

LIBRARY OF CONGRESS

IN THE MATTER OF:)
)
 SOVEREIGN IMMUNITY)
 ROUNDTABLES)

Remote Conference
 1220 L Street, N.W.
 Washington, D.C.

Friday,
 December 11, 2020

The parties met, pursuant to the notice, at
 10:05 a.m.

PARTICIPANTS:

Session 1:

Frederick Allen, Nautilus Productions
 Sara Benson, University of Illinois
 at Urbana Champaign
 Andrea Johnson, C MATH is EASY
 Craig Linder, Dow Jones & Company
 Kevin Madigan, Copyright Alliance
 Johannes Munter, News Media Alliance
 Maria Sapiandante, Intellectual Property Attorney
 Jeff Sedlik, Art Center College of Design
 Kevin Smith, University of Kansas
 William Thro, University of Kentucky

Session 2:

Dr. Keith Bell, Author
 Michael Bynum, Author
 Devin Laiho, Colorado Attorney General's Office
 Melissa Levine, University of Michigan Library
 Angus MacDonald, University of California,
 Office of General Counsel
 Isaac Molnar, Ohio Attorney General's Office
 Kristen Murphy, American Chemical Society
 Brian Wassom, American Intellectual Property
 Law Association

PARTICIPANTS: (Cont'd)

Session 3:

Brandon Butler, Association of Southeastern
Research Libraries; Software Preservation
Network

Yvonne Dooley, University of North Texas

Harold Evans, University of Arkansas

Kurt R. Klaus Sr., National Partner, Dunlap
Bennett & Ludwig, PLLC

Raven Lanier, University of Michigan Library

Rachael Samberg, University of California,
Berkeley

Douglas Shontz, University of Illinois;

Association of Public and Land Grant
Universities

Session 4:

Jonathan Band, Library Copyright Alliance

Michael Bynum, Author

Alicia Calzada, National Press Photographers
Association

Kevin Madigan, Copyright Alliance

Darcee Olson, Louisiana State University

Marc Vockell, University of Texas System

Yuanxiao Xu, University of Michigan Library

P R O C E E D I N G S

(10:05 a.m.)

1
2
3 MS. SMITH: I think we are all here, and we
4 are about to start our roundtables, so if anyone who
5 is a panelist -- I think we're all muted, but if we
6 can mute if you're not muted, and I think everyone
7 else, including the Copyright Office, if we can turn
8 off our video for a second because we are so excited
9 that we are able to start today's event with welcoming
10 opening remarks by our brand new register that we are
11 so thrilled to have, Shira Perlmutter. Shira?

12 MS. PERLMUTTER: Thanks, Regan. Good
13 morning, everyone. On behalf of the Copyright Office,
14 I want to welcome all of you to this roundtable for
15 our policy study on sovereign immunity.

16 Today's event is a first for the Office.
17 These are the first public roundtables we've conducted
18 entirely remotely. I'm grateful to the Copyright
19 Office staff, and, in particular, the Office of
20 General Counsel and the Office of Public Information
21 and Education for working to ensure a smooth
22 transition to this online format, and for making this
23 event accessible to as many members of the public as
24 possible.

25 I'd also like to thank our panelists in

1 advance for their contributions. As with all
2 Copyright Office studies, our analysis and
3 recommendations depend on the strength of the record
4 presented to us, and we appreciate your willingness to
5 provide the benefit of your expertise.

6 The issue of state sovereign immunity to
7 infringement suits has long been a concern for the
8 Copyright Office. In 1988, at the request of
9 Congress, Register Ralph Oman issued a report
10 summarizing comments on this topic and proposing
11 legislative changes. The Office's findings and
12 recommendations provided the basis for the Copyright
13 Remedy Clarification Act of 1990.

14 Later, Register Marybeth Peters testified to
15 Congress regarding proposed legislation that sought to
16 avoid the constitutional issue by encouraging
17 voluntary waivers of immunity by states. She noted
18 that the ability of copyright owners to protect their
19 property and to obtain complete relief when their
20 rights are violated is central to the balance of
21 interests in the Copyright Act.

22 The current study comes at the request of
23 Senators Tillis and Leahy following the Supreme
24 Court's recent decision in *Allen v. Cooper* striking
25 down the Copyright Remedy Clarification Act. Their

1 request stressed the importance of the legislative
2 record to an assessment of whether there is a
3 sufficient basis for abrogating state sovereign
4 immunity. Today's discussion is therefore critical to
5 the Office's, and, ultimately, to Congress'
6 consideration.

7 We look forward to an illuminating
8 discussion. Thank you again for your participation,
9 and let me now turn the proceedings back over to
10 Regan.

11 MS. SMITH: Thank you so much, Shira, and
12 thank you for those remarks.

13 We are going to begin the roundtables. As
14 Shira said, my name is Regan Smith, General Counsel of
15 the Copyright Office. Before we start with the first
16 panel, I will go over a few logistical items to make
17 sure we're getting this correct.

18 So I think everyone who is on panel one can
19 turn on their videos and maybe stay muted until we
20 commence. And so the roundtable sessions will be
21 moderated by the Copyright Office attorneys here, on
22 the call. We will pose questions and call on
23 panelists to respond. We'll do our best to give
24 everyone the opportunity to chime in. You can use the
25 raise hand button on Zoom or you could kind of raise

1 your hand if you need to signal, but if you're not
2 speaking, please mute your audio to minimize any
3 extraneous noise.

4 Given the number of panelists and topics
5 that we have to cover, we are trying to ask responders
6 to limit responses to no more than two minutes. We
7 apologize in advance that, if it's going over, we may
8 need to cut you off. We may even need to mute. We're
9 going to try not to do that, but we appreciate your
10 understanding of our time constraints, our need to
11 hear from everyone. It's a virtual format we're all
12 adjusting to. So if you can try to limit your
13 comments to the specific question posed, there will be
14 a few opportunities for everyone to speak, we
15 envision.

16 Secondly, we have five scheduled sessions.
17 This first one is scheduled to stop at 11:30, at which
18 time we'll have a short break. They can be accessed
19 by the same Zoom link we are now using throughout the
20 day.

21 I'm not sure, but perhaps certain panelists
22 may be accessing one link where you can turn your
23 video on for a panel that you're not on. Just, if you
24 don't do that, that will help to turn your video on
25 when it is the session you're scheduled for.

1 Our final session of the day is an open mic
2 session in which members of the public are able to
3 provide additional comments for the benefit of our
4 administrative record.

5 If you are interested in participating, you
6 may sign up at a Survey Monkey link provided in a chat
7 box no later -- by 3:00 p.m., Eastern Time. If
8 someone wanted to give me a nod if we have the Survey
9 Monkey link up there yet? Yes, I see a nod. Okay.
10 So you should be seeing that if you are watching these
11 roundtables.

12 Beginning at 5:15, Copyright Office staff
13 will call on and un-mute those who have signed up to
14 participate, time permitting. Comments should be
15 about three minutes, anything related to our study,
16 and can be on any topics noted throughout the day.

17 And, finally, today's event is being
18 recorded. That video will be posted on the Copyright
19 Office website and YouTube channel eventually. We
20 also have a court reporter transcribing the
21 proceedings, as you may know if you've participated in
22 front of the old school physical format of these
23 roundtables, and that transcript, too, will be posted
24 on the Copyright Office website.

25 So now I'm going to start the first panel.

1 This session concerns evidence of actual or threatened
2 infringement by state actors. I will provide a little
3 bit of a roadmap so folks understand, or they may want
4 to chime in, because I do think the virtual medium
5 makes it a little harder to anticipate, so I want to
6 make sure we can maximize our limited time.

7 So we are hoping to touch on a few key areas
8 in this order. Namely, first, sort of qualitative
9 considerations in evaluating evidence of infringement
10 in broader trends; secondly, individual examples;
11 third, the nature of alleged infringements at issue,
12 that is, whether reckless or intentional conduct is
13 implicated, how could we tell whether exceptions and
14 limitations may apply; and, finally, whether state
15 immunity has any effects upon sales and licensing
16 practices.

17 So, before we begin, I'm going to ask my
18 Copyright Office colleagues who are joining us today
19 to introduce themselves, and, actually, all of the
20 Copyright Office's colleagues present who are -- I
21 don't see on video because you will be participating.
22 Other panelists could do this -- pop up now to say
23 hello. So starting with Mr. Amer.

24 MR. AMER: Good morning, Kevin Amer, Deputy
25 General Counsel.

1 MS. RUBEL: Jordana Rubel, Assistant General
2 Counsel.

3 MS. MANGUM: Jalyce Mangum, Attorney
4 Advisor.

5 MR. GRAY: Mark Gray, also Attorney Advisor.

6 MS. KERN: Melinda Kern, Ringer Fellow.

7 MS. SMITH: Thank you. Thank you all. And
8 now I think I will call on participants, so if you can
9 provide your name and your affiliation. We'll sort of
10 hold off on opening statements, but you will have the
11 opportunity to tell us your broad interests in the
12 first question posed to you. If we could start with
13 Mr. Allen.

14 MR. ALLEN: Good morning. Thanks for having
15 me here. I'm Frederick Allen from Nautilus
16 Productions, and I'm the Allen in Allen v. Cooper.

17 MS. SMITH: Thank you.

18 Ms. Benson?

19 MS. BENSON: Good morning, my name is Sara
20 Benson. I am the copyright librarian at the
21 University of Illinois Libraries.

22 MS. SMITH: Thank you.

23 Ms. Johnson?

24 MS. JOHNSON: My name is Andrea Johnson.
25 I'm with C Math is Easy in Corpus Christi, Texas.

1 MS. SMITH: Thank you.

2 Mr. Linder?

3 MR. LINDER: Good morning, my name is Craig
4 Linder, Associate General Counsel at Dow Jones and
5 Company. We're the publisher of *The Wall Street*
6 *Journal*, *Barron's*, *Market Watch*, and other
7 publications.

8 MS. SMITH: Thank you.

9 Mr. Madigan?

10 MR. MADIGAN: Hey, everyone, I'm Kevin
11 Madigan. I'm VP of Legal Policy and Copyright Counsel
12 at the Copyright Alliance.

13 MS. SMITH: Mr. Munter?

14 MR. MUNTER: Hi, all. I'm Johannes Munter.
15 I'm a consultant with the News Media Alliance.

16 MS. SMITH: Thank you.

17 Ms. Sapiandante? I hope I pronounced that
18 right. I think you're muted.

19 MS. SAPIANDANTE: Hi, I'm Maria Sapiandante.
20 I'm an attorney that practices intellectual property
21 for state agencies.

22 MS. SMITH: Thank you.

23 Mr. Sedlik?

24 MR. SEDLIK: I'm Jeff Sedlik. I am a
25 professor at the Art Center College of Design, and I

1 am President and CEO of the PLUS Coalition.

2 MS. SMITH: Thank you.

3 Mr. Smith?

4 MR. SMITH: Hi. Thank you for having me
5 here today. My name is Kevin Smith. I'm the Dean of
6 Libraries, and a courtesy professor of law, that is, I
7 teach copyright law, at the University of Kansas Law
8 School.

9 MS. SMITH: Thank you.

10 And, finally, just because alphabetically,
11 Mr. Thro.

12 MR. THRO: Yes. Hi, my name is Bill Thro.
13 I'm the General Counsel at the University of Kentucky.
14 I'm here on behalf of not only the University of
15 Kentucky, but the Association of Public and Land-Grant
16 Universities, as well as the American Association of
17 Universities.

18 MS. SMITH: Thank you all for being here.
19 We are very excited to hear what you have to share
20 with the Office today, and let's get started. I
21 think, if the first topic is to start on broader
22 issues, I would like to direct the first question to
23 the Copyright Alliance who submitted a survey and
24 response to this study.

25 So I'm wondering, Mr. Madigan, could you

1 please describe the methodology towards the survey,
2 and provide a short summary of the key conclusions
3 that you have gotten regarding the prevalence of
4 infringements by states?

5 MR. MADIGAN: Sure. Absolutely. So, in
6 response to the Copyright Office's NOI back in June,
7 the Copyright Alliance launched a public survey, which
8 included many of the same questions listed in the NOI.

9 We solicited feedback from copyright owners
10 on their experience with infringement by state
11 entities. But we designed the survey in a way that we
12 believed would solicit the most sort of accurate
13 responses from creators and copyright owners who may
14 not have a legal background.

15 We also conducted interviews with a number
16 of Copyright Alliance members and individual creators
17 who have experienced infringement by state entities
18 and have either been unable or deterred from
19 exercising their rights due to state sovereign
20 immunity.

21 Overall, we compiled what we believe is
22 compelling evidence showing that the remedies against
23 infringement are inadequate, or non-existent, and that
24 state copyright infringement is a growing trend that
25 is increasingly threatening the goals of the copyright

1 system.

2 And just to talk a little bit more
3 specifically, I guess, we had our survey open for a
4 few weeks, we had about 600 and -- I think it was 657
5 total responses. Well over 100 of those responses
6 said that they had encountered infringement by a state
7 entity, but I think it's important to note that, of
8 those respondents, over 50 percent said that they had
9 experienced multiple instances of infringement. So
10 we're not just talking about 115 total, some of the
11 respondents said things like there were multiple
12 instances, they stopped counting, there were dozens,
13 countless, several.

14 I would also note that over 60 percent of
15 the 657 total respondents to the survey said that they
16 did not have time or resources to monitor for
17 infringement, and so we feel like the numbers of
18 people who found that were being infringed by state
19 entities would be a lot higher if there was more
20 monitoring.

21 I would also note that the numbers don't
22 account for matters settled confidentially out of
23 court or situations where the owners didn't pursue
24 enforcement due to the perceived sort of futility of
25 remedies available when suing states.

1 You know, I think it's also important to
2 talk about the responses to our question about the
3 time that the infringement was discovered because
4 there was a clear trend of increasing infringements
5 starting in the mid to late '90s, and then increasing
6 yearly through the 2000s and 2010s, with the most
7 instances occurring in 2019.

8 I would just say that I think this steady
9 sort of rise over the last 20 years corresponds with
10 the Florida Prepaid and Chavez cases that challenged
11 the validity of the CRCA and may have resulted in
12 states taking sort of a more liberal approach to
13 unauthorized use of copyright-protected works.

14 I can go on about the survey. I know I'm
15 probably getting to my two minutes here.

16 MS. SMITH: Yeah. Well maybe I can ask a
17 couple of questions. I think the office has some
18 questions about the survey design, and then I was
19 trying to fit -- to message who would be called on
20 next, and I think we'll turn to Ms. Benson, but I do
21 want to make sure we can ask those questions first to
22 Mr. Madigan.

23 So one question was about the longevity. It
24 seems to me the trend analysis you just spoke to is
25 not necessarily reflected in the survey. Did the

1 survey ask questions about the period of time for
2 infringement, or are you separately contributing that
3 comment from your other studies?

4 MR. MADIGAN: No, no. Our survey, one of
5 our questions was what year was the infringement
6 detected, and so we have -- in our initial comments,
7 we have a paragraph or so talking about the results to
8 that, and we create a graph that shows sort of a
9 steady few instances through the 1990s, and then,
10 starting in the late '90s and early 2000s, that's when
11 they start to go up, and they increase every year up
12 until when we stopped. The last year was 2019.

13 MS. SMITH: Okay. Could you speak a little
14 bit about the survey logistics? So what was the
15 response rate, or where was it publicized? What was
16 the completion rate, if you know?

17 MR. MADIGAN: Well we had, like I think I
18 mentioned, 657 total respondents, and we did -- we
19 created the survey through survey monkey. Again, we
20 drew the questions almost entirely from the Copyright
21 Office NOI.

22 There were certain questions we didn't
23 include that were more directed to state policies that
24 we just didn't feel -- that wasn't really the
25 information that we were trying to gather. These were

1 questions directed more towards individual creators
2 and copyright owners, so, for the most part, they were
3 drawn directly from the NOI.

4 But we didn't include in our initial
5 comments all of our list of questions, but we're happy
6 to make those available to the public.

7 MS. SMITH: I think if you were willing to
8 share the list of your questions with the Office, that
9 might be helpful in analyzing that. I also wonder,
10 would you be willing to submit the individual survey
11 -- I was thinking last night they were called response
12 cards but I'm sure that's not the term they use
13 anymore -- but the individual actual responses?

14 MR. MADIGAN: Yeah, we'd be happy to do
15 that. And one of the reasons we didn't attach it is
16 just because the -- I mean, for some of the questions
17 that we asked to explain the instance of infringement,
18 there's 60 page long responses. So it is quite long,
19 but we're happy -- we're absolutely happy to share
20 that with everyone.

21 MS. SMITH: Yes. I think if you're willing
22 to, that may be helpful. I know that the Court noted
23 it was important to see if instances could be
24 corroborated, so we will welcome accepting that into
25 the record.

1 Again, just to set up, we're wheeling around
2 you a little more than most, but can you opine, in
3 your opinion from Copyright Alliance, whether the
4 respondents are a representative sample of relevant
5 copyright owners? How should the Office or Congress
6 go about evaluating that?

7 MR. MADIGAN: Well I think they're certainly
8 representative of the individual creator members that
9 we represent. Most of the people who responded to the
10 survey were small businesses or individual creators.
11 So I would say these aren't really representative of
12 some of the larger organizations that are members of
13 the Copyright Alliance, but I think those
14 organizations were represented through their own
15 comments, and are also represented on this, and other,
16 panels throughout the day.

17 MS. SMITH: Okay, thank you.

18 So, Ms. Benson, your comment addressed the
19 survey. Would you like to share your thoughts on the
20 survey, and perhaps the overall approach you would
21 suggest the Office or Congress takes towards analyzing
22 evidence that's pertinent?

23 MS. BENSON: Yes. Thanks for the
24 opportunity to comment on the survey. One of my
25 concerns about the survey is, of course, and you've

1 just mentioned this, that the data was not shared
2 openly. I, too, create and conduct surveys and am
3 very aware of proper methodology in terms of
4 information science and just social science, in
5 general.

6 One of my concerns is the small number of
7 respondents. I understand that 657 total respondents
8 sounds like a large number, but if you're talking
9 about all of the American public who owns copyright,
10 that's a very small number, including myself. I have
11 many copyrighted books, articles, et cetera,
12 educational materials, and I never received this
13 survey.

14 So I think, unfortunately, I don't feel like
15 it's a representative sample, and I don't feel that
16 it's statistically significant, and I feel like that
17 is an important factor because we are looking, and
18 when broaching sovereign immunity, we need to see
19 evidence of widespread infringement. I don't think
20 that this survey does much to show that.

21 Some of my other concerns about the survey
22 include whether fair use was considered at all in the
23 survey. I understand that sometimes when people have
24 their work being used by someone else they immediately
25 say that it's infringement, but we, as copyright

1 experts -- and I'm sure I'm talking to people who are
2 all experts, so I'm not trying to explain it to
3 people, but I think there are a lot of exceptions that
4 apply.

5 Of course, you know, at university libraries
6 and educational institutions we have a -- quite a few
7 exceptions that apply to copyright, such as Section
8 108, Section 110, Section 107, and I think,
9 unfortunately, when things are used for educational
10 purposes, sometimes others don't understand that.

11 And I'm not saying that fair use applies to
12 everything that's educational, please don't take this
13 comment as overstating the case, but I do think it
14 should be included in some sort of descriptor in the
15 survey to make clear that there are some exceptions.

16 And I know that there's a Ninth Circuit case
17 on point where, when sending a DMCA take down notice,
18 we, as users and creators, should also consider
19 whether the use was a fair use, and I think, in this
20 survey, we should take that into account as well. And
21 we should use a critical eye when interpreting the
22 evidence.

23 So the evidence that was submitted, I don't
24 see it as evidence yet because I haven't seen the
25 data. So when I conduct qualitative research and

1 quantitative research, I try to make my data as open
2 as possible and put it into our data repository so
3 that I can see, and others can see, whether the
4 results are replicable, because, to me, good science
5 requires replicability. So I think I'll stop there so
6 others can comment.

7 MS. SMITH: Okay. I actually may want to
8 ask two follow up questions to you, and I do think
9 it's helpful that Mr. Madigan has signaled that they
10 may share the data. So there's two small questions.
11 First, I mean, you noted, in a sense, we're all
12 copyright owners, we all are creators.

13 I don't know if that necessarily means the
14 scope of the potential respondents needs to be the
15 entire American public, right? Because, as Mr.
16 Madigan mentioned, his members -- he's more focused on
17 perhaps people who are trying to license or make
18 economic use of their copyrights, and there's
19 certainly a lot in there.

20 So do you have an opinion as to what would
21 be the proper frame that we would look at to determine
22 potential responses if we think, you know, maybe
23 something a little shy of everyone is the subset?

24 MS. BENSON: I understand that you're seeing
25 the subset as people who are trying to make economic

1 use of their works, but that also is a large group of
2 people, because I also make economic use of my works
3 as an educator, and I do a lot of independent
4 consulting, and I have a book published through ECRL,
5 another book coming out through ALA.

6 So we, at the universities, have a lot of
7 creators, right -- we create scholarship, we create
8 books -- and so I don't believe that that population
9 was included in this survey of folks who are actually
10 creating for educational purposes as well. So I think
11 the survey has to at least include my representatives,
12 right, who are scholars and researchers, and who also
13 create economic value.

14 So I'm not sure I can define the exact scope
15 of it, but I do know that I feel it's missing a key
16 element.

17 MS. SMITH: Okay, thank you.

18 MR. MADIGAN: Can I respond to that?

19 MS. SMITH: Yes, I think I would like to
20 hear from you.

21 As the Copyright Office, I was not trying to
22 throw that out as a definition. We're trying to
23 figure out what should be the lens we're looking at to
24 determine whether there is widespread infringement.

25 So, Mr. Madigan, if you could respond to

1 that, including maybe how you publicized the survey as
2 well?

3 MR. MADIGAN: Yeah. So when you dive more
4 into the survey, you'll certainly see plenty of
5 responses from people who create educational
6 materials, so they are certainly represented in the
7 survey.

8 And if I could just go back to the fair use
9 point for a minute. You know, obviously, limitations
10 and exceptions are an important consideration, but
11 they're not entirely relevant as has been alluded.

12 I say that because, ultimately, whether we
13 abrogate or adjust state sovereign immunity would have
14 no effect on a state's entity's ability to defend
15 itself by showing fair use or invoking any other
16 limitation and exception, and I believe that's why you
17 didn't see any questions in the Copyright Office NOI
18 directed to fair use.

19 In fact, if the unauthorized uses are fair,
20 as many of the university commentators have said, then
21 sovereign immunity is really irrelevant, and these
22 types of uses can continue whether or not immunity is
23 abrogated.

24 And I would also say that the highest number
25 of respondents from our survey that said they found

1 infringements were photographers, and the
2 organizations and individuals, creators who submitted
3 comments attest to the fact that the unauthorized uses
4 that they encountered were really wholesale
5 reproductions of their works for commercial purposes
6 that are, therefore, unlikely to be fair uses.

7 And then if I could just say one more thing
8 about the fair use as it relates to sovereign immunity
9 is that the doctrine of state sovereign immunity
10 actually prevents fair use analyses, and it hinders
11 the development of the fair use doctrine.

12 There may be state entity uses that raise
13 novel and important questions about the boundaries of
14 fair use, questions that may actually benefit users of
15 copyrighted works, but when we sweep those questions
16 aside in the name of sovereign immunity, it actually,
17 I think, does a disservice to all copyright
18 stakeholders by sort of holding back the development
19 of our understanding of fair use.

20 MS. SMITH: Thank you. One final question:
21 how was the survey publicized?

22 MR. MADIGAN: How is it publicized? Oh, I
23 mean, we can share it with you all today, if you'd
24 want. It's not public now.

25 MS. SMITH: No, no, no. I mean, did it --

1 was it on Twitter, or how did you try to gather
2 responses --

3 MR. MADIGAN: Oh. Right. Yeah. We blasted
4 it out to our full membership, we tweeted about it,
5 sent it out in emails, through all social media
6 platforms.

7 MS. SMITH: Okay, thank you.

8 So I think that the next order, just so
9 people can get ready, is Mr. Thro, then Mr. Sedlik.
10 So, Mr. Thro, I know you have a lot of experience on
11 these issues as well. Could you speak to the general
12 approach you think the Office or Congress should take
13 in evaluating this question, as well as, in your
14 experience, any broad patterns in infringement?

15 MR. THRO: Sorry. It took me a second to
16 un-mute. I think first, and foremost, as the
17 Copyright Office undertakes this study, it's important
18 to distinguish between an infringement and a
19 constitutional violation. As Ms. Benson said, not all
20 alleged infringements are even infringements, but even
21 if there is an infringement, that doesn't necessarily
22 mean it's a constitutional violation.

