, 194:4, 194:6, 194:14, 194:16, 194:20, 196:5, 197:24, 198:15, 198:16, 199:24, 199:25, 200:25, 201:9, 210:5, 218:5, 218:12, 226:20, 227:3, 227:5, 228:20, 243:14, 244:5, 245:16, 245:18, 249:7
DIDN'T [8] - 40:16, 65:20, 65:23, 80:14, 159:20, 183:4, 188:5, 188:24
DIE [2] - 128:1, 142:10
DIFFERENCE [6] - 111:16, 145:24, 181:8, 183:2, 186:22, 234:1
DIFFERENCES [5] - 111:3, 111:4, 131:11, 183:5, 186:19
DIFFERENT [34] - 17:5, 24:16, 28:20, 36:22, 36:25, 50:2, 50:8, 52:6, 53:11, 59:1, 59:18, 61:19, 133:2, 152:6, 174:4, 178:10, 178:21, 179:5, 180:19, 180:20, 182:21, 182:22, 185:14, 186:1, 187:20, 198:12, 205:21, 215:3, 229:24, 236:23, 236:25, 237:3, 241:11, 248:6
DIFFERENTLY [2] - 214:14, 246:5
DIFFERS [1] - 187:16
DIFFICULT [3] - 51:8, 140:23, 228:22
DIFFICULTY [2] - 117:14, 137:1
DIG [1] - 134:17
DIMINISHED [1] - 127:8
DIOCESAN [1] - 207:21
DIocese [3] - 206:10, 207:11, 208:1
DIRECT [20] - 16:6, 16:12, 16:25, 17:8,

17:13, 54:25, 74:17, 81:12, 82:20, 82:21, 84:6, 84:17, 86:13, 113:22, 114:7, 150:19, 151:22, 165:3, 230:5, 254:3
DIRECTED [2] - 20:5, 218:13
DIRECTION [2] - 16:17, 222:25
DIRECTLY [3] - 39:13, 205:19, 224:7
DIRECTOR [2] - 170:14, 170:15
DIRECTORS [1] - 30:13
DISADVANTAGE [1] - 103:19
DISAGREE [5] - 49:24, 51:6, 107:3, 226:3, 239:1
DISAGREED [1] - 85:23
DISAGREEING [1] - 245:23
DISCLOSE [1] - 120:17
DISCLOSED [3] - 65:8, 65:11, 172:19
DISCLOSURE [3] - 64:23, 65:1, 181:23
DISCONTINUED [1] - 80:24
DISCOURAGE [2] - 79:25, 96:14
DISCRETION [4] - 45:3, 45:4, 46:18, 46:20
DISCRIMINATION [7] - 9:11, 32:9, 48:6, 48:13, 49:17, 49:18, 71:6
DISCRIMINATORY [2] - 48:10, 48:13
DISCUSS [5] - 78:10, 143:14, 171:7, 172:6, 174:3
DISCUSSED [10] - 16:9, 17:18, 18:14, 41:3, 131:20, 141:25, 212:8, 224:12, 226:5, 243:7
DISCUSSING [1] - 42:1
DISCUSSION [6] - 35:13, 74:3, 218:18, 223:4, 237:14, 246:23
DISCUSSIONS [2] - 28:5, 73:14

DISEASE [4] - 126:19, 127:12, 127:22, 128:3
DISORDER [10] - 123:9, 123:20, 124:1, 124:15, 125:2, 125:19, 126:7, 126:8, 127:4, 137:20
DISORDERS [19] - 115:22, 117:16, 117:17, 117:18, 123:5, 123:11, 123:25, 125:1, 126:6, 128:8, 128:14, 128:17, 128:21, 137:16, 137:18, 141:25, 142:2, 142:3, 142:6
DISPARATE [7] - 47:18, 47:21, 47:24, 47:25, 48:1, 48:7, 48:9
DISRUPTED [1] - 202:6
DISRUPTION [1] - 202:3
DISRUPTIONS [1] - 149:11
DISRUPTIVE [1] - 72:9
DISSENT [7] - 84:19, 85:3, 85:16, 85:19, 85:21, 85:23, 86:22
DISSENTED [2] - 84:22, 85:2
DISSENTING [1] - 86:14
DISSERTATION [1] - 59:20
DISTINCTION [2] - 91:13, 213:10
DISTINGUISHED [2] - 60:16, 60:23
DISTRICT [6] - 1:1, 1:2, 17:19, 206:14, 207:16, 215:22
DIVERSE [2] - 62:3, 121:15
DIVIDED [10] - 16:18, 17:2, 36:6, 36:18, 37:6, 37:8, 37:18, 37:23, 38:7, 185:16
DIVISION [8] - 2:11, 4:4, 166:4, 170:10, 170:11, 170:12, 170:13, 170:15
DO [250] - 3:21, 3:22, 7:4, 9:8, 17:22, 18:12, 21:22, 23:22, 23:24, 23:25, 24:3,

24:15, 24:16, 30:16, 34:12, 37:11, 37:12, 39:1, 39:4, 39:10, 41:18, 42:2, 44:9, 45:2, 47:2, 47:13, 48:23, 48:25, 49:9, 49:10, 51:17, 52:25, 53:16, 53:18, 53:24, 54:6, 55:4, 55:13, 56:2, 56:9, 57:3, 59:22, 61:10, 61:11, 61:20, 62:3, 62:9, 62:10, 62:20, 66:17, 66:18, 68:16, 69:20, 70:3, 70:8, 70:16, 73:3, 78:23, 80:2, 83:19, 83:20, 84:5, 84:6, 84:19, 84:24, 85:2, 86:3, 86:16, 87:8, 89:4, 91:9, 91:14, 95:4, 95:16, 95:18, 95:21, 95:24, 96:4, 97:3, 99:3, 99:5, 99:11, 99:15, 99:18, 99:22, 101:1, 105:3, 106:2, 106:7, 106:8, 107:2, 108:24, 109:20, 110:10, 110:24, 111:13, 112:5, 114:2, 115:3, 115:7, 115:10, 115:12, 115:23, 116:14, 117:3, 117:5, 117:6, 117:7, 117:8, 117:9, 117:10, 117:12, 117:15, 118:2, 118:4, 118:5, 119:9, 119:14, 119:15, 119:22, 119:24, 121:13, 121:14, 121:21, 121:24, 122:1, 122:5, 123:19, 125:4, 127:10, 128:13, 129:2, 130:5, 130:8, 130:19, 130:25, 131:10, 132:9, 132:22, 133:13, 134:6, 137:11, 137:13, 138:9, 138:12, 138:16, 138:19, 138:21, 140:10, 141:5, 141:20, 144:7, 144:9, 144:10, 144:13, 144:16, 144:20, 146:6, 153:8, 153:18, 153:24, 154:2, 156:1, 156:13,

156:14, 156:15,
157:11, 158:16,
159:9, 162:17,
163:19, 165:23,
166:9, 166:10,
167:25, 169:4,
169:16, 170:7,
171:18, 173:11,
173:13, 174:11,
175:13, 177:7,
178:2, 178:3,
178:14, 179:10,
188:15, 189:10,
190:21, 194:11,
194:13, 194:22,
195:2, 196:25,
197:2, 198:3, 198:5,
198:7, 200:7,
200:10, 200:14,
200:16, 200:19,
203:4, 203:6, 204:5,
204:15, 205:7,
205:20, 205:24,
208:15, 208:19,
210:18, 212:13,
212:15, 212:24,
213:21, 214:19,
215:6, 216:23,
218:10, 219:1,
220:25, 227:24,
228:4, 229:7,
230:23, 230:25,
231:5, 234:12,
236:9, 246:3,
247:13, 249:4,
249:7, 252:15,
252:16, 252:22

DOCTOR [28] - 22:18,
23:13, 57:17, 60:19,
60:21, 61:6, 80:4,
117:3, 117:11,
119:9, 121:13,
121:25, 123:21,
131:23, 147:17,
165:21, 166:7,
167:23, 171:12,
175:19, 176:1,
177:6, 180:2,
183:23, 190:2,
192:5, 192:25, 193:5

DOCTOR'S [1] - 119:4

DOCTORAL [2] -
59:19, 61:6

DOCTORS [4] - 12:7,
60:23, 203:5, 239:16

DOCTRINE [1] - 15:15

DOCUMENT [24] -
56:9, 56:17, 68:2,
84:4, 114:13, 138:6,
143:6, 148:1, 158:5,

158:7, 158:11,
159:2, 159:19,
161:8, 165:9,
165:16, 175:23,
184:1, 207:2, 228:8,
228:10, 244:4,
244:10, 244:11

DOCUMENTED [2] -
81:24, 195:19

DOCUMENTS [16] -
5:19, 97:25, 114:18,
114:21, 143:3,
143:10, 186:6,
193:16, 193:18,
193:19, 193:21,
232:4, 232:6, 235:9,
251:25, 252:1

DOES [91] - 15:7,
15:12, 16:6, 18:11,
18:12, 19:16, 19:25,
20:7, 28:10, 28:11,
28:15, 28:25, 29:13,
29:21, 30:13, 30:25,
31:3, 31:5, 31:19,
36:11, 41:8, 43:25,
44:1, 44:9, 46:13,
46:23, 50:20, 50:21,
51:12, 53:13, 55:12,
61:24, 71:11, 75:7,
79:8, 81:17, 83:1,
83:3, 83:19, 85:11,
90:15, 96:24,
115:19, 118:11,
118:14, 122:14,
122:16, 122:17,
122:19, 122:20,
122:22, 123:25,
124:19, 125:17,
128:23, 135:8,
142:12, 147:5,
150:11, 159:15,
160:13, 160:15,
161:6, 169:13,
173:19, 174:12,
179:11, 179:18,
188:13, 208:12,
212:10, 214:16,
215:21, 216:1,
216:11, 216:12,
218:22, 224:20,
224:24, 225:4,
225:7, 225:25,
227:6, 232:12,
234:6, 238:20,
248:15, 248:19,
250:16

DOESN'T [2] - 13:10,
82:25

DOING [21] - 45:8,
45:24, 48:21, 97:22,

122:12, 129:7,
141:24, 157:13,
157:19, 159:16,
160:1, 160:16,
181:16, 193:14,
193:25, 210:11,
210:16, 221:25,
226:12, 246:15,
251:2

DOLLARS [4] - 13:2,
81:19, 92:16, 219:25

DON'T [92] - 15:22,
19:1, 24:4, 25:15,
26:25, 27:22, 31:14,
32:23, 34:19, 35:22,
35:23, 36:10, 36:23,
40:13, 40:18, 41:21,
42:6, 44:11, 45:21,
46:11, 51:15, 55:13,
57:2, 57:5, 62:15,
74:1, 75:18, 81:3,
90:15, 91:12, 92:19,
95:8, 108:21,
110:12, 110:14,
111:9, 127:5,
137:23, 139:14,
139:17, 140:7,
146:1, 150:2,
159:14, 160:10,
161:3, 161:4, 161:5,
161:7, 161:10,
161:11, 161:17,
161:25, 164:24,
183:9, 184:10,
192:24, 197:10,
197:20, 199:8,
199:13, 200:11,
202:5, 202:11,
202:22, 203:8,
206:15, 209:25,
215:5, 216:14,
223:6, 226:18,
228:7, 228:24,
233:24, 236:8,
236:10, 237:25,
238:15, 239:7,
243:16, 245:12,
245:25, 246:7,
247:9, 250:7,
250:23, 251:2,
251:3, 252:15,
252:23

DONALD [4] - 1:5,
2:19, 3:3

DONE [9] - 62:18,
64:1, 89:17, 109:25,
110:13, 184:5,
216:11, 220:7,
234:20

DOUBLED [1] - 90:9

DOUBT [3] - 20:14,
30:2, 99:18

DOWN [9] - 21:22,
70:13, 76:6, 175:3,
175:5, 189:11,
229:11, 234:24,
241:22

DOZENS [1] - 26:1

DR [48] - 22:1, 22:15,
23:6, 55:2, 56:7,
64:16, 65:7, 65:17,
84:25, 85:1, 85:3,
85:21, 86:9, 86:21,
93:6, 97:20, 104:24,
105:14, 113:9,
113:16, 113:25,
120:11, 142:24,
146:7, 147:22,
150:7, 151:8,
151:25, 152:17,
152:24, 162:13,
163:3, 163:4,
163:14, 163:16,
163:17, 164:4,
164:11, 165:6,
172:12, 173:10,
181:2, 182:5,
184:12, 191:25,
193:12, 193:16,
224:16

DRAFT [12] - 84:3,
158:19, 159:5,
159:10, 159:22,
160:3, 160:4,
160:14, 161:1,
161:5, 162:1, 242:16

DRAFTED [3] -
184:12, 227:23,
227:24

DRAW [3] - 49:15,
49:21

DRAWING [1] - 248:16

DRAWN [1] - 107:3

DRINK [1] - 252:24

DRIVE [1] - 171:17

DRIVING [1] - 156:21

DROP [3] - 26:24,
34:3, 187:20

DROPPED [2] - 187:1,
188:13

DROPPING [1] - 228:3

DRS [2] - 235:24,
236:14

DRUG [2] - 71:6, 78:5

DUE [8] - 13:14,
13:20, 81:14,
131:20, 198:13,
199:7, 202:21,
202:23

DUNK [1] - 226:22

DUPLICATIVE [2] -
23:23, 164:11

DURATION [1] - 124:3

DURING [13] - 28:6,
59:14, 59:23, 71:19,
71:24, 115:10,
116:2, 131:12,
133:22, 158:13,
168:18, 188:10,
188:11

DUTIES [1] - 118:10

DUTY [2] - 19:10, 35:5

E

EACH [5] - 3:15, 3:18,
5:11, 75:10, 220:1

EARLIER [20] - 19:1,
34:25, 35:13, 44:23,
100:2, 170:9, 171:1,
173:17, 181:2,
182:10, 192:5,
210:13, 212:8,
217:12, 219:1,
232:11, 233:10,
239:25, 240:3, 243:7

EARLY [1] - 126:13

EASILY [1] - 137:6

EAST [1] - 171:16

EASTERN [1] - 1:2

EASY [2] - 89:8,
226:23

ECONOMIC [9] - 7:9,
7:16, 7:17, 7:19,
14:6, 15:2, 15:13,
72:11, 220:4

ECONOMIST [1] -
85:3

EDITORIAL [2] -
101:15, 169:7

EDUCATION [6] -
56:24, 64:17, 72:9,
114:24, 115:23,
120:12

EDUCATIONAL [2] -
72:22, 166:23

EFFECT [34] - 15:1,
22:9, 23:19, 26:6,
37:19, 70:14, 71:1,
80:11, 83:4, 87:8,
94:7, 94:11, 96:5,
99:9, 104:15,
104:18, 112:14,
112:15, 136:13,
137:3, 141:6,
141:20, 144:21,
144:24, 145:7,
145:10, 145:15,
156:4, 170:24,
171:4, 188:23,

188:24, 192:14, 239:5
EFFECTIVE [42] - 10:12, 10:20, 11:12, 11:21, 12:1, 13:20, 22:11, 22:12, 23:20, 25:7, 70:23, 73:9, 74:14, 76:7, 77:6, 78:24, 79:1, 81:12, 83:9, 90:8, 92:13, 96:20, 135:21, 135:22, 135:23, 135:24, 156:3, 174:13, 174:16, 174:19, 174:21, 175:2, 176:5, 176:12, 177:2, 189:24, 189:25, 191:22, 195:20, 196:2, 216:17
EFFECTIVENESS [21] - 74:10, 75:4, 75:6, 75:10, 75:11, 81:23, 82:14, 83:20, 85:6, 86:2, 86:3, 90:11, 101:1, 174:11, 174:18, 175:9, 175:10, 175:12, 175:18, 176:8, 176:16
EFFECTS [12] - 19:15, 74:7, 74:10, 78:1, 103:20, 107:9, 107:17, 108:12, 174:4, 174:6, 190:15, 237:19
EFFICACY [3] - 78:1, 129:20, 175:5
EFFICIENT [1] - 8:14
EFFORTS [1] - 8:6
EIGHT [8] - 51:25, 54:10, 67:18, 67:21, 85:17, 87:5, 91:17, 92:7
EIGHTFOLD [1] - 91:24
EITHER [20] - 69:25, 73:7, 79:13, 87:21, 88:10, 90:22, 90:23, 91:20, 125:21, 136:20, 136:21, 159:6, 172:7, 186:22, 199:10, 199:13, 208:7, 214:12, 218:23, 234:1
ELABORATE [1] - 240:2
ELEMENT [1] - 240:12
ELEMENTS [1] - 17:13

ELEVATED [2] - 108:8, 155:10
ELICIT [1] - 163:1
ELICITED [1] - 24:8
ELIGIBLE [4] - 14:9, 217:25, 230:3, 231:10
ELIMINATE [2] - 199:21, 230:14
ELIMINATED [1] - 83:22
ELIMINATION [1] - 156:10
ELIZABETH [6] - 2:15, 4:20, 58:2, 58:3, 97:22, 143:1
ELMO [4] - 74:19, 81:7, 90:14, 101:11
ELSE [12] - 37:17, 52:3, 54:2, 93:3, 112:18, 143:8, 143:16, 148:19, 190:1, 196:8, 244:1, 252:7
ELSE'S [1] - 155:6
ELSEWHERE [1] - 7:14
EMERGENCY [2] - 167:22, 168:13
EMERGES [1] - 17:18
EMPHASIZED [1] - 226:24
EMPIRICAL [1] - 100:21
EMPLOYED [5] - 166:2, 200:4, 200:5, 200:11, 212:5
EMPLOYEE [7] - 32:5, 33:16, 34:22, 237:5, 240:3, 240:14, 247:4
EMPLOYEE'S [1] - 151:19
EMPLOYEES [15] - 13:8, 13:13, 27:5, 27:13, 31:17, 43:13, 52:13, 121:18, 208:8, 212:3, 244:9, 247:19, 249:4, 249:7, 249:13
EMPLOYER [38] - 7:4, 26:23, 29:24, 29:25, 30:5, 30:24, 32:17, 33:6, 33:9, 34:3, 34:21, 42:22, 48:5, 48:8, 71:3, 79:12, 90:4, 94:25, 98:21, 98:25, 146:4, 165:25, 199:22, 227:16, 228:4, 230:3, 230:13,

231:2, 235:5, 236:17, 240:4, 240:16, 243:15, 244:8, 247:5, 247:22
EMPLOYER'S [1] - 7:2
EMPLOYER-BASED [4] - 71:3, 79:12, 90:4, 94:25
EMPLOYER - SPONSORED [2] - 199:22, 230:3
EMPLOYERS [25] - 13:5, 13:11, 13:16, 13:17, 13:22, 23:5, 25:4, 27:3, 35:25, 96:10, 99:3, 99:11, 144:7, 144:10, 144:24, 149:23, 199:1, 227:24, 230:18, 231:24, 239:6, 244:25, 247:20, 249:13, 250:18
EMPLOYERS' [1] - 247:3
EMPPOWERED [1] - 177:20
ENACT [1] - 49:20
ENACTED [3] - 39:19, 43:6, 44:7
ENACTMENT [1] - 208:17
ENAMORED [1] - 240:18
ENCOUNTER [1] - 179:10
ENCOURAGED [1] - 12:14
END [10] - 53:17, 136:3, 181:18, 182:25, 183:1, 183:19, 186:5, 186:16, 187:1, 187:21
ENDEAVOR [2] - 239:4, 252:6
ENDED [1] - 209:17
ENDOCRINE [1] - 117:15
ENDOCRINOLOGIST [1] - 116:16
ENDOCRINOLOGY [8] - 114:4, 115:14, 115:17, 115:20, 116:2, 116:7, 116:9, 118:8
ENDOMETRIAL [1] - 108:16
ENDOMETRIOSIS [5] - 125:9, 125:10,

125:14, 125:16, 129:24
ENDS [1] - 134:13
ENFORCE [5] - 7:23, 21:7, 35:5, 233:19, 240:7
ENFORCED [1] - 233:23
ENFORCEMENT [1] - 240:13
ENFORCING [4] - 21:13, 33:25, 214:8, 214:24
ENGAGE [2] - 48:5, 225:19
ENGLAND [1] - 70:19
ENHANCES [1] - 129:20
ENJOIN [2] - 8:12, 215:6
ENOUGH [4] - 11:7, 51:1, 162:7, 246:4
ENROLL [1] - 14:3
ENROLLED [4] - 12:21, 182:16, 186:11, 187:25
ENROLLMENT [3] - 14:2, 25:1, 25:10
ENTIRE [5] - 28:13, 85:18, 85:19, 199:14, 223:17
ENTIRELY [1] - 232:20
ENTIRETY [2] - 100:24, 152:1
ENTITIES [27] - 26:2, 29:2, 41:7, 50:22, 51:2, 51:4, 99:22, 144:16, 197:23, 198:4, 198:23, 205:6, 229:21, 231:12, 232:2, 232:7, 232:9, 232:15, 232:17, 232:21, 232:23, 233:21, 243:20, 243:22, 243:24, 249:11
ENTITLED [20] - 30:22, 35:21, 36:19, 37:1, 37:19, 37:24, 38:7, 45:11, 45:19, 47:1, 47:3, 52:10, 84:19, 102:5, 219:5, 242:20, 251:6, 253:5
ENTITY [9] - 28:12, 31:22, 47:14, 48:15, 49:18, 50:5, 226:20, 230:13, 248:2
ENTRY [1] - 72:1

ENVIRONMENT [2] - 19:14, 21:5
ENVIRONMENTAL [2] - 19:5, 118:25
EPA [13] - 16:10, 18:15, 19:2, 19:6, 19:7, 19:8, 20:13, 21:1, 21:5, 35:12, 35:17, 66:10, 233:12
EPA'S [1] - 19:11
EPIDEMIOLOGY [2] - 115:25, 167:13
EQUAL [1] - 9:9
EQUALLY [8] - 36:6, 36:18, 37:5, 37:8, 37:18, 37:23, 38:7, 50:8
EQUALS [2] - 187:18, 187:19
ERA [1] - 239:23
ERISA [5] - 13:12, 24:25, 230:25, 240:6, 240:7
ERODED [1] - 19:21
ESCAPE [1] - 26:20
ESPECIALLY [3] - 59:19, 134:13, 220:7
ESQUIRE [11] - 1:11, 2:2, 2:3, 2:6, 2:6, 2:11, 2:15, 2:16, 2:16, 2:17, 2:17
ESSENCE [1] - 18:20
ESSENTIALLY [7] - 19:3, 139:4, 212:19, 216:15, 218:8, 218:13, 247:18
ESTABLISH [2] - 17:1, 111:3
ESTABLISHED [3] - 58:25, 155:23, 155:24
ESTABLISHES [1] - 235:13
ESTABLISHMENT [1] - 9:11
ESTIMATE [16] - 62:16, 62:18, 99:5, 133:19, 133:22, 136:23, 197:4, 228:22, 229:9, 229:12, 230:1, 237:18, 238:3, 238:4, 238:23, 239:2
ESTIMATED [3] - 81:13, 81:15, 229:16
ESTIMATES [5] - 12:24, 89:21, 229:8, 229:17, 235:8
ESTIMATING [1] - 91:23

ESTROGEN [5] - 127:5, 127:11, 127:20, 127:23, 128:1
ET [4] - 1:5, 2:19, 83:14, 205:4
ETHAN [3] - 2:11, 4:17, 25:22
EVALUATION [3] - 81:24, 117:13, 132:12
EVEN [30] - 14:24, 19:1, 24:23, 34:13, 37:7, 39:2, 40:19, 41:8, 42:6, 46:13, 50:8, 50:13, 50:20, 51:6, 51:15, 79:24, 80:2, 80:11, 96:13, 144:23, 153:9, 197:4, 198:19, 219:3, 226:9, 228:2, 228:24, 231:23, 244:24, 249:5
EVENING [2] - 6:1, 252:12
EVENLY [2] - 16:18, 17:2
EVENT [1] - 42:8
EVENTS [1] - 103:20
EVER [5] - 34:9, 61:21, 68:2, 124:14, 225:15
EVERY [10] - 37:20, 79:22, 94:20, 172:6, 192:25, 194:20, 197:3, 197:9, 239:19, 248:24
EVERYBODY [4] - 6:13, 33:1, 232:12, 232:13
EVERYONE [3] - 54:9, 101:11, 207:13
EVERYONE'S [1] - 104:8
EVERYTHING [8] - 24:7, 24:10, 55:15, 55:16, 55:23, 98:5, 164:3, 165:23
EVIDENCE [33] - 43:3, 43:24, 48:8, 55:11, 56:5, 62:10, 67:5, 68:4, 71:16, 83:12, 83:17, 83:19, 83:20, 85:9, 86:6, 100:21, 101:3, 106:7, 114:8, 152:3, 152:6, 155:19, 155:20, 155:24, 156:19, 158:11, 164:14, 172:21, 172:23,

191:1, 224:12, 229:22, 231:14
EVIDENCE-BASED [1] - 85:9
EVIDENTIARY [1] - 235:23
EXACT [2] - 50:1, 70:10
EXACTLY [7] - 12:8, 52:1, 159:21, 180:6, 210:24, 212:10, 228:22
EXAM [2] - 47:17, 47:18
EXAMINATION [9] - 54:25, 97:18, 105:6, 113:22, 142:22, 152:22, 165:3, 175:17, 193:10
EXAMPLE [17] - 12:2, 16:10, 27:8, 34:3, 71:18, 71:21, 80:16, 130:11, 169:21, 194:6, 194:24, 195:15, 199:16, 203:13, 219:16, 242:14, 250:25
EXAMPLES [4] - 62:24, 107:2, 168:9, 232:14
EXCELLENT [2] - 93:16, 155:21
EXCEPT [7] - 24:10, 36:20, 55:16, 55:23, 68:17, 215:21, 225:11
EXCEPTION [7] - 6:24, 26:19, 35:9, 44:18, 77:13, 222:15, 225:12
EXCEPTIONS [6] - 6:21, 6:24, 44:11, 44:13, 243:18, 250:10
EXCESSIVELY [2] - 123:12
EXCHANGE [1] - 219:19
EXCHANGES [2] - 220:3, 242:23
EXCISE [1] - 240:10
EXCLUDED [1] - 188:9
EXCLUSION [3] - 164:17, 244:4, 244:10
EXCLUSIVELY [1] - 63:9
EXCUSE [1] - 142:7
EXCUSED [3] - 113:6,

157:9, 204:4
EXECUTIVE [2] - 4:2, 48:16
EXEMPT [8] - 30:1, 32:17, 33:9, 196:16, 239:20, 245:1, 248:25, 249:15
EXEMPTING [1] - 242:15
EXEMPTION [64] - 6:17, 6:18, 27:15, 27:17, 27:18, 28:1, 28:2, 28:3, 28:7, 28:10, 28:22, 28:24, 29:1, 29:11, 29:18, 29:24, 33:5, 38:21, 38:22, 40:22, 42:22, 43:14, 43:23, 46:5, 46:6, 46:9, 46:14, 46:21, 50:10, 52:18, 95:10, 95:11, 95:14, 95:22, 99:6, 120:6, 120:7, 138:1, 138:2, 138:7, 138:13, 145:25, 190:18, 196:11, 197:12, 199:11, 201:12, 211:6, 211:15, 212:9, 232:3, 237:13, 240:12, 243:15, 243:16, 243:24, 244:9, 246:24, 248:7, 248:8, 250:13, 250:21, 251:1
EXEMPTIONS [44] - 6:18, 13:15, 25:7, 40:7, 40:22, 42:14, 44:9, 44:10, 44:22, 46:2, 46:11, 46:13, 104:16, 104:19, 104:22, 121:4, 141:6, 141:17, 141:19, 144:20, 145:2, 173:3, 196:14, 197:12, 198:20, 198:22, 198:23, 199:2, 199:7, 199:23, 220:18, 220:24, 221:23, 223:18, 224:4, 243:6, 243:8, 243:10, 243:11, 243:25, 249:25, 250:5, 250:6
EXERCISE [4] - 160:10, 225:19, 226:25, 247:15
EXERCISING [3] - 45:15, 46:19, 250:8

EXHAUSTIVELY [1] - 37:20
EXHIBIT [18] - 55:7, 55:23, 56:4, 56:8, 56:14, 68:1, 74:18, 95:11, 95:12, 101:7, 101:8, 114:6, 137:25, 138:1, 138:2, 163:6, 232:3, 232:8
EXHIBITS [5] - 24:11, 55:10, 55:19, 114:7, 251:19
EXIST [2] - 43:8, 225:4
EXISTED [1] - 196:14
EXISTENCE [4] - 43:5, 152:25, 198:20, 224:11
EXISTING [7] - 6:24, 67:10, 69:5, 69:18, 99:7, 220:18, 244:21
EXPAND [1] - 41:6
EXPANDED [3] - 40:14, 78:9, 211:8
EXPANDING [1] - 147:4
EXPANSION [3] - 12:22, 250:14, 250:22
EXPECT [5] - 76:1, 76:4, 77:6, 96:21, 237:17
EXPECTED [2] - 65:2, 75:21
EXPECTING [1] - 72:2
EXPENSE [1] - 208:6
EXPENSIVE [9] - 11:19, 134:4, 134:13, 176:25, 177:4, 191:21, 192:6, 192:8, 192:9
EXPERIENCE [19] - 64:18, 120:13, 127:16, 130:23, 130:25, 131:8, 133:22, 139:21, 140:21, 140:22, 141:1, 141:4, 173:22, 178:22, 178:23, 189:16, 191:6, 191:8, 230:8
EXPERIENCED [2] - 131:14, 179:6
EXPERIENCING [2] - 128:6, 201:19
EXPERT [27] - 64:18, 64:23, 65:1, 65:3, 65:11, 65:13, 65:18, 65:19, 66:7, 69:7, 96:2, 97:5, 100:12,

100:15, 112:22, 120:13, 120:17, 120:18, 138:20, 139:11, 152:11, 152:14, 164:17, 172:12, 172:19, 172:23, 241:12
EXPERTISE [14] - 46:24, 47:4, 47:8, 139:1, 141:12, 142:16, 153:6, 220:9, 220:15, 220:17, 222:2, 223:3, 223:10, 224:4
EXPERTS [6] - 66:21, 84:4, 164:18, 172:19, 172:22, 230:8
EXPLAIN [3] - 75:1, 180:5, 187:14
EXPLAINED [3] - 35:4, 51:8, 78:1
EXPLAINING [1] - 26:23
EXPLAINS [1] - 19:16
EXPLICIT [1] - 243:2
EXPLORED [1] - 39:23
EXPOSES [1] - 43:15
EXPRESSED [2] - 96:24, 240:20
EXPRESSLY [6] - 39:14, 52:10, 215:21, 216:1, 216:11, 220:7
EXTEND [2] - 134:12, 208:11
EXTENSIVE [1] - 62:16
EXTENSIVELY [1] - 216:24
EXTENT [23] - 5:18, 18:23, 20:4, 20:14, 66:6, 86:9, 91:20, 112:23, 120:18, 123:14, 124:7, 141:9, 142:4, 145:4, 172:23, 209:7, 209:10, 209:24, 215:21, 225:10, 233:10, 235:25, 252:18
EXTRAORDINARY [1] - 236:18
EXTREMELY [1] - 228:22

F

F.3D [1] - 164:17
F.SUPP.2D [1] -

206:11
FACE [11] - 14:21,
 14:22, 125:2, 151:1,
 151:9, 201:23,
 202:10, 212:6,
 224:7, 244:4, 244:11
FACED [5] - 47:14,
 50:6, 149:6, 149:7,
 149:15
FACING [2] - 201:25,
 202:12
FACT [32] - 9:19, 17:9,
 17:10, 21:14, 22:10,
 23:19, 27:11, 30:14,
 32:6, 32:8, 65:7,
 69:12, 74:14, 107:8,
 107:16, 161:20,
 161:25, 188:13,
 192:20, 209:3,
 220:19, 224:18,
 225:5, 227:4,
 228:23, 238:18,
 242:12, 244:17,
 246:25, 249:5,
 252:13, 252:20
FACTOR [1] - 211:21
FACTORS [4] - 41:11,
 42:1, 74:12, 156:6
FACTS [4] - 6:4, 9:19,
 9:25, 163:20
FACULTY [4] - 58:14,
 61:1, 61:9, 116:17
FAIL [2] - 11:16, 13:19
FAILED [3] - 21:7,
 119:14, 238:7
FAILING [3] - 96:18,
 240:10, 240:11
FAILS [1] - 48:10
FAILURE [6] - 120:17,
 123:6, 126:7,
 126:16, 126:22,
 128:18
FAILURES [1] - 75:12
FAIR [8] - 11:7, 59:6,
 62:9, 63:14, 88:20,
 162:7, 226:16, 246:4
FAIRLY [6] - 17:12,
 216:13, 223:15,
 233:2, 233:12, 235:6
FALL [3] - 43:14, 47:7,
 180:11
FALLBACK [1] -
 230:25
FALLS [1] - 48:16
FAMILIAR [18] - 5:16,
 56:17, 63:14, 63:20,
 74:20, 87:19,
 105:10, 105:13,
 105:24, 107:20,
 119:25, 120:3,

120:6, 138:3,
 144:19, 166:11,
 194:19, 198:2
FAMILIARIZED [1] -
 98:3
FAMILIES [1] - 12:12
FAMILY [13] - 14:1,
 14:6, 72:12, 81:24,
 81:25, 111:23,
 167:3, 167:5,
 175:11, 176:24,
 184:24, 194:17
FAR [11] - 37:4, 95:19,
 131:18, 136:22,
 142:15, 145:11,
 145:19, 151:21,
 199:3, 218:15, 246:9
FASHION [1] - 53:23
FASTER [1] - 53:23
FATAL [1] - 14:24
FAVORS [1] - 251:11
FCRR [1] - 1:19
FDA [4] - 78:4, 166:16,
 178:18, 218:3
FDA-APPROVED [3] -
 166:16, 178:18,
 218:3
FEAR [1] - 191:22
FEDERAL [33] - 17:22,
 17:23, 18:2, 18:3,
 26:10, 33:25, 35:3,
 35:6, 35:10, 48:16,
 50:4, 64:23, 64:24,
 101:7, 101:12,
 105:15, 105:19,
 111:6, 111:25,
 169:19, 172:20,
 172:21, 206:15,
 212:13, 217:17,
 219:21, 220:3,
 231:20, 232:5,
 233:14, 237:12,
 240:22, 242:23
FEDERALLY [2] -
 179:21, 179:24
FEDERALLY -
QUALIFIED [2] -
 179:21, 179:24
FEE [2] - 12:17,
 192:11
FEEL [8] - 24:2, 52:3,
 93:13, 96:17,
 116:23, 129:9,
 177:23, 247:4
FEES [1] - 134:22
FELL [1] - 145:1
FELLOWS [2] - 118:7,
 122:21
FELLOWSHIP [8] -
 115:12, 115:13,

116:2, 167:11,
 167:13, 167:16,
 167:17, 168:12
FELT [1] - 86:6
FEMALE [5] - 76:8,
 76:20, 103:7,
 126:10, 172:4
FERTILITY [3] - 77:14,
 116:10, 117:19
FERTILIZATION [1] -
 129:8
FEW [10] - 28:1, 86:13,
 118:22, 163:14,
 165:5, 165:24,
 171:8, 183:17,
 217:11, 242:8
FIELD [9] - 35:7,
 58:22, 58:24, 59:1,
 59:7, 96:2, 115:20,
 193:23, 195:6
FIFTH [2] - 16:21,
 16:22
FIGHT [1] - 11:6
FILE [2] - 240:5, 247:5
FILL [3] - 11:10,
 11:15, 133:8
FILLING [3] - 132:24,
 133:12, 155:1
FINAL [13] - 38:17,
 39:7, 39:10, 39:23,
 84:3, 157:20,
 159:24, 160:15,
 160:25, 216:5,
 217:23, 237:21,
 238:12
FINALIZATION [1] -
 83:24
FINALIZED [1] - 83:25
FINALLY [5] - 26:9,
 212:7, 217:10,
 232:1, 244:2
FINANCIAL [10] -
 10:5, 13:24, 14:21,
 16:7, 16:25, 17:9,
 133:24, 149:6,
 177:22, 179:14
FINANCIALLY [2] -
 177:23, 179:16
FIND [7] - 20:18, 37:5,
 91:15, 179:18,
 181:5, 205:20, 227:3
FINDING [4] - 39:17,
 108:7, 183:22,
 205:19
FINDINGS [7] - 9:19,
 83:18, 112:5, 163:7,
 188:14, 252:13,
 252:20
FINE [9] - 5:15, 33:13,
 33:14, 49:21, 210:9,

222:18, 234:14,
 234:17, 249:10
FINER [1] - 70:19
FINES [1] - 208:12
FINISH [3] - 3:13,
 177:21
FINISHED [2] - 87:1,
 161:8
FIREFIGHTERS [3] -
 47:18, 47:19, 47:22
FIRST [34] - 1:20,
 18:15, 21:25, 25:2,
 26:8, 26:15, 28:23,
 30:20, 42:18, 43:16,
 52:7, 68:6, 68:18,
 68:22, 74:20, 85:25,
 94:4, 97:25, 101:10,
 101:21, 101:22,
 106:10, 113:20,
 114:13, 126:6,
 131:15, 143:3,
 172:18, 185:15,
 185:18, 185:24,
 186:7, 211:14
FIRSTHAND [1] -
 123:22
FISCHER [35] - 2:6,
 4:8, 4:9, 15:24, 16:3,
 16:4, 16:15, 18:6,
 18:10, 18:13, 20:3,
 20:20, 20:21, 20:24,
 210:7, 210:18,
 210:21, 210:23,
 211:25, 213:13,
 214:7, 214:23,
 215:14, 219:7,
 219:13, 222:8,
 222:23, 227:22,
 234:11, 234:15,
 234:19, 234:21,
 234:23, 246:21,
 252:8
FIVE [13] - 9:8, 9:9,
 74:2, 82:4, 134:11,
 134:12, 134:19,
 135:1, 135:3,
 135:16, 135:17,
 155:13, 226:2
FIVE-YEAR [1] - 135:1
FIVEFOLD [4] - 155:8,
 156:1, 156:15,
 156:21
FLASHES [1] - 127:20
FLATLY [1] - 37:16
FLAWED [5] - 212:25,
 248:11, 248:12,
 248:13
FLIES [1] - 224:6
FLIP [5] - 56:11,
 56:14, 165:12,

165:18, 185:8
FLOATING [2] - 33:1,
 33:4
FLOOR [3] - 1:20, 2:3,
 2:7
FLUCTUATIONS [1] -
 154:18
FOCUS [16] - 57:8,
 57:11, 61:2, 61:3,
 69:15, 73:12, 87:23,
 104:8, 108:25,
 109:4, 119:8,
 167:19, 167:21,
 168:14, 211:13,
 237:10
FOCUSED [4] - 46:6,
 85:16, 100:25,
 105:20
FOCUSES [1] - 110:18
FOCUSING [2] - 8:5,
 8:9
FOIA [1] - 232:4
FOLKS [4] - 3:10,
 110:6, 207:7, 207:9
FOLLOW [6] - 33:20,
 93:12, 94:21,
 181:11, 212:23,
 213:7
FOLLOWED [1] -
 233:5
FOLLOWING [12] -
 6:1, 6:6, 10:1, 63:12,
 90:5, 103:8, 112:12,
 167:7, 167:10,
 168:13, 196:3,
 217:18
FONT [1] - 104:9
FOOD [1] - 78:5
FOOTNOTE [8] -
 102:4, 104:9,
 104:10, 106:11,
 109:6, 160:22,
 160:25
FOR [377] - 1:2, 2:8,
 2:19, 3:9, 3:10, 3:15,
 3:16, 3:18, 4:3, 5:1,
 5:12, 5:23, 6:15, 7:3,
 7:8, 7:12, 7:20, 8:15,
 8:16, 9:14, 10:5,
 10:9, 11:12, 11:19,
 12:2, 12:11, 12:17,
 13:23, 14:9, 15:9,
 15:22, 16:4, 19:24,
 20:9, 20:25, 22:5,
 23:2, 23:4, 24:7,
 24:10, 24:20, 25:22,
 27:6, 27:7, 27:22,
 29:8, 31:1, 33:17,
 35:9, 39:16, 40:5,
 40:8, 40:10, 40:20,

41:11, 41:13, 41:20,
42:14, 43:4, 43:14,
43:16, 43:21, 44:17,
45:1, 45:4, 46:2,
46:8, 46:11, 47:17,
47:20, 47:23, 48:6,
50:19, 50:23, 52:16,
52:22, 54:22, 55:4,
55:16, 57:20, 57:25,
59:10, 61:9, 62:1,
64:11, 64:19, 65:6,
65:17, 67:3, 67:11,
67:13, 67:14, 68:17,
69:3, 71:17, 71:18,
71:20, 72:9, 72:10,
72:11, 72:13, 72:23,
73:10, 73:16, 77:19,
78:8, 78:24, 79:13,
79:17, 80:15, 82:4,
82:16, 85:11, 86:9,
90:7, 96:3, 96:9,
96:19, 96:25, 97:5,
97:6, 101:11, 103:6,
103:21, 106:2,
106:3, 106:13,
107:15, 108:3,
108:8, 108:9,
110:18, 112:21,
113:14, 113:19,
113:24, 114:2,
116:20, 116:21,
117:12, 117:13,
119:15, 120:17,
123:5, 123:17,
123:25, 124:6,
124:8, 124:11,
125:25, 127:13,
128:16, 128:19,
129:6, 129:8,
129:17, 130:3,
130:5, 130:11,
130:15, 130:16,
131:20, 132:2,
132:13, 132:17,
132:18, 132:23,
133:2, 133:13,
133:20, 134:11,
134:25, 135:3,
135:11, 135:25,
136:4, 136:5,
136:20, 136:25,
137:11, 137:16,
139:8, 139:9,
139:15, 140:2,
140:5, 140:8,
140:16, 142:1,
142:6, 142:9,
142:12, 144:5,
145:5, 145:13,
147:1, 147:22,
148:16, 149:2,

153:5, 153:13,
154:5, 154:19,
154:22, 155:17,
155:19, 155:21,
156:12, 156:14,
156:18, 156:21,
157:11, 157:12,
157:16, 160:5,
162:21, 163:25,
164:6, 164:8,
164:23, 165:9,
165:16, 166:15,
166:23, 167:4,
169:5, 169:6, 169:8,
169:21, 170:14,
170:15, 170:16,
170:19, 172:13,
172:18, 172:22,
173:19, 173:23,
174:10, 174:23,
177:25, 178:11,
179:17, 179:19,
179:22, 180:18,
180:24, 181:14,
182:10, 182:16,
183:4, 183:12,
184:1, 184:16,
184:18, 184:19,
184:20, 184:24,
187:7, 187:12,
188:1, 188:12,
188:15, 189:11,
190:5, 190:12,
190:15, 192:5,
192:10, 194:6,
194:23, 194:25,
195:8, 195:15,
195:17, 196:4,
196:5, 196:19,
196:23, 197:12,
198:12, 198:18,
198:23, 199:16,
199:19, 200:17,
200:24, 201:8,
201:17, 203:13,
203:17, 203:21,
203:23, 204:13,
204:23, 205:4,
205:10, 205:24,
206:15, 206:22,
209:10, 210:16,
210:19, 211:6,
211:14, 211:18,
211:19, 213:25,
214:6, 214:18,
215:23, 217:2,
217:6, 217:15,
220:2, 220:16,
220:18, 220:23,
221:10, 221:11,
221:14, 221:18,

221:23, 223:2,
223:22, 224:13,
225:11, 225:22,
226:10, 226:23,
228:22, 230:3,
230:18, 231:10,
233:1, 233:24,
234:5, 234:12,
235:13, 237:6,
240:3, 240:9,
240:10, 240:11,
240:23, 241:15,
241:25, 242:12,
242:14, 243:24,
246:24, 248:17,
248:20, 249:10,
249:23, 250:3,
250:17, 251:1,
251:3, 251:4, 251:8,
251:18, 251:20,
251:23, 252:19
FORCE [4] - 37:24,
45:14, 68:25, 156:21
FORCED [2] - 7:10,
14:10
FOREGO [1] - 10:19
FOREGOING [1] -
253:3
FORGET [1] - 18:17
FORGIVE [2] - 15:19,
123:21
FORGO [2] - 178:25,
191:18
FORGOES [1] - 208:1
FORM [9] - 51:3, 51:4,
65:8, 145:6, 145:14,
156:3, 161:7,
184:15, 218:15
FORMALIZED [1] -
84:2
FORMATS [1] - 186:1
FORMING [1] - 68:20
FORMS [8] - 11:19,
83:9, 90:9, 90:11,
92:11, 136:20,
145:18, 174:19
FORT [2] - 206:10,
207:11
FORTH [5] - 24:7,
109:5, 111:6, 160:5,
204:13
FORTUNATE [1] -
248:14
FORWARD [1] -
223:13
FOUND [9] - 16:25,
106:15, 108:2,
112:5, 112:9, 181:7,
183:1, 204:6, 205:18
FOUNDATION [3] -

24:1, 24:7, 56:2
FOUNDATIONAL [1] -
57:20
FOUNDATIONS [2] -
119:1, 169:24
FOUR [5] - 17:3, 26:7,
185:16, 223:24,
226:3
FOURS [2] - 42:11,
240:21
FRACTURE [1] -
127:24
FRAME [5] - 110:1,
180:24, 188:10,
188:11, 188:20
FRAMES [1] - 164:5
FRAMEWORK [1] -
221:1
FRANKLY [3] - 18:25,
219:14, 226:8
FRAUGHT [1] - 239:4
FREE [9] - 12:4, 33:1,
33:4, 52:3, 93:14,
140:18, 208:8,
225:19, 239:16
FREE-FLOATING [2] -
33:1, 33:4
FREEDOM [3] - 47:9,
190:11, 247:10
FREQUENCY [2] -
123:13, 195:11
FREQUENT [1] -
123:13
FREQUENTLY [2] -
169:6, 169:9
FRIENDS [1] - 164:22
FROM [145] - 3:12,
4:14, 6:7, 12:20,
12:25, 17:5, 19:5,
19:8, 19:14, 25:24,
26:17, 33:25, 34:15,
35:25, 39:2, 43:17,
45:7, 45:23, 46:16,
48:13, 48:23, 50:7,
53:21, 55:2, 55:3,
58:9, 59:1, 65:18,
66:10, 70:21, 75:2,
78:1, 79:25, 84:22,
91:6, 93:8, 94:3,
94:23, 94:24, 95:1,
96:11, 103:3,
104:22, 106:12,
107:3, 111:6, 112:5,
115:5, 115:11,
115:14, 117:16,
121:14, 121:16,
121:17, 121:20,
121:21, 122:10,
123:1, 125:18,
126:16, 126:19,

128:1, 128:2,
128:14, 129:3,
129:12, 133:11,
134:23, 143:13,
145:24, 153:24,
154:4, 157:1,
157:20, 158:22,
160:22, 161:5,
162:12, 163:1,
167:24, 169:4,
169:12, 171:23,
174:14, 181:12,
181:24, 184:4,
184:21, 184:25,
185:2, 185:3,
185:10, 186:3,
189:5, 191:5,
191:19, 194:1,
196:16, 198:8,
203:3, 203:7,
203:14, 204:18,
204:24, 205:12,
205:14, 206:13,
206:17, 207:4,
207:15, 207:16,
207:20, 208:3,
208:20, 214:8,
214:24, 217:7,
218:15, 221:15,
223:18, 224:4,
224:16, 225:3,
230:7, 231:24,
232:4, 236:14,
237:7, 237:16,
238:10, 239:13,
241:10, 242:16,
243:6, 243:23,
244:11, 245:1,
247:18, 249:6,
249:25, 252:8,
252:17, 253:4
FRONT [12] - 11:13,
11:20, 92:19,
107:22, 114:6,
134:8, 134:21,
178:19, 192:7,
192:9, 192:11,
238:16
FULL [10] - 7:25,
54:21, 78:19, 81:5,
101:22, 113:18,
190:7, 190:16,
191:19, 218:3
FULLY [3] - 106:7,
229:6, 230:24
FULLY-INSURED [1] -
230:24
FUNCTION [3] -
48:17, 126:2, 227:22
FUNCTIONING [2] -

<p>115:22, 126:9 FUNDAMENTAL [1] - 241:10 FUNDAMENTALLY [1] - 238:25 FUNDED [21] - 118:20, 118:23, 118:24, 169:16, 169:18, 169:19, 169:23, 169:24, 169:25, 170:5, 170:6, 170:18, 171:2, 180:10, 230:4, 231:10, 231:19, 231:20, 231:24, 237:6, 237:7 FUNDING [4] - 14:9, 103:5, 180:11, 231:11 FURTHER [21] - 7:16, 51:22, 73:16, 97:11, 105:1, 109:1, 112:17, 120:10, 134:25, 142:19, 156:23, 193:6, 203:25, 209:19, 217:8, 226:18, 246:18, 246:19, 248:17, 252:8, 252:10 FUTURE [3] - 147:6, 173:20, 206:22 FUTURES [1] - 69:2</p>	<p>101:19, 102:23, 103:25, 117:11, 123:1, 128:10, 130:18, 138:3, 180:4, 187:5, 209:1, 247:13 GENERATE [1] - 188:16 GENERATED [1] - 94:21 GENERIC [1] - 145:17 GEORGIA [1] - 206:14 GESTATIONAL [1] - 168:18 GET [45] - 7:13, 9:1, 41:19, 51:15, 53:14, 53:17, 53:24, 54:9, 72:3, 76:4, 76:6, 87:21, 88:5, 116:24, 126:3, 127:7, 131:22, 133:10, 137:12, 137:14, 154:17, 156:11, 166:21, 179:3, 182:19, 188:4, 210:13, 211:4, 212:4, 215:8, 218:17, 219:1, 220:25, 223:23, 224:20, 227:9, 228:6, 229:11, 236:10, 241:24, 247:13, 248:13, 249:4, 249:7, 252:6 GETS [3] - 13:25, 161:9, 174:25 GETTING [11] - 76:18, 92:14, 104:9, 129:10, 133:12, 139:2, 177:14, 203:15, 232:1, 249:13, 250:18 GG-13(A)(4) [1] - 45:3 GIVE [19] - 18:22, 26:16, 34:4, 39:3, 43:12, 52:2, 60:1, 61:13, 62:24, 74:19, 136:22, 157:4, 162:25, 168:9, 197:4, 216:12, 227:20, 241:8, 250:6 GIVEN [17] - 8:1, 19:18, 25:14, 35:19, 36:9, 44:8, 52:16, 63:18, 63:24, 70:25, 77:24, 210:12, 216:9, 232:19, 238:18, 248:5 GIVES [3] - 190:10, 235:12, 240:23</p>	<p>GIVING [1] - 168:1 GLOBAL [1] - 15:16 GLOBALLY [1] - 110:20 GLOSS [2] - 19:24, 20:4 GLUCOSE [1] - 71:22 GO [49] - 5:21, 8:14, 9:6, 9:24, 42:1, 42:12, 42:15, 46:3, 51:22, 54:6, 54:14, 56:24, 56:25, 60:10, 66:15, 75:24, 80:9, 80:21, 87:20, 106:9, 114:24, 116:22, 121:11, 126:1, 137:17, 137:23, 148:12, 161:23, 163:19, 164:3, 164:23, 165:1, 173:8, 173:14, 185:6, 186:14, 214:3, 214:25, 221:21, 222:7, 231:10, 234:22, 236:11, 237:6, 239:10, 249:9, 252:22, 252:24 GOAL [1] - 180:7 GOALS [3] - 177:20, 177:22 GOES [10] - 51:13, 51:20, 68:8, 139:1, 151:21, 161:9, 225:23, 227:11, 248:15 GOING [62] - 3:20, 3:21, 14:11, 17:25, 20:15, 22:17, 26:16, 31:12, 32:8, 32:21, 34:3, 34:12, 34:19, 34:22, 41:4, 41:22, 48:25, 51:23, 54:5, 59:13, 66:7, 74:18, 76:6, 81:7, 82:16, 87:21, 101:6, 101:10, 104:8, 116:23, 116:24, 119:3, 121:2, 126:5, 151:17, 161:17, 162:4, 165:23, 173:1, 173:2, 182:1, 188:25, 190:25, 191:1, 193:13, 199:16, 200:12, 205:20, 210:18, 216:16, 218:14, 223:9, 227:16, 234:5, 235:4, 235:5, 238:25, 243:22,</p>	<p>244:6, 244:15, 247:7, 250:24 GOLDMAN [105] - 2:2, 4:1, 4:2, 5:6, 5:7, 5:9, 5:22, 5:23, 8:1, 8:8, 8:24, 9:7, 9:25, 11:3, 11:7, 15:4, 15:11, 15:19, 15:25, 16:5, 20:22, 20:24, 21:4, 21:19, 22:14, 23:9, 23:12, 24:13, 24:22, 25:12, 25:17, 54:7, 54:15, 55:1, 55:24, 56:6, 57:6, 58:7, 64:15, 65:4, 65:16, 65:22, 65:25, 66:3, 66:16, 80:10, 84:12, 85:15, 86:12, 87:21, 88:1, 90:13, 93:15, 93:18, 97:8, 97:11, 98:12, 105:4, 105:7, 105:23, 109:1, 111:11, 112:17, 113:8, 113:23, 116:19, 117:1, 119:3, 119:7, 120:10, 120:24, 121:5, 121:12, 132:8, 133:7, 136:7, 136:10, 139:13, 139:19, 139:20, 141:3, 141:18, 142:19, 147:16, 148:3, 148:18, 150:1, 150:18, 151:21, 152:21, 152:23, 156:23, 158:1, 158:5, 158:10, 158:18, 159:17, 160:18, 160:21, 161:21, 161:24, 162:7, 252:11, 254:5, 254:9 GONE [8] - 22:9, 23:18, 70:13, 71:20, 163:20, 189:11, 205:17, 248:3 GOOD [46] - 4:5, 4:8, 4:16, 4:19, 4:22, 4:25, 5:3, 5:20, 9:18, 16:3, 25:21, 39:13, 39:17, 40:8, 41:12, 41:14, 41:19, 41:22, 42:2, 42:5, 42:6, 42:8, 58:17, 94:21, 97:20, 97:21, 97:24, 136:4, 142:24, 142:25, 160:12, 162:11, 193:12, 193:15, 209:13, 209:23, 210:21,</p>	<p>210:22, 213:23, 214:21, 216:14, 219:16, 225:6, 246:24 GOT [7] - 58:8, 101:14, 103:13, 183:3, 188:9, 188:10, 208:21 GOVERNING [2] - 26:11, 45:5 GOVERNMENT [55] - 13:24, 14:10, 17:7, 18:3, 26:10, 32:6, 33:25, 35:3, 35:6, 39:25, 40:2, 50:4, 51:13, 56:4, 66:23, 111:25, 158:13, 160:23, 161:13, 169:19, 215:16, 219:21, 221:1, 221:16, 222:9, 222:10, 224:1, 224:10, 224:22, 225:1, 225:10, 226:7, 226:12, 226:21, 227:1, 227:7, 228:23, 231:20, 231:23, 232:5, 232:11, 232:13, 233:15, 233:19, 234:25, 240:23, 247:16, 247:18, 247:21, 248:15, 248:23, 248:24, 249:17, 249:21 GOVERNMENT 'S [7] - 16:23, 100:15, 152:14, 219:4, 221:6, 231:16, 250:22 GOVERNMENT - FUNDED [1] - 231:20 GRADUATE [4] - 57:13, 58:15, 115:1, 115:5 GRADUATED [2] - 167:1, 171:23 GRANDFATHER [5] - 52:12, 205:18, 209:9, 224:11, 224:17 GRANDFATHERED [23] - 52:15, 52:20, 52:24, 53:9, 53:12, 53:21, 145:2, 196:15, 196:22, 197:8, 205:7, 205:11, 205:18, 206:1, 206:21,</p>
G				
<p>GAIN [1] - 168:18 GAP [2] - 69:18, 70:9 GAPS [1] - 69:3 GAVE [4] - 48:4, 133:9, 153:1, 184:23 GENDER [1] - 57:13 GENERAL [30] - 2:2, 4:2, 4:7, 4:9, 4:10, 4:14, 4:15, 4:17, 30:20, 44:21, 50:4, 67:15, 94:19, 96:12, 99:16, 116:6, 142:4, 145:19, 148:6, 149:20, 164:4, 166:3, 166:4, 167:11, 167:12, 170:10, 184:22, 194:2, 216:4 GENERAL 'S [1] - 143:14 GENERALLY [20] - 11:25, 37:7, 47:9, 47:10, 59:14, 62:20, 79:18, 87:19,</p>				

