

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MARYLAND

3  
4 STEPHEN V. KOLBE, et al.

5 PLAINTIFFS

6 VS.

CIVIL NO. CCB-13-2841

7 MARTIN J. O'MALLEY, et al.

8 DEFENDANTS

9 Baltimore, Maryland

10 July 22, 2014

11  
12 The above-entitled case came on for a motions  
13 hearing before the Honorable Catherine C. Blake,  
14 United States District Judge

15 A P P E A R A N C E S

16  
17 For the Plaintiffs:

18 John Parker Sweeney, Esquire  
19 Marc A. Nardone, Esquire  
20 James W. Porter, III, Esquire  
Sky Woodward, Esquire

21 For the Defendants:

22 Matthew J. Fader, Esquire  
23 Jennifer L. Katz, Esquire  
24 Dan Friedman, Esquire

25 Gail A. Simpkins, RPR  
Official Court Reporter

P R O C E E D I N G S

1  
2 THE CLERK: The matter now pending before this  
3 Court is Civil Case Number CCB-13-cv-2841, Kolbe, et  
4 al. versus O'Malley, et al. Counsel for the  
5 plaintiffs are John Sweeney, Marc Nardone, James  
6 Porter, III, Sky Woodward. Counsel for the defendant  
7 are Dan Friedman, Matthew Fader, Jennifer Katz. This  
8 matter now comes before the Court for a motions  
9 hearing.

10 THE COURT: All right. Good morning again,  
11 everyone, and I am looking forward to hearing from  
12 you. Having talked briefly to counsel yesterday, I  
13 understand that the defendant is going to proceed  
14 first, and I'm happy to hear from you.

15 MR. FADER: Thank you.

16 Good morning, Your Honor, may it please the  
17 Court.

18 When this lawsuit was filed last October, only  
19 one federal court had decided the constitutionality of  
20 assault weapons and large-capacity magazine bans in  
21 the wake of the Supreme Court's landmark decisions in  
22 Heller and McDonald. That decision of the D.C.  
23 Circuit has now been joined by federal district courts  
24 in New York, Connecticut, and with respect to  
25 large-capacity magazines, Colorado, in unanimously

1 holding that such laws do not violate the right to  
2 keep and bear arms codified in the Second Amendment.

3 THE COURT: There are no cases that have decided  
4 to the contrary?

5 MR. FADER: That's correct, Your Honor.  
6 Although each of those courts either assumed or found  
7 that the laws at issue burdened the Second Amendment  
8 right in some way, they unanimously held that any such  
9 burden is minimal, that intermediate scrutiny applied  
10 to those challenges, and that evidence similar to that  
11 presented in the record before this Court was more  
12 than sufficient to meet the government's burden under  
13 intermediate scrutiny.

14 This case, like those, presents the issue of  
15 whether the Maryland's General Assembly acted within  
16 its constitutional discretion when it enacted bans on  
17 particularly dangerous firearms and magazines,  
18 firearms designed for modern military assaults, and  
19 both firearms and magazines disproportionately used in  
20 mass public shootings and murders of law enforcement  
21 officers.

22 The arguments the plaintiffs make in advocating  
23 their position ignore the evidence presented in the  
24 case, conflict with controlling Supreme Court and  
25 Fourth Circuit precedent, and also contradict the

1 persuasive decisions of the now five other federal  
2 courts to have upheld similar laws.

3 I want to start by articulating a few things  
4 that this case is not about. First, this case is not  
5 about whether the Second Amendment is important. The  
6 Supreme Court has held that it is a right that  
7 preexisted the Constitution, that is fundamental to  
8 our concept of ordered liberty. The State's position  
9 in this case is not in conflict with that.

10 This case is also not about whether the Second  
11 Amendment stands alone as an absolute right that does  
12 not need to accommodate under any circumstances other  
13 important public interests, including public safety.  
14 The Supreme Court has held just as firmly that, like  
15 other guarantees in the Bill of Rights, the Second  
16 Amendment is not unlimited, notwithstanding its  
17 absolute sounding language.

18 This case is also not about what the Supreme  
19 Court has determined to be the central component of  
20 the Second Amendment right, which is self-defense  
21 within the home. The evidence in this case is clear  
22 that the firearms at issue are used only extremely  
23 rarely in self-defense cases, that more than ten  
24 rounds are fired in self-defense only extremely  
25 rarely, if ever, and that other firearms and magazines

1 can and are used far, far, more often in self-defense.

2 THE COURT: Let me ask you, what is the state of  
3 the evidence on whether these weapons are commonly  
4 used for either hunting or marksmanship, target  
5 practice?

6 MR. FADER: With respect to hunting, Your Honor,  
7 I think that the state of the evidence is that there  
8 is no evidence that they are commonly used for  
9 hunting. There is evidence that some people have used  
10 them for hunting, but there is no evidence that they  
11 are commonly or frequently used for hunting, nor is  
12 there any evidence that they serve any better purpose  
13 for hunting than hundreds of different firearms that  
14 are still lawful to be purchased in the State of  
15 Maryland.

16 With respect to marksmanship, there is evidence  
17 that there are marksmanship competitions that are  
18 specifically created for these firearms. So there is  
19 evidence that, to the extent that these are owned,  
20 that a purpose for which people frequently own them is  
21 marksmanship and to participate in some of these  
22 competitions, or because these firearms are so similar  
23 to firearms used in military combat, competitions have  
24 been created for people to use them in scenarios that  
25 imitate that.

1           But with respect to that issue, Your Honor, the  
2 defendants' position is that that is not a use, the  
3 competitive sporting purpose is not a use that is  
4 protected by the Second Amendment as historically  
5 understood.

6           The Supreme Court identified the central  
7 component of that right as self-defense. It also  
8 noted that individuals at the time of the founding  
9 would have found its use for hunting to be at least  
10 equal to the sense of the importance of the use for  
11 militia purposes. It never mentioned competitive  
12 sport shooting. I think that the individuals who  
13 ratified the Second Amendment in 1791 would have  
14 found, in looking at the purpose of this amendment,  
15 the expenditure of thousands of rounds of ammunition  
16 in sport to be not something protected by their  
17 understanding of the Second Amendment, which is what  
18 the Supreme Court has determined should guide the  
19 courts in analyzing that amendment.

20           THE COURT: It appears from the McDonald case  
21 that the appropriate date for the historical analysis  
22 might also include 1868, or approximately, when the  
23 Fourteenth Amendment was ratified. Is there anything  
24 that would suggest that at that time competitive  
25 marksmanship was within the scope of the right?

1 MR. FADER: Certainly nothing that's within the  
2 record before Your Honor, and nothing that I'm aware  
3 of. There's nothing to indicate the competitive  
4 marksmanship was understood to be protected.

5 Certainly shooting to gain competency with the  
6 firearm, but that's something much different than the  
7 competitive sports shooting for which these are used  
8 today.

9 THE COURT: Since we are talking about this  
10 issue at the moment of common use, and you probably  
11 would get to this anyway, but what is again in the  
12 record -- let me be sure I understand your position --  
13 on the numbers of assault weapons, I'll just call  
14 them, banned weapons in Maryland?

15 MR. FADER: The state of the record -- oh, in  
16 Maryland.

17 THE COURT: In Maryland, and in the United  
18 States.

19 MR. FADER: In the United States, the state of  
20 the record is that -- the plaintiffs have alleged that  
21 their numbers are that 8.2 million of those firearms  
22 were around through the end of 2012.

23 That is using a definition for what the  
24 plaintiffs have defined as modern sporting rifles,  
25 which is not necessarily coextensive with the assault

1 rifles described in the Maryland law and appears to be  
2 an amorphous definition that the plaintiffs use as  
3 whatever manufacturers describe as being a modern  
4 sporting rifle.

5 But even taking that as the number, we would  
6 take that as, for summary judgment purposes, the upper  
7 limit of what numbers there would be. A witness  
8 called by the defendants as a hybrid fact expert  
9 witness, Chief Johnson, identified the number as five  
10 million. So it's I think fair to, for the purpose of  
11 the summary judgment record, to treat it in that  
12 range.

13 The plaintiffs have also, one of their expert  
14 witnesses identified a study that they say shows that  
15 the average owner of one of these firearms owns more  
16 than three of them, 3.1 of them. So for determining  
17 how extensive ownership of these is, then it would  
18 appear that fewer than three million Americans, less  
19 than one percent of the population would own one of  
20 those firearms.

21 The state with respect to Maryland is that --  
22 let me get the exact numbers, but it is also that well  
23 fewer than one percent of the population, if you go by  
24 numbers of what has been sold as regulated firearms in  
25 the State, would own them.



1           The total number of assault weapons sold through  
2           2012, according to the data by the Maryland State  
3           Police, would have been 43,647. The number through  
4           2013, as of the last data for the last brief that was  
5           filed, was 58,075. There would be more that were  
6           processed after that from 2013.

7           If you include what has been referred to as the  
8           Type O firearms, which are receivers that could be  
9           used to build an assault rifle, or could be used to  
10          build something that would still be lawful under this  
11          law, even adding all of those, the numbers would be  
12          69,072 through 2012, or 92,515 through 2013.

13          THE COURT: Okay. Thank you.

14          MR. FADER: The Fourth Circuit has described a  
15          two-prong test for addressing Second Amendment claims.  
16          The first prong asks whether the law being challenged  
17          burdens conduct protected by the Second Amendment as  
18          historically understood.

19          The second prong asks, if the law does burden  
20          such protected conduct, does the law satisfy the  
21          applicable test under means and scrutiny?

22          The plaintiffs' suggestion that this Court  
23          ignore binding Fourth Circuit precedent in favor of a  
24          split Ninth Circuit panel decision that expressly  
25          disagreed with the Fourth Circuit's decision regarding

1 handgun wear and carry law is obviously untenable.

2           Moreover, the plaintiffs simply misread the  
3 Supreme Court's decision in Heller. The Supreme Court  
4 in Heller did not even suggest that no standard of  
5 scrutiny would be applicable. To the contrary, the  
6 Supreme Court stated under any of the standards of  
7 scrutiny that we have applied to enumerated  
8 constitutional rights, banning from the home the most  
9 preferred firearm in the nation, to keep and use for  
10 protection of one's home and family, would fail  
11 constitutional muster. The Supreme Court thus implied  
12 that it would look to a means and scrutiny test. It  
13 just didn't need to identify which one in that case.

14           THE COURT: And in any event, it's quite clear  
15 that that's the Fourth Circuit's approach.

16           MR. FADER: It certainly is, Your Honor.

17           THE COURT: On the means, and on the level of  
18 intermediate scrutiny, and then I'll let you come back  
19 to the first prong, there has been a recent submission  
20 by the plaintiffs of I guess the McCullen case from  
21 the Supreme Court. They appear to suggest that that  
22 might change or affect the standard for intermediate  
23 scrutiny that should be applied in this Second  
24 Amendment case.

25           Do you want to respond to that.

1 MR. FADER: Certainly, Your Honor. Thank you.

2 That case does not define the standard for  
3 intermediate scrutiny. In fact, the phrase,  
4 intermediate scrutiny, is used only once in the  
5 Supreme Court's decision in McCullen, and it is in  
6 reference to a completely different case.

7 The issue where the Supreme Court referenced  
8 intermediate scrutiny was to say that it was not  
9 impermissible for the Supreme Court to address the  
10 first prong of a standard of scrutiny test first, and  
11 then proceed to the second prong, even if it was  
12 ultimately going to find that the law didn't satisfy  
13 the second prong.

14 The Supreme Court referenced that it had done so  
15 in a different case employing intermediate scrutiny.  
16 That's the only mention of intermediate scrutiny in  
17 that case.

18 What the Supreme Court did was apply  
19 straightforwardly a test that it has used in specific  
20 circumstances dealing with First Amendment cases  
21 involved in time, manner, place restrictions, and that  
22 case specifically dealing with buffer zones outside of  
23 abortion clinics. It did not purport to redefine  
24 intermediate scrutiny.

25 In fact, courts articulate an intermediate

1 scrutiny test in many different ways, and that has  
2 been true with respect to intermediate scrutiny as  
3 applied in the First Amendment context. There are  
4 many different articulations of that standard. The  
5 Supreme Court did not purport to change that in any  
6 way.

7 In fact, the Fourth Circuit's articulation of  
8 the means and scrutiny standard is fully justified by  
9 Supreme Court cases articulating the standard in very  
10 similar terms.

11 For example, in Clark versus Jeter, 486 U.S.  
12 456, the Supreme Court articulated the intermediate  
13 scrutiny standard as to withstand intermediate  
14 scrutiny, a statutory classification must be  
15 substantially related to an important governmental  
16 objective, pretty much exactly what the Fourth Circuit  
17 has articulated as the intermediate scrutiny standard  
18 for this case.

19 That has not been overruled, and the McCullen  
20 case didn't purport to overrule it. It simply is the  
21 case that courts have articulated that standard in  
22 different ways in different cases. This Court, of  
23 course, sits in the Fourth Circuit, which has  
24 articulated it in the way that it has been described  
25 in our papers.

1 Under the Fourth Circuit's test, the first  
2 question is does the law burden conduct within the  
3 scope of the Second Amendment as historically  
4 understood?

5 The concept of scope as the Supreme Court has  
6 defined it is based on history and tradition. It's  
7 not established in the Constitution. The Supreme  
8 Court was clear in Heller that the right codified in  
9 the Second Amendment preexisted the Constitution. The  
10 Supreme Court said this is not a right granted by the  
11 Constitution, and it is not dependent on the  
12 Constitution for its existence. So the scope of the  
13 amendment is defined by history and traditional.

14 Just as the Supreme Court stated in Heller that  
15 it would border on the frivolous to argue that only  
16 arms in existence in the 18th Century were protected  
17 by the Second Amendment, so it would border on the  
18 frivolous to argue that our understanding of the  
19 limitations on that amendment would only be  
20 limitations that were actually in existence at the  
21 time of the Second Amendment. And in fact, the  
22 limitations that the Court identified in Heller as  
23 presumptively lawful are limitations that were not in  
24 place at the time of the Second Amendment.

25 There were not concealed carry laws at that

1 time. Those arose in the early 19th Century. There  
2 were not prohibitions on felons and the mentally ill  
3 to carry firearms. Those arose in the 20th Century.  
4 There were not the same protections on carry a firearm  
5 into sensitive places.

6 So these are all limitations recognized by the  
7 Supreme Court as presumptively lawful, which clearly  
8 have as their purpose the protection of public safety  
9 and which demonstrate that the Second Amendment is not  
10 unlike all other constitutional rights, but in fact  
11 sits within the other rights guaranteed by the Bill of  
12 Rights as being subject to certain limitations, which  
13 the Supreme Court has analyzed under means and  
14 scrutiny standards.

15 Plaintiffs try to avoid looking at the issue of  
16 scope in that context by glomming onto a single phrase  
17 in the Heller decision, and they articulate numerosity  
18 as the sole issue in defining whether something is  
19 within the scope of the Second Amendment right.

20 Although there are some other courts that have  
21 also addressed that issue using numerosity as the  
22 threshold, the defendants believe that that misreads  
23 the Heller case for several reasons.

24 First, in Heller, the common use concept came  
25 into the decision not as a discussion of what is

1 absolutely protected by the Second Amendment, but as a  
2 description of one of a number of limitations on that  
3 right. The Court identified that the Second Amendment  
4 does not protect weapons that are not in common use at  
5 the time.

6 The justification that the Court identified for  
7 that limitation was not any historical focus on  
8 numbers, but the historical practice of allowing a ban  
9 on possession of weapons that are dangerous or  
10 unusual. That's the historical justification the  
11 Supreme Court pointed to.

12 Moreover, focusing only on numerosity is  
13 inconsistent with the other limitations that the  
14 Supreme Court identified in Heller, an inexhaustive  
15 list of presumptively lawful limitations that have  
16 nothing to do with numerosity, and it also conflicts  
17 with common sense.

18 If the threshold is simply how many of the  
19 firearms there are, what is that number, and is there  
20 a day whereby successful marketing campaigns or  
21 successfully identifying a price point for certain  
22 weapons, there is a magical transition into  
23 constitutional protection for weapons that the day  
24 before were not protected?

25 It also raises questions about when you would

1 look to the issue of common use with respect to a  
2 particular law. California enacted an assault weapons  
3 and large-capacity magazine ban in 1989, when the  
4 record is clear that there were far, far fewer assault  
5 rifles in existence.

6 THE COURT: As you suggest, a number of courts  
7 have looked at this numerosity issue and whether  
8 something is in common use.

9 Do you think there is an appropriate part of the  
10 Heller/McDonald analysis that does focus on the number  
11 of weapons, but just that is not sufficient in itself  
12 to define scope?

13 MR. FADER: I think the Supreme Court clearly  
14 stated that the Second Amendment does not protect  
15 firearms -- does not protect arms that are not in  
16 common use at the time.

17 In Heller, the Supreme Court analyzed Miller and  
18 said our conclusion from Miller, what they were really  
19 saying is firearms not in common use at the time do  
20 not get Second Amendment protection.

21 So I think the Supreme Court's focus on that was  
22 for that purpose of identifying that limitation. I do  
23 not think that it established the converse and said  
24 anything that is in common use, no matter how  
25 dangerous, no matter how much it affects public



1 safety, is necessarily protected. I don't think that  
2 it established that counterpoint.

3 THE COURT: Does it involve an analysis, which  
4 we were talking about a little bit earlier, about the  
5 use, I mean if they are common, but the use is  
6 something other than self-defense?

7 MR. FADER: I think it certainly could, Your  
8 Honor. I think that's not something that the Supreme  
9 Court articulated. But in light of the Supreme  
10 Court's focus in Heller, I mean Heller was all about  
11 what the Second Amendment is.

12 Is it a militia-centric right that doesn't  
13 provide individual rights, or is it for another  
14 purpose? The Supreme Court looked and said it's not  
15 for the purpose of militia. That's why it was  
16 codified in the Second Amendment, but that's not what  
17 the right meant, and the right meant that you had a  
18 right for self-defense, and they also said that some  
19 people believed the right was equally important for  
20 hunting.

21 Certainly the Supreme Court has identified that  
22 focus on purposes, and what people viewed the purpose  
23 as being at the time the Second Amendment was ratified  
24 as being relevant. So I think it would be relevant to  
25 that discussion, but I don't think that the

1 discussion -- as would be relevant issues of how  
2 dangerous the firearms are and what risks they pose to  
3 public safety, because that's what the Supreme Court  
4 identified as the historical justification for the  
5 common use limitation.

6 So I think all of those, not a focus simply on  
7 how many are there, would be relevant to that  
8 discussion.

9 One other scope point that I want to address  
10 briefly --

11 THE COURT: Sure.

12 MR. FADER: -- with respect only to the  
13 large-capacity magazines is whether they fall within  
14 the scope of the Second Amendment at all. I don't  
15 think that the particular issues that the defendants  
16 have raised here have been addressed by other courts;  
17 although, other courts certainly have looked at this  
18 with respect to numerosity issues and found that  
19 magazines are protected.

20 But magazines are not arms themselves. The  
21 Supreme Court identified the definition of arms at the  
22 time of the Second Amendment as the same as today,  
23 weapons of offense, which a magazine by itself is not,  
24 nor are large-capacity magazines necessary to operate  
25 any firearm. There is no evidence in this case that

1 there is any firearm that cannot be operated with a  
2 magazine with a capacity of ten rounds or less.

3 THE COURT: But certainly there are some  
4 firearms that must have a magazine.

5 MR. FADER: At least they must have a magazine  
6 to fire more than one round. If you can put one in  
7 the chamber without a magazine, you can use that one  
8 round. But there are firearms that need magazines,  
9 but not magazines with a capacity of more than ten  
10 rounds, and that's the only thing that is banned by  
11 Maryland law, is magazines with more than ten rounds.

12 THE COURT: I think it's a little bit different  
13 argument, though, to say that a magazine, which at  
14 least to some degree would be seen as an integral part  
15 of the firearm which is not banned, or which may come  
16 under additional protection, to say that an integral  
17 part of that weapon doesn't constitute a bearable arm.

18 There may be other reasons why, obviously, that  
19 you are arguing that they don't need to be more than  
20 ten rounds. I'm just saying I have a little bit of a  
21 difficulty with saying that LCM's are not even within  
22 the protection of the Second Amendment at all.

23 MR. FADER: I think the answer is the difference  
24 between a large-capacity magazine and a magazine with  
25 ten rounds or less. This is not a law that affects

1 all magazines, and there is no firearm --

2 There's no arm. It's the right to keep and bear  
3 arms that's protected. There's no arm that functions  
4 differently or that can't function without a magazine  
5 of ten rounds or less, and that's why the defendants  
6 believe that those are outside the scope.

7 THE COURT: Okay.

8 MR. FADER: If the laws do burden conduct that  
9 is protected by the Second Amendment to some degree,  
10 the question becomes what level of scrutiny to apply.

11 The Fourth Circuit has identified the assessment  
12 of which level of scrutiny should apply as taking into  
13 account burdens on Second Amendment rights, the nature  
14 of a person's Second Amendment interests, the extent  
15 to which those interests are burdened by the  
16 government regulation, and the strength of the  
17 government's justification for the regulation.

18 Here, as every court that has considered this  
19 issue has held --

20 THE COURT: Let me just back up a minute since  
21 you are moving into the burden analysis. Is the State  
22 taking the position that the analysis should stop at  
23 the first prong, that they are dangerous and unusual  
24 weapons, or that there is enough sufficient burden on  
25 the Second Amendment that I would not even need to

1 move into the means and scrutiny?

2 Obviously you would argue the full set of both  
3 prongs, but do you take that first position?

4 MR. FADER: Yes, Your Honor. There are two  
5 prongs to the test. In order to prevail in this case,  
6 the plaintiffs have to prevail on both prongs. The  
7 defendants would need to prevail on one or the other,  
8 and the defendants do take the position that these  
9 laws fall outside the scope of the Second Amendment as  
10 historically understood based on the historical  
11 tradition of prohibiting, of allowing the prohibition  
12 of dangerous and usual firearms.

13 THE COURT: Okay. That's what I thought. I  
14 just wanted to be clear.

15 Now so far the other courts that have looked at  
16 this, my recollection is that they have all at least  
17 assumed, without necessarily deciding, that there is a  
18 burden on the Second Amendment, and they have moved  
19 past that first prong.

20 MR. FADER: That's true, Your Honor. Some have  
21 assumed, some have found, but they all have moved on  
22 to the second prong of the analysis. That's  
23 consistent with the way the Fourth Circuit has treated  
24 other laws, other Second Amendment challenges, where  
25 it has assumed a burden on the Second Amendment rights

1 and gone on, without even discussing the burden issue  
2 to uphold the statutes based on an application of  
3 intermediate scrutiny. So that's a method that would  
4 be open to the Court as well.

5 As every court that has considered the issue has  
6 held, intermediate scrutiny would apply to Second  
7 Amendment challenges to assault weapons and  
8 large-capacity magazine bans, because even if there is  
9 a burden on the Second Amendment rights, it is a small  
10 one.

11 The Fourth Circuit stated first in Chester, and  
12 has gone on to repeat in other cases, we do not apply  
13 strict scrutiny whenever a law impinges upon a right  
14 specifically enumerated in the Bill of Rights. And  
15 indeed, the evidence is clear that this law does not  
16 infringe on any central component of the Second  
17 Amendment right, and any burden that it imposes is  
18 minimal because there are many other firearms,  
19 including the firearm the Supreme Court, the class of  
20 firearms the Supreme Court has identified as  
21 overwhelmingly chosen by Americans for the lawful  
22 purpose of self-defense, the handguns that are all  
23 still available, used for those purposes that the  
24 Second Amendment serves.

25 The intermediate scrutiny test, as identified by

1 the Fourth Circuit, asks whether there is a reasonable  
2 fit between this law and the government's substantial  
3 interest, and that is the test that this Court uses  
4 sitting in the Fourth Circuit.

5 As far as an application of the intermediate  
6 scrutiny standard, the evidence that is before this  
7 Court certainly support a reasonable fit between the  
8 bans at issue and the government's substantial  
9 interest in protecting public safety and reducing the  
10 negative effects of firearm violence.

11 These firearms are primarily useful for  
12 offensive military-style assaults, not for defensive  
13 purposes or for hunting. They were designed for use  
14 in Militaria and are still adopted by militaries  
15 around the world as the most effective firearms, with  
16 the sole exception that those firearms are automatic  
17 as opposed to semiautomatic firearms.

18 But a 30-round clip in a semiautomatic AR-15 can  
19 still be emptied in five seconds, causing the D.C.  
20 Circuit and other courts to treat it as virtually  
21 indistinguishable from the M16 military version.

22 Moreover, as has been discussed in the briefs,  
23 the United States Army and law enforcement agencies  
24 have determined that even selective fire weapons that  
25 have the capacity to fire in automatic or

1 semiautomatic mode are more effectively used for their  
2 military and law enforcement purposes in semiautomatic  
3 mode.

4 These firearms and magazines are also  
5 disproportionately used in mass public shootings and  
6 murders of law enforcement officers.

7 Large-capacity magazines have been identified as  
8 used in 85 percent of mass shootings where the  
9 magazine capacity is known. Sometimes those numbers  
10 are given as 50 percent of mass shootings because  
11 shootings where the magazine capacity isn't known are  
12 treated as being in the non-large-capacity magazine  
13 category. But where that magazine capacity is known,  
14 the numbers show 85 percent. The average number of  
15 shots fired in those cases is 75.

16 From 1982 to 2012, 21 percent of mass public  
17 shootings involved an assault rifle, and more than 50  
18 percent used large-capacity magazines. Even worse,  
19 when these firearms and magazines are used, the data  
20 show that they result in more fatalities, more  
21 injuries than in situations in which they are not  
22 used.

23 THE COURT: Let me ask you to address the  
24 question of the evidence a little bit. Obviously  
25 there are several motions to exclude that have been



1 filed.

2 Regarding Mr. -- is the correct pronunciation  
3 Mr. Koper?

4 MR. FADER: Yes.

5 THE COURT: Obviously he has been cited in any  
6 number of cases that have looked at this. Do you know  
7 if any of those other cases involved a motion to  
8 exclude? Was there a challenge even to the  
9 admissibility of Mr. Koper's evidence?

10 MR. FADER: I'm not aware of any challenge in  
11 any of those cases. No, Your Honor.

12 THE COURT: Can you tell me a little bit more  
13 about the issue involving the Mother Jones data and  
14 any other database that Ms. Allen, among others, might  
15 have relied on? What exactly, and where is it from?

16 MR. FADER: The Mother Jones database, Your  
17 Honor, Mother Jones Magazine has collected information  
18 on mass public shootings that have occurred beginning  
19 in 1982, and it is consistently updated. It's based  
20 on public press reports, which, by the way,  
21 differentiated from all of the other information in  
22 the cases cited by the plaintiffs where the data that  
23 was at issue was information by a private individual  
24 saying I think my business would have made tons of  
25 money if the contract hadn't been breached, and that

1 was data that was a black box that was inaccessible to  
2 anybody else.

3 Here, what we are dealing with is a compilation  
4 of information from public news sources of firearms  
5 that were used, the number of shots that were fired,  
6 the capacity of the magazines, and other information  
7 about the incidents collected from public sources, so  
8 that it is easily reviewed and investigated by anybody  
9 who would be interested in checking its validity.

10 THE COURT: And did any of the experts in this  
11 case do that, look at the Mother Jones data, but also  
12 go back and look at the public press reports that  
13 underlie it?

14 MR. FADER: No. Yes, there are some instances  
15 in which they went and looked at press reports, but  
16 there was no systematic review of that information to  
17 identify whether every single entry was correctly  
18 reported from any news source.

19 But it is publicly-available information that  
20 has been subject to scrutiny, and it's available to be  
21 subject to scrutiny, which again distinguishes it from  
22 the kinds of information relied on by experts the  
23 courts have found not to be fair game, because it's  
24 not accessible. It's not subject to review. It's not  
25 subject to testing. This is a much different type of

1 information.

2 THE COURT: Okay.

3 MR. FADER: Of course, these mass public  
4 shootings are very public events. So it's not hard to  
5 go back and try to find a news article to see if the  
6 information in it is incorrect in some respect.

7 THE COURT: There is also a National Rifle  
8 Association database that's relied on?

9 MR. FADER: And that's not a database as such as  
10 much as a collection of stories that Lucy Allen had  
11 relied on.

12 So the Mother Jones database, they have made an  
13 effort based on an understanding, based on a  
14 definition of mass public shooting to identify each  
15 and every shooting that falls within that definition  
16 and put information in that database. So it's an  
17 attempt at a comprehensive database of those  
18 incidents.

19 The National Rifle Association stories are  
20 different. Those are collections of stories that are  
21 reported by the National Rifle Association to  
22 highlight self-defense incidents.

23 Ms. Allen is clear that it is not a  
24 comprehensive database. It is not a systematically  
25 created database. It's a collection of stories, but

1 it is not the most comprehensive collection of  
2 information about those incidents that she was able to  
3 find, and no more comprehensive study has been  
4 identified.

5 So plaintiffs cited, I don't remember the name  
6 of the case, but they cited a case to say anecdotal  
7 evidence is not preferred. Well, what the case  
8 actually says is when you have a comprehensive  
9 systematic study that reaches one conclusion,  
10 anecdotal evidence that contradicts it is not the best  
11 evidence.

12 Here, there is no comprehensive  
13 scientifically-assembled study. What we have, the  
14 most comprehensive study that she was able to find,  
15 and that anybody has identified, is this database, or  
16 is not the database, excuse me, but is a collection of  
17 stories that has been analyzed for two different  
18 periods and has found, out of over 600 incidents, only  
19 one in which more than ten shots were fired in  
20 self-defense.

21 THE COURT: Thank you.

22 MR. FADER: Moreover, the testimony of law  
23 enforcement officers is that assault weapons and  
24 large-capacity magazines are dangerous and unusual  
25 firearms from some of Maryland's leading law

1 enforcement officers, and that the bans will advance  
2 Maryland's interest in public safety by reducing the  
3 availability of those firearms and magazines for use  
4 by criminals, reducing the threat to innocent  
5 civilians from unintentional misuse, and helping to  
6 protect law enforcement officers.