23 As I think the Court has made clear in all
24 of its sovereign immunity jurisprudence, Congress
25 doesn't get to pick what is a constitutional

1 violation, the Court does, and, in the context of
2 copyright, that would mean a deprivation of property
3 without due process.

4 Now, what does that mean? Well, for one
5 thing, it means that negligent copyright infringement
6 is not going to count as a constitutional violation.
7 It's going to have to be something that's really close
8 to a taking. It also means that there is a question
9 as to whether there is an adequate remedy at state
10 law. If your state allows you to recover for a
11 regulatory taking, it is possible that that state
12 would also allow you to recover for a regulatory
13 taking that results from the state's policy that
14 deprives you of your copyright.

15 So I think you have to really narrow the
16 definition of what you are looking at. Infringements
17 don't matter, constitutional violations do.

18 MR. AMER: Can I ask a quick follow up on
19 that? And others can weigh in, too. I mean, I think
20 the question for us is how do we, as the Copyright
21 Office, make that assessment? I hear one of the
22 concerns about survey evidence is the fact that there
23 isn't -- it's difficult to know to what extent the
24 claims were meritorious, or to what extent the state
25 may have had a valid fair use claim, or whether, as

1 you say, the infringement was negligent versus
2 intentional, so do you have thoughts about how we can
3 -- what sort of evidence would be most useful for us
4 in doing the study and making that assessment as to
5 how prevalent these sorts of infringements are?

6 MR. THRO: Well I think, in terms of
7 assessing a constitutional violation, it's important
8 to look at other areas of the law, and, generally, if
9 a governmental entity isn't going to be found to have
10 violated the Constitution, then the governmental
11 entity has adopted a policy that actually results in a
12 constitutional violation.

13 If a university, for example, said that
14 African-Americans could not attend, that would clearly
15 be a constitutional violation. So if a university had
16 a policy that we will always violate copyright and
17 never pay any attention to it, that may be a policy.

18 Similarly, if we took somebody's book and
19 said, hey, this is a really great book, we can make a
20 lot of money off of it, and we took copies of the book
21 and then produced our own copies of the book and sold
22 them without any royalties to the author, that would
23 probably amount to a taking.

24 But the fact that one in 15,000 employees at
25 the University of Kentucky inadvertently violates

1 someone's copyright, or even intentionally violates
2 their copyright, does not necessarily mean that the
3 University of Kentucky has committed a constitutional
4 violation.

5 MS. SMITH: Can I ask a question? I think
6 you have a wealth of experience in public
7 institutions, as well as, you know, the State of
8 Virginia certainly. Do you have any sense as to
9 whether there is a distinction in policies adopted by
10 public institutions compared to private colleges or
11 universities? I don't know if you have -- I would be
12 interested to hear your thoughts.

13 MR. THRO: Yes. And this is purely
14 anecdotal and is not based upon any survey or anything
15 like that. I think, first, and foremost, it's
16 important to remember, as Ms. Benson said, that
17 universities are creators of copyright and various
18 other intellectual property and all that. We want our
19 employees to do that, and we want to take advantage of
20 that, so we're not going to do anything intentionally
21 to undermine that from happening.

22 I think the biggest, probably, use of the
23 state for sovereign immunity is if we get a suit that
24 is totally trivial -- and we get a number of those in
25 all kinds of spheres because people perceive that a

1 state university doesn't like bad publicity and a
2 state university has a lot of money -- you know, we'll
3 use sovereign immunity to get rid of the frivolous
4 suit as quickly as possible, but, overall, I think we
5 are doing everything we can to support not only
6 copyright, but intellectual property.

7 MR. SMITH: Ms. Smith, may I comment?

8 MS. SMITH: Sure.

9 MR. SMITH: Thank you.

10 MS. SMITH: Yes. Mr. Smith?

11 MR. SMITH: Thank you very much. Because I
12 am a university administrator, and a librarian, and
13 I've spent the last 15 years as a copyright advisor in
14 both a public and a private university, that is,
15 before I worked for the University of Kansas, I worked
16 for Duke University, so I can speak directly to are
17 there differences? The answer is no.

18 I've worked on developing copyright policies
19 for both of those universities, as well as consulting
20 with a host of universities on the development of
21 copyright policies. The one conversation I have never
22 heard is we don't have to worry about this because of
23 sovereign immunity.

24 I have been involved in multiple
25 developments of policy at both private and public

1 universities and across the board, those are careful
2 processes that try to observe the legitimate rights of
3 creators for the reason that Ms. Benson stated: We
4 have a campus full of creators. They try to make
5 responsible use of the exceptions, including fair use.

6 But I have never, ever heard a university
7 adopt a policy or a practice simply because they
8 believed they were insulated from lawsuit by sovereign
9 immunity.

10 MS. SMITH: Thank you. That is helpful, to
11 hear your experiences.

12 I'm wondering, to make sure we're sort of
13 zigzagging the two perspectives, could we hear from
14 Mr. Sedlik? Because I think, as Mr. Madigan noted, a
15 lot of the responses the Copyright Alliance received
16 were from visual artists, and you have represented
17 their interests in many associations.

18 MR. SEDLIK: Sure. Well, in addition, I am
19 a professional photographer, but I also work in
20 academia. I'm a 25 year professor at the Art Center
21 College of Design.

22 First of all, the individual creators and
23 their trade associations hold a deep respect for the
24 universities and libraries and research institutions,
25 and have no complaints as to legitimate fair use, or

1 usage under Section 108, et cetera. They understand
2 the vital role that these institutions and the people
3 who work with them, and for them, or attend those
4 institutions play in society.

5 But at the same time, in my role as a mentor
6 to my fellow photographers through my trade
7 association affiliations, I get photographers and
8 illustrators coming to me requesting advice. They
9 don't know where to turn. Their works have been
10 infringed, and sometimes, and increasingly so, this is
11 by state entities.

12 I would agree with the comments thus far
13 that the people who work in the museums and the
14 libraries are not going out and purposefully
15 infringing, but, at the same time, even if you look in
16 the comments that the Copyright Office received, you
17 will see letters from institutions saying, yeah, we
18 used it, but, you know, we have immunity. And they're
19 not relying on fair use, they're relying on immunity
20 in those responses. These are letters from
21 institutions, from libraries, et cetera, and from
22 colleges.

23 So I would advise the Copyright Office that
24 you need to consider the universe of discovered
25 infringements because creators discover only a very

1 small percentage of the infringements of their works.
2 They're out creating. They don't have the time to
3 scour the universe for all the infringements of their
4 work, and they typically happen upon them or they're
5 advised that there is an infringement, and then they
6 have to address it.

7 And so those are the only people that I hear
8 from. I don't hear from the people who didn't
9 discover the infringements by state entities, I hear
10 from the people who did. So we have to be careful
11 about when we're talking about numbers.

12 In addition, I'm an educator who creates,
13 and many of those on this panel and who will be
14 participating today are educators who create, but
15 there is a difference between educators who create
16 while relying on their employment income to feed their
17 families versus creators who rely principally, and
18 only, on their creative licensing income from their
19 creations under copyright law and under the
20 Constitution in order to make use of their works, and
21 in order to sustain their businesses and feed their
22 families, and when their works are used without their
23 knowledge or permission by any entity, it harms them,
24 and injunctive relief alone is not helpful to them.

25 They need to get the revenue that they

1 deserve under the Constitution during the copyright
2 life of their work in order to support themselves,
3 their businesses, and their families. These are not
4 greedy people, these are people who are struggling to
5 survive.

6 And so, in addition, the notion that a
7 taking would solve the problem is also incorrect
8 because the courts, in my understanding, interpret
9 taking to mean that all of the value of that asset is
10 taken.

11 So it's a real challenge, and what we're
12 finding is that, just in closing, that creators are
13 hesitant to even contact the states, and most
14 certainly very hesitant to bring an action against the
15 states because of recent developments and perceived
16 possibility of liability if they lose, and also the
17 cost of the action.

18 MS. SMITH: Thank you, Mr. Sedlik.

19 Actually, I see Ms. Sapiandante. You may
20 have un-muted. Did you want to respond to that before
21 we move to individual perspectives or?

22 MS. SAPIANDANTE: Yes, I would. I think
23 that it's important that the Copyright Office look at
24 every state because there are some states, especially
25 California, that has adopted statutory authority in

1 which they have trained -- mandatory training for
2 their employees and for state agencies, and so there
3 are states, individual states that have done that.

4 And it's important to not just take it as a
5 broad sweep for sovereign immunity, but to look at
6 what efforts each state has been making to educate,
7 basically, their employees.

8 MS. SMITH: Okay. Do you have the
9 California statutory cite for that?

10 MS. SAPIANDANTE: I do. It is the
11 California Government Code 13988. Basically, what
12 California has is that it mandates that all state
13 agencies provide an infrastructure for educating their
14 employees on what actually is copyright, because with
15 the new era of internet there is a huge -- people
16 don't know the difference if it doesn't have a
17 copyright designation, that it's free, anything that's
18 on the internet, and so I provide a lot of training to
19 -- across California.

20 Basically, once you train employees -- and I
21 think it's the education part that they should look at
22 more, and statutes that mandate educating employees,
23 educating state agencies, public entities, things like
24 that, as opposed to a broad sweep of sovereign
25 immunity.

1 MS. SMITH: Okay. Thank you. I think to be
2 mindful of time, next we're going to make sure we get
3 to probe on some more of these individual stories. We
4 know that is something the Court signaled could be
5 helpful. I'm going to pass the mic to my colleague,
6 Ms. Mangum.

7 MS. MANGUM: Hello. I wanted to start with
8 Mr. Allen, if I could. You described in your comments
9 to the Office's NOI, incidents in Alabama, and then in
10 North Carolina. Can you describe those incidents and
11 how you attempted to enforce your copyrights, and also
12 whether, when you tried to enforce, whether sovereign
13 immunity was offered as a response from the entity?

14 MR. ALLEN: All right, I'll do the best I
15 can in two minutes. I responded to two specific
16 things. One, the Department of Natural Resources in
17 Alabama pulled an image off my website, removed a
18 copyright mark, and then re-posted it to their
19 website, and I sent them a bill for that work. They
20 sent me a response back that they had taken the work
21 down, but they weren't going to pay the bill.

22 Given the cost of dealing with an
23 infringement, it was not worth the amount of money
24 that I would have made off that relatively small bill
25 that I sent them to even pursue that. And that's a

1 very common thing. I've had that happen in several
2 other instances with other institutions, whether they
3 were government or not.

4 So cost is a huge issue. I've heard it said
5 that a typical copyright case costs in excess of
6 \$350,000 to prosecute, and I can assure you that that
7 number is correct from personal experience.

8 In the bigger picture, in *Allen v. Cooper* --
9 and I'm going to assume that a certain amount of
10 knowledge already exists on the panelists and everyone
11 about that -- State of North Carolina violated an
12 agreement that involved the company that found the
13 shipwreck *Queen Anne's Revenge*, Blackbeard the
14 pirate's shipwreck, and I was a party to that
15 agreement because I had an agreement with the company
16 that found the shipwreck.

17 We went into mediation. The state paid me
18 \$15,000 for copyright violations in that, and within
19 about a year and a half, the State of North Carolina
20 passed a law that we like to call Blackbeard's Law,
21 which converted *Nautilus* intellectual property into
22 the public domain.

23 Within three weeks of that, the State of
24 North Carolina again published videos that included
25 *Nautilus* intellectual property video and images

1 without my knowledge, permission, or a license, and
2 that's pretty much what led to our lawsuit which we
3 filed in December of 2015.

4 Now, over that period, as you well know,
5 we've been all the way to the Supreme Court and were
6 unable to enforce our copyright under the Copyright
7 Remedy Clarification Act, and I think I have several
8 frustrations along those lines.

9 One, I'm the creator of my work. I
10 registered my copyrights in a timely manner. I have
11 defended my copyrights. I've even watermarked the
12 work that's at issue. So I have followed every
13 federal statute and law that I'm required to follow,
14 and I still have no remedy and no way to address the
15 infringement by the State of North Carolina. And so
16 we're five years into the litigation and we have yet
17 to be able to address the actual facts of our case.

18 So, you know, with all due respect to the
19 academics here, when they talk about state remedies,
20 and that's a big if, there are -- most states do not
21 have remedies, and judges, as you'll see from our
22 panel that's coming up later, always defer to federal
23 issues. They say copyright's a federal issue, this is
24 not a state issue, and that's certainly what we've
25 encountered.

1 The state's given a long list of why they
2 are not responsible for infringements. As a state
3 entity, they say that the agreement that we signed
4 initially in 2013 in which they paid me \$15,000 is
5 void, illegal, and unenforceable, yet they signed it.
6 So that is the reality here.

7 And I would absolutely echo everything that
8 Mr. Sedlik said. I've experienced the exact same
9 things. And I'm a creator. I only get paid, though,
10 when I work. I don't have a job where I get a
11 paycheck every week, and my intellectual property is a
12 big part of my business. And I've been licensing
13 images and video for 25 years plus, and I depend on
14 that.

15 I also have the problem that this
16 infringement or copyright violation is an intentional
17 act. In my case, you have two intentional acts which
18 bookend a law that's literally written to take away my
19 intellectual property. So I don't know how you
20 address that, but that is certainly an inequity there.

21 I guess also, in the case of the UNC press,
22 which is part of the North Carolina college system,
23 they have 4,400 copyrights registered. I looked this
24 up for fun one time. Now, the State of North Carolina
25 can enforce a copyright infringement case against me,

1 but, right now, I have absolutely no ability to
2 enforce a copyright infringement case against them.

3 So I'm not asking for, in my case, a special
4 rule, I'm just asking for the same rule that everybody
5 else has. If they can enforce their copyright
6 violation against me, I should have that same right
7 and that same equitable ability in court, but I don't
8 have that right now.

9 And, more than anything, I'm a state
10 taxpayer, and states are using my money, in the -- in
11 especially my case, to infringe my work, so I'm now in
12 direct competition to the state that I pay taxes to,
13 and I just don't think that works on any level.

14 In the end, as a creator, this is my job,
15 this is my work, this is how I pay my bills, this is
16 how I pay for equipment, for insurance, mortgage,
17 everything that everybody else does, and if the State
18 of North Carolina can download one of my videos from
19 YouTube, and put it out in the world and monetize it,
20 or de-monetize it and take away that value, and I have
21 no recourse, that's a real problem.

22 So, again, in my case, I just want equity.
23 I understand fair use and all that, but I would like
24 the ability to have the same legal federal copyright
25 protections that a university or a state entity has.

1 So I really kind of feel like my case, Allen v.
2 Cooper, is the canary in the coal mine, and the
3 predictable outcome of a failure to hold states
4 accountable for copyright infringement, and so this is
5 why we're here.

6 MS. MANGUM: Thank you, Mr. Allen. We
7 really appreciate those comments.

8 I want to move to Ms. Johnson of C Math is
9 Easy. I know you had stated in your initial response
10 to our call for roundtable participants that you had
11 an incident with a university in Texas. Can you
12 describe that experience, or that incident, how you
13 believe your rights were infringed, how you attempted
14 to enforce your rights, and then, also, whether
15 sovereign immunity was offered a response to you from
16 the entity?

17 MS. JOHNSON: Well it all started with
18 helping some students with mathematics. They had
19 asked me, the parents had asked me to help them on a
20 specific test, a state -- a Texas exam, and so I asked
21 the parent what are you using? So the student brought
22 something from school, from Moody high school, and
23 they had -- and I looked.

24 As I was going through it, there was nothing
25 on the front, it just said TSI math practice test, and

1 so I was, like, well let me look and see so I can
2 begin to help and begin to tutor the student. But, as
3 I began going through it, all of a sudden, the work
4 starting changing, and then, all of a sudden, I began
5 to notice that some of the work looked familiar.

6 All of a sudden, I saw Texas A&M University
7 Upward Bound Program, and, all of the sudden, I see
8 many parts of my workbook retyped and -- on -- into
9 this math packet. Our original book is written in 24
10 font, in color, but now our work was retyped, with
11 typos, in black and white, nine font, and lifted out
12 at least 30, 40 pages of the meat of our workbook,
13 reprinted, and then given to high schools in the
14 district.

15 This particular program at the university,
16 they go to several of the high schools in the city and
17 other independent school districts, and so I don't
18 even know how far my work has gone and how many times
19 it's been reproduced, and copied, and passed out to
20 whole high schools and so forth.

21 It was verbatim. We use I guess you can say
22 lay terms when we were writing this workbook. We
23 wanted it to be easy. Anybody can understand it at a
24 glance. And so they just used every word, every math
25 problem, every number that we used, verbatim.

1 Mathematics is not easy to retype, and so a division
2 problem, a square root was retyped intentionally and
3 put out to schools without our permission, without any
4 kind of contract.

5 We've been talking with Texas A&M in five or
6 six different apartments for -- since 2015 because we
7 heard about the need. Eighty percent of students were
8 failing this exam. We have been going to the Corpus
9 Christi independent school district since 2016,
10 telling them about our TSI math workshops and boot
11 camps to help them with their issues with mathematics
12 for this particular exam that helps students get into
13 career, and also into college.

14 The particular test that we deal with, if
15 the student wants to get into dual credit classes, to
16 take dual credit classes, they have to take this exam,
17 but over 80 percent of students were failing the math
18 portion and could not take college math courses.
19 That's where we came into play.

20 And so, all of a sudden, we realized that we
21 could not be everywhere, so we designed this TSI math
22 workbook, which was seven years in the making. When
23 we put out the book and had a book launching, all of a
24 sudden, our business slowed down, and we were
25 wondering why, and then, months later, we realized

1 that our work had been retyped and Texas A&M Upward
2 Bound had put their logo on our work. Even though it
3 had our logo and it had copyright at the bottom, had
4 our name on it, they lifted it off and then passed it
5 as their own.

6 This was our livelihood that was taken from
7 us. We decided to step out of the classroom so that
8 we can help more people, as educators. I came from
9 middle school, with an engineering background before
10 that, and my business partner is a university college
11 professor with seven children, and, all of a sudden,
12 we are writing books, but then things are no more
13 because the university has taken our clientele,
14 passing it to the high schools.

15 MS. MANGUM: If I can interrupt and ask, how
16 did you bring this to their attention, or did you
17 bring this to their attention, and what was their
18 response? Was sovereign immunity offered as a
19 response?

20 MS. JOHNSON: Well when we began to try to
21 pursue it, COVID happened. And so we discovered it
22 late January, early February, and so we were asking
23 around, what can we do, how do we need to approach?

24 So we were investigating how we could
25 approach, and so when we were about to begin to let

1 them know about the issue, everything shut down, so
2 there was nobody in the Office to even approach
3 because the doors were closed. They weren't taking
4 just any kind of phone call and so forth. So the
5 COVID pandemic really put a damper on trying to reach
6 people.

7 And then we pursued 11 -- been through 11
8 lawyers, and everybody said, oh, sorry, that's Texas
9 A&M University, we don't want to tackle their system,
10 and they're under sovereign immunity. And I was like,
11 there's nothing I can do? And so 11 lawyers turned us
12 away. Because the very next thing when they called me
13 back was, they said sovereign immunity, sorry.

14 MR. AMER: Can I ask just a couple of
15 clarifying questions? So the book that you produced
16 is sort of a training or a workbook for high school
17 students to help them prepare for statewide
18 standardized math tests?

19 MS. JOHNSON: Yes. For youth and adults.
20 Anybody, if you're going to be taking this exam, it
21 tells you if you can take college-level classes or you
22 would be thrown into remedial classes, foundational
23 math classes. That's what our exam is for.

24 MR. AMER: Okay. And just to clarify, where
25 did you see this reproduced? What sort of publication

1 was it that I guess Texas A&M used this material in?

2 MS. JOHNSON: Yeah, a student at one of the
3 local high schools had handed it to me so that I can
4 look at it to begin helping them. And so, you
5 remember when we're in school and the teacher gave you
6 a practice packet, you know, to go study at home with
7 a little staple on it? That's what we found.

8 And then, so the last four or five pages was
9 our work, retyped in this student packet to study for
10 this exam, with the Texas A&M University logo on it,
11 with our work underneath it --

12 MR. AMER: Okay.

13 MS. JOHNSON: -- retyped.

14 MS. MANGUM: Thank you so much for your
15 comments, Ms. Johnson. We appreciate you sharing your
16 experience.

17 I want to move to Mr. Linder from Dow Jones.
18 In your amicus brief filed in support of Mr. Allen,
19 you detail a matter involving the California Public
20 Employees Retirement System. Can you describe what
21 happened in that situation, and, in particular, how
22 Dow Jones discovered the infringement, how it
23 initially attempted to enforce their copyright, and
24 whether sovereign immunity was offered as a response
25 when you attempted to approach that entity?

1 MR. LINDER: My pleasure. And thanks, of
2 course, for having us today. So, by way of
3 background, as I mentioned, Dow Jones is the publisher
4 of *The Wall Street Journal*, among other publications,
5 and, through those newsrooms, we maintain one of the
6 largest news-gathering corporations in the world.

7 At Dow, we're in the business of creating,
8 collecting, and communicating information to people,
9 but that's a very expensive undertaking, and the --

10 MS. MANGUM: Mr. Linder, you're a little in
11 and out. If you could adjust maybe your mic?

12 MR. LINDER: Let's see. I'm a little
13 closer. Is this any better?

14 MS. MANGUM: That's better.

15 MR. LINDER: Okay. The undertaking that the
16 Dow Jones does with our journals, it's a very
17 expensive endeavor, and it's an endeavor that, in our
18 digital day and age, is particularly susceptible to
19 copyright infringement, so, as a result, at Dow Jones,
20 you know, we take steps to police unauthorized use of
21 our work, as many copyright holders do, but even we
22 were surprised at the systematic nature and the
23 brazenness of the infringement that was undertaken by
24 CalPERS, which is a state retirement fund, a pension
25 fund, that used instrumentality of the California

1 government.

2 So what did CalPERS do? Between 2009 and
3 2017, CalPERS used, without authorization,
4 approximately 9,000 articles from *The Wall Street*
5 *Journal*, 250 articles from *Barron's*, and 560 articles
6 from Dow Jones news wires and Dow Jones --

7 (Away from microphone.)

8 MR. LINDER: All told, CalPERS reproduced
9 approximately 53,000 separate articles from
10 approximately 4,500 publishers. These were full text
11 reproductions on a publicly-accessible website.
12 CalPERS also compiled a daily email, full text
13 articles, sent it to hundreds of recipients both
14 inside and outside the agency.

15 Now we first became aware of this in June of
16 2017 when a blogger who focuses on the financial
17 industry publicly reported the existence of this
18 repository. At that point, we began our own
19 investigations from the blogger's reporting, and began
20 conversations with CalPERS. CalPERS invoked sovereign
21 immunity, I should say, almost immediately.

22 Now the case law that existed at the time,
23 by which I mean that, frankly, there wasn't -- there
24 had not been the *Allen v. Cooper* proceeding -- meant
25 that we were able to reach a settlement both on our

1 copyright claims and on the liability we had. But,
2 candidly, it's a settlement that, you know, severely
3 undervalued the work at Dow Jones.

4 At the time, Dow Jones charged approximately
5 \$360 to reproduce a single article in an email to 300
6 people, which is what CalPERS did on an industrial
7 scale, and we also charged approximately \$1,900 to
8 display a single article on a publicly-available
9 website per year. Now, if you mapped those numbers
10 onto CalPERS activity, that would have resulted in
11 actual damages of approximately \$22 million, or
12 minimum statutory damages of about \$7.3 million at the
13 \$700 statutory rate.

14 I should also mention Dow Jones routinely
15 registers all of the articles that appear in the print
16 edition of *The Wall Street Journal*, as well as the
17 print edition of *Barron's*. Like other copyright
18 holders, we have not yet figured out an official way
19 to register all of the only online works, but that's a
20 separate conversation for the Office.

21 But that means that, you know, we were in a
22 position to be able to assert our rights against
23 CalPERS. We have a very large library of registered
24 copyrights. So, again, that should have resulted in a
25 really significant settlement, and the settlement that

1 we agreed to with CalPERS was valued at \$3.4 million,
2 split between cash and the purchasing services.

3 Now, candidly, we were satisfied with that
4 settlement, given the state of the law, but I think we
5 all have to acknowledge that, in the cold light of
6 day, Allen v. Cooper changes the analysis for an
7 agency. So, following the Allen v. Cooper decision,
8 if we were to present our claims to CalPERS today, I
9 think you would hear a much firmer invocation of
10 sovereign immunity, along with a dismissal of our
11 claims.