206:22, 207:22, 207:24, 207:25, 208:1, 208:5, 209:8, 224:13	60:17, 115:9, 116:7, 118:7	239:2, 239:9	106:25, 108:9, 118:20, 120:25, 124:2, 130:12, 132:15, 132:16, 134:6, 134:7, 135:2, 137:1, 137:4, 139:10, 140:2, 140:14, 145:5, 145:10, 145:19, 146:8, 146:13, 147:8, 147:18, 147:24, 148:17, 148:18, 148:25, 149:6, 149:7, 149:11, 149:15, 155:8, 155:18, 160:4, 161:13, 163:17, 165:22, 171:20, 173:23, 173:25, 174:17, 184:13, 189:8, 189:22, 190:2, 190:4, 190:6, 194:1, 195:19, 197:3, 197:9, 198:11, 202:6, 207:6, 207:12, 208:16, 208:18, 211:3, 213:1, 213:5, 215:16, 220:9, 220:11, 220:14, 222:2, 223:4, 223:10, 224:3, 225:15, 225:20, 227:13, 227:14, 227:17, 229:4, 230:9, 232:22, 236:2, 239:14, 240:6, 240:8, 242:12, 242:15, 244:13, 247:5, 248:24, 249:17	34:17, 34:18, 35:19, 35:23, 35:24, 37:7, 37:20, 41:3, 41:17, 41:18, 41:21, 42:1, 42:6, 42:17, 44:12, 44:21, 44:25, 46:12, 46:18, 46:23, 48:25, 50:21, 51:11, 51:21, 52:3, 53:4, 53:16, 55:7, 55:13, 55:15, 56:2, 57:19, 58:6, 58:17, 58:18, 60:12, 60:25, 62:12, 62:15, 62:17, 62:18, 62:20, 62:21, 62:25, 63:3, 63:5, 63:7, 63:10, 63:17, 63:19, 63:23, 64:1, 65:5, 65:18, 65:20, 65:23, 67:5, 68:2, 70:11, 71:19, 71:22, 72:2, 72:10, 73:3, 73:8, 73:12, 77:4, 79:11, 79:16, 80:14, 82:2, 82:5, 83:19, 85:5, 85:7, 88:10, 89:17, 89:20, 89:22, 91:20, 92:17, 92:19, 93:9, 93:13, 93:21, 93:25, 95:9, 95:13, 95:21, 96:4, 96:15, 96:20, 97:3, 97:8, 98:18, 99:5, 99:6, 99:18, 100:11, 100:14, 100:19, 100:23, 101:3, 101:15, 102:2, 103:19, 104:25, 105:3, 105:19, 105:20, 106:25, 107:2, 111:2, 111:4, 111:20, 112:5, 112:18, 112:19, 115:23, 117:20, 118:22, 118:24, 121:15, 122:2, 122:23, 122:24, 124:1, 124:14, 124:22, 125:4, 125:20, 125:24, 127:8, 129:15, 129:24, 130:25, 131:4, 131:8, 131:11, 131:14, 132:16, 133:23, 136:24, 136:25, 137:23, 138:6, 138:8, 138:14, 138:17, 138:21, 140:7, 140:12, 141:1, 141:5, 141:7, 141:20, 141:25,
GRANDFATHERING [1] - 157:14	H	HAPPENED [4] - 86:25, 147:18, 209:24, 211:3		
GRANT [8] - 43:7, 45:4, 45:22, 216:4, 223:15, 236:18, 248:15, 251:12	HABITS [1] - 102:5	HAPPENING [1] - 126:18		
GRANTED [1] - 156:7	HAD [99] - 5:10, 6:12, 6:13, 12:10, 16:24, 19:8, 19:10, 19:20, 21:8, 30:8, 35:13, 36:5, 39:19, 39:21, 65:17, 70:13, 71:22, 79:9, 79:11, 80:18, 82:9, 84:2, 85:8, 85:25, 86:5, 86:6, 87:8, 90:4, 90:6, 91:5, 91:7, 91:8, 95:13, 96:15, 96:16, 105:8, 109:5, 110:7, 112:1, 112:13, 123:22, 124:14, 133:13, 135:6, 137:1, 145:5, 145:22, 146:1, 148:25, 149:11, 153:10, 153:17, 153:18, 155:13, 156:12, 164:19, 167:20, 181:14, 181:23, 182:13, 184:5, 187:1, 187:7, 189:19, 189:22, 190:17, 191:10, 192:20, 194:2, 194:9, 194:11, 198:13, 200:5, 200:14, 203:11, 205:17, 205:24, 208:23, 208:24, 209:16, 209:21, 209:23, 210:12, 211:12, 218:6, 218:21, 220:5, 236:3, 236:21, 240:20, 241:23, 247:22, 248:3, 252:12	HAPPENS [5] - 29:23, 127:10, 137:14, 177:2, 222:18		
GRANTING [1] - 27:10		HAPPY [6] - 49:22, 148:10, 157:18, 161:16, 209:15, 227:8		
GRANTS [3] - 118:20, 118:22, 170:5		HARD [4] - 6:15, 20:11, 114:15, 136:24		
GREAT [4] - 59:24, 165:15, 165:21, 208:6		HARD-PRESSED [1] - 136:24		
GREATER [3] - 128:5, 134:10, 156:13		HARM [30] - 7:16, 7:19, 13:25, 14:21, 14:22, 14:24, 15:2, 15:13, 15:14, 16:7, 16:25, 17:9, 19:5, 98:20, 98:24, 149:7, 151:12, 201:23, 201:25, 202:18, 227:10, 231:3, 233:5, 235:11, 248:24, 251:10		
GROUND [3] - 9:4, 164:18		HARMED [9] - 14:19, 21:7, 23:4, 234:2, 234:3, 234:5, 234:24, 235:4, 235:10		
GROUP [14] - 42:24, 43:25, 66:21, 84:3, 98:21, 98:25, 122:11, 182:19, 183:4, 183:13, 202:20, 221:8, 221:9		HARMFUL [1] - 19:14		
GROUPS [10] - 52:19, 72:19, 180:20, 180:21, 182:19, 182:21, 183:1, 183:3, 183:13		HARMS [5] - 7:17, 147:11, 147:14, 147:22, 147:25		
GROWTH [1] - 111:24		HARRISBURG [1] - 2:4		
GUESS [1] - 193:4		HARVARD [2] - 114:25, 115:4		
GUIDANCE [1] - 6:6		HAS [140] - 11:20, 11:24, 12:14, 13:4, 13:10, 15:13, 18:21, 21:17, 22:9, 22:10, 22:16, 23:17, 23:18, 23:19, 25:14, 26:10, 27:16, 28:1, 28:5, 28:6, 28:12, 31:8, 33:6, 35:1, 35:4, 36:17, 37:13, 37:21, 43:14, 45:13, 47:14, 48:8, 48:23, 49:12, 64:1, 64:4, 64:25, 65:8, 70:3, 70:5, 71:13, 71:21, 77:22, 83:3, 83:20, 85:12, 88:2, 92:13, 93:10, 100:5, 100:8,		
GUIDELINE [1] - 222:16				
GUIDELINES [23] - 42:25, 43:5, 43:8, 68:23, 69:5, 69:19, 177:12, 221:14, 222:12, 222:13, 222:15, 222:24, 223:1, 243:6, 243:9, 243:10, 243:13, 243:14, 243:15, 243:18, 250:5, 250:9				
GUTTMACHER [18] - 89:7, 102:2, 106:12, 109:5, 109:13, 109:22, 110:6, 110:13, 110:15, 110:17, 111:5, 111:12, 112:6, 112:7, 112:13, 154:4, 154:9, 160:22	HALF [7] - 5:12, 62:19, 210:5, 210:7, 210:9, 230:1			
GUYS [1] - 195:15	HALF-HOUR [2] - 5:12			
GYNECOLOGIST [2] - 114:3, 125:4	HAND [7] - 48:1, 48:2, 101:23, 113:13, 245:4, 245:5, 245:6			
GYNECOLOGY [4] -	HANDED [1] - 159:1			
	HANDLING [1] - 236:4			
	HANDY [1] - 175:17			
	HAPPEN [7] - 127:15, 133:9, 141:10, 191:17, 230:10,			

142:2, 142:12,
143:18, 144:3,
144:10, 145:13,
146:6, 146:24,
148:6, 149:23,
151:25, 152:2,
152:3, 152:7,
152:10, 152:12,
152:13, 152:16,
153:17, 155:9,
155:13, 155:15,
156:6, 156:12,
156:13, 156:20,
156:25, 157:11,
157:13, 157:14,
158:5, 159:23,
160:24, 161:11,
161:17, 162:17,
163:6, 163:20,
164:11, 164:24,
166:18, 166:20,
168:2, 168:5, 170:2,
170:5, 170:7,
170:21, 171:18,
171:22, 172:4,
174:8, 175:16,
177:22, 177:24,
178:3, 178:16,
178:20, 178:23,
179:4, 179:6, 179:9,
179:11, 179:13,
180:18, 181:22,
187:24, 188:5,
189:5, 189:9,
189:11, 189:20,
189:22, 189:24,
190:6, 190:9,
190:17, 190:20,
191:16, 192:10,
192:18, 193:6,
194:23, 194:25,
195:10, 195:15,
195:16, 196:25,
197:24, 199:2,
199:6, 199:10,
199:15, 200:4,
200:5, 200:6, 200:7,
200:10, 200:14,
201:3, 201:12,
202:22, 203:3,
203:7, 203:8, 203:9,
203:11, 203:13,
204:19, 205:18,
206:1, 206:15,
207:7, 207:9,
208:19, 208:24,
209:11, 209:12,
209:16, 209:18,
209:24, 212:24,
214:3, 214:12,
214:18, 214:19,

215:10, 215:16,
216:10, 216:14,
216:18, 216:23,
218:9, 219:11,
220:6, 220:8,
220:22, 221:15,
223:2, 223:16,
224:24, 225:2,
225:24, 226:23,
228:16, 228:19,
229:2, 229:22,
230:7, 230:23,
230:25, 231:5,
232:3, 232:15,
232:17, 232:21,
232:23, 234:6,
234:13, 234:17,
234:21, 235:2,
236:10, 236:22,
236:25, 237:5,
238:15, 238:19,
239:5, 240:15,
242:11, 242:24,
243:5, 244:12,
244:16, 244:17,
244:23, 245:3,
246:18, 246:19,
247:17, 248:4,
248:5, 248:6, 248:7,
248:9, 250:2,
251:21, 252:1,
252:2, 252:3,
252:14, 252:15,
252:24
HAVEN [2] - 47:17,
49:16
HAVEN'T [1] - 34:12
HAVING [13] - 12:7,
72:13, 72:16,
100:25, 103:19,
111:21, 117:14,
155:22, 190:8,
203:15, 246:23,
247:1, 252:22
HE [12] - 18:18, 31:8,
31:9, 31:10, 85:2,
85:4, 85:7, 85:8,
139:8, 242:9, 247:6,
247:7
HEAD [3] - 136:1,
143:10
HEADER [1] - 187:17
HEADING [1] - 42:4
HEALTH [106] - 3:4,
10:9, 12:11, 12:13,
13:3, 15:1, 16:8,
17:21, 22:6, 22:12,
23:21, 42:24, 43:25,
52:15, 52:19, 52:20,
52:21, 53:9, 53:12,

53:21, 53:22, 58:18,
58:21, 58:24, 59:8,
60:16, 61:6, 62:6,
62:20, 63:6, 64:12,
67:2, 71:17, 71:20,
72:7, 77:25, 78:12,
79:2, 79:13, 79:19,
79:25, 82:4, 86:3,
87:3, 87:11, 90:4,
94:1, 96:6, 99:1,
101:16, 102:8,
102:22, 103:5,
103:15, 110:19,
118:25, 120:14,
121:1, 121:18,
123:16, 138:21,
138:23, 140:22,
151:19, 154:6,
166:5, 167:21,
169:8, 169:11,
169:20, 170:17,
170:20, 173:24,
178:3, 178:16,
178:17, 179:21,
179:24, 182:13,
190:13, 195:23,
195:24, 199:20,
202:21, 205:3,
205:7, 205:9, 206:1,
207:21, 209:8,
217:13, 219:18,
220:1, 220:9,
220:13, 221:8,
221:9, 223:20,
223:25, 224:2,
224:8, 234:4, 249:4,
249:24
HEALTHCARE [16] -
24:25, 57:15, 58:23,
59:2, 59:5, 59:7,
61:4, 63:8, 77:22,
96:12, 167:4,
167:21, 169:11,
220:16, 220:21
HEALTHCARE.GOV
[1] - 219:20
HEALTHY [1] - 193:1
HEALY [22] - 2:17,
4:25, 5:1, 157:16,
204:7, 204:9,
204:10, 204:12,
204:17, 204:22,
205:2, 205:22,
206:10, 206:25,
207:4, 207:8,
207:19, 208:19,
208:22, 209:14,
210:2
HEAR [7] - 14:23,
22:22, 25:24, 34:15,

158:22, 164:25,
182:7
HEARD [14] - 24:2,
203:3, 203:7,
221:15, 224:16,
230:7, 236:14,
239:12, 239:13,
242:10, 244:12,
244:16, 252:2, 252:3
HEARING [10] - 1:14,
3:8, 3:20, 159:13,
251:15, 252:1,
252:2, 252:19,
252:20, 253:1
HEARSAY [3] - 85:11,
85:12, 203:18
HEART [2] - 128:3,
128:4
HEAVIER [1] - 124:4
HEAVILY [1] - 160:24
HEAVY [2] - 123:12,
135:25
HELD [16] - 29:2, 29:4,
29:19, 29:25, 30:8,
32:3, 37:21, 38:6,
48:4, 212:11,
212:14, 215:20,
225:21, 232:18,
242:22, 247:24
HELLO [1] - 143:2
HELP [12] - 28:21,
117:19, 129:4,
129:19, 129:23,
129:25, 153:7,
170:18, 179:17,
180:22, 181:9,
182:24
HELPED [3] - 125:24,
171:6, 189:22
HELPFUL [2] - 144:1,
177:10
HELPING [2] - 22:21,
177:10
HELPS [3] - 129:6,
129:16, 129:22
HER [43] - 22:8, 22:20,
22:23, 23:1, 23:17,
55:14, 64:17, 65:7,
65:8, 66:11, 71:22,
72:11, 80:20, 80:25,
81:1, 119:4, 120:12,
120:17, 120:25,
123:17, 123:19,
127:13, 127:16,
127:17, 139:1,
140:14, 141:9,
141:12, 150:21,
162:17, 172:6,
173:1, 173:19,
173:21, 173:23,

173:24, 174:7,
174:10, 184:15,
240:4, 240:16, 247:5
HERE [103] - 3:2, 4:12,
5:23, 6:13, 6:14,
8:16, 9:8, 14:3,
15:25, 17:8, 17:24,
18:25, 20:14, 20:18,
20:25, 21:2, 21:9,
21:13, 21:15, 21:17,
27:20, 32:8, 35:19,
35:23, 38:14, 38:23,
39:16, 39:18, 39:20,
39:22, 39:24, 40:1,
40:5, 40:9, 41:3,
42:11, 42:19, 45:9,
45:20, 45:21, 46:11,
46:23, 48:11, 48:24,
49:8, 49:17, 49:18,
50:8, 50:9, 50:19,
50:21, 54:10, 95:9,
106:3, 106:20,
109:23, 110:5,
115:23, 147:7,
158:23, 159:16,
160:11, 160:16,
161:1, 161:2,
161:11, 164:22,
164:23, 167:9,
187:14, 195:12,
196:7, 196:10,
198:23, 200:1,
204:20, 204:21,
207:12, 212:24,
215:2, 215:7,
215:24, 217:22,
218:22, 220:11,
224:4, 224:21,
225:2, 226:15,
227:7, 228:21,
229:19, 232:14,
233:14, 234:17,
237:21, 238:8,
238:21, 243:18,
244:20, 249:23,
251:12
HERSELF [3] - 86:10,
184:12, 184:13
HERSHEY [9] - 23:15,
166:1, 166:2, 170:7,
171:15, 171:17,
178:4, 179:14
HHS [8] - 39:23,
218:9, 227:25,
228:19, 229:2,
229:5, 232:7, 249:8
HIGH [2] - 70:21,
89:11
HIGHER [5] - 96:20,
103:21, 154:2,

<p>154:6, 205:13 HIGHEST [2] - 175:4, 176:5 HIGHLIGHT [1] - 165:24 HIGHLIGHTED [1] - 207:12 HIGHLY [3] - 79:1, 81:12, 164:10 HIGHMARK [1] - 182:9 HIM [2] - 213:9, 242:10 HIP [1] - 127:24 HIS [8] - 30:12, 30:13, 85:3, 85:4, 86:21, 139:8, 219:23, 226:8 HISTORICALLY [1] - 92:12 HISTORY [1] - 43:11 HIT [1] - 48:3 HOBBY [11] - 26:8, 43:17, 46:16, 51:6, 198:6, 211:9, 217:19, 217:21, 219:2, 226:3, 226:9 HOLD [5] - 96:25, 97:3, 142:12, 162:16, 215:19 HOLDERS [1] - 52:23 HOLDING [2] - 41:23, 225:16 HOME [7] - 30:9, 31:4, 31:10, 31:11, 31:12, 33:13, 252:23 HOMEBUILDERS [1] - 241:18 HONOR [231] - 4:1, 4:5, 4:8, 4:13, 4:16, 4:19, 4:22, 4:25, 5:3, 5:7, 5:9, 5:22, 6:2, 8:9, 8:17, 8:24, 9:8, 9:9, 9:15, 9:17, 9:23, 13:4, 15:24, 16:1, 16:3, 16:20, 20:3, 20:21, 21:20, 21:21, 21:24, 22:14, 22:16, 23:24, 24:9, 24:13, 24:15, 24:22, 25:12, 25:17, 25:19, 25:21, 25:24, 26:20, 27:1, 27:9, 27:19, 28:5, 28:23, 29:6, 29:13, 30:20, 31:13, 31:17, 32:15, 32:24, 33:3, 33:15, 33:23, 34:10, 34:11, 34:20, 35:1, 35:12, 36:16, 37:14, 37:25, 38:13, 38:14, 38:24, 39:12, 40:14, 40:20, 40:25, 41:8,</p>	<p>41:24, 42:16, 42:19, 44:20, 45:2, 45:21, 46:2, 46:7, 46:15, 46:25, 48:19, 49:4, 49:23, 50:14, 50:18, 51:22, 53:1, 53:13, 54:4, 54:7, 54:15, 55:9, 55:21, 55:24, 55:25, 56:25, 57:4, 57:19, 57:24, 58:2, 64:15, 64:22, 65:4, 65:10, 65:16, 65:25, 66:6, 85:10, 86:8, 88:2, 90:14, 97:8, 97:11, 97:14, 97:15, 97:17, 103:10, 104:25, 105:5, 108:19, 109:2, 112:18, 112:21, 112:25, 113:10, 116:19, 116:25, 119:3, 120:11, 120:16, 120:20, 121:8, 121:10, 136:8, 138:25, 139:11, 139:14, 140:13, 141:8, 142:15, 142:21, 147:16, 148:3, 148:11, 150:1, 151:20, 151:21, 152:18, 152:21, 156:24, 158:1, 158:3, 158:6, 158:25, 160:19, 161:15, 162:7, 162:11, 162:14, 163:2, 163:13, 164:9, 165:2, 172:11, 172:16, 173:4, 181:21, 184:8, 190:24, 192:2, 193:8, 203:21, 203:25, 204:2, 204:8, 204:12, 204:18, 205:23, 209:15, 210:3, 210:7, 210:18, 210:21, 212:8, 218:17, 218:21, 224:11, 232:1, 234:11, 235:14, 235:18, 235:19, 235:21, 236:5, 236:14, 236:24, 238:2, 238:15, 238:16, 238:22, 239:12, 239:25, 240:17, 240:20, 240:24, 241:15, 241:24,</p>	<p>242:18, 242:21, 243:21, 244:2, 244:19, 245:7, 245:10, 245:18, 245:22, 246:4, 246:17, 246:21, 249:17, 250:11, 252:9, 252:10, 252:11, 252:25 HONOR'S [7] - 6:6, 30:23, 45:10, 51:14, 212:11, 214:10, 245:23 HONORABLE [1] - 1:11 HONORS [1] - 167:2 HOPE [8] - 24:15, 171:17, 212:22, 214:9, 215:3, 215:7, 248:16, 248:18 HOPEFULLY [1] - 215:8 HOPING [1] - 74:25 HOPKINS [7] - 57:9, 58:9, 58:12, 58:21, 59:10, 59:16, 60:4 HORMONAL [14] - 77:1, 103:18, 104:11, 107:5, 107:21, 108:4, 108:6, 108:9, 108:10, 108:14, 128:20, 128:23, 129:4, 175:5 HORMONES [3] - 115:21, 126:11, 127:17 HORSE [1] - 236:2 HOSPITAL [5] - 12:17, 116:16, 117:3, 121:25, 167:9 HOSPITALIZED [1] - 124:12 HOT [1] - 127:19 HOURLY [6] - 5:12, 157:12, 210:5, 210:7, 210:9 HOURS [7] - 118:11, 118:12, 118:14, 118:17, 119:9, 119:11, 119:19 HOUSEKEEPING [1] - 165:5 HOUSES [3] - 43:15, 197:12, 197:15 HOW [87] - 3:11, 5:14, 22:25, 23:4, 28:10, 28:11, 28:12, 28:15, 30:16, 46:18, 49:24,</p>	<p>59:2, 62:16, 67:19, 69:20, 70:25, 73:24, 79:8, 83:21, 91:10, 92:22, 97:22, 99:3, 106:21, 110:7, 110:14, 112:5, 115:21, 116:3, 118:10, 118:14, 119:9, 122:5, 123:24, 124:17, 125:2, 125:17, 126:15, 126:21, 128:13, 132:9, 133:25, 135:8, 135:12, 136:18, 144:7, 150:2, 159:15, 160:13, 160:15, 166:2, 168:1, 169:16, 170:2, 171:22, 172:3, 174:12, 193:14, 196:25, 197:18, 197:20, 198:3, 198:7, 212:13, 214:16, 214:20, 221:16, 223:5, 228:17, 228:18, 228:23, 228:24, 229:6, 229:8, 229:23, 231:15, 233:11, 238:20, 244:3, 251:4 HOWEVER [9] - 13:4, 16:21, 181:10, 182:25, 187:22, 208:24, 209:3, 209:4, 209:18 HR [1] - 250:4 HRSA [21] - 22:6, 42:25, 44:5, 87:7, 220:14, 220:22, 221:14, 221:18, 222:2, 222:4, 222:5, 222:12, 223:1, 223:2, 223:10, 224:3, 243:8, 243:15, 250:4, 250:6, 250:8 HRSA'S [1] - 243:10 HUDMAN [1] - 83:12 HUDSON [2] - 36:9, 36:17 HUH [1] - 86:23 HUMAN [6] - 3:4, 12:14, 67:2, 78:12, 87:3, 87:11 HUNDRED [3] - 77:3, 126:24, 127:1 HYPERLINK [1] - 158:8</p>	<p>HYPOTHESIS [1] - 189:3 HYPOTHESIZED [1] - 247:6 HYPOTHETICAL [4] - 30:24, 31:14, 31:16, 32:20 HYSTERECTOMY [1] - 188:10</p>
I				
<p>I'D [6] - 87:17, 114:8, 211:21, 236:7, 239:24, 243:4 I'LL [2] - 29:10, 52:4 I'M [93] - 3:21, 4:6, 4:13, 4:17, 4:20, 4:23, 5:1, 5:4, 5:16, 5:23, 23:9, 24:5, 28:9, 31:2, 34:8, 34:10, 37:19, 37:21, 49:21, 50:16, 51:23, 53:16, 55:5, 57:24, 58:1, 59:13, 65:22, 68:9, 72:25, 74:18, 74:23, 81:7, 89:12, 101:6, 101:10, 101:21, 103:8, 103:10, 104:8, 105:14, 105:17, 116:17, 119:3, 126:5, 129:9, 129:10, 136:23, 139:14, 143:25, 144:15, 145:8, 148:1, 148:10, 153:11, 157:18, 159:9, 161:16, 161:17, 165:23, 166:3, 166:4, 166:5, 169:7, 169:9, 170:9, 170:15, 178:16, 178:18, 181:21, 184:8, 186:7, 193:13, 193:19, 194:5, 194:9, 198:2, 198:9, 199:4, 199:8, 199:12, 203:3, 207:8, 210:18, 225:16, 227:8, 237:12, 245:22, 252:11, 252:20 I'VE [2] - 63:2, 93:14 IDEA [8] - 168:1, 196:25, 223:14, 225:18, 226:11, 228:13, 239:1, 250:4 IDENTICAL [3] - 40:11, 40:14, 41:15</p>				

IDENTIFIABLE [1] - 236:19
IDENTIFIED [3] - 69:17, 111:4, 208:24
IDENTIFY [35] - 73:15, 100:4, 100:7, 114:16, 146:7, 146:10, 146:12, 146:18, 146:23, 147:2, 147:5, 147:8, 147:13, 147:18, 147:23, 148:16, 148:24, 149:5, 149:10, 149:14, 165:9, 165:16, 175:23, 184:1, 200:2, 201:2, 201:11, 201:18, 201:24, 209:12, 209:18, 220:12, 221:1, 223:7, 236:22
IDENTIFYING [2] - 223:3, 223:16
IF [207] - 3:12, 5:10, 5:14, 5:25, 7:4, 8:12, 8:21, 8:22, 8:24, 9:21, 14:11, 15:9, 20:23, 20:24, 21:21, 24:1, 25:14, 25:23, 30:7, 30:23, 31:11, 32:5, 32:15, 32:18, 32:20, 33:8, 33:11, 39:12, 40:7, 40:18, 41:8, 41:24, 42:9, 43:13, 44:25, 45:17, 46:13, 47:20, 47:22, 48:7, 48:9, 48:24, 49:4, 49:14, 49:20, 49:21, 50:14, 50:20, 51:6, 52:3, 53:13, 53:15, 53:17, 55:7, 55:9, 55:14, 56:7, 56:11, 56:14, 56:19, 56:20, 56:25, 57:7, 62:7, 64:15, 67:19, 68:1, 68:6, 68:13, 70:3, 74:19, 75:25, 76:3, 76:5, 76:12, 78:14, 79:12, 79:21, 80:18, 80:22, 80:24, 81:2, 81:9, 82:20, 82:21, 83:22, 84:6, 84:18, 85:20, 86:13, 87:7, 87:8, 87:21, 88:1, 89:13, 92:1, 92:7, 93:12, 93:14, 93:19, 94:24, 95:4, 95:7, 96:15, 97:8, 105:4, 105:8, 107:20, 111:13,

114:7, 114:9, 114:12, 114:18, 114:19, 116:22, 123:18, 123:21, 124:1, 126:15, 127:12, 134:13, 135:2, 137:14, 137:17, 137:20, 137:24, 139:13, 140:17, 141:20, 142:12, 144:1, 146:3, 148:5, 148:8, 150:18, 152:24, 152:25, 153:8, 153:16, 153:18, 154:2, 156:14, 157:3, 158:1, 159:25, 160:6, 165:12, 171:5, 173:17, 173:25, 176:1, 179:15, 179:16, 179:18, 180:5, 180:22, 181:2, 182:23, 184:7, 185:8, 186:8, 186:14, 186:18, 186:19, 186:23, 191:17, 191:19, 192:13, 194:9, 194:11, 195:7, 195:13, 198:1, 203:20, 204:6, 204:19, 204:23, 208:12, 212:24, 213:20, 214:2, 214:9, 214:21, 216:20, 217:5, 217:14, 220:25, 221:4, 226:21, 230:4, 230:10, 232:19, 234:13, 235:21, 236:7, 236:21, 237:7, 240:23, 242:10, 244:14, 245:13, 248:14, 248:17, 249:5
IFR [13] - 39:1, 39:18, 39:21, 40:14, 41:1, 42:2, 42:3, 207:6, 217:5, 217:15, 217:16, 217:22, 217:23
IFR'S [2] - 217:11, 222:14
IFRS [9] - 38:18, 39:15, 40:11, 52:16, 160:23, 208:18, 209:11, 209:21, 217:3
IGNORE [1] - 37:12

ILLEGAL [1] - 251:9
ILLEGALITY [1] - 233:6
IMAGINE [2] - 191:8, 191:10
IMMEDIATE [3] - 98:19, 98:23, 202:18
IMMEDIATELY [4] - 25:8, 216:17, 216:22, 235:2
IMMUNIZATION [1] - 69:1
IMMUNIZATIONS [1] - 43:4
IMPACT [24] - 19:25, 34:17, 36:12, 44:10, 47:21, 47:25, 48:7, 48:9, 89:23, 95:25, 123:14, 123:16, 123:17, 124:6, 138:17, 141:22, 160:16, 170:21, 190:21, 231:17, 235:25, 238:21, 244:15, 245:2
IMPACTED [3] - 72:18, 237:14, 237:15
IMPACTS [1] - 108:22
IMPAIRED [1] - 123:18
IMPAIRMENT [1] - 127:19
IMPENDING [2] - 238:4, 238:6
IMPERATIVE [1] - 30:15
IMPERIL [1] - 43:17
IMPLANT [7] - 77:1, 91:1, 92:15, 92:18, 174:24, 176:7, 176:12
IMPLANTED [5] - 76:25, 77:2, 92:18, 155:13, 174:25
IMPLANTS [5] - 76:9, 83:10, 90:8, 94:12, 112:11
IMPLEMENT [2] - 250:9, 250:10
IMPLEMENTATION [4] - 39:24, 40:3, 40:4, 40:6
IMPLEMENTED [3] - 16:24, 218:13, 235:2
IMPLEMENTING [1] - 241:12
IMPLICATES [1] - 51:8
IMPLICATION [1] - 107:7

IMPLICIT [2] - 225:7, 243:1
IMPLICITLY [1] - 242:25
IMPLIES [1] - 221:18
IMPORTANT [22] - 24:25, 51:9, 74:13, 107:8, 172:9, 174:2, 174:10, 174:18, 177:10, 177:18, 177:19, 178:1, 210:23, 218:19, 218:20, 224:22, 224:23, 227:11, 230:17, 235:2, 237:21, 248:13
IMPOSE [7] - 3:20, 14:5, 30:12, 221:10, 223:21, 231:17, 250:2
IMPOSED [1] - 231:8
IMPOSES [4] - 43:18, 46:17, 50:24, 232:24
IMPOSSIBLE [2] - 34:8, 147:19
IMPRESSION [1] - 26:16
IMPROPER [1] - 172:22
IMPROPERLY [1] - 240:4
IMPROVE [2] - 86:3, 224:8
IMPROVED [1] - 70:22
IMPROVEMENT [1] - 106:16
IN [831] - 1:1, 3:2, 3:10, 3:19, 3:22, 4:3, 5:11, 5:17, 5:19, 6:3, 6:5, 6:25, 7:1, 7:3, 7:6, 7:15, 7:17, 7:18, 7:22, 8:4, 9:17, 9:19, 9:22, 9:25, 10:2, 10:5, 10:9, 10:12, 10:15, 10:21, 11:2, 11:5, 11:13, 11:19, 11:24, 12:19, 12:21, 12:25, 13:17, 14:3, 14:15, 14:23, 14:25, 15:2, 15:12, 15:16, 15:20, 16:8, 16:9, 16:17, 16:23, 17:9, 17:10, 17:12, 17:15, 17:18, 17:19, 17:21, 17:22, 17:23, 18:3, 18:9, 18:14, 18:15, 18:22, 19:2, 19:5, 19:11, 19:13, 19:19, 20:1, 20:8, 20:17, 21:7, 21:14, 21:20,

22:2, 22:6, 22:8, 22:10, 22:11, 22:13, 22:16, 22:24, 23:15, 23:19, 23:23, 24:13, 24:17, 25:7, 25:8, 25:24, 26:6, 26:7, 26:8, 26:9, 26:14, 26:22, 26:25, 27:9, 27:10, 27:20, 27:21, 27:24, 28:2, 28:8, 28:14, 28:17, 28:22, 29:2, 29:17, 30:11, 30:12, 30:14, 30:17, 31:19, 31:24, 32:6, 32:8, 33:15, 35:5, 35:9, 35:16, 35:20, 35:22, 36:3, 36:4, 36:12, 36:14, 37:9, 37:15, 38:16, 39:15, 39:17, 40:1, 40:3, 40:8, 40:10, 40:17, 41:1, 41:10, 41:11, 41:13, 41:17, 41:23, 42:2, 42:6, 42:8, 42:16, 42:25, 43:5, 43:10, 44:6, 44:8, 44:24, 45:7, 45:11, 45:15, 45:16, 45:23, 46:18, 46:19, 47:15, 47:16, 48:3, 48:5, 48:8, 49:7, 49:8, 49:12, 49:13, 49:18, 49:25, 50:1, 50:3, 50:8, 50:9, 50:24, 51:5, 51:19, 52:6, 52:16, 53:4, 53:5, 53:10, 53:20, 53:23, 54:9, 54:10, 57:7, 57:13, 58:14, 58:18, 58:19, 58:20, 59:6, 59:19, 60:12, 60:17, 60:24, 61:5, 61:6, 61:10, 61:15, 61:21, 62:4, 62:5, 62:18, 62:24, 63:4, 63:6, 63:11, 63:21, 64:2, 64:7, 64:12, 64:18, 65:7, 65:8, 65:13, 66:7, 66:11, 66:12, 67:4, 67:14, 67:15, 68:1, 68:4, 68:20, 68:23, 69:8, 69:9, 69:12, 69:18, 69:21, 69:22, 70:4, 70:12, 70:18, 70:19, 70:20, 71:2, 71:6, 71:15, 71:25, 72:3, 72:7, 72:20, 73:7, 73:14, 74:13, 74:14, 75:13, 75:15, 75:17, 75:22, 76:1, 76:10, 76:17,

77:7, 78:20, 79:12,
81:13, 81:14, 81:16,
81:19, 81:24, 82:1,
82:2, 83:5, 83:12,
84:4, 85:6, 86:1,
86:3, 86:6, 86:13,
87:18, 87:23, 88:1,
88:6, 88:10, 88:12,
88:15, 88:23, 89:11,
89:18, 89:24, 90:4,
90:5, 91:19, 92:5,
92:25, 93:2, 93:11,
93:13, 93:20, 93:21,
93:23, 94:3, 94:12,
94:19, 96:2, 96:6,
96:12, 96:13, 96:22,
97:5, 97:25, 98:4,
98:7, 99:16, 99:19,
100:3, 100:4, 100:7,
100:18, 100:23,
100:24, 101:19,
102:3, 102:7,
102:16, 102:23,
103:1, 103:3, 103:4,
103:5, 103:9,
103:10, 103:14,
103:25, 105:9,
105:10, 105:11,
106:14, 106:16,
106:18, 106:20,
106:24, 107:1,
107:6, 107:8,
107:11, 107:16,
107:18, 107:22,
107:23, 108:11,
108:17, 109:5,
109:16, 109:21,
110:8, 110:10,
110:19, 111:6,
111:13, 111:16,
111:19, 112:11,
112:25, 113:4,
114:4, 114:6,
114:19, 115:2,
115:6, 115:8,
115:13, 115:22,
115:25, 116:2,
116:6, 116:7,
116:19, 117:15,
117:19, 117:22,
118:6, 118:7, 119:5,
120:13, 120:20,
120:25, 121:18,
122:10, 122:11,
122:20, 123:13,
123:18, 123:24,
124:3, 124:4,
124:11, 124:17,
124:18, 125:7,
125:17, 126:9,
127:1, 127:2, 127:9,

127:12, 128:7,
128:12, 129:7,
129:9, 129:16,
129:19, 129:23,
130:2, 130:8,
130:23, 131:8,
131:11, 131:17,
132:14, 132:20,
133:6, 133:12,
133:18, 133:22,
135:3, 135:24,
136:15, 136:16,
136:23, 136:25,
137:25, 138:4,
138:11, 138:20,
138:23, 140:11,
140:22, 140:25,
141:1, 141:7,
141:11, 141:21,
141:24, 142:3,
142:4, 142:5, 142:9,
143:3, 143:11,
143:19, 145:17,
145:19, 145:21,
145:24, 146:7,
146:12, 146:18,
146:22, 146:24,
147:8, 147:11,
147:13, 147:22,
147:24, 148:5,
148:8, 148:16,
148:24, 148:25,
149:5, 149:6,
149:10, 149:11,
149:14, 149:15,
149:19, 151:8,
151:13, 152:1,
153:6, 153:25,
154:7, 154:14,
154:16, 155:3,
155:4, 155:7, 155:8,
155:9, 155:14,
156:2, 156:12,
156:17, 156:22,
158:7, 159:12,
159:18, 160:1,
160:2, 160:3, 160:7,
160:23, 160:25,
161:1, 161:2, 161:8,
161:20, 161:25,
162:4, 162:5,
162:25, 164:3,
164:16, 165:7,
167:2, 167:3, 167:9,
167:10, 167:14,
167:20, 168:11,
168:15, 168:24,
169:5, 169:18,
170:3, 170:12,
170:17, 170:20,
171:8, 171:10,

171:17, 172:12,
172:25, 173:3,
173:10, 173:20,
173:22, 174:6,
175:9, 175:12,
175:13, 175:17,
176:3, 176:18,
176:21, 177:7,
177:10, 177:20,
178:4, 178:7,
178:19, 178:22,
179:13, 179:19,
180:7, 180:11,
180:13, 180:20,
181:9, 181:13,
181:19, 181:24,
182:11, 182:12,
182:15, 182:16,
183:7, 183:10,
183:16, 183:20,
183:23, 184:13,
184:15, 184:23,
185:1, 185:16,
185:23, 186:1,
186:7, 186:11,
186:22, 187:3,
187:5, 187:9,
187:20, 187:22,
188:22, 189:1,
189:4, 189:9,
189:13, 189:16,
189:17, 189:18,
190:2, 190:18,
190:23, 191:17,
191:23, 191:24,
192:7, 192:12,
192:13, 192:14,
192:15, 192:19,
192:23, 193:4,
193:16, 193:23,
194:15, 194:16,
194:17, 194:23,
195:2, 195:3, 195:7,
195:10, 195:13,
195:17, 195:19,
195:22, 195:24,
196:1, 196:2, 196:4,
197:1, 197:9,
197:19, 198:4,
198:10, 198:20,
199:1, 199:5, 199:9,
199:13, 199:14,
200:1, 200:19,
200:21, 201:6,
201:14, 201:22,
202:2, 202:9,
202:16, 202:18,
203:3, 203:9,
204:25, 205:5,
205:7, 205:15,
205:17, 205:21,

206:5, 206:6,
206:14, 206:17,
206:22, 207:16,
207:22, 207:25,
208:2, 208:16,
208:23, 209:1,
209:2, 209:5,
209:21, 210:25,
211:1, 211:3,
211:11, 211:13,
211:18, 214:1,
214:6, 214:17,
214:19, 214:21,
215:17, 215:22,
216:10, 216:19,
216:24, 216:25,
217:4, 217:12,
218:8, 218:16,
218:19, 218:20,
219:2, 219:15,
219:17, 219:25,
220:9, 220:17,
220:19, 220:23,
221:2, 221:13,
221:14, 222:2,
222:24, 223:3,
223:6, 223:19,
224:1, 224:3, 224:6,
224:7, 224:12,
225:9, 225:17,
225:19, 226:2,
226:3, 226:9,
226:20, 227:2,
227:13, 227:22,
228:5, 228:8,
228:16, 228:21,
228:23, 229:4,
229:8, 229:19,
229:20, 229:23,
229:24, 229:25,
230:2, 230:21,
231:3, 231:4,
231:14, 231:15,
232:1, 232:3, 232:8,
232:21, 233:7,
233:14, 233:16,
234:3, 234:6, 235:4,
235:7, 235:9, 237:3,
237:4, 237:10,
237:18, 238:5,
238:10, 238:16,
238:22, 239:3,
239:14, 240:2,
240:10, 240:13,
240:14, 240:25,
241:9, 242:11,
242:12, 242:18,
242:21, 243:8,
243:13, 243:14,
245:3, 245:13,
245:17, 246:8,

246:9, 246:15,
247:1, 247:7, 247:9,
247:11, 247:23,
247:25, 248:1,
248:10, 249:4,
249:16, 249:19,
249:20, 249:21,
250:12, 250:20,
250:24, 251:19,
251:24, 252:4,
252:17, 252:21,
253:4

INACCURACIES [1] -
114:19

INACTION [5] - 16:14,
16:15, 19:11,
233:16, 234:1

INAFFORDABILITY
[1] - 133:14

INC [1] - 164:16

INCLINED [1] - 21:22

INCLUDE [18] - 10:1,
46:12, 57:15, 58:22,
68:24, 122:14,
122:17, 122:20,
123:11, 127:21,
128:12, 130:21,
168:10, 174:24,
191:10, 209:2,
229:18, 250:5

INCLUDED [7] -
67:14, 95:5, 167:13,
185:1, 187:22,
193:24, 232:3

INCLUDES [5] - 22:20,
63:9, 118:18, 175:6,
207:22

INCLUDING [14] -
36:5, 64:19, 65:14,
75:9, 77:25, 96:3,
97:6, 112:2, 117:17,
170:11, 172:13,
183:13, 228:5,
251:17

INCOME [3] - 14:8,
72:21, 80:13

INCONCEIVABLE [1]
- 242:24

INCONSISTENT [2] -
43:23, 233:3

INCONSISTENTLY [2]
- 73:8, 80:23

INCORPORATE [1] -
128:20

INCORPORATED [1] -
243:16

INCORPORATES [1] -
139:5

INCREASE [17] - 7:15,
43:21, 52:19, 81:1,

<p>91:24, 94:12, 96:22, 107:1, 112:11, 130:2, 142:1, 142:8, 155:8, 155:10, 156:2, 156:15, 220:20</p> <p>INCREASED [10] - 71:7, 102:17, 102:19, 106:16, 127:22, 127:23, 155:13, 156:21, 208:2, 239:14</p> <p>INCREASES [3] - 82:22, 128:6, 196:2</p> <p>INCREASING [2] - 71:2, 220:15</p> <p>INCREDIBLY [5] - 6:21, 124:5, 137:17, 156:7, 212:9</p> <p>INCUR [1] - 205:13</p> <p>INDEPENDENT [2] - 39:3, 250:9</p> <p>INDEX [1] - 254:1</p> <p>INDIANA [1] - 207:17</p> <p>INDICATE [1] - 187:6</p> <p>INDICATED [4] - 16:17, 92:21, 103:5, 103:18</p> <p>INDICATES [1] - 252:19</p> <p>INDICATION [8] - 41:3, 91:4, 188:6, 214:11, 225:6, 227:6, 228:9, 243:22</p> <p>INDICATIONS [1] - 128:19</p> <p>INDIVIDUAL [12] - 122:8, 122:9, 122:13, 132:14, 145:17, 146:11, 146:21, 155:4, 190:13, 221:9, 236:15, 236:20</p> <p>INDIVIDUALIZE [1] - 132:18</p> <p>INDIVIDUALLY [1] - 148:11</p> <p>INDIVIDUALS [4] - 26:25, 199:5, 200:19, 229:9</p> <p>INDULGE [1] - 235:21</p> <p>INDULGENCE [3] - 5:25, 136:7, 160:18</p> <p>INDUSTRY [1] - 208:9</p> <p>INFERENCE [1] - 232:17</p> <p>INFERTILITY [13] - 22:20, 114:5, 115:14, 116:8, 117:14, 118:8,</p>	<p>122:11, 128:8, 128:15, 129:3, 129:12, 129:15, 129:19</p> <p>INFLUENTIAL [1] - 156:7</p> <p>INFORMATION [11] - 47:10, 82:15, 82:18, 111:22, 154:5, 154:8, 163:5, 182:23, 195:1, 205:24, 237:16</p> <p>INFORMED [1] - 12:10</p> <p>INHERENT [3] - 44:24, 78:20, 247:11</p> <p>INITIAL [1] - 11:20</p> <p>INITIATE [1] - 19:12</p> <p>INITIATING [1] - 129:22</p> <p>INJECTABLE [1] - 175:8</p> <p>INJUNCTION [41] - 1:14, 3:9, 7:24, 8:4, 9:14, 9:18, 21:21, 24:14, 27:10, 33:24, 65:5, 99:4, 99:15, 99:19, 99:20, 99:23, 144:8, 144:14, 144:15, 144:17, 146:5, 159:13, 160:17, 202:17, 212:19, 213:24, 214:5, 214:8, 214:18, 215:10, 227:12, 230:17, 235:13, 236:19, 245:2, 248:15, 249:6, 251:12, 251:17, 251:18, 251:20</p> <p>INJUNCTIONS [9] - 26:5, 27:5, 99:12, 144:11, 197:24, 216:20, 239:7, 244:22</p> <p>INJURIES [1] - 20:8</p> <p>INJURY [16] - 16:12, 17:9, 17:10, 18:23, 18:24, 20:5, 20:15, 35:16, 35:17, 227:12, 233:6, 233:10, 235:13, 237:1, 237:2, 244:3</p> <p>INKLING [1] - 244:16</p> <p>INNER [1] - 174:25</p> <p>INQUIRY [1] - 19:25</p> <p>INSERTED [3] - 134:24, 155:9</p> <p>INSERTION [3] - 134:7, 134:22,</p>	<p>192:11</p> <p>INSOFAR [1] - 138:10</p> <p>INSTANCE [2] - 127:13, 129:8</p> <p>INSTANCES [1] - 53:20</p> <p>INSTANTANEOUS [1] - 192:15</p> <p>INSTANTIATED [1] - 28:13</p> <p>INSTEAD [12] - 11:11, 11:16, 35:10, 39:1, 42:3, 44:2, 48:2, 50:1, 50:3, 190:8, 238:9, 252:22</p> <p>INSTITUTE [24] - 22:4, 64:10, 66:4, 66:17, 66:19, 89:7, 102:2, 106:12, 107:13, 109:5, 109:13, 110:13, 110:16, 110:17, 110:18, 111:5, 111:12, 112:6, 154:4, 154:9, 160:22, 169:23, 171:3, 180:11</p> <p>INSTITUTE'S [1] - 44:6</p> <p>INSTITUTES [6] - 102:22, 103:5, 103:15, 118:24, 118:25, 169:20</p> <p>INSTITUTIONS [5] - 169:25, 170:1, 199:21, 200:6, 211:6</p> <p>INSTRUCTED [1] - 82:10</p> <p>INSTRUCTIVE [1] - 16:22</p> <p>INSURANCE [36] - 7:8, 12:24, 13:6, 30:11, 52:19, 52:22, 90:4, 100:12, 144:4, 145:25, 150:8, 150:14, 151:16, 152:11, 178:3, 178:17, 179:11, 179:19, 182:10, 182:14, 198:14, 199:20, 200:23, 205:4, 205:9, 205:14, 208:13, 212:2, 218:7, 218:11, 220:2, 220:9, 221:8, 221:9, 223:7</p> <p>INSURED [15] - 90:3, 93:2, 94:1, 94:13, 153:19, 166:15, 178:4, 178:15,</p>	<p>179:8, 180:16, 180:17, 182:12, 190:22, 190:23, 230:24</p> <p>INSURER [1] - 7:2</p> <p>INSURERS [2] - 95:1, 229:3</p> <p>INTEGRATE [1] - 129:4</p> <p>INTEGRATION [1] - 63:6</p> <p>INTEND [4] - 87:24, 150:16, 162:25, 163:19</p> <p>INTENDED [5] - 12:8, 43:11, 150:12, 150:15, 224:8</p> <p>INTENDING [1] - 173:17</p> <p>INTENTIONAL [1] - 48:5</p> <p>INTERDISCIPLINAR Y [2] - 59:1, 170:17</p> <p>INTEREST [28] - 16:8, 17:21, 19:4, 19:13, 19:19, 19:22, 20:17, 20:18, 35:16, 35:21, 47:5, 51:11, 51:13, 51:17, 51:18, 52:5, 116:20, 167:20, 224:22, 226:1, 226:4, 226:5, 226:7, 227:2, 227:4, 234:3, 251:11</p> <p>INTERESTED [3] - 57:13, 176:11, 182:11</p> <p>INTERESTING [3] - 160:9, 183:21, 216:18</p> <p>INTERESTINGLY [1] - 174:14</p> <p>INTERFERE [1] - 40:6</p> <p>INTERIM [9] - 3:19, 38:17, 39:7, 39:10, 39:23, 216:5, 217:23, 237:21, 238:11</p> <p>INTERNAL [8] - 166:4, 167:8, 167:11, 167:12, 170:10, 171:16, 171:19, 184:22</p> <p>INTERNALLY [1] - 252:16</p> <p>INTERNIST [1] - 166:3</p> <p>INTERPRET [1] - 220:23</p> <p>INTERPRETATION [14] - 45:17, 51:19,</p>	<p>52:9, 71:9, 218:23, 218:24, 219:4, 221:3, 221:4, 222:1, 241:13, 242:19, 249:19, 249:22</p> <p>INTERPRETATIONS [1] - 47:6</p> <p>INTERPRETING [3] - 45:11, 221:2, 221:16</p> <p>INTERVAL [1] - 134:9</p> <p>INTERVENE [1] - 27:10</p> <p>INTERVENTION [4] - 182:20, 183:3, 183:5, 188:24</p> <p>INTERVENTIONS [4] - 62:7, 171:5, 180:22, 181:8</p> <p>INTO [67] - 7:10, 22:9, 23:18, 41:19, 46:3, 51:10, 55:11, 56:4, 63:6, 70:14, 71:1, 71:20, 72:1, 73:16, 82:15, 85:14, 87:21, 88:11, 89:18, 94:7, 94:11, 95:1, 99:9, 107:10, 107:17, 108:11, 112:14, 112:15, 114:8, 129:5, 134:17, 136:13, 137:3, 137:17, 137:20, 139:2, 144:21, 144:24, 145:7, 145:10, 145:15, 152:24, 153:5, 155:9, 156:4, 158:11, 161:10, 166:21, 173:14, 174:12, 180:19, 182:18, 185:16, 185:25, 188:23, 192:14, 197:7, 204:17, 207:6, 218:17, 220:25, 223:17, 227:9, 232:1, 246:10, 247:13, 249:24</p> <p>INTRAMURAL [1] - 119:1</p> <p>INTRAUTERINE [7] - 76:10, 76:13, 90:17, 92:7, 130:22, 135:23, 175:1</p> <p>INTRODUCTIONS [1] - 3:24</p> <p>INVESTIGATE [3] - 32:10, 73:17, 240:9</p> <p>INVESTIGATED [2] - 89:20, 89:23</p>
--	---	--	--	--

INVESTIGATES [1] - 115:21	10:2, 10:5, 10:8, 10:13, 10:21, 10:25, 11:8, 12:8, 13:3, 14:2, 15:2, 15:6, 15:7, 15:9, 15:12, 15:15, 15:21, 16:10, 16:16, 16:19, 16:22, 17:5, 17:9, 17:10, 17:11, 17:16, 17:18, 17:20, 17:23, 17:24, 18:4, 18:8, 18:14, 18:21, 18:23, 19:17, 19:23, 19:24, 20:4, 20:5, 20:6, 20:13, 20:14, 20:15, 20:18, 21:4, 21:9, 21:15, 21:19, 22:1, 22:17, 22:22, 23:23, 24:7, 24:15, 24:19, 24:22, 24:24, 24:25, 25:9, 25:10, 25:13, 25:23, 25:25, 26:12, 26:22, 26:24, 27:1, 27:17, 27:18, 27:23, 27:25, 28:12, 28:15, 28:16, 28:21, 28:24, 29:15, 30:1, 30:4, 30:14, 30:16, 30:20, 30:22, 31:7, 32:3, 32:6, 32:8, 32:9, 32:13, 32:15, 32:16, 32:17, 32:20, 32:21, 32:22, 32:25, 33:4, 33:6, 33:8, 33:9, 33:11, 33:13, 33:14, 33:17, 34:1, 34:2, 34:10, 34:11, 34:22, 35:4, 35:7, 35:8, 35:10, 35:15, 35:18, 35:21, 35:24, 36:9, 36:10, 36:11, 36:18, 36:21, 37:3, 37:9, 37:11, 37:12, 37:18, 37:23, 38:2, 38:7, 38:14, 38:22, 39:8, 40:8, 41:2, 41:3, 41:4, 41:9, 41:10, 41:21, 42:4, 42:5, 42:18, 42:19, 42:20, 42:22, 43:1, 43:13, 43:20, 43:24, 44:15, 44:17, 44:20, 45:1, 45:6, 45:10, 45:12, 45:18, 45:21, 45:22, 45:23, 46:2, 46:6, 46:9, 46:11, 47:5, 47:8, 48:11, 48:15, 48:17, 48:20, 48:22, 49:3, 49:9, 49:10, 49:11, 49:15, 49:24, 50:8, 50:14, 50:19, 51:18,	52:1, 52:9, 53:9, 53:18, 54:10, 55:11, 55:19, 55:21, 55:23, 56:9, 56:10, 56:18, 58:1, 59:2, 59:6, 59:22, 60:13, 60:15, 61:2, 61:3, 61:20, 61:24, 62:1, 62:9, 62:10, 62:15, 63:14, 65:2, 65:5, 65:9, 65:13, 65:14, 66:4, 66:7, 66:9, 66:13, 66:17, 66:19, 66:20, 68:3, 68:4, 68:7, 68:14, 68:17, 68:18, 69:3, 69:4, 69:21, 69:22, 70:5, 70:7, 70:9, 70:11, 71:11, 71:16, 72:13, 72:16, 72:25, 74:14, 74:16, 74:20, 74:24, 75:3, 75:7, 75:11, 75:12, 75:16, 75:17, 75:18, 75:19, 75:21, 75:25, 76:13, 76:16, 76:20, 76:24, 76:25, 77:1, 77:2, 77:3, 77:5, 77:20, 77:21, 78:4, 79:1, 79:2, 79:21, 79:23, 80:11, 80:18, 81:10, 81:11, 81:21, 81:22, 81:24, 82:6, 82:8, 82:12, 82:23, 85:3, 85:24, 86:9, 86:21, 86:23, 87:10, 87:15, 87:16, 87:23, 88:1, 88:15, 88:23, 89:9, 89:10, 90:13, 91:1, 91:13, 91:14, 91:16, 91:19, 91:21, 92:15, 93:10, 94:16, 94:20, 94:21, 95:2, 95:10, 95:11, 96:8, 97:22, 98:5, 98:15, 98:18, 98:22, 99:8, 100:20, 100:21, 101:7, 101:9, 101:10, 101:12, 101:18, 102:4, 102:8, 102:20, 102:22, 102:23, 102:24, 103:22, 103:24, 104:6, 104:9, 104:12, 106:5, 106:7, 106:12, 106:20, 107:7, 107:8, 107:9, 107:10, 107:15, 108:5, 108:9, 108:11, 108:15, 108:17, 108:25,	109:9, 109:21, 109:22, 109:23, 109:24, 110:15, 110:17, 110:21, 111:12, 111:16, 111:23, 111:24, 112:23, 113:20, 113:21, 114:6, 114:12, 114:13, 115:20, 116:10, 116:11, 116:23, 117:22, 118:15, 119:11, 119:12, 119:13, 119:19, 120:4, 120:18, 120:22, 120:23, 121:2, 121:6, 122:7, 123:6, 123:8, 123:9, 123:12, 123:18, 124:2, 124:3, 124:9, 125:6, 125:7, 125:9, 125:10, 125:16, 126:7, 126:8, 126:13, 126:15, 126:21, 127:1, 127:3, 127:12, 127:15, 128:4, 128:10, 129:20, 129:24, 130:10, 130:11, 132:2, 134:4, 134:9, 134:14, 134:21, 134:24, 135:6, 135:13, 135:16, 135:19, 135:21, 135:22, 135:23, 136:5, 137:11, 138:1, 138:2, 138:13, 139:7, 139:8, 139:9, 139:14, 139:16, 139:18, 140:15, 141:9, 141:11, 141:22, 143:1, 143:21, 143:22, 143:25, 144:1, 145:8, 147:1, 147:3, 147:17, 148:5, 148:7, 148:9, 149:1, 150:3, 150:9, 150:12, 150:19, 150:21, 150:24, 151:3, 151:11, 151:13, 151:14, 151:17, 154:1, 154:2, 154:5, 154:6, 154:7, 154:8, 154:10, 156:7, 156:14, 156:16, 156:20, 157:10, 157:11, 157:24,	158:6, 158:7, 158:12, 158:17, 158:18, 159:12, 159:14, 159:15, 159:17, 159:20, 159:23, 160:2, 160:3, 160:7, 160:9, 160:10, 160:11, 160:14, 160:16, 160:23, 160:25, 161:1, 161:8, 161:11, 161:12, 161:19, 161:20, 161:24, 161:25, 162:1, 162:5, 162:22, 163:8, 163:11, 163:14, 163:16, 164:1, 164:7, 164:21, 165:11, 165:17, 165:19, 166:13, 168:17, 169:22, 170:18, 171:1, 171:12, 171:14, 171:16, 172:23, 173:2, 173:6, 173:16, 173:17, 173:19, 174:1, 174:2, 174:5, 174:13, 174:18, 174:24, 175:15, 175:24, 176:3, 176:6, 176:8, 176:14, 176:19, 177:14, 177:19, 177:25, 178:4, 179:11, 179:15, 179:19, 184:3, 184:9, 184:11, 184:15, 184:21, 185:2, 185:3, 185:9, 185:10, 185:14, 185:18, 185:19, 185:20, 185:21, 185:25, 186:5, 186:9, 187:4, 187:12, 187:15, 188:6, 188:15, 188:18, 188:21, 189:4, 189:6, 189:14, 189:16, 190:25, 191:1, 191:13, 192:8, 192:23, 193:4, 193:12, 195:25, 197:10, 198:9, 200:17, 201:16, 202:17, 204:22, 206:13, 206:16, 206:17, 206:24, 206:25, 207:11,
-------------------------------------	--	--	---	---