7 I do want to say just a word about the  
8 plaintiffs' claim that the Court cannot even consider  
9 those sources of information, because they claim they  
10 were not before the General Assembly at the time that  
11 it enacted this law. The plaintiffs' argument is  
12 wrong in two ways.

13 First, there is no such limitation on the  
14 Court's consideration of evidence. Second, some of  
15 the evidence actually was before the General Assembly.  
16 The Fourth Circuit has been clear that there is no  
17 requirement that evidence be before the General  
18 Assembly to be considered by the Court.

19 In Woollard, the Fourth Circuit relied on the  
20 evidentiary basis found in testimonial evidence of law  
21 enforcement officers to support a law against the  
22 Second Amendment challenge.

23 In United States versus Carter, the Fourth  
24 Circuit emphasized that the government could meet its  
25 intermediate scrutiny burden by resorting to a wide

1 range of sources, such as legislative text and  
2 history, empirical evidence, case law and common  
3 sense, as circumstances and context require. The  
4 defendants here rely on all of those sources.

5 The plaintiffs claim that that is in conflict  
6 with the Supreme Court decision in Turner  
7 Broadcasting, but they simply misread that case. In  
8 Turner Broadcasting, the Court stated that legislators  
9 are not required to make an administrative record to  
10 accommodate court review, and if they are not required  
11 to make that record, then the courts can't be limited  
12 to only looking at what is in a record.

13 More importantly, the Turner Broadcasting court  
14 said that on remand, the court below could consider  
15 introduction of additional evidence as to the harm  
16 that the broadcasters in that case would incur.

17 The plaintiffs read into that sentence a  
18 limitation saying that only the broadcasters could  
19 introduce that evidence in opposing the government,  
20 but for two reasons, they misread that.

21 First, the sentence doesn't say that. More  
22 importantly, in that case the broadcasters and the  
23 federal government were on the same side. The law  
24 that was at issue was to protect broadcasters by  
25 requiring cable companies to carry their signals. It

1 was the government's burden to introduce evidence  
2 about the harm on broadcasters; and, therefore, it was  
3 the government that would have to be introducing that  
4 additional evidence on remand.

5 So there is simply no support for the  
6 plaintiffs' notion in that case or either of the cases  
7 they cited for the first time in their reply brief,  
8 which simply don't stand for the propositions for  
9 which they have cited them.

10 The bottom line is that as the Fourth Circuit  
11 has said, it is the legislature's job and not the  
12 province of the court to weigh conflicting evidence  
13 and make policy judgments regarding the dangers that  
14 firearms pose to public safety.

15 This Court's responsibility is to determine  
16 whether there is substantial evidence to justify the  
17 General Assembly's predictive judgment, whether there  
18 is a reasonable fit between the law and the  
19 government's important interests.

20 There are two other claims that I would like to  
21 just address briefly, Your Honor.

22 THE COURT: Yes.

23 MR. FADER: One is a claim under the Equal  
24 Protection Clause. As to both of these remaining  
25 claims, there is a motion to dismiss pending, as well

1 as a motion for summary judgment.

2 The Equal Protection Clause keeps governmental  
3 decision-makers from treating --

4 THE COURT: Let me just stop you there. Just on  
5 a procedural basis, is there any reason to address the  
6 motion to dismiss if it is all disposed with in the  
7 summary judgment motion?

8 MR. FADER: I think that it can be dismissed on  
9 either grounds, Your Honor. I think that there are  
10 clear legal reasons that could be the basis for  
11 dismissing on the motion to dismiss or for summary  
12 judgment, but we are certainly treating them as  
13 combined at this point.

14 THE COURT: Okay.

15 MR. FADER: Under Fourth Circuit jurisprudence,  
16 and I'm talking specifically about Morrison versus  
17 Garraghty, 239 F.3d, at 654, a plaintiff must first  
18 demonstrate that he has been treated differently from  
19 others with whom he is similarly situated in order to  
20 make an equal protection claims.

21 In this case, the equal protection claims arise  
22 from the plaintiffs' claim that exceptions in the law  
23 applicable to retired law enforcement officers violate  
24 their equal protection rights, but the plaintiffs are  
25 not similarly situated to those retired law



1 enforcement officers.

2 The plaintiffs initially challenged two  
3 exceptions with respect to assault weapons; one, an  
4 exception for the transfer of firearms actually  
5 obtained for a retired law enforcement officer in the  
6 line of duty when he wasn't active duty.

7 The plaintiffs seem to have dropped any argument  
8 with respect to that exception and have dropped any  
9 claim that they are similarly situated, since those  
10 law enforcement officers obviously would have had to  
11 receive extensive training on those particular  
12 firearms.

13 But they seem to be maintaining their claim that  
14 the provision allowing an exception for transfer to a  
15 retiring law enforcement officer at the time of  
16 retirement is a violation of the Equal Protection  
17 Clause. But there again, the class of plaintiffs who  
18 are not retired law enforcement officers are not  
19 similarly situated to retired law enforcement  
20 officers, who, in connection with their law  
21 enforcement responsibilities, have had extensive  
22 training not only on how to use the firearm, but how  
23 to act in circumstances calling for the use of deadly  
24 force, how to minimize other casualties on the  
25 emotional, mental and psychological preparation needed

1 for the possibility of deadly force shooting  
2 situations, which simply makes them not similarly  
3 situated.

4 Moreover, as far as possible rationales on a law  
5 that would be addressed under the rational basis test,  
6 the General Assembly could certainly have rationally  
7 concluded that retired law enforcement officers did  
8 not present the same risks of having these instruments  
9 fall into the hands of criminals, or used for ill  
10 purposes, as if they were proliferating in the hands  
11 of others.

12 The last claim in this case, Your Honor, is a  
13 void for vagueness claim. Here again, simple legal  
14 principles are dispositive.

15 The Fourth Circuit has held that facial  
16 vagueness challenges to criminal statutes are allowed  
17 only when the statute implicates First Amendment  
18 rights. The plaintiffs have not disagreed with that  
19 legal standard in the Fourth Circuit.

20 This case does not implicate First Amendment  
21 rights. The plaintiffs have only brought a facial  
22 challenge to the law, and, therefore, that facial  
23 challenge must fail. This is a pre-enforcement facial  
24 challenge to the law that cannot survive under that  
25 standard.

1           The Supreme Court also in the Village of Hoffman  
2 case said vagueness challenges to statutes which do  
3 not involve First Amendment freedoms must be examined  
4 in light of the facts of the case at hand. One whose  
5 conduct the statute clearly applies may not  
6 successfully challenge it for vagueness. Even --

7           THE COURT: That opinion by the Supreme Court,  
8 do you think that's consistent with what the Fourth  
9 Circuit has said?

10           It seems to me the Fourth Circuit was a bit more  
11 categorical than the Supreme Court was in the Village  
12 case, and looking at the other courts that have  
13 addressed this, most of them have addressed the  
14 merits, I think.

15           MR. FADER: Certainly some of the other courts  
16 have addressed the merits; although, I don't know that  
17 any of those were in situations in which there was not  
18 an as applied challenge as well.

19           I think in the Village of Hoffman, that  
20 statement is less categorical, but it applies to it as  
21 an applied challenge.

22           It says vagueness challenges that don't involve  
23 First Amendment freedoms must be examined in light of  
24 the facts of the case at hand, indicating that there  
25 must be facts that have been put forward with respect

1 to a particular plaintiff saying this is something I  
2 want to be able to use, or this is conduct I want to  
3 be able to engage in that is prohibited.

4 Here, the declarations that have been submitted  
5 by the plaintiffs indicate that they know exactly what  
6 is covered by this law. They want to purchase or sell  
7 AR-15s and AK-47s, and they are upset that this law  
8 prohibits them from doing so. There is no specific  
9 factual scenario that would allow for an as-applied  
10 challenge here.

11 And to the extent that the plaintiffs have  
12 identified individual firearms or decisions by the  
13 Maryland State Police that they consider incorrect, or  
14 that they believe were made inappropriately, those are  
15 not an appropriate basis for a facial challenge to a  
16 law.

17 They have raised individual issues that could be  
18 raised in state courts if there were to be a criminal  
19 prosecution brought with respect to this, but that's  
20 not the basis for a facial challenge to the law.

21 THE COURT: Now when the plaintiffs brought the  
22 McCullen case to our attention, they also included  
23 something I think described as newly discovered  
24 evidence, but they included a bulletin from July of  
25 2014 issued by the Maryland State Police, I think

1 going to the issue of a copy, what is a copy. If you  
2 would like to address that.

3 MR. FADER: Certainly. The first point  
4 addressing that, Your Honor, would be, again, that is  
5 with respect to a particular firearm that they have  
6 identified. It is not even a firearm that any of the  
7 plaintiffs have said that they want to acquire, but  
8 aren't because of this law.

9 So it's not -- that kind of focus on individual  
10 firearms is not appropriate in considering a facial  
11 challenge where there is a clearly defined core of  
12 prohibited conduct as established by the plaintiffs'  
13 own allegation. So a one-off situation doesn't make a  
14 law facially unconstitutional.

15 With respect to the firearm at issue, what it  
16 appears to be is that the plaintiffs disagree with the  
17 State Police's preliminary determination as to whether  
18 that particular firearm satisfied the test of having  
19 completely interchangeable internal components.

20 There is a manual that comes with the firearm  
21 that says that all of the major subassemblies of the  
22 firearm are completely interchangeable with an AR-15,  
23 and the plaintiffs have identified a part that they  
24 believe is not fully interchangeable with an AR-15.  
25 Under the Maryland State Police's policy, they will go

1 back and review that, and if they agree with it, then  
2 they may change their view.

3 But this is a circumstance dealing with an  
4 individual firearm, and the fact that there may be  
5 further review, or even if there was an incorrect  
6 decision as to that particular firearm does not call  
7 into question the facial validity of the law itself.

8 Thank you.

9 THE COURT: Thank you. Thank you Mr. Fader.

10 Mr. Sweeney.

11 MR. SWEENEY: May it please the Court.

12 THE COURT: Good morning.

13 MR. SWEENEY: I am John Parker Sweeney, and I  
14 represent citizens of Maryland and citizen groups that  
15 are challenging the bans in SB281 on popular firearms  
16 and magazines.

17 We are grateful for the opportunity to appear  
18 before Your Honor today. At the outset, we want to  
19 thank the Court for the opportunity to develop a  
20 factual record.

21 I must commend Mr. Fader and Mr. Friedman for  
22 their professionalism and civility that allowed us to  
23 go through expedited discovery, including 40  
24 depositions over the holidays, through a terrible  
25 winter weather-wise to get here, and I am equally

1 proud to say that we have teed up these motions  
2 without once requiring the Court to intervene and  
3 resolve any disputes between us.

4 THE COURT: Well, I will echo your thanks to  
5 counsel on both sides. I would certainly agree from  
6 what I have seen everyone has handled this very  
7 professionally. These are important arguments, and I  
8 appreciate how you dealt with it.

9 MR. SWEENEY: This is the finest of litigating  
10 in Maryland. That's why I enjoy it so much.

11 What distinguishes this case from every other  
12 case relied upon by Mr. Fader, starting with the  
13 Heller II decision, and the more recent district court  
14 cases, is that we have developed a full record,  
15 including depositions of key witnesses. The other  
16 cases were largely resolved on summary judgment based  
17 on declarations and expert reports, but without the  
18 benefit of cross-examination through deposition.

19 Depositions in this case have demonstrated that  
20 the defendants' experts' opinions offered by the  
21 defendants to support the law in question are not  
22 reliable, and should be excluded.

23 Let me start first by addressing Mr. Koper, who  
24 Your Honor asked about during Mr. Fader's examination.  
25 Mr. Koper is the principal author of two very

1 significant, indeed, critical studies in this area.

2 When the federal government banned assault  
3 weapons and magazines with the capacity greater than  
4 ten in 1994, that was for a ten-year period, and the  
5 law required a study of its efficacy be done. Mr.  
6 Koper, Dr. Koper, excuse me, was charged by the  
7 government, and under contract to the Department of  
8 Justice, prepared those studies.

9 He prepared a 1997 interim study, as required  
10 under the Act, and he repaired a 2004 updated study,  
11 as required under the Act, and these studies were  
12 considered by Congress when Congress allowed the law  
13 to expire in 2004.

14 One of the things that we were able to do that  
15 no one else has done is depose Dr. Koper. I was,  
16 frankly, more than a little surprised to find out that  
17 he had never been deposed before.

18 And so what did we learn at Dr. Koper's  
19 deposition? First we asked him about the effect of  
20 the federal bans.

21 He said in his report, "There has been no  
22 discernible reduction in the lethality and  
23 injuriousness of gun violence." I asked him if that  
24 report was correct, and he said yes. This is at page  
25 94 of his deposition.



1 I went on to say is that still your view today  
2 based upon your study and analysis of the impact of  
3 the federal ban on assault weapons and large-capacity  
4 magazines?

5 Answer, yes. Based on the data that I analyzed,  
6 it's still my view of it.

7 I asked all right. Are you aware of anyone  
8 else's data with respect to studying the impact of the  
9 federal ban on assault weapons and large-capacity  
10 magazines that reached a conclusion different from the  
11 conclusion that you stated here?

12 Answer, no.

13 I went on on page 96 to say isn't it true that  
14 as you sit here today, you cannot conclude with a  
15 reasonable degree of scientific probability that the  
16 federal ban on assault weapons and large-capacity  
17 magazines reduce crimes related to guns?

18 Answer, correct.

19 Question, and it didn't reduce the number of --

20 THE COURT: But let me stop you for a minute.  
21 The reducing crimes related to guns isn't really the  
22 area of my focus in this case, is it?

23 Again, we are obviously not talking about a ban  
24 on handguns or many other kinds of guns that are used  
25 in the course of committing crimes.

1 MR. SWEENEY: I went on to ask, Your Honor, and  
2 it didn't reduce the number of deaths or injuries  
3 caused by guns either, correct?

4 Answer, correct.

5 THE COURT: Yes.

6 MR. SWEENEY: I further went on to ask him about  
7 the effect of state bans rather than the federal ban.  
8 On page 84 of his deposition I said you address, on  
9 note 95, I believe state bans on assault weapons in  
10 which you say, "A few studies suggest that state-level  
11 assault weapon bans have not reduced crime." Am I  
12 reading that correct?

13 Answer, yes.

14 Question, and is that still your view today?

15 Answer, I've not seen any further studies of  
16 this yet, but yes, I mean, essentially that's the  
17 conclusion.

18 I asked him about his study with respect to the  
19 use of the banned firearms and assaults on law  
20 enforcement officers.

21 On page 128, I asked would you agree with me  
22 that law enforcement officers are far more likely to  
23 be killed by motor vehicles in the line of duty than  
24 assault rifles?

25 Answer, yes.

1           Question, vastly more likely to be killed by  
2 handguns than by assault rifles?

3           Answer, yes.

4           Possibly even more like likely to be killed by  
5 shotguns than by assault rifles, probably more likely?

6           Answer, probably.

7           I then asked him about mass shootings, page 131.

8           And if you assume four or more, referring to  
9 individuals shot in one incident, can you state to a  
10 reasonable degree of scientific probability based upon  
11 the evidence available to you that banning assault  
12 rifles will reduce the number of incidents of mass  
13 shootings?

14           Answer, I can't say that based -- I mean I can't  
15 make a firm projection of that based on any particular  
16 available data. There might be data to suggest that  
17 there could be some reduction in that, but it's hard  
18 to really clearly project what that would be or how  
19 difficult it might be to detect statistically.

20           THE COURT: Let me ask you, Mr. Sweeney, again,  
21 the context in which I am evaluating these experts'  
22 testimony or deciding whether to exclude it, it seems  
23 to me is somewhat different from the traditional case,  
24 medical malpractice, product liability, something  
25 where it is required for an expert opining on

1 causation to reach an opinion, as you suggest,  
2 something more likely than not, probable, scientific  
3 probability.

4 It doesn't seem to me that is the precise  
5 context here when what we are trying to evaluate is  
6 whether there is a reasonable fit, that the  
7 legislature's predictive judgment is supportable. It  
8 seems to me like a different kind of analysis.

9 MR. SWEENEY: If the opinions advanced by the  
10 State to support the constitutionality of the law that  
11 restricts fundamental rights of American citizens  
12 cannot be based upon the same evidence that meets Rule  
13 702 and other federal cases, I don't think Your Honor  
14 should affirm the statute.

15 THE COURT: That was not the thrust of my  
16 question. I think Rule 702 needs to be --

17 What satisfies Rule 702 can vary depending on  
18 the context of the case and the purpose for which an  
19 opinion is being offered. So I'm perhaps not making  
20 myself clear.

21 MR. SWEENEY: One of the issues in the Turner  
22 Broadcasting case was whether or not the Congress had  
23 before it evidence of the harm that it sought to  
24 correct. One of the things that the Supreme Court  
25 said in that case was, on remand, there has to be

1 evidence to support that.

2 Causation is not irrelevant. If the firearms in  
3 question and the large-capacity magazines that are  
4 being banned have not been shown, as Mr. Fader  
5 asserts, to be disproportionately involved in mass  
6 shootings, or the murders of law enforcement officers,  
7 or indeed, crime in general involving firearms, then  
8 there is no causation to underlie the infringement on  
9 constitutional rights, which all the courts, as Your  
10 Honor pointed out, have either assumed or found occurs  
11 with these sorts of prohibitions. We are the first  
12 ones to actually probe the evidence relied on by the  
13 defendants.

14 Let me conclude with a portion here of Dr.  
15 Koper's testimony with respect to what he could  
16 predict from bans similar to the ones that are before  
17 Your Honor in this case.

18 On page 84 I asked, you would not expect a ban  
19 on assault weapons or large-capacity magazines to  
20 actually reduce the number of firearms-related assault  
21 or robberies, correct?

22 Answer, correct.

23 Question, and you would not expect a ban on  
24 assault weapons or large-capacity magazines to reduce  
25 firearm-related home invasions, correct?

1           Answer, no. Correct, I mean.

2           Question, and you wouldn't expect a ban on  
3 assault weapons or large-capacity magazines to reduce  
4 the number of firearm assaults on police officers,  
5 correct?

6           Answer, correct. That's fair enough.

7           A careful reading of his deposition shows that  
8 he can't really support the efficacy of the bans in  
9 question here.

10           Mr. Fader pointed out a number of critical,  
11 let's call them material facts underlying his motion.  
12 We proffered at the temporary restraining order  
13 hearing to Your Honor that we would develop evidence  
14 to support the critical elements of our challenge. We  
15 proffered that we would show that the banned firearms  
16 are in common use. Even using defendants' five  
17 million nationwide and 92,000 in Maryland, we have  
18 demonstrated that these are common.

19           THE COURT: Let me ask you the same question  
20 that I asked Mr. Fader. What is the state of the  
21 record that they are commonly used for self-defense?

22           MR. SWEENEY: We have shown that the banned  
23 firearms are chosen for self-defense.

24           Professor Webster, the only expert to testify  
25 before the Maryland General Assembly, readily

1 acknowledged that the banned firearms are sometimes  
2 used for self-defense.

3 We produced --

4 THE COURT: Do you have the cite to that for  
5 Professor Webster?

6 MR. SWEENEY: I do. It's page 115 of his  
7 deposition, Your Honor.

8 THE COURT: Of his deposition. Thank you.

9 MR. SWEENEY: Yes. We produced a survey result  
10 conducted by the plaintiff, National Shooting Sports  
11 Foundation, of more than 22,000 owners of modern  
12 sporting rifles, who gave as the number one and two  
13 purposes for owning those firearms target shooting and  
14 home defense.

15 THE COURT: Do you have evidence of their use  
16 for self-defense? I understand the choice issue. I  
17 understand people wanting them for that purpose, but  
18 actually using them in self-defense?

19 MR. SWEENEY: Yes. And may I say, Your Honor,  
20 that the requirement of common use is not supported in  
21 the text of Heller, and is a red herring.

22 Nothing in Heller requires handguns to have been  
23 used for self-defense in the District of Columbia.  
24 Indeed, they could not have been, because they had  
25 long been banned.

1           Moreover, operable long guns were banned in the  
2 homes of D.C. citizens, a prohibition which was  
3 separately overturned in the District of Columbia.

4           There was no evidence before the Court in the  
5 District of Columbia that either handguns or long guns  
6 had ever been used in the defense of homes in the  
7 District of Columbia. It is not use that is the  
8 linchpin here. The linchpin is found in the text of  
9 Heller, which talks about the nature of arms that are  
10 protected by the Second Amendment.

11           The issue here is whether the firearms and  
12 magazines banned here are typically possessed by  
13 responsible law-abiding citizens for lawful purposes,  
14 typically possessed.

15           Remember, the text of the Second Amendment is  
16 keep and bear arms. The operative verb is kept,  
17 commonly kept for lawful purposes, commonly possessed,  
18 and this is particularly true when we are talking  
19 about defense of the home.

20           Heller went on to say the Second Amendment  
21 extends to all instruments that constitute bearable  
22 arms, even those that were not in existence at the  
23 time of the founding.

24           Mr. Fader conceded that simply because we are  
25 not talking about a blunderbuss, we don't lose the



1 protection of the Second Amendment.

2 But they went on to say, in reading their prior  
3 decision in Miller, which was the only previous  
4 Supreme court decision that determined what arms were  
5 or were not subject to the Second Amendment, we read  
6 Miller to say only that the Second Amendment does not  
7 protect those weapons not typically possessed by  
8 law-abiding citizens for lawful purposes, such as  
9 short barrel shotguns.

10 They went on to talk about the traditional  
11 militia was formed from a pool of men bringing arms in  
12 common use at the time for lawful purposes, like  
13 self-defense.

14 Imagine, if you will, a hypothetical militia  
15 muster in Towson, Maryland today, Your Honor. Will  
16 you not see assembled on the town green men bearing  
17 the banned firearms that contain the banned magazines?

18 Of course, you will. It's ridiculous to suggest  
19 that that would not be the case.

20 THE COURT: But if it were a random sample of  
21 the population, what percentage of those people  
22 showing up for the Towson militia would have the  
23 banned guns?

24 MR. SWEENEY: Well, considering the numbers that  
25 we have, and if only armed citizens who chose to keep

1 arms at home were the ones who responded to the  
2 militia, I would say a number substantially higher  
3 than the one percent that Mr. Fader has already  
4 conceded. We don't have that evidence.

5 The Second Amendment under Heller protects the  
6 arms that the people choose to keep in their homes in  
7 case they need them for the lawful purposes of  
8 self-defense, hunting, and marksmanship proficiency,  
9 which even Mr. Fader has conceded is covered by the  
10 Second Amendment.

11 There is no need to quibble about whether  
12 competitive marksman is covered because proficiency  
13 marksmanship is clearly covered by the Second  
14 Amendment.

15 Every federal court that has considered this  
16 issue has analyzed these laws under the Second  
17 Amendment. Not a single court has accepted Mr.  
18 Fader's construction of commonly used and required  
19 evidence of frequent use.

20 I am grateful to say that we do not have to  
21 frequently use arms in the defense of our homes in  
22 Maryland, and there would be no point in requiring  
23 that as a precondition for the protection of arms  
24 under the Second Amendment.

25 THE COURT: Do you think, if we are at the

1 second prong where, as we discussed, courts have gone,  
2 that the frequency of a particular use, of a  
3 particular type of firearm does not bear on the Second  
4 Amendment analysis at all, that it is not relevant to  
5 deciding whether this is the kind of very substantial  
6 and severe burden that was involved in Heller, all  
7 guns, all handguns?

8 MR. SWEENEY: No, it is not relevant, Your  
9 Honor.

10 THE COURT: Why not?

11 MR. SWEENEY: Because the prohibition on popular  
12 firearms and magazines, that is, commonly owned for  
13 lawful purposes by the people, that prohibition is off  
14 the table under Heller. Before we get to the second  
15 prong of your analysis, I would like to address that  
16 issue briefly.

17 In Heller, there was no discussion by the Court  
18 that Mr. Fader would have you follow of it's okay to  
19 balance the interests here between whether or not the  
20 people really need these firearms for self-defense,  
21 and the government disputes that, or whether they are  
22 protected by the Second Amendment, because Heller made  
23 clear that a complete ban of firearms would be off the  
24 table as a policy choice.

25 And yes, they did say that under any of the

1 heightened scrutiny analyses used by the Court in the  
2 context of other fundamental rights, a prohibition on  
3 handguns would fail. So too would the prohibition on  
4 operable long guns be equally found to be  
5 unconstitutional in that case.

6 But the Court didn't stop there. It went on to  
7 say we know of no other enumerated constitutional  
8 right whose core protection has been subjected to a  
9 freestanding interest balancing approach.

10 The very enumeration of the right takes out of  
11 the hands of government, even the third branch, the  
12 power to decide on a case-by-case basis whether the  
13 right is really worth insisting on. A constitutional  
14 guarantee subject to future judges' assessment of its  
15 usefulness is no constitutional guarantee at all.

16 Constitutional rights are enshrined with the  
17 scope they were understood to have when the people  
18 adopted them, whether or not future legislatures or  
19 even future judges think the scope too broad.

20 The Second Amendment is no different than like  
21 the first. It is the very product of an interest  
22 balancing by the people, which Justice Breyer would  
23 now conduct for them anew. And whatever else it  
24 leaves to future evaluations, it surely elevates above  
25 all other interests the right of law-abiding,

1 responsible citizens to use arms in defense of hearth  
2 and home.

3 Mr. Fader invites the Court to apply the  
4 balancing test offered by Justice Breyer in dissent  
5 and rejected by the majority in Heller.

6 THE COURT: How exactly do you think he is  
7 inviting me to do that at the first prong? I mean I  
8 haven't heard the words interest balancing, and I  
9 thought what Mr. Fader said was I have to, as I do,  
10 follow the Fourth Circuit, and if get to the second  
11 prong, I apply an intermediate scrutiny test.

12 MR. SWEENEY: Well, the Fourth Circuit precedent  
13 does not require any interest balancing in this case.

14 THE COURT: I'm agreeing with you.

15 MR. SWEENEY: The Fourth Circuit precedent in  
16 fact has never considered a complete prohibition on  
17 firearms that have been commonly kept for lawful  
18 purposes in the home. That has never been before the  
19 Fourth Circuit. Any of its case law is not binding in  
20 that regard.

21 What do we have in the Fourth Circuit?

22 The Masciandaro case said we observe that any  
23 law regulating the content of speech is subject to  
24 strict scrutiny. We assume that any law that would  
25 burden the fundamental core right of self-defense in

1 the home by a law-abiding citizen would be subject to  
2 strict scrutiny.

3 Now, that sounds like a pretty strong statement.  
4 That sounds like the Fourth Circuit would be saying if  
5 we had to decide it, we would use strict scrutiny.

6 The Court went on in the Carter case to say as  
7 we have noted, application of strict scrutiny is  
8 important to protect the core right of self-defense  
9 identified in Heller.

10 In Woollard, the Fourth Circuit panel that  
11 reversed Judge Legg said we reject the view that would  
12 place the right to arm one's self in public on equal  
13 footing with the right to arm one's self at home,  
14 necessitating that we apply strict scrutiny.

15 Plaintiffs' position is that a complete  
16 prohibition of arms that are commonly kept for lawful  
17 purpose in the home is off the table as a policy  
18 choice. There's no balancing.

19 But if Your Honor is to look at the Fourth  
20 Circuit cases, the teaching of the Fourth Circuit is  
21 not what Mr. Fader suggests. The teaching of the  
22 Fourth Circuit is clear. On this record, the only  
23 level of constitutional scrutiny, if in fact the ban  
24 is not impermissible per se under Heller, the only  
25 permissible level of strict scrutiny, strict scrutiny

1 requires something the defendants have not even  
2 pretended to show, narrow tailoring in the choice of  
3 the least restrictive alternative.

4 Not only is the evidence disputed that the bans  
5 would even be effective, there is no evidence  
6 whatsoever that alternatives were considered.

7 Let me pause here and go to the question of  
8 intermediate scrutiny, because I see that it is on  
9 Your Honor's mind.

10 Mr. Fader used language to suggest that oh, the  
11 courts are all over the place. There are lots of  
12 different formulations of intermediate scrutiny.  
13 What's a court to do? The Fourth Circuit cases are  
14 very helpful on what intermediate scrutiny means in  
15 this context.

16 First, let's talk about, however, the only  
17 Circuit Court that has decided one of these banned  
18 cases, Heller II, which Mr. Fader referred to a number  
19 of times during the temporary restraining hearing and  
20 has been remarkably quiet on.

21 That case applied intermediate scrutiny and it  
22 said the District must establish a tight fit between  
23 the registration requirements and an important or  
24 substantial government interest, a fit that employs  
25 not necessarily the least restrictive means, but a

1 means narrowly tailored to achieve the desired  
2 objective.

3 The cases cited by Mr. Fader in his brief on  
4 time, place, and manner restrictions similarly use the  
5 narrowly tailored to serve a significant government  
6 interest formulation.

7 But let's not stop there. Let's look at the  
8 Fourth Circuit Second Amendment cases relied on by Mr.  
9 Fader. What did Chester cite to, the first case to be  
10 considered?

11 It cited, in applying intermediate scrutiny, the  
12 Board of Trustees v. Fox, and that case said what our  
13 decisions require is a fit between the legislature's  
14 ends and the means chosen to accomplish those ends, a  
15 fit that is not necessarily perfect, but reasonable,  
16 that represents not necessarily the single best  
17 disposition, but one whose scope is in proportion to  
18 the interest served, that employs not necessarily the  
19 least restrictive means, but as we have put it in the  
20 other context discussed above, a means narrowly  
21 tailored to achieve the desired objective.

22 So too Chester looked to Marzzarella, the Third  
23 Circuit case involving handguns that did not have  
24 serial numbers on them, that also said the regulation  
25 need not be the least restrictive means, but may not



1 burden more speech than is reasonably necessary in  
2 applying the standard of intermediate scrutiny.

3 Masciandaro itself cited Chester, and it also  
4 cited Ward v. Rock Against Racism, the Supreme Court  
5 case that talked about regulations that are narrowly  
6 tailored to pass intermediate scrutiny, as well as  
7 Board of Trustees of State University, also referring  
8 to we uphold such restrictions so long as they are  
9 narrowly tailored to serve the significant government  
10 interest.

