SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES FEDERAL BUREAU OF INVESTIGATION,) ET AL.,) Petitioners,) v.) No. 20-828 YASSIR FAZAGA, ET AL.,) Respondents.)

Pages: 1 through 139 Place: Washington, D.C. Date: November 8, 2021

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 3 FEDERAL BUREAU OF INVESTIGATION,) 4 ET AL.,) 5 Petitioners,)) No. 20-828 6 v. 7 YASSIR FAZAGA, ET AL.,) 8 Respondents.) 9 - - - - - - - - - - - - - - - - -10 11 Washington, D.C. 12 Monday, November 8, 2021 13 14 The above-entitled matter came on for 15 oral argument before the Supreme Court of the United States at 10:00 a.m. 16 17 18 **APPEARANCES:** 19 EDWIN S. KNEEDLER, Deputy Solicitor General, 20 Department of Justice, Washington, D.C.; on behalf 21 of the Petitioners. CATHERINE M.A. CARROLL, ESQUIRE, Washington, D.C.; on 22 23 behalf of the Agent Respondents. 24 AHILAN T. ARULANANTHAM, ESQUIRE, Los Angeles, California; on behalf of Respondents Fazaga et al. 25

2

1	CONTENTS	
2	ORAL ARGUMENT OF:	PAGE:
3	EDWIN S. KNEEDLER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	CATHERINE M.A. CARROLL, ESQ.	
7	On behalf of the Agent Respondents	53
8	ORAL ARGUMENT OF:	
9	AHILAN T. ARULANANTHAM, ESQ.	
10	On behalf of Respondents Fazaga,	
11	et al.	63
12	REBUTTAL ARGUMENT OF:	
13	EDWIN S. KNEEDLER, ESQ.	
14	On behalf of the Petitioners	134
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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1 PROCEEDINGS 2 (10:00 a.m.) 3 CHIEF JUSTICE ROBERTS: Today's orders of the Court have been duly entered and 4 certified and filed with the clerk. 5 6 We will hear argument first this 7 morning in Case 20-828, the Federal Bureau of Investigation versus Fazaga. 8 9 Mr. Kneedler. ORAL ARGUMENT OF EDWIN S. KNEEDLER 10 11 ON BEHALF OF THE PETITIONERS 12 MR. KNEEDLER: Mr. Chief Justice, and 13 may it please the Court: 14 The state secrets privilege is firmly 15 grounded in the Constitution and the common law 16 and is critical to safequarding the national security. The Ninth Circuit did not disagree 17 18 with the district court's conclusion that the 19 information concerning the foreign intelligence 20 investigation at issue here was -- falls within 21 that privilege. The Ninth Circuit instead held that 2.2 23 Section 1806(f) of FISA displaces the state 24 secrets privilege and requires the district 25 court to adjudicate the merits of plaintiffs'

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1 challenge using the very information that is 2 covered by the privilege. 3 That novel interpretation cannot be squared with the text, context, or purpose of 4 Section 1806(f). That section's purpose is to 5 6 provide a special mechanism for the suppression 7 of evidence when the government seeks to use it against an aggrieved person in a judicial 8 9 proceeding or other proceeding. 10 The Ninth Circuit's first rationale 11 was that the government uses information against 12 a party when it invokes the state secrets privilege. But the government invokes the 13 14 privilege to prevent the use of information, not 15 to facilitate its use. 16 Indeed, in this case, the government 17 argued, and the district court agreed, that 18 because the information concerning the reasons, 19 the subjects, the sources and methods of this foreign intelligence investigation was so 20 21 central to the case that the case -- that the 2.2 First Amendment claim had to be dismissed. The Ninth Circuit's other rationale 23 24 was equally erroneous. It ruled that 25 plaintiffs' prayer for relief seeking an

1 injunction requiring the FBI to destroy or 2 return the information comes within 1806(f)'s reference to a motion or request to discover or 3 obtain surveillance application orders and 4 related materials. But that clause governs 5 6 discovery in aid of a suppression motion. Ιt 7 likewise does not displace the privilege. 8 At the very least, given the 9 constitutional and deep common law roots of the state secrets privilege, Section 1806 cannot be 10 11 read to -- to reflect a congressional intent 12 that would be required to abrogate the 13 privilege. 14 JUSTICE THOMAS: Mr. Kneedler, do you 15 place -- a -- few times in your opening remarks 16 you referred to this as a common law privilege. 17 Is that your argument, that it's based in common 18 law rather than inheres in executive power?

MR. KNEEDLER: No, we -- we think it's very strongly rooted in executive power. It -it -- it's also firmly rooted in the common law, and the -- the reflection of it being in the -in -- as part of the executive power goes all the way back to the founding. Some -- many of those early disputes were vis-a-vis Congress,

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1 not the courts. But the basic point of the need 2 for the executive to protect information pertaining to the nation's security as being 3 part of the presidential prerogative and the 4 executive branch necessity goes all the way back 5 6 to the founding. 7 But it's also recognized for very good 8 reasons, the same reasons, really, as a matter of federal common law. 9 10 JUSTICE THOMAS: One final question. 11 The Respondent seems to make quite a bit of the 12 -- two cases, Totten and Reynolds, and argues 13 that these two have separate doctrines with 14 respect to executive powers or to state secrets. 15 Do you think they're two separate 16 doctrines, or is it just one doctrine? 17 MR. KNEEDLER: We think, at bottom, 18 that it's just one doctrine. The -- the 19 question of the privilege in the first instance goes to the exclusion of the evidence --20 21 JUSTICE THOMAS: Yeah. 2.2 MR. KNEEDLER: -- from the proceeding. 23 But then the next question is, what happens if the evidence is excluded? And in that 24 25 situation, as we argued here, where the evidence

б

is so central, at least where the evidence is so 1 2 central to the case or its adjudication would risk disclosing information at the core of the 3 case, the case should be dismissed. 4 And, in fact, this Court's decision in 5 6 Tenet versus Doe rejected the claim or the 7 contention that -- that the doctrine of Totten was simply a contract doctrine. The Court said, 8 in fact, Totten was not so limited. 9 10 And the Court, quoting the -- the famous passage from Totten, said public policy 11 12 forbids the maintenance of any suit in a court of justice the trial of which would inevitably 13 lead to the disclosure of matters which the law 14 15 itself regards as confidential. 16 And in Reynolds itself, while the 17 Court was dealing with a privilege, it pointed out that Totten was a particularly clear case, 18 and it was not necessary to -- even to get into 19 20 the question of evidence because the -- the case concerned the existence of a -- of a spy 21 2.2 agreement that was central to the case. 23 But I think the way the -- the Court referred to Totten indicates that that was an 24 25 easy case that actually could be dismissed in

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8

1	the face of the complaint because the face of	
2	the complaint was alleging the existence that	
3	was of a secret item that was that was	
4	protected by the by the national security.	
5	But, if you get further along, maybe	
6	the face of the complaint doesn't say that, but,	
7	as the government's declaration in this case	
8	demonstrated, the adjudication of the case, if	
9	it went forward, would concern the sources and	
10	methods, et cetera, of the foreign intelligence	
11	investigation that that such that	
12	plaintiffs' First Amendment challenge could not	
13		
14	JUSTICE SOTOMAYOR: Mr. Kneedler	
15	MR. KNEEDLER: properly be	
16	adjudicated.	
17	JUSTICE THOMAS: Thank you.	
18	JUSTICE SOTOMAYOR: part of I'm	
19	sorry, Justice Thomas.	
20	JUSTICE THOMAS: No, I'm finished.	
21	JUSTICE SOTOMAYOR: Did you finish?	
22	Thank you.	
23	I'm a little confused. I thought the	
24	Ninth Circuit here basically only displaced the	
25	state secrets privilege with respect to the	

9

1 ability of the judge to determine whether, after 2 reviewing the information that was necessary, 3 that it thought necessary, that it should -then should determine whether the seizure was 4 lawful or unlawful under 1806. 5 I thought that there were separate 6 7 writings basically saying that if, at that point, it found the seizure unlawful, that then 8 9 it would consider disclosure only. I don't 10 think it said it would disclose if the seizure 11 was lawful. It said it would disclose only if 12 it's unlawful. 13 MR. KNEEDLER: But --14 JUSTICE SOTOMAYOR: I don't know where 15 in any of our jurisprudence we've ever suggested 16 that an in camera review by a judge threatened 17 national security. 18 MR. KNEEDLER: Our submission is not 19 that when the government invokes the state 20 secrets privilege that a court is altogether barred from looking at the -- at in camera 21 2.2 submission by the government to explain why the 23 information is privileged. 24 But the Ninth Circuit went beyond 25 that. It relied on 1806(f) to actually

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1 adjudicate the merits. It said the court should 2 consider all of the constitutional challenges 3 that -- that the plaintiffs are bringing. 4 JUSTICE SOTOMAYOR: I'm sorry. 1806 only permits on its terms a disclosure if the 5 6 information is seized unlawfully. So I don't 7 know where you would get that the Court was trying to do anything else but determine that. 8 And I think there were some of the 9 10 majority who wrote separately and said, if the 11 Court chooses to disclose, then -- but that's a 12 big if -- assuming that your seizure was unlawful, then it has to be disclosed. 13 14 I guess my bottom line is you seem to 15 be rendering 1810 a nullity by basically saying, 16 if I invoke state -- if I don't invoke 1806 by 17 move -- me, the government -- by moving to 18 suppress evidence, then -- and I tell you it's a 19 state secret, even if I seize these materials 20 unlawfully, the Petitioners have no claim under 21 1810. 2.2 Is that what you're saying? 23 MR. KNEEDLER: Well, several things. 24 1810 does not apply to the government. 25 1810 is only a suit for damages.

1	JUSTICE SOTOMAYOR: Exactly. So if
2	these
3	MR. KNEEDLER: So it cannot be the
4	basis for for a suit for an injunction.
5	JUSTICE SOTOMAYOR: Well, that's
6	assuming we read 1806 the way you do.
7	MR. KNEEDLER: No. No, I
8	JUSTICE SOTOMAYOR: But 1810
9	MR. KNEEDLER: I was making a point
10	
11	JUSTICE SOTOMAYOR: lets a
12	MR. KNEEDLER: about 18 about 18
13	
14	JUSTICE SOTOMAYOR: person
15	MR. KNEEDLER: Yes.
16	JUSTICE SOTOMAYOR: 1810 lets a
17	person who's been surveilled unlawfully sue for
18	actual damages, liquidated damages, punitive
19	damages, and reasonable attorneys' fees.
20	So assume, as I must, on the face of
21	the complaint that the plaintiffs might be able
22	to prove without your information that they have
23	standing because they've been unlawfully
24	surveilled, and they're suing for a violation of
25	1810.

12

1 You're claiming that they don't --2 they're not entitled to have the judge determine 3 whether they've been surveilled unlawfully or 4 not? MR. KNEEDLER: There -- there are two 5 6 points about 8 -- about Section 1806(f). One is 7 that it is simply a suppression mechanism, not a -- a -- a determination to --8 JUSTICE SOTOMAYOR: Do we need to 9 reach that if we -- if we just say that 1806 10 11 doesn't displace state secrets? Why would we 12 even reach that question? MR. KNEEDLER: Well, I -- state secret 13 14 -- because there's a threshold question. 15 1806(f) only applies -- it's triggered by the 16 government's intention or obvious purpose --17 JUSTICE SOTOMAYOR: No, sir. 18 MR. KNEEDLER: -- to use the 19 information. JUSTICE SOTOMAYOR: You -- you say 20 21 that the state secrets is not displaced by 22 1806(f). If we agree with that, why would we 23 reach that very knotty question, which, in your 24 brief, you asked us not to reach, of whether or 25 not a claim under 1810 would permit the judge to

1 look at the materials and say a seizure is 2 unlawful or not? MR. KNEEDLER: What we've -- what 3 we've suggested is not before the Court is the 4 question of dismissal as a remedy or as a 5 consequence of invocation of the state secrets 6 7 privilege. The other arguments we're making go to 8 the interpretation of 1806 itself. In terms of 9 10 when can it be invoked, in our view, it can be 11 invoked only when the government affirmatively 12 will use the information against an aggrieved 13 party. 14 CHIEF JUSTICE ROBERTS: Mr. Kneedler 15 16 MR. KNEEDLER: And the invocation of 17 18 CHIEF JUSTICE ROBERTS: -- how is that 19 -- how is that consistent -- I mean, I think I 20 understand the argument you made in this respect 21 in your brief, but I'd like to hear it 22 concisely. How is that consistent with the 23 24 language that any aggrieved person can use the 25 statute to discover or obtain applications or

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1 orders or other materials relating to the 2 electronic surveillance? That sounds like the other aggrieved person is using 1806(f). 3 MR. KNEEDLER: Yes, but in -- but we 4 submit in response, in the situation, just like 5 in an ordinary suppression situation, if the 6 7 government -- and -- and this is a statutory codification of what is, at bottom, a regular 8 9 suppression motion or -- or procedure. 10 When the government intends to 11 introduce evidence obtained or derived from 12 foreign intelligence surveillance, then the 13 aggrieved party against whom the evidence would 14 be used has an opportunity, just as in a -- a 15 normal suppression motion, to challenge the 16 validity of the surveillance or -- or other way 17 in which the government obtained the evidence. 18 So it has to be triggered first by the 19 government's use of the information. And when you -- when you read all -- all -- the preceding 20 21 sections and (f) together, we think that's very 2.2 clear. 23 Subsection (c) requires the government 24 to notify an aggrieved party when it intends to use information against him in a proceeding. 25

15

1 (e) provides for a motion to suppress that. And 2 then (f) is about how a suppression procedure 3 would operate, whether -- whether it -- it's the 4 result of the government's notification or a motion under (e) or, as a -- as a safeguard to 5 make sure this procedure is exclusive, any other 6 7 way in which a aggrieved party might seek to 8 challenge the government's use of the information. 9 10 And your reference to the language in 11 -- in (f) refers to a motion or request is made 12 by an aggrieved party to discover or obtain applications or orders or other materials 13 14 relating to the surveillance. 15 That is all information. It's classic 16 suppression. We want -- we want to see what 17 went -- what went into the warrant or what went 18 into the application to the FISC. So it's about 19 suppression --20 JUSTICE KAGAN: But why isn't --21 MR. KNEEDLER: -- not about a -- a 2.2 general discovery. 23 JUSTICE KAGAN: -- well, why isn't it about both? I mean, a significant part of it is 24 25 obviously about suppression, but there are also

16

1 these references to discovery. And why -- why 2 shouldn't we understand this provision as doing both things, as codifying a suppression 3 procedure and also codifying a discovery 4 procedure? Because it may be that plaintiffs in 5 a case like this one look to discover very 6 7 sensitive materials and Congress wanted a procedure in place to deal with those kinds of 8 9 discovery requests. 10 MR. KNEEDLER: Well, in a -- in a 11 civil case, if there is a discovery request and 12 the -- and the information is covered by the privilege, the mechanism for dealing with that 13 14 is the assertion of the state secrets privilege. 15 There is no automatic right in a civil 16 plaintiff to get discovery from the government 17 vis- α -vis a privilege. But in -- but where the 18 government actually comes forward and says we 19 want to use this information against you, then 20 21 JUSTICE KAGAN: But you're just --22 you're just excising words from this statute. I 23 mean, this -- this statute is about discovering, 24 obtaining, or suppressing evidence. That's --25 MR KNEEDLER: Well --

17

1 JUSTICE KAGAN: -- that's the (f) 2 language, right? 3 MR. KNEEDLER: Yes, but the -- but --JUSTICE KAGAN: Suppressing, 4 obtaining, or discovering, right? 5 6 MR. KNEEDLER: Yes, but --7 JUSTICE KAGAN: I mean, it just seems 8 as though Congress wanted to do two things here. It said we realize there are these 9 10 very sensitive materials, and maybe the 11 government will want to use them, and the person 12 will say: Oh, that's illegal, the government 13 That's one set of can't use them. 14 circumstances. 15 And the other set of circumstances is 16 maybe a plaintiff wants access to those 17 materials, and the government wants to say: No, 18 you can't have them. And that's another way in 19 which this statute says here are the procedures 20 you use when that occurs. 21 MR. KNEEDLER: I -- I think that that 2.2 phrasing has to be looked at in the context of -- of all of the -- all of the subsections 23 dealing with the government's intent to use. 24 25 And, indeed, Section 1806 as a whole,

1806 is termed -- is titled Use of Information. 1 2 Subsection (a) describes the uses to which the 3 government may put the evidence, that it can use it only in connection with minimization 4 procedures. 5 Subsection (b) says that it -- that it 6 7 can't be turned over for law enforcement purposes without a reservation by the Attorney 8 General. 9 10 (c) through (g) deal with the 11 government's use of the information against a 12 party in a -- in a narrow situation in a legal 13 proceeding. JUSTICE GORSUCH: Mr. Kneedler, I'm --14 15 I'm curious, in the list you gave the Chief 16 Justice of the various sets -- subsections that 17 you think support your -- your position, you 18 didn't list (a), and -- which talks about 19 preserving privileges that otherwise exist. And I'm just curious why the government didn't 20 21 invoke (a). There must be a reason. 2.2 MR. KNEEDLER: No, I think -- I think 23 (a) does cover that. I --24 JUSTICE GORSUCH: Oh, so let's throw 25 that in now too. Okay. All right.

1 MR. KNEEDLER: Well --2 JUSTICE GORSUCH: Okay. No. 3 MR. KNEEDLER: -- but -- but I think 4 it was --5 JUSTICE GORSUCH: No, I just wondered б if you had a -- had thought about it, and if 7 not, that's fine. MR. KNEEDLER: Yeah. No, I think it 8 also covers, like, attorney-client privilege --9 10 JUSTICE GORSUCH: Okay. MR. KNEEDLER: -- of the person being 11 12 surveilled. 13 JUSTICE GORSUCH: Okay. All right. 14 If you --15 MR. KNEEDLER: But --16 JUSTICE GORSUCH: I just wondered if 17 you had had a thought about it. MR. KNEEDLER: Yeah. No, I -- I --18 19 JUSTICE GORSUCH: And if you didn't, 20 that's fine. 21 MR. KNEEDLER: -- I -- I think that's 22 a further confirmation of the --JUSTICE GORSUCH: Okay, okay. I got 23 it. 24 25 "Otherwise use, " help me out with

20

1 that. The language is "enter into evidence, disclose, or otherwise use." 2 Why doesn't "otherwise use" cover --3 cover this circumstance? 4 MR. KNEEDLER: Well, I -- I think, 5 6 again, I'm -- I'm not sure if you're looking at 7 subsection (c) --JUSTICE GORSUCH: Yeah. 8 MR. KNEEDLER: -- or (e), but 9 10 subsection (c) says "whenever the government 11 intends to enter into evidence or otherwise use 12 or disclose." That --13 JUSTICE GORSUCH: So -- so it has to 14 be a circumstance, it seems to me, where the 15 government isn't putting the evidence on and it 16 isn't disclosing it to the other side, but it's 17 making use of the evidence in some other 18 fashion. 19 And, here, I think there's a pretty 20 good argument on the other side that the government is using it as a means to dismiss the 21 2.2 case without disclosing it. And -- and -- and 23 it is the existence of this secret evidence that will neither be put in evidence nor disclosed 24 that is the basis for the dismissal under 25

21

1 Reynolds and Totten in the government's view. 2 So why -- why doesn't that fit 3 perfectly? 4 MR. KNEEDLER: I -- the -- the -- the 5 language "enter" -- "enter into evidence or otherwise use or disclose" is intended, as we 6 7 understand it, to be a comprehensive description of any way in which the evidence might be --8 JUSTICE GORSUCH: But it isn't because 9 you've got "otherwise use." So it can't be that 10 11 "enter into evidence" and disclosure are 12 comprehensive. 13 MR. KNEEDLER: Well, you --14 JUSTICE GORSUCH: By definition, 15 Congress says they aren't and that there's an 16 other -- there's another way to use this 17 evidence that doesn't involve its disclosure. 18 MR. KNEEDLER: Well, you -- "use" 19 could also -- I mean, "enter into evidence" 20 suggests a formal proceeding, either a judicial proceeding or maybe a formal --21 2.2 JUSTICE GORSUCH: I think we have --23 MR. KNEEDLER: -- proceeding under the 24 25 JUSTICE GORSUCH: -- a pretty formal

22

1	proceeding here, Mr. Kneedler, don't you?
2	MR. KNEEDLER: Yeah. No, no, but my
3	my I think you were looking I
4	understood you to be looking for an explanation
5	for the word "use." And the explanation I'm
6	giving is that when when you don't have a
7	formal proceeding where you where you have
8	Rules of Evidence introducing something into
9	evidence, something received in evidence, but an
10	informal adjudication before an agency that does
11	not have that sort of system
12	JUSTICE GORSUCH: But, Mr. Kneedler,
13	we're talking
14	MR. KNEEDLER: you might use it
15	even if
16	JUSTICE GORSUCH: Mr. Kneedler,
17	we're talking about "otherwise use" in court,
18	and and, clearly, because we've got
19	disclosure and and entry into evidence.
20	Those things happen in court.
21	Why couldn't it be, again, that
22	"otherwise use" might include when the
23	government cites the existence of secret
24	evidence it's not willing to disclose or put in
25	evidence as a basis for dismissal of the

23

1 lawsuit? That's using the evidence as an 2 offensive weapon? 3 MR. KNEEDLER: Well, it -- again, we think, when the government invokes the state 4 secrets privilege, it is invoking it to keep it 5 out of the case. It's not -- what -- what --6 7 what the language is, is "to use against the person in the proceeding," but the -- but 8 assertion of the state secrets privilege 9 10 successfully --11 JUSTICE BARRETT: Mr. Kneedler --12 MR. KNEEDLER: -- keeps it out of the 13 proceeding. I'm sorry. 14 JUSTICE BARRETT: -- can I follow up 15 on Justice Gorsuch's question? I guess I had 16 understood -- and maybe I'm misunderstanding --17 your position to be that in 1806(c), "intends to 18 enter into evidence or otherwise use or 19 disclose," that it's not simply in a trial, but 20 it's "to otherwise use or disclose at any trial, 21 hearing, or other proceeding in or before any 2.2 court, department, officer, agency, regulatory 23 body, or other authority of the United States." 24 I had understood you to be saying, 25 well, in all of those situations, you might not

24

1 be introducing into evidence, but you might be 2 using the evidence, bringing it before a 3 regulatory body in some way that's not a 4 proceeding. Or am I misunderstanding --5 MR. KNEEDLER: No, that's precise --6 JUSTICE BARRETT: -- your argument? 7 MR. KNEEDLER: -- that's precisely our explanation. One --8 JUSTICE BARRETT: And I -- oh, go 9 10 ahead. 11 MR. KNEEDLER: I'm sorry. 12 JUSTICE BARRETT: Sorry. Go ahead. 13 MR. KNEEDLER: No, I was going to say 14 one other -- one other clue to this is the very 15 same phrase "intends to enter into" -- or "enter 16 into evidence or otherwise use or disclose" in 17 (c) is used in (e), which says "any person 18 against whom evidence obtained," et cetera, 19 "will be introduced or otherwise used or 20 disclosed, may file a motion to suppress." 21 So I think that links (c)'s language 2.2 about use to the motion to suppress, which is 23 the way in which, again, (e) uses the very same 24 language. And then (f) is about the procedures 25 for suppression. And (g) then says, if the

25

1	government if the district court determines
2	that the surveillance was not lawful, it shall,
3	in accordance with the requirements of law,
4	suppress the evidence which was unlawfully
5	obtained or otherwise grant the motion.
6	And "otherwise grant the motion" was
7	intended to leave open the question of whether
8	this Court's decision in Alderman would apply
9	under under FISA. So it
10	JUSTICE BARRETT: Thank you.
11	MR. KNEEDLER: it all hangs
12	together. And it this would be a surprising
13	way in which the government excuse me in
14	which court Congress would override, abrogate
15	the state secrets privilege in a sentence about
16	discovery in the middle of four five
17	subsections of this statute dealing pretty
18	clearly with the suppression of evidence.
19	And even when you look at 1806(f)
20	itself, it it it talks about discover or
21	obtain applications or orders or other materials
22	relating to the electronic surveillance. It's
23	not a it's not talking about evidence about
24	the plaintiffs' claim generally. It's focused
25	specifically on the things dealing with the

26

1 electronic surveillance.

2	JUSTICE ALITO: It
3	JUSTICE BARRETT: Mister
4	JUSTICE ALITO: it seems to me, Mr.
5	Kneedler, you have at least one textual argument
6	regarding the language in subsection (f), and
7	that is whether the prayer for relief
8	constitutes a motion or request.
9	But putting that aside, do you have
10	any other arguments about the literal meaning of
11	the language in subsection (f) on which the
12	Respondents rely? And if you don't, what are
13	the structural features that you rely on?
14	I understand your argument to be based
14	I understand your argument to be based
14 15	I understand your argument to be based mostly on structure and not on the literal
14 15 16	I understand your argument to be based mostly on structure and not on the literal language of of subsection (f). So two parts
14 15 16 17	I understand your argument to be based mostly on structure and not on the literal language of of subsection (f). So two parts to that. Any other strictly textual arguments?
14 15 16 17 18	I understand your argument to be based mostly on structure and not on the literal language of of subsection (f). So two parts to that. Any other strictly textual arguments? And, if not, which structural arguments are you
14 15 16 17 18 19	I understand your argument to be based mostly on structure and not on the literal language of of subsection (f). So two parts to that. Any other strictly textual arguments? And, if not, which structural arguments are you relying on or which anomalies would result if
14 15 16 17 18 19 20	I understand your argument to be based mostly on structure and not on the literal language of of subsection (f). So two parts to that. Any other strictly textual arguments? And, if not, which structural arguments are you relying on or which anomalies would result if their interpretation were adopted?
14 15 16 17 18 19 20 21	I understand your argument to be based mostly on structure and not on the literal language of of subsection (f). So two parts to that. Any other strictly textual arguments? And, if not, which structural arguments are you relying on or which anomalies would result if their interpretation were adopted? MR. KNEEDLER: Well, there are, I
14 15 16 17 18 19 20 21 22	I understand your argument to be based mostly on structure and not on the literal language of of subsection (f). So two parts to that. Any other strictly textual arguments? And, if not, which structural arguments are you relying on or which anomalies would result if their interpretation were adopted? MR. KNEEDLER: Well, there are, I think, very important textual arguments in the

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formal court proceedings, where -- where you 1 2 might file a discovery motion, but -- but 3 outside of formal proceedings, if you want to 4 obtain -- excuse me -- obtain the evidence effectively in the same way you would through 5 6 discovery, but what you were --7 JUSTICE ALITO: But the point is, literally, they want to obtain this information, 8 9 do they not? 10 MR. KNEEDLER: No, what -- what their 11 prayer for relief seeks is -- is actually 12 expungement of it, not -- not to receive it. 13 JUSTICE GORSUCH: I thought they made 14 very plain that they'd be very happy to get the 15 documents back, which I think would be to obtain 16 them. 17 MR. KNEEDLER: Right, but -- but if --18 JUSTICE GORSUCH: No? 19 MR. KNEEDLER: Yes, but that doesn't, 20 I think, really tie in with -- with what they --21 what their complaint was. But the more 2.2 fundamental point is 8 -- 1810 does not provide 23 for injunctive actions against the United 24 States. And the Privacy Act does not provide 25 for expungement.

1	But the structural point, we think, is
2	also very important. As I mentioned here, the
3	the entirety of 1806 is addressed to the
4	government's use of information derived from
5	foreign intelligence surveillance. That's the
б	title. (a) talks about use with minimization;
7	(b) talks about when it's going to be furnished
8	for law enforcement purposes. All of these
9	other provisions that that we're discussing
10	go to when the government tries to use it in the
11	proceedings.
12	JUSTICE ALITO: Okay. I've got that
13	point. This is they are taking some language
14	out of this and interpreting it to mean
15	something that is quite different from most of
16	what is addressed in 1806. I I've got that.
17	Any other structural features that you
18	rely on?
19	MR. KNEEDLER: Well, the the
20	language I don't know whether it's structural
21	or but the language in in (c) and
22	excuse me (c) and (e) that I referred to,
23	which ties "otherwise use" to suppression, and
24	then (f) being an implementation of the of
25	the method for suppression, and on on (g) ,

29

1	which talks about grant suppress the evidence
2	or otherwise grant the motion it's the same
3	motion to exclude the evidence from the
4	proceeding. The court can either suppress it
5	or, I think Congress hoped, do something else
6	besides besides turning over all the
7	information to the defendant as part of the
8	suppression. That's
9	CHIEF JUSTICE ROBERTS: Thank
10	MR. KNEEDLER: but but (g) talks
11	about suppression of evidence, not not
12	obtaining it.
13	CHIEF JUSTICE ROBERTS: Thank you, Mr.
14	Kneedler.
15	MR. KNEEDLER: I'm sorry.
16	CHIEF JUSTICE ROBERTS: Justice
17	Thomas, anything further?
18	JUSTICE THOMAS: Mr. Kneedler, you
19	were just one brief thing. You were in the
20	process when you were discussing subsection (c)
21	and the it's 1806(c), you the phrase
22	"against an aggrieved person," you were about to
23	tell us what you thought of that before you got
24	distracted.
25	MR. KNEEDLER: I think that's very

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important because it -- it -- it -- it shows 1 2 that it -- it has to be triggered by something 3 that the government is doing before you even get into this procedure, and -- and that's why the 4 word "suppress" is very important here. 5 6 If the government intends to use the 7 information against somebody, you can move to suppress it, or, if it's in a more informal 8 9 proceeding, you move to have it excluded or 10 don't consider it or whatever its -- whatever 11 its equivalent is. 12 Now there may be some civil 13 proceedings where -- where the evidence, you 14 know, maybe there's an argument it shouldn't 15 even be suppressed, but -- but, again, it's all 16 -- in 1978, it was all directed toward 17 suppression, where the government intends to use 18 information against the person in the 19 proceeding, whereas the state secrets privilege 20 keeps it out of the proceeding. 21 JUSTICE THOMAS: Thank you. 2.2 CHIEF JUSTICE ROBERTS: Justice 23 Breyer? JUSTICE BREYER: Well, assume you're 24 25 right that 180 -- that this particular statute

31

1 doesn't displace the state secret doctrine. 2 Still, there are many situations and different 3 kinds in which it might arise. 4 This is an unusual one. A plaintiff sues government officials and says: You have 5 6 unlawfully been wiretapping or surveying, whatever. Okay? 7 The government goes back and says: 8 9 Judge, we have a good reason for doing that 10 wiretapping, and we don't want to tell people 11 what it is. 12 Doesn't the judge -- shouldn't he 13 still look to see if they're right? I mean, 14 one, maybe they don't. Two, maybe it isn't that 15 important. Three, maybe how they got it, 16 legally or illegal, has something to do with 17 whether -- and, E, maybe there are different 18 ways in which you could disclose some but not 19 all. 20 I mean, wouldn't that be generally 21 true whether this applies or it doesn't apply? 2.2 MR. KNEEDLER: What you're describing, 23 I think, is the normal administration of the 24 state secrets privilege. 25 JUSTICE BREYER: Uh-huh.

1	MR KNEEDLER: If the government
2	invokes it, yes, we're saying the court can look
3	at it, but it can't use it as a vehicle to
4	decide the merits of the case.
5	JUSTICE BREYER: Why not? If well,
б	that's Justice Scalia's opinion. I mean, I
7	don't know.
8	MR. KNEEDLER: No, I
9	JUSTICE BREYER: Here, we have a
10	motion to dismiss, and all we have is that. And
11	before we decide whether the case should have
12	been dismissed or not dismissed, doesn't the
13	district judge and perhaps the court of appeals
14	and, for all I know, maybe us, have to look at
15	this information?
16	MR. KNEEDLER: Yeah, we we are
17	we are not we are not saying that in the
18	normal state secrets case the court, if if
19	necessary
20	JUSTICE BREYER: Could look at it.
21	MR. KNEEDLER: can't can't look
22	at the
23	JUSTICE BREYER: Okay. Then why don't
24	we just say this, say this case needn't be
25	dismissed. What should happen and and it

33

1 doesn't displace -- this 1806, it doesn't 2 displace anything that's relevant here, but we 3 should send it back, and the Ninth Circuit was 4 wrong, and the district court and maybe the 5 circuit too should go and look at the information if they deem that necessary in terms 6 of the relevance to the case and decide --7 MR. KNEEDLER: But --8 9 JUSTICE BREYER: -- its relevance, how 10 it was obtained, dah, dah, dah, dah, dah, dah, dah, 11 dah. 12 MR. KNEEDLER: But --13 JUSTICE BREYER: And then someone can 14 move, like the government --15 MR. KNEEDLER: -- the district court 16 _ _ 17 JUSTICE BREYER: -- hey, keep this 18 out, dismiss the case. 19 MR. KNEEDLER: -- the district court 20 -- the government -- the district court already 21 did that. The government moved to --2.2 JUSTICE BREYER: And did the Ninth 23 Circuit? MR. KNEEDLER: The Ninth Circuit did 24 25 not reach the dismissal question --

34

1	JUSTICE BREYER: No.
2	MR. KNEEDLER: because it concluded
3	
4	JUSTICE BREYER: So maybe they should
5	go back and say: Well, given the nature of this
6	information and how it was obtained, we will
7	review whether the district court was right to
8	dismiss it. Maybe we send it back to the
9	district court. A lot of things.
10	But, I mean
11	MR. KNEEDLER: No, we
12	JUSTICE BREYER: my point is there
13	should be a way to look at the information for
14	the court and decide what to do, not whether
15	this particular statute applies or not. I don't
16	know.
17	MR. KNEEDLER: Yeah. Yeah, we don't
18	think this statute in this point in context
19	JUSTICE BREYER: And that's the end of
20	the case. All we have to do is say that you're
21	out of it?
22	MR. KNEEDLER: No, that that I
23	mean, that's that's what we think the proper
24	disposition is.
25	JUSTICE BREYER: Okay.

1	MR. KNEEDLER: It should reject the
2	district court or the court court of
3	appeals' erroneous view of 1806(f) and that it
4	displaces the state secrets privilege and have
5	it go back to the Ninth Circuit to review the
6	district court's determination that the evidence
7	was covered by the privilege, which Respondent
8	did not challenge below, and then whether
9	dismissal is necessary because
10	JUSTICE BREYER: Yeah, because those
11	are separate questions.
12	MR. KNEEDLER: the evidence is so
13	central to the to the case.
14	JUSTICE BREYER: No more questions.
15	CHIEF JUSTICE ROBERTS: Okay. Justice
16	Alito, anything further?
17	Justice Sotomayor?
18	JUSTICE SOTOMAYOR: Can you answer my
19	question directly? 1810 gives any person who's
20	been unlawfully surveilled the right to seek
21	damages, punitive and otherwise, and attorneys'
22	fees.
23	If I'm hearing you right, your
24	arguments, you say that if a party has standing
25	and very few have standing because very few

36

1 people know they've been surveilled in the way these plaintiffs do. 2 I've had research done, and the only 3 plaintiffs that have standing that I found where 4 a court has found standing to bring an 1810 5 claim is the Fourth Circuit case. 6 7 So -- but I think what you're saying to me is, if those -- these plaintiffs, who 8 9 appear to have reasonable grounds to believe 10 they were surveilled, so they have standing, 11 that they can't proceed if you claim state 12 secrets. 13 They can't have a judge look at this evidence to determine whether it was lawful or 14 15 unlawful because you say, if a judge says it's 16 unlawful, and I don't know how, because if a 17 judge says it's unlawful, how are you injured? 18 All they have to do after that is prove their 19 damages. 20 MR. KNEEDLER: But -- first of all --21 JUSTICE SOTOMAYOR: You have no 2.2 defense once they've proven --23 MR. KNEEDLER: -- first of all, we don't believe that they have established 24 25 aggrieved party status. Whether -- whether --

37

1 whether, to what extent, or against whom 2 electronic surveillance was used has not been disclosed. And so --3 JUSTICE SOTOMAYOR: My bottom line is 4 you're saying a person who's been unlawfully 5 surveilled, if I -- if the government claims 6 7 secret, doesn't have recovery under 1810? MR. KNEEDLER: Unless it could be 8 9 proved in -- in some other way. Now, in the --10 in --11 JUSTICE SOTOMAYOR: They have proved 12 it some other way. MR. KNEEDLER: Well, you -- you could 13 14 -- you could have -- you -- you could have other 15 disclosures of -- of surveillance maybe in a 16 criminal prosecution or in some other way. 17 There was testimony by the -- the informant here 18 in a criminal proceeding that disclosed some 19 information that could have been the -- the basis for an 1810 proceeding. 20 21 But our bottom line is 1810 says 2.2 nothing about the state secrets privilege. Ιt is --23 24 JUSTICE SOTOMAYOR: But answer my 25 question. If they -- if -- you -- once you

1 claim state secret, you say there's no way to 2 look at the information to determine whether it 3 was unlawfully obtained? MR. KNEEDLER: If the requisites for 4 dismissal are satisfied, which means the court 5 agreeing that the information is privileged and 6 7 that the case cannot proceed because the information is so central. But there's nothing 8 9 in 1810 that suggests the displacement of the 10 state secrets privilege. 11 And, yes, if -- if -- if all those 12 requisites were shown, then, yes, the case would 13 not go forward. 14 CHIEF JUSTICE ROBERTS: Justice Kagan? 15 JUSTICE KAGAN: I'm going to follow up 16 on Justice Breyer's question, and I'm not sure I 17 understood the government's position. 18 Is the government's position now that 19 it would be wrong to dismiss on the pleadings 20 without any further inquiry into the nature of the materials and how they affect the lawsuit? 21 2.2 MR. KNEEDLER: No. I mean, the 23 government invoked the state secrets privilege. The government -- the district court found it 24 25 was privileged. The government argued that,

39

1 therefore, the First Amendment claim needs to be 2 dismissed because that claim is the invest -this foreign intelligence surveillance 3 investigation was actually based solely on their 4 First Amendment rights. 5 6 And to defend against that, it would 7 be necessary to look at the sources, methods, et cetera, of -- of that --8 9 JUSTICE KAGAN: Yes. So --MR. KNEEDLER: -- investigation. 10 11 JUSTICE KAGAN: -- I mean, I -- I -- I 12 think what Justice Breyer was suggesting is, in a case like this, I mean, maybe dismissal would 13 14 be the only appropriate remedy for the problem, 15 but maybe not. It depends, and it depends on 16 some investigation of the materials and how they 17 figure in the case and what harms they present and so forth. 18 19 And the Ninth Circuit seems to have 20 misunderstood that point. Maybe you contest 21 that point. But the Ninth Circuit seems to say 2.2 in a kind of old-fashioned Totten-like way, the government says state secrets and we just have 23 24 to dismiss it in the ordinary case, putting 25 aside the statute.

40

1 And I thought we made clear in General 2 Dynamics that that's only true in a small 3 category of cases where the subject matter of the lawsuit itself revealed a state secret but 4 that in cases like this -- in cases like this, 5 where asked -- it's an evidentiary privilege. 6 7 And, first, we're going to decide what kind of evidence should be excluded, and then 8 we're going to decide based on the -- the full 9 10 evidence of the case whether the suit can go 11 forward or not in all fairness to the parties. 12 And that's what it seems the Ninth Circuit didn't understand, and maybe you 13 14 contest, but I'm not sure you do. 15 MR. KNEEDLER: Well, no, no, I -- I 16 think the Ninth Circuit did get confused, but I 17 -- I want to make the point that the district court already did what you're describing. 18 19 The government invoked the state 20 secrets privilege. The district court held in the Ninth -- Respondents, and the Ninth Circuit 21 2.2 did not disagree, that -- that all the 23 information about the investigation was 24 privileged. 25 The district court then proceeded to

41

1	say, can this court can this case properly go
2	forward without that information? And said no,
3	both because that that's the very central
4	fact of the case, what was the basis or reason
5	for the investigation, and that can't be
б	adjudicated without delving into that
7	information or, at the very least, it would risk
8	disclosure of that. Therefore, that First
9	Amendment claim should be dismissed.
10	We and and that should have been
11	affirmed, in our view, by the Ninth Circuit.
12	But they didn't reach that question because they
13	they went through this other process of
14	saying 1806(f) displaces the state state
15	secrets privilege. Therefore, there's no basis
16	for dismissal under the state secrets privilege
17	at least at least as of now.
18	So we think it should go back, where
19	we think the Ninth Circuit should affirm the
20	district court's
21	JUSTICE KAGAN: But it should
22	MR. KNEEDLER: dismissal.
23	JUSTICE KAGAN: but your it
24	should you think it should affirm, but you're
25	saying the Ninth Circuit should reach that

42

1 question --2 MR. KNEEDLER: Yes. Yes. 3 JUSTICE KAGAN: -- and should decide 4 that question --5 MR. KNEEDLER: Yes. 6 JUSTICE KAGAN: -- as to whether all 7 of those conclusions about whether the nature of the evidence required dismissal was -- was 8 9 correct? 10 MR. KNEEDLER: Yes. 11 Justice CHIEF JUSTICE ROBERTS: 12 Gorsuch? 13 JUSTICE GORSUCH: I -- I'd like to 14 come at that same question from a different 15 angle. Here's where I'm stuck, Mr. Kneedler. 16 You know, Reynolds told us and General Dynamics 17 reaffirmed that the state secret privilege 18 allows the government to keep evidence away from a party but that generally the party is free to 19 20 prove its case using other evidence. 21 And so the government's really at a 2.2 choice. Does it want to disclose the evidence 23 and defend itself, or does it want to let a 24 judgment, a tort judgment, go ahead against it 25 and -- and keep -- keep national security safe?