207:15, 207:18, 207:24, 208:21, 209:14, 209:21, 210:9, 210:23, 211:3, 211:14, 211:17, 211:22, 211:23, 211:24, 211:25, 212:8, 212:9, 212:14, 212:15, 212:17, 212:19, 212:22, 212:25, 213:1, 213:4, 213:10, 213:17, 214:9, 214:17, 215:5, 215:7, 215:11, 215:18, 216:4, 216:13, 216:15, 216:18, 216:20, 216:21, 217:2, 217:4, 217:5, 217:8, 217:9, 217:10, 217:11, 217:13, 217:17, 217:22, 218:5, 218:12, 218:15, 218:19, 219:16, 220:3, 220:4, 220:7, 220:13, 220:17, 220:20, 221:3, 221:4, 221:11, 221:17, 221:18, 221:25, 222:1, 222:3, 222:5, 222:11, 222:21, 223:5, 223:15, 223:22, 223:25, 224:12, 224:15, 224:23, 225:1, 225:2, 225:5, 225:6, 225:7, 225:8, 225:10, 225:12, 225:14, 225:19, 225:23, 226:12, 226:14, 226:15, 226:17, 227:5, 227:11, 227:16, 227:22, 227:25, 228:1, 228:9, 228:10, 228:14, 228:15, 228:19, 228:22, 230:16, 230:17, 230:21, 231:1, 231:3, 231:7, 231:13, 231:14, 231:18, 232:3, 232:16, 233:2, 233:12, 233:17, 233:18, 233:24, 233:25, 234:4, 234:14, 234:17,	234:25, 235:4, 235:5, 235:6, 236:11, 237:13, 237:17, 237:19, 237:21, 238:4, 238:6, 238:7, 238:11, 238:13, 238:16, 238:23, 239:1, 239:2, 239:4, 239:7, 239:8, 239:19, 240:1, 240:4, 240:12, 240:24, 241:2, 241:11, 241:16, 241:17, 242:10, 242:19, 242:20, 242:23, 243:2, 243:12, 243:18, 243:21, 244:5, 244:7, 244:11, 244:17, 244:19, 244:20, 244:21, 245:2, 245:8, 245:12, 245:14, 245:19, 245:25, 246:1, 246:3, 246:12, 246:17, 246:24, 247:7, 247:9, 247:14, 247:16, 247:17, 247:21, 247:24, 247:25, 248:13, 248:19, 248:20, 248:25, 249:5, 249:8, 249:12, 249:15, 249:25, 250:8, 250:13, 250:15, 250:23, 250:24, 251:3, 251:4, 251:5, 251:6, 252:5, 252:21, 253:3 ISN'T [2] - 27:17, 249:23 ISSUANCE [1] - 208:17 ISSUE [47] - 7:24, 8:23, 9:18, 13:25, 15:6, 21:15, 21:21, 24:14, 37:5, 38:13, 40:20, 41:1, 42:6, 42:9, 51:17, 51:18, 52:5, 67:16, 67:22, 69:15, 74:3, 87:18, 95:8, 100:23, 102:7, 120:9, 138:4, 152:1, 161:1, 164:19, 173:2, 190:18, 198:23, 209:8, 209:20, 212:7, 214:16, 214:17, 218:16, 233:8,	236:4, 240:13, 242:18, 245:7, 247:11, 249:12, 252:3 ISSUED [16] - 28:1, 38:16, 39:18, 66:12, 67:18, 160:12, 160:14, 160:15, 209:22, 211:2, 212:20, 217:5, 217:12, 217:18, 217:20, 233:18 ISSUER [1] - 221:8 ISSUES [23] - 8:3, 9:1, 26:7, 26:14, 28:5, 36:5, 39:20, 47:6, 57:14, 101:16, 102:8, 110:19, 135:2, 140:4, 169:8, 173:25, 213:18, 213:19, 213:21, 214:14, 215:9, 218:20, 235:23 ISSUING [1] - 217:3 IT [445] - 3:19, 5:13, 7:12, 8:3, 8:13, 8:21, 8:22, 8:25, 9:2, 11:6, 13:17, 15:12, 15:13, 15:15, 16:15, 16:19, 16:24, 17:10, 17:11, 17:22, 17:23, 18:9, 18:11, 18:12, 18:13, 19:9, 19:12, 19:24, 19:25, 20:4, 20:5, 20:6, 20:7, 20:13, 21:16, 23:19, 24:20, 25:10, 25:13, 25:25, 26:19, 27:17, 27:25, 28:3, 28:12, 28:20, 29:3, 29:11, 29:13, 29:14, 29:16, 29:22, 31:17, 32:1, 32:4, 32:14, 32:22, 32:25, 33:2, 33:4, 35:1, 35:4, 35:15, 35:19, 36:6, 36:11, 36:21, 37:12, 37:13, 39:11, 39:17, 40:24, 41:5, 41:9, 41:16, 41:21, 42:11, 42:23, 43:18, 44:1, 44:2, 44:20, 45:18, 45:23, 46:4, 47:20, 47:22, 48:4, 48:9, 48:15, 48:16, 48:18, 48:21, 49:8, 49:11, 49:12, 49:20, 49:22, 49:24, 50:8, 50:12, 50:21, 51:7, 51:20, 51:25, 52:17, 53:6, 53:7, 53:16,	55:12, 55:13, 55:21, 56:11, 57:1, 57:2, 57:3, 57:5, 59:6, 61:20, 62:5, 62:9, 63:14, 63:18, 65:18, 66:9, 66:20, 67:7, 67:9, 68:1, 68:5, 68:7, 68:17, 69:15, 69:18, 70:2, 70:3, 70:4, 70:5, 70:21, 71:11, 73:23, 74:16, 74:24, 75:1, 75:9, 77:21, 79:19, 79:21, 81:9, 81:10, 81:11, 81:16, 81:23, 82:25, 83:1, 83:3, 83:6, 83:7, 84:1, 84:3, 85:17, 86:14, 87:1, 87:10, 88:1, 88:18, 89:8, 89:10, 89:11, 90:13, 90:15, 91:21, 93:1, 93:7, 93:17, 94:21, 95:2, 95:6, 95:16, 95:17, 95:18, 95:19, 95:25, 98:10, 98:18, 98:22, 100:19, 101:5, 101:7, 101:10, 101:14, 103:13, 104:6, 105:18, 106:12, 108:2, 108:5, 108:11, 108:13, 109:23, 110:5, 110:21, 111:1, 111:15, 112:8, 112:23, 116:23, 120:18, 120:23, 120:25, 122:16, 122:17, 122:19, 122:20, 122:22, 123:25, 124:2, 124:8, 124:24, 125:6, 126:23, 129:1, 129:6, 129:16, 129:22, 129:23, 129:25, 131:15, 132:24, 133:13, 134:3, 134:6, 134:12, 134:14, 135:9, 135:17, 137:1, 137:11, 138:10, 138:14, 138:16, 138:17, 139:18, 141:22, 143:22, 143:23, 147:6, 150:12, 150:21, 151:11, 151:19, 153:2, 154:6, 154:10, 156:5, 156:16,	157:10, 157:19, 158:18, 159:3, 159:4, 159:9, 159:14, 159:15, 159:18, 159:19, 159:20, 159:21, 159:23, 160:10, 160:15, 161:4, 161:5, 161:6, 161:8, 161:11, 161:12, 161:18, 161:20, 162:4, 162:5, 162:6, 164:21, 164:23, 165:13, 165:19, 165:23, 169:13, 169:15, 169:24, 169:25, 172:23, 174:14, 176:8, 176:17, 177:2, 179:4, 180:13, 180:22, 181:2, 184:14, 184:19, 184:20, 185:14, 185:24, 185:25, 186:8, 186:9, 186:15, 186:20, 187:3, 187:12, 187:18, 187:19, 188:16, 188:22, 190:4, 190:6, 190:10, 190:15, 191:8, 191:13, 192:14, 197:9, 202:25, 204:15, 204:19, 206:6, 206:18, 207:13, 207:15, 207:24, 208:3, 208:11, 208:12, 209:5, 210:8, 210:10, 210:23, 211:18, 212:22, 213:1, 213:21, 214:2, 214:10, 214:13, 215:21, 215:25, 216:12, 216:13, 216:16, 216:18, 217:1, 217:13, 218:5, 218:12, 218:13, 219:10, 219:13, 220:6, 220:7, 220:21, 221:7, 222:18, 222:20, 222:22, 223:2, 223:11, 223:24, 224:4, 224:18, 224:23, 224:25, 225:4, 225:6, 226:4, 226:6, 226:7, 226:10, 226:12, 226:13,
---	---	---	--	--

226:24, 226:25, 227:3, 227:5, 227:7, 227:11, 228:14, 228:17, 228:21, 231:3, 233:1, 233:12, 233:17, 234:24, 235:6, 236:18, 236:24, 237:3, 237:8, 237:15, 238:17, 239:20, 240:22, 240:23, 241:11, 242:23, 243:24, 246:5, 246:10, 248:13, 249:20, 250:24, 251:3, 251:4, 252:21 IT'S [105] - 5:18, 7:9, 9:14, 10:15, 11:2, 11:5, 14:23, 17:12, 19:1, 19:18, 20:4, 20:11, 21:15, 23:9, 23:12, 27:1, 30:25, 31:2, 32:8, 34:8, 34:10, 36:11, 36:25, 43:23, 44:24, 45:13, 50:9, 58:25, 61:18, 66:2, 66:10, 71:4, 74:22, 83:13, 84:18, 84:19, 88:17, 89:13, 90:20, 90:22, 90:23, 91:24, 94:18, 94:25, 104:3, 107:12, 108:1, 116:12, 125:3, 125:7, 125:22, 126:8, 126:14, 126:24, 129:10, 138:6, 147:18, 148:4, 148:7, 150:4, 159:5, 159:14, 159:19, 161:1, 161:18, 162:12, 164:25, 171:19, 172:5, 172:22, 177:25, 185:22, 191:1, 209:1, 209:25, 210:12, 216:11, 219:7, 219:8, 221:5, 222:15, 222:20, 222:23, 226:16, 231:15, 232:16, 234:16, 234:17, 237:13, 239:4, 239:5, 239:21, 240:3, 243:9, 243:13, 245:2, 245:3, 245:5, 246:12, 250:8, 251:5 ITEMS [1] - 43:3 ITS [53] - 12:17, 13:8,	13:13, 15:16, 16:8, 16:9, 17:20, 17:21, 19:4, 19:5, 19:10, 19:13, 19:19, 19:22, 20:17, 34:6, 35:2, 35:5, 35:16, 35:20, 35:22, 39:23, 42:25, 43:9, 43:10, 43:24, 67:23, 68:20, 69:14, 83:18, 83:25, 84:2, 85:6, 107:18, 108:7, 131:2, 131:5, 195:14, 207:25, 208:1, 208:5, 208:11, 217:25, 230:14, 234:4, 242:12, 244:9, 245:4, 245:5, 245:6, 250:8, 251:18 ITSELF [6] - 10:14, 35:18, 42:19, 43:17, 92:17, 212:17 IUD [21] - 76:13, 76:16, 90:16, 92:14, 92:15, 134:7, 134:10, 135:1, 135:17, 136:17, 137:1, 137:5, 140:2, 155:3, 155:13, 155:19, 175:1, 176:7, 176:12, 179:4 IUD'S [12] - 83:10, 90:8, 90:12, 91:5, 92:2, 92:11, 94:12, 112:11, 128:25, 134:1, 155:9, 156:2 IUDS [5] - 11:18, 11:21, 12:2, 134:4, 156:22 J JAMA [2] - 103:24, 104:10 JANUARY [5] - 24:24, 25:9, 34:23, 230:17 JARRING [1] - 124:5 JOB [4] - 60:13, 86:1, 93:16, 177:21 JOBS [1] - 124:24 JOHNS [7] - 57:9, 58:9, 58:12, 58:21, 59:10, 59:15, 60:4 JOINED [1] - 58:21 JONATHAN [6] - 2:2, 4:2, 5:23, 98:9, 98:11, 98:12 JONES [4] - 106:11, 109:7, 110:25, 195:16	JOURNAL [2] - 70:19, 169:7 JOURNALS [2] - 169:7, 169:10 JUDGE [4] - 15:19, 18:18, 150:18, 168:1 JUDICIAL [1] - 45:19 JUDICIALLY [1] - 209:4 JUMP [1] - 186:3 JUNE [1] - 102:7 JUNIOR [1] - 170:19 JURISDICTION [1] - 37:17 JURISDICTIONAL [7] - 36:21, 36:24, 36:25, 37:4, 37:6, 37:22, 37:23 JURISPRUDENCE [5] - 18:9, 48:14, 48:23, 49:10, 49:12 JURISPRUDENTIAL [1] - 49:15 JURY [2] - 55:13, 164:24 JUST [118] - 6:14, 11:1, 13:2, 15:4, 25:15, 28:8, 29:3, 29:16, 29:24, 31:15, 32:25, 37:11, 38:25, 44:21, 44:24, 45:2, 49:8, 49:22, 51:23, 52:4, 53:6, 54:10, 55:13, 55:18, 55:22, 56:11, 58:24, 65:16, 65:20, 65:23, 76:9, 83:4, 93:9, 93:19, 93:23, 93:25, 99:8, 102:13, 103:2, 106:23, 108:1, 109:11, 112:21, 114:8, 114:15, 114:18, 116:19, 119:6, 128:11, 134:17, 141:15, 143:20, 146:16, 148:1, 149:24, 153:15, 154:11, 156:13, 158:22, 159:1, 159:11, 160:19, 161:10, 161:19, 161:21, 161:24, 162:1, 162:3, 162:17, 163:25, 164:4, 164:5, 164:23, 165:5, 165:12, 165:18, 166:21, 166:22, 168:1, 168:9, 174:7,	175:24, 176:1, 184:15, 185:8, 185:14, 185:22, 185:24, 186:2, 187:10, 187:11, 187:22, 193:2, 193:13, 198:20, 199:9, 203:21, 214:3, 219:14, 222:11, 222:21, 226:10, 231:13, 233:8, 234:21, 235:6, 236:7, 239:17, 240:2, 240:18, 240:19, 242:8, 243:7, 243:21, 244:18, 245:8, 250:23 JUSTICE [9] - 2:10, 2:15, 4:18, 4:21, 4:24, 5:2, 5:5, 219:22, 226:5 JUSTICES [2] - 17:3, 226:2 JUSTIFIABLE [1] - 248:21 JUSTIFICATION [2] - 211:18, 217:2 JUSTIN [2] - 2:16, 4:23 K KADE [68] - 2:15, 4:19, 4:20, 24:9, 55:16, 55:21, 55:25, 57:4, 57:23, 58:2, 58:4, 58:5, 64:22, 65:10, 66:5, 66:6, 80:7, 85:10, 86:8, 97:13, 97:14, 97:17, 97:19, 97:22, 98:16, 103:10, 103:14, 103:17, 104:24, 108:19, 112:21, 116:25, 120:16, 120:23, 121:8, 121:10, 132:5, 133:4, 138:25, 139:7, 140:13, 141:8, 142:15, 142:21, 142:23, 143:1, 143:22, 143:24, 147:21, 148:10, 148:13, 148:14, 148:20, 148:23, 150:6, 150:21, 150:25, 151:5, 151:8, 151:12, 151:17, 151:24, 152:18,	158:25, 161:15, 254:6, 254:10 KAISER [1] - 83:15 KAVANAUGH [1] - 195:25 KEEP [5] - 21:23, 24:17, 25:24, 135:2, 246:22 KENNEDY [1] - 226:5 KEPT [1] - 122:23 KEY [2] - 73:15, 219:25 KILLER [1] - 128:4 KIND [13] - 29:22, 30:22, 31:25, 49:7, 62:9, 92:19, 117:11, 132:9, 171:18, 174:8, 213:24, 250:25, 251:6 KINDLY [6] - 165:6, 165:12, 165:16, 165:18, 168:9, 175:23 KINDS [3] - 44:3, 61:19, 107:10 KING [4] - 219:16, 242:17, 242:21, 243:1 KNEW [5] - 67:12, 78:14, 91:6, 195:12, 244:6 KNOW [106] - 9:13, 11:1, 22:2, 22:16, 25:15, 34:19, 36:10, 40:18, 43:17, 46:16, 56:9, 62:15, 68:16, 69:20, 70:3, 70:8, 70:10, 70:16, 81:3, 83:3, 84:5, 84:24, 85:2, 87:7, 87:8, 94:24, 95:4, 95:13, 96:11, 96:17, 99:3, 99:11, 99:15, 99:22, 109:20, 110:10, 110:14, 110:24, 111:13, 127:13, 128:10, 135:10, 136:22, 138:6, 144:7, 144:10, 144:16, 144:20, 146:3, 146:6, 150:2, 153:2, 153:4, 153:8, 153:9, 153:16, 153:18, 153:24, 154:2, 156:14, 156:15, 159:1, 159:14, 161:4, 161:7, 161:11, 161:25, 164:21, 164:23, 174:7,
---	--	--	--	---

<p>189:10, 191:5, 192:24, 195:15, 197:2, 197:6, 197:10, 197:20, 198:3, 198:5, 198:7, 199:8, 199:13, 200:7, 200:11, 200:15, 200:16, 200:19, 202:5, 202:11, 202:22, 208:15, 208:19, 213:14, 215:7, 218:19, 228:13, 228:24, 232:12, 240:17, 244:5, 252:23</p> <p>KNOWING [1] - 229:6</p> <p>KNOWLEDGE [9] - 64:17, 120:12, 123:22, 128:11, 140:14, 189:7, 194:1, 194:2, 228:14</p> <p>KNOWN [7] - 65:18, 72:8, 83:7, 108:9, 239:19, 248:25, 249:14</p> <p>KNOWS [3] - 34:5, 141:11, 249:8</p> <p>KOPPLIN [17] - 2:16, 5:3, 5:4, 162:14, 164:9, 172:15, 172:18, 181:21, 184:8, 190:24, 193:7, 193:8, 193:11, 193:13, 203:20, 203:23, 254:14</p>	<p>LARCS [18] - 12:14, 174:22, 174:23, 175:4, 176:6, 177:3, 183:17, 183:19, 183:20, 185:19, 186:3, 186:5, 186:8, 186:14, 186:16, 189:14, 192:9</p> <p>LARGE [6] - 25:3, 47:2, 96:11, 108:2, 229:17, 229:19</p> <p>LARGER [1] - 93:22</p> <p>LAST [20] - 23:6, 38:15, 39:15, 42:21, 51:14, 68:13, 68:14, 68:16, 81:5, 86:23, 106:18, 113:21, 154:11, 185:20, 186:24, 195:10, 195:23, 195:24, 243:14, 244:18</p> <p>LASTS [3] - 124:7, 134:11, 134:19</p> <p>LATE [2] - 93:22, 148:4</p> <p>LATER [7] - 34:5, 37:16, 87:22, 87:25, 160:3, 206:21</p> <p>LATEST [1] - 88:5</p> <p>LAW [29] - 4:4, 6:20, 7:22, 7:24, 9:2, 9:4, 13:9, 17:17, 21:5, 21:7, 21:9, 30:21, 40:17, 45:15, 48:13, 49:8, 49:9, 87:15, 131:2, 131:6, 209:13, 225:12, 226:15, 231:1, 242:11, 245:4, 245:5, 246:12, 252:13</p> <p>LAWS [3] - 7:11, 38:18, 233:22</p> <p>LAWSUITS [1] - 26:4</p> <p>LAWYER [3] - 72:25, 99:16, 236:3</p> <p>LAWYERS [2] - 6:10, 196:7</p> <p>LAY [2] - 56:2, 194:25</p> <p>LAYING [1] - 24:1</p> <p>LEAD [7] - 57:20, 57:25, 116:21, 124:8, 124:10, 163:3, 163:14</p> <p>LEADING [4] - 71:23, 80:7, 132:5, 133:4</p> <p>LEAKED [2] - 158:19, 159:23</p> <p>LEARN [1] - 183:11</p> <p>LEARNED [2] - 203:8,</p>	<p>203:13</p> <p>LEARNING [1] - 189:20</p> <p>LEAST [12] - 11:13, 17:3, 115:17, 124:18, 134:3, 177:13, 212:23, 214:25, 225:16, 247:21, 249:20, 250:21</p> <p>LEAVE [2] - 113:2, 157:7</p> <p>LECTURER [1] - 193:23</p> <p>LED [3] - 59:17, 59:20, 248:11</p> <p>LEEWAY [3] - 47:15, 48:4, 50:7</p> <p>LEFT [4] - 101:23, 176:17, 234:13, 236:2</p> <p>LEFT-HAND [1] - 101:23</p> <p>LEGAL [4] - 47:15, 50:4, 50:6, 206:18</p> <p>LEGISLATION [1] - 71:5</p> <p>LEGISLATIVE [1] - 43:11</p> <p>LEGITIMATE [4] - 226:25, 233:5, 247:24, 249:20</p> <p>LEGWORK [1] - 218:10</p> <p>LENGTH [4] - 17:18, 18:18, 164:19, 171:8</p> <p>LESS [23] - 10:20, 11:12, 13:20, 14:17, 20:6, 76:10, 76:20, 77:7, 91:24, 111:19, 131:18, 134:13, 136:4, 136:22, 145:11, 145:19, 174:16, 176:9, 187:6, 187:8, 189:24, 191:21, 191:22</p> <p>LESS-EFFECTIVE [1] - 189:24</p> <p>LET [14] - 3:10, 36:2, 46:22, 52:14, 73:10, 109:3, 137:2, 158:21, 158:22, 162:16, 162:17, 213:7, 215:14, 218:9</p> <p>LET'S [8] - 88:3, 158:21, 193:21, 198:22, 210:4, 234:18, 237:10, 250:11</p>	<p>LETTER [3] - 245:3, 245:5, 246:12</p> <p>LEVEL [10] - 57:12, 57:13, 58:16, 59:18, 61:5, 81:20, 82:8, 146:1, 175:3, 176:16</p> <p>LEVELS [4] - 71:22, 72:22, 125:25, 213:16</p> <p>LIABILITY [2] - 48:9, 50:12</p> <p>LIFE [19] - 27:22, 39:16, 40:8, 40:10, 40:20, 41:11, 41:13, 41:20, 123:14, 124:6, 127:16, 127:19, 135:1, 137:19, 142:9, 168:20, 177:20, 217:15</p> <p>LIFE-THREATENING [2] - 137:19, 142:9</p> <p>LIGHT [1] - 37:15</p> <p>LIKE [96] - 9:21, 13:9, 20:13, 20:25, 24:2, 29:22, 33:5, 34:24, 35:23, 38:12, 38:15, 38:17, 39:16, 39:18, 39:20, 39:22, 39:24, 41:2, 42:13, 45:9, 47:9, 48:18, 48:21, 53:18, 55:10, 56:23, 64:16, 67:25, 74:17, 76:17, 79:21, 81:4, 81:8, 82:20, 84:17, 87:17, 95:9, 113:8, 114:8, 114:14, 116:13, 119:8, 120:11, 123:3, 123:23, 126:13, 128:11, 129:7, 129:9, 130:13, 130:23, 131:15, 134:17, 137:22, 137:24, 138:10, 145:2, 145:3, 158:6, 158:11, 161:7, 161:10, 165:15, 168:11, 169:19, 169:21, 170:9, 172:12, 173:17, 175:20, 180:2, 183:23, 187:12, 198:6, 199:15, 203:7, 211:21, 212:8, 218:17, 227:9, 231:4, 235:22, 235:23, 236:7, 239:11, 239:24, 240:18,</p>	<p>242:7, 242:17, 243:4, 243:9, 243:24, 244:19, 245:8, 248:3, 249:20</p> <p>LIKELIHOOD [1] - 130:2</p> <p>LIKELY [7] - 6:7, 14:13, 25:10, 50:11, 72:6, 96:5, 191:20</p> <p>LIKEWISE [1] - 102:18</p> <p>LIMINE [5] - 66:12, 245:13, 245:17, 246:8, 246:15</p> <p>LIMIT [1] - 141:24</p> <p>LIMITED [8] - 67:8, 162:4, 211:17, 214:6, 223:15, 224:18, 237:16, 245:9</p> <p>LIMITS [1] - 248:1</p> <p>LINE [7] - 48:23, 49:15, 77:5, 142:17, 154:11, 161:22, 181:22</p> <p>LINED [3] - 159:23, 176:10, 214:17</p> <p>LINES [2] - 90:18, 176:4</p> <p>LIST [4] - 9:21, 53:19, 147:22, 193:17</p> <p>LISTED [3] - 84:4, 148:8, 176:8</p> <p>LISTEN [2] - 34:20, 69:7</p> <p>LISTENING [1] - 12:6</p> <p>LISTS [1] - 223:24</p> <p>LITERATURE [8] - 67:12, 69:6, 74:9, 79:24, 82:14, 96:18, 189:9, 194:18</p> <p>LITIGANT [2] - 20:9, 20:12</p> <p>LITIGATION [17] - 19:12, 27:16, 27:19, 27:22, 28:2, 28:7, 46:16, 197:21, 197:22, 204:25, 205:6, 206:6, 216:16, 232:23, 235:9, 237:16, 249:9</p> <p>LITTLE [24] - 11:5, 21:1, 26:8, 27:8, 27:9, 27:11, 28:9, 33:23, 34:24, 38:12, 52:2, 88:18, 88:23, 123:3, 129:9, 134:17, 149:19, 171:7, 215:14, 218:18, 222:20, 224:12, 225:19,</p>
L				
<p>LABELED [1] - 159:5</p> <p>LABOR [14] - 3:7, 31:18, 31:21, 31:23, 32:10, 32:11, 33:16, 33:17, 33:19, 240:6, 240:8, 247:2</p> <p>LACK [2] - 133:11, 213:23</p> <p>LAID [3] - 7:22, 9:5, 9:14</p> <p>LAND [1] - 6:20</p> <p>LANGUAGE [14] - 43:10, 45:18, 125:17, 216:3, 219:17, 221:1, 221:4, 222:3, 223:19, 223:22, 224:1, 224:2, 224:6, 225:3</p> <p>LARC [1] - 189:25</p>				

249:18 LIVE [2] - 6:2, 240:13 LIVED [1] - 182:12 LIVES [1] - 125:18 LIVING [4] - 55:4, 114:2, 126:2, 167:2 LO [3] - 85:1, 85:3, 86:21 LOBBY [11] - 26:8, 43:18, 46:16, 51:7, 198:6, 211:9, 217:19, 217:21, 219:2, 226:3, 226:9 LOCATE [1] - 53:8 LOCATED [2] - 171:14, 171:16 LODGED [1] - 139:4 LOGIC [1] - 235:6 LOGICAL [1] - 49:7 LONG [13] - 11:13, 12:15, 32:16, 95:13, 124:3, 127:21, 138:6, 138:13, 171:22, 174:23, 183:17, 228:8, 242:12 LONG-ACTING [3] - 12:15, 174:23, 183:17 LONG-TERM [1] - 127:21 LONGER [5] - 14:20, 188:5, 208:10, 233:22, 239:15 LOOK [37] - 29:14, 29:22, 36:9, 38:9, 49:5, 49:10, 59:4, 62:6, 69:3, 75:18, 82:16, 86:2, 91:14, 94:2, 95:9, 114:9, 114:12, 114:17, 114:21, 137:24, 154:19, 154:22, 160:2, 160:6, 161:7, 161:10, 175:17, 186:8, 186:18, 186:19, 186:23, 214:20, 226:18, 241:12, 242:5, 247:14, 249:5 LOOKED [15] - 16:22, 37:20, 75:12, 88:11, 94:4, 94:8, 109:19, 112:9, 171:4, 185:18, 190:8, 194:23, 204:17, 208:23, 215:23 LOOKING [25] - 63:11, 75:12, 90:10, 92:4, 98:17, 101:21,	102:13, 112:7, 112:8, 125:24, 146:16, 146:17, 146:23, 148:1, 148:15, 159:25, 185:22, 186:7, 198:9, 199:18, 204:21, 209:15, 213:25, 237:12, 241:15 LOOKS [5] - 29:23, 76:16, 114:14, 187:12, 217:14 LOSASSO'S [1] - 85:21 LOSE [25] - 7:7, 13:15, 14:16, 34:12, 34:22, 41:4, 52:23, 98:20, 98:24, 124:19, 144:4, 199:14, 200:2, 200:12, 200:22, 200:23, 201:7, 202:19, 205:11, 206:22, 209:9, 229:12, 229:13, 231:8, 244:6 LOSING [2] - 200:15, 230:20 LOSS [4] - 127:24, 128:1, 153:5, 212:6 LOST [12] - 100:5, 100:8, 146:8, 146:13, 147:8, 153:2, 199:6, 199:10, 200:7, 201:3, 202:22, 230:4 LOT [20] - 26:12, 27:16, 47:6, 71:16, 148:9, 181:14, 190:11, 194:16, 211:3, 211:11, 216:15, 221:25, 223:4, 224:10, 227:14, 230:22, 244:20, 244:21 LOW [6] - 14:8, 72:6, 72:21, 80:13, 127:20, 177:16 LOWER [5] - 72:21, 88:18, 88:23, 154:2, 238:4 LOWERED [1] - 71:8 LOWEST [4] - 175:9, 175:12, 176:21, 177:5 LUNCH [3] - 53:24, 157:11, 157:12 LUNCHEON [1] - 157:23 LYDIA [1] - 195:22	LYING [1] - 123:21 M M.D.'S [1] - 60:25 MADE [20] - 5:17, 6:3, 12:10, 23:24, 30:10, 39:17, 41:13, 51:4, 52:5, 78:20, 107:14, 192:21, 215:12, 217:11, 223:8, 224:19, 226:7, 232:5, 236:7, 246:3 MAIN [1] - 85:4 MAINTAIN [4] - 7:24, 171:11, 207:25, 208:1 MAINTAINING [1] - 208:5 MAJOR [2] - 79:2, 242:23 MAJORITY [3] - 157:3, 168:7, 226:9 MAKE [35] - 12:5, 14:17, 30:15, 40:16, 41:18, 41:21, 45:14, 49:14, 51:23, 52:20, 53:5, 53:22, 60:1, 65:21, 65:24, 67:13, 75:18, 78:2, 78:17, 80:3, 132:22, 137:2, 139:17, 141:15, 141:22, 181:8, 205:2, 205:8, 209:8, 215:8, 228:1, 231:18, 235:22, 244:19, 248:14 MAKERS [2] - 82:16, 82:19 MAKES [4] - 28:14, 210:2, 225:1 MAKING [32] - 22:11, 23:19, 39:20, 46:4, 52:17, 63:3, 67:1, 78:11, 78:18, 85:6, 85:9, 98:14, 100:15, 107:18, 108:17, 132:19, 139:6, 152:14, 160:1, 168:21, 171:6, 180:23, 181:10, 182:24, 189:17, 189:21, 193:3, 205:12, 217:7, 226:14, 248:9, 248:18 MALE [1] - 76:8 MANAGE [2] - 128:20, 129:6 MANAGED [2] - 63:5,	136:24 MANAGEMENT [1] - 155:17 MANAGING [1] - 135:25 MANDATE [97] - 6:19, 11:10, 11:14, 11:18, 11:24, 12:4, 12:9, 12:21, 12:23, 13:1, 13:7, 21:11, 22:10, 23:3, 23:18, 33:25, 43:16, 43:17, 44:5, 44:7, 44:11, 44:12, 46:17, 50:23, 51:12, 52:8, 63:21, 70:13, 70:17, 71:1, 94:6, 94:11, 102:1, 104:22, 109:15, 120:3, 131:2, 131:6, 131:17, 131:18, 136:13, 140:6, 140:24, 144:21, 144:25, 145:6, 145:9, 145:14, 145:20, 145:21, 155:23, 155:25, 156:8, 156:20, 166:11, 166:14, 166:15, 166:19, 168:23, 168:25, 170:22, 178:6, 178:23, 179:7, 181:19, 188:23, 189:2, 189:5, 189:10, 189:12, 189:18, 189:20, 190:3, 191:9, 192:13, 196:3, 196:11, 196:16, 197:6, 197:23, 204:25, 205:6, 205:14, 206:7, 207:6, 207:15, 208:4, 211:16, 221:23, 222:14, 224:14, 225:25, 233:20, 240:11 MANDATES [1] - 241:11 MANDATORY [6] - 141:6, 214:18, 220:18, 223:23, 224:2, 250:1 MANNER [1] - 221:20 MANY [66] - 13:22, 14:15, 14:20, 24:25, 25:2, 26:6, 27:2, 27:4, 34:1, 51:2, 60:23, 62:16, 67:19, 73:24, 91:10, 92:19,	99:3, 103:19, 110:7, 116:3, 118:10, 118:14, 119:9, 121:16, 121:20, 122:5, 124:17, 125:2, 133:13, 144:7, 153:23, 164:13, 168:1, 170:2, 173:16, 176:19, 179:2, 193:24, 194:18, 195:10, 196:25, 197:18, 197:20, 198:3, 198:7, 208:23, 216:19, 216:22, 218:19, 227:23, 228:17, 228:18, 228:23, 228:24, 229:6, 229:8, 229:20, 230:18, 230:19, 233:16, 239:6, 243:24, 249:2, 250:17, 250:23 MARCH [1] - 27:22 MARKED [2] - 95:10, 138:1 MARKET [1] - 1:20 MARKETPLACES [2] - 100:12, 152:11 MARKETSCAN [1] - 94:2 MARRIAGE [1] - 102:18 MARRY [1] - 21:1 MASSACHUSETTS [23] - 2:18, 16:10, 16:13, 18:1, 18:14, 19:2, 19:3, 19:4, 19:8, 19:9, 19:21, 20:12, 21:1, 21:4, 21:6, 21:8, 35:1, 35:12, 35:17, 35:20, 231:4, 233:12 MASSIVE [1] - 208:12 MASTERS [5] - 59:18, 61:5, 115:25, 116:3, 167:13 MATERIALS [1] - 207:23 MATTER [12] - 3:2, 8:3, 24:21, 31:4, 55:12, 65:2, 71:12, 87:18, 158:2, 158:23, 159:20, 253:5 MATTERS [2] - 26:13, 165:5 MAY [93] - 5:7, 5:8, 5:25, 6:14, 7:20,
--	--	--	---	--

<p>9:21, 13:9, 15:25, 16:2, 17:22, 20:8, 20:24, 25:8, 25:19, 25:20, 39:7, 48:5, 50:2, 54:15, 54:17, 54:18, 55:7, 57:7, 57:8, 57:19, 58:6, 64:15, 68:5, 72:2, 81:9, 82:20, 82:21, 84:6, 84:18, 86:13, 93:19, 95:7, 97:8, 97:16, 102:7, 105:4, 107:20, 111:20, 113:10, 113:11, 116:20, 130:2, 132:16, 132:17, 139:13, 140:25, 142:7, 142:10, 147:6, 150:18, 153:17, 158:1, 158:2, 158:4, 160:7, 161:21, 162:9, 162:10, 174:1, 179:17, 189:13, 191:20, 192:18, 193:8, 193:9, 200:6, 200:14, 200:15, 206:1, 208:22, 212:16, 215:2, 215:19, 216:5, 217:7, 217:25, 221:19, 229:12, 232:2, 235:19, 235:20, 240:25, 243:24, 247:6, 247:20, 249:13</p> <p>MAYBE [10] - 27:2, 84:25, 195:11, 197:7, 207:12, 215:7, 237:8, 244:5, 244:24, 248:5</p> <p>ME [71] - 3:10, 6:10, 9:23, 15:19, 15:23, 18:11, 24:21, 28:21, 33:11, 36:2, 36:11, 46:22, 48:25, 49:3, 52:14, 53:17, 53:19, 53:25, 73:10, 74:19, 87:23, 88:14, 90:1, 106:8, 109:3, 109:8, 110:6, 114:9, 115:11, 116:24, 123:21, 123:24, 125:8, 125:22, 129:12, 137:2, 142:7, 143:13, 143:20, 150:14, 150:24, 158:21, 158:22, 162:17, 162:25, 164:25, 183:4, 192:1,</p>	<p>192:20, 192:22, 196:21, 197:4, 198:12, 198:17, 204:23, 205:20, 207:3, 213:7, 214:19, 215:14, 222:11, 222:20, 227:20, 234:10, 234:16, 235:22, 238:16</p> <p>MEAN [14] - 23:3, 29:24, 78:14, 80:14, 91:23, 98:12, 115:19, 123:25, 128:24, 147:6, 156:16, 159:13, 160:13, 169:13</p> <p>MEANS [14] - 24:2, 28:10, 49:2, 69:25, 75:12, 79:12, 79:22, 123:22, 124:2, 126:17, 127:15, 169:15, 203:8, 225:23</p> <p>MEANT [4] - 90:6, 212:10, 230:9, 244:23</p> <p>MEDICAID [5] - 12:22, 14:1, 81:25, 179:17, 179:19</p> <p>MEDICAL [59] - 7:19, 12:6, 14:14, 14:22, 22:18, 23:13, 23:15, 57:17, 60:21, 60:24, 60:25, 64:19, 65:14, 66:21, 73:5, 81:12, 96:3, 97:5, 104:3, 107:9, 115:4, 116:17, 117:2, 118:6, 118:9, 119:9, 123:4, 123:20, 132:1, 132:17, 142:3, 142:6, 149:7, 149:12, 149:16, 151:2, 151:10, 166:1, 167:6, 167:7, 167:12, 168:16, 171:9, 171:11, 171:15, 171:23, 171:25, 172:13, 173:25, 179:14, 201:23, 201:25, 202:4, 202:6, 202:11, 202:13, 203:4, 242:13</p> <p>MEDICALLY [5] - 12:10, 14:18, 147:1, 149:2, 201:16</p> <p>MEDICATION [2] - 132:2, 132:23</p>	<p>MEDICATIONS [5] - 94:19, 94:22, 125:24, 129:14, 173:25</p> <p>MEDICINE [27] - 22:24, 55:6, 60:8, 60:11, 60:18, 66:4, 66:17, 66:19, 66:20, 70:19, 93:6, 107:13, 115:21, 166:4, 166:5, 167:8, 167:11, 167:14, 170:10, 171:16, 171:19, 171:22, 184:22, 220:15, 223:3, 223:12, 250:4</p> <p>MEDICINE'S [1] - 64:10</p> <p>MEDICINES [1] - 22:4</p> <p>MEET [4] - 98:7, 143:11, 196:5, 206:20</p> <p>MEETING [4] - 69:23, 75:7, 184:22, 184:24</p> <p>MEETS [1] - 207:21</p> <p>MELLON [4] - 18:1, 35:2, 35:4, 35:9</p> <p>MELNIKAS [1] - 102:16</p> <p>MEMBER [3] - 73:13, 84:21, 123:18</p> <p>MEMBERS [9] - 6:11, 6:14, 22:4, 64:10, 66:25, 73:24, 85:22, 86:20, 228:3</p> <p>MEMORY [2] - 136:25, 137:7</p> <p>MEN [5] - 21:12, 72:16, 149:20, 153:13, 153:14</p> <p>MENOPAUSE [2] - 126:13, 127:14</p> <p>MENSTRUAL [3] - 124:2, 135:25, 155:22</p> <p>MENSTRUATION [8] - 117:17, 123:5, 123:10, 123:11, 123:12, 124:1, 124:15, 128:17</p> <p>MENTION [5] - 44:1, 119:14, 206:5, 211:22, 219:3</p> <p>MENTIONED [15] - 44:23, 49:16, 67:4, 112:10, 123:4, 129:25, 156:18, 170:9, 173:17, 187:24, 195:18, 205:23, 214:15,</p>	<p>223:5, 250:12</p> <p>MESSAGE [1] - 215:8</p> <p>MET [3] - 70:3, 143:13, 196:7</p> <p>METAPHOR [1] - 246:24</p> <p>METHOD [23] - 11:21, 12:3, 75:10, 75:14, 75:22, 76:5, 79:21, 96:20, 107:15, 174:13, 176:24, 179:5, 185:21, 185:23, 186:23, 186:24, 186:25, 189:23, 189:24, 189:25, 192:8, 198:12</p> <p>METHODOLOGY [3] - 181:23, 182:4, 184:14</p> <p>METHODS [55] - 11:12, 12:1, 13:20, 61:24, 62:2, 73:9, 75:8, 76:7, 77:6, 77:12, 77:13, 77:14, 77:16, 92:14, 94:8, 107:12, 107:14, 108:4, 108:6, 108:9, 108:11, 108:14, 149:25, 173:22, 174:2, 174:5, 174:9, 174:16, 174:21, 175:6, 175:10, 175:11, 175:14, 176:5, 176:11, 176:13, 176:22, 177:3, 177:4, 178:10, 178:11, 178:18, 178:21, 182:8, 183:15, 185:19, 185:20, 186:20, 187:13, 189:13, 190:12, 191:2, 192:6, 195:21, 198:19</p> <p>MICHAEL [4] - 2:6, 2:16, 4:9, 16:4</p> <p>MICHIGAN [2] - 60:5, 167:1</p> <p>MIDDLE [4] - 82:21, 103:1, 103:11, 180:14</p> <p>MIGHT [23] - 33:16, 67:4, 71:19, 71:22, 83:21, 88:18, 130:11, 138:17, 141:10, 164:23, 173:19, 176:11, 179:3, 187:19, 192:25, 193:1,</p>	<p>193:19, 199:21, 203:9, 203:20, 205:25, 236:24, 241:14</p> <p>MILLION [4] - 12:19, 13:2, 229:9, 230:2</p> <p>MILLIONS [5] - 26:17, 26:21, 34:13, 52:12, 220:2</p> <p>MIND [8] - 25:24, 53:13, 156:12, 167:25, 188:3, 189:22, 236:8, 236:10</p> <p>MINIMUM [2] - 221:10, 223:21</p> <p>MINOR [1] - 237:2</p> <p>MINORITY [1] - 47:19</p> <p>MINUTES [9] - 3:15, 3:17, 51:25, 52:1, 54:10, 54:11, 113:4, 171:8, 210:6</p> <p>MIRENA [16] - 76:16, 90:20, 130:21, 134:11, 134:19, 135:1, 135:17, 136:25, 137:4, 137:9, 155:3, 155:8, 155:13, 155:19, 156:2, 156:22</p> <p>MISS [1] - 124:22</p> <p>MISSED [1] - 93:14</p> <p>MISSION [2] - 220:20</p> <p>MISTAKE [1] - 192:21</p> <p>MISTAKEN [2] - 181:3, 181:4</p> <p>MISTAKES [1] - 75:18</p> <p>MISTIMED [1] - 69:25</p> <p>MITIGATE [1] - 128:21</p> <p>MNUCHIN [1] - 3:5</p> <p>MODERATE [1] - 124:9</p> <p>MODERN [2] - 107:21, 108:6</p> <p>MODIFICATIONS [1] - 216:10</p> <p>MODIFIED [1] - 111:7</p> <p>MODIFY [6] - 215:20, 216:1, 221:22, 222:24, 223:11, 230:14</p> <p>MODIFYING [2] - 39:18, 222:16</p> <p>MOMENT [14] - 20:25, 58:1, 58:5, 73:10, 74:20, 81:8, 97:9, 146:11, 146:15, 147:2, 147:10, 160:2, 192:1, 203:21</p> <p>MONEY [5] - 14:1,</p>
--	---	---	--	--

14:4, 80:14, 92:20, 136:3
MONTH [5] - 65:9, 106:18, 135:11, 135:13, 192:22
MONTHLY [5] - 79:21, 119:16, 134:15, 135:6, 135:11
MONTHS [6] - 160:15, 177:13, 186:15, 186:21, 187:18, 188:7
MOOT [1] - 173:6
MOOTED [1] - 37:13
MORAL [66] - 6:18, 26:2, 27:16, 27:18, 27:25, 28:2, 28:3, 28:7, 28:10, 28:12, 28:16, 28:18, 28:24, 29:3, 29:10, 29:25, 30:8, 30:14, 30:17, 31:3, 31:6, 31:8, 31:22, 32:3, 32:7, 32:12, 32:13, 32:16, 32:20, 32:22, 33:7, 33:11, 40:7, 40:22, 44:9, 46:5, 46:8, 51:9, 95:11, 95:21, 104:19, 120:6, 138:1, 138:13, 149:24, 190:18, 198:24, 199:23, 212:9, 212:11, 225:12, 239:25, 240:5, 242:9, 242:11, 243:11, 246:24, 247:3, 247:20, 247:22, 247:24, 248:1, 250:13, 250:21
MORALITY [2] - 28:21
MORE [79] - 7:1, 8:17, 11:21, 11:25, 12:1, 12:10, 12:19, 14:3, 14:4, 14:13, 15:16, 20:22, 22:11, 22:12, 23:20, 40:19, 40:25, 41:9, 52:2, 63:10, 70:23, 72:5, 72:18, 72:20, 73:19, 85:8, 90:9, 96:9, 96:18, 96:19, 96:22, 106:8, 106:19, 106:25, 108:6, 122:24, 123:3, 124:3, 127:21, 134:4, 134:18, 135:11, 135:21, 135:22, 135:23, 135:24, 136:3, 137:18,

140:23, 141:5, 141:16, 156:3, 157:5, 164:1, 164:2, 168:18, 171:8, 176:12, 176:25, 177:15, 189:14, 189:25, 190:11, 191:20, 195:11, 195:20, 196:2, 214:13, 215:15, 225:5, 231:3, 233:24, 234:10, 234:21, 237:2, 245:7, 248:20
MORE-EFFECTIVE [1] - 189:25
MORNING [17] - 4:5, 4:8, 4:16, 4:19, 4:22, 4:25, 5:3, 16:3, 25:21, 97:20, 97:21, 97:23, 142:24, 142:25, 204:19, 204:24, 239:25
MOST [40] - 11:18, 70:11, 76:7, 77:5, 83:9, 90:8, 91:7, 91:9, 92:13, 94:18, 95:2, 106:1, 111:21, 124:9, 124:11, 125:16, 127:17, 127:25, 130:20, 136:16, 155:2, 155:3, 166:15, 174:19, 174:21, 175:2, 176:5, 177:2, 177:3, 178:3, 192:6, 192:8, 192:9, 192:25, 218:19, 218:20, 228:7, 232:8, 244:24, 250:12
MOSTLY [3] - 3:10, 171:20, 178:4
MOTION [16] - 3:9, 7:22, 9:15, 9:19, 27:10, 65:9, 66:11, 160:17, 245:13, 245:17, 245:23, 246:8, 246:15, 251:13, 251:18, 251:20
MOVE [10] - 9:23, 33:21, 38:11, 42:13, 92:10, 108:24, 151:23, 158:11, 235:24, 246:14
MOVED [2] - 55:10, 223:12
MOVEMENT [1] - 146:22

MOVING [2] - 3:24, 118:13
MPH [1] - 61:5
MR [227] - 4:1, 4:8, 4:16, 4:22, 4:25, 5:6, 5:7, 5:9, 5:22, 8:1, 8:8, 8:24, 9:7, 9:25, 11:3, 11:7, 15:4, 15:11, 15:19, 15:24, 15:25, 16:3, 16:5, 16:15, 18:6, 18:10, 18:13, 20:3, 20:20, 20:21, 20:22, 20:24, 21:4, 21:19, 22:14, 23:9, 23:12, 24:13, 24:22, 25:12, 25:17, 25:19, 25:21, 27:18, 28:4, 28:23, 29:6, 29:8, 29:13, 29:15, 30:19, 31:5, 31:13, 31:16, 31:23, 32:4, 32:14, 32:23, 33:3, 33:14, 33:20, 33:22, 36:16, 36:23, 37:14, 38:12, 38:24, 39:6, 40:13, 40:18, 40:24, 41:24, 42:13, 42:16, 44:14, 44:16, 44:20, 45:20, 46:1, 46:7, 46:25, 48:18, 49:4, 49:23, 50:18, 52:4, 53:1, 53:13, 54:1, 54:3, 54:7, 54:15, 55:1, 55:9, 55:24, 56:6, 57:6, 57:19, 58:7, 64:15, 65:4, 65:16, 65:22, 65:25, 66:3, 66:16, 80:10, 84:12, 84:24, 85:15, 86:12, 87:21, 88:1, 90:13, 93:15, 93:18, 97:8, 97:11, 105:4, 105:7, 105:23, 109:1, 111:11, 112:17, 113:8, 113:23, 116:19, 117:1, 119:3, 119:7, 120:10, 120:24, 121:5, 121:12, 132:8, 133:7, 136:7, 136:10, 139:13, 139:19, 139:20, 141:3, 141:18, 142:19, 147:16, 148:3, 148:18, 150:1, 150:18, 151:21, 152:21, 152:23, 156:23, 157:16, 158:1, 158:5, 158:10, 158:18, 159:17,

160:18, 160:21, 161:21, 161:24, 162:7, 204:7, 204:9, 204:10, 204:12, 204:17, 204:22, 205:2, 205:22, 206:10, 206:25, 207:4, 207:8, 207:19, 208:19, 208:22, 209:14, 210:2, 210:7, 210:9, 210:18, 210:21, 210:23, 211:1, 211:25, 214:7, 214:23, 215:14, 219:7, 219:13, 222:8, 222:23, 227:22, 234:11, 234:15, 234:19, 234:21, 234:23, 235:18, 235:21, 236:5, 236:13, 236:24, 238:2, 238:15, 238:22, 239:11, 241:17, 241:22, 242:2, 242:4, 242:7, 245:15, 245:18, 245:22, 246:4, 246:17, 246:21, 252:8, 252:10, 252:11, 254:5, 254:9
MS [106] - 4:5, 4:13, 4:19, 5:3, 24:9, 55:16, 55:21, 55:25, 57:4, 57:23, 58:2, 58:4, 58:5, 64:22, 65:10, 66:5, 66:6, 80:7, 85:10, 86:8, 97:13, 97:14, 97:17, 97:19, 98:16, 103:10, 103:14, 103:17, 104:24, 108:19, 112:21, 116:25, 120:16, 120:23, 121:8, 121:10, 132:5, 133:4, 138:25, 139:7, 140:13, 141:8, 142:15, 142:21, 142:23, 143:22, 143:24, 147:21, 148:10, 148:13, 148:14, 148:20, 148:23, 150:6, 150:21, 150:25, 151:5, 151:8, 151:12, 151:17, 151:24, 152:18, 157:24, 158:25, 161:15,

162:9, 162:11, 162:14, 163:2, 163:10, 163:13, 163:22, 163:25, 164:9, 165:2, 165:4, 172:11, 172:15, 172:18, 173:4, 173:9, 180:1, 181:21, 182:2, 182:3, 184:8, 184:12, 184:17, 185:7, 190:24, 191:12, 192:1, 192:4, 193:5, 193:7, 193:8, 193:11, 203:17, 203:20, 203:23, 204:2, 254:6, 254:10, 254:13, 254:14
MUCH [21] - 6:25, 11:21, 14:8, 21:16, 25:16, 40:11, 49:7, 65:7, 105:2, 135:8, 145:10, 155:6, 164:14, 186:22, 193:5, 204:3, 225:14, 248:19, 248:20, 251:3, 251:4
MULTIFACTORIAL [2] - 156:5, 156:17
MULTIPLE [1] - 26:11
MUNICIPALITY [2] - 48:14, 50:3
MUST [6] - 14:4, 19:25, 65:18, 221:24, 223:8, 244:4
MY [107] - 3:19, 4:1, 4:6, 4:9, 4:19, 4:25, 5:4, 5:23, 37:11, 47:12, 56:10, 56:18, 59:24, 61:3, 61:8, 62:19, 71:4, 74:20, 87:10, 87:16, 97:9, 97:22, 98:2, 100:1, 108:25, 109:4, 114:11, 114:14, 116:2, 118:15, 119:15, 121:15, 122:10, 124:18, 125:7, 133:11, 133:22, 136:15, 139:7, 140:21, 140:22, 140:24, 141:1, 141:22, 143:1, 143:5, 143:10, 145:9, 148:2, 151:17, 153:23, 154:16, 155:4, 155:6, 155:7, 155:9, 155:14,

155:17, 155:23, 156:12, 156:17, 156:18, 156:22, 163:3, 163:8, 163:22, 165:11, 165:17, 166:25, 167:7, 167:8, 167:9, 167:22, 168:12, 168:14, 168:19, 169:23, 171:1, 171:3, 171:20, 175:17, 178:4, 180:3, 180:9, 184:5, 185:3, 189:3, 191:7, 191:22, 192:12, 193:12, 194:8, 195:1, 195:4, 195:7, 199:19, 203:11, 203:20, 209:25, 238:10, 242:8, 245:13, 252:18, 252:21 MYSELF [1] - 98:3	212:14 NEAR [2] - 195:6, 206:22 NEAR-DAILY [1] - 195:6 NEARLY [1] - 81:14 NECESSARILY [4] - 85:11, 153:2, 153:4, 228:7 NECESSARY [7] - 19:1, 24:23, 202:17, 224:19, 238:5, 250:3, 252:22 NEED [20] - 3:22, 7:12, 10:25, 11:1, 15:4, 15:5, 49:14, 52:3, 57:2, 57:3, 57:5, 77:19, 124:12, 216:21, 226:18, 226:24, 248:17, 249:18, 251:4, 252:15 NEEDED [2] - 82:5, 223:11 NEEDING [1] - 179:11 NEEDS [8] - 12:6, 108:13, 123:19, 131:24, 132:1, 132:19, 221:1, 227:1 NEGATIVE [7] - 15:1, 71:13, 71:16, 72:11, 74:7, 77:25, 107:17 NEGATIVELY [1] - 141:23 NEGLECTED [1] - 241:22 NEIL [2] - 38:1 NEUTRAL [1] - 30:4 NEVER [4] - 211:17, 225:20, 226:5, 226:9 NEVERTHELESS [3] - 232:23, 235:3, 237:18 NEW [90] - 6:16, 7:4, 7:6, 7:18, 13:14, 14:5, 14:17, 14:25, 23:4, 25:1, 25:5, 26:16, 27:17, 27:18, 27:23, 27:25, 34:17, 38:17, 40:11, 41:5, 47:17, 49:16, 70:18, 87:19, 98:19, 98:23, 99:8, 100:1, 100:5, 100:8, 100:20, 103:6, 107:8, 107:20, 107:23, 108:9, 120:6, 138:3, 140:15, 144:21, 144:23, 146:9, 146:10, 146:14,	147:9, 148:20, 149:2, 149:7, 149:12, 149:17, 153:10, 160:11, 163:3, 163:8, 163:22, 167:6, 171:1, 171:3, 180:3, 180:9, 184:5, 185:3, 192:12, 196:10, 196:14, 198:22, 198:23, 199:2, 199:7, 199:23, 200:9, 200:13, 201:3, 201:15, 201:20, 203:16, 207:6, 208:17, 209:10, 209:21, 222:14, 231:4, 235:1, 236:1, 236:16, 236:17, 239:17, 239:22, 244:24 NEWSPAPER [2] - 161:18, 194:24 NEXT [17] - 106:22, 151:17, 157:24, 162:8, 175:3, 175:5, 175:9, 176:10, 176:14, 176:16, 185:8, 186:9, 186:14, 186:18, 188:1, 214:12, 215:6 NICOLE [9] - 2:3, 2:6, 4:6, 4:11, 4:13, 98:9, 98:11, 98:12, 162:12 NIGHT [1] - 127:20 NIGHTS [1] - 119:17 NIH [2] - 169:24, 170:18 NIH-FUNDED [1] - 170:18 NO [112] - 8:24, 10:25, 12:3, 13:4, 13:10, 14:20, 17:5, 25:8, 28:2, 31:2, 31:23, 32:23, 34:7, 35:4, 35:8, 37:3, 38:24, 41:3, 49:6, 51:24, 57:4, 65:6, 67:10, 69:12, 72:24, 73:13, 75:25, 81:2, 89:23, 90:7, 91:12, 99:21, 100:6, 100:10, 102:3, 106:4, 106:14, 106:25, 110:23, 112:21, 121:5, 133:2, 135:2, 135:3, 140:14, 143:10, 143:17, 146:15, 146:22,	148:22, 149:4, 149:9, 152:9, 152:12, 152:16, 153:15, 159:19, 160:4, 161:19, 164:21, 166:17, 173:4, 178:18, 178:20, 179:9, 183:2, 185:21, 185:23, 186:19, 186:24, 188:5, 188:15, 193:6, 194:21, 195:1, 196:9, 197:20, 198:5, 198:11, 199:4, 199:8, 199:12, 199:17, 200:9, 200:20, 201:13, 203:25, 204:2, 208:10, 208:24, 211:25, 217:8, 220:9, 220:17, 222:2, 222:3, 222:8, 224:3, 227:25, 233:22, 234:17, 235:4, 237:19, 239:15, 243:21, 244:13, 246:19 NO-METHOD [1] - 186:24 NOBODY [2] - 33:2, 235:4 NON [1] - 60:23 NON-DOCTORS [1] - 60:23 NONCOMPLIANCE [1] - 50:24 NONCONTRACEPTI VE [1] - 129:18 NONE [6] - 26:20, 75:9, 77:17, 77:18, 145:5, 198:18 NONETHELESS [1] - 250:18 NONFEDERAL [1] - 169:21 NONGOVERNMENT AL [1] - 66:20 NONLEADING [1] - 133:6 NONPREGNANCY [1] - 130:16 NONPREGNANCY - PREVENTION [1] - 130:16 NONPRESCRIPTION [2] - 185:20, 186:23 NONPROFIT [2] - 29:4, 29:19	NONPROFITS [1] - 99:6 NOR [3] - 26:22, 155:18, 247:14 NORMAL [3] - 124:4, 126:9, 126:10 NORMATIVE [1] - 30:12 NORTHERN [3] - 167:2, 206:14, 207:16 NOT [405] - 3:20, 5:13, 5:19, 6:2, 6:14, 7:4, 7:13, 8:2, 8:13, 9:4, 10:13, 11:5, 11:10, 11:13, 11:15, 13:3, 14:9, 14:21, 16:19, 16:20, 18:8, 18:23, 20:9, 21:13, 23:23, 24:6, 25:2, 25:15, 25:25, 26:20, 27:1, 27:6, 27:11, 27:12, 28:6, 28:16, 28:20, 28:25, 29:8, 29:13, 30:10, 30:13, 30:25, 31:2, 31:5, 31:20, 32:6, 32:13, 32:14, 32:22, 33:12, 33:14, 34:8, 34:18, 35:7, 36:1, 36:5, 36:11, 36:18, 37:8, 37:19, 37:20, 37:21, 38:7, 38:14, 39:12, 40:22, 40:24, 40:25, 41:9, 42:2, 42:5, 42:19, 43:8, 43:25, 44:1, 45:18, 46:4, 46:13, 46:15, 46:25, 47:10, 47:22, 48:18, 48:21, 49:9, 49:25, 50:14, 50:16, 50:50, 51:1, 51:10, 51:12, 51:23, 52:8, 52:11, 53:8, 53:13, 55:12, 55:14, 56:2, 56:25, 57:12, 57:17, 57:18, 57:24, 59:13, 60:19, 60:20, 60:22, 63:9, 64:25, 65:6, 65:10, 66:9, 67:4, 69:4, 69:12, 69:18, 69:25, 71:19, 71:22, 72:2, 72:24, 73:1, 73:3, 73:7, 78:10, 79:5, 79:10, 80:3, 80:14, 80:18, 80:19, 80:23, 80:25, 82:10, 82:18, 83:19, 83:25, 85:9, 85:11, 85:13, 86:1, 89:12, 89:21, 91:21, 93:10,
N				
NAME [21] - 4:1, 4:6, 4:9, 4:20, 5:1, 5:4, 5:23, 18:17, 54:22, 58:1, 86:23, 97:22, 113:14, 113:19, 113:20, 113:21, 113:24, 118:22, 143:1, 162:21, 193:12 NAMED [1] - 68:23 NAMES [3] - 84:4, 86:18, 145:18 NARROW [1] - 120:22 NARROWER [2] - 6:25, 248:19 NATIONAL [20] - 64:7, 66:20, 81:20, 88:17, 88:22, 93:25, 94:25, 102:22, 103:4, 103:14, 111:23, 111:24, 112:2, 118:24, 118:25, 127:3, 154:3, 169:20, 184:6, 241:17 NATIONALLY [1] - 199:10 NATIONWIDE [1] - 229:12 NATURAL [3] - 127:14, 175:11, 176:23 NATURE [4] - 79:20, 147:4, 154:18,				

93:23, 96:19, 99:5,
99:12, 99:16, 99:23,
100:11, 100:14,
100:20, 101:5,
102:19, 103:8,
104:15, 104:18,
104:21, 105:15,
106:7, 106:17,
106:20, 108:9,
108:25, 110:18,
111:4, 111:15,
111:20, 112:7,
114:15, 121:2,
121:3, 125:14,
125:15, 125:24,
127:10, 128:10,
130:8, 132:16,
132:25, 133:8,
133:11, 139:10,
139:18, 139:22,
141:10, 144:9,
144:11, 144:13,
144:15, 144:17,
144:19, 144:24,
145:8, 146:2, 146:3,
146:6, 146:15,
146:21, 147:5,
147:6, 147:10,
147:18, 148:4,
150:3, 150:11,
150:15, 151:19,
152:10, 152:12,
152:13, 152:16,
153:1, 153:4,
153:11, 155:18,
156:19, 157:18,
158:15, 158:24,
159:2, 159:4, 159:6,
159:8, 159:9,
159:14, 159:23,
161:2, 161:6,
161:13, 161:25,
163:11, 163:17,
165:23, 172:19,
173:23, 174:6,
174:9, 178:1,
178:12, 178:24,
179:9, 179:11,
179:18, 181:8,
181:22, 182:19,
183:4, 186:22,
186:25, 189:23,
190:15, 190:25,
192:18, 192:21,
192:22, 193:19,
194:5, 194:11,
194:12, 194:13,
194:20, 194:25,
196:19, 196:22,
197:2, 197:4,
197:16, 197:24,