11 Woollard also cited Masciandaro. Carter cited  
12 Chester and Marzzarella and Masciandaro.

13 The Fourth Circuit cases relied upon by Mr.  
14 Fader, while perhaps not in the text saying narrowly  
15 tailored, all cited cases, includes Supreme Court  
16 cases, that talk about narrow tailoring.

17 THE COURT: Uh-huh.

18 MR. SWEENEY: Other district court cases  
19 considering bans on firearms and magazines have also  
20 cited case law that requires narrow tailoring under  
21 intermediate scrutiny.

22 We saw in the New York State Rifle Association  
23 case, they relied upon Kachalsky, a Second Circuit  
24 case, and Masciandaro itself that they cited there.

25 In Shew, they cited Mazzarella.

1           In the Fiat case out of California, they cited  
2           Chovan and Chester and Board of Trustees v. Fox,  
3           already cited to Your Honor.

4           Narrow tailoring is a theme throughout the cases  
5           relied upon by the Fourth Circuit and the District  
6           Court cases relied upon by Mr. Fader, and what is  
7           absent in this case is any effort by the State  
8           whatsoever to show narrowly tailored. There is no  
9           evidence, nor even argument that alternatives that  
10          would be less restrictive than a complete prohibition  
11          have been considered and rejected, and wouldn't work  
12          because ineffective, nor could there be.

13          Before these bans took effect last fall, there  
14          were two regulations in effect governing the firearms  
15          and magazines in question. For sometime now Maryland  
16          has put a cap of 20 rounds on the capacity of  
17          magazines.

18          For sometime now, Maryland has required, under  
19          its 77R regulation, that the firearms that are now  
20          banned only be purchased after application and  
21          background check, the so-called 77R process, which is  
22          the only restriction on the purchase of handguns.

23          Now, Mr. Fader was unable to come up with any  
24          evidence to support a problem preexisting the ban in  
25          the State of Maryland to justify a complete

1 prohibition. There was no evidence, and our brief is  
2 replete with the statements of law enforcement  
3 officers admitting that the firearms are not  
4 disproportionately used in crime in Maryland; and,  
5 praise the Lord, we have not had mass shootings, and  
6 we have not had assaults on law enforcement officers  
7 with the firearms in question.

8 There is no evidence that the state of  
9 regulation in Maryland, prior to the effective date of  
10 these bans on October 1, 2013, was such as to require  
11 these bans, or that the prior regulations long in  
12 effect were not less restrictive alternatives.

13 Less restrictive alternatives are required by  
14 the McCullen court. They are required by Standard  
15 Broadcasting. That is what must be shown, and that's  
16 what has not been shown in this case.

17 The legislature had before it precious little  
18 evidence. What it did have was Dr. Webster's  
19 statement focusing primarily upon the handgun  
20 regulation, with one paragraph about the ban on the  
21 firearms and magazines that was based solely upon Dr.  
22 Koper's 1997 report.

23 It also had the testimony of Martin O'Malley,  
24 and when we asked the defendants to produce all the  
25 documents that supported that testimony, the answer

1 was there are none.

2 It had the testimony of Chief Johnson, and let  
3 me pause there for a moment, Your Honor.

4 We were not provided with the testimony, the  
5 oral testimony of Chief Johnson in advance of his  
6 deposition. It was not disclosed to us as a document  
7 that the plaintiffs would rely upon. It was not  
8 provided to us in a copy that the plaintiffs  
9 represented was the official Bill file.

10 We went down to Annapolis and we copied the Bill  
11 file ourselves. It was not in the Bill file there.  
12 It was not even mentioned or relied upon in the  
13 opening brief of the defendants. They raise it for  
14 the first time in their reply, and we were able to  
15 obtain it. It was never provided to Your Honor in its  
16 entirety, but there's a critical statement in there.

17 Chief Johnson is talking about why a ban on  
18 large-capacity magazines might prevent mass shooters  
19 from being able to reload and continue shooting. He  
20 said you might be able to change a magazine in two  
21 seconds if you're on a range in a calm environment.  
22 But if you are not thinking clearly, it's going to  
23 take longer than two seconds, if you can reload at  
24 all.

25 Now if that doesn't apply to a home owner facing

1 in the middle of the night a sudden break-in, an  
2 intruder.

3 The need for home defense only arises in the  
4 most dire, uncertain and surprising context, and to  
5 expect a home owner to have to change out magazines  
6 every ten rounds under the circumstances of a  
7 frightened response, to unknown and unnumbered number  
8 of intruders coming into the home, is too much.

9 THE COURT: Again, I'll come back to the  
10 question. I think I remember from the papers, there  
11 was one instance cited, not in Maryland, but somewhere  
12 else in the country, that might indicate a firing of  
13 more than ten rounds in self-defense.

14 There are, on the other hand, certainly many  
15 more, unfortunately, than one example of mass  
16 shootings where more than ten rounds have been fired.  
17 Am I wrong about that?

18 MR. SWEENEY: One of the things that Dr. Koper  
19 readily admitted is the number of these incidents is  
20 quite small, and one must be very careful about  
21 drawing any conclusions from them.

22 There was the unfortunate incidence of Elliot  
23 Rodger on the Santa Barbara campus in California, in  
24 which the troubled young man stabbed three of his  
25 roommates to death, got in a high-powered BMW, sped

1 around the campus striking pedestrians and bicyclists,  
2 and shot three more people with two handguns and 51  
3 ten-round capacity magazines. None of the firearms  
4 that are subject to the ban here were involved in that  
5 horrible assault.

6 Professor Webster was asked about it. He didn't  
7 mention bans like this being able to make a difference  
8 in those things. He talked about the need for greater  
9 surveillance and vigilance with respect to mental  
10 illness, and let me pause for a moment there, if I  
11 may, and talk about that.

12 Maryland had a task force on mental illness and  
13 firearms ongoing in 2013. Dr. Webster was on it.

14 Captain McCauley, now retired from the Maryland  
15 State Police, was its co-chair. The task force came  
16 out with a number of recommendations. Dr. Webster  
17 didn't mention them to the General Assembly when he  
18 supported SB281.

19 In December we learned, in Dr. Webster's  
20 deposition of 2013, Michael Bloomberg donated \$250,000  
21 to Dr. Webster's gun control center at the Johns  
22 Hopkins Bloomberg School of Public Health that already  
23 bears Mr. Bloomberg's name because of the generous  
24 donations he has provided in the past.

25 Dr. Webster convened a symposium in January of

1 2013 in response, and he invited Mr. Bloomberg to  
2 speak, along with Governor O'Malley. They suggested  
3 at the outset of this symposium that, among other  
4 reforms, that there should be a ban on military-style  
5 assault weapons and large-capacity magazines.

6 And lo and behold, not a month later, Mr.  
7 O'Malley, Governor O'Malley was before the General  
8 legislature asking for that, and Professor Webster was  
9 supporting it, without any discussion of the sorts of  
10 recommendation that Dr. Webster had been working on  
11 with Captain McCauley and many others on a blue ribbon  
12 panel to control the kinds of unfortunate incidents  
13 that we saw with Elliot Roger.

14 The bans in this case have not been shown to be  
15 effective when they were employed on the federal  
16 level. They have not been shown to be effective when  
17 they have been employed in other states. The bans in  
18 this case will impermissibly intrude upon the  
19 constitutional right of Marylanders to keep in their  
20 homes popular firearms that they commonly choose to  
21 use for lawful purposes, including self-defense.

22 The government does not have the right under the  
23 Second Amendment to tell the citizens that they cannot  
24 choose popular firearms. These are popular firearms.  
25 They are protected. Any such ban is a policy choice

1 that's off the table.

2 Thank you, Your Honor.

3 THE COURT: Thank you. I'm going to take about  
4 a five-minute break, and then I will be happy to hear  
5 whatever rebuttal either side would like to make.

6 (A recess was taken.)

7 THE COURT: Mr. Fader. Let me just clarify one  
8 thing at the beginning. You're not challenging the  
9 plaintiffs' standing in this case, are you?

10 MR. FADER: There was a challenge in the motion  
11 to dismiss to the standing of some of the business  
12 plaintiffs. But in light of where we are, and the  
13 fact that there are plaintiffs who do have standing,  
14 we are not challenging that.

15 THE COURT: Okay. Thank you.

16 MR. FADER: Your Honor, there are a few points  
17 that I want to address. But I think preliminarily,  
18 there was a colloquy early on when Mr. Sweeney was  
19 presenting about the evidence, and the types of  
20 evidence that are cognizable in a case of this nature,  
21 and as Your Honor pointed out, this is different from  
22 the context of a medical malpractice case when  
23 causation is the issue, and there are well-defined  
24 evidentiary standards that must be met for proof of  
25 causation to be made before a jury.



1           Here, the Court is not looking at whether the  
2 plaintiffs can satisfy a test for factors for tort  
3 liability. The question is whether there was  
4 substantial evidence to support the General Assembly's  
5 predictive judgment that this would advance Maryland's  
6 purposes in public safety.

7           Necessarily, the types of evidence that the  
8 Court can consider are the types of evidence that the  
9 General Assembly could consider. In examining what  
10 would be substantial evidence before the General  
11 Assembly, it does not make any sense, and no court has  
12 ever held, that the General Assembly, when a law gets  
13 challenged, all of a sudden has to be held to the  
14 standard of what would be admissible in court.

15           The General Assembly is allowed to look at the  
16 types of evidence that legislatures are able to  
17 consider, and that's the type of evidence that, when a  
18 court is considering whether the government has met  
19 its burden, the Fourth Circuit has said that common  
20 sense is a factor that the Court can consider in  
21 looking at whether the government has satisfied its  
22 burden under intermediate scrutiny.

23           A decision that we cited in briefing on the  
24 motion to exclude, a very recent decision by the  
25 District of Columbia District Court in the Heller III

1 case, looking at other elements of the District of  
2 Columbia's law post-Heller took I think the most  
3 thorough examination of this issue that has been taken  
4 in the context of these Second Amendment challenges in  
5 identifying the types of evidence that a court can  
6 consider and found clearly, certainty is not required.

7 There is no requirement for scientific certainty  
8 because you are dealing with the prerogatives of a  
9 General Assembly as constrained by the constitutional  
10 restraints of the Second Amendment, of course; but  
11 it's the kind of evidence that can be considered by a  
12 General Assembly that is appropriate to consider in  
13 this context as well.

14 With respect to Professor Koper, Your Honor,  
15 plaintiffs I think have built their case with respect  
16 to Professor Koper around selective out-of-context  
17 quotations, and ignoring Professor Koper's testimony  
18 explaining what he meant, and ignoring the caveats  
19 that he used when he first made those statements, and  
20 quoting them without reference to any of those  
21 caveats.

22 First of all, with respect to the federal ban,  
23 Professor Koper is the only scholar to have done a  
24 thorough investigation of the federal ban, and he did  
25 not find it to be completely ineffective, as Mr.

1 Sweeney's presentation would indicate.

2 In fact, Professor Koper, although limited to  
3 certain types of evidence that he had before him, has  
4 described ways in which the federal ban did appear to  
5 be effective.

6 In particular, although by the time he did his  
7 report in 2004, there had not been systematic evidence  
8 at that point of a reduction in large-capacity  
9 magazines, Professor Koper both explained why that was  
10 the case, and explained subsequent evidence coming  
11 from studies of use of large-capacity magazines in  
12 Virginia, indicating a very significant drop in the  
13 criminal use of large-capacity magazines during the  
14 period of the ban and a pretty significant rise  
15 afterward, indicating that it did in fact have that  
16 effect on recovery of magazines used in crimes.

17 But maybe more importantly are some of the  
18 things that Professor Koper mentioned about the  
19 federal ban itself and some of its limitations that  
20 would cause a reasonable person looking at it to  
21 understand that only over a long period of time would  
22 a ban of that nature be expected to be effective.

23 One of the most significant problems with the  
24 federal ban was the fact that it was not a ban on the  
25 transfer of those firearms and magazines that it

1 covered. It was a ban only on the transfer of  
2 firearms and magazines that were first produced after  
3 the date of the ban.

4 So there was actually free transfer of firearms  
5 and magazines during most of the period of the federal  
6 ban, and with respect to large-capacity magazines,  
7 there were even millions of those imported from abroad  
8 into this country, as long as they were manufactured  
9 before the date the ban took effect, meaning, as  
10 Professor Koper explained, and plaintiffs ignore, you  
11 can't necessarily --

12 Availability is the key. If you continue to  
13 have these firearms and magazines available, readily  
14 available for transfer, why is it that you would  
15 expect to see a significant decline in their use if  
16 they keep being injected into the system?

17 Maryland's ban takes a different approach. It  
18 bans the transfer of these firearms and magazines  
19 going forward. That's a significant departure, and  
20 based on that significant limitation, which meant that  
21 expectations of some as far as the results of the  
22 federal ban weren't necessarily realized, although  
23 there was progress during that time, but Maryland's  
24 ban has taken a different approach.

25 The evidence is that criminals obtain their

1 firearms primarily through straw purchases, purchases  
2 on the secondary market, and theft from law-abiding  
3 individuals, meaning that if you are going to reduce  
4 the availability of these firearms for criminal uses  
5 and uses by people who may be mentally ill that have  
6 been involved in some of these mass public shootings,  
7 you need to reduce their availability generally.

8 That is something that in some ways the federal  
9 ban wasn't able to accomplish because it continued to  
10 allow transfers, but that Maryland's ban has  
11 addressed, and which is one of the bases in which  
12 Professor Koper said that he does expect it to be  
13 likely that Maryland's ban over the long term will  
14 promote Maryland's interest in public safety in  
15 reducing the negative effects of handgun violence.

16 With respect to state bans, Professor Koper, a  
17 footnote in Professor Koper's 1997 report, I'm sorry,  
18 2004 report, identified that there had been two  
19 studies of a limited nature looking at the wrong  
20 outcome determination with respect to efficacy of  
21 existing state bans on large-capacity magazines and  
22 assault weapons, and he identified why no value should  
23 be placed, why less value should be placed on those  
24 studies, because they looked at the wrong outcome.  
25 They looked at whether this reduced crime generally,

1 the straw man that the plaintiffs have erected saying  
2 this ban doesn't reduce crime generally.

3 That's not the target. The idea is there are  
4 particularly dangerous firearms and magazines, and if  
5 criminals are forced to substitute other firearms that  
6 are less dangerous and other magazines that have  
7 lesser capacity, that the result will be fewer shots,  
8 fewer injuries, and, therefore, reducing the negative  
9 effects of handgun violence.

10 So the plaintiffs have a strongly misleading  
11 focus on quotes pulled out of context from Dr. Koper  
12 that he has explained in his declarations in this  
13 case.

14 THE COURT: My recollection even of his  
15 deposition surrounding some of those quotes is that he  
16 would say yes, I agree, subject to qualification.

17 MR. FADER: In fact, on that point of the State  
18 bans, and a part conveniently omitted from the  
19 citation to the declaration from the plaintiffs, he  
20 said subject to the same qualifications I used in the  
21 report.

22 They ignored the qualifications in the report.  
23 They ignored the qualifications that he made in his  
24 declaration and pretended they weren't there, and  
25 that's true with respect to pretty much every citation

1 they have from Professor Koper's testimony. Professor  
2 Koper explained why, in his testimony about a specific  
3 level of scientific probability, he couldn't provide  
4 one.

5 Well, there's no requirement that the General  
6 Assembly have evidence that something that it is going  
7 to implement will work to a degree of scientific  
8 certainty. It's what support there is for the  
9 predictive judgment that the General Assembly had  
10 made.

11 Professor Koper explains why evidence from the  
12 federal ban does not necessarily apply to a different  
13 ban that Maryland is implementing now, especially with  
14 improvements that Maryland may have made.

15 The plaintiffs are correct that the Heller  
16 decision had no discussion of balancing, and balancing  
17 is not what the State is asking this Court to do.

18 The Supreme Court in Heller, at page 634,  
19 specifically discussed the balancing inquiry that  
20 Justice Breyer was recommending, and the Supreme Court  
21 specifically said that Justice Breyer's  
22 interest-balancing test was not any of the traditional  
23 forms of scrutiny that that Supreme Court had implied.

24 Intermediate scrutiny is not a form of interest  
25 balancing. It does not ask this Court to weigh the

1 evidence on one side or the other and come out with  
2 your own conclusion as to what the best policy would  
3 be. That's not what intermediate scrutiny does. It's  
4 to look at whether there is a reasonable fit between  
5 the law and the government's interest.

6 And yes, that reasonable fit inquiry has been  
7 determined to look at whether the law is tailored to  
8 the interest, is narrowly tailored, not in the sense  
9 of a strict scrutiny standard of whether it is the  
10 narrowest of all possible applications, but whether  
11 there is a reasonable fit, whether it is reasonably  
12 tailored.

13 Here, the General Assembly took a reasonable  
14 tailored approach to this. They didn't ban all  
15 semiautomatic weapons. They didn't ban all weapons  
16 that had been used in crime. This is focused on  
17 particular firearms that have been manufactured, sold,  
18 identified as particularly useful in military-style  
19 assaults and have been found to be disproportionately  
20 used in mass public shootings and the murder of law  
21 enforcement officers. It is not a balancing, and it  
22 is a tailored law.

23 The plaintiffs also I think make a mistake in  
24 attempting to find support from Heller with respect to  
25 the issue of whether these firearms are popular, and



1 they are quoting from provisions in Heller which talk  
2 about how the handgun is overwhelmingly chosen as a  
3 class of weapons for lawful defense of the home. The  
4 plaintiffs read that as basically saying anything  
5 that's popular gets protection absolutely and cannot  
6 be banned.

7 That's manifestly misreading Heller, which was  
8 focused on a particular class of weapons most used by  
9 Americans for self-defense, a firearm that now, after  
10 having a few years of sales that have been much  
11 greater than any years before, may have at most  
12 reached the level of being less than three percent of  
13 the gun stock of the country, simply doesn't qualify  
14 on the same plane as the entire class of weapons  
15 overwhelmingly chosen by Americans for self-defense.

16 To the extent that there was discussion about  
17 the intermediate scrutiny standard and different  
18 articulations of it, I would submit that those are  
19 different articulation of the standard and not  
20 fundamental differences in the test being applied.

21 In fact, in each of the cases, including the  
22 D.C. Circuit's decision in Heller II, and the other  
23 cases in New York, Connecticut and Colorado, the  
24 courts reached the same result, which is that these  
25 laws satisfy intermediate scrutiny. There is a

1 minimal, if any, burden on the Second Amendment right,  
2 and that the government's evidence, substantially  
3 similar to the evidence in this case, is sufficient to  
4 meet that burden.

5 A word with respect to Chief Johnson's  
6 testimony, Your Honor. The testimony of Chief Johnson  
7 before the General Assembly was not anything, first of  
8 all, that was in the custody or control of the  
9 defendants, and moreover, not anything that the  
10 defendants had intended to use until the plaintiffs  
11 made I think a legally inaccurate argument that the  
12 Court's focus needed to be on evidence that was before  
13 the General Assembly.

14 But more importantly, it's in the public record.  
15 It's available for Your Honor to have taken judicial  
16 notice of it, whether it was cited by any party. It  
17 also duplicates the testimony that he had in this case  
18 on the same issues, and plaintiffs had a full  
19 opportunity to examine him with respect to that when  
20 they deposed him in this case.

21 Notably absent from the plaintiffs' presentation  
22 was any discussion really of the testimony that the  
23 law enforcement officers, the chief law enforcement  
24 officers of Maryland's largest law enforcement  
25 agencies have given in this case, which in and of

1       itself provides more than sufficient justification for  
2       the predictive judgment to the General Assembly  
3       discussing the particular dangers that these firearms  
4       present to law enforcement in the context of mass  
5       shootings and these active shooter events, that even  
6       though we are fortunate enough to not have had one in  
7       Maryland, that we are as much at risk as any state in  
8       the country, except that our General Assembly is  
9       trying to enact laws to protect against that.

10             The simple fact that, as Mr. Sweeney said,  
11       praise the Lord, it hasn't happened here does not mean  
12       that the General Assembly is left to simply hope that  
13       it doesn't happen, without taking action, when there  
14       is substantial evidence to support the predictive  
15       judgment that it made.

16             For those reasons, Your Honor, unless Your Honor  
17       has questions, the defendants would ask that the Court  
18       grant their motion for summary judgment and dismiss  
19       the lawsuit.

20             THE COURT: Thank you, Mr. Fader. I appreciate  
21       it.

22             Mr. Sweeney, would you like a rebuttal?

23             MR. SWEENEY: Briefly, Your Honor, yes.

24             I must say that rebuttal generated a flurry of  
25       notes for me from my team. I will do my best to give

1       them justice.

2               First, with respect to what Dr. Koper said about  
3       the efficacy of the federal ban in his official report  
4       to the Department of Justice and the United States  
5       Congress in 2004, on page two, one, there has not been  
6       a clear decline in the use of assault rifles.

7               Two, the ban has not yet reduced the use of  
8       large-capacity magazines in crime.

9               Even if you are looking for a narrow purpose,  
10       not the prevention of crimes, not the prevention of  
11       assaults on law enforcement officers, not the  
12       prevention of mass shootings, but simply less frequent  
13       use of the banned firearms and magazines, that did not  
14       occur in the ten years of the federal ban, according  
15       to the official report on its effectiveness.

16               THE COURT: Mr. Fader suggested that the federal  
17       ban did not prohibit transfers of the existing  
18       weapons?

19               MR. SWEENEY: Well, Your Honor, the Maryland ban  
20       is far more vulnerable to substitution than the  
21       federal ban was.

22               Imagine, if you will, the difference between  
23       having a ban that covers all of the United States and  
24       a ban in Maryland that does not extend to  
25       Pennsylvania, Delaware or Virginia, three contiguous

1 states, in which the magazines in question can readily  
2 be purchased, brought into the state, and lawfully  
3 possessed by Marylanders. That was not an incident  
4 with the federal ban. The Maryland ban is far more  
5 vulnerable to substitution of other firearms.

6 So true with respect to semiautomatic rifles  
7 covered by the Maryland ban. The heavy-barrel AR-15,  
8 for instance, which is exempted from the ban by  
9 statute, can be readily created out of any AR-15 by  
10 simply substituting in a heavy barrel.

11 And what's the purpose of the heavy barrel?  
12 Well, it's heavier. It keeps the gun from floating up  
13 during frequent fire, and it keeps the barrel from  
14 overheating during many rounds being exchanged. That  
15 makes it very useful for competitive marksmanship.

16 Now if any AR-15 can be readily converted to  
17 make it legal under Maryland's law, how could it be  
18 any more vulnerable than the federal law was -- any  
19 less vulnerable than the federal law was?

20 Let me address for a moment the Rule 702 issue,  
21 Your Honor, because frankly, it troubles me.

22 While the test of substantial evidence to  
23 support, and we maintain there is substantial evidence  
24 before the legislature, because how could the  
25 legislature have draw inferences from evidence which

1 was not before it?

2 But let's set aside whether it's the  
3 substantiality of evidence before the legislature or  
4 that which was added after the fact. That evidence  
5 itself must pass Rule 702, or what is Rule 702 for?

6 I have seen no case --

7 THE COURT: I think Rule 702 primarily applies  
8 to the admissibility of evidence in a court  
9 proceeding. It's not ordinarily something that the  
10 legislature has to deal with.

11 MR. SWEENEY: And this is a court proceeding.

12 THE COURT: But when it's in front of a  
13 legislature, it is a legislative proceeding.

14 MR. SWEENEY: And when it comes to court, there  
15 must be substantial evidence.

16 THE COURT: Right.

17 MR. SWEENEY: The substantiality of evidence  
18 must be evidence which is admissible, and the  
19 admissibility of evidence is ruled by, among other  
20 things, Rule 702.

21 Mr. Fader's position is that the rights of  
22 Marylanders can turn on junk science, and that's  
23 perfectly fine, and that this Court has nothing to say  
24 in that, that you have no role whatsoever in  
25 determining the admissibility of that evidence,

1 whether it's reliable, whether it's credible, and  
2 whether the experts are even basing their opinions on  
3 expertise.

4 THE COURT: Well, I don't agree with your  
5 characterization of Mr. Fader's argument, but I  
6 understand your point and your reasons for challenging  
7 Dr. Koper's opinions.

8 MR. SWEENEY: Dr. Koper's opinions are simply  
9 not based on sufficient data. They would not pass  
10 muster under Rule 702.

11 Mr. Fader suggested there was a pipeline of  
12 manufactured firearms that had been manufactured prior  
13 to the effective date of the federal ban that affected  
14 its efficacy. There is no evidence that there was a  
15 ten-year pipeline of supply. In other words, whatever  
16 pipeline there was, it certainly was not shown to have  
17 lasted the full extent of the ten-year ban, and that  
18 was certainly not addressed.

19 Even if you consider the evidence before the  
20 legislature, there is no substantial tailoring here.  
21 They didn't try to make this law as narrow as  
22 necessary to intrude the least on Second Amendment  
23 rights. No effort was done by the General Assembly.  
24 There is no evidence of that. No effort was even done  
25 by Mr. Fader.

1           He comes in and he says oh, well, we didn't ban  
2 all semiautomatic rifles, only some, only the most  
3 popular semiautomatic rifles.

4           We have in the record evidence from the Maryland  
5 State Police that the AR-15 is the most popular  
6 centerfire semiautomatic rifle in the United States,  
7 followed only by the AK-47, both of them banned.

8           They cannot pretend that they have left unbanned  
9 large swaths of semiautomatic rifles. Even if there  
10 was support for their subclass argument, their  
11 subclass argument fails.

12           They draw their subclass argument from Heller  
13 and they make it in three different contexts.

14           First they say because this isn't the ban of a  
15 complete class of firearms, it isn't protected by the  
16 Second Amendment. It doesn't even involve the Second  
17 Amendment.

18           Then they say well, there's no burden on Second  
19 Amendment rights, because we didn't ban a complete  
20 class of firearms.

21           The weight they try to put on the word class in  
22 Heller will not be borne by the language there.

23           Judge Scalia said the handgun ban amounts to a  
24 prohibition of an entire class of arms that is  
25 overwhelmingly chosen by American society for that



1 lawful purpose.

2 In 1994, in the Staples case, cited and relied  
3 upon by the defendants in their opening brief, the  
4 Supreme Court had occasion to distinguish between  
5 automatic and semiautomatic rifles. The context of  
6 that case is critical, and even more important is the  
7 language used by the court there.

8 It is also important to understand that the  
9 author of that opinion was Judge Thomas, who joined in  
10 Scalia's opinion in Heller, Justice Scalia, who  
11 authored Heller, Justice Kennedy, who joined in  
12 Justice Scalia's opinion, as well as Justice Ginsburg,  
13 who joined in the Staples majority opinion.

14 Now, what did that case involve? It was a  
15 violation of the same act that had been involved in  
16 the Miller case about what arms are prohibited, and  
17 what arms are covered by the Second Amendment.

18 Now, there wasn't a Second Amendment discussion  
19 back in 1994, but what there was was a detailed  
20 discussion about the critical distinction between  
21 automatic and semiautomatic fire. In fact, that's the  
22 point for which Mr. Fader relies on that case in his  
23 opening brief; but what he didn't read carefully  
24 enough was what did that case really involve?

25 It was the prosecution of an individual who was

1 in possession of an AR-15 that had been converted to  
2 make it capable of automatic fire, and the government  
3 said you're guilty. You're guilty under Miller.

4 This is a firearm that had to have been  
5 registered with the ATF.

6 By the way, I can purchase an M16 today, pay the  
7 tax stamp with the IRS -- the ATF, and I can come home  
8 with it and use it in Maryland. It's not banned by  
9 the law, a fully automatic M16, but that's beside the  
10 point.

11 What this case said was the government's  
12 position was that an AR-15, a semiautomatic firearm,  
13 is so dangerous that the person who owns it should  
14 expect that it might fall under the Act and require  
15 registration.

16 The individual said I didn't know it was capable  
17 of automatic fire. I never used it for automatic  
18 fire. I had no idea.

19 He was convicted, and the Supreme Court rejected  
20 that, and they went through great detail about the  
21 difference between automatic fire and semiautomatic  
22 fire. They said that the AR-15s capable of being  
23 converted to fully automatic fire are a class of  
24 weapons, a class of weapons, not just semiautomatic  
25 rifles being a class of weapons, not AR-15

1 semiautomatic rifles being a class of weapons.

2 But AR-15 semiautomatic rifles capable of being  
3 readily converted into automatic fire were referred to  
4 by the Supreme Court in the Staples case not once as a  
5 class, not twice as a class, three times as a class.

6 I doubt that Justice Scalia, writing in the  
7 Heller case in 2008, was unmindful of the Staples  
8 case, which he cited in his Heller case, or the fact  
9 that they relied upon the word class to describe a  
10 narrow category of only some semiautomatic rifles. It  
11 simply doesn't bear the weight that defendants would  
12 try to put on it.

13 So what we come down to in this case is is there  
14 evidence substantial or otherwise to support the Act?  
15 Where is the narrow tailoring? Why ten rounds? Why  
16 not 15?

17 Fifteen was the number involved in Colorado.  
18 Seven was used in New York, and that was rejected out  
19 of hand by the court. Seven, on a case relied on by  
20 Mr. Fader, was found to be constitutionally  
21 impermissible. The Colorado court said 15.

22 Where is the attempt to narrowly tailor? Where  
23 did ten come from? Where is the support for it?

24 The Washington Post study that they rely on to  
25 suggest that well, maybe there was an effect after all

1 with respect to the federal ban is another example of  
2 unreliable data collected by the media, untested,  
3 unreported in any peer review journal.

4 The people of Maryland deserve better, and we  
5 are relying on Your Honor to be the gatekeeper.

6 Thank you very much for your time and for your  
7 patience, Your Honor.

8 THE COURT: Thank you, Mr. Sweeney.

9 As I said at the beginning, I do appreciate the  
10 very careful, thorough briefing and argument from both  
11 sides, and that you obviously have been able to work  
12 together well. These are important issues, and I will  
13 get a written decision out for you as soon as  
14 possible. Thank you all very much.