1 Okay. And FISA was enacted against 2 that backdrop. And -- and if I were pressed, I would say FISA is perfectly consistent with that 3 understanding of state secrets. 4 The problem is that now the government 5 6 takes a very -- much stronger view of what state 7 secrets doctrine is and it imports a lot of the Totten stuff into it and says anytime we have a 8 9 secret, we're -- we're entitled to use that 10 evidence in our possession without telling you 11 anything about it as a basis for dismissing the 12 suit more or less as a matter of routine. 13 And instead of being put to the choice 14 of accepting a tort judgment but keeping a 15 secret, it now gets both. It gets to reject the 16 tort judgment and keep the secret. And in a --17 in a world in which the national security state is growing larger every day, that's quite a 18 19 power. And it seems like the Ninth Circuit 20 21 operated on this understanding of the state 2.2 secrets doctrine, which might be inconsistent 23 with FISA, I think probably is inconsistent with 24 FISA, and then we have to ask the question of 25 which displaces. But that question only arises

1 if we accept a mistaken view of the state 2 secrets doctrine. 3 And so I think your friends on the other side have made this point and suggested 4 why don't we just address the state secrets 5 problem and say the Ninth Circuit misunderstood 6 7 state secrets doctrine and reverse or remand on that basis, and then we don't have to get into 8 9 this question of a conflict which only arises on 10 a mistaken understanding of state secrets 11 doctrine. 12 What say you to that? MR. KNEEDLER: The Ninth Circuit did 13 14 not -- did not reach the -- the dismissal issue 15 in this case. 16 JUSTICE GORSUCH: I -- I -- I 17 understand that. 18 MR. KNEEDLER: But -- and -- and with 19 respect to their argument about 1806(f) 20 displacing, in their view, it displaces the 21 state secrets privilege with respect to the 2.2 exclusion of the evidence also, not just to the 23 -- not -- not just to the dismissal remedy. We think that is -- that that is 24 25 clearly wrong and that it -- what they're

45

1 basically saying --JUSTICE GORSUCH: Well, why wouldn't 2 this be an alternative basis for affirmance 3 and -- and for finding for the Respondent? 4 MR. KNEEDLER: Because it would change 5 6 the judgment. The Ninth Circuit's judgment 7 contemplated -- I mean, in two ways -- well -well, the opinion contemplated that if -- it --8 9 it assumed, with, frankly, I think maybe no 10 basis to assume, but anyway, that -- that the --11 that the entire case would be wrapped up in 12 terms of whether there was electronic surveillance, which --13 14 JUSTICE GORSUCH: That's clearly --15 MR. KNEEDLER: -- has not been the --16 JUSTICE GORSUCH: -- wrong. So why 17 not just say that and send it back, and we don't 18 have to get into this question about whether 19 FISA displaces state secrets, which begs the 20 question of what state secrets is? 21 MR. KNEEDLER: No, I -- I -- I think 2.2 it's the other way around, with all respect, 23 Justice Gorsuch. This is a -- this is a case in which the Ninth Circuit relied on a statutory 24 25 holding, which could have ramifications much

46

1 more -- much broader than this. 2 But -- but the -- the point about the court deciding it, it would require an 3 alteration of the judgment because the Ninth 4 Circuit contemplated that in proceedings on 5 remand, there could -- the state secrets 6 7 privilege could be invoked and maybe even the dismissal remedy would be available in the 8 district -- in the court of appeals' view on --9 10 on remand. 11 So that -- so it's not properly before 12 this Court without a -- without a 13 cross-petition. 14 CHIEF JUSTICE ROBERTS: Justice 15 Kavanaugh? 16 JUSTICE KAVANAUGH: Yeah, I have 17 several questions, Mr. Kneedler. 18 First, I just want to make sure, with 19 respect to Justice Gorsuch, is it your view that that issue's before us? 20 21 MR. KNEEDLER: I -- I don't think it is before you. I mean, it has been advanced as 22 23 an alternative ground for affirmance, but I think it would require an alteration of the 24 25 judgment. But, in any way -- in any event, it

47

1 does seem to us that the statutory question is 2 antecedent the way the court looked at it. 3 And if the court was wrong, then it should reach the question of dismissal. And --4 and I would think this Court would want the 5 Ninth Circuit's view of -- of looking at the 6 7 evidence is this a case where dismissal might be appropriate before it entered into the question 8 of -- of how dismissal can -- how and when 9 dismissal can follow a successful --10 11 JUSTICE KAVANAUGH: You've said this 12 _ _ MR. KNEEDLER: -- invocation of 13 14 privilege. 15 JUSTICE KAVANAUGH: -- but I just want 16 to nail it down. The district court looked at 17 the evidence, concluded that the state secrets 18 privilege applied and dismissed. 19 When -- when we send it back to the 20 Ninth Circuit, they will be able to review that, I think you said that --21 MR. KNEEDLER: Yes, that evidence is 2.2 in the record. It's available to -- to this 23 Court. It's -- there was a classified 24 25 declaration that was presented to the attorney

48

1 general, Attorney General Holder, when he invoked or asserted the state secrets privilege. 2 3 JUSTICE KAVANAUGH: So your -- that was your answer to Justice Breyer and Justice 4 Kagan, I think. So --5 6 MR. KNEEDLER: Yes. 7 JUSTICE KAVANAUGH: Okay. And then 8 picking up on Justice Thomas's first question, back to the statutory issue, he referred to the 9 10 constitutional status of the state secrets privilege, and I think -- I would be curious how 11 12 that plays into our statutory interpretation. 13 I think you said at one point we 14 shouldn't expect Congress to do a drive-by 15 incursion on the state secrets privilege through 16 this kind of language. But how does the constitutional -- potential constitutional 17 18 backdrop of the state secrets privilege play in? 19 MR. KNEEDLER: I think the -- I think 20 the Court should insist upon some sort of clear 21 statement or clear indication that Congress 2.2 intended to abrogate a privilege that is, in our 23 view, critical to the president's exercise of 24 his Article II powers. And -- and so there is, 25 I think, a strong presumption against reading a

1 phrase buried in a statute clearly otherwise 2 dealing with the suppression of evidence and --3 and a statute that is protective of the government's interests and protective of the 4 national security, to read it to abrogate a 5 privilege in a -- in a disposition of a case 6 7 that would undermine that. JUSTICE KAVANAUGH: Because there 8 9 would be a major Article II issue if Congress 10 tried to do that, but we don't need to get into 11 that. Is that --12 MR. KNEEDLER: That -- that's correct. 13 And the same thing would be true about a statute 14 that is said to be in derogation of the common 15 law. You --16 JUSTICE KAVANAUGH: Right. 17 MR. KNEEDLER: -- you wouldn't 18 naturally read a statute to overcome that. 19 JUSTICE KAVANAUGH: Last question. 20 The search claims are still alive regardless of 21 what we're talking about here, right? We're 2.2 talking about the religious claims? 23 MR. KNEEDLER: The -- the district court dismissed the Fourth Amendment claims. 24 We 25 did not -- we did not seek that. So, on appeal,

50

1 it's the religion claims because that goes to 2 the reasons and the scope of the investigation. 3 That's the core of the state secrets privilege. And the government decided that at 4 this point it was not going to assert the state 5 6 secrets privilege over the Fourth Amendment 7 claims. But down the road, it might if they can't be disposed of on -- on another basis. 8 9 JUSTICE KAVANAUGH: So are they still 10 alive in the district court then, the search 11 claims? 12 MR. KNEEDLER: Well, not the way the 13 district court disposed of it, but the -- but 14 the Ninth Circuit said it was wrong for the 15 district court to do that. So, if this case 16 goes back, the Ninth Circuit presumably would --17 would reach the same conclusion. 18 JUSTICE KAVANAUGH: Would the 19 government oppose the search claims continuing? MR. KNEEDLER: No, I -- I think that 20 was our -- our position on appeal. I -- I --21 2.2 JUSTICE KAVANAUGH: That's --MR. KNEEDLER: -- standing here, I 23 24 can't think of a reason why, but I -- you know, 25 I --

1 JUSTICE KAVANAUGH: I'm not binding 2 you for all time --3 MR. KNEEDLER: No, I -- I just --JUSTICE KAVANAUGH: -- but at this 4 5 moment. Yeah. 6 MR. KNEEDLER: -- I would just want to 7 make sure. 8 JUSTICE KAVANAUGH: Thank you. 9 CHIEF JUSTICE ROBERTS: Justice 10 Barrett? 11 JUSTICE BARRETT: Mr. Kneedler, do you 12 concede that 1806(f) could apply in a suit 13 brought against the government? Maybe under 14 1810, maybe under something else. 15 MR. KNEEDLER: No, 1810 could not be 16 brought against the government because of --17 JUSTICE BARRETT: I'm sorry. 18 MR. KNEEDLER: Yeah. Only damages. 19 But, if the government intended to introduce or 20 use the evidence in that case against -- against the civil plaintiff, it could be used, yes. But 21 it -- but it's not a free-floating discovery 2.2 23 device. JUSTICE BARRETT: No, I understand 24 25 it's not a free-floating discovery device. I'm

52

1 just -- I understand your position that it's, 2 you know, when the government wants to use or introduce evidence, that it -- that it applies 3 then, but the government may seek to do that 4 even if -- even if it's not a criminal 5 prosecution, for example, that the government 6 7 has brought? MR. KNEEDLER: Yes. If the government 8 -- if -- or if -- if a plaintiff brings a suit 9 10 against the government and the government 11 intends to use the information --12 JUSTICE BARRETT: Right. 13 MR. KNEEDLER: -- then 1806(f) would 14 be available. 15 JUSTICE BARRETT: So you're not taking 16 the position that Judge Bumatay took in the 17 Ninth Circuit, where he seemed to view it more 18 as confined to that circumstance? 19 MR. KNEEDLER: Yeah. No, we think it 20 -- it -- it applies irrespective of who brought 21 the proceeding. 2.2 JUSTICE BARRETT: Okay. MR. KNEEDLER: It's the use, 23 24 introduction into evidence, use, et cetera, 25 against the person. So the -- the -- the

1 against is what -- is what triggers it. 2 JUSTICE BARRETT: Thank you. 3 CHIEF JUSTICE ROBERTS: Thank you, Mr. 4 Kneedler. Ms. Carroll. 5 ORAL ARGUMENT OF CATHERINE M.A. CARROLL 6 7 ON BEHALF OF THE AGENT RESPONDENTS MS. CARROLL: Thank you, Mr. Chief 8 9 Justice, and may it please the Court: 10 I'd like to make two points. 11 First, Section 1806(f) provides only a 12 narrow mechanism for deciding the admissibility and discoverability of surveillance materials. 13 14 It does not speak at all to the fact that the 15 government's assertion of the state secrets 16 privilege deprives the individual defendants of 17 a valid defense, a defense that depends not on 18 the surveillance evidence that would be at issue 19 in a FISA proceeding but on the privileged 20 information about the targets, predicates, and 21 scope of the investigation. 2.2 Second, adjudicating the individual 23 defendants' liability in camera and ex parte 24 with no jury and no right to participate would 25 violate the Seventh Amendment and Due Process

54

1 Clause. 2 Even if the court of appeals' 3 interpretation were plausible, FISA does not compel it, and this Court should reject a 4 5 reading that raises those grave concerns. I welcome the Court's questions. 6 7 JUSTICE THOMAS: If we accept the 8 government's argument, though, we don't have to 9 get to that, right? 10 MS. CARROLL: Accepting the 11 government's argument that -- that FISA does not 12 displace the privilege --13 JUSTICE THOMAS: Yeah. MS. CARROLL: -- I think that that 14 15 resolves the -- the question because that was 16 the holding of the Ninth Circuit. The Ninth 17 Circuit instructed the district court to decide 18 in camera and ex parte whether the defendants 19 violated the constitutional and statutory provisions. That's the invocation --20 21 JUSTICE THOMAS: No, I'm -- actually, 2.2 I'm -- I may have confused matters. I mean the 23 constitutional avoidance argument. 24 MS. CARROLL: Correct. These are 25 constitutional issues that would arise if the

1	court of appeals' interpretation of FISA were
2	accepted. And I think it's largely undisputed
3	that under the court of appeals' reading you
4	would have an in camera ex parte adjudication
5	not just of the lawfulness of the surveillance
6	under FISA but of the ultimate liability on the
7	First Amendment and equal protection claims.
8	And I think it's undisputed that that
9	would violate the individual defendants' jury
10	trial rights and due process rights.
11	Now Mr. Kneedler, I think, has made
12	some good points that we agree with about the
13	language of 1806(f) regarding what a use is and
14	what a what a covered motion or request is.
15	But I think there's a just a
16	broader point to make about that statute, and
17	that is that the FISA, both 1806(f) and,
18	frankly, an 1810 claim, are completely
19	orthogonal to what is at issue in the First
20	Amendment and equal protection claims and the
21	defenses that are necessary to those claims.
22	As has been discussed, the result of
23	an 1806(f) procedure is limited to suppression
24	or admission of the fruits of the surveillance,
25	so the recordings, and potentially disclosure to

56

1 the aggrieved party of the application,

2 materials, and court orders.

None of that enables revelation of or 3 certainly not disclosure to my clients or the 4 ability to adjudicate the merits and defenses of 5 the religious discrimination claims, which, as I 6 7 said, don't turn on the surveillance evidence. They turn on who was or was not a target of 8 investigation, why were they under 9 10 investigation, what were the motivations and 11 predicates, and what was the degree of fit 12 between the methods used and legitimate counterterrorism goals, what were my clients' 13 individual motivations. 14

15 Those are all classic jury questions. 16 They are questions that are completely subject 17 to the privilege, as Judge Carney found, and 18 they -- they cannot come out, even in a limited 19 FISA proceeding, even if we thought that 1806 was available. So I think that that's kind of a 20 21 broader reason why the statute as a whole can't 2.2 be read to displace the privilege.

The -- the privilege here, as Mr.
Kneedler indicated, was properly asserted, and
the -- the court of appeals did not dispute

1	that.
2	In in making that determination,
3	the district court and he says he paid
4	especially close attention to the classified
5	materials, which the district court described as
б	providing comprehensive and detailed
7	information, informing the court as to the
8	sensitive and privileged facts.
9	And Judge Carney concluded from that
10	classified material that it provided essential
11	evidence to showing "that the purported dragnet
12	investigations were not indiscriminate schemes
13	to target Muslims but were properly predicated
14	and focused." That is the information that the
15	individual defendants need to be able to defend
16	themselves.
17	And this Court recognized in General
18	Dynamics, as the lower courts have uniformly
19	recognized, that it would be manifestly unfair
20	to allow claims to go on in that situation where
21	the government's assertion of the privilege
22	prevents an individual capacity defendant from
23	putting forward a defense that depends on that
24	privileged information, which, again, even if
25	there were some reason reading of FISA that

58

1 would allow a limited proceeding in camera to determine the lawfulness of the proceeding under 2 3 FISA, that has nothing to do with the privileged information and is not a mechanism for bringing 4 it out or allowing my clients to rely on it. 5 6 Just a -- a couple of quick points on 7 the text of 1806(f). Justice Gorsuch, you asked what could the phrase "otherwise use" mean if 8 9 we're not talking about entry into evidence. 10 And I agree with Mr. Kneedler that 11 that language certainly covers use of 12 information in a proceeding outside of a court. 13 But even in court, as Your Honor knows, there 14 are many ways to use information without 15 entering in -- into evidence. I think, in this 16 context, with surveillance information, the most 17 likely use would be to impeach a witness. But there are other ways --18 19 JUSTICE GORSUCH: Counsel, on that, 20 you'd agree, though, that there aren't many ways to use evidence in court without either entering 21 2.2 it into evidence or disclosing it, impeachment 23 being a good example of disclosing it? 24 MS. CARROLL: Impeachment, I think, is 25 also a use because you're not --

1	JUSTICE GORSUCH: It involves
2	disclosure, right?
3	MS. CARROLL: And I think refresh
4	JUSTICE GORSUCH: Can you think of
5	another example?
б	MS. CARROLL: refreshing a
7	witness's recollection, I think, is one.
8	JUSTICE GORSUCH: Can you think of
9	another example? Refreshing recollection,
10	that's a good one. That's a good one. Others?
11	MS. CARROLL: I think I think also,
12	in in a summary judgment proceeding, as the
13	language of Rule 56 indicates, that when you use
14	information in support of a summary judgment
15	motion, it is not officially being entered into
16	evidence. It has to be in form that could be
17	admissible into evidence, but it is not
18	JUSTICE GORSUCH: I guess my question,
19	though, for for for Mr. Kneedler and I
20	guess for you is, can you think of another use
21	in court that doesn't involve disclosure or
22	entry into evidence? Each of the examples
23	you've given me involves at least disclosure.
24	MS. CARROLL: I'm not actually sure
25	that you do disclose to the jury when you're

60

1 refreshing a witness's recollection. But, in 2 any event --3 JUSTICE GORSUCH: No, but you're disclosing it to the witness, right? 4 MS. CARROLL: You're disclosing it to 5 6 the witness, that -- that is true, and if it --7 if it's something that would help them to remember their recollection. But I think, 8 9 again, that that also brings in the fact that we 10 could be talking about proceedings that aren't 11 subject to the Rules of Evidence as well. 12 And I think, again, thinking back to the broader question, even if the Court thought 13 14 it were plausible to read that language more 15 capaciously, a reading of Section 1806(f) that 16 would allow, as the court of appeals thought, 17 adjudication not just of whether the privilege was properly asserted, not just of whether the 18 19 FISA surveillance was lawfully authorized and 20 conducted, but whether the individual defendants 21 are liable for damages on constitutional claims, 2.2 to have that adjudication conducted without a 23 jury in an ex parte procedure in which they have 24 no apparent right to participate would plainly 25 raise grave and I think undisputed

1 constitutional questions that -- that plainly 2 favor the government's equally and, we think, 3 more plausible interpretation of the statute. So we think the Ninth Circuit was 4 clearly wrong to hold that the privilege was 5 6 displaced by FISA. It should, as Mr. Kneedler 7 has suggested, instead have affirmed on the ground that Judge Carney relied on given that 8 9 the classified information indicated, as the 10 district court put it, the classified 11 information gives defendants a valid defense 12 that is no longer available because of the assertion of the privilege. 13 14 JUSTICE SOTOMAYOR: Counsel, why is it -- why is it that the government's reading helps 15 you? I thought the essence of your claim is 16 17 that an ex parte review hurts your client 18 because it doesn't give your clients an 19 opportunity to be a part of it, as the Seventh 20 Amendment, correct? 21 MS. CARROLL: That's correct. 2.2 JUSTICE SOTOMAYOR: So why does it 23 matter if the government is the one that's 24 moving to use the evidence? Why wouldn't your 25 agents be suffering the same deprivation?

61

1 MS. CARROLL: I think it -- I think it 2 would be, and I think that relates to the broader point I was making that even if 1806(f) 3 is invoked, regardless of how you think it could 4 be invoked, it doesn't get to the real problem 5 in this case, which is the unavailability of the 6 7 privileged information. To Your Honor's point, the 8 constitutional claims we've mentioned under the 9 10 Seventh Amendment and the Due Process Clause are 11 violations that would arise from the court of 12 appeals' -- may I finish my response? 13 CHIEF JUSTICE ROBERTS: Yes. 14 MS. CARROLL: From the court of 15 appeals's interpretation. And under the 16 avoidance canon, where this Court has before it 17 two plausible interpretations of the statute, 18 the avoidance canon calls for rejecting the 19 interpretation that would raise those grave 20 questions. 21 And we think the government's 2.2 interpretation, as recently adopted as well by 23 the Fourth Circuit, is certainly plausible and that the Ninth Circuit's interpretation is 24 25 certainly not more than plausible. And so the

63

1 avoidance canon would come into play there. 2 CHIEF JUSTICE ROBERTS: Thank you, Ms. 3 Carroll. Justice Thomas? 4 JUSTICE THOMAS: Nothing for me, 5 Chief. 6 7 CHIEF JUSTICE ROBERTS: All right. 8 Justice Sotomayor? Okay. Justice Gorsuch, anything further? 9 10 No? 11 Justice Barrett? Justice Barrett? 12 JUSTICE BARRETT: No. 13 CHIEF JUSTICE ROBERTS: Okay. Thank 14 you, counsel. 15 Mr. Arulanantham. 16 ORAL ARGUMENT OF AHILAN T. ARULANANTHAM 17 ON BEHALF OF RESPONDENTS FAZAGA, ET AL. 18 MR. ARULANANTHAM: Thank you, Mr. Chief Justice, and may it please the Court: 19 20 Defendants do not seek just to exclude secret information from this case. If that were 21 22 true, there would have been no need for them to 23 file a motion to dismiss our religion claims. Instead, what they seek is not just to 24 25 exclude information but also to dismiss it. And

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to be clear, as we've said repeatedly below, we will not seek discovery on the religion claims. We're prepared to proceed just on our own evidence. So this case is entirely about dismissal based on their need to use secret information to defend themselves. Now we recognize they have a legitimate interest in defending themselves, but neither Congress nor the common law permit dismissal on that basis. Congress struck a balance. FISA permits them to defend the suit using information that we will never see, but, as Justice Sotomayor had suggested earlier, it requires the court to review the information ex parte and in camera to determine if the surveillance was lawful. Section 1806, as Justice Gorsuch has already mentioned, applies not just when they seek to enter secret information into evidence but also when they otherwise use it. "Use" is very broad. It means to put into service, and "otherwise use" means, as Justice Gorsuch has been saying, in a different manner. So there

25 has to be a way different from just using or

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1 disclosing that's also covered by the statute. 2 Relying on information to win dismissal of a 3 lawsuit is obviously using that information. The government is also wrong on the 4 common law. As General Dynamics explained, the 5 6 Reynolds privilege is a privilege. The 7 privileged information is excluded, but the case goes on without it. And in a -- that's 150 8 9 years of case law on which Reynolds relies. In 10 both the U.S. and England, they can't point to a 11 single case where plaintiffs could make their 12 case without the privileged information and yet still the court ordered dismissal. 13 14 Like the widows in Reynolds itself, we 15 are entitled to that opportunity, whether under 16 FISA's rules or under the common law. 17 Lastly, I want to emphasize again, 18 Your Honors, that the court of appeals did not 19 hold that we can ever see privileged evidence. If the district court orders disclosure to us, 20 21 the government can reassert the privilege. 2.2 JUSTICE THOMAS: Counsel, can you give 23 me an example of a case where "used" was 24 employed the way you are suggesting? 25 MR. ARULANANTHAM: Yes, Your Honor.

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it.

In the firearms context, this Court has done it even without the word "otherwise" actually. So the Court has said, for example, in Bailey v. United States that just referring to a gun in the course of a criminal transaction is using I -- I think, also, that statute, again, is only "use." We have "otherwise use." So I think ours is even more -- more broad than the one that -- the examples that the government uses or Judge Bumatay's. And sticking on the same point, if I may, Your Honor, it is conceivable, I suppose, that there might be some other use you could come up with, although I don't think I've heard one yet that is not a -- a disclosure or enter into evidence, but that's not really the question, right?

19 The question is whether, when you 20 refer to a document in your motion and say we win and the other side loses their religion 21 2.2 claims because of those documents, is that also a use of it? And it just seems perfectly clear 23 24 that that must be true.

25 JUSTICE THOMAS: But it seems

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67

1	counterintuitive that you would say you use it
2	by excluding it.
3	MR. ARULANANTHAM: Yes, Your Honor.
4	And this goes to Justice Gorsuch's point also
5	about the relationship between the common law
б	and FISA. If they were only seeking to exclude
7	it, if they say we will keep it in our vault and
8	then let the chips fall where they may, I don't
9	think that would be a use.
10	But, when they then go further and say
11	we don't just want the common law traditional
12	rule, we want to now dismiss the religion
13	claims, even though you can make your case with
14	your own evidence, that transforms it from just
15	keeping it excluded into an affirmative use.
16	They're using it to effectuate the dismissal of
17	the religion claims.
18	So, at that point, it becomes a use.
19	And that's why I think it's also relevant that
20	the Ninth Circuit the decision below only
21	they said they only are finding it displaced
22	with respect to the dismissal remedy.
23	And and that's, I think, important
24	because it's it's when they move to dismiss
25	that it becomes a use and isn't merely exclusion

68

1 of the information at issue.

2 CHIEF JUSTICE ROBERTS: Well, you just said "the information at issue." 3 And what they're using, it seems to me, is the privilege. 4 They're not using the information. The whole 5 6 point of this statutory provision in 1806 is to 7 keep the information from being used. I think it makes more sense to talk about using the 8 9 privilege as opposed to a counterintuitive reading, at least, I guess this is their 10 11 argument, which -- which is that this is to --12 this proceeding is to prevent -- prevent the use 13 as opposed to using it. 14 Maybe a consequence of it is that the 15 privilege is established, and then that meant --16 means the information can't be used, but I don't 17 see how the -- not allowing the information to 18 be introduced is using the information. 19 MR. ARULANANTHAM: So I -- I don't 20 disagree with Your Honor there. I think, if all 21 they were doing was trying to keep it out and 2.2 nothing else, that would not be a use. 23 And I think it's because they argue 24 that the state secrets privilege actually 25 authorizes dismissal, unlike every other

69

1 privilege, even when the plaintiffs can move 2 forward without the privileged information, 3 that's why it becomes a use. But, to go back to the beginning of 4 your question, Mr. Chief Justice, I think to say 5 6 that they're using the privilege and not using 7 the information is a little odd. I think they are using the privilege, but the -- the motion 8 makes no sense without the references to the 9 secret information, without the, you know, 10 11 submission of actually two classified 12 declarations and a classified memorandum. So 13 they're using both. 14 And -- and I think that that is the 15 most natural meaning of the word "otherwise 16 use." It -- it -- I really can't imagine 17 how their motion would make any sense if it 18 didn't refer to the information. 19 So -- and once they're referring to 20 it, again, not just to keep it out but also to win dismissal of the religion claims, that's 21 2.2 what makes it into a use. 23 JUSTICE GORSUCH: Could -- could they 24 win dismissal by invoking a privilege if there were no evidence to support the invocation of 25

70

1 the privilege?

2 MR. ARULANANTHAM: Yeah, and we 3 struggled, Your Honor, we could not think of a -- a context in which that would arise. It 4 seems like they have to, in order to win, say 5 6 it's not just the fact that we're excluding the 7 information, it's also now that the -- the evidence, even though it's out of the case, is 8 9 actually not out of the case and is doing some 10 kind of work to come and dismiss claims, even 11 though the plaintiffs say that they can make 12 their case without it. 13 CHIEF JUSTICE ROBERTS: But it would

be a perfectly natural argument to say we think, because of the national security basis, this information cannot be used. I mean, that's how you'd say it before the judge. And then the judge is supposed to say: Well, you're using it, so you lose.

20 MR. ARULANANTHAM: Again, Your Honor, 21 I -- I really think, if that's all they were 22 saying, if they were saying because of the 23 national security implications, this information 24 has to go out of the case, then they would have 25 filed a motion in limine. They wouldn't have

71

1 filed it just in response to the complaint. 2 They would have waited for us to file 3 either a discovery motion, which, again, we're not going to file, or a motion for summary 4 judgment. And -- and then they'd file a motion 5 in limine. That would not be a use. 6 7 But, instead, what they've come -what they've done is they've said: On the 8 pleadings and declarations, only because we put 9 10 them in the case because we were concerned about 11 this possibility, really, because normally we 12 could have waited and filed the declarations later, just on the pleadings they've said the 13 14 whole -- the whole religion aspect of the case, 15 the first eight counts, have to be gone. 16 That's not just a result of the 17 exclusion of the evidence. So this is very 18 different from a case like most state secrets 19 cases where the plaintiffs need the information in order to receive. This is a case where we 20 21 have all the evidence that we need on these 2.2 religion claims just based on our own evidence, 23 and yet they're still saying the religion claims cannot go forward. 24

25 JUSTICE ALITO: Can you explain the

72

1	basis for the distinction that I understand you
2	to have just made? And perhaps I didn't
3	understand what you said, but what I thought you
4	said was that invoking the state secrets
5	privilege for the purpose of excluding evidence
6	is a use, but invoking the privilege for the
7	purpose of seeking dismissal is not a use.
8	MR. ARULANANTHAM: I must have
9	misspoken. I'm very sorry
10	JUSTICE ALITO: Oh.
11	MR. ARULANANTHAM: Your Honor.
12	That's exactly backwards. So if they just
13	invoke it to exclude the information
14	JUSTICE ALITO: I'm sorry. All right.
15	Backwards. I
16	MR. ARULANANTHAM: that is not a
17	use.
18	JUSTICE ALITO: What is the basis for
19	drawing that distinction? It seems that you're
20	you're if invoking the privilege is using
21	the privilege, wouldn't it be wouldn't you
22	wouldn't you be using the privilege in both of
23	those situations? Why why in one and not in
24	the other?
25	MR. ARULANANTHAM: I I think it's

1 using the privilege, but it's not using the 2 information. 3 JUSTICE ALITO: Why is it not using the information? 4 MR. ARULANANTHAM: Well, I -- I just 5 6 think, in normal discovery, normal privileges, 7 all the privileges, if -- and the -- these are 8 arguments that we agree with, that they're in their brief, if I'm in an attorney-client 9 10 situation and someone tries to get discovery and 11 we say, well, that information is privileged, we 12 want to keep it out of the case, you don't say 13 you're using the evidence. 14 But, if I then say: Oh, because you 15 have done that, now the underlying claim on 16 which you sought discovery has to be dismissed, 17 even though you say you don't need the evidence 18 and you don't want it anymore, or, actually, I 19 mean, like, we never wanted it, but anyway, you 20 know, you -- you don't want it. 21 Now you're doing something more than 2.2 just keeping it out of the case, and that --23 that -- that distinction is -- is critical. JUSTICE BREYER: So -- so, look, I 24 25 read Professor Donohue's brief from Georgetown,

74

1 and so that's very much in my mind. I thought 2 it was a good brief, and I think she seems to 3 know what she's talking about it certainly does. So I'm thinking, look, the thing is 4 that you don't want the case dismissed. Of 5 6 And Totten doesn't apply. And so they course. 7 shouldn't have had anything to do with that. 8 They should just look to Reynolds. 9 MR. ARULANANTHAM: That's right, Your 10 Honor. 11 JUSTICE BREYER: All right. Now give 12 -- that's what seems to be the issue and the problem. So do you really care whether the 13 14 government's right or wrong on the displacement 15 of the state secrets doctrine by 1806 or 16 whatever? 17 Suppose we said, no, it doesn't, but 18 it doesn't matter that it doesn't because, of 19 course, as quoting the government, the judges will look at this information, and if the 20 information -- it doesn't solve the problem --21 2.2 simply to say we don't want the information, 23 namely you, of course, you don't. Judge, look 24 But the government says: 25 at this. You will see that we both can't

75

1 introduce the information because it's just too 2 secret, it's unbelievable harm if we do, and it 3 proves beyond any doubt their case is wrong. What is the Court supposed to do then? 4 And there I don't know. And we have Justice 5 6 Scalia's opinion on that. And where I am at the 7 moment is I don't know, but I don't have to 8 decide that yet. 9 And it might not be those situations 10 that are the dilemma I just described until not 11 only the district court under the proper 12 standard but also the court of appeals looks at this and sees if there's some special reason to 13 14 dismiss the whole case or not. 15 No automatic dismissal. No automatic 16 no dismissal. I don't know. 17 All right. There you are. That's 18 where I am. Say anything you like. 19 MR. ARULANANTHAM: Thank you, Your 20 Three -- three thoughts I have about Honor. 21 that. 2.2 First, I just want to be clear on the 23 very first point you made, why do we even care 24 about FISA? We have two distinct paths, as we 25 see it, to success in -- in this Court.

1 The Court could hold that the state 2 secrets privilege does not authorize dismissals, 3 either at all, outside of contracting cases, or where the very subject matter is not secret, or 4 the narrower ground, which I think Your Honor 5 had discussed with Mr. Kneedler, which is on the 6 7 pleadings before any of the information has been looked at. And the district court looked at 8 9 declarations, not at the underlying information. 10 JUSTICE KAGAN: But Mr. Kneedler says 11 that that way of resolving the case would not 12 get to an affirmance. How would it get to an 13 affirmance? 14 MR. ARULANANTHAM: T -- T think it. 15 gets to an affirmance because, at the very end 16 of the court of appeals decision, the court says 17 it's adopting -- this is in the proceedings on 18 remand -- it says it's adopting the D.C. 19 Circuit's rule from In re Sealed Case that the government -- it's essentially Judge -- then 20 21 Judge Scalia's view in Molerio, the valid 2.2 defense rule saying you can't dismiss that on the pleadings. 23 You've got to look at the information 24 25 and see if the injustice that we're

77

1 contemplating here actually would happen. Is it 2 true that, actually, there was no bug in Mr. Fazaga's office when he was giving very, you 3 know, intensive religious instruction to his 4 congregants, or maybe it was warranted, you 5 6 know, meaning there was a warrant for it. 7 And -- and then, if that's true, and so this would be -- work a grave injustice on 8 9 the government, once we know that, if that's 10 actually true, then you dismiss the case. 11 That was what Judge -- then Judge 12 Scalia said in Molerio; the decision below adopts that through its affirmance of In re 13 14 Sealed Case. And so that's why I think it would 15 be an affirmance. 16 This Court could just say: We hold it 17 was too early, send it back, and I suppose you could say FISA displaces it or you -- you could 18 19 not -- or, excuse me, you could say FISA doesn't 20 displace it or you could say we don't have to 21 decide that, we vacate that, and just send back 2.2 the state secrets portion of the case, and that 23 would be an affirmance because it would lead you 24 to a very similar result, which is that, just as 25 Congress wanted, the Court is looking at the

1 evidence not just to decide if it should be 2 secret but if the government broke the law, if 3 the surveillance was actually unlawful. You know, that -- that, I think, is 4 the critical reason why, because of that last 5 part, it is an affirmance. 6 7 Now that being said -- and I still 8 want to come back to the other parts of your 9 question, Justice Breyer -- we only have to win 10 that it's a basis for -- an alternative basis 11 for affirmance if it's not in the question 12 presented, right? 13 I mean, if it's in the question, 14 because you can't determine if FISA displaces 15 the state secrets privilege without knowing what 16 the state secrets privilege does, then it seems 17 to me that the Court can address it that way as 18 well. 19 We said in our brief in opposition, in 20 compliance with this Court's rule, 15.2, we said 21 we are going to argue that under General 2.2 Dynamics, there is no dismissal remedy available 23 in this case. We also argued that in the court 24 of appeals, a slightly different theory, but we 25 preserved the claim.

1	And then they replied in their reply
2	on the merits, and they cited a long set of
3	court of appeals cases that they said affirmed
4	their rule. And now they've come and said it's
5	not in the question presented. It said that
6	I think it is in the question presented, and we
7	also gave notice of that, and they didn't say
8	that it was not.
9	So I do think it's an alternative
10	basis by which the an alternative path to
11	victory. But just to go back then to, Justice
12	Breyer, the second part of your question, and
13	not to abandon in any way our arguments on FISA,
14	I want to stress another part of our
15	displacement argument which has actually not
16	been discussed thus far today.
17	1806(f) says, if the attorney general
18	files a declaration that disclosure or an
19	adversary hearing would harm national security,
20	then it shall apply these ex parte in camera
21	procedures that we have been talking about to
22	determine if the surveillance was lawfully
23	authorized and conducted.
24	Now that standard, the attorney
25	general files a declaration that disclosure

80

1 would harm national security, is almost 2 identical to the standard in Reynolds that divulging the information could risk endangering 3 national security. 4 Substantively, the substantive rule is 5 almost identical. And the result of their view 6 7 is that the same attorney general declaration, because this declaration satisfies 1806(f), it 8 says disclosure of this information would 9 10 reasonably endanger national security, an 11 attorney general declaration in our case, gives 12 the government two options. 13 They can move to dismiss under state 14 secrets privilege, which is what they've done, 15 or they can go through 1806(f) and give the 16 information ex parte and in camera to the court 17 even though the statute says these are the 18 procedures that shall be applied, 19 notwithstanding any other law, whenever these conditions are met. 20 21 And so that is a powerful displacement 2.2 effect not for the state secrets privilege in 23 general but for the state secrets privilege as 24 applied to cases involving the domestic electronic surveillance of Americans. 25

1 And that's all that's issue in this 2 case, is just about giving the district court ex 3 parte in camera review, not -- not evidence, not -- not disclosure to us, because the decision 4 below says they can reassert the privilege if 5 there's a disclosure to us. 6 7 But just that -- that aspect, the ex parte in camera review for cases involving 8 domestic electronic surveillance, on that 9 aspect, 1806(f) occupies the field. It takes 10 away any other options, including outright 11 12 dismissal under what they say is the state 13 secrets privilege. 14 JUSTICE KAGAN: I -- I quess what 15 strikes me as wrong about that argument is that 16 if you look at 1806 and you just take a step 17 backward and you're not focusing on, like, what 18 does this word mean and what does that word 19 mean, but if you just take a step backward, what 1806 is all about is deciding whether 20 surveillance is legal. 21 2.2 And according to 1806, that matters 23 with respect to whether the government can use 24 it in the standard way that illegal evidence can't be used in a proceeding, and, for whatever 25

reason, Congress thought it also mattered with
 respect to discovery requests on the part of,
 let's say, a plaintiff.

4 And -- and that's a very different focus, you know, is -- was this -- was this 5 6 obtained illegally, because we think that that 7 question has something to do with whether we -it should be discoverable or whether it should 8 be usable in court from the normal state secrets 9 10 inquiry, which is, you know, illegal, legal, who 11 cares? It's just dangerous for national 12 security.

13 MR. ARULANANTHAM: Yes, Your Honor. I 14 agree that both -- both parts of that. I -- I 15 certainly agree that the purpose of it is to 16 determine if it was lawfully authorized and 17 conducted.

18 And while I -- I do think that's broader -- if you'll permit a slight 19 deviation -- I think it's broader than what the 20 21 individual defendants' counsel has suggested, 2.2 that it's only about Fourth Amendment. Ιt 23 certainly incorporates First Amendment, and FISA 24 was very much about the First Amendment and, in 25 part, the persecution of religious minorities

82

83

1 actually. 2 So I -- I think that it's broader than 3 that. But I agree it's just about determining whether the surveillance was lawful in whatever 4 context it may arise. 5 6 And I also agree, Your Honor, that 7 often, in the pre-FISA practice, the only inquiry in the state secrets privilege analysis 8 was whether or not the information should be 9 10 secret. 11 But there were also cases where the 12 courts were not simply interested in whether or 13 not it was secret. They were also interested in 14 whether the Fourth Amendment was violated here. 15 We have cited a few of those in our brief, 16 Jabara v. Kelly. There's also a dissent in 17 Halkin v. Helms from the rehearing en banc where 18 the judge makes this argument. 19 So I don't think it's implausible that 20 the -- Congress might have looked -- seeing a 21 backdrop of abuses identified in the Church 2.2 Committee, surveillance of Vietnam War 23 protestors and MLK and even a justice of this 24 court, I believe, they -- they would have said 25 we don't just want to know whether this is

1 secret. We also want to know did you break the 2 law. 3 And so I don't think it's that implausible to believe that they used the same 4 substantive standard but said we want to bring 5 6 the courts in to decide if the government was 7 acting illegally. JUSTICE ALITO: What is your answer to 8 9 Ms. Carroll's argument about the rights of -- of 10 her clients? Suppose that, in conducting this 11 ex parte in camera review, the judge says this 12 was illegal because it was based on religion. 13 Does that -- is that the end of the case for her clients? 14 15 MR. ARULANANTHAM: I don't think it's 16 the end of the case. But --17 JUSTICE ALITO: Well, then can they 18 have a trial? 19 MR. ARULANANTHAM: I mean, on that 20 question, I think, if the Court finds that, then 21 you're not going to be able to give that same 22 question to the jury. We acknowledged that at 23 _ _ JUSTICE ALITO: Well, isn't that a 24 25 violation of -- of their due process rights?

1 MR. ARULANANTHAM: So we have 2 deliberately not said in our briefing whether we 3 think that's true or not and instead left it --JUSTICE ALITO: Well, that's why I'm 4 asking you now. How can that possibly be 5 consistent with -- with due process? 6 7 MR. ARULANANTHAM: Well, I think --JUSTICE ALITO: I mean, that's --8 9 that's the Star Chamber. I mean, a judge in 10 camera ex parte, without any -- not -- not only 11 without the participants -- the presence of the 12 defendants, without the presence of their 13 attorneys, determines that they violated the --14 the plaintiffs' First Amendment rights. 15 MR. ARULANANTHAM: So I want to say, 16 after I answer your question, why I think it's 17 not a reason to construe the statute, so if you'll -- but -- but, to answer your question 18 19 directly, I think the -- the tricky issue for a 20 court, if they were actually considering this constitutional question, it would have to first 21 2.2 consider what about the mirror image, because, 23 obviously, the same exact thing that you have said is true of us. 24

25 And if it's true that they have

86

1 engaged in entirely lawful conduct, it sure 2 sounds bad for the reasons Your Honor has said, 3 but if they've engaged in unlawful conduct and you're going to dismiss the claim without us 4 having any opportunity to have a jury trial and 5 6 all the rest of it and due process as well, it 7 is -- and as -- we have not been able to understand why it's any --8 JUSTICE ALITO: Well, do you think 9 10 that every --11 MR. ARULANANTHAM: -- different. Tt's 12 exactly the mirror problem. JUSTICE ALITO: -- do you think that 13 14 everybody who is aggrieved and would like to 15 bring suit has a due process right to bring that 16 suit and recover? 17 MR. ARULANANTHAM: No, but this is a 18 different situation. For both sides, we're 19 hypothesizing -- and this gets to my reasons for 20 believing it's premature -- we're hypothesizing 21 we've beaten summary judgment, both sides, 2.2 right? Both sides have beaten summary judgment. 23 We've shown standing. There's no sovereign 24 immunity problem. All the other doctrines, 25 Iqbal, et cetera. And yet, still here we are.

1 And in -- in that situation, I think it's the 2 mirror image problem. 3 The other thing I would say, Your 4 Honor --JUSTICE ALITO: Well, it's not -- I 5 6 don't see how it can be a mirror image problem 7 because the due process rights of potential plaintiffs are not the same as the due process 8 9 rights of -- of potential defendants. 10 But, beyond that, if this is the 11 conclusion -- if this is the result to which 12 your argument leads, isn't that a powerful 13 reason for interpreting the statutory language 14 differently? 15 MR. ARULANANTHAM: Right. Thank you, 16 Your Honor. So I think it's not for two 17 reasons. You know, the -- the -- the main 18 reason is because, if you look at Section 19 1806(q), which is the provision which authorizes relief in the case, once the district court has 20 21 determined that the surveillance either was or 2.2 was not lawfully authorized and conducted, it 23 says you suppress the evidence or otherwise grant the motion in accordance with the 24 25 requirements of law.

1 And what read -- we read that to mean 2 that if we have an 1806(f) process, whether on 3 summary judgment or however it comes up, and then the court finds the surveillance is 4 unlawful, they now have the right to say at that 5 point this would violate the Seventh Amendment 6 7 to bind us to that. And, therefore, it would not be in 8

9 accordance with the requirements of law, and 10 then the issue can be litigated. And I should 11 say, when I say the issue would be litigated, 12 the Bivens litigation hasn't happened. The 1810 -- our 1810 claim in this case, which no 13 14 one has moved to dismiss, although you heard Mr. 15 Kneedler say they might move to dismiss it, 16 right, that claim still remains to be litigated. 17 And the defendants may well be out of 18 this case long before we get to this spot. Or, 19 if there really wasn't a warrant and they were 20 spying on Mr. Abdelrahim while he was leading 21 his housemates in prayer without a warrant, then 2.2 they might lose on summary judgment, and then 23 the case will be gone.

24 So I think it would be a mistake to 25 construe the statute very narrowly and, on their

89

1	view, basically destroy the ability to litigate
2	1810 claims because of this possibility which
3	is, you know, very, very unlikely to happen.
4	JUSTICE ALITO: What about this the
5	the "grant the motion in accordance with law"
6	language that you just mentioned? In "in
7	accordance with law," does that include in
8	accordance with the state secrets privilege?
9	MR. ARULANANTHAM: It actually does,
10	Your Honor. On the relief side, it does. And
11	that's consistent with the Ninth Circuit's
12	holding as to what would happen well,
13	actually, I'm sorry. The Ninth Circuit had, I
14	think, two reasons you know, let me step back
15	a second.
16	The Ninth Circuit said we think the
17	privilege is still available here and we haven't
18	required disclosure to the plaintiffs. And I
19	think that is consistent with FISA, both
20	1806(f), and when we're going through the
21	process of deciding whether or not the
22	information was lawfully authorized or
23	conducted, and on the relief side.
24	It's consistent on the (f) part
25	because the statute does not say that the

90

district court "shall" disclose to the plaintiffs if needed to -- to determine the lawfulness of surveillance. It says you "may disclose to the plaintiffs subject to security procedures and protective orders only if needed to determine the lawfulness of the surveillance."

And what that means is that the 8 9 government has the ability to argue in the extremely unlikely event -- it has never 10 11 happened -- that -- that -- it happened once and 12 then it got reversed on appeal. You know, the -- the -- the -- a district court ordered 13 a disclosure when determining the legality of 14 15 surveillance to the plaintiffs, right? 16 In the extraordinarily unlikely event 17 that that happens, the government will have the 18 ability to come in and say no, even with 19 protective orders, even with whatever else you 20 want to do with your SCIF or whatever it is, 21 there is no way to protect national security to 2.2 give this information to them. And that is, I 23 think, the -- the state secrets privilege. That's the same argument. 24

25 JUSTICE BARRETT: And -- and to kind

91

1 of go back, like Justice Kagan was saying, the 2 state secrets privilege says, lawfully or 3 unlawfully obtained, we don't care because it would harm national security. So you're 4 conceding that, even after you run through the 5 6 gamut of 1806(f) and conclude, listen, this was 7 unlawfully obtained, you're conceding that the state secrets privilege could kick in and still 8 9 keep it out? 10 MR. ARULANANTHAM: At the relief 11 stage, so it -- it doesn't -- the main thing it 12 does is -- what -- what FISA does is it brings 13 the court into the picture where they can see 14 the evidence. 15 But -- but, when the portions of it 16 that require disclosure to plaintiffs, that has 17 "may" in it. And so that's why it's a -- it's a 18 -- I -- I think it's perfectly consistent with 19 the state secrets privilege at common law, but I 20 just want to make sure clearly that I'm understanding -- that I'm answering your 21 2.2 question. You're looking like I'm not answering 23 your question. 24 JUSTICE BARRETT: No, I'm just trying 25 to follow how this actually would play out.

1	MR. ARULANANTHAM: Yeah. Sure. So
2	you have to give the information to the court.
3	And that's what that's what Congress wanted.
4	The courts get to find out if the government is
5	breaking the law or not.
6	But, if you ever want to disclose to
7	the plaintiffs to go beyond just the court and
8	now go to us and to the public, now the
9	government has the ability to argue that that
10	that's not permitted in the
11	JUSTICE BARRETT: So you would be
12	MR. ARULANANTHAM: interests of
13	national security.
14	JUSTICE BARRETT: deprived of your
15	opportunity to get relief?
16	MR. ARULANANTHAM: Yes. In our in
17	our yes. And in our
18	JUSTICE BARRETT: So you would lose?
19	Like, you couldn't it was unlawfully
20	obtained, but because it was protected by the
21	state secrets privilege, you can't recover?
22	MR. ARULANANTHAM: No well, I mean,
23	I think that's possible in some cases. In our
24	particular case, we said the the prayer
25	for relief clearly says we want the evidence

1 the unlawful -- the information unlawfully 2 obtained to be destroyed or returned. That's 3 what we said.

So I think we have made a request to 4 obtain, absolutely, because we said "return." 5 6 That's one of the things that we asked for. But 7 we said "destroyed or returned," and that means 8 that -- I mean, what we would argue in the 9 district court if we ever got to this spot was 10 that, look, even if they say they can't show it 11 to everyone, they still need to destroy it.

12 And that would make a difference. Т mean, then our clients would at least still know 13 14 that the government, whatever records they got 15 from them because, you know, Mr. Fazaga was 16 leading his congregation in prayer or Mr. Malik 17 decided as a young man to embrace his faith, 18 they would at least know then that got burned 19 because it wasn't right. It wasn't right to spy 20 on them because you thought that they were 21 dangerous just because they were embracing their 2.2 faith.