198:5, 198:7, 199:1,
199:4, 199:5, 199:8,
199:9, 199:12,
200:6, 200:9,
200:14, 200:15,
200:19, 202:25,
203:11, 204:14,
205:7, 205:25,
207:8, 208:12,
208:19, 208:25,
209:1, 209:9,
209:18, 210:8,
210:10, 210:25,
211:2, 211:5, 211:7,
212:10, 212:16,
213:18, 214:18,
214:19, 215:7,
215:19, 216:1,
216:11, 218:23,
219:1, 219:3, 221:4,
221:10, 221:13,
221:19, 223:5,
223:21, 224:20,
224:24, 225:3,
225:4, 225:7,
225:12, 225:16,
226:1, 226:14,
226:16, 226:24,
227:3, 227:6, 228:1,
228:9, 228:15,
228:20, 229:6,
230:23, 230:24,
230:25, 231:13,
231:17, 232:12,
232:13, 233:5,
233:19, 234:12,
235:12, 236:15,
236:16, 236:19,
236:25, 237:3,
238:23, 239:5,
239:20, 239:21,
240:1, 240:18,
240:21, 240:22,
242:10, 242:19,
243:9, 243:12,
244:5, 244:17,
244:19, 245:2,
245:14, 245:19,
246:12, 247:3,
247:13, 247:22,
247:23, 248:6,
248:7, 248:9,
248:19, 249:1,
249:7, 249:10,
249:13, 249:15,
249:23, 250:2,
250:13, 250:15,
251:4, 251:5, 252:21
NOT-FOR-PROFIT [1]
- 110:18
NOTABLE [1] - 136:15

NOTE [1] - 95:10
NOTED [2] - 81:11,
106:20
NOTHING [21] - 11:23,
43:10, 45:7, 45:23,
48:23, 91:8, 97:11,
104:25, 109:1,
112:17, 112:19,
142:19, 156:23,
205:19, 216:8,
216:9, 244:12,
247:25, 252:8,
252:10
NOTICE [22] - 8:15,
25:14, 26:20, 39:1,
39:19, 42:3, 52:17,
154:25, 160:5,
160:12, 169:12,
213:22, 215:17,
216:8, 217:21,
217:25, 218:6,
218:9, 228:11,
228:20, 230:16,
249:11
NOTICEABLE [1] -
209:4
NOTICES [4] - 232:7,
237:17, 244:12,
244:14
NOTIFIED [1] - 229:2
NOTIFIES [1] - 232:13
NOTIFY [3] - 212:1,
227:25, 244:9
NOTION [1] - 222:11
NOTRE [2] - 34:5
NOW [60] - 3:12,
16:17, 18:25, 21:21,
24:14, 25:9, 28:8,
36:8, 51:12, 52:1,
53:16, 54:6, 66:19,
70:5, 87:17, 95:7,
139:1, 139:6, 143:9,
156:2, 156:11,
157:10, 158:20,
159:19, 162:6,
165:15, 168:4,
171:9, 180:2,
196:14, 197:10,
198:9, 198:22,
200:1, 200:11,
200:20, 200:21,
204:5, 209:11,
211:23, 211:24,
216:18, 220:11,
225:9, 228:16,
229:6, 229:15,
232:11, 232:16,
234:20, 235:6,
236:11, 246:16,
246:25, 247:17,

248:25, 249:8,
249:11, 252:23
NUANCE [1] - 9:17
NUMBER [45] - 1:3,
3:7, 6:7, 36:5, 59:17,
70:7, 70:8, 70:12,
70:16, 71:13, 72:4,
75:13, 75:21, 88:19,
118:18, 122:12,
122:14, 125:5,
128:4, 136:23,
140:11, 145:1,
154:1, 154:7, 155:8,
155:12, 157:4,
169:18, 177:24,
186:3, 186:4,
187:13, 187:14,
187:15, 188:17,
192:23, 197:2,
197:3, 197:5, 197:7,
197:10, 206:14,
206:16, 211:20,
224:17
NUMBERS [11] - 71:3,
135:12, 187:9,
187:20, 188:12,
229:1, 229:16,
229:18, 229:19,
231:9, 237:20
NUMERAL [1] - 84:10
NUMEROUS [1] -
167:25
NUTSHELL [1] -
162:25
NW [2] - 2:12, 2:18

O

O'CLOCK [1] - 234:18
O'MALLEY [1] - 83:13
OATH [1] - 6:3
OBES [1] - 103:20
OBJECT [14] - 27:3,
64:22, 86:8, 116:23,
120:16, 142:16,
150:18, 162:14,
172:15, 181:22,
184:9, 226:20,
233:21, 249:9
OBJECTED [4] - 51:2,
65:17, 161:14,
244:25
OBJECTING [2] -
50:22, 158:23
OBJECTION [37] -
30:22, 30:25, 31:6,
31:7, 31:8, 32:7,
32:16, 33:7, 65:13,
66:13, 80:7, 85:4,
85:10, 112:22,
120:15, 132:5,
133:4, 138:25,
139:4, 139:5, 139:7,
140:13, 141:8,
147:16, 148:3,
148:18, 150:1,
150:3, 162:25,
173:5, 173:7,
190:24, 203:17,
232:18, 236:6, 240:5
OBJECTIONABLE [2]
- 116:24, 208:13
OBJECTIONS [9] -
26:2, 64:21, 121:7,
149:24, 198:24,
218:1, 242:9,
242:11, 248:20
OBJECTIVE [1] -
83:17
OBJECTOR [2] -
239:19, 248:25
OBJECTORS [5] -
40:5, 240:1, 242:16,
249:2, 249:15
OBJECTS [2] - 58:5,
247:6
OBLIGATION [1] -
250:1
OBLIGATIONS [2] -
47:15, 50:6
OBSERVE [1] -
106:14
OBSERVED [2] -
102:2, 108:5
OBSERVES [1] -
102:16
OBSTETRICIAN [1] -
114:3
OBSTETRICS [4] -
60:17, 115:8, 116:6,
118:7
OBTAIN [1] - 179:19
OBTAINED [1] -
197:23
OBVIOUSLY [7] -
11:23, 65:4, 124:5,
135:9, 172:8, 174:2,
178:11
OCCASION [1] - 95:14
OCCASIONS [1] -
179:2
OCCUR [5] - 8:21,
8:23, 73:6, 75:13,
233:7
OCCURRED [1] -
188:22
OCTOBER [1] -
212:21
ODD [2] - 222:20,
222:21

ODDS [2] - 126:12, 127:8 OF [1226] - 1:2, 1:3, 2:2, 2:8, 2:10, 2:15, 3:2, 3:3, 3:4, 3:5, 3:7, 4:3, 4:7, 4:10, 4:14, 4:18, 4:21, 4:24, 5:2, 5:5, 5:15, 5:24, 6:7, 6:8, 6:11, 6:14, 6:20, 6:23, 7:1, 7:6, 7:11, 7:21, 8:4, 8:9, 9:1, 9:9, 9:13, 9:14, 9:19, 10:14, 10:20, 11:12, 11:17, 11:18, 11:19, 11:20, 11:21, 12:1, 12:3, 12:5, 12:6, 12:7, 12:11, 12:13, 12:14, 12:16, 12:18, 12:22, 12:24, 13:6, 13:7, 13:16, 13:17, 13:19, 13:25, 14:7, 14:8, 14:11, 15:1, 15:6, 15:9, 15:13, 15:16, 15:18, 16:6, 16:9, 16:11, 16:25, 17:3, 17:13, 17:21, 17:23, 18:8, 18:20, 18:23, 19:3, 19:4, 19:13, 19:15, 19:17, 19:22, 19:24, 20:1, 20:11, 21:6, 21:12, 21:19, 21:24, 22:3, 22:4, 22:19, 22:20, 22:23, 22:24, 23:5, 23:17, 23:23, 24:1, 24:6, 24:10, 24:16, 24:18, 25:2, 25:4, 25:9, 26:1, 26:4, 26:6, 26:12, 26:13, 26:17, 26:20, 26:21, 26:23, 27:2, 27:16, 27:24, 28:2, 28:5, 28:11, 28:17, 28:22, 29:2, 29:4, 29:5, 29:17, 29:18, 29:19, 29:22, 30:8, 30:11, 30:13, 30:19, 30:21, 30:22, 30:23, 31:19, 31:21, 31:22, 31:23, 31:25, 32:25, 34:1, 34:3, 34:4, 34:13, 34:20, 34:22, 35:5, 35:6, 35:10, 35:18, 36:3, 36:5, 36:8, 36:12, 37:10, 37:15, 37:21, 37:23, 37:24, 38:6, 38:25, 39:1, 39:14, 39:22, 40:3, 40:4, 40:6, 41:4, 41:11, 41:19, 41:22, 41:25,	42:3, 42:4, 42:5, 42:7, 42:9, 42:17, 42:20, 42:23, 43:1, 43:2, 43:4, 43:7, 43:9, 43:10, 43:15, 43:20, 43:24, 44:3, 44:6, 45:4, 45:5, 45:10, 45:15, 45:22, 46:1, 46:8, 46:10, 46:16, 46:23, 47:3, 47:6, 47:9, 47:17, 48:2, 48:6, 48:23, 49:5, 49:7, 49:11, 49:18, 49:25, 50:3, 51:3, 51:9, 51:14, 51:19, 52:6, 52:9, 52:12, 52:15, 52:18, 52:19, 52:21, 53:17, 53:19, 53:20, 55:5, 56:12, 56:14, 57:8, 57:20, 58:22, 58:24, 59:3, 59:7, 59:17, 59:20, 59:24, 60:5, 60:7, 60:10, 60:16, 60:17, 61:2, 61:3, 61:6, 61:8, 61:15, 61:19, 62:2, 62:6, 62:9, 62:12, 62:19, 62:24, 63:2, 63:4, 63:5, 63:6, 63:8, 64:1, 64:4, 64:6, 64:9, 64:10, 64:18, 64:23, 65:1, 65:5, 65:7, 65:8, 66:4, 66:8, 66:17, 66:19, 66:20, 66:21, 66:24, 66:25, 67:2, 67:6, 67:7, 67:12, 67:19, 67:21, 68:3, 68:7, 68:10, 68:22, 69:4, 69:10, 69:14, 69:15, 69:17, 69:24, 70:8, 70:9, 70:19, 70:21, 71:2, 71:3, 71:5, 71:8, 71:9, 71:13, 71:14, 71:15, 71:16, 72:4, 72:5, 72:9, 72:15, 72:16, 73:6, 73:13, 73:14, 73:18, 73:20, 73:24, 74:4, 74:7, 74:9, 74:10, 74:11, 74:12, 75:5, 75:8, 75:10, 75:11, 75:13, 75:19, 75:20, 75:21, 75:23, 76:7, 76:17, 76:18, 77:3, 77:7, 77:9, 77:12, 77:13, 77:25, 78:6, 78:12, 78:15, 78:19, 78:25, 79:3, 79:5, 79:6, 79:16, 79:20,	79:24, 80:11, 80:17, 80:20, 80:24, 81:1, 81:9, 81:10, 81:12, 81:18, 81:23, 81:24, 82:13, 82:14, 83:4, 83:7, 83:8, 83:9, 83:20, 83:23, 83:24, 84:3, 84:7, 84:18, 84:21, 85:16, 85:20, 86:2, 86:4, 86:5, 86:18, 86:20, 87:2, 87:5, 87:11, 87:12, 88:10, 88:15, 89:4, 89:18, 89:21, 89:23, 90:3, 90:5, 90:7, 90:9, 90:11, 91:7, 91:18, 92:11, 92:14, 92:16, 92:19, 92:20, 92:24, 93:6, 93:22, 93:23, 94:1, 94:4, 94:8, 94:12, 94:17, 94:19, 94:22, 95:4, 95:17, 96:2, 96:5, 96:6, 96:10, 96:11, 96:12, 96:17, 96:21, 96:25, 97:3, 97:5, 98:3, 99:6, 100:5, 100:8, 101:3, 101:5, 101:6, 101:8, 101:12, 101:15, 101:22, 102:7, 102:18, 102:22, 103:5, 103:6, 103:15, 103:19, 104:11, 104:15, 104:19, 105:8, 105:10, 105:11, 106:1, 106:7, 106:16, 107:2, 107:5, 107:6, 107:9, 107:10, 107:11, 107:13, 107:17, 108:2, 108:4, 108:6, 108:7, 108:8, 108:10, 108:12, 108:14, 108:15, 108:20, 108:22, 108:25, 109:4, 110:1, 111:22, 111:23, 111:24, 112:11, 112:24, 114:4, 114:6, 114:13, 115:9, 115:15, 115:20, 116:1, 116:10, 116:15, 116:17, 116:18, 116:20, 117:2, 117:11, 117:13, 117:15, 117:16, 117:17, 118:2, 118:20,	118:22, 118:24, 118:25, 119:2, 119:14, 119:20, 120:4, 120:13, 120:19, 121:6, 121:19, 122:10, 122:21, 122:23, 123:5, 123:9, 123:11, 123:14, 123:15, 123:18, 123:22, 124:6, 124:8, 124:9, 124:19, 125:1, 125:2, 125:3, 125:5, 125:10, 125:13, 125:16, 125:18, 125:21, 125:25, 126:2, 126:4, 126:5, 126:7, 126:9, 126:10, 126:12, 126:17, 126:18, 126:20, 126:23, 126:24, 127:1, 127:8, 127:14, 127:16, 127:18, 127:19, 127:20, 127:21, 127:22, 127:23, 127:24, 128:1, 128:4, 128:5, 128:6, 128:7, 128:11, 128:17, 128:19, 128:21, 129:16, 129:18, 129:20, 129:22, 129:24, 130:1, 130:5, 130:18, 131:12, 131:19, 132:9, 132:12, 132:14, 132:19, 132:23, 133:11, 133:13, 133:14, 133:19, 133:23, 133:24, 134:1, 134:9, 135:1, 135:16, 135:21, 135:24, 136:3, 136:17, 136:23, 136:24, 137:3, 137:4, 137:6, 137:16, 138:22, 138:23, 139:1, 139:3, 139:10, 140:7, 140:11, 140:14, 140:21, 140:23, 141:10, 141:12, 141:17, 141:23, 141:25, 142:2, 142:3, 142:5, 142:13, 142:17, 143:10, 143:19, 143:25, 144:3,	144:14, 144:15, 145:1, 145:4, 145:5, 145:6, 145:13, 145:14, 145:16, 145:17, 145:18, 145:19, 145:22, 145:23, 145:24, 145:25, 146:1, 146:3, 146:9, 146:10, 146:13, 146:17, 146:18, 146:19, 146:25, 147:4, 147:9, 147:11, 147:12, 147:22, 147:24, 148:5, 148:8, 148:9, 148:19, 148:20, 149:1, 149:2, 149:7, 149:11, 149:12, 149:17, 149:25, 150:7, 150:19, 150:21, 150:22, 150:25, 151:2, 151:3, 151:9, 151:13, 151:14, 151:18, 152:3, 152:7, 153:9, 153:10, 153:23, 153:24, 154:9, 154:11, 154:17, 154:18, 155:8, 155:12, 155:17, 155:19, 155:20, 156:3, 156:5, 156:6, 156:8, 156:10, 156:22, 157:1, 158:12, 158:14, 158:19, 158:23, 159:3, 159:4, 159:11, 159:12, 159:13, 159:18, 159:22, 160:1, 160:14, 160:25, 161:6, 162:1, 164:1, 164:2, 164:4, 164:5, 164:11, 164:13, 164:14, 164:17, 166:4, 166:5, 166:13, 166:17, 166:19, 166:22, 167:1, 167:13, 167:15, 167:17, 167:19, 167:22, 168:1, 168:7, 168:9, 168:10, 168:12, 168:22, 168:24, 169:1, 169:7, 169:18, 169:20, 169:23, 170:9, 170:10, 170:11, 170:21, 171:4,
--	--	---	--	---

171:18, 171:25,
172:4, 172:5, 172:6,
172:9, 172:13,
172:20, 172:21,
172:24, 173:2,
174:1, 174:4, 174:6,
174:8, 174:10,
174:11, 174:13,
174:16, 174:19,
174:25, 175:4,
175:9, 175:10,
175:12, 175:20,
176:17, 177:13,
177:17, 177:24,
178:3, 178:10,
178:18, 178:19,
179:1, 179:3, 180:6,
180:11, 180:13,
180:14, 180:15,
180:20, 181:5,
181:12, 181:14,
181:17, 181:18,
181:22, 182:7,
182:12, 182:14,
182:17, 182:18,
182:22, 182:25,
183:1, 183:12,
183:15, 183:16,
183:19, 183:20,
184:4, 184:9,
184:11, 184:22,
186:3, 186:4, 186:5,
186:10, 186:12,
186:13, 186:16,
186:20, 186:25,
187:1, 187:4, 187:6,
187:11, 187:13,
187:15, 187:21,
188:2, 188:12,
188:14, 188:19,
188:24, 189:10,
189:17, 189:21,
190:7, 190:8,
190:10, 190:16,
190:21, 191:1,
191:18, 191:20,
192:6, 192:7, 192:8,
192:17, 192:18,
193:2, 193:19,
193:21, 193:24,
193:25, 194:1,
194:2, 194:10,
194:14, 194:17,
194:18, 194:19,
194:21, 195:4,
195:11, 195:14,
195:20, 195:21,
196:18, 196:21,
196:25, 197:4,
197:7, 197:12,
197:15, 197:18,

197:23, 198:3,
198:12, 198:18,
198:19, 199:1,
199:5, 199:10,
199:11, 199:12,
199:13, 199:19,
200:7, 200:9,
200:11, 200:13,
200:15, 200:16,
200:17, 200:22,
201:2, 201:3,
201:12, 201:16,
201:19, 201:24,
201:25, 202:3,
202:4, 202:5, 202:9,
202:11, 202:13,
202:17, 202:21,
202:22, 203:7,
203:16, 205:3,
205:9, 205:15,
206:10, 206:12,
206:14, 206:18,
206:21, 206:25,
207:11, 207:13,
207:16, 207:21,
208:8, 208:17,
208:23, 209:3,
209:23, 210:8,
210:10, 211:8,
211:11, 211:16,
211:20, 211:22,
212:3, 212:4, 212:6,
212:12, 212:13,
212:14, 212:18,
212:21, 213:2,
213:4, 213:16,
213:22, 213:23,
213:24, 215:2,
215:11, 215:15,
215:25, 216:1,
216:15, 216:19,
216:22, 217:9,
217:21, 217:25,
218:3, 218:20,
218:23, 218:24,
219:3, 219:4,
219:14, 219:25,
220:1, 220:2, 220:4,
220:10, 220:12,
221:17, 221:20,
221:25, 222:16,
222:17, 223:4,
223:15, 223:20,
224:6, 224:7,
224:11, 224:17,
225:10, 225:14,
225:16, 225:19,
225:24, 226:10,
226:15, 226:16,
226:20, 226:25,
227:1, 227:12,

227:14, 227:17,
227:23, 228:5,
228:7, 228:11,
229:12, 229:13,
229:18, 229:19,
229:20, 229:23,
230:12, 230:15,
230:18, 230:20,
230:22, 231:7,
231:9, 231:17,
231:25, 232:2,
232:4, 232:5, 232:6,
232:8, 232:14,
232:16, 232:22,
233:1, 233:5, 233:6,
233:10, 233:19,
233:21, 234:4,
234:5, 234:23,
235:5, 235:9,
235:13, 235:16,
235:24, 236:1,
236:12, 236:15,
236:16, 236:17,
237:2, 237:8,
237:14, 237:19,
237:22, 238:9,
238:12, 238:14,
238:16, 238:20,
238:23, 239:2,
239:22, 240:3,
240:6, 240:12,
240:19, 240:25,
241:6, 241:11,
241:18, 242:9,
242:14, 242:19,
242:20, 243:2,
243:12, 243:13,
243:19, 243:22,
244:4, 244:10,
244:11, 244:12,
244:14, 244:17,
244:20, 244:21,
244:23, 244:25,
245:10, 246:1,
246:6, 246:11,
247:2, 247:8,
247:12, 247:13,
247:15, 247:19,
247:20, 248:1,
248:11, 249:8,
249:11, 250:14,
250:15, 250:20,
250:24, 250:25,
251:6, 251:8,
251:15, 252:5,
252:13, 252:20,
252:22, 253:4
OFF [4] - 143:10,
161:9, 165:5, 165:25
OFFER [8] - 34:7,
129:6, 129:15,

132:17, 163:5,
163:18, 172:12,
184:10
OFFERED [5] - 58:14,
65:19, 66:7, 112:23,
120:18
OFFERING [3] - 13:5,
13:11, 221:8
OFFICE [5] - 2:2, 4:7,
4:10, 4:14, 143:14
OFFICIAL [3] - 1:19,
170:7, 253:8
OFTEN [3] - 71:25,
136:18, 176:18
OH [5] - 58:18, 67:10,
74:6, 74:9, 192:20
OKAY [74] - 9:6,
20:19, 21:3, 21:18,
23:11, 24:12, 25:6,
25:16, 29:7, 33:10,
33:19, 39:5, 54:2,
54:5, 55:18, 57:22,
57:25, 65:12, 66:13,
88:9, 89:17, 89:22,
90:19, 91:3, 103:16,
105:2, 109:3,
111:10, 114:15,
121:2, 121:6,
129:10, 136:22,
139:16, 144:2,
148:13, 148:15,
156:25, 157:6,
158:9, 158:24,
161:3, 162:8,
162:16, 162:24,
163:11, 163:19,
164:7, 164:20,
165:1, 171:7,
175:22, 180:2,
180:24, 181:5,
182:8, 183:25,
185:5, 190:15,
192:3, 204:5,
204:11, 210:4,
210:11, 210:20,
215:13, 217:13,
234:9, 234:15,
236:13, 242:1,
242:5, 251:14
OLD [5] - 36:10,
36:11, 37:12,
126:15, 127:15
OLDER [2] - 108:7,
108:10
ON [287] - 3:8, 3:24,
5:11, 6:1, 6:23, 7:21,
8:3, 8:6, 8:8, 8:9,
8:13, 8:17, 9:4, 9:14,
9:18, 9:23, 10:13,
10:14, 11:6, 12:5,

14:1, 14:5, 14:6,
15:1, 15:15, 15:17,
16:11, 16:20, 17:17,
19:1, 20:1, 21:16,
21:24, 22:4, 25:1,
25:25, 26:7, 26:15,
27:2, 30:12, 30:23,
32:5, 32:8, 33:20,
33:21, 34:17, 36:12,
38:11, 38:14, 39:9,
39:11, 42:10, 42:19,
43:9, 44:10, 46:6,
46:14, 46:15, 47:3,
48:1, 48:2, 49:25,
51:11, 51:16, 51:17,
52:1, 52:4, 53:14,
59:18, 61:1, 61:4,
62:10, 63:3, 63:18,
64:1, 64:5, 64:10,
64:17, 65:2, 68:10,
68:13, 69:1, 69:15,
73:11, 73:21, 73:23,
73:25, 74:3, 74:10,
74:19, 75:5, 75:10,
75:19, 75:24, 76:23,
79:19, 79:20, 80:17,
81:4, 81:7, 83:18,
83:25, 84:9, 85:16,
85:25, 87:8, 87:22,
87:23, 87:25, 88:7,
89:8, 90:13, 90:19,
93:12, 93:22, 94:14,
96:6, 96:17, 98:9,
100:12, 100:15,
100:25, 101:11,
101:15, 101:23,
102:10, 104:11,
105:20, 106:9,
108:1, 108:10,
108:24, 110:19,
111:13, 111:15,
112:3, 114:12,
116:15, 116:17,
118:13, 119:8,
119:13, 119:16,
119:17, 119:18,
119:19, 120:12,
122:18, 124:6,
124:15, 125:8,
129:2, 131:22,
135:9, 135:10,
136:17, 136:19,
138:17, 139:21,
140:4, 140:24,
141:4, 141:7,
141:10, 141:21,
141:23, 145:12,
145:16, 145:19,
145:23, 150:11,
151:23, 152:11,
152:14, 154:8,

<p>154:18, 156:17, 157:14, 158:22, 159:20, 160:16, 160:24, 161:5, 161:18, 162:6, 162:16, 163:3, 164:12, 164:14, 164:18, 164:19, 165:23, 166:22, 169:7, 173:2, 173:7, 174:25, 175:16, 176:17, 185:18, 185:22, 186:6, 188:25, 190:7, 190:22, 191:7, 195:6, 204:20, 205:13, 206:5, 206:18, 206:21, 207:10, 207:12, 209:6, 209:17, 211:2, 211:13, 212:8, 213:7, 215:1, 215:24, 216:4, 216:16, 217:20, 217:22, 219:6, 219:7, 219:8, 219:19, 220:15, 220:16, 221:21, 222:7, 222:13, 223:11, 224:10, 225:2, 228:6, 229:1, 230:19, 231:8, 231:17, 232:24, 233:8, 234:23, 235:8, 235:9, 235:16, 235:22, 236:1, 236:3, 236:7, 236:13, 237:10, 237:15, 238:21, 239:12, 239:25, 240:2, 240:19, 240:21, 242:8, 242:22, 244:3, 244:4, 244:20, 245:7, 245:13, 245:16, 245:20, 246:3, 246:6, 246:7, 246:14, 248:13, 250:7, 251:25, 252:12, 252:14</p> <p>ONCE [4] - 132:22, 161:8, 192:11, 193:2</p> <p>ONE [97] - 5:10, 8:19, 11:18, 13:10, 17:17, 20:25, 22:3, 25:23, 28:7, 28:10, 28:15, 30:16, 36:8, 39:14, 40:20, 41:10, 41:12, 45:10, 48:1, 48:23, 49:12, 52:15, 55:19, 64:9, 66:24, 67:21,</p>	<p>69:17, 73:18, 73:20, 74:19, 75:16, 76:5, 76:10, 76:16, 77:7, 80:20, 82:23, 85:16, 92:1, 92:7, 95:4, 97:9, 121:6, 121:9, 124:9, 125:16, 126:23, 126:24, 127:1, 127:16, 128:4, 129:24, 134:8, 134:12, 137:6, 141:16, 142:12, 145:1, 151:14, 154:11, 156:6, 156:25, 157:1, 161:22, 163:11, 173:7, 176:9, 182:18, 182:19, 185:25, 192:1, 192:23, 194:21, 198:13, 207:13, 207:19, 208:7, 213:8, 217:6, 218:19, 224:24, 231:17, 233:8, 234:10, 234:17, 234:21, 236:22, 241:24, 245:7, 248:16, 248:18, 249:21</p> <p>ONE-TIME [2] - 134:8, 134:12</p> <p>ONES [6] - 77:10, 108:7, 138:10, 170:6, 176:16, 232:8</p> <p>ONGOING [3] - 111:24, 202:20, 202:23</p> <p>ONLY [36] - 7:23, 8:21, 10:13, 14:21, 22:3, 28:1, 29:1, 29:15, 32:18, 33:5, 34:2, 37:5, 41:10, 64:9, 86:2, 91:17, 93:20, 99:16, 112:8, 149:23, 153:16, 164:25, 188:7, 188:25, 190:8, 193:1, 208:6, 210:12, 214:2, 221:15, 221:19, 229:1, 230:16, 235:12, 243:12, 245:21</p> <p>ONSET [1] - 126:17</p> <p>OPEN [4] - 25:1, 25:10, 96:9, 209:17</p> <p>OPENED [1] - 213:9</p> <p>OPENING [2] - 3:14, 3:16</p>	<p>OPENINGS [1] - 5:12</p> <p>OPENS [2] - 3:1, 212:12</p> <p>OPERATING [1] - 249:3</p> <p>OPINION [22] - 36:7, 96:4, 96:8, 96:24, 98:18, 98:23, 100:20, 138:21, 141:5, 142:12, 156:17, 173:2, 188:18, 190:2, 190:25, 191:13, 191:17, 206:18, 207:16, 226:10, 252:4, 252:6</p> <p>OPINIONS [2] - 97:3, 174:8</p> <p>OPPORTUNITY [6] - 96:9, 103:5, 181:11, 190:17, 232:20, 236:3</p> <p>OPPOSED [1] - 108:7</p> <p>OPPOSING [1] - 11:4</p> <p>OPPOSITION [1] - 251:19</p> <p>OPT [12] - 13:7, 13:12, 13:16, 23:5, 40:5, 43:13, 96:10, 211:16, 212:1, 212:15, 232:20, 242:14</p> <p>OPT-OUT [2] - 40:5, 43:13</p> <p>OPTIMAL [2] - 71:20, 72:3</p> <p>OPTIMALLY [1] - 107:15</p> <p>OPTING [4] - 11:11, 11:15, 96:19, 228:15</p> <p>OPTION [4] - 229:3, 230:12, 230:25, 248:8</p> <p>OPTIONAL [6] - 211:23, 211:25, 226:14, 232:16, 248:10, 250:16</p> <p>OPTIONS [16] - 100:1, 163:4, 163:23, 171:1, 171:3, 173:12, 180:3, 180:9, 184:5, 185:4, 190:16, 191:20, 191:21, 191:22, 192:12, 208:6</p> <p>OPTS [1] - 7:4</p> <p>OR [175] - 7:14, 8:5, 10:19, 12:3, 13:5, 13:8, 13:11, 13:13, 13:17, 13:19, 14:11,</p>	<p>15:18, 18:23, 19:25, 20:8, 20:14, 28:3, 28:19, 28:20, 29:4, 31:18, 31:20, 32:13, 32:22, 33:7, 34:21, 35:5, 36:5, 37:12, 37:17, 41:16, 41:21, 42:1, 42:5, 42:24, 43:10, 43:12, 44:7, 47:10, 48:6, 48:21, 49:2, 49:20, 50:23, 52:22, 56:2, 62:8, 65:1, 66:8, 67:9, 69:25, 72:6, 73:7, 73:18, 73:19, 79:5, 79:12, 80:3, 80:24, 82:18, 84:25, 85:17, 87:22, 88:10, 90:20, 90:23, 91:8, 91:21, 92:14, 100:21, 107:8, 109:11, 114:19, 116:10, 120:19, 120:22, 120:23, 121:3, 122:8, 123:13, 124:3, 125:21, 127:2, 128:24, 133:2, 133:12, 135:11, 135:21, 136:20, 142:8, 145:18, 148:5, 148:19, 149:7, 149:24, 150:3, 150:12, 150:15, 151:22, 153:17, 153:20, 154:2, 157:4, 159:7, 160:5, 169:11, 169:20, 172:7, 172:21, 172:24, 173:18, 173:23, 174:6, 174:9, 175:1, 175:8, 178:20, 178:25, 179:18, 179:19, 179:21, 181:9, 181:24, 184:18, 188:10, 189:23, 189:25, 190:1, 190:15, 191:14, 194:12, 199:14, 200:4, 202:13, 203:14, 205:10, 205:18, 207:23, 208:10, 210:5, 212:2, 214:13, 215:20, 218:7, 218:11, 218:24, 219:3, 219:21, 221:9, 221:20, 221:22, 222:4, 222:16, 222:21,</p>	<p>227:16, 229:22, 230:13, 230:14, 231:10, 237:14, 240:1, 242:19, 245:4, 247:3, 247:15, 247:24, 249:21, 250:10, 251:6, 252:24</p> <p>ORAL [8] - 12:2, 79:21, 80:22, 80:24, 130:21, 133:17, 133:20, 135:5</p> <p>ORANGES [1] - 109:11</p> <p>ORDER [21] - 3:22, 30:12, 53:5, 54:9, 66:7, 97:25, 98:7, 143:3, 143:11, 180:20, 207:25, 214:17, 214:20, 214:23, 237:18, 245:13, 245:16, 246:1, 249:6, 252:18, 252:21</p> <p>ORDINARY [1] - 241:5</p> <p>ORGANIZATION [4] - 28:14, 29:4, 102:23, 217:25</p> <p>ORGANIZATIONS [2] - 27:6, 34:2</p> <p>ORGANIZED [1] - 176:3</p> <p>ORIGINAL [5] - 38:21, 42:21, 43:14, 43:22, 211:5</p> <p>ORIGINALLY [2] - 55:3, 211:8</p> <p>OSORIO [2] - 241:3, 241:4</p> <p>OTHER [89] - 6:4, 13:9, 14:6, 15:2, 16:25, 17:6, 17:7, 28:14, 29:21, 34:1, 41:12, 43:2, 48:2, 50:19, 52:2, 71:3, 73:22, 74:11, 79:12, 85:22, 86:3, 86:9, 86:20, 92:11, 106:21, 107:2, 108:13, 108:15, 111:14, 115:23, 117:18, 119:1, 121:9, 121:17, 143:10, 149:16, 151:1, 151:10, 154:11, 161:22, 164:18, 169:5, 169:9, 172:19, 172:22, 173:25, 174:16, 175:5,</p>
---	---	--	---	--

179:18, 179:20,
182:20, 185:19,
186:20, 187:13,
188:8, 188:25,
189:6, 189:8,
189:15, 192:14,
194:2, 194:22,
195:3, 195:17,
195:18, 197:22,
199:21, 202:10,
202:13, 203:4,
203:8, 203:9, 208:6,
208:22, 209:16,
213:5, 225:1, 230:1,
230:22, 231:4,
231:12, 231:18,
231:19, 239:3,
240:10, 240:23,
242:8
OTHERS [10] - 47:10,
62:8, 66:23, 72:19,
77:15, 93:6, 130:8,
155:5, 177:1, 215:21
OTHERWISE [4] -
53:23, 80:5, 82:5,
203:1
OUGHT [4] - 67:14,
69:9, 78:24, 79:3
OUR [48] - 6:1, 6:5,
7:22, 8:8, 9:14, 9:19,
9:20, 15:20, 16:9,
21:23, 23:22, 23:25,
24:3, 42:7, 42:16,
65:9, 67:10, 82:15,
86:1, 86:5, 86:6,
86:21, 109:18,
110:8, 111:21,
112:9, 112:22,
122:11, 141:24,
157:24, 158:7,
159:18, 179:13,
181:7, 183:5, 184:4,
187:4, 188:24,
212:22, 214:9,
215:2, 215:17,
216:24, 229:20,
230:8, 235:13,
237:15
OURSELVES [1] -
24:4
OUT [67] - 7:4, 7:22,
9:5, 9:14, 9:22, 13:7,
13:12, 13:16, 14:11,
23:5, 30:3, 32:21,
37:17, 40:5, 43:13,
44:11, 44:13, 44:18,
44:22, 76:17, 77:3,
77:9, 79:16, 83:6,
86:5, 91:18, 92:20,
96:10, 119:6, 126:3,

126:24, 127:1,
140:7, 149:19,
166:17, 178:9,
178:18, 182:13,
186:15, 188:13,
189:6, 189:10,
194:4, 206:4,
207:13, 210:13,
211:16, 212:1,
212:16, 214:12,
215:2, 216:6, 227:5,
228:15, 231:19,
232:20, 233:15,
239:17, 242:14,
243:11, 243:21,
244:10, 244:13,
244:22, 244:24,
249:25, 252:6
OUT-OF-POCKET [3]
- 166:17, 178:18,
189:10
OUTCOMES [5] -
75:20, 123:16,
169:22, 171:2,
180:10
OUTLINES [1] - 23:25
OUTS [1] - 222:6
OUTSIDE [11] - 6:22,
64:5, 84:4, 84:13,
88:10, 96:25,
102:18, 125:21,
141:11, 142:13,
142:16
OUTSTANDING [1] -
155:21
OVARIAN [7] - 108:15,
123:6, 126:7, 126:9,
126:16, 126:21,
128:18
OVARIES [3] - 126:11,
127:5, 127:10
OVER [41] - 12:21,
13:1, 19:24, 26:1,
26:3, 27:19, 27:23,
28:7, 51:23, 53:24,
57:1, 62:18, 65:9,
66:2, 93:1, 94:9,
95:1, 101:24, 108:4,
119:4, 122:24,
125:23, 134:12,
134:15, 134:25,
135:12, 135:16,
140:21, 154:17,
155:10, 155:16,
163:20, 181:12,
183:12, 186:14,
188:2, 188:19,
192:13, 229:9, 230:1
**OVER-THE-
COUNTER** [1] -

125:23
OVERALL [2] -
129:21, 145:10
OVERLAP [5] -
118:15, 118:17,
118:18, 237:17,
237:20
OVERRIDE [2] -
65:12, 121:9
OVERRULED [4] -
141:13, 181:25,
185:5, 191:3
OVERRULING [1] -
173:7
OVERSEE [1] - 170:10
OVERSEEING [1] -
62:1
OVERVIEW [1] - 164:4
OWN [18] - 19:19,
23:17, 30:15,
120:25, 122:10,
136:15, 143:5,
155:4, 155:6, 155:7,
174:7, 189:17,
190:13, 190:14,
216:22, 229:17,
235:8, 242:13
OWNERS [2] - 29:4,
29:18

P

PA [4] - 1:9, 1:21, 2:4,
2:7
PAGE [2] - 122:23,
195:22
PACT [1] - 81:25
PAGE [26] - 9:14,
10:14, 43:9, 68:7,
68:8, 68:13, 74:18,
74:22, 80:17, 81:4,
82:20, 84:5, 84:18,
86:13, 90:13, 101:6,
101:8, 101:12,
107:23, 114:13,
143:25, 144:1,
185:8, 250:7, 254:1
PAGES [3] - 52:7,
84:9, 86:13
PAID [2] - 11:20, 79:13
PAIN [16] - 117:17,
123:6, 125:1, 125:5,
125:6, 125:11,
125:13, 125:17,
125:21, 126:3,
128:17, 128:18,
130:12, 142:1,
155:22
PANEL [1] - 104:21
PAPER [5] - 83:13,

93:10, 106:24,
110:25
PAPERS [2] - 9:20,
26:16
PAR [1] - 21:16
PARAGARD [1] -
90:20
PARAGRAPH [47] -
10:7, 10:15, 10:18,
10:22, 10:23, 10:24,
81:5, 81:8, 82:10,
82:21, 82:24, 83:7,
83:12, 98:18,
100:18, 100:19,
101:22, 102:14,
103:1, 103:4, 103:9,
103:11, 143:19,
143:25, 146:17,
146:23, 148:8,
148:15, 148:24,
149:5, 149:10,
149:14, 150:25,
151:6, 151:8, 158:8,
198:10, 199:18,
200:21, 201:6,
201:14, 201:22,
202:2, 202:9,
202:16, 221:13
PARAGRAPHS [8] -
10:3, 10:6, 10:10,
10:11, 10:16, 10:17,
147:12, 147:23
PARAMETERS [1] -
180:6
PARDON [1] - 115:11
PARENS [10] - 15:14,
16:7, 16:12, 17:15,
17:17, 18:2, 18:18,
34:25, 35:3, 35:8
PARENTHESSES [1] -
81:16
PARENTHOOD [1] -
179:21
PARITY [3] - 215:23,
230:23, 231:5
PART [35] - 22:20,
22:23, 35:4, 42:9,
51:19, 52:6, 59:6,
59:24, 61:8, 67:6,
69:9, 69:14, 73:18,
73:20, 78:6, 78:15,
78:25, 79:3, 87:12,
94:4, 116:10, 118:2,
119:14, 120:4,
158:12, 159:18,
166:19, 167:15,
171:25, 172:5,
172:9, 174:25,
195:4, 216:7, 237:21
PARTICIPANT [1] -

181:13
PARTICIPANTS [3] -
110:14, 180:12,
207:23
PARTICIPANTS' [1] -
218:2
PARTICIPATE [2] -
182:15, 232:21
PARTICIPATED [1] -
73:14
PARTICIPATING [1] -
183:7
PARTICULAR [26] -
3:21, 20:2, 31:25,
49:11, 49:20, 87:18,
93:13, 96:13,
132:19, 173:5,
173:15, 174:5,
174:11, 174:13,
175:13, 182:20,
184:18, 195:2,
195:8, 195:13,
206:4, 208:24,
211:13, 214:20,
222:19, 227:20
PARTICULARLY [8] -
20:5, 36:13, 61:5,
181:9, 214:9,
214:14, 217:5, 246:2
PARTIES [5] - 3:13,
3:14, 3:16, 6:2,
251:16
PARTNERED [1] -
182:9
PARTS [2] - 95:17,
174:10
PARTUM [1] - 12:15
PARTY [5] - 34:6,
212:2, 218:7,
218:10, 229:4
PASS [2] - 158:6,
205:13
PASSAGE [1] - 90:5
PASSED [5] - 28:8,
198:11, 198:18,
224:20, 250:1
PAST [3] - 26:1, 51:25,
173:22
PATCH [2] - 175:7,
176:15
PATCHWORK [1] -
26:4
PATIENT [33] -
121:13, 121:15,
122:8, 122:10,
124:6, 124:11,
124:12, 124:15,
125:4, 129:17,
131:19, 132:14,
132:21, 132:23,

<p>135:2, 136:24, 137:4, 140:2, 141:2, 152:25, 153:8, 154:15, 154:16, 154:19, 169:22, 171:2, 172:4, 179:16, 179:17, 179:18, 180:10, 190:11, 198:11</p> <p>PATIENT'S [1] - 132:12</p> <p>PATIENT - CENTERED [3] - 169:22, 171:2, 180:10</p> <p>PATIENTS [89] - 11:10, 11:14, 11:19, 12:4, 12:9, 14:16, 22:19, 23:2, 23:14, 62:8, 117:12, 117:13, 118:10, 119:23, 121:14, 121:15, 121:21, 122:2, 122:5, 122:6, 122:8, 122:9, 122:13, 122:17, 122:20, 122:23, 122:25, 125:20, 125:22, 126:16, 126:19, 128:13, 128:14, 128:16, 129:2, 129:7, 130:5, 130:19, 130:24, 131:1, 131:5, 131:12, 131:22, 132:10, 132:24, 133:8, 133:13, 133:20, 133:23, 134:2, 135:10, 136:18, 137:11, 138:10, 138:17, 140:7, 140:15, 142:10, 145:5, 145:13, 145:22, 147:6, 155:1, 155:9, 155:12, 156:2, 156:18, 157:1, 171:21, 173:11, 175:14, 178:3, 178:15, 178:24, 179:7, 179:8, 189:20, 192:20, 198:18, 199:19, 200:2, 200:4, 200:5, 200:10, 200:15, 200:16, 203:9, 203:14</p> <p>PATIENTS' [2] - 131:24, 202:4</p> <p>PATRIAE [10] - 15:14,</p>	<p>16:7, 16:12, 17:15, 17:17, 18:2, 18:19, 34:25, 35:3, 35:8</p> <p>PATTERNS [9] - 94:22, 102:1, 102:3, 106:14, 109:15, 109:19, 111:19, 112:9, 154:17</p> <p>PAUSE [3] - 136:9, 160:20, 203:22</p> <p>PAY [15] - 79:13, 79:16, 79:22, 80:3, 80:12, 80:13, 80:18, 90:7, 92:20, 135:10, 140:7, 153:10, 192:10, 192:22, 240:10</p> <p>PAYING [3] - 14:11, 136:3, 231:12</p> <p>PAYMENT [1] - 12:17</p> <p>PAYMENTS [1] - 83:5</p> <p>PAYS [7] - 79:18, 79:24, 90:7, 96:11, 96:13, 96:15, 178:20</p> <p>PCORI [3] - 169:22, 171:2, 180:10</p> <p>PECULIAR [1] - 187:19</p> <p>PEER [4] - 104:6, 110:25, 169:5, 169:6</p> <p>PELVIC [12] - 117:17, 123:6, 125:1, 125:5, 125:6, 125:11, 125:13, 125:17, 125:21, 128:17, 130:12, 155:22</p> <p>PENALTIES [1] - 50:23</p> <p>PENN [11] - 55:5, 60:7, 60:10, 61:2, 90:2, 93:5, 122:3, 166:1, 166:2, 168:14, 170:16</p> <p>PENNSYLVANIA [109] - 1:2, 1:3, 2:8, 2:12, 3:3, 4:3, 5:24, 7:7, 12:13, 12:20, 12:25, 13:4, 13:6, 13:10, 14:7, 14:8, 15:1, 21:12, 22:13, 22:24, 23:15, 24:20, 27:20, 34:4, 34:21, 43:9, 43:19, 55:3, 64:2, 64:6, 64:8, 87:23, 88:12, 88:16, 88:24, 89:19, 89:24, 90:4, 93:2, 93:20, 93:23, 95:4, 96:6, 96:25, 100:4, 110:2, 110:8, 110:11, 112:2,</p>	<p>115:9, 115:15, 116:1, 116:16, 116:18, 117:2, 119:2, 121:19, 121:20, 127:2, 138:11, 138:24, 140:12, 141:7, 141:11, 141:21, 142:13, 146:8, 146:18, 146:24, 147:8, 147:13, 147:24, 148:16, 148:25, 149:6, 149:11, 149:15, 153:25, 157:2, 163:9, 181:12, 182:12, 190:23, 197:1, 197:19, 198:4, 198:6, 198:8, 199:2, 199:6, 199:9, 199:14, 202:19, 227:10, 229:19, 229:21, 230:2, 230:9, 230:21, 231:3, 232:2, 232:8, 232:14, 233:11, 235:4, 235:8, 242:12, 243:20, 252:4</p> <p>PENNSYLVANIA'S [4] - 34:11, 233:10, 234:2</p> <p>PENNSYLVANIANS [1] - 12:21</p> <p>PEOPLE [26] - 14:3, 21:10, 28:20, 29:17, 59:1, 62:4, 64:2, 64:5, 68:10, 75:17, 75:20, 79:25, 86:19, 94:18, 111:20, 148:6, 187:16, 199:10, 199:13, 216:21, 219:18, 220:2, 229:7, 235:3, 237:14, 250:23</p> <p>PER [11] - 75:22, 76:11, 91:18, 118:12, 118:17, 119:11, 122:6, 135:11, 176:9, 176:18</p> <p>PERCENT [37] - 69:24, 70:2, 70:4, 70:6, 70:7, 70:12, 70:21, 71:14, 73:6, 80:21, 81:2, 88:21, 88:23, 89:1, 89:10, 89:14, 92:7, 99:6, 125:3, 126:23, 133:23, 134:3,</p>	<p>137:8, 153:24, 154:1, 154:7, 157:4, 183:18, 183:20, 186:13, 186:17, 186:21, 186:25, 187:1, 197:8</p> <p>PERCENTAGE [8] - 88:14, 88:15, 91:10, 133:19, 134:1, 157:1, 187:12, 187:15</p> <p>PERCENTAGES [1] - 186:20</p> <p>PERFECT [6] - 48:3, 75:16, 75:17, 157:11, 250:25</p> <p>PERFECTLY [2] - 204:15, 222:18</p> <p>PERFORM [4] - 122:15, 124:14, 129:19, 132:11</p> <p>PERFORMED [5] - 22:9, 64:5, 92:22, 107:22, 109:10</p> <p>PERHAPS [2] - 195:11, 205:20</p> <p>PERIOD [9] - 25:10, 32:18, 71:2, 90:5, 94:9, 124:3, 154:20, 183:12, 209:17</p> <p>PERIODS [6] - 125:11, 125:21, 125:22, 128:18, 131:13, 135:25</p> <p>PERMANENT [5] - 26:5, 39:24, 176:10, 176:13, 244:22</p> <p>PERMANENTE [1] - 83:15</p> <p>PERMISSION [5] - 57:20, 57:25, 97:15, 116:21, 204:7</p> <p>PERMIT [1] - 43:13</p> <p>PERMITTED [1] - 66:9</p> <p>PERMITTING [1] - 242:13</p> <p>PERSON [7] - 65:1, 84:24, 146:11, 146:21, 150:15, 179:20, 236:22</p> <p>PERSONAL [2] - 140:14, 174:7</p> <p>PERSONALLY [4] - 141:1, 169:2, 173:24, 179:20</p> <p>PERSPECTIVE [5] - 22:3, 22:18, 23:13, 133:11, 163:17</p> <p>PERSUADED [2] - 50:14, 50:17</p>	<p>PERTAIN [2] - 155:3, 159:15</p> <p>PERTAINING [3] - 204:25, 205:6, 206:7</p> <p>PERTAINS [1] - 48:14</p> <p>PH.D [1] - 58:9</p> <p>PH.D.'S [1] - 61:1</p> <p>PHARMACIES [1] - 203:14</p> <p>PHARMACISTS [1] - 203:14</p> <p>PHARMACY [1] - 192:21</p> <p>PHENOMENON [2] - 145:4, 179:6</p> <p>PHILADELPHIA [6] - 1:9, 1:21, 2:7, 22:24, 121:24, 167:9</p> <p>PHILOSOPHY [1] - 51:9</p> <p>PHONE [2] - 5:11, 98:9</p> <p>PHRASE [3] - 18:15, 115:16, 246:5</p> <p>PHYSICIAN [4] - 60:22, 163:16, 166:3, 193:2</p> <p>PHYSICIANS [3] - 11:11, 75:4, 121:17</p> <p>PILL [13] - 91:17, 96:19, 128:24, 130:21, 134:9, 135:5, 136:1, 145:18, 175:6, 176:15, 176:19, 190:1</p> <p>PILLS [10] - 11:22, 12:3, 80:15, 91:8, 91:11, 91:14, 129:17, 133:17, 133:21, 134:5</p> <p>PITTSBURGH [1] - 55:3</p> <p>PLACE [11] - 24:17, 25:7, 81:7, 131:17, 133:16, 135:3, 160:6, 181:20, 189:18, 197:7, 207:6</p> <p>PLACES [1] - 239:3</p> <p>PLAIN [2] - 45:18, 125:17</p> <p>PLAINLY [1] - 7:21</p> <p>PLAINTIFF [3] - 26:22, 64:25, 208:16</p> <p>PLAINTIFF'S [1] - 3:20</p> <p>PLAINTIFFS [7] - 17:7, 17:8, 151:12, 206:19, 206:21, 216:19, 229:20</p>
--	--	---	--	--

PLAINTIFFS ^[2] -

3:24, 164:9

PLAN ^[32] - 30:11,53:9, 53:12, 53:21,
79:13, 79:19, 145:2,
145:3, 151:19,
206:19, 206:20,
206:21, 207:7,
207:9, 207:21,
207:22, 207:24,
208:7, 208:11,
208:18, 221:8,
228:2, 228:11,
230:13, 230:14,
230:15, 230:18,
244:4, 244:10,
244:11, 250:2**PLANNED** ^[1] - 179:21**PLANNING** ^[12] - 14:2,14:6, 81:24, 81:25,
167:3, 167:5,
168:20, 175:11,
176:24, 177:8,
184:24, 194:18**PLANS** ^[45] - 13:5,13:11, 24:25, 25:1,
25:8, 25:10, 25:13,
42:24, 43:25, 52:12,
52:15, 52:20, 52:21,
52:23, 53:23, 63:5,
71:3, 72:9, 99:1,
196:15, 196:18,
196:22, 196:25,
197:8, 198:14,
199:15, 199:23,
202:21, 205:3,
205:7, 205:9,
205:11, 205:15,
206:1, 209:8,
209:11, 224:11,
224:13, 224:17,
229:10, 230:24,
244:8, 249:12**PLAY** ^[3] - 173:10,

174:12, 177:7

PLAYED ^[1] - 59:6**PLEASE** ^[12] - 3:23,54:22, 87:23, 106:9,
113:9, 113:13,
113:19, 113:24,
162:20, 165:10,
182:5, 184:1**POCKET** ^[7] - 14:11,79:17, 92:20, 140:8,
166:17, 178:18,
189:10**POINT** ^[41] - 9:7, 24:1,25:11, 26:13, 30:3,
34:20, 35:15, 37:3,
37:13, 45:2, 46:15,47:12, 55:23, 57:24,
85:25, 107:5, 107:6,
111:4, 116:23,
119:6, 125:23,
150:24, 159:3,
159:7, 159:12,
160:7, 160:11,
164:15, 165:15,
175:20, 183:23,
211:4, 222:19,
227:15, 227:19,
231:21, 239:17,
243:4, 243:21,
244:3, 244:18**POINTED** ^[2] - 206:4,

233:15

POINTS ^[6] - 83:6,163:15, 165:24,
187:11, 192:5,
231:18**POISED** ^[1] - 21:24**POLICE** ^[2] - 31:25,

240:2

POLICES ^[1] - 33:2**POLICIES** ^[2] - 12:17,

25:3

POLICING ^[3] - 31:19,

31:22, 32:2

POLICY ^[5] - 12:18,16:23, 52:22,
192:23, 220:10**POLICYHOLDERS** ^[1]

- 205:10

POLICYMAKERS ^[1] -

66:23

POLITICAL ^[2] -

110:22, 220:4

POPULATION ^[5] -61:18, 121:16,
129:16, 141:2, 178:5**POPULATION** -**BASED** ^[1] - 61:18**PORTION** ^[3] - 207:12,

236:12, 252:21

POSES ^[1] - 30:24**POSING** ^[1] - 230:5**POSITION** ^[8] - 15:10,50:14, 51:12, 58:14,
60:15, 140:22,
160:24, 247:1**POSITIVE** ^[1] - 29:5**POSSIBILITY** ^[1] -

89:9

POSSIBLE ^[6] - 5:18,25:13, 234:13,
237:19, 240:3, 252:6**POSSIBLY** ^[1] - 53:10**POST** ^[15] - 12:15,23:2, 112:15, 131:9,
140:6, 145:20,145:21, 153:17,
153:20, 153:22,
155:12, 252:19,
252:20**POST-ACA** ^[1] - 140:6**POST-HEARING** ^[2] -

252:19, 252:20

POSTMENOPAUSAL^[1] - 130:12**POSTS** ^[1] - 194:24**POTENTIAL** ^[3] -

71:24, 81:18, 212:12

POTENTIALLY ^[4] -136:5, 137:19,
147:4, 211:19**POWER** ^[2] - 35:4,

35:5

PRACTICAL ^[1] -

123:24

PRACTICE ^[36] -22:20, 22:23, 69:1,
118:9, 120:25,
122:11, 123:4,
125:7, 131:11,
136:16, 154:17,
155:4, 155:6, 155:7,
155:10, 155:14,
155:23, 156:22,
171:10, 171:12,
171:14, 171:15,
171:18, 171:19,
171:20, 172:1,
173:11, 178:4,
178:22, 179:13,
189:17, 203:4,
203:9, 209:2**PRACTICES** ^[1] -

155:15

PRACTICING ^[4] -140:21, 163:16,
166:7, 171:22**PRE** ^[8] - 23:2, 131:8,132:22, 133:21,
145:20, 155:12,
177:16, 239:23**PRE-ACA** ^[4] - 131:8,132:22, 133:21,
239:23**PRE-TERM** ^[1] -

177:16

PRECEDENT ^[4] -37:8, 49:2, 49:3,
164:21**PRECEDENTIAL** ^[4] -36:19, 37:19, 37:24,
38:8**PRECEPTS** ^[1] - 28:18**PRECIPITOUSLY** ^[1] -

94:5

PRECISE ^[1] - 197:10**PRECISELY** ^[2] -

194:9, 197:2

PRECLUDE ^[1] -

214:24

PRECLUDED ^[1] -

221:4

PRECONCEPTION ^[2]

- 63:8, 73:23

PREDICTION ^[4] -140:16, 140:18,
239:2, 239:8**PREEMPTING** ^[1] -

216:9

PREFATORY ^[1] -

223:19

PREFER ^[2] - 9:23,

56:25

PREFERENCE ^[1] -

174:7

PREFERENCES ^[1] -

190:14

PREFERRED ^[2] -

85:5, 85:7

PREGNANCIES ^[40] -7:15, 12:16, 14:14,
69:24, 71:15, 71:25,
72:5, 72:8, 72:20,
73:6, 75:13, 75:22,
81:20, 82:1, 88:8,
88:9, 88:12, 88:15,
89:18, 91:18,
106:23, 106:24,
142:4, 142:5, 150:7,
150:23, 151:3,
151:10, 151:14,
151:18, 176:18,
176:20, 177:11,
177:15, 177:17,
191:23, 202:10,
202:12**PREGNANCY** ^[58] -9:11, 10:1, 10:4,
10:8, 10:13, 10:21,
69:16, 69:21, 69:22,
70:20, 71:8, 71:11,
71:13, 71:19, 71:20,
71:22, 71:24, 72:14,
72:17, 72:23, 73:4,
73:21, 74:12, 74:15,
76:11, 77:7, 79:2,
80:20, 81:1, 81:13,
91:20, 96:22,
111:23, 117:14,
127:9, 130:6, 130:9,
130:15, 137:17,
137:18, 137:21,
142:6, 142:7,
149:16, 150:12,
151:1, 153:25,
154:6, 168:15,168:18, 172:5,
172:7, 172:8,
173:18, 176:9,
187:23, 188:1**PREGNANT** ^[22] -31:11, 70:1, 71:23,
72:2, 72:3, 73:3,
76:1, 76:4, 76:18,
91:21, 126:12,
127:7, 127:8,
137:12, 137:14,
137:20, 150:16,
173:18, 173:20,
177:14, 188:4**PREJUDICED** ^[1] -

164:24

PRELIMINARY ^[11] -1:14, 3:9, 7:24, 8:4,
26:5, 159:13,
160:17, 244:22,
251:17, 251:18,
251:20**PREMATURE** ^[6] -123:6, 126:7, 126:8,
126:16, 126:21,
128:18**PREMATURELY** ^[1] -

127:23

PREMISE ^[2] - 81:21,

82:7

PREMISES ^[1] - 106:2**PREMIUMS** ^[1] - 208:2**PRENATAL** ^[3] - 72:1,

72:3, 150:8

PREPARATION ^[4] -93:11, 135:9,
195:17, 196:4**PREPARATIONS** ^[1] -

134:14

PREPARE ^[7] - 98:1,98:7, 143:4, 143:5,
143:11, 195:8, 196:5**PREPARED** ^[2] -

164:2, 194:8

PREPARING ^[4] -193:17, 194:3,
194:7, 194:23**PREROGATIVE** ^[1] -

20:16

PREROGATIVES ^[1] -

19:20

PRESCRIBE ^[11] -23:1, 119:22, 130:4,
130:6, 130:8,
130:14, 130:19,
132:1, 132:10,
133:25, 134:11**PRESCRIBED** ^[4] -80:4, 131:4, 133:17,
198:13