15 (The proceedings concluded.)  
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REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of Stephen V. Kolbe, et al., Plaintiffs vs. Martin J. O'Malley, Defendants, et al., Civil Action No. CCB-13-2841, before the Honorable Catherine C. Blake, United States District Judge, on July 22, 2014 is true and accurate.

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Gail A. Simpkins  
Official Court Reporter

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<b>\$</b>	<b>6</b>	56:21	<b>allowing</b> [3] - 15:8, 21:11, 33:14	<b>appear</b> [4] - 8:18, 10:21, 38:17, 67:4
<b>\$250,000</b> [1] - 62:20	<b>600</b> [1] - 28:18	<b>acknowledged</b> [1] - 47:1	<b>alone</b> [1] - 4:11	<b>applicable</b> [3] - 9:21, 10:5, 32:23
<b>1</b>	<b>634</b> [1] - 71:18	<b>acquire</b> [1] - 37:7	<b>alternative</b> [1] - 55:3	<b>application</b> [4] - 22:2, 23:5, 54:7, 58:20
<b>1</b> [1] - 59:10	<b>654</b> [1] - 32:17	<b>act</b> [2] - 33:23, 81:15	<b>alternatives</b> [4] - 55:6, 58:9, 59:12, 59:13	<b>applications</b> [1] - 72:10
<b>115</b> [1] - 47:6	<b>69,072</b> [1] - 9:12	<b>Act</b> [4] - 40:10, 40:11, 82:14, 83:14	<b>Amendment</b> [74] - 3:2, 3:7, 4:5, 4:11, 4:16, 4:20, 6:4, 6:13, 6:17, 6:23, 9:15, 9:17, 10:24, 11:20, 12:3, 13:3, 13:9, 13:17, 13:21, 13:24, 14:9, 14:19, 15:1, 15:3, 16:14, 16:20, 17:11, 17:16, 17:23, 18:14, 18:22, 19:22, 20:9, 20:13, 20:14, 20:25, 21:9, 21:18, 21:24, 21:25, 22:7, 22:9, 22:17, 22:24, 29:22, 34:17, 34:20, 35:3, 35:23, 48:10, 48:15, 48:20, 49:1, 49:5, 49:6, 50:5, 50:10, 50:14, 50:17, 50:24, 51:4, 51:22, 52:20, 56:8, 63:23, 66:4, 66:10, 74:1, 79:22, 80:16, 80:17, 80:19, 81:17, 81:18	<b>applied</b> [9] - 3:9, 10:7, 10:23, 12:3, 35:18, 35:21, 36:9, 55:21, 73:20
<b>128</b> [1] - 42:21	<b>7</b>	<b>acted</b> [1] - 3:15	<b>Amendments</b> [74] - 3:2, 3:7, 4:5, 4:11, 4:16, 4:20, 6:4, 6:13, 6:17, 6:23, 9:15, 9:17, 10:24, 11:20, 12:3, 13:3, 13:9, 13:17, 13:21, 13:24, 14:9, 14:19, 15:1, 15:3, 16:14, 16:20, 17:11, 17:16, 17:23, 18:14, 18:22, 19:22, 20:9, 20:13, 20:14, 20:25, 21:9, 21:18, 21:24, 21:25, 22:7, 22:9, 22:17, 22:24, 29:22, 34:17, 34:20, 35:3, 35:23, 48:10, 48:15, 48:20, 49:1, 49:5, 49:6, 50:5, 50:10, 50:14, 50:17, 50:24, 51:4, 51:22, 52:20, 56:8, 63:23, 66:4, 66:10, 74:1, 79:22, 80:16, 80:17, 80:19, 81:17, 81:18	<b>applies</b> [3] - 35:5, 35:20, 78:7
<b>131</b> [1] - 43:7	<b>702</b> [9] - 44:13, 44:16, 44:17, 77:20, 78:5, 78:7, 78:20, 79:10	<b>Action</b> [1] - 85:4	<b>amendment</b> [4] - 6:14, 6:19, 13:13, 13:19	<b>apply</b> [10] - 11:18, 20:10, 20:12, 22:6, 22:12, 53:3, 53:11, 54:14, 60:25, 71:12
<b>15</b> [2] - 83:16, 83:21	<b>75</b> [1] - 24:15	<b>action</b> [1] - 75:13	<b>American</b> [2] - 44:11, 80:25	<b>applying</b> [2] - 56:11, 57:2
<b>1791</b> [1] - 6:13	<b>77R</b> [2] - 58:19, 58:21	<b>active</b> [2] - 33:6, 75:5	<b>Americans</b> [4] - 8:18, 22:21, 73:9, 73:15	<b>appreciate</b> [3] - 39:8, 75:20, 84:9
<b>1868</b> [1] - 6:22	<b>8</b>	<b>added</b> [1] - 78:4	<b>ammunition</b> [1] - 6:15	<b>approach</b> [5] - 10:15, 52:9, 68:17, 68:24, 72:14
<b>18th</b> [1] - 13:16	<b>8.2</b> [1] - 7:21	<b>adding</b> [1] - 9:11	<b>amorphous</b> [1] - 8:2	<b>appropriate</b> [5] - 6:21, 16:9, 36:15, 37:10, 66:12
<b>1982</b> [2] - 24:16, 25:19	<b>84</b> [2] - 42:8, 45:18	<b>additional</b> [3] - 19:16, 30:15, 31:4	<b>amounts</b> [1] - 80:23	<b>AR-15</b> [11] - 23:18, 37:22, 37:24, 77:7, 77:9, 77:16, 80:5, 82:1, 82:12, 82:25, 83:2
<b>1989</b> [1] - 16:3	<b>85</b> [2] - 24:8, 24:14	<b>address</b> [10] - 11:9, 18:9, 24:23, 31:21, 32:5, 37:2, 42:8, 51:15, 64:17, 77:20	<b>amorphous</b> [1] - 8:2	<b>AR-15s</b> [2] - 36:7, 82:22
<b>1994</b> [3] - 40:4, 81:2, 81:19	<b>9</b>	<b>addressed</b> [8] - 14:21, 18:16, 34:5, 35:13, 35:16, 69:11, 79:18	<b>amorphous</b> [1] - 8:2	<b>area</b> [2] - 40:1, 41:22
<b>1997</b> [3] - 40:9, 59:22, 69:17	<b>92,000</b> [1] - 46:17	<b>addressing</b> [3] - 9:15, 37:4, 39:23	<b>amorphous</b> [1] - 8:2	<b>argue</b> [3] - 13:15, 13:18, 21:2
<b>19th</b> [1] - 14:1	<b>92,515</b> [1] - 9:12	<b>administrative</b> [1] - 30:9	<b>amorphous</b> [1] - 8:2	<b>arguing</b> [1] - 19:19
<b>2</b>	<b>94</b> [1] - 40:25	<b>admissibility</b> [4] - 25:9, 78:8, 78:19, 78:25	<b>amorphous</b> [1] - 8:2	<b>argument</b> [10] - 19:13, 29:11, 33:7, 58:9, 74:11, 79:5, 80:10, 80:11, 80:12, 84:10
<b>20</b> [1] - 58:16	<b>95</b> [1] - 42:9	<b>admissible</b> [2] - 65:14, 78:18	<b>amorphous</b> [1] - 8:2	<b>arguments</b> [2] - 3:22, 39:7
<b>2004</b> [5] - 40:10, 40:13, 67:7, 69:18, 76:5	<b>96</b> [1] - 41:13	<b>admitted</b> [1] - 61:19	<b>amorphous</b> [1] - 8:2	<b>arise</b> [1] - 32:21
<b>2008</b> [1] - 83:7	<b>A</b>	<b>admitting</b> [1] - 59:3	<b>amorphous</b> [1] - 8:2	<b>arises</b> [1] - 61:3
<b>2012</b> [4] - 7:22, 9:2, 9:12, 24:16	<b>abiding</b> [5] - 48:13, 49:8, 52:25, 54:1, 69:2	<b>adopted</b> [2] - 23:14, 52:18	<b>amorphous</b> [1] - 8:2	<b>arm</b> [5] - 19:17, 20:2, 20:3, 54:12, 54:13
<b>2013</b> [7] - 9:4, 9:6, 9:12, 59:10, 62:13, 62:20, 63:1	<b>able</b> [12] - 28:2, 28:14, 36:2, 36:3, 40:14, 60:14, 60:19, 60:20, 62:7, 65:16, 69:9, 84:11	<b>advance</b> [3] - 29:1, 60:5, 65:5	<b>amorphous</b> [1] - 8:2	<b>armed</b> [1] - 49:25
<b>2014</b> [3] - 1:10, 36:25, 85:6	<b>abortion</b> [1] - 11:23	<b>advanced</b> [1] - 44:9	<b>amorphous</b> [1] - 8:2	<b>arms</b> [20] - 3:2, 13:16, 16:15, 18:20, 18:21, 20:3, 48:9, 48:16, 48:22, 49:4, 49:11, 50:1, 50:6, 50:21, 50:23, 53:1, 54:16, 80:24, 81:16, 81:17
<b>20th</b> [1] - 14:3	<b>above-entitled</b> [1] - 1:12	<b>advocating</b> [1] - 3:22	<b>amorphous</b> [1] - 8:2	<b>Army</b> [1] - 23:23
<b>21</b> [1] - 24:16	<b>abroad</b> [1] - 68:7	<b>affect</b> [1] - 10:22	<b>amorphous</b> [1] - 8:2	<b>arose</b> [2] - 14:1, 14:3
<b>22</b> [2] - 1:10, 85:6	<b>absent</b> [2] - 58:7, 74:21	<b>affected</b> [1] - 79:13	<b>amorphous</b> [1] - 8:2	<b>article</b> [1] - 27:5
<b>22,000</b> [1] - 47:11	<b>absolute</b> [2] - 4:11, 4:17	<b>affects</b> [2] - 16:25, 19:25	<b>amorphous</b> [1] - 8:2	
<b>239</b> [1] - 32:17	<b>absolutely</b> [2] - 15:1, 73:5	<b>affirm</b> [1] - 44:14	<b>amorphous</b> [1] - 8:2	
<b>3</b>	<b>accepted</b> [1] - 50:17	<b>agencies</b> [2] - 23:23, 74:25	<b>amorphous</b> [1] - 8:2	
<b>3.1</b> [1] - 8:16	<b>accessible</b> [1] - 26:24	<b>agree</b> [5] - 38:1, 39:5, 42:21, 70:16, 79:4	<b>amorphous</b> [1] - 8:2	
<b>30-round</b> [1] - 23:18	<b>accommodate</b> [2] - 4:12, 30:10	<b>agreeing</b> [1] - 53:14	<b>amorphous</b> [1] - 8:2	
<b>4</b>	<b>accomplish</b> [2] - 56:14, 69:9	<b>AK-47</b> [1] - 80:7	<b>amorphous</b> [1] - 8:2	
<b>40</b> [1] - 38:23	<b>according</b> [2] - 9:2, 76:14	<b>AK-47s</b> [1] - 36:7	<b>amorphous</b> [1] - 8:2	
<b>43,647</b> [1] - 9:3	<b>account</b> [1] - 20:13	<b>al</b> [6] - 1:4, 1:7, 2:4, 85:3, 85:4	<b>amorphous</b> [1] - 8:2	
<b>456</b> [1] - 12:12	<b>accurate</b> [1] - 85:7	<b>allegation</b> [1] - 37:13	<b>amorphous</b> [1] - 8:2	
<b>486</b> [1] - 12:11	<b>achieve</b> [2] - 56:1,	<b>alleged</b> [1] - 7:20	<b>amorphous</b> [1] - 8:2	
<b>5</b>		<b>Allen</b> [3] - 25:14, 27:10, 27:23	<b>amorphous</b> [1] - 8:2	
<b>50</b> [2] - 24:10, 24:17		<b>allow</b> [2] - 36:9, 69:10	<b>amorphous</b> [1] - 8:2	
<b>51</b> [1] - 62:2		<b>allowed</b> [4] - 34:16, 38:22, 40:12, 65:15	<b>amorphous</b> [1] - 8:2	
<b>58,075</b> [1] - 9:5			<b>amorphous</b> [1] - 8:2	

<p><b>articulate</b> [2] - 11:25, 14:17</p> <p><b>articulated</b> [5] - 12:12, 12:17, 12:21, 12:24, 17:9</p> <p><b>articulating</b> [2] - 4:3, 12:9</p> <p><b>articulation</b> [2] - 12:7, 73:19</p> <p><b>articulations</b> [2] - 12:4, 73:18</p> <p><b>as-applied</b> [1] - 36:9</p> <p><b>aside</b> [1] - 78:2</p> <p><b>assault</b> [29] - 2:20, 7:13, 7:25, 9:1, 9:9, 16:2, 16:4, 22:7, 24:17, 28:23, 33:3, 40:2, 41:3, 41:9, 41:16, 42:9, 42:11, 42:24, 43:2, 43:5, 43:11, 45:19, 45:20, 45:24, 46:3, 62:5, 63:5, 69:22, 76:6</p> <p><b>assaults</b> [7] - 3:18, 23:12, 42:19, 46:4, 59:6, 72:19, 76:11</p> <p><b>assembled</b> [2] - 28:13, 49:16</p> <p><b>Assembly</b> [22] - 3:15, 29:10, 29:15, 29:18, 34:6, 46:25, 62:17, 65:9, 65:11, 65:12, 65:15, 66:9, 66:12, 71:6, 71:9, 72:13, 74:7, 74:13, 75:2, 75:8, 75:12, 79:23</p> <p><b>Assembly's</b> [2] - 31:17, 65:4</p> <p><b>asserts</b> [1] - 45:5</p> <p><b>assessment</b> [2] - 20:11, 52:14</p> <p><b>Association</b> [4] - 27:8, 27:19, 27:21, 57:22</p> <p><b>assume</b> [2] - 43:8, 53:24</p> <p><b>assumed</b> [5] - 3:6, 21:17, 21:21, 21:25, 45:10</p> <p><b>ATF</b> [2] - 82:5, 82:7</p> <p><b>attempt</b> [2] - 27:17, 83:22</p> <p><b>attempting</b> [1] - 72:24</p> <p><b>attention</b> [1] - 36:22</p> <p><b>author</b> [2] - 39:25, 81:9</p> <p><b>authored</b> [1] - 81:11</p> <p><b>automatic</b> [11] - 23:16, 23:25, 81:5, 81:21, 82:2, 82:9, 82:17, 82:21, 82:23, 83:3</p>	<p><b>availability</b> [4] - 29:3, 68:12, 69:4, 69:7</p> <p><b>available</b> [8] - 22:23, 26:19, 26:20, 43:11, 43:16, 68:13, 68:14, 74:15</p> <p><b>average</b> [2] - 8:15, 24:14</p> <p><b>avoid</b> [1] - 14:15</p> <p><b>aware</b> [3] - 7:2, 25:10, 41:7</p> <p style="text-align: center;"><b>B</b></p> <p><b>background</b> [1] - 58:21</p> <p><b>balance</b> [1] - 51:19</p> <p><b>balancing</b> [12] - 52:9, 52:22, 53:4, 53:8, 53:13, 54:18, 71:16, 71:19, 71:22, 71:25, 72:21</p> <p><b>Baltimore</b> [1] - 1:9</p> <p><b>ban</b> [60] - 15:8, 16:3, 41:3, 41:9, 41:16, 41:23, 42:7, 45:18, 45:23, 46:2, 51:23, 54:23, 58:24, 59:20, 60:17, 62:4, 63:4, 63:25, 66:22, 66:24, 67:4, 67:14, 67:19, 67:22, 67:24, 68:1, 68:3, 68:6, 68:9, 68:17, 68:22, 68:24, 69:9, 69:10, 69:13, 70:2, 71:12, 71:13, 72:14, 72:15, 76:3, 76:7, 76:14, 76:17, 76:19, 76:21, 76:23, 76:24, 77:4, 77:7, 77:8, 79:13, 79:17, 80:1, 80:14, 80:19, 80:23, 84:1</p> <p><b>banned</b> [21] - 7:14, 19:10, 19:15, 40:2, 42:19, 45:4, 46:15, 46:22, 47:1, 47:25, 48:1, 48:12, 49:17, 49:23, 55:17, 58:20, 73:6, 76:13, 80:7, 82:8</p> <p><b>banning</b> [2] - 10:8, 43:11</p> <p><b>bans</b> [24] - 2:20, 3:16, 22:8, 23:8, 29:1, 38:15, 40:20, 42:7, 42:9, 42:11, 45:16, 46:8, 55:4, 57:19, 58:13, 59:10, 59:11, 62:7, 63:14, 63:17,</p>	<p>68:18, 69:16, 69:21, 70:18</p> <p><b>Barbara</b> [1] - 61:23</p> <p><b>barrel</b> [5] - 49:9, 77:7, 77:10, 77:11, 77:13</p> <p><b>based</b> [16] - 13:6, 21:10, 22:2, 25:19, 27:13, 39:16, 41:2, 41:5, 43:10, 43:14, 43:15, 44:12, 59:21, 68:20, 79:9</p> <p><b>bases</b> [1] - 69:11</p> <p><b>basing</b> [1] - 79:2</p> <p><b>basis</b> [7] - 29:20, 32:5, 32:10, 34:5, 36:15, 36:20, 52:12</p> <p><b>bear</b> [5] - 3:2, 20:2, 48:16, 51:3, 83:11</p> <p><b>bearable</b> [2] - 19:17, 48:21</p> <p><b>bearing</b> [1] - 49:16</p> <p><b>bears</b> [1] - 62:23</p> <p><b>becomes</b> [1] - 20:10</p> <p><b>beginning</b> [3] - 25:18, 64:8, 84:9</p> <p><b>behold</b> [1] - 63:6</p> <p><b>below</b> [1] - 30:14</p> <p><b>benefit</b> [1] - 39:18</p> <p><b>beside</b> [1] - 82:9</p> <p><b>best</b> [4] - 28:10, 56:16, 72:2, 75:25</p> <p><b>better</b> [2] - 5:12, 84:4</p> <p><b>between</b> [13] - 19:24, 23:2, 23:7, 31:18, 39:3, 51:19, 55:22, 56:13, 72:4, 76:22, 81:4, 81:20, 82:21</p> <p><b>bicyclists</b> [1] - 62:1</p> <p><b>Bill</b> [6] - 4:15, 14:11, 22:14, 60:9, 60:10, 60:11</p> <p><b>binding</b> [2] - 9:23, 53:19</p> <p><b>bit</b> [6] - 17:4, 19:12, 19:20, 24:24, 25:12, 35:10</p> <p><b>black</b> [1] - 26:1</p> <p><b>Blake</b> [2] - 1:13, 85:6</p> <p><b>Bloomberg</b> [3] - 62:20, 62:22, 63:1</p> <p><b>Bloomberg's</b> [1] - 62:23</p> <p><b>blue</b> [1] - 63:11</p> <p><b>blunderbuss</b> [1] - 48:25</p> <p><b>BMW</b> [1] - 61:25</p> <p><b>Board</b> [3] - 56:12, 57:7, 58:2</p> <p><b>border</b> [2] - 13:15, 13:17</p>	<p><b>borne</b> [1] - 80:22</p> <p><b>bottom</b> [1] - 31:10</p> <p><b>box</b> [1] - 26:1</p> <p><b>branch</b> [1] - 52:11</p> <p><b>breached</b> [1] - 25:25</p> <p><b>break</b> [2] - 61:1, 64:4</p> <p><b>break-in</b> [1] - 61:1</p> <p><b>Breyer</b> [3] - 52:22, 53:4, 71:20</p> <p><b>Breyer's</b> [1] - 71:21</p> <p><b>brief</b> [7] - 9:4, 31:7, 56:3, 59:1, 60:13, 81:3, 81:23</p> <p><b>briefing</b> [2] - 65:23, 84:10</p> <p><b>briefly</b> [5] - 2:12, 18:10, 31:21, 51:16, 75:23</p> <p><b>briefs</b> [1] - 23:22</p> <p><b>bringing</b> [1] - 49:11</p> <p><b>broad</b> [1] - 52:19</p> <p><b>broadcasters</b> [5] - 30:16, 30:18, 30:22, 30:24, 31:2</p> <p><b>Broadcasting</b> [5] - 30:7, 30:8, 30:13, 44:22, 59:15</p> <p><b>brought</b> [4] - 34:21, 36:19, 36:21, 77:2</p> <p><b>buffer</b> [1] - 11:22</p> <p><b>build</b> [2] - 9:9, 9:10</p> <p><b>built</b> [1] - 66:15</p> <p><b>bulletin</b> [1] - 36:24</p> <p><b>burden</b> [22] - 3:9, 3:12, 9:19, 13:2, 20:8, 20:21, 20:24, 21:18, 21:25, 22:1, 22:9, 22:17, 29:25, 31:1, 51:6, 53:25, 57:1, 65:19, 65:22, 74:1, 74:4, 80:18</p> <p><b>burdened</b> [2] - 3:7, 20:15</p> <p><b>burdens</b> [2] - 9:17, 20:13</p> <p><b>business</b> [2] - 25:24, 64:11</p> <p style="text-align: center;"><b>C</b></p> <p><b>cable</b> [1] - 30:25</p> <p><b>California</b> [3] - 16:2, 58:1, 61:23</p> <p><b>calm</b> [1] - 60:21</p> <p><b>campaigns</b> [1] - 15:20</p> <p><b>campus</b> [2] - 61:23, 62:1</p> <p><b>cannot</b> [8] - 19:1, 29:8, 34:24, 41:14, 44:12, 63:23, 73:5,</p>	<p>80:8</p> <p><b>cap</b> [1] - 58:16</p> <p><b>capable</b> [4] - 82:2, 82:16, 82:22, 83:2</p> <p><b>capacity</b> [37] - 2:20, 2:25, 16:3, 18:13, 18:24, 19:2, 19:9, 19:24, 22:8, 23:25, 24:7, 24:9, 24:11, 24:12, 24:13, 24:18, 26:6, 28:24, 40:3, 41:3, 41:9, 41:16, 45:3, 45:19, 45:24, 46:3, 58:16, 60:18, 62:3, 63:5, 67:8, 67:11, 67:13, 68:6, 69:21, 70:7, 76:8</p> <p><b>Captain</b> [1] - 63:11</p> <p><b>captain</b> [1] - 62:14</p> <p><b>careful</b> [3] - 46:7, 61:20, 84:10</p> <p><b>carefully</b> [1] - 81:23</p> <p><b>carry</b> [5] - 10:1, 13:25, 14:3, 14:4, 30:25</p> <p><b>Carter</b> [3] - 29:23, 54:6, 57:11</p> <p><b>Case</b> [1] - 2:3</p> <p><b>case</b> [97] - 1:12, 3:14, 3:24, 4:4, 4:9, 4:10, 4:18, 4:21, 6:20, 10:13, 10:20, 10:24, 11:2, 11:6, 11:15, 11:17, 11:22, 12:18, 12:20, 12:21, 14:23, 18:25, 21:5, 26:11, 28:6, 28:7, 30:2, 30:7, 30:16, 30:22, 31:6, 32:21, 34:12, 34:20, 35:2, 35:4, 35:12, 35:24, 36:22, 39:11, 39:12, 39:19, 41:22, 43:23, 44:18, 44:22, 44:25, 45:17, 49:19, 50:7, 52:5, 52:12, 53:13, 53:19, 53:22, 54:6, 55:21, 56:9, 56:12, 56:23, 57:5, 57:20, 57:23, 57:24, 58:1, 58:7, 59:16, 63:14, 63:18, 64:9, 64:20, 64:22, 66:1, 66:15, 67:10, 70:13, 74:3, 74:17, 74:20, 74:25, 78:6, 81:2, 81:6, 81:14, 81:16, 81:22, 81:24, 82:11, 83:4, 83:7, 83:8, 83:13, 83:19</p> <p><b>case-by-case</b> [1] - 52:12</p>
--	--	--	---	---

<p><b>cases</b> [28] - 3:3, 4:23, 11:20, 12:9, 12:22, 22:12, 24:15, 25:6, 25:7, 25:11, 25:22, 31:6, 39:14, 39:16, 44:13, 54:20, 55:13, 55:18, 56:3, 56:8, 57:13, 57:15, 57:16, 57:18, 58:4, 58:6, 73:21, 73:23</p> <p><b>casualties</b> [1] - 33:24</p> <p><b>categorical</b> [2] - 35:11, 35:20</p> <p><b>category</b> [2] - 24:13, 83:10</p> <p><b>Catherine</b> [2] - 1:13, 85:5</p> <p><b>causation</b> [5] - 44:1, 45:2, 45:8, 64:23, 64:25</p> <p><b>caused</b> [1] - 42:3</p> <p><b>causing</b> [1] - 23:19</p> <p><b>caveats</b> [2] - 66:18, 66:21</p> <p><b>CCB-13-2841</b> [2] - 1:6, 85:5</p> <p><b>CCB-13-cv-2841</b> [1] - 2:3</p> <p><b>center</b> [1] - 62:21</p> <p><b>centerfire</b> [1] - 80:6</p> <p><b>central</b> [3] - 4:19, 6:6, 22:16</p> <p><b>centric</b> [1] - 17:12</p> <p><b>Century</b> [3] - 13:16, 14:1, 14:3</p> <p><b>certain</b> [3] - 14:12, 15:21, 67:3</p> <p><b>certainly</b> [17] - 7:1, 7:5, 10:16, 11:1, 17:7, 17:21, 18:17, 19:3, 23:7, 32:12, 34:6, 35:15, 37:3, 39:5, 61:14, 79:16, 79:18</p> <p><b>certainty</b> [3] - 66:6, 66:7, 71:8</p> <p><b>CERTIFICATE</b> [1] - 85:1</p> <p><b>certify</b> [1] - 85:2</p> <p><b>chair</b> [1] - 62:15</p> <p><b>challenge</b> [15] - 25:8, 25:10, 29:22, 34:22, 34:23, 34:24, 35:6, 35:18, 35:21, 36:10, 36:15, 36:20, 37:11, 46:14, 64:10</p> <p><b>challenged</b> [3] - 9:16, 33:2, 65:13</p> <p><b>challenges</b> [7] - 3:10, 21:24, 22:7, 34:16,</p>	<p>35:2, 35:22, 66:4</p> <p><b>challenging</b> [4] - 38:15, 64:8, 64:14, 79:6</p> <p><b>chamber</b> [1] - 19:7</p> <p><b>change</b> [5] - 10:22, 12:5, 38:2, 60:20, 61:5</p> <p><b>characterization</b> [1] - 79:5</p> <p><b>charged</b> [1] - 40:6</p> <p><b>check</b> [1] - 58:21</p> <p><b>checking</b> [1] - 26:9</p> <p><b>Chester</b> [6] - 22:11, 56:9, 56:22, 57:3, 57:12, 58:2</p> <p><b>Chief</b> [5] - 8:9, 60:2, 60:5, 74:5, 74:6</p> <p><b>chief</b> [2] - 60:17, 74:23</p> <p><b>choice</b> [5] - 47:16, 51:24, 54:18, 55:2, 63:25</p> <p><b>choose</b> [3] - 50:6, 63:20, 63:24</p> <p><b>chose</b> [1] - 49:25</p> <p><b>chosen</b> [6] - 22:21, 46:23, 56:14, 73:2, 73:15, 80:25</p> <p><b>Chovan</b> [1] - 58:2</p> <p><b>Circuit</b> [40] - 2:23, 3:25, 9:14, 9:23, 9:24, 12:16, 12:23, 20:11, 21:23, 22:11, 23:1, 23:4, 23:20, 29:16, 29:19, 29:24, 31:10, 32:15, 34:15, 34:19, 35:9, 35:10, 53:10, 53:12, 53:15, 53:19, 53:21, 54:4, 54:10, 54:20, 54:22, 55:13, 55:17, 56:8, 56:23, 57:13, 57:23, 58:5, 65:19</p> <p><b>Circuit's</b> [5] - 9:25, 10:15, 12:7, 13:1, 73:22</p> <p><b>circumstance</b> [1] - 38:3</p> <p><b>circumstances</b> [5] - 4:12, 11:20, 30:3, 33:23, 61:6</p> <p><b>citation</b> [2] - 70:19, 70:25</p> <p><b>cite</b> [2] - 47:4, 56:9</p> <p><b>cited</b> [23] - 25:5, 25:22, 28:5, 28:6, 31:7, 31:9, 56:3, 56:11, 57:3, 57:4, 57:11, 57:15, 57:20, 57:24, 57:25, 58:1,</p>	<p>58:3, 61:11, 65:23, 74:16, 81:2, 83:8</p> <p><b>citizen</b> [2] - 38:14, 54:1</p> <p><b>citizens</b> [8] - 38:14, 44:11, 48:2, 48:13, 49:8, 49:25, 53:1, 63:23</p> <p><b>Civil</b> [2] - 2:3, 85:4</p> <p><b>CIVIL</b> [1] - 1:6</p> <p><b>civilians</b> [1] - 29:5</p> <p><b>civility</b> [1] - 38:22</p> <p><b>claim</b> [9] - 29:8, 29:9, 30:5, 31:23, 32:22, 33:9, 33:13, 34:12, 34:13</p> <p><b>claims</b> [5] - 9:15, 31:20, 31:25, 32:20, 32:21</p> <p><b>clarify</b> [1] - 64:7</p> <p><b>Clark</b> [1] - 12:11</p> <p><b>class</b> [17] - 22:19, 33:17, 73:3, 73:8, 73:14, 80:15, 80:20, 80:21, 80:24, 82:23, 82:24, 82:25, 83:1, 83:5, 83:9</p> <p><b>classification</b> [1] - 12:14</p> <p><b>Clause</b> [3] - 31:24, 32:2, 33:17</p> <p><b>clear</b> [13] - 4:21, 10:14, 13:8, 16:4, 21:14, 22:15, 27:23, 29:16, 32:10, 44:20, 51:23, 54:22, 76:6</p> <p><b>clearly</b> [8] - 14:7, 16:13, 35:5, 37:11, 43:18, 50:13, 60:22, 66:6</p> <p><b>CLERK</b> [1] - 2:2</p> <p><b>clinics</b> [1] - 11:23</p> <p><b>clip</b> [1] - 23:18</p> <p><b>co</b> [1] - 62:15</p> <p><b>co-chair</b> [1] - 62:15</p> <p><b>codified</b> [3] - 3:2, 13:8, 17:16</p> <p><b>coextensive</b> [1] - 7:25</p> <p><b>cognizable</b> [1] - 64:20</p> <p><b>collected</b> [3] - 25:17, 26:7, 84:2</p> <p><b>collection</b> [4] - 27:10, 27:25, 28:1, 28:16</p> <p><b>collections</b> [1] - 27:20</p> <p><b>colloquy</b> [1] - 64:18</p> <p><b>Colorado</b> [4] - 2:25, 73:23, 83:17, 83:21</p> <p><b>Columbia</b> [5] - 47:23, 48:3, 48:5, 48:7, 65:25</p>	<p><b>Columbia's</b> [1] - 66:2</p> <p><b>combat</b> [1] - 5:23</p> <p><b>combined</b> [1] - 32:13</p> <p><b>coming</b> [2] - 61:8, 67:10</p> <p><b>commend</b> [1] - 38:21</p> <p><b>committing</b> [1] - 41:25</p> <p><b>common</b> [17] - 7:10, 14:24, 15:4, 15:17, 16:1, 16:8, 16:16, 16:19, 16:24, 17:5, 18:5, 30:2, 46:16, 46:18, 47:20, 49:12, 65:19</p> <p><b>commonly</b> [11] - 5:3, 5:8, 5:11, 46:21, 48:17, 50:18, 51:12, 53:17, 54:16, 63:20</p> <p><b>companies</b> [1] - 30:25</p> <p><b>competency</b> [1] - 7:5</p> <p><b>competitions</b> [3] - 5:17, 5:22, 5:23</p> <p><b>competitive</b> [7] - 6:3, 6:11, 6:24, 7:3, 7:7, 50:12, 77:15</p> <p><b>compilation</b> [1] - 26:3</p> <p><b>complete</b> [7] - 51:23, 53:16, 54:15, 58:10, 58:25, 80:15, 80:19</p> <p><b>completely</b> [4] - 11:6, 37:19, 37:22, 66:25</p> <p><b>component</b> [3] - 4:19, 6:7, 22:16</p> <p><b>components</b> [1] - 37:19</p> <p><b>comprehensive</b> [7] - 27:17, 27:24, 28:1, 28:3, 28:8, 28:12, 28:14</p> <p><b>concealed</b> [1] - 13:25</p> <p><b>conceded</b> [3] - 48:24, 50:4, 50:9</p> <p><b>concept</b> [3] - 4:8, 13:5, 14:24</p> <p><b>conclude</b> [2] - 41:14, 45:14</p> <p><b>concluded</b> [2] - 34:7, 84:15</p> <p><b>conclusion</b> [6] - 16:18, 28:9, 41:10, 41:11, 42:17, 72:2</p> <p><b>conclusions</b> [1] - 61:21</p> <p><b>conduct</b> [8] - 9:17, 9:20, 13:2, 20:8, 35:5, 36:2, 37:12, 52:23</p> <p><b>conducted</b> [1] - 47:10</p> <p><b>conflict</b> [3] - 3:24, 4:9, 30:5</p>	<p><b>conflicting</b> [1] - 31:12</p> <p><b>conflicts</b> [1] - 15:16</p> <p><b>Congress</b> [4] - 40:12, 44:22, 76:5</p> <p><b>Connecticut</b> [2] - 2:24, 73:23</p> <p><b>connection</b> [1] - 33:20</p> <p><b>consider</b> [10] - 29:8, 30:14, 36:13, 65:8, 65:9, 65:17, 65:20, 66:6, 66:12, 79:19</p> <p><b>consideration</b> [1] - 29:14</p> <p><b>considered</b> [10] - 20:18, 22:5, 29:18, 40:12, 50:15, 53:16, 55:6, 56:10, 58:11, 66:11</p> <p><b>considering</b> [4] - 37:10, 49:24, 57:19, 65:18</p> <p><b>consistent</b> [2] - 21:23, 35:8</p> <p><b>consistently</b> [1] - 25:19</p> <p><b>constitute</b> [2] - 19:17, 48:21</p> <p><b>Constitution</b> [5] - 4:7, 13:7, 13:9, 13:11, 13:12</p> <p><b>constitutional</b> [13] - 3:16, 10:8, 10:11, 14:10, 15:23, 45:9, 52:7, 52:13, 52:15, 52:16, 54:23, 63:19, 66:9</p> <p><b>constitutionality</b> [2] - 2:19, 44:10</p> <p><b>constitutionally</b> [1] - 83:20</p> <p><b>constrained</b> [1] - 66:9</p> <p><b>construction</b> [1] - 50:18</p> <p><b>contain</b> [1] - 49:17</p> <p><b>content</b> [1] - 53:23</p> <p><b>context</b> [17] - 12:3, 14:16, 30:3, 43:21, 44:5, 44:18, 52:2, 55:15, 56:20, 61:4, 64:22, 66:4, 66:13, 66:16, 70:11, 75:4, 81:5</p> <p><b>contexts</b> [1] - 80:13</p> <p><b>contiguous</b> [1] - 76:25</p> <p><b>continue</b> [2] - 60:19, 68:12</p> <p><b>continued</b> [1] - 69:9</p> <p><b>contract</b> [2] - 25:25, 40:7</p> <p><b>contradict</b> [1] - 3:25</p>
---	---	--	--	---