12 And I can tell you that because we are
13 negotiating right now, dealing right now with another
14 entity in a different state that has similarly engaged
15 in what I would call the industrial reproduction of
16 Dow Jones' articles without any conceivable fair use,
17 pointed, as you can expect, directly to sovereign
18 immunity from the Allen v. Cooper case.

19 MS. MANGUM: Can you tell us what state that
20 is?

21 MR. LINDER: It is an entity in Texas. And
22 following Allen v. Cooper, there's very little to stop
23 a state agency with the mentality that has the desire
24 to engage in wholesale copyright from doing just that.
25 Even if a state, as some do, allow for suits against

1 themselves or agents, those waivers generally only
2 apply to federal court -- I'm sorry -- state court,
3 and, of course, federal court is the exclusive home
4 for copyright remedies.

5 Section 301 may further preempt state law
6 claims that look like copyright claims, and inverse
7 condemnation taking claims, those are, at best,
8 unproven. Now we've seen some cases in different
9 states where -- that have cast some doubts on the
10 viability of these suits.

11 So what that means is copyright holders,
12 like Dow Jones, are left holding the bag when state
13 entities are able to use sovereign immunity as a
14 shield, while also separately enforcing their own
15 copyrights with the sword, and that's a system that
16 strikes me as inherently unjust.

17 This is about copyright willful systematic
18 infringement. It's not about accidental infringement,
19 it's not about incidental infringement, and it's not
20 about fair use, as I think Mr. Madigan mentioned
21 earlier. This is about making sure that state
22 entities that engage in systematic industrial-scale
23 copyright infringement are held responsible for that
24 -- those actions, just as a private actor would be.

25 MS. MANGUM: Thank you so much, Mr. Linder,

1 for sharing.

2 I want to move to Mr. Munter because the
3 News Media Alliance addressed this CalPERS situation
4 in their comments to the Office and in response to our
5 NOI. You described this incident as a systematic
6 violation that lasted for years and involved thousands
7 of copyright owners. Can you describe or expound on
8 that? Who were the other copyright owners that were
9 impacted, and were they able to obtain remedy, to your
10 knowledge?

11 MR. MUNTER: Sure. So News Media Alliance
12 represents about 2,000 news media organizations in the
13 United States and internationally, ranging from
14 national titles to small, local newspapers. And what
15 is common with all of our members is that they all
16 provide reliable and trustworthy information to their
17 communities, keeping decisionmakers in check, and
18 supporting a healthy democracy.

19 That is a vital function that is currently
20 -- far too many newspapers are struggling currently.
21 News deserts are spreading across the U.S., and news
22 publishers rely on robust copyright protections. When
23 we approached this study and these comments, we asked
24 our members for examples and the CalPERS case was the
25 one that was mentioned most often as the most severe

1 instance lately.

2 It is worth noting that this is -- probably
3 is -- quite possibly, only the tip of the iceberg.
4 News especially, if you think about it, is very hard
5 to -- it's very easy to infringe. You only need to
6 have one subscription, and then you can copy a full
7 article, paste it in an email or on a website, and
8 send it potentially to thousands of people, which is
9 exactly what happened here, in CalPERS.

10 So, in addition to Dow Jones over 9,000
11 articles copied, there were at least -- almost 6,900
12 from the New York Times, over 5,500 from the *Los*
13 *Angeles Times*, almost 3,900 from the *Sacramento Bee*,
14 which is owned by McClatchy, and almost 2,000 from
15 Washington Post, and these are just some of the
16 biggest ones. We were unable to secure the full list
17 of all of the newspapers whose content was infringed.

18 And we are aware that, according to public
19 reporting, at least two of these newspapers reached
20 settlements with CalPERS in addition to Dow Jones,
21 but, other than that, we were unable to ascertain as
22 to how most of these were resolved or whether they
23 were resolved.

24 MS. MANGUM: And, to your knowledge, from
25 your members, do you know whether there have been any

1 other instances involving any other state entities and
2 whether sovereign immunity was offered as a response
3 when they attempted to enforce their rights?

4 MR. MUNTER: There are certainly, we have
5 heard, like, of individual, like, instances of, like,
6 a -- like, single instances of infringement, but
7 that's not what we're -- like, that's not what's
8 causing economic harm to newspapers. That's not what
9 we're concerned about here, like, a professor
10 uploading a news article to a course portal or
11 something like that. So those ones, we've received
12 just anecdotal, like, instances of infringement like
13 that.

14 With regards to large-scale infringement
15 that we are really concerned of, CalPERS was the only
16 one that we heard about.

17 MS. MANGUM: Thank you, Mr. Munter.

18 I will pass it back to Ms. Smith.

19 MS. SMITH: Thank you, Ms. Mangum. The
20 third key area we'd like to focus on is how the Office
21 and Congress can determine if acts of infringement are
22 intentional or reckless, and so I think, on the one
23 hand, we certainly appreciate the key importance that
24 exceptions and limitations like fair use play, we
25 appreciate the Supreme Court opinion noting that

1 there's some instances of honest mistakes that may not
2 provide sufficient background to move forward, but I
3 also hear, for example, I think it was Mr. Linder who
4 said we're focusing on -- I wrote it down --
5 industrial reproduction without any conceivable fair
6 use defense.

7 I think we're trying to understand how we
8 can separate out these examples to determine where
9 there may be examples of intentional and reckless
10 infringement, on the one hand, from other acts, and
11 how should we go about that. So I don't know who
12 would like to speak to the general approach. If you
13 want to just raise your hand then, and we'll try to go
14 that way.

15 (No response.)

16 MS. SMITH: No? Anyone? Okay. Ms. Benson?

17 MS. BENSON: I believe that, and we've noted
18 this before, it's not just a few bad actors that we're
19 looking for here. And I do have a lot of empathy for
20 the folks who have spoken today. My husband is
21 actually an artist, so I feel you. I think that the
22 issue, though, is not widespread enough to merit
23 constitutional concern, and we did note some evidence
24 in our comments.

25 I was joined by Douglas Shontz from our

1 Office of General Counsel, where he noted that we have
2 three to six complaints that rise to his office per
3 year of infringement, and our first response is to
4 take it down immediately, and our second response is
5 to reach out and talk to the person who has made that
6 complaint, and then, in most instances, we will reach
7 an agreement and a settlement with the person. We
8 don't assert sovereign immunity in that instance at
9 all, and I know Kevin Smith brought that up as well.

10 So I'm trying to point out that there are
11 good actors out here, and we are not part of that
12 cohort, and so I think it's not as widespread as to
13 raise constitutional concerns.

14 MS. SMITH: So I appreciate that. Whether
15 something is widespread is slightly different, as well
16 as how a state might respond in remedies is slightly
17 different to the question of whether the initial act
18 might have been reckless or intentional.

19 Do you know, in terms of the three to six
20 complaints you may receive a year, do you have any
21 insight into the nature of those complaints or how we
22 should evaluate these complaints that go all the way
23 to court and get a judgment? Because we see that in
24 some cases it may not happen with sovereign immunity
25 used as a backup.

1 MS. BENSON: I can't speak to those three to
2 six complaints, I think Douglas could, but I do think
3 that when you're talking about people removing water
4 marks and intentionally taking off things that are
5 proprietary, to me, that would demonstrate intent, so
6 that would be one of the instances I think we could
7 look at to see whether something is intentional.

8 Unfortunately, it's hard, from the
9 perspective of the person who -- if their work was
10 taken from them, they might feel like every act is
11 intentional, right, because they're saying this is
12 mine and then you took it, but that doesn't
13 necessarily mean that people understand what's going
14 on, right, because, unfortunately, there's a lot of
15 misunderstanding. And part of my job is to educate
16 people about, yes, everything on the internet is not
17 free for you to take, right?

18 And so I think that we would have to look
19 for those kinds of intentional acts, and removing
20 protective watermarks and copyright notices, to me, is
21 one way to demonstrate that.

22 MS. SMITH: Thank you.

23 Mr. Allen, I can see you wanted to respond.
24 Do you agree in the sense that removal of watermarks
25 or copyright management information might be a good

1 standard to look at in terms of conduct for
2 intentionality or recklessness?

3 MR. ALLEN: No, in just listening to Ms.
4 Benson, I mean, first off, when you write a law to
5 abrogate somebody's intellectual property rights,
6 that's an intentional act, and it doesn't just affect
7 me, it affects everyone who comes under that law, so
8 you have addressed, you have created a law against
9 multitudes of people in that case.

10 Further, as I understand it, it's a basic
11 principle in copyright that if it's not yours, ask the
12 copyright owner for the use. And if somebody misuses
13 a video or a picture of mine, it didn't just magically
14 appear on their website, it didn't just magically get
15 posted to their YouTube channel, they had to
16 physically go and move it. You can't have an
17 accidental infringement in that case. So there is
18 intent there.

19 So the argument that, oh, we didn't mean to
20 do it, well you may have been uninformed or
21 uneducated, but you did physically mean to do it, and
22 you did actually do it. So I think it's a specious
23 argument.

24 MR. AMER: Well, so that raises --

25 MS. SMITH: Correct.

1 MR. AMER: Dean Smith, I see you, and so
2 maybe let me just ask this, and if you want to weigh
3 in on it as well, please do. What is the proper
4 standard for intentional infringement?

5 I mean, we've been talking about examples.
6 Ms. Benson, your example involved an entity removing a
7 watermark. In that situation, it seems clear that
8 we're talking about -- willfulness, I think, is the
9 right description. Someone knows that their conduct
10 is unlawful, but they do it anyway.

11 Is that what we need to look for, or is it
12 enough that a state entity might intend to do the act,
13 but they might have a good faith but ultimately
14 erroneous view that that activity is fair use? Does
15 that sort of conduct fall within the standard of
16 intentional conduct under the Supreme Court's
17 jurisprudence?

18 MR. SMITH: Well I don't know if you were
19 asking me or inviting me to speak, but I will, just
20 briefly. I wanted to return to what Mr. Thro had been
21 telling us because, throughout this conversation, I
22 think we've lost the emphasis on what is -- and you're
23 asking exactly this question -- what is the evidence
24 we should be assessing?

25 Mr. Allen talks about being treated fairly.

1 That state entities can enforce their copyright and he
2 can't enforce his copyright against the state entity.
3 I think that's only partially true. But I also just
4 want to emphasize that there is a reason that there is
5 a sovereign immunity doctrine, and there has been for
6 200 years. It is a fundamental part of our system of
7 federalism. So the standard of evidence has to be
8 very high.

9 I do believe that intentionality is the
10 standard you should be looking at, and a lot of the
11 examples that we've seen today, heard today, and a lot
12 of the examples that we saw in the comments simply
13 don't rise to the level that we would need them to be
14 sufficient evidence -- which is the language used by
15 the notice of information -- sufficient evidence for
16 the abrogation of a constitutional privilege that is a
17 fundamental part of our federalist system.

18 MS. SMITH: Can you answer more directly my
19 question, which I think Mr. Amer has -- you know,
20 we're trying to drill down as a copyright law
21 professor. How do we determine whether an act of
22 infringement should be reckless or intentional? Does
23 it need to be willfully and knowing infringement
24 absent state sovereign immunity? Mr. Allen has said,
25 for example, you know that you are copying. What

1 would you say is the appropriate standard for us to
2 look at this time?

3 MR. SMITH: I think it does have to be
4 willful and intentional. I think, again, I should
5 probably just let Mr. Thro speak because I think he
6 said this correctly. You would have to find state
7 policy. You asked about policy earlier, and I think
8 that was the correct question. You would have to find
9 policy that was intentional that enabled infringement.

10 MS. SMITH: One thing I'll just say, maybe
11 you could address, and -- is I don't quite see that in
12 the Court's opinion, right? It is looking at specific
13 examples of infringements, whether discussing the Oman
14 report, and whether those acts of infringement
15 themselves are intentional and not a state policy
16 behind what may be behind an infringement, and it
17 could be that they did not have the details presented
18 to them in the report, but if you could connect that
19 to the opinion, I would be help -- be grateful for
20 that.

21 MR. THRO: Sure. I'll be happy to attempt
22 to. I think it's important to note that there is
23 never any such a thing as an unintentional
24 constitutional violation. You have to have the level
25 of intent, but I think, to echo Dean Smith, you have

1 to go beyond merely intent.

2 A university has thousands of employees and
3 those employees do not always do what they are
4 supposed to do or behave, okay? This is why I have
5 job security is misbehaving employees and misbehaving
6 students. But there is a difference between something
7 that the university does as a policy or something that
8 a state agency does as a policy and the actions of
9 what I'm going to describe as a rogue employee.

10 I think we see this in some of the police
11 misconduct cases, to use a different analogy. If a
12 cop does something wrong, that cop can be, and should
13 be, sued for his, or her, intentional violations, but
14 it's very hard to impose liability on the city that
15 employed that cop unless you can show that the city
16 has a policy of not training or giving the wrong
17 training.

18 I would think that to rise to a
19 constitutional level that would justify abrogation
20 against the states, it would actually have to be
21 almost a policy or practice. Certainly intentional,
22 but also a policy or practice that has the full
23 blessing of the state.

24 MS. SMITH: That is actually interesting. I
25 think a slight pivot, since you provided that analogy.

1 Do you have experience as to under what circumstances
2 a copyright owner might recover damages by filing a
3 1983 suit against a state official in their personal
4 capacity, and can you speak to whether state
5 organizations might typically indemnify employees to
6 perhaps make recovery more meaningful to a potential
7 plaintiff in that instance?

8 MR. THRO: I'm not aware of anything in
9 either Virginia, or Kentucky, or Colorado when I was
10 working in those states where an individual -- a
11 copyright owner filed a Section 1983 claim against an
12 individual. I think that would -- that is,
13 theoretically, possible, and, assuming you could prove
14 infringement, the individual would be personally
15 liable.

16 As to whether the state would indemnify,
17 that's going to be an open question in terms of state
18 law. We do not indemnify if you're clearly and
19 unambiguously acting outside the scope of your
20 employment.

21 But the question of indemnification in a
22 1983 suit against someone in their personal capacity
23 is totally unconnected to sovereign immunity. The
24 individual is going to be held personally liable. The
25 indemnification question is merely a fact -- question

1 of whether their employer will pick up the tab.

2 And I do think that is a realistic mechanism
3 to go after what I'll call the rogue employee who
4 engaged in copyright infringement without the express
5 authorization, and, in fact, contrary to the
6 directions of his, or her, employer.

7 MS. SMITH: Okay. So thank you. I do think
8 that qualified immunity, it might, we've seen in other
9 contexts, as you raised, present a hurdle in some of
10 the instances. And I think, copyright-wise, we might
11 be sort of gingerly just adopting that, given some of
12 the discussions in other contexts this year, but it is
13 good to consider.

14 Mr. Allen, did you want to respond?

15 MR. ALLEN: Yeah. Just real quickly, in our
16 case, we have filed a 1983 claim, a motion for
17 reconsideration, on that. As you can imagine, the
18 state has said that they are not liable, so we'll see
19 how that turns out.

20 MS. SMITH: Mr. Sedlik?

21 MR. SEDLIK: On the question of
22 intentionality or recklessness, you know, I do work at
23 a college, and I have had the opportunity, by working
24 as an expert witness, to kind of look behind the
25 curtain at a number of institutions, including state

1 institutions, and how they operate, and how they
2 control, or do not control, the intellectual property
3 that is in their possession.

4 I'm not talking about any institution that
5 anybody on this panel is involved with, but - there
6 are works that are stored on professors' hard drives
7 that they've obtained from Google images, there are
8 open servers that staff and students can access
9 without any knowledge of the IP policies.

10 There is a lack of supervision to ensure
11 adherence to IP policies, there's a lack of training
12 of staff and students on IP policies, there's works
13 that are used without a fair use analysis, and there
14 are digital asset management systems that are not set
15 up to include the rights information for the works
16 that are stored in them, such that people accessing
17 those digital asset management systems don't know
18 whether or not they can make use of the work, and they
19 may make use of the work regardless. And that is
20 reckless disregard, which is the equivalent of intent.

21 MS. SMITH: Okay. So we are going a little
22 bit over on this panel, which was a regular length
23 schedule. It's to stop at 11:30 because we got a bit
24 of a late start. Our panel two starts 11:45, so we're
25 kind of heading in for a break, but I want to ask a

1 couple of questions on recklessness or intentionality
2 to give people an opportunity to speak on that issue
3 if they have not already.

4 I don't know, Mr. Madigan, do you have
5 thoughts about, absent courts, the best way that the
6 Copyright Office should evaluate some of the survey
7 responses to determine whether conduct was intentional
8 or reckless?

9 And, particularly, I think one thing that
10 would be helpful, we've really appreciated hearing
11 from all of the educational entities here today, but
12 if there is also anyone who can speak to outside of
13 the educational context, other state actors, or ways
14 we might evaluate those questions, I think that would
15 be helpful to us.

16 MR. MADIGAN: Sure. Well I'd have to go
17 back and look at some of the specific responses, but I
18 think that there were -- there was a pattern shown in
19 the responses to our survey that showed at least
20 non-negligent examples of infringement.

21 There were situations described where
22 attorneys' warnings or cease and desist letters were
23 ignored. As Mr. Allen was talking about earlier,
24 copyright management information, or watermarks, or
25 copyright marks on the works were either ignored or

1 removed. And then there were also instances in which
2 the use of a work continued after a license expired
3 when the institute was aware of that license expiring.

4 So, you know, while I'm sure there are
5 plenty of inadvertent infringements, there does appear
6 to also be intentional, non-negligent instances of
7 infringement, which I know some of the authors and
8 creators can attest to. So I think those are some of
9 the things we want to consider.

10 MS. SMITH: Thank you. One housekeeping
11 matter.

12 Ms. Johnson, you had put in the chat, you'd
13 reported that you sent some letters. Could you say
14 that on video so we can get them in the record because
15 the chat itself is not being transcribed, as well as
16 anything else you'd like to speak on this topic.

17 MS. JOHNSON: We did send out cease and
18 desist letters just recently, and so we did get a
19 response from Texas A&M University that they were
20 looking into it, but we have not yet got a response
21 back from the Corpus Christi independent school
22 district.

23 Even though we had many visits with several
24 principals in the area, we had met with counselors,
25 particularly at one particular high school we met with

1 counselors, we met with the principal, we met with
2 math teachers, we were moving forward dealing with our
3 TSI math program, and then -- suddenly, we -- they
4 never -- they would not return our phone calls after
5 we had met with them.

6 And then we found out later on that our
7 book, and pieces of our book were being passed out at
8 certain high schools. And this high school is
9 actually on the list that the university helps and
10 works with, so we're thinking possibly -- even though
11 because -- we were in talks with them, that -- all of
12 a sudden the talks just halted.

13 So we're thinking that they got a hold to
14 some of the material and began using it as their own
15 through the university because the program works with
16 -- between the two of them. And so, just all of a
17 sudden, things no longer were being negotiated and
18 talked about, and contracts weren't made. As a
19 result, I'm feeling when -- our materials start being
20 passed out freely through the local district and other
21 districts.

22 MS. SMITH: Well I think that's a perfect
23 way to segue to how this is affecting negotiations.
24 Ms. Mangum?

25 MS. MANGUM: Thank you, Ms. Johnson.

1 I want to talk to Mr. Madigan, as a
2 representative of the copyright owners. To what
3 extent do you know that licensing terms differ when
4 the licensee is a state entity, and what is the basis
5 for concluding that these differences, any
6 differences, are because of sovereign immunity?

7 MR. MADIGAN: Sure. So in our survey
8 results we had about -- only about 14 percent of
9 respondents said that they license to state entities.
10 We asked whether they provide different payment
11 licensing -- for licensing terms and transactions with
12 state entities. We had 23 percent answer yes, with 56
13 percent answering no.

14 Out of those respondents, 68 percent of
15 copyright owners responded that they believed they'd
16 lost revenue or licensing opportunities due to state
17 infringement. Only 10 percent responded that they did
18 not believe that they had lost licensing or revenue
19 opportunities.

20 Many of the respondents who answered yes
21 went on to describe the losses they incurred,
22 including things like lost book sales, lost
23 subscriptions, and licensing fees for photographs and
24 video footage, but also more intangible losses, such
25 as careers cut short due to lost revenue or time spent

1 trying to, you know, stop the infringement.

2 MS. MANGUM: Mr. Munter, I believe you
3 wanted to respond?

4 MR. MUNTER: I didn't have anything planned,
5 but, yes, it's important to remember, especially,
6 like, in the news context, that these are copyright
7 holders whose works are used by states for their own
8 purposes, as in, like, they stay up to date on what is
9 happening in their communities, in addition to the
10 newspapers keeping communities themselves informed.

11 In the CalPERS case -- in some cases, as Mr.
12 Linder noted, the damages -- the potential licenses
13 were worth millions, and that is a lot of money for
14 newspapers, especially small, local newspapers who are
15 connected to their community and depend on a very
16 limited group of subscribers. So to see state
17 entities infringe the copyright of these newspapers is
18 especially disheartening.

19 MS. MANGUM: Thank you so much.

20 I wanted to ask either Mr. Thro, or, Ms.
21 Benson, you could respond, how often do state
22 entities, to your knowledge, offer to pay a fee, or a
23 licensing fee once an alleged misuse of copyright is
24 brought to the entity's attention, and if these fees
25 aren't paid, are there situations where there's

1 another remedy for the creator? Mr. Thro?

2 MR. THRO: Yes. Ms. Benson may have more
3 specifics. I note that she just said that the
4 University of Illinois spends \$16 million a year on
5 licenses for various copyrights. I think, and this is
6 purely anecdotal, it would depend upon the situation.

7 If we get something where there -- where, in
8 our analysis, there is a clear violation, and
9 reasonable people will disagree on the contours of
10 fair use and whether or not something is, or is not, a
11 violation, but if we get something that is a clear
12 violation, we will either cease using it immediately,
13 or, if it's something that we actually do need, we
14 would negotiate an appropriate licensing arrangement.

15 In talking to my peers at other
16 institutions, I think that's probably standard among
17 large state universities.

18 MS. MANGUM: So, to clarify, a fee isn't
19 offered even if it's a clear intentional violation.
20 Unless the agency or entity doesn't need the work in
21 the future, there's no fee offered, generally?

22 MR. THRO: I mean, if it's something that we
23 don't need, we would, obviously, cease and desist
24 using it. If it's something that we need going
25 forward, we would work out a licensing agreement.

1 There may be circumstances where, particularly if it
2 has been a longstanding infringement, we might offer
3 some sort of fee or reimbursement.

4 But, as Ms. Benson and others have said,
5 universities are in the business of creating, and it's
6 very important to us to preserve not only our
7 copyrights, but our intellectual property. We're not
8 going to intentionally violate, we're not going to do
9 something on a large-scale industrial level.
10 Occasionally, people will violate. When those come to
11 our attention, we will stop that, negotiate out a --
12 if we need it, some sort of licensing agreement.

13 MS. BENSON: If I may, I just wanted to add
14 that our library is one of the largest in the world.
15 We spend \$16 million in licensing fees. I'm curious
16 as to why we would pay such an enormous amount of
17 money to license databases and electronic works if we
18 are intentional infringers. To me, that is an
19 enormous amount of money that we're spending.

20 And we do take it very seriously. I
21 actually work with our patrons who are doing mass
22 downloads for text analysis, for instance. If it
23 violates terms of service, they will contact me and I
24 will work with a vendor to come up with an agreement
25 because we do not wish to violate our licensing

1 agreements, and to lose our relationships with our
2 vendors, of course, because we are customers of our
3 vendors.

4 So I do think that when we do have an
5 instance where we know we've infringed and it comes to
6 our counsel -- again, that's very limited amounts --
7 they will work with the person, and, often, it will
8 result in a payment. We don't assert sovereign
9 immunity, we will stop using that item. That is my
10 understanding from talking to our general counsel's
11 office. I'm not the one who they talk to directly.

12 MS. MANGUM: Mr. Linder, did you want to
13 respond?

14 MR. LINDER: Yeah, I just wanted to respond
15 to the notion that state agencies being presented with
16 relevant infringement claim will stop using the work
17 that's been infringed, and if they want to use it in
18 the future and negotiate a proper license -- that's
19 the state of the law right now, right?

20 Even after *Allen v. Cooper*, a copyright
21 holder who finds that a state agency is misusing their
22 work can obtain an injunction against -- to cease the
23 work and against future use of that work, which is why
24 I think it's so important that we understand the sort
25 of standard-setting aspect of the law, because the

1 notion that a state agency will stop and then only pay
2 money if they want to continue to use the content is
3 the law is now.