<p>PRESCRIBING [6] - 94:22, 130:24, 130:25, 131:12, 131:16, 155:15</p> <p>PRESCRIPTION [32] - 71:6, 77:10, 77:13, 77:15, 77:20, 79:23, 80:15, 80:19, 80:23, 94:19, 94:20, 132:10, 132:23, 133:2, 133:3, 133:8, 133:12, 133:20, 134:2, 135:6, 135:11, 135:22, 137:4, 139:23, 140:2, 153:1, 153:9, 153:13, 185:19, 186:20, 187:13</p> <p>PRESCRIPTIONS [11] - 11:11, 11:15, 23:2, 80:25, 96:19, 133:24, 136:19, 140:8, 153:18, 155:1, 203:15</p> <p>PRESENT [1] - 65:2</p> <p>PRESENTATION [3] - 184:4, 184:21, 184:23</p> <p>PRESENTATIONS [6] - 60:1, 61:13, 63:18, 63:24, 184:25, 185:11</p> <p>PRESENTED [5] - 100:11, 100:14, 152:10, 152:13, 243:18</p> <p>PRESENTING [1] - 184:5</p> <p>PRESERVING [1] - 218:2</p> <p>PRESS [1] - 194:25</p> <p>PRESSED [1] - 136:24</p> <p>PRESUMABLY [2] - 8:13, 8:14</p> <p>PRETERM [1] - 72:6</p> <p>PRETEXT [2] - 31:1, 31:3</p> <p>PRETTY [9] - 40:11, 49:1, 49:7, 58:17, 79:18, 89:6, 188:22, 225:6, 226:7</p> <p>PREVAIL [1] - 221:24</p> <p>PREVAILS [1] - 30:17</p> <p>PREVALENCE [1] - 127:3</p> <p>PREVALENT [2] - 10:2, 69:23</p> <p>PREVENT [5] - 130:6, 130:9, 130:15, 202:18, 205:14</p>	<p>PREVENTABLE [1] - 10:8</p> <p>PREVENTATIVE [10] - 22:5, 64:11, 64:19, 65:13, 74:4, 172:13, 200:24, 202:20, 202:23, 202:25</p> <p>PREVENTING [6] - 10:4, 10:13, 74:12, 74:15, 79:1, 214:8</p> <p>PREVENTION [1] - 130:16</p> <p>PREVENTIVE [35] - 43:21, 44:3, 45:5, 52:11, 67:3, 67:6, 67:13, 67:14, 68:23, 68:24, 69:4, 69:10, 73:5, 78:6, 78:15, 78:24, 78:25, 79:3, 87:13, 96:3, 97:5, 98:20, 98:25, 105:21, 144:5, 167:14, 169:11, 202:25, 220:13, 220:15, 221:12, 223:3, 223:7, 224:9, 250:3</p> <p>PREVIOUS [4] - 50:25, 206:4, 207:14, 252:18</p> <p>PREVIOUSLY [5] - 44:19, 51:14, 163:4, 163:18, 189:23</p> <p>PRICE [2] - 2:11, 220:1</p> <p>PRIESTS [9] - 39:16, 40:8, 40:10, 40:20, 41:11, 41:13, 41:20, 217:15</p> <p>PRIMARILY [2] - 9:16, 143:7</p> <p>PRIMARY [9] - 63:7, 67:11, 143:6, 156:14, 156:21, 167:17, 167:21, 171:20, 193:22</p> <p>PRINCIPLE [3] - 50:5, 50:7, 240:25</p> <p>PRINCIPLES [3] - 30:21, 191:2, 241:6</p> <p>PRIOR [25] - 38:17, 39:9, 40:11, 79:9, 91:5, 130:1, 131:18, 132:15, 140:23, 154:13, 155:7, 155:23, 163:15, 170:13, 173:22, 178:6, 178:22, 197:11, 197:21, 209:2, 217:15,</p>	<p>228:10, 235:9, 252:5</p> <p>PRIVATE [11] - 17:7, 20:9, 20:12, 66:21, 79:13, 81:19, 110:18, 169:24, 178:16, 182:9, 198:14</p> <p>PRIVATELY [12] - 90:3, 93:2, 94:1, 153:19, 166:15, 178:15, 179:8, 180:16, 180:17, 182:11, 190:22, 190:23</p> <p>PRIVATELY - INSURED [8] - 90:3, 93:2, 94:1, 178:15, 179:8, 180:17, 190:22, 190:23</p> <p>PRIVILEGES [1] - 159:6</p> <p>PROBABLY [7] - 5:20, 32:1, 157:4, 168:7, 193:2, 210:13, 228:7</p> <p>PROBLEM [7] - 79:3, 124:7, 145:20, 148:7, 157:18, 203:10, 204:14</p> <p>PROBLEMATIC [4] - 212:17, 222:21, 222:24, 250:12</p> <p>PROBLEMS [8] - 111:20, 124:9, 124:11, 203:15, 212:13, 213:6, 229:15, 246:25</p> <p>PROCEDURAL [15] - 8:6, 8:11, 8:12, 8:19, 8:21, 9:12, 38:13, 158:2, 158:23, 213:2, 213:19, 213:21, 213:22, 214:2, 215:15</p> <p>PROCEDURE [6] - 6:23, 77:21, 100:16, 152:15, 172:20, 214:3</p> <p>PROCEDURES [3] - 119:13, 119:15, 122:12</p> <p>PROCEED [6] - 3:12, 3:22, 21:18, 120:10, 213:19, 213:20</p> <p>PROCEEDING [4] - 65:5, 138:4, 184:18, 236:12</p> <p>PROCEEDINGS [3] - 1:24, 210:25, 253:4</p> <p>PROCESS [29] - 24:6, 100:15, 129:17,</p>	<p>143:14, 152:14, 211:7, 211:23, 212:6, 212:23, 212:25, 215:1, 215:2, 217:5, 217:24, 218:14, 226:14, 226:21, 228:25, 229:11, 232:10, 232:13, 232:15, 232:21, 233:4, 248:4, 248:11, 249:3, 250:16, 251:5</p> <p>PRODUCE [4] - 91:17, 126:11, 127:5, 127:11</p> <p>PRODUCED [5] - 1:24, 26:4, 47:18, 102:10, 212:25</p> <p>PRODUCES [1] - 127:17</p> <p>PRODUCT [2] - 169:1, 191:1</p> <p>PRODUCTION [1] - 126:10</p> <p>PRODUCTIVE [1] - 123:18</p> <p>PRODUCTS [2] - 103:7, 208:9</p> <p>PROFESS [1] - 248:2</p> <p>PROFESSED [1] - 247:3</p> <p>PROFESSIONAL [1] - 77:22</p> <p>PROFESSIONALS [1] - 242:13</p> <p>PROFESSOR [12] - 55:5, 60:16, 117:5, 117:22, 117:23, 118:3, 118:16, 163:21, 164:11, 166:5, 166:7, 171:10</p> <p>PROFESSORIAL [1] - 118:10</p> <p>PROFESSORS [2] - 60:24, 122:3</p> <p>PROFFER [2] - 64:16, 120:11</p> <p>PROFIT [1] - 110:18</p> <p>PROGESTIN [1] - 91:17</p> <p>PROGESTIN - ONLY [1] - 91:17</p> <p>PROGRAM [14] - 14:2, 16:23, 58:17, 58:18, 60:24, 61:5, 61:7, 82:1, 82:2, 116:3, 170:16, 170:18, 237:6, 237:7</p> <p>PROGRAMS [12] -</p>	<p>13:24, 14:4, 14:10, 59:21, 230:4, 231:10, 231:15, 231:19, 231:20, 231:25, 247:16</p> <p>PROHIBIT [1] - 19:8</p> <p>PROHIBITIVE [2] - 178:13, 179:4</p> <p>PROHIBITS [4] - 33:24, 45:7, 45:23, 51:7</p> <p>PROJECT [5] - 38:4, 62:2, 170:24, 170:25, 171:7</p> <p>PROJECTS [8] - 59:17, 59:20, 62:18, 119:5, 169:16, 170:2, 170:5, 170:21</p> <p>PROMOTING [1] - 220:16</p> <p>PROMOTIONS [1] - 59:14</p> <p>PROMULGATE [3] - 39:7, 216:5, 250:6</p> <p>PROMULGATED [5] - 6:17, 6:22, 44:7, 44:19, 160:8</p> <p>PRONG [4] - 8:22, 8:23, 20:6, 227:12</p> <p>PRONGS [2] - 20:1, 20:7</p> <p>PRONOUNCED [1] - 23:12</p> <p>PROOF [1] - 184:11</p> <p>PROPER [1] - 246:13</p> <p>PROPOSED [2] - 217:21, 224:25</p> <p>PROPOSITION [1] - 109:16</p> <p>PROTECT [6] - 19:10, 19:12, 24:17, 208:3, 216:21, 235:3</p> <p>PROTECTED [10] - 21:6, 27:5, 33:24, 99:4, 99:12, 99:22, 144:8, 144:16, 216:19, 239:6</p> <p>PROTECTING [8] - 16:8, 17:21, 19:5, 19:19, 20:17, 21:5, 35:20, 234:4</p> <p>PROTECTION [3] - 9:10, 19:14, 216:23</p> <p>PROTECTIVE [1] - 108:14</p> <p>PROTECTS [2] - 21:10, 21:12</p> <p>PROTOCOLS [1] - 129:5</p> <p>PROVE [1] - 82:6</p>
---	---	---	--	---

<p>PROVERA ^[1] - 175:8</p> <p>PROVIDE ^[32] - 7:3, 13:8, 13:12, 13:23, 22:25, 23:16, 30:10, 32:16, 33:12, 38:18, 42:24, 44:23, 48:25, 53:19, 66:22, 77:23, 98:1, 141:9, 144:25, 170:18, 197:24, 208:7, 208:13, 217:25, 218:6, 218:9, 221:10, 223:8, 223:21, 228:6, 231:21, 250:2</p> <p>PROVIDED ^[14] - 53:4, 64:25, 77:22, 78:6, 85:12, 94:20, 182:22, 207:23, 217:24, 221:13, 221:18, 223:16, 228:10</p> <p>PROVIDER ^[5] - 147:3, 182:10, 190:11, 193:22, 208:13</p> <p>PROVIDERS ^[3] - 12:18, 193:3, 223:20</p> <p>PROVIDES ^[3] - 42:23, 45:3, 222:12</p> <p>PROVIDING ^[28] - 13:17, 23:5, 27:3, 27:12, 30:3, 31:6, 31:9, 32:7, 33:7, 36:1, 51:5, 89:23, 99:13, 99:23, 144:11, 144:17, 167:4, 196:19, 196:23, 197:16, 218:1, 227:2, 232:18, 239:20, 242:14, 244:25, 249:10</p> <p>PROVISION ^[7] - 47:21, 47:24, 48:1, 48:2, 67:5, 220:23, 248:9</p> <p>PROVISIONS ^[1] - 241:11</p> <p>PSYCHIATRY ^[2] - 103:24, 104:10</p> <p>PUBLIC ^[10] - 58:18, 60:16, 61:6, 81:19, 82:4, 159:19, 166:5, 228:1, 250:22, 251:11</p> <p>PUBLIC-TRADED ^[1] - 250:22</p> <p>PUBLICATION ^[4] - 101:18, 103:24, 104:10, 106:12</p>	<p>PUBLICATIONS ^[10] - 60:2, 62:21, 119:5, 168:4, 168:5, 168:8, 168:17, 168:19, 169:1, 169:5</p> <p>PUBLICLY ^[8] - 28:25, 211:15, 225:17, 225:18, 226:13, 231:24, 248:7, 250:14</p> <p>PUBLICLY-FUNDED ^[1] - 231:24</p> <p>PUBLICLY-TRADED ^[5] - 211:15, 225:17, 225:18, 226:13, 248:7</p> <p>PUBLISH ^[2] - 61:11, 117:9</p> <p>PUBLISHED ^[13] - 62:25, 70:18, 93:7, 93:9, 93:10, 102:7, 104:3, 106:24, 108:1, 163:12, 195:22, 195:24, 196:1</p> <p>PUBLISHES ^[1] - 89:7</p> <p>PULL ^[1] - 178:9</p> <p>PURCHASED ^[2] - 134:24, 219:18</p> <p>PURELY ^[3] - 12:5, 130:6, 145:12</p> <p>PURPORTS ^[2] - 159:22, 160:3</p> <p>PURPOSE ^[8] - 43:20, 43:24, 48:6, 66:25, 67:7, 167:17, 180:15, 224:7</p> <p>PURPOSES ^[6] - 130:15, 130:16, 131:20, 226:10, 233:25, 235:13</p> <p>PURSUANT ^[2] - 114:11, 144:25</p> <p>PURSUING ^[1] - 8:5</p> <p>PUSH ^[1] - 136:18</p> <p>PUSHBACK ^[1] - 145:11</p> <p>PUSHING ^[1] - 145:22</p> <p>PUT ^[22] - 8:15, 24:6, 25:7, 32:14, 48:18, 48:21, 74:19, 82:15, 95:1, 101:10, 160:5, 162:4, 162:5, 178:19, 184:7, 184:13, 189:18, 204:20, 205:17, 207:6, 236:7, 247:19</p> <p>PUTS ^[2] - 128:5, 221:25</p> <p>PUTTING ^[2] - 41:15,</p>	<p>184:15</p> <p>PUZZLED ^[1] - 28:9</p> <p>Q</p> <p>QUALIFIED ^[3] - 139:10, 179:21, 179:24</p> <p>QUALIFIES ^[1] - 179:16</p> <p>QUALIFY ^[4] - 179:19, 212:15, 212:16, 237:5</p> <p>QUALITY ^[4] - 59:3, 123:14, 124:6, 127:19</p> <p>QUARTER ^[1] - 210:12</p> <p>QUASI ^[5] - 17:20, 18:19, 20:17, 35:20, 234:3</p> <p>QUASI-SOVEREIGN ^[3] - 18:19, 20:17, 234:3</p> <p>QUESTION ^[49] - 15:7, 29:15, 29:20, 29:21, 30:21, 31:15, 33:6, 37:11, 41:25, 44:25, 45:12, 46:23, 48:22, 51:9, 53:14, 55:14, 74:20, 80:9, 85:11, 105:19, 132:6, 133:6, 139:8, 139:9, 139:17, 140:18, 140:20, 141:16, 144:22, 147:17, 148:2, 151:15, 151:17, 152:5, 156:25, 157:1, 194:5, 195:7, 219:20, 220:3, 220:6, 234:23, 238:10, 239:12, 242:23, 243:5, 243:17</p> <p>QUESTIONABLE ^[1] - 225:20</p> <p>QUESTIONED ^[2] - 55:11, 226:9</p> <p>QUESTIONING ^[7] - 51:7, 142:17, 154:11, 181:22, 212:12, 227:14, 246:10</p> <p>QUESTIONS ^[23] - 28:11, 28:22, 36:8, 45:10, 47:4, 51:14, 51:16, 57:7, 57:21, 57:23, 62:5, 88:2, 93:13, 114:15,</p>	<p>116:20, 119:4, 166:22, 181:15, 193:6, 193:13, 203:25, 246:18, 246:19</p> <p>QUICK ^[4] - 54:9, 74:19, 158:2, 240:19</p> <p>QUIETLY ^[1] - 227:24</p> <p>QUITE ^[5] - 27:15, 28:18, 62:3, 69:23, 242:12</p> <p>QUO ^[3] - 7:25, 24:17, 212:20</p> <p>QUOTE ^[2] - 66:10, 221:18</p> <p>R</p> <p>RACIALLY ^[1] - 47:18</p> <p>RAGLAND ^[1] - 38:5</p> <p>RAISE ^[3] - 23:22, 87:24, 113:13</p> <p>RAN ^[1] - 180:14</p> <p>RANDOMIZED ^[3] - 180:19, 182:6, 182:18</p> <p>RANGE ^[7] - 78:19, 119:11, 119:12, 119:13, 149:25, 190:7, 218:3</p> <p>RATE ^[6] - 12:16, 70:21, 71:8, 80:20, 88:22, 96:22</p> <p>RATES ^[2] - 70:11, 176:8</p> <p>RATHER ^[8] - 16:14, 46:21, 92:2, 92:11, 208:17, 213:15, 232:20, 233:16</p> <p>RATIONALE ^[5] - 49:1, 53:2, 164:8, 204:18, 209:10</p> <p>RE ^[1] - 98:3</p> <p>RE-FAMILIARIZED ^[1] - 98:3</p> <p>REACH ^[8] - 8:2, 42:6, 42:8, 92:9, 177:22, 213:15, 213:18, 221:20</p> <p>REACHES ^[1] - 164:13</p> <p>READ ^[48] - 5:15, 37:15, 42:9, 81:8, 81:9, 95:14, 95:21, 100:23, 101:3, 105:8, 105:19, 109:5, 138:7, 138:14, 151:25, 152:3, 152:7, 190:17, 190:20, 194:6, 194:10,</p>	<p>194:11, 194:14, 194:16, 194:19, 194:20, 195:3, 195:6, 195:8, 195:10, 195:16, 195:21, 198:15, 199:24, 200:25, 201:9, 204:18, 204:24, 207:19, 221:6, 221:22, 222:4, 228:7, 239:7, 245:13, 245:16, 252:14</p> <p>READING ^[12] - 83:2, 103:3, 151:7, 193:24, 194:16, 194:20, 195:5, 225:14, 226:16, 238:1, 238:17, 249:24</p> <p>READS ^[2] - 205:5, 224:1</p> <p>READY ^[4] - 24:15, 54:6, 54:14, 204:6</p> <p>REAL ^[6] - 15:13, 27:20, 31:7, 125:18, 215:9</p> <p>REALITY ^[1] - 50:10</p> <p>REALIZE ^[2] - 104:9, 192:22</p> <p>REALIZED ^[1] - 72:2</p> <p>REALLY ^[20] - 17:5, 30:4, 30:25, 31:3, 55:12, 57:12, 72:15, 74:1, 75:18, 179:3, 185:21, 185:24, 185:25, 186:19, 188:25, 190:12, 190:15, 234:24, 243:18, 250:16</p> <p>REASK ^[2] - 80:9, 133:5</p> <p>REASON ^[18] - 8:10, 24:24, 30:5, 50:2, 99:18, 107:12, 147:5, 153:5, 153:9, 156:14, 159:18, 164:21, 172:17, 182:10, 190:5, 206:2, 209:22, 223:2</p> <p>REASONABLE ^[8] - 96:5, 97:4, 138:22, 188:18, 221:5, 221:24, 232:17, 249:22</p> <p>REASONABLY ^[3] - 46:20, 222:4, 238:6</p> <p>REASONED ^[1] - 52:6</p> <p>REASONING ^[4] - 49:5, 49:25, 133:16,</p>
--	--	--	---	--

219:24
REASONS [9] - 52:16, 107:2, 172:18, 188:8, 206:23, 233:1, 234:5, 240:23, 251:8
REASSURE [1] - 178:19
REBECCA [3] - 2:16, 5:4, 193:12
REBUTTAL [2] - 234:12, 246:20
RECALL [12] - 5:13, 52:25, 91:10, 111:20, 140:1, 145:16, 194:11, 194:13, 194:22, 195:2, 195:13, 197:7
RECALLED [1] - 195:7
RECEIPT [1] - 63:4
RECEIVE [6] - 14:20, 124:13, 179:22, 199:19, 230:2, 231:11
RECEIVED [4] - 115:25, 180:11, 180:21, 252:1
RECEIVING [2] - 26:18, 27:7
RECENT [5] - 70:11, 83:8, 83:14, 90:3, 136:25
RECENTLY [10] - 39:19, 63:10, 89:21, 92:22, 93:25, 106:25, 107:22, 168:19, 196:4
RECOGNITION [1] - 242:9
RECOGNIZE [3] - 20:16, 114:9, 245:10
RECOGNIZED [2] - 27:9, 47:14
RECOGNIZES [2] - 50:5, 50:10
RECOLLECTION [1] - 153:23
RECOMMEND [1] - 78:23
RECOMMENDATION [3] - 44:6, 69:15, 78:2
RECOMMENDATION S [25] - 12:6, 66:22, 67:2, 67:8, 67:11, 67:13, 67:17, 67:18, 67:23, 68:20, 68:25, 69:1, 69:2, 74:4, 78:11, 78:13, 78:19, 78:21, 82:17, 85:6, 85:17, 87:4, 87:8,

87:12, 107:18
RECOMMENDED [9] - 78:4, 78:21, 107:13, 136:25, 147:1, 149:2, 178:25, 201:17, 223:11
RECOMMENDING [1] - 173:15
RECORD [43] - 6:5, 9:22, 9:25, 10:21, 11:1, 11:2, 11:5, 14:23, 21:20, 22:2, 23:23, 53:5, 53:6, 54:22, 65:17, 98:15, 112:22, 113:14, 113:19, 113:24, 119:5, 162:4, 162:5, 162:21, 164:6, 209:1, 224:13, 231:14, 232:4, 235:10, 235:22, 236:7, 245:9, 245:20, 246:2, 246:7, 246:10, 248:13, 249:16, 250:14, 251:22, 253:4
RECORDED [1] - 1:24
RECORDS [5] - 154:15, 154:16, 154:19, 154:22, 209:3
RECROSS [4] - 105:3, 105:6, 112:20, 254:3
RECRUIT [1] - 180:15
RECRUITED [3] - 180:17, 180:18, 182:7
RECRUITING [2] - 180:12, 182:11
RECRUITMENT [1] - 182:8
REDIRECT [5] - 152:20, 152:22, 204:1, 204:2, 254:3
REDRESSABILITY [1] - 20:7
REDRESSABLE [1] - 17:11
REDUCE [5] - 12:16, 52:21, 108:15, 205:3, 205:9
REDUCED [2] - 6:7, 188:12
REDUCING [2] - 92:5, 92:6
REDUCTION [3] - 91:19, 91:22, 156:10
REFER [12] - 10:25, 81:4, 81:17, 128:24,

165:6, 179:15, 179:20, 219:9, 221:7, 223:19, 240:8
REFERENCE [4] - 102:13, 106:10, 106:22, 243:19
REFERENCED [2] - 53:9, 180:4
REFERENCES [2] - 98:3, 105:13
REFERRED [8] - 66:11, 112:1, 121:17, 125:8, 170:25, 194:25, 249:5
REFERRING [10] - 68:5, 99:20, 100:2, 105:15, 175:24, 193:20, 198:1, 201:6, 201:22, 202:2
REFERS [2] - 81:18, 129:1
REFILLED [1] - 79:23
REFLECT [1] - 106:7
REFLECTED [6] - 186:5, 204:25, 205:5, 206:6, 212:12, 231:15
REFLECTING [2] - 163:7, 185:12
REFLECTS [2] - 155:5, 176:2
REFORMS [1] - 219:25
REFRAINING [1] - 205:12
REFUSE [2] - 13:22, 133:20
REFUSED [1] - 140:2
REGARD [3] - 170:8, 192:12, 205:23
REGARDING [9] - 78:2, 78:7, 106:23, 163:22, 168:5, 173:11, 175:14, 178:15, 195:24
REGARDLESS [2] - 220:25, 229:17
REGISTER [7] - 101:7, 101:13, 105:16, 105:19, 111:7, 217:17, 237:12
REGULAR [1] - 125:8
REGULARLY [3] - 130:20, 134:11, 169:9
REGULATED [3] - 13:6, 13:12, 230:25
REGULATION [4] - 13:5, 13:11, 49:20,

218:12
REGULATIONS [11] - 6:16, 13:15, 21:14, 39:19, 40:12, 159:14, 159:22, 159:24, 217:24, 233:18, 238:11
REGULATORS [1] - 228:20
REGULATORY [1] - 44:21
REINFORCES [1] - 21:16
REJECT [2] - 134:2, 153:18
REJECTED [4] - 137:4, 219:22, 224:25, 225:6
REJECTING [1] - 137:9
REJECTS [1] - 217:1
RELATE [1] - 196:2
RELATED [8] - 57:13, 62:13, 62:25, 64:2, 64:5, 169:10, 208:10, 211:6
RELATING [1] - 62:22
RELATIONS [2] - 35:6, 72:16
RELATIONSHIP [1] - 102:20
RELATIVE [1] - 108:3
RELATIVELY [3] - 41:6, 142:7, 183:17
RELEVANT [7] - 20:6, 101:19, 103:25, 115:23, 160:11, 209:25, 226:15
RELIABILITY [2] - 111:16, 188:14
RELIABLE [4] - 94:16, 94:18, 111:19, 191:1
RELIED [5] - 39:9, 160:24, 206:5, 207:10, 209:6
RELIEF [1] - 17:12
RELIES [2] - 164:14, 224:10
RELIGION [4] - 28:17, 51:9, 225:19, 226:25
RELIGIOUS [53] - 6:17, 6:24, 26:2, 27:3, 27:6, 27:15, 29:1, 29:9, 29:18, 29:23, 31:20, 33:5, 33:7, 34:1, 38:21, 38:22, 40:5, 40:7, 40:22, 42:21, 44:10, 46:6, 46:14, 50:20, 95:10, 95:14, 99:3,

104:15, 120:7, 137:25, 138:7, 144:7, 149:24, 190:18, 198:24, 199:23, 211:15, 218:1, 232:18, 232:24, 237:13, 239:19, 243:11, 243:15, 243:25, 247:10, 247:12, 248:8, 248:25, 249:2, 249:15, 250:18
RELY [5] - 19:1, 101:4, 152:4, 161:18, 225:2
RELYING [5] - 15:17, 39:10, 162:6, 215:24, 216:4
REMAIN [1] - 30:9
REMARKABLY [1] - 159:24
REMEDY [1] - 240:15
REMEDYING [1] - 48:7
REMEMBER [5] - 74:1, 88:19, 143:8, 194:9, 224:23
REMEMBERING [1] - 210:24
REMOVED [1] - 96:17
RENDERING [1] - 250:15
RENE [1] - 3:6
RENEW [6] - 80:15, 80:19, 80:23, 80:25, 96:18, 112:22
REPACKAGED [1] - 185:14
REPEAT [4] - 5:19, 6:3, 164:3, 196:20
REPEATEDLY [1] - 36:17
REPHRASE [1] - 144:22
REPLY [1] - 251:21
REPORT [29] - 10:14, 67:22, 68:3, 68:7, 74:17, 82:15, 82:17, 83:24, 83:25, 84:3, 84:16, 84:18, 84:22, 85:4, 85:18, 85:19, 86:25, 87:2, 98:2, 98:4, 101:2, 102:11, 104:14, 104:15, 104:18, 105:9, 105:11, 105:15, 107:20
REPORTED [1] - 181:16

REPORTER [2] - 1:19, 253:8 REPRESENT [1] - 35:2 REPRESENTS [2] - 35:8, 122:13 REPRODUCTIVE [27] - 62:20, 63:6, 72:15, 110:19, 114:4, 115:13, 115:16, 115:20, 115:22, 116:2, 116:7, 116:9, 116:16, 117:15, 117:18, 118:8, 120:14, 121:1, 138:21, 138:23, 154:6, 167:4, 167:21, 168:20, 172:5, 180:16, 193:1 REPRODUCTIVE - AGE [2] - 180:16, 193:1 REQUEST [3] - 205:24, 217:6, 232:4 REQUESTED [3] - 3:14, 215:11, 252:4 REQUIRE [10] - 7:1, 7:2, 14:14, 43:25, 46:13, 50:20, 124:12, 214:25, 231:1, 241:6 REQUIRED [9] - 64:25, 108:17, 144:24, 172:20, 207:24, 225:11, 225:12, 228:19, 228:20 REQUIREMENT [9] - 26:3, 52:11, 212:1, 216:10, 227:25, 228:1, 228:2, 244:8, 245:1 REQUIREMENTS [10] - 213:2, 213:4, 216:1, 220:18, 221:11, 223:22, 228:12, 233:19, 233:22, 250:3 REQUIRES [7] - 46:12, 64:23, 119:17, 226:11, 226:12, 226:13, 237:2 REQUIRING [4] - 13:5, 13:11, 48:2, 50:22 RERead [3] - 29:10, 98:2, 196:4 RESEARCH [45] - 23:17, 58:10, 58:15, 58:20, 58:24, 59:8,	59:17, 59:23, 59:24, 61:4, 61:15, 62:2, 62:3, 62:4, 89:18, 96:12, 110:18, 117:7, 118:2, 118:20, 119:20, 157:14, 166:9, 166:21, 167:15, 167:18, 167:19, 167:22, 169:2, 169:18, 169:22, 170:8, 170:11, 170:14, 170:15, 170:17, 170:20, 171:2, 180:11, 180:12, 187:5, 189:6, 193:25, 195:5, 195:19 RESEARCHED [3] - 63:17, 63:23, 166:18 RESEARCHER [5] - 22:18, 23:14, 118:13, 169:15, 193:23 RESEARCHERS [1] - 59:4 RESEARCHING [1] - 61:10 RESERVED [1] - 234:12 RESIDENCY [6] - 115:7, 115:8, 115:10, 167:8, 167:10, 167:14 RESIDENTS [7] - 16:9, 19:22, 118:6, 122:21, 234:2, 234:4, 251:11 RESOLVE [1] - 8:3 RESOLVES [1] - 241:5 RESOLVING [1] - 217:2 RESOURCES [3] - 22:6, 64:12, 220:13 RESPECT [18] - 27:15, 35:5, 46:5, 46:24, 88:11, 102:15, 111:7, 154:25, 159:10, 163:15, 173:6, 218:25, 221:12, 236:25, 237:1, 237:4, 250:20, 251:16 RESPECTFULLY [2] - 49:23, 245:22 RESPECTS [1] - 227:23 RESPOND [5] - 46:20, 111:20, 139:13,	222:19, 242:7 RESPONDING [3] - 39:25, 40:2, 41:2 RESPONSE [8] - 84:19, 86:14, 86:21, 222:17, 227:21, 236:22, 250:23, 251:19 RESPONSES [1] - 232:7 RESPONSIBILITIES [2] - 59:25, 118:15 RESPONSIBILITY [3] - 19:6, 19:9, 220:22 RESPONSIBLE [1] - 62:1 RESPONSIBLY [2] - 106:19 RESTORATION [1] - 247:10 RESTRUCTURED [2] - 6:5, 23:25 RESULT [53] - 7:6, 12:9, 12:22, 13:18, 16:6, 41:4, 43:16, 71:4, 71:15, 71:25, 76:10, 93:9, 96:21, 100:5, 100:8, 142:3, 144:3, 146:9, 146:10, 146:13, 146:19, 147:9, 148:5, 148:19, 148:20, 149:2, 149:7, 149:12, 149:17, 181:5, 197:23, 200:9, 200:22, 201:7, 211:8, 211:22, 212:4, 212:18, 212:22, 212:25, 213:3, 215:4, 217:9, 229:13, 231:7, 231:25, 232:16, 233:21, 247:8, 248:6, 248:12, 251:6 RESULTED [4] - 11:24, 22:11, 23:19, 189:5 RESULTING [1] - 126:9 RESULTS [9] - 10:4, 47:19, 47:20, 47:23, 93:8, 184:3, 185:4, 187:8, 248:11 RETHOUGHT [1] - 189:21 RETURN [6] - 126:5, 178:24, 233:8, 239:22, 239:24, 250:11	RETURNING [2] - 33:22, 121:13 REVERSIBLE [4] - 90:9, 174:21, 174:23, 183:18 REVIEW [11] - 56:19, 69:6, 84:1, 97:25, 143:3, 154:15, 165:23, 169:6, 169:8, 169:10, 194:4 REVIEWED [11] - 84:3, 84:14, 104:6, 110:25, 143:5, 143:7, 152:2, 154:13, 154:16, 187:10, 195:21 REVIEWER [1] - 169:5 REVIEWERS [1] - 84:13 REYNOLDS [1] - 217:1 RFRA [34] - 46:2, 46:5, 46:11, 46:12, 46:13, 46:14, 46:24, 47:2, 47:5, 47:8, 47:12, 50:11, 50:12, 50:20, 51:16, 51:17, 218:24, 218:25, 219:2, 219:4, 219:6, 219:7, 225:11, 225:13, 225:15, 225:16, 225:23, 226:11, 226:20, 226:22, 227:6, 247:17, 248:22 RICCI [2] - 47:16, 240:19 RIGHT [44] - 8:16, 16:16, 21:21, 25:9, 51:20, 76:13, 77:5, 79:18, 80:2, 80:20, 89:15, 91:1, 100:12, 100:21, 109:8, 113:13, 132:3, 143:8, 146:20, 147:9, 150:9, 150:13, 152:11, 152:15, 159:9, 159:17, 168:4, 171:12, 175:4, 176:1, 176:10, 177:25, 183:13, 192:19, 198:21, 200:11, 200:16, 200:19, 209:11, 217:19, 238:16, 246:16, 248:4, 252:23 RIGHTLY [1] - 28:19 RIGHTS [3] - 9:10,	35:5, 204:16 RING [2] - 175:7, 176:15 RISE [8] - 54:12, 113:5, 146:19, 157:22, 191:23, 191:24, 201:8, 210:14 RISEN [3] - 148:17, 148:19, 201:12 RISK [20] - 10:20, 48:10, 72:13, 72:16, 72:19, 72:23, 81:1, 91:25, 92:5, 92:6, 103:21, 107:6, 108:3, 108:8, 127:22, 127:23, 128:5, 128:6, 132:16, 230:20 RISKS [6] - 107:5, 108:12, 108:15, 123:16, 128:21, 142:8 RIVER [1] - 36:9 ROBERT [1] - 164:16 ROBERTS [1] - 219:22 ROBUST [1] - 74:3 ROD [1] - 174:24 ROLE [9] - 6:14, 22:8, 31:19, 33:17, 73:11, 117:22, 118:3, 173:10, 177:7 ROLES [1] - 170:7 ROLL [2] - 15:5, 88:6 ROMAN [4] - 84:7, 84:10 ROOM [2] - 2:12, 175:17 ROUGHLY [22] - 62:16, 69:20, 73:24, 118:10, 118:14, 119:9, 119:11, 122:5, 124:17, 125:2, 126:15, 126:21, 133:19, 133:23, 135:8, 135:13, 135:17, 135:19, 137:8, 229:12 ROUTINE [3] - 67:14, 69:10, 78:25 ROW [14] - 76:1, 176:4, 177:3, 185:18, 185:19, 185:20, 185:25, 186:8, 186:15, 186:22, 186:24, 187:18 ROWS [3] - 176:3, 185:25, 186:18
---	---	---	--	---

RPR [1] - 1:19
RULE [47] - 6:18, 6:22, 26:19, 28:7, 28:24, 29:1, 32:20, 35:9, 39:17, 39:20, 39:23, 40:4, 50:20, 52:7, 52:17, 64:23, 64:24, 95:10, 95:11, 95:14, 95:22, 120:7, 138:1, 138:2, 138:7, 138:9, 138:13, 144:21, 160:1, 172:20, 173:6, 206:5, 211:15, 212:16, 214:12, 214:21, 215:6, 217:8, 222:16, 223:18, 229:24, 248:8, 248:17, 248:19, 250:13
RULED [2] - 236:4, 236:9
RULEMAKING [4] - 217:4, 217:21, 251:1, 251:5
RULEMAKINGS [1] - 28:6
RULES [172] - 3:21, 7:4, 7:6, 7:18, 7:21, 8:13, 8:15, 9:3, 13:14, 14:5, 14:17, 14:25, 23:4, 25:5, 26:11, 26:16, 26:22, 30:3, 34:10, 34:17, 38:17, 39:7, 39:10, 41:5, 41:6, 43:20, 44:13, 44:19, 44:22, 45:5, 45:14, 45:16, 55:10, 87:17, 87:19, 95:7, 96:6, 96:9, 98:19, 98:23, 99:7, 99:8, 100:5, 100:9, 100:20, 100:23, 101:3, 101:21, 102:15, 103:1, 103:4, 137:23, 138:4, 138:23, 140:10, 140:11, 140:15, 140:25, 141:5, 141:19, 142:14, 144:4, 144:23, 146:9, 146:10, 146:14, 146:19, 147:9, 148:5, 148:20, 149:3, 149:8, 149:12, 149:17, 151:25, 152:2, 152:3, 152:6, 152:7, 152:24, 153:3,

153:10, 158:19, 160:4, 160:8, 160:11, 160:14, 160:23, 160:24, 161:2, 161:7, 161:10, 162:1, 172:21, 190:18, 190:21, 194:6, 194:10, 194:11, 194:15, 194:16, 194:20, 195:3, 200:9, 200:13, 200:18, 200:22, 201:3, 201:15, 201:20, 201:25, 202:6, 202:14, 202:17, 202:21, 202:23, 203:16, 209:5, 211:2, 211:10, 211:12, 211:18, 211:22, 212:20, 214:4, 214:8, 214:19, 214:24, 215:9, 215:11, 216:5, 216:17, 222:14, 224:25, 225:10, 227:23, 227:24, 228:15, 228:16, 229:8, 229:14, 231:16, 231:25, 232:16, 233:2, 233:22, 235:1, 236:1, 236:16, 236:18, 237:19, 237:22, 237:24, 238:2, 238:12, 238:14, 238:19, 238:23, 238:25, 239:3, 239:22, 243:9, 243:12, 244:24, 246:25, 247:18, 247:25, 248:1, 251:9
RULING [2] - 214:10, 246:7
RUN [2] - 11:14, 219:19
RUNNING [2] - 157:15, 157:16
RUNS [2] - 29:19, 220:19
RUSH [1] - 192:24
RÉSUMÉ [3] - 62:15, 154:14, 167:24

S

S-A-M-A-N-T-H-A [1] - 113:21
S.C.T [1] - 241:4

SAFELY [1] - 21:21
SAFER [3] - 22:11, 23:20, 129:17
SAFETY [3] - 129:20, 174:1, 234:4
SAID [51] - 5:23, 8:20, 16:5, 18:25, 19:3, 29:11, 36:17, 37:7, 37:16, 37:18, 41:14, 41:16, 46:10, 70:2, 88:4, 105:20, 109:4, 111:21, 134:19, 135:6, 147:15, 159:11, 162:2, 164:4, 168:11, 183:9, 187:25, 205:16, 208:25, 211:1, 214:2, 215:25, 217:3, 217:23, 218:5, 218:8, 218:14, 225:10, 226:4, 226:6, 232:11, 234:16, 238:19, 240:3, 242:9, 245:10, 248:11, 248:23, 248:24, 249:8, 251:14
SAMANTHA [7] - 22:15, 113:9, 113:15, 113:16, 114:1, 120:12, 254:8
SAME [32] - 8:15, 8:23, 29:16, 34:1, 39:9, 41:20, 48:11, 50:1, 50:9, 76:14, 109:16, 125:9, 138:22, 141:8, 161:2, 164:13, 164:14, 164:19, 172:18, 172:22, 185:10, 185:12, 185:21, 185:25, 187:12, 187:15, 195:24, 201:22, 202:2, 214:4, 215:23, 217:20
SAMPLE [3] - 108:2, 186:13, 188:17
SANDBERG [3] - 2:16, 4:22, 4:23
SANTELLI [3] - 102:15, 106:22, 106:23
SASSO [5] - 84:24, 84:25, 85:1, 85:3, 86:21
SATISFIES [2] - 228:11, 243:25
SATISFY [1] - 17:13

SAVANNAH [1] - 206:19
SAVED [1] - 13:1
SAVINGS [3] - 10:5, 81:14, 81:19
SAW [2] - 186:2, 226:25
SAY [76] - 11:1, 11:2, 18:1, 18:7, 18:8, 20:4, 24:23, 28:24, 30:2, 32:5, 32:15, 33:5, 33:14, 33:15, 33:22, 34:19, 37:12, 37:13, 37:14, 39:6, 40:21, 40:24, 40:25, 41:8, 42:5, 49:8, 49:22, 52:3, 52:4, 59:6, 62:9, 62:19, 63:14, 74:1, 78:18, 87:7, 88:20, 89:3, 89:13, 90:15, 91:9, 95:3, 101:5, 101:18, 101:21, 102:15, 103:4, 106:8, 107:7, 118:16, 124:18, 128:23, 157:4, 175:3, 179:23, 188:21, 189:19, 192:20, 193:21, 202:25, 219:15, 220:21, 221:21, 222:4, 225:22, 227:6, 228:24, 237:25, 238:14, 239:3, 245:24, 245:25, 249:7, 249:22, 251:2
SAYING [8] - 20:13, 25:6, 34:8, 34:10, 161:18, 161:25, 209:23, 234:25
SAYS [38] - 11:4, 33:11, 35:19, 36:24, 81:16, 81:23, 86:14, 106:13, 109:23, 110:5, 151:9, 151:11, 158:18, 159:20, 161:5, 166:15, 176:17, 186:8, 186:9, 186:15, 187:4, 187:18, 206:6, 206:18, 207:15, 207:20, 215:19, 216:4, 221:7, 222:12, 223:18, 223:20, 227:7, 237:15, 241:9, 247:25
SCALE [1] - 252:4

SCALED [1] - 6:8
SCALIA [1] - 18:18
SCAN [2] - 67:10, 68:22
SCHEME [2] - 220:5, 241:9
SCHOLARLY [4] - 64:1, 64:4, 167:25, 168:2
SCHOOL [9] - 22:24, 60:24, 115:4, 116:17, 117:2, 164:16, 167:6, 171:23, 177:21
SCHOOLS [2] - 60:25, 199:20
SCIALABBA [4] - 241:3, 241:20, 241:21
SCIENCE [2] - 62:10, 129:9
SCIENCES [2] - 60:17, 166:6
SCIENTIFIC [9] - 66:21, 67:12, 69:6, 100:21, 101:19, 102:24, 103:25, 193:25, 223:12
SCIENTIST [1] - 58:10
SCOPE [11] - 6:25, 81:10, 108:20, 120:22, 139:1, 141:12, 150:5, 150:19, 150:21, 211:11, 225:24
SCOTT [1] - 2:2
SCRAMBLING [1] - 204:13
SCREEN [2] - 204:20, 207:12
SCREENINGS [1] - 221:13
SEARCH [1] - 53:18
SEARCHED [1] - 53:7
SEBELIUS [2] - 206:11, 215:23
SEC [1] - 162:16
SECOND [16] - 38:22, 46:1, 46:10, 52:10, 103:3, 172:22, 177:4, 185:19, 185:21, 185:24, 207:10, 211:21, 216:3, 236:10, 241:9, 241:24
SECONDLY [1] - 192:24
SECRETARY [4] - 39:7, 39:8, 216:5, 216:6

SECTION [5] - 68:8, 215:18, 215:25, 221:7, 237:13 SECTIONS [1] - 100:25 SECTOR [1] - 82:4 SEE [55] - 26:25, 36:23, 41:9, 57:23, 62:7, 76:1, 76:4, 77:6, 84:19, 86:16, 90:16, 96:18, 96:21, 109:10, 117:13, 117:16, 121:21, 122:5, 122:10, 122:18, 122:20, 123:11, 125:6, 125:15, 125:20, 125:22, 126:18, 127:25, 135:12, 143:23, 157:19, 167:24, 171:5, 176:6, 176:8, 176:11, 176:14, 176:17, 180:20, 180:22, 181:11, 181:16, 182:21, 182:23, 183:5, 183:6, 183:14, 186:24, 188:24, 191:23, 192:15, 193:1, 207:13, 222:3, 226:17 SEEING [5] - 122:23, 122:24, 187:14, 189:4, 193:3 SEEK [4] - 13:23, 194:4, 199:21, 237:6 SEEKING [3] - 6:6, 212:18, 214:7 SEEM [2] - 187:19, 226:3 SEEMS [5] - 20:13, 65:18, 82:11, 129:13, 222:20 SEEN [10] - 13:21, 25:15, 68:2, 99:5, 120:25, 131:11, 157:14, 191:16, 229:22 SELECTED [1] - 110:14 SELECTIVE [1] - 106:6 SELF [3] - 51:3, 121:17, 229:3 SELF - CERTIFICATION [1] - 51:3 SELF-INSURERS [1] - 229:3	SELF-REFERRED [1] - 121:17 SEND [2] - 218:15, 244:10 SENSE [8] - 15:16, 140:24, 141:10, 141:22, 210:2, 234:25, 237:3, 237:4 SENT [3] - 16:18, 182:13, 244:13 SENTENCE [2] - 102:14, 103:3 SEPARATE [5] - 38:18, 39:3, 42:7, 42:17, 169:4 SEPARATED [1] - 176:4 SERIOUS [6] - 103:21, 123:20, 127:21, 127:25, 142:2, 142:6 SERIOUSLY [1] - 222:23 SERVE [5] - 51:12, 61:21, 121:24, 169:4, 226:1 SERVED [1] - 101:15 SERVES [3] - 224:21, 226:4, 226:6 SERVICE [3] - 12:17, 77:23, 220:14 SERVICES [42] - 3:5, 12:14, 14:2, 22:5, 22:6, 30:11, 43:4, 43:21, 44:3, 45:5, 52:11, 58:21, 58:24, 59:8, 63:6, 64:11, 64:12, 67:3, 67:13, 68:25, 69:8, 73:5, 78:12, 78:24, 79:14, 79:17, 80:1, 82:4, 86:2, 87:3, 87:11, 87:13, 119:1, 167:4, 179:16, 179:22, 220:13, 221:19, 223:11, 223:16 SERVING [1] - 227:2 SET [7] - 15:18, 49:11, 109:5, 111:6, 132:19, 190:16, 191:20 SETTING [1] - 24:7 SETTINGS [1] - 63:7 SETTLED [1] - 35:1 SEVEN [1] - 238:20 SEVERAL [7] - 52:7, 129:14, 168:24, 177:12, 189:8, 195:17, 215:20 SEVERE [9] - 123:16, 124:9, 124:10,	124:11, 125:11, 125:20, 128:18, 137:19 SEXUAL [3] - 72:16, 102:18, 107:1 SEXUALLY [3] - 102:3, 106:15, 106:17 SHALL [7] - 18:8, 42:24, 42:25, 221:9, 221:10, 223:20, 223:21 SHARED [1] - 97:4 SHARING [7] - 78:16, 79:11, 83:8, 83:22, 87:14, 223:22, 250:3 SHE [46] - 4:11, 22:1, 22:2, 22:8, 22:16, 22:17, 22:22, 22:25, 23:13, 23:16, 65:13, 65:19, 68:18, 70:1, 71:23, 72:3, 80:14, 80:22, 80:23, 80:24, 80:25, 105:17, 120:25, 121:2, 123:18, 123:19, 127:15, 137:20, 139:10, 140:14, 141:9, 141:11, 150:22, 163:5, 163:16, 164:1, 164:13, 173:2, 173:19, 173:25, 174:1, 174:17, 179:4, 184:13 SHEPHERD [1] - 24:3 SHIFT [2] - 35:25, 231:24 SHORT [1] - 127:18 SHORT-TERM [1] - 127:18 SHORTLY [1] - 188:22 SHOT [1] - 176:15 SHOULD [31] - 5:15, 8:2, 18:21, 26:20, 30:9, 31:4, 31:9, 31:10, 37:15, 44:3, 47:15, 50:6, 51:10, 54:8, 66:9, 68:1, 78:6, 81:11, 101:8, 108:24, 177:13, 187:24, 213:18, 213:19, 245:4, 245:5, 245:6, 246:6, 247:2, 247:14, 247:22 SHOW [12] - 9:2, 34:11, 35:15, 72:5, 75:7, 94:10, 108:14, 189:12, 237:5,	237:8, 238:5, 238:7 SHOWED [1] - 90:11 SHOWING [5] - 79:24, 91:4, 106:24, 185:25, 207:3 SHOWN [1] - 189:9 SHOWS [3] - 75:21, 185:15, 187:8 SIDE [15] - 3:24, 3:25, 52:2, 74:7, 74:10, 101:23, 103:19, 107:9, 108:12, 174:4, 174:6, 176:17, 190:15, 242:8, 249:12 SIDES [1] - 252:18 SIGN [1] - 227:5 SIGNIFICANCE [4] - 42:4, 187:5, 187:7, 220:4 SIGNIFICANT [28] - 40:17, 40:19, 40:23, 41:1, 41:6, 41:10, 41:16, 94:11, 112:10, 124:8, 124:10, 127:19, 133:14, 134:8, 136:15, 153:5, 156:10, 187:9, 211:20, 213:6, 220:14, 220:24, 222:5, 231:3, 231:9, 231:17, 233:25, 237:18 SIGNIFICANTLY [12] - 6:5, 123:14, 123:16, 124:3, 126:10, 126:12, 134:10, 134:15, 155:10, 155:16, 156:19, 212:17 SILLIMAN [8] - 36:9, 36:12, 36:20, 36:24, 37:4, 37:9, 37:12, 37:15 SIMILAR [6] - 29:23, 125:12, 126:14, 159:25, 185:17, 191:8 SIMILARITIES [1] - 111:3 SIMILARLY [9] - 13:10, 19:9, 21:9, 95:21, 95:24, 101:23, 138:13, 183:2 SIMPLY [14] - 92:19, 214:23, 216:4, 217:8, 222:3, 223:14, 224:5,	225:2, 227:6, 228:4, 248:25, 249:23, 250:13, 251:4 SINCE [38] - 9:22, 19:8, 22:9, 23:18, 26:12, 35:1, 36:17, 36:23, 37:20, 37:21, 70:5, 82:13, 101:16, 119:5, 128:3, 131:5, 137:2, 140:14, 145:6, 145:9, 145:14, 152:24, 156:3, 156:19, 173:10, 178:14, 179:7, 188:21, 189:9, 189:11, 194:19, 197:9, 198:11, 198:17, 207:5, 207:6, 209:16, 240:11 SINCERE [10] - 30:6, 30:25, 32:6, 32:16, 33:7, 33:11, 149:24, 150:3, 198:24, 247:3 SINCERELY [7] - 29:25, 30:8, 51:4, 212:11, 212:14, 232:18, 247:24 SINCERELY-HELD [5] - 29:25, 30:8, 212:11, 232:18, 247:24 SINCERITY [5] - 31:19, 31:20, 240:2, 240:12, 247:13 SINGLE [23] - 34:21, 53:8, 100:4, 100:7, 137:3, 140:1, 146:7, 146:12, 146:18, 146:24, 147:8, 147:13, 147:23, 148:16, 148:25, 149:6, 149:10, 149:15, 194:20, 236:15, 236:17, 236:19 SISTERS [5] - 26:8, 27:8, 27:9, 27:11, 33:23 SIT [1] - 21:22 SITTING [2] - 143:13, 147:7 SITUATION [7] - 20:12, 30:24, 31:25, 173:24, 200:17, 228:21, 230:22 SIX [4] - 6:7, 6:12, 26:1, 90:17 SIZE [1] - 188:17 SKIN [1] - 77:2
--	---	--	--	--

SKIP [1] - 119:4
SLAM [1] - 226:22
SLATE [7] - 26:1,
 27:2, 38:15, 42:20,
 46:16, 211:2, 244:20
SLIGHTLY [1] - 91:24
SMALL [10] - 79:18,
 79:24, 79:25, 80:12,
 80:13, 84:7, 96:13,
 108:7, 163:25
SMALLER [1] - 104:9
SO [352] - 5:18, 9:7,
 14:3, 15:9, 16:19,
 17:3, 17:12, 17:22,
 19:8, 19:23, 21:19,
 24:4, 24:15, 24:16,
 24:19, 25:2, 25:6,
 27:5, 27:22, 28:1,
 28:9, 28:21, 29:1,
 29:2, 29:15, 29:19,
 30:4, 31:21, 32:2,
 32:11, 32:25, 33:10,
 36:4, 36:11, 37:7,
 37:11, 40:7, 40:21,
 43:19, 44:8, 44:12,
 47:15, 47:24, 48:11,
 48:12, 48:21, 49:2,
 49:14, 52:1, 52:2,
 53:3, 53:5, 53:9,
 54:5, 54:10, 55:13,
 55:18, 60:4, 60:12,
 61:18, 63:2, 63:14,
 65:18, 70:11, 70:25,
 71:7, 72:13, 72:15,
 73:2, 75:2, 75:15,
 75:18, 75:25, 76:3,
 77:10, 77:21, 78:25,
 79:11, 79:15, 80:11,
 80:17, 81:21, 82:9,
 84:13, 86:25, 88:10,
 88:25, 89:2, 89:4,
 89:5, 89:8, 89:13,
 90:2, 90:10, 90:19,
 91:16, 91:19, 92:4,
 92:9, 94:21, 94:25,
 95:19, 96:15, 96:24,
 98:6, 99:8, 99:11,
 101:7, 101:18,
 102:13, 103:18,
 106:10, 106:22,
 107:14, 108:16,
 109:13, 109:25,
 110:10, 111:9,
 112:7, 115:16,
 115:20, 117:14,
 118:18, 119:16,
 121:2, 121:6,
 123:13, 124:2,
 125:3, 125:20,
 125:25, 126:24,

127:12, 127:18,
 128:13, 128:16,
 129:17, 130:4,
 131:8, 131:18,
 131:23, 132:11,
 134:17, 135:11,
 135:13, 135:21,
 136:12, 139:16,
 139:17, 140:7,
 141:4, 141:15,
 141:24, 142:15,
 144:3, 145:13,
 145:21, 146:3,
 146:16, 147:4,
 147:11, 148:15,
 149:19, 151:19,
 152:6, 155:2,
 155:10, 155:12,
 155:23, 156:1,
 156:13, 157:19,
 158:10, 158:21,
 159:2, 159:6,
 159:12, 159:15,
 159:17, 159:19,
 159:25, 160:5,
 160:13, 160:21,
 161:10, 161:12,
 162:3, 163:5,
 163:16, 164:24,
 165:22, 166:7,
 168:11, 169:8,
 169:18, 169:25,
 170:10, 170:25,
 171:19, 171:21,
 171:24, 172:3,
 172:8, 173:5,
 173:16, 174:21,
 175:4, 175:6,
 175:16, 175:17,
 176:3, 176:4, 176:6,
 176:16, 177:2,
 177:3, 177:9,
 177:12, 177:16,
 177:20, 177:22,
 177:23, 178:9,
 178:18, 179:4,
 179:14, 180:9,
 180:13, 180:24,
 181:2, 181:7,
 181:15, 182:9,
 182:13, 183:4,
 183:14, 183:16,
 183:21, 184:17,
 185:15, 185:18,
 185:23, 185:25,
 186:7, 186:12,
 187:7, 187:17,
 187:19, 187:23,
 188:4, 188:6,
 188:11, 188:18,
 189:3, 189:14,

190:8, 191:7,
 191:10, 191:22,
 192:22, 192:23,
 192:25, 193:2,
 194:11, 194:18,
 195:5, 195:15,
 195:16, 195:21,
 196:10, 196:21,
 197:15, 197:24,
 198:1, 198:9,
 198:17, 199:2,
 199:5, 200:1, 200:6,
 200:10, 204:17,
 205:5, 205:16,
 205:19, 205:22,
 206:1, 206:8,
 206:12, 207:13,
 208:2, 208:20,
 209:7, 209:24,
 210:12, 212:3,
 212:4, 212:16,
 213:20, 214:5,
 214:16, 214:20,
 215:14, 215:21,
 216:16, 216:20,
 217:13, 218:12,
 219:6, 219:10,
 220:7, 220:21,
 221:3, 222:9,
 222:15, 222:19,
 223:14, 225:2,
 226:11, 227:20,
 227:24, 228:13,
 230:12, 230:23,
 231:2, 231:7,
 231:23, 233:1,
 234:17, 234:18,
 234:19, 235:1,
 237:7, 237:12,
 237:24, 238:9,
 238:10, 238:18,
 239:21, 241:14,
 243:1, 243:9,
 243:16, 244:18,
 245:1, 248:13,
 249:9, 250:7,
 252:18, 252:22
SOCIAL [2] - 82:4,
 179:13
SOCIETY [2] - 184:22,
 184:24
SOCIOLOGY [1] -
 57:10
SOLACE [1] - 240:24
SOLELY [1] - 46:6
SOLICITUDE [10] -
 18:5, 18:8, 18:14,
 18:20, 19:2, 19:17,
 19:23, 35:13, 35:14,
 35:22

SOME [131] - 6:14,
 7:20, 9:15, 13:17,
 13:19, 14:22, 15:6,
 17:16, 20:4, 20:9,
 23:16, 23:17, 24:1,
 33:17, 35:25, 47:3,
 47:15, 48:4, 48:25,
 50:7, 53:20, 57:7,
 57:20, 62:24, 63:11,
 64:7, 69:7, 72:18,
 73:15, 79:9, 79:10,
 80:3, 88:1, 88:6,
 91:8, 93:8, 94:18,
 98:3, 101:5, 108:10,
 118:17, 121:17,
 121:18, 122:7,
 123:1, 125:15,
 127:9, 127:21,
 128:21, 129:18,
 130:1, 130:2, 130:5,
 131:19, 133:18,
 134:14, 135:10,
 135:25, 136:5,
 142:2, 142:5, 142:9,
 144:4, 145:13,
 145:16, 149:23,
 150:25, 151:9,
 160:14, 161:9,
 164:1, 168:9,
 168:10, 168:17,
 168:22, 169:21,
 169:23, 173:14,
 174:15, 176:25,
 178:11, 180:20,
 184:4, 188:3, 188:8,
 188:9, 188:12,
 188:13, 189:12,
 189:13, 189:19,
 189:21, 189:23,
 190:22, 194:19,
 195:21, 196:15,
 196:18, 196:21,
 197:15, 197:23,
 199:19, 200:10,
 200:22, 200:23,
 202:9, 205:6, 215:8,
 222:12, 225:10,
 225:17, 229:3,
 229:23, 231:4,
 232:6, 232:14,
 232:21, 232:23,
 235:9, 237:2, 238:3,
 244:16, 245:10,
 248:4, 248:10,
 249:11, 250:20,
 250:24
SOMEBODY [3] -
 147:5, 153:6, 212:15
SOMEHOW [7] -
 36:25, 37:13,
 221:17, 224:1,

224:15, 226:11,
 228:13
SOMEONE [5] - 32:21,
 34:11, 53:16,
 130:11, 179:15
SOMEONE'S [1] -
 150:2
SOMETHING [18] -
 27:17, 29:11, 79:16,
 87:24, 93:14, 107:8,
 125:6, 125:7,
 130:13, 145:3,
 147:18, 156:11,
 178:7, 190:1, 209:5,
 222:21, 231:13,
 252:24
SOMETIMES [9] -
 11:16, 61:17, 61:18,
 62:3, 62:5, 62:7,
 126:1, 126:3, 174:8
SOMEWHAT [1] -
 17:16
SOMEWHERE [5] -
 88:20, 88:25, 89:14,
 186:6, 228:8
SOON [2] - 24:15,
 252:6
SORRY [19] - 23:9,
 58:1, 65:22, 72:25,
 74:23, 75:24, 77:24,
 103:8, 103:10,
 105:14, 124:22,
 148:4, 181:21,
 184:8, 196:20,
 200:23, 203:3,
 222:7, 252:11
SORT [7] - 32:25,
 81:9, 83:23, 94:16,
 124:19, 220:10,
 237:2
SORTED [1] - 54:9
SORTS [1] - 212:12
SOUND [2] - 14:18,
 100:21
SOUNDS [1] - 249:20
SOURCE [6] - 42:20,
 46:8, 75:3, 111:22,
 184:9, 184:11
SOURCES [11] -
 68:22, 69:9, 105:9,
 105:10, 105:24,
 106:21, 119:1,
 121:16, 121:20,
 122:10, 194:4
SOVEREIGN [9] -
 17:20, 18:19, 19:12,
 19:19, 20:16, 20:17,
 35:16, 35:20, 234:3
SPACE [1] - 41:20
SPACED [1] - 177:15