And so it wouldn't be everything, you know, perhaps that we want, but it's well -well within the scope of the complaint, and it

93

would also preserve the government's state

2	secrets privilege.
3	That being said, I feel all of this
4	we're so far ahead of it, Right? All the Court
5	would have to decide now in either of the two
6	paths is that FISA displaces the state secrets
7	privilege when the government is seeking to use
8	information, as it is here. And you wouldn't
9	even have to decide this question about request
10	to obtain. You could just decide they are using
11	it. They're otherwise using it. And because of
12	that, they can keep the information in their
13	vault, but they can't win dismissal of our
14	religion claims. We get our day in court on the
15	religion claims.
16	Or the Court could decide it was
17	premature to dismiss I think, as Justice
18	Kagan perhaps was suggesting, you could decide
19	it's premature to dismiss on state secrets at
20	this stage
21	JUSTICE KAVANAUGH: Where does Article
22	II fit into your analysis? Because Judge
23	Bumatay and then Judge Diaz on the Fourth
24	Circuit both started with an Article II backdrop
25	and the roots of the state secrets privilege and

95

1 said, in interpreting 1806(f), we think this is 2 the better reading as a matter of text, but we also think this would be a very odd way for 3 Congress to narrow, I guess, the state secrets 4 privilege, which is so foundational to the 5 6 national security of the country. 7 MR. ARULANANTHAM: All right, so, the bottom-line answer -- and I have lots of 8 9 thoughts on the doctrine that they were 10 discussing -- but the bottom-line answer is, 11 when we're not talking about an area of 12 exclusive and conclusive executive power --13 JUSTICE KAVANAUGH: Well, that's --14 I'm going to stop you right there, sorry --15 that's debatable --16 MR. ARULANANTHAM: Well --17 JUSTICE KAVANAUGH: -- right? And 18 that's the issue that hopefully we never have to 19 decide. 20 MR. ARULANANTHAM: So --21 JUSTICE KAVANAUGH: But -- but I 2.2 think, right now, that's -- that's a question. 23 And so you avoid deciding that question, which has a lot of ramifications, and I understand 24 25 exactly what you're saying on the Jackson

1 framework there, and we avoid deciding that by 2 not interpreting the statute to trigger that 3 question.

MR. ARULANANTHAM: So, if -- if we're 4 on the same page on the standard, right, then I 5 would say it's limited to the domestic 6 7 electronic surveillance of U.S. persons, and, I mean, this Court in Keith invited Congress to 8 9 legislate in that area, right?

10 And also, equally important, Your 11 Honor, only ex parte in camera review, and that 12 second element is also important. If you look 13 at Nixon, for example, look at the last footnote 14 in Nixon. It's Footnote 21 on page 716. What 15 the Court says is we expect the district court 16 is now going to have to go through -- this is 17 high-level communications between the president 18 and his advisors -- and excise the information 19 that may be privileged under Reynolds. 20 JUSTICE KAVANAUGH: Nixon also, as you 21 know well, distinguished national security 2.2 information, so that would not be -- that would 23 be different, at least if it's presidential

communications, and I think that's --

24

25 MR. ARULANANTHAM: Right, but -- but,

1	respectfully, Your Honor, I'm I'm making a
2	narrow point here just about ex parte review.
3	JUSTICE KAVANAUGH: Yeah.
4	MR. ARULANANTHAM: That footnote cites
5	Reynolds. It doesn't just cite it. It says we
6	will have to the district court should and
7	it says you should cooperate with government
8	counsel to go through the information that may
9	need to be excised under Reynolds.
10	And so what I think that the the
11	Court was imagining was the the president's
12	communication about national security with his
13	high-level advisors may not belong anywhere out
14	in the New York Times or anywhere else, but the
15	Court can look at it to determine if and
16	and exclude it in the course of litigation,
17	which is important to determine if the president
18	broke the law.
19	And that's all FISA did here. That's
20	why I think the the the scope of the
21	displacement here is very narrow. It's just
22	limited to ex parte in camera review by courts.
23	And that's why I think there's not even a
24	serious Article II question here.
25	I mean, this is

98

1	JUSTICE KAVANAUGH: One other
2	question. Sorry.
3	MR. ARULANANTHAM: Sure. No.
4	JUSTICE KAVANAUGH: I appreciate all
5	that explanation, which is helpful.
б	One other question, which is, are you
7	seeking to narrow Totten on your state secrets
8	argument, or are you taking it as written?
9	MR. ARULANANTHAM: We we take it
10	exactly as General Dynamics described it.
11	JUSTICE KAVANAUGH: Okay. Not as
12	written?
13	MR. ARULANANTHAM: And in our view,
14	also as Tenet described it, yes, Your Honor.
15	JUSTICE KAVANAUGH: Yeah. Yeah.
16	MR. ARULANANTHAM: And I know you had
17	asked I can't remember, I think it was Mr.
18	Kneedler the about the passage in Totten
19	where they say: Look, judicial I can't
20	remember the exact language, but it's something
21	like review of of any matter that could give
22	rise to the divulging of secret information, you
23	know, that passage, and I would just point to
24	the fact this is the same passage that's picked
25	up in Tenet and that the government relies on to

1 say it's -- it's broad. 2 The very next paragraph there, the 3 Court says: As a -- I'm talking about Totten now -- as a general matter, we can say that 4 suits about matters which are sort of inherently 5 secret cannot be maintained. And what they cite 6 7 is marital communication, attorney-client communication, all of these things, regular 8 9 privilege law. 10 JUSTICE KAVANAUGH: Well --11 MR. ARULANANTHAM: It's -- that part 12 of the case is actually not resting on a national security rationale. It's just saying, 13 14 look, if I want to sue my wife over a promise 15 that she made in the kitchen or something, you 16 know, that's going to be -- that's going to be barred. And the court can figure that out very 17 18 early. You don't need to wait for discovery to 19 figure out that, obviously, that suit is barred. JUSTICE KAVANAUGH: To pick up Justice 20 21 Breyer's question earlier, though, it doesn't 2.2 seem like we need to get into that. 23 If we conclude -- if we agree with the government -- I know you don't want us to -- but 24 25 if we agree with the government on the 1806(f)

1 issue and send it back to the Ninth Circuit, as 2 Justice Breyer and Justice Kagan described and I mentioned earlier, all these kinds of issues can 3 be fleshed out and come back to us where that's 4 the central focus of the case. 5 I feel like we'd be doing a drive-by 6 7 in this case on a massively important issue if we get into that. 8 9 MR. ARULANANTHAM: Yeah, I -- I agree, 10 Your Honor, that the narrowest ruling in our 11 favor probably in the whole case, yeah, I mean, 12 I think the "otherwise use" -- maybe I'm the 13 only one, or maybe not, I don't know, but I -- I 14 -- I think -- I think "otherwise use" is very 15 plausible as -- as a ground of statutory 16 interpretation for FISA. 17 You don't need to get into the 18 question, Justice Sotomayor, you had asked about 19 whether plaintiffs can use it in discovery if 20 you find the government is using it here, right? 21 But -- but the narrowest ground, perhaps even 2.2 narrower than that, would just be to say it was 23 wrong to dismiss on the pleadings in this case. 24 We know the very subject matter of this case is not a state secret. The government 25

101

1	said this person worked for them. They said
2	they expect the majority of the audio and video
3	will be available for the litigation below. And
4	the district court still dismissed the whole
5	thing without ever looking to see whether
б	JUSTICE KAVANAUGH: Well, the I'm
7	sorry to interrupt. The Ninth Circuit hasn't
8	really passed on that yet.
9	MR. ARULANANTHAM: They didn't. They
10	didn't.
11	JUSTICE KAVANAUGH: So why would we
12	pass on it before the Ninth Circuit did? That
13	would seem out of order to me.
14	MR. ARULANANTHAM: Well, yes, I I
15	it's true our argument that the dismissal
16	was premature, that was our primary argument. I
17	guess the issue is that I read their brief
18	perhaps you can ask them but I I I read
19	their brief to be arguing for an affirmance, you
20	know, going underneath, an affirmance of the
21	district court order. And you cannot affirm the
22	district court order. But maybe that's wrong.
23	Maybe that's not what they're saying.
24	JUSTICE KAVANAUGH: Well, I I guess
25	I heard a little different from Mr. Kneedler,

102

1 but he can get back into that on rebuttal. 2 MR. ARULANANTHAM: Yes, but -- but --3 but I think the Court could also say we disagree on FISA, but we want you, court of appeals, to 4 address the prematurity argument, and state 5 6 secrets is nowhere here. 7 I think I would -- I would say, if --8 if Your Honors find that the question presented 9 does not include state secrets at all, then that 10 would also mean you shouldn't touch the valid 11 defense issues that are in the -- that are in 12 the case as well. 13 JUSTICE GORSUCH: I'd like your help 14 with a related problem, and -- and that is, you 15 know, asking this question that we're struggling 16 with about 1806's consistency with state 17 secrets, it raises a question what state secrets 18 is. 19 And in 1978, when the Church Committee 20 issued -- after Church Committee issued its 21 report and Congress adopted FISA, Reynolds was 2.2 on the books, and that was pretty much it, and 23 Totten was over there having to do with spy --24 contracts with spies. And so -- so the state secrets doctrine pretty clearly meant you 25

103

1 exclude the evidence and the case continues. 2 It's only since then in relatively recent times that the government has asserted 3 the Totten bar really kicks in in a lot of cases 4 and that lower courts have run with that ball. 5 So asking what the state secrets means 6 7 today and whether that implicates FISA seems to be a different question. 8 9 MR. ARULANANTHAM: Yes, I completely agree, Your Honor. I would note that in their 10 11 long string cite footnote in their reply brief, 12 where they say here is all the court of appeals 13 cases, and leaving aside that most of those 14 cases are about where the plaintiff can't make 15 their case, but, even leaving that aside, the 16 string cite ends before 1978. You know, it ends 17 around 1980, I think. 18 I mean, there's -- there's -- even in 19 all of the cases that they have cited, they 20 don't prove that dismissal was a contemplated 21 remedy under state secrets outside the 2.2 government contracting context in 1978. 23 And I think it's quite clear that actually, in 1978, if you -- there's lots of 24 25 state secrets cases. These are in Professor

104

1 Donohue's brief, among other places, and, 2 actually, several of them are in ours as well, 3 but -- but, you know, it's very clear that that prior rule, the evidence was excluded and the 4 5 case goes on without it. 6 I mean, we cite cases from England 7 from the early 1800s, Wyatt v. Gore --JUSTICE GORSUCH: I mean, I -- I -- I 8 9 -- I'm sorry to interrupt, but the -- but the -but the -- but I do want to interrupt because I 10 11 think my real problem and what I'm hoping for an 12 answer for, we're -- we're -- we're in 13 tremendous agreement on this point, but -- but 14 what I'm struggling with is your -- the case was 15 asked us, does -- does FISA displace state 16 secrets doctrine? And if this Court hasn't 17 definitively answered what the state secrets doctrine is, that's hard, and if Congress had in 18 19 mind one version of the state secrets doctrine, is that relevant -- the one that's relevant that 20 21 we should be asking about, you know, or do we 2.2 ask something -- other question? 23 MR. ARULANANTHAM: I mean, I --24 JUSTICE GORSUCH: That's what I need 25 your help with.

1	MR. ARULANANTHAM: I see. I see.
2	I haven't thought, to be perfectly honest, about
3	whether the question presented is incorporating
4	today's understanding versus that one.
5	I think, when you're looking at what
6	what Congress contemplated I can answer
7	that part of the question for you Congress
8	obviously in 1978 is thinking about a state
9	secrets doctrine in 1978.
10	And so the fact that they are saying,
11	oh, look, FISA is not displaced and, yes, allow
12	us to dismiss claims, that that doesn't make
13	any sense because, if you're going to say, okay,
14	freeze the world and and operate as it
15	existed in 1978, then you can't be giving them a
16	dismissal remedy.
17	I don't know if that that
18	satisfactorily answers your question, but, yeah,
19	that that's my that's my view on that
20	subject.
21	I also think that if the Court thinks
22	that the state secrets question is not within
23	the question presented, if that's if that's
24	the Court's view, then but but the Court
25	also thinks that the district court can, you

106

1 know, proceed on the state secrets question, I'm 2 not sure there's a rationale for answering either one, to be perfectly honest with you, 3 but, yeah, that's my -- that's my view on that. 4 JUSTICE ALITO: But what happens in 5 your view in this situation? The plaintiff 6 7 claims that electronic surveillance was conducted for discriminatory reasons, in 8 violation of the -- the plaintiff's right to the 9 free exercise of religion, makes that a prima 10 11 facie case. That's not that hard to do in an 12 employment case. 13 The evidence obtained through the 14 electronic surveillance shows without any doubt 15 that, in fact, the surveillance was not based on 16 the plaintiff's religion; it was based on the 17 fact that there was evidence that the plaintiff 18 is a terrorist. 19 What happens in that situation? And 20 the latter is covered by state secrets. And the government says this can't be, it -- this is too 21 2.2 sensitive to be disclosed. What happens there? MR. ARULANANTHAM: Yeah, I think 23 24 there's two options. Under the decision below, 25 which adopts the D.C. Circuit's view, which in

1 -- sort of based on the Molerio decision that we 2 discussed earlier, Judge -- then Judge Scalia's view, the court can look at that information, 3 find the exact finding that you just made, and 4 then rule for the defendants. That -- that's 5 6 one view. 7 The common law view is different. The common law view is that, look, privilege 8 sometimes hurts one side, sometimes hurts the 9 10 other side. It often leaves evidence out that 11 probably would have resulted in a victory, you 12 let the chips fall where they may. And the -- and the decision below did 13 14 not adopt that rule. It adopted the rule from 15 the D.C. Circuit. I think those are the two 16 plausible options. 17 What is not acceptable in our view is 18 to say even if the evidence may show the 19 opposite, it may show it was blatant religious discrimination, it said simply on Muslims, 20 21 that's what -- that's what -- that he was told, 2.2 the FBI told him to surveil simply on Muslims, 23 that nonetheless you would still win dismissal

24 because, hypothetically, they could have a full

25 and effective defense. That's the Fourth

1 Circuit view. It's the view that's pressed by 2 the other side. And that we would strongly 3 object to, Your Honor. CHIEF JUSTICE ROBERTS: 4 Thank you, 5 counsel. 1806(f), the provision we're talking 6 7 about, takes up the whole page of 207a and yet it consists of two sentences. The sentence 8 9 we've been talking about is 20 lines, and squirreled away in there are these few words 10 11 that you're relying on for displacement of the 12 state secrets privilege, for a reading of -- of 13 FISA that has enormous consequences for state 14 secrets, for national security. 15 And I just wonder, why would Congress 16 put such significant language stuck in this 17 provision? Isn't that an oblique way to have 18 the consequences you're ascribing to that 19 language? 20 The -- the -- the jargon in our opinions, as you know, is this is, you know, 21 2.2 burying an elephant in a mouse hole, which is a 23 little overused, but what's the answer to that? MR. ARULANANTHAM: Yes. 24 So I favor 25 short declarative sentences, but, you know,

109

1 leaving that aside, I -- I -- I disagree with 2 their claim that FISA as a whole is hiding anything in a mouse hole. You know, it's --3 it's passed in the wake of extensive abuses that 4 were uncovered by the Church Committee. And 5 6 this provision, it says, if the attorney general 7 -- you know, perhaps it should have been written in a sentence or in its own section. You know, 8 9 I would have probably put it in three sections, 10 I think, if you think of its parts. 11 But -- but it clearly says that if the 12 attorney general finds that disclosure of the 13 information or an adversarial hearing would harm 14 national security, then you adopt the ex parte 15 in camera review process and determine if the 16 surveillance was lawful. So --17 CHIEF JUSTICE ROBERTS: But -- but --MR. ARULANANTHAM: -- I --18 19 CHIEF JUSTICE ROBERTS: I'm sorry. Go 20 ahead. 21 MR. ARULANANTHAM: No, just I -- I --2.2 I think this is a statute about domestic 23 electronic surveillance. The whole thing is --24 I mean, it creates the foreign intelligence surveillance court. It does all these things, 25

110

1 as Your Honor obviously knows. I just -- I just 2 don't see this as a mouse hole. If it were trying to displace state 3 secrets privilege in other contexts not related 4 to electronic surveillance, I think there would 5 6 be a better argument that it doesn't make any 7 sense if they did this here. But the displacement is only in the -- in the sense that 8 9 it creates all the procedures, the exclusive 10 procedures for how you litigate cases --11 CHIEF JUSTICE ROBERTS: But I think --12 MR. ARULANANTHAM: -- about 13 surveillance. 14 CHIEF JUSTICE ROBERTS: -- I -- I 15 think your argument really does hinge on the "or 16 other materials" language. Everything else is 17 consistent with Mr. Kneedler's point that this governs when the government wants to introduce 18 19 evidence and not affording a vehicle for what 20 the court below did. 21 MR. ARULANANTHAM: No, Your Honor, I -- I -- I would -- I would say there's two parts 22 23 that really contradict that view. 24 One is the plain language, "any motion 25 and request under any other statute or rule,"

1 which they really have to add words into and say 2 any motion about admissibility or in response to -- I mean, they -- they're having to cram 3 narrow -- narrowing construction onto this very 4 broad text. 5 The second point -- I think this is 6 7 something Justice Sotomayor said right early on -- is, on their view -- and I think Mr. 8 9 Kneedler agreed with this -- they can just dismiss 1810 claims. They can just win 10 11 dismissal of 1810 claims on the state secrets 12 privilege. 13 So Justice Alito had asked about 14 structural considerations earlier. I mean, the 15 structural argument in our favor is 16 extraordinarily strong. I mean, on their view, 17 every 1810 claim they can just pick and the ones 18 they want to dismiss on state secrets, they can 19 dismiss it using the same attorney general declaration that is described in 1806(f). 20 21 So I think those are our two 2.2 arguments, strongest arguments, for why that part, the request to obtain part of the case --23 24 part of our argument goes for us. Obviously, 25 the "use" argument is different, right? If we

112

1 win on that, then we don't have to get into this. 2 3 CHIEF JUSTICE ROBERTS: Thank you. Justice Thomas? 4 Justice Breyer? 5 Justice Alito? 6 7 JUSTICE ALITO: Yeah, a technical 8 argument about the use provision. The use 9 provision requires the government to give notice 10 that it is going to use the information. And 11 that makes sense when the government wants to 12 introduce this -- it at trial, so it gives 13 notice that it's going to use it at trial, and 14 that allows the other party to move to suppress 15 the evidence. 16 But what sense does it make to require 17 prior notice when what the government is going 18 to do is to invoke the state secrets privilege? 19 You just invoke the state secrets privilege, but you have to send a notice that says we intend to 20 21 invoke the state secrets privilege and now we 2.2 invoke the state secrets privilege? Does that 23 make any sense? MR. ARULANANTHAM: I -- I think it 24 25 does. In -- in this case, it served a useful

113

1 function. They filed a notice of motion, and 2 then they filed -- filed the motion. And we said -- as a preliminary matter before even 3 briefing it, we tried to make some of these 4 Totten versus Reynolds kinds of arguments to the 5 6 district court, and we said don't even look at 7 the information; first, decide as a threshold matter whether or not the state secrets evidence 8 -- doctrine can apply here. And we said it may 9 10 be a necessary evil that you'll have to look at 11 the ex parte information, but if you can avoid 12 doing that, that would be better. We said it's 13 presumptively unconstitutional. 14 So it served a very important function -- we lost, obviously, that argument. But --15 16 but -- but I think it served a very important 17 function here, and -- and, yeah, I do think it's -- it's important for that reason. 18 19 JUSTICE ALITO: One other question. 20 Under 1806, do you think that the judge must be able to look at all of the evidence to the 21 2.2 extent it's necessary to decide whether the 23 surveillance was lawful? 24 MR. ARULANANTHAM: Its applications, 25 orders, and such other materials as are

114

1 necessary to determine. I don't -- I don't know 2 what the scope of "such other materials" is. 3 You know, the court of appeals predicted -- it 4 didn't decide -- it predicted that the scope of evidence that would be reviewable to determine 5 6 whether the clearly electronic surveillance for 7 FISA purposes, like him leaving recording devices in a prayer hall and walking away, to 8 9 decide if that was discriminatory on the basis 10 of religion would be the same information that you would need to decide if, say, his consensual 11 12 conversations were also in violation of the Free 13 Exercise Clause. 14 But the court said, if that's wrong, 15 then that's fine. Then the district court can 16 say it's wrong --17 JUSTICE ALITO: But --18 MR. ARULANANTHAM: -- and then it can 19 separate -- it can -- it can apply normal --JUSTICE ALITO: -- what I'm --20 21 MR. ARULANANTHAM: -- or state secrets 22 privilege. 23 JUSTICE ALITO: -- what I'm interested 24 in is this. In cases involving the state 25 secrets privilege, isn't it true that the court

does not necessarily look at all of the -- of
 the evidence? There are situations in which the
 evidence is too sensitive.

Think the most secret -- think of the most secret evidence that the -- the government possesses. Yet, 1806 seems to say that the -the court reviews ex parte in camera the evidence -- the -- that evidence if it's -- if it has a bearing on whether the surveillance was lawfully conducted.

11 MR. ARULANANTHAM: Yes. So our 12 position would be that FISA brings the courts 13 into the process. And so, you know, the 14 government can always choose not to rely on some 15 piece of information. It doesn't even want to 16 give it to a court because it's worried the 17 court might leak the information. And they can 18 choose to do that.

But, if they -- if they want to use it to show that the surveillance was lawful, they have to give it to the court as long as it's within that "such other materials relating to surveillance."

24 But, you know, that's what I -- that's 25 what we think. I'm not sure the Court has to

116

1 address that question here. Obviously, it's, 2 again, guite premature. And I think the -- the Court could hold that, you know, if this were 3 like nuclear weapons in Hawaii or one of these 4 other things -- I don't know how this would 5 happen in this case, it's 15 years old -- but --6 7 but, you know, I think the Court could say we're 8 not deciding whether there might be, you know, some set of information, maybe it's because that 9 10 part is in the constitutional core if somehow 11 the president were involved in our case, which 12 seems quite implausible to me, but, you know -and -- and say, well, you know, we're not 13 14 deciding that little part of it, but, in 15 general, FISA displaces the privilege and what 16 it says is that other such materials relating to 17 the surveillance have to be turned over to the court, not to us, but to the court. 18 19 JUSTICE ALITO: Wouldn't that be quite something? Because just dealing with some 20 21 super-secret information in district court -- in 2.2 district courthouses around the country would 23 create an incredible security problem. Most of the -- most district courts don't have the 24 25 facilities to deal with information of that

117

1 sensitivity. 2 MR. ARULANANTHAM: Well, I -- we're 3 only talking about domestic electronic surveillance of Americans. It doesn't arise --4 the -- the claims don't arise if we're talking 5 about things like, for example, what you -- this 6 7 Court was dealing with, you know, last month in a different state secrets case. 8 9 So we're only talking about that. And, obviously, in criminal cases, Justice 10 11 Alito, already, courts all the time are doing 12 FISA ex parte in camera review where the government is trying to use the information in 13 criminal cases. So I --14 15 JUSTICE ALITO: Yeah, only if the 16 government chooses to -- wants to use the 17 information in a criminal case. 18 MR. ARULANANTHAM: Yes, that -- that's 19 true, Your Honor. I -- I -- our view is that 20 Congress thought, in this context, given the 21 history of abuse that had happened in this 2.2 particular area, it was important to interpose 23 the courts to play their role to ensure that surveillance remained within the confines of the 24 25 law.

1	CHIEF JUSTICE ROBERTS: Justice
2	Sotomayor?
3	JUSTICE SOTOMAYOR: Counsel, you
4	disclaim wanting to use this information. The
5	government hasn't made a motion to use it. It
6	made a motion to dismiss.
7	You concede that whether or not that
8	motion to dismiss is appropriate under Reynolds
9	and General Dynamics and all that case law
10	shouldn't be addressed by us, correct?
11	MR. ARULANANTHAM: No, Your Honor. I
12	I believe it's within the question presented,
13	and the Court has the authority and we did
14	argue it below. We said
15	JUSTICE SOTOMAYOR: Yes, but
16	MR. ARULANANTHAM: we put it in the
17	BIO. So
18	JUSTICE SOTOMAYOR: but you agree
19	
20	MR. ARULANANTHAM: our position
21	is
22	JUSTICE SOTOMAYOR: that it hasn't
23	been properly briefed before us, and the Ninth
24	Circuit didn't look at that?
25	MR. ARULANANTHAM: No, the Ninth

1 Circuit didn't look at that because en banc 6-5 2 in the Jefferson decision, it -- it ruled that 3 Totten and Reynolds were on a continuum. 4 JUSTICE SOTOMAYOR: Right. But -- but 5 -- but --6 MR. ARULANANTHAM: And this is before 7 General Dynamics. 8 JUSTICE SOTOMAYOR: Exactly. So --9 MR. ARULANANTHAM: Right. So -- so it 10 _ _ JUSTICE SOTOMAYOR: -- that hasn't 11 12 been really addressed by them, not the way 13 you've argued it before us? 14 MR. ARULANANTHAM: No, Your Honor, it 15 was foreclosed --16 JUSTICE SOTOMAYOR: All right. So --17 MR. ARULANANTHAM: -- under circuit 18 precedent. So we didn't make this exact -- this 19 argument there. 20 JUSTICE SOTOMAYOR: So, if you were to 21 lose -- and I know you desperately don't want 22 to, but assume my assumption that all we hold is 23 that no one's invoked 1806 here, and we send it back for the Court below to decide how state 24 25 secrets interacts with a motion to dismiss.

1 Is that the narrowest ruling that we 2 could issue? 3 MR. ARULANANTHAM: Yes, Your Honor. I think holding that either, as I had discussed 4 with Justice Kavanaugh, either that you 5 shouldn't have dismissed on the pleadings or 6 7 that we want the Ninth Circuit to decide if you should have dismissed on the pleadings, I would 8 9 just point -- just note, I guess, that the en 10 banc Ninth Circuit foreclosed our argument about 11 the scope of the Reynolds privilege here. 12 It was before General Dynamics, so 13 perhaps we could argue, hey, look, you know --14 JUSTICE SOTOMAYOR: Exactly. So if we 15 tell them look at your holding in light of 16 General Dynamics --17 MR. ARULANANTHAM: Yes, Your Honor. 18 JUSTICE SOTOMAYOR: -- they should do 19 that anyway? MR. ARULANANTHAM: Yes, Your Honor. 20 Yes, Your Honor. That would be the -- the 21 2.2 narrowest. 23 JUSTICE SOTOMAYOR: Thank you. 24 CHIEF JUSTICE ROBERTS: Justice Kagan? 25 JUSTICE KAGAN: So this question

121

1 doesn't assume you lose. Suppose, you know, 2 just on this question of the relationship between the two questions, suppose that the 3 easiest question in this case, I think, is the 4 question of when dismissal is appropriate and 5 that the Ninth Circuit decision was in some 6 7 important way premised on an incorrect understanding of when dismissal is appropriate 8 in a state secrets case. 9 10 And suppose too that I find the 1806 11 questions quite difficult. And if the entire 12 discussion of the Ninth Circuit was premised on this error about state secrets dismissals, one 13 14 wouldn't have to get into that. That would seem 15 an attractive solution to me. 16 But that leaves an opinion on the 17 books which may well be wrong, that the Ninth

18 Circuit's view of 1806, in fact, is incorrect.

19 So what should I do?

20 MR. ARULANANTHAM: I think the Court 21 could affirm on the alternative ground, but that 22 would still leave the Ninth Circuit opinion on 23 the books, I guess, is your -- your point, Your 24 Honor.

25 I guess -- I -- I suppose the Court

122

1 could say, under these circumstances, where --2 you know, our first argument to the Ninth Circuit was the dismissal was premature. 3 Perhaps the Court should say: We 4 think that the court should have addressed that 5 question first and, for that reason, we vacate 6 7 the -- the decision and ask the Court to -- to address that -- that question first. 8 9 I'm not sure -- I mean, under that 10 view, you wouldn't say whether it was right or 11 whether it was wrong. You were saying that 12 under these circumstances, given the 13 significance of the issues or, you know, for 14 whatever other reasons, we think it more 15 appropriate to address the question whether the 16 dismissal here was premature. 17 The district court did not look at the 18 actual underlying evidence. The district court 19 didn't explain why, when we said we would move 20 on our summary -- for summary judgment on the 21 religion claims, didn't say why that would still 2.2 somehow lead to inevitably the disclosure of 23 information, you know, unless -- unless they -they carried the risk and it was -- it was them 24 25 that caused the risk.

1	So I suppose Your Honor could could
2	take that approach. I feel like your question
3	sort of did assume we would lose on FISA in the
4	end, but, you know, I mean, our our our
5	view is that the Court could also affirm on
б	either of those two grounds, but I guess Your
7	Honor already knew that.
8	So now have I answered your question?
9	I sense yeah?
10	CHIEF JUSTICE ROBERTS: Justice
11	Gorsuch.
12	JUSTICE GORSUCH: I just want to make
13	sure I understand your answer to the question.
14	So it might be possible, I I think
15	you're saying, to vacate and remand the case and
16	say it was premature for the Ninth Circuit to
17	determine that FISA displaced state secrets
18	without first asking what state secrets is and
19	how it applies to this case?
20	MR. ARULANANTHAM: Yes, Your Honor,
21	and we would say, as Justice Sotomayor had
22	suggested, particularly in light of General
23	Dynamics.
24	JUSTICE GORSUCH: Okay.
25	MR. ARULANANTHAM: And and there's

1 two -- if I -- if I -- if I may, Your Honor, 2 there's two aspects to that. One is whether dismissal is available in light of General 3 Dynamics, and the other is the prematurity part, 4 whether you can do it on the pleadings or you 5 6 have to let the case play out. 7 JUSTICE GORSUCH: Got it. Thank you. CHIEF JUSTICE ROBERTS: Justice 8 9 Kavanauqh. 10 JUSTICE KAVANAUGH: One follow-up on 11 the Article II discussion we were having earlier 12 -- I appreciate your answers on that -- just so I'm clear about what I'm suggesting. 13 14 I agree with you there would be real 15 doubts about whether the executive's power, 16 Article II power, to conduct domestic 17 surveillance would be exclusive and preclusive 18 under Category 3 of the Jackson framework, so I 19 -- I agree that would be doubtful in my view, although we haven't said that. 20 21 But, at a minimum, I think the 2.2 government is saying, in this separation of 23 powers back and forth between the executive and Congress, what the executive is due is that 24 25 Congress speak clearly, directly, give some

125

1	clearer indication of an intent to intrude on
2	the state secrets privilege than we have here.
3	And the Chief Justice's questions
4	about a few words and Justice Alito's questions,
5	which I would certainly second, the district
6	court that this kind of information,
7	depending on what it is, is not the kind of
8	information you want floating around even in the
9	White House to people, much less floating around
10	the country, depending on what it is, of course.
11	So, on that question, that Article II
12	influences the reading is kind of what I'm
13	getting at with Article II, not the
14	exclusive/preclusive.
15	MR. ARULANANTHAM: Uh-huh. Yeah, I
16	think there are other statutes that have already
17	crossed this bridge. FOIA Exemption 1 and the
18	post EPA v. Mink congressional action on that is
19	one.
20	CIPA, even FISA, other provisions of
21	FISA which require very extremely sensitive
22	programs that the government is running to be
23	disclosed to this Court.
24	So, in that sense, I I don't think
25	there's a when when we're talking about

domestic electronic surveillance and only ex
 parte review and all that, that's sort of the
 answer I gave before.
 JUSTICE KAVANAUGH: Yeah.

5 MR. ARULANANTHAM: The one other thing 6 I would say on it, Your Honor, is we're talking 7 here about rules for litigation, and all of this 8 is about when they file something in court and, 9 you know, all of that.

10 And it's very well recognized that 11 Congress has the power to set up a set of rules 12 for litigation, whether it be evidentiary rules 13 or other related procedures. Vance v. Terrazas, 14 you know, talks about this even in a context 15 where there may not be power over the original 16 -- I think, in there, it's the denaturalization 17 context. When you then talk about making the 18 evidentiary rules, Congress's power is even 19 heightened.

And so, here, we're not talking about whether the government has the power in the first place to do some thing. We're talking about where they've already done it and now we're setting remedies up.

25 1806(f) and 1810 are mechanisms, and

127

1 even if you believe them that it's about 2 government's use, the whole thing is about what happens in court. And so I think there also 3 were far afield from what I would think of as 4 potential core Article II concerns. 5 JUSTICE KAVANAUGH: Thank you. 6 7 CHIEF JUSTICE ROBERTS: Justice 8 Barrett. JUSTICE BARRETT: I do have a 9 question. It's a follow-up to something Justice 10 Alito asked you earlier. He said to posit, you 11 12 know, you have religion claims in the suit, and 13 the suit is about whether the surveillance violated or discriminated on the basis of 14 15 religion. But review of the application and the 16 related documents shows that there was no 17 religious discrimination. It was based on, you 18 know, very good evidence that the targets were 19 terrorists. 20 You said in that circumstance, like, 21 okay, well, then they've asserted the state secrets privilege, let the chips fall where they 2.2 23 may, that dismissal's not an appropriate remedy 24 under the state secrets privilege. Did I 25 misunderstand that?

1	MR. ARULANANTHAM: Yes, Your Honor. I
2	said there's two options. What you just
3	described is the traditional common law rule,
4	and it was the rule certainly in 1978.
5	JUSTICE BARRETT: You mean that it
6	proceeds forward just without the
7	MR. ARULANANTHAM: Without the
8	privileged evidence
9	JUSTICE BARRETT: Okay. But my
10	question is then, what happens to the individual
11	defendants? Let's say the evidence that they
12	can use to defend themselves against the claim
13	that they religiously discriminated is in this
14	body of evidence that's protected by the state
15	secrets doctrine. And you're saying dismissal's
16	not a remedy, so they just go in with their
17	hands tied behind their back and they just are
18	sitting ducks?
19	MR. ARULANANTHAM: Yes. So so two
20	thoughts, Your Honor. Under common law, that is
21	certainly the result, and there are
22	JUSTICE BARRETT: Except, under common
23	law, if you have a privilege like
24	attorney-client and it's exclusively a common
25	law privilege, it can be pierced if it would

129

1 violate the due process rights, right? But, 2 if -- if the state secrets privilege is not 3 entirely common law, if it has a constitutional element, I'm not sure that the due process 4 rights of the defendants could pierce it. 5 MR. ARULANANTHAM: Yes, I'm -- I'm --6 7 I'm just thinking of common law cases that are actually cited in Professor Donohue's brief. 8 Republic of China is one. Northrop v. McDonnell 9 10 Douglas, where the defendant wants the 11 information and they say the chips fall where 12 they may. But -- so -- so --13 JUSTICE BARRETT: Can that happen if 14 there's a constitutional element to the 15 privilege? 16 MR. ARULANANTHAM: So, I mean, if 17 we're talking about Article II, no, but you're 18 asking about a due process element? 19 JUSTICE BARRETT: Well, I'm asking, 20 like, chips fall where they may, and you're -you're saying that that's fine even if it 21 2.2 violates the due process rights of the 23 individual defendants? MR. ARULANANTHAM: Well, I think --24 25 so, again, there's another option, and I want to

130

1 make sure I get to talk about the other 2 option --JUSTICE BARRETT: Okay. 3 MR. ARULANANTHAM: -- right, which is 4 Justice Scalia's -- or then Judge Scalia's 5 6 option, but -- but, yes, I think it's often 7 going to be true -- I mean, if -- if the Due 8 Process Clause requires that someone needs the 9 evidence, then, obviously, that would trump the 10 -- the common law. That -- that just seems --11 so --12 JUSTICE BARRETT: So that assumes the 13 state secrets privilege is only common law? 14 MR. ARULANANTHAM: Yes, but if -- oh, 15 you're asking what if you have a conflict 16 between the Due Process Clause and the Article 17 II element of the state secrets privilege? I --18 I don't -- I -- I don't know. I think, you 19 know, again, whatever the answer is, it would be 20 within the scope of the statute because it's in 21 accordance with the requirements of law. But --2.2 JUSTICE BARRETT: It's just hard to 23 see letting the chips fall where they may if it's then the individual defendants who are 24 25 deprived of access to information that they need

131

1 to defend themselves against the claim that they 2 discriminated on the basis of religion when let's imagine, in Justice Alito's hypothetical, 3 it's utterly clear from all the materials that 4 there was no religious discrimination. 5 6 MR. ARULANANTHAM: Yes. So, aqain, I 7 still want to talk about the other option. 8 JUSTICE BARRETT: Yeah. 9 MR. ARULANANTHAM: But the -- the last thing I'll say before I do that is -- and this 10 11 is discussed to some extent in Tenet and cases 12 like that -- the government can always 13 indemnify, right? I mean, that -- when we're 14 talking about people who are working for the 15 government, which is typically what's going to 16 happen in an 1810 case, you know, if you're 17 talking about the mirror image problem, do you 18 let the harm of the due process problem you're 19 talking about or the Seventh Amendment problem 20 you're talking about fall on this side of the ledger or on our side of the ledger? You know, 21 2.2 we're out of luck even if they blatantly broke the law, where they have --23 24 JUSTICE BARRETT: The due process --25 MR. ARULANANTHAM: -- the possibility

1	
2	JUSTICE BARRETT: rights, as
3	Justice Alito pointed out, are not the same for
4	defendants and plaintiffs.
5	MR. ARULANANTHAM: Yes. The Seventh
6	Amendment rights are certainly the same. But
7	let me get to the
8	JUSTICE BARRETT: Yeah. Please.
9	MR. ARULANANTHAM: let me get to
10	the other the other point. I mean, then
11	Judge Scalia and, actually, building even on a
12	prior case, Ellsberg, said that the court is
13	and this has become an In re Sealed Case, the
14	D.C. Circuit's rule, and it is the rule adopted
15	by the decision below in this case is that in
16	that situation, the court can look at the
17	information, as Justice Alito had imagined,
18	decide that, yes, there is no basis for finding
19	that these people were discriminated against and
20	rule for the defendants.
21	And and that actually is what
22	happened in Molerio, where the person had a
23	claim that they thought a First Amendment
24	claim that they thought the court held would
25	should survive summary judgment. But they said:

1 But we've seen the evidence and we know that 2 claim is wrong. And so they nonetheless ruled 3 for the defendant. And I think that option would 4 certainly be available under the court of 5 6 appeals' decision in this case, so I think, if 7 you -- if you affirmed, that option would still be --8 9 JUSTICE BARRETT: Then you're okay 10 with that option? 11 MR. ARULANANTHAM: -- available to 12 them. Yes, we haven't challenged it -- we 13 haven't challenged it here. And -- but, you 14 know, the -- the very last thing I would say 15 about that is our clients, they may have had 16 real targets, but the instructions that the 17 informant says he got and what he did was he went all over the place and he talked --18 19 JUSTICE BARRETT: Well, I mean, I'm 20 not talking just about the facts of your case, 21 obviously, because how we interpret the statute 2.2 or what we might say or not say about the state 23 secrets privilege has ramifications beyond your 24 case. 25 MR. ARULANANTHAM: Understood, Your

1 Honor. 2 JUSTICE BARRETT: Thank you, counsel. 3 CHIEF JUSTICE ROBERTS: Thank you, counsel. 4 Rebuttal, Mr. Kneedler. 5 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER 6 7 ON BEHALF OF THE PETITIONERS MR. KNEEDLER: Thank you, Mr. Chief 8 9 Justice. Several points. 10 First of all, we think it makes sense 11 the proper disposition of the case is to review 12 what the Ninth Circuit did decide, not what it 13 did not decide. The Ninth Circuit did not decide whether the district court's dismissal of 14 15 only the First Amendment claim was proper on the 16 basis of the state secrets privilege because it 17 said the state's privilege was -- state secrets 18 privilege was displaced by FISA. And there's no doubt the privilege 19 20 existed clearly under Reynolds at the time that 21 FISA was enacted. So there is certainly no 2.2 reason to think that FISA displaced that 23 well-established privilege. 24 The question of what the consequence 25 of that privilege is not the privilege itself;

135

1 it's what happens if the privilege is validly asserted and the evidence is removed from the 2 case. So I think, Justice Gorsuch, the question 3 is what Congress would have thought about the 4 state secrets privilege itself, not the 5 6 consequences of a successful assertion of it. 7 And as to whether 1806(f) displaces the state secrets privilege, I think, for a 8 number of reasons, it clearly does not. For 9 example, it provides for the attorney general to 10 11 control things, not the head of the agency, 12 which is the -- who invokes the state secrets 13 privilege. 14 And, true, FISA was enacted to address 15 abuses of domestic surveillance, but other 16 provisions of FISA addressed that with the --17 with the FISC and the applications for 18 approvals. But what -- what Congress did in 19 1806(f) and -- and the related provisions was to codify in statute a procedure that had been 20 21 developed at common law or by courts for the 2.2 suppression of evidence that was -- that was 23 obtained by electronic surveillance. And that 24 would arise only if the attorney general decided 25 to -- to put forward the evidence, as Justice

136

1 Alito described.

2	And there are many other things that
3	make that clear. Subsection (f) refers to two
4	motion types of motion, a motion to suppress
5	or a motion to obtain discovery of either the
6	application and order or the materials or the
7	evidence in order to suppress. And then
8	subsection (g), when it says that the court
9	grants that motion, it doesn't say grant
10	judgment. It says grant the order to suppress
11	or otherwise grant the motion, which means the
12	motion to exclude the evidence may be suppressed
13	or it may be something less than suppressed,
14	something more than suppressed. So it's all
15	wrapped up in the in in the procedures for
16	suppression.
17	On the question of dismissal, we think
18	that that it is artificial to separate Totten
19	from Reynolds. Reynolds Reynolds itself had

19 from Reynolds. Reynolds -- Reynolds itself had 20 a footnote about Totten after it discusses the 21 fact that national security information can be 22 excluded. It says: See Totten. And then it 23 describes Totten as a case where the -- the case 24 was -- was not permitted to go forward even at 25 the pleadings stage because it was obvious from

the face of the pleadings that the -- that the
 case could not go forward because it concerned a
 state -- a state secret.

But there are other situations in 4 which it is central to the case, a state secret, 5 6 such as here. They allege that plaintiffs --7 that defendants violated their First Amendment rights. But the evidence might well furnish a 8 9 basis for defending against that. That is 10 central to the case in the same way that the 11 contract in -- in Totten and in Tenet was 12 central to the case.

And General Dynamics, in fact,
contains a -- a number of passages that are
helpful, supportive of the idea that dismissal
can be an appropriate remedy.

17 For example, Respondents say that as 18 plaintiffs they're happy to make their case and 19 then let the chips fall where they may, putting to one side the threat of blackmail, gray mail 20 21 against the government in that sort of 2.2 situation, forcing it to settle or maybe even 23 accept an injunction against us -- against it. 24 But General Dynamics says it seems to 25 be unrealistic to separate, as the Court of

1 Federal Claims did, the claims from the defense 2 and to allow the former to proceed while the latter is barred. Claims and defenses together, 3 it -- it's those that establish the 4 justification or lack of justification for 5 6 judicial relief. 7 The point is, if the -- if the issue cannot be fairly, soundly, safely adjudicated 8 9 without risking disclosure of national security information, then it can be -- it can and should 10 11 be dismissed, whether this arises by the 12 government's assertion of a defense in rebuttal, it's not even an affirmative defense, it is a 13 14 defense -- a factual defense, or whether it --15 it goes to the plaintiff's -- to the plaintiff's 16 case. And, in fact, in General Dynamics --17 no, I think it's in Tenet versus Doe, the Court 18 also relies on Weinberger, where the case was 19 dismissed because the defense could not be 20

21 properly asserted due to state secrets

22 information.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr.24 Kneedler, counsel. The case is submitted.