4 If, as Congress had I think attempted, and
5 intended, that was not the state of the law, then the
6 state agency is in a very different position.

7 MS. SMITH: Mr. Sedlik, would you also want
8 to speak to this? We're entering last call.

9 MR. SEDLIK: Yes. In my experience, the
10 license terms employed by visual artists in
11 contracting with the states are no different than the
12 license terms they use when contracting with other
13 parties. When those agreements are breached, of
14 course they do have injunctive relief, but even
15 Congress said in passing the CRCA in 1990, I believe
16 they said that injunctions are an incomplete remedy.
17 And that's very true because the artists can't get
18 remuneration, they can't get their lost profits, and
19 -- there are lost licensing opportunities.

20 If a state takes one of my photographs and
21 puts it on the cover of a book, I can never license
22 that photograph for another book cover during the
23 copyright life of the work, because no publisher will
24 take it for a book cover if it has previously been
25 featured on a book cover.

1 MS. SMITH: Yeah. Just to be very clear,
2 you're saying once you experience an infringement by a
3 state actor, it is affecting the market for that work
4 with others who may not be state actors, correct?

5 MR. SEDLIK: That's right.

6 MS. SMITH: Thank you.

7 So, Ms. Johnson, I think you have also said
8 -- if you would like to share your experience about
9 your additional products, and then I think we may be
10 wrapping up. If anyone wants to say one last thing,
11 raise your hand so we can get you; otherwise, we will
12 be concluding. We'll go Mr. Madigan next after Ms.
13 Johnson. Thank you.

14 MS. JOHNSON: Because of the infringement
15 that we have experienced, we have been reluctant to
16 put out our nursing math workbook because we're afraid
17 that it might be also lifted because it's in the same
18 style in which -- we know very much so that they like
19 the style in which we're designing our books.

20 So we have not purposely put it out on the
21 market because of the fear of copyright infringement,
22 and maybe not be able to get our worth that we have
23 put into this next book that we have waiting and ready
24 to be put out, but the fear that someone's going to
25 lift it also.

1 So it hasn't been a good place to be a
2 creator when you know that people are stealing your
3 work. And you know that they like it. I'm glad that
4 they like it, but we're not getting any payment for
5 what they do like.

6 MS. SMITH: Thank you, Ms. Johnson, for
7 sharing your experience.

8 I think, Mr. Madigan, you can have the final
9 comment. If you could try to be relatively brief
10 because we are running a bit late.

11 MR. MADIGAN: Yeah, just a real quick
12 closing thought. So there's this obvious back and
13 forth going on between us and those who are opposed to
14 abrogating state sovereign immunity who say there's no
15 sufficient record of infringement, and then those of
16 us who say there are, but I think it's important to
17 understand that there's no magic number of
18 infringements or a bright line that would trigger
19 congressional action.

20 In *Turner Broadcasting v. FCC*, the Supreme
21 Court held that Congress can use its legislative
22 authority to make predictive judgments that further
23 important government interests, and I believe that the
24 evidence offered at these roundtables and in the
25 comments period creates a record supportive of a

1 decision by Congress to make a predictive judgment on
2 the extent of harm caused by state copyright
3 infringement, and to take actions that further the
4 goals of our copyright system.

5 So I would just suggest that we sort of
6 consider sovereign immunity in a little bit of a
7 broader context of whether it really serves the goals
8 of the copyright system.

9 MS. SMITH: Thank you. And thank you all
10 for contributing to the panelist discussion. That is
11 a wrap for this one. We're going to take a brief
12 break for a sound check. So if you are on panel one,
13 you can turn your video off. If you are on panel two,
14 you can turn your video on. Let's try to start around
15 11:50. We'll do the best we can, and thank you.

16 (Whereupon, a short recess was taken.)

17 MR. AMER: Welcome back, everyone. Again,
18 my name is Kevin Amer. I'm Deputy General Counsel
19 here at the Copyright Office. We're really grateful
20 to have all of you here participating with us. We're
21 going to start session two, which is another panel on
22 evidence of state infringement.

23 Before we do, just a couple of housekeeping
24 reminders. First, for the panelists, if you could
25 just please remember when you're not speaking to mute

1 your microphone to avoid any extraneous noise.

2 Secondly, just a reminder for those watching
3 on the public link, we are -- if you are interested in
4 signing up to participate in the open mic session at
5 the end of the day, you can do so at the link that
6 should be provided in the chat here shortly on Survey
7 Monkey, and then, at the end of the day, you'll be
8 able to come back using the same public link to make
9 comments as part of the open mic.

10 So let's get started. This panel, as I
11 mentioned, has to do with evidence of infringement.

12 It's going to follow, roughly, the same
13 roadmap that the first session this morning did.
14 First, we're going to I think talk in a broader way
15 about the types of evidence that the Copyright Office
16 should consider, what type of evidence, broadly, is
17 relevant to assessing this question. Then I think
18 we're going to move towards more specific examples
19 that folks have raised in terms of identifying claims
20 of infringement against states.

21 Then we would like to talk about the
22 standard that the Court articulated in terms of what
23 it means for infringement to be intentional -- what
24 level of intent is required to satisfy the
25 constitutional standard. And then, finally, we're

1 going to talk about any effect that sovereign immunity
2 may have in your experience on licensing negotiations
3 involving copyright owners and states.

4 So just to kick things off, if we could --
5 if I could ask all of the panelists to introduce
6 themselves. Let's start with Dr. Bell, please.

7 DR. BELL: My name is Dr. Keith Bell, and
8 I'm in private practice.

9 MR. AMER: And, Mr. Bynum, are you on the
10 phone?

11 (No response.)

12 MR. AMER: I see your name. I'm not sure if
13 Mr. Bynum is on.

14 (No response.)

15 MR. AMER: Let's go to -- is it -- I hope I
16 pronounce -- forgive me. Is it Laiho? Mr. Laiho?

17 MR. LAIHO: You got it. Good morning, my
18 name is Devin Laiho. I'm a senior assistant attorney
19 general with the Colorado Attorney General's Office.
20 we advise executive branch state agencies, except for
21 some of the higher educational institutions in the
22 state. I just need to make a disclaimer that any
23 comments that I make today are not made on behalf of
24 any of our clients or state agencies.

25 MR. AMER: Great. Thank you.

1 Ms. Levine?

2 MS. LEVINE: My name is Melissa Levine. I
3 direct the Copyright Office at the University of
4 Michigan library. I also am a lecturer for the
5 University of Michigan School of Information, where I
6 teach a course on intellectual property information
7 law, and want to mention that I'm part of -- I'm a
8 founding member of a working group that established
9 rightsstatements.org, which is geared towards
10 providing relevant intellectual property information
11 for educational and cultural needs.

12 MR. AMER: Thank you.

13 Mr. MacDonald?

14 MR. MACDONALD: Good morning, everybody, my
15 name is Angus MacDonald. I work at the University of
16 California's Office of General Counsel. I handle
17 copyright matters for the entire University of
18 California system, which comprises 10 UC campuses,
19 five medical centers, and three affiliated national
20 laboratories. I just want to thank the Copyright
21 Office for hosting this roundtable to discuss this
22 significant constitutional issue. Thank you.

23 MR. AMER: Thank you.

24 Mr. Molnar?

25 MR. MOLNAR: My name's Isaac Molnar. I am

1 intellectual property counsel for the Ohio Attorney
2 General. In Ohio, the attorney general is required by
3 law to represent every state entity, and, as IP
4 counsel, all copyright claims, cease and desist
5 letters, et cetera, come to me, so I have a pretty
6 good idea of copyright infringement issues in Ohio.

7 MR. AMER: Thank you.

8 Ms. Murphy?

9 MS. MURPHY: Hi, I'm Kristen Murphy. I'm
10 the director of the American Chemical Society's
11 Examinations Institute, and I'm also a professor of
12 chemistry and biochemistry at the University of
13 Wisconsin, Milwaukee.

14 MR. AMER: And, finally, Mr. Wassom?

15 MR. WASSOM: Hi, I'm a private practitioner
16 in a law firm based in Michigan. I am here today on
17 behalf of the American Intellectual Property Law
18 Association, the AIPLA, and, as Mr. Laiho did, I'm
19 going to just disclaim that I'm not speaking today on
20 behalf of myself, my firm, or my clients, but rather,
21 on behalf of the AIPLA.

22 MR. AMER: Great. Thank you all again. So,
23 as I mentioned, I would like to start at sort of a
24 higher level and talk to you about what sorts of
25 evidence is relevant, and I actually -- Mr. Wassom,

1 I'd like to start with you if I could.

2 In AIPLA's submission, you listed a number
3 of copyright infringement suits that have been brought
4 against states in the past I believe two decades. Mr.
5 Bynum also submitted a lengthy list of infringement
6 actions brought against states. I'm wondering if you
7 could talk a bit about your view in terms of what we
8 can draw from that sort of evidence in terms of
9 assessing the prevalence of infringement by states.

10 MR. WASSOM: Sure. Thanks, Kevin. So in
11 AIPLA's submission, we identified 19 different written
12 decisions from litigated cases that are available
13 online and in publicly-available databases. What's
14 interesting about the cases themselves is the breadth
15 of works and of state agencies that were involved in
16 the cases.

17 So the works themselves include such diverse
18 examples as photographs, video recordings,
19 standardized tests, books, book chapters, graphic
20 designs, paintings, software, databases, teaching
21 materials, and research reports, which speaks to the
22 wide swath of creators and creative institutions that
23 are impacted by this sort of activity.

24 The defendants in these cases included
25 state-sponsored commissions, institutes, foundations,

1 boards, bureaus, educational institutions, and
2 hospitals, again reminding us that when we speak of
3 abstract terms, like the state, it really encompasses
4 a broad range of entities with whom creators may
5 interact and entities that may otherwise use
6 copyrighted materials that non-state actors would need
7 to pay a license fee for or face recrimination for
8 infringing.

9 Our members, which include both private
10 practitioners, in-house counsel, counsel for public
11 entities, but a wide -- a large number of private
12 practitioners who are in the trenches day in and day
13 out fighting these cases, strongly suspect that this
14 is really only the tip of the iceberg.

15 As any practitioner understands, the number
16 of cases filed versus the number that actually result
17 in a public opinion, there's a wide discrepancy
18 between the two, and the number of unreported,
19 settled, or never filed lawsuits is almost inevitably
20 much higher than what we see from these 19 different
21 cases.

22 In addition, the cost of litigation and the
23 obvious futility of bringing infringement claims
24 against the state entities, we suspect, and we
25 understand anecdotally, would deter a number of cases

1 that might have otherwise been filed.

2 It's important to remember here that, as the
3 Supreme Court itself explained in the Allen decision,
4 the writing has been on the wall for the CRCA for at
5 least two decades before the Court finally
6 acknowledged its death.

7 The vast majority of lower Court decisions
8 had already decided that the CRCA was
9 unconstitutional, and practitioners know that, so not
10 only the number of creators understand that the remedy
11 is futile, but the attorneys who had otherwise filed
12 those case on behalf of the creators understood that
13 those cases were futile.

14 To sum up, these 19 cases, we believe, are
15 the tip of the iceberg on the infringement that is
16 actually occurring.

17 MR. AMER: So that's an interesting point, I
18 mean, because you're right. And one of the points
19 that we've heard in the comments is the fact that, as
20 the Court said in the Allen v. Cooper decision, the
21 law after Florida Prepaid was fairly clear that
22 sovereign immunity precluded copyright claims against
23 states, so, in some ways, it seems surprising that
24 there would continue to be significant numbers of
25 cases.

1 Were you able to determine to what extent
2 these cases involved claims for damages against
3 states, as opposed to, for example, claims for
4 injunctive relief brought against individual state
5 officials?

6 MR. WASSOM: So we didn't drill down to that
7 level of specificity in terms of gathering hard data
8 and numbers, but our read of these cases is that each
9 of them, the plaintiffs sought damages, and that would
10 have been something that they sought, but for the fact
11 that they were stymied by immunity.

12 MR. AMER: And is it your understanding,
13 just from having looked at those cases, that,
14 essentially, they were efforts to distinguish the CRCA
15 from the Patent Remedy Act that was addressed? I
16 mean, were they essentially trying to make the
17 argument that, notwithstanding Florida Prepaid,
18 sovereign immunity did not apply?

19 MR. WASSOM: Again, the level of legal
20 analysis and the strategies used vary from case to
21 case, but all of them, in one form or another, were
22 trying to get the relief that CRCA otherwise would
23 have provided.

24 MR. AMER: Mr. MacDonald, looks like you've
25 raised your hand. Would you like to weigh in on the

1 usefulness of this evidence?

2 MR. MACDONALD: I would. Thank you, Kevin.
3 I'd just like to provide a little bit of context
4 because I did review the AIPLA submission. In
5 response to the -- question one about specific
6 instances, as Mr. Wassom pointed out, there are 19
7 examples, but it was over the span of 36 years. If
8 you look at the first bullet -- one of the earlier
9 cases that's bullet pointed in the AIPLA submission,
10 it's from 1984, and it goes through instances of 2020.

11 Nineteen examples over the course of 36
12 years does not seem like an overwhelming amount so --
13 that would necessitate abrogating
14 constitutionally-protected sovereign immunity.

15 I also think that these examples, these
16 bullet points, are not entirely probative for the
17 Copyright Office's inquiry. I haven't heard, and I
18 haven't seen, anything in the AIPLA submission, or in
19 other submissions, that -- of any proof, or evidence,
20 or a determination that, setting aside 11th Amendment
21 sovereign immunity, the state defendants did not have
22 meritorious, or at least plausible, defenses that, had
23 they been fully litigated, they may have prevailed.

24 I think it's going to be that level of
25 inquiry that's going to be required based on whatever

1 is available in the public record on these various
2 matters, most of which did get dismissed at an early
3 stage because of sovereign immunity.

4 There's another reason why I just think that
5 this bullet pointed list is not entirely probative.
6 It simply purports to identify how state entities
7 responded in response to a copyright infringement
8 lawsuit: by relying on their
9 constitutionally-protected sovereign immunity, among
10 other defenses. It doesn't actually establish that
11 any of these alleged infringements, at the time of the
12 alleged infringement, were done with intentional or
13 reckless intent, and that's the standard that we're
14 talking about.

15 I think it's going to be far more probative
16 to actually look at fully-litigated cases, cases
17 involving public entities that, for whatever reason,
18 sovereign immunity didn't apply. I'm sure the
19 Copyright Office and others on this panel are aware of
20 the Georgia State litigation where the publishers
21 ended up losing on almost all the counts and having to
22 actually pay the costs of Georgia State, or the
23 Authors Guild v. HathiTrust matter involving the
24 University of Michigan, the University of California,
25 and other state institutions. I'll pause right there.

1 MR. AMER: Thank you. Now, so you've raised
2 a number of important points that I want to sort of
3 take in turn here. You first mentioned the number of
4 cases. I guess there were 19 in the AIPLA's
5 submission.

6 If Mr. Bynum is on the phone, I would like
7 to invite him to weigh in on this question of the
8 number of cases that are relevant here. Mr. Bynum,
9 are you there?

10 (No response.)

11 MR. AMER: Okay, I guess not.

12 Well let me turn it back to you, Mr. Wassom.
13 What I was going to ask Mr. Bynum, I was going to ask
14 him about this list of, I think it's almost 160 cases
15 that he provided to us. Mr. Wassom, AIPLA's
16 submission was I guess a subset of that longer list.
17 Did you intend that to be just sort of a
18 representative sample, or was there a reason that you
19 limited your submission to 19 cases rather than the
20 full 160?

21 MR. WASSOM: Oh, by no means did we intend
22 it to be an exhaustive list. It is, in fact, a
23 representative sample. To Mr. MacDonald's point,
24 there's certainly more analysis that could be done of
25 those decisions, and we wanted to dig deeper into each

1 one and talk about what the relevant issues are. I'm
2 sure some are going to be more probative than others.
3 That's fine.

4 It's not meant to be a smoking gun, but it's
5 certainly indicative, we feel, of the state of the law
6 and the state of infringement activity that's going
7 on. The cases are all there. They're all accessible
8 in public databases for the world to read and the
9 Office to study as well. Certainly, if the Office
10 would invite AIPLA's further submission and analysis
11 of those cases, that's something that we could
12 provide.

13 I would say, though, that 19 issues -- 19
14 cases on an issue that ought to have already been so
15 clear, as a matter of constitution law, I think --
16 Kevin, to your point though, you kind of -- I read a
17 suggestion in your initial comments that that's
18 actually a fair number of cases compared to what the
19 understanding should have already been.

20 As a litigator, I know that there are a
21 number of issues that I wish someone else would have
22 spent hundreds of thousands of dollars litigating
23 fully all of the various possible defenses so that we
24 would have a robust public record of what the merits
25 of each case are, but we can't expect another party to

1 do that.

2 MR. AMER: Well, right. So just to maybe
3 turn back to you, Mr. MacDonald, and I want to bring
4 others in, too, I mean, you made an important point, I
5 think, in noting that it's not clear from just the
6 fact that these cases were filed to what extent the
7 states may have had other valid defenses, whether the
8 copyright owners ultimately would have prevailed.

9 I think, from our standpoint at the
10 Copyright Office, the question is what other evidence
11 -- I mean, the problem with us using those cases is
12 the fact that they've -- the merits are not able to be
13 addressed because of sovereign immunity, right? So
14 the cases don't really provide a vehicle for us to
15 assess whether there were meritorious defenses, et
16 cetera.

17 So do you have thoughts about other sorts of
18 evidence or ways that we can use these sorts of cases
19 to make this assessment?

20 MR. MACDONALD: Yes, I do. Well, as I
21 mentioned, there are some fully-litigated cases where
22 sovereign immunity, for whatever reason, was not at
23 issue or did not preclude a decision on the merits,
24 and I cited a couple, and there is an extensive record
25 in the Georgia State litigation, as well as in the

1 Authors Guild v. HathiTrust litigation.

2 I do think that that -- those cases are
3 going be far more probative than, you know, 19 cases
4 that have been dismissed at a motion to dismiss level.
5 That's point number one.

6 The second point that I think -- in terms of
7 looking at evidence -- and I do respect and admire,
8 and I think it's going to be a significant project for
9 the Office to really get into the evidence, but one of
10 the questions in the notice of inquiry, which is
11 Question 1-F, is whether the infringement was
12 committed pursuant to a state policy.

13 I have looked at most of the initial
14 comments, as well as the reply comments submitted in
15 response to the notice of inquiry. I saw no evidence
16 whatsoever of state policies that -- where the state
17 institution had a policy of we're just going to
18 infringe and not worry about it and rely upon
19 sovereign immunity.

20 I think we heard from Mr. Thro of the
21 University of Kentucky who provided some elucidation
22 about what is really required here. It's a de facto
23 policy, or a pervasive pattern or practice of
24 infringement. Again, I don't see that.

25 The third point is that I really do think

1 it's going to require going into the public record for
2 a lot of these cases and a lot of the points that Mr.
3 Bynum and AIPLA had submitted to see what is raised in
4 the motion to dismiss. Was it purely sovereign
5 immunity, or were there meritorious other defenses
6 that were raised?

7 Just by way of example, I did carefully look
8 at the AIPLA submission, and I did look at Mr. Bynum,
9 and I was looking specifically for the University of
10 California, and there was a reference to a 1987 case
11 called B.V. Engineering v. UCLA, and in the second
12 paragraph of the District Court's decision, which, of
13 course, granted sovereign immunity, it specifically
14 said that the defendant regent's motion is based on
15 various grounds, including a claim that defendant is
16 entitled to immunity from suit under the 11th
17 Amendment.

18 And then in the -- two sentences later, the
19 Court says it does not reach the remaining issues
20 posed by the parties on their motions for summary
21 judgment, the point being is there are typically many
22 meritorious defenses that are raised, at least in my
23 own practice and from what I've observed with other
24 state institutions, aside from the sovereign immunity,
25 and I do think that those need to be carefully looked

1 at.

2 MR. AMER: Thank you.

3 Mr. Wassom, I see you've raised your hand so
4 I'm going to go back to you quickly, and then I would
5 invite, particularly, folks from states to weigh in on
6 this question, too. I mean, I would say, at least on
7 its face, the fact that we have evidence of up to 160
8 cases filed against states since 2000 for copyright
9 infringement seems noteworthy, and so I wonder if
10 other state representatives agree with Mr. MacDonald
11 that we sort of need to look at those cases on a more
12 granular level to determine whether there's this sort
13 of a pervasive issue. But, Mr. Wassom, you wanted to
14 respond?

15 MR. WASSOM: Thank you. Two quick points
16 and I'll pass the mic. The first is it's the number
17 of cases that either were never filed or were filed at
18 the complaint stage and abandoned which are -- the
19 data that's provided so far suggests that number is
20 going to be orders of magnitude higher than the number
21 of cases we can actually identify with decisions that
22 were reached.

23 The second being Mr. MacDonald's point is a
24 great one that there -- that state entities have wide
25 variety of other defenses available to them, and once

1 the state -- once -- if, in fact, the CRCA, that
2 remedy was re-adopted and sovereign immunity no longer
3 became an issue, now we'll be able to actually
4 litigate those and be able to determine their merits,
5 and the availability of those defenses is a great
6 reason for state entities to not fear that the sky is
7 falling just because the CRCA is reinstated.

8 They have a wide variety of other defenses
9 to fall back on, so the impact on those state agencies
10 is likely to be muted by those.

11 MR. AMER: All right, thank you. Mr. Laiho?

12 MR. LAIHO: Yes. One of the things that I
13 wanted to comment on is that -- is the number of cases
14 and the number of allegations that we get of
15 infringement. So while it's true that state agencies
16 do occasionally receive emails or letters alleging
17 that they've infringed on authors' work, when I say
18 occasionally, I'm talking about a handful of
19 allegations over a multi-year period.

20 I've been in our office for over 20 years,
21 and, on average, our office receives maybe one
22 infringement allegation per year, and that's across
23 all of the different state agencies that we represent.
24 So I think it's really important to understand that.
25 This isn't some pervasive pattern of even allegations

1 that the state agencies are infringing authors'
2 content.

3 MR. AMER: Yes, Mr. Molnar?

4 MR. MOLNAR: Yeah, I would just follow up.
5 As IP counsel for State of Ohio, I've been since 2012,
6 so going on nine full years, and I have -- I went back
7 and counted how many cease and desist letters I've had
8 to deal with for all our state entities: two year
9 colleges, four year colleges, state agencies, and it
10 amounted to seven over the course of nine years. Just
11 cease and desist letters.

12 And, of those seven, we actually -- there
13 two or three that were meritorious, and we settled.
14 We paid the -- paid out some judgment, and that's a
15 matter of public record. So they just don't come up
16 very often. They really don't. At least in my
17 practice. Like I said, I think this is consistent
18 with what Mr. Laiho said, I'd expect to see a cease
19 and desist letter maybe once or twice a year.

20 MR. AMER: So you mentioned paying out
21 settlements, or paying damages.

22 MR. MOLNAR: Yeah.

23 MR. AMER: Is that the state's typical
24 practice when presented with an infringement claim? I
25 mean, do you undertake an assessment of the merits,

1 and, if you find it meritorious, try to work out a
2 financial settlement, or is it typical that you will
3 assert sovereign immunity?

4 MR. MOLNAR: I don't know what the law is in
5 the other states, but in Ohio there's a pretty easy
6 workaround to allow for immunity, so the state will
7 be, potentially, on the hook regardless of whether or
8 not we assert 11th Amendment immunity or not.

9 That is, you can sue -- if you can obtain a
10 public records request, find out the individual who's
11 actually responsible for the copyright infringement,
12 sue them in a personal capacity, and, under Ohio law,
13 we represent them, and then indemnify them. So we
14 have to be very cognizant of that risk.

15 So we really assess the merit of claims, and
16 where we've had meritorious claims, like, clear
17 copyright infringement, we've settled, period. And
18 then, we're also the chief state law enforcement
19 officer, and it's not a particularly good look, in our
20 opinion, to use the 11th Amendment the way this -- you
21 know, as a technicality to avoid following the law.
22 So we have two different approaches, but they work in,
23 I think, the same way.

24 MR. AMER: So you were talking before about,
25 I assume, 1983 suits against the state officials in

1 their personal capacity? Was that what you were --

2 MR. MOLNAR: Well, you can sue an individual
3 in their personal capacity for copyright infringement.
4 Just a copyright claim against that individual. We've
5 had to deal with that case. We had a case where our
6 agency, it was the Department of Natural Resources,
7 was sued, and we dismissed that on 11th Amendment
8 grounds because it was not a proper suit, but they
9 brought the suit again.