SPACING [3] - 72:10, 177:11, 177:17
SPANS [1] - 52:7
SPEAK [10] - 22:8, 22:15, 117:9, 136:16, 141:16, 146:2, 155:2, 155:5, 164:2, 182:4
SPEAKERS [1] - 104:21
SPEAKING [8] - 6:13, 59:14, 86:9, 112:2, 117:11, 130:18, 140:21, 192:7
SPECIAL [10] - 18:5, 18:8, 18:14, 18:20, 19:2, 19:17, 19:23, 35:13, 35:14, 35:21
SPECIALIZE [1] - 114:3
SPECIFIC [20] - 34:2, 46:24, 62:24, 66:24, 67:3, 67:12, 73:11, 73:12, 101:6, 123:4, 132:16, 146:11, 146:21, 194:4, 214:24, 217:16, 223:7, 227:16, 229:2, 233:17
SPECIFICALLY [21] - 12:1, 59:4, 62:22, 69:12, 81:5, 83:6, 85:25, 95:9, 105:11, 108:22, 121:3, 137:24, 146:2, 164:15, 168:22, 182:11, 223:5, 226:6, 227:3, 231:21, 235:23
SPECIFICS [1] - 42:25
SPECTRUM [1] - 190:10
SPECULATING [1] - 231:14
SPECULATION [1] - 35:24
SPELL [4] - 54:21, 113:18, 162:20, 243:11
SPELLED [1] - 162:22
SPEND [2] - 14:5, 61:8
SPENDING [1] - 220:1
SPENDS [1] - 14:1
SPENT [1] - 167:2
SPERMICIDE [1] - 176:23
SPERMICIDES [1] - 77:13
SPOKE [3] - 93:19, 98:9, 111:14

SPOKEN [1] - 5:10
SPONGE [1] - 77:14
SPONSOR [2] - 208:7, 230:14
SPONSORED [2] - 199:22, 230:3
SPONSORS [1] - 250:2
SPOUSES [1] - 13:18
SPRING [2] - 180:13, 184:23
SQUARE [1] - 2:3
SQUARED [1] - 224:5
SQUARELY [2] - 47:7, 217:1
STABLE [1] - 177:23
STAND [5] - 15:25, 54:18, 113:9, 127:15, 157:7
STANDARD [5] - 9:13, 238:4, 238:5, 238:6, 242:11
STANDING [44] - 15:6, 15:7, 15:8, 15:12, 15:15, 15:21, 16:6, 16:7, 16:11, 17:1, 17:4, 17:6, 17:13, 18:2, 18:19, 18:24, 19:25, 20:1, 21:8, 21:16, 26:15, 33:23, 34:9, 35:22, 36:4, 36:6, 36:13, 37:10, 227:13, 233:9, 233:25, 234:6, 235:12, 236:13, 236:25, 237:4, 237:9, 237:11, 238:5, 238:21, 239:12
STANDS [2] - 170:16, 174:22
START [11] - 25:1, 25:4, 101:22, 103:3, 165:5, 165:25, 210:24, 219:15, 228:11, 230:18, 252:23
STARTED [6] - 51:25, 167:6, 168:11, 180:12, 188:22, 194:3
STARTS [3] - 101:22, 102:14, 103:11
STATE [60] - 13:24, 13:25, 14:4, 14:9, 16:11, 16:24, 17:1, 17:4, 17:20, 18:1, 18:21, 19:3, 19:12, 19:18, 19:22, 20:8, 35:2, 35:7, 35:10,

35:15, 35:18, 35:20, 48:15, 49:18, 54:21, 55:5, 60:7, 60:10, 61:2, 71:5, 82:2, 82:8, 89:7, 90:2, 93:5, 113:14, 113:18, 113:24, 151:20, 162:20, 166:1, 166:2, 168:14, 170:16, 182:12, 219:19, 228:20, 230:4, 231:1, 231:9, 231:10, 231:11, 231:12, 231:19, 231:20, 233:11, 237:6, 237:7, 244:23
STATE'S [2] - 20:16, 35:24
STATE-BY-STATE [1] - 89:7
STATE-FUNDED [5] - 230:4, 231:10, 231:19, 237:6, 237:7
STATED [12] - 131:20, 159:18, 182:10, 198:10, 199:19, 200:21, 201:7, 201:14, 201:23, 202:3, 202:9, 202:16
STATEMENT [13] - 53:6, 86:15, 204:18, 204:22, 204:23, 205:5, 207:22, 217:7, 238:11, 238:13, 238:16, 238:24, 239:8
STATEMENTS [5] - 3:15, 3:16, 3:17, 3:18, 56:20
STATES [32] - 1:1, 2:10, 3:4, 3:5, 3:6, 10:2, 13:9, 16:16, 16:25, 17:19, 18:22, 25:22, 26:6, 35:7, 36:3, 36:13, 36:14, 69:22, 81:13, 94:23, 95:2, 95:5, 100:8, 110:19, 146:13, 154:7, 216:25, 229:24, 230:1, 230:6, 230:22, 231:4
STATISTICAL [8] - 139:9, 140:16, 140:18, 186:3, 187:4, 187:7, 188:16
STATISTICALLY [2] - 112:10, 187:9
STATISTICS [1] - 139:2

STATUS [11] - 7:25, 24:17, 52:24, 71:20, 205:12, 206:22, 207:25, 208:1, 208:6, 209:9, 212:20
STATUTE [19] - 13:5, 13:11, 17:24, 18:3, 35:11, 42:22, 43:1, 43:3, 43:20, 45:7, 45:22, 47:9, 215:19, 220:11, 221:22, 224:6, 225:4, 226:16, 230:23
STATUTE'S [2] - 43:24, 45:18
STATUTES [6] - 39:3, 39:6, 44:23, 48:4, 225:1, 231:6
STATUTORY [17] - 8:3, 38:18, 38:25, 42:7, 42:14, 42:17, 45:1, 46:1, 46:8, 46:10, 50:19, 213:15, 215:16, 220:5, 222:25, 241:5, 241:9
STAY [10] - 20:25, 31:4, 31:10, 31:12, 33:13, 245:4, 245:5, 245:6, 249:14
STEAD [1] - 9:18
STEINBERG [3] - 10:7, 10:17, 10:23
STENOTYPE [1] - 1:24
STENOTYPE - COMPUTER [1] - 1:24
STEP [8] - 7:3, 7:10, 73:10, 219:6, 219:8, 219:11, 219:12, 219:15
STEPPING [1] - 238:9
STEPS [1] - 219:14
STERILIZATION [8] - 76:9, 76:21, 77:19, 79:15, 176:10, 176:13, 188:11, 208:10
STETSON [1] - 164:16
STEVE [1] - 3:5
STILL [14] - 26:6, 32:19, 50:4, 93:11, 127:7, 127:9, 145:13, 160:10, 178:14, 200:1, 201:11, 214:3, 232:24, 249:3
STIMSON [1] - 2:17
STIPULATE [7] -

55:19, 55:22, 57:1, 158:14, 159:2, 159:4, 159:6
STIPULATED [2] - 24:9, 55:15
STOP [4] - 14:12, 54:3, 87:23, 151:4
STRAINS [1] - 220:21
STRAWBERRY [1] - 2:3
STREET [2] - 1:20, 2:7
STRICT [1] - 126:17
STRIKE [2] - 136:11, 235:24
STRONG [4] - 48:8, 49:1, 167:20, 174:8
STRONGLY [1] - 251:11
STRUCK [2] - 247:12, 247:17
STRUGGLED [1] - 226:19
STUDENTS [6] - 59:18, 59:19, 61:5, 61:6, 118:6, 122:2
STUDIED [1] - 57:10
STUDIES [22] - 61:18, 61:19, 61:22, 63:2, 63:5, 63:8, 63:11, 64:7, 66:22, 72:4, 77:24, 83:8, 107:3, 108:10, 108:13, 152:6, 152:8, 189:9, 189:12, 189:15, 195:2
STUDY [107] - 22:9, 69:14, 77:25, 81:18, 82:8, 83:14, 90:3, 91:7, 92:21, 92:25, 93:4, 93:9, 93:19, 93:21, 94:1, 94:14, 94:16, 94:19, 94:24, 100:1, 101:24, 102:16, 102:19, 104:15, 104:18, 106:15, 106:20, 107:25, 108:1, 108:5, 109:5, 109:9, 109:13, 109:17, 109:18, 109:22, 109:25, 110:2, 110:8, 111:5, 111:13, 111:14, 112:2, 112:6, 112:7, 112:9, 112:13, 163:4, 163:6, 163:8, 163:9, 163:23, 164:1, 164:2, 164:5, 164:6, 171:1, 171:3, 171:4, 180:3, 180:5,

180:7, 180:8, 180:9, 180:13, 180:15, 180:25, 181:6, 181:13, 181:17, 181:18, 181:24, 182:5, 182:15, 182:17, 182:18, 182:25, 183:8, 183:10, 183:16, 183:19, 183:21, 184:5, 184:19, 184:20, 185:16, 186:4, 186:5, 186:10, 186:11, 186:13, 186:16, 187:2, 187:21, 187:23, 187:25, 188:2, 188:21, 188:22, 188:24, 192:12, 195:14 STUDYING [2] - 59:2, 111:19 STUFF [1] - 246:12 SUBCHAPTER [1] - 215:20 SUBGROUP [3] - 73:21, 73:23, 73:25 SUBGROUPS [3] - 73:17, 73:18, 73:20 SUBJECT [6] - 48:9, 50:11, 50:12, 65:1, 146:4, 232:22 SUBJECTED [1] - 39:21 SUBJECTING [1] - 208:11 SUBMISSION [1] - 252:20 SUBMIT [1] - 26:23 SUBMITTED [3] - 229:25, 251:16, 251:22 SUBMITTING [3] - 51:3, 51:4, 251:23 SUBSECTION [2] - 43:7, 221:11 SUBSECTIONS [2] - 43:2, 43:3 SUBSEQUENT [5] - 37:7, 194:19, 208:16, 215:19, 232:7 SUBSEQUENTLY [1] - 209:25 SUBSET [2] - 149:24, 232:4 SUBSIDIARY [2] - 47:4, 51:16 SUBSPECIALITY [1] - 116:11	SUBSPECIALTY [2] - 115:13, 116:12 SUBSTANTIAL [7] - 43:18, 46:17, 50:24, 51:2, 67:5, 232:24, 233:6 SUBSTANTIALLY [1] - 247:16 SUBSTANTIVE [12] - 8:6, 8:17, 8:20, 8:22, 8:25, 9:12, 213:3, 213:23, 214:10, 214:13, 217:6, 218:18 SUBSTANTIVELY [1] - 9:3 SUCH [14] - 12:3, 47:4, 79:14, 103:21, 140:25, 156:11, 175:10, 175:11, 187:20, 201:19, 221:12, 228:16, 248:20, 251:1 SUDDEN [1] - 153:10 SUDDENLY [1] - 96:16 SUE [2] - 47:20, 47:23 SUED [2] - 26:2, 27:4 SUFFER [12] - 7:9, 7:19, 15:14, 117:16, 125:18, 126:16, 126:19, 128:1, 129:3, 147:13, 153:24, 227:10 SUFFERED [4] - 15:13, 18:23, 147:24, 148:6 SUFFERING [4] - 128:14, 129:12, 142:1, 235:3 SUFFICIENT [5] - 17:1, 20:10, 20:15, 20:18, 39:13 SUFFICIENTLY [1] - 240:21 SUGGEST [3] - 177:12, 237:24, 237:25 SUGGESTED [4] - 53:22, 125:3, 242:9, 252:12 SUGGESTING [3] - 31:2, 227:15, 247:21 SUGGESTS [4] - 37:9, 43:11, 106:18, 244:16 SUITED [1] - 190:12 SUM [1] - 14:25 SUMMARY [1] - 228:5 SUPERSEDE [1] -	215:20 SUPERVISED [1] - 59:19 SUPPORT [4] - 15:9, 67:5, 170:18, 214:13 SUPPORTED [5] - 221:14, 226:15, 226:16, 250:14, 250:15 SUPPORTING [3] - 155:19, 155:20, 251:18 SUPPOSED [7] - 78:8, 126:11, 127:14, 245:8, 245:20, 246:1, 251:5 SUPPOSEDLY [1] - 26:21 SUPREMACY [1] - 19:7 SUPREME [22] - 16:19, 26:7, 36:4, 37:24, 38:3, 38:5, 40:1, 40:2, 47:13, 47:16, 48:4, 49:2, 51:7, 211:9, 213:17, 219:15, 225:20, 226:2, 226:19, 226:23, 241:2, 249:6 SURE [36] - 28:23, 51:23, 53:5, 53:16, 57:24, 75:2, 78:17, 89:12, 98:14, 137:2, 139:18, 139:19, 141:15, 141:19, 143:22, 145:8, 153:11, 159:9, 163:2, 166:25, 168:11, 170:25, 174:21, 176:3, 180:9, 182:6, 183:14, 184:3, 187:17, 191:7, 193:19, 194:5, 195:7, 195:10, 195:13 SURELY [1] - 220:6 SURGERIES [1] - 122:14 SURGICAL [3] - 77:21, 119:15, 122:12 SURPRISED [1] - 176:19 SURVEY [7] - 62:4, 111:15, 111:17, 111:18, 111:23, 111:24, 182:17 SURVEYS [3] - 110:13, 181:14	SUSPECT [1] - 34:15 SUSTAINED [13] - 80:8, 85:13, 86:11, 132:6, 133:5, 139:12, 142:18, 147:20, 150:4, 150:20, 151:23, 203:19 SUZANNE [2] - 1:19, 253:9 SWALLOW [2] - 6:21, 26:19 SWEAR [1] - 113:12 SWEATS [1] - 127:20 SWEEPING [6] - 211:11, 218:16, 235:1, 248:6, 248:20, 251:1 SWITCH [2] - 243:23, 244:1 SWORN [4] - 54:20, 113:17, 162:17, 162:19 SYLLOGISM [1] - 49:7 SYMPTOMS [4] - 126:18, 127:20, 130:1, 132:12 SYSTEM [1] - 121:18 SYSTEMATIC [1] - 62:5	225:3, 227:16, 232:2, 235:5, 242:5, 244:8, 250:17, 250:24 TAKEN [15] - 51:12, 54:13, 66:14, 107:10, 108:11, 113:7, 157:23, 184:3, 184:4, 184:21, 184:25, 185:2, 210:15, 214:11, 219:11 TAKES [1] - 88:6 TAKING [10] - 25:4, 48:12, 74:11, 122:12, 133:12, 160:23, 174:1, 227:17, 228:18, 236:17 TALK [16] - 34:24, 36:2, 38:12, 52:14, 82:11, 83:3, 88:3, 109:3, 157:19, 178:10, 178:12, 178:21, 182:1, 190:11, 215:14, 222:11 TALKED [11] - 18:18, 36:20, 88:4, 108:22, 128:22, 163:9, 176:22, 198:20, 216:24, 239:24, 249:18 TALKING [9] - 29:1, 38:20, 38:23, 38:25, 48:24, 109:11, 174:17, 217:16, 239:18 TALKS [2] - 82:24, 150:22 TARGETED [1] - 57:7 TASK [1] - 68:25 TASKS [1] - 58:6 TAUGHT [3] - 59:18, 63:17, 63:23 TAX [3] - 219:17, 219:24, 242:22 TAXES [1] - 240:10 TEACH [5] - 58:15, 61:4, 118:2, 118:5, 118:6 TEACHER [2] - 22:18, 23:14 TEACHING [5] - 59:22, 61:10, 119:20, 122:21, 175:13 TEAM [1] - 6:11 TECHNICAL [1] - 47:8 TECHNOLOGY [1] -
T				
TAB [14] - 56:7, 56:14, 68:1, 101:9, 101:10, 101:12, 114:12, 143:20, 143:22, 165:7, 165:15, 175:20, 183:23, 198:10 TABLE [16] - 6:10, 10:14, 74:18, 74:21, 75:15, 78:1, 80:18, 184:3, 184:21, 184:24, 185:2, 185:10, 185:15, 185:21, 185:24, 186:7 TAKE [36] - 8:15, 27:8, 29:14, 38:9, 48:10, 48:22, 49:7, 49:10, 54:8, 54:18, 73:10, 81:8, 85:13, 95:7, 113:3, 118:11, 118:14, 119:16, 129:18, 133:16, 161:7, 181:11, 187:17, 210:4, 210:8, 210:10, 212:19, 223:15,				

75:3
TEEN [3] - 102:18,
 106:23, 106:24
TEENS [2] - 102:15,
 107:1
TELL [31] - 3:10,
 15:23, 18:11, 36:10,
 49:3, 50:16, 53:19,
 88:14, 90:1, 107:25,
 114:9, 116:24,
 123:24, 143:20,
 155:4, 161:11,
 161:17, 162:6,
 165:12, 170:24,
 178:16, 180:4,
 180:6, 185:8, 204:6,
 214:19, 222:19,
 222:20, 227:20,
 229:17, 234:10
TELLING [3] - 33:10,
 83:4, 236:20
TEMPLE [1] - 167:8
TEN [2] - 54:10, 113:4
TEND [1] - 72:20
TENS [1] - 52:12
TENSION [3] - 241:5,
 247:11, 249:20
TENURED [1] - 117:25
TERM [5] - 19:24,
 127:18, 127:21,
 135:16, 177:16
TERMINOLOGY [1] -
 53:11
TERMS [13] - 11:19,
 15:12, 29:2, 99:16,
 123:24, 132:14,
 135:24, 136:23,
 145:17, 160:1,
 174:6, 189:17, 192:7
TERRITORY [2] -
 35:18, 35:24
TEST [3] - 62:7, 187:4,
 188:16
TESTIFIED [19] -
 98:18, 98:22,
 100:19, 107:16,
 139:21, 139:25,
 140:5, 143:18,
 144:3, 145:8, 163:4,
 164:12, 164:19,
 171:11, 181:2,
 184:14, 186:2,
 235:25, 244:13
TESTIFY [4] - 23:7,
 104:22, 121:3,
 196:10
TESTIMONY [29] - 6:8,
 9:16, 22:25, 23:16,
 64:24, 65:3, 65:7,
 65:11, 66:7, 68:5,

69:7, 111:7, 112:23,
 120:18, 120:24,
 145:9, 154:14,
 161:19, 163:15,
 164:10, 184:15,
 203:24, 230:7,
 235:24, 236:6,
 236:20, 245:11,
 246:9, 252:2
TEXAS [7] - 16:16,
 16:25, 17:19, 36:3,
 36:5, 36:12, 36:14
TEXT [1] - 43:24
TEXTBOOK [2] -
 16:10, 17:10
THAN [48] - 11:22,
 11:23, 12:2, 12:19,
 16:14, 40:19, 41:1,
 41:10, 46:21, 53:11,
 53:23, 67:9, 72:18,
 74:12, 76:10, 76:20,
 77:7, 86:10, 86:21,
 90:9, 91:24, 92:2,
 92:11, 120:22,
 122:24, 124:4,
 134:4, 145:20,
 154:2, 176:9,
 176:12, 176:25,
 187:6, 187:8, 194:2,
 195:3, 195:11,
 198:13, 210:13,
 213:15, 225:15,
 226:18, 231:3,
 232:20, 233:16,
 237:2, 238:4, 248:19
THANK [52] - 5:22,
 11:3, 15:24, 20:19,
 20:21, 21:18, 24:12,
 25:16, 25:17, 65:25,
 77:18, 97:14, 97:17,
 98:14, 99:17,
 104:24, 104:25,
 105:2, 111:10,
 113:2, 114:22,
 142:21, 152:17,
 152:18, 152:19,
 157:6, 157:8,
 157:21, 158:25,
 165:2, 165:21,
 167:23, 172:10,
 175:19, 177:6,
 184:7, 191:25,
 193:5, 193:15,
 203:2, 203:23,
 204:3, 204:12,
 235:14, 235:15,
 246:21, 251:13,
 251:23, 252:7,
 252:25

THANKS [1] - 97:24
THAT [1412] - 3:19,
 3:23, 5:11, 5:13,
 5:14, 5:15, 5:16,
 5:17, 5:18, 5:19, 6:4,
 6:21, 7:5, 7:23, 8:2,
 8:13, 8:23, 9:2, 9:15,
 9:17, 9:19, 10:2,
 10:5, 10:13, 10:21,
 11:2, 11:14, 12:4,
 12:25, 13:3, 13:7,
 13:9, 13:12, 14:3,
 14:8, 14:23, 15:2,
 15:6, 15:10, 15:12,
 15:22, 15:23, 16:18,
 16:23, 17:1, 17:2,
 17:4, 17:9, 17:13,
 17:17, 17:20, 17:23,
 17:24, 18:1, 18:7,
 18:16, 18:21, 18:23,
 18:24, 19:6, 19:9,
 19:11, 19:13, 19:16,
 19:17, 19:20, 19:25,
 20:4, 20:8, 20:13,
 20:18, 21:4, 21:7,
 21:9, 21:12, 21:15,
 21:16, 21:19, 21:22,
 21:24, 22:5, 22:9,
 22:10, 23:3, 23:17,
 23:18, 23:25, 24:2,
 24:3, 24:5, 24:7,
 24:14, 24:15, 24:24,
 25:2, 25:6, 25:8,
 25:10, 25:11, 25:13,
 25:15, 25:25, 26:16,
 26:18, 26:19, 26:20,
 26:23, 27:11, 27:19,
 27:23, 28:4, 28:7,
 28:12, 28:13, 28:18,
 28:24, 29:5, 29:12,
 29:16, 29:20, 29:25,
 30:2, 30:9, 30:14,
 30:15, 30:18, 30:20,
 30:22, 31:4, 31:9,
 31:10, 31:16, 31:17,
 31:24, 31:25, 32:6,
 32:8, 32:9, 32:10,
 32:14, 32:17, 32:18,
 32:23, 33:1, 33:4,
 33:5, 33:6, 33:8,
 33:13, 33:14, 33:15,
 33:20, 34:2, 34:3,
 34:6, 34:8, 34:10,
 34:13, 34:17, 34:25,
 35:2, 35:7, 35:9,
 35:13, 35:15, 35:17,
 35:18, 35:23, 35:25,
 36:4, 36:8, 36:13,
 36:16, 36:17, 36:24,
 36:25, 37:1, 37:4,
 37:6, 37:9, 37:12,

37:13, 37:15, 37:16,
 37:21, 37:22, 38:2,
 38:6, 38:22, 39:3,
 39:6, 39:8, 39:9,
 39:12, 39:17, 39:19,
 40:21, 40:24, 41:1,
 41:2, 41:3, 41:7,
 41:9, 41:10, 41:14,
 41:18, 41:20, 41:21,
 41:22, 41:23, 41:25,
 42:2, 42:4, 42:9,
 42:20, 42:24, 43:2,
 43:5, 43:8, 43:10,
 43:11, 43:13, 43:16,
 43:18, 43:19, 43:21,
 44:15, 44:21, 44:23,
 44:24, 44:25, 45:2,
 45:7, 45:8, 45:12,
 45:13, 45:16, 45:21,
 45:23, 46:3, 46:12,
 46:17, 46:19, 47:1,
 47:2, 47:4, 47:10,
 47:14, 47:19, 47:22,
 48:5, 48:8, 48:14,
 48:16, 48:17, 48:18,
 48:20, 48:21, 48:25,
 49:2, 49:3, 49:9,
 49:14, 49:16, 49:21,
 49:24, 50:2, 50:3,
 50:5, 50:7, 50:9,
 50:10, 50:12, 50:13,
 50:14, 50:17, 50:19,
 50:22, 51:1, 51:4,
 51:6, 51:9, 51:12,
 51:18, 52:4, 52:7,
 52:8, 52:9, 52:16,
 52:21, 52:25, 53:5,
 53:8, 53:10, 53:14,
 53:16, 53:22, 53:24,
 54:10, 55:19, 55:23,
 56:9, 56:10, 56:12,
 56:15, 56:17, 56:18,
 56:19, 57:11, 57:15,
 57:22, 58:8, 58:22,
 58:25, 59:6, 59:14,
 59:15, 59:22, 59:23,
 60:13, 60:24, 62:2,
 62:9, 63:14, 63:24,
 64:9, 64:11, 65:6,
 65:14, 65:18, 65:19,
 66:6, 66:9, 66:11,
 66:12, 66:24, 66:25,
 67:1, 67:3, 67:7,
 67:9, 68:4, 68:8,
 68:14, 68:23, 69:4,
 69:17, 69:25, 70:1,
 70:2, 70:7, 70:8,
 70:9, 70:11, 70:12,
 70:20, 70:25, 71:2,
 71:9, 71:16, 71:23,
 72:4, 72:5, 72:25,

74:19, 74:24, 75:1,
 75:6, 75:13, 75:14,
 75:22, 76:4, 76:9,
 76:13, 76:16, 76:17,
 76:20, 76:24, 76:25,
 77:1, 77:2, 77:3,
 77:20, 78:1, 78:4,
 78:12, 78:14, 78:17,
 78:18, 78:19, 78:21,
 78:24, 78:25, 79:8,
 79:12, 79:19, 79:22,
 79:24, 80:2, 80:4,
 80:14, 80:18, 80:20,
 81:3, 81:7, 81:8,
 81:11, 81:17, 81:18,
 81:21, 82:5, 82:6,
 82:7, 82:8, 82:9,
 82:11, 82:21, 82:23,
 82:24, 83:3, 83:7,
 83:8, 83:11, 83:17,
 84:19, 84:21, 84:24,
 85:4, 85:5, 85:7,
 85:14, 85:16, 85:24,
 86:1, 86:4, 86:6,
 86:9, 86:16, 86:21,
 87:7, 87:8, 87:10,
 87:15, 87:16, 87:24,
 88:4, 89:4, 89:9,
 89:14, 90:1, 90:6,
 90:10, 91:2, 91:6,
 91:14, 91:15, 91:16,
 91:25, 92:19, 92:21,
 93:8, 93:10, 94:4,
 94:9, 94:10, 94:14,
 95:7, 95:10, 95:24,
 96:8, 96:13, 96:16,
 96:18, 96:20, 96:21,
 96:24, 96:25, 97:3,
 98:4, 98:5, 98:18,
 98:19, 98:22, 98:23,
 99:5, 99:8, 99:11,
 99:12, 99:17, 99:18,
 99:19, 99:22, 100:1,
 100:2, 100:3,
 100:19, 100:20,
 100:21, 100:23,
 101:3, 101:8, 101:9,
 101:18, 101:22,
 102:2, 102:4, 102:8,
 102:10, 102:14,
 102:16, 102:20,
 102:23, 102:24,
 103:3, 103:11,
 103:18, 103:22,
 103:24, 104:12,
 105:24, 106:5,
 106:7, 106:10,
 106:13, 106:15,
 106:18, 106:20,
 106:24, 106:25,
 107:4, 107:7, 107:8,

107:10, 107:12, 107:13, 107:14, 107:15, 107:16, 107:21, 107:22, 107:25, 108:1, 108:5, 108:9, 108:13, 108:15, 109:9, 109:15, 109:16, 109:22, 109:23, 109:24, 110:18, 111:4, 111:18, 111:21, 112:3, 112:5, 114:13, 115:3, 115:7, 115:19, 115:21, 116:3, 116:10, 116:11, 117:18, 118:2, 118:11, 118:14, 118:18, 119:6, 119:12, 119:13, 119:14, 119:17, 119:19, 120:4, 121:6, 122:7, 122:9, 122:12, 122:14, 123:4, 123:6, 123:8, 123:11, 123:12, 123:19, 124:2, 124:3, 124:7, 125:3, 125:6, 125:7, 125:9, 125:13, 125:18, 125:23, 126:7, 126:11, 126:13, 126:17, 127:1, 127:3, 127:4, 127:13, 127:15, 127:17, 127:18, 127:25, 128:2, 128:3, 128:5, 128:6, 128:10, 128:12, 128:22, 128:23, 128:24, 129:5, 129:6, 129:13, 129:15, 129:20, 130:2, 130:10, 130:11, 130:13, 130:20, 131:14, 131:22, 131:23, 132:3, 132:17, 132:20, 133:16, 133:22, 134:2, 134:4, 134:10, 134:12, 134:15, 134:17, 134:19, 135:6, 135:8, 135:17, 135:19, 136:3, 136:5, 136:11, 136:12, 136:24, 137:2, 137:6, 137:20, 138:4, 138:9, 139:3,	139:4, 139:10, 139:13, 139:14, 139:16, 139:17, 139:21, 139:25, 140:1, 140:5, 140:6, 140:15, 140:24, 140:25, 141:1, 141:4, 141:9, 141:11, 141:22, 141:25, 142:5, 142:8, 142:12, 143:6, 143:19, 143:21, 144:1, 144:3, 144:10, 144:15, 144:16, 144:19, 144:20, 144:22, 144:23, 145:3, 145:4, 145:8, 145:9, 145:22, 146:1, 146:2, 147:1, 147:5, 147:6, 147:11, 147:18, 147:22, 148:9, 149:1, 149:23, 150:7, 150:9, 150:11, 150:24, 151:11, 151:12, 151:25, 152:3, 152:5, 152:25, 153:2, 153:4, 153:7, 153:9, 153:12, 153:23, 154:1, 154:2, 154:8, 155:2, 156:6, 156:11, 156:12, 156:14, 156:20, 157:13, 157:19, 158:5, 158:7, 158:18, 158:19, 159:8, 159:10, 160:9, 160:11, 160:14, 160:24, 161:12, 161:13, 161:19, 161:24, 161:25, 162:1, 162:5, 162:6, 163:4, 163:6, 163:9, 163:11, 163:17, 163:20, 164:3, 164:20, 165:9, 165:11, 165:16, 165:17, 165:19, 166:15, 166:16, 166:21, 167:10, 167:24, 168:10, 168:12, 168:14, 169:2, 169:4, 169:12, 170:6, 170:24, 170:25, 171:1, 171:7, 171:11, 171:12, 172:9, 172:15,	172:23, 173:5, 173:7, 173:14, 173:19, 174:1, 174:2, 174:12, 174:17, 174:24, 175:6, 175:8, 175:15, 175:16, 175:23, 176:6, 176:11, 176:14, 176:16, 176:19, 176:22, 177:2, 177:12, 177:14, 178:2, 178:7, 178:12, 178:17, 178:20, 178:25, 179:6, 179:17, 179:20, 181:3, 181:4, 181:7, 181:11, 181:23, 182:1, 182:22, 183:1, 183:3, 183:4, 183:11, 183:21, 184:3, 184:4, 185:9, 185:10, 185:16, 185:17, 186:2, 186:5, 186:7, 186:9, 186:13, 186:24, 187:1, 187:8, 187:10, 187:19, 187:25, 188:6, 188:8, 188:10, 188:11, 188:13, 188:14, 188:15, 188:21, 188:25, 189:3, 189:4, 189:6, 189:9, 189:10, 189:12, 189:13, 189:19, 189:22, 189:24, 189:25, 190:7, 190:25, 191:8, 191:11, 191:13, 191:16, 191:19, 191:22, 192:15, 192:22, 192:23, 194:1, 194:8, 194:14, 194:22, 195:2, 195:8, 195:12, 195:14, 195:15, 195:16, 195:18, 195:19, 195:22, 196:1, 196:4, 196:15, 196:18, 196:20, 196:21, 197:7, 197:9, 197:11, 197:16, 197:21, 197:23, 198:2, 198:5, 198:6, 198:7, 198:11, 198:15, 198:17, 198:20, 198:22,	199:2, 199:15, 199:24, 200:7, 200:19, 200:21, 200:25, 201:9, 201:14, 201:16, 201:23, 201:25, 202:3, 202:9, 202:16, 203:7, 204:24, 205:3, 205:7, 205:9, 205:19, 205:21, 205:22, 205:25, 206:1, 206:4, 206:8, 206:13, 206:15, 206:16, 206:17, 206:19, 206:23, 207:4, 207:10, 207:15, 207:16, 207:19, 207:20, 207:23, 208:3, 208:7, 208:13, 208:19, 208:21, 208:25, 209:3, 209:5, 209:7, 209:10, 209:11, 209:13, 209:14, 209:16, 209:17, 209:20, 209:22, 209:24, 210:2, 211:1, 211:2, 211:7, 211:11, 211:13, 211:14, 211:16, 211:18, 211:21, 211:22, 212:1, 212:3, 212:4, 212:5, 212:16, 212:19, 212:22, 212:25, 213:1, 213:3, 213:8, 213:11, 213:12, 213:17, 213:21, 214:9, 214:12, 214:14, 214:16, 214:17, 214:20, 214:21, 215:2, 215:3, 215:7, 215:9, 215:10, 215:16, 215:24, 216:4, 216:10, 216:11, 216:19, 217:1, 217:4, 217:7, 217:9, 217:11, 217:15, 217:16, 217:22, 217:24, 218:5, 218:15, 218:16, 218:19, 218:22, 219:1, 219:11, 219:16, 219:20, 219:23, 220:4, 220:6, 220:7, 220:13, 220:19, 220:21, 220:23,	221:2, 221:16, 221:17, 221:18, 221:20, 221:24, 222:1, 222:3, 222:11, 222:13, 222:19, 222:25, 223:7, 223:9, 223:11, 223:14, 223:15, 223:16, 223:17, 223:18, 223:22, 224:5, 224:12, 224:13, 224:18, 224:21, 224:24, 225:2, 225:5, 225:6, 225:8, 225:11, 225:14, 225:16, 225:18, 225:21, 225:25, 226:4, 226:8, 226:9, 226:11, 226:12, 226:13, 226:15, 226:17, 227:3, 227:4, 227:6, 227:10, 227:11, 227:13, 227:21, 227:22, 227:24, 228:5, 228:6, 228:7, 228:8, 228:9, 228:10, 228:11, 228:13, 228:14, 228:17, 228:24, 229:2, 229:3, 229:9, 229:10, 229:11, 229:15, 229:17, 229:18, 230:1, 230:9, 230:12, 230:16, 230:19, 230:24, 231:1, 231:7, 231:11, 231:13, 231:16, 231:21, 231:23, 232:2, 232:5, 232:9, 232:15, 232:17, 233:2, 233:4, 233:5, 233:6, 233:12, 233:15, 233:18, 233:21, 233:24, 234:6, 234:13, 234:14, 234:25, 235:1, 235:2, 235:3, 235:6, 235:7, 235:10, 235:12, 236:3, 236:4, 236:7, 236:15, 236:19, 236:20, 237:4, 237:5, 237:7, 237:8, 237:17, 237:21, 237:24, 237:25, 238:1, 238:3, 238:7, 238:8, 238:11, 238:13, 238:15,
--	---	--	---	---

238:18, 238:21,
238:23, 238:24,
239:1, 239:2, 239:3,
239:4, 239:6, 239:8,
239:13, 239:15,
239:17, 239:18,
240:2, 240:4,
240:12, 240:14,
240:21, 240:25,
241:9, 241:14,
241:16, 241:17,
241:23, 241:24,
242:6, 242:8, 242:9,
242:10, 242:18,
242:22, 242:23,
242:24, 242:25,
243:4, 243:8,
243:12, 243:20,
243:21, 243:22,
243:24, 244:5,
244:8, 244:10,
244:13, 244:17,
244:19, 244:23,
244:24, 245:3,
245:4, 245:5, 245:8,
245:9, 245:12,
245:14, 245:24,
245:25, 246:3,
246:5, 246:7, 246:8,
246:12, 246:14,
246:17, 246:23,
246:25, 247:6,
247:8, 247:9,
247:11, 247:16,
247:18, 247:19,
247:21, 247:22,
247:23, 247:25,
248:1, 248:3, 248:5,
248:11, 248:12,
248:13, 248:14,
248:16, 248:18,
248:19, 248:20,
248:25, 249:14,
249:21, 250:1,
250:4, 250:8,
250:12, 250:23,
250:24, 251:4,
251:6, 251:9, 252:6,
252:12, 252:15,
252:16, 252:17,
252:18, 252:21,
252:22, 253:3
THAT'S [21] - 21:10,
29:8, 29:20, 38:1,
38:5, 44:14, 45:20,
46:7, 74:18, 76:14,
98:10, 117:21,
127:6, 132:4,
164:17, 168:7,
181:1, 198:21,
206:11, 210:2,

213:13
THE [2887] - 1:1, 1:2,
1:11, 2:2, 2:8, 3:1,
3:2, 3:5, 3:8, 3:10,
3:11, 3:12, 3:14,
3:16, 3:19, 3:20,
3:23, 3:24, 4:2, 4:3,
4:6, 4:7, 4:10, 4:11,
4:14, 4:18, 4:20,
4:23, 5:1, 5:5, 5:6,
5:8, 5:11, 5:13, 5:16,
5:17, 5:18, 5:23,
5:25, 6:2, 6:3, 6:5,
6:7, 6:8, 6:10, 6:11,
6:15, 6:17, 6:18,
6:19, 6:20, 6:21,
6:22, 6:23, 7:1, 7:4,
7:7, 7:9, 7:10, 7:11,
7:12, 7:14, 7:15,
7:17, 7:21, 7:22,
7:23, 7:24, 8:1, 8:4,
8:5, 8:6, 8:9, 8:10,
8:11, 8:12, 8:14,
8:15, 8:17, 8:18,
8:20, 8:21, 8:22,
8:25, 9:1, 9:2, 9:3,
9:4, 9:6, 9:10, 9:11,
9:12, 9:13, 9:18,
9:19, 9:22, 9:24,
9:25, 10:1, 10:2,
10:5, 10:6, 10:9,
10:10, 10:14, 10:15,
10:16, 10:17, 10:21,
10:23, 10:25, 11:1,
11:2, 11:4, 11:5,
11:9, 11:13, 11:17,
11:18, 11:20, 11:24,
12:4, 12:5, 12:6,
12:7, 12:8, 12:9,
12:11, 12:13, 12:14,
12:16, 12:18, 12:20,
12:22, 12:24, 12:25,
13:1, 13:2, 13:3,
13:6, 13:7, 13:14,
13:17, 13:20, 13:25,
14:1, 14:3, 14:4,
14:5, 14:7, 14:17,
14:23, 14:25, 15:1,
15:2, 15:3, 15:4,
15:5, 15:6, 15:7,
15:11, 15:14, 15:17,
15:19, 15:21, 15:22,
16:2, 16:4, 16:5,
16:7, 16:8, 16:13,
16:17, 16:19, 16:21,
16:22, 16:23, 16:24,
17:3, 17:4, 17:8,
17:10, 17:13, 17:18,
17:21, 18:2, 18:4,
18:7, 18:9, 18:11,
18:13, 18:15, 18:16,

18:17, 18:20, 18:21,
18:22, 19:2, 19:3,
19:7, 19:13, 19:14,
19:16, 19:21, 19:23,
19:24, 20:1, 20:5,
20:6, 20:7, 20:13,
20:14, 20:16, 20:19,
20:22, 21:1, 21:3,
21:5, 21:6, 21:10,
21:11, 21:12, 21:13,
21:14, 21:15, 21:16,
21:18, 21:20, 21:25,
22:2, 22:4, 22:5,
22:6, 22:7, 22:9,
22:10, 22:13, 22:23,
23:1, 23:4, 23:8,
23:11, 23:14, 23:18,
23:23, 24:5, 24:6,
24:10, 24:12, 24:16,
24:17, 24:18, 24:19,
24:24, 25:1, 25:2,
25:6, 25:7, 25:9,
25:10, 25:13, 25:16,
25:18, 25:20, 25:22,
25:24, 26:1, 26:3,
26:5, 26:7, 26:10,
26:11, 26:12, 26:13,
26:15, 26:16, 26:19,
27:2, 27:8, 27:9,
27:11, 27:14, 27:15,
27:16, 27:18, 27:20,
27:22, 27:24, 27:25,
28:2, 28:3, 28:6,
28:9, 28:10, 28:13,
28:15, 28:17, 28:21,
28:22, 28:23, 28:24,
28:25, 29:3, 29:5,
29:7, 29:10, 29:14,
29:15, 29:16, 29:17,
29:18, 29:24, 30:3,
30:7, 30:8, 30:11,
30:13, 30:20, 30:21,
30:23, 30:24, 31:2,
31:3, 31:5, 31:7,
31:8, 31:11, 31:14,
31:15, 31:18, 31:19,
31:20, 31:21, 31:22,
31:23, 32:2, 32:5,
32:6, 32:10, 32:11,
32:19, 32:20, 32:25,
33:5, 33:10, 33:11,
33:16, 33:17, 33:19,
33:21, 33:23, 33:24,
33:25, 34:1, 34:2,
34:4, 34:5, 34:15,
34:16, 34:17, 34:25,
35:3, 35:6, 35:7,
35:9, 35:13, 35:14,
35:15, 35:17, 35:18,
35:21, 35:24, 36:2,
36:3, 36:4, 36:8,

36:11, 36:12, 36:13,
36:14, 36:17, 36:20,
36:21, 36:24, 37:1,
37:3, 37:5, 37:9,
37:15, 37:16, 37:24,
37:25, 38:9, 38:13,
38:15, 38:16, 38:20,
38:21, 38:22, 38:25,
39:2, 39:3, 39:5,
39:7, 39:8, 39:9,
39:13, 39:14, 39:15,
39:16, 39:17, 39:18,
39:20, 39:21, 39:24,
39:25, 40:1, 40:2,
40:4, 40:6, 40:10,
40:11, 40:14, 40:15,
40:16, 40:17, 40:19,
40:21, 40:22, 41:1,
41:6, 41:7, 41:10,
41:11, 41:12, 41:13,
41:19, 41:20, 41:23,
41:25, 42:2, 42:4,
42:6, 42:7, 42:8,
42:10, 42:12, 42:13,
42:14, 42:15, 42:18,
42:20, 42:21, 42:22,
42:23, 43:1, 43:2,
43:5, 43:6, 43:10,
43:13, 43:16, 43:17,
43:19, 43:20, 43:22,
43:23, 43:25, 44:2,
44:4, 44:5, 44:6,
44:8, 44:9, 44:10,
44:11, 44:15, 44:17,
44:23, 44:24, 44:25,
45:2, 45:4, 45:7,
45:10, 45:11, 45:12,
45:13, 45:14, 45:15,
45:17, 45:18, 45:22,
45:23, 45:25, 46:1,
46:3, 46:5, 46:6,
46:8, 46:9, 46:10,
46:11, 46:12, 46:14,
46:17, 46:18, 46:20,
46:22, 46:23, 47:1,
47:2, 47:3, 47:7,
47:8, 47:9, 47:13,
47:16, 47:17, 47:18,
47:19, 47:20, 47:22,
47:23, 47:25, 48:1,
48:2, 48:4, 48:6,
48:7, 48:10, 48:11,
48:12, 48:13, 48:16,
48:20, 48:21, 49:5,
49:6, 49:8, 49:10,
49:15, 49:16, 49:17,
49:18, 49:25, 50:1,
50:3, 50:4, 50:9,
50:10, 50:11, 50:13,
50:16, 50:19, 50:20,
50:21, 50:23, 50:24,

50:25, 51:2, 51:4,
51:7, 51:11, 51:12,
51:13, 51:15, 51:16,
51:17, 51:18, 51:19,
51:20, 51:21, 51:24,
52:2, 52:4, 52:5,
52:6, 52:9, 52:11,
52:14, 52:15, 52:16,
52:18, 52:19, 52:21,
52:23, 53:2, 53:4,
53:6, 53:10, 53:15,
53:17, 53:18, 53:20,
53:23, 54:2, 54:5,
54:8, 54:12, 54:14,
54:17, 54:18, 54:21,
54:22, 54:23, 55:5,
55:10, 55:11, 55:12,
55:18, 55:19, 55:22,
56:1, 56:12, 56:14,
56:20, 56:24, 57:2,
57:5, 57:8, 57:12,
57:22, 57:23, 57:25,
58:1, 58:3, 58:5,
58:15, 58:18, 58:19,
58:20, 58:21, 58:22,
58:24, 59:2, 59:3,
59:6, 59:15, 60:17,
60:24, 61:2, 61:3,
61:5, 61:6, 61:15,
62:2, 62:3, 62:10,
62:12, 63:4, 63:12,
63:15, 63:20, 63:21,
64:1, 64:4, 64:10,
64:11, 64:13, 64:18,
64:21, 64:24, 64:25,
65:1, 65:2, 65:5,
65:8, 65:12, 65:17,
65:19, 65:20, 65:23,
66:2, 66:4, 66:5,
66:6, 66:8, 66:11,
66:13, 66:17, 66:19,
66:25, 67:2, 67:4,
67:7, 67:10, 67:12,
67:16, 67:21, 67:22,
68:3, 68:7, 68:10,
68:13, 68:17, 68:21,
68:22, 68:23, 68:24,
68:25, 69:2, 69:6,
69:11, 69:14, 69:15,
69:17, 69:22, 69:23,
70:1, 70:2, 70:7,
70:10, 70:11, 70:13,
70:16, 70:17, 70:18,
70:20, 70:21, 70:22,
71:1, 71:8, 71:9,
71:17, 71:20, 71:23,
71:24, 72:1, 72:7,
72:11, 73:3, 73:11,
73:12, 73:13, 73:14,
73:21, 73:22, 73:24,
73:25, 74:3, 74:9,

74:17, 74:19, 75:3, 75:5, 75:6, 75:8, 75:9, 75:11, 75:12, 75:15, 75:18, 75:21, 75:23, 75:25, 76:5, 76:6, 76:7, 76:8, 76:14, 76:23, 77:1, 77:2, 77:5, 77:6, 77:10, 77:12, 77:13, 77:14, 77:15, 77:23, 77:24, 78:2, 78:4, 78:8, 78:10, 78:11, 78:16, 78:18, 78:19, 78:20, 78:23, 79:5, 79:9, 79:19, 79:20, 80:8, 80:9, 80:11, 80:14, 80:17, 80:19, 81:4, 81:5, 81:7, 81:10, 81:12, 81:13, 81:18, 81:20, 81:21, 81:22, 81:23, 82:1, 82:2, 82:9, 82:13, 82:14, 82:15, 82:16, 82:17, 82:18, 82:19, 82:23, 83:2, 83:3, 83:4, 83:6, 83:7, 83:9, 83:10, 83:17, 83:19, 83:23, 83:24, 83:25, 84:2, 84:3, 84:5, 84:6, 84:9, 84:10, 84:11, 84:18, 84:21, 84:22, 85:4, 85:5, 85:7, 85:8, 85:10, 85:11, 85:13, 85:16, 85:18, 85:19, 85:22, 85:23, 85:25, 86:4, 86:5, 86:8, 86:11, 86:14, 86:18, 86:20, 86:25, 87:2, 87:3, 87:7, 87:9, 87:10, 87:12, 87:15, 87:17, 87:20, 88:3, 88:4, 88:5, 88:7, 88:9, 88:13, 88:14, 88:15, 88:17, 88:19, 88:20, 88:22, 88:25, 89:2, 89:3, 89:6, 89:7, 89:9, 89:11, 89:13, 89:16, 89:17, 89:18, 89:20, 89:22, 89:23, 89:25, 90:1, 90:2, 90:5, 90:8, 90:10, 90:11, 90:13, 90:15, 90:16, 90:17, 90:19, 90:21, 90:22, 90:24, 90:25, 91:1, 91:3, 91:6, 91:9, 91:12, 91:13, 91:14, 91:16, 91:19, 91:20, 91:23, 92:1, 92:3, 92:4, 92:5, 92:6,	92:8, 92:9, 92:12, 92:14, 92:16, 92:17, 92:21, 92:23, 92:24, 92:25, 93:1, 93:3, 93:5, 93:7, 93:8, 93:9, 93:12, 93:13, 93:17, 93:19, 93:23, 94:6, 94:8, 94:10, 94:12, 94:18, 94:19, 94:23, 95:1, 95:4, 95:7, 95:8, 95:10, 95:11, 95:14, 95:21, 96:2, 96:5, 96:6, 96:9, 96:16, 96:22, 97:1, 97:4, 97:10, 97:13, 97:16, 98:2, 98:3, 98:9, 98:11, 98:13, 98:14, 98:19, 98:23, 99:6, 99:7, 99:8, 99:11, 99:15, 99:20, 99:22, 100:1, 100:5, 100:7, 100:8, 100:15, 100:16, 100:20, 100:23, 100:25, 101:1, 101:3, 101:7, 101:10, 101:11, 101:12, 101:15, 101:19, 101:21, 101:22, 101:23, 102:1, 102:2, 102:6, 102:7, 102:10, 102:13, 102:14, 102:15, 102:19, 102:22, 102:23, 103:1, 103:3, 103:4, 103:6, 103:8, 103:11, 103:13, 103:14, 103:16, 103:19, 103:25, 104:3, 104:9, 104:11, 104:14, 104:15, 104:18, 104:21, 104:22, 105:2, 105:8, 105:9, 105:10, 105:11, 105:15, 105:18, 105:19, 105:20, 105:22, 105:24, 106:2, 106:7, 106:10, 106:11, 106:12, 106:13, 106:18, 106:21, 106:22, 107:3, 107:5, 107:6, 107:7, 107:9, 107:11, 107:13, 107:16, 107:22, 107:23, 108:6, 108:10, 108:12, 108:15, 108:20, 108:21,	109:3, 109:5, 109:7, 109:8, 109:13, 109:14, 109:16, 109:18, 109:20, 109:24, 109:25, 110:1, 110:2, 110:3, 110:4, 110:5, 110:8, 110:10, 110:12, 110:13, 110:15, 110:17, 110:19, 110:21, 110:23, 110:24, 110:25, 111:1, 111:2, 111:5, 111:6, 111:8, 111:9, 111:10, 111:14, 111:23, 111:25, 112:5, 112:6, 112:7, 112:11, 112:12, 112:13, 112:14, 112:19, 112:21, 112:22, 112:23, 112:24, 113:1, 113:2, 113:5, 113:8, 113:9, 113:11, 113:12, 113:13, 113:14, 113:15, 113:18, 113:19, 113:20, 113:24, 114:4, 114:12, 114:13, 114:15, 114:21, 115:9, 115:15, 115:16, 115:20, 116:1, 116:9, 116:15, 116:17, 116:18, 116:19, 116:22, 117:2, 117:13, 117:15, 118:18, 118:22, 118:24, 118:25, 119:2, 119:4, 119:5, 119:11, 119:17, 119:25, 120:3, 120:4, 120:6, 120:9, 120:13, 120:15, 120:18, 120:19, 120:21, 120:22, 120:24, 121:2, 121:3, 121:6, 121:9, 121:11, 121:18, 121:19, 121:21, 122:14, 122:24, 123:11, 123:14, 123:15, 123:18, 123:20, 124:7, 124:9, 124:11, 125:1, 125:4, 125:9, 125:16, 125:18, 125:23, 126:6, 126:11, 126:17, 126:18, 126:20,	127:2, 127:13, 127:16, 127:18, 127:21, 127:24, 128:4, 128:12, 128:14, 128:16, 128:21, 128:24, 129:5, 129:6, 129:14, 129:15, 129:17, 129:20, 129:22, 129:24, 130:2, 130:20, 130:21, 131:1, 131:2, 131:5, 131:6, 131:16, 131:18, 131:20, 131:24, 132:2, 132:6, 132:12, 132:13, 132:14, 132:18, 132:19, 132:20, 132:23, 133:5, 133:8, 133:11, 133:12, 133:13, 134:1, 134:6, 134:7, 134:9, 134:10, 134:11, 134:21, 134:22, 134:24, 134:25, 135:1, 135:2, 135:3, 135:5, 135:9, 135:12, 135:16, 135:17, 135:23, 136:1, 136:3, 136:5, 136:12, 136:13, 136:16, 136:17, 136:18, 136:23, 137:2, 137:8, 137:9, 137:22, 137:25, 138:1, 138:7, 138:10, 138:13, 138:17, 138:23, 139:1, 139:3, 139:4, 139:5, 139:12, 139:16, 139:17, 139:22, 139:25, 140:5, 140:6, 140:10, 140:11, 140:15, 140:17, 140:20, 140:23, 141:5, 141:6, 141:9, 141:11, 141:13, 141:15, 141:16, 141:17, 141:19, 141:23, 141:25, 142:2, 142:4, 142:13, 142:18, 142:20, 143:5, 143:6, 143:10, 143:13, 143:14, 143:20, 143:23, 144:1, 144:3, 144:14, 144:20,	144:21, 144:23, 144:25, 145:6, 145:9, 145:14, 145:16, 145:18, 145:22, 146:9, 146:10, 146:12, 146:13, 146:19, 146:25, 147:3, 147:4, 147:9, 147:11, 147:16, 147:17, 147:20, 147:22, 148:1, 148:5, 148:7, 148:8, 148:12, 148:20, 148:22, 149:2, 149:7, 149:12, 149:25, 150:2, 150:4, 150:5, 150:7, 150:15, 150:19, 150:20, 150:21, 150:22, 150:24, 151:2, 151:3, 151:4, 151:6, 151:11, 151:12, 151:13, 151:15, 151:18, 151:20, 151:22, 151:23, 151:25, 152:2, 152:3, 152:6, 152:7, 152:14, 152:15, 152:19, 152:20, 152:24, 153:1, 153:3, 153:5, 153:9, 153:16, 153:23, 153:24, 154:3, 154:4, 154:6, 154:7, 154:8, 154:9, 154:18, 154:20, 154:22, 155:2, 155:3, 155:7, 155:8, 155:12, 155:17, 155:18, 155:19, 155:20, 155:23, 155:24, 155:25, 156:3, 156:6, 156:7, 156:8, 156:14, 156:15, 156:17, 156:19, 156:20, 156:21, 156:25, 157:3, 157:6, 157:7, 157:8, 157:10, 157:14, 157:16, 157:18, 157:20, 157:22, 158:2, 158:4, 158:9, 158:10, 158:11, 158:12, 158:13, 158:14, 158:15, 158:16, 158:18, 158:19, 158:21, 158:22, 158:24, 159:1, 159:3, 159:4,
---	--	---	--	---

159:7, 159:8, 159:10, 159:12, 159:14, 159:18, 159:21, 159:22, 159:23, 159:25, 160:7, 160:9, 160:11, 160:14, 160:15, 160:17, 160:21, 160:22, 160:23, 160:24, 160:25, 161:1, 161:2, 161:3, 161:4, 161:6, 161:7, 161:8, 161:10, 161:13, 161:14, 161:16, 161:20, 161:23, 162:1, 162:2, 162:3, 162:4, 162:5, 162:8, 162:10, 162:12, 162:16, 162:20, 162:21, 162:22, 162:24, 163:3, 163:8, 163:11, 163:14, 163:15, 163:17, 163:19, 163:20, 163:22, 163:24, 164:1, 164:2, 164:5, 164:6, 164:7, 164:10, 164:12, 164:13, 164:14, 164:16, 164:17, 164:19, 164:20, 165:7, 165:9, 165:16, 165:22, 166:1, 166:4, 166:11, 166:13, 166:15, 166:18, 166:24, 167:1, 167:17, 167:19, 167:21, 168:1, 168:7, 168:10, 168:12, 168:23, 168:24, 169:1, 169:7, 169:19, 169:20, 169:22, 169:24, 170:6, 170:9, 170:11, 170:12, 170:14, 170:15, 170:21, 170:22, 170:25, 171:1, 171:2, 171:3, 171:4, 171:15, 172:12, 172:17, 172:18, 172:19, 172:22, 172:23, 172:24, 173:1, 173:2, 173:3, 173:5, 173:6, 173:20, 173:22, 174:1, 174:10, 174:11, 174:16,	174:19, 174:21, 174:23, 174:24, 174:25, 175:1, 175:2, 175:3, 175:4, 175:5, 175:6, 175:7, 175:9, 175:12, 175:14, 175:16, 175:17, 175:21, 175:24, 176:3, 176:4, 176:5, 176:6, 176:7, 176:10, 176:11, 176:12, 176:14, 176:15, 176:16, 176:17, 176:19, 176:21, 176:22, 176:23, 177:2, 177:3, 177:4, 177:11, 177:13, 177:17, 177:24, 178:6, 178:7, 178:10, 178:14, 178:17, 178:21, 178:22, 178:25, 179:7, 179:14, 179:16, 179:18, 179:23, 179:25, 180:3, 180:6, 180:7, 180:9, 180:10, 180:11, 180:12, 180:13, 180:14, 180:15, 180:20, 180:24, 181:11, 181:12, 181:13, 181:14, 181:17, 181:18, 181:19, 181:23, 181:25, 182:4, 182:7, 182:10, 182:12, 182:14, 182:15, 182:17, 182:18, 182:20, 182:25, 183:1, 183:3, 183:6, 183:7, 183:10, 183:11, 183:13, 183:15, 183:16, 183:17, 183:19, 183:20, 183:24, 184:1, 184:5, 184:9, 184:10, 184:11, 184:13, 184:14, 184:16, 184:17, 184:19, 184:20, 184:22, 184:23, 185:1, 185:3, 185:5, 185:8, 185:10, 185:12, 185:15, 185:16, 185:18, 185:19, 185:20, 185:21, 185:23, 185:25, 186:3, 186:4, 186:5, 186:8,	186:9, 186:10, 186:11, 186:12, 186:13, 186:14, 186:16, 186:18, 186:19, 186:22, 186:23, 186:24, 187:1, 187:3, 187:4, 187:7, 187:12, 187:13, 187:15, 187:17, 187:20, 187:21, 187:22, 187:24, 188:1, 188:2, 188:12, 188:13, 188:14, 188:16, 188:17, 188:21, 188:22, 188:23, 188:25, 189:1, 189:4, 189:5, 189:9, 189:11, 189:18, 189:20, 190:2, 190:9, 190:10, 190:16, 190:17, 190:21, 191:1, 191:2, 191:3, 191:4, 191:5, 191:7, 191:9, 191:11, 191:16, 191:19, 191:20, 191:21, 192:3, 192:6, 192:8, 192:9, 192:10, 192:12, 192:13, 192:18, 192:21, 192:25, 193:2, 193:7, 193:9, 193:17, 193:24, 193:25, 194:2, 194:3, 194:5, 194:6, 194:8, 194:10, 194:11, 194:14, 194:15, 194:16, 194:17, 194:20, 194:25, 195:3, 195:8, 195:10, 195:14, 195:15, 195:24, 196:3, 196:7, 196:10, 196:11, 196:16, 197:2, 197:3, 197:6, 197:7, 197:10, 197:11, 197:22, 198:5, 198:10, 198:11, 198:13, 198:17, 198:22, 198:23, 199:2, 199:7, 199:11, 199:14, 199:23, 200:9, 200:13, 200:17, 201:3, 201:12, 201:14, 201:16, 201:19, 201:22, 201:25,	202:6, 202:13, 202:17, 202:19, 202:21, 202:23, 203:16, 203:19, 204:1, 204:3, 204:9, 204:11, 204:13, 204:14, 204:17, 204:18, 204:20, 204:21, 204:22, 204:23, 204:24, 204:25, 205:1, 205:3, 205:4, 205:6, 205:9, 205:11, 205:14, 205:16, 205:18, 205:21, 205:23, 205:25, 206:1, 206:2, 206:3, 206:4, 206:5, 206:7, 206:8, 206:9, 206:10, 206:13, 206:14, 206:16, 206:17, 206:18, 206:19, 206:20, 206:22, 206:24, 206:25, 207:2, 207:5, 207:6, 207:10, 207:11, 207:12, 207:14, 207:15, 207:16, 207:18, 207:19, 207:20, 207:21, 208:1, 208:3, 208:6, 208:7, 208:13, 208:15, 208:16, 208:17, 208:20, 208:23, 209:1, 209:3, 209:5, 209:7, 209:8, 209:9, 209:10, 209:12, 209:20, 209:21, 209:22, 209:24, 210:4, 210:11, 210:14, 210:16, 210:19, 210:20, 210:22, 211:1, 211:5, 211:7, 211:9, 211:14, 211:16, 211:17, 211:18, 211:21, 211:22, 211:24, 212:5, 212:7, 212:9, 212:14, 212:20, 212:22, 212:23, 213:1, 213:2, 213:3, 213:4, 213:5, 213:7, 213:10, 213:11, 213:12, 213:13, 213:14, 213:16, 213:17, 213:18, 213:19, 213:20, 213:22, 213:23,	213:24, 214:2, 214:3, 214:4, 214:11, 214:12, 214:14, 214:16, 214:21, 214:25, 215:1, 215:6, 215:7, 215:8, 215:9, 215:10, 215:13, 215:15, 215:18, 215:21, 215:22, 215:23, 215:24, 215:25, 216:1, 216:2, 216:3, 216:4, 216:5, 216:9, 216:10, 216:12, 216:14, 216:19, 216:20, 216:21, 216:25, 217:1, 217:3, 217:4, 217:6, 217:7, 217:8, 217:12, 217:14, 217:15, 217:16, 217:18, 217:20, 217:21, 217:23, 218:3, 218:5, 218:8, 218:10, 218:13, 218:15, 218:17, 218:19, 218:20, 218:23, 219:2, 219:4, 219:6, 219:8, 219:10, 219:14, 219:15, 219:17, 219:19, 219:20, 219:21, 219:22, 219:24, 219:25, 220:1, 220:5, 220:8, 220:11, 220:13, 220:22, 220:25, 221:1, 221:2, 221:3, 221:4, 221:6, 221:7, 221:14, 221:15, 221:17, 221:19, 221:21, 221:22, 221:25, 222:1, 222:4, 222:7, 222:9, 222:10, 222:11, 222:12, 222:13, 222:14, 222:15, 222:17, 222:18, 222:24, 222:25, 223:1, 223:6, 223:7, 223:11, 223:14, 223:16, 223:19, 223:24, 223:25, 224:1, 224:2, 224:3, 224:6, 224:7, 224:10, 224:12, 224:13, 224:14, 224:17, 224:18, 224:20, 224:21, 224:24, 224:25,
--	---	--	---	---