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2	was	submit	ted.)						
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21									
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23									
24									
25									

Official					
1	abandon [1] 79:13	121 :21 123 :5	among [1] 104:1	15 111:15,24,25 112:8 113:	
	Abdelrahim [1] 88:20	affirmance [12] 45:3 46:23	analysis [2] 83:8 94:22	15 119 :19 120 :10 122 :2	
1 [1] 125: 17	ability [6] 9:1 56:5 89:1 90:	76:12,13,15 77:13,15,23	Angeles [1] 1:24	134 :6	
10:00 [2] 1: 16 3: 2	9,18 92: 9	78: 6,11 101 :19,20	angle [1] 42:15	arguments [11] 13:8 26:10,	
12:07 [1] 139: 1	able [6] 11:21 47:20 57:15	affirmative [2] 67:15 138:	anomalies [1] 26:19	17,18,22 35: 24 73: 8 79: 13	
134 [1] 2 :14	84:21 86:7 113:21	13	another [8] 17:18 21:16 50:	111:22,22 113:5	
15 [1] 116 :6	above-entitled [1] 1:14	affirmatively [1] 13:11	8 59: 5,9,20 79: 14 129: 25	arise [8] 31:3 54:25 62:11	
15.2 ^[1] 78 :20	abrogate [4] 5:12 25:14 48:	affirmed [4] 41:11 61:7 79:	answer [14] 35:18 37:24	70: 4 83: 5 117: 4,5 135: 24	
150 [1] 65: 8	22 49 :5	3 133 :7	48: 4 84: 8 85: 16,18 95: 8,	arises [3] 43:25 44:9 138:	
18 [2] 11: 12,12	absolutely [1] 93:5	affording [1] 110:19	10 104 :12 105 :6 108 :23	11	
180 [1] 30: 25	abuse [1] 117:21	afield [1] 127:4	123 :13 126 :3 130 :19	around ^[5] 45:22 103:17	
1800s [1] 104:7	abuses [3] 83:21 109:4	agency [3] 22:10 23:22	answered [2] 104:17 123:	116: 22 125: 8,9	
1806 ^[24] 5 :10 9 :5 10 :4,16	135 :15	135 :11	8	Article [12] 48:24 49:9 94:	
11:6 12:10 13:9 17:25 18:	accept [3] 44:1 54:7 137:	Agent [3] 1:23 2:7 53:7	answering [3] 91:21,22	21,24 97:24 124:11,16 125:	
1 28 :3,16 33 :1 56 :19 64 :	23	agents [1] 61:25	106:2	11,13 127: 5 129: 17 130: 16	
18 68 :6 74 :15 81 :16,20,22	acceptable [1] 107:17	aggrieved [12] 4:8 13:12,	answers [2] 105:18 124:12	artificial [1] 136:18	
113 :20 115 :6 119 :23 121 :	accepted [1] 55:2	24 14:3,13,24 15:7,12 29:	antecedent [1] 47:2	ARULANANTHAM [95] 1:	
10,18	accepting [2] 43:14 54:10	22 36:25 56:1 86:14	anytime [1] 43:8	24 2:9 63:15,16,18 65:25	
1806's [1] 102 :16	access [2] 17:16 130:25	agree [16] 12:22 55:12 58:	anyway [3] 45:10 73:19	67:3 68:19 70:2,20 72:8,	
1806(c [2] 23 :17 29 :21	accordance [7] 25:3 87:24	10,20 73: 8 82: 14,15 83: 3,6	120 :19	11,16,25 73: 5 74: 9 75: 19	
1806(f ^[34] 3: 23 4: 5 9: 25	88:9 89:5,7,8 130:21	99: 23,25 100: 9 103: 10	apparent [1] 60:24	76:14 82:13 84:15,19 85:1,	
12: 6,15,22 14 :3 25 :19 35 :	according [1] 81:22	118: 18 124: 14,19	appeal [3] 49:25 50:21 90:	7,15 86: 11,17 87: 15 89: 9	
3 41 :14 44 :19 51 :12 52 :13	acknowledged [1] 84:22	agreed [2] 4:17 111:9	12	91:10 92:1,12,16,22 95:7,	
53: 11 55: 13,17,23 58: 7 60:	Act [1] 27:24	agreeing [1] 38:6	appeals [11] 32:13 56:25	16,20 96: 4,25 97: 4 98: 3,9,	
15 62: 3 79: 17 80: 8,15 81:	acting [1] 84:7	agreement [2] 7:22 104:13	60 :16 65 :18 75 :12 76 :16	13,16 99: 11 100: 9 101: 9,	
10 88: 2 89: 20 91 :6 95 :1	action [1] 125:18	ahead [5] 24:10,12 42:24	78 :24 79 :3 102 :4 103 :12	14 102: 2 103 :9 104 :23	
99:25 108:6 111:20 126:	actions [1] 27:23	94: 4 109: 20	114:3	105:1 106:23 108:24 109:	
25 135: 7,19	actual [2] 11:18 122:18	AHILAN [3] 1:24 2:9 63:16	appeals' [7] 35:3 46:9 54:2	18,21 110: 12,21 112: 24	
1806(f)'s [1] 5:2	actually [29] 7:25 9:25 16:	aid [1] 5:6	55:1,3 62:12 133:6	113:24 114:18,21 115:11	
1806(g [1] 87:19	18 26 :23 27 :11 39 :4 54 :21	AL [5] 1:4,7,25 2:11 63:17	appeals's [1] 62:15	117:2,18 118:11,16,20,25	
1810 [26] 10: 15,21,24,25 11:	59 :24 66 :2 68 :24 69 :11 70 :	Alderman [1] 25:8	appear [1] 36:9	119: 6,9,14,17 120: 3,17,20	
8,16,25 12: 25 27: 22 35 :19	9 73 :18 77 :1,2,10 78 :3 79 :	ALITO [34] 26:2,4 27:7 28:	APPEARANCES [1] 1:18	121:20 123:20,25 125:15	
36:5 37:7,20,21 38:9 51:	15 83:1 85:20 89:9,13 91:	12 35: 16 71: 25 72: 10,14,	application [5] 5:4 15:18	126: 5 128: 1,7,19 129: 6,16,	
14,15 55: 18 88: 13,13 89: 2	25 99:12 103:24 104:2	18 73: 3 84: 8,17,24 85: 4,8	56:1 127:15 136:6	24 130: 4,14 131: 6,9,25	
111: 10,11,17 126: 25 131:	129:8 132:11,21	86:9,13 87:5 89:4 106:5	applications [5] 13:25 15:	132: 5,9 133: 11,25	
16	add [1] 111:1	111:13 112:6,7 113:19	13 25: 21 113: 24 135 :17	ascribing [1] 108:18	
1978 [9] 30 :16 102 :19 103 :	address [7] 44:5 78:17	114:17,20,23 116:19 117:	applied [3] 47:18 80:18,24	aside [5] 26:9 39:25 103:13,	
16,22,24 105: 8,9,15 128: 4	102: 5 116: 1 122: 8,15 135:	11,15 127:11 132:3,17 136:	applies [7] 12:15 31:21 34:	15 109 :1	
1980 [1] 103: 17	14	1	15 52 :3,20 64 :19 123 :19	aspect [3] 71:14 81:7,10	
2	addressed [6] 28:3,16 118:	Alito's [2] 125:4 131:3	apply [8] 10:24 25:8 31:21	aspects [1] 124:2	
20 [1] 108 :9	10 119 :12 122 :5 135 :16	alive [2] 49:20 50:10	51 :12 74 :6 79 :20 113 :9	assert [1] 50:5	
20-828 [1] 3 :7	adjudicate [3] 3:25 10:1	allege [1] 137:6	114 :19	asserted [7] 48:2 56:24 60:	
2021 [1] 1 :12	56 :5	alleging [1] 8:2	appreciate [2] 98:4 124:12	18 103:3 127:21 135:2	
207a [1] 108 :7	adjudicated [3] 8:16 41:6	allow [5] 57:20 58:1 60:16	approach [1] 123:2	138: 21	
21 [1] 96 :14	138 :8	105:11 138:2	appropriate [8] 39:14 47:8	assertion [7] 16:14 23:9	
	adjudicating 11 53:22	allowing [2] 58:5 68:17	118 :8 121 :5,8 122 :15 127 :	53:15 57:21 61:13 135:6	
3	adjudication 6 7:2 8:8	allows [2] 42:18 112:14	23 137 :16	138 :12	
3 [2] 2:4 124: 18	22:10 55:4 60:17,22	almost [2] 80:1,6	approvals [1] 135:18	assume [6] 11:20 30:24 45:	
5	administration [1] 31:23	already [7] 33:20 40:18 64:	area [3] 95:11 96:9 117:22	10 119 :22 121 :1 123 :3	
	admissibility [2] 53:12	19 117 :11 123 :7 125 :16	aren't [3] 21:15 58:20 60:	assumed [1] 45:9	
53 [1] 2 :7	111:2	126: 23	10	assumes [1] 130:12	
56 [1] 59: 13	admissible [1] 59:17	alteration [2] 46:4,24	argue [7] 68:23 78:21 90:9	assuming [2] 10:12 11:6	
6	admission [1] 55:24	alternative [6] 45:3 46:23	92:9 93:8 118:14 120:13	assumption [1] 119:22	
	adopt [2] 107:14 109:14	78:10 79:9,10 121:21	argued [5] 4:17 6:25 38:25	attention [1] 57:4	
6-5 [1] 119: 1	adopted [5] 26:20 62:22	although [3] 66:15 88:14	78 :23 119 :13	Attorney [12] 18:8 47:25	
63 [1] 2: 11	102 :21 107 :14 132 :14	124 :20	argues [1] 6:12	48:1 79: 17,24 80: 7,11 109 :	
7	adopting [2] 76:17,18	altogether [1] 9:20	arguing [1] 101:19	6,12 111 :19 135 :10,24	
716 [1] 96: 14	adopts [2] 77:13 106:25	Amendment [23] 4:22 8:	argument [43] 1:15 2:2,5,8,	attorney-client [4] 19:9	
	advanced [1] 46:22	12 39 :1,5 41 :9 49 :24 50 :6	12 3 :6,10 5 :17 13 :20 20 :	73 :9 99 :7 128 :24	
8	adversarial [1] 109:13	53 :25 55 :7,20 61 :20 62 :10	20 24 :6 26 :5,14 30 :14 44 :	attorneys [1] 85:13	
8 [3] 1:12 12:6 27:22	adversary [1] 79:19	82:22,23,24 83:14 85:14	19 53 :6 54 :8,11,23 63 :16	attorneys' [2] 11:19 35:21	
	advisors [2] 96:18 97:13	88:6 131:19 132:6,23 134:	68:11 70:14 79:15 81:15	attractive [1] 121:15	
A	affect [1] 38:21	15 137 :7	83 :18 84 :9 87 :12 90 :24 98 :		
a.m [2] 1:16 3:2					

Heritage Reporting Corporation

Americans [2] 80:25 117:4 8 101:15,16 102:5 110:6,

affirm [5] 41:19,24 101:21

authority [2] 23:23 118:13

		Official		
authorize [1] 76:2	10,14 3:11 53:7 63:17 134:	22	category [2] 40:3 124:18	claim [26] 4:22 7:6 10:20
authorized [5] 60:19 79:23	7	brought [4] 51:13,16 52:7,	CATHERINE [3] 1:22 2:6	12:25 25:24 36:6,11 38:1
82:16 87:22 89:22	behind [1] 128:17	20	53 :6	39: 1,2 41: 9 55: 18 61: 16
authorizes [2] 68:25 87:19	believe [6] 36:9,24 83:24	bug [1] 77:2	caused [1] 122:25	73:15 78:25 86:4 88:13,16
automatic [3] 16:15 75:15,	84:4 118:12 127:1	building [1] 132:11	central [11] 4:21 7:1,2,22	109:2 111:17 128:12 131:
15	believing [1] 86:20	Bumatay [2] 52:16 94:23	35 :13 38 :8 41 :3 100 :5 137 :	-
available [11] 46:8 47:23	belong [1] 97:13	Bumatay's [1] 66:11	5,10,12	claiming [1] 12:1
52 :14 56 :20 61 :12 78 :22	below [12] 35:8 64:1 67:20	BUREAU [2] 1:3 3:7	certainly [13] 56:4 58:11	claims [37] 37:6 49:20,22,
89: 17 101 :3 124 :3 133 :5,	77 :12 81 :5 101 :3 106 :24	buried [1] 49:1	62: 23,25 74: 3 82: 15,23	24 50 :1,7,11,19 55 :7,20,21
	107 :13 110 :20 118 :14 119 :	burned [1] 93:18	125 :5 128 :4,21 132 :6 133 :	56 :6 57 :20 60 :21 62 :9 63 :
avoid [3] 95:23 96:1 113:	24 132 :15	burying [1] 108:22	5 134: 21	23 64:2 66:22 67:13,17 69:
11 avoidance [4] 54:23 62:16.	besides [2] 29:6,6 better [3] 95:2 110:6 113:	C	certified [1] 3:5 cetera [5] 8:10 24:18 39:8	21 70:10 71:22,23 89:2 94:
18 63:1	12	c)'s [1] 24:21	52: 24 86:25	14,15 105: 12 106: 7 111: 10, 11 117: 5 122: 21 127: 12
away [4] 42:18 81:11 108:	between [6] 56:12 67:5 96:	California [1] 1:25	challenge 5 4:1 8:12 14:	138: 1,1,3
10 114 :8	17 121 :3 124 :23 130 :16	calls [1] 62:18	15 15 :8 35 :8	classic [2] 15:15 56:15
	beyond [5] 9:24 75:3 87:10	came [1] 1:14	challenged [2] 133:12,13	classified [7] 47:24 57:4,
<u> </u>	92:7 133:23	camera [18] 9:16,21 53:23	challenges [1] 10:2	10 61 :9,10 69 :11,12
back [27] 5:24 6:5 27:15 31:	big [1] 10:12	54:18 55:4 58:1 64:16 79:	Chamber [1] 85:9	clause [6] 5:5 54:1 62:10
8 33: 3 34: 5,8 35: 5 41: 18	bind [1] 88:7	20 80:16 81:3,8 84:11 85:	change [1] 45:5	114 :13 130 :8,16
45 :17 47 :19 48 :9 50 :16 60 :	binding [1] 51:1	10 96: 11 97: 22 109: 15	CHIEF [40] 3:3,12 13:14,18	clear [13] 7:18 14:22 40:1
12 69:4 77:17,21 78:8 79:	BIO [1] 118:17	115 :7 117 :12	18 :15 29 :9,13,16 30 :22 35 :	
11 89 :14 91 :1 100 :1,4 102 :	bit [1] 6:11	cannot [10] 4:3 5:10 11:3	15 38 :14 42 :11 46 :14 51 :9	103 :23 104 :3 124 :13 131 :
1 119 :24 124 :23 128 :17	Bivens [1] 88:12	38 :7 56 :18 70 :16 71 :24 99 :	53: 3,8 62: 13 63: 2,6,7,13,	4 136 :3
backdrop [4] 43:2 48:18	blackmail [1] 137:20	6 101 :21 138 :8	19 68:2 69:5 70:13 108:4	clearer [1] 125:1
83 :21 94 :24	blatant [1] 107:19	canon ^[3] 62:16,18 63:1	109: 17,19 110: 11,14 112: 3	clearly [14] 22:18 25:18 44:
backward [2] 81:17,19	blatantly [1] 131:22	capaciously [1] 60:15	118:1 120:24 123:10 124:	25 45:14 49:1 61:5 91:20
backwards [2] 72:12,15	body [3] 23:23 24:3 128:14	capacity [1] 57:22	8 125 :3 127 :7 134 :3,8 138 :	92:25 102:25 109:11 114:
bad [1] 86:2	books [3] 102:22 121:17,	care [3] 74:13 75:23 91:3	23	6 124 :25 134 :20 135 :9
Bailey [1] 66:3	23	Cares [1] 82:11	China [1] 129:9	clerk [1] 3:5
balance [1] 64:11 ball [1] 103:5	both [16] 15:24 16:3 41:3	Carney ^[3] 56:17 57:9 61:8 carried ^[1] 122:24	chips [7] 67:8 107:12 127:	client [1] 61:17
banc [3] 83:17 119:1 120:	43 :15 55 :17 65 :10 69 :13	CARROLL [18] 1:22 2:6 53:	22 129 :11,20 130 :23 137 :	clients [7] 56:4 58:5 61:18
10	72 :22 74 :25 82 :14,14 86 :	5,6,8 54: 10,14,24 58: 24 59:	19	84: 10,14 93: 13 133: 15
bar [1] 103:4	18,21,22 89: 19 94: 24	3,6,11,24 60: 5 61: 21 62: 1,	choice [2] 42:22 43:13	clients' [1] 56:13
barred [4] 9:21 99:17,19	bottom 5 6:17 10:14 14:8	14 63: 3	choose [2] 115:14,18	close [1] 57:4
138: 3	37:4,21	Carroll's [1] 84:9	chooses [2] 10:11 117:16	clue [1] 24:14
BARRETT [40] 23:11,14	bottom-line [2] 95:8,10 branch [1] 6:5	Case [124] 3:7 4:16,21,21 7:	Church [4] 83:21 102:19, 20 109:5	codification [1] 14:8 codify [1] 135:20
24 :6,9,12 25 :10 26 :3 51 :	break [1] 84:1	2,4,4,18,20,22,25 8: 7,8 16:	CIPA [1] 125:20	codifying [2] 16:3,4
10,11,17,24 52: 12,15,22	breaking [1] 92:5	6,11 20: 22 23: 6 32: 4,11,18,	Circuit [52] 3:17,22 8:24 9:	come [10] 42:14 56:18 63:1
53 :2 63 :11,11,12 90 :25 91 :	Breyer [26] 30:23,24 31:25	24 33:7,18 34:20 35:13 36:	24 33 :3,5,23,24 35 :5 36 :6	66 :15 70 :10 71 :7 78 :8 79 :
24 92: 11,14,18 127: 8,9	32: 5,9,20,23 33: 9,13,17,22	6 38: 7,12 39: 13,17,24 40:	39 :19,21 40 :13,16,21 41 :	4 90 :18 100 :4
128: 5,9,22 129: 13,19 130:	34 :1,4,12,19,25 35 :10,14	10 41: 1,4 42: 20 44: 15 45:	11,19,25 43 :20 44 :6,13 45 :	
3,12,22 131: 8,24 132: 2,8	39 :12 48 :4 73 :24 74 :11 78 :	11,23 47 :7 49 :6 50 :15 51 :	24 46 :5 47 :20 50 :14,16 52 :	
133: 9,19 134: 2	9 79 :12 100 :2 112 :5	20 62:6 63:21 64:4 65:7,9,	17 54: 16,17 61: 4 62: 23 67:	
based [11] 5:17 26:14 39:4	Breyer's [2] 38:16 99:21	11,12,23 67: 13 70: 8,9,12,	20 89: 13,16 94: 24 100: 1	common [24] 3:15 5:9,16,
40 :9 64 :5 71 :22 84 :12 106 :	bridge [1] 125:17	24 71 :10,14,18,20 73 :12,	101: 7,12 107: 15 108: 1	17,21 6: 9 49: 14 64: 9 65: 5,
15,16 107 :1 127 :17	brief [13] 12:24 13:21 29:19	22 74: 5 75: 3,14 76: 11,19	118: 24 119: 1,17 120: 7,10	16 67: 5,11 91: 19 107: 7,8
basic [1] 6:1	73:9,25 74:2 78:19 83:15	77 :10,14,22 78 :23 80 :11	121: 6,12,22 122: 3 123 :16	128:3,20,22,24 129:3,7
basically [5] 8:24 9:7 10:	101: 17,19 103: 11 104: 1	81:2 84: 14,16 87: 20 88: 13,	134: 12,13	130: 10,13 135: 21
15 45:1 89:1	129 :8	18,23 92:24 99:12 100:5,7,	Circuit's [10] 4:10,23 45:6	communication [3] 97:12
basis [24] 11:4 20:25 22:25	briefed [1] 118:23	11,23,25 102: 12 103: 1,15	47: 6 62: 24 76: 19 89: 11	99: 7,8
37: 20 41: 4,15 43: 11 44: 8 45: 3,10 50: 8 64: 10 70: 15	briefing [2] 85:2 113:4	104: 5,14 106: 11,12 111: 23	106: 25 121: 18 132: 14	communications ^[2] 96:
72 :1,18 78 :10,10 79 :10	bring ^[4] 36:5 84:5 86:15,	112: 25 116: 6,11 117: 8,17 118: 9 121: 4,9 123: 15,19	circumstance [4] 20:4,14	17,24
	15		52 :18 127 :20	compel [1] 54:4
114 :9 127 :14 131 :2 132 : 18 134 :16 137 :9	bringing [3] 10:3 24:2 58:4	124: 6 131: 16 132: 12,13,15 133: 6,20,24 134: 11 135: 3	circumstances [4] 17:14,	complaint [7] 8:1,2,6 11:
bearing [1] 115:9	brings [4] 52:9 60:9 91:12	136: 23,23 137: 2,5,10,12,	15 122 :1,12	21 27 :21 71 :1 93 :25
beaten [2] 86:21,22	115: 12	18 138 :16,19,24 139 :1	cite 5 97:5 99:6 103:11,16	completely [3] 55:18 56:
become [1] 132:13	broad [4] 64:22 66:9 99:1	cases [23] 6:12 40:3,5,5 71:	104:6	16 103 :9
becomes [3] 67:18,25 69:3	111:5 broader 181 46:1 55:16 56:	19 76 :3 79 :3 80 :24 81 :8	cited [4] 79:2 83:15 103:19	compliance [1] 78:20
beginning [1] 69:4	broader [8] 46:1 55:16 56: 21 60:13 62:3 82:19,20 83:	83:11 92:23 103:4,13,14,	129:8 cites [2] 22:23 97:4	comprehensive [3] 21:7, 12 57:6
begs [1] 45:19	21 60:13 62:3 62:19,20 63:	19,25 104 :6 110 :10 114 :24	civil [4] 16:11,15 30:12 51:	concede [2] 51:12 118:7
behalf [11] 1:20,23,25 2:4,7,	broke [3] 78:2 97:18 131:	117:10,14 129:7 131:11	21	conceding [2] 91:5,7