10 We told them if you know who did it, if you
11 have a name of an individual, which they did, then you
12 need to sue them in their personal capacity, and they
13 did.

14 MR. AMER: But I'm talking about situations
15 where the state employee is acting pursuant to state
16 policy or acting in their capacity as a state
17 official. In that circumstance, you would need to
18 bring the action under 1983, I gather, right, and the
19 official would be entitled to qualified immunity?

20 MR. MOLNAR: So I'm not sure you would bring
21 it under 1983. I mean, the claims that I've seen and
22 where this has come up, it's been a claim for
23 copyright infringement. Now, district courts that
24 have considered it have said qualified immunity
25 applies in that case.

1 MR. AMER: Okay. Mr. MacDonald, you raised
2 your hand.

3 MR. MACDONALD: Yes. Thank you for again
4 allowing me the opportunity. The answer is, yes, we
5 do pay from time to time. I don't have any sort of
6 specific numbers, but, in response to credible,
7 meritorious claims of copyright infringement where our
8 own defenses, separate from sovereign immunity, are,
9 in my opinion, not very strong, I do recommend some
10 payment to settle the matter because we respect
11 copyrights.

12 We have various policies that require us to
13 adhere to copyrights. We're subject to the Higher
14 Education Opportunity Act which requires annual
15 copyright disclosures or, potentially, our federal
16 funding is withheld. So, yes, we do pay on occasion.
17 I would say it's certainly less than 50 percent, but
18 certainly greater than zero percent.

19 And in a few instances we have settled on,
20 sometimes in addition to payment or sometimes in lieu
21 of payment, to take corrective measures with the
22 aggrieved copyright owner. One such example was where
23 a college radio station had to impose some educational
24 requirements to all of their new employees about
25 copyright, and copyright infringement, and the balance

1 of fair use. So those are some of the examples where
2 we do take measures, including payment, in response to
3 credible copyright infringement claims.

4 MR. AMER: Great. I do want to turn to some
5 of the copyright owners who have raised specific
6 allegations of infringement that they've experienced
7 by states.

8 Dr. Bell, I'd like to start with you, if I
9 could. You have submitted comments through the
10 Copyright Alliance alleging numerous infringements by
11 multiple state entities. I was wondering if you could
12 just give a brief sort of overview of those
13 situations, and the types of infringements that you're
14 claiming, and how the states have responded.

15 DR. BELL: Okay. Well, again, I think this
16 is just the tip of the iceberg, but I've identified
17 more than 130 universities, public universities, who
18 have infringed or whose employees have infringed upon
19 my copyright. Now the question of whether it's
20 meritorious, we probably would disagree on many of
21 them, but that's something I'd like to see happen in
22 Court rather than just not being able to go after them
23 because of sovereign immunity.

24 In Ohio, I wrote a cease and desist, and the
25 only responses I got was we claim sovereign immunity.

1 University of Texas is particularly of interest to me.
2 It's a great university, and I got my Master's there
3 and my Doctorate, and did post doc there, and worked
4 there.

5 They have a very strong brand, make a
6 fortune on licensing their works, and are
7 well-respected in the community with what their
8 policies are, but when I had multiple infringements by
9 employees of the University of Texas, the only
10 response I got was sovereign immunity.

11 MR. AMER: Let's just back up. So you are
12 -- you have a number of books that you've published --

13 DR. BELL: Yes.

14 MR. AMER: -- correct? Could you describe
15 sort of the nature of the infringements that you're
16 experiencing? What are the states actually doing with
17 your works?

18 DR. BELL: So I've written 11 books, 10 of
19 them on sports psychology and human performance
20 psychology. I have a copyright on the book *Winning*
21 *Isn't Normal*, and a separate copyright on the name --
22 the heart of the book, the main passage that I wrote
23 the book around, also called *Winning Isn't Normal*.

24 All of my books have been infringed upon,
25 but *Winning Isn't Normal* particularly has been hugely

1 infringed upon. It's been distributed, disseminated
2 by -- out to -- disseminated out to, literally,
3 millions of people without any kind of remuneration
4 from them. Some of it is very clearly infringement.

5 The University of Louisville, for example,
6 each of their -- eight of their sports infringed on my
7 copyright, gave attribution to anonymous. And at
8 least one of those stories had prior warnings from the
9 national governing body in that sport, and yet the
10 infringement continued.

11 MR. AMER: So what, exactly, was the
12 infringement? What did they do?

13 DR. BELL: Well, first of all, they
14 infringed upon my right to how it's used. So, for
15 example, I have a number of -- I have, particularly
16 derivatives, of a passage specifically that has a
17 copyright on that is going, or being distributed
18 widely right now.

19 It has a phrase in there that's illiterate
20 and nonsensical, and that's really very embarrassing
21 to me, as an author, right? That bothers me. They
22 distributed unbelievably widely. I have one
23 particular derivative that has been copied and
24 disseminated millions of times.

25 A very important part of my concern with

1 this is that because of all the infringing on my
2 works, I stopped writing. I was very prolific in
3 getting a bunch of books out in a fairly short number
4 of years, but the amount of sales that's gone on makes
5 it very difficult for me to collect and stop people
6 stealing my work, and particularly if it's the state.
7 I think that hurts society, that people sort of just
8 stop writing.

9 MR. AMER: I know you've filed -- you've
10 asserted claims in a number of courts, infringement
11 suits, and so, in those cases, is the typical
12 response, or is sovereign immunity one of the defenses
13 that states have typically raised?

14 DR. BELL: I don't think so. I'm not sure,
15 but I don't think so in those particular cases. There
16 are hundreds of cases that I haven't pursued because
17 of sovereign immunity. I can't afford to do that, and
18 I can't afford to take them to trial.

19 I think that my goal in sending a cease and
20 desist is to get them to stop, but I also want there
21 to be a deterrent effect to stop other people. So,
22 for example, I've had multiple infringements from
23 Northeastern State University, and they did it over
24 many of their sports, and their recruiting office, and
25 some of the other administrative offices, and I just

1 couldn't go after them with sovereign immunity.

2 The universities license their brands, their
3 trademarks, their patents, and their copyrights, and
4 they make sure that even their own employees -- they
5 own what their own employees do a lot of the time, and
6 if their employees on their own then go use it, then
7 they go after their own employees. They also punish
8 students for that kind of behavior. I find that
9 appalling.

10 MR. AMER: Thank you. That's helpful.

11 I do, just in the interest of time, want to
12 move to -- I believe -- Mr. Bynum, are you there now?

13 (No response.)

14 MR. AMER: One of these times this will
15 work, but apparently not yet. Okay. I would like
16 then to turn to Ms. Murphy. You've talked about
17 infringements of various pieces of intellectual
18 property that the American Chemical Society has
19 produced. Could you talk just generally about what
20 sorts of infringements by states you've experienced?

21 MS. MURPHY: Of course. Thank you. So just
22 so everyone's clear, I'm actually part of the Division
23 of Chemical Education, which is a technical division
24 of the American Chemical Society. Of that, we have an
25 entity called the Examination Institute, and that's

1 what I lead. We're a very small group, unlike our
2 parent organization, ACS.

3 We've been around since 1934, and we produce
4 standardized tests in chemistry. These are used by
5 many institutions -- currently, over 2,500
6 institutions use our exams in some capacity -- and we
7 hold secure copyrights on our test items.

8 Because many of our tests are used for final
9 exams, our test lifetime is actually quite long,
10 depending on the area. So a general chemistry or
11 organic chemistry test might only live from -- as a
12 released or active test for maybe four to six years, a
13 physical chemistry test might live for 10 to 12 years
14 because it takes so long to develop these exams.

15 The types of infringement that we've
16 experienced over the number of years that I've been
17 director, and that's a little over five years, have
18 included actions by employees of institutions, where
19 they have either photocopied our tests or they've
20 translated our materials into either study materials
21 or their own exams using learning management systems
22 or directly using paper tests, most commonly using
23 learning management systems.

24 And then the other component of this is
25 where the secure site that is supposed to be set up in

1 which the tests are administered is not, in fact, as
2 secure as it needs to be, and students then are the
3 ones that either take pictures of the exams or they
4 remove tests from the site, and then, obviously, that
5 comprises our items.

6 We've had a fairly good experience being
7 able to work with institutions that infringe that are
8 private that are not part of state institutions, and
9 we've been able to seek some damages and be able to --
10 really, the more important thing -- not the damages,
11 but the more important thing is to be able to correct
12 actions so that the infringement doesn't continue.

13 We have many entities that are a part of
14 state institutions. Sometimes they're actually state
15 universities, sometimes they're connected to state
16 universities, and it does get murky, where we have
17 come up against sovereign immunity almost immediately.

18 In fact, I'm a chemist, not a lawyer, so I
19 apologize for not being well-versed in what so many of
20 you are, but the lawyers that we work with oftentimes
21 will tell us that we're simply not able to pursue
22 things simply because it's a state institution, and we
23 stop at that point.

24 We certainly make every effort to be able to
25 have the materials removed, but, oftentimes, that

1 falls to us then. Because there's nothing we can do,
2 we have to recall tests. Hundreds of thousands of
3 dollars are spent on our side, and, like I said, we're
4 a very small group. We have 60 products that we're
5 trying to protect with about five people.

6 MR. AMER: Okay. Let me just jump in. It
7 sounds to me like we have some background noise, so if
8 everyone who is not speaking could --

9 MR. GRAY: Kevin, I think that may be Mr.
10 Bynum, actually.

11 MR. AMER: Oh, wait. Let me just --

12 MR. GRAY: Mr. Bynum, can you hear us?

13 MR. AMER: I think I can mute him. Okay.
14 Thank you, Ms. Murphy. I just want to ask a couple of
15 clarifying questions. So you produce -- are they
16 model exams? I'm interested in sort of what your
17 normal marketing practices are. You know, who are
18 your customers for these sorts of materials? What's
19 the normal business practice?

20 MS. MURPHY: So our customers are actually
21 faculty and instructors in departments. So to go to a
22 procurement model or license for a university just
23 doesn't fit our product because it's simply not
24 widespread use by a university, it's only used by
25 chemistry departments. The customers range from high

1 schools all the way through R1 universities.

2 MR. AMER: So I wasn't totally clear. Have
3 you encountered situations where you've contacted
4 states, or a municipality, or a state entity and
5 brought an infringement to their attention, and what
6 has their response been?

7 MS. MURPHY: We have been told that, under
8 sovereign immunity, that we have no recourse, and, at
9 that point, we've dropped it.

10 MR. AMER: Can you tell us what state, or
11 states, have said that?

12 MS. MURPHY: I don't think I can disclose
13 that. Some of these things are actually ongoing
14 investigations at this time, so I'm sorry --

15 MR. AMER: No --

16 MS. MURPHY: -- I'm just trying to be very
17 careful.

18 MR. AMER: -- I understand. And have the
19 states said that they intend to keep using the
20 materials?

21 MS. MURPHY: Okay. So, and that's where it
22 comes to we're looking for corrective action
23 primarily. It's less about getting damages and more
24 about correcting the action so that our items stay
25 secure, and that's been somewhat successful in terms

1 of being able to work with the faculty to provide a
2 secure environment so that it doesn't continue to
3 happen.

4 And we do get corrective action in terms of
5 if it was a willful act by an instructor, to have it
6 removed, but that's too late at that point. We have
7 to recall the test, and we are the ones that have to
8 pay the costs associated with that. And we can only
9 sustain so much. I mean, we are a very small entity.

10 MR. AMER: Okay, thank you.

11 I'm going to try one more time with Mr.
12 Bynum. Are you there, Mr. Bynum?

13 MR. BYNUM: Yeah --

14 (Away from microphone.)

15 MR. AMER: Mr. Bynum, are you there?

16 MR. BYNUM: Yes. Yes. It --

17 (Away from microphone.)

18 MR. AMER: Mr. Bynum, are you there?

19 MR. BYNUM: Hello?

20 MR. AMER: Yeah, we can barely hear you.

21 MR. ANDREADIS: Mr. Bynum, you may need to
22 change your audio to call in. I will try to help you
23 offline in the -- by IM'ing you directly, so -- if you
24 can't do that yourself.

25 MR. BYNUM: Yes, I would appreciate your

1 help.

2 MR. AMER: Okay. Yeah, I think we may have
3 to wait until we get that sorted out because I'm just
4 not able to hear you, unfortunately.

5 I want to now turn to the issue of
6 intentional infringements, and to what extent there is
7 evidence that infringements by states are rising to
8 the level of intentional infringement articulated by
9 the Court, and I'm going to turn it over to my
10 colleague, Mark Gray, to ask some questions about
11 that.

12 MR. GRAY: Thanks, Kevin. So, as Kevin
13 mentioned, in *Allen v. Cooper*, one of the things the
14 Court was concerned about is whether copyright
15 infringement was being done intentionally, recklessly,
16 or negligently, and so to understand how we, at the
17 Office, should think about that while we're going
18 through the study, one of the things we are trying to
19 figure out is, generally, when infringement claims are
20 brought to a state, how does the state respond?

21 And so I think we already heard from Mr.
22 MacDonald a little bit to this, and just a minute ago
23 from Prof. Murphy, but, Dr. Bell, could you speak a
24 little bit more? You mentioned that there was one
25 instance where they said -- they raised immunity, but

1 could you speak to any others? I believe you are
2 muted.

3 DR. BELL: Can you hear me now?

4 MR. GRAY: Yes. Perfectly. Thank you.

5 DR. BELL: So one of the things I wanted to
6 comment on was -- that I missed before was that I have
7 a tremendous number of infringements from public
8 schools, and way more than from public universities,
9 and I haven't gone after them because of sovereign
10 immunity, although I have a few where they have
11 responded to cease and desist by claiming sovereign
12 immunity.

13 Particularly cogent, I think, in this case
14 was one of the school districts in Michigan which
15 claimed that it was state policy that -- to say that
16 sovereign immunity was state policy in Michigan.
17 Because of that, it's really had me cut back on the
18 number of claims I've made to public schools in
19 Michigan.

20 A couple other things that are of concern is
21 being able to -- other people, private schools,
22 private universities, vendors, teams, all who buy
23 multiple copies of my books, are -- can't really
24 compete with that. It's not fair to them.

25 And for me, one of the problems with

1 copyright law right now is that there are cases where
2 many people claim, oh, geez, it's infringement, and
3 that -- and I'd like to be able to litigate that, but
4 it's really difficult if we're doing that.

5 They have the right to go make proposals, or
6 try and argue fair use or things like that, but it's a
7 situation now where a lot of them go and say it's all
8 over the world, my work. There are millions and
9 millions of copies of it out there. All anyone has to
10 do is claim that they got it from an illegal source to
11 muddy the waters on the merits of that copyright.

12 They'll claim innocent infringement, which
13 we -- I'm happy to litigate, but I don't think it's
14 just innocent infringement just because they got it
15 from an illegal source instead of getting it directly
16 from me.

17 MR. GRAY: So if I can ask two quick -- oh,
18 sorry. Can I ask two quick questions about that,
19 actually?

20 DR. BELL: Yeah.

21 MR. GRAY: So when you say, "illegal
22 source", do you mean that they're claiming that they
23 obtained it from a school district or another state
24 entity?

25 DR. BELL: Sometimes, yes.

1 MR. GRAY: Okay.

2 DR. BELL: Sometimes they don't know where
3 they got -- whose it was. It's just all over the
4 internet without any attribution, or inappropriate
5 attribution, misstated attribution, or anonymous, or
6 no attribution at all, and so they say, well, gee, you
7 know, I couldn't possibly have known, and, of course,
8 they can. They have at least constructive knowledge
9 that it's my work. It's very easy to find that out.

10 MR. GRAY: Great. And then my second
11 question is you mentioned a Michigan school district
12 saying that it was the state policy of Michigan.
13 Could you give a little bit more examples of that? Do
14 you mean they adopted your work as part of a
15 curriculum, or what kind of policy?

16 DR. BELL: What I was told by that entity
17 was that there was something, and it was state policy,
18 and they gave me some number. I can't remember the
19 number of it right now. But they told me it was
20 policy.

21 MR. GRAY: Okay. In that case, I think Mr.
22 MacDonald actually wanted to respond really quickly,
23 so would you go ahead, Mr. MacDonald?

24 MR. MACDONALD: Thank you, Mark, and I
25 promise to be brief. I appreciate your repeated

1 indulgences in allowing me to speak. I just want to
2 briefly respond to Dr. Bell. Winning Isn't Normal, I
3 actually read the heart of that book, the passage that
4 has been copied on, according to Dr. Bell, numerous
5 instances. It's a powerful statement. It was
6 inspiring to me to read it. I have, and the
7 University of California has, great respect for
8 authors. In my professional capacity and pro bono
9 work, I represent many of these authors.

10 However, with due respect to Dr. Bell, I
11 think it's a very curious case study for the Copyright
12 Alliance to highlight Dr. Bell in its submission. And
13 in the APLU and the AAU reply submission it talks
14 about Dr. Bell's recent track record of litigated
15 matters that have, unfortunately for him, not fared
16 very well.

17 He mentioned the school district in
18 Michigan. There is a school district in Ohio, the
19 Worthington City School District, where he lost on a
20 litigated matter, not sovereign immunity, on fair use.

21 It's referenced in the Copyright Office's
22 fair use index: Southern District of Ohio, June 2,
23 2020, a fair use decision in favor of the school
24 district, where the Court specifically talked about
25 how it was not addressing the other arguments raised

1 by the defendants, including de minimis infringement,
2 innocent infringement, and no vicarious liability.

3 Also, in 2019 Dr. Bell again lost his case,
4 with prejudice, in the Bell v. Magna Times case in the
5 District of Utah, April 29, 2019. Again, fair use.

6 In the most recent case, in my jurisdiction,
7 the Northern District of California, Dr. Bell, on

8 October 14, 2020, this year, less than two
9 months ago, was ordered to pay \$120,000 in attorneys'
10 fees to a small non-profit pool club, and \$2,000 in
11 costs to the defendant. There were a lot of
12 statements about exorbitant settlement demands,
13 extortionate settlement demands, and not advancing the
14 purposes of the Copyright Act.

15 MR. AMER: Let me just jump in. I certainly
16 take the point that we want to look carefully at the
17 merits of all the cases that folks are alleging. I
18 don't want to go sort of too far down the road of
19 assessing specific claims in fine detail. I don't
20 know that we have time for that today.

21 I do want to ask sort of the broader point
22 that we discussed a bit during the first session,
23 which is what does it mean -- what sort of evidence
24 should we be looking towards in deciding whether
25 infringement activity by states is intentional?

1 Does that mean that the state actor has to
2 know what they're doing is unlawful and they do it
3 anyway, or can intentional mean that they intended to
4 do the conduct but they may have a reasonable basis
5 for concluding that something is fair use or it's
6 otherwise lawful?

7 MR. MOLNAR: Yeah, so I would view it more
8 as more towards the former, and I'll just give you an
9 example of what we do in Ohio. And this is for every
10 state agency and anyone who asks.

11 We have a fair use assessment where if
12 someone wants to use a work in some way, whether it's
13 for a class, even for a public records disclosure
14 because we are, in fact, reproducing -- potentially
15 reproducing someone's copyrighted work for a public
16 record disclosure, even for that we go through and
17 assess, or they'll have me assess whether or not --
18 what we think in terms of whether it's fair use or not
19 and make a determination. Some of them are close
20 calls and some of them are clearly fair use, in my
21 opinion.

22 But, to me, that's being careful. I don't
23 think that's being intentional, I think that's the
24 state showing a respect for copyright laws and not
25 necessarily just willfully going out and infringing

1 someone's copyright.

2 MR. GRAY: Yes, Mr. Laiho?

3 MR. LAIHO: You know, earlier I had
4 mentioned the small number of complaints that we've
5 seen over the many years, but the other thing that I
6 think is notable that goes to the question you're
7 asking right now is the intent issue. The occasional
8 violations that we've seen are typically the result of
9 a lack of familiarity with copyright principles, or it
10 could be confusion related to the scope of licenses
11 that either the state or a vendor may have.

12 I'm not personally aware of a single
13 instance, even of the small number of instances of
14 alleged violations we've seen, where an agency
15 intentionally violated an author's intellectual
16 property rights.

17 One thing I wanted to go to as well because
18 I think it's important is, in the first panel, one of
19 the speakers mentioned a situation where copyright
20 information had been removed from an image, and that
21 the entity had then used this image with the removed
22 copyright information, and that was a subject of
23 discussion for several minutes.

24 I think it's important to understand that
25 the copyright information may have been removed by a

1 completely different entity and then placed on a
2 website where that website may even be attempting,
3 through the internet, to get people to search, for
4 example, free images online that -- and I think it's
5 much more likely that a state employee is going to be
6 searching free images, finding something that may, in
7 fact, be a copyright image that they're not authorized
8 to use, but they think they are because the search
9 they did was for free images of whatever it is that
10 they're trying to post on their website.

11 I think it's important to understand that
12 even in instances like that where it may appear on its
13 face that there was intent because copyright
14 information had been removed from an image, that it's
15 often the case that it is not the -- a state employee
16 who's actually done that removal, and that they've
17 innocently obtained the image from a different
18 website.

19 MR. GRAY: Thank you. I guess in the
20 hypothetical instance -- let's speak purely in
21 hypotheticals -- if a state employee did infringe
22 intentionally and you figured that out during your
23 investigation, what kind of penalties would that
24 person face sort of in the employment context?

25 MR. LAIHO: If the question is coming back

1 to me on that one, I'm --

2 MR. GRAY: Yes.

3 MR. LAIHO: -- not involved with the
4 employment context. Typically, what we do -- what
5 we've found, though, is that -- when we've identified
6 infringement is that the content is immediately taken
7 down. But, from the employment side, I don't have any
8 information I can share on that.

9 MR. GRAY: And, Mr. MacDonald, do you have
10 any experience with that either?

11 MR. MACDONALD: I do not. I have no
12 experience whatsoever about an employee that has
13 intentionally infringed and what the consequences are
14 because we've never gotten to that point.
15 Hypothetically, if there were a situation like that,
16 that would be deemed, at the very least, as a
17 violation of our university policy, which has the same
18 force and effect of state law, and so appropriate
19 sanctions might be levied against that individual
20 staff member or faculty member.

21 Moreover, if the decision is to ultimately
22 pay some sort of settlement fee, which I think we
23 probably would in an intentional infringement type of
24 a matter, it would come out of the department funds,
25 and I think the department chair would take

1 appropriate measures against that particular
2 individual for having to pay for a third party
3 infringement claim.

4 MR. GRAY: Yes, Ms. Murphy?

5 MS. MURPHY: Could I just ask a question
6 here? I mean, when it goes to intent, I understand
7 that that's an important component as far as the law
8 goes or, potentially, what you're seeking here, but it
9 doesn't change the fact that the copyright gets
10 violated. And, in some cases, the -- what might be
11 perceived as I'm following copyright law and I'm using
12 this, whatever material in a fair use setting, if it
13 destroys the value of the materials, does it really
14 matter what intent is?

15 I mean, the cost to the copyright holder is
16 still the same. The materials are now destroyed, and
17 they have to go back, and they have to create
18 something new.

19 MR. AMER: Yeah, I mean, I think what we're
20 trying to get at here is the constitutional standard
21 that the Supreme Court was talking about in the Allen
22 case where it talked about the fact that not every
23 copyright infringement necessarily rises to the level
24 of a constitutional violation, and that intentionality
25 is relevant to that analysis.

1 Could I just go back quickly to you, Mr.
2 Wassom? Just to preview, we're going to then ask
3 about licensing practices, and, Mr. Bynum, I know
4 you've been patient, and so we're, I think, probably
5 going to direct the first question on that topic to
6 you.

7 But just quickly, Mr. Wassom, I know in your
8 comments you did discuss this question about what
9 intentionality means in this context and whether it
10 can be distinguished from willfulness. Could you
11 describe your view on that question and whether you
12 think that -- what showing you think is required to
13 establish intentionality here?

14 MR. WASSOM: Sure. Very briefly, I would
15 refer you to our written comments where we do have a
16 discussion on the fact that there can be daylight
17 between intent, meaning to commit copyright
18 infringement, and negligence. There can be a degree
19 of intentionality that rises to a cognizable level
20 that ought to be taken into account without it being
21 an intent to break the law, especially where the law
22 here is so unclear.

23 But there is case law to support that, and
24 I'd refer you to the written comments for a more
25 in-depth explanation.