<p><b>contradicts</b> [1] - 28:10  <b>contrary</b> [2] - 3:4, 10:5  <b>control</b> [3] - 62:21, 63:12, 74:8  <b>controlling</b> [1] - 3:24  <b>convened</b> [1] - 62:25  <b>conveniently</b> [1] - 70:18  <b>converse</b> [1] - 16:23  <b>converted</b> [4] - 77:16, 82:1, 82:23, 83:3  <b>convicted</b> [1] - 82:19  <b>copied</b> [1] - 60:10  <b>copy</b> [3] - 37:1, 60:8  <b>core</b> [4] - 37:11, 52:8, 53:25, 54:8  <b>correct</b> [15] - 3:5, 25:2, 40:24, 41:18, 42:3, 42:4, 42:12, 44:24, 45:21, 45:22, 45:25, 46:1, 46:5, 46:6, 71:15  <b>correctly</b> [1] - 26:17  <b>counsel</b> [4] - 2:4, 2:6, 2:12, 39:5  <b>counterpoint</b> [1] - 17:2  <b>country</b> [4] - 61:12, 68:8, 73:13, 75:8  <b>course</b> [5] - 12:23, 27:3, 41:25, 49:18, 66:10  <b>COURT</b> [59] - 1:1, 2:10, 3:3, 5:2, 6:20, 7:9, 7:17, 9:13, 10:14, 10:17, 16:6, 17:3, 18:11, 19:3, 19:12, 20:7, 20:20, 21:13, 24:23, 25:5, 25:12, 26:10, 27:2, 27:7, 28:21, 31:22, 32:4, 32:14, 35:7, 36:21, 38:9, 38:12, 39:4, 41:20, 42:5, 43:20, 44:15, 46:19, 47:4, 47:8, 47:15, 49:20, 50:25, 51:10, 53:6, 53:14, 57:17, 61:9, 64:3, 64:7, 64:15, 70:14, 75:20, 76:16, 78:7, 78:12, 78:16, 79:4, 84:8  <b>court</b> [24] - 2:19, 20:18, 22:5, 30:10, 30:13, 30:14, 31:12, 39:13, 49:4, 50:15, 50:17, 55:13, 57:18, 59:14, 65:11, 65:14, 65:18, 66:5, 78:8, 78:11, 78:14, 81:7,</p>	<p>83:19, 83:21  <b>Court</b> [83] - 1:25, 2:3, 2:8, 2:17, 3:11, 3:24, 4:6, 4:14, 4:19, 6:6, 6:18, 9:22, 10:3, 10:6, 10:11, 10:21, 11:7, 11:9, 11:14, 11:18, 12:5, 12:9, 12:12, 12:22, 13:5, 13:8, 13:10, 13:14, 13:22, 14:7, 14:13, 15:3, 15:6, 15:11, 15:14, 16:13, 16:17, 17:9, 17:14, 17:21, 18:3, 18:21, 22:4, 22:19, 22:20, 23:3, 23:7, 29:8, 29:18, 30:6, 30:8, 35:1, 35:7, 35:11, 38:11, 38:19, 39:2, 44:24, 48:4, 51:17, 52:1, 52:6, 53:3, 54:6, 55:17, 57:4, 57:15, 58:6, 65:1, 65:8, 65:20, 65:25, 71:17, 71:18, 71:20, 71:23, 71:25, 75:17, 78:23, 81:4, 82:19, 83:4, 85:11  <b>Court's</b> [8] - 2:21, 10:3, 11:5, 16:21, 17:10, 29:14, 31:15, 74:12  <b>courts</b> [21] - 2:23, 3:6, 4:2, 6:19, 11:25, 12:21, 14:20, 16:6, 18:16, 18:17, 21:15, 23:20, 26:23, 30:11, 35:12, 35:15, 36:18, 45:9, 51:1, 55:11, 73:24  <b>covered</b> [7] - 36:6, 50:9, 50:12, 50:13, 68:1, 77:7, 81:17  <b>covers</b> [1] - 76:23  <b>created</b> [4] - 5:18, 5:24, 27:25, 77:9  <b>credible</b> [1] - 79:1  <b>crime</b> [7] - 42:11, 45:7, 59:4, 69:25, 70:2, 72:16, 76:8  <b>crimes</b> [5] - 41:17, 41:21, 41:25, 67:16, 76:10  <b>criminal</b> [4] - 34:16, 36:18, 67:13, 69:4  <b>criminals</b> [4] - 29:4, 34:9, 68:25, 70:5  <b>critical</b> [6] - 40:1, 46:10, 46:14, 60:16,</p>	<p>81:6, 81:20  <b>cross</b> [1] - 39:18  <b>cross-examination</b> [1] - 39:18  <b>custody</b> [1] - 74:8</p>	<p><b>D</b></p> <p><b>D.C</b> [4] - 2:22, 23:19, 48:2, 73:22  <b>Dan</b> [2] - 1:23, 2:7  <b>dangerous</b> [10] - 3:17, 15:9, 16:25, 18:2, 20:23, 21:12, 28:24, 18:3, 18:21, 22:4, 22:19, 22:20, 23:3, 23:7, 29:8, 29:18, 30:6, 30:8, 35:1, 35:7, 35:11, 38:11, 38:19, 39:2, 44:24, 48:4, 51:17, 52:1, 52:6, 53:3, 54:6, 55:17, 57:4, 57:15, 58:6, 65:1, 65:8, 65:20, 65:25, 71:17, 71:18, 71:20, 71:23, 71:25, 75:17, 78:23, 81:4, 82:19, 83:4, 85:11  <b>date</b> [5] - 6:21, 59:9, 68:3, 68:9, 79:13  <b>deadly</b> [2] - 33:23, 34:1  <b>deal</b> [1] - 78:10  <b>dealing</b> [5] - 11:20, 11:22, 26:3, 38:3, 66:8  <b>dealt</b> [1] - 39:8  <b>death</b> [1] - 61:25  <b>deaths</b> [1] - 42:2  <b>December</b> [1] - 62:19  <b>decide</b> [2] - 52:12, 54:5  <b>decided</b> [3] - 2:19, 3:3, 55:17  <b>deciding</b> [3] - 21:17, 43:22, 51:5  <b>decision</b> [18] - 2:22, 9:24, 9:25, 10:3, 11:5, 14:17, 14:25, 30:6, 32:3, 38:6, 39:13, 49:3, 49:4, 65:23, 65:24, 71:16, 73:22, 84:13  <b>decision-makers</b> [1] - 32:3  <b>decisions</b> [4] - 2:21, 4:1, 36:12, 56:13  <b>declaration</b> [2] - 70:19, 70:24  <b>declarations</b> [3] - 36:4, 39:17, 70:12</p>	<p><b>decline</b> [2] - 68:15, 76:6  <b>defendant</b> [2] - 2:6, 2:13  <b>DEFENDANTS</b> [1] - 1:8  <b>defendants</b> [17] - 8:8, 14:22, 18:15, 20:5, 21:7, 21:8, 30:4, 39:21, 45:13, 55:1, 59:24, 60:13, 74:9, 74:10, 75:17, 81:3, 83:11  <b>Defendants</b> [2] - 1:21, 85:4  <b>defendants'</b> [3] - 6:2, 39:20, 46:16  <b>defense</b> [32] - 4:20, 4:23, 4:24, 5:1, 6:7, 17:6, 17:18, 22:22, 27:22, 28:20, 46:21, 46:23, 47:2, 47:14, 47:16, 47:18, 47:23, 48:6, 48:19, 49:13, 50:8, 50:21, 51:20, 53:1, 53:25, 54:8, 61:3, 61:13, 63:21, 73:3, 73:9, 73:15  <b>defensive</b> [1] - 23:12  <b>define</b> [2] - 11:2, 16:12  <b>defined</b> [5] - 7:24, 13:6, 13:13, 37:11, 64:23  <b>defining</b> [1] - 14:18  <b>definition</b> [5] - 7:23, 8:2, 18:21, 27:14, 27:15  <b>degree</b> [5] - 19:14, 20:9, 41:15, 43:10, 71:7  <b>Delaware</b> [1] - 76:25  <b>demonstrate</b> [2] - 14:9, 32:18  <b>demonstrated</b> [2] - 39:19, 46:18  <b>Department</b> [2] - 40:7, 76:4  <b>departure</b> [1] - 68:19  <b>dependent</b> [1] - 13:11  <b>depose</b> [1] - 40:15  <b>deposed</b> [2] - 40:17, 74:20  <b>deposition</b> [10] - 39:18, 40:19, 40:25, 42:8, 46:7, 47:7, 47:8, 60:6, 62:20, 70:15  <b>depositions</b> [3] - 38:24, 39:15, 39:19</p>	<p><b>describe</b> [2] - 8:3, 83:9  <b>described</b> [5] - 8:1, 9:14, 12:24, 36:23, 67:4  <b>description</b> [1] - 15:2  <b>deserve</b> [1] - 84:4  <b>designed</b> [2] - 3:18, 23:13  <b>desired</b> [2] - 56:1, 56:21  <b>detail</b> [1] - 82:20  <b>detailed</b> [1] - 81:19  <b>detect</b> [1] - 43:19  <b>determination</b> [2] - 37:17, 69:20  <b>determine</b> [1] - 31:15  <b>determined</b> [5] - 4:19, 6:18, 23:24, 49:4, 72:7  <b>determining</b> [2] - 8:16, 78:25  <b>develop</b> [2] - 38:19, 46:13  <b>developed</b> [1] - 39:14  <b>difference</b> [4] - 19:23, 62:7, 76:22, 82:21  <b>differences</b> [1] - 73:20  <b>different</b> [24] - 5:13, 7:6, 11:6, 11:15, 12:1, 12:4, 12:22, 19:12, 26:25, 27:20, 28:17, 41:10, 43:23, 44:8, 52:20, 55:12, 64:21, 68:17, 68:24, 71:12, 73:17, 73:19, 80:13  <b>differentiated</b> [1] - 25:21  <b>differently</b> [2] - 20:4, 32:18  <b>difficult</b> [1] - 43:19  <b>difficulty</b> [1] - 19:21  <b>dire</b> [1] - 61:4  <b>disagree</b> [1] - 37:16  <b>disagreed</b> [2] - 9:25, 34:18  <b>discernible</b> [1] - 40:22  <b>disclosed</b> [1] - 60:6  <b>discovered</b> [1] - 36:23  <b>discovery</b> [1] - 38:23  <b>discretion</b> [1] - 3:16  <b>discussed</b> [4] - 23:22, 51:1, 56:20, 71:19  <b>discussing</b> [2] - 22:1, 75:3  <b>discussion</b> [11] - 14:25, 17:25, 18:1, 18:8, 51:17, 63:9, 71:16, 73:16, 74:22,</p>
---	---	---	---	---	---

<p>81:18, 81:20  <b>dismiss</b> [5] - 31:25,  32:6, 32:11, 64:11,  75:18  <b>dismissed</b> [1] - 32:8  <b>dismissing</b> [1] - 32:11  <b>disposed</b> [1] - 32:6  <b>disposition</b> [1] - 56:17  <b>dispositive</b> [1] - 34:14  <b>disproportionately</b> [5]  - 3:19, 24:5, 45:5,  59:4, 72:19  <b>disputed</b> [1] - 55:4  <b>disputes</b> [2] - 39:3,  51:21  <b>dissent</b> [1] - 53:4  <b>distinction</b> [1] - 81:20  <b>distinguish</b> [1] - 81:4  <b>distinguishes</b> [2] -  26:21, 39:11  <b>DISTRICT</b> [2] - 1:1, 1:2  <b>district</b> [3] - 2:23,  39:13, 57:18  <b>District</b> [11] - 1:13,  47:23, 48:3, 48:5,  48:7, 55:22, 58:5,  65:25, 66:1, 85:6  <b>document</b> [1] - 60:6  <b>documents</b> [1] - 59:25  <b>donated</b> [1] - 62:20  <b>donations</b> [1] - 62:24  <b>done</b> [6] - 11:14, 40:5,  40:15, 66:23, 79:23,  79:24  <b>doubt</b> [1] - 83:6  <b>down</b> [2] - 60:10,  83:13  <b>Dr</b> [17] - 40:6, 40:15,  40:18, 45:14, 59:18,  59:21, 61:18, 62:13,  62:16, 62:19, 62:21,  62:25, 63:10, 70:11,  76:2, 79:7, 79:8  <b>draw</b> [2] - 77:25, 80:12  <b>drawing</b> [1] - 61:21  <b>drop</b> [1] - 67:12  <b>dropped</b> [2] - 33:7,  33:8  <b>duplicates</b> [1] - 74:17  <b>during</b> [7] - 39:24,  55:19, 67:13, 68:5,  68:23, 77:13, 77:14  <b>duty</b> [3] - 33:6, 42:23</p>	<p>42:7, 58:13, 58:14,  59:12, 67:16, 68:9,  83:25  <b>effective</b> [8] - 23:15,  55:5, 59:9, 63:15,  63:16, 67:5, 67:22,  79:13  <b>effectively</b> [1] - 24:1  <b>effectiveness</b> [1] -  76:15  <b>effects</b> [3] - 23:10,  69:15, 70:9  <b>efficacy</b> [5] - 40:5,  46:8, 69:20, 76:3,  79:14  <b>effort</b> [4] - 27:13, 58:7,  79:23, 79:24  <b>either</b> [8] - 3:6, 5:4,  31:6, 32:9, 42:3,  45:10, 48:5, 64:5  <b>elements</b> [2] - 46:14,  66:1  <b>elevates</b> [1] - 52:24  <b>Elliot</b> [2] - 61:22,  63:13  <b>emotional</b> [1] - 33:25  <b>emphasized</b> [1] -  29:24  <b>empirical</b> [1] - 30:2  <b>employed</b> [2] - 63:15,  63:17  <b>employing</b> [1] - 11:15  <b>employs</b> [2] - 55:24,  56:18  <b>emptied</b> [1] - 23:19  <b>enact</b> [1] - 75:9  <b>enacted</b> [3] - 3:16,  16:2, 29:11  <b>end</b> [1] - 7:22  <b>ends</b> [2] - 56:14  <b>enforcement</b> [29] -  3:20, 23:23, 24:2,  24:6, 28:23, 29:1,  29:6, 29:21, 32:23,  33:1, 33:5, 33:10,  33:15, 33:18, 33:19,  33:21, 34:7, 34:23,  42:20, 42:22, 45:6,  59:2, 59:6, 72:21,  74:23, 74:24, 75:4,  76:11  <b>engage</b> [1] - 36:3  <b>enjoy</b> [1] - 39:10  <b>enshrined</b> [1] - 52:16  <b>entire</b> [2] - 73:14,  80:24  <b>entirety</b> [1] - 60:16  <b>entitled</b> [1] - 1:12  <b>entry</b> [1] - 26:17  <b>enumerated</b> [3] - 10:7,</p>	<p>22:14, 52:7  <b>enumeration</b> [1] -  52:10  <b>environment</b> [1] -  60:21  <b>equal</b> [5] - 6:10, 32:20,  32:21, 32:24, 54:12  <b>Equal</b> [3] - 31:23,  32:2, 33:16  <b>equally</b> [3] - 17:19,  38:25, 52:4  <b>erected</b> [1] - 70:1  <b>especially</b> [1] - 71:13  <b>Esquire</b> [7] - 1:18,  1:18, 1:19, 1:19,  1:22, 1:22, 1:23  <b>essentially</b> [1] - 42:16  <b>establish</b> [1] - 55:22  <b>established</b> [4] - 13:7,  16:23, 17:2, 37:12  <b>et</b> [6] - 1:4, 1:7, 2:3,  2:4, 85:3, 85:4  <b>evaluate</b> [1] - 44:5  <b>evaluating</b> [1] - 43:21  <b>evaluations</b> [1] -  52:24  <b>event</b> [1] - 10:14  <b>events</b> [2] - 27:4, 75:5  <b>evidence</b> [85] - 3:10,  3:23, 4:21, 5:3, 5:7,  5:8, 5:9, 5:10, 5:12,  5:16, 5:19, 18:25,  22:15, 23:6, 24:24,  25:9, 28:7, 28:10,  28:11, 29:14, 29:15,  29:17, 29:20, 30:2,  30:15, 30:19, 31:1,  31:4, 31:12, 31:16,  36:24, 43:11, 44:12,  44:23, 45:1, 45:12,  46:13, 47:15, 48:4,  50:4, 50:19, 55:4,  55:5, 58:9, 58:24,  59:1, 59:8, 59:18,  64:19, 64:20, 65:4,  65:7, 65:8, 65:10,  65:16, 65:17, 66:5,  66:11, 67:3, 67:7,  67:10, 68:25, 71:6,  71:11, 72:1, 74:2,  74:3, 74:12, 75:14,  77:22, 77:23, 77:25,  78:3, 78:4, 78:8,  78:15, 78:17, 78:18,  78:19, 78:25, 79:14,  79:19, 79:24, 80:4,  83:14  <b>evidentiary</b> [2] -  29:20, 64:24  <b>exact</b> [1] - 8:22</p>	<p><b>exactly</b> [4] - 12:16,  25:15, 36:5, 53:6  <b>examination</b> [3] -  39:18, 39:24, 66:3  <b>examine</b> [1] - 74:19  <b>examined</b> [2] - 35:3,  35:23  <b>examining</b> [1] - 65:9  <b>example</b> [3] - 12:11,  61:15, 84:1  <b>except</b> [1] - 75:8  <b>exception</b> [4] - 23:16,  33:4, 33:8, 33:14  <b>exceptions</b> [2] -  32:22, 33:3  <b>exchanged</b> [1] - 77:14  <b>exclude</b> [4] - 24:25,  25:8, 43:22, 65:24  <b>excluded</b> [1] - 39:22  <b>excuse</b> [2] - 28:16,  40:6  <b>exempted</b> [1] - 77:8  <b>existence</b> [5] - 13:12,  13:16, 13:20, 16:5,  48:22  <b>existing</b> [2] - 69:21,  76:17  <b>expect</b> [7] - 45:18,  45:23, 46:2, 61:5,  68:15, 69:12, 82:14  <b>expectations</b> [1] -  68:21  <b>expected</b> [1] - 67:22  <b>expedited</b> [1] - 38:23  <b>expenditure</b> [1] - 6:15  <b>expert</b> [5] - 8:8, 8:13,  39:17, 43:25, 46:24  <b>expertise</b> [1] - 79:3  <b>experts</b> [3] - 26:10,  26:22, 79:2  <b>experts'</b> [2] - 39:20,  43:21  <b>expire</b> [1] - 40:13  <b>explained</b> [5] - 67:9,  67:10, 68:10, 70:12,  71:2  <b>explaining</b> [1] - 66:18  <b>explains</b> [1] - 71:11  <b>expressly</b> [1] - 9:24  <b>extend</b> [1] - 76:24  <b>extends</b> [1] - 48:21  <b>extensive</b> [3] - 8:17,  33:11, 33:21  <b>extent</b> [5] - 5:19,  20:14, 36:11, 73:16,  79:17  <b>extremely</b> [2] - 4:22,  4:24</p>	<p style="text-align: center;"><b>F</b></p> <p><b>F.3d</b> [1] - 32:17  <b>facial</b> [8] - 34:15,  34:21, 34:22, 34:23,  36:15, 36:20, 37:10,  38:7  <b>facially</b> [1] - 37:14  <b>facing</b> [1] - 60:25  <b>fact</b> [19] - 8:8, 11:3,  11:25, 12:7, 13:21,  14:10, 38:4, 53:16,  54:23, 64:13, 67:2,  67:15, 67:24, 70:17,  73:21, 75:10, 78:4,  81:21, 83:8  <b>factor</b> [1] - 65:20  <b>factors</b> [1] - 65:2  <b>facts</b> [4] - 35:4, 35:24,  35:25, 46:11  <b>factual</b> [2] - 36:9,  38:20  <b>fader</b> [1] - 39:12  <b>Fader</b> [28] - 1:22, 2:7,  38:9, 38:21, 45:4,  46:10, 46:20, 48:24,  50:3, 50:9, 51:18,  53:3, 53:9, 54:21,  55:10, 55:18, 56:3,  56:9, 57:14, 58:6,  58:23, 64:7, 75:20,  76:16, 79:11, 79:25,  81:22, 83:20  <b>FADER</b> [32] - 2:15,  3:5, 5:6, 7:1, 7:15,  7:19, 9:14, 10:16,  11:1, 16:13, 17:7,  18:12, 19:5, 19:23,  20:8, 21:4, 21:20,  25:4, 25:10, 25:16,  26:14, 27:3, 27:9,  28:22, 31:23, 32:8,  32:15, 35:15, 37:3,  64:10, 64:16, 70:17  <b>Fader's</b> [4] - 39:24,  50:18, 78:21, 79:5  <b>fail</b> [3] - 10:10, 34:23,  52:3  <b>fails</b> [1] - 80:11  <b>fair</b> [3] - 8:10, 26:23,  46:6  <b>fall</b> [5] - 18:13, 21:9,  34:9, 58:13, 82:14  <b>falls</b> [1] - 27:15  <b>family</b> [1] - 10:10  <b>far</b> [11] - 5:1, 16:4,  21:15, 23:5, 34:4,  42:22, 68:21, 76:20,  77:4  <b>fatalities</b> [1] - 24:20</p>
<b>E</b>				
<p><b>early</b> [2] - 14:1, 64:18  <b>easily</b> [1] - 26:8  <b>echo</b> [1] - 39:4  <b>effect</b> [8] - 40:19,</p>				