Official

constitutional [15] 5:9 10:93:9 94:4,14,16 96:8,15,1524 107:1,13 119:2 121:6determining [2] 83:3 90:23,25 67:12,24 70:10 75:2 48:10,17,17 54:19,23,2597:6,11,15 99:3,17 101:4,122:7 132:15 133:61414 76:22 77:10 80:13 86:460:21 61:1 62:9 85:21 116:21,22 102:3,4 103:12 104:21,22 102:3,4 103:12 104:79:18 25 80:7 8 11 111:20developed [1] 135:21	Official				
concerned NB-86 contemplating N7-21 71:0 contemplating N7-21 72:0 contemplating N7-21 72:0 contemplating N7-21 72:0 contemplating N7-22 72:0 contemplating N7	conceivable [1] 66:13	46: 5 103: 20 105: 6	122: 4,5,7,17,18 123: 5 125:	deep [1] 5:9	different [17] 28:15 31:2,
137.2 concerning [13:16.4:16] concerning [13:16.4:16] concerning [13:16.4:17] 21:17:25 21:17	concern [1] 8:9	contemplating [1] 77:1	6,23 126 :8 127 :3 132 :12,	defend [7] 39:6 42:23 57:	
concersing Bit 3:10 4:18 context (1144.17:22 44 context (1144.17:22 4	concerned [3] 7:21 71:10	contention [1] 7:7	16,24 133: 5 136: 8 137: 25	15 64: 6,12 128: 12 131: 1	78:24 82:4 86:11,18 96:23
concisely IN 182:2 18.6:10 68:17 10:4.83:5 18.6:14 10:22 17:20 12:21 17:20 12:22 17:20 12:20 17:20		contest [2] 39:20 40:14	138: 18	defendant [4] 29:7 57:22	101:25 103:8 107:7 111:
conclude [N 013:22 103:22 117:20 126:14.17 2 413:14 18 57:16 66:20 61:1163 difficult (11:21:11) concluded [N 34:2 47:71 continues [N 103:1 continues [N 103:1 20 56:12 67:38 83:12 directel [N 33:16 85:10 conclusions [N 14:27 contract [N 103:16 21 116:24 117:11 23:35: discotes [N 103:16 85:10 discotes [N 103:16 85:10 conduct [N 66:12 / 22 / 22 contract [N 102:24 contract [N 102:24 contract [N 102:24 discotes [N 10:24 discotes [N 10:16 / 22:16 22:24:25:17.7] discotes [N 10:16 / 21:16 22:26:25:17.1] disclose [N 10:16 / 21:16 22:26:25:17.1] disclose [N 10:16 / 21:16 22:26:25:17.1] disclose [N 10:16 / 11:16 / 21:16 22:26:25:17.1] disclose [N 10:16 / 11:16 / 21:16 / 22:16 22:24:22:16 / 22:16 22:24:22:16 / 2		context [11] 4:4 17:22 34:			
conclude Q 916 99:23 contexts II 110:4 continuum Q 116:22 20 86:12 87:9 88:17 07:5 dilemma II 75:10 67:9 conclusion III 42:7 contracting II 96:19 contracting II 76:3 103:1 121 112:32:32 30:324 directly III 35:10:10:10:10:10:10:10:10:10:10:10:10:10:				defendants [17] 53:16 54:	
concluded [94:2] 47:1 continueg [96:9] contract [97:8] contract [97:8] <thcotract [97:8]<="" th=""> <</thcotract>	-				
57-9 conclusion (3:16 80:17) continuum (119:19) 84-9 32:4 97:22 103:5 143 directly (3:32:19:8:19) 67.11 contracting (119:17) 12 directly (3:32:19:8:19) directly (3:32:19:8:19) 67.11 contracting (119:17) 12 directly (3:32:19:8:19) directly (3:32:19:8:19) conclusion (119:12) 22 contracting (119:12) contracting (119:12) directly (3:32:19:8:11) conducted (10:60:20:27 epicontracting (119:12) contracting (119:12) contracting (119:12) contracting (119:12) conducted (10:60:20:27 epicontracting (119:12) contracting (119:12) contracting (119:12) contracting (119:12) contracting (119:12) conditing (119:12) contracting (11					
conclusion [13:18.507] continuum [11:19.3] 12 1162:417:112.313; defendints [10:32.55] 12:42.5 conclusions [11:42; contract [17:8] 17:83:103; cover [10:82:20:3,4] defendints [10:83:22:3,7] disclose [10:97,7] conduct [16:61:3] 34:4:6 cover [19:92:80:1] cover [19:92:80:1] cover [19:92:80:1] defendints [10:83:12:83;1,2] disclose [10:97,7] disclose [10:92,2] disclose [10:92,2] disclose [10:92,2] disclose [10:12,2] disclose					
a7:11 contracting IP78:137:11 21 accordusions II1427 disagree II317:0:028 accordusion II1421 condusion II1427 contracting III76:1032 accordusion II1427 disagree III317:0:028 accordusion III1421 condusion III162 contracts III102:24 contracts III102:24 scitt 45:1105:20 disagree III317:0:028 accordusion III118:42 conducted III160:20:22 78 contracts III102:24 contracts III102:24 scitt 45:1105:20 disagree III317:0:028 accordusion III118:42 conducted III160:20:27 78 contracts III102:24 contracts III1112:21 contracts III112:21 contracts III112:21 contracts III1112:21 contracts III112:21 contracts III112:21 contracts III112:21 contracts III112:21 contracts III112:22 contracts IIII112:22 contracts				,	-
conclusions (n.427) contracting [n75-3] (03) cover nfl (82:30)(34) cover nfl (82:30)(34) contradict (n168)(22) 201/22:102:1 <			,		
conditions (P198:12 22 covered (P42:16:12.387) defense (P498:12.817) disclam (P116:4) conduct (P186:1.3124) contracts (P102:24) sciental (P116:22) fieldse (P196:12:23) disclam (P116:4) conducting (P184:12) contracts (P102:24) sciental (P116:22) fieldse (P196:12:21) fieldse (P196:12:21) <td< td=""><td></td><td></td><td></td><td>-</td><td>•</td></td<>				-	•
conductions 0:00000000000000000000000000000000000		•		-	
conduct (#) 861:3 124:16 contral (#) 140:23 covers (#) 199 56:11 11 07:25 138:1,21,31,4 11 202.12 21:6 22:24 25: 23 82:17 87:22 99:23 106: convers (#) 199 56:11 create (#) 116:23 create (#					
conducted @ 60:02.27:e) control 10135:11 cram I01111:3 cram I0111:3 14:20 19:20 24:16 31:18 4:22 23 82:17 87:28 92:31 06: conversations I0114:12 conversations I0114:12 cram I0111:3 cram I0111:3 14:20 19:20 24:16 31:18 4:22 23 82:17 87:28 92:31 06: conversations I0114:12 conversations I0114					
23 217 87:22 89:21 96: conversations III 141:23 corate III 116:23 dofenses III 55:21 56:5 59:22 90:1.4 92:6 confidential ID 715 correct III 94:94 94:12 54: correct III 94:94 94:12 92:19 correct III 94:94:94:12 92:19 correct III 94:94:14:19 correct III 94:94:14:19 correct III 94:94:14:19 correct III 94:94:14:19 correct III 94:19 corect III 94:19					
conducting (II 84:10) corre (III 72:5 (a) 2116:10 correct (III 42:94 96:12 54: 2378:5 117:10.14 correct (III 42:94 96:12 54: 2378:5 117:10.14 correct (III 42:94 96:12 54: 2378:5 117:10.14 correct (III 42:94 96:12 97:8 314 65:22 82:12 97:8 354:12 22 correct (III 42:94 96:12 97:8 354:16 52: 82:22 197:8 108:5 118:3 134:2;4 138: 24 corres-petition (III 46:13 25: 857:15 54:14:11.120:22 76:18 108:5 117:120:22 76:18 108:5 117:120:22 76:18 108:5 117:120:22 76:18 108:5 117:120:22 76:18 108:5 117:120:22 76:18 109:22 1104:18 1056.7 corre (III 42:94 96:12) corres (III 42:94 96:12) 23:85:85 65:13 disclosures (III 12:17) 24 20:86:14 97:16 95:16 95:17 100:21 117:120:22 76:18 100:22 110:11 20:22 76:18 100:21 104:18 1056.7 Department III 12:22 damages (III 12:5:14 20:86:14 97:16 109:1 20:21 104:18 1056.7 20:86:14 97:16 109:1 100:11 120:22 76:18 100:21 104:18 1056.7 20:86:14 97:16 109:1 100:11 120:22 76:18 100:21 104:18 1056.7 20:86:14 97:16 109:1 100:11 120:22 76:18 100:21 104:18 1056.7 20:86:14 97:16 109:1 100:11 120:16 27:2 126:11 135:4 11:20:22 76:18 100:21 104:18 109:15 11:20:16 27:2 126:11 135:4 11:20:16 27:2 126:11 126:16 27:2 126:11 126:16 27:2 126:11 126:16 27:2 126:11 126:16 27:2 126:11 120:11 120:12 11:20:16 27:2 126:11 120:11 120:12 11:20:16 27:2 126:11 120:11 120:12 11:20:16 27:2 126:11 120:11 120:12 11:20:11 120:12 11:20:		conversations [1] 114:12	create [1] 116:23		,
confidential III 7:15 127:5 665: 117:10,14.17 23 confines III 117:24 24 61:20.21 118:10 24 61:20.21 118:10 23 78:5 23 78:5 23 78:5 23 78:5 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:22 3 60:45 65:1 25 82:1 8:1 71:10,14.17 21 86:5 2 11:1,17 22:1 9 41:8 20 66:1 67:16.25 60:9 81: 20 66:1 67:16.25 60:9 81: 20 66:1 67:16.25 60:9 81: 20 66:1 67:16.25 60:9 81: 20 66:1 67:16.25 60:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.25 80:9 81: 20 66:1 67:16.27 81: 20 66:1 76:16.22 80:1 81:16:10 110:12: 10:1 11:12:10 110:11:10: 10:1 11:12:10 110:11:10: 10:1 11:12:10 110:11:10: 10:1 11:12:10 110:11:10:11:11:10:11:11:10: 10:1 11:12:10 110:11:11:10:11:11:10:11:11:10:11:11:10:11:11	8 115 :10	cooperate [1] 97:7	creates [2] 109:24 110:9	138: 3	disclosed [7] 10:13 20:24
confined Correct Gardines Correct Gardines Correct Gardines Correct Gardines Gardines <thgardines< th=""> <thgardines< th=""> <thga< td=""><td>conducting [1] 84:10</td><td>core [4] 7:3 50:3 116:10</td><td>criminal [7] 37:16,18 52:5</td><td>definition [1] 21:14</td><td>24:20 37:3,18 106:22 125:</td></thga<></thgardines<></thgardines<>	conducting [1] 84:10	core [4] 7:3 50:3 116:10	criminal [7] 37:16,18 52:5	definition [1] 21:14	24: 20 37: 3,18 106: 22 125:
Confines (#147:24 confirmation [#19:22 24 81:20.21 #18:10 couldn't [#22:21 92:19 couldn't [#22:21 92:19 couldn't [#22:21 92:19 couldn't [#22:21 92:19 couldn't [#22:21 92:19 couldn't [#22:21 92:19 couldn't [#22:21 92:19 consequent [#3:23 04:16 63:14 65:22 82:21 97:6 couldn't [#22:22 138:9 congregatis (#77:5 congregatis [#3:25 46:7 77:8 21:15 25:14 29:5 48: 10:25 11:13:3 43:2 92:3 95:3 96:8 counterterrorism (#56: 126:11 136:4;18 10:56.7 71:8 21:16 25:14 29:5 48: 10:15 117:20 124:24,25 10:15 117:20 124:24,25 10:15 117:20 124:24,25 10:15 117:20 124:24,25 10:15 117:20 124:24,25 10:15 117:20 124:24,25 10:15 117:20 124:24,25 counse (#66:57 46:19;23 125:10 counterterrorism (#56: 126:11 136:4;18 counse (#16:57 46:19;23 125:10 counterterrorism (#56: 126:11 136:4;18 counse (#16:57 46:19;23 125:10 counterterrorism (#56: 126:11 136:4;18 counse (#16:57 46:19;23 23:22 25:1,14 27:1 29:4 consecution (#148:4 consecution (#148:4 consecution (#148:4 13:56 counse (#16:57 46:19;23 23:22 25:1,14 27:1 29:4 23:17,25 48:2 119:3: 124:13 74:14 22:19 consecution (#148:4 consistency (#19:0:10:23 10:68:22 29:13,14 27:14 27:14 29:4 13:16 6:10 68:13 04:16:25 10:68:22 29:14:10:27 10:16 82:29 29:110:01 10:16 82:29 29:110:01 10:17 72 17:18 48:10 19:72 14:19 22:19 22:19 22:10 20:10 13:15 14:21:19 122:122:15 13:36. 11:10:17 72:17 13:15 13:36. 12:10 12:17 12:15 13:36. 12:10 12:11:12:15 13:36. 12:10 12:11:12:15 13:36. 12:10 12:11:12:15 13:36. 12:10 12:114:20 13:11:12:11:10 13:15 14:20 13:10 13:10 10:11 13:12:10 13:10 1	confidential [1] 7:15	127: 5	66: 5 117: 10,14,17	definitively [1] 104:17	23
confirmation (1) 19:22 colume (10) 19:22:21 92:19 crossed (1) 25:17 del ving (1) 41:6 disclosure (20) 7:19 41:8 confused (1) 8:23 40:16 53:14 65:22 82:21 97:8 108:51 18:31 34:2,4138 D D Contrust (1) 11:12:22 7:10 105:52 56:4 59:22,21,23 65: 20:66:16 77:18,224 80:98 11:16 108:19 61:14 D D Contrust (1) 11:12:22 7:10 106:25 107:15 32:14 deprivation (1) 31:16 12:12 22:22 138:9 106:25 107:15 32:14 deprivation (1) 12:15 33: 12:16:26 26:20 26:24 25 deprivation (1) 12:15 33: 12:16:26 26:20 26:24 25 deprivation (1) 41:16 20:15 23: 12:16:26 26:20 26:24 25 deprivation (1) 41:14 12:16:26 26:20 26:24 25 deprivation (1) 41:16 20:16 27:22 12:16:26 27:20 26:24 25 deprivation (1) 41:16 20:16 27:22 12:16:26 27:20 26:24 25 deprivation (1) 41:16 20:16 27:22 12:16:26 27:20 26:24 25 deprivation (1) 41:14 12:22 56:16 5:22 deprivation (1) 41:16 20:16 27:22 12:16:16 22:29:11:12:17 12:16:16 22:29:11:12:17 12:16:16 22:29:11:12:12:11 12:16:16 22:22:16 32:25:16 27:12:17:13:16:16:12:22 <td< td=""><td></td><td></td><td></td><td></td><td>-</td></td<>					-
conflict pl 44:91 30:16 confused [98:23 40:16 54:22 Consel [11 58:19 61:14 63:14 65:22 82:19 7:8 108:51 18:3 134:24 138 crossed [11 425:17 b] dematuralization [11 68:1 65:25 56:4 59:2,21 23 65: 20 66:16 79:18.25 80:9 81: 20 60:16 79:18.25 80:9 81: 20 60:16 79:18.25 80:9 81: 20 60:16 79:18.25 80:9 81: 20 60:16 79:18.25 80:9 81: 21 66:29 80:14 92:14 92:14 31 77:23 41 77:23 61:15 51:16 counterimity [19 56: 11: 21 16:6 25:20 26:24.25 discover pl 53:16 discover pl 53:17:16 deprives [19 51:16 deprives [19 51:16 described [19 7:67 51:10 98:10,14 400:21 11:20 21 described [19 7:67 51:10 31:6 5 dematuralization [19 61:25 deprives [19 51:16 deprives [19 51:16 deprives [19 51:16 described [19 92:14 130:25 deprives [19 51:16 described [19 7:67 51:10 31:6 5 dematuralization [19 162:3 11 61:25 107:16 132:14 dah [17 33:18 94:14 deal [19 33:16 11 22 16:6 25:20 26:24.25 discover pl 53:16 12:25 described [19 7:67 51:10 31:6 12:22 86:14 27:13 73:6, 10 16 82:22 99:18 100:19 21 22 25:14 27:13 23:23 15: 11 40:79 423 84:17 76:8 10 16 82:22 25:14 42:1 29:24 described [19 7:67 51:10 31:6 5: 21 40:17,9 423 54:17 76:8 11 40:79 423 54:17 74:8 11 40:79 42 52:19 22:10 11 40:76 44:12 22 11 41:9 42:19 42:10 11 41:9 414:12 11 41:9 414 41:12 11 41:9 414 41:12 11 41:9 414 41:3					
confused PI8-23 40:16 63:14 65:22 82:21 97:81 curious PI18:15,20 48:11 denaturalization P1 42: 55:25 56:4 59:2,21,23 65: congregation P193:16 counterintuitive P167: D D CF11:11,20,22 76:18 16 D Department P1:120:23:22 66:16 79:18,25 80:981: Congress P1:526 167: Counterintuitive P167: Gounterterrorism (1)56: 17:715 17:82:14 93:20 92:3 95:4 96:6. 12:153:220 26:24 25: 12:156:250 26:24,25 108:51 117:20 124:24,25 counterterrorism (1)56: 10:11 deprivation (1) 61:25 12:163:250 20:24:24,25 108:51 117:20 124:24,25 counter (17:15) counter (17:15) deprivation (1) 61:25 discoverable (1) 82:8 12:163:20 02:22 5:1,14 21:153:11 10:11 dasperous (18:81:11 95:16 Deputy (1) 1:19 discoverable (1) 82:8 12:15:18 Counter (17:11:15):33:41,153:41:3 Counter (17:11:15):34:41 deprivation (1) 94:14 5 12:15:18 Counter (17:11:15):33:41,15:34:13 Counter (17:11:15):33:41,15:12:14 describer (18:21:13:21:19) 16:14.91:11:12:14:12:12:14 16:14.91:11:12:12:14 16:14.91:11:12:14:12:12:14 16:14.91:11:12:14:12:12:14 16:14.91:11:12:14:12:14:12:14 16:14.91:11:12:14:12:1					
54:22 108:5 118:3 134:2,4 138: congregation [19:3:16 Congress [20] 52:5 16:7 16 D					·
congregants (0.77:5 congregation (0.93):16 Congressional (0.23):22 32:1 93:20 92:3 95:4 96:8 102:21 104:18 46:9,11 12:11 35:21 104:18 46:9,11 12:11 35:21 104:18 46:9,11 102:11 135:4,18 Congressional (0.57):112:15 12:11 135:4,18 Congressional (0.51):11 12:16 20 102:117:15 conserved (0.14):114:11 20 101:17:115 conserved (0.14):114:11 20 101:17:115 conserved (0.14):114:11 20 101:17:115 consistent (0.13):15:13 35:26 99:11.19,23 44:13 35:26 99:114:27:139 conserved (0.14):114:27 consistent (0.13):15:13 45:22,236:38: 35:22 104:18 99:10:230: 10 85:22 D.C. [11:11.20.22 76:18 106:25 107:15 132:14 dial (0.13):10:10,10			curious [3] 18:15,20 48:11		
congregation [193:16] counterituitive [267:1] D.C [71:11,20,22 76:18] depending [2125:7,10] 12 12:22 23 38:9 17:8 21:15 25:14 29:5 48:1 counterterrorism [156:1] 100:25 107:15 32:14 dath [73:31:0,10,10,10,10] 17 57:23 18 57:57:10 17 57:23 17 57:23 18 57:57:57:10 19 57:57:57:10 98:10,14 100:21 11:20 16 51:49:13 13:21:23:16 10:19 13 5:5 16 51:22,22 56:42:71:37:8,5 16 51:22,22 56:42:71:37:8,5 16 51:22,22 56:42:71:37:8,5 16 51:24:22:55:41:47:7:13 45:22:25:53:10 17 57:13 45:22:22:57:10 17 57:13 56:22:25:57:10 19 57:57:10 19 57:57:10 19 57:57:10 19 57:57:10 13 51:22:25:10 10 57:22:25:10:11:10:12:17:14:12:23:14 13 51:22:25:10:11:10:17:13:12:12:12:14:12:13:14 13 51:23:16:10:11:11:12:12:12:14:12:13:14 12 57:17:13 55:22:25:57:10 13 51:23:17:12:17:11:12:12:12:12:12:12:12:12:12:12:12:12:			D		
Congress (#) 5:25 (67) Congress (#) 5:25 (67) <thcongress (#)="" (67)<="" 5:25="" th=""> Congress (#) 5:25 (67)<!--</td--><td></td><td></td><td>D.C [7] 1:11 20 22 76:18</td><td></td><td></td></thcongress>			D.C [7] 1 :11 20 22 76 :18		
Congress (a) 52:14 29:54 Counterterrorism (1) 56: dah (7) 33:10.10,10,10,10,10,10,10,10,10,10,10,10,10,1					
11/3 21 4/9 64:9 j.11 77:20 13 10,11 damages (B 10:25 11:16) 13 10,11 deprivation (D 61:25) 12 5:0 12 5:0 12 5:0 12 5:0 12 5:10 12 5:10 12 5:10 12 5:10 12 5:10 13 13 13 5:16 12 5:10	-				
82:1 83:20 92:3 95:4 96:8 102:21 104:18 105:6,7 126:11 135:4,18 country 19 95:6 116:22 125:10 damages (9 10:25 11:18, 18,19 35:21 36:19 51:18, 60:21 deprived (2 92:14 130:25 deprives (1) 53:16 discoverable (1) 53:13 discoverable (1) 53:13 108:15 117:20 124:24,25 Congress's (1) 126:18 counts (1) 71:15 couple (1) 58:6 fd:14 damages (9) 10:25 11:18, dangerous (2 82:11 93: 21 deprived (2 92:14 130:25 deprives (1) 53:16 discoverable (1) 53:13 discoverable (1) 57:510 125:18 course (0 66:5 74:6,19,23 97:16 126:10 97:16 126:10 day (2 43:18 94:14 deal (2) 16:8 18:10 116:25 deal (2) 16:18 110 116:317; deprived (2 92:14 130:25 deprives (1) 53:16 discoverable (1) 85:20 derived (2) 14:1120 65:122,25 64:2 71:3 73:6, 16:10 82:17,25 49:2 116:20 consequence [3 13:6 68: 12:2 22 55:1,14 27:1 29:44 20 10:17,11 13:4 22:17,20 23:22 25:1,14 27:1 29:44 deprived (2) 92:1 11:20 describes (2) 18:2 13:23 discriminated (4) 127:14 describes (2) 18:2 13:23 18 135:6 consider (4) 9:10:2.3 32:2,91,14 35:2,2 56:5 8: 5,24 40:10,31,5 59:25 96:1, 18:134:12,13,14 14:407:9 42:3 54:17 75:8 decide (2) 93:1,2 113:2,11 describes (2) 18:2:13:2,13 discriminatory (2) 106:8 consider (4) 19:11:14 24,17 55:1,3 56:2,25 57:3, 18:134:12,13,14 14:407:9 42:3 54:17 75:8 discusses (1) 19:2.1 discusses (1) 19:2.1 discusses (1) 10:2.1 discusses (1) 112:1 107:20 127:17 13:1:1					
102:21 104:18 105:67 108:15 117:20 124:24,25 Course \$1 0126:18 Congress's [0126:18 Congress's [0126:18 Congress's [0126:18 Congress's [0126:18] 125:10 Course [0:65:74:6,19,23 97:16 125:10 18, 19 35:21 36:19 51:18 dangerous [2] 82:11 93: 21 dangerous [2] 82:11 93: 21 dangerous [2] 82:11 93: 21 deal [0] 16:8 18:10 116:25 dealing [0] 7:17 16:13 17; 22 40:18, 012, 17:29 44; 14 134:24 deprives [0] 53:16 deprives [0] 53:16 degrives [0] 57:6 75:10 described [0] 57:6 75:10 described [0] 57:6 75:10 described [0] 57:6 75:10 describes [2] 18:2 136:23 10:6 82:2 99:18 100:19 describing [2] 31:22 40:18 describing [2] 31:22 40:18 description [0] 21:22 40:18 destroy [0] 57:6 77:6 description [0] 21:22 40:18 destroy [0] 57:6 77:6 description [0] 21:22 40:18 destroy [0] 57:6 77:6 destroy [0] 110:21 destroy [0] 57:6 77:10 destroy [0] 57:6 77:10 determined [0] 57:10 destroy [0] 57:6 77:10 destroy [0] 57:10 des		-	damages [8] 10:25 11:18,		
108:15 117:20 124:24,25 126:11 135:4,18 counts [1] 71:15 couple [1] 58:6 60:21 dangerous [2] 82:11 93: 21 Deputy [1] 1:19 derived [2] 14:11 28:4 derogation [1] 48:14 discovering [2] 16:23 17: derogation [1] 48:14 congressional [2] 5:11 125:18 97:16 125:10 COURT [173] 11:1,15 3:4,13, consequence [3] 13:66: 25 4:17 78:10,12 17:23 9: dealing [8] 717 16:13 17: 23:22 25:1,14 27:1 29:4 14 134:24 COURT [173] 11:1,15 3:4,13, 25 4:17 78:10,12 17:23 9: dealing [8] 717 16:13 17: 24 25:17,25 49:2 116:20 Deputy [1] 1:19 derived [8] 57:5 75:10 98:10,14 100:2 111:20 16:14,9,11,16 25:16 27:2, 98:10,14 100:2 111:20 consequence [3] 108:13, consequence [3] 108:13, consider [4] 9:9 10:2 30: 912 47:2,35,16,24 48:20 23:22 25:1,14 27:1 29:4 33:6:5 14:407:9 42:3 54:17 73:2 decide [3] 52:4 40:18,20,25 41:1 46:3 14:407:9 42:3 54:17 73:2 decide [3] 52:4 40:18,20,25 41:1 45:5 14:407:9 42:3 54:17 73:2 decide [3] 50:4 93:17 13:- decide [3] 50:4 93:17 13:- decider [3] 50:4		-	18,19 35: 21 36: 19 51: 18		
126:11 135:4,18 couple [1] 58:6 dangerous [2] 82:11 93: derived [2] 14:11 28:4 5 Congress's [1] 126:18 course [10] 66:5 74:6, 19,23 97:16 125:10 Gorgenos [2] 82:11 93: derived [2] 14:11 28:4 5 Congress's [1] 126:18 COURT [179] 11:1,15 3:4,13, 25:17 7:8, 10,12, 17,23 97:16 125:10 65:12,25 64:2 71:3 73:6, consenual [0] 114:11 20 10:1,7,11 13:4 22:17,20 24 25:17,25 49:2 116:20 98:10,14 100:2 111:20 65:12,22 564:2 71:3 73:6, consequence [3] 108:13, 347.9,14 35:2,2,2 36:5 38: 52.44 0:18,20,25 49:2 116:20 described [19] 21:2 40:1 13:7 34: described [19] 21:2 40:1 14:1 12:1 described [12] 21:2 40:1 12:7 consequences [3] 108:13, 347.9,14 35:2,2,2 36:5 38: 71:21 78:1 84:6 94:5,9,10, 107:20 127:17 131:5 description [12]:7 description [1					
Congress's III 126:18 congressional [2] 5:11 course [0] 66:5 74:6, 19,23 97:16 125:10 21 day [2] 43:18 94:14 deal [3] 16:8 18:10 116:25 dealing [10] 7:17 16:13 17: 24 25:17, 25 49:2 116:20 derogation [11,9]:14 described [3] 7:5 75:10 discovery [21] 5:6 15:22 dealing [10] 7:17 16:13 17: 24 25:17, 25 49:2 116:20 consequence [3] 13:6 68: 14 134:24 25 4:17 7:8, 10, 12, 17, 23 9: 20 10:17, 71 13:4 22:17, 20 consequence [3] 13:6 68: 23:22, 25:1, 14 27:1 29:4 14 134:24 32:22, 13, 18 33:4, 15, 19, 20 34:7, 9, 14 35:2, 22 36:5 38: decide [29] 32:4, 11 36:3 decor gation [11,9]:14 describing [2] 18:2 136:23 discriminated [4] 127:14 describing [2] 18:2 136:23 consequence [3] 108:13, 18 135:6 34:7, 9, 14 35:2, 22 36:5 38: 44:02, 52, 44:20, 25 41:1 46:3, 52:4 40:18, 20, 25 41:1 46:3, 52:4 40:18, 20, 25 4:17, 75:16, 27, 42:14 44:07, 9, 42:3 54:17, 75:8 44:02, 77:17 58:12, 13, 56:2, 25 57:3, 49:24 50:10, 13, 15 53:9 54: 10 17:20 127:17 131:5 description [10] 12:7 destroy [2] 93:2,7 destroy [2] 93:2,7 destroy [2] 93:2,7 determination [19] 12:8 35: 65:10 discussing [2] 05:22 76:6 114:9 considerations [11 11:14] consistent [10] 10:2:16 consistent [10] 10:2:16 consistent [10] 10:2:16 60:13, 16 61:10 62:11, 14, 10:13, 75:41, 11, 22, 57:6; 11:10:27 11:11:12 deciding [10] 46:3 53:12 81: 20 89:21 95:23 96:1 116:8; 14 4:12 discussing [10] 22:0 95:10 33:18 34:8 38:19 93:24 63: description [10] 12:8; 14:12		couple [1] 58:6	-		-
Connection [1] 18:4 COURT [173] 11:1,15 3:4,13, 125 (17,25 49:2 117; 76:13 17: 24 25:17,25 49:2 117; 76:13 17: 24 25:17,25 49:2 116:20, 136:53 Consensual [1] 114:11 Consensual [1] 114:11 Consensual [1] 114:11 Counce [1] 13:6 Counce [1] 13:4 22:17,25 49:2 117; 76:13 17: 24 25:17,25 49:2 116:20, 117; 7 Counce [1] 13:6 Counce [1] 13:2 Counce [1] 13:6 Counce [1] 13:6 Counce [1] 13:2 Counce [1] 13:6 Counce [1] 13:7 Counce [1] 13:7 Counce [1] 13:12 Counce [1]	Congress's [1] 126:18	course [6] 66:5 74:6,19,23			discovery [21] 5:6 15:22
12:16 Connection (1) 18:4 25 4:17 7:8,10,12,17,23 9; dealing (8) 7:17 16:13 17; 128:13 36:1 10.16 82:2 99:18 100:19 consequence (8) 13:6 68: 23:22 25:1,14 27:1 29:4 32:2,13,18 33:4,15,19,20 17:7 debatable (1) 95:15 describing (2) 31:22 40:18 discriminated (4) 127:14 14 134:24 32:2,13,18 33:4,15,19,20 34:7,9,14 35:2,2,2 36:5 38; debatable (1) 95:15 describing (2) 31:22 40:18 discriminated (4) 127:14 18 135:6 5,24 40:18,20,25 41:1 46:3 14 40:7,9 42:3 54:17 75:8 description (1) 119:21 description (1) 21:7 description (1) 21:3 description (1) 21:7 description (1) 21:7 description (1) 21:7 description (1) 21:3 description (1) 21:3 description (1) 21:3 description (1) 21:3 descriptio	congressional [2] 5:11	97 :16 125 :10	5	described [8] 57:5 75:10	16: 1,4,9,11,16 25: 16 27: 2,
consensual (1) 114:11 20 10:1,7,11 13:4 22:17,20 24 25:17,25 49:2 116:20 110:17 113:4 22:17,20 136:5 consequence [3] 13:6 68: 23:22 25:1,14 27:1 29:4 32:2,13,18 33:4,15,19,20 117:7 debatable [1] 95:15 decide [29] 32:4,11 33:7 34: describes [2] 18:2 136:23 discriminated [4] 127:14 18 135:6 5,24 40:18,20,25 41:1 46:3 14 40:7,9 42:3 54:17 75:8 decide [29] 32:4,11 33:7 34: describes [2] 31:2 2 40:18 discriminated [4] 127:14 consider [4] 9:9 10:2 30: 9,12 47:2,3,5,16,24 48:20 49:24 50:10,13,15 53:9 54: 14 40:7,9 42:3 54:17 75:8 destroy [3] 5:1 88:1 93:11 discriminatory [2] 106:8 107:20 127:17 131:5 considerations [1] 111:14 2,4,17 55:1,3 56:2,25 57:3, 57:1,7 58:12,13,21 59:21 18 134:12,13,14 decide [3] 50:4 93:17 135: decide [4] 9:9:1,4 10:8 107:20 127:17 131:15 discussed [6] 55:22 76:6 657:2 discusses [1] 16:20 114:9 consistent [9] 13:19,23 43: 16 63:19 64:15 65:13,18, 24 20 89:21 95:23 96:1 16:8; 12:2 36:14 38:2 58:2 64: discussing [3] 28:9 29:20 16 78:14 79:22 82:16 90:2. 95:10 consitutional [19] 5:10: 23 79:3 80:16 81:2 82:9 20 76:16 77:12 83:17 decide [9] 77:1,13 119:21 21:6 12:2 36:14 38:2 58:2 64: discussing [3] 28:2 92:20 95:10 <td>125:18</td> <td>COURT [173] 1:1,15 3:4,13,</td> <td></td> <td>98:10,14 100:2 111:20</td> <td>6 51:22,25 64:2 71:3 73:6,</td>	125: 18	COURT [173] 1:1,15 3:4,13,		98:10,14 100:2 111:20	6 51: 22,25 64: 2 71: 3 73: 6,
consequence [3] 13:6 68: 23:22 25:1,18 33:4,15,19,20 117:7 describing [2] 31:22 40:18 discriminated [4] 127:14 14 134:24 32:2,13,18 33:4,15,19,20 34:7,9,14 35:2,2,2 36:5 38: decide [29] 32:4,11 33:7 34: describing [2] 31:22 40:18 discriminated [4] 127:14 10 85:22 49:24 50:10,13,15 53:9 54: 5,24 40:18,20,25 41:1 46:3 77:21 78:1 84:6 94:5,9,10 destroy [9] 5:1 89:1 93:11 107:20 127:17 131:5 consider [1] 111:14 24,17 55:1,3 56:2,25 57:3, 5,7,17 58:12,13,21 59:21 16,18 95:19 113:7,22 114: destroy [9] 5:1 89:1 93:12 discriminated [4] 127:14 consistency [1] 102:16 60:13,16 61:10 62:11,14, 49,11 119:24 120:7 132: 16 63:19 64:15 65:13,18, 24 decide [3] 50:4 93:17 135: decide [3] 50:4 93:17 135: decide [3] 50:4 93:17 135: discussed [6] 55:22 76:6 79:16 107:2 120:4 131:11 consistency [1] 102:16 60:13,16 61:10 62:11,14, deciding [8] 46:3 53:12 81: 12:2 6:14 38:2 58:2 64: discussing [3] 28:9 29:20 discussing [3] 28:9 29:20 discussing [3] 28:9 29:20 discussing [3] 28:9 29:20 discussing [3] 28:24 63: discussing [3] 28:24 63: 114:9 consistent [9] 13:19,23 43: 16 63:19 64:15 65:13,18, 23 79:3 80:16 81:2 82:9 20 67:16 77:12 81:4 106: 12:7 109:15 114:15, <	connection [1] 18:4	25 4: 17 7: 8,10,12,17,23 9:	-	128: 3 136: 1	10,16 82: 2 99: 18 100: 19
14 134:4 consequences [3] 108:13, 18 135:6 23.22 (3):13 34:2 19,20 debatable [1] 95:15 decide [29] 32:4,11 33:7 34: 14 40:7,9 42:3 54:17 75:8 description [1] 21:7 description [1] 21:7 128:13 131:2 131:2 131:2 131:2 131:2 description [1] 21:7 consider [4] 9:9 10:2 30: 10 85:22 9,12 47:2,3,5,16,24 48:20 49:24 50:10,13,15 53:9 54: 15,7,17 58:12,13,21 59:21 debatable [1] 95:15 decide [29] 32:4,11 33:7 34: 14 40:7,9 42:3 54:17 75:8 description [1] 21:7 description [1] 21:7 128:13 131:2 130: 10 85:22 discrimination [4] 56:6 consider [4] 9:10:2 30: 10 85:22 9,12 47:2,3,5,16,24 48:20 77:21 78:18 48:6 94:5,9,10, 15,21 43:15 53:9 54: 16,31,16 61:10 62:11,14, 24 140:7,9 42:13:14 description [1] 11:2:8 35: detailed [1] 57:6 discussed [6] 55:22 76:6 consistency [1] 102:16 60:13,16 61:10 62:11,14, 24 16 63:19 64:15 65:13,18, 20 66:13, 75:4,11,12,25 76: 10:177 deciding [8] 46:3 53:12 81: 24 deciding [8] 46:3 53:12 81: 24 deciding [8] 46:3 53:12 81: 24 discussing [9] 28:9 29:20 95:10 consitution [1] 13:19 23 79:3 80:16 81:2 82:9 constitution [1] 13:5 83:4 90:1,13 91:13 92:27 97:6,11,15 99:3,17 101:4, 23 79:3 80:16 81:2 82:9 20 76:16 77:12 81:4 106: 24 107:1,13 119:2 121:6 determined [1] 87:21 dismiss [28] 20:21 32:10 33:18 34:8 38:19 39:24 63: 23:26 67:12,24 70:10 75: 23:18 34:8 38:19 39:24 63: 23:26 57:12,24 70:10 75: 23:18 34:8 38:19 39:24 64: 23:17 108:13 84:2 33:18 34:8 38:19 39:24 33:18 34:8 38:19 39:24 64: 23:17 108					
14:14:24 15:12:14:13:14:14:14:14:14:14:14:14:14:14:14:14:14:	-			-	
18 135:6 031, 13, 14 032, 12 033 034 14 407, 9 423 54:17 75:8 destroy [9] 15:1 93:11 107:20 127:17 131:5 10 85:22 0912 47:2, 3, 5, 16, 24 48:20 49:24 50:10, 13, 15 53:9 54: 77:21 78:1 84:6 94:5, 9, 10, destroy [9] 51.8 91:1 93:11 107:20 127:17 131:5 considerations [0] 111:14 2, 4, 17 55:1, 3 56:2, 25 57:3, 5, 7, 17 58:12, 13, 21 59:21 destroy [9] 102:18 35: destroy [9] 102:8 35: discussed [9] 55:2 27 6:6 consistency [0] 102:16 60:13, 16 61:10 62:11, 14, decided [3] 50:4 93:17 135: 24 decided [3] 50:4 93:17 135: destroy [9] 1.4 10:8 79:16 107:2 120:4 131:11 3 85:6 89:11, 19, 24 91:18 106 63:19 64:15 65:13, 18, 24 20 66:1, 3 75:4, 11, 12, 25 76: 16 63:19 64:15 65:13, 18, 24 12:2 36:14 38:2 58:2 64: discussing [3] 28:9 29:20 110:17 1, 8, 16, 16 77:16, 25 78:17, 20 89:21 95:23 96:1 116:8, 6 97:15, 17 109:15 114:1,5 discussing [3] 28:9 29:20 consitution [1] 3:15 83:24 84:20 85:20 87:20 decision [14] 75: 52:8 67: 20 76:16 77:12 81:4 106: 6 97:15, 17 109:15 114:1,5 discussion [2] 121:12 124:21 2 48:10, 17, 17 54:19, 23, 25 97:6, 11, 15 99:3, 17 101:4, 16 105:21, 24, 25 107:3 109: 20 76:16 77:12 81:4 106: 24 477:10 80:13 86:4 23:18 34:8 88:19 9:22 46:<				•	
10 3,24 40:10,20,20,411,403,7 77:21 77:21 77:21 78:184:694:59,910,103,1553:95,41 discription (19:10:103,105,103,103,103,103,103,103,103,103,103,103	-			desperately mins.21	
10 85:22 10 85:22 considerations [1] 111:14 considering [1] 85:20 consistency [1] 102:16 consistency [1] 102:16 consistent [9] 13:19,23 43: 3 85:6 89:11,19,24 91:18 110:17 consists [1] 108:8 consists [1] 108:8 consist [1] 108:8 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 13:15 constitution [1] 11:14 constitution [1] 11:14 construction [1] 11:17:14 bit 11:24 construction [1] 11:17:7 bit 12:27 fill 108:25 contains [1] 137:14			,		
considerations [1] 111:14 considering [1] 85:20 consistency [1] 102:16 consistency [1] 102:16 consistent [9] 13:19,23 43: 3 85:6 89:11,19,24 91:18 110:17 consists [1] 108:8 constitutes [1] 26:8 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 3:15 constitution [1] 13:15 constitution [1] 13:15 construction [1] 11:4 construction [1] 11:7 construction [1					
considering [1] 85:20 5,7,17 58:12,13,21 59:21 18 134:12,13,14 6 57:2 79:16 107:2 120:4 13:11 consistency [1] 102:16 60:13,16 61:10 62:11,14, decided [3] 50:4 93:17 135: 24 12:2 36:14 38:2 58:2 64: discusses [1] 136:20 3 85:6 89:11,19,24 91:18 16 63:19 64:15 65:13,18, 24 12:2 36:14 38:2 58:2 64: discussing [3] 28:9 29:20 100:17 1,8,16,16 77:16,25 78:17, 23 79:3 80:16 81:2 82:9 20 66:1,3 75:4,11,12,25 76: 20 89:21 95:23 96:1 116:8, 14 12:3 17 discussion [2] 121:12 124: constitutes [1] 26:8 23 79:3 80:16 81:2 82:9 83:24 84:20 85:20 87:20 83:24 84:20 85:20 87:20 20 76:16 77:12 81:4 106: 20 76:16 77:12 81:4 106: 23:17 11 constitution [1] 3:15 88:4 90:1,13 91:13 92:2,7 93:9 94:4,14,16 96:8,15,15 24 107:1,13 119:2 121:6 122:7 132:15 133:6 determines [2] 25:1 85:13 33:18 34:8 38:19 39:24 63: constitution [1] 11:4 20 5:10:20 113:6 114:3,14, 16 105:21,24,25 107:3 109: 24 107:1,13 119:2 121:6 14 38:14,15 94:17,19 100:23 33:18 34:8 38:19 39:24 63: 23,25 67:12,24 70:10 75: 14 4eveloped [1] 135:21 4eveloped [1] 135:21 4eviation [1] 82:20 4eviation [1] 82:20 4eviation [1] 82:20 4eviation [1] 82:20		, ,			
consistency [1] 102:16 consistent [9] 13:19,23 43: 3 85:6 89:11,19,24 91:18 110:17 consists [1] 108:8 constitutes [1] 26:8 constitution [1] 3:15 constitution [1] 111:460:31.0 64:13 62:1,14, 4.16 96:8,15,15 constitution [1] 3:15 construction [1] 111:4decided [3] 50:4 93:17 135: constitution [1] 4:5 65:13,18, construction [1] 111:4decidend [3] 50:4 93:17 135: construction [1] 111:4 construction [1] 111:4decidend [3] 50:4 93:17 135: construction [1] 111:4decidend [3] 50:4 93:17 135: construction [1] 113:6 114:3,14, construction [1] 137:14decidend [3] 50:4 93:17 135: construction [1] 108:25 to inf (1] 108:25 declarative [1] 108:25determine [19] 9:1,4 10:8 construction [1] 114:8 construction [1] 114:8 construction [1] 137:14discusses [1] 136:20 discusses [1] 136:20 construction [1] 114:8 construction [1] 114:8discusses [1] 136:20 discusses [1] 136:20 construction [1] 114:8 construe [2] 85:17 88:25 contains [1] 137:					
consistent [9] 13:19,23 43: 3 85:6 89:11,19,24 91:18 110:17 consists [1] 108:8 constitutes [1] 26:8 Constitution [1] 3:15 constitutional [15] 5:9 10: 2 48:10,17,17 54:19,23,25 60:21 61:1 62:9 85:21 116: 10 129:3,14 construction [1] 111:4 construction [1] 111:416 63:19 64:15 65:13,18, constitutions [1] 63:29 85:21 116: construction [1] 111:424 decision [8] 46:3 53:12 81: 14 decision [14] 7:5 25:8 67: 20 76:16 77:12 81:4 106: 24 107:1,13 119:2 121:6 12:7 132:15 133:6 declaration [8] 8:7 47:25 79:18,25 80:7,8,11 111:20 declarations [4] 69:12 71: 9,12 76:9 declarative [1] 108:25 declarative [1] 108:2512:2 36:14 38:2 58:2 64: discussion [2] 121:12 124: discussion [2] 121:12 124: dismiss [28] 20:21 32:10 33:18 34:8 38:19 39:24 63: 23,25 67:12,24 70:10 75: 14 deviation [1] 35:21 deviation [1] 82:20 deviation [1] 82:20 deviation [1] 82:20 deviation [1] 82:20 device [2] 51:23,25 devices [1] 114:8 Diaz [1] 94:23discussing [3] 28:9 29:20 95:10			decided [3] 50:4 93:17 135:		
3 85:6 89:11,19,24 91:18 110:17 20 66:1,3 75:4,11,12,25 76: 1,8,16,16 77:16,25 78:17, consists [1] 108:8 deciding [8] 46:3 53:12 81: 20 89:21 95:23 96:1 116:8, 14 16 78:14 79:22 82:16 90:2, 97:15,17 109:15 114:1,5 95:10 consists [1] 108:8 23 79:3 80:16 81:2 82:9 14 6 97:15,17 109:15 114:1,5 discussion [2] 121:12 124: constitution [1] 3:15 83:24 84:20 85:20 87:20 83:24 84:20 85:20 87:20 decision [14] 7:5 25:8 67: 20 76:16 77:12 81:4 106: 24 107:1,13 119:2 121:6 determined [1] 87:21 dismiss [28] 20:21 32:10 constitutional [15] 5:9 10: 2 48:10,17,17 54:19,23,25 97:6,11,15 99:3,17 101:4, 60:21 61:1 62:9 85:21 116: 93:9 94:4,14,16 96:8,15,15 122:7 132:15 133:6 determining [2] 83:3 90: 122:7 132:15 133:6 33:18 34:8 38:19 39:24 63: 23,25 67:12,24 70:10 75: 14 33:18 34:8 38:19 39:24 63: 23,25 67:12,24 70:10 75: 14 14 76:22 77:10 80:13 86:4 declaration [8] 8:7 47:25 79:18,25 80:7,8,11 111:20 developed [1] 135:21 88:14,15 94:17,19 100:23 10 129:3,14 16 105:21,24,25 107:3 109: 25 110:20 113:6 114:3,14, construction [1] 111:4 15,25 115:7,16,17,21,25 9,12 76:9 declaration [4] 69:12 71: 9,12 76:9 9,12 76:9 devices [1] 114:8 8119:25 8119:25 31:5 39:5 39: 32:25 35:9 38:5 39:			24		
110:171,8,16,16 77:16,25 78:17, consists [1] 108:820 89:21 95:23 96:1 116:8, 146 97:15,17 109:15 114:1,5 123:17discussion [2] 121:12 124: 11consists [1] 108:823 79:3 80:16 81:2 82:983:24 84:20 85:20 87:206ecision [14] 7:5 25:8 67: 20 76:16 77:12 81:4 106: 20 76:16 77:12 81:4 106: 24 81:0,17,17 54:19,23,25699:15,17 109:15 114:1,5discussion [2] 121:12 124: 11constitutional [15] 5:9 10: 2 48:10,17,17 54:19,23,2593:9 94:4,14,16 96:8,15,1593:9 94:4,14,16 96:8,15,1524 107:1,13 119:2 121:6 122:7 132:15 133:66etermines [2] 25:1 85:13 determining [2] 83:3 90: 1433:18 34:8 38:19 39:24 63: 23,25 67:12,24 70:10 75: 14construction [1] 111:421,22 102:3,4 103:12 104: 10 129:3,1416 105:21,24,25 107:3 109: 25 110:20 113:6 114:3,14, 15,25 115:7,16,17,21,2579:18,25 80:7,8,11 111:20 declaration [4] 69:12 71: 9,12 76:9developed [1] 135:21 devices [1] 114:888:14,15 94:17,19 100:23 105:12 111:10,18,19 118:6, 8 119:25construc [2] 85:17 88:25 contains [1] 137:14116:3,7,18,18,21 117:79.12 76:9 declarative [1] 108:259.12 76:9 declarative [1] 108:258119:25 22:25 33:25 35:9 38:5 39:			deciding [8] 46:3 53:12 81:		-
consists [1] 108:8 constitutes [1] 26:823 79:3 80:16 81:2 82:9 83:24 84:20 85:20 87:20 88:4 90:1,13 91:13 92:2,7 constitutional [15] 5:9 10: 2 48:10,17,17 54:19,23,25 60:21 61:1 62:9 85:21 116: 10 129:3,1414 decision [14] 7:5 25:8 67: 20 76:16 77:12 81:4 106: 24 107:1,13 119:2 121:6 122:7 132:15 133:611 determines [2] 25:1 85:13 determining [2] 83:3 90: 1411 dismiss [28] 20:21 32:1010 129:3,14 construction [1] 111:4 construc [2] 85:17 88:25 contains [1] 137:1416 105:21,24,25 107:3 109: 15,25 115:7,16,17,21,25 116:3,7,18,18,21 117:779:18,25 80:7,8,11 111:20 9,12 76:9 declaration [8] 09:12 71: 9,12 76:911 123:1711 determines [2] 25:1 85:13 determining [2] 83:3 90: 1433:18 34:8 38:19 39:24 63: 33:18 34:8 38:19 39:24 63: 33:18 34:8 38:19 39:24 63: 13:18 34:8 38:19 39:24 63: 14	, ,		20 89:21 95:23 96:1 116:8,		
constitutes [1] 26:883:24 84:20 85:20 87:20decision [14] 7:5 25:8 67:determined [1] 87:21dismiss [28] 20:21 32:10Constitution [1] 3:1588:4 90:1,13 91:13 92:2,720 76:16 77:12 81:4 106:determines [2] 25:1 85:1333:18 34:8 38:19 39:24 63:constitutional [15] 5:9 10:93:9 94:4,14,16 96:8,15,1524 107:1,13 119:2 121:6determines [2] 25:1 85:1333:18 34:8 38:19 39:24 63:2 48:10,17,17 54:19,23,2597:6,11,15 99:3,17 101:4,21,22 102:3,4 103:12 104:14 76:22 77:10 80:13 86:460:21 61:1 62:9 85:21 116:21,22 102:3,4 103:12 104:16 105:21,24,25 107:3 109:14developed [1] 135:2110 129:3,1416 105:21,24,25 107:3 109:79:18,25 80:7,8,11 111:20deviation [1] 82:20105:12 111:10,18,19 118:6,construction [1] 111:425 110:20 113:6 114:3,14,9,12 76:9devices [1] 114:88119:25construe [2] 85:17 88:2515,25 115:7,16,17,21,259,12 76:9devices [1] 114:8dismissal [45] 13:5 20:25contains [1] 137:14116:3,7,18,18,21 117:7declarative [1] 108:25Diaz [1] 94:2322:25 33:25 35:9 38:5 39:					
constitution (1):13:3 constitution (1):11:3 construction (1):11:4 construction (1):11:4 construct (2):15:7.16,17,21.25 construct (1):10:25 construct (1):10:25 construct (1):10:25 construct (1):10:25 construe (1):10:25 construct (1):10:25 construe (1):10:25 <td></td> <td></td> <td></td> <td>determined [1] 87:21</td> <td>dismiss [28] 20:21 32:10</td>				determined [1] 87:21	dismiss [28] 20:21 32:10
constitutional [15] 5:9 10: 2 48:10,17,17 54:19,23,25 60:21 61:1 62:9 85:21 116: 10 129:3,14 construction [1] 111:4 construction [1] 111:4 construction [1] 111:4 construction [1] 111:4 construction [1] 111:4 construction [1] 111:4 construction [1] 117:1493:9 94:4,14,16 96:8,15,15 97:6,11,15 99:3,17 101:4, 21,22 102:3,4 103:12 104: 16 105:21,24,25 107:3 109: 25 110:20 113:6 114:3,14, 15,25 115:7,16,17,21,25 contains [1] 137:1424 107:1,13 119:2 121:6 122:7 132:15 133:6 declaration [8] 8:7 47:25 79:18,25 80:7,8,11 111:20 declarations [4] 69:12 71: 9,12 76:9determining [2] 83:3 90: 1423,25 67:12,24 70:10 75: 14 76:22 77:10 80:13 86:4 developed [1] 135:21 developed [1] 135:21 deviation [1] 82:20 devices [1] 114:8 Diaz [1] 94:2323,25 67:12,24 70:10 75: 14 76:22 77:10 80:13 86:4 developed [1] 135:21 deviation [1] 82:20 deviation [1] 82:20 devices [1] 114:8 Diaz [1] 94:2323,25 67:12,24 70:10 75: 14 76:22 77:10 80:13 86:4 developed [1] 135:21 deviation [1] 82:20 deviation [1] 82:20 devices [1] 114:8 Diaz [1] 94:2323,25 67:12,24 70:10 75: 14 76:22 77:10 80:13 86:4 developed [1] 135:21 deviation [1] 82:20 devices [1] 114:8 Diaz [1] 94:23	Constitution [1] 3:15			determines [2] 25:1 85:13	33:18 34:8 38:19 39:24 63:
2 48: 10, 17, 17 34: 19,25,25 37.0, 11, 15 35.0, 17 101.4, 60:21 61:1 62:9 85:21 116: 21,22 102:3,4 103:12 104: 21,22 102:3,4 103:12 104: 16 105:21,24,25 107:3 109: 25 110:20 113:6 114:3, 14, construct [2] 85:17 88:25 declaration [8] 8:7 47:25 79:18,25 80:7,8,11 111:20 declarations [4] 69:12 71: 9,12 76:9 developed [1] 135:21 deviation [1] 82:20 devices [2] 51:23,25 88:14,15 94:17, 19 100:23 105:12 111:10,18,19 118:6, 8 119:25 construe [2] 85:17 88:25 contains [1] 137:14 15,25 115:7,16,17,21,25 116:3,7,18,18,21 117:7 9,12 76:9 declarative [1] 108:25 devices [1] 114:8 Diaz [1] 94:23 8119:25 22:25 33:25 35:9 38:5 39:	constitutional [15] 5:9 10:	93:9 94:4,14,16 96:8,15,15			23,25 67: 12,24 70: 10 75:
10 129:3,14 16 105:21,24,25 107:3 109:1	2 48: 10,17,17 54: 19,23,25	97: 6,11,15 99: 3,17 101: 4,			14 76 :22 77 :10 80 :13 86 :4
construction [1] 111:4 25 110:20 113:6 114:3,14, declarations [4] 69:12 71: device [2] 51:23,25 8 119:25 construe [2] 85:17 88:25 15,25 115:7,16,17,21,25 9,12 76:9 devices [1] 114:8 devices [1] 114:8 contains [1] 137:14 116:3,7,18,18,21 117:7 declarative [1] 108:25 Diaz [1] 94:23 22:25 33:25 35:9 38:5 39:	60: 21 61: 1 62: 9 85: 21 116:			•	88:14,15 94:17,19 100:23
construe [2] 85:17 88:25 construe [2] 85:17 88:25 construe [1] 137:14 construe [1] 108:25 g,12 76:9 devices [1] 114:8 dismissal [45] 13:5 20:25 contains [1] 137:14 116:3,7,18,18,21 117:7 declarative [1] 108:25 Diaz [1] 94:23 22:25 33:25 35:9 38:5 39:					105:12 111:10,18,19 118:6,
Constitute [2] 05.17 86.25 13,25 113.7,16,17,21,25 declarative [1] 108:25 Diaz [1] 94:23 22:25 33:25 35:9 38:5 39:					
			·		
Contemplated (9) 45:7,8 118:13 119:24 121:20,25 40000 10000 0000 00000 00000 119:24 121:20,25 400000 00000 00000 00000 00000 00000 0000					
		118:13 119:24 121:20,25		amerence [1] 93:12	13 41: 16,22 42: 8 44: 14,23