225:1, 225:3, 225:5,
225:9, 225:10,
225:12, 225:15,
225:18, 225:19,
225:20, 225:22,
225:24, 225:25,
226:2, 226:3, 226:5,
226:8, 226:10,
226:11, 226:12,
226:14, 226:15,
226:16, 226:17,
226:18, 226:19,
226:20, 226:21,
226:23, 226:24,
227:1, 227:4, 227:5,
227:6, 227:8,
227:10, 227:11,
227:12, 227:13,
227:15, 227:19,
227:23, 228:5,
228:11, 228:13,
228:15, 228:16,
228:23, 228:25,
229:1, 229:4, 229:7,
229:8, 229:10,
229:16, 229:20,
229:23, 229:24,
229:25, 230:1,
230:5, 230:8,
230:15, 230:18,
231:2, 231:7, 231:9,
231:11, 231:14,
231:16, 231:18,
231:23, 232:2,
232:4, 232:5, 232:6,
232:8, 232:9,
232:11, 232:12,
232:13, 232:14,
232:15, 232:19,
232:22, 233:2,
233:4, 233:7, 233:9,
233:10, 233:13,
233:14, 233:15,
233:17, 233:18,
233:19, 233:20,
234:3, 234:4, 234:6,
234:9, 234:14,
234:16, 234:20,
234:22, 234:24,
234:25, 235:7,
235:9, 235:11,
235:15, 235:16,
235:20, 235:22,
235:24, 235:25,
236:1, 236:2, 236:6,
236:7, 236:9,
236:10, 236:11,
236:12, 236:16,
236:17, 236:21,
237:4, 237:8,
237:10, 237:13,

237:14, 237:15,
237:16, 237:17,
237:18, 237:21,
237:22, 238:2,
238:4, 238:6, 238:9,
238:10, 238:12,
238:14, 238:18,
238:19, 238:21,
238:22, 238:23,
239:1, 239:3,
239:10, 239:12,
239:13, 239:14,
239:15, 239:18,
239:22, 239:25,
240:6, 240:8, 240:9,
240:11, 240:12,
240:19, 240:22,
240:25, 241:8,
241:10, 241:12,
241:16, 241:20,
241:22, 242:1,
242:3, 242:5, 242:8,
242:11, 242:15,
242:16, 242:17,
242:18, 242:19,
242:20, 242:22,
242:25, 243:5,
243:6, 243:8,
243:10, 243:11,
243:13, 243:14,
243:15, 243:16,
243:18, 243:19,
243:20, 243:23,
243:24, 244:3,
244:4, 244:10,
244:11, 244:15,
244:17, 244:18,
244:21, 244:23,
244:25, 245:4,
245:5, 245:7, 245:9,
245:12, 245:13,
245:14, 245:16,
245:19, 245:20,
245:24, 245:25,
246:6, 246:7, 246:8,
246:9, 246:11,
246:14, 246:15,
246:19, 246:23,
246:24, 246:25,
247:2, 247:6, 247:7,
247:10, 247:11,
247:13, 247:15,
247:17, 247:18,
247:19, 247:21,
247:23, 247:25,
248:1, 248:4, 248:7,
248:8, 248:9,
248:10, 248:12,
248:13, 248:14,
248:15, 248:16,
248:21, 248:23,

248:24, 249:1,
249:3, 249:5, 249:6,
249:11, 249:16,
249:17, 249:18,
249:19, 249:21,
249:24, 250:3,
250:4, 250:5, 250:6,
250:7, 250:8,
250:11, 250:12,
250:13, 250:14,
250:15, 250:16,
250:21, 250:22,
251:4, 251:5, 251:9,
251:10, 251:12,
251:14, 251:15,
251:16, 251:17,
251:19, 251:20,
251:21, 251:22,
251:23, 252:1,
252:2, 252:4, 252:5,
252:8, 252:14,
252:18, 253:3, 253:4
THEIR [128] - 6:4,
6:15, 7:7, 11:10,
11:11, 11:15, 12:6,
12:11, 13:16, 13:17,
13:23, 23:5, 27:12,
30:15, 34:16, 35:5,
35:6, 44:22, 47:4,
52:21, 52:22, 53:22,
59:19, 67:5, 72:10,
79:15, 79:17, 80:4,
90:7, 95:1, 96:19,
98:21, 98:25,
100:24, 112:15,
124:24, 125:21,
125:22, 126:2,
126:20, 129:18,
130:1, 132:2,
132:13, 132:18,
145:25, 146:4,
149:11, 151:13,
151:14, 152:1,
153:9, 153:18,
156:12, 170:19,
171:6, 176:8,
177:10, 177:11,
177:20, 177:21,
177:22, 177:23,
178:17, 179:22,
180:22, 181:9,
182:24, 188:3,
188:10, 188:19,
189:21, 189:22,
190:11, 190:13,
190:14, 192:19,
193:1, 193:3, 193:4,
199:6, 199:15,
199:20, 199:22,
200:12, 201:7,
202:20, 202:22,

203:15, 205:3,
205:8, 205:10,
205:15, 206:22,
207:7, 207:9,
208:18, 209:9,
211:11, 212:2,
212:3, 216:22,
218:23, 218:24,
220:20, 221:2,
221:3, 221:18,
225:9, 225:24,
229:17, 230:4,
230:8, 230:20,
231:1, 232:24,
235:8, 243:25,
247:20, 249:4,
249:12, 249:13,
249:18, 251:23
THEM [87] - 3:15,
3:17, 3:21, 8:15, 9:9,
12:11, 14:5, 23:22,
25:2, 26:23, 33:13,
34:1, 34:20, 35:8,
44:22, 45:6, 46:13,
51:5, 53:4, 62:19,
67:19, 87:5, 91:7,
95:9, 106:1, 106:2,
107:15, 109:10,
114:9, 114:19,
118:17, 124:1,
125:24, 128:22,
130:3, 130:6, 130:8,
132:2, 133:9,
136:19, 137:14,
137:24, 137:25,
140:10, 145:23,
146:3, 147:1,
148:10, 149:2,
153:1, 168:24,
169:8, 177:25,
178:19, 178:20,
179:15, 179:22,
180:17, 180:19,
180:22, 182:15,
182:24, 189:22,
190:12, 190:15,
190:16, 190:20,
194:18, 194:19,
194:21, 200:12,
201:17, 203:7,
208:23, 214:8,
214:19, 214:24,
214:25, 216:12,
216:22, 218:9,
221:22, 224:15,
225:2, 235:5
THEME [2] - 17:17,
25:23
THEMSELVES [5] -
33:1, 238:19, 243:8,
243:11, 243:16

THEN [79] - 3:13, 8:16,
9:12, 11:5, 14:17,
15:14, 18:17, 23:3,
26:8, 26:9, 29:25,
32:9, 32:17, 33:8,
36:6, 37:21, 41:5,
41:16, 57:9, 58:6,
60:7, 63:10, 69:5,
70:5, 71:7, 75:9,
76:3, 76:6, 78:12,
78:14, 80:17, 81:15,
81:23, 83:14, 87:12,
87:15, 132:1,
135:16, 136:2,
139:25, 144:18,
159:15, 161:9,
161:22, 167:2,
167:6, 167:10,
168:18, 173:6,
175:2, 175:9,
176:21, 177:4,
186:8, 186:14,
186:21, 186:23,
187:3, 188:3,
189:24, 197:10,
198:17, 206:6,
209:16, 210:5,
211:8, 212:7,
214:25, 218:9,
221:11, 221:21,
222:14, 223:10,
223:24, 237:11,
239:21, 250:6, 251:2
THEORY [6] - 16:12,
17:14, 17:16, 17:17,
19:11, 34:25
THERE [251] - 6:4,
6:11, 7:14, 10:25,
17:16, 17:25, 19:17,
19:20, 20:14, 20:18,
21:5, 21:9, 24:19,
24:22, 25:8, 25:9,
25:23, 26:12, 27:15,
27:20, 27:21, 28:1,
28:5, 28:6, 28:18,
30:4, 30:14, 32:6,
32:15, 32:16, 32:20,
32:21, 33:17, 35:8,
37:5, 37:9, 39:2,
39:13, 39:16, 39:18,
39:20, 39:22, 39:24,
39:25, 40:3, 40:7,
40:8, 41:3, 41:5,
41:14, 41:15, 41:16,
42:2, 42:5, 44:17,
45:1, 45:6, 45:23,
47:5, 53:3, 53:10,
53:20, 54:3, 56:21,
57:7, 57:11, 58:10,
60:12, 60:15, 60:23,
65:5, 68:9, 69:4,

70:9, 70:18, 71:16,
72:4, 72:18, 72:19,
74:3, 75:15, 75:16,
76:16, 76:18, 77:3,
79:22, 79:23, 82:13,
83:11, 84:13, 86:18,
87:20, 89:9, 91:3,
91:4, 91:13, 91:19,
94:11, 94:20, 99:19,
106:25, 108:17,
110:11, 111:3,
111:16, 111:18,
114:6, 114:18,
115:5, 116:17,
118:15, 119:12,
119:13, 122:6,
125:5, 125:13,
125:15, 126:8,
126:15, 128:19,
129:10, 130:14,
131:18, 133:1,
134:14, 134:25,
135:3, 135:10,
137:16, 143:8,
144:20, 145:10,
155:7, 159:15,
160:3, 160:4,
161:19, 164:21,
166:3, 167:22,
168:17, 173:16,
174:15, 175:15,
176:7, 176:8,
177:12, 178:11,
179:2, 183:2, 183:9,
183:16, 183:18,
183:19, 186:10,
186:15, 186:18,
186:25, 187:8,
187:19, 188:7,
188:8, 188:9, 189:7,
189:8, 189:12,
190:25, 192:13,
192:23, 195:17,
195:22, 195:23,
195:25, 196:15,
197:1, 197:12,
197:15, 197:18,
197:22, 202:3,
205:20, 208:22,
209:13, 211:11,
211:12, 211:17,
211:25, 213:10,
214:9, 215:5,
216:15, 217:3,
217:4, 217:8,
217:10, 219:3,
220:17, 222:1,
222:3, 222:11,
222:21, 223:4,
224:12, 225:7,
225:8, 227:14,

227:25, 228:1,
228:8, 229:15,
230:1, 231:1, 231:8,
231:14, 231:18,
231:19, 231:24,
233:25, 234:17,
235:7, 235:10,
237:13, 237:19,
238:11, 239:7,
240:1, 240:24,
241:2, 242:15,
243:15, 243:19,
243:21, 244:7,
244:20, 244:21,
244:23, 245:2,
246:1, 247:24,
247:25, 248:4,
248:5, 249:20,
249:23, 251:3
THERE'S ^[11] - 22:1,
27:19, 65:6, 163:14,
168:4, 169:21,
189:12, 195:18,
227:25, 248:17,
249:23
THEREFORE ^[16] -
13:14, 14:18, 21:8,
30:10, 36:11, 56:2,
72:10, 79:3, 196:19,
197:15, 205:13,
230:5, 230:10,
230:19, 237:20,
245:19
THERETO ^[1] - 5:18
THESE ^[116] - 6:18,
7:4, 7:6, 7:17, 13:15,
13:19, 14:3, 14:15,
25:5, 26:7, 26:22,
34:9, 34:18, 39:10,
41:5, 42:1, 45:16,
46:2, 57:20, 71:9,
75:2, 75:5, 77:5,
78:13, 86:2, 87:11,
87:19, 91:5, 92:10,
92:13, 94:12, 96:9,
110:12, 114:11,
116:20, 123:25,
125:25, 126:5,
127:14, 130:4,
131:12, 131:19,
138:3, 138:22,
140:8, 140:25,
141:23, 145:11,
147:4, 149:17,
150:25, 151:2,
151:9, 153:10,
155:19, 156:18,
160:4, 181:12,
186:6, 187:8, 187:9,
196:14, 196:18,
196:22, 198:19,

200:5, 200:11,
200:22, 201:6,
202:2, 202:4, 202:9,
207:7, 207:8,
208:20, 208:25,
210:25, 211:2,
211:12, 211:22,
212:20, 214:8,
214:13, 214:24,
215:11, 216:17,
216:21, 217:23,
222:5, 229:13,
229:20, 231:9,
231:18, 231:19,
231:25, 232:6,
232:16, 233:21,
235:1, 237:19,
237:20, 237:21,
238:11, 238:25,
239:5, 239:21,
243:9, 243:12,
244:5, 244:24,
245:11, 250:1,
250:9, 250:10,
250:20, 251:25
THEY ^[215] - 3:22,
6:20, 6:21, 6:22,
6:25, 7:2, 9:22,
13:18, 14:11, 14:17,
14:18, 26:18, 30:14,
31:11, 34:12, 34:19,
40:12, 40:13, 40:16,
40:17, 40:25, 41:15,
44:11, 47:7, 47:20,
47:23, 51:17, 53:10,
53:22, 56:1, 58:17,
58:18, 61:17, 61:18,
62:7, 65:10, 65:18,
66:18, 68:12, 69:25,
71:19, 77:10, 78:14,
79:12, 79:13, 80:5,
86:3, 87:12, 90:6,
94:9, 95:13, 98:20,
98:24, 103:18,
106:2, 106:6,
107:12, 107:14,
110:14, 114:10,
114:19, 119:5,
119:6, 121:16,
121:20, 125:11,
125:24, 126:3,
127:7, 127:8, 127:9,
132:16, 133:1,
137:14, 137:18,
137:23, 137:25,
140:7, 141:6,
141:20, 145:1,
145:2, 153:1, 153:2,
153:11, 158:13,
159:24, 164:24,
169:19, 171:5,

174:9, 175:2, 176:9,
177:22, 177:23,
177:25, 178:1,
178:12, 178:20,
179:17, 180:19,
181:8, 181:13,
181:16, 182:17,
182:18, 182:19,
182:21, 187:25,
188:4, 188:5,
188:10, 190:9,
190:13, 191:20,
192:21, 192:22,
192:25, 193:3,
197:24, 199:16,
200:6, 200:14,
201:23, 203:7,
205:2, 205:8,
205:12, 206:5,
208:19, 209:4,
209:23, 212:24,
214:2, 214:12,
215:3, 215:8,
215:11, 215:16,
216:3, 216:12,
216:13, 216:18,
217:7, 217:11,
217:16, 219:1,
219:11, 221:2,
221:7, 221:16,
221:21, 222:1,
223:2, 225:24,
226:10, 227:17,
227:19, 228:6,
228:16, 228:18,
228:19, 228:20,
228:24, 229:1,
229:7, 229:9,
229:11, 229:16,
230:4, 230:10,
231:5, 231:16,
231:18, 231:21,
233:2, 233:3, 235:1,
235:2, 235:25,
236:15, 236:16,
236:21, 237:4,
237:7, 237:25,
238:7, 239:4,
239:15, 239:18,
244:1, 244:13,
247:4, 247:14,
247:20, 248:16,
248:17, 248:18,
249:8, 249:9,
249:10, 250:6,
250:7, 251:9
THING ^[11] - 5:10,
5:20, 28:24, 50:9,
71:11, 76:14, 83:2,
94:17, 124:19,
188:25, 234:10

THINGS ^[12] - 14:15,
125:12, 129:14,
156:17, 161:19,
173:16, 192:17,
194:22, 209:24,
223:24, 236:5, 242:8
THINK ^[159] - 3:22,
8:20, 15:6, 16:10,
16:22, 17:5, 19:1,
20:5, 20:6, 20:11,
27:22, 29:3, 29:16,
29:22, 30:20, 31:13,
32:4, 32:10, 35:14,
35:22, 36:16, 37:3,
39:2, 39:12, 40:7,
40:8, 40:13, 41:13,
41:25, 42:3, 42:9,
42:10, 44:20, 44:23,
44:24, 44:25, 45:21,
45:22, 47:2, 49:4,
49:24, 50:20, 51:17,
51:24, 52:2, 52:15,
52:17, 53:4, 53:16,
53:24, 54:8, 68:17,
85:20, 88:4, 89:2,
89:3, 89:5, 93:14,
94:18, 95:2, 95:8,
106:6, 108:21,
108:24, 111:9,
111:18, 128:10,
136:24, 137:3,
137:6, 137:23,
139:5, 139:14,
146:1, 147:3, 155:5,
156:5, 156:16,
158:16, 161:3,
161:13, 161:17,
170:4, 173:6,
173:19, 177:9,
177:24, 179:3,
183:9, 186:2,
189:14, 190:4,
190:6, 191:19,
192:20, 204:5,
204:14, 209:20,
209:25, 210:9,
210:23, 212:11,
212:16, 213:1,
214:1, 215:10,
216:11, 216:13,
217:10, 217:14,
218:18, 218:25,
219:14, 219:16,
222:17, 223:6,
224:5, 224:11,
224:23, 225:17,
225:23, 226:17,
227:4, 227:8,
227:10, 233:1,
233:12, 233:24,
234:9, 236:18,

236:20, 236:24,
237:1, 237:24,
238:6, 238:7, 238:8,
239:7, 241:14,
243:16, 244:2,
244:14, 245:12,
245:25, 246:8,
246:10, 246:12,
246:24, 247:8,
247:21, 248:3,
248:10, 248:12,
250:8, 250:23,
251:3, 252:16

THINKS [3] - 24:20,
31:9, 41:9

THIRD [16] - 34:6,
49:2, 62:19, 157:20,
164:16, 185:20,
186:22, 187:3,
212:2, 212:7,
213:17, 216:25,
217:3, 218:7,
218:10, 229:4

THIRD-PARTY [5] -
34:6, 212:2, 218:7,
218:10, 229:4

THIRTIES [1] - 89:12

THIS [303] - 3:7, 3:11,
3:19, 6:16, 7:8, 7:18,
7:21, 8:4, 8:10,
13:10, 13:21, 13:25,
17:5, 17:12, 17:18,
18:4, 19:11, 20:15,
22:17, 24:14, 24:21,
25:9, 25:25, 26:13,
26:14, 26:22, 27:1,
27:10, 27:16, 28:7,
29:22, 30:2, 30:5,
34:14, 35:18, 37:9,
37:13, 39:1, 39:4,
40:19, 41:9, 41:17,
42:20, 44:9, 45:15,
45:24, 46:15, 47:13,
49:5, 51:13, 55:22,
57:1, 57:24, 64:2,
64:5, 64:16, 65:1,
65:4, 66:7, 66:24,
68:2, 68:3, 74:21,
75:7, 75:21, 76:12,
78:9, 78:19, 82:2,
82:10, 83:12, 83:19,
83:20, 84:4, 84:14,
86:25, 87:18, 87:21,
87:22, 87:24, 88:10,
92:21, 93:13, 94:9,
94:16, 95:2, 96:17,
97:12, 97:23, 99:8,
100:11, 100:14,
100:24, 101:7,
101:12, 103:1,

103:9, 106:11,
107:8, 108:4,
108:19, 108:25,
109:20, 109:21,
110:24, 111:4,
111:12, 111:13,
112:25, 114:11,
114:14, 120:11,
120:20, 122:23,
123:13, 123:22,
124:5, 124:19,
125:2, 126:19,
127:12, 133:13,
138:4, 138:25,
140:15, 140:20,
142:16, 142:17,
145:19, 145:23,
146:11, 146:15,
146:21, 146:24,
147:2, 147:10,
150:19, 151:21,
152:1, 152:10,
152:13, 154:18,
155:18, 155:20,
156:1, 156:8, 158:6,
158:11, 159:1,
159:3, 159:7,
159:12, 159:13,
159:17, 159:19,
160:2, 160:7,
160:13, 160:14,
160:24, 161:1,
161:25, 162:1,
162:15, 163:1,
172:11, 172:19,
175:24, 176:2,
178:9, 178:19,
180:4, 180:25,
181:5, 181:22,
181:24, 182:4,
182:6, 183:12,
184:1, 184:3, 184:9,
184:13, 184:14,
184:18, 184:21,
184:24, 185:3,
188:20, 189:1,
189:14, 189:16,
190:18, 190:25,
192:22, 193:23,
195:6, 196:1, 196:4,
197:21, 203:9,
204:19, 204:22,
204:24, 205:5,
206:13, 206:17,
206:24, 206:25,
207:2, 207:11,
207:12, 207:13,
207:15, 208:16,
209:7, 209:18,
211:3, 211:4,
212:18, 212:21,

212:24, 215:6,
215:17, 215:18,
215:20, 216:6,
217:5, 217:13,
218:12, 218:16,
218:20, 219:24,
220:8, 220:10,
220:23, 222:2,
222:11, 223:18,
224:14, 225:10,
225:11, 225:23,
226:13, 226:22,
227:13, 227:17,
227:24, 228:4,
228:14, 228:19,
229:23, 230:12,
231:7, 232:22,
233:11, 233:17,
234:6, 234:23,
236:11, 238:3,
239:4, 239:8,
239:17, 239:25,
240:13, 240:18,
240:22, 241:1,
243:2, 243:17,
244:2, 244:8,
244:15, 245:1,
245:8, 246:1, 246:2,
246:5, 246:9,
246:15, 246:22,
248:3, 248:6,
248:19, 249:8,
249:16, 249:24,
250:4, 250:14,
251:2, 251:15,
251:16, 251:24
THOROUGH [1] -
132:11
THOROUGHLY [1] -
228:8
THOSE [122] - 5:19,
6:8, 9:21, 13:2, 26:4,
26:21, 27:6, 28:22,
37:17, 38:9, 38:17,
39:6, 41:25, 43:3,
47:6, 48:3, 51:3,
52:15, 53:7, 59:4,
61:15, 61:21, 68:10,
68:24, 69:5, 69:8,
69:9, 71:15, 73:17,
73:18, 74:12, 79:10,
86:19, 86:20,
108:22, 110:11,
110:14, 111:18,
114:9, 114:18,
122:8, 125:15,
127:24, 128:7,
128:14, 128:19,
128:20, 129:20,
129:23, 129:25,
130:2, 133:14,

133:24, 135:21,
137:18, 142:2,
142:3, 142:5,
144:10, 147:14,
147:25, 148:6,
150:8, 152:7,
153:19, 154:19,
155:16, 163:7,
168:22, 169:1,
170:5, 170:6, 174:9,
175:12, 176:4,
176:5, 176:13,
176:15, 179:16,
182:23, 184:25,
185:17, 185:24,
188:4, 189:15,
190:8, 190:21,
195:3, 195:21,
196:3, 196:22,
196:25, 197:18,
198:3, 203:11,
205:12, 205:22,
206:8, 206:9,
206:10, 209:24,
214:1, 214:6,
216:19, 220:2,
223:1, 229:16,
231:12, 231:15,
233:1, 233:22,
234:5, 243:22,
244:12, 244:14,
247:15, 248:10,
249:11, 249:19,
251:8

THOUGH [4] - 37:7,

50:8, 51:15, 198:19

THOUGHT [5] - 29:11,
93:15, 183:21,

241:23, 248:5

THOUGHTFUL [1] -
251:24

THOUSAND [1] -
92:16

THOUSANDS [2] -
39:22

THREAT [1] - 140:24

THREATEN [1] -
250:16

THREATENING [2] -
137:19, 142:9

THREATENS [1] -
211:19

THREE [23] - 6:8,
21:25, 38:15, 38:18,
39:2, 42:17, 43:2,
69:9, 74:1, 116:4,
128:7, 128:14,
128:16, 128:19,
176:3, 180:19,
182:18, 183:1,

183:12, 185:24,
211:12, 214:14,
250:11

THRESHOLD [1] -
41:18

THROMBOSIS [1] -
103:22

THROUGH [50] - 7:14,
9:1, 10:3, 10:6,
10:10, 10:16, 13:18,
13:24, 14:9, 17:11,
24:6, 39:1, 42:3,
55:19, 56:11, 56:15,
57:1, 68:8, 73:5,
74:25, 84:7, 94:3,
100:3, 110:4,
114:17, 137:24,
147:12, 147:23,
148:9, 148:10,
165:12, 165:18,
169:19, 169:20,
176:2, 180:10,
180:25, 181:3,
199:20, 199:22,
203:8, 203:13,
205:17, 208:23,
209:15, 214:3,
215:1, 222:11,
236:6, 248:4

THROUGHOUT [10] -
26:5, 28:13, 62:12,
68:4, 152:7, 168:2,
170:3, 181:18,
183:15, 224:25

THURSDAY [1] - 1:8

THUS [3] - 41:14,
220:3, 241:5

TIED [1] - 51:19

TIER [10] - 175:4,

175:5, 175:9,

175:10, 175:12,

176:5, 176:14,

176:21, 177:4, 177:5

TIERS [1] - 185:17

TIME [79] - 5:14, 17:4,
20:23, 31:11, 43:6,
43:16, 51:23, 52:1,
57:15, 58:21, 58:25,
59:14, 59:23, 61:8,
64:16, 65:6, 69:23,
70:1, 70:2, 71:2,
71:23, 72:3, 75:6,
75:8, 79:23, 83:7,
85:8, 86:4, 88:6,
94:9, 94:20, 108:4,
108:10, 110:1,
116:20, 124:8,
131:13, 133:22,
134:8, 134:12,
134:15, 135:12,

141:16, 146:22, 154:17, 154:20, 155:11, 157:11, 160:2, 160:3, 160:7, 162:1, 164:5, 168:13, 172:4, 172:11, 177:10, 180:24, 183:12, 186:13, 188:10, 188:11, 188:20, 189:1, 192:13, 194:8, 194:10, 197:6, 208:24, 209:18, 209:21, 211:14, 217:13, 222:18, 234:12, 234:13, 242:12, 252:4, 252:19 TIMES ^[11] - 26:8, 26:12, 38:16, 107:23, 124:17, 124:18, 130:14, 133:1, 135:17, 155:13, 217:11 TIMING ^[3] - 129:22, 173:19, 193:2 TITLE ^[8] - 9:10, 47:21, 47:24, 117:22, 195:14, 231:22, 240:15, 247:5 TO ^[1233] - 3:20, 3:21, 3:22, 3:24, 5:14, 5:18, 6:2, 6:3, 6:6, 6:7, 6:15, 6:19, 7:2, 7:9, 7:10, 7:13, 7:17, 7:19, 7:24, 8:10, 8:12, 9:1, 9:7, 9:9, 9:16, 9:18, 9:21, 9:23, 10:25, 11:2, 11:8, 11:11, 11:16, 11:20, 12:5, 12:6, 12:7, 12:16, 13:7, 13:8, 13:12, 13:13, 13:14, 13:19, 13:20, 13:22, 13:25, 14:3, 14:10, 14:13, 14:14, 15:2, 15:3, 15:5, 15:8, 15:15, 16:8, 17:1, 17:10, 17:25, 18:7, 18:22, 18:23, 19:1, 19:6, 19:10, 19:12, 19:18, 20:4, 20:5, 20:6, 20:8, 20:11, 20:12, 20:14, 20:15, 20:23, 20:24, 20:25, 21:7, 21:22, 21:25, 22:17, 22:19, 23:1, 23:22, 23:24, 24:3, 24:4, 24:8, 24:10, 24:17, 24:21,	25:24, 26:13, 26:17, 26:24, 27:3, 27:10, 27:12, 27:15, 28:3, 28:25, 29:10, 29:12, 29:21, 29:22, 29:23, 30:5, 30:10, 30:12, 30:15, 30:19, 30:22, 31:6, 31:7, 31:8, 31:12, 31:18, 31:25, 32:5, 32:6, 32:7, 32:12, 32:16, 32:21, 33:7, 33:12, 33:13, 33:16, 33:22, 34:3, 34:4, 34:7, 34:9, 34:11, 34:12, 34:17, 34:19, 34:20, 34:22, 34:24, 35:5, 35:9, 35:14, 35:15, 35:16, 35:17, 35:21, 35:24, 36:1, 36:2, 36:9, 36:19, 37:2, 37:11, 37:19, 37:24, 37:25, 38:7, 38:12, 38:25, 39:4, 39:10, 39:21, 39:23, 39:25, 40:2, 40:11, 41:2, 41:4, 41:6, 41:17, 41:18, 41:21, 42:1, 42:2, 42:6, 42:8, 42:13, 42:21, 42:23, 43:2, 43:7, 43:11, 43:12, 43:13, 43:14, 43:15, 43:21, 43:25, 44:2, 44:8, 44:11, 44:13, 44:18, 44:22, 45:1, 45:2, 45:4, 45:9, 45:11, 45:12, 45:13, 45:14, 45:19, 45:21, 46:5, 46:12, 46:18, 46:20, 46:24, 47:1, 47:3, 47:11, 47:12, 47:13, 48:3, 48:8, 48:9, 48:10, 48:14, 48:15, 48:16, 48:23, 48:25, 49:3, 49:11, 49:14, 49:15, 49:18, 49:19, 49:22, 49:25, 50:1, 50:2, 50:11, 50:12, 50:22, 51:1, 51:2, 51:6, 51:13, 51:19, 51:20, 51:23, 52:1, 52:3, 52:10, 52:11, 52:12, 52:14, 52:20, 52:23, 53:4, 53:5, 53:14, 53:17, 53:18, 53:22, 53:25, 54:6, 54:9, 54:11, 54:14, 55:15, 56:2, 56:7, 56:23, 56:24, 56:25, 57:20, 57:25, 58:6, 58:12, 59:4,	59:6, 59:13, 60:4, 60:7, 60:10, 61:10, 62:6, 62:7, 62:9, 62:13, 62:15, 62:19, 62:20, 62:22, 62:25, 63:14, 64:2, 64:5, 64:16, 65:2, 65:9, 65:17, 65:21, 65:24, 66:6, 66:7, 66:11, 66:22, 67:2, 67:5, 67:8, 67:10, 67:14, 67:25, 68:5, 68:6, 68:13, 68:21, 68:22, 69:3, 69:6, 69:7, 69:8, 69:9, 69:11, 69:12, 70:4, 70:21, 70:22, 71:4, 71:7, 71:14, 71:23, 72:2, 72:3, 72:6, 72:7, 72:8, 72:20, 73:3, 73:17, 74:1, 74:17, 74:18, 74:19, 75:1, 76:1, 76:4, 76:7, 77:6, 77:22, 77:23, 78:8, 78:10, 78:11, 78:13, 78:17, 78:18, 78:22, 78:23, 78:24, 79:3, 79:9, 79:15, 79:16, 80:3, 80:13, 80:14, 80:21, 80:25, 81:2, 81:4, 81:7, 81:8, 81:14, 81:15, 81:17, 81:18, 81:19, 81:21, 82:6, 82:10, 82:11, 82:15, 82:16, 82:17, 82:18, 82:20, 82:21, 83:9, 83:11, 83:12, 83:19, 83:20, 83:23, 84:6, 84:17, 85:4, 85:18, 85:19, 86:1, 86:2, 86:5, 86:8, 86:13, 86:14, 86:21, 86:25, 87:2, 87:13, 87:17, 87:21, 87:23, 87:24, 88:6, 88:11, 88:17, 88:20, 89:4, 89:8, 89:13, 89:24, 91:5, 91:20, 92:1, 92:7, 92:10, 92:13, 92:15, 92:17, 92:18, 92:20, 93:9, 93:12, 94:2, 94:5, 94:10, 94:16, 94:18, 94:21, 95:7, 95:9, 95:10, 95:14, 96:4, 96:5, 96:10, 96:18, 96:21, 97:9, 97:15, 97:25, 98:1, 98:7, 98:17, 98:20, 98:24, 99:18, 99:20, 100:2, 100:11, 100:14,	100:18, 101:1, 101:6, 101:10, 101:25, 102:7, 102:13, 102:15, 104:8, 104:14, 104:21, 105:9, 105:15, 106:8, 107:14, 108:7, 108:13, 108:14, 108:15, 108:20, 109:3, 109:10, 109:13, 111:2, 111:7, 112:2, 112:22, 112:23, 113:9, 114:7, 114:8, 114:11, 114:12, 114:16, 114:17, 114:23, 114:24, 114:25, 115:4, 115:11, 116:13, 116:21, 116:23, 116:24, 118:9, 118:12, 118:13, 118:16, 119:3, 119:6, 119:8, 119:11, 119:14, 119:19, 120:11, 120:17, 120:18, 120:25, 121:2, 121:13, 121:21, 123:2, 123:3, 123:14, 123:17, 123:19, 124:4, 124:7, 124:8, 124:9, 124:10, 124:12, 124:14, 124:19, 124:22, 125:1, 125:3, 125:4, 125:8, 125:22, 125:23, 126:1, 126:5, 126:6, 126:11, 126:20, 127:10, 127:14, 127:15, 128:7, 128:11, 128:19, 128:20, 128:21, 128:24, 129:1, 129:4, 129:12, 129:14, 129:15, 129:19, 130:1, 130:4, 130:6, 130:9, 130:15, 130:19, 130:23, 130:24, 131:1, 131:4, 131:12, 131:18, 131:19, 131:20, 131:22, 132:10, 133:1, 133:10, 133:12, 133:13, 133:23, 133:24, 134:6, 134:9, 134:14, 134:17,	134:23, 134:25, 135:2, 136:1, 136:2, 136:16, 136:17, 136:19, 136:22, 136:24, 137:6, 137:12, 137:14, 137:19, 137:22, 137:23, 137:24, 138:21, 138:22, 139:8, 139:13, 140:7, 140:19, 140:21, 140:23, 140:24, 141:5, 141:6, 141:9, 141:15, 141:16, 141:19, 141:23, 141:24, 142:4, 142:16, 142:17, 143:3, 143:5, 143:11, 143:14, 143:18, 144:20, 144:24, 144:25, 145:4, 145:5, 146:2, 146:4, 146:25, 147:6, 147:19, 148:2, 148:10, 148:25, 149:1, 149:19, 149:24, 150:16, 150:24, 151:17, 152:10, 152:13, 152:25, 153:7, 153:8, 153:17, 153:18, 153:22, 154:4, 154:12, 154:14, 154:16, 154:25, 155:2, 155:3, 155:5, 155:7, 155:23, 156:1, 156:6, 156:7, 156:11, 156:12, 156:13, 156:18, 156:20, 157:18, 157:19, 158:6, 158:11, 158:14, 158:15, 158:23, 159:2, 159:4, 159:6, 159:9, 159:10, 159:15, 159:21, 159:22, 160:3, 160:19, 160:22, 161:9, 161:11, 161:14, 161:16, 161:17, 161:18, 161:19, 162:4, 162:15, 162:25, 163:15, 163:19, 163:25, 164:2, 164:5, 164:10, 164:12, 164:25, 165:5, 165:6, 165:13, 165:15,
--	--	---	--	--

165:22, 165:23,
165:24, 165:25,
168:14, 168:20,
169:6, 169:10,
169:13, 170:8,
170:13, 170:18,
170:19, 170:24,
170:25, 171:5,
171:9, 171:10,
172:6, 172:12,
172:15, 172:19,
172:23, 172:24,
173:1, 173:2, 173:6,
173:16, 173:17,
173:18, 173:20,
174:3, 174:5, 174:9,
174:15, 175:20,
175:25, 176:10,
176:11, 176:17,
177:16, 177:19,
177:20, 177:21,
177:24, 178:2,
178:6, 178:16,
178:19, 178:22,
178:24, 178:25,
179:3, 179:4,
179:15, 179:17,
179:19, 179:20,
179:22, 180:2,
180:3, 180:5,
180:15, 180:18,
180:20, 180:22,
180:24, 181:10,
181:11, 181:16,
181:22, 182:1,
182:4, 182:7,
182:13, 182:15,
182:23, 183:6,
183:14, 183:23,
184:14, 184:15,
185:8, 185:17,
186:4, 186:14,
187:1, 187:6,
187:17, 187:23,
188:1, 188:4, 188:6,
188:19, 189:7,
189:12, 189:24,
190:6, 190:9,
190:10, 190:11,
190:16, 190:17,
190:25, 191:1,
191:8, 191:10,
191:13, 191:14,
191:20, 192:10,
192:12, 192:20,
192:24, 193:13,
193:20, 194:20,
194:25, 195:4,
195:8, 196:2, 196:5,
196:10, 196:11,
197:11, 197:21,

197:24, 198:1,
198:12, 198:13,
198:22, 199:7,
199:16, 199:21,
200:12, 201:6,
201:15, 201:16,
201:22, 202:2,
202:17, 202:18,
202:21, 202:23,
204:7, 204:15,
204:25, 205:2,
205:3, 205:6, 205:8,
205:11, 205:13,
205:14, 205:19,
205:20, 205:23,
205:24, 206:7,
207:14, 207:23,
207:24, 207:25,
208:8, 208:11,
208:16, 209:2,
209:7, 209:8, 209:9,
209:12, 209:15,
209:18, 209:24,
209:25, 210:5,
210:6, 210:8,
210:10, 210:12,
210:18, 210:23,
211:4, 211:13,
211:16, 211:21,
212:1, 212:8,
212:15, 212:19,
212:20, 212:24,
213:16, 213:20,
214:10, 214:19,
214:21, 214:25,
215:6, 215:9,
215:17, 215:20,
215:21, 216:6,
216:10, 216:16,
216:17, 216:21,
217:8, 217:14,
217:17, 217:25,
218:1, 218:3, 218:6,
218:9, 218:14,
218:15, 218:17,
218:23, 218:24,
218:25, 219:5,
219:9, 219:14,
219:18, 219:20,
220:5, 220:6, 220:8,
220:12, 220:13,
220:16, 220:19,
220:20, 220:21,
220:22, 220:23,
221:1, 221:7,
221:12, 221:16,
221:21, 221:22,
222:4, 222:11,
222:12, 222:15,
222:19, 223:1,
223:2, 223:6, 223:9,

223:10, 223:16,
223:19, 224:2,
224:4, 224:8, 224:9,
224:14, 224:17,
224:18, 224:20,
224:23, 225:10,
225:17, 225:22,
226:3, 226:13,
226:17, 226:18,
226:21, 226:24,
227:2, 227:8, 227:9,
227:11, 227:15,
227:16, 227:20,
227:21, 227:25,
228:1, 228:2,
228:10, 228:20,
228:22, 229:7,
229:8, 229:11,
230:5, 230:9,
230:13, 230:14,
231:2, 231:10,
231:22, 231:24,
232:7, 232:18,
232:20, 233:8,
233:13, 233:19,
234:5, 234:10,
234:24, 235:2,
235:3, 235:4, 235:5,
235:11, 235:22,
235:24, 235:25,
236:7, 236:10,
236:18, 236:21,
236:25, 237:1,
237:4, 237:5,
237:18, 238:5,
238:7, 238:25,
239:7, 239:11,
239:13, 239:17,
239:22, 239:24,
240:1, 240:2, 240:5,
240:7, 240:8, 240:9,
240:10, 240:11,
240:19, 241:1,
241:6, 241:12,
241:14, 241:22,
242:7, 242:14,
242:17, 242:20,
242:24, 242:25,
243:4, 243:6, 243:7,
243:10, 243:18,
243:19, 243:22,
243:23, 244:1,
244:6, 244:8,
244:15, 244:19,
244:25, 245:8,
245:9, 245:20,
246:1, 246:22,
247:5, 247:6, 247:7,
247:9, 248:3, 248:5,
248:11, 248:13,
248:15, 248:23,

249:5, 249:14,
249:18, 249:22,
249:25, 250:2,
250:9, 250:11,
250:17, 250:20,
250:24, 251:1,
251:2, 251:5, 251:6,
251:7, 251:10,
251:12, 251:16,
251:19, 251:23,
252:3, 252:5, 252:6,
252:15, 252:16,
252:18, 252:22
TODAY [31] - 3:8,
7:23, 9:16, 21:25,
22:3, 22:15, 23:7,
25:24, 26:6, 34:15,
70:3, 70:8, 73:9,
97:4, 115:24, 120:9,
147:5, 147:7,
160:16, 195:12,
195:17, 196:10,
200:1, 201:2,
201:18, 201:24,
202:4, 202:11,
202:21, 227:14,
250:19
TODAY'S [2] - 252:1,
252:2
TOGETHER [2] - 6:12,
175:18
TOLD [9] - 47:19,
47:22, 69:12, 82:9,
86:1, 109:8, 110:6,
123:21, 152:25
TOLERATE [3] -
174:5, 174:6, 174:16
TOO [4] - 7:7, 37:12,
188:9, 219:8
TOOK [2] - 107:17,
160:6
TOOL [1] - 168:20
TOOLS [1] - 175:13
TOP [12] - 6:23, 7:21,
21:24, 58:18, 75:9,
75:25, 86:18,
119:19, 143:10,
144:1, 176:4, 177:3
TOPIC [4] - 64:2, 64:5,
69:17, 195:25
TOPICS [6] - 59:18,
61:4, 73:16, 73:17,
168:10, 169:10
TOTAL [1] - 134:6
TOTALLY [2] - 33:4,
89:12
TOUCH [1] - 212:8
TOWARD [4] - 76:7,
83:6, 168:14, 223:16
TOWARDS [1] -

164:15
TRACEABLE [1] -
17:10
TRADED [8] - 28:25,
211:15, 225:17,
225:18, 226:13,
248:7, 250:15,
250:22
TRAINING [8] - 59:1,
64:18, 118:7,
120:13, 166:25,
167:8, 167:18,
168:12
TRANSCRIPT [2] -
1:24, 253:4
TRANSCRIPTION [1] -
1:24
TRANSFORMED [1] -
161:9
TRANSFUSION [2] -
124:13, 124:14
TREASURY [4] - 3:6,
31:18, 161:6, 240:9
TREAT [11] - 22:19,
117:18, 119:22,
123:5, 128:8,
128:13, 129:11,
137:11, 138:11,
138:18, 141:24
TREATMENT [11] -
47:24, 48:1, 126:5,
130:1, 132:17,
149:12, 155:18,
155:21, 156:8,
202:4, 202:6
TREATMENTS [13] -
129:5, 129:7,
129:15, 129:19,
129:21, 129:23,
130:3, 131:20,
132:15, 133:15,
141:24, 145:12,
155:20
TREATS [1] - 23:14
TRENDS [2] - 94:3,
154:25
TRIAL [6] - 4:20, 4:23,
5:1, 5:4, 7:25, 182:6
TRIGGER [1] - 47:4
TRIVEDI [1] - 83:13
TRUE [11] - 29:8, 33:8,
34:1, 43:13, 45:21,
48:11, 96:25,
216:20, 242:11,
243:12, 243:13
TRUISMS [1] - 14:15
TRUMP [3] - 1:5, 2:19,
3:3
TRUSSELL [2] -
81:16, 81:22

<p>TRY [9] - 20:25, 133:10, 136:22, 161:22, 210:8, 210:10, 212:24, 229:7, 246:22</p> <p>TRYING [6] - 111:2, 170:19, 173:18, 187:23, 187:25, 188:4</p> <p>TUBAL [1] - 188:11</p> <p>TUESDAY [2] - 6:1, 252:12</p> <p>TUONG [1] - 23:8</p> <p>TURN [13] - 56:7, 67:25, 68:6, 68:13, 83:23, 87:17, 100:18, 101:6, 104:14, 137:22, 171:9, 180:2, 198:22</p> <p>TURNED [1] - 168:14</p> <p>TURNING [4] - 98:17, 125:1, 143:18, 248:23</p> <p>TWICE [1] - 115:17</p> <p>TWO [40] - 6:16, 8:18, 30:17, 48:3, 73:20, 75:15, 82:3, 90:5, 110:13, 121:3, 127:24, 131:13, 164:18, 170:13, 171:4, 180:13, 181:12, 182:20, 182:21, 182:22, 183:1, 186:1, 186:18, 188:2, 192:5, 206:4, 206:8, 208:10, 208:20, 208:25, 209:11, 211:10, 211:22, 214:24, 215:11, 237:20, 241:11, 247:18, 249:19</p> <p>TWO-YEAR [4] - 90:5, 171:4, 180:13, 188:2</p> <p>TYPE [2] - 125:2, 139:10</p> <p>TYPES [11] - 45:5, 125:13, 130:18, 133:24, 141:25, 182:22, 183:14, 185:16, 193:19, 193:21, 248:1</p> <p>TYPICAL [4] - 75:16, 75:19, 75:23, 90:23</p> <p>TYPICALLY [3] - 60:25, 79:16, 150:8</p>	<p>5:2, 38:2, 38:5, 68:24, 69:24, 241:19</p> <p>U.S.C [5] - 38:19, 45:3, 223:19, 243:3</p> <p>ULTIMATELY [6] - 11:13, 35:25, 67:16, 67:22, 231:11, 233:18</p> <p>ULTRA [1] - 219:12</p> <p>UNABLE [2] - 179:19, 209:12</p> <p>UNADORNED [1] - 46:17</p> <p>UNCERTAINTY [3] - 217:2, 217:4, 239:5</p> <p>UNCOMMONLY [1] - 125:15</p> <p>UNDER [77] - 6:3, 6:19, 7:10, 8:20, 8:21, 8:22, 8:25, 9:10, 12:22, 14:17, 15:14, 17:13, 17:15, 19:7, 19:11, 23:4, 26:12, 31:16, 39:13, 39:19, 42:4, 44:7, 46:5, 47:2, 47:5, 48:16, 50:11, 50:12, 51:16, 53:11, 64:22, 64:24, 71:22, 75:23, 76:12, 77:2, 78:16, 90:22, 95:18, 96:15, 98:21, 98:25, 99:6, 100:16, 102:1, 109:14, 140:10, 145:1, 152:15, 153:3, 198:14, 199:23, 201:14, 202:20, 213:11, 213:22, 215:25, 218:5, 219:2, 219:12, 220:3, 221:16, 222:4, 225:11, 225:12, 226:22, 229:2, 230:25, 240:5, 240:7, 244:21, 248:8, 248:21, 249:3</p> <p>UNDERGRADUATE [2] - 57:12, 166:25</p> <p>UNDERLYING [1] - 209:10</p> <p>UNDERMINE [1] - 224:20</p> <p>UNDERMINED [1] - 21:15</p> <p>UNDERPINNINGS [1] - 132:13</p> <p>UNDERSERVED [1] - 220:16</p> <p>UNDERSTAND [38] -</p>	<p>24:19, 28:17, 28:21, 35:14, 41:24, 45:25, 46:4, 50:18, 55:10, 66:1, 76:12, 78:17, 78:18, 80:2, 95:16, 95:17, 95:18, 95:24, 105:18, 113:1, 120:21, 136:2, 137:2, 138:9, 138:16, 138:17, 140:10, 141:16, 157:13, 160:10, 161:21, 162:3, 164:20, 180:5, 194:5, 197:9, 216:15, 246:3</p> <p>UNDERSTANDING [6] - 71:5, 87:10, 87:16, 133:10, 154:17, 166:13</p> <p>UNDERSTOOD [1] - 68:19</p> <p>UNDERTAKE [1] - 19:25</p> <p>UNDESIRABLE [1] - 103:19</p> <p>UNFORTUNATELY [2] - 183:4, 191:21</p> <p>UNIFORMLY [1] - 139:22</p> <p>UNILATERALLY [1] - 225:22</p> <p>UNINSURED [1] - 179:15</p> <p>UNINTENDED [57] - 7:15, 10:1, 10:4, 10:8, 10:13, 10:20, 12:16, 69:16, 69:20, 69:22, 69:24, 70:20, 71:8, 71:11, 71:13, 71:14, 71:19, 71:21, 71:25, 72:5, 72:8, 72:13, 72:17, 72:20, 72:23, 73:4, 73:6, 73:21, 74:15, 79:2, 80:20, 81:1, 81:13, 81:20, 82:1, 88:7, 88:9, 88:11, 88:15, 89:18, 96:22, 111:23, 142:4, 142:5, 149:15, 150:12, 150:22, 151:1, 151:2, 151:9, 151:14, 151:18, 153:25, 168:15, 191:23, 202:10, 202:12</p> <p>UNINTENTIONAL [1] - 48:7</p> <p>UNIQUE [2] - 132:19,</p>	<p>230:21</p> <p>UNITED [21] - 1:1, 2:10, 3:4, 3:5, 3:6, 10:2, 16:16, 17:19, 25:22, 26:6, 35:7, 36:3, 36:13, 36:14, 69:22, 81:13, 100:7, 110:19, 146:13, 154:7, 216:25</p> <p>UNIVERSITY [21] - 22:23, 34:4, 57:9, 58:13, 58:22, 59:10, 59:16, 60:4, 60:5, 115:9, 115:15, 116:1, 116:15, 116:18, 117:2, 119:2, 121:19, 167:1, 167:7, 167:12</p> <p>UNLESS [5] - 9:22, 11:4, 30:5, 112:18, 246:18</p> <p>UNLIKE [3] - 28:25, 112:12, 230:22</p> <p>UNLIKELY [1] - 220:7</p> <p>UNPLANNED [1] - 14:13</p> <p>UNPOLICED [1] - 33:4</p> <p>UNPRECEDENTED [1] - 242:10</p> <p>UNPUBLISHED [1] - 109:9</p> <p>UNTIL [9] - 3:12, 7:25, 28:8, 57:23, 115:14, 116:4, 180:14, 210:12, 234:17</p> <p>UP [56] - 8:15, 11:13, 11:20, 15:22, 21:1, 33:20, 34:25, 49:1, 53:6, 66:5, 70:4, 73:16, 74:19, 81:7, 81:21, 90:18, 92:15, 92:18, 93:12, 96:9, 116:24, 122:23, 125:3, 126:20, 134:8, 134:13, 134:21, 136:3, 158:6, 159:23, 173:3, 176:7, 176:10, 187:17, 192:7, 192:9, 192:11, 204:6, 212:12, 213:3, 213:7, 213:16, 214:17, 215:3, 216:16, 222:1, 223:17, 229:1, 229:7, 230:5, 236:6, 242:18, 243:5, 248:17, 248:18</p> <p>UP-FRONT [4] -</p>	<p>134:8, 134:21, 192:7, 192:9</p> <p>UPFRONT [2] - 92:14, 96:20</p> <p>UPHELD [2] - 39:14, 164:18</p> <p>UPON [4] - 14:2, 100:20, 101:4, 152:4</p> <p>UPSET [1] - 247:19</p> <p>UPSETTING [1] - 124:5</p> <p>UPTAKE [1] - 195:20</p> <p>URGE [1] - 34:19</p> <p>URGED [1] - 6:2</p> <p>URGING [1] - 9:8</p> <p>US [24] - 24:3, 53:4, 56:25, 64:25, 74:25, 75:1, 107:25, 129:22, 158:20, 161:11, 165:12, 170:24, 172:20, 180:4, 181:14, 185:9, 204:6, 212:19, 218:15, 223:13, 228:7, 235:12, 239:22, 241:6</p> <p>USAGE [1] - 109:15</p> <p>USE [73] - 5:14, 10:19, 11:16, 12:14, 13:19, 13:20, 18:12, 50:1, 61:25, 62:3, 62:13, 62:17, 63:9, 75:13, 75:16, 75:17, 75:19, 75:23, 77:7, 79:6, 80:3, 80:5, 80:19, 80:24, 81:15, 90:7, 90:23, 92:1, 92:7, 94:3, 94:12, 94:19, 94:22, 96:12, 96:14, 102:1, 102:3, 102:5, 102:17, 106:14, 106:16, 107:7, 108:8, 109:19, 111:19, 111:22, 112:9, 112:11, 129:2, 129:14, 130:20, 146:25, 149:1, 150:7, 155:19, 168:15, 173:1, 174:9, 175:13, 175:15, 181:15, 188:6, 189:25, 196:2, 201:16, 217:25, 221:17, 229:7, 229:10</p> <p>USED [23] - 30:3, 42:21, 75:4, 75:25, 76:3, 76:5, 79:21,</p>
U				
U.S [8] - 2:15, 4:18,				

<p>80:22, 81:2, 91:5, 94:9, 108:3, 115:16, 149:20, 153:13, 153:14, 172:24, 181:23, 183:15, 185:16, 189:14, 205:21, 232:15 USEFUL [3] - 24:20, 24:23, 103:7 USES [2] - 22:19, 232:12 USING [37] - 11:25, 12:2, 14:12, 22:22, 70:23, 73:7, 73:8, 74:13, 75:20, 75:22, 76:17, 79:25, 91:5, 91:7, 91:8, 91:10, 92:10, 94:1, 106:19, 108:6, 123:23, 156:2, 183:17, 183:19, 183:20, 186:3, 186:4, 186:14, 186:16, 186:25, 189:23, 189:24, 212:5, 232:9, 243:20, 243:23 USUAL [1] - 195:11 USUALLY [6] - 125:23, 153:6, 161:7, 161:10, 169:10, 175:16 UTILIZATION [2] - 140:23, 156:22 UTILIZE [3] - 155:18, 156:8, 156:12</p>	<p>18:1, 19:2, 20:13, 21:5, 35:2, 35:12, 35:17, 36:3, 36:9, 36:12, 36:14, 38:1, 38:4, 47:16, 145:18, 185:23, 206:11, 215:23, 216:25, 219:16, 240:19, 241:3, 241:18, 242:18, 242:21 VERY [47] - 5:16, 8:10, 8:13, 15:5, 21:16, 23:24, 25:16, 28:20, 29:23, 62:16, 73:8, 76:8, 79:24, 84:11, 86:6, 96:13, 99:16, 105:2, 105:4, 111:12, 125:11, 136:23, 142:6, 164:4, 166:23, 174:2, 174:8, 174:9, 174:18, 176:1, 176:4, 177:9, 177:17, 177:25, 193:5, 204:3, 210:11, 212:23, 214:25, 215:18, 215:23, 217:3, 223:25, 224:12, 225:15, 236:20, 252:17 VIEW [6] - 3:19, 36:12, 41:21, 42:7, 42:16, 50:25 VIEWPOINT [1] - 110:22 VIEWS [1] - 28:20 VII [3] - 9:10, 240:15, 247:5 VII'S [2] - 47:21, 47:24 VIOLATE [3] - 7:21, 9:3, 233:2 VIOLATED [3] - 8:12, 9:3, 213:2 VIOLATES [2] - 213:3, 213:5 VIOLATING [2] - 47:21, 47:24 VIOLATION [3] - 17:23, 205:15, 215:15 VIREs [1] - 219:12 VIRTUALLY [2] - 26:13, 40:14 VIRTUE [1] - 249:8 VISIT [2] - 92:17, 172:6 VISITS [2] - 122:8, 125:4 VITAE [2] - 114:14,</p>	<p>143:6 VITRO [1] - 129:7 VOLUME [1] - 124:4 VOX [1] - 159:15 VS [3] - 1:4, 18:14, 233:12</p> <p>W</p> <p>W-E-I-S-M-A-N [1] - 54:24 WADING [1] - 51:10 WAIT [3] - 151:4, 177:13 WAIVE [1] - 215:17 WAIVER [1] - 82:1 WAIVING [1] - 216:8 WALK [3] - 74:25, 148:10, 176:2 WANT [31] - 5:14, 19:24, 20:23, 33:12, 49:14, 51:23, 78:17, 83:23, 87:23, 93:12, 100:18, 104:14, 105:9, 106:8, 109:4, 109:10, 141:15, 154:11, 165:23, 173:20, 174:9, 177:25, 182:7, 210:5, 211:13, 216:16, 219:14, 223:6, 233:8, 247:9 WANTED [13] - 6:15, 65:15, 69:25, 82:18, 114:16, 114:23, 119:6, 126:6, 171:9, 180:17, 239:17, 243:7, 252:12 WANTING [1] - 209:8 WANTS [1] - 234:10 WARRANTED [1] - 209:12 WAS [276] - 9:3, 16:15, 16:18, 17:1, 17:2, 19:6, 19:21, 21:5, 22:5, 27:20, 27:21, 28:1, 28:8, 34:4, 35:17, 37:4, 37:5, 39:12, 39:13, 39:18, 39:25, 40:2, 40:7, 41:1, 41:5, 41:12, 41:14, 41:15, 41:16, 41:17, 41:21, 42:2, 43:6, 43:7, 44:5, 44:7, 47:25, 51:1, 52:17, 53:5, 53:6, 53:7, 53:20, 57:8, 57:11, 58:14, 58:24, 59:24, 64:11, 65:19, 66:12, 66:25, 67:1,</p>	<p>67:7, 67:9, 67:10, 68:20, 69:11, 69:17, 69:18, 69:23, 70:2, 70:18, 70:25, 71:9, 72:1, 72:3, 73:15, 73:20, 73:22, 73:23, 74:3, 74:25, 75:7, 76:3, 76:5, 78:8, 78:23, 79:23, 80:4, 81:2, 81:13, 82:11, 82:13, 83:7, 83:8, 83:17, 84:3, 84:24, 85:4, 85:16, 86:1, 86:5, 87:1, 88:5, 91:3, 91:4, 92:22, 92:24, 93:1, 93:7, 94:11, 94:14, 94:23, 95:4, 95:6, 99:19, 100:1, 100:2, 100:3, 102:7, 105:14, 105:19, 106:10, 106:11, 107:21, 107:22, 108:1, 109:13, 109:15, 109:25, 110:1, 110:25, 111:1, 111:3, 111:13, 111:15, 112:3, 112:7, 112:8, 116:3, 116:9, 131:15, 131:17, 131:18, 134:1, 134:3, 136:12, 139:3, 143:6, 143:8, 145:9, 146:4, 151:15, 153:2, 153:10, 155:22, 159:21, 159:22, 160:15, 160:22, 163:3, 164:18, 167:10, 167:18, 167:19, 167:22, 169:23, 170:14, 170:25, 171:1, 171:3, 172:19, 175:24, 178:6, 179:4, 180:3, 180:7, 180:9, 180:13, 180:15, 180:25, 181:2, 181:3, 181:4, 181:19, 181:23, 182:6, 182:19, 183:2, 183:21, 184:24, 186:13, 186:17, 186:20, 187:8, 187:9, 187:19, 187:24, 188:7, 188:25, 189:1, 189:18, 192:12, 192:23, 194:18, 195:7,</p>	<p>195:13, 195:14, 195:22, 195:23, 196:1, 197:8, 197:12, 197:22, 204:24, 205:20, 205:21, 207:2, 207:4, 207:13, 207:19, 209:5, 209:10, 209:13, 209:22, 209:23, 211:8, 211:17, 214:2, 217:6, 217:18, 217:22, 219:3, 219:4, 219:16, 219:20, 219:24, 222:18, 223:1, 223:2, 223:9, 224:8, 224:18, 224:19, 224:24, 224:25, 226:8, 226:21, 226:22, 226:24, 227:3, 230:1, 232:5, 233:4, 233:5, 233:15, 236:4, 236:6, 236:20, 239:20, 240:18, 240:21, 241:15, 241:20, 243:1, 243:5, 243:19, 244:6, 244:15, 246:8, 246:14, 249:20 WASHINGTON [2] - 2:13, 2:18 WASN'T [2] - 16:13, 192:14 WATER [2] - 26:12, 244:20 WAY [39] - 5:13, 21:7, 25:13, 35:14, 40:15, 40:24, 41:7, 41:9, 53:10, 56:25, 62:5, 75:11, 88:1, 94:16, 94:18, 94:21, 111:14, 114:12, 129:19, 133:6, 142:9, 162:5, 179:20, 185:14, 213:16, 214:20, 214:22, 220:23, 222:3, 222:25, 227:5, 227:23, 228:15, 228:17, 229:16, 234:1, 239:7, 240:1, 250:21 WAYNE [2] - 206:11, 207:11 WAYS [9] - 14:15, 141:1, 169:18, 205:24, 218:19,</p>
<p>V</p> <p>VAGINAL [1] - 175:7 VAGUE [2] - 148:4, 212:10 VALID [1] - 8:11 VALUE [5] - 187:4, 187:6, 187:7, 188:16 VARIATION [3] - 122:7, 123:1, 145:17 VARIES [1] - 150:15 VARIETY [6] - 22:19, 52:5, 61:19, 117:16, 122:10, 137:16 VARIOUS [2] - 90:11, 175:14 VARY [2] - 150:11, 174:14 VENOUS [1] - 103:22 VERSION [2] - 160:14, 160:15 VERSUS [30] - 3:3, 16:10, 16:16, 17:19,</p>				