1 MR. AMER: Great. Thank you. I think now
2 we would like to talk about licensing practices, and
3 so I'm going to turn it over to my colleague, Melinda
4 Kern, to -- Dr. Bell, did you have --

5 DR. BELL: Yeah. I just wanted the
6 opportunity to respond to Mr. MacDonald. So in the
7 case in California that he spoke of, the judge in that
8 case said very clearly that I may very well have a
9 very good case, but he did -- I think the judge did
10 what he was supposed to do because it was a failure on
11 my attorney's part to put any evidence to the
12 courtroom.

13 We all know that there's some great people
14 in every field, and some people who don't do very well
15 in every field, and we, copyright holders, have to
16 depend a lot on the attorneys who handle matters for
17 us, and it's not easy to get -- necessarily get the
18 best since attorneys become expensive.

19 And in the case in Ohio also, my attorneys
20 filed against the wrong party and some other factors
21 like that, and those things are going to be cleared
22 up, and there are going to be some bad decisions, but
23 there's also been a lot of clear-cut issues and better
24 settlements in cases.

25 MR. AMER: Okay, thank you. I think we are

1 going to move on to licensing practices, so, Ms. Kern,
2 you can start with that.

3 MS. KERN: Thank you. So the first question
4 that I want to address is, basically, what role do
5 sovereign immunity and other potential defenses play
6 in choosing whether to negotiate with copyright
7 owners, and I'd like to start with Mr. Laiho, Mr.
8 Molnar, Mr. MacDonald, and then finish with Ms.
9 Levine.

10 MR. LAIHO: So, from a licensing
11 perspective, I mean, I think it's important to keep in
12 mind that state agencies, it's very important to make
13 sure that we protect authors' rights, and our office
14 works with state agencies in Colorado to ensure that
15 other agencies are not violating authors' intellectual
16 property rights.

17 We do license a lot of content through
18 various state agencies because it's important to
19 recognize the value that these authors put into their
20 works.

21 MR. MOLNAR: Yeah, in Ohio I -- we would say
22 close to none. I mean, I can't think of an example in
23 an actual business to business licensing situation
24 between a state agency, or a university, or two year
25 school where we have suggested, or said that we are

1 not going to pay as much because if -- of 11th
2 Amendment immunity. That's not something that would
3 enter the calculation.

4 MR. MACDONALD: Oh, it's my turn. I would
5 echo those other comments, which is sovereign immunity
6 plays no role, as far as I'm aware, on our licensing
7 practices. I did some research systemwide at the
8 University of California. We pay approximately \$100
9 million every year in library content. Why would we
10 pay such exorbitant sums if we would just
11 intentionally infringe or have a policy of
12 infringement? Some campuses pay well into the tens of
13 millions of dollars a year.

14 This is just library content. This is
15 separate from a lot of other content that we license
16 for. But, again, I'm not aware of sovereign immunity
17 every playing a role in our licensing practices or
18 getting a discount on our licenses.

19 MS. LEVINE: Hi. I can only echo what some
20 of my colleagues have said. And I want to refer back
21 to the previous panel when Dean Smith mentioned that,
22 in working both in public and private institutions, he
23 never had an experience where sovereign immunity was
24 discussed as a strategic component of a decision
25 regarding a particular situation.

1 I've been at the University of Michigan
2 library for a little over a decade. I've worked at
3 Florida International University, another state
4 university. I've also the privilege of working at the
5 Library of Congress and the Smithsonian, federal
6 agencies. Never in any of those situations has
7 sovereign immunity come up as a strategic tool for
8 blocking otherwise bad behavior.

9 Michigan, currently, in our library, we
10 spent in the range of \$29 million on collections,
11 meaning things that we license and purchase. It's
12 gone up over \$10 million in the years that I've worked
13 there. That does not include software, licenses,
14 performance licenses, and the millions of other
15 dollars worth of intellectual property that we
16 purchase and license.

17 This has come up in several themes
18 throughout this conversation, but the university
19 environment, like the state, is an ecosystem. I'm not
20 aware of any state policy encouraging or permitting
21 violation of copyright by public school districts. I
22 find that quite surprising. The school districts also
23 spend lots of money on these materials, and there's
24 not -- it doesn't make sense that there's intentional
25 infringement that's reckless or widespread.

1 University of Michigan's Ann Arbor campus
2 embodies in the range of 100,000 people, so we have
3 about just shy of 32,000 undergrads currently, just
4 shy of 17,000 graduate students, and about 51,000
5 employees, all of whom are subject to the law of the
6 state and of the nation, all of whom can either be
7 fired, dismissed, disciplined, expelled under
8 employment rules under our university policies. I
9 just don't, I don't see the larger issue vis-a-vis
10 sovereign immunity.

11 MS. KERN: Thank you. Thank you for those
12 comments.

13 So the next question I'd like to ask -- Mr.
14 Wassom, I'll reference one of the statements in
15 AIPLA's comments, basically, that said that state
16 sovereign immunity detracts from content owners'
17 bargaining power to license works to state entities
18 because a large percentage of U.S. educational
19 institutions are public, or at least partially-funded,
20 state-funded, so, collectively, those institutions
21 have substantial market power to drive down the
22 licensing fees.

23 So I'll start with you. My question is kind
24 of a three part question. Can you provide any
25 specific examples on these practices? Do you believe

1 that the negotiation table is slanted before parties
2 even reach that table? And then, relatedly -- and I
3 believe some of the panelists before touched on this

4 -- is there any evidence of how licensing
5 terms for states differ in terms of those offered to
6 private entities? I will start with you, and then if
7 we could hear from Prof. Murphy, and Dr. Bell, and if
8 Mr. Bynum is on, we'll hear from him as well, too.

9 MR. WASSOM: Sure. Thank you, Ms. Kern. In
10 the interest of time, I'll collapse your questions
11 into one answer, and that is we don't have specific
12 data that AIPLA specifically has gathered on that.
13 These are conclusions based on the case law that we've
14 discussed and the anecdotal information we have
15 available to us, and a logical extrapolation from that
16 data.

17 But, no, we don't have specific case
18 examples to add to the conversation on that point.

19 MS. MURPHY: In the case of Exam Institute,
20 we don't actually seek licenses. We don't go through
21 the procurement offices to be able to do that simply
22 because we operate in such a small area. We're only
23 in chemistry, and so, therefore, I've been informed
24 that our ability to be able to seek such a license is
25 likely not to be effective. So we don't go that

1 route.

2 MS. KERN: And, Dr. Bell, did you have
3 anything to add or? I believe you're muted. I
4 believe you're muted, sir.

5 DR. BELL: I offer very reasonable licenses
6 to institutions to use my work. The problem is social
7 media. An institution can license my work for less
8 than the cost of a poster or a book that I sell. Most
9 often, I get from universities are -- teams, right?
10 Coaches that are using my work to inspire performance,
11 to motivate performance.

12 But instead of sending it out to 12 people
13 on the wrestling team, or 30 people on the basketball
14 team, or 120 on the football team, they put it on
15 social media and send it out to millions. And it's
16 made it so, I just can't -- It's too damaging for me
17 to license to -- for social media work, right? But
18 that's what they're using it for.

19 And when they do, of course they're
20 violating their contracts with Twitter or Facebook.
21 And those contracts are not with me, they're with
22 them, but I'm harmed by those, right? So when they
23 misrepresent that they own my work to social media
24 platforms, I'm tremendously damaged from that, right?

25 I'm happy to offer licenses, and I offer

1 deep discounts for licenses for honest use of my work,
2 right? But if they're going to put it out to a
3 million people, I can't afford to license and make
4 them buy it most of the time without it being hugely
5 damaging to both of us.

6 MS. KERN: Thank you.

7 MR. AMER: Could I ask a quick follow up
8 question I guess primarily to the representatives of
9 states? So, I mean, the clear theme, I think, that
10 you're expressing is that it's either exceedingly rare
11 or almost unheard of for states to assert sovereign
12 immunity in licensing negotiations.

13 Is there a little bit of a disconnect
14 between that and the fact that states certainly have
15 not hesitated to assert sovereign immunity in
16 litigation? I mean, North Carolina, obviously, took
17 the issue all the way to the Supreme Court, there have
18 been numerous other cases that have been brought to
19 our attention where states have asserted sovereign
20 immunity, so I wonder what your thoughts are in terms
21 of how common and how important the defense is in
22 practice for states in responding to copyright claims.

23 MR. MOLNAR: So I think, at least from my
24 perspective, that, in the context of a licensing
25 negotiation, we've already entered into that

1 arrangement pre-supposing or kind of acknowledging
2 that the work we're trying to use is of a value to a
3 state. That if we're going to use it otherwise, it
4 would be copyright infringement.

5 Where we've asserted the 11th Amendment
6 immunity has been in cases where the cease and desist
7 letter is brazenly just of no merit, and that's where
8 we tend to use the 11th Amendment as a way to avoid
9 having to litigate a case that is just -- lacks merit.

10 Where there's been meritorious claims, as I
11 said, we've settled. Paid \$120,000, we paid \$10,000.
12 Recently, we just paid \$1,000 for example of someone
13 who downloaded a picture that didn't have any
14 attribution so they thought it was okay. They used
15 it. We got a cease and desist letter, we paid it out.

16 So I think the 11th Amendment, from my
17 perspective, as a defense is against -- is a way for
18 the states to save money against frivolous litigation.

19 MR. AMER: Mr. MacDonald?

20 MR. MACDONALD: Thank you, Kevin. That's a
21 great question. I see no disconnect, and here's why.
22 Public universities are copyright stewards. We are
23 copyright owners, large copyright owners, copyright
24 creators. We have lots of faculty that publish. We
25 need to be good adherents to copyright law, which is

1 why we pursue such vast licensing programs and have
2 such a high volume of staff that are devoted to
3 licensing.

4 I see no disconnect between that and in
5 litigation, assuming that settlement discussions have
6 not produced a settlement and a litigation occurs, to
7 cite and rely upon sovereign immunity, among other
8 defenses, because, in addition to being copyright
9 stewards, we are financial stewards, we are public
10 trusts, and if there is a way to articulate sovereign
11 immunity as a basis for dismissing the action when
12 there are other meritorious defenses, as opposed to
13 going through the cost of discovery and going through
14 a summary judgment phase, financially, from -- as a
15 financial steward, we have to, we have a fiduciary
16 duty to raise a constitutionally-protected immunity.

17 And so, for that reason, I just don't see
18 any disconnect.

19 MR. AMER: Mr. Wassom?

20 MR. WASSOM: Two points real briefly. The
21 first is that the troubling aspect of the defense we
22 just heard is that it's the sovereign deciding when
23 the lawsuit, when the claim is frivolous or not. All
24 other defendants have to have the court decide that
25 for them. What we're hearing is that we'll offer you

1 what we think is fair, and if you don't like what we
2 think is fair, then we'll exercise our trump card with
3 sovereign immunity.

4 The second point, too, is that we're hearing
5 from a lot of representatives of state agencies that
6 do have very defensible, and very noble, and honorable
7 policies, but, back to my original point was the case
8 law encompasses a wide variety of state agencies that
9 aren't universities, that don't have that copyright
10 respect for creators. The Allen v. Cooper case, of
11 course, was a state board of tourism or some such
12 thing.

13 There are commissions, foundations, bureaus,
14 all sort of other agencies out there that perhaps
15 don't have the same respect for copyright that a
16 university would.

17 MR. AMER: Anyone else like to respond to
18 that issue? Yes, Ms. Levine?

19 MS. LEVINE: The sovereign has to agree
20 to --

21 MR. AMER: Oh, I'm sorry, I think you cut
22 out for a sec on the line. Could you say that again?

23 MS. LEVINE: The sovereign has to agree to
24 be sued. That's how sovereign immunity works. We are
25 still all bound, as attorneys, if we're attorneys, to

1 faithfully apply the law, and, as Mr. MacDonald said
2 -- I'm not a litigator, but there's a responsibility
3 to raise available and legitimate defenses as part of
4 your responsibility as an attorney.

5 MR. AMER: Mr. Molnar, did you have a
6 response?

7 MR. MOLNAR: Yeah. I mean, representing
8 state agencies, we certainly, in Ohio, respect
9 copyright law through our -- all of our state
10 agencies. And, again, just to circle back to a point
11 I made at the very beginning, I would read, it's a
12 case, 57 F. Supp. 3d 985, from District of Minnesota
13 that outlines how sovereign immunity applies to suits
14 against a state, how it applies to suits against
15 individuals in their official capacity, and how it
16 applies to suits against individuals in their personal
17 capacity.

18 I would recommend, especially as an IP
19 attorney, become very familiar with suing someone in
20 their personal capacity. That is your way around 11th
21 Amendment immunity full stop.

22 MS. KERN: And then, Kevin, do we have time
23 for one quick follow up question?

24 Mr. MacDonald, you mentioned towards the
25 beginning of this panel how, I believe you said -- you

1 quoted it as corrective measures in terms of when you
2 saw that there was infringement with a radio station,
3 and in, I'm not sure if it was in lieu of payment or
4 what, there was education provided. Do you have any
5 other examples of corrective measures that you've
6 taken when there is infringement?

7 MR. MACDONALD: Sure. And your recounting
8 is correct. In that particular instance, it was
9 actually in lieu of payment. Well, of course, an
10 injunction, a self-imposed injunction is a corrective
11 measure that we take. We say we're going to take it
12 down. We disagree with the merits, but to resolve
13 this matter swiftly, we'll just take it down. I think
14 that's a corrective measure. We also make promises,
15 at times, that we won't ever put it back up again.

16 And if copyright owners come to us -- and,
17 again, we are, ourselves, major copyright owners -- if
18 they come to us and offer other creative solutions,
19 we'd be happy to entertain them, including financial
20 payments that are less than the sums that are asked
21 for, which we think are unreasonable in many
22 instances.

23 MS. KERN: Thank you.

24 MR. AMER: Okay. Well, we are just a bit
25 over time, but I think we've made up some ground, so I

1 think we are going to close this session. I'd like to
2 thank all of you for participating. This was very
3 helpful. Our next session begins at 2:00, so we will
4 see everyone then. Thank you very much.

5 MR. GRAY: And one quick note for the
6 audience. Please remember that there is a sign up
7 link that's being pasted in the chat if you want to
8 speak at the open mic and share comments there, and
9 that will close at 3:00 p.m. So if you're interested
10 in speaking, please use that link and sign up soon.
11 Thanks.

12 (Whereupon, at 1:20 p.m., the roundtables in
13 the above-entitled matter were recessed, to reconvene
14 at 2:01 p.m. this same day, December 11, 2020.)

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1 A F T E R N O O N S E S S I O N

2 (2:01 p.m.)

3 MR. AMER: Welcome back everyone. We are
4 about ready to start session three of today's
5 roundtable. Session three has to do with state
6 policies and practices to prevent and address
7 infringement. Just to remind everyone again of a few
8 housekeeping matters. Panelists, if you could please
9 remember just to keep your audio muted when you're not
10 speaking. That would be helpful to those watching on
11 the public link. For anyone who is interested in
12 participating in our open mic session at the end of
13 the day, if you could please sign up using the link in
14 the chat by 3:00 today. That would be great. Our
15 open mic session will start at 5:15.

16 So let's get started on panel three. I'll
17 be primarily asking the questions along with my
18 colleagues Mark Gray and Regan Smith. We're really
19 grateful to all of you for participating. We wanted
20 to have a specific panel that focuses on state
21 policies and practices to address infringement. In
22 this session, we may spend a little more time with
23 each of the panelists to drill down on specific
24 policies. So I just would invite all the other
25 panelists to be patient. We will get to you and we

1 just want to sort of get as much specific information
2 as we can about particular policies.

3 So why don't we combine the introductions
4 with a brief overview statement, if you would, about
5 your overall policies and practices in your state or
6 your entity that are designed both to avoid
7 infringement and then also to address instances of
8 infringement when they do arise. Mr. Butler, I'd like
9 to invite you to start.

10 MR. BUTLER: Absolutely, thanks, Kevin. So
11 hi, I'm Brandon Butler. I'm the Director of
12 Information Policy at the University of Virginia
13 Library and I'm a copyright lawyer who has been
14 working with libraries and library groups for more
15 than a decade now. The bulk of my experience in this
16 realm is not with any particular institution, but
17 actually sort of helping multiple institutions,
18 libraries, educators, and students kind of understand
19 their rights and frankly, typically, to overcome the
20 sort of chilling effects of fear of copyright
21 liability. And so the notion that we feel unleashed
22 by sovereign immunity always makes me kind of smile.

23 So I'm very happy to speak to my experience
24 at UVA, but I'm also here actually kind of with a hat
25 on for a couple of associations, who play a big role

1 in helping to ensure that folks understand copyright
2 and live within it. And so the Association of
3 Southeastern Research Libraries is one group. We
4 filed comments in this proceeding, written comments.
5 And also I'm the law and policy advisor to the
6 Software Preservation Network and that's a group that
7 joined an amicus brief in the Cooper case.

8 And so to say a little bit about those two
9 organizations in particular, ASERL is a group of
10 libraries in the Southeast Research Libraries and it
11 has a broad array of programs that help ensure that
12 all of its members have access to good information
13 about copyright and so there's a Scholarly
14 Communications Interest Group within ASERL with a
15 Listserv, where people talk to each other about
16 copyright questions they're having.

17 They're able to compare best practices. We
18 have a webinar series, a really rich webinar series
19 that ASERL hosts where, again, copyright lawyers and
20 experts are a very common fixture in that webinar
21 series with the goal of helping aid in compliance on
22 ASERL member institution campuses.

23 More specific example, during the -- and the
24 aftermath of the COVID crisis, when all the
25 institutions went on lock down, ASERL hosted a series

1 of copyright office hours, where some of the resources
2 -- some of the institutions with the greatest
3 resources and access to kind of really strong
4 expertise made themselves available to talk to other
5 institutions who might not have access to that and so
6 that there could be again conversations within the
7 ASERL community about the best way to sort of reckon
8 with this sort of unprecedented change in
9 circumstances. And then of course ASERL also joins
10 amicus briefs in these cases to -- I think cases like
11 Cooper, to try to make sure again that the law is
12 consistent with our practices and vice versa, right.

13 I'll say a couple of words about SPN and
14 then I'll be done, I promise. The Software
15 Preservation Network similarly has been really focused
16 on copyright in part for something I'll talk -- I hope
17 I get a chance to talk about later, which is the
18 really, the really powerful chilling effect that
19 copyright has had specifically on software
20 preservation and anxiety about copyright and
21 uncertainty about copyright.

22 And so one of the first things that the
23 Software Preservation Network did as a relatively
24 young organization was to engage with the DMCA
25 process. So we were aware of how the DMCA affected

1 software preservation. There was certainly no one who
2 said, but wait a minute, you know, nine of us are
3 public institutions. The law doesn't matter, right.
4 Instead, the response was, well, how do we interact
5 productively with the legal system.

6 So we obtained the DMCA exemption. We
7 developed resources for members explaining the scope
8 of that rule. So there's literally a sort of
9 checklist, you know. If you can take all 12 of these
10 boxes, then you qualify for the exemption. We
11 publicized that. We held webinars about it. We host
12 monthly chats similar to ASERL for folks to talk about
13 the questions that are coming up on their campuses and
14 how best to resolve them. And again we engage with
15 court cases. We watch court cases closely and we
16 engage with them as amicus filers.

17 And so I guess my overall point with those
18 two hats on is, you know, this is a world where if we
19 thought there was no -- this was not a big issue for
20 us or that we can afford to be lackadaisical about it,
21 that certainly isn't evidenced in the way that we
22 coordinate and invest our time together to try to
23 understand and comply with the law. So, thanks a lot.
24 It's good to be here.

25 MR. AMER: Ms. Dooley?

1 MS. DOOLEY: Hello. My name is Yvonne
2 Dooley and I'm the business librarian and copyright
3 specialist at the University of North Texas. And as
4 far as our policies and procedures with regard to
5 copyright, copyright law, we are very -- we have very
6 strong policies outlining our copyright compliance.
7 We have a copyright compliance policy that
8 specifically states what kind of -- where we outline
9 the law, we give examples in compliance with the U.S.
10 copyright law, and we also outline copyright
11 infringement and what that means in various criminal
12 penalties, as well as disciplinary actions that UNT
13 can take place in.

14 So my overall statement is just that as a
15 university, we respect copyright law. We try to
16 instill that in our faculty, staff, and students. And
17 that's what I'm here to demonstrate today.

18 MR. AMER: Thank you. Mr. Evans? Oh, I
19 think you're muted, sir.

20 MR. EVANS: Did you not hear me?

21 MR. AMER: No. We can hear you now though.

22 MR. EVANS: Oh, I'm sorry, my apologies. I
23 had to switch to the headphones because I was having
24 some audio problems earlier. I'm the Associate Vice
25 President, Legal and Research for the University of

1 Arkansas system, which is comprised of 20 campuses and
2 our unit is probably more than 50,000 student and
3 faculty and staff members. And I'm essentially the
4 in-house intellectual property counsel for the
5 University, you know, and one of my duties is to be a
6 resource for questions about use of copyright
7 materials, you know, particularly in determining
8 whether or not a particular use is fair.

9 And I, on an annual basis, try to visit as
10 many of those campuses as I can and I have a
11 presentation called Copyright 101, that essentially
12 goes -- is an introduction to copyright law and to
13 advise faculty and staff on what their rights and
14 responsibilities are under the Copyright Act. And one
15 things that I go through is the things that they can
16 and cannot do or should and should not do about to
17 protect their own copyright materials, but to ensure
18 that they do not run afoul of the copyright law. And
19 I explain explicitly to those individuals the possible
20 penalties that may be assessed against them on an
21 individual basis.

22 You know, the issue of sovereign immunity is
23 really the very last issue that I mention in my
24 presentation because basically it's to impress upon
25 them what their personal liability may be regarding,

1 you know, their use of materials for which they have
2 not sought permission. And I go through the four
3 factor test for fair use and explain to them just what
4 the limitations are. And to the extent that that
5 damages are part of a claim brought against them, then
6 that is the issue of -- that's when the issue of
7 sovereign immunity does rise.

8 As the intellectual property counsel for the
9 University, one of the things that I -- that I have to
10 be aware of are the financial resources of the
11 University and really I have no authority to agree to
12 pay damages for anyone. One thing that may not be
13 unique about the state of Arkansas, but that should be
14 understood that the University as a state entity has
15 no authority to pay damages unless those damages have
16 been assessed by the Arkansas State Claims Commission.

17 So there is a process and a remedy for those
18 who believe that their copyright works have been
19 infringed by a state entity. You know, they can file
20 a claim for damages in the State Claims Commission.
21 So that's one resource that is available to those
22 individuals.

23 But I, as a legal counsel for the
24 University, have no authority to agree to pay damages
25 to anyone based on claims for infringement. But in

1 any case our University does make considerable effort
2 to make those students and staff aware of rights and
3 responsibilities under the Copyright Act. And that's
4 sort of the summary of my presentation.

5 MR. AMER: Thank you very much. Mr. Klaus,
6 I believe you're the only non-representative of a
7 state entity here, so we're very much interested in
8 your perspective.

9 MR. KLAUS: Well, it's great to be here.
10 Right, I was just wondering if I was in the right
11 section. My name is Kurt Klaus. I'm a National
12 Partner at the law firm of Dunlap Bennett & Ludwig,
13 PLLC, over here in Washington, D.C., and I lead the
14 media and entertainment law practice for DBL. And
15 prior to the practice of law, I actually shot regional
16 and national TV commercials and I worked in the
17 production department of feature films.

18 And, to the extent of my practice, I'm a
19 commercial attorney, so I do transactions. I'm not a
20 litigator. So, I'm on the front lines with people
21 that are producing the media content that you're
22 seeing or experiencing. We do have occasion to
23 interact with libraries. We do have occasion to
24 interact with other state agencies.

25 A lot of what I do, insofar as going through

1 processes involving state and local governments, has
2 to do with access. And to the extent that clients
3 have asked me, you know, such and such a state is
4 using my content or is interested in it, or I've seen
5 a photograph of mine being used by a state or local
6 government that's not licensed, or something like
7 that, you know, they want to know what their options
8 are to be paid for that use.

9 The typical response from me is, well, you
10 know, there's this thing called state sovereignty and
11 I'm not sure that you would want to engage a state.
12 You might want to. Our first round would be to try to
13 negotiate some sort of license or at least make them
14 aware, try to find the responsible party within the
15 state and make them aware of this usage that's not
16 authorized. That's all I'm going to say now. So I
17 hope to get some good questions and be more
18 responsive.