48.8 47, 7, 810 64:50 21.767 732:1008 (13): enacted Wat: 1442 24.12, 716 24.84, 82.327 explase frids 26.82 explase frids 27.82 explase frids 27.8		Official				
21 24 27, 75 (15) 167 8-22 domestic #802/4 819 35 (14 28) (13 01 0428, 18, 20) 36 (14 028, 10 0428, 18, 20) 19 21 155, 122, 21 151 103 section 130, 150, 160 end #3 (14 076, 15 41) 42 (25) 223, 24 (25), 16 19 21 155, 122, 123, 123, 113 15 80, 14 126, 23 section 120, 16, 16 end #3 (16, 16), 16 end #3 (16), 16 end	46: 8 47: 4,7,9,10 64: 5,10	21 70:9 73:21 100:6 113:	enables [1] 56:3	24: 1,2,16,18 25: 4,18,23 27:	expect [3] 48:14 96:15 101:	
sh:12 24:13 01:15 103: 96:6 109:22 1173: 173:15 16 123:4 22 43:10 44:22 47:17 122 19 20 105:16 07:23 111-11 22:16 25:03 27:17 25:17 16 123:4 95:7 57:11 889; 15:21:22 89:5 21 30:14 13:17:15 15 000 hurle \$17:872:10:11 12:12:22:37:17 11:11 12:12:12:23:16:19:22:17 99:10 hurle \$13:72:11:11 99:10 hurle \$13:72:11:11:11 99:10 hurle \$13:72:11:11:11 99:10 hurle \$13:72:11:11:11 99:10 hurle \$13:72:11:11:11 11 11 11:11:11:11:11:11:11:11:11:11:11:11:11:	65 :2,13 67 :16,22 68 :25 69 :	12 117 :11	enacted [3] 43:1 134:21	4 29: 1,3,11 30: 13 35: 6,12		
2) 10:10:10:12:31:13:12 12:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5 11:31:5:5:1:5:5:5:5:5:5:5:5:5:5:5:5:5:5:	21,24 72:7 75:15,16 78:22	domestic [8] 80:24 81:9	135: 14	36: 14 40: 8,10 42: 8,18,20,	explain [3] 9:22 71:25 122:	
121.5.8 122.0:10 124.3 done M 98:6 88:1 71:8 73: endanger M 90:10 56:7 57:11 48:9; 15.2/122 89:5 123.16 123.6 123.8 double M 75:3 00:14 132:3 endanger M 90:10 56:7 97:11 48:9; 15.2/122 89:5 13 19 double M 75:3 00:14 132:3 endonger M 18:7 23:8 57:31:1 77:21:11 32:4 89:5 13 19 double M 75:3 00:14 12:3:1 endonger M 19:0:16 57:31:1 77:21:11 32:4 endonger M 19:0:16 13:1 35:2: 22: 24:94:7 double M 75:3 00:14 12:3:1 endonger M 19:0:16 11:11:16 11:11:16 13:1 35:2: 22: 24:94:7 double M 74:16 50:7 19:23:13 42:15: 15:4:20 11:11:16 11:11:16 13:1 35:2: 22: 25:16:7 drive by M 84:14 10:06 entror M 24:15: 15:4:20 11:11:16 11:16 13:1 35:2: 22: 25:16:7 drive by M 84:14 10:06 entror M 24:15:15:14:24 11:11:16 12:17:16 12:17:16 13:1 35:2: 22: 25:16:7 drive by M 84:14:10:06 entror M 24:12:24:18 entro	81:12 94:13 101:15 103:	96:6 109:22 117:3 124:16	end [5] 34:19 76:15 84:13,	22 43 :10 44 :22 47 :7,17,22	19	
134:14 136:17 37:15 15 80:14 128:23 ndanjeoring (19:03) 69:16.17 22:00:11 61:24 69:16.72 20:01.16 124 69:16.72 20:01.16 124 expongement (27:12,2 13 13 13 13 69:16 128:15 67:13.17 7:14 13:24 69:15 7:03 7:11.72.12 27:2 25 13 19 10 10 10 10 10 10 10 10 10 10 10 10 10 11	20 105 :16 107 :23 111 :11	126:1 135:15	16 123: 4	49 :2 51 :20 52 :3,24 53 :18	explained [1] 65:5	
dismissal's Pr22:12 Donohue's Pr32:51 04: enforcement Pr82:72:67 644:20:65:19 6:17 6:77:4 Psychopement Pr12:12, 25 Psychopement Pr12:12, 21	121: 5,8 122: 3,16 124: 3	done [6] 36:3 66:1 71:8 73:	endanger [1] 80:10	56 :7 57 :11 58 :9,15,21,22	explanation [4] 22:4,5 24:	
128:15 1129:8 enforcement IR17:22 65 26 26 26 26 26 26 26 26 26 26 26 27 26 27 26 27	134:14 136:17 137:15	15 80: 14 126: 23	endangering [1] 80:3	59 :16,17,22 60 :11 61 :24	8 98: 5	
128:15 1129:8 enforcement IR17:22 65 26 26 26 26 26 26 26 26 26 26 26 27 26 27 26 27	dismissal's [2] 127:23	Donohue's [3] 73:25 104:	ends [2] 103:16,16	64: 4,20 65: 19 66: 17 67: 14	expungement [2] 27:12,	
13 9 England Piest 014-62 872.391:14 92.25 103:1 92:14 92:25 103:1 92:14 92:25 103:1 92:14 92:25 103:1 92:14 92:25 103:1 91:14 92:25 103:1 91:14 92:25 103:1 91:14 92:25 103:1 91:14 92:15 103:10 91:14 92:15 103:10 91:14 92:15 103:10 91:14 92:15 103:10 91:14 92:15 103:10 91:15 92:16 93:10 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:16 93:16 93:16 91:17 93:16 </td <td>128:15</td> <td>1 129:8</td> <td>enforcement [2] 18:7 28:8</td> <td>69:25 70:8 71:17,21,22 72:</td> <td></td>	128 :15	1 129 :8	enforcement [2] 18:7 28:8	69 :25 70 :8 71 :17,21,22 72 :		
dismissed IPI 4:22 74:26 displace UPS 2:419-87 displace UPS 7:11 displace UPS 7:11 displace UPS 7:12 displace UPS 7:12 di	dismissals [2] 76:2 121:	doubt [3] 75:3 106:14 134:	engaged [2] 86:1,3	5 73: 13,17 78: 1 81: 3,24	extensive [1] 109:4	
32:12:12:23:39:2:41:9 doubts (11:24:16 ensure (11:17:23 11:11:11:11:11:11:11:11:11:11:11:11:11:	13	19	England [2] 65:10 104:6	87:23 91:14 92:25 103:1	extent [3] 37:1 113:22 131:	
18 49.24 73:16 74:5 0149 Douglas in 129:10 enter (in 120:11 121:55.11 144:5 1152.35.88 124:81 11:16 13 31:2 54:12 56:22 77:12 dragnet (in 57:11 dragnet (in 57:11 enter (in 120:11 121:55.21 11:16 127:16 126:22,25 136:7.1 121:37:13 136:22.22,5 136:7.1 121:37:13 136:22.22,5 136:7.1 121:37:13 121:37:13 121:37:14 121:16 121:1	dismissed [17] 4:22 7:4,25	doubtful [1] 124:19	enormous [1] 108:13	104: 4 106: 13,17 107: 10,18	11	
1206.3 138:11.20 dismissing III 44:11 displaced III 57:11 33:12 54:12 56:22 77: 20 104:15 110:3 0 uoks II 128:18 ducks II 128:28 ducks II 128:18 ducks II 128:28 ducks II 128:18 ducks	32 :12,12,25 39 :2 41 :9 47 :	doubts [1] 124:15	ensure [1] 117:23	110:19 112:15 113:8,21	extraordinarily [2] 90:16	
1206.6 138:11.20 dismissing III 43:11 displaced III 5:11 20 104:15 1103 20 104:15 1104:15 1103 20 104:15 1104:120 20 104:15 1104:10 20 104:15 1104:10 20 104:15 110	18 49 :24 73 :16 74 :5 101 :4	Douglas [1] 129:10	enter [11] 20:1,11 21:5,5,11,	114: 5 115: 2,3,5,8,8 122: 18	111 :16	
dismissing m43:11 dragnet m67:11 66:16 133:1132.22.25136.7. 21 133:1122.54:12.66:22.77.12 drawing m72:19 entering m85:16.21 133:1132.22.22.136.7. 121.73.8 0164:16:10:13 displace m67.72.11 entering m85:16.21 133:1132.22.22.136.7. 121.73.8 136:12:27:10:11:12:17 ext2 556:66:16:677.8. entirely m64:14:12:11 entirely m142:10:56:25 136:17.44:115.16:12:00:17.44:57.46:07.44:16:16:16:10:12:18 137:13:13:17 ext2 556:66:16:677.8. entirely m12:16:56:35:92:2 116:17.17:12:12:16:16:17.44:17.79:02.16:16:17.72:12:16:16:17.72:12:16:16:17.72:17:17:12:12:16:17:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:17:12:12:11:11:11:11:11:11:11:11:11:11:11:	120: 6,8 138: 11,20	down [2] 47:16 50:7			extremely [2] 90:10 125:	
Ispace (%E7 / 2:113:) Idrawing (%T2:1) entered (%T2:447:8:69:15 12:137:8 Victore (%T2:108:1112):11 10:10:11:12:11 10:10:11:12:12 12:137:8 Victore (%T2:108:1112):11 12:137:8 10:10:12:12:12 10:10:11:12:12:13 11:11:12:11 11:11:11:11 12:11:11:11:11 10:10:12:12:12 10:10:11:12:12:13 11:11:11:11 11:11:11:11 11:11:11:11 10:10:12:12:12 10:12:12:12:13 11:11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11:11 11:11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11 11:11:11:11:11 11:11:11:11:11 11:11:11:11:11 11:11:11:11:11 11:11:11:11:11 11:11:11:11:11 11:11:11:11:		dragnet [1] 57:11				
I 33:12 54:12 56:12 77:1 drive-by [P4:8::4 100:6] entering [P3:8:15:2] evidentiary [P4:0:6 128:1] Tace [P3:10:6:1] 0 104:61 f013: displaced [P3:2:1 05:11 123:17] 84:25 85:6 66:15 67:7.8 entirely [P3:2:3] evidentiary [P1:0:1] 12.8 0 143:61 123:17 84:25 85:6 66:15 67:7.8 entirely [P3:2:9 86:5 92:2] 15:7 147:12 78:11 60:9 70:6 98:24 105:11 1 14 79:15 80:27 97:21 108 Dynamics [P4:02:2] entirely [P3:2:9 86:5 92:2] 11:7 14:15 79:20 80: 60:9 70:6 98:24 105:10 1 14 79:15 80:27 82:29 10:0 upul [P5:7:20 entirely [P3:28:98:0 11:57 147:12 78:11 60:9 70:6 98:24 105:10 1 13:12 7:18 65:7 78:20 80:1 13:17 71:8 13:17 equivalent [P3:0:11 13:17 12:18 13:14 13:17 12:18 13:14 1 3:17 13:17 12:11:1 13:17 12:12:1 Each [P3:22] earlier [P1:6:10; 17:10 essence 10:11:16 11:7:13 20:13:14 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:12 13:17 12:12:			entered [3] 3:4 47:8 59:15			
20 0404:15 (10.3) ducks in 123:16 entire in 24.11 (12:11) 12:18 face III (12:11) 116 (15:22) 12:18 (13:12:12) entire in 24.11 (12:12) entire in 24.11 (12:12) in 22:19 (13:12) face III (12:12) 14:14 (13:22) 12:14 (13:22) 12:14 (13:12) entire in 24.11 (12:12) in 11:12) face III (11:12) face III (11:12) 14:14 (13:22) 13:17 (13:13:12) entire in 24.21 (13:11) in 11:12) in 11:12) in 11:12) face III (11:12) face III (11:11:12) face III (11:11:12) face III (11:11:12) face III (11:12) face III (11:11:12) face III (11:11:12) face III (11:11:12) face III (11:11:11:11:11:11:11:11:11:11:11:11:11:	1 -	-				
displaced @8.24 1221 Due (# 83.25 65:10 827.8) entirely @84.86:11 123:3 evil(10:113:10) facilitate U+15 134:18,22 42.26 86:8 66:16 877.8 entirely @122:19 56:9 59:22 351:17 64:15:10:96: facilitate U+15 14 79:15 80:21 97:21 06: Upy @12:21 95:05 59:22 16 81:2,7.84:11 85:10 96: facilitate U+15 11 10:0: Upy @12:21 95:05 59:22 197:64:14:15:20 197:74:17:14:15:14:94:14:15:20 138:7 71:66:57 78:22 98:10 upy @11:07:14 197:12:22:16 197:74:17:14:17:17:12:16:16 138:7 71:16 55:16 95:22 error III 121:13 12 95:25 98:10:119:8:12 factu @17:65:16:13:17 138:17 138:17 E	,				face [5] 8:1,1,6 11:20 137:1	
61:6 67:2 105:11 123:17 34:25 866 86.6 (15 87.7); 8 entirety II 28:3 ex (95:23 65:116 85:4 60; 16 27.7); 8 facilities III 16:25 displacement (738:9 74; 11 50:22 97:21 06; 149:72 106; 149:72 106; 149:72 106; 149:72 106; 149:72 120; 156:79:22 98:10 ontry (92:19 58:95:22 16; 177:17:12 126; 168:97:177:17:12 126; 177:17:12 126; 177:17:12 126; 1139:117, 712:12 126; 1139:115, 712:12 1139:117, 712:12 126; 138:17 facilities III 47:15 facilities III 47:15 facilities III 47:15 11 110:8 77:18 78:14 94:6 116:15 77:18 75:12 28:10 115 77:12 72:12 66; 123:29 20:107 1137:13 138:17 displacing IV 44:20 57:18 65:5 78:22 98:10 1139:17:21 71:12 126; 123:13:13:16 exactly (91:17:12 126; 149:13:13:16; 149:13:13:16; 149:13:13:16 fairly (91:36:74:139:11; 139:13; 138:17 disposition III 34:24 49:5 130:72 111:14 124:11 ESQUIRE III 12:22 55:59 65:23 68:01 91:16:16 fairly (91:36:74:139:12) 134:11 136:12 117:11 127:11 127:11 127:11 127:11 127:11 127:11 127:11 127:11 127:12 117:61 33:01 07:10 fairly (91:36:12, 22:11 110:41:11:11 117:61 33:01 07:10 137:12 138:17 disposition [96:22 117:11:12:11 127:11 127:12 117:11:11						
134:822 124:24 129:14, 18:22 30; displacement 178:97:4; 147:15 80:21 97:21 108; 147:15 80:22 197:21 108; 147:15 80:23 35:4; 41:14 43:25 44:20 45:10 1110:2; 147:16 85:7 82:22 89:10 41:14 43:25 44:20 45:10 119:7 119:7 129:12; 148:14 43:25 44:20 45:10 119:7 119:7 129:12; 138:17 119:7 129:14 133:11 119:7 117:12 28:10 119:7 119:7 129:12; 138:17 119:7 129:14 133:11 119:7 119:12 129:14 119:16 129:22 409:14 113:14 119:16 129:22 409:14 113:14 119:16 129:22 50:10 119:8 120; 129:25 89:10 119:8 120; 129:21 120:11 31:20; 129:21 120:11 31:20; 129:11 20:11 31:20; 129:12 32:11 30:11 30:11 30; 129:12 32:11 30:11 30; 129:12 32:11 30:11 30; 129:129:12 32:11:11:11 30; 129:12 32:11 30:12 30:11:10; 129:12 32:11 30:					facilitate [1] 4:15	
displacement [7] 38:9 74: 7.16 131:14.24 138:12 entry [8] 22:19 58:9 59:22 16 61:2,7 24:11 88:10 86: fact [41,75.9,414 53:14 609.70:06 98:24 405:10 11 110:2 Dynamics [19,40:2 42:16 Dynamics [19,40:2 42:16 equal [8,55:7:20 isplaces [11,71:12] 126:1 106:15,77 12:11:18 136:21 13 77:16 78:14 94:6 116:15 138:91 107:10:12,16 equal [8,55:7:20 equal [9,42:4 61:2 96:10 115:7 117:12 126:1 isplaces [11,77:6,7 13:32:0] displacing [14:4:20 file [9,17:10 136:17 facts [11,77:6,7 13:13:24] error [11:11:3 error [11:11:3 error [11:11:3 facts [11,77:6,7 13:12 13:22] 133:17 file [9,62:25 facts [11,77:6,7 13:12 facts [11,77:6,7 13:12 13:22] facts [11,77:6,7 13:12 13:22] facts [11,77:6,7 13:12 13:22] 134:11 file [9,62:25 file [9,62:25 file [9,62:25 file [9,63:26] facts [11,77:6,7 13:12] facts [11,77:6,7 13:12] displace [10,52:2 early [9,52:5,77:17,97:16] file [9,52:5,77:17,97:16] file [9,7:16,7 24:12] facts [9,7:16,93:16] facts [9,7:16,17:14:12]						
14 78:15 80:21 97:21 108: duly 03:4 EPA (1125:16 11 97:22 201:41 13:11 009: 70:6 98:24 105:10 displaces (113:23 35:4 57:18 65:5 78:22 98:10 118:7:17:12 128:1 118:7:17:12 128:1 1009: 70:19 98:24 105:10 displacing (114:20 118:3:17 118:2:23 124:44 13:11 118:7:17:12 128:1 118:7:17:12 128:1 118:7:17:12 128:1 displacing (114:20 133:17 133:23 124:44 13:11 128:23 124:44 13:11 128:18 118:7:17:12 128:18 118:7:17:12 128:18 118:7:17:12 128:18 118:7:17:12 128:18 118:7:17:12 128:18 118:7:17:12 128:11 118:18 118:19:23 129:23 120:23 13:120 128:11/11 128:11 128:11/11 128:11 128:11/11 <td< td=""><td></td><td>, , , ,</td><td></td><td></td><td>fact [14] 7:5,9 41:4 53:14</td></td<>		, , , ,			fact [14] 7:5,9 41:4 53:14	
11 110:8 Dynamics 16 40:2 42:16 equal [95:7,20 1157 117 121 26:1 106:16,17 121116 136:21 41:14 43:25 44:20 45:19 57:18 65:5 78:22 98:10 equal [94:24 61:2 96:10 1157 117 121 26:1 1157 117 121 26:1 41:14 43:25 44:20 45:19 138:01 equal [94:24 35:3 Exact [95:23 63:0 17:4 1157 117 121 26:1 1157 117 121 26:1 41:14 43:25 44:20 45:19 133:01 Exact [95:23 63:0 17:4 1157 117 121 26:1 1157 117 121 26:1 41:14 43:25 44:20 45:19 133:01 Exact [95:23 63:0 17:4 1157 117 121 26:1 117:11 119:18:2 41:14 43:25 44:20 45:19 133:01 Exact [95:25 37:17 99:16 Essential [97:10 essential [97:10 essential [97:10 117:11 12:12 26:1 117:11 12:12 20:11 12:1 41:14 43:25 77:17 99:16 104:7 111:1 127:11 117:11 12:12 31:1 136:12 137:10 essential [97:10 essential [97:10 137:10 131:10 136:12 136:12 136:12 136:12 136:12 136:12 136:12 136:12 136:12 137:16 103:12 136:12 136:12 136:12 136:12 136:12 136:12 136:12 137:16 103:12 136:12 136:12 136:12 136:12 <td></td> <td></td> <td>-</td> <td></td> <td>60:9 70:6 98:24 105:10</td>			-		60:9 70:6 98:24 105:10	
displaces [m] 3:23 35:4 57:16 36:5 7:22 88:10 equivalent [0] 30:11 exact [0] 8:23 8:20 107:4 137:13 138:17 138: 17 isplacing [0] 44:20 isplacing [0] 45:20 isplac					106:15,17 121:18 136:21	
41:14 43:25 44:20 45:19 77:18 78:14 94:6 116:15 138:7 118: 19: 77 120:12.16 123:23 124:4 137:13.24 138:17 equivalent ID 30:11 error ID 121:3 138:17 118:18 error ID 121:3 especially ID 57:4 12 95:25 98:10 119:8 122 especially ID 57:4 12 95:25 98:10 119:8 122 especially ID 57:4 134:11 118:18 Exactly ID 12:12 65: 12 95:25 98:10 119:8 122 12 95:25 98:10 119:8 122 117:6 135:10 137:17 12 95:25 98:10 139:17 12 95:27 71:17 99:18 essential ID 97:10 essential ID 97:10 establish of 12 36:24 68: 15 13 30:13 14:45 110 10 134:6 effective ID 107:25 effective ID 107:11 estil 23:30 00:17 73:17 93:17 23 100:21 103:15,18 107: 13 10:23 100:41 105:114:113:24 130:22 132:11 136:24 137:32 90:1 130:12 130:21 103:15,18 107: 130:12 130:21 103:15,18 107: 130:12 13					137:13 138:17	
177:16 78:14 94:6 116:15 135:7 123:22 124:4 137:13.24 138:17 17:000000 [2]:4:24 35:3 error 01 121:13 12 95:25 98:10 119:8 120; 14 12 95:25 98:10 119:8 120; 15 5,0 66:23 66:3 96:13 16 12 97:10 essential 10 57:10 essential 10 57:10 essential 10 57:10 essential 10 57:10 essential 10 57:10 essential 10 17:10 essential 10 17:10 essenti					facts [2] 57:8 133:20	
135:7 136:17 Each (0.59):22 136:17 Fairly (0.13):63		,	-		factual [1] 138:14	
displacing (II) 44:20 disposition (IV) 34:24 49:1 Exact (IV) 59:22 earlier (V) 64:14 59:21 100; 3107:2 111/14 124:11) especially (IV) 57:4 ESQ (IRE 11:22,24 earlier (V) 64:14 59:21 100; 3107:2 111/14 124:11) example (IV) 65:20 65:23 66:3 96:13 105:20 111/14 124:11) fair (IV) 69:22 65:59 65:23 66:3 96:13 fair (IV) 69:22 65:59 65:23 66:3 96:13 dispute (IV) 52:6 3107:2 111/14 124:11) 127:11 essential IV) 76:20 early (IV) 52:5 77:17 99:18 essential IV) 76:20 early (IV) 52:2 77:17 99:18 essential IV) 76:20 early (IV) 52:2 77:17 99:18 fair (IV) 99:12 100; 137:19 23 distinct (IV) 29:24 distinct (IV) 29:24 104:7 111/7; easy (IV 7:25 essential IV) 76:20 easy (IV 7:25 essential IV 76:20 easy (IV 7:25 exclude (IV) 76:20 easy (IV 7:25					fairly [1] 138:8	
disposed [1508,31] L Each [1652]					fairness [1] 40:11	
disposition (3) 34:24 49:6) Each (19 59:22 earlie) (76 46:14 49:21 10 dispute (19 56:25) ESQUIRE (21:22,24 earlie) (76 46:14 49:21 10 essential (19 57:10) 59:5,6 56:23 66:3 96:13 essential (18 57:10) Fall (19 67:8 107:12 127:22 19:12 10 30:23 131:20) dispute (19 56:25) 127:11 essential (19 57:10) essential (19 57:10) examples (15:22 66:10) 137:19 distinction (07 72:1, 19 73: early (19 5:25 77:17 99:18) essential (19 57:10) excisel (19 67:20) excisel (19 77:9) distinguished (19 6:21) fdv: (14 91:23, 13 3: ET (10) 14.7, 25 2:11 8:10) excisel (19 77:9) favo (14 61:2 100:11 108: 24 113 33:4, 15, 19; 23, 13 3: ffect (18 0:22) even (517:19 10:19 12:12 exclude (17 6:24 30:9) 40: 46 65:7 67:15 104:4 136:22 favo (14 61:2 100:11 108: 24 11:15 25:1 32:3 33:4, 15, 19; 20 effect (18 0:22) effect (18 0:22) even (517:19 10:19 12:12 excludie (17 6:24 30:9) 40: 45 65:7 67:15 104:4 136:22 Fazaga's (177:3) 20:2 54 11:2 64:94 71:64 eight (17 71:15 96:7:13 69:1 70:8; 10:73: 96:7:13 69:1 70:8; 10:73: 55:15 5:61:10 65:20 75:11 76:8 etclure (19 5:16 51:2) feel (18 2:10) feel (18 2:10) 20:2 52:1 13:2 11 76:8 eight (17 71:15 12:2) 23:100:11 03:15 12:2; exclusive(19 15:18 2:2; feel (19 4:13 10:6 12:2)		E			faith [2] 93:17,22	
13:11 earlier (7.64:14 99:21 100: 3 107:2 111:14 124:11 127:11 essence (1.61:16 117:6 135:10 137:17 129:11.20 130:23 131:20 disputs (1) 5:25 3 107:2 111:14 124:11 essential (0.57:10 essential (0.57:10 127:11 distinct (1) 75:24 dist.71 (1.75:24 essential (0.57:10 essential (0.57:10 essential (0.57:10 essential (0.57:10 fails (0.32:02 distinct (1) (27:24 easiest (1.121:4 15 excluse (1.96:18 excluse (1.97:9 fails (0.32:02 excluse (1.96:18 excluse (1.97:9 excluse (1.97:9 fails (0.32:02 excluse (1.96:16 22 fails (0.32:02 fails		Each [1] 59:22		-	fall [8] 67:8 107:12 127:22	
dispute III 56:25 3 107:2 111:14 124:11 essential III 07:10 examples I2 59:22 66:10 137:19 dispute III 5:25 127:11 early III 52:10 essential III 07:10 establish III 138:4 excise III 95:12 0:19 5:12 falls III 3:20 distinct III 75:24 104:7 111:7 easies III 121:14 15 excise III 95:12 0:16:12 falls III 3:20 distinct III 75:24 104:7 111:7 easies III 121:14 15 excise III 95:12 0:16:12 fashion II 20:18 distinct III 75:24 104:7 112:1 23.13 24:18 39:7 52:24 63:17 86: 67:6 72:13 97:16 103:1 fashion II 20:18 district III 78:16, 24 40:17, effect IV 80:22 even I617:19 10:19 12:12 excludel III 61:22 Fazaga's III 77:3 district III 79, 33:2.6 38:24 40:17, effective III 07:25 22:15 25:19 30:3.15 46:7 8 65:7 67:15 104:4 136:22 Fazaga's III 77:3 23 50:10,13,15 54:17 57:3; effective III 071:15 effective III 071:15 9 67:13 69:17 70:8; 107:3 5 25:5 54:2 56:18,10 57: 5 cs:10:6 65:12 fall 11:3 2:17 96:15 97:6 101:4,21:22 106:3 120:4,5 123:6 13:55 23 100:21 103:15; 18 107: 110:9 124:17 feel III 4:13 3:7 6:9 96:15 97:6 101:4,21:22:17; 18 125:5 96:7 106:7,14 1		earlier [7] 64:14 99:21 100:		,	129:11,20 130:23 131:20	
disputes (h 5:25 127:11 east (y (b 5:25 77:17 99:18) essentially (h 76:20) Except (h 128:22) falls (h 3:20) distinct (h 75:24 aesiset (h 121:4) easiset (h 121:4		3 107 :2 111 :14 124 :11			137 :19	
dissent [1] 83:16 early [6] 5:25 77:17 99:18 establish [1] 138:4 excise [1] 96:18 famous [1] 7:11 distinct [1] 75:24 104:7 111:7 establish [1] 138:4 excise [1] 96:18 famous [1] 7:11 23 distinct [1] 75:24 104:7 111:7 establish [1] 138:4 excise [1] 97:16 42:4 127:4 23 distinct [1] 72:1, 19 73: easy [1] 7:25 ET [10] 1:4,7,25 2:11 8:10 excise [1] 96:18 famous [1] 7:11 24:18 39:7 52:24 63:17 84: 67:6 72:13 97:16 103:1 faror [1] 61:22 favor [1] 61:22 favor [1] 61:22 favor [1] 61:22 22:10 02:1 astablish [1] 138:4 exclude [1] 62:24 30:9 40: favor [1] 61:22 exclude [1] 62:24 30:9 40: favor [1] 61:22 22:10 02:1 favor [1] 61:22 favor [1] 61:22 favor [1] 61:22 favor [1] 61:23 10:13: favor [1] 61:22 favor [1 -	127 :11		-	falls [1] 3:20	
distinct (1) 75:24 distinction (2) 72:1,19 73: 23 104:7 111:7 easies (1) 121:4 easies (1) 121:4 district (5) 3:18,24 4:17, 25:1 32:13 33:4, 15, 19,20 effect (1) 80:22 effect (1) 80:22 effect (1) 80:22 effect (1) 80:22 effect (1) 80:22 effect (1) 107:25 effect (1) 107:26 effect (1) 107:25 effect (1) 107:26 effect (1) 107:25 effect (1) 107:25 effect (1) 107:26 effect (1) 107:26 ef		early [5] 5:25 77:17 99:18			famous [1] 7:11	
distinction [8] 72:1,19 73: easiest [0] 121:4 15 exclising [0] 16:22 fashion [0] 20:18 distinguished [0] 96:21 district [60] 31:18,24 4:17 Effect [0] 80:22 effect [0] 80:22 even [9] 7:19 10:19 12:12 exclude [0] 29:36 30:20,25 favor [4] 61:2 100:11 108: 25:1 32:13 33:4,15,19,20 effect [0] 80:22 even [9] 7:19 10:19 12:12 excluded [7] 6:24 30:9 40: 6 83:17 93:15 20:25 41:20 46:9 47:16 49: effect [0] 67:16 22:55 54:2 66:18,19 57: 8 65:7 67:15 104:4 436:22 FBI [2] 5:1 107:22 20:25 41:20 46:9 47:16 49: effect [0] 67:16 24 58:13 60:13 62:3 66:2, 5 FEDERAL [41:3 3:7 6:9 31:28 7:20 90:1,13 95:9 21 71:3 76:3 87:21 94:5 17 75:23 80:17 783:23 90: 67:25 71:17 FEDERAL [41:3 3:7 6:9 34:12 87:20 90:1,13 93:9 21 71:3 76:3 87:21 94:5 17 75:23 80:17 783:23 90: 67:25 71:17 feel [8] 94:3 100:6 123:2 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 23 100:21 103:15,18 107: 110:9 124:17 feel [8] 94:3 100:6 123:2 10:5:25 113:6 114:15 116: 26:13 7:2 45:12 80:25 81: 21 26:14 18 127:1 129:21 110:9 124:17 feel [8] 94:3 100:6 123:2 10:5:25 113:6 113:6 12:7; 13:6 113:5 12:24:20; 21:3 21:11 36:26:13 27:4 28: 21 74:13 76:9 77:9 77:19		-			far [3] 79:16 94:4 127:4	
23 easy [17:25] ET [10] 14,7,25 2:11 8:10 exclude [8] 29:3 63:20,25 favor [4] 61:2 100:11 108: 24 111:15 district [61] 29:24 10 134:6 25 67:6 72:13 97:16 103:1 24 111:15 25:13 2:13 33:4,15,19,20 effect [1] 80:22 effect [1] 80:22 even [51] 7:19 10:19 12:12 exclude [8] 29:3 63:20,25 67:6 72:13 97:16 103:1 74:11:15 25:13 2:13 2:13 3:4,15,19,20 effect [1] 80:22 effect [1] 80:22 even [51] 7:19 10:19 12:12 exclude [7] 6:24 30:9 40; 8 63:17 93:15 20.25 41:20 46:9 47:16 49; effect [1] 80:22 effect [1] 80:22 25:5 55:25:5 55:2 56:18,19 57; exclusion [4] 6:20 44:22 FED ERAL [4]:3 3:7 6:9 31:2 87:20 90:1,13 93; 21 71:3 76:3 87:21 94:5 106:3 120:4,5 123:6 136:5; 18:19 91:5 93:10 94:9 97; exclusive [4] 15:6 95:12 138:1 61:5 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5; 18:13 9:15 93:10 94:9 97; exclusive [4] 15:6 95:12 109: 91:41:10 8:22 10:5 113:6 117:15 electronic [1] 42:22:6 22 18:13:3,6 115:15 125.8; exclusive [4] 15:6 95:12 109: 91:41:10 8:22 10:5 114:6 117:3 126:1 13:22 132:11 13:6:24 13:11 36:24 110:5 114:6 117:3 126:1 13:12 213:11		easiest [1] 121:4			fashion [1] 20:18	
distinguished [1] 96:21 distracted [1] 22:24 distracted [1] 22		easy [1] 7:25	-	-	favor [4] 61:2 100:11 108:	
distracted [10] 29:24 10 134:6 25 136:12 exclusion [10] 61:01.01.1 FAZAGA [6] 1:7,25 2:10 3: distracted [10] 29:24 10 134:6 effect (10 80:22 even [51] 7:19 10:19 12:12 excluded [7] 6:24 30:9 40: 8 63:17 93:15 347.9 35:26 38:24 40:17 effect (10 80:22 effect (10 127:5 52:5,5 54:2 56:18,19 57: excluding [9] 67:2 70:6 72: FaZAGA [6] 1:7,25 2:10 3: 20.25 41:20 46:9 47:16 49: effect (10 17:15 9 67:13 69:1 70:8,10 73: exclusing [9] 67:2 70:6 72: Fall [2] 5:1 107:22 5 61:10 65:20 75:11 76:8 either [12] 21:20 29:4 58: 17 75:23 80:17 83:23 90: 67:25 71:17 FEDERAL [4] 1:3 3:7 6:9 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 23 100:21 103:15,18 107: exclusive [4] 15:6 95:12 feel [9] 94:3 100:6 123:2 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 23 100:21 103:15,18 107: feel [9] 94:3 100:6 123:2 feel [9] 94:3 100:6 123:2 21,22,24 122:17,18 125:5 9 67:106:7,14 109:23 131:21 2:111 133:24 137: exclusive/preclusive [1] 128:24 fiel [1] 81:10 divulging [2] 80:3 98:22 100:5 114:6 117:3 126:1 22 138:13 exclusive/preclusive [1] 128:24 fiel [1] 81:10 10:9:91:91:19:112:12 everybody [1] 86:14 25	-	EDWIN [5] 1:19 2:3,13 3:			24 111: 15	
district [51] 3:18,24 4:17 effect (11 80:22) even [51] 7:19 10:19 12:12) excluded [7] 6:24 30:9 40; 8 63:7 93:15 34:7,9 35:2,6 38:24 40:17, effectively (11 27:5) effectively (11 27:5) 52:5,5 54:2 56:18 30:3,15 46:7 8 65:7 67:15 104:4 136:22) FBI [2] 51:1 07:22 20,25 41:20 46:9 47:16 49: effectively (11 77:15) 967:13 60:13 62:3 66:2, 5 exclusion [4] 6:20 44:22 FEI [2] 51:1 07:22 5 61:10 65:20 75:11 76:8 eight (11 71:15) 9 67:13 69:1 70:8,10 73: exclusion [4] 6:20 44:22 FEI [2] 51:1 07:22 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 18,19 91:5 93:10 94:9 97: exclusive [4] 15:6 95:12 feel [3] 94:3 100:6 123:2 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 18,19 91:5 93:10 94:9 97: exclusive/preclusive [1] feel [3] 94:3 100:6 123:2 134:14 19 9 67:1 36:7.1 40:23 130:21 45:12 80:25 84: 20 126:14,18 127:1 129:21 125:14 fied [1] 81:10 131:1 43:7,22 44:2,7,11 74: 135:23 event [6] 96:12 129:4,14, 13:1:22 132:11 136:24 137: excus [4] 25:13 27:4 28: fied [1] 81:10 14:1 43:7,22 44:2,7,11 74: elephant [1] 108:22 everyhody [1] 86:14 2,5,14 95:12 124:23,24 fied [1] 13:5,70:25 71:1,19 19 105:9 113:9 128					FAZAGA [6] 1:7,25 2:10 3:	
25:1 32:13 33:4,15,19,20 effective (1) 107:25 22:15 25:19 30:3,15 46:7 8 65:7 67:15 104:4 136:22 Fazga's (1) 77:3 34:7,9 35:2,6 38:24 40:17, effectively (1) 27:5 effectively (1) 27:5 52:5,5 54:2 66:18,19 57: excluding [9,67:2 70:6 72: FBI [2] 5:1 107:22 20:25 41:20 46:9 47:16 49; eight (1) 71:15 eight (1) 71:15 9 67:1 36:17 07:3 8 65:7 67:15 104:4 136:22 FEDERAL [4] 13:37:13 28:17 35:0:10,13,15 54:17 57:3 eight (1) 71:15 eight (1) 71:15 24 58:13 60:13 62:3 66:2 5 exclusion [4] 6:20 42:2 FEDERAL [4] 13:37: 69:1 36:12 87:20 90:1,13 93:9 21 71:3 76:3 87:21 94:5 18,19 91:5 93:10 94:9 97: exclusive [4] 15:6 95:12 feel [9] 94:3 100:6 123:2 96:5 7 106:7,14 109:23 106:3 120:4,5 123:6 136:5 20 102:1 103:15,18 107: 110:9 124:17 feel [9] 94:3 100:6 123:2 132:22 42:27,18 125: 9 96:7 106:7,14 109:23 110:5 114:6 117:3 126:1 22 138:13 exclusive/preclusive [1] 128:24 fiel (1) 181:10 131:1 43:7,22 44:2,7,11 74: 135:23 eephant [1] 108:22 22 177:19 g2:17 19:112:10 24 38:13 everybody [1] 86:14 exclusively [1] 128:12 24,5 126:8 70:22 71:1,12 14 130:27 eephant [1] 108:22 eerybody [1] 86:		effect [1] 80:22			8 63: 17 93: 15	
23:7:93:26:38:2440:77, effectively [1127:5 esclusion [116:67:7:6:7:5 esclusion [116:67:7:6:7:5 file [11:3:3:7:6:9 138:1 36:12 87:20 90:1,13 93:9 21 71:3 76:3 87:21 94:5 106:3 120:4,5 123:6 136:5 18;19 91:5 93:10 94:9 97: exclusivel [116:16:20 44:22 feel [19:94:3 100:6 123:2 feel [19:94:3 100:6 123:2 26:13 72:2 4:2:2,24 122:17,18 125:5 26:13 72:4 5:12 80:25 81: 20 126:14,18 127:1 129:21 110:9 124:17 exclusively [1128:24 feel [19:94:3 100:6 123:2 134:14 99:7: 106:7,14 109:23 101:5 114:6 117:3 126:1 123:13 everusivel [1126:13 27:4 28: feel [19:91:129:4,14: feel [19:91:129:4,14: feel [19:91:129:4,14: feel [19:91:129:4,12:16 feel [19:91:129:4,12:16 feel [19:91:129:4,12:16 feel [19:91:		effective [1] 107:25			Fazaga's [1] 77:3	
20.25 41:20 46:9 47:16 49; effectuate [1] 67:16 24 58:13 60:13 62:3 66:2; 5 features [2] 26:13 28:17 23 50:10,13,15 54:17 57:3; eight [1] 71:15 9 67:13 69:1 70:8,10 73; exclusion [4] 6:20 44:22 features [2] 26:13 28:17 36:12 87:20 90:1,13 93:9 21 71:3 76:3 87:21 94:5 17 75:23 80:17 83:23 90; 67:25 71:17 exclusion [4] 6:20 44:22 feel [9] 94:3 100:61 123:2 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 23 100:21 103:15,18 107; 110:9 124:17 feel [9] 94:3 100:61 123:2 21,22,24 122:17,18 125:5 26:1 37:2 45:12 80:25 81; 20 126:14,18 127:1 129:21 110:9 124:17 feel [9] 94:3 100:61 123:2 134:14 9 96:7 106:7,14 109:23 131:22 132:11 136:24 137; 22 138:13 exclusive/preclusive [1] 125:14 field [1] 81:10 131:143:7,22 44:2,7,11 74; 135:23 element [5] 96:12 129:4,14, everybody [1] 86:14 exclusively [1] 128:24 field [1] 81:10 file [7] 24:20 27:2 63:23 71: 13 1:143:7,22 44:2,7,11 74; 18 130:17 elephant [1] 108:22 everybody [1] 86:14 everybody [1] 86:14 executive [9] 51:18,20,236 6: file [7] 24:20 27:2 63:23 71: 24,51 126:8 file [7] 24:20 27:2 63:23 71: 131:122 132:11 136:124 137; everybody [1] 86:14 everybody [1] 86		effectively [1] 27:5			-	
23, 50:10, 13, 15, 54:17, 57:3, eight [1] 71:15 967:13 69:170:18, 10 73: exclusion [4] 6:20 44:22 FEDERAL [4] 1:3 3:7 6:9 361:10 65:20 75:11 76:8 21 71:3 76:3 87:21 94:5 18, 19 91:5 93:10 94:9 97: exclusion [4] 6:20 44:22 feel [3] 94:3 100:6 123:2 96:15 97:6 101:4,21,22 106:3 120:4, 5 123:6 136:5 23 100:21 103:15, 18 107: 110:9 124:17 feel [3] 94:3 100:6 123:2 105:25 113:6 114:15 116: electronic [16] 14:2 25:22 18 113:3, 6 115: 15 125:8, exclusive [4] 15:6 95:12 feel [3] 94:3 100:6 123:2 134:14 9 96:7 106:7, 14 109:23 131:22 132:11 136:24 137: exclusive/preclusive [1] feel [10 125:4 110:5 114:6 117:3 126:1 22 126:14, 18 127:1 129:21 125:14 exclusively [1] 128:24 field [1] 81:10 110:5 114:6 117:3 126:1 135:23 everybody [1] 86:14 2,5,14 95:12 124:23,24 field [1] 74:20 27:2 63:23 71: 110:5 113:9 128:15 18 130:17 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [1] 74:20 27:2 63:23 71: 110:5 113:9 128:15 Ellsberg [1] 132:12 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [1] 73:5 70:25 71:1,12 13:1 43:7,22 44:2,7,117 4: 18 130:17 everyone [1] 93:17 feel widence [1] 93:17 file [1] 24:20 27:2 63:2				-		
25 61:10 65:20 75:11 76:8 either [12] 21:20 29:4 58: 301:17 30:317 01:310; either [12] 21:20 29:4 58: 17 75:23 80:17 83:23 90: 67:25 71:17 138:1 81:2 87:20 90:1,13 93:9 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 23 100:21 103:15,18 107: 110:9 124:17 ecclusive [4] 15:6 95:12 16eel [8] 94:3 100:6 123:2 105:25 113:6 114:15 116: electronic [16] 14:2 25:22 18 113:3,6 115:15 125:8, exclusive/preclusive [1] 108:10 125:4 134:14 9 96:7 106:7,14 109:23 131:22 132:11 136:24 137: 22 138:13 eccusive[1] 128:24 eccusive[1] 128:24 dotring [19] 6:16,18 77:8 135:23 element [5] 96:12 129:4,14, 13 evert [4] 46:25 60:2 90:10, 22 777:19 file [7] 24:20 27:2 63:23 71: 31:1 43:7,22 44:2,7,11 74: 13 130:17 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [7] 3:5 70:25 71:1,12 19 105:9 113:9 128:15 elephant [1] 108:22 everybody [1] 86:14 executive [9] 5:18,20,23 6: filed [7] 3:5 70:25 71:1,12 24 empaxize [1] 65:17 everything [2] 93:23 110: Exemption [1] 124:15 files [2] 79:18,25 21 27:16 employed [1] 65:17 exist [1] 18:19 exist [1] 18:19 find [5] 92:4 100:20 102:8 107:4 12	'					
31:10 00.2013.1110 21 71:3 76:3 87:21 94:5 171 33 76:3 87:21 94:5 18,19 91:5 93:10 94:9 97: 01.25 71.11 61.25 71.11						
10:207:207:30:1:1:30:30:9 106:3 120:4,5 123:6 136:5 106:3 120:4,5 123:6 136:5 100:3 120:4,5 123:6 136:5 100:3 120:4,5 123:6 136:5 100:3 120:4,5 123:6 136:5 100:9 124:17 96:15 97:6 101:4,21,22 106:3 120:4,5 123:6 136:5 23 100:21 103:15,18 107: 100:9 124:17 100:9 124:17 105:25 113:6 114:15 116: 26:1 37:2 45:12 80:25 81: 9 66:7 106:7,14 109:23 131:22 132:11 136:24 137: 20 126:14,18 127:1 129:21 1125:14 108:10 125:4 134:14 9 96:7 106:7,14 109:23 110:5 114:6 117:3 126:1 22 138:13 exclusive/19 128:24 field [1] 81:10 15 95:9 102:25 104:16,18 18 130:17 element [5] 96:12 129:4,14, 16 everybody [1] 86:14 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [7] 3:5 70:25 71:1,12 19 105:9 113:9 128:15 elephant [1] 108:22 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 93:21 everybody [1] 93:21 everybing [2] 93:23 110: files [2] 79:18,25					feel [3] 94:3 100:6 123:2	
36 : 15 97:5 010:42, 122 electronic [16] 14:2 25:22 100:21 103:15, 16 107. 110:5 124.17 105 :25 113:6 114:15 116: 26:1 37:2 45:12 80:25 81: 9 96:7 106:7, 14 109:23 18 113:3,6 115:15 125:8, exclusive/preclusive [11] 134 :14 9 96:7 106:7, 14 109:23 110:5 114:6 117:3 126:1 22 126:14,18 127:1 129:21 125:14 exclusively [1] 128:24 divulging [2] 80:3 98:22 110:5 114:6 117:3 126:1 135:23 event [4] 46:25 60:2 90:10, 22 77:19 file [7] 24:20 27:2 63:23 71: 31:1 43:7,22 44:2,7,11 74: element [5] 96:12 129:4,14, 16 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [7] 3:5 70:25 71:1,12 13 13:1 43:7,22 44:2,7,11 74: element [5] 96:12 129:4,14, 16 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [7] 3:5 70:25 71:1,12 13 13:1 43:7,22 44:2,7,11 74: elephant [1] 108:22 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [7] 3:5 70:25 71:1,12 14 60:20 embrace [1] 93:17 everybody [1] 86:14 2,5,14 95:12 124:23,24 files [2] 79:18,25 16 everybody [1] 86:14 2,5 71:20 10:18 14:11,13, exist [1] 18:19 find [5] 92:4 100:20 102:8 17 empasize [1] 65:17 25 7:1,20 10:18 14:11,15, 2	,					
21,22,24 122:17,18 125:5 134:14 26:1 37:2 45:12 80:25 81: 9 96:7 106:7,14 109:23 110:5 114:6 117:3 126:1 135:23 20 126:14,18 127:1 129:21 131:22 132:11 136:24 137: 22 138:13 125:14 108:10 125:4 field [1] 81:10 101:13:122 132:11 136:24 137: 22 138:13 20 126:14,18 127:1 129:21 131:22 132:11 136:24 137: 22 138:13 125:14 108:10 125:4 field [1] 81:10 101:13:122 132:11 136:24 137: 22 138:13 20 126:14,18 127:1 129:21 131:22 132:11 136:24 137: 22 138:13 125:14 108:10 125:4 field [1] 81:10 101:13:122 132:11 136:24 137: 22 138:13 20 126:14,18 127:1 129:21 131:22 132:11 136:24 137: 22 138:13 125:14 108:10 125:4 field [1] 81:10 101:13:122 132:11 136:24 137: 22 138:13 101:13:122:12 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 86:14 22 77:19 16 everybody [1] 125:17 everything [2] 93:23 110: 114:13 23 22:12 113:1,2,2 100:10 125:17 embracing [1] 93:17 16 evidence [121] 4:7 6:20,24, emphasize [1] 65:17 114:13 everything [2] 93:23 110: 125:17 Exemption [1] 125:17 everything [2] 93:23 110: 114:13 113:1,2,2 100:12 17:6 138:18 doing [9] 16:2 30:3 31:9 68: employment [1] 106:12 en [3] 83:17 119:1 120:9 17 16:24 18:3 20:1,11,15, 22:8,9,9,19,24,25 23:1,18 23 22:23 finding [4] 45:4 67:21 107: 4 132:18						
121,22,24 122,17,16 123,3 9 96:7 106:7,14 109:23 131:22 132:11 136:24 137: 123,14 exclusively [1] 128:24 field [1] 81:10 134:14 110:5 114:6 117:3 126:1 135:23 event [4] 46:25 60:2 90:10, exclusively [1] 128:24 field [1] 81:10 131:1 43:7,22 44:2,7,11 74: 18 130:17 element [5] 96:12 129:4,14, 16 event [4] 46:25 60:2 90:10, 22 77:19 2,4,5 126:8 15 95:9 102:25 104:16,18, 18 130:17 elephant [1] 108:22 everybody [1] 86:14 2,5,14 95:12 124:23,24 field [7] 3:5 70:25 71:1,12 16 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 28:20 field [7] 3:5 70:25 71:1,12 131:22 123:11 135:23 everybody [1] 86:14 2,5,14 95:12 124:23,24 field [7] 3:5 70:25 71:1,12 131:22 125 elephant [1] 108:22 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 86:14 everybody [1] 128:15 field [7] 3:5 70:25 71:1,12 24 edocuments [3] 27:15 66: emphasize [1] 65:17 everybody [1] 4:7 6:20,24, exist [1] 18:19 exist [1] 18:19 evist [1] 121:10				•		
134.14 110:5 114:6 117:3 126:1 131:22 132:11 136:24 137. 131:22 132:13 27:4 28: figure [3] 39:17 99:17,19 doctrine [19] 6:16,18 7:7,8 135:23 element [5] 96:12 129:4,14, 22 138:13 excuse [4] 25:13 27:4 28: figure [3] 39:17 99:17,19 31:1 43:7,22 44:2,7,11 74: 18 130:17 elephant [1] 108:22 event [4] 46:25 60:2 90:10, 22 77:19 24,5 126:8 doctrines [3] 6:13,16 86: elephant [1] 108:22 everybody [1] 86:14 2,5,14 95:12 124:23,24 file [7] 3:5 70:25 71:1,12 24 embrace [1] 93:17 embracing [1] 93:21 everything [2] 93:23 110: executive's [1] 124:15 files [2] 79:18,25 documents [3] 27:15 66: emphasize [1] 65:17 25 7:1,20 10:18 14:11,13, exist [1] 18:19 find [5] 92:4 100:20 102:8 documents [3] 27:16 employed [1] 65:24 17 16:24 18:3 20:1,11,15, existed [2] 105:15 134:20 finding [4] 45:4 67:21 107: Doe [2] 7:6 138:18 en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 findis [3] 84:20 88:4 109:12						
doctrine [19] 6:16,18 7:7,8 135:23 element [5] 96:12 129:4,14, is 130:17 event [4] 46:25 60:2 90:10, is 277:19 is 24,5 126:8 15 95:9 102:25 104:16,18, 18 130:17 elephant [1] 108:22 everybody [1] 86:14 is 430:17 everybody [1] 86:14 is 570:25 71:1,12 19 105:9 113:9 128:15 elephant [1] 108:22 everybody [1] 86:14 is 613,16 86: everybody [1] 93:11 everybody [1] 93:23 everybol [1] 93:21 everything [2] 93:23 110: everything [2] 93:23 110: file [7] 24:20 27:2 63:23 71: 24 elephant [1] 108:22 everybody [1] 86:14 is 570:25 71:1,12 files [2] 79:18,25 24 embrace [1] 93:17 embracing [1] 93:21 everything [2] 93:23 110: everything [2] 93:23 110: files [2] 79:18,25 22 127:16 emphasize [1] 65:17 employed [1] 65:24 evidence [121] 4:7 6:20,24, 114:13 exist [1] 18:19 107:4 121:10 22 127:16 employed [1] 65:24 if 162:12,32,24 21:5,8,11,17,19 if 162:105:15 134:20 finding [4] 45:4 67:21 107: 20 ci [2] 7:6 138:18 en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 if 32:22:3 if indis [3] 84:20 88:4 109:12		,				
31:1 43:7,22 44:2,7,11 74: element [5] 96:12 129:4,14, 16 exervious [9] 5:18,20,23 6: 2,4,5 126:8 15 95:9 102:25 104:16,18, 18 130:17 elephant [1] 108:22 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [7] 3:5 70:25 71:1,12 19 105:9 113:9 128:15 elephant [1] 108:22 everybody [1] 93:11 everybody [1] 93:21 everything [2] 93:23 110: executive's [1] 124:15 files [2] 79:18,25 24 embracing [1] 93:17 embracing [1] 93:21 everything [2] 93:23 110: executive's [3] 48:23 106:10 files [2] 79:18,25 documents [3] 27:15 66: emphasize [1] 65:17 employed [1] 65:24 25 7:1,20 10:18 14:11,13, exist [1] 18:19 exist [1] 18:19 exist [2] 105:15 134:20 finding [4] 45:4 67:21 107: Doe [2] 7:6 138:18 en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 findis [3] 84:20 88:4 109:12					-	
15 95:9 102:25 104:16,18, 19 18 130:17 everybody [1] 86:14 2,5,14 95:9 102:23,24 filed [7] 3:5 70:25 71:1,12 19 105:9 113:9 128:15 elephant [1] 108:22 everybody [1] 86:14 2,5,14 95:12 124:23,24 filed [7] 3:5 70:25 71:1,12 10 everybody [1] 93:17 everybody [1] 93:21 everything [2] 93:23 10: Exemption [1] 125:17 files [2] 79:18,25 final [1] 6:10 114:13 embracing [1] 93:21 embracing [1] 93:21 everything [2] 93:23 114:13 executive's [3] 48:23 106:10 22 127:16 employed [1] 65:24 employed [1] 65:24 17 25 71:20 10:18 14:11,13, existed [2] 105:15 134:20 17 16:2 17,23;24 21:5,8,11,17,19 23 23 22:23 finding [4] 45:4 67:21 107:4 18 130:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 findis [3] 84:20 88:4 109:12						
19 30.5 102.25 102.10, 10, 10, 19 elephant [1] 108:22 everyone [1] 93:17 everyone [1] 93:11 executive's [1] 124:15 113:1,2,2 documents [3] 6:13,16 86: Ellsberg [1] 132:12 ewbrace [1] 93:17 everyone [1] 93:23 110: everyone [1] 93:21 everyone [1] 93:21 10: files [2] 79:18,25 documents [3] 27:15 66: embracing [1] 93:21 emphasize [1] 65:17 everyone [12] 4:7 6:20,24, 114:13 everyone [1] 18:19 22 127:16 employed [1] 65:24 employment [1] 106:12 25 7:1,20 10:18 14:11,13, exist [1] 18:19 existed [2] 105:15 134:20 finding [4] 45:4 67:21 107: doing [9] 16:2 30:3 31:9 68: en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 23 22:23 finds [3] 84:20 88:4 109:12						
In 10:10:10:10:10:10:10:10:10:10:10:10:10:1						
24 embrace [1] 93:17 everyting [3] 35:25 110. Exemption [3] 25:17 final [1] 6:10 documents [3] 27:15 66: emphasize [1] 65:17 employed [1] 65:24 evidence [121] 4:7 6:20,24, 114:13 final [1] 6:10 22 127:16 employed [1] 65:24 employment [1] 106:12 25 7:1,20 10:18 14:11,13, exist [1] 18:19 finding [4] 45:4 67:21 107: Doe [2] 7:6 138:18 em [3] 83:17 119:1 120:9 en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 findis [3] 84:20 88:4 109:12			-			
24 embracing [1] 93:21 ind evidence [121] 4:7 6:20,24, 114:13 find [5] 92:4 100:20 102:8 documents [3] 27:15 66: emphasize [1] 65:17 evidence [121] 4:7 6:20,24, 114:13 exist [1] 18:19 22 127:16 employed [1] 65:24 employment [1] 106:12 17 16:24 18:3 20:1,11,15, existed [2] 105:15 134:20 finding [4] 45:4 67:21 107: Doe [2] 7:6 138:18 en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 finds [3] 84:20 88:4 109:12		-		-		
documents [3] 27:15 66: emphasize [1] 65:17 emphasize [1] 65:17 25 7:1,20 10:18 14:11,13, exist [1] 18:19 107:4 121:10 22 127:16 employed [1] 65:24 17 16:24 18:3 20:1,11,15, existed [2] 105:15 134:20 107:4 121:10 Doe [2] 7:6 138:18 employment [1] 106:12 en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 105:15 134:20 4 132:18						
22 127:16 employed [1] 65:24 employment [1] 106:12 17 16:24 18:3 20:1,11,15, existed [2] 105:15 134:20 finding [4] 45:4 67:21 107: Doe [2] 7:6 138:18 employment [1] 106:12 17 16:24 18:3 20:1,11,15, existed [2] 105:15 134:20 finding [4] 45:4 67:21 107: doing [9] 16:2 30:3 31:9 68: en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 finding [4] 45:4 67:21 107:						
Doe [2] 7:6 138:18 employment [1] 106:12 if 7:23,24 21:5,8,11,17,19 existence [4] 7:21 8:2 20: 4 132:18 doing [9] 16:2 30:3 31:9 68: en [3] 83:17 119:1 120:9 22:8,9,9,19,24,25 23:1,18 23 22:23 4 32:18						
doing [9] 16:2 30:3 31:9 68: en [3] 83:17 119:1 120:9 17,25,24 21:0,5,11,17,15 constende 13,121 0.2 20:1 finds [3] 84:20 88:4 109:12						
	DOE 4 7:6 138:18			- AVISTORCA 141 /111 817 701		
	daina 10140-0 00-0 04-0 00	on [2] 02.17 110.1 100.0			finds [3] 84:20 88.4 109.12	