<p><b>favor</b> [1] - 9:23  <b>federal</b> [31] - 2:19, 2:23, 4:1, 30:23, 40:2, 40:20, 41:3, 41:9, 41:16, 42:7, 44:13, 50:15, 63:15, 66:22, 66:24, 67:4, 67:19, 67:24, 68:5, 68:22, 69:8, 71:12, 76:3, 76:14, 76:16, 76:21, 77:4, 77:18, 77:19, 79:13, 84:1  <b>felons</b> [1] - 14:2  <b>few</b> [4] - 4:3, 42:10, 64:16, 73:10  <b>fewer</b> [5] - 8:18, 8:23, 16:4, 70:7, 70:8  <b>Fiat</b> [1] - 58:1  <b>fifteen</b> [1] - 83:17  <b>file</b> [3] - 60:9, 60:11  <b>filed</b> [3] - 2:18, 9:5, 25:1  <b>fine</b> [1] - 78:23  <b>finest</b> [1] - 39:9  <b>fire</b> [12] - 19:6, 23:24, 23:25, 77:13, 81:21, 82:2, 82:17, 82:18, 82:21, 82:22, 82:23, 83:3  <b>firearm</b> [24] - 7:6, 10:9, 14:4, 18:25, 19:1, 19:15, 20:1, 22:19, 23:10, 33:22, 37:5, 37:6, 37:15, 37:18, 37:20, 37:22, 38:4, 38:6, 45:25, 46:4, 51:3, 73:9, 82:4, 82:12  <b>firearm-related</b> [1] - 45:25  <b>firearms</b> [81] - 3:17, 3:18, 3:19, 4:22, 4:25, 5:13, 5:18, 5:22, 5:23, 7:21, 8:15, 8:20, 8:24, 9:8, 14:3, 15:19, 16:15, 16:19, 18:2, 19:4, 19:8, 21:12, 22:18, 22:20, 23:11, 23:15, 23:16, 23:17, 24:4, 24:19, 26:4, 28:25, 29:3, 31:14, 33:4, 33:12, 36:12, 37:10, 38:15, 42:19, 45:2, 45:7, 45:20, 46:15, 46:23, 47:1, 47:13, 48:11, 49:17, 51:12, 51:20, 51:23, 53:17, 57:19, 58:14, 58:19, 59:3, 59:7, 59:21,</p>	<p>62:3, 62:13, 63:20, 63:24, 67:25, 68:2, 68:4, 68:13, 68:18, 69:1, 69:4, 70:4, 70:5, 72:17, 72:25, 75:3, 76:13, 77:5, 79:12, 80:15, 80:20  <b>firearms-related</b> [1] - 45:20  <b>fired</b> [5] - 4:24, 24:15, 26:5, 28:19, 61:16  <b>firing</b> [1] - 61:12  <b>firm</b> [1] - 43:15  <b>firmly</b> [1] - 4:14  <b>First</b> [6] - 11:20, 12:3, 34:17, 34:20, 35:3, 35:23  <b>first</b> [31] - 2:14, 4:4, 9:16, 10:19, 11:10, 13:1, 14:24, 20:23, 21:3, 21:19, 22:11, 29:13, 30:21, 31:7, 32:17, 37:3, 39:23, 40:19, 45:11, 52:21, 53:7, 55:16, 56:9, 60:14, 66:19, 66:22, 68:2, 74:7, 76:2, 80:14  <b>fit</b> [11] - 23:2, 23:7, 31:18, 44:6, 55:22, 55:24, 56:13, 56:15, 72:4, 72:6, 72:11  <b>five</b> [5] - 4:1, 8:9, 23:19, 46:16, 64:4  <b>five-minute</b> [1] - 64:4  <b>floating</b> [1] - 77:12  <b>flurry</b> [1] - 75:24  <b>focus</b> [10] - 15:7, 16:10, 16:21, 17:10, 17:22, 18:6, 37:9, 41:22, 70:11, 74:12  <b>focused</b> [2] - 72:16, 73:8  <b>focusing</b> [2] - 15:12, 59:19  <b>follow</b> [2] - 51:18, 53:10  <b>followed</b> [1] - 80:7  <b>footing</b> [1] - 54:13  <b>footnote</b> [1] - 69:17  <b>FOR</b> [1] - 1:2  <b>force</b> [4] - 33:24, 34:1, 62:12, 62:15  <b>forced</b> [1] - 70:5  <b>foregoing</b> [1] - 85:2  <b>form</b> [1] - 71:24  <b>formed</b> [1] - 49:11  <b>forms</b> [1] - 71:23  <b>formulation</b> [1] - 56:6  <b>formulations</b> [1] -</p>	<p>55:12  <b>fortunate</b> [1] - 75:6  <b>forward</b> [3] - 2:11, 35:25, 68:19  <b>Foundation</b> [1] - 47:11  <b>founding</b> [2] - 6:8, 48:23  <b>four</b> [1] - 43:8  <b>Fourteenth</b> [1] - 6:23  <b>Fourth</b> [38] - 3:25, 9:14, 9:23, 9:25, 10:15, 12:7, 12:16, 12:23, 13:1, 20:11, 21:23, 22:11, 23:1, 23:4, 29:16, 29:19, 29:23, 31:10, 32:15, 34:15, 34:19, 35:8, 35:10, 53:10, 53:12, 53:15, 53:19, 53:21, 54:4, 54:10, 54:19, 54:20, 54:22, 55:13, 56:8, 57:13, 58:5, 65:19  <b>fox</b> [1] - 58:2  <b>Fox</b> [1] - 56:12  <b>frankly</b> [2] - 40:16, 77:21  <b>free</b> [1] - 68:4  <b>freedoms</b> [2] - 35:3, 35:23  <b>freestanding</b> [1] - 52:9  <b>frequency</b> [1] - 51:2  <b>frequent</b> [3] - 50:19, 76:12, 77:13  <b>frequently</b> [3] - 5:11, 5:20, 50:21  <b>Friedman</b> [3] - 1:23, 2:7, 38:21  <b>frightened</b> [1] - 61:7  <b>frivolous</b> [2] - 13:15, 13:18  <b>front</b> [1] - 78:12  <b>full</b> [4] - 21:2, 39:14, 74:18, 79:17  <b>fully</b> [4] - 12:8, 37:24, 82:9, 82:23  <b>function</b> [1] - 20:4  <b>functions</b> [1] - 20:3  <b>fundamental</b> [5] - 4:7, 44:11, 52:2, 53:25, 73:20  <b>future</b> [4] - 52:14, 52:18, 52:19, 52:24</p>	<p><b>game</b> [1] - 26:23  <b>Garraghty</b> [1] - 32:17  <b>gatekeeper</b> [1] - 84:5  <b>general</b> [1] - 45:7  <b>General</b> [25] - 3:15, 29:10, 29:15, 29:17, 31:17, 34:6, 46:25, 62:17, 63:7, 65:4, 65:9, 65:10, 65:12, 65:15, 66:9, 66:12, 71:5, 71:9, 72:13, 74:7, 74:13, 75:2, 75:8, 75:12, 79:23  <b>generally</b> [3] - 69:7, 69:25, 70:2  <b>generated</b> [1] - 75:24  <b>generous</b> [1] - 62:23  <b>Ginsburg</b> [1] - 81:12  <b>given</b> [2] - 24:10, 74:25  <b>glomming</b> [1] - 14:16  <b>governing</b> [1] - 58:14  <b>government</b> [16] - 20:16, 29:24, 30:19, 30:23, 31:3, 40:2, 40:7, 51:21, 52:11, 55:24, 56:5, 57:9, 63:22, 65:18, 65:21, 82:2  <b>government's</b> [9] - 3:12, 20:17, 23:2, 23:8, 31:1, 31:19, 72:5, 74:2, 82:11  <b>governmental</b> [2] - 12:15, 32:2  <b>Governor</b> [2] - 63:2, 63:7  <b>grant</b> [1] - 75:18  <b>granted</b> [1] - 13:10  <b>grateful</b> [2] - 38:17, 50:20  <b>great</b> [1] - 82:20  <b>greater</b> [3] - 40:3, 62:8, 73:11  <b>green</b> [1] - 49:16  <b>grounds</b> [1] - 32:9  <b>groups</b> [1] - 38:14  <b>guarantee</b> [2] - 52:14, 52:15  <b>guaranteed</b> [1] - 14:11  <b>guarantees</b> [1] - 4:15  <b>guess</b> [1] - 10:20  <b>guide</b> [1] - 6:18  <b>guilty</b> [2] - 82:3  <b>gun</b> [4] - 40:23, 62:21, 73:13, 77:12  <b>guns</b> [9] - 41:17, 41:21, 41:24, 42:3, 48:1, 48:5, 49:23, 51:7, 52:4</p>	<p style="text-align: center;"><b>H</b></p> <p><b>hand</b> [4] - 35:4, 35:24, 61:14, 83:19  <b>handgun</b> [6] - 10:1, 59:19, 69:15, 70:9, 73:2, 80:23  <b>handguns</b> [10] - 22:22, 41:24, 43:2, 47:22, 48:5, 51:7, 52:3, 56:23, 58:22, 62:2  <b>handled</b> [1] - 39:6  <b>hands</b> [3] - 34:9, 34:10, 52:11  <b>happy</b> [2] - 2:14, 64:4  <b>hard</b> [2] - 27:4, 43:17  <b>harm</b> [3] - 30:15, 31:2, 44:23  <b>Health</b> [1] - 62:22  <b>hear</b> [2] - 2:14, 64:4  <b>heard</b> [1] - 53:8  <b>hearing</b> [5] - 1:13, 2:9, 2:11, 46:13, 55:19  <b>hearth</b> [1] - 53:1  <b>heavier</b> [1] - 77:12  <b>heavy</b> [3] - 77:7, 77:10, 77:11  <b>heavy-barrel</b> [1] - 77:7  <b>heightened</b> [1] - 52:1  <b>held</b> [8] - 3:8, 4:6, 4:14, 20:19, 22:6, 34:15, 65:12, 65:13  <b>Heller</b> [41] - 2:22, 10:3, 10:4, 13:8, 13:14, 13:22, 14:17, 14:23, 14:24, 15:14, 16:17, 17:10, 39:13, 47:21, 47:22, 48:9, 48:20, 50:5, 51:6, 51:14, 51:17, 51:22, 53:5, 54:9, 54:24, 55:18, 65:25, 66:2, 71:15, 71:18, 72:24, 73:1, 73:7, 73:22, 80:12, 80:22, 81:10, 81:11, 83:7, 83:8  <b>Heller/McDonald</b> [1] - 16:10  <b>helpful</b> [1] - 55:14  <b>helping</b> [1] - 29:5  <b>hereby</b> [1] - 85:2  <b>herring</b> [1] - 47:21  <b>high</b> [1] - 61:25  <b>high-powered</b> [1] - 61:25  <b>higher</b> [1] - 50:2  <b>highlight</b> [1] - 27:22  <b>historical</b> [6] - 6:21, 15:7, 15:8, 15:10,</p>
<b>G</b>			<p><b>Gail</b> [2] - 1:25, 85:10  <b>gain</b> [1] - 7:5</p>	

<p>18:4, 21:10  <b>historically</b> [4] - 6:4, 9:18, 13:3, 21:10  <b>history</b> [3] - 13:6, 13:13, 30:2  <b>Hoffman</b> [2] - 35:1, 35:19  <b>holding</b> [1] - 3:1  <b>holidays</b> [1] - 38:24  <b>home</b> [18] - 4:21, 10:8, 10:10, 45:25, 47:14, 48:19, 50:1, 53:2, 53:18, 54:1, 54:13, 54:17, 60:25, 61:3, 61:5, 61:8, 73:3, 82:7  <b>homes</b> [5] - 48:2, 48:6, 50:6, 50:21, 63:20  <b>Honor</b> [44] - 2:16, 3:5, 5:6, 6:1, 7:2, 10:16, 11:1, 17:8, 21:4, 21:20, 25:11, 25:17, 31:21, 32:9, 34:12, 37:4, 38:18, 39:24, 42:1, 44:13, 45:10, 45:17, 46:13, 47:7, 47:19, 49:15, 51:9, 54:19, 58:3, 60:3, 60:15, 64:2, 64:16, 64:21, 66:14, 74:6, 74:15, 75:16, 75:23, 76:19, 77:21, 84:5, 84:7  <b>Honor's</b> [1] - 55:9  <b>Honorable</b> [2] - 1:13, 85:5  <b>hope</b> [1] - 75:12  <b>Hopkins</b> [1] - 62:22  <b>horrible</b> [1] - 62:5  <b>hundreds</b> [1] - 5:13  <b>hunting</b> [10] - 5:4, 5:6, 5:9, 5:10, 5:11, 5:13, 6:9, 17:20, 23:13, 50:8  <b>hybrid</b> [1] - 8:8  <b>hypothetical</b> [1] - 49:14</p>	<p>72:18  <b>identify</b> [3] - 10:13, 26:17, 27:14  <b>identifying</b> [3] - 15:21, 16:22, 66:5  <b>ignore</b> [3] - 3:23, 9:23, 68:10  <b>ignored</b> [2] - 70:22, 70:23  <b>ignoring</b> [2] - 66:17, 66:18  <b>II</b> [3] - 39:13, 55:18, 73:22  <b>III</b> [3] - 1:19, 2:6, 65:25  <b>ill</b> [3] - 14:2, 34:9, 69:5  <b>illness</b> [2] - 62:10, 62:12  <b>imagine</b> [2] - 49:14, 76:22  <b>imitate</b> [1] - 5:25  <b>impact</b> [2] - 41:2, 41:8  <b>impermissible</b> [3] - 11:9, 54:24, 83:21  <b>impermissibly</b> [1] - 63:18  <b>impinges</b> [1] - 22:13  <b>implement</b> [1] - 71:7  <b>implementing</b> [1] - 71:13  <b>implicate</b> [1] - 34:20  <b>implicates</b> [1] - 34:17  <b>implied</b> [2] - 10:11, 71:23  <b>importance</b> [1] - 6:10  <b>important</b> [11] - 4:5, 4:13, 12:15, 17:19, 31:19, 39:7, 54:8, 55:23, 81:6, 81:8, 84:12  <b>importantly</b> [4] - 30:13, 30:22, 67:17, 74:14  <b>imported</b> [1] - 68:7  <b>imposes</b> [1] - 22:17  <b>improvements</b> [1] - 71:14  <b>IN</b> [1] - 1:1  <b>inaccessible</b> [1] - 26:1  <b>inaccurate</b> [1] - 74:11  <b>inappropriately</b> [1] - 36:14  <b>incidence</b> [1] - 61:22  <b>incident</b> [2] - 43:9, 77:3  <b>incidents</b> [8] - 26:7, 27:18, 27:22, 28:2, 28:18, 43:12, 61:19, 63:12  <b>include</b> [2] - 6:22, 9:7  <b>included</b> [2] - 36:22,</p>	<p>36:24  <b>includes</b> [1] - 57:15  <b>including</b> [6] - 4:13, 22:19, 38:23, 39:15, 63:21, 73:21  <b>inconsistent</b> [1] - 15:13  <b>incorrect</b> [3] - 27:6, 36:13, 38:5  <b>incur</b> [1] - 30:16  <b>indeed</b> [4] - 22:15, 40:1, 45:7, 47:24  <b>indicate</b> [4] - 7:3, 36:5, 61:12, 67:1  <b>indicating</b> [3] - 35:24, 67:12, 67:15  <b>indistinguishable</b> [1] - 23:21  <b>individual</b> [8] - 17:13, 25:23, 36:12, 36:17, 37:9, 38:4, 81:25, 82:16  <b>individuals</b> [4] - 6:8, 6:12, 43:9, 69:3  <b>ineffective</b> [2] - 58:12, 66:25  <b>inexhaustive</b> [1] - 15:14  <b>inferences</b> [1] - 77:25  <b>information</b> [13] - 25:17, 25:21, 25:23, 26:4, 26:6, 26:16, 26:19, 26:22, 27:1, 27:6, 27:16, 28:2, 29:9  <b>infringe</b> [1] - 22:16  <b>infringement</b> [1] - 45:8  <b>injected</b> [1] - 68:16  <b>injuries</b> [3] - 24:21, 42:2, 70:8  <b>injuriousness</b> [1] - 40:23  <b>innocent</b> [1] - 29:4  <b>inquiry</b> [2] - 71:19, 72:6  <b>insisting</b> [1] - 52:13  <b>instance</b> [2] - 61:11, 77:8  <b>instances</b> [1] - 26:14  <b>instruments</b> [2] - 34:8, 48:21  <b>integral</b> [2] - 19:14, 19:16  <b>intended</b> [1] - 74:10  <b>interchangeable</b> [3] - 37:19, 37:22, 37:24  <b>interest</b> [16] - 23:3, 23:9, 29:2, 52:9, 52:21, 53:8, 53:13,</p>	<p>55:24, 56:6, 56:18, 57:10, 69:14, 71:22, 71:24, 72:5, 72:8  <b>interest-balancing</b> [1] - 71:22  <b>interested</b> [1] - 26:9  <b>interests</b> [6] - 4:13, 20:14, 20:15, 31:19, 51:19, 52:25  <b>interim</b> [1] - 40:9  <b>intermediate</b> [34] - 3:9, 3:13, 10:18, 10:22, 11:3, 11:4, 11:8, 11:15, 11:16, 11:24, 11:25, 12:2, 12:12, 12:13, 12:17, 22:3, 22:6, 22:25, 23:5, 29:25, 53:11, 55:8, 55:12, 55:14, 55:21, 56:11, 57:2, 57:6, 57:21, 65:22, 71:24, 72:3, 73:17, 73:25  <b>internal</b> [1] - 37:19  <b>intervene</b> [1] - 39:2  <b>introduce</b> [2] - 30:19, 31:1  <b>introducing</b> [1] - 31:3  <b>introduction</b> [1] - 30:15  <b>intrude</b> [2] - 63:18, 79:22  <b>intruder</b> [1] - 61:2  <b>intruders</b> [1] - 61:8  <b>invasions</b> [1] - 45:25  <b>investigated</b> [1] - 26:8  <b>investigation</b> [1] - 66:24  <b>invited</b> [1] - 63:1  <b>invites</b> [1] - 53:3  <b>inviting</b> [1] - 53:7  <b>involve</b> [6] - 17:3, 35:3, 35:22, 80:16, 81:14, 81:24  <b>involved</b> [9] - 11:21, 24:17, 25:7, 45:5, 51:6, 62:4, 69:6, 81:15, 83:17  <b>involving</b> [3] - 25:13, 45:7, 56:23  <b>irrelevant</b> [1] - 45:2  <b>IRS</b> [1] - 82:7  <b>issue</b> [28] - 3:7, 3:14, 4:22, 6:1, 7:10, 11:7, 14:15, 14:18, 14:21, 16:1, 16:7, 20:19, 22:1, 22:5, 23:8, 25:13, 25:23, 30:24, 37:1, 37:15, 47:16, 48:11, 50:16, 51:16,</p>	<p>64:23, 66:3, 72:25, 77:20  <b>issued</b> [1] - 36:25  <b>issues</b> [7] - 18:1, 18:15, 18:18, 36:17, 44:21, 74:18, 84:12  <b>itself</b> [8] - 16:11, 18:23, 38:7, 57:3, 57:24, 67:19, 75:1, 78:5</p>
				<b>J</b>
				<p><b>James</b> [2] - 1:19, 2:5  <b>January</b> [1] - 62:25  <b>Jennifer</b> [2] - 1:22, 2:7  <b>Jeter</b> [1] - 12:11  <b>job</b> [1] - 31:11  <b>John</b> [3] - 1:18, 2:5, 38:13  <b>Johns</b> [1] - 62:21  <b>Johnson</b> [5] - 8:9, 60:2, 60:5, 60:17, 74:6  <b>Johnson's</b> [1] - 74:5  <b>joined</b> [4] - 2:23, 81:9, 81:11, 81:13  <b>Jones</b> [5] - 25:13, 25:16, 25:17, 26:11, 27:12  <b>journal</b> [1] - 84:3  <b>judge</b> [1] - 80:23  <b>Judge</b> [4] - 1:13, 54:11, 81:9, 85:6  <b>judges</b> [1] - 52:19  <b>judges'</b> [1] - 52:14  <b>judgment</b> [13] - 8:6, 8:11, 31:17, 32:1, 32:7, 32:12, 39:16, 44:7, 65:5, 71:9, 75:2, 75:15, 75:18  <b>judgments</b> [1] - 31:13  <b>judicial</b> [1] - 74:15  <b>July</b> [3] - 1:10, 36:24, 85:6  <b>junk</b> [1] - 78:22  <b>jurisprudence</b> [1] - 32:15  <b>jury</b> [1] - 64:25  <b>justice</b> [1] - 76:1  <b>Justice</b> [11] - 40:8, 52:22, 53:4, 71:20, 71:21, 76:4, 81:10, 81:11, 81:12, 83:6  <b>justification</b> [5] - 15:6, 15:10, 18:4, 20:17, 75:1  <b>justified</b> [1] - 12:8  <b>justify</b> [2] - 31:16, 58:25</p>
<b>I</b>				
<p><b>idea</b> [2] - 70:3, 82:18  <b>identified</b> [23] - 6:6, 8:9, 8:14, 13:22, 15:3, 15:6, 15:14, 17:21, 18:4, 18:21, 20:11, 22:20, 22:25, 24:7, 28:4, 28:15, 36:12, 37:6, 37:23, 54:9, 69:18, 69:22,</p>				

<b>K</b>				
<p><b>Kachalsky</b> [1] - 57:23  <b>Katz</b> [2] - 1:22, 2:7  <b>keep</b> [8] - 3:2, 10:9, 20:2, 48:16, 49:25, 50:6, 63:19, 68:16  <b>keeps</b> [3] - 32:2, 77:12, 77:13  <b>Kennedy</b> [1] - 81:11  <b>kept</b> [4] - 48:16, 48:17, 53:17, 54:16  <b>key</b> [2] - 39:15, 68:12  <b>killed</b> [3] - 42:23, 43:1, 43:4  <b>kind</b> [4] - 37:9, 44:8, 51:5, 66:11  <b>kinds</b> [3] - 26:22, 41:24, 63:12  <b>known</b> [3] - 24:9, 24:11, 24:13  <b>KOLBE</b> [1] - 1:4  <b>Kolbe</b> [2] - 2:3, 85:3  <b>Koper</b> [20] - 25:3, 39:23, 39:25, 40:6, 40:15, 61:18, 66:14, 66:16, 66:23, 67:2, 67:9, 67:18, 68:10, 69:12, 69:16, 70:11, 71:2, 71:11, 76:2  <b>Koper's</b> [9] - 25:9, 40:18, 45:15, 59:22, 66:17, 69:17, 71:1, 79:7, 79:8</p>	<p><b>largely</b> [1] - 39:16  <b>largest</b> [1] - 74:24  <b>last</b> [5] - 2:18, 9:4, 34:12, 58:13  <b>lasted</b> [1] - 79:17  <b>law</b> [81] - 3:20, 8:1, 9:11, 9:16, 9:19, 9:20, 10:1, 11:12, 13:2, 16:2, 19:11, 19:25, 22:13, 22:15, 23:2, 23:23, 24:2, 24:6, 28:22, 28:25, 29:6, 29:11, 29:20, 29:21, 30:2, 30:23, 31:18, 32:22, 32:23, 32:25, 33:5, 33:10, 33:15, 33:18, 33:19, 33:20, 34:4, 34:7, 34:22, 34:24, 36:6, 36:7, 36:16, 36:20, 37:8, 37:14, 38:7, 39:21, 40:5, 40:12, 42:19, 42:22, 44:10, 45:6, 48:13, 49:8, 52:25, 53:19, 53:23, 53:24, 54:1, 57:20, 59:2, 59:6, 65:12, 66:2, 69:2, 72:5, 72:7, 72:20, 72:22, 74:23, 74:24, 75:4, 76:11, 77:17, 77:18, 77:19, 79:21, 82:9  <b>law-abiding</b> [5] - 48:13, 49:8, 52:25, 54:1, 69:2  <b>lawful</b> [17] - 5:14, 9:10, 13:23, 14:7, 15:15, 22:21, 48:13, 48:17, 49:8, 49:12, 50:7, 51:13, 53:17, 54:16, 63:21, 73:3, 81:1  <b>lawfully</b> [1] - 77:2  <b>laws</b> [10] - 3:1, 3:7, 4:2, 13:25, 20:8, 21:9, 21:24, 50:16, 73:25, 75:9  <b>lawsuit</b> [2] - 2:18, 75:19  <b>LCM's</b> [1] - 19:21  <b>leading</b> [1] - 28:25  <b>learn</b> [1] - 40:18  <b>learned</b> [1] - 62:19  <b>least</b> [9] - 6:9, 19:5, 19:14, 21:16, 55:3, 55:25, 56:19, 56:25, 79:22  <b>leaves</b> [1] - 52:24  <b>left</b> [2] - 75:12, 80:8  <b>legal</b> [4] - 32:10,</p>	<p>34:13, 34:19, 77:17  <b>legally</b> [1] - 74:11  <b>Legg</b> [1] - 54:11  <b>legislative</b> [2] - 30:1, 78:13  <b>legislators</b> [1] - 30:8  <b>legislature</b> [8] - 59:17, 63:8, 77:24, 77:25, 78:3, 78:10, 78:13, 79:20  <b>legislature's</b> [3] - 31:11, 44:7, 56:13  <b>legislatures</b> [2] - 52:18, 65:16  <b>less</b> [13] - 8:18, 19:2, 19:25, 20:5, 35:20, 58:10, 59:12, 59:13, 69:23, 70:6, 73:12, 76:12, 77:19  <b>lesser</b> [1] - 70:7  <b>lethality</b> [1] - 40:22  <b>level</b> [9] - 10:17, 20:10, 20:12, 42:10, 54:23, 54:25, 63:16, 71:3, 73:12  <b>liability</b> [2] - 43:24, 65:3  <b>liberty</b> [1] - 4:8  <b>light</b> [4] - 17:9, 35:4, 35:23, 64:12  <b>likely</b> [6] - 42:22, 43:1, 43:4, 43:5, 44:2, 69:13  <b>limit</b> [1] - 8:7  <b>limitation</b> [6] - 15:7, 16:22, 18:5, 29:13, 30:18, 68:20  <b>limitations</b> [10] - 13:19, 13:20, 13:22, 13:23, 14:6, 14:12, 15:2, 15:13, 15:15, 67:19  <b>limited</b> [3] - 30:11, 67:2, 69:19  <b>linchpin</b> [2] - 48:8  <b>line</b> [3] - 31:10, 33:6, 42:23  <b>list</b> [1] - 15:15  <b>litigating</b> [1] - 39:9  <b>lo</b> [1] - 63:6  <b>look</b> [9] - 10:12, 16:1, 26:11, 26:12, 54:19, 56:7, 65:15, 72:4, 72:7  <b>looked</b> [9] - 16:7, 17:14, 18:17, 21:15, 25:6, 26:15, 56:22, 69:24, 69:25  <b>looking</b> [11] - 2:11, 6:14, 14:15, 30:12,</p>	<p>35:12, 65:1, 65:21, 66:1, 67:20, 69:19, 76:9  <b>Lord</b> [2] - 59:5, 75:11  <b>lose</b> [1] - 48:25  <b>Lucy</b> [1] - 27:10</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>M16</b> [3] - 23:21, 82:6, 82:9  <b>magazine</b> [17] - 2:20, 16:3, 18:23, 19:2, 19:4, 19:5, 19:7, 19:13, 19:24, 20:4, 22:8, 24:9, 24:11, 24:12, 24:13, 60:20  <b>Magazine</b> [1] - 25:17  <b>magazines</b> [55] - 2:25, 3:17, 3:19, 4:25, 18:13, 18:19, 18:20, 18:24, 19:8, 19:9, 19:11, 20:1, 24:4, 24:7, 24:18, 24:19, 26:6, 28:24, 29:3, 38:16, 40:3, 41:4, 41:10, 41:17, 45:3, 45:19, 45:24, 46:3, 48:12, 49:17, 51:12, 57:19, 58:15, 58:17, 59:21, 60:18, 61:5, 62:3, 63:5, 67:9, 67:11, 67:13, 67:16, 67:25, 68:2, 68:5, 68:6, 68:13, 68:18, 69:21, 70:4, 70:6, 76:8, 76:13, 77:1  <b>magical</b> [1] - 15:22  <b>maintain</b> [1] - 77:23  <b>maintaining</b> [1] - 33:13  <b>major</b> [1] - 37:21  <b>majority</b> [2] - 53:5, 81:13  <b>makers</b> [1] - 32:3  <b>malpractice</b> [2] - 43:24, 64:22  <b>man</b> [2] - 61:24, 70:1  <b>manifestly</b> [1] - 73:7  <b>manner</b> [2] - 11:21, 56:4  <b>manual</b> [1] - 37:20  <b>manufactured</b> [4] - 68:8, 72:17, 79:12  <b>manufacturers</b> [1] - 8:3  <b>Marc</b> [2] - 1:18, 2:5  <b>market</b> [1] - 69:2  <b>marketing</b> [1] - 15:20  <b>marksman</b> [1] - 50:12</p>	<p><b>marksmanship</b> [9] - 5:4, 5:16, 5:17, 5:21, 6:25, 7:4, 50:8, 50:13, 77:15  <b>Martin</b> [2] - 59:23, 85:4  <b>MARTIN</b> [1] - 1:7  <b>MARYLAND</b> [1] - 1:2  <b>Maryland</b> [36] - 1:9, 5:15, 7:14, 7:16, 7:17, 8:1, 8:21, 9:2, 19:11, 36:13, 36:25, 37:25, 38:14, 39:10, 46:17, 46:25, 49:15, 50:22, 58:15, 58:18, 58:25, 59:4, 59:9, 61:11, 62:12, 62:14, 71:13, 71:14, 75:7, 76:19, 76:24, 77:4, 77:7, 80:4, 82:8, 84:4  <b>Maryland's</b> [11] - 3:15, 28:25, 29:2, 65:5, 68:17, 68:23, 69:10, 69:13, 69:14, 74:24, 77:17  <b>Marylanders</b> [3] - 63:19, 77:3, 78:22  <b>Marzarella</b> [2] - 56:22, 57:12  <b>Masciandaro</b> [5] - 53:22, 57:3, 57:11, 57:12, 57:24  <b>mass</b> [18] - 3:20, 24:5, 24:8, 24:10, 24:16, 25:18, 27:3, 27:14, 43:7, 43:12, 45:5, 59:5, 60:18, 61:15, 69:6, 72:20, 75:4, 76:12  <b>material</b> [1] - 46:11  <b>matter</b> [5] - 2:2, 2:8, 16:24, 16:25, 85:3  <b>Matthew</b> [2] - 1:22, 2:7  <b>Mazzarella</b> [1] - 57:25  <b>McCauley</b> [2] - 62:14, 63:11  <b>McCullen</b> [5] - 10:20, 11:5, 12:19, 36:22, 59:14  <b>McDonald</b> [2] - 2:22, 6:20  <b>mean</b> [7] - 17:5, 17:10, 42:16, 43:14, 46:1, 53:7, 75:11  <b>meaning</b> [2] - 68:9, 69:3  <b>means</b> [13] - 9:21, 10:12, 10:17, 12:8, 14:13, 21:1, 55:14,</p>
<p style="text-align: center;"><b>L</b></p> <p><b>landmark</b> [1] - 2:21  <b>language</b> [4] - 4:17, 55:10, 80:22, 81:7  <b>large</b> [27] - 2:20, 2:25, 16:3, 18:13, 18:24, 19:24, 22:8, 24:7, 24:12, 24:18, 28:24, 41:3, 41:9, 41:16, 45:3, 45:19, 45:24, 46:3, 60:18, 63:5, 67:8, 67:11, 67:13, 68:6, 69:21, 76:8, 80:9  <b>large-capacity</b> [25] - 2:20, 2:25, 16:3, 18:13, 18:24, 19:24, 22:8, 24:7, 24:18, 28:24, 41:3, 41:9, 41:16, 45:3, 45:19, 45:24, 46:3, 60:18, 63:5, 67:8, 67:11, 67:13, 68:6, 69:21, 76:8</p>				