<p>225:18, 233:17, 248:10, 250:24 WE [337] - 3:2, 3:8, 3:12, 3:13, 3:23, 5:10, 5:11, 6:5, 6:7, 6:8, 6:11, 6:12, 7:22, 7:25, 8:8, 8:16, 9:5, 9:8, 9:15, 9:17, 11:5, 13:21, 16:9, 16:10, 16:17, 16:21, 17:5, 17:12, 17:13, 17:24, 18:8, 18:16, 18:20, 18:25, 19:16, 20:15, 21:20, 21:22, 21:23, 21:24, 23:22, 23:25, 24:3, 24:9, 24:14, 25:3, 25:15, 25:23, 25:24, 26:25, 28:18, 29:1, 33:20, 34:18, 35:13, 35:22, 35:23, 35:24, 37:5, 38:22, 38:24, 39:10, 42:1, 42:10, 42:16, 43:17, 46:16, 46:25, 47:2, 48:24, 49:9, 49:10, 53:4, 53:7, 53:8, 53:9, 53:14, 54:5, 54:8, 54:9, 55:13, 55:18, 55:22, 57:1, 57:5, 58:6, 62:2, 62:4, 62:7, 64:22, 67:11, 67:18, 68:22, 69:3, 69:6, 69:12, 70:10, 70:11, 73:8, 73:15, 74:9, 75:18, 76:1, 76:6, 78:11, 78:13, 78:25, 82:18, 84:9, 85:25, 86:5, 86:6, 86:8, 88:23, 90:2, 91:6, 93:25, 94:2, 94:4, 94:8, 94:10, 95:8, 96:11, 96:18, 96:21, 102:2, 106:13, 108:20, 108:21, 109:11, 112:1, 112:9, 112:13, 112:22, 113:3, 120:16, 124:4, 125:15, 127:13, 127:25, 128:10, 128:16, 128:22, 129:4, 129:5, 129:6, 129:7, 129:14, 129:15, 129:18, 131:20, 133:10, 137:23, 139:1, 139:17, 142:15, 142:16, 146:1, 156:6, 157:11, 157:12, 157:13, 158:12,</p>	<p>159:1, 159:2, 159:3, 159:6, 159:16, 159:18, 159:20, 160:16, 161:4, 161:5, 161:11, 161:24, 161:25, 162:3, 162:4, 162:5, 162:12, 162:14, 163:6, 164:22, 164:23, 164:24, 166:21, 171:4, 171:7, 172:15, 174:22, 175:17, 176:22, 178:12, 178:21, 179:13, 180:11, 180:12, 180:16, 180:17, 180:18, 181:7, 181:10, 181:11, 181:15, 181:21, 181:22, 182:6, 182:9, 182:10, 182:13, 183:1, 183:4, 183:6, 183:14, 183:21, 184:4, 184:9, 184:21, 185:17, 187:5, 187:7, 187:14, 187:22, 187:25, 188:21, 188:23, 189:3, 189:10, 190:7, 191:22, 198:20, 201:11, 202:4, 204:5, 204:21, 205:17, 208:15, 208:23, 208:24, 209:11, 209:15, 209:16, 209:18, 210:12, 210:13, 210:24, 210:25, 211:4, 211:5, 211:7, 211:10, 211:12, 212:18, 212:24, 213:1, 214:7, 215:2, 215:7, 215:10, 215:17, 216:11, 216:13, 216:16, 216:21, 216:24, 218:14, 220:25, 221:7, 222:23, 223:6, 223:17, 224:5, 225:2, 225:23, 226:18, 228:3, 228:6, 228:13, 228:21, 229:15, 229:19, 230:16, 230:19, 230:23, 231:13, 232:3, 233:1, 233:11, 234:5,</p>	<p>234:17, 235:11, 235:23, 237:17, 237:19, 239:24, 243:7, 244:12, 244:16, 244:17, 246:15, 246:23, 246:25, 247:1, 247:9, 247:17, 248:6, 248:7, 248:8, 248:14, 249:22, 250:23, 251:2, 251:3, 251:8, 251:12, 252:15 WE'RE [4] - 8:9, 99:19, 210:11, 225:11 WE'VE [1] - 206:3 WEB [4] - 171:5, 180:21, 181:7, 250:7 WEB-BASED [3] - 171:5, 180:21, 181:7 WEBSITE [5] - 154:8, 175:16, 183:3, 183:5, 185:18 WEBSITES [2] - 182:22, 182:23 WEEK [7] - 118:11, 118:12, 118:14, 118:17, 119:9, 119:11, 119:19 WEEKENDS [1] - 119:17 WEEKS [2] - 28:1, 195:11 WEIGH [1] - 12:7 WEIGHED [1] - 26:7 WEIGHT [5] - 36:19, 38:8, 72:6, 168:18, 177:16 WEISMAN [26] - 10:2, 10:5, 10:9, 10:15, 10:21, 22:1, 54:19, 54:23, 55:2, 56:7, 64:17, 65:17, 86:9, 97:20, 104:24, 105:14, 163:4, 163:9, 163:17, 163:21, 164:4, 164:11, 181:2, 235:24, 236:14, 254:4 WEISMAN'S [1] - 65:7 WELFARE [2] - 16:9, 17:21 WELL [106] - 8:18, 9:13, 16:7, 16:12, 18:4, 19:21, 22:2, 22:17, 27:14, 27:24, 28:11, 30:7, 30:19, 32:19, 35:1, 36:20,</p>	<p>39:11, 40:10, 40:16, 40:18, 41:12, 43:14, 44:4, 44:5, 46:22, 48:20, 49:8, 50:12, 52:6, 53:15, 54:8, 58:15, 60:2, 62:18, 63:24, 64:6, 77:21, 78:10, 80:22, 81:18, 83:12, 85:22, 85:25, 88:3, 93:17, 105:17, 107:5, 108:21, 109:23, 120:17, 125:16, 128:3, 129:23, 137:16, 139:7, 142:13, 147:2, 148:7, 155:22, 155:24, 160:2, 161:3, 164:23, 167:9, 167:14, 169:23, 171:23, 173:16, 173:23, 174:25, 184:10, 188:12, 188:21, 189:19, 192:17, 193:22, 209:20, 210:11, 216:15, 216:22, 217:11, 219:10, 223:6, 223:17, 225:1, 225:23, 226:2, 227:3, 227:11, 227:12, 227:15, 227:18, 227:19, 227:22, 229:3, 230:22, 231:18, 237:10, 237:25, 244:7, 245:15, 248:24, 250:5, 250:23, 251:25 WELL-REASONED [1] - 52:6 WELLESLEY [1] - 57:9 WENDY [1] - 1:11 WENT [28] - 60:4, 60:7, 70:4, 70:13, 71:1, 87:2, 94:6, 94:11, 99:8, 112:14, 112:15, 114:25, 115:4, 136:13, 137:3, 144:21, 144:24, 145:6, 145:10, 145:14, 152:24, 156:3, 188:23, 192:14, 197:7, 205:19, 246:9, 246:10 WERE [149] - 6:22, 6:25, 8:12, 11:18,</p>	<p>12:4, 16:18, 17:4, 25:7, 32:5, 40:11, 40:13, 41:15, 42:8, 43:5, 45:15, 51:6, 52:16, 53:3, 64:9, 65:10, 66:24, 67:4, 68:16, 68:22, 69:3, 69:6, 69:12, 69:24, 69:25, 71:3, 73:18, 73:24, 74:7, 78:11, 78:14, 79:12, 82:9, 82:16, 83:4, 83:22, 89:13, 91:10, 92:1, 92:7, 94:2, 94:10, 96:16, 100:2, 102:10, 106:17, 106:19, 107:4, 108:5, 109:16, 110:11, 110:12, 112:1, 122:18, 131:2, 132:24, 133:1, 137:8, 139:22, 144:20, 144:24, 145:2, 145:3, 145:21, 145:22, 145:23, 146:3, 153:19, 153:23, 155:1, 155:24, 159:1, 160:1, 160:4, 160:8, 160:12, 168:13, 178:11, 178:13, 179:2, 180:6, 180:19, 181:10, 181:11, 181:16, 182:11, 182:14, 182:18, 182:21, 183:6, 183:7, 183:10, 183:12, 183:14, 183:15, 183:16, 183:18, 183:20, 185:22, 186:14, 186:15, 186:25, 187:23, 187:25, 188:4, 188:5, 188:8, 188:9, 189:23, 193:3, 194:7, 196:15, 196:16, 196:18, 196:22, 197:1, 197:15, 197:16, 197:18, 198:4, 198:6, 198:20, 204:15, 205:20, 205:23, 208:25, 209:5, 209:22, 209:23, 211:2, 212:20, 213:20, 214:21, 217:12, 229:21, 232:9, 233:18, 244:24,</p>
---	--	--	--	---

245:1, 252:16
WEREN'T [1] - 40:12
WEST [2] - 22:24,
 121:24

WHAT [242] - 3:22,
 5:19, 8:20, 11:1,
 12:8, 15:9, 17:24,
 23:3, 23:23, 28:10,
 28:15, 28:16, 28:21,
 29:21, 29:23, 30:7,
 30:16, 32:8, 32:12,
 33:10, 34:10, 34:19,
 35:18, 36:11, 38:22,
 44:3, 44:17, 45:5,
 48:20, 48:24, 49:9,
 49:14, 53:18, 54:5,
 55:4, 56:9, 57:8,
 57:23, 58:1, 58:3,
 60:15, 61:2, 61:24,
 65:14, 66:4, 66:17,
 66:25, 67:11, 67:13,
 68:20, 69:8, 73:15,
 73:22, 75:7, 75:18,
 75:21, 76:25, 78:8,
 78:23, 80:11, 81:17,
 83:3, 84:9, 85:20,
 86:25, 88:15, 89:4,
 89:22, 91:4, 91:21,
 92:24, 94:23, 96:8,
 96:17, 97:25, 101:9,
 108:4, 109:23,
 110:1, 110:15,
 111:2, 114:2,
 114:10, 114:13,
 115:3, 115:10,
 115:19, 117:11,
 117:12, 117:15,
 120:25, 123:9,
 123:22, 123:25,
 124:2, 126:7,
 127:10, 128:10,
 130:18, 131:15,
 132:15, 132:16,
 133:9, 133:19,
 134:1, 134:21,
 137:14, 139:8,
 139:14, 139:18,
 141:6, 141:10,
 141:20, 143:3,
 143:20, 145:8,
 154:13, 154:25,
 156:1, 157:1,
 157:11, 158:16,
 158:23, 159:11,
 159:12, 159:14,
 159:16, 159:20,
 159:21, 159:25,
 160:3, 160:6,
 160:16, 161:10,
 161:11, 161:12,
 162:25, 164:7,

164:11, 164:24,
 166:13, 167:19,
 169:13, 171:18,
 172:6, 173:14,
 173:18, 173:23,
 174:5, 174:8,
 174:19, 174:22,
 175:2, 176:2,
 179:10, 180:6,
 180:7, 181:5,
 181:16, 183:6,
 183:11, 183:14,
 184:9, 184:11,
 185:9, 187:14,
 188:18, 188:21,
 189:3, 190:5,
 190:12, 190:13,
 190:14, 190:21,
 191:5, 191:17,
 192:7, 193:4,
 193:16, 193:19,
 194:4, 195:14,
 197:10, 204:5,
 204:6, 204:21,
 205:19, 207:2,
 207:18, 208:21,
 209:21, 210:24,
 210:25, 211:10,
 211:24, 212:14,
 212:15, 212:16,
 212:18, 212:24,
 213:24, 214:5,
 215:1, 217:23,
 218:13, 221:2,
 224:19, 225:23,
 226:12, 226:25,
 227:6, 230:9,
 230:10, 232:6,
 233:24, 234:25,
 238:7, 238:14,
 239:2, 239:5, 239:9,
 239:24, 240:3,
 241:14, 241:20,
 245:2, 245:10,
 246:2, 247:14,
 247:17, 249:5,
 249:8, 249:25,
 252:14, 252:15
WHAT'S [4] - 61:21,
 66:5, 212:10, 225:5
WHATEVER [3] -
 42:25, 162:1, 247:20
WHEATON [7] - 26:9,
 40:1, 41:2, 217:18,
 217:22, 217:23,
 218:8
WHEN [76] - 8:3,
 13:16, 16:11, 18:12,
 19:18, 35:15, 37:5,
 43:2, 49:9, 49:12,
 60:10, 61:20, 62:9,

66:23, 70:8, 70:10,
 84:2, 87:7, 87:10,
 89:3, 91:9, 92:16,
 100:1, 100:2, 107:8,
 109:20, 109:25,
 112:1, 115:1, 115:5,
 119:17, 119:22,
 122:9, 122:18,
 125:22, 127:14,
 127:22, 128:23,
 129:7, 129:11,
 130:4, 130:14,
 133:1, 133:8,
 133:16, 133:25,
 134:8, 134:12,
 136:11, 157:13,
 160:7, 164:18,
 168:11, 168:14,
 169:16, 173:19,
 177:23, 177:25,
 178:9, 179:10,
 187:24, 188:15,
 190:13, 191:9,
 193:3, 194:3, 194:6,
 194:12, 194:16,
 205:16, 213:9,
 213:14, 231:16,
 241:4, 241:9, 243:14
WHERE [57] - 7:13,
 15:15, 17:20, 18:18,
 25:1, 25:3, 28:19,
 30:24, 35:9, 51:20,
 55:2, 56:24, 75:17,
 90:15, 91:14,
 102:13, 103:9,
 114:24, 116:14,
 121:13, 121:14,
 122:7, 126:8,
 134:14, 150:24,
 161:4, 164:17,
 167:1, 167:3,
 169:23, 171:4,
 171:14, 176:6,
 176:14, 178:23,
 179:3, 181:24,
 182:21, 185:2,
 186:8, 186:9,
 186:10, 186:15,
 187:3, 187:18,
 218:14, 225:4,
 226:19, 228:21,
 229:4, 231:1, 231:5,
 239:19, 244:10,
 247:1, 247:12,
 247:17
WHETHER [64] -
 18:23, 20:15, 28:19,
 31:24, 32:3, 32:13,
 32:21, 33:6, 34:20,
 36:5, 41:15, 41:16,
 42:1, 42:5, 45:1,

45:10, 47:5, 48:21,
 49:11, 49:19, 78:13,
 79:5, 82:17, 90:20,
 101:25, 109:11,
 109:14, 110:10,
 110:24, 121:3,
 131:21, 138:22,
 147:17, 150:2,
 150:12, 150:14,
 150:15, 159:9,
 161:8, 161:20,
 189:25, 207:8,
 208:15, 212:13,
 213:10, 218:22,
 219:4, 219:20,
 220:2, 221:3, 221:5,
 222:10, 222:20,
 222:21, 234:23,
 240:1, 242:19,
 242:22, 243:5,
 243:17, 247:1,
 247:2, 247:15
WHICH [131] - 6:1,
 6:20, 6:25, 7:15,
 7:19, 11:20, 12:7,
 12:11, 15:17, 15:18,
 21:6, 22:20, 24:20,
 26:6, 29:18, 33:24,
 35:7, 36:10, 36:21,
 43:15, 43:20, 43:24,
 45:3, 45:10, 48:15,
 48:23, 49:16, 49:19,
 50:14, 51:14, 52:23,
 53:20, 53:21, 55:19,
 56:7, 58:14, 62:4,
 62:25, 63:8, 65:2,
 65:8, 73:20, 75:3,
 75:12, 75:19, 75:25,
 76:10, 78:13, 79:2,
 87:18, 90:6, 90:8,
 91:17, 94:5, 102:4,
 102:7, 106:7,
 106:18, 106:22,
 109:9, 111:24,
 114:7, 120:9, 124:9,
 124:10, 129:24,
 132:9, 134:7, 134:8,
 135:16, 135:21,
 137:16, 139:8,
 141:5, 141:19,
 141:25, 143:25,
 151:6, 153:6, 154:5,
 155:4, 155:17,
 157:10, 158:12,
 159:22, 160:16,
 160:25, 167:13,
 169:22, 170:18,
 171:16, 174:22,
 174:24, 180:3,
 186:13, 186:16,
 187:8, 191:21,

198:9, 199:21,
 204:19, 205:11,
 205:24, 206:9,
 206:24, 207:11,
 209:12, 212:8,
 214:25, 216:20,
 217:11, 217:15,
 217:17, 217:18,
 220:9, 221:7, 222:5,
 223:10, 223:20,
 224:3, 224:8,
 225:12, 232:3,
 232:15, 232:21,
 243:7, 246:2, 249:4,
 249:12, 252:5
WHILE [5] - 25:8,
 59:15, 129:10,
 218:2, 245:10
WHIM [1] - 247:19
WHITE [3] - 1:19,
 47:22, 253:9
WHO [152] - 7:12,
 10:19, 12:25, 14:9,
 14:12, 14:20, 15:21,
 15:22, 22:19, 23:14,
 26:18, 26:21, 27:3,
 27:5, 28:14, 29:2,
 29:15, 29:17, 30:17,
 30:22, 32:2, 34:11,
 34:22, 45:6, 60:23,
 66:21, 71:21, 72:13,
 72:16, 72:18, 73:7,
 76:17, 77:22, 79:10,
 82:16, 84:14, 86:19,
 87:3, 90:3, 93:3,
 96:15, 98:7, 100:5,
 100:8, 106:17,
 108:3, 108:5,
 111:18, 117:13,
 117:16, 118:5,
 122:2, 125:18,
 125:20, 126:1,
 126:16, 126:19,
 128:1, 129:3,
 129:11, 129:24,
 130:11, 134:2,
 135:10, 137:1,
 137:4, 137:19,
 140:2, 140:12,
 142:1, 143:11,
 146:8, 146:13,
 146:24, 147:8,
 147:13, 147:24,
 148:25, 149:6,
 149:11, 149:15,
 153:8, 153:16,
 153:17, 153:24,
 155:12, 156:2,
 174:15, 178:16,
 179:10, 180:16,
 182:12, 182:13,

<p>182:16, 183:7, 183:10, 185:22, 187:23, 187:25, 188:9, 189:20, 189:23, 192:25, 195:13, 196:5, 199:6, 199:10, 199:14, 200:2, 200:4, 200:5, 200:10, 200:12, 200:15, 201:3, 201:6, 201:11, 201:19, 201:24, 202:12, 202:19, 202:22, 203:9, 203:14, 219:18, 226:20, 227:16, 228:14, 229:12, 229:13, 230:2, 230:24, 232:12, 235:10, 235:16, 236:3, 236:15, 236:17, 237:14, 237:15, 240:1, 240:4, 244:6, 244:8, 244:25, 247:22, 250:17, 250:18</p> <p>WHO'S [5] - 34:3, 165:25, 172:4, 172:5, 210:16</p> <p>WHOEVER [1] - 29:19</p> <p>WHOLE [3] - 15:3, 83:2, 190:9</p> <p>WHOM [4] - 13:18, 136:25, 137:11, 142:6</p> <p>WHOSE [7] - 13:22, 84:4, 127:10, 146:18, 148:16, 200:16, 202:5</p> <p>WHY [37] - 8:10, 15:22, 24:24, 26:25, 34:2, 36:21, 48:22, 58:12, 68:16, 70:16, 72:25, 82:11, 84:24, 85:2, 85:24, 92:9, 92:10, 106:5, 107:2, 107:12, 119:12, 139:16, 159:18, 160:10, 164:21, 184:10, 187:15, 188:6, 188:19, 192:12, 192:14, 219:10, 227:20, 230:16, 239:21, 244:5</p> <p>WIDELY [1] - 30:3</p> <p>WIDESPREAD [2] - 228:14, 244:15</p> <p>WILDLIFE [1] - 241:19</p>	<p>WILL [172] - 3:11, 3:12, 3:13, 7:7, 7:8, 7:12, 7:14, 7:15, 7:18, 11:2, 11:5, 13:15, 13:19, 13:20, 13:23, 14:5, 14:8, 14:10, 14:16, 14:17, 14:19, 14:21, 14:22, 14:23, 14:25, 15:13, 17:16, 21:23, 22:1, 22:2, 22:8, 22:15, 22:22, 22:25, 23:3, 23:4, 23:6, 23:13, 23:16, 23:22, 24:3, 24:6, 24:15, 24:16, 25:3, 25:4, 25:10, 26:19, 26:21, 29:14, 29:24, 30:2, 34:15, 34:17, 35:25, 38:9, 45:5, 45:6, 48:9, 52:21, 53:14, 54:3, 54:9, 81:9, 85:13, 95:8, 98:19, 98:20, 98:23, 98:24, 103:2, 113:3, 113:24, 118:9, 120:24, 130:3, 140:11, 141:20, 141:22, 142:1, 144:4, 146:19, 146:24, 147:13, 151:1, 151:9, 157:11, 157:12, 157:19, 158:13, 162:4, 162:5, 165:6, 165:12, 165:16, 165:18, 166:22, 171:7, 175:23, 182:4, 184:1, 186:24, 187:17, 190:22, 191:17, 199:14, 200:2, 200:22, 200:23, 201:8, 201:15, 202:10, 202:19, 204:5, 205:3, 205:9, 206:21, 208:13, 210:8, 210:10, 212:23, 215:8, 218:8, 227:10, 229:8, 229:13, 229:18, 229:24, 230:10, 230:19, 231:3, 231:8, 231:10, 231:12, 231:17, 231:24, 232:19, 233:6, 233:9, 233:22, 234:24, 235:7, 235:10, 235:16, 235:18, 236:15,</p>	<p>236:17, 238:1, 238:3, 238:19, 238:20, 239:2, 239:5, 239:9, 241:8, 241:24, 242:5, 246:5, 246:22, 251:9, 252:3, 252:5, 252:15, 252:16</p> <p>WILLING [2] - 174:5, 174:15</p> <p>WIND [1] - 230:5</p> <p>WINDOW [1] - 25:3</p> <p>WIPE [1] - 43:22</p> <p>WISDOM [5] - 66:8, 112:24, 120:19, 172:24, 246:11</p> <p>WISE [1] - 223:9</p> <p>WISH [6] - 52:20, 53:22, 205:2, 205:8, 212:1, 251:23</p> <p>WISHED [1] - 220:5</p> <p>WITH [222] - 3:23, 4:7, 4:9, 4:18, 4:20, 4:23, 5:5, 5:16, 21:1, 22:7, 26:2, 27:14, 28:4, 28:20, 29:23, 30:14, 32:23, 35:6, 38:21, 40:6, 41:22, 42:11, 43:20, 43:23, 45:18, 46:4, 46:21, 46:24, 47:14, 48:24, 48:25, 49:24, 50:6, 51:6, 52:20, 56:17, 56:20, 57:22, 59:4, 62:7, 62:20, 63:14, 63:20, 64:13, 64:25, 67:1, 67:22, 71:14, 71:20, 72:6, 72:16, 72:21, 74:20, 75:13, 77:5, 77:13, 78:7, 81:9, 81:14, 83:19, 83:21, 85:23, 87:1, 87:19, 87:22, 87:24, 88:11, 93:22, 97:4, 97:9, 97:12, 98:3, 98:7, 98:9, 101:1, 101:22, 102:14, 102:15, 103:11, 103:20, 104:11, 105:10, 105:13, 105:24, 106:2, 107:3, 107:20, 108:8, 108:19, 110:21, 111:7, 112:6, 118:9, 118:15, 118:17, 119:25, 120:3, 120:6, 122:21, 123:1, 124:15, 125:4, 125:11, 125:21, 127:4,</p>	<p>127:12, 128:13, 128:18, 128:22, 129:4, 129:11, 129:12, 129:15, 129:22, 129:25, 132:20, 133:13, 134:6, 136:16, 137:18, 138:3, 141:1, 142:6, 143:11, 143:13, 144:19, 153:6, 153:7, 153:12, 153:22, 154:25, 155:2, 155:6, 158:2, 158:7, 158:11, 158:24, 159:9, 163:15, 163:20, 166:11, 166:17, 167:1, 168:15, 168:21, 170:7, 171:6, 173:3, 173:6, 173:22, 176:19, 177:15, 178:18, 179:6, 180:22, 182:9, 182:24, 183:5, 188:18, 189:6, 189:14, 189:15, 189:16, 190:11, 192:1, 192:9, 194:19, 196:5, 196:7, 196:21, 197:3, 198:2, 198:17, 198:23, 203:4, 203:11, 203:20, 205:23, 205:24, 208:8, 208:12, 213:3, 213:7, 213:19, 213:20, 214:12, 214:21, 215:3, 217:6, 218:25, 221:12, 222:1, 222:25, 224:6, 224:18, 226:19, 228:15, 229:1, 229:5, 229:8, 229:16, 230:8, 230:16, 233:3, 236:25, 237:1, 237:3, 239:1, 239:4, 240:6, 240:11, 240:18, 240:21, 245:23, 246:25, 248:18, 249:15, 250:20, 251:16</p> <p>WITHDRAW [1] - 26:17</p> <p>WITHDRAWAL [5] - 76:3, 76:5, 77:14, 175:10, 176:23</p> <p>WITHIN [12] - 47:7,</p>	<p>57:11, 59:7, 60:24, 73:12, 76:5, 80:20, 82:3, 97:4, 150:21, 204:15</p> <p>WITHOUT [16] - 12:7, 14:11, 36:7, 37:17, 78:15, 78:21, 83:2, 87:14, 96:10, 127:16, 140:18, 153:4, 160:12, 178:1, 178:21</p> <p>WITNESS [86] - 6:13, 23:25, 34:16, 54:18, 54:19, 54:23, 55:11, 64:16, 65:2, 84:10, 87:22, 87:25, 88:7, 88:13, 88:17, 88:22, 89:2, 89:6, 89:11, 89:16, 89:20, 89:25, 90:2, 90:17, 90:21, 90:24, 91:1, 91:6, 91:12, 91:16, 91:23, 92:3, 92:5, 92:8, 92:12, 92:23, 93:1, 93:5, 93:8, 97:12, 98:13, 105:22, 109:7, 109:18, 109:24, 110:2, 110:4, 110:8, 110:12, 110:17, 110:23, 111:1, 111:9, 113:6, 113:12, 113:15, 113:17, 113:20, 114:6, 120:11, 140:20, 141:15, 142:20, 148:22, 150:2, 152:19, 157:3, 157:8, 157:9, 157:20, 157:24, 162:8, 162:15, 162:18, 162:22, 163:1, 179:25, 184:20, 185:3, 191:2, 191:4, 191:7, 244:13, 246:8</p> <p>WITNESS' [2] - 142:16, 164:12</p> <p>WITNESSES [12] - 6:2, 6:7, 6:9, 6:12, 9:16, 21:25, 25:25, 34:18, 54:6, 239:13, 244:5, 254:3</p> <p>WITNESSES' [1] - 245:11</p> <p>WOMAN [33] - 70:1, 71:21, 72:1, 72:11, 72:15, 73:1, 80:13, 80:18, 100:4, 100:7, 123:17, 124:2,</p>
--	--	---	--	--

127:12, 137:19,
146:7, 146:12,
146:18, 146:24,
147:8, 147:13,
147:24, 148:16,
148:25, 149:6,
149:11, 149:15,
173:17, 174:5,
174:15, 179:3,
179:10, 227:20

WOMEN [262] - 7:3,
7:6, 7:12, 7:13, 7:18,
7:20, 10:5, 10:9,
10:19, 11:25, 12:2,
12:19, 12:25, 13:15,
13:19, 13:22, 14:9,
14:12, 14:20, 15:1,
21:10, 21:13, 22:5,
22:11, 22:21, 23:4,
23:19, 26:18, 26:21,
30:9, 30:15, 31:4,
31:9, 31:10, 32:9,
33:12, 34:13, 64:11,
64:19, 67:3, 67:15,
69:21, 70:23, 71:17,
71:18, 72:21, 73:7,
75:22, 76:1, 76:4,
76:17, 77:3, 77:9,
78:8, 78:11, 78:22,
78:24, 79:9, 79:16,
80:3, 83:9, 89:24,
90:3, 91:5, 91:18,
92:10, 92:19, 92:25,
93:2, 93:20, 93:23,
94:1, 94:5, 94:13,
96:3, 96:6, 96:11,
96:15, 96:18, 96:25,
97:6, 98:20, 98:24,
101:24, 102:4,
103:21, 106:15,
106:17, 106:19,
107:11, 107:14,
107:22, 108:2,
108:3, 108:5,
108:12, 109:21,
110:6, 110:7,
110:11, 111:24,
112:3, 115:22,
117:16, 117:19,
119:15, 123:5,
123:25, 124:19,
125:2, 125:18,
126:1, 126:23,
126:24, 127:1,
127:10, 127:22,
128:1, 128:4,
129:11, 129:16,
129:24, 129:25,
130:2, 135:25,
136:3, 136:5,
138:23, 139:22,

140:11, 141:7,
141:10, 141:21,
141:23, 142:1,
142:5, 142:9,
142:13, 144:4,
149:20, 151:1,
151:9, 153:13,
153:14, 153:15,
153:16, 153:19,
153:24, 156:7,
156:11, 166:16,
168:15, 171:6,
171:20, 171:21,
172:13, 174:7,
174:15, 176:9,
176:18, 177:10,
177:12, 177:19,
178:11, 178:16,
180:16, 180:17,
181:9, 181:12,
181:16, 182:12,
182:13, 182:16,
183:7, 183:10,
183:17, 183:19,
183:20, 185:22,
186:3, 186:4,
186:10, 186:12,
186:15, 186:16,
186:25, 187:22,
187:25, 188:3,
188:4, 188:7, 188:8,
188:13, 188:19,
189:11, 189:13,
189:23, 190:3,
190:6, 190:9,
190:22, 190:23,
191:17, 191:19,
192:18, 192:24,
192:25, 193:1,
200:22, 200:23,
201:3, 201:6,
201:11, 201:19,
201:23, 201:24,
202:3, 202:5,
202:10, 202:12,
202:18, 202:22,
211:20, 212:4,
221:12, 227:1,
228:18, 228:23,
228:25, 229:8,
229:12, 229:18,
229:19, 229:24,
230:2, 230:9,
230:10, 230:19,
230:23, 231:8,
231:9, 231:17,
235:7, 235:10,
237:15, 237:23,
238:1, 238:3,
238:13, 238:19,
238:20, 238:24,

247:7, 247:22,
250:17
WOMEN'S [47] -
34:17, 58:22, 59:5,
59:7, 61:4, 62:20,
63:4, 63:7, 63:8,
63:11, 67:6, 67:11,
69:4, 69:10, 72:9,
78:6, 78:15, 79:2,
79:6, 83:5, 83:21,
95:19, 95:25,
101:16, 102:8,
120:14, 121:1,
127:5, 138:20,
140:22, 146:25,
149:1, 167:20,
169:8, 169:11,
170:17, 170:20,
189:17, 192:15,
201:15, 217:13,
223:25, 224:1,
224:7, 224:8, 236:1,
249:24
WON [2] - 65:20,
65:23
WON'T [3] - 162:6,
164:3, 244:1
WONDER [1] - 53:9
WONDERING [1] -
82:11
WORD [4] - 205:18,
205:21, 221:17,
221:25
WORDED [1] - 42:22
WORDS [7] - 28:14,
86:3, 90:16, 123:23,
192:14, 240:10,
240:19
WORK [45] - 6:15,
27:5, 57:8, 58:12,
58:20, 59:15, 59:22,
61:2, 61:3, 62:7,
62:10, 63:3, 64:1,
64:4, 72:9, 79:8,
86:5, 116:14,
116:15, 117:3,
117:5, 117:19,
118:13, 119:8,
119:10, 119:15,
119:17, 121:13,
124:20, 124:22,
126:1, 130:3, 166:1,
166:19, 169:4,
169:23, 171:10,
195:4, 199:19,
221:25, 231:15,
250:17, 251:5
WORKED [9] - 6:12,
58:9, 58:20, 59:10,
132:15, 132:16,

167:3, 173:23
WORKER [1] - 179:13
WORKFORCE [4] -
30:13, 123:18,
247:7, 247:23
WORKING [4] - 3:12,
122:11, 194:3, 222:5
WORLD [8] - 75:17,
121:22, 145:21,
239:18, 239:19,
239:22, 244:23,
247:9
WORLDS [1] - 131:8
WORSE [1] - 200:17
WORSENING [1] -
142:2
WORSHIP [3] - 43:15,
197:13, 197:16
WOULD [283] - 5:11,
5:19, 6:13, 8:13,
8:14, 8:16, 8:21,
8:23, 9:2, 9:21, 9:23,
11:10, 11:14, 16:24,
20:4, 20:9, 20:25,
21:22, 24:20, 24:23,
25:23, 27:11, 29:3,
29:16, 29:18, 30:21,
31:17, 31:22, 32:2,
32:4, 32:11, 32:14,
32:15, 33:5, 33:14,
33:15, 33:22, 34:6,
34:9, 34:24, 36:24,
37:1, 37:14, 37:25,
38:12, 40:4, 40:6,
40:18, 40:21, 40:24,
40:25, 41:8, 42:5,
42:13, 43:15, 43:16,
43:22, 45:2, 45:9,
47:20, 47:23, 48:18,
48:22, 50:11, 52:18,
53:18, 53:23, 55:10,
55:13, 56:7, 56:8,
56:11, 56:23, 56:25,
62:19, 64:16, 67:25,
68:6, 74:1, 74:17,
76:1, 76:4, 76:18,
77:3, 77:6, 77:19,
78:12, 78:14, 78:15,
78:21, 79:15, 79:16,
79:20, 79:22, 80:5,
80:14, 80:21, 81:1,
81:4, 81:7, 82:2,
82:5, 82:20, 84:17,
85:5, 85:7, 89:8,
89:14, 91:17, 92:10,
95:9, 95:19, 95:25,
96:18, 96:20, 96:21,
101:5, 101:18,
107:7, 112:22,
113:8, 116:13,

118:16, 119:8,
120:11, 122:17,
122:20, 123:3,
123:21, 124:18,
128:3, 128:11,
130:23, 131:22,
131:23, 132:1,
132:9, 133:1, 133:8,
133:9, 133:10,
133:20, 133:23,
133:25, 134:2,
134:17, 135:17,
137:22, 138:10,
138:23, 141:7,
146:3, 150:2,
151:19, 153:2,
153:4, 153:8,
153:11, 155:3,
156:20, 157:4,
158:6, 158:10,
162:14, 164:10,
164:15, 165:15,
166:17, 168:10,
172:12, 172:15,
175:3, 175:8,
175:20, 178:1,
178:9, 178:10,
178:20, 178:24,
179:4, 179:20,
180:2, 180:22,
181:22, 182:21,
182:24, 183:23,
184:9, 189:3, 191:8,
191:10, 191:11,
191:22, 191:23,
192:15, 193:4,
194:22, 194:25,
195:12, 196:21,
198:17, 201:7,
201:23, 202:3,
205:11, 208:6,
208:7, 212:7,
212:19, 213:21,
213:24, 214:2,
214:5, 214:7,
214:10, 214:20,
214:25, 215:3,
218:17, 219:9,
219:10, 219:11,
220:6, 220:8,
220:22, 226:22,
227:9, 228:13,
228:14, 228:17,
230:3, 231:1,
234:12, 235:21,
235:22, 235:23,
236:18, 236:19,
236:22, 237:3,
237:4, 237:5, 237:6,
237:8, 237:14,
237:15, 237:22,

<p>238:12, 239:11, 239:22, 240:12, 240:15, 240:17, 240:18, 242:7, 242:17, 242:23, 242:24, 244:14, 244:16, 244:18, 245:3, 245:8, 247:18, 247:23, 248:3, 248:4, 248:5, 248:6, 248:7, 248:8, 248:16, 248:18, 251:12 WOULDN 'T [3] - 30:5, 32:1, 33:3 WRAP [1] - 216:16 WRIGHT [1] - 3:4 WRIT [1] - 47:2 WRITE [1] - 241:22 WRITERS' [1] - 38:4 WRITING [7] - 25:25, 27:2, 38:14, 42:19, 46:15, 244:20, 252:23 WRITTEN [5] - 63:17, 63:23, 168:2, 228:16 WRONGLY [1] - 28:19 WROTE [2] - 194:12, 206:6</p>	<p>134:11, 134:12, 134:19, 135:3, 135:16, 140:21, 155:16, 170:14, 171:23, 171:24, 181:13, 183:1, 193:24, 193:25 YEP [1] - 86:24 YES [216] - 4:13, 18:6, 22:14, 22:22, 29:6, 44:16, 45:13, 53:1, 54:1, 54:15, 55:24, 55:25, 56:10, 56:13, 56:16, 56:18, 56:22, 57:16, 57:24, 58:11, 59:9, 59:12, 59:24, 60:3, 60:14, 60:25, 61:12, 61:14, 61:23, 62:11, 62:14, 62:23, 63:2, 63:16, 63:22, 63:25, 64:3, 64:7, 64:14, 65:16, 67:18, 67:24, 68:3, 68:9, 68:12, 68:15, 69:17, 71:10, 73:6, 74:6, 74:9, 74:16, 74:22, 74:24, 76:22, 77:18, 77:21, 79:7, 80:6, 81:1, 81:6, 81:22, 82:8, 82:23, 83:1, 83:6, 83:19, 84:2, 84:15, 84:20, 84:23, 85:1, 86:17, 87:6, 88:13, 89:16, 89:25, 91:6, 92:12, 93:25, 95:6, 95:15, 95:20, 95:23, 96:1, 96:7, 97:2, 97:7, 97:10, 98:13, 99:2, 99:10, 99:14, 99:25, 100:25, 101:20, 102:9, 102:12, 102:21, 102:25, 103:23, 104:2, 104:7, 104:13, 104:20, 105:20, 105:22, 106:1, 107:19, 107:24, 109:7, 109:18, 109:24, 110:3, 111:1, 113:1, 115:18, 117:4, 117:24, 118:1, 118:21, 120:5, 120:16, 121:8, 121:23, 122:4, 123:2, 124:16, 124:21, 124:23, 124:25, 126:14, 128:9, 130:7, 130:13, 130:17,</p>	<p>131:3, 131:7, 131:10, 131:14, 131:25, 133:18, 134:20, 135:7, 135:15, 135:18, 135:20, 136:6, 136:15, 137:10, 138:5, 138:15, 140:4, 140:9, 142:11, 143:7, 143:23, 144:6, 149:22, 150:10, 152:2, 152:21, 153:21, 155:14, 156:10, 158:25, 160:21, 163:10, 163:24, 165:8, 165:11, 165:14, 165:17, 165:20, 166:12, 166:20, 167:18, 168:7, 168:25, 169:3, 169:6, 170:6, 170:23, 172:2, 173:13, 174:17, 177:2, 178:4, 178:5, 178:9, 179:2, 181:4, 181:7, 182:2, 183:14, 185:13, 185:15, 190:1, 190:4, 190:20, 191:16, 195:5, 196:13, 196:17, 196:24, 197:14, 198:1, 199:25, 201:1, 201:10, 204:9, 205:1, 209:14, 213:13, 219:7, 242:4 YESTERDAY [1] - 66:12 YET [7] - 11:21, 25:15, 82:10, 93:10, 147:18, 163:12 YORK [3] - 107:23, 167:6, 231:4 YOU [809] - 5:8, 5:14, 5:15, 5:17, 5:18, 5:22, 8:4, 8:5, 8:12, 8:18, 8:20, 8:24, 8:25, 9:13, 11:1, 11:2, 11:3, 14:23, 15:5, 15:17, 15:22, 15:24, 16:2, 16:16, 19:20, 20:19, 20:21, 20:22, 20:23, 21:18, 21:22, 22:2, 22:16, 22:22, 23:23, 24:1, 24:2, 24:4, 24:6, 24:12, 24:14, 24:15, 25:6, 25:16, 25:17,</p>	<p>25:20, 27:14, 28:19, 29:5, 30:16, 32:19, 34:15, 36:2, 36:8, 37:11, 37:14, 38:20, 40:21, 41:18, 42:5, 42:8, 42:9, 44:12, 46:3, 46:4, 46:11, 46:15, 46:22, 48:12, 48:20, 48:21, 48:22, 48:24, 48:25, 49:4, 49:6, 49:14, 49:16, 49:20, 49:21, 49:22, 49:24, 50:16, 50:20, 51:24, 51:25, 52:1, 52:3, 52:14, 52:25, 53:4, 53:14, 53:15, 53:16, 53:17, 53:18, 53:24, 54:6, 54:14, 54:17, 55:2, 55:4, 55:7, 55:8, 55:10, 55:14, 55:15, 56:2, 56:7, 56:9, 56:11, 56:12, 56:14, 56:17, 56:19, 56:20, 56:23, 56:24, 56:25, 57:3, 57:17, 57:22, 58:8, 58:9, 58:12, 58:20, 58:21, 59:6, 59:10, 59:13, 59:15, 59:22, 60:1, 60:4, 60:7, 60:10, 60:19, 61:10, 61:11, 61:20, 62:9, 62:10, 62:15, 62:16, 62:21, 62:24, 62:25, 63:14, 63:17, 63:20, 63:23, 64:1, 64:9, 65:14, 65:20, 65:23, 65:25, 66:24, 68:2, 68:6, 68:16, 69:20, 70:2, 70:3, 70:8, 70:16, 72:24, 73:1, 73:3, 73:11, 73:18, 74:17, 74:20, 74:25, 75:21, 76:4, 77:3, 77:6, 77:18, 77:19, 78:1, 78:18, 79:5, 81:4, 81:8, 81:9, 82:9, 82:20, 82:21, 83:3, 84:5, 84:6, 84:17, 84:19, 84:24, 85:2, 85:20, 86:13, 86:16, 87:7, 87:8, 87:18, 87:20, 87:21, 87:24, 88:3, 88:4, 88:5, 88:10, 89:3, 89:4, 89:17, 89:23, 91:9, 91:20, 91:21, 92:9, 92:16, 92:21, 93:3, 93:10, 93:12, 93:14, 93:15, 93:19, 93:21, 94:24, 95:4,</p>	<p>95:7, 95:13, 95:16, 95:18, 95:21, 95:24, 96:4, 96:24, 97:3, 97:14, 97:16, 97:17, 97:22, 97:25, 98:7, 98:12, 98:14, 98:18, 98:22, 99:3, 99:11, 99:15, 99:17, 99:18, 99:22, 100:1, 100:4, 100:7, 100:11, 100:14, 100:19, 100:23, 101:3, 101:15, 101:18, 102:10, 103:9, 104:24, 104:25, 105:2, 105:3, 105:8, 105:10, 105:19, 105:20, 105:24, 105:25, 106:2, 106:8, 107:2, 107:3, 107:16, 107:20, 107:25, 108:22, 108:24, 109:3, 109:4, 109:8, 109:9, 109:16, 109:20, 110:6, 110:10, 110:24, 111:10, 111:13, 111:14, 112:1, 112:5, 112:18, 113:2, 113:11, 113:24, 114:2, 114:7, 114:8, 114:9, 114:10, 114:12, 114:16, 114:17, 114:19, 114:22, 114:23, 114:24, 115:1, 115:3, 115:5, 115:7, 115:10, 115:12, 115:23, 116:5, 116:13, 116:14, 116:22, 116:23, 116:25, 117:3, 117:5, 117:7, 117:9, 117:11, 117:12, 117:19, 117:25, 118:2, 118:5, 118:22, 119:9, 119:22, 119:25, 120:3, 120:6, 121:10, 121:14, 121:21, 121:24, 122:2, 122:5, 122:15, 122:17, 122:18, 122:20, 122:23, 122:24, 123:3, 123:4, 123:9, 123:22, 123:23, 123:24, 124:1, 124:14, 126:6, 128:5, 128:8,</p>
Y				
<p>YEAH [7] - 91:23, 168:11, 175:24, 177:9, 179:25, 189:8, 234:19 YEAR [41] - 25:2, 75:13, 75:22, 76:2, 76:5, 76:11, 76:17, 77:7, 80:21, 90:5, 91:18, 122:5, 122:6, 123:2, 135:1, 135:14, 167:2, 167:4, 171:4, 176:9, 176:18, 180:13, 188:1, 188:2, 193:2, 195:23, 195:24, 196:1, 197:3, 197:9, 208:2, 212:21, 220:1, 228:11, 230:15, 230:18, 239:14, 241:20, 241:23, 252:5 YEARS [29] - 26:1, 27:7, 46:16, 59:11, 60:5, 60:12, 82:3, 82:4, 112:11, 115:10, 116:3, 116:4, 122:24, 127:15, 127:16,</p>				

128:13, 128:23,
129:2, 129:11,
130:4, 130:5, 130:8,
130:14, 130:19,
130:23, 130:25,
131:4, 131:8,
131:11, 131:15,
131:23, 132:1,
132:9, 132:22,
133:2, 133:9,
133:16, 133:19,
133:25, 134:12,
134:14, 134:19,
135:5, 135:9,
135:11, 136:2,
136:11, 136:22,
136:23, 137:3,
137:11, 137:17,
138:3, 138:6, 138:9,
138:10, 138:14,
138:16, 138:17,
138:21, 139:4,
139:5, 139:17,
139:18, 139:25,
140:1, 140:5,
140:10, 140:17,
140:18, 141:4,
141:5, 141:14,
141:20, 142:12,
142:21, 143:3,
143:8, 143:11,
143:18, 143:20,
144:3, 144:7,
144:10, 144:14,
144:16, 144:20,
144:22, 144:23,
145:22, 146:3,
146:7, 146:12,
146:17, 146:23,
147:7, 147:11,
147:12, 147:22,
147:23, 148:15,
148:24, 149:5,
149:10, 149:14,
149:23, 150:14,
151:6, 151:25,
152:3, 152:5, 152:7,
152:10, 152:13,
152:17, 152:18,
152:19, 152:25,
153:1, 153:2, 153:8,
153:12, 153:16,
153:17, 153:18,
153:24, 154:2,
154:13, 154:14,
154:19, 154:22,
154:25, 155:4,
156:1, 156:14,
156:15, 157:4,
157:6, 157:8,
157:13, 157:14,

157:19, 157:21,
158:4, 158:16,
158:22, 158:23,
158:25, 159:1,
159:8, 159:9,
159:11, 159:25,
160:2, 160:5,
161:17, 162:6,
162:10, 162:17,
162:25, 163:19,
163:20, 164:15,
164:21, 164:23,
165:2, 165:6, 165:9,
165:12, 165:15,
165:16, 165:18,
165:21, 166:2,
166:7, 166:9,
166:11, 166:18,
166:22, 167:15,
167:23, 167:25,
168:2, 168:5, 168:9,
169:4, 169:12,
169:15, 169:16,
170:2, 170:7,
170:24, 171:10,
171:11, 171:18,
171:22, 172:10,
173:1, 173:7,
173:11, 174:7,
175:3, 175:13,
175:19, 175:20,
175:23, 176:1,
176:6, 176:7,
176:11, 176:14,
176:16, 177:6,
178:7, 178:14,
178:23, 178:24,
178:25, 179:6,
179:10, 179:23,
180:4, 180:5, 181:5,
182:1, 182:4, 182:7,
183:11, 183:23,
184:1, 184:7,
184:10, 184:17,
184:18, 185:8,
186:2, 186:8,
186:14, 186:18,
186:19, 186:23,
186:24, 187:14,
187:17, 188:15,
190:17, 190:21,
191:5, 191:25,
192:6, 192:10,
192:15, 192:24,
193:5, 193:9,
193:13, 193:14,
193:15, 193:16,
193:17, 193:19,
194:2, 194:3, 194:4,
194:6, 194:11,
194:12, 194:14,

194:22, 195:2,
195:7, 195:8,
195:13, 195:15,
196:5, 196:10,
196:14, 196:20,
196:21, 196:25,
197:4, 197:11,
197:18, 197:21,
198:1, 198:3,
198:10, 198:16,
198:17, 199:1,
199:5, 199:9,
199:13, 199:18,
199:25, 200:1,
200:7, 200:10,
200:11, 200:16,
200:21, 201:2,
201:7, 201:14,
201:18, 201:23,
201:24, 202:3,
202:5, 202:9,
202:11, 202:16,
202:21, 203:2,
203:3, 203:4, 203:7,
203:8, 203:13,
203:23, 204:3,
204:6, 204:9,
204:12, 204:15,
204:23, 204:24,
205:16, 205:19,
207:3, 208:21,
209:12, 210:5,
210:12, 213:7,
213:14, 214:5,
214:17, 214:18,
215:6, 217:17,
218:6, 218:8,
218:10, 218:14,
218:19, 219:11,
222:10, 222:19,
223:23, 224:16,
225:3, 229:17,
229:22, 230:7,
234:10, 234:16,
234:20, 235:14,
235:15, 235:20,
236:3, 236:7, 236:9,
236:10, 236:14,
239:11, 239:13,
240:23, 241:8,
241:25, 244:14,
244:19, 245:13,
245:16, 245:24,
245:25, 246:3,
246:18, 246:21,
249:5, 249:9,
249:10, 251:13,
252:7, 252:11,
252:12, 252:15,
252:16, 252:22,
252:23, 252:25

YOU'D [3] - 68:13,
137:24, 238:8
YOU'LL [1] - 74:19
YOU'RE [6] - 33:10,
38:21, 116:24,
157:19, 158:23,
196:18
YOU'VE [5] - 64:4,
115:16, 139:21,
167:24, 169:2
YOUNG [1] - 106:17
YOUNGER [2] - 72:21,
106:18
YOUR [419] - 4:1, 4:5,
4:8, 4:13, 4:16, 4:19,
4:22, 4:25, 5:3, 5:7,
5:9, 5:14, 5:17, 5:22,
6:2, 6:6, 8:6, 8:9,
8:17, 8:24, 9:7, 9:9,
9:15, 9:17, 9:22,
13:4, 15:9, 15:24,
15:25, 16:3, 16:20,
20:3, 20:21, 21:20,
21:24, 22:14, 22:16,
23:24, 24:9, 24:13,
24:15, 24:22, 25:12,
25:17, 25:19, 25:21,
25:23, 26:20, 27:1,
27:9, 27:19, 28:4,
28:23, 29:6, 29:13,
29:21, 30:20, 30:23,
31:13, 31:16, 32:15,
32:24, 33:3, 33:15,
33:23, 34:10, 34:11,
34:19, 34:25, 35:12,
36:12, 36:16, 37:14,
37:25, 38:13, 38:14,
38:24, 39:12, 40:14,
40:20, 40:25, 41:8,
41:21, 41:24, 42:16,
42:19, 44:20, 45:2,
45:10, 45:21, 46:2,
46:5, 46:7, 46:15,
46:25, 48:19, 49:4,
49:23, 50:14, 50:18,
51:14, 51:22, 53:1,
53:13, 54:3, 54:6,
54:7, 54:15, 54:21,
55:9, 55:10, 55:21,
55:24, 55:25, 56:23,
56:25, 57:4, 57:8,
57:19, 57:24, 58:1,
58:2, 58:8, 59:13,
60:13, 60:15, 61:2,
61:15, 62:12, 62:15,
64:15, 64:22, 65:4,
65:10, 65:12, 65:16,
65:25, 66:6, 66:13,
67:25, 68:1, 68:5,
68:14, 73:11, 83:23,

85:10, 86:8, 86:23,
87:17, 88:2, 90:10,
90:14, 96:2, 97:3,
97:8, 97:11, 97:14,
97:15, 97:17, 98:1,
98:8, 98:17, 98:18,
98:23, 100:18,
100:20, 103:10,
104:25, 105:5,
108:19, 109:1,
109:16, 109:25,
111:5, 111:7,
112:17, 112:21,
112:25, 113:10,
113:13, 113:14,
113:18, 113:24,
114:23, 115:10,
116:10, 116:13,
116:19, 116:25,
117:12, 117:19,
117:22, 118:9,
118:10, 118:13,
118:20, 119:3,
119:8, 119:20,
119:23, 120:11,
120:16, 120:20,
121:6, 121:8,
121:10, 121:13,
121:14, 122:21,
123:4, 124:17,
126:5, 126:15,
128:6, 128:11,
128:13, 130:5,
130:19, 130:23,
130:24, 131:1,
131:11, 132:22,
132:23, 133:19,
134:1, 136:7,
136:18, 136:19,
137:4, 137:22,
137:25, 138:20,
138:25, 139:3,
139:11, 139:14,
139:21, 139:23,
140:6, 140:13,
141:8, 142:15,
142:20, 142:21,
143:4, 143:11,
143:18, 143:19,
145:5, 145:13,
146:16, 146:17,
147:12, 147:16,
148:2, 148:3,
148:11, 150:1,
151:15, 151:20,
151:21, 152:18,
152:21, 154:14,
154:15, 155:15,
156:2, 156:23,
157:1, 158:1, 158:3,
158:6, 158:25,

160:11, 160:18, 161:15, 162:7, 162:8, 162:11, 162:14, 162:20, 162:24, 163:2, 163:13, 164:7, 164:9, 165:2, 165:22, 165:25, 166:13, 166:19, 166:22, 166:23, 167:15, 167:19, 167:24, 168:2, 169:12, 169:16, 170:3, 170:21, 171:9, 171:10, 171:14, 171:25, 172:11, 172:16, 173:4, 173:11, 174:12, 178:3, 178:15, 178:22, 180:2, 180:7, 181:21, 184:8, 188:14, 188:18, 189:7, 189:16, 190:2, 190:24, 191:5, 191:13, 191:17, 192:2, 193:8, 193:17, 194:7, 194:12, 194:23, 196:5, 198:9, 198:18, 199:18, 203:4, 203:9, 203:21, 203:23, 203:25, 204:2, 204:7, 204:12, 204:15, 204:18, 205:23, 209:14, 210:3, 210:7, 210:18, 210:21, 212:8, 212:11, 213:9, 214:1, 214:10, 218:6, 218:7, 218:17, 218:21, 224:11, 228:3, 232:1, 234:9, 234:11, 235:14, 235:18, 235:19, 235:21, 236:5, 236:13, 236:22, 236:24, 237:24, 238:2, 238:15, 238:16, 238:22, 239:12, 239:25, 240:17, 240:20, 240:24, 241:15, 241:24, 242:18, 242:21, 243:21, 244:2, 244:19, 245:7, 245:10, 245:18, 245:22,	245:23, 246:4, 246:17, 246:21, 249:7, 249:17, 250:11, 252:9, 252:10, 252:11, 252:17, 252:25 YOURS ^[1] - 110:1
	Z
	ZERO ^[5] - 94:5, 219:6, 219:7, 219:8, 219:15 ZOLNA ^[1] - 70:19 ZOOM ^[1] - 207:13 ZOOMING ^[1] - 149:19 ZUBIK ^[13] - 26:9, 33:24, 40:3, 99:15, 99:20, 99:23, 144:14, 226:18, 226:22, 226:24, 227:3, 232:22, 249:6