1	4	4	
1	4	4	

	Official			
fine [4] 19:7,20 114:15 129:	framework [2] 96:1 124:18	33: 14,20,21 37: 6 38: 23,24,	Helms [1] 83:17	important [15] 26:22 28:2
21	frankly [2] 45:9 55:18	25 39: 23 40: 19 42: 18 43: 5	help [4] 19:25 60:7 102:13	30 :1,5 31 :15 67 :23 96 :10,
finish [2] 8:21 62:12	free [3] 42:19 106:10 114:	50: 4,19 51: 13,16,19 52: 2,4,	104: 25	12 97:17 100:7 113:14,16,
finished [1] 8:20	12	6,8,10,10 61: 23 65: 4,21 66:	helpful [2] 98:5 137:15	18 117: 22 121 :7
firearms [1] 66:1	free-floating [2] 51:22,25	10 74 :19,24 76 :20 77 :9 78 :	helps [1] 61:15	imports [1] 43:7
firmly [2] 3:14 5:21	freeze [1] 105:14	2 80:12 81:23 84:6 90:9,	hiding [1] 109:2	include [3] 22:22 89:7 102:
first [34] 3:6 4:10,22 6:19 8:	friends [1] 44:3	17 92 :4,9 93 :14 94 :7 97 :7	high-level [2] 96:17 97:13	9
12 14: 18 36: 20,23 39: 1,5	fruits [1] 55:24	98: 25 99: 24,25 100: 20,25	hinge [1] 110:15	including [1] 81:11
40 :7 41 :8 46 :18 48 :8 53 :	full [2] 40:9 107:24	103:3,22 106:21 110:18	history [1] 117:21	inconsistent [2] 43:22,23
11 55 :7,19 71 :15 75 :22,23	function [3] 113:1,14,17	112:9,11,17 115:5,14 117:	hold [6] 61:5 65:19 76:1 77:	incorporates [1] 82:23
82:23,24 85:14,21 113:7	fundamental [1] 27:22	13,16 118 :5 124 :22 125 :22	16 116 :3 119 :22	incorporating [1] 105:3
122 :2,6,8 123 :18 126 :22	furnish [1] 137:8	126:21 131:12,15 137:21	Holder [1] 48:1	incorrect [2] 121:7,18
132 :23 134 :10,15 137 :7	furnished [1] 28:7	government's [24] 8:7 12:	holding 5 45:25 54:16 89:	incredible [1] 116:23
FISA [51] 3: 23 25: 9 43: 1,3,	further [7] 8:5 19:22 29:17	16 14 :19 15 :4,8 17 :24 18 :	12 120: 4,15	incursion [1] 48:15
23,24 45 :19 53 :19 54 :3,11	35 :16 38 :20 63 :9 67 :10	11 21:1 28:4 38: 17,18 42:	hole [3] 108:22 109:3 110:2	Indeed [2] 4:16 17:25
55: 1,6,17 56: 19 57: 25 58:	G	21 49 :4 53 :15 54 :8,11 57 :	honest [2] 105:2 106:3	indemnify [1] 131:13 indicated [2] 56:24 61:9
3 60:19 61:6 64:11 67:6 75:24 77:18,19 78:14 79:	gamut [1] 91:6	21 61:2,15 62:21 74:14 94: 1 127:2 138:12	Honor [41] 58:13 65:25 66: 13 67:3 68:20 70:3,20 72:	indicates [2] 7:24 59:13
13 82:23 89:19 91:12 94:6	gave [3] 18:15 79:7 126:3	governs [2] 5:5 110:18	13 67 .3 68 .20 70 .3,20 72 . 11 74 :10 75 :20 76 :5 82 :13	indication [2] 48:21 125:1
97: 19 100: 16 102: 4,21	General [32] 1:19 15:22 18:	grant [9] 25:5,6 29:1,2 87:	83:6 86:2 87: 4,16 89: 10	indiscriminate [1] 57:12
103 :7 104 :15 105 :11 108 :	9 40:1 42:16 48:1,1 57:17	24 89:5 136:9.10.11	96: 11 97: 1 98: 14 100: 10	individual [11] 53:16,22 55:
13 109 :2 114 :7 115 :12	65:5 78:21 79:17,25 80:7,	grants [1] 136:9	103: 10 108: 3 110: 1,21	9 56:14 57:15,22 60:20 82:
116 :15 117 :12 123 :3,17	11,23 98: 10 99: 4 109: 6,12	grave [4] 54:5 60:25 62:19	117 :19 118 :11 119 :14 120 :	21 128 :10 129 :23 130 :24
125: 20,21 134: 18,21,22	111:19 116:15 118:9 119:	77:8	3,17,20,21 121 :24 123 :1,7,	inevitably [2] 7:13 122:22
135: 14,16	7 120: 12,16 123: 22 124: 3	gray [1] 137:20	20 124 :1 126 :6 128 :1,20	influences [1] 125:12
FISA's [1] 65:16	135: 10,24 137: 13,24 138:	ground [6] 46:23 61:8 76:5	134: 1	informal [2] 22:10 30:8
FISC [2] 15:18 135:17	17	100 :15,21 121 :21	Honor's [1] 62:8	informant [2] 37:17 133:17
fit [3] 21:2 56:11 94:22	generally [3] 25:24 31:20	grounded [1] 3:15	Honors [2] 65:18 102:8	information [124] 3:19 4:1,
five [1] 25:16	42 :19	grounds [2] 36:9 123:6	hoped [1] 29:5	11,14,18 5: 2 6: 2 7: 3 9: 2,
fleshed [1] 100:4	Georgetown [1] 73:25	growing [1] 43:18	hopefully [1] 95:18	23 10 :6 11 :22 12 :19 13 :12
floating [2] 125:8,9	gets [4] 43:15,15 76:15 86:	guess [13] 10:14 23:15 59:	hoping [1] 104:11	14: 19,25 15: 9,15 16: 12,19
focus [2] 82:5 100:5	19	18,20 68: 10 81: 14 95: 4	House [1] 125:9	18 :1,11 27 :8 28 :4 29 :7 30 :
focused [2] 25:24 57:14	getting ^[1] 125:13 give ^[12] 61:18 65:22 74:11	101: 17,24 120: 9 121: 23,25	housemates [1] 88:21	7,18 32: 15 33: 6 34: 6,13
focusing [1] 81:17	80:15 84:21 90:22 92:2 98:	123 :6	however [1] 88:3	37: 19 38: 2,6,8 40: 23 41: 2,
FOIA [1] 125:17	21 112 :9 115 :16,21 124 :25	gun [1] 66:4	hurts [3] 61:17 107:9,9	7 52: 11 53: 20 57: 7,14,24
follow [4] 23:14 38:15 47:	given [6] 5:8 34:5 59:23 61:	н	hypothesizing ^[2] 86:19,	58 :4,12,14,16 59 :14 61 :9,
10 91:25	8 117:20 122:12	Halkin [1] 83:17	20 hypothetical [1] 131:3	11 62: 7 63: 21,25 64: 6,13,
follow-up [2] 124:10 127: 10	gives [4] 35:19 61:11 80:11	hall [1] 114:8	hypothetically [1] 107:24	15,20 65: 2,3,7,12 68: 1,3,5, 7,16,17,18 69: 2,7,10,18 70 :
footnote [5] 96:13,14 97:4	112 :12	hands [1] 128:17	inpottietically in 107.24	7,16,23 71: 19 72: 13 73: 2,4
103: 11 136: 20	giving [4] 22:6 77:3 81:2	hangs [1] 25:11		11 74 :20,21,22 75 :1 76 :7,9
forbids [1] 7:12	105 :15	happen [8] 22:20 32:25 77:	idea [1] 137:15	24 80 :3,9,16 83 :9 89 :22
forcing [1] 137:22	goals [1] 56:13	1 89: 3,12 116: 6 129: 13	identical [2] 80:2,6	90: 22 92: 2 93: 1 94: 8,12
foreclosed [2] 119:15 120:	Gore [1] 104:7	131 :16	identified [1] 83:21	96 :18,22 97 :8 98 :22 107 :3
10	GORSUCH [46] 18:14,24	happened [5] 88:12 90:11,	II [12] 48:24 49:9 94:22,24	109 :13 112 :10 113 :7,11
foreign [7] 3:19 4:20 8:10	19: 2,5,10,13,16,19,23 20: 8,	11 117: 21 132: 22	97: 24 124: 11,16 125: 11,13	114:10 115:15,17 116:9,21
14 :12 28 :5 39 :3 109 :24	13 21: 9,14,22,25 22: 12,16	happens [8] 6:23 90:17	127 :5 129 :17 130 :17	25 117:13,17 118:4 122:23
form [1] 59:16	27 :13,18 42 :12,13 44 :16	106 :5,19,22 127 :3 128 :10	illegal [5] 17:12 31:16 81:	125:6,8 129:11 130:25
formal [6] 21:20,21,25 22:7	45: 2,14,16,23 46: 19 58: 7,	135:1	24 82:10 84:12	132:17 136:21 138:10,22
27: 1,3	19 59: 1,4,8,18 60: 3 63: 9	happy [2] 27:14 137:18	illegally [2] 82:6 84:7	informing [1] 57:7
former [1] 138:2	64:18,23 69:23 102:13	hard [3] 104:18 106:11 130:	image [4] 85:22 87:2,6 131:	inherently [1] 99:5
forth [2] 39:18 124:23	104 :8,24 123 :11,12,24 124 :	22 barm (6) 75 :2 70 :10 90: 1	17	inheres [1] 5:18
forward [12] 8:9 16:18 38:	7 135:3 Gorsuch's 121 23:15 67:4	harm [6] 75:2 79:19 80:1	imagine [2] 69:16 131:3 imagined [1] 132:17	injunction [3] 5:1 11:4 137
13 40:11 41:2 57:23 69:2	Gorsuch's [2] 23:15 67:4 got [14] 19:23 21:10 22:18	91:4 109:13 131:18	imagining [1] 97:11	23
71:24 128:6 135: 25 136 :	28: 12,16 29: 23 31: 15 76:	harms [1] 39:17 Hawaii [1] 116:4	immunity [1] 86:24	injunctive [1] 27:23
24 137 :2	24 90:12 93:9,14,18 124:7	head [1] 135:11	impeach [1] 58:17	injured [1] 36:17
found [5] 9:8 36:4,5 38:24	133:17	hear [2] 3:6 13:21	impeachment [2] 58:22,	injustice [2] 76:25 77:8
56:17	government [98] 4:7,11,13,	heard [3] 66:15 88:14 101:	24	inquiry [3] 38:20 82:10 83:
foundational [1] 95:5	16 9 :19,22 10 :17,24 13 :11	25	implausible [3] 83:19 84:4	8
founding [2] 5:24 6:6	14: 7,10,17,23 16: 16,18 17:	hearing [4] 23:21 35:23 79:	116 :12	insist [1] 48:20
four [1] 25:16 Fourth [8] 36:6 49:24 50:6	11,12,17 18: 3,20 20: 10,15,	19 109 :13	implementation [1] 28:24	instance [1] 6:19 instead [6] 3:22 43:13 61:7
62:23 82:22 83:14 94:23	21 22 :23 23 :4 25 :1,13 28 :	heightened [1] 126:19	implicates [1] 103:7	63:24 71:7 85:3
107 :25	10 30: 3,6,17 31: 5,8 32: 1	held [3] 3:22 40:20 132:24	implications [1] 70:23	instructed [1] 54:17

	Official			
instruction [1] 77:4	issue [19] 3:20 44:14 48:9	78:9 79:11 81:14 83:23 84:	35: 1,12 36: 20,23 37: 8,13	legally [1] 31:16
instructions [1] 133:16	49: 9 53: 18 55: 19 68: 1,3	8,17,24 85: 4,8 86: 9,13 87:	38:4,22 39:10 40:15 41:22	legislate [1] 96:9
intelligence [7] 3:19 4:20	74:12 81:1 85:19 88:10,11	5 89: 4 90: 25 91 :1,24 92:	42:2,5,10,15 44:13,18 45:5,	legitimate [2] 56:12 64:8
8:10 14:12 28:5 39:3 109:	95:18 100:1,7 101:17 120:	11,14,18 94: 17,21 95: 13,	15,21 46: 17,21 47: 13,22	less [3] 43:12 125:9 136:13
24	2 138 :7	17,21 96: 20 97: 3 98: 1,4,11,	48: 6,19 49: 12,17,23 50: 12,	letting [1] 130:23
intend [1] 112:20	issue's [1] 46:20	15 99: 10,20,20 100: 2,2,18	20,23 51: 3,6,11,15,18 52: 8,	liability [2] 53:23 55:6
intended [4] 21:6 25:7 48:	issued [2] 102:20,20	101:6,11,24 102:13 104:8,	13,19,23 53: 4 55: 11 56: 24	liable [1] 60:21
22 51 :19	issues [4] 54:25 100:3 102:	24 106:5 108:4 109:17,19	58:10 59:19 61:6 76:6,10	light [3] 120:15 123:22 124:
intends [8] 14:10,24 20:11	11 122: 13	110: 11,14 111: 7,13 112: 3,	88:15 98:18 101:25 111:9	3
23:17 24:15 30:6,17 52:11	item [1] 8:3	4,5,6,7 113: 19 114: 17,20,	134: 5,6,8 138: 24	likely [1] 58:17
intensive [1] 77:4	itself [10] 7:15,16 13:9 25:	23 116 :19 117 :10,15 118 :1,		likewise [1] 5:7
intent [3] 5:11 17:24 125:1	20 40 :4 42 :23 65 :14 134 :	1,3,15,18,22 119: 4,8,11,16,		limine [2] 70:25 71:6
intention [1] 12:16	25 135 :5 136 :19	20 120: 5,14,18,23,24,24,	knowing [1] 78:15	limited [6] 7:9 55:23 56:18
interacts [1] 119:25	J	25 123 :10,10,12,21,24 124 :		58:1 96:6 97:22
interest [1] 64:8	Jabara [1] 83:16	7,8,8,10 125 :4 126 :4 127 :6,		line ^[3] 10:14 37:4,21 lines ^[1] 108:9
interested [3] 83:12,13 114:23	Jackson [2] 95:25 124:18	7,7,9,10 128: 5,9,22 129: 13, 19 130: 3,5,12,22 131: 3,8,	lack [1] 138:5	links [1] 24:21
interests [2] 49:4 92:12	jargon [1] 108:20	24 132 :2,3,8,17 133 :9,19	language [26] 13:24 15:10	liquidated [1] 11:18
interpose [1] 117:22	Jefferson [1] 119:2	134: 2,3,9 135: 3,25 138: 23	17:2 20:1 21:5 23:7 24:21,	list [2] 18:15,18
interpret [1] 133:21	judge [32] 9:1,16 12:2,25	Justice's [1] 125:3	24 26: 6,11,16 28: 13,20,21	listen [1] 91:6
interpretation [12] 4:3 13:	31 :9,12 32 :13 36 :13,15,17	justification [2] 138:5,5	48:16 55:13 58:11 59:13	literal [2] 26:10,15
9 26:20 48:12 54:3 55:1	52:16 56:17 57:9 61:8 66:		60:14 87:13 89:6 98:20	literally [1] 27:8
61 :3 62 :15,19,22,24 100 :	11 70: 17,18 74: 24 76: 20,	K	108: 16,19 110: 16,24	litigate [2] 89:1 110:10
16	21 77: 11,11 83: 18 84: 11	KAGAN [22] 15:20,23 16:	largely [1] 55:2	litigated [3] 88:10,11,16
interpretations [1] 62:17	85: 9 94: 22,23 107: 2,2 113:	21 17: 1,4,7 38: 14,15 39: 9,	larger [1] 43:18	litigation [5] 88:12 97:16
interpreting [4] 28:14 87:	20 130 :5 132 :11	11 41: 21,23 42: 3,6 48: 5	Last [6] 49:19 78:5 96:13	101:3 126:7,12
13 95 :1 96: 2	judges [1] 74:19	76: 10 81: 14 91: 1 94: 18	117 :7 131 :9 133 :14	little [5] 8:23 69:7 101:25
interrupt [3] 101:7 104:9,	judgment [18] 42:24,24 43:	100: 2 120: 24,25	Lastly [1] 65:17	108 :23 116 :14
10	14,16 45: 6,6 46: 4,25 59: 12,	Kavanaugh [35] 46:15,16	later [1] 71:13	long [4] 79:2 88:18 103:11
introduce [6] 14:11 51:19	14 71: 5 86: 21,22 88: 3,22	47: 11,15 48: 3,7 49: 8,16,19		115: 21
52:3 75:1 110:18 112:12	122 :20 132 :25 136 :10	50: 9,18,22 51: 1,4,8 94: 21	law [43] 3:15 5:9,16,18,21 6:	longer [1] 61:12
introduced [2] 24:19 68:	judicial [4] 4:8 21:20 98:19	95: 13,17,21 96: 20 97: 3 98:		look [40] 13:1 16:6 25:19
18	138:6	1,4,11,15 99: 10,20 101: 6,	15 64:9 65:5,9,16 67:5,11	31: 13 32: 2,14,20,21 33: 5
introducing [2] 22:8 24:1	jurisprudence [1] 9:15	11,24 120 :5 124 :9,10 126 :	78:2 80: 19 84:2 87: 25 88:	34 :13 36 :13 38 :2 39 :7 73 :
introduction [1] 52:24	jury [7] 53:24 55:9 56:15 59: 25 60:23 84:22 86:5	4 127:6	9 89:5,7 91:19 92:5 97:18	24 74: 4,8,20,24 76: 24 81:
intrude [1] 125:1	Justice [311] 1:20 3:3,12 5:	keep [13] 23:5 33:17 42:18, 25,25 43:16 67:7 68:7,21	99 :9 107 :7,8 117 :25 118 :9 128 :3,20,23,25 129 :3,7	16 87: 18 93: 10 96: 12,13
invest [1] 39:2	14 6:10,21 7:13 8:14,17,18,		130 :10,13,21 131 :23 135 :	97:15 98:19 99:14 105:11
INVESTIGATION [14] 1:3	19,20,21 9 :14 10 :4 11 :1,5,	keeping [3] 43:14 67:15 73:		107: 3,8 113: 6,10,21 115: 1
3 :8,20 4 :20 8 :11 39 :4,10,	8,11,14,16 12: 9,17,20 13:	22	lawful [10] 9:5,11 25:2 36:	118 :24 119 :1 120 :13,15
16 40 :23 41 :5 50 :2 53 :21	14,18 15: 20,23 16: 21 17: 1,	keeps [2] 23:12 30:20	14 64:17 83:4 86:1 109:16	122: 17 132: 16
56: 9,10	4,7 18: 14,16,24 19: 2,5,10,	Keith [1] 96:8	113:23 115:20	looked [6] 17:22 47:2,16
investigations [1] 57:12 invited [1] 96:8	13,16,19,23 20 :8,13 21 :9,	Kelly [1] 83:16	lawfully [7] 60:19 79:22 82:	76:8,8 83:20
invocation [5] 13:6,16 47:	14,22,25 22: 12,16 23: 11,	kick [1] 91:8	16 87 :22 89 :22 91 :2 115 :	looking [9] 9:21 20:6 22:3, 4 47:6 77:25 91:22 101:5
-	14,15 24: 6,9,12 25: 10 26: 2,		10	
13 54:20 69:25 invoke ^[8] 10:16,16 18:21	3,4 27: 7,13,18 28: 12 29: 9,	kind [9] 39:22 40:8 48:16	lawfulness [4] 55:5 58:2	105:5 looks [1] 75:12
72: 13 112: 18,19,21,22	13,16,16,18 30: 21,22,22,	56:20 70:10 90:25 125:6,7,		Los [1] 1:24
invoked [9] 13:10,11 38:23	24 31:25 32:5,6,9,20,23 33:	12	lawsuit [4] 23:1 38:21 40:4	lose [6] 70:19 88:22 92:18
40: 19 46: 7 48: 2 62: 4,5	9,13,17,22 34: 1,4,12,19,25	kinds [4] 16:8 31:3 100:3	65: 3	119: 21 121: 1 123: 3
119: 23	35: 10,14,15,15,17,18 36:	113 :5	lead [3] 7:14 77:23 122:22	loses [1] 66:21
invokes [6] 4:12,13 9:19	21 37: 4,11,24 38: 14,14,15,	kitchen [1] 99:15	leading [2] 88:20 93:16	lost [1] 113:15
23:4 32:2 135: 12	16 39: 9,11,12 41: 21,23 42:	KNEEDLER [143] 1:19 2:3,	leads [1] 87:12	lot [4] 34:9 43:7 95:24 103:
invoking [5] 23:5 69:24 72:	3,6,11,11,13 44: 16 45: 2,14,	13 3: 9,10,12 5: 14,19 6: 17,	leak [1] 115:17	4
4,6,20	16,23 46: 14,14,16,19 47:	22 8: 14,15 9: 13,18 10: 23	least [11] 5:8 7:1 26:5 41:7,	lots [2] 95:8 103:24
involve [2] 21:17 59:21	11,15 48: 3,4,4,7,8 49: 8,16,	11: 3,7,9,12,15 12: 5,13,18	17,17 59: 23 68: 10 93: 13,	lower [2] 57:18 103:5
involved [1] 116:11	19 50: 9,18,22 51: 1,4,8,9,9,	13: 3,14,16 14: 4 15: 21 16:	18 96: 23	luck [1] 131:22
involves [2] 59:1,23	11,17,24 52: 12,15,22 53: 2,	10,25 17: 3,6,21 18: 14,22	leave [2] 25:7 121:22	M
involving [3] 80:24 81:8	3,9 54: 7,13,21 58: 7,19 59:	19: 1,3,8,11,15,18,21 20: 5,	leaves [2] 107:10 121:16	
114: 24	1,4,8,18 60: 3 61: 14,22 62:	9 21: 4,13,18,23 22: 1,2,12,	leaving [4] 103:13,15 109:	M.A [3] 1:22 2:6 53:6
lqbal [1] 86:25	13 63: 2,4,5,7,8,9,11,11,12,	14,16 23: 3,11,12 24: 5,7,11,		made [13] 13:20 15:11 27:
irrespective [1] 52:20	13,19 64: 14,18,23 65: 22	13 25: 11 26: 5,21 27: 10,17,		13 40:1 44:4 55:11 72:2
isn't [11] 15:20,23 20:15,16	66:25 67:4 68:2 69:5,23 70:13 71:25 72:10,14,18	19 28 :19 29 :10,14,15,18, 25 31 :22 32 :1,8,16,21 33 :8,	left 11 85:3 legal 3 18:12 81:21 82:10	75: 23 93: 4 99: 15 107: 4 118: 5,6
21 :9 31 :14 67 :25 84 :24 87 :	73 :3,24 74 :11 75 :5 76 :10	12,15,19,24 34: 2,11,17,22	legality [1] 90:14	mail [1] 137: 20
12 108:17 114:25	10.0,27 17.11 10.0 10.10	12,10,10,27 07. 2,11,17,22	isguing 1990.14	1101 U 107.20

main aristitude dipset maintained dipset marrow (min difficiency (min disc)	Official				
maintenance III 986 mind 74:110419 natrom W [0:8825 opject W (0:8825)	main [2] 87:17 91:11	22 137 :8	narrowing [1] 111:4	0	
major Migroffy 01001012 minum 0124201 minum 012401 <th< td=""><td>maintained [1] 99:6</td><td>mind [2] 74:1 104:19</td><td></td><td></td><td></td></th<>	maintained [1] 99:6	mind [2] 74:1 104:19			
majerity 37 (0):0 (1012) minimum (124:21) 42:25 43:7.49:570:1520 Obtain (19:64.132:516:12) opposite (19:63:03) manifesti y (19:719) minoritios (19:22:6) minoritios (19:22:6) 37:29:83:10.34:6.38:3 35:29:10.34:2.38:3 35:29:10.34:2.38:3 35:29:22:25:31:0.34:6.38:3 many (16:24:22:8:14) minoritios (19:22:6) minoritios (19:22:6) 14:36:21:138:9 35:29:10.11:22:34:13:138:5 35:29:10.11:22:34:13:138:5 material (15:70:14) misunderstand (19:17) misunderstand (19:17) 12:12:13:10:12:22:138:13:138:5 11:12:41:13:13:16:16:11:17: 17:28:21:38:21:38:13:13:68 misunderstand (19:17) 22:11:12:02:21:14:11 necessity (19:65 11:12:41:13:16:16:11:17: 17:28:21:38:21:38:13:38:6 Mister (19:23:2) 11:35:10:12:22:13:10:11:13:16:16:11:17: 11:12:41:13:16:16:11:17: 11:12:41:13:16:16:11:17: 17:28:21:38		minimization ^[2] 18:4 28:		-	
matrix 1 minutal 1 (13) minutal 1 (13		-		-	
man 033:17 minorities 102:25 21:91:4.92:1.3.96:3.92:7 93:5.94:0.111:23:1.98:6 option 17:25:19 potion 17:25:19 option 17:25:19			,		
mitmaner					
manner if 64.24 1131-17 14 332-21 138-9 10 41 32-25 138-9 1131-13 42, 70 1131-13 42, 70 20 135-2 31-1 28-13 31-1 133-2, 70 110-24 32-25 100-24 110-24 100-24					
Instruction On Lat. Comparison Dat. Lat. Comparison Dat. Lat. Co	manifestly [1] 57:19	mirror [5] 85:22 86:12 87:2,			
Interplace Interplace <thinterplace< th=""> Interplace Interpla</thinterplace<>					, , -
21 99.57 martial 19.95.7 matrial 19.95.7 material 1		•			
massively 01:00:7 materials P15:5 10:10 114:1 fb13 f5:7 17:00 114:1 fb13 f5:1					
Intesting (1) Intestin		, -		-	
International (N 12) 125 International (N 12) 121 </td <td>-</td> <td></td> <td>-</td> <td>-</td> <td></td>	-		-	-	
minute 192.02.01 misunderstanding IP 23. mist 13.			-		,
113:113:1111 113:21:113 113:24:113:113 113:24:113:113:113:113:113:113:113:113:113:11	materials [21] 5:5 10:19 13:			-	
11 23:138:22 133:1 332. 10 103:9 133:21 10 103:9 133:21 10 103:9 133:21 15 66:275:140:16 113: misunderstood [23:92:0] 166:23:21 46:171:192.172 10 103:9 133:21 10 103:9 133:21 15 66:275:141:171:22 10:171 104:24 114:11 130: 16:32:24 46:171:192.172: 00:171 104:24 114:11 130: 00 crus [11:17:20] ord[13:19:75:96:160:171:152:26] ord[13:19:75:96:160:172:33] 00:171 104:24 114:11 130: 00 crus [11:17:20] ord[13:19:15:96:171:152:27:6] ord[13:19:15:61:155:75:7 needed [10:17:33] nomming [11:17:5] ord[13:19:15:56:76:7] needed [11:17:12:26] ord[13:19:15:56:77:7] needed [11:17:12:16:27:16:36:10:17:15:36:77:17:12:32:26] ord[13:19:15:56:77:7] needed [11:17:12:27:12:10:10:10:10:10:10:10:10:10:10:10:10:10:	1 14: 1 15: 13 16: 7 17: 10,	-	,		
111 1111 1111 1111 1111 1111 1111 1111 1111 1111 1111 1111 1111 1111 1111 1111 1111<	17 25 :21 38 :21 39 :16 53 :			10 100 0 100 01	
1314 136.02 MLK [N 83:23] 17 95:11 97:99 91:08.22 occurs IP 17:20 ordinary [P14:6 39:24] 1314 136.6 40:33 Molerio [P16:21 77:12] 100:17 104:22 100:17 104:22 ordinary [P14:6 39:24] ordinary [P14:6 39:24] 2 99:21 99:4 100:24 1133:3 moment [P15:5 75:7] needed [P10:25] needed [P10:224] office [P17:33] <				a a a um la a 1/1 04 . 40	,
Inter 100:0			,	-	
Induction Induction <t< td=""><td></td><td></td><td></td><td></td><td></td></t<>					
43.1 2 98:21 99:4 / 10:10 / 11:2:2 23 24 24 25 25 95 0th (Pa) (23, 13) 0th (Pa) (23, 13) 0th (Pa) (23, 13) 36 15:15 75:7 needed (Pa) 90:2.5 needed (Pa) 90					
2 30:2 195-4 (100.24 + 115.3) Infinite 191.5 (15.7) Infinite 191.5 (15.7) Infinite 191.5 (15.7) 8 amothing 192:1 monthing 193.7 meed n't 13.224 need n't 13.224 official 19115 17.20 21:16 2321.23 244 17.20 21:16 23.16 244 17.20 21:16 23.16					
B Interver In					
Institus Institus <th< td=""><td></td><td>5</td><td></td><td></td><td></td></th<>		5			
Industry (P, 14, 94, 22, 01) Informal (P, 12, 22, 91) Informal (P, 12, 22, 42, 93) often (P, 12, 22, 42, 93) often (P, 12, 22, 12, 10, 13, 73, 91, 24, 16, 41, 13, 42, 22, 23, 34, 22, 34, 51, 16, 16, 17, 12, 34, 16, 37, 13, 92, 14, 16, 41, 13, 42, 22, 23, 23, 23, 23, 23, 23, 23, 23, 2					
22 93:0 minos (w/2):136:0 nitos 169:0 nitos 169:0 137:2 137:21:136:0 144:46:22 64:26 157:35:0 With 190:1 23:42 151:15:10 23:22 81:16:15:10 23:22 81:16:15:10 23:22 81:16:15:10 23:22 81:16:15:10 23:22 81:16:15:10 23:22 81:16:16:10 161:16:10:10:13:12:12:10 161:16:10:10:13:12:10 17:16:10:13:16:14:11:10:10:13:12:12:10 17:16:10:13:16:14:11:16:10:13:12:10 17:16:10:13:16:14:11:10:10:13:12:10 11:16:10:10:13:12:10:13:11 10:10:10:11:10:10:13:12:10:13:11 10:10:10:11:10:10:13:12:10:13:11 11:16:16:10:10:11:10:10:13:12:10:13:11 11:16:16:10:10:11:10:10:13:12:10:13:11 11:16:16:10:10:11:10:10:13:12:10:13:11 11:16:16:10:10:11:10:10:12:11:11:10:10:12:12:11:11:11:11:12:10:12:10:11:11:11:11:11:11:11:11:11:11:11:11:		•			
1110 100.10 110 100.10 110 100.10 110 100.10 110 1					
111 11111 1111 1111 <				-	
23 23 <t< td=""><td></td><td></td><td></td><td>,</td><td></td></t<>				,	
23 52 53 54 10, 22 542 56 151, 51 12 42:022 252, 56 151, 51 12 42:022 252, 56 8:24 9:24 33:3, 22, 43 85; 24 127:21 128; 9130:3 103:1, 124:10, 221 19 84:19 85:8, 988:1 92: 151, 51 12 4:20, 22 25:5, 6 8:24 9:24 33:3, 22, 43 85; 24 127:21 128; 9130:3 103:1, 124:10, 221 110:1, 16, 25 112:14 13:1; 29 33:6, 13 96:8 97:25 100: 17 70:25 71:3, 4, 5 87:24 45:6, 24 46:4 47:6, 20 50; 01d 10 116:6 10d:1 146:12, 17, 72 110:1, 16, 25 112:14 13:17, 132 110:1, 16, 25 113 14:13 10:1 131:17, 132 23 109:24 111:3, 14, 16 44:8 59; 110:24 111:2 113:12, 14:10 22:17, 122:16 134:1, 16 77:9 87:20 90:11 Others 10:90:12 01:16 139:21 01:16 139:22 01:16 139:17 02:17 139:11 12:16 139:12 01:16 139:11 119:16 139:11 01:16 139:11 119:16 139:11 01:16 139:17 02:139:16 139:12 01:16 139:17 02:139:16 139:12 01:16 139:11 139:16 139:1	,				
11:03:07:07:22:02:03:05:05:00:05:02:05:00:05:02:05:00:05:02:05:00:05:02:05:00:05:02:05:00:00:07:03:05:00:00:07:00:07:07					
0 10 10 10 10 10 10 10 10 10 10 10 10 10					
19 93 <t< td=""><td></td><td></td><td></td><td></td><td></td></t<>					
22 39:10 30:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 103:18 104:6.8, 11 102:10 101:7, 12 118:23, 25 0 noce 10 36:22 37:26 69:10 11 101:10 101:7, 12 118:23, 25 77:6 mouse 10 108:22 109:3 11 102:10 103:15 108:11 102:11 100:11 101:7, 12 118:23, 25 100:11 016:23 66:10, 14 20:2, 3, 11 2:61, 22:1, 23:16 134:12, 13 20:2, 3, 11 2:61, 22:1, 23:16 134:12, 13 20:2, 3, 11 2:61, 22:1, 23:18 12:6 12:21 100:10, 16:12 36:10, 16:16 2:23 21:8:14 103:12 2:21 2:3:16 134:12, 13 21:16 12:61, 21:16 12:25 21:16 12:61, 21:16 12:25 21:16 12:61, 21:16 12:25 21:16 12:61, 21:16 12:25 21:16 12:61, 21:16 12:25 21:16 12:61, 21:16 12:25 21:16 12:61, 21:16 12:61, 22:9:13 17:16 21:16 12:61, 21:16 12:61, 22:9:13 17:16:8 21:10:11 10:12, 14:15 31:12 21:10:11 10:12, 14:15 31:12 21:10:11 10:12, 14:15 31:12 21:10:11 10:12, 14:15 31:12 21:11 10:12, 14:12:10:11 21:12:12:12:12:11:11 10:12 21:11 10:12:12 21:11 10:12:12 21:11 10:12:12 21:11 10:12:12 21:11 10:12:12 21:11 10:11:11 21:11:11		,			
111111111111111111111111111111111111					
23 103:024 110:00 102:2 100:100:1 101:100:1 100:100:1 101:100:1 100:100:1 100:1100:1 101:					
0 12:14 12:05 10:13:19 moiles [2] 56:10,14 20:7,10 12:16,12,17,22 29:19 31:4,14 42:15 29:19 31:4,14 42:55 29:19 31:4,14 42:55 29:13 31:2 56:10,167:35 29:13 31:2 56:10,167:35 29:13 31:2 56:10,167:35 29:13 31:2 56:10,167:35 29:13 31:2 56:10,167:35 10:10 61:12:1 52:13:16 11:10:11 10:12:14:12:13:12 13:10:11:10:11:11:10:12:14:12:12:12:12 13:10:11:10:12:14:12:12:12:12 13:10:11:10:12:14:12:12:12:12 13:10:11:10:11:11:10:12:14:12:12:12:12:12:11:11:11:11:10:11:11:10:11:11:10:11:11:					
11:11:13:12:14:12:14 110:2 110:17:30:7,9 32: 110:2 22:2 123:16 134:12,13 29:19 31:4,14 48:13 59:7, 23:18,20 24:16,19 25:5,6 22:2 32:3:14:13:10:12:14:12:14 110:2 110:2 110:17:30:7,9 33: None (10:15:3 10:10:11:10:12:14:12:14 22:2 32:3:14:13:10:12:14:12:14 110:17:30:7,9 33: None (10:15:3 110:12:14:12:14:12:14 13:10:11:10:12:14:12:14 meant [2]:68:15:10:25 moved [2]:33:21:18:14 nored [2]:10:17:61:24 nored [2]:10:17:23 13:104:19:20:10:14:10:12:14 16:13:52:12:15:13:11:13:14:12:14:12:19 nored [2]:10:17:61:24 noreal [7]:11:10:11:2:14:12:19:11:10:12:14 13:2:10:11:10:12:14:12:10:12:14:11:10:12:14:12:10:12:14:12:14:11:10:11:12:14:12:14:12:14:11:10:11:12:14:12:14:12:14:12:14:12:14:11:10:11:11:10:11:12:14:12:14:12:14:11:11:10:11:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:11:11:11:11:11:11:11:11:11:11:11:11:					
Include (i) (20) (20) (20) (20) (20) (20) (20) (20		-			
11:02 11:02 11:02 23:88:14 93:6 98:1,6 100: 20:23:25 22:14 93:1 60:2 means [9] 20:21 38:5 64: move [10] 10:17 30:7,9 33: 14 67:24 69:1 80:13 88:15 nonetheless [2] 107:23 13:104:19,20 105:4 106:3 13:104:19,20 105:4 106:3 6 136:11 112:14 122:19 nore [10] 10:17 61:24 13:2:1 13:2:1 107:6,9 110:24 113:19 13:64:22.30 66:2.8 69:15 mechanism [5] 4:6 12:7 moving [2] 10:17 61:24 nore [10] 11:17 61:24 13:2:1 116:14 53:1:23 32: 107:6,9 110:24 113:19 13:14:1:1 0ut [30] 7:18 19:25 23:6,12 mechanisms [5] 4:6 12:7 moving [2] 10:17 61:24 normall [7] 14:15 31:23 32: 107:6,9 111:24 113:19 13:14:22:10 100:4 10:20 31:18 4:22 13:12:23 26:12 100:4 10:22 31:18 4:22 100:13:17 9:18 19:25 23:6,12 mentis [6] 28:2 62:9 much [7] 43:5 45:2 48:1 Northrop [1] 12:9:9 nort [2] 103:10 120:9 ones [1] 111:17 00:4 10:1:3 107:10 124: 13:22:32 32:4 9::13:11 18:4 36:3 0ut [30] 7:2 23:8:8 58: 0ut [30] 7:2 23:8:13:10:10:12:17 10:4 10:13 107:10 124: 10:4 10:13 107:10 124: 10:2:1 10:8 117:3,9,15 10:2:1 10:8 117:3,9,15 10:2:1 10:8 117:3,9,15 10:2:1 10:8 117:3,9,15 10:2:1 10:8 117:3,9	-		,		
Interference Interference <td< td=""><td></td><td></td><td></td><td></td><td></td></td<>					
12223 06.10 90:3 93.7 Ho. 14 97.24 95.7 60.13 06.13 Interfetees (1 107.23) 107:6.9 110:24 113:19 136:13 00.12 14 122:19 meant [2] 68:15 102:25 moved [2] 33:21 88:14 moving [2] 10:17 61:24 133:2 107:6.9 110:24 113:19 136:11 00.12/14 mechanism [5] 4:6 12:7 moving [2] 10:17 61:24 moving [2] 10:17 61:24 133:2 107:6.9 110:24 113:19 136:11 00.12/14 mechanisms [5] 126:25 meved [2] 33:21 88:14 moving [2] 10:17 61:24 18 73:6.6 82:9 114:19 normal [7] 14:15 31:23 32: 107:6.9 110:24 113:19 101:64 121:13 124:2,10 mechanisms [5] 126:25 58:24 593:6,11,24 60:5 normall [7] 14:15 31:23 32: 107:6.9 110:24 113:19 101:64 121:110:17 mentioned [5] 28:2 62:9 normally [1] 171:1 normally [1] 171:11 normally [1] 129:9 ones [1] 111:17 merly [1] 67:25 Muslims [3] 57:13 107:20, 3 63:5 68:22 39:14 40:24 32:54 49:51: 103:21 118:4 36:3 methods [4] 4:19 8:10 39: 75:61:12 Notification [1] 15:4 notification [1] 15:4 103:21 110:8 117:3,9,15 103:21 100:13 103:21 100:13 methods [4] 4:19 8:10 39: nail [1] 47:16 namely [1] 74:23 notification [1] 18:12 0pen [1] 25:7 0pen [1] 25:17 0ver [6] 12:13 105:14					
110:11 110:12 111:12					
International (1) 30:102:23 Intervent (1) 30:17 61:24 Intervent (1) 11:17 Intervent (1) 11:17 Intervent (1) 11:11 Interve				-	
Internation 19.4.5 12.7. Internation 19.4.5 12.7. Internation 19.4.5 12.7. Internation 19.4.5 12.7. Internation 19.4.5 12.5.4 Ms (19.53:5,8 54:10,14,24) Internation 19.4.5 12.7. Internation 19.4.5 12.7. Internation 19.4.5 12.7. mechanisms (1) 126:25 Ms (19.53:5,8 54:10,14,24) 18.73:6,6 82:9 114:19 normally (1) 71:11 normally (1) 71:11 Northrop (1) 129:9 normally (1) 71:11 Northrop (1) 129:9 northing [5] 37:22 38:8 58: 36:15 68:22 Internation 19.7.7 112:9,13,17.					
16: 13: 53: 12: 50:4 INS 10: 50:5, 50:4: 10, 14, 24 16: 73: 60; 62: 9: 114: 19 one's (1) 119:23 50: 16: 50: 50: 21: 50: 12: 20: 17 mechanisms (1) 126: 25 fil: 21: 62: 1, 14: 63: 2: 84: 9 normally (1) 71: 11 one's (1) 119: 23 one's (1) 119: 23 s9: 24: 97: 13: 99: 17, 19 64: 19: 89: 6: 100: 3 74: 18: 224: 102: 22: 125: 9 much (7) 43: 6: 45: 25: 46: 1 northing (5) 37: 22: 38: 85: 39: 14: 40: 2: 43: 25: 44: 9: 51: 10: 13: 39: 14: 40: 2: 43: 25: 44: 9: 51: 100: 13 onting (5) 37: 22: 38: 13: 107: 20, 22 36: 55: 68: 22 notific ation (1) 15: 4 notify (1) 14: 24 notific ation (1) 15: 4 notific ation (1) 15: 4 notific ation (1) 15: 4 notify (1) 14: 24 notify (1) 15: 5 notify (1) 14: 24 notify (1) 14: 24 notify (1) 15: 5 notify (1) 14: 24 notify (1) 15: 5 notify (1) 14: 24 notify (1) 16: 1 notify (1) 15: 5 notify (1) 16: 1 notify (1) 15: 5 notify (1) 15: 5 notify (1) 15: 5 notify (1) 16: 1 notify (1) 15: 5 notify (1) 16: 1 notify (1) 16: 1 no		-			
memorandum [1] 69:12 50:24 53:50; 11:24 60:3 normaly [19 71:11] ones [1] 111:17 only [37] 8:24 9:9,11 10:5, 25 92:4 97:13 99:17,19 memorandum [1] 69:12 61:21 62:1,14 63:2 84:9 northrop [1] 129:9 onthing [5] 37:22 38:8 58: only [37] 8:24 9:9,11 10:5, 25 92:4 97:13 99:17,19 merity [1] 67:25 much [7] 43:6 45:25 46:1 northrop [1] 129:9 nothing [6] 37:22 38:8 58: 39:14 40:2 43:25 44:9 51: 100:4 101:13 107:10 124: merity [1] 67:25 Muslims [3] 57:13 107:20, 22 notice [6] 79:7 112:9,13,17, 18 53:11 66:8 67:6,20,21 71:9 75:11 78:9 82:22 83: outright [1] 81:11 s6:5 79:2 must [5] 11:20 18:21 66:24 72:8 113:20 notification [1] 15:4 notification [1] 15:4 103:2 110:8 117:3,9,15 103:2 110:8 117:3,9,15 103:2 110:8 117:3,9,15 method [1] 28:25 namely [1] 74:23 narrow [7] 74:12 53:12 95: notify [1] 14:24 103:2 110:8 117:3,9,15 133:18 over [6] 18:7 29:6 50:6 99: novel [1] 42:1 narrow [7] 76:5 100:22 narrow [7] 76:5 100:22 nowhere [1] 102:6 operate [2] 15:3 105:14 operate [1] 15:15 operate [1] 15:22 0wer [4] 43:21 0wer [4] 64:3 67:14 71:22 13:1:17 116:8 123:14 133: 120:1,22 number [2] 135:9 137:14 121:16,2					
mentional functional function and function for the second formation formation formation formation formation for the second formation formation formation formation formation formation for the second formation formatin the second formating formation formation formation formation fo					
64:19 89:6 100:3 merely [1] 67:25 merely [1] 67:25 74:1 82:24 102:22 125:9 Muslims [3] 57:13 107:20, 22 nothing [5] 37:22 38:8 58: 3 63:5 68:22 25 12:15 13:11 18:4 36:3 39:14 40:2 43:25 44:9 51: 18 53:11 66:8 67:6,20,21 71:9 75:11 78:9 82:22 83: 755:12 6 131:22 132:3 outright [1] 81:11 met [1] 80:20 method [1] 28:25 methods [4] 4:19 8:10 39: 7 56:12 must [5] 11:20 18:21 66:24 72:8 113:20 70 71:9 75:11 78:9 82:22 83: 103:21 6 131:22 132:3 outright [1] 81:11 notific ation [1] 15:4 middle [1] 25:16 notific ation [1] 15:4 namely [1] 74:23 narrow [7] 18:12 53:12 95: 4 97:2,21 98:7 111:4 narrower [2] 76:5 100:22 narrowest [4] 100:10,21 notwithstanding [1] 80: 19 novel [1] 4:3 25 12:15 13:11 18:4 36:3 39:14 40:2 43:25 44:9 51: 18 53:11 66:8 67:6,20,21 71:9 75:11 78:9 82:22 83: 103:21 6 131:22 132:3 outright [1] 81:11 middle [1] 25:16 might [22] 11:21 15:7 70: 14 102:23 116:17 126:15 133:18 notwithstanding [1] 80: 19 novel [1] 4:3 November [1] 11:2 nowhere [1] 102:6 number [2] 135:9 137:14 0pen [1] 25:7 opening [1] 5:15 operated [1] 43:21 opinion [5] 32:6 45:8 75:6 over come [1] 49:18 over used [1] 108:23 own [4] 64:3 67:14 71:22 109:8		,	-		
is 03.0 100.0 merely (1) 67:25 merely (1) 80:20 metely (1) 28:25 merely (1) 2				-	
Image: Product of 12.03 Image: Product of 12.03 <td></td> <td></td> <td></td> <td></td> <td></td>					
Numerics (9,3,25,10,1,32,4) 22 56:5 79:2 must [5] 11:20 18:21 66:24 notification [1] 15:4 methods [4] 4:19 8:10 39: 72:8 113:20 notification [1] 15:4 methods [4] 4:19 8:10 39: nail [1] 47:16 notification [1] 14:24 might [22] 11:21 15:7 21:8 narrow [7] 18:12 53:12 95: 19 novel [1] 4:3 novel [1] 4:3 open [1] 25:7 0pen [1] 25:7 open [1] 25:7 13:3 43:22 47:7 50:7 66: 14 75:9 83:20 88:15,22 14 75:9 83:20 88:15,22 narrower [2] 76:5 100:22 115:17 116:8 123:14 133: 120:1,22				40 50.44 60.0 67.0 00.04	-
36.5 7 8.2 Indust (9 11.20 16.2 + 06.24) 20 113.1 7 85:10 90:5 96:11 100:13 over (8) 18:7 29:6 50:6 99: methods (4) 4:19 8:10 39: 7 2:8 113:20 notification (1) 15:4 notification (1) 15:4 103:2 110:8 117:3,9,15 14 102:23 116:17 126:15 methods (4) 4:19 8:10 39: nail (1) 47:16 namely (1) 74:23 notwithstanding (1) 80: 19 over (0) 125:7 0pen (1) 25:7 0pen (1) 25:15 0perate [2] 15:3 105:14 0ver used (1) 108:23 0ver used (1) 108:23 </td <td></td> <td></td> <td></td> <td></td> <td></td>					
Inter (1) 00.20 Image: (1) 00.20 <tht< td=""><td></td><td></td><td></td><td></td><td></td></tht<>					
N Include (1) 20:23 Include (1) 20:23 <thinclude (1)="" 20:23<="" th=""> <thinclude (1)="" 2<="" td=""><td></td><td></td><td></td><td></td><td></td></thinclude></thinclude>					
7 56:12 nail [1] 47:16 19 24 open [1] 25:7 overcome [1] 49:18 might [22] 11:21 15:7 21:8 narrow [7] 18:12 53:12 95: 4 97:2,21 98:7 111:4 novel [1] 12:6 open [1] 25:7 open [1] 25:15 open [1] 25:14 overcome [1] 49:18 31:3 43:22 47:7 50:7 66: 1 97:2,21 98:7 111:4 narrower [2] 76:5 100:22 narrowest [4] 100:10,21 nullity [1] 10:15 operated [1] 43:21 oper		N			
middle [1] 25:16 namely [1] 74:23 novel [1] 4:3 open [1] 25:7 opening [1] 5:15 override [1] 25:14 might [22] 11:21 15:7 21:8 97:2,21 98:7 111:4 novel [1] 102:6 operate [2] 15:3 105:14 operated [1] 43:21 operated [1] 43:21 31:3 43:22 47:7 50:7 66: narrower [2] 76:5 100:22 narrowest [4] 100:10,21 nullity [1] 10:15 opinion [5] 32:6 45:8 75:6 109:8 115:17 116:8 123:14 133: 120:1,22 number [2] 135:9 137:14 121:16,22 P		nail [1] 47:16	-		
might [2] 11:21 15:7 21:8 narrow [7] 18:12 53:12 95: November [1] 1:12 opening [1] 5:15 overused [1] 108:23 22:14,22 23:25 24:1 27:2 4 97:2,21 98:7 111:4 narrower [2] 76:5 100:22 nowhere [1] 102:6 operate [2] 15:3 105:14 operated [1] 43:21 operated [1] 43:21 14 75:9 83:20 88:15,22 120:1,22 120:1,22 120:1,22 number [2] 135:9 137:14 121:16,22 P					
111 1111 111 111		-		-	
22. 14,22 23.23 24. 14,22 23.23 24. 14,22 <t< td=""><td>•</td><td></td><td></td><td></td><td></td></t<>	•				
14 75:9 83:20 88:15,22 narrowest [4] 100:10,21 nullity [1] 10:15 opinion [5] 32:6 45:8 75:6 100:10 115:17 116:8 123:14 133: 120:1,22 number [2] 135:9 137:14 121:16,22 P				•	
115:17 116:8 123:14 133: 120:1,22 number [2] 135:9 137:14 121:16,22					
					P
	113.17 110.0 123:14 133:				