<p>55:25, 56:1, 56:14, 56:19, 56:20, 56:25  <b>meant</b> [4] - 17:17, 66:18, 68:20  <b>media</b> [1] - 84:2  <b>medical</b> [2] - 43:24, 64:22  <b>meet</b> [3] - 3:12, 29:24, 74:4  <b>meets</b> [1] - 44:12  <b>men</b> [2] - 49:11, 49:16  <b>mental</b> [3] - 33:25, 62:9, 62:12  <b>mentally</b> [2] - 14:2, 69:5  <b>mention</b> [3] - 11:16, 62:7, 62:17  <b>mentioned</b> [3] - 6:11, 60:12, 67:18  <b>merits</b> [2] - 35:14, 35:16  <b>met</b> [2] - 64:24, 65:18  <b>method</b> [1] - 22:3  <b>Michael</b> [1] - 62:20  <b>middle</b> [1] - 61:1  <b>might</b> [9] - 6:22, 10:22, 25:14, 43:16, 43:19, 60:18, 60:20, 61:12, 82:14  <b>Militaria</b> [1] - 23:14  <b>militaries</b> [1] - 23:14  <b>military</b> [7] - 3:18, 5:23, 23:12, 23:21, 24:2, 63:4, 72:18  <b>military-style</b> [3] - 23:12, 63:4, 72:18  <b>militia</b> [7] - 6:11, 17:12, 17:15, 49:11, 49:14, 49:22, 50:2  <b>militia-centric</b> [1] - 17:12  <b>Miller</b> [6] - 16:17, 16:18, 49:3, 49:6, 81:16, 82:3  <b>million</b> [4] - 7:21, 8:10, 8:18, 46:17  <b>millions</b> [1] - 68:7  <b>mind</b> [1] - 55:9  <b>minimal</b> [3] - 3:9, 22:18, 74:1  <b>minimize</b> [1] - 33:24  <b>minute</b> [3] - 20:20, 41:20, 64:4  <b>misleading</b> [1] - 70:10  <b>misread</b> [3] - 10:2, 30:7, 30:20  <b>misreading</b> [1] - 73:7  <b>misreads</b> [1] - 14:22  <b>mistake</b> [1] - 72:23  <b>misuse</b> [1] - 29:5</p>	<p><b>mode</b> [2] - 24:1, 24:3  <b>modern</b> [4] - 3:18, 7:24, 8:3, 47:11  <b>moment</b> [4] - 7:10, 60:3, 62:10, 77:20  <b>money</b> [1] - 25:25  <b>month</b> [1] - 63:6  <b>moreover</b> [7] - 10:2, 15:12, 23:22, 28:22, 34:4, 48:1, 74:9  <b>morning</b> [3] - 2:10, 2:16, 38:12  <b>Morrison</b> [1] - 32:16  <b>most</b> [13] - 10:8, 23:15, 28:1, 28:14, 35:13, 61:4, 66:2, 67:23, 68:5, 73:8, 73:11, 80:2, 80:5  <b>Mother</b> [5] - 25:13, 25:16, 25:17, 26:11, 27:12  <b>motion</b> [10] - 25:7, 31:25, 32:1, 32:6, 32:7, 32:11, 46:11, 64:10, 65:24, 75:18  <b>motions</b> [4] - 1:12, 2:8, 24:25, 39:1  <b>motor</b> [1] - 42:23  <b>move</b> [1] - 21:1  <b>moved</b> [2] - 21:18, 21:21  <b>moving</b> [1] - 20:21  <b>MR</b> [56] - 2:15, 3:5, 5:6, 7:1, 7:15, 7:19, 9:14, 10:16, 11:1, 16:13, 17:7, 18:12, 19:5, 19:23, 20:8, 21:4, 21:20, 25:4, 25:10, 25:16, 26:14, 27:3, 27:9, 28:22, 31:23, 32:8, 32:15, 35:15, 37:3, 38:11, 38:13, 39:9, 42:1, 42:6, 44:9, 44:21, 46:22, 47:6, 47:9, 47:19, 49:24, 51:8, 51:11, 53:12, 53:15, 57:18, 61:18, 64:10, 64:16, 70:17, 75:23, 76:19, 78:11, 78:14, 78:17, 79:8  <b>murder</b> [1] - 72:20  <b>murders</b> [3] - 3:20, 24:6, 45:6  <b>must</b> [17] - 12:14, 19:4, 19:5, 32:17, 34:23, 35:3, 35:23, 35:25, 38:21, 55:22, 59:15, 61:20, 64:24, 75:24, 78:5, 78:15,</p>	<p>78:18  <b>muster</b> [3] - 10:11, 49:15, 79:10</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>name</b> [2] - 28:5, 62:23  <b>Nardone</b> [2] - 1:18, 2:5  <b>narrow</b> [8] - 55:2, 57:16, 57:20, 58:4, 76:9, 79:21, 83:10, 83:15  <b>narrowest</b> [1] - 72:10  <b>narrowly</b> [9] - 56:1, 56:5, 56:20, 57:5, 57:9, 57:14, 58:8, 72:8, 83:22  <b>nation</b> [1] - 10:9  <b>National</b> [4] - 27:7, 27:19, 27:21, 47:10  <b>nationwide</b> [1] - 46:17  <b>nature</b> [5] - 20:13, 48:9, 64:20, 67:22, 69:19  <b>necessarily</b> [11] - 7:25, 17:1, 21:17, 55:25, 56:15, 56:16, 56:18, 65:7, 68:11, 68:22, 71:12  <b>necessary</b> [3] - 18:24, 57:1, 79:22  <b>necessitating</b> [1] - 54:14  <b>need</b> [13] - 4:12, 10:13, 19:8, 19:19, 20:25, 21:7, 50:7, 50:11, 51:20, 56:25, 61:3, 62:8, 69:7  <b>needed</b> [2] - 33:25, 74:12  <b>needs</b> [1] - 44:16  <b>negative</b> [3] - 23:10, 69:15, 70:8  <b>never</b> [6] - 6:11, 40:17, 53:16, 53:18, 60:15, 82:17  <b>New</b> [4] - 2:24, 57:22, 73:23, 83:18  <b>newly</b> [1] - 36:23  <b>news</b> [3] - 26:4, 26:18, 27:5  <b>night</b> [1] - 61:1  <b>Ninth</b> [1] - 9:24  <b>NO</b> [1] - 1:6  <b>non</b> [1] - 24:12  <b>non-large-capacity</b> [1] - 24:12  <b>none</b> [2] - 60:1, 62:3  <b>notably</b> [1] - 74:21</p>	<p><b>note</b> [1] - 42:9  <b>noted</b> [2] - 6:8, 54:7  <b>notes</b> [1] - 75:25  <b>nothing</b> [6] - 7:1, 7:2, 7:3, 15:16, 47:22, 78:23  <b>notice</b> [1] - 74:16  <b>notion</b> [1] - 31:6  <b>notwithstanding</b> [1] - 4:16  <b>Number</b> [1] - 2:3  <b>number</b> [24] - 8:5, 8:9, 9:1, 9:3, 15:2, 15:19, 16:6, 16:10, 24:14, 25:6, 26:5, 41:19, 42:2, 43:12, 45:20, 46:4, 46:10, 47:12, 50:2, 55:18, 61:7, 61:19, 62:16, 83:17  <b>numbers</b> [11] - 7:13, 7:21, 8:7, 8:22, 8:24, 9:11, 15:8, 24:9, 24:14, 49:24, 56:24  <b>numerosity</b> [6] - 14:17, 14:21, 15:12, 15:16, 16:7, 18:18</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O'MALLEY</b> [1] - 1:7  <b>O'Malley</b> [6] - 2:4, 59:23, 63:2, 63:7, 85:4  <b>objective</b> [3] - 12:16, 56:2, 56:21  <b>observe</b> [1] - 53:22  <b>obtain</b> [2] - 60:15, 68:25  <b>obtained</b> [1] - 33:5  <b>obviously</b> [8] - 10:1, 19:18, 21:2, 24:24, 25:5, 33:10, 41:23, 84:11  <b>occasion</b> [1] - 81:4  <b>occur</b> [1] - 76:14  <b>occurred</b> [1] - 25:18  <b>occurs</b> [1] - 45:10  <b>October</b> [2] - 2:18, 59:10  <b>OF</b> [1] - 1:2  <b>offense</b> [1] - 18:23  <b>offensive</b> [1] - 23:12  <b>offered</b> [3] - 39:20, 44:19, 53:4  <b>officer</b> [2] - 33:5, 33:15  <b>officers</b> [22] - 3:21, 24:6, 28:23, 29:1, 29:6, 29:21, 32:23, 33:1, 33:10, 33:18,</p>	<p>33:20, 34:7, 42:20, 42:22, 45:6, 46:4, 59:3, 59:6, 72:21, 74:23, 74:24, 76:11  <b>official</b> [3] - 60:9, 76:3, 76:15  <b>Official</b> [2] - 1:25, 85:11  <b>often</b> [1] - 5:1  <b>omitted</b> [1] - 70:18  <b>once</b> [3] - 11:4, 39:2, 83:4  <b>one</b> [41] - 2:19, 8:13, 8:15, 8:19, 8:23, 10:13, 15:2, 18:9, 19:6, 19:7, 21:7, 22:10, 28:9, 28:19, 31:23, 33:3, 35:4, 37:13, 40:14, 40:15, 43:9, 44:21, 44:24, 47:12, 50:3, 55:17, 56:17, 59:20, 61:11, 61:15, 61:18, 61:20, 64:7, 67:23, 69:11, 71:4, 72:1, 75:6, 76:5  <b>one's</b> [3] - 10:10, 54:12, 54:13  <b>one-off</b> [1] - 37:13  <b>ones</b> [3] - 45:12, 45:16, 50:1  <b>ongoing</b> [1] - 62:13  <b>open</b> [1] - 22:4  <b>opening</b> [3] - 60:13, 81:3, 81:23  <b>operable</b> [2] - 48:1, 52:4  <b>operate</b> [1] - 18:24  <b>operated</b> [1] - 19:1  <b>operative</b> [1] - 48:16  <b>opining</b> [1] - 43:25  <b>opinion</b> [7] - 35:7, 44:1, 44:19, 81:9, 81:10, 81:12, 81:13  <b>opinions</b> [5] - 39:20, 44:9, 79:2, 79:7, 79:8  <b>opportunity</b> [3] - 38:17, 38:19, 74:19  <b>opposed</b> [1] - 23:17  <b>opposing</b> [1] - 30:19  <b>oral</b> [1] - 60:5  <b>order</b> [3] - 21:5, 32:19, 46:12  <b>ordered</b> [1] - 4:8  <b>ordinarily</b> [1] - 78:9  <b>otherwise</b> [1] - 83:14  <b>ourselves</b> [1] - 60:11  <b>out-of-context</b> [1] - 66:16</p>
---	--	---	--	---

<p><b>outcome</b> [2] - 69:20, 69:24</p> <p><b>outset</b> [2] - 38:18, 63:3</p> <p><b>outside</b> [3] - 11:22, 20:6, 21:9</p> <p><b>overheating</b> [1] - 77:14</p> <p><b>overrule</b> [1] - 12:20</p> <p><b>overruled</b> [1] - 12:19</p> <p><b>overturned</b> [1] - 48:3</p> <p><b>overwhelmingly</b> [4] - 22:21, 73:2, 73:15, 80:25</p> <p><b>own</b> [5] - 5:20, 8:19, 8:25, 37:13, 72:2</p> <p><b>owned</b> [2] - 5:19, 51:12</p> <p><b>owner</b> [3] - 8:15, 60:25, 61:5</p> <p><b>owners</b> [1] - 47:11</p> <p><b>ownership</b> [1] - 8:17</p> <p><b>owning</b> [1] - 47:13</p> <p><b>owns</b> [2] - 8:15, 82:13</p>	<p>31:25</p> <p><b>Pennsylvania</b> [1] - 76:25</p> <p><b>people</b> [15] - 5:9, 5:20, 5:24, 17:19, 17:22, 47:17, 49:21, 50:6, 51:13, 51:20, 52:17, 52:22, 62:2, 69:5, 84:4</p> <p><b>per</b> [1] - 54:24</p> <p><b>percent</b> [9] - 8:19, 8:23, 24:8, 24:10, 24:14, 24:16, 24:18, 50:3, 73:12</p> <p><b>percentage</b> [1] - 49:21</p> <p><b>perfect</b> [1] - 56:15</p> <p><b>perfectly</b> [1] - 78:23</p> <p><b>perhaps</b> [2] - 44:19, 57:14</p> <p><b>period</b> [4] - 40:4, 67:14, 67:21, 68:5</p> <p><b>periods</b> [1] - 28:18</p> <p><b>permissible</b> [1] - 54:25</p> <p><b>person</b> [2] - 67:20, 82:13</p> <p><b>person's</b> [1] - 20:14</p> <p><b>persuasive</b> [1] - 4:1</p> <p><b>phrase</b> [2] - 11:3, 14:16</p> <p><b>pipeline</b> [3] - 79:11, 79:15, 79:16</p> <p><b>place</b> [5] - 11:21, 13:24, 54:12, 55:11, 56:4</p> <p><b>placed</b> [2] - 69:23</p> <p><b>places</b> [1] - 14:5</p> <p><b>plaintiff</b> [3] - 32:17, 36:1, 47:10</p> <p><b>plaintiffs</b> [41] - 2:5, 3:22, 7:20, 7:24, 8:2, 8:13, 10:2, 10:20, 14:15, 21:6, 25:22, 28:5, 30:5, 30:17, 32:24, 33:2, 33:7, 33:17, 34:18, 34:21, 36:5, 36:11, 36:21, 37:7, 37:16, 37:23, 60:7, 60:8, 64:12, 64:13, 65:2, 66:15, 68:10, 70:1, 70:10, 70:19, 71:15, 72:23, 73:4, 74:10, 74:18</p> <p><b>PLAINTIFFS</b> [1] - 1:5</p> <p><b>Plaintiffs</b> [2] - 1:17, 85:3</p> <p><b>plaintiffs'</b> [9] - 9:22, 29:8, 29:11, 31:6, 32:22, 37:12, 54:15, 64:9, 74:21</p>	<p><b>plane</b> [1] - 73:14</p> <p><b>point</b> [10] - 15:21, 18:9, 32:13, 37:3, 50:22, 67:8, 70:17, 79:6, 81:22, 82:10</p> <p><b>pointed</b> [4] - 15:11, 45:10, 46:10, 64:21</p> <p><b>points</b> [1] - 64:16</p> <p><b>Police</b> [5] - 9:3, 36:13, 36:25, 62:15, 80:5</p> <p><b>police</b> [1] - 46:4</p> <p><b>Police's</b> [2] - 37:17, 37:25</p> <p><b>policy</b> [6] - 31:13, 37:25, 51:24, 54:17, 63:25, 72:2</p> <p><b>pool</b> [1] - 49:11</p> <p><b>popular</b> [9] - 38:15, 51:11, 63:20, 63:24, 72:25, 73:5, 80:3, 80:5</p> <p><b>population</b> [3] - 8:19, 8:23, 49:21</p> <p><b>Porter</b> [2] - 1:19, 2:6</p> <p><b>portion</b> [1] - 45:14</p> <p><b>pose</b> [2] - 18:2, 31:14</p> <p><b>position</b> [10] - 3:23, 4:8, 6:2, 7:12, 20:22, 21:3, 21:8, 54:15, 78:21, 82:12</p> <p><b>possessed</b> [5] - 48:12, 48:14, 48:17, 49:7, 77:3</p> <p><b>possession</b> [2] - 15:9, 82:1</p> <p><b>possibility</b> [1] - 34:1</p> <p><b>possible</b> [3] - 34:4, 72:10, 84:14</p> <p><b>possibly</b> [1] - 43:4</p> <p><b>post</b> [1] - 66:2</p> <p><b>Post</b> [1] - 83:24</p> <p><b>post-Heller</b> [1] - 66:2</p> <p><b>power</b> [1] - 52:12</p> <p><b>powered</b> [1] - 61:25</p> <p><b>practice</b> [2] - 5:5, 15:8</p> <p><b>praise</b> [2] - 59:5, 75:11</p> <p><b>pre</b> [1] - 34:23</p> <p><b>pre-enforcement</b> [1] - 34:23</p> <p><b>precedent</b> [4] - 3:25, 9:23, 53:12, 53:15</p> <p><b>precious</b> [1] - 59:17</p> <p><b>precise</b> [1] - 44:4</p> <p><b>precondition</b> [1] - 50:23</p> <p><b>predict</b> [1] - 45:16</p> <p><b>predictive</b> [6] - 31:17, 44:7, 65:5, 71:9, 75:2, 75:14</p>	<p><b>preexisted</b> [2] - 4:7, 13:9</p> <p><b>preexisting</b> [1] - 58:24</p> <p><b>preferred</b> [2] - 10:9, 28:7</p> <p><b>preliminarily</b> [1] - 64:17</p> <p><b>preliminary</b> [1] - 37:17</p> <p><b>preparation</b> [1] - 33:25</p> <p><b>prepared</b> [2] - 40:8, 40:9</p> <p><b>prerogatives</b> [1] - 66:8</p> <p><b>present</b> [2] - 34:8, 75:4</p> <p><b>presentation</b> [2] - 67:1, 74:21</p> <p><b>presented</b> [2] - 3:11, 3:23</p> <p><b>presenting</b> [1] - 64:19</p> <p><b>presents</b> [1] - 3:14</p> <p><b>press</b> [3] - 25:20, 26:12, 26:15</p> <p><b>presumptively</b> [3] - 13:23, 14:7, 15:15</p> <p><b>pretend</b> [1] - 80:8</p> <p><b>pretended</b> [2] - 55:2, 70:24</p> <p><b>pretty</b> [4] - 12:16, 54:3, 67:14, 70:25</p> <p><b>prevail</b> [3] - 21:5, 21:6, 21:7</p> <p><b>prevent</b> [1] - 60:18</p> <p><b>prevention</b> [3] - 76:10, 76:12</p> <p><b>previous</b> [1] - 49:3</p> <p><b>price</b> [1] - 15:21</p> <p><b>primarily</b> [4] - 23:11, 59:19, 69:1, 78:7</p> <p><b>principal</b> [1] - 39:25</p> <p><b>principles</b> [1] - 34:14</p> <p><b>private</b> [1] - 25:23</p> <p><b>probability</b> [4] - 41:15, 43:10, 44:3, 71:3</p> <p><b>probable</b> [1] - 44:2</p> <p><b>probe</b> [1] - 45:12</p> <p><b>problem</b> [1] - 58:24</p> <p><b>problems</b> [1] - 67:23</p> <p><b>procedural</b> [1] - 32:5</p> <p><b>proceed</b> [2] - 2:13, 11:11</p> <p><b>proceeding</b> [3] - 78:9, 78:11, 78:13</p> <p><b>proceedings</b> [1] - 84:15</p> <p><b>process</b> [1] - 58:21</p> <p><b>processed</b> [1] - 9:6</p> <p><b>produce</b> [1] - 59:24</p> <p><b>produced</b> [3] - 47:3, 47:9, 68:2</p>	<p><b>product</b> [2] - 43:24, 52:21</p> <p><b>professionalism</b> [1] - 38:22</p> <p><b>professionally</b> [1] - 39:7</p> <p><b>professor</b> [4] - 46:24, 62:6, 71:1, 71:11</p> <p><b>Professor</b> [14] - 47:5, 63:8, 66:14, 66:16, 66:17, 66:23, 67:2, 67:9, 67:18, 68:10, 69:12, 69:16, 69:17, 71:1</p> <p><b>proffered</b> [2] - 46:12, 46:15</p> <p><b>proficiency</b> [2] - 50:8, 50:12</p> <p><b>progress</b> [1] - 68:23</p> <p><b>prohibit</b> [1] - 76:17</p> <p><b>prohibited</b> [3] - 36:3, 37:12, 81:16</p> <p><b>prohibiting</b> [1] - 21:11</p> <p><b>prohibition</b> [11] - 21:11, 48:2, 51:11, 51:13, 52:2, 52:3, 53:16, 54:16, 58:10, 59:1, 80:24</p> <p><b>prohibitions</b> [2] - 14:2, 45:11</p> <p><b>prohibits</b> [1] - 36:8</p> <p><b>project</b> [1] - 43:18</p> <p><b>projection</b> [1] - 43:15</p> <p><b>proliferating</b> [1] - 34:10</p> <p><b>promote</b> [1] - 69:14</p> <p><b>prong</b> [14] - 9:15, 9:16, 9:19, 10:19, 11:10, 11:11, 11:13, 20:23, 21:19, 21:22, 51:1, 51:15, 53:7, 53:11</p> <p><b>prongs</b> [3] - 21:3, 21:5, 21:6</p> <p><b>pronunciation</b> [1] - 25:2</p> <p><b>proof</b> [1] - 64:24</p> <p><b>proportion</b> [1] - 56:17</p> <p><b>propositions</b> [1] - 31:8</p> <p><b>prosecution</b> [2] - 36:19, 81:25</p> <p><b>protect</b> [8] - 15:4, 16:14, 16:15, 29:6, 30:24, 49:7, 54:8, 75:9</p> <p><b>protected</b> [16] - 6:4, 6:16, 7:4, 9:17, 9:20, 13:16, 15:1, 15:24, 17:1, 18:19, 20:3,</p>
<b>P</b>				
<p><b>page</b> [9] - 40:24, 41:13, 42:8, 42:21, 43:7, 45:18, 47:6, 71:18, 76:5</p> <p><b>panel</b> [3] - 9:24, 54:10, 63:12</p> <p><b>papers</b> [2] - 12:25, 61:10</p> <p><b>paragraph</b> [1] - 59:20</p> <p><b>Parker</b> [2] - 1:18, 38:13</p> <p><b>part</b> [5] - 16:9, 19:14, 19:17, 37:23, 70:18</p> <p><b>participate</b> [1] - 5:21</p> <p><b>particular</b> [14] - 16:2, 18:15, 33:11, 36:1, 37:5, 37:18, 38:6, 43:15, 51:2, 51:3, 67:6, 72:17, 73:8, 75:3</p> <p><b>particularly</b> [4] - 3:17, 48:18, 70:4, 72:18</p> <p><b>party</b> [1] - 74:16</p> <p><b>pass</b> [3] - 57:6, 78:5, 79:9</p> <p><b>past</b> [2] - 21:19, 62:24</p> <p><b>patience</b> [1] - 84:7</p> <p><b>pause</b> [3] - 55:7, 60:3, 62:10</p> <p><b>pay</b> [1] - 82:6</p> <p><b>pedestrians</b> [1] - 62:1</p> <p><b>peer</b> [1] - 84:3</p> <p><b>pending</b> [2] - 2:2,</p>				

20:9, 48:10, 51:22, 63:25, 80:15 <b>protecting</b> [1] - 23:9 <b>protection</b> [13] - 10:10, 14:8, 15:23, 16:20, 19:16, 19:22, 32:20, 32:21, 32:24, 49:1, 50:23, 52:8, 73:5 <b>Protection</b> [3] - 31:24, 32:2, 33:16 <b>protections</b> [1] - 14:4 <b>protects</b> [1] - 50:5 <b>proud</b> [1] - 39:1 <b>provide</b> [2] - 17:13, 71:3 <b>provided</b> [4] - 60:4, 60:8, 60:15, 62:24 <b>provides</b> [1] - 75:1 <b>province</b> [1] - 31:12 <b>provision</b> [1] - 33:14 <b>provisions</b> [1] - 73:1 <b>psychological</b> [1] - 33:25 <b>public</b> [25] - 3:20, 4:13, 14:8, 16:25, 18:3, 23:9, 24:5, 24:16, 25:18, 25:20, 26:4, 26:7, 26:12, 27:3, 27:4, 27:14, 29:2, 31:14, 54:12, 65:6, 69:6, 69:14, 72:20, 74:14 <b>Public</b> [1] - 62:22 <b>publicly</b> [1] - 26:19 <b>publicly-available</b> [1] - 26:19 <b>pulled</b> [1] - 70:11 <b>purchase</b> [3] - 36:6, 58:22, 82:6 <b>purchased</b> [3] - 5:14, 58:20, 77:2 <b>purchases</b> [2] - 69:1 <b>purport</b> [3] - 11:23, 12:5, 12:20 <b>purpose</b> [17] - 5:12, 5:20, 6:3, 6:14, 8:10, 14:8, 16:22, 17:14, 17:15, 17:22, 22:22, 44:18, 47:17, 54:17, 76:9, 77:11, 81:1 <b>purposes</b> [17] - 6:11, 8:6, 17:22, 22:23, 23:13, 24:2, 34:10, 47:13, 48:13, 48:17, 49:8, 49:12, 50:7, 51:13, 53:18, 63:21, 65:6 <b>put</b> [7] - 19:6, 27:16, 35:25, 56:19, 58:16,	80:21, 83:12 <b>Q</b> <b>qualification</b> [1] - 70:16 <b>qualifications</b> [3] - 70:20, 70:22, 70:23 <b>qualify</b> [1] - 73:13 <b>questions</b> [2] - 15:25, 75:17 <b>quibble</b> [1] - 50:11 <b>quiet</b> [1] - 55:20 <b>quite</b> [2] - 10:14, 61:20 <b>quotations</b> [1] - 66:17 <b>quotes</b> [2] - 70:11, 70:15 <b>quoting</b> [2] - 66:20, 73:1 <b>R</b> <b>Racism</b> [1] - 57:4 <b>raise</b> [1] - 60:13 <b>raised</b> [3] - 18:16, 36:17, 36:18 <b>raises</b> [1] - 15:25 <b>random</b> [1] - 49:20 <b>range</b> [3] - 8:12, 30:1, 60:21 <b>rarely</b> [2] - 4:23, 4:25 <b>rather</b> [1] - 42:7 <b>ratified</b> [3] - 6:13, 6:23, 17:23 <b>rational</b> [1] - 34:5 <b>rationales</b> [1] - 34:4 <b>rationality</b> [1] - 34:6 <b>reach</b> [1] - 44:1 <b>reached</b> [3] - 41:10, 73:12, 73:24 <b>reaches</b> [1] - 28:9 <b>read</b> [4] - 30:17, 49:5, 73:4, 81:23 <b>readily</b> [7] - 46:25, 61:19, 68:13, 77:1, 77:9, 77:16, 83:3 <b>reading</b> [3] - 42:12, 46:7, 49:2 <b>realized</b> [1] - 68:22 <b>really</b> [8] - 16:18, 41:21, 43:18, 46:8, 51:20, 52:13, 74:22, 81:24 <b>reason</b> [1] - 32:5 <b>reasonable</b> [12] - 23:1, 23:7, 31:18, 41:15, 43:10, 44:6, 56:15, 67:20, 72:4, 72:6, 72:11, 72:13	<b>reasonably</b> [2] - 57:1, 72:11 <b>reasons</b> [6] - 14:23, 19:18, 30:20, 32:10, 75:16, 79:6 <b>rebuttal</b> [3] - 64:5, 75:22, 75:24 <b>receive</b> [1] - 33:11 <b>receivers</b> [1] - 9:8 <b>recent</b> [3] - 10:19, 39:13, 65:24 <b>recess</b> [1] - 64:6 <b>recognized</b> [1] - 14:6 <b>recollection</b> [2] - 21:16, 70:14 <b>recommendation</b> [1] - 63:10 <b>recommendations</b> [1] - 62:16 <b>recommending</b> [1] - 71:20 <b>record</b> [16] - 3:11, 7:2, 7:12, 7:15, 7:20, 8:11, 16:4, 30:9, 30:11, 30:12, 38:20, 39:14, 46:21, 54:22, 74:14, 80:4 <b>recovery</b> [1] - 67:16 <b>red</b> [1] - 47:21 <b>redefine</b> [1] - 11:23 <b>reduce</b> [10] - 41:17, 41:19, 42:2, 43:12, 45:20, 45:24, 46:3, 69:3, 69:7, 70:2 <b>reduced</b> [3] - 42:11, 69:25, 76:7 <b>reducing</b> [6] - 23:9, 29:2, 29:4, 41:21, 69:15, 70:8 <b>reduction</b> [3] - 40:22, 43:17, 67:8 <b>reference</b> [2] - 11:6, 66:20 <b>referenced</b> [2] - 11:7, 11:14 <b>referred</b> [3] - 9:7, 55:18, 83:3 <b>referring</b> [2] - 43:8, 57:7 <b>reforms</b> [1] - 63:4 <b>regard</b> [1] - 53:20 <b>regarding</b> [3] - 9:25, 25:2, 31:13 <b>registered</b> [1] - 82:5 <b>registration</b> [2] - 55:23, 82:15 <b>regulated</b> [1] - 8:24 <b>regulating</b> [1] - 53:23 <b>regulation</b> [6] - 20:16, 20:17, 56:24, 58:19,	59:9, 59:20 <b>regulations</b> [3] - 57:5, 58:14, 59:11 <b>reject</b> [1] - 54:11 <b>rejected</b> [4] - 53:5, 58:11, 82:19, 83:18 <b>related</b> [5] - 12:15, 41:17, 41:21, 45:20, 45:25 <b>relevant</b> [6] - 17:24, 18:1, 18:7, 51:4, 51:8 <b>reliable</b> [2] - 39:22, 79:1 <b>relied</b> [16] - 25:15, 26:22, 27:8, 27:11, 29:19, 39:12, 45:12, 56:8, 57:13, 57:23, 58:5, 58:6, 60:12, 81:2, 83:9, 83:19 <b>relies</b> [1] - 81:22 <b>reload</b> [2] - 60:19, 60:23 <b>rely</b> [3] - 30:4, 60:7, 83:24 <b>relying</b> [1] - 84:5 <b>remaining</b> [1] - 31:24 <b>remand</b> [3] - 30:14, 31:4, 44:25 <b>remarkably</b> [1] - 55:20 <b>remember</b> [3] - 28:5, 48:15, 61:10 <b>repaired</b> [1] - 40:10 <b>repeat</b> [1] - 22:12 <b>replete</b> [1] - 59:2 <b>reply</b> [2] - 31:7, 60:14 <b>report</b> [10] - 40:21, 40:24, 59:22, 67:7, 69:17, 69:18, 70:21, 70:22, 76:3, 76:15 <b>reported</b> [2] - 26:18, 27:21 <b>Reporter</b> [2] - 1:25, 85:11 <b>REPORTER'S</b> [1] - 85:1 <b>reports</b> [4] - 25:20, 26:12, 26:15, 39:17 <b>represent</b> [1] - 38:14 <b>represented</b> [1] - 60:9 <b>represents</b> [1] - 56:16 <b>require</b> [5] - 30:3, 53:13, 56:13, 59:10, 82:14 <b>required</b> [11] - 30:9, 30:10, 40:5, 40:9, 40:11, 43:25, 50:18, 58:18, 59:13, 59:14, 66:6 <b>requirement</b> [4] -	29:17, 47:20, 66:7, 71:5 <b>requirements</b> [1] - 55:23 <b>requires</b> [3] - 47:22, 55:1, 57:20 <b>requiring</b> [3] - 30:25, 39:2, 50:22 <b>resolve</b> [1] - 39:3 <b>resolved</b> [1] - 39:16 <b>resorting</b> [1] - 29:25 <b>respect</b> [33] - 2:24, 5:6, 5:16, 6:1, 8:21, 12:2, 16:1, 18:12, 18:18, 27:6, 33:3, 33:8, 35:25, 36:19, 37:5, 37:15, 41:8, 42:18, 45:15, 62:9, 66:14, 66:15, 66:22, 68:6, 69:16, 69:20, 70:25, 72:24, 74:5, 74:19, 76:2, 77:6, 84:1 <b>respond</b> [1] - 10:25 <b>responded</b> [1] - 50:1 <b>response</b> [2] - 61:7, 63:1 <b>responsibilities</b> [1] - 33:21 <b>responsibility</b> [1] - 31:15 <b>responsible</b> [2] - 48:13, 53:1 <b>restraining</b> [2] - 46:12, 55:19 <b>restraints</b> [1] - 66:10 <b>restriction</b> [1] - 58:22 <b>restrictions</b> [3] - 11:21, 56:4, 57:8 <b>restrictive</b> [7] - 55:3, 55:25, 56:19, 56:25, 58:10, 59:12, 59:13 <b>restricts</b> [1] - 44:11 <b>result</b> [4] - 24:20, 47:9, 70:7, 73:24 <b>results</b> [1] - 68:21 <b>retired</b> [7] - 32:23, 32:25, 33:5, 33:18, 33:19, 34:7, 62:14 <b>retirement</b> [1] - 33:16 <b>retiring</b> [1] - 33:15 <b>reversed</b> [1] - 54:11 <b>review</b> [6] - 26:16, 26:24, 30:10, 38:1, 38:5, 84:3 <b>reviewed</b> [1] - 26:8 <b>ribbon</b> [1] - 63:11 <b>ridiculous</b> [1] - 49:18 <b>Rifle</b> [4] - 27:7, 27:19, 27:21, 57:22
---	--	--	--	--