19 MR. AMER: Great, thank you very much. I
20 believe Ms. Lanier is next.

21 MS. LANIER: Hi. I'm Raven Lanier and I
22 work at the University of Michigan. I have a split
23 position that's between the Library Copyright Office
24 and our Center for Academic Innovation, which works
25 closely with faculty and teams across the University

1 in developing online learning initiatives, including
2 both online degree program courses, Teach-Outs, online
3 credit bearing courses and massive open online courses
4 or MOOCs. I've worked at the University for almost
5 two-and-a-half years now. I'm in the major -- my
6 major role in each of my positions is to educate and
7 consult on matters of copyright.

8 This frequently involves talking to people
9 about how they can lawfully use the works of others
10 either through fair use or another exception or from
11 asking permission to use the work. So I consult
12 regularly with students, faculty, staff, with the
13 library when there are issues, and I'm generally
14 involved with the Center of Academic Innovation
15 whenever there are any copyright issues or concerns
16 that come up there.

17 MR. AMER: Great, thank you. Ms. Samberg, I
18 believe you're next.

19 MS. SAMBERG: Thank you very much for this
20 opportunity. My name is Rachael Samberg and I am also
21 a copyright lawyer, as well as the Scholarly
22 Communication Officer and Program Director of UC
23 Berkeley Libraries, Office of Scholarly Communication
24 Services.

25 My office offers literally thousands of

1 consultations and thousands of trainings every single
2 year for scholars, faculty, and students on our campus
3 about responsibly using and managing copyright in
4 their research, publishing, and teaching. My office
5 also sets policy for and advises the library and
6 supports other University campus departments regarding
7 the copyright decisions that they and we make on
8 behalf of the University.

9 One of the cores of questions in the
10 roundtable is whether or how copyright-related
11 behavior is undertaken by the University, as opposed
12 to individual employees. So I think it will be
13 helpful today to understand what offices like mine
14 across the country actually try to inform and to
15 educate and guide campus units and departments on
16 copyright-related decision-making.

17 I'm going to address that today by dividing
18 policies and procedures for two categories of
19 purported state actors. One, the individual
20 researchers, instructors, and students; and, two, the
21 state institution, itself, so departments, units, or
22 programs or university-created policies that guide
23 individuals to take action. And in doing that I'll
24 underscore that we not only don't see credible
25 evidence of widespread or reckless infringement, but

1 in fact the policies that we actually have and the
2 procedures that we undertake prevent and address any
3 potential infringement.

4 MR. AMER: Thank you. And Mr. Shontz, I
5 think you were last, but not least.

6 MR. SHONTZ: Thank you. Thanks all for the
7 opportunity to be here today. My name is Douglas
8 Shontz. I'm the Chief Intellectual Property Counsel
9 for the University of Illinois. I'm also here today
10 part of representing the Association of Public and
11 Land-Grant Universities of which the University of
12 Illinois is a member.

13 And, you know, I'm speaking -- in terms of,
14 you know, policies and practices, I'm speaking about
15 my home University's policies and practices, not the
16 Association. But I can tell you that in addition to
17 what we do specifically here at the University of
18 Illinois, that my counterparts and fellow members of
19 the APLU also are generally extremely diligent about
20 having policies and practices to comply.

21 You know, our policies, you know, across the
22 board comply with copyright law. We all, you know,
23 collectively spend, you know, millions of dollars in
24 license fees each year. We have contracting offices
25 that handle license agreements. We have dedicated

1 copyright librarians. We have posted policies. And I
2 think Ms. Samberg was actually making an excellent
3 important distinction that some of the folks listening
4 on the roundtable today might not be aware of is that,
5 you know, we, as universities, we have duties to our
6 institution in terms of institutional work, but that
7 we also have a large population of students and
8 faculty who are largely independent actors and we
9 still spend hundreds of hours and, you know, put
10 tremendous resources into helping them comply with
11 copyright law as well.

12 For example, our copyright librarian here at
13 the University of Illinois probably had in the
14 neighborhood of 200 plus individual one-on-one
15 consultations over the course of the last year with
16 students and faculty, talking about how to comply with
17 copyright law for their work. She also gives about 50
18 workshops a year to students, faculty, and staff
19 across campus. We have a website laying out,
20 providing resources and guidance to people about both
21 their roles as faculty and students for complying with
22 copyright law, as well as for institutional work for
23 staff and for research purposes.

24 So, you know, in general, as I think Ms.
25 Samberg said and you probably heard from folks

1 throughout the day so far, is that we really are -- we
2 really put a lot of effort into compliance with all
3 intellectual property law including copyright law and
4 that our practice is to address each allegation of
5 infringement in the same manners, that we examine it,
6 we take it seriously, and we address it as we believe
7 appropriate and in compliance with the law.

8 MR. AMER: Great, thank you. That's a very
9 helpful overview from all of you and you've identified
10 several issues that I think we're going to drill down
11 on. I think I wanted to start by just asking a little
12 bit about what the bases for your adherence -- for
13 your handling of intellectual property cases -- may
14 be.

15 You know, we saw in some of the comments
16 that there's a strong set of informal institutional
17 norms among state libraries and universities. We've
18 heard today how important it is that universities are
19 themselves generators of lots of copyrighted works and
20 active participants in the intellectual property
21 system. I'm wondering to what extent your copyright
22 policies are governed by those sorts of norms or
23 whether there are sort of more formal laws or policies
24 that we should be aware of as well. Yes, Ms. Samberg.

25 MS. SAMBERG: So I know that a lot of us can

1 build on that, so I'll just take one piece of what you
2 asked and I'll talk about policy that's set by campus,
3 different campus department and specifically the
4 library.

5 So one way in which the library utilizes or
6 consumes copyrighted content is through special
7 collections digitization or making our collections
8 materials available online. We've expressly set
9 policy regarding the workflows and guidance on how to
10 do that responsibly, our responsible access workflows.
11 They are to expressly comply with copyright law
12 whenever we review collections or materials for
13 digitization and online hosting. Thus, with that
14 express policy, there's no intentionality of
15 infringement, much less a widespread effort to
16 infringe.

17 Importantly, we also have a policy on what
18 happens if we make a mistake. Again, this is a public
19 policy set by the library. To the extent that we err
20 in the research we do about a collection or make an
21 incorrect fair use determination or at least one that
22 someone disagrees with anyway, we have something
23 called a community engagement policy that invites
24 people to contact us if they think we've gone astray
25 in our assessment. And under that policy, we

1 expressly take materials down or other remedial
2 measures as appropriate, including with respect to
3 metadata and other materials.

4 We do not, as part of that policy, and have
5 not ever resulted to relying on sovereign immunity to
6 stand on keeping the content available. Again, we
7 take it down, review it for copyright if we ever
8 receive such a complaint. But in the five years I've
9 been at UC Berkeley, we have not even had to take
10 anything down because we've never even received a
11 takedown request based on purported copyright
12 infringement.

13 I also want to point out that these policies
14 that I just mentioned are adoptable and adaptable by
15 other institutions and have already been adopted and
16 adapted by other U.S. cultural heritage institutions
17 and state institutions, so that they can also
18 understand how to provide responsible online access to
19 research collections. I can keep going, but I'll turn
20 it over to others to add more about their policies,
21 too.

22 MR. AMER: Thank you very much. Would
23 others like to weigh in?

24 MR. BUTLER: I could just echo Rachael. We
25 have very similar policies at the University of

1 Virginia. We have a policy for folks who find
2 something in our digital collections that they believe
3 shouldn't be there. There's a contact point that's
4 routed to a set of people within the library,
5 including me. The item is taken down immediately. We
6 vet that claim and we resolve it.

7 And similarly we've just adopted a new
8 digital collections workflow and again I was involved
9 in writing that policy and the policy puts a very high
10 premium on confidence about the status of the works
11 that we're digitizing and whether we can make them
12 lawfully accessible. And then I'm on -- I'm also on
13 the team that evaluates proposals and so when somebody
14 says, here's a collection I want to digitize, that
15 doesn't make it past the post until I say, yes, that's
16 okay.

17 And so those are the kinds of policies that
18 I think actually you'll find fairly common. And
19 thanks to, you know, super heroes like Rachael and
20 some other leaders in the field who write these
21 policies and publish them, there are standards that
22 folks are I think adopting, so that we're all kind of
23 doing similar stuff because we work together and talk
24 to each other about those things.

25 MR. AMER: Thank you. And so just to

1 clarify, is the policy you're referring to, you know
2 -- it sounds like it's sort of written at the library
3 level. Is it then sort of ratified at the university
4 level or does it have some sort of an official effect?

5 MS. SAMBERG: So different departments have
6 different policies throughout the University.
7 However, they are governed at a super structure by
8 systemwide and campus-wide, at least within the
9 University of California system, so systemwide
10 copyright policy and a campus-wide university policy.
11 And that campus-wide policy provides similar guidance
12 and instruction and repercussions for complying with
13 copyright law in various contexts, so for example use
14 of materials in instruction, use of materials in
15 research.

16 Our policy at the library was created in the
17 specific context of some activities that the library
18 needs to undertake. So we both adhere to the
19 systemwide policy, but we have these extra additional
20 policies we've created to govern -- that comport with
21 the University policy to govern specific needs that
22 our department has.

23 MR. BUTLER: Yeah, precisely. We have an
24 umbrella policy at the highest level and, you know --
25 I mean to give you a sense, it took us -- it was, you

1 know, as these things do, many months of multiple
2 stakeholder convenings to develop this kind of a
3 policy and then kind of promulgate it within the
4 library, you know, taking the digitization policy as
5 an example.

6 So, you know, it's a serious thing that is
7 taken very seriously and now that it's in place, it is
8 followed because it took a lot of time to make it.
9 But, you know, it's an internal policy, so you won't
10 find it on, you know, on our website, but it governs
11 how we operate internally in terms of what we're going
12 to digitize.

13 MS. SAMBERG: And our policies at our
14 library are online. We've made them available
15 expressly to be used and adopted by other
16 institutions. Again, I'll just give one example of
17 the policies we set around digitization. I'm happy to
18 provide other policies we've set such as related to
19 course -- electronic course content material or
20 duplication of library materials. We have again set
21 policy to support copyright compliance with respect to
22 other library-specific functions as well.

23 MR. AMER: Thank you. That's helpful. One
24 thing I wanted to ask about and others will have the
25 opportunity to talk about specific policies, but I did

1 want to ask a question that we were discussing during
2 the last panels, which is that we really heard a very
3 clear message from the state representatives, who have
4 been here, and that sovereign immunity is not
5 something that they assert very frequently. You know,
6 it's sort of a last resort, I think people have
7 mentioned.

8 So I wonder -- but at the same time there's
9 a lot of concern that we've heard in the comments
10 expressed about the idea that sovereign immunity could
11 be taken away. So I wonder, if you could talk a
12 little bit about sort of what role you see sovereign
13 immunity playing in terms of your institution's
14 ability to carry out their work. And, you know, I
15 think you can tell what I'm getting at. You know, if
16 it's something that is rarely if ever asserted, does
17 that -- how do you reconcile that with the idea that
18 it's a threat to take it away?

19 MR. SHONTZ: Well, I think -- go ahead, Mr.
20 Evans, sorry.

21 MR. EVANS: No, no, I was just going to say
22 that, you know, I sort of see it as a catastrophic
23 insurance policy to prevent tremendous damage to the
24 treasury of the State of Arkansas, but more
25 specifically to the financial resources of the

1 University of Arkansas and its various campuses.

2 The thing that I mentioned before though
3 that may be different about the State of Arkansas is
4 that we do have a State Claims Commission. So if an
5 individual does feel aggrieved by an action of a state
6 entity and particularly of the University of Arkansas,
7 that then that claim can be brought in the State
8 Claims Commission. You know, I've been representing
9 the University, both inside and outside, for 35 years
10 and so I've seen the kinds of complaints and actions
11 taken against the University.

12 But there have been very -- well, there's
13 been only one federal lawsuit brought against the
14 University of Arkansas for copyright infringement. It
15 was in, I believe it was in 2007 and the damage
16 portion of the claim was dismissed on sovereign
17 immunity grounds, but the injunctive part was allowed
18 to go forward. And the federal district court at the
19 time had noted that that same plaintiff had brought a
20 claim in the State Claims Commission and had been
21 awarded \$15,000 for infringement of copyright, so the
22 court basically dismissed the entire case because the
23 judge took the position that the issue had been
24 resolved within the State Claims Commission.

25 But over the years the claims that we have

1 received have been almost always involving a student
2 who has downloaded a video game. In fact I get those
3 probably on a biweekly basis where some student -- or
4 for some reason in recent years Sims 4 has become very
5 popular amongst students on a particular campus. But
6 our position on that -- those come to me because I'm
7 the designated agent under the DMCA and so I get all
8 of those.

9 And so I refer those as soon as I get them
10 to the person in charge of our Information Technology
11 Department on the respective campus and that person
12 deals directly with the students and usually their
13 computer privileges are suspended for a period of time
14 as a deterrent. And if the person continues to do it,
15 their privileges are terminated and that student may
16 be subject to other disciplinary actions under the
17 student conduct policy. So those are the kinds of the
18 things that that we're dealing with.

19 There have been a few instances where I've
20 received claims of infringement because of the
21 inadvertent use of a photograph on a newsletter. In
22 fact the most recent one was a newsletter that had
23 been published by our agriculture extension service,
24 where we immediately took that down and responded to
25 the individual and explained the actions taken.

1 Now to the extent that a license fee is
2 demanded if we want to continue the use of the
3 photograph, we pay the license fee. But when it's
4 presented to us as a damage claim for past use, we
5 have no authority to do that unless the individual
6 brought -- presents a claim to the State Claims
7 Commission.

8 MR. AMER: And I -- I'm sorry, go ahead.

9 MR. SHONTZ: I was going to say that I think
10 one of the things I would start by pointing out is
11 what we're talking about here is abrogating a
12 foundational constitutional right and that should
13 never be taken lightly. It should never be treated in
14 the manner that should be sort of -- should be a very,
15 very high standard probably to the point of beyond a
16 reasonable doubt in the same way if you were going to
17 contemplate legislation that's going to impinge or
18 abrogate parts of First Amendment rights or any other
19 -- you know, Fourth Amendment rights. I mean this is
20 a constitutional right for states that we're talking
21 about here. So there should be a very, very high bar
22 to it.

23 And what the -- what I'm hearing over this
24 -- over the course of the multiple panels is -- and I
25 think what Mr. Evans was just laying out is a great

1 example of it, is that the injunctive relief went
2 forward. The harm that was alleged was taken care of.
3 What was not permitted to go forward was -- was a
4 large damage claim.

5 And what seems to -- the theme that I'm
6 hearing throughout these panels during the course of
7 the day is really that folks are upset that they don't
8 get to pursue statutory damages, that there isn't --
9 there isn't a big payday associated with it. But the
10 reality is in my time -- I'm not aware of any lawsuits
11 against the University of Illinois for copyright
12 infringement. But what I am aware of and have dealt
13 with personally are instances of, you know, claims
14 that there was a misuse of a photograph or something
15 of that nature and we address those and there have
16 been times when we've settled for what were reasonable
17 licensing fees.

18 You know, we always take -- as a first step
19 we -- the fact is we look at it -- as I said, we
20 investigate it, we look as whether to there is a basis
21 for an infringement claim. You know, generally, it's
22 a very -- we're very quick to take down something that
23 appears to infringe even if it -- even if there might
24 be a fair use basis for it at the time. You know,
25 we're very -- we're very quick to respond to copyright

1 owners and then investigate it and work with them.

2 And if there is -- if there is a basis for,
3 you know, a claim of licensing fees, there have been
4 times when the University has settled for that. And
5 that's really what we're talking about here is making
6 the copyright owner whole and to get to abrogate a
7 bedrock constitutional right for the states, just for
8 the purposes of allowing people to pursue statutory
9 damages, that seems like that should be a very, very,
10 very high bar.

11 MR. BUTLER: Yeah. Can I answer things,
12 real quick? One is, one of the trends in my work
13 almost for the last decade has been I've engaged in a
14 lot of dialogues with different practice communities
15 in an academic context and over and over again what we
16 find is what we call a permissions culture and they --
17 academics generally are afraid to engage in anything
18 they think might come within a mile of something
19 unlawful.

20 A part of that, part of that is they're
21 lawful people and universities are conservative
22 places, believe it or not, and they don't want to do
23 things that are crazy. But part of it is that the
24 word of statutory damages has traveled fast over the
25 last couple of decades and people are aware of things

1 like the Jamie Thomas-Rasset case. They feel that the
2 stakes in copyright can be extraordinarily high and
3 that chills them.

4 And a part of what we've tried to do and the
5 work that a lot of us have done on campuses is to help
6 people understand that they have rights and that they
7 should feel comfortable exercising those rights and
8 they shouldn't be afraid that a troll is going to show
9 up and shake them down.

10 And that's the other point I wanted to make,
11 which is I think a part of what state sovereign
12 immunity seems demonstrably to do is to reduce the
13 incentives to go chasing after big paydays by suing
14 folks, institutions and folks who work at our
15 institutions. And it wouldn't take too many stories
16 about that to have a chilling effect again on lawful
17 activity, things that are clearly fair use. You get a
18 nasty letter and everyone in that academic community
19 knows that someone in their community got a nasty
20 letter when they tried to publish a screenshot from a
21 video game or when they tried to -- and that really
22 shapes practice and really chills teaching and
23 scholarship.

24 Even now with sovereign immunity in place
25 and with not a huge amount of lawsuits as a result, I

1 really fear what would happen if the threshold came
2 down and the folks with opportunistic lawsuits came
3 out to play.

4 MS. SAMBERG: You're muted.

5 MR. AMER: Thank you. Do you think that
6 state institutions, universities and libraries in
7 particular, are more susceptible to the sorts of
8 lawsuits that you're describing or threats that you're
9 describing compared to private institutions? Because
10 it seems to me that a similar concern could be
11 expressed by private institutions, but they are
12 certainly subject to copyright suits when they do
13 infringe.

14 MR. BUTLER: That's a good question and it's
15 a part of the kind of puzzle here that honestly I
16 think the front-line practitioners in those private
17 institutions do not behave as if -- or rather the
18 front-line practitioners in public institutions don't
19 behave as if they have carte blanche to infringe and I
20 think that largely explains the difference. Everyone
21 is behaving more or less responsibly and so I think
22 that is a major part of why the entire community has
23 similar kind of outcomes in terms of behavior.

24 MR. AMER: Ms. Samberg?

25 MS. SAMBERG: Yeah. Picking up on Brandon's

1 point, the reputation of the university is at stake
2 whenever the university is taking action with respect
3 to its policies and decision-making on copyright.

4 So before coming to UC Berkeley, I was six
5 years at Stanford University and while I was in a
6 slightly different role, I can say that we have the
7 same kind of responsible behavior without formally
8 calling them responsible access workflows or policies
9 because universities as a whole are interested in
10 their public relations and their community relations
11 and they're very visible and high profile members of
12 the community and take that seriously, which is why
13 you see so much of proliferation of copyright policies
14 regarding what people can do with other people's
15 materials, what you can do with your own materials,
16 what individual departments can do, and that isn't
17 necessarily going to change private versus public.

18 But I will say that if we thought we were
19 going to be sued constantly, every single time we made
20 a decision, we wouldn't be able to make as robust uses
21 of state resources as we are currently able to make to
22 support scholarship. So for example, I mentioned the
23 responsible access workflows. If we thought we were
24 going to be sued constantly -- our responsible access
25 workflows depend on having good information about the

1 collections that are in our possession or that we
2 steward and the information that we have isn't always
3 perfect.

4 But we have the ability to rely on the
5 metadata that we have, as well as exceptions like fair
6 use or where applicable 108 to make informed
7 decisions. If we felt though that we were going to
8 get sued every single time and risk fair use or risk
9 108, then we would absolutely choose not to make this
10 content available for the community and that harms the
11 advancement of science and the useful arts. So taking
12 away our sovereign immunity is directly in direct
13 contravention to the purpose of the Copyright Act.

14 MS. SMITH: If I could jump in for a second.
15 I'm struggling with trying to figure out if there's
16 not really a difference in actions between private and
17 public universities, what role states' sovereign
18 immunity is playing in ensuring that productive uses
19 and fair uses and such continue to be enabled. And I
20 also would like to understand any specific evidence of
21 actions that may have been chilled because I think
22 we're trying to get data here to consider. Thank you.

23 MS. SAMBERG: I can give you two examples,
24 one from when I was in a private context and one in a
25 public context, which is in a private context at

1 Stanford, because we lacked certain information about
2 a collection, we chose not to make that content
3 available for research. And now because we have
4 responsible access workflows and have good metadata at
5 UC Berkeley and know that we have some level of
6 protection to make -- not for us to rely on sovereign
7 immunity, but to make us less attractive potential
8 litigants, that we can go forward and make more
9 content available for research.

10 MS. SMITH: Did you feel that fair use was
11 not sufficiently reliable in the Stanford example to
12 proceed with the project?

13 MS. SAMBERG: It was -- sorry, it was part
14 of an overall examination and it deterred us from
15 embarking kind of systematically on a digitization
16 project.

17 MR. AMER: Ms. Lanier, I think you raised
18 your hand.

19 MS. LANIER: Yeah. I think another
20 important distinction to remember between private and
21 public universities is that the things that we do at
22 public universities are all FOIA-able and they're very
23 transparent and we are accountable to both our
24 constituents in Michigan and also to the broader
25 public. So we need to make smart decisions about

1 copyright not only because we want to follow the law
2 and it's the correct thing to do, but because what we
3 do is very transparent and people can look into the
4 agreements we've made, the things that we've done, and
5 it can all be under public scrutiny.

6 I think it's also important, sovereign --
7 you haven't seen large changes in the behavior of
8 public universities when it comes to sovereign
9 immunity because we're -- I think that we're all aware
10 that there is a line there of widespread intentional
11 and reckless copyright infringement that we don't want
12 to cross.

13 Sovereign immunity is important because
14 emboldens us and our faculty and students to take
15 advantage of our -- the rights given to us in the
16 Copyright Act and it kind of insulates us in ways that
17 help us make, to feel more comfortable relying on the
18 various analyses of our faculty and staff and we don't
19 want to lose that. And so we're very careful that
20 we're not intentionally and recklessly infringing
21 copyright because we are aware that if there is
22 widespread intentional and reckless copyright
23 infringement, which we do not believe that there is,
24 that the sovereign immunity can be abrogated by
25 Congress.

1 MR. BUTLER: And to the point about
2 failures, just really quickly and I apologize, I think
3 we've seen some comments earlier in the roundtables
4 that show the differences of opinion about the scope
5 of that, right, and that we can't rely on our rights
6 holder friends to agree with us about what is willful
7 infringement, what is even infringement at all. And
8 so, you know, there's sort of what we believe very
9 strongly to be fair use and then there's whether we
10 think it's going to draw a lawsuit and how devastating
11 will that lawsuit be.

12 And I do know there's, you know --
13 anecdotally I can say private institutions do tend to
14 be a little more conservative. There's none of them
15 on the panel here, but I believe that that's true to
16 their detriment; that is not that they're less crazy,
17 but rather that they're less able to take full
18 advantage of their rights because there is a penumbra
19 of litigation fear that pushes them back from the line
20 of where the Copyright Act actually wants them to go
21 because it's not worth incurring the ire of folks like
22 Dr. Bell.

23 MS. SMITH: I'm not sure we're going to be
24 inclined to say that the need to resort to the
25 judicial system sometimes to figure out fair use -

1 because certainly people can have their day in court
2 -- means there's an inability to exercise rights I
3 mean on either side, right. But I think if you're
4 stating that public universities are making uses that
5 private institutions may not, it would be helpful to
6 understand some examples of what those uses may be.
7 Is that what you're saying?

8 MR. BUTLER: That's what I'm saying and I
9 think -- I mean one example, I think if you look at
10 the participation of different institutions in the
11 HathiTrust Digital Library in the early days, right, I
12 think that if I'm remembering correctly, and you can
13 go and look, the private institutions were more
14 conservative in terms of what were they willing to
15 place into that collection, which was ultimately
16 vindicated as a fair use activity.

17 You had institutions that were private and
18 institutions from countries that didn't have a fair
19 use doctrine, but that were going back and saying, you
20 know, we're only going to put in materials that are
21 clearly public domain even though again ultimately
22 that was a lawful use that was blessed as a lawful
23 use. And so those institutions weren't able to
24 participate as fully because they feared the
25 litigation risk more than public institutions did.

1 MS. LANIER: And I don't think -- I totally
2 agree with Mr. Butler's points, but I don't think that
3 this is a question of public universities can do
4 different things that private institutions can't.
5 It's not like I can and cannot. It's a will and
6 won't. Like public universities and private
7 universities can do the same things. What the
8 difference is what they will do and I think HathiTrust
9 is a clear example there that Mr. Butler brought up.