Official				
p.m [1] 139 :1	place [4] 5:15 16:8 126:22	88:21 92:24 93:16 114:8	128:23,25 129:2,15 130:13,	135 :10
PAGE [4] 2:2 96:5,14 108:7	133 :18	pre-FISA [1] 83:7	17 133:23 134:16,17,18,19,	providing [1] 57:6
paid [1] 57:3	places [1] 104:1	precedent [1] 119:18	23,25,25 135: 1,5,8,13	provision [8] 16:2 68:6 87:
paragraph [1] 99:2	plain [2] 27:14 110:24	preceding [1] 14:20	privileged [16] 9:23 38:6,	19 108:6,17 109:6 112:8,9
part [20] 5:23 6:4 8:18 15:	plainly [2] 60:24 61:1	precise [1] 24:5	25 40 :24 53 :19 57 :8,24 58 :	provisions [5] 28:9 54:20
24 29:7 61:19 78:6 79:12,	plaintiff [9] 16:16 17:16 31:	precisely [1] 24:7	3 62:7 65:7,12,19 69:2 73:	125: 20 135: 16,19
14 82:2,25 89:24 99:11	4 51:21 52:9 82:3 103:14	preclusive [1] 124:17	11 96: 19 128: 8	public [2] 7:11 92:8
105:7 111:23,23,24 116:10,	106: 6,17	predicated [1] 57:13	privileges [3] 18:19 73:6,7	punitive [2] 11:18 35:21
14 124 :4	plaintiff's [4] 106:9,16 138:	predicates [2] 53:20 56:11	probably [4] 43:23 100:11	purported [1] 57:11
parte [20] 53:23 54:18 55:4	15.15	predicted [2] 114:3,4	107 :11 109 :9	purpose [6] 4:4,5 12:16 72:
60: 23 61: 17 64: 16 79: 20	plaintiffs [21] 10:3 11:21	preliminary [1] 113:3	problem [16] 39:14 43:5	5,7 82: 15
80: 16 81: 3,8 84: 11 85: 10	16 :5 36 :2,4,8 65 :11 69 :1	premature [8] 86:20 94:17,	44 :6 62 :5 74 :13,21 86 :12,	purposes [3] 18:8 28:8
96: 11 97: 2,22 109: 14 113:	70 :11 71 :19 87 :8 89 :18 90 :	19 101 :16 116 :2 122 :3,16	24 87 :2,6 102 :14 104 :11	114:7
11 115 :7 117 :12 126 :2	2,4,15 91 :16 92 :7 100 :19	123: 16	116: 23 131: 17,18,19	put [11] 18:3 20:24 22:24
participants [1] 85:11	132: 4 137: 6,18	prematurity [2] 102:5 124:	procedure [10] 14:9 15:2,6	43 :13 61 :10 64 :22 71 :9
participate [2] 53:24 60:24	plaintiffs' [5] 3:25 4:25 8:	4	16: 4,5,8 30: 4 55: 23 60: 23	108:16 109:9 118:16 135:
particular [4] 30:25 34:15	12 25 :24 85 :14	premised [2] 121:7,12	135: 20	25
92:24 117:22	plausible [8] 54:3 60:14	prepared [1] 64:3	procedures [10] 17:19 18:	putting [5] 20:15 26:9 39:
particularly [2] 7:18 123:	61:3 62:17,23,25 100:15	prerogative [1] 6:4	5 24 :24 79 :21 80 :18 90 :5	24 57 :23 137 :19
22	107 :16	presence [2] 85:11,12	110 :9,10 126 :13 136 :15	
parties [1] 40:11	play [5] 48:18 63:1 91:25	present [1] 39:17	proceed [5] 36:11 38:7 64:	Q
parts [6] 26:16,23 78:8 82:	117:23 124:6	presented [8] 47:25 78:12	3 106:1 138:2	question [87] 6:10,19,23 7:
14 109 :10 110 :22	plays [1] 48:12	79 :5,6 102 :8 105 :3,23 118 :		20 12: 12,14,23 13: 5 23: 15
party [13] 4:12 13:13 14:13,	pleadings [11] 38:19 71:9,	12	proceeding [29] 4:9,9 6:22	25:7 33:25 35:19 37:25 38:
24 15:7,12 18:12 35:24 36:	13 76 :7,23 100 :23 120 :6,8	preserve [1] 94:1	14: 25 18: 13 21: 20,21,23	16 41: 12 42: 1,4,14 43: 24,
25 42 :19,19 56 :1 112 :14	124:5 136: 25 137: 1	preserved [1] 78:25	22: 1,7 23: 8,13,21 24: 4 29:	25 44: 9 45: 18,20 47: 1,4,8
pass [1] 101:12	please [4] 3:13 53:9 63:19	preserving [1] 18:19	4 30 :9,19,20 37 :18,20 52 :	48:8 49:19 54:15 59:18 60:
passage [4] 7:11 98:18,23,	132: 8	president [3] 96:17 97:17	21 53: 19 56: 19 58: 1,2,12	13 66: 18,19 69: 5 78: 9,11,
24	point [35] 6:1 9:8 11:9 27:7,	116 :11	59 :12 68 :12 81 :25	13 79:5,6,12 82:7 84:20,22
passages [1] 137:14	22 28 :1,13 34 :12,18 39 :20,	president's [2] 48:23 97:	proceedings [7] 27:1,3 28:	85:16,18,21 91:22,23 94:9
passed [2] 101:8 109:4	21 40 :17 44 :4 46 :2 48 :13	11	11 30 :13 46 :5 60 :10 76 :17	95:22,23 96:3 97:24 98:2,
path [1] 79:10	50 :5 55 :16 62 :3,8 65 :10	presidential [2] 6:4 96:23	proceeds [1] 128:6	6 99: 21 100: 18 102: 8,15,
paths [2] 75:24 94:6	66:12 67:4,18 68:6 75:23	pressed [2] 43:2 108:1	process [23] 29:20 41:13	17 103:8 104:22 105:3,7,
people [5] 31:10 36:1 125:	88:6 97:2 98:23 104: 13	presumably [1] 50:16	53 :25 55 :10 62 :10 84 :25	18,22,23 106:1 113:19 116:
9 131 :14 132 :19	110 :17 111 :6 120 :9 121 :	presumption [1] 48:25	85 :6 86 :6,15 87 :7,8 88 :2	1 118: 12 120: 25 121: 2,4,5
perfectly [7] 21:3 43:3 66:	23 132 :10 138 :7	presumptively [1] 113:13	89: 21 109: 15 115: 13 129:	122:6,8,15 123:2,8,13 125:
23 70 :14 91 :18 105 :2 106 :	pointed [2] 7:17 132:3	pretty [5] 20:19 21:25 25:	1,4,18,22 130 :8,16 131 :18,	11 127: 10 128: 10 134: 24
3	points [5] 12:6 53:10 55:12	17 102: 22,25	24	135: 3 136: 17
perhaps [9] 32:13 72:2 93:	58:6 134: 9	prevent [3] 4:14 68:12,12	Professor [3] 73:25 103:	questions [12] 35:11,14 46:
24 94:18 100:21 101:18	policy [1] 7:11	prevents [1] 57:22	25 129 :8	17 54: 6 56: 15,16 61: 1 62:
109 :7 120 :13 122 :4	portion [1] 77:22	prima [1] 106 :10	programs [1] 125:22	20 121: 3,11 125: 3,4
permit [3] 12:25 64:9 82:19				quick [1] 58:6
permits [2] 10:5 64:12	portions [1] 91:15 posit [1] 127:11	primary [1] 101:16 prior [3] 104:4 112:17 132:	promise [1] 99:14 proper [4] 34:23 75:11 134:	quite [8] 6:11 28:15 43:18
permitted [2] 92:10 136:24	position [9] 18:17 23:17	12	11,15	103:23 116:2,12,19 121:11
persecution [1] 82:25	38 :17,18 50 :21 52 :1,16	Privacy [1] 27:24	properly [8] 8:15 41:1 46:	quoting [2] 7:10 74:19
person [16] 4:8 11:14,17	115 :12 118 :20	privilege [127] 3:14,21,24 4:		
13:24 14:3 17:11 19:11 23:	possesses [1] 115:6	2,13,14 5 :7,10,13,16 6 :19	23 138 :21	
8 24:17 29:22 30:18 35:19	possession [1] 43:10	7: 17 8: 25 9: 20 13: 7 16: 13,	prosecution [2] 37:16 52:	raise [2] 60:25 62:19
37:5 52: 25 101 :1 132: 22	possibility [3] 71:11 89:2	14,17 19: 9 23: 5,9 25: 15	6	raises [2] 54:5 102:17
persons [1] 96:7	131 :25	30 :19 31 :24 35 :4,7 37 :22	protect [2] 6:2 90:21	ramifications [3] 45:25 95:
pertaining [1] 6:3	possible [2] 92:23 123:14	38: 10,23 40: 6,20 41: 15,16	protected [3] 8:4 92:20	24 133 :23
pertinent [1] 26:23	possible [2] 92.23 123.14 possibly [1] 85:5	42: 17 44: 21 46: 7 47: 14,18	128 :14	rather [1] 5:18
Petitioners [7] 1:5,21 2:4,	post [1] 125:18	48: 2,11,15,18,22 49: 6 50: 3,		rationale [4] 4:10,23 99:13
14 3:11 10:20 134:7	potential [4] 48:17 87:7,9	6 53: 16 54: 12 56: 17,22,23	protective [4] 49:3,4 90:5,	106 :2
	127: 5		19	re [3] 76:19 77:13 132:13
phrase [5] 24:15 26:23 29: 21 49:1 58:8	potentially [1] 55:25	57: 21 60: 17 61: 5,13 65: 6,		reach [10] 12:10,12,23,24
phrasing [1] 17:22	power [11] 5:18,20,23 43:	6,21 68: 4,9,15,24 69: 1,6,8, 24 70: 1 72: 5 6 20 21 22 73:	-	33: 25 41: 12,25 44: 14 47: 4
pick [2] 99:20 111:17	19 95:12 124:15,16 126:11,	24 70:1 72:5,6,20,21,22 73: 1 76:2 78:15,16 80:14,22,	20 103: 20	50 :17
1.				read [12] 5:11 11:6 14:20
picked [1] 98:24	15,18,21 powerful ^[2] 80:21 87:12	23 81:5,13 83:8 89:8,17	proved [2] 37:9,11	49:5,18 56:22 60:14 73:25
picking [1] 48:8		90: 23 91: 2,8,19 92: 21 94:	proven [1] 36:22	88: 1,1 101: 17,18
picture [1] 91:13 piece [1] 115:15	powers ^[3] 6 :14 48 :24 124 : 23	2,7,25 95: 5 99: 9 107: 8 108: 12 110: 4 111: 12 112:	proves [1] 75:3 provide [3] 4:6 27:22,24	reading [10] 48:25 54:5 55:
pierce [1] 129:5	practice [1] 83:7		-	3 57: 25 60: 15 61: 15 68: 10
pierced [1] 128:25	prayer [7] 4:25 26:7 27:11	18,19,21,22 114: 22,25 116: 15 120: 11 125: 2 127: 22,24	-	95:2 108:12 125:12
	prayer 114.20 20.7 21.11	10 120.11 120.2 121.22,24		

	Official			
reaffirmed [1] 42:17	relevant [4] 33:2 67:19	Respondents [10] 1:8,23,	safeguarding [1] 3:16	14 110: 4 111: 11,18 112: 18,
real [4] 62:5 104:11 124:14	104: 20,20	25 2:7,10 26:12 40:21 53:	safely [1] 138:8	19,21,22 113: 8 114: 21,25
133: 16	relied [3] 9:25 45:24 61:8	7 63:17 137:17	same [23] 6:8 24:15,23 27:	117:8 119: 25 121 :9,13
realize [1] 17:9 really [15] 6:8 27:20 42:21	relief [10] 4:25 26:7 27:11 87:20 89:10,23 91:10 92:	response [4] 14:5 62:12 71:1 111:2	5 29: 2 42 :14 49 :13 50 :17 61 :25 66 :12 80 :7 84 :4,21	123 :17,18 125 :2 127 :22,24 128 :15 129 :2 130 :13,17
66:17 69:16 70:21 71:11	15,25 138: 6	rest [1] 86:6	85:23 87:8 90:24 96:5 98:	133: 23 134: 16,17 135: 5,8,
74:13 88:19 101:8 103:4	relies [3] 65:9 98:25 138:	resting [1] 99:12	24 111 :19 114 :10 132 :3,6	12 138 :21
110 :15,23 111 :1 119 :12	19	result [8] 15:4 26:19 55:22	137: 10	Section [10] 3:23 4:5 5:10
reason [15] 18:21 31:9 41:	religion [20] 50:1 63:23 64:	71:16 77:24 80:6 87:11	satisfactorily [1] 105:18	12:6 17:25 53:11 60:15 64:
4 50 :24 56 :21 57 :25 75 :13	2 66:21 67:12,17 69:21 71:	128: 21	satisfied [1] 38:5	18 87: 18 109 :8
78:5 82:1 85:17 87:13,18	14,22,23 84: 12 94: 14,15	resulted [1] 107:11	satisfies [1] 80:8	section's [1] 4:5
113 :18 122 :6 134 :22	106 :10,16 114 :10 122 :21	return [2] 5:2 93:5	saying [26] 9:7 10:15,22 23:	
reasonable [2] 11:19 36:9	127 :12,15 131 :2	returned [2] 93:2,7	24 32 :2,17 36 :7 37 :5 41 :	security [27] 3:17 6:3 8:4 9:
reasonably [1] 80:10 reasons [11] 4:18 6:8,8 50:	religious [7] 49:22 56:6 77: 4 82:25 107:19 127:17	revealed [1] 40:4 revelation [1] 56:3	14,25 45 :1 64 :24 70 :22,22 71 :23 76 :22 91 :1 95 :25 99 :	17 42: 25 43: 17 49: 5 70: 15, 23 79: 19 80: 1,4,10 82: 12
2 86:2,19 87:17 89:14 106:	131: 5	reverse [1] 44:7	13 101 :23 105 :10 122 :11	90: 4,21 91: 4 92: 13 95: 6
8 122 :14 135 :9	religiously [1] 128:13	reversed [1] 90:12	123 :15 124 :22 128 :15 129 :	96: 21 97: 12 99: 13 108: 14
reassert [2] 65:21 81:5	rely [5] 26:12,13 28:18 58:5	review [18] 9:16 34:7 35:5	21	109 :14 116 :23 136 :21 138 :
REBUTTAL [5] 2:12 102:1	115 :14	47:20 61:17 64:15 81:3,8	says [43] 16:18 17:19 18:6	9
134: 5,6 138: 12	relying [3] 26:19 65:2 108:	84:11 96:11 97:2,22 98:21	20:10 21:15 24:17,25 26:	see [16] 15:16 31:13 64:13
receive [2] 27:12 71:20	11	109:15 117:12 126:2 127:	24 31: 5,8 36: 15,17 37: 21	65:19 68:17 74:25 75:25
received [1] 22:9	remained [1] 117:24	15 134: 11	39 :23 43 :8 57 :3 74 :24 76 :	76:25 87:6 91:13 101:5
recent [1] 103:3	remains [1] 88:16	reviewable [1] 114:5	10,16,18 79: 17 80: 9,17 81:	105 :1,1 110 :2 130 :23 136 :
recently [1] 62:22	remand [5] 44:7 46:6,10	reviewing [1] 9:2	5 84:11 87:23 90:3 91:2	22
recognize [1] 64:7 recognized [4] 6:7 57:17,	76:18 123:15 remarks [1] 5:15	reviews [1] 115:7 Reynolds [21] 6:12 7:16	92:25 96:15 97:5,7 99:3 106:21 109:6,11 112:20	seeing [1] 83:20 seek [8] 15:7 35:20 49:25
19 126 :10	remedies [1] 126:24	21 :1 42 :16 65 :6,9,14 74 :8	116: 16 133: 17 136: 8,10,22	52:4 63: 20,24 64: 2,20
recollection [4] 59:7,9 60:	remedy [11] 13:5 39:14 44:	80:2 96:19 97:5,9 102:21	137 :24	seeking [5] 4:25 67:6 72:7
1,8	23 46 :8 67 :22 78 :22 103 :	113:5 118:8 119:3 120:11	Scalia [2] 77:12 132:11	94:7 98:7
record [1] 47:23	21 105: 16 127: 23 128: 16	134:20 136:19,19,19	Scalia's [6] 32:6 75:6 76:	seeks [2] 4:7 27:11
recording [1] 114:7	137 :16	rights [14] 39:5 55:10,10	21 107: 2 130: 5,5	seem [5] 10:14 47:1 99:22
recordings [1] 55:25	remember [3] 60:8 98:17,	84:9,25 85:14 87:7,9 129:	schemes [1] 57:12	101 :13 121 :14
records [1] 93:14	20	1,5,22 132: 2,6 137: 8	SCIF [1] 90:20	seemed [1] 52:17
recover [2] 86:16 92:21 recovery [1] 37:7	removed [1] 135:2 rendering [1] 10:15	rise [1] 98:22 risk [5] 7:3 41:7 80:3 122:	scope [8] 50:2 53:21 93:25 97:20 114:2,4 120:11 130:	seems [21] 6:11 17:7 20:14 26:4 39:19,21 40:12 43:20
refer [2] 66:20 69:18	repeatedly [1] 64:1	24,25	20	66:23,25 68:4 70:5 72:19
reference [2] 5:3 15:10	replied [1] 79:1	risking [1] 138:9	Sealed [3] 76:19 77:14 132:	-
references [2] 16:1 69:9	reply [2] 79:1 103:11	road [1] 50:7	13	116:12 130:10 137:24
referred [4] 5:16 7:24 28:	report [1] 102:21	ROBERTS [32] 3:3 13:14,	search [3] 49:20 50:10,19	seen [1] 133:1
22 48 :9	Republic [1] 129:9	18 29: 9,13,16 30: 22 35: 15	Second [6] 53:22 79:12 89:	sees [1] 75:13
referring [2] 66:4 69:19	request [9] 5:3 15:11 16:	38 :14 42 :11 46 :14 51 :9 53 :	15 96:12 111:6 125:5	seize [1] 10:19
refers [2] 15:11 136:3	11 26 :8 55 :14 93 :4 94 :9	3 62:13 63:2,7,13 68:2 70:	secret [30] 8:3 10:19 12:13	
reflect [1] 5:11 reflection [1] 5:22	110:25 111:23 requests [2] 16:9 82:2	13 108 :4 109: 17,19 110 :11, 14 112: 3 118 :1 120 :24	20 :23 22 :23 31 :1 37 :7 38 : 1 40 :4 42 :17 43 :9,15,16	seizure [5] 9:4,8,10 10:12 13:1
refresh [1] 59:3	require [5] 46:3,24 91:16	123 :10 124 :8 127 :7 134 :3	63 :21 64 :5,20 69 :10 75 :2	send [9] 33:3 34:8 45:17
refreshing [3] 59:6,9 60:1	112 :16 125 :21	138:23	76:4 78:2 83: 10,13 84: 1	47 :19 77 :17,21 100 :1 112 :
regarding [2] 26:6 55:13	required [3] 5:12 42:8 89:	role [1] 117:23	98 :22 99 :6 100 :25 115 :4,5	20 119: 23
regardless [2] 49:20 62:4	18	rooted [2] 5:20,21	137: 3,5	sense [12] 68:8 69:9,17
regards [1] 7:15	requirements [4] 25:3 87:	roots [2] 5:9 94:25	secrets [118] 3:14,24 4:12	105 :13 110 :7,8 112 :11,16,
regular [2] 14:8 99:8	25 88:9 130:21	routine [1] 43:12	5: 10 6: 14 8: 25 9: 20 12: 11,	23 123 :9 125 :24 134 :10
regulatory [2] 23:22 24:3	requires [5] 3:24 14:23 64:	Rule [17] 59:13 67:12 76:19,	21 13: 6 16: 14 23: 5,9 25:	sensitive [6] 16:7 17:10 57:
rehearing [1] 83:17 reject [3] 35:1 43:15 54:4	15 112: 9 130 :8 requiring [1] 5 :1	22 78:20 79:4 80:5 104:4 107:5,14,14 110:25 128:3,	15 30:19 31:24 32:18 35:4 36:12 37:22 38:10,23 39:	8 106:22 115:3 125:21 sensitivity [1] 117:1
rejected [1] 7:6	requisites [2] 38:4,12	4 132: 14,14,20	23 40: 20 41: 15,16 43: 4,7,	sentence [3] 25:15 108:8
rejecting [1] 62:18	research [1] 36:3	ruled [3] 4:24 119:2 133:2	22 44: 2,5,7,10,21 45: 19,20	109 :8
related [6] 5:5 102:14 110:	reservation [1] 18:8	Rules [7] 22:8 60:11 65:16	46: 6 47: 17 48: 2,10,15,18	sentences [2] 108:8,25
4 126 :13 127 :16 135 :19	resolves [1] 54:15	126: 7,11,12,18	50:3,6 53:15 68:24 71:18	separate [7] 6:13,15 9:6
relates [1] 62:2	resolving [1] 76:11	ruling [2] 100:10 120:1	72:4 74:15 76:2 77:22 78:	35:11 114:19 136:18 137:
relating [5] 14:1 15:14 25:	respect [10] 6:14 8:25 13:	run [2] 91:5 103:5	15,16 80 :14,22,23 81 :13	25
22 115:22 116:16	20 44 :19,21 45 :22 46 :19	running [1] 125: 22	82:9 83:8 89:8 90:23 91:2, 8 10 92:31 94:3 6 10 35 95:	separately [1] 10:10
relationship [2] 67:5 121: 2	67:22 81:23 82:2 respectfully [1] 97:1	S	8,19 92:21 94:2,6,19,25 95: 4 98:7 102:6,9,17,17,25	separation [1] 124:22 serious [1] 97:24
relatively [1] 103:2	Respondent 3 6:11 35:7	safe [1] 42:25	103: 6,21,25 104: 16,17,19	served [3] 112:25 113:14,
relevance [2] 33:7,9	45:4	safeguard [1] 15:5	105: 9,22 106: 1,20 108: 12,	16
·	Heritage Reporting Corporation			
Cheet	Heri	lage Reporting Corpor	auon	
Sheet 9				reaffirmed - served

Official				
service [1] 64:22	14,16 12: 9,17,20 35: 17,18	statutes [1] 125:16	4 86:21,22 88:3,22 122:20,	8 128 :12 131 :1
set [6] 17:13,15 79:2 116:9	36: 21 37: 4,11,24 61: 14,22	statutory [9] 14:7 45:24 47:	20 132 :25	theory [1] 78:24
126: 11,11	63:8 64:14 100:18 111:7	1 48:9,12 54:19 68:6 87:	super-secret [1] 116:21	there's [27] 12:14 20:19 21:
sets [1] 18:16	118: 2,3,15,18,22 119: 4,8,	13 100: 15	support [3] 18:17 59:14 69:	15,16 30: 14 38: 1,8 41: 15
setting [1] 126:24	11,16,20 120: 14,18,23 123:	step [3] 81:16,19 89:14	25	55:15 75:13 81:6 83:16 86:
settle [1] 137:22	21	sticking [1] 66:12	supportive [1] 137:15	23 97:23 103:18,18,24 106
Seventh [6] 53:25 61:19	sought [1] 73:16	Still [19] 31:2,13 49:20 50:9	suppose [9] 66:13 74:17	2,24 110: 22 123: 25 124: 2
62:10 88:6 131:19 132:5	soundly [1] 138:8	65:13 71:23 78:7 86:25 88:	77:17 84:10 121:1,3,10,25	125:25 128:2 129:14,25
several [4] 10:23 46:17	sounds [2] 14:2 86:2	16 89: 17 91: 8 93: 11,13	123 :1	134 :19
104 :2 134 :9	sources [3] 4:19 8:9 39:7	101:4 107:23 121:22 122:	supposed [2] 70:18 75:4	therefore [4] 39:1 41:8,15
shall [4] 25:2 79:20 80:18	sovereign [1] 86:23	21 131 :7 133 :7	suppress [14] 10:18 15:1	88: 8
90 :1	special [2] 4:6 75:13	stop [1] 95:14	24: 20,22 25: 4 29: 1,4 30: 5,	they've [13] 11:23 12:3 36:
she's [1] 74:3	specifically [1] 25:25	stress [1] 79:14	8 87: 23 112: 14 136: 4,7,10	1,22 71: 7,8,8,13 79: 4 80:
short [1] 108:25	spies [1] 102:24	strictly [1] 26:17	suppressed [4] 30:15 136:	14 86 :3 126 :23 127 :21
shouldn't [8] 16:2 30:14	spot [2] 88:18 93:9	strikes [1] 81:15	12,13,14	thinking [4] 60:12 74:4
31 :12 48 :14 74 :7 102 :10	spy ^[3] 7: 21 93: 19 102: 23	string [2] 103:11,16	suppressing [2] 16:24 17:	105 :8 129 :7
118 :10 120 :6	spying [1] 88:20	strong [2] 48:25 111:16	4	thinks [2] 105:21,25
show [4] 93:10 107:18,19	squared [1] 4:4	stronger [1] 43:6	suppression [22] 4:6 5:6	THOMAS [17] 5:14 6:10,21
115 :20	squirreled [1] 108:10	strongest [1] 111:22	12:7 14:6,9,15 15:2,16,19,	8:17,19,20 29:17,18 30:21
showing [1] 57:11	stage [3] 91:11 94:20 136:	strongly [2] 5:20 108:2	25 16: 3 24: 25 25: 18 28: 23,	54:7,13,21 63:4,5 65:22
shown [2] 38:12 86:23	25	struck [1] 64:11	25 29: 8,11 30: 17 49: 2 55:	66:25 112:4
shows [3] 30:1 106:14 127:	standard [6] 75:12 79:24	structural [7] 26:13,18 28:	23 135: 22 136 :16	Thomas's [1] 48:8
16	80:2 81:24 84:5 96:5	1,17,20 111: 14,15	SUPREME [2] 1:1,15	though [10] 17:8 54:8 58:
side [12] 20:16,20 44:4 66:	standing [8] 11:23 35:24,	structure [1] 26:15	surprising [1] 25:12	20 59: 19 67: 13 70: 8,11 73:
21 89: 10,23 107: 9,10 108:	25 36: 4,5,10 50: 23 86: 23	struggled [1] 70:3	surveil [1] 107:22	17 80: 17 99: 21
2 131: 20,21 137: 20	Star [1] 85:9	struggling [2] 102:15 104:	surveillance [55] 5:4 14:2,	thoughts [3] 75:20 95:9
sides [3] 86:18,21,22	started [1] 94:24	14	12,16 15: 14 25: 2,22 26: 1	128: 20
significance [1] 122:13	state [131] 3:14,23 4:12 5:	stuck [2] 42:15 108:16	28:5 37:2,15 39:3 45:13	threat [1] 137:20
significant [2] 15:24 108:	10 6: 14 8: 25 9: 19 10: 16,	stuff [1] 43:8	53: 13,18 55: 5,24 56: 7 58:	threatened [1] 9:16
16	19 12: 11,13,21 13: 6 16: 14	subject [7] 40:3 56:16 60:	16 60: 19 64: 17 78: 3 79: 22	Three [4] 31:15 75:20,20
similar [1] 77:24	23: 4,9 25: 15 30: 19 31: 1,	11 76:4 90:4 100: 24 105 :	80:25 81:9,21 83:4,22 87:	109 :9
simply [7] 7:8 12:7 23:19	24 32 :18 35 :4 36 :11 37 :22	20	21 88: 4 90: 3,7,15 96: 7	threshold [2] 12:14 113:7
74:22 83:12 107:20,22	38: 1,10,23 39: 23 40: 4,19	subjects [1] 4:19	106: 7,14,15 109: 16,23,25	throw [1] 18:24
since [1] 103:2	41: 14,14,16 42: 17 43: 4,6,	submission [3] 9:18,22 69:	110:5,13 113:23 114:6	tie [2] 26:25 27:20
single [1] 65:11	17,21 44: 1,5,7,10,21 45: 19,	11	115:9,20,23 116:17 117:4,	tied [1] 128:17
sir [1] 12:17	20 46: 6 47: 17 48: 2,10,15,	submit [1] 14:5	24 124: 17 126: 1 127: 13	ties [1] 28:23
sitting [1] 128:18	18 50: 3,5 53: 15 68: 24 71:	submitted [2] 138:24 139:	135: 15,23	title [1] 28:6
situation [12] 6:25 14:5,6	18 72: 4 74: 15 76: 1 77: 22	2	surveilled [8] 11:17,24 12:	titled [1] 18:1
18 :12 57 :20 73 :10 86 :18	78:15,16 80:13,22,23 81:	Subsection [11] 14:23 18:	3 19: 12 35: 20 36: 1,10 37:	today [2] 79:16 103:7
87:1 106:6,19 132:16 137:	12 82: 9 83: 8 89: 8 90: 23	2,6 20: 7,10 26: 6,11,16 29:	6	Today's [2] 3:3 105:4
22	91: 2,8,19 92: 21 94: 1,6,19,	20 136: 3,8	surveying [1] 31:6	together [3] 14:21 25:12
situations [6] 23:25 31:2	25 95: 4 98: 7 100: 25 102: 5,	subsections [3] 17:23 18:	survive [1] 132:25	138 :3
72 :23 75 :9 115 :2 137 :4	9,16,17,24 103: 6,21,25	16 25: 17	system [1] 22:11	took [1] 52:16
slight [1] 82:19	104:15,17,19 105:8,22 106:	substantive [2] 80:5 84:5	Τ	tort [3] 42:24 43:14,16
slightly [1] 78:24	1,20 108: 12,13 110: 3 111:	Substantively [1] 80:5	tolkod [1] 102-10	Totten [21] 6:12 7:7,9,11,
small [1] 40:2	11,18 112: 18,19,21,22 113:	SUCCESS [1] 75:25	talked [1] 133:18	18,24 21: 1 43: 8 74: 6 98: 7,
solely [1] 39:4	8 114: 21,24 117: 8 119: 24	successful [2] 47:10 135:	talks [7] 18:18 25:20 28:6,7	18 99:3 102:23 103:4 113:
Solicitor [1] 1:19	121:9,13 123:17,18 125:2	6	29: 1,10 126: 14	5 119: 3 136: 18,20,22,23
solution [1] 121:15	127:21,24 128:14 129:2	successfully [1] 23:10	target [2] 56:8 57:13	137: 11
solve [1] 74:21	130:13,17 133:22 134:16,	sue [2] 11:17 99:14	targets [3] 53:20 127:18	Totten-like [1] 39:22
somebody [1] 30:7	17 135: 5,8,12 137: 3,3,5	sues [1] 31:5	133:16	touch [1] 102:10
somehow [2] 116:10 122:	138 :21	suffering [1] 61:25	technical [1] 112:7	toward [1] 30:16
22	state's [1] 134:17	suggested [7] 9:15 13:4	Tenet [6] 7:6 98:14,25 131:	traditional [2] 67:11 128:3
someone [3] 33:13 73:10	statement [1] 48:21	44:4 61:7 64:14 82:21 123:	11 137: 11 138: 18	transaction [1] 66:5
1 30 :8	STATES [5] 1:1,16 23:23	22	termed [1] 18:1	transforms [1] 67:14
sometimes [2] 107:9,9	27 :24 66:4	suggesting [4] 39:12 65:	terms [4] 10:5 13:9 33:6 45:	tremendous [1] 104:13
sorry [15] 8:19 10:4 23:13	status [2] 36:25 48:10	24 94: 18 124: 13	12 Torrozon (1) 400-10	trial [8] 7:13 23:19,20 55:10
24: 11,12 29: 15 51: 17 72: 9,	statute [29] 13:25 16:22,23	suggests [2] 21:20 38:9	Terrazas [1] 126:13	84:18 86:5 112:12,13
14 89:13 95:14 98:2 101:7	17:19 25:17 30:25 34:15,	suing [1] 11:24	terrorist [1] 106:18	tricky [1] 85:19
104 :9 109 :19	18 39: 25 49: 1,3,13,18 55:	suit [13] 7:12 10:25 11:4 40:	terrorists [1] 127:19	tried [2] 49:10 113:4
sort [7] 22:11 48:20 99:5	16 56: 21 61: 3 62: 17 65: 1	10 43:12 51:12 52:9 64:12	testimony [1] 37:17	tries [2] 28:10 73:10
107:1 123:3 126:2 137:21	66:7 80:17 85:17 88:25 89:	86:15,16 99:19 127:12,13	text [4] 4:4 58:7 95:2 111:5	trigger [1] 96:2
SOTOMAYOR [40] 8:14,18,	25 96:2 109:22 110:25	suits [1] 99:5	textual [3] 26:5,17,22	triggered [3] 12:15 14:18
21 9: 14 10: 4 11: 1,5,8,11,	130:20 133:21 135:20	summary [10] 59:12,14 71:	themselves [5] 57:16 64:6,	30 :2
Heritage Reporting Corporation				

Official

		Official	
triggers [1] 53:1	93 :1	77 :25 92 :3	111 :10 112 :1
true [17] 31:21 40:2 49:13	Unless [3] 37:8 122:23,23	wanting [1] 118:4	wiretapping ^[2] 31:6,10
60: 6 63: 22 66: 24 77: 2,7,	unlike [1] 68:25	wants [7] 17:16,17 52:2	within [8] 3:20 5:2 93:25
10 85: 3,24,25 101: 15 114:	unlikely [3] 89:3 90:10,16	110:18 112:11 117:16 129:	105 :22 115 :22 117 :24 118 :
25 117 :19 130 :7 135 :14	unrealistic [1] 137:25	10	12 130: 20
trump [1] 130:9	until [1] 75:10	War [1] 83:22	without [32] 11:22 18:8 20:
trying [5] 10:8 68:21 91:24	unusual [1] 31:4	warrant [4] 15:17 77:6 88:	22 38: 20 41: 2,6 43: 10 46:
110: 3 117 :13	up [12] 23:14 38:15 45:11	19,21	12,12 58: 14,21 60: 22 65: 8,
turn [2] 56:7,8	48:8 66:15 88:3 98:25 99:	warranted [1] 77:5	12 66:2 69:2,9,10 70:12
turned [2] 18:7 116:17	20 108: 7 126: 11,24 136: 15	Washington [3] 1:11,20,	78: 15 85: 10,11,12 86: 4 88:
turning [1] 29:6	usable [1] 82:9	22	21 101 :5 104 :5 106 :14
two [29] 6:12,13,15 12:5 17:	useful [1] 112:25	way [36] 5:24 6:5 7:23 11:6	123:18 128:6,7 138:9
8 26 :16,23 31 :14 45 :7 53 :	uses [4] 4:11 18:2 24:23	14:16 15:7 17:18 21:8,16	witness [3] 58:17 60:4,6
10 62:17 69:11 75:24 80:	66: 11	24: 3,23 25: 13 27: 5 34: 13	witness's [2] 59:7 60:1
12 87:16 89:14 94:5 106:	using [31] 4:1 14:3 20:21	36:1 37:9,12,16 38:1 39:	wonder [1] 108:15
24 107:15 108:8 110:22	23:1 24:2 42:20 64:12,25	22 45:22 46:25 47:2 50:12	wondered [2] 19:5,16
111:21 121:3 123:6 124:1,	65:3 66:5 67:16 68:4,5,8,	64:25 65:24 76:11 78:17	word [6] 22:5 30:5 66:2 69:
2 128: 2,19 136: 3	13,18 69:6,6,8,13 70:18 72:	79:13 81:24 90:21 95:3	15 81: 18,18
types [1] 136:4	20,22 73: 1,1,3,13 94: 10,11	108:17 119:12 121:7 137:	words [4] 16:22 108:10
typically [1] 131:15	100: 20 111: 19	10	111 :1 125 :4
<u> </u>	utterly [1] 131:4	ways ^[5] 31:18 45:7 58:14,	work [2] 70:10 77:8
	V	18,20	worked [1] 101:1
U.S [2] 65:10 96:7		weapon [1] 23:2	working [1] 131:14
ultimate [1] 55:6	vacate [3] 77:21 122:6 123:	weapons [1] 116:4	world [2] 43:17 105:14
unavailability [1] 62:6	15	Weinberger [1] 138:19	worried [1] 115:16
unbelievable [1] 75:2	valid [4] 53:17 61:11 76:21	welcome [1] 54:6	wrapped [2] 45:11 136:15
unconstitutional [1] 113:	102 :10	well-established [1] 134:	writings [1] 9:7
13	validity [1] 14:16	23	written [3] 98:8,12 109:7
uncovered [1] 109:5	validly [1] 135:1	whatever [11] 30:10,10 31:	wrote [1] 10:10
under [41] 9:5 10:20 12:25	Vance [1] 126:13	7 74 :16 81 :25 83 :4 90 :19,	Wyatt [1] 104:7
15:5 20:25 21:23 25:9,9	various [1] 18:16	20 93 :14 122 :14 130 :19	
37: 7 41: 16 51: 13,14 55: 3,	vault [2] 67:7 94:13	whenever [2] 20:10 80:19	<u> </u>
6 56:9 58:2 62:9,15 65:15,	vehicle [2] 32:3 110:19	whereas [1] 30:19	YASSIR [1] 1:7
16 75:11 78:21 80:13 81:	version [1] 104:19	Whereupon [1] 139:1	years [2] 65:9 116:6
12 96:19 97:9 103:21 106:	versus [5] 3:8 7:6 105:4	whether [67] 9:1,4 12:3,24	York [1] 97:14
24 110:25 113:20 118:8	113: 5 138: 18	15 :3,3 25 :7 26 :7 28 :20 31 :	young [1] 93:17
119:17 122:1,9,12 124:18	victory [2] 79:11 107:11	17,21 32 :11 34 :7,14 35 :8	
127:24 128:20,22 133:5	video [1] 101:2	36 :14,25,25 37 :1 38 :2 40 :	
134: 20	Vietnam [1] 83:22	10 42: 6,7 45: 12,18 54: 18	
underlying [3] 73:15 76:9	view [36] 13:10 21:1 35:3		
122 :18	41: 11 43: 6 44: 1,20 46: 9,	60: 17,18,20 65: 15 66: 19	
undermine [1] 49:7	19 47 :6 48 :23 52 :17 76 :21	74: 13 81: 20,23 82: 7,8 83:	
underneath [1] 101:20	80:6 89:1 98:13 105:19,24	4,9,12,14,25 85: 2 88: 2 89:	
understand [13] 13:20 16:	106: 4,6,25 107: 3,6,7,8,17	21 100 :19 101 :5 103 :7	
2 21:7 26:14 40:13 44:17	108: 1,1 110: 23 111: 8,16	105: 3 113: 8,22 114: 6 115:	
51 :24 52 :1 72 :1,3 86 :8 95 :	117 :19 121 :18 122 :10 123 :	9 116 :8 118 :7 122 :10,11,	
24 123 :13	5 124 :19	15 124: 2,5,15 126: 12,21	
understanding [6] 43:4,	violate [4] 53:25 55:9 88:6	127 :13 134 :14 135 :7 138 :	
21 44 :10 91 :21 105 :4 121 :	129:1	11,14 White #1405:0	
8	violated [5] 54:19 83:14 85:	White [1] 125:9	
understood [5] 22:4 23:16,		who's [3] 11:17 35:19 37:5	
24 38:17 133:25	violates [1] 129:22	whole [12] 17:25 56:21 68:	
undisputed [3] 55:2,8 60:	violation [4] 11:24 84:25	5 71:14,14 75:14 100:11	
25	106: 9 114: 12	101: 4 108: 7 109: 2,23 127:	
unfair [1] 57:19	violations [1] 62:11	2	
uniformly [1] 57:18	vis-à-vis [1] 16:17	whom [3] 14:13 24:18 37:1	
UNITED 5 1:1,16 23:23	vis-a-vis [1] 5:25	widows [1] 65:14	
		wife [1] 99:14	
27:23 66:4	W	will [17] 3:6 13:12 17:11,12	
unlawful [12] 9:5,8,12 10:	wait [1] 99:18	20 :24 24 :19 34 :6 47 :20 64 :	
13 13: 2 36: 15,16,17 78: 3	waited [2] 71:2,12	2,13 67: 7 74: 20,25 88: 23	
86:3 88:5 93:1	wake [1] 109:4	90:17 97:6 101:3	
unlawfully [14] 10:6,20 11:	walking [1] 114:8	willing [1] 22:24	
17,23 12 :3 25 :4 31 :6 35 :			
		win [10] 65:2 66:21 69:21,	
20 37 :5 38 :3 91 :3,7 92 :19	wanted [5] 16:7 17:8 73:19	win [10] 65:2 66:21 69:21, 24 70:5 78:9 94:13 107:23	