<p>rifle [4] - 8:4, 9:9, 24:17, 80:6</p> <p>rifles [18] - 7:24, 8:1, 16:5, 42:24, 43:2, 43:5, 43:12, 47:12, 76:6, 77:6, 80:2, 80:3, 80:9, 81:5, 82:25, 83:1, 83:2, 83:10</p> <p>Rights [3] - 4:15, 14:12, 22:14</p> <p>rights [17] - 10:8, 14:10, 14:11, 17:13, 20:13, 21:25, 22:9, 32:24, 34:18, 34:21, 44:11, 45:9, 52:2, 52:16, 78:21, 79:23, 80:19</p> <p>rise [1] - 67:14</p> <p>risk [1] - 75:7</p> <p>risks [2] - 18:2, 34:8</p> <p>robberies [1] - 45:21</p> <p>rock [1] - 57:4</p> <p>Rodger [1] - 61:23</p> <p>Roger [1] - 63:13</p> <p>role [1] - 78:24</p> <p>roommates [1] - 61:25</p> <p>round [3] - 19:6, 19:8, 62:3</p> <p>rounds [14] - 4:24, 6:15, 19:2, 19:10, 19:11, 19:20, 19:25, 20:5, 58:16, 61:6, 61:13, 61:16, 77:14, 83:15</p> <p>RPR [1] - 1:25</p> <p>Rule [9] - 44:12, 44:16, 44:17, 77:20, 78:5, 78:7, 78:20, 79:10</p> <p>ruled [1] - 78:19</p>	<p>81:10, 83:6</p> <p>Scalia's [2] - 81:10, 81:12</p> <p>scenario [1] - 36:9</p> <p>scenarios [1] - 5:24</p> <p>Scholar [1] - 66:23</p> <p>School [1] - 62:22</p> <p>science [1] - 78:22</p> <p>scientific [6] - 41:15, 43:10, 44:2, 66:7, 71:3, 71:7</p> <p>scientifically [1] - 28:13</p> <p>scientifically-assembled [1] - 28:13</p> <p>scope [14] - 6:25, 13:3, 13:5, 13:12, 14:16, 14:19, 16:12, 18:9, 18:14, 20:6, 21:9, 52:17, 52:19, 56:17</p> <p>scrutiny [58] - 3:9, 3:13, 9:21, 10:5, 10:7, 10:12, 10:18, 10:23, 11:3, 11:4, 11:8, 11:10, 11:15, 11:16, 11:24, 12:1, 12:2, 12:8, 12:13, 12:14, 12:17, 14:14, 20:10, 20:12, 21:1, 22:3, 22:6, 22:13, 22:25, 23:6, 26:20, 26:21, 29:25, 52:1, 53:11, 53:24, 54:2, 54:5, 54:7, 54:14, 54:23, 54:25, 55:8, 55:12, 55:14, 55:21, 56:11, 57:2, 57:6, 57:21, 65:22, 71:23, 71:24, 72:3, 72:9, 73:17, 73:25</p> <p>se [1] - 54:24</p> <p>Second [68] - 3:2, 3:7, 4:5, 4:10, 4:15, 4:20, 6:4, 6:13, 6:17, 9:15, 9:17, 10:23, 13:3, 13:9, 13:17, 13:21, 13:24, 14:9, 14:19, 15:1, 15:3, 16:14, 16:20, 17:11, 17:16, 17:23, 18:14, 18:22, 19:22, 20:9, 20:13, 20:14, 20:25, 21:9, 21:18, 21:24, 21:25, 22:6, 22:9, 22:16, 22:24, 29:22, 48:10, 48:15, 48:20, 49:1, 49:5, 49:6, 50:5, 50:10, 50:13, 50:16,</p>	<p>50:24, 51:3, 51:22, 52:20, 56:8, 57:23, 63:23, 66:4, 66:10, 74:1, 79:22, 80:16, 80:18, 81:17, 81:18</p> <p>second [8] - 9:19, 11:11, 11:13, 21:22, 29:14, 51:1, 51:14, 53:10</p> <p>secondary [1] - 69:2</p> <p>seconds [3] - 23:19, 60:21, 60:23</p> <p>see [4] - 27:5, 49:16, 55:8, 68:15</p> <p>seem [3] - 33:7, 33:13, 44:4</p> <p>selective [2] - 23:24, 66:16</p> <p>self [27] - 4:20, 4:23, 4:24, 5:1, 6:7, 17:6, 17:18, 22:22, 27:22, 28:20, 46:21, 46:23, 47:2, 47:16, 47:18, 47:23, 49:13, 50:8, 51:20, 53:25, 54:8, 54:12, 54:13, 61:13, 63:21, 73:9, 73:15</p> <p>self-defense [25] - 4:20, 4:23, 4:24, 5:1, 6:7, 17:6, 17:18, 22:22, 27:22, 28:20, 46:21, 46:23, 47:2, 47:16, 47:18, 47:23, 49:13, 50:8, 51:20, 53:25, 54:8, 61:13, 63:21, 73:9, 73:15</p> <p>sell [1] - 36:6</p> <p>semiautomatic [18] - 23:17, 23:18, 24:1, 24:2, 72:15, 77:6, 80:2, 80:3, 80:6, 80:9, 81:5, 81:21, 82:12, 82:21, 82:24, 83:1, 83:2, 83:10</p> <p>sense [6] - 6:10, 15:17, 30:3, 65:11, 65:20, 72:8</p> <p>sensitive [1] - 14:5</p> <p>sentence [2] - 30:17, 30:21</p> <p>separately [1] - 48:3</p> <p>serial [1] - 56:24</p> <p>serve [3] - 5:12, 56:5, 57:9</p> <p>served [1] - 56:18</p> <p>serves [1] - 22:24</p> <p>set [2] - 21:2, 78:2</p> <p>seven [1] - 83:18</p> <p>Seven [1] - 83:19</p> <p>several [2] - 14:23,</p>	<p>24:25</p> <p>severe [1] - 51:6</p> <p>Shew [1] - 57:25</p> <p>shooter [1] - 75:5</p> <p>shooters [1] - 60:18</p> <p>Shooting [1] - 47:10</p> <p>shooting [8] - 6:12, 7:5, 7:7, 27:14, 27:15, 34:1, 47:13, 60:19</p> <p>shootings [17] - 3:20, 24:5, 24:8, 24:10, 24:11, 24:17, 25:18, 27:4, 43:7, 43:13, 45:6, 59:5, 61:16, 69:6, 72:20, 75:5, 76:12</p> <p>short [1] - 49:9</p> <p>shot [2] - 43:9, 62:2</p> <p>shotguns [2] - 43:5, 49:9</p> <p>shots [4] - 24:15, 26:5, 28:19, 70:7</p> <p>show [5] - 24:14, 24:20, 46:15, 55:2, 58:8</p> <p>showing [1] - 49:22</p> <p>shown [7] - 45:4, 46:22, 59:15, 59:16, 63:14, 63:16, 79:16</p> <p>shows [2] - 8:14, 46:7</p> <p>side [3] - 30:23, 64:5, 72:1</p> <p>sides [2] - 39:5, 84:11</p> <p>signals [1] - 30:25</p> <p>significant [9] - 40:1, 56:5, 57:9, 67:12, 67:14, 67:23, 68:15, 68:19, 68:20</p> <p>similar [6] - 3:10, 4:2, 5:22, 12:10, 45:16, 74:3</p> <p>similarly [6] - 32:19, 32:25, 33:9, 33:19, 34:2, 56:4</p> <p>Simpkins [2] - 1:25, 85:10</p> <p>simple [2] - 34:13, 75:10</p> <p>simply [15] - 10:2, 12:20, 15:18, 18:6, 30:7, 31:5, 31:8, 34:2, 48:24, 73:13, 75:12, 76:12, 77:10, 79:8, 83:11</p> <p>single [4] - 14:16, 26:17, 50:17, 56:16</p> <p>sit [1] - 41:14</p> <p>sits [2] - 12:23, 14:11</p> <p>sitting [1] - 23:4</p>	<p>situated [5] - 32:19, 32:25, 33:9, 33:19, 34:3</p> <p>situation [1] - 37:13</p> <p>situations [3] - 24:21, 34:2, 35:17</p> <p>Sky [2] - 1:19, 2:6</p> <p>small [2] - 22:9, 61:20</p> <p>so-called [1] - 58:21</p> <p>society [1] - 80:25</p> <p>sold [3] - 8:24, 9:1, 72:17</p> <p>sole [2] - 14:18, 23:16</p> <p>solely [1] - 59:21</p> <p>sometime [2] - 58:15, 58:18</p> <p>sometimes [2] - 24:9, 47:1</p> <p>somewhat [1] - 43:23</p> <p>somewhere [1] - 61:11</p> <p>soon [1] - 84:13</p> <p>sorry [1] - 69:17</p> <p>sorts [2] - 45:11, 63:9</p> <p>sought [1] - 44:23</p> <p>sounding [1] - 4:17</p> <p>sounds [2] - 54:3, 54:4</p> <p>source [1] - 26:18</p> <p>sources [5] - 26:4, 26:7, 29:9, 30:1, 30:4</p> <p>specific [3] - 11:19, 36:8, 71:2</p> <p>specifically [6] - 5:18, 11:22, 22:14, 32:16, 71:19, 71:21</p> <p>sped [1] - 61:25</p> <p>speech [2] - 53:23, 57:1</p> <p>split [1] - 9:24</p> <p>sport [2] - 6:12, 6:16</p> <p>sporting [4] - 6:3, 7:24, 8:4, 47:12</p> <p>Sports [1] - 47:10</p> <p>sports [1] - 7:7</p> <p>stabbed [1] - 61:24</p> <p>stamp [1] - 82:7</p> <p>stand [1] - 31:8</p> <p>Standard [1] - 59:14</p> <p>standard [18] - 10:4, 10:22, 11:2, 11:10, 12:4, 12:8, 12:9, 12:13, 12:17, 12:21, 23:6, 34:19, 34:25, 57:2, 65:14, 72:9, 73:17, 73:19</p> <p>standards [3] - 10:6, 14:14, 64:24</p> <p>standing [3] - 64:9,</p>
<b>S</b>				
<p>safety [9] - 4:13, 14:8, 17:1, 18:3, 23:9, 29:2, 31:14, 65:6, 69:14</p> <p>sales [1] - 73:10</p> <p>sample [1] - 49:20</p> <p>Santa [1] - 61:23</p> <p>satisfied [2] - 37:18, 65:21</p> <p>satisfies [1] - 44:17</p> <p>satisfy [4] - 9:20, 11:12, 65:2, 73:25</p> <p>saw [2] - 57:22, 63:13</p> <p>SB281 [2] - 38:15, 62:18</p> <p>Scalia [3] - 80:23,</p>				

<p>64:11, 64:13  <b>stands</b> [1] - 4:11  <b>Staples</b> [4] - 81:2, 81:13, 83:4, 83:7  <b>start</b> [2] - 4:3, 39:23  <b>starting</b> [1] - 39:12  <b>state</b> [16] - 5:2, 5:7, 7:15, 7:19, 8:21, 36:18, 42:7, 42:9, 42:10, 43:9, 46:20, 59:8, 69:16, 69:21, 75:7, 77:2  <b>State</b> [17] - 5:14, 8:25, 9:2, 20:21, 36:13, 36:25, 37:17, 37:25, 44:10, 57:7, 57:22, 58:7, 58:25, 62:15, 70:17, 71:17, 80:5  <b>State's</b> [1] - 4:8  <b>state-level</b> [1] - 42:10  <b>statement</b> [4] - 35:20, 54:3, 59:19, 60:16  <b>statements</b> [2] - 59:2, 66:19  <b>STATES</b> [1] - 1:1  <b>states</b> [2] - 63:17, 77:1  <b>States</b> [9] - 1:13, 7:18, 7:19, 23:23, 29:23, 76:4, 76:23, 80:6, 85:6  <b>statistically</b> [1] - 43:19  <b>statute</b> [4] - 34:17, 35:5, 44:14, 77:9  <b>statutes</b> [3] - 22:2, 34:16, 35:2  <b>statutory</b> [1] - 12:14  <b>Stephen</b> [1] - 85:3  <b>STEPHEN</b> [1] - 1:4  <b>still</b> [8] - 5:14, 9:10, 22:23, 23:14, 23:19, 41:1, 41:6, 42:14  <b>stock</b> [1] - 73:13  <b>stop</b> [5] - 20:22, 32:4, 41:20, 52:6, 56:7  <b>stories</b> [5] - 27:10, 27:19, 27:20, 27:25, 28:17  <b>straightforwardly</b> [1] - 11:19  <b>straw</b> [2] - 69:1, 70:1  <b>strength</b> [1] - 20:16  <b>strict</b> [9] - 22:13, 53:24, 54:2, 54:5, 54:7, 54:14, 54:25, 72:9  <b>striking</b> [1] - 62:1  <b>strong</b> [1] - 54:3  <b>strongly</b> [1] - 70:10  <b>studies</b> [8] - 40:1, 40:8, 40:11, 42:10,</p>	<p>42:15, 67:11, 69:19, 69:24  <b>study</b> [11] - 8:14, 28:3, 28:9, 28:13, 28:14, 40:5, 40:9, 40:10, 41:2, 42:18, 83:24  <b>studying</b> [1] - 41:8  <b>style</b> [3] - 23:12, 63:4, 72:18  <b>subassemblies</b> [1] - 37:21  <b>subclass</b> [3] - 80:10, 80:11, 80:12  <b>subject</b> [12] - 14:12, 26:20, 26:21, 26:24, 26:25, 49:5, 52:14, 53:23, 54:1, 62:4, 70:16, 70:20  <b>subjected</b> [1] - 52:8  <b>submission</b> [1] - 10:19  <b>submit</b> [1] - 73:18  <b>submitted</b> [1] - 36:4  <b>subsequent</b> [1] - 67:10  <b>substantial</b> [13] - 23:2, 23:8, 31:16, 51:5, 55:24, 65:4, 65:10, 75:14, 77:22, 77:23, 78:15, 79:20, 83:14  <b>substantiality</b> [2] - 78:3, 78:17  <b>substantially</b> [3] - 12:15, 50:2, 74:2  <b>substitute</b> [1] - 70:5  <b>substituting</b> [1] - 77:10  <b>substitution</b> [2] - 76:20, 77:5  <b>successful</b> [1] - 15:20  <b>successfully</b> [2] - 15:21, 35:6  <b>sudden</b> [2] - 61:1, 65:13  <b>sufficient</b> [6] - 3:12, 16:11, 20:24, 74:3, 75:1, 79:9  <b>suggest</b> [10] - 6:24, 10:4, 10:21, 16:6, 42:10, 43:16, 44:1, 49:18, 55:10, 83:25  <b>suggested</b> [3] - 63:2, 76:16, 79:11  <b>suggestion</b> [1] - 9:22  <b>suggests</b> [1] - 54:21  <b>summary</b> [7] - 8:6, 8:11, 32:1, 32:7, 32:11, 39:16, 75:18  <b>supply</b> [1] - 79:15  <b>support</b> [17] - 23:7,</p>	<p>29:21, 31:5, 39:21, 44:10, 45:1, 46:8, 46:14, 58:24, 65:4, 71:8, 72:24, 75:14, 77:23, 80:10, 83:14, 83:23  <b>supportable</b> [1] - 44:7  <b>supported</b> [3] - 47:20, 59:25, 62:18  <b>supporting</b> [1] - 63:9  <b>Supreme</b> [53] - 2:21, 3:24, 4:6, 4:14, 4:18, 6:6, 6:18, 10:3, 10:6, 10:11, 10:21, 11:5, 11:7, 11:9, 11:14, 11:18, 12:5, 12:9, 12:12, 13:5, 13:7, 13:10, 13:14, 14:7, 14:13, 15:11, 15:14, 16:13, 16:17, 16:21, 17:8, 17:9, 17:14, 17:21, 18:3, 18:21, 22:19, 22:20, 30:6, 35:1, 35:7, 35:11, 44:24, 49:4, 57:4, 57:15, 71:18, 71:20, 71:23, 81:4, 82:19, 83:4  <b>surely</b> [1] - 52:24  <b>surprised</b> [1] - 40:16  <b>surprising</b> [1] - 61:4  <b>surrounding</b> [1] - 70:15  <b>surveillance</b> [1] - 62:9  <b>survey</b> [1] - 47:9  <b>survive</b> [1] - 34:24  <b>swaths</b> [1] - 80:9  <b>Sweeney</b> [9] - 1:18, 2:5, 38:10, 38:13, 43:20, 64:18, 75:10, 75:22, 84:8  <b>SWEENEY</b> [24] - 38:11, 38:13, 39:9, 42:1, 42:6, 44:9, 44:21, 46:22, 47:6, 47:9, 47:19, 49:24, 51:8, 51:11, 53:12, 53:15, 57:18, 61:18, 75:23, 76:19, 78:11, 78:14, 78:17, 79:8  <b>Sweeney's</b> [1] - 67:1  <b>symposium</b> [2] - 62:25, 63:3  <b>system</b> [1] - 68:16  <b>systematic</b> [3] - 26:16, 28:9, 67:7  <b>systematically</b> [1] - 27:24</p>	<p style="text-align: center;"><b>T</b></p> <p><b>table</b> [4] - 51:14, 51:24, 54:17, 64:1  <b>tailor</b> [1] - 83:22  <b>tailored</b> [12] - 56:1, 56:5, 56:21, 57:6, 57:9, 57:15, 58:8, 72:7, 72:8, 72:12, 72:14, 72:22  <b>tailoring</b> [6] - 55:2, 57:16, 57:20, 58:4, 79:20, 83:15  <b>talks</b> [1] - 48:9  <b>target</b> [3] - 5:4, 47:13, 70:3  <b>task</b> [2] - 62:12, 62:15  <b>tax</b> [1] - 82:7  <b>teaching</b> [2] - 54:20, 54:21  <b>team</b> [1] - 75:25  <b>teed</b> [1] - 39:1  <b>temporary</b> [2] - 46:12, 55:19  <b>ten</b> [19] - 4:23, 19:2, 19:9, 19:11, 19:20, 19:25, 20:5, 28:19, 40:4, 61:6, 61:13, 61:16, 62:3, 76:14, 79:15, 79:17, 83:15, 83:23  <b>ten-round</b> [1] - 62:3  <b>ten-year</b> [3] - 40:4, 79:15, 79:17  <b>term</b> [1] - 69:13  <b>terms</b> [1] - 12:10  <b>terrible</b> [1] - 38:24  <b>test</b> [18] - 9:15, 9:21, 10:12, 11:10, 11:19, 12:1, 13:1, 21:5, 22:25, 23:3, 34:5, 37:18, 53:4, 53:11, 65:2, 71:22, 73:20, 77:22  <b>testify</b> [1] - 46:24  <b>testimonial</b> [1] - 29:20  <b>testimony</b> [15] - 28:22, 43:22, 45:15, 59:23, 59:25, 60:2, 60:4, 60:5, 66:17, 71:1, 71:2, 74:6, 74:17, 74:22  <b>testing</b> [1] - 26:25  <b>text</b> [5] - 30:1, 47:21, 48:8, 48:15, 57:14  <b>THE</b> [61] - 1:1, 1:2, 2:2, 2:10, 3:3, 5:2, 6:20, 7:9, 7:17, 9:13, 10:14, 10:17, 16:6, 17:3, 18:11, 19:3,</p>	<p>19:12, 20:7, 20:20, 21:13, 24:23, 25:5, 25:12, 26:10, 27:2, 27:7, 28:21, 31:22, 32:4, 32:14, 35:7, 36:21, 38:9, 38:12, 39:4, 41:20, 42:5, 43:20, 44:15, 46:19, 47:4, 47:8, 47:15, 49:20, 50:25, 51:10, 53:6, 53:14, 57:17, 61:9, 64:3, 64:7, 64:15, 70:14, 75:20, 76:16, 78:7, 78:12, 78:16, 79:4, 84:8  <b>theft</b> [1] - 69:2  <b>theme</b> [1] - 58:4  <b>themselves</b> [1] - 18:20  <b>therefore</b> [3] - 31:2, 34:22, 70:8  <b>thinking</b> [1] - 60:22  <b>Third</b> [1] - 56:22  <b>third</b> [1] - 52:11  <b>Thomas</b> [1] - 81:9  <b>thorough</b> [3] - 66:3, 66:24, 84:10  <b>thousands</b> [1] - 6:15  <b>threat</b> [1] - 29:4  <b>three</b> [8] - 8:16, 8:18, 61:24, 62:2, 73:12, 76:25, 80:13, 83:5  <b>threshold</b> [2] - 14:22, 15:18  <b>throughout</b> [1] - 58:4  <b>thrust</b> [1] - 44:15  <b>tight</b> [1] - 55:22  <b>today</b> [8] - 7:8, 18:22, 38:18, 41:1, 41:14, 42:14, 49:15, 82:6  <b>together</b> [1] - 84:12  <b>tons</b> [1] - 25:24  <b>took</b> [4] - 58:13, 66:2, 68:9, 72:13  <b>tort</b> [1] - 65:2  <b>total</b> [1] - 9:1  <b>town</b> [1] - 49:16  <b>Towson</b> [2] - 49:15, 49:22  <b>tradition</b> [2] - 13:6, 21:11  <b>traditional</b> [4] - 13:13, 43:23, 49:10, 71:22  <b>training</b> [2] - 33:11, 33:22  <b>transcript</b> [1] - 85:2  <b>transfer</b> [7] - 33:4, 33:14, 67:25, 68:1, 68:4, 68:14, 68:18  <b>transfers</b> [2] - 69:10, 76:17</p>
---	--	---	--	--

<p><b>transition</b> [1] - 15:22  <b>treat</b> [2] - 8:11, 23:20  <b>treated</b> [3] - 21:23, 24:12, 32:18  <b>treating</b> [2] - 32:3, 32:12  <b>troubled</b> [1] - 61:24  <b>troubles</b> [1] - 77:21  <b>true</b> [7] - 12:2, 21:20, 41:13, 48:18, 70:25, 77:6, 85:7  <b>Trustees</b> [3] - 56:12, 57:7, 58:2  <b>try</b> [5] - 14:15, 27:5, 79:21, 80:21, 83:12  <b>trying</b> [2] - 44:5, 75:9  <b>turn</b> [1] - 78:22  <b>Turner</b> [4] - 30:6, 30:8, 30:13, 44:21  <b>twice</b> [1] - 83:5  <b>two</b> [16] - 9:15, 21:4, 28:17, 29:12, 30:20, 31:20, 33:2, 39:25, 47:12, 58:14, 60:20, 60:23, 62:2, 69:18, 76:5, 76:7  <b>two-prong</b> [1] - 9:15  <b>type</b> [3] - 26:25, 51:3, 65:17  <b>Type</b> [1] - 9:8  <b>types</b> [6] - 64:19, 65:7, 65:8, 65:16, 66:5, 67:3  <b>typically</b> [3] - 48:12, 48:14, 49:7</p>	<p><b>underlying</b> [1] - 46:11  <b>understood</b> [6] - 6:5, 7:4, 9:18, 13:4, 21:10, 52:17  <b>unfortunate</b> [2] - 61:22, 63:12  <b>unfortunately</b> [1] - 61:15  <b>unintentional</b> [1] - 29:5  <b>UNITED</b> [1] - 1:1  <b>United</b> [9] - 1:13, 7:17, 7:19, 23:23, 29:23, 76:4, 76:23, 80:6, 85:6  <b>University</b> [1] - 57:7  <b>unknown</b> [1] - 61:7  <b>unless</b> [1] - 75:16  <b>unlike</b> [1] - 14:10  <b>unlimited</b> [1] - 4:16  <b>unmindful</b> [1] - 83:7  <b>unnumbered</b> [1] - 61:7  <b>unreliable</b> [1] - 84:2  <b>unreported</b> [1] - 84:3  <b>untenable</b> [1] - 10:1  <b>untested</b> [1] - 84:2  <b>unusual</b> [3] - 15:10, 20:23, 28:24  <b>up</b> [5] - 20:20, 39:1, 49:22, 58:23, 77:12  <b>updated</b> [2] - 25:19, 40:10  <b>upheld</b> [1] - 4:2  <b>uphold</b> [2] - 22:2, 57:8  <b>upper</b> [1] - 8:6  <b>upset</b> [1] - 36:7  <b>useful</b> [3] - 23:11, 72:18, 77:15  <b>usefulness</b> [1] - 52:15  <b>uses</b> [3] - 23:3, 69:4, 69:5  <b>usual</b> [1] - 21:12</p>	<p>41:6, 42:14, 54:11  <b>viewed</b> [1] - 17:22  <b>vigilance</b> [1] - 62:9  <b>Village</b> [3] - 35:1, 35:11, 35:19  <b>violate</b> [2] - 3:1, 32:23  <b>violation</b> [2] - 33:16, 81:15  <b>violence</b> [4] - 23:10, 40:23, 69:15, 70:9  <b>Virginia</b> [2] - 67:12, 76:25  <b>virtually</b> [1] - 23:20  <b>void</b> [1] - 34:13  <b>vs</b> [1] - 85:3  <b>VS</b> [1] - 1:6  <b>vulnerable</b> [4] - 76:20, 77:5, 77:18, 77:19</p>	<p><b>whereby</b> [1] - 15:20  <b>wide</b> [1] - 29:25  <b>winter</b> [1] - 38:25  <b>wise</b> [1] - 38:25  <b>withstand</b> [1] - 12:13  <b>witness</b> [2] - 8:7, 8:9  <b>witnesses</b> [2] - 8:14, 39:15  <b>Woodward</b> [2] - 1:19, 2:6  <b>Woollard</b> [3] - 29:19, 54:10, 57:11  <b>word</b> [4] - 29:7, 74:5, 80:21, 83:9  <b>words</b> [2] - 53:8, 79:15  <b>world</b> [1] - 23:15  <b>worse</b> [1] - 24:18  <b>worth</b> [1] - 52:13  <b>writing</b> [1] - 83:6  <b>written</b> [1] - 84:13</p>
<b>U</b>	<b>V</b>	<b>W</b>	<b>Y</b>
<p><b>U.S</b> [1] - 12:11  <b>ultimately</b> [1] - 11:12  <b>unable</b> [1] - 58:23  <b>unanimously</b> [2] - 2:25, 3:8  <b>unbanned</b> [1] - 80:8  <b>uncertain</b> [1] - 61:4  <b>unconstitutional</b> [2] - 37:14, 52:5  <b>under</b> [31] - 3:12, 4:12, 9:10, 9:21, 10:6, 13:1, 14:13, 19:16, 31:23, 32:15, 34:5, 34:24, 37:25, 40:7, 40:10, 40:11, 50:5, 50:16, 50:24, 51:14, 51:25, 54:24, 57:20, 58:18, 61:6, 63:22, 65:22, 77:17, 79:10, 82:3, 82:14  <b>underlie</b> [2] - 26:13, 45:8</p>	<p><b>vagueness</b> [5] - 34:13, 34:16, 35:2, 35:6, 35:22  <b>validity</b> [2] - 26:9, 38:7  <b>value</b> [2] - 69:22, 69:23  <b>vary</b> [1] - 44:17  <b>vastly</b> [1] - 43:1  <b>vehicles</b> [1] - 42:23  <b>verb</b> [1] - 48:16  <b>version</b> [1] - 23:21  <b>versus</b> [4] - 2:4, 12:11, 29:23, 32:16  <b>view</b> [5] - 38:2, 41:1,</p>	<p><b>wake</b> [1] - 2:21  <b>Ward</b> [1] - 57:4  <b>Washington</b> [1] - 83:24  <b>ways</b> [5] - 12:1, 12:22, 29:12, 67:4, 69:8  <b>weapon</b> [2] - 19:17, 42:11  <b>weapons</b> [38] - 2:20, 5:3, 7:13, 7:14, 9:1, 15:4, 15:9, 15:22, 15:23, 16:2, 16:11, 18:23, 20:24, 22:7, 23:24, 28:23, 33:3, 40:3, 41:3, 41:9, 41:16, 42:9, 45:19, 45:24, 46:3, 49:7, 63:5, 69:22, 72:15, 73:3, 73:8, 73:14, 76:18, 82:24, 82:25, 83:1  <b>wear</b> [1] - 10:1  <b>weather</b> [1] - 38:25  <b>weather-wise</b> [1] - 38:25  <b>Webster</b> [8] - 46:24, 47:5, 62:6, 62:13, 62:16, 62:25, 63:8, 63:10  <b>Webster's</b> [3] - 59:18, 62:19, 62:21  <b>weigh</b> [2] - 31:12, 71:25  <b>weight</b> [2] - 80:21, 83:11  <b>well-defined</b> [1] - 64:23  <b>whatsoever</b> [3] - 55:6, 58:8, 78:24</p>	<p><b>year</b> [3] - 40:4, 79:15, 79:17  <b>years</b> [3] - 73:10, 73:11, 76:14  <b>yesterday</b> [1] - 2:12  <b>York</b> [4] - 2:24, 57:22, 73:23, 83:18  <b>young</b> [1] - 61:24</p>
<b>Z</b>			<p><b>zones</b> [1] - 11:22</p>