10 MS. SMITH: Yes. We're talking about
11 judgments that public universities may make, that
12 private universities wouldn't because they have the
13 benefit of sovereign immunity, which might deter
14 litigation for better or for worse; right? So, Mr.
15 Evans, did you want to chime in on that?

16 MR. EVANS: Yes, well, yeah, yeah. I wanted
17 to jump in on something that Ms. Lanier had mentioned
18 earlier in terms of being subject to the Freedom of
19 Information Act. Well, I think it actually goes
20 beyond that because the thing is, public universities
21 have additional bosses beyond their presidents or
22 their chancellors or their board of trustees. They
23 also have bosses in the state legislature. And that's
24 what we have to deal with.

25 You know, the state legislature would be

1 very concerned if any of the institutions were subject
2 to paying damages for copyright infringement. We get
3 into the political realm at that point in terms of
4 what some congressman who -- I'm sorry some state
5 legislation who is in the district where one of our
6 campuses is located and that particular campus with a
7 major copyright infringement lawsuit literally has to
8 throw -- and things like -- and those kinds of
9 instances. So public universities have to be very
10 concerned about taking actions that will upset members
11 of the state legislature, who control the purses of
12 those institutions. So it's being conservative not in
13 terms of the uses of copyright materials. It's being
14 conservative in damaging the financial resources of
15 the university and those financial resources are
16 controlled by the state legislature.

17 MS. SMITH: This is my last question, but is
18 there evidence of lawsuits or patterns of lawsuits or
19 cease and desist letters, or other types of
20 enforcement activities against private institutions
21 that you are aware of to set a basis for the
22 alternative behavior you're describing to by public
23 institutions?

24 MS. SAMBERG: I think that goes back to some
25 of what -- the great point that Raven made about the

1 will and the won't, which is far more eloquent than I
2 was able to do with respect to our decision-making
3 when I was at Stanford, which is that you're less
4 likely to undertake the activities if you're worried
5 about the result or outcome when you're at private
6 institutions. And so I saw the same kind of --
7 although again I was in a different role, I saw the
8 same kinds of complaints against individual actors, so
9 again want to make sure we distinguish between people
10 doing things that maybe they shouldn't do themselves
11 versus what the institution does. But the institution
12 as a whole or in itself doesn't make certain decisions
13 because it fears statutory damages.

14 MR. SHONTZ: I think also --

15 MS. SMITH: It does sound like perhaps a no,
16 in terms of being aware of litigation or cease and
17 desist letters or specific things received by private
18 institutions, but -- okay.

19 MR. SHONTZ: I also, I guess I have to
20 object a little bit to the premise of the question
21 because what we're talking about here is a discussion
22 about abrogating a bedrock constitutional right and so
23 the threshold should be extremely high. So rather
24 than sort of a research study, which no one apparently
25 here is aware of or has undertaken, comparing public

1 and private institutions, which I don't even know how
2 you would begin to conduct such a study since we keep
3 -- the private institutions are going to keep quiet
4 about their settlements and the like in that domain.

5 What we're talking about is abrogating a
6 constitutional right and so it should really be a
7 discussion about what can be demonstrated that the
8 public agencies, the states are misbehaving in the
9 realm of copyright.

10 And the answer is that there really is no
11 evidence that we've seen and in fact is to the
12 contrary to what we've seen is that we have dedicated
13 staff, dedicated resources, hundreds of person hours
14 per year consulting with people on our campuses, on
15 our -- my counterpart's campuses and deep, thorough
16 investigation into allegations of copyright to the
17 point of almost sometimes being afraid of our own
18 shadows.

19 And it's not just -- it's not just images on
20 a website. I mean I'm consulted by our -- we operate
21 two performing art centers. We have multiple
22 departments of fine arts, music, theater, dance, et
23 cetera and all of those departments are very careful
24 about the issues around copyright. They come to our
25 office to consult about it. They come to our

1 copyright librarian to consult about it. And so it
2 really seems to be just kind of a red herring to try
3 to make a comparison in a vacuum between --

4 MS. SMITH: Thank you, thank you. I think
5 we need to move on because sort of the time, Mr. Amer.

6 MR. AMER: Yes. Well, I would like to get
7 Mr. Klaus's perspective on this, just as someone who
8 has worked with state entities. I wonder what your
9 perspective is in terms of how central a role or not
10 sovereign immunity plays in your dealings with the
11 state either in negotiations, litigation, or other
12 areas.

13 MR. KLAUS: Okay. I've been fascinated
14 listening to the conversation. It's encouraging to
15 hear about the extent of, the degree of I guess you
16 could say that libraries go to -- various established,
17 esteemed libraries go to, to comply with copyright law
18 to reduce their -- mitigate their risk related to
19 potential litigation. My experience has not been so
20 much with libraries, although licensing materials to
21 libraries, content to libraries certainly.

22 It's been more with other agencies involving
23 the states and those who may not be as educated or
24 have as solid of policies in place. And, I know
25 you're looking for specific data and specific examples

1 and I can't share those for a couple of reasons. One
2 is because, maybe as I suggested earlier, the
3 inquiries that I receive sometimes are pretty
4 fleeting. They're like, you know, what's my potential
5 here. What can I do to stop this. And people have
6 already mentioned, look, cease and desist letters, try
7 to negotiate a license agreement.

8 One of the things that was brought up in a
9 previous panel was, you know, sounds like the
10 libraries are pretty good with taking down potentially
11 infringing materials. It's an ephemeral issue. But
12 one of the panels brought up -- and I've represented
13 photographers, so it's like what if my photograph is
14 used and the market for that photograph is
15 eviscerated.

16 Then suddenly do the libraries still stand
17 up and say, well, look, we're going to plead for mercy
18 and if that doesn't work, then we're going to invoke
19 the sovereign immunity. I mean at what point -- at
20 what point is there value seen in a -- let's say even
21 a minor work that's affected majorly for the content
22 creator.

23 MR. AMER: That's an interesting point. I
24 mean, you make a good point in suggesting that it may
25 well be -- it seems reasonable to think that

1 libraries, university libraries are more well-versed
2 and perhaps careful with respect to copyright than
3 other state entities. Do you have experience working
4 with or dealing with other state entities that in your
5 experience would suggest that maybe there's a
6 difference between libraries and universities compared
7 to other state entities?

8 MR. KLAUS: Well, nothing directly upon
9 observation, okay, so -- and having talked with other
10 attorneys that work in this space and other content
11 creators there have been materials that, for example,
12 photographs is probably the easiest example that
13 states sometimes post hey, come see Tennessee a
14 national photograph and it winds up, okay, so what's
15 the agency that's responsible for that.

16 There's also sometimes misunderstandings;
17 the public might see a photograph on the state site or
18 something like that and they'll assume that since the
19 government is posting it, it's public domain. I mean
20 I've had that question asked to me a lot. So there's
21 a lot -- I think even within the library system, but
22 potentially more so outside the library system within
23 states.

24 It's an education and a uniformed
25 understanding that has to be I guess proliferated

1 across and that's a big task, right, that has to be
2 proliferated across state agencies relative to
3 copyright. Because I can tell you that if I had a
4 conversation with a sheriff's department in Alaska
5 about copyright versus University of Berkeley, you
6 know, Berkeley, California, it's going to be an
7 entirely different conversation because the knowledge
8 is just not there and I guess the resources are less
9 available to folks outside of the major content users,
10 which in my -- from my point of view is universities
11 among other agencies, but especially universities.

12 MR. AMER: Ms. Samberg?

13 MS. SAMBERG: Mr. Klaus, I want to give you
14 some good news. It's not a complete panacea to the
15 problem, but the some good news is that we within
16 libraries at universities are involved in national
17 organizations that provide training beyond
18 universities to other state agencies and institutions.
19 And I agree, it is not as robust to the non-university
20 community because we ourselves, are employed in a
21 certain context and only have so many hours of the day
22 and I would love to see more state funds devoted to
23 the education for other agencies.

24 But I, myself, am on a -- am part of a
25 national group that goes around and provides training

1 on scholarly communication and copyright. There are
2 -- and maybe Brandon can talk about this too, there's
3 a copyright training program for HBCUs and for school
4 districts. So we are there providing that beyond just
5 a university community.

6 But I do want to just make -- correct one
7 thing. I don't think it was necessarily wrong, but
8 just to clarify it a little bit that you said, which
9 is that you refer to the decisions acknowledging that
10 the libraries are very responsible about the decisions
11 we make, which I agree. But I want to just clarify
12 that we're not just making decisions for ourselves.
13 We are providing this training for our campuses and
14 for the public.

15 So we do it for the public through robust
16 online content and through our consultations, which as
17 a state university we provide not just to UC Berkeley
18 requesters, but also to the public. So we're
19 educating the public through those consultations and
20 through our presentations.

21 Just to give you a sense of scope, in 2019
22 to 2020, my office provided 1,380 consultations
23 regarding copyright. That's 62 percent of all our
24 consultations, we're these people, and that
25 represented an increase of close to 60 percent over

1 the previous year and 1,239 percent since our first
2 year, showing that we are reaching a good deal of
3 campus and also that they are aware of their copyright
4 responsibilities and that we're available to help.

5 MS. SMITH: So what percentage of those
6 consultations were outside of UC Berkeley to the
7 general public or to other parts of California?

8 MS. SAMBERG: I don't have that statistic on
9 hand, but many of the ways in which the general public
10 requests come up are because people want to utilize
11 materials we have in our collections and their
12 scholarship. And I can dig for -- I separate out that
13 data and I can find more data for that if you'd like.

14 MR. BUTLER: One thing I wanted to mention
15 is that it sort of cuts both ways; that is if -- and I
16 agree, I think -- I agree with Rachael and with Kurt,
17 that libraries do a great job handling copyright and
18 educating our communities about copyright. And the
19 flip side of that is that libraries and campuses are
20 really heavy users of copyrighted material and we're
21 the ones that rely on fair use a lot and rely on 108 a
22 lot and rely on 110 and 121, right, accessibility.

23 I've worked in the accessibility community
24 and they are terrified of copyright to the point again
25 of, you know, they need to learn -- they're working on

1 learning more about their rights and not being so
2 afraid. And so it would be a bad outcome and not
3 proportional or tailored, as Cooper requires, I think,
4 if what happens is, you know, state sovereign immunity
5 is abrogated in a way that has a colossal -- that has
6 an effect on the folks who are responsible users, who
7 are the heaviest users because of, you know, the less
8 heavy users, who are more likely to make a mistake or
9 whatever, right. So we have to think about that too
10 when we think about proportionality and tailoring.
11 The reason we're all here is that we have so much at
12 stake.

13 MR. AMER: Great, thank you. There's a fair
14 amount of overlap in these topics, but I think that we
15 wanted to ask a few questions about the processes that
16 are in place for addressing infringement claims by
17 state institutions when they do arise. So I'm going
18 to turn it over to Mark Gray to ask some questions on
19 that.

20 MR. GRAY: Sure. Thank you, Kevin. So one
21 of the things I was curious about, I mean I think we
22 spoke to it more in the last panel, but we've talked a
23 little bit already today about the volume of
24 consultations, but I'm curious for people who are
25 coming from the state university side what is the

1 general volume of copyright claims that you come
2 across.

3 Mr. Evans, you mentioned that you get a lot
4 of DMCA claims just by virtue of being the DMCA
5 designee for your university. But outside of that in
6 terms of claims involving your university rather than
7 student activity, what is the relative volume there
8 and maybe some details about kind of what are common
9 patterns you might see?

10 MR. EVANS: Outside of the, you know, the
11 claims of infringement from -- and they're primarily
12 coming from one association. I think it's, you know,
13 the Entertainment Software Association regarding the
14 -- you know, some of our students that are rather
15 enthusiastic about certain video games. We get very
16 few claims and almost invariably they relate to
17 illegal software download by a student.

18 Occasionally, claims regarding, you know, a
19 photograph that was used without permission, but those
20 have been very rare. I get maybe one or two of those
21 a year and those are usually resolved very amicably by
22 agreeing to remove the allegedly infringing photograph
23 once an investigation has been determined that the use
24 was not fair. You know, we take immediate action
25 regarding those kinds of claims. But beyond that,

1 it's almost always been an illegal download of
2 software by a student.

3 MR. GRAY: And then maybe as one quick
4 follow-up question, you talked earlier about the State
5 Claims Commission. Is that sort of like a quasi-state
6 court proceeding? Is that more of an administrative
7 proceeding? What's the flavor of that?

8 MR. EVANS: Well, actually it falls under
9 the jurisdiction of the state legislature.

10 MR. GRAY: Okay.

11 MR. EVANS: It was created, and I can't
12 remember the exact date, but it was created really to
13 address the use of primarily contract and injury
14 claims against the state because of sovereign immunity
15 and you have an injured party not being able to sue in
16 either federal or state court because Amendment 20 to
17 the Arkansas State Constitution basically says that
18 states should never be a defendant in its courts. So
19 we have sovereign immunity both at the state and at
20 the federal level.

21 In response to that, the legislature created
22 the State Claims Commission to provide some redress to
23 those who believe they have somehow been injured both
24 physically and financially by a state agency.

25 MR. GRAY: That's very interesting. Thank

1 you.

2 MR. EVANS: And the Commission has authority
3 to -- well, it's a three-person panel that makes the
4 decision regarding whether or not an award of damages
5 should be made to the complainant.

6 MR. GRAY: And then anyone else?

7 MR. SHONTZ: I'll just jump in and say, you
8 know, my experience is probably very similar to Mr.
9 Evans is. The volume of alleged copyright
10 infringement demands that we get in the course of a
11 year is extremely low. We're talking single digits.
12 But, again, we take them all very seriously. That's
13 kind of the point is we're stewards of the public
14 resources and we have a duty to comply with the law.

15 A duty to provide educational services to
16 disseminate knowledge and we have to balance all that.
17 And so we take all of these claims and allegations
18 very, very seriously and in each case we look at them.
19 In some cases there have been settlements for
20 reasonable license fees.

21 And that actually makes me want to go back
22 to something Mr. Klaus has said and it's a little bit
23 of a red herring to say that posting a photograph on a
24 state website eviscerates the value for the
25 photographer because the state would have had to pay a

1 license fee to that photographer for that use. And so
2 to claim that somehow the value is eviscerated, that
3 the photographer can't get any more value out of that
4 photograph anymore is just a red herring.

5 I mean we could have paid a reasonable
6 license fee in the instances where there were an
7 intentional unlicensed use of a photo, but a lot of
8 times when these allegations come in they are making
9 demands for expenses well over the purchase price of
10 all the rights for the photograph and that's just
11 completely unreasonable.

12 MR. GRAY: So in the last panel we actually
13 had someone bring up the photograph issue, I think it
14 was Mr. Wassom, in the context of a book cover, right.
15 Like the idea being that if a very recognizable
16 photograph has already been on one book cover, no one
17 is going to want their book to have the exact same
18 cover. It's a different book. Do you see that as
19 different from kind of the website issue? Mr. Shontz?

20 MR. SHONTZ: Oh, sorry, I saw Ms. Samberg
21 stick her hand up, so I was going to give her an --

22 MR. GRAY: Oh, I'm sorry. I've got a lot of
23 things to keep track of. I missed you, Ms. Samberg,
24 I'm sorry. We can get to you in a second.

25 MR. SHONTZ: I didn't hear the particular

1 example about the book cover, so if someone else heard
2 that, that come up in an earlier panel, I would defer
3 to them to provide some input.

4 MS. SAMBERG: I just wanted to add that when
5 that comment was made in the earlier panel, there
6 wasn't any suggestion that I heard anyway, and I
7 apologize if I misheard, but there was not a
8 suggestion or evidence that the use of an image on a
9 book was done by a state agency institution or actor.
10 It seems very unlikely to me that in commercially wide
11 publications, that a state actor like a university
12 press would use images for books without paying a
13 license fee.

14 I work very closely with the University of
15 California Press and know what their policies are and
16 I don't know of a single University Press that
17 wouldn't license images to put on a book cover. So
18 I'm not sure the question really has a good factual
19 basis.

20 MR. KLAUS: Right. And then I was using
21 that as an example. That was from a previous panel
22 and it was a book context, not the website. But the
23 question that Mr. Shontz brought up is value and
24 making a qualitative decision about the value of the
25 creative product or the end product being, you know,

1 the market -- the value of a person's creativity as
2 expressed in content of course is what the market will
3 bear.

4 And if there's a wrongful user of that
5 content, I don't see why -- and I'm not talking about
6 statutory damages -- I don't see why under copyright
7 they are not allowed to seek the highest value for
8 that content as possible. I mean isn't that part of
9 the contract? And if the value is eviscerated, whose
10 call is that? I mean is it the university's right to
11 make that call? I don't think so. I mean it's just
12 -- it's a rhetorical question and I'm just kind of
13 throwing it out there.

14 MR. GRAY: Thank you. And then I guess as a
15 next question, again, to keep -- going back to the
16 last panel where I was also moderating, we heard the
17 last panel from representatives from Colorado and
18 Oklahoma about how when a copyright claim comes in, it
19 gets routed to the AG's office specifically.
20 Obviously, Mr. Evans, you mentioned there's kind of
21 the Claims Commission process, but for everyone else
22 how are claims routed, you know, to which office and
23 generally how long does that time take to route? Ms.
24 Samberg?

25 MS. SAMBERG: So, in our institution, as Mr.

1 Evans said, he's the DMCA agent of his. We have a
2 DMCA agent at ours. And I can say that out of the
3 five years that I -- for the first three years, I was
4 actually a separate DMCA agent for the library until
5 the rules changed on that and now we just use the main
6 university one. Out of the five years, we have
7 received zero claims. So I can't tell you the time it
8 takes between receipt of the claim for when we will
9 take it down. But through DMCA take downs, we've
10 received zero claims. For all of the content that we
11 make available online, zero in five years.

12 We've received requests to take down content
13 for other reasons, such as people asserting privacy or
14 other things and again our community engagement policy
15 addresses that, but zero related to copyright.

16 MR. BUTLER: My experience is exactly the
17 same. Since I've been at the University of Virginia,
18 I have not seen any claims of copyright -- of DMCA or
19 otherwise come across my desk, but the routing is the
20 same. Our DMCA agent is in our general counsel's
21 office and he vets all those claims and the word I got
22 from him echoes what we've heard today. You can count
23 the alleged infringements he's seen in the last five
24 years on, you know, one hand.

25 MS. SMITH: And Mr. Butler, just to make

1 sure I understand, I think I understand what you were
2 saying, but you were saying that it's university-wide
3 and not specific to the library programs?

4 MR. BUTLER: (No verbal response.)

5 MS. SMITH: Yes, I see nodding for the court
6 reporter. Thank you.

7 MS. LANIER: At the University of Michigan,
8 our office works closely with our Office of General
9 Counsel, who has someone on staff who handles
10 copyright concerns, and we -- like I said, we work
11 closely with them. So in talking with him and
12 preparing for this meeting, it seems like our office
13 has a lot of inquiries, but a lot of them are
14 misunderstandings, like maybe misunderstandings about
15 a license the University had purchased or how a
16 creative commons license had worked. But we work --
17 our OGC works with potential complainants and
18 sovereign immunity does not come up when dealing with
19 those issues.

20 MR. SHONTZ: In similar fashion, how it is
21 with the University of Illinois that our -- part of
22 the routing of the things depends on what the entry
23 point is for the allegation of infringement because
24 the person claiming infringement may go to -- may
25 contact a sort of general email box for the

1 University.

2 They may try to contact an individual staff
3 member, who they think is linked to the website that
4 has the purported infringement material and, you know,
5 so it's the -- but once a human being put eyeballs on
6 a letter saying University has infringed my copyright,
7 please pay me x thousands of dollars in damages,
8 they're very, generally very quick to get something
9 over to our Office of University Counsel and then it
10 will end up very quickly in my inbox to handle.

11 MR. GRAY: Great. And then Ms. Dooley, do
12 you have anything to add as well?

13 MS. DOOLEY: I do not, I'm sorry.

14 MR. GRAY: That's perfectly fine. And then,
15 Mr. Klaus, you mentioned that there may be a
16 distinction between universities and then other types
17 of maybe non-educational state agencies. Have you
18 noticed any peculiarities or differences in things
19 like response time or routing of concerns between
20 different types of agencies?

21 MR. KLAUS: Well, again, this is not
22 strictly in the context of copyright. It's more in
23 the context of production, right, and the production
24 -- I was the former Director of Business and Legal
25 Affairs at National Geographic Channel and so I've got

1 it both from the inside, in-house point of view and
2 outside counsel point of view. The response time
3 varies.

4 It really depends upon the interest of the
5 agency and what you're doing or what you're proposing.
6 So, if you don't have their attention, they're slow to
7 respond. And so it's -- in the context of a copyright
8 issue, I have no direct experience, like challenging
9 an agency in that regard. But everything else is
10 like, if they're on board, they're very attentive.

11 But what I can say, however, that when
12 topics do turn to copyright besides access, involving,
13 you know, for example, a channel or a producer is
14 going to own all the footage and there's no review
15 rights of the materials and we're not going to give
16 you the materials, that's where questions arise
17 because that becomes a negotiating point, right, not
18 so much a direct copyright infringement or a copyright
19 control issue, but more of if you want access, then we
20 want access to your materials. So that arises at some
21 point and you have to be careful about how they can
22 use those materials once you deliver them, if you
23 deliver them.

24 MR. GRAY: Great. And then one more
25 question and if no one has experience on this, that's

1 totally fine. But are any of you with the state
2 institutions aware of any sort of insurance contracts
3 or sort of similar agreements that might cover
4 inadvertent or intentional hypothetical infringement?

5 MR. SHONTZ: Sorry, just to clarify, the
6 question was whether any of the state institutions
7 have insurance policies against infringement? Is that
8 what --

9 MR. GRAY: Yeah, that would cover these
10 sorts of -- yeah, these sorts of claims.

11 MR. SHONTZ: I'm not aware that our
12 university has one.

13 MR. BUTLER: I'm not either.

14 MS. SAMBERG: I can't speak to that either,
15 but it's an opportunity I think to talk about a
16 related policy which is -- that the University of
17 California has, which is that the University will
18 defend in litigation, scholars or faculty who have
19 made good faith fair use decisions in compliance with
20 University policy.

21 MR. GRAY: Does that include indemnification
22 or just defense?

23 MS. SAMBERG: As far as I know just defense.

24 MR. GRAY: Okay.

25 MR. SHONTZ: And, also, I should point out

1 the University of Illinois, at least, and I imagine my
2 counterpart universities are the same, we have a self
3 -- we're largely covered by our self-insurance policy,
4 so something like this, which is a very low level
5 activity, like I said, no more than single digits in a
6 year or allegations wouldn't even rise to the
7 necessity of like a separate third-party insurance
8 coverage.

9 MR. EVANS: Yeah. Our state law does cover
10 the indemnification of employees who are acting in
11 good faith in the course of their duties and
12 responsibilities to the state entity.

13 MR. GRAY: Great. Okay. Well, if no one
14 else has anything else on that, I think I'm going to
15 kick it back over to Kevin to get ready to wrap up.

16 MR. AMER: Great. I don't think I have any
17 further questions. Does anyone else from the
18 Copyright Office have any additional questions?

19 (No Response.)

20 MR. AMER: Okay. So I think we can wrap
21 this session up a few minutes early. Thank you all
22 very, very much for your participation. It really is
23 extremely valuable. We will be back at 3:45 for
24 session four. Thank you very much.

25 (Whereupon, a brief recess was taken.)

1 MS. RUBEL: Hello everybody. My name is
2 Jordana Rubel. I am Assistant General Counsel at the
3 U.S. Copyright Office and I will be leading this panel
4 along with my colleague, Jalyce Mangum. Before we
5 begin the session, just a couple of quick reminders.
6 If you're not speaking, please keep yourself muted, so
7 that we minimize any extraneous noise and raise a hand
8 either physically or with the raise hand button if
9 you'd like to contribute. We'll do our best to call
10 on you. We do ask that you keep your comments short,
11 just to ensure that you and your fellow panelists are
12 able to contribute to the discussion. And we'll ask
13 probing questions as we're able to and time permits.

14 This session here is going to focus on
15 existing remedies for infringement of copyrights by
16 state entities. The topics that we hope to cover
17 during this session include the existing remedies in
18 federal court, the possibilities of bringing claims in
19 state courts, and what are some of the obstacles to
20 bringing claims like those, the types of damages
21 available for claims brought in state court, and then
22 the types of damages that are available -- sorry, and
23 then the risk of concern about frivolous claims that
24 might be brought either in federal or state court. So
25 hopefully we'll get to all of those topics.

1 Before I ask the first question, I'm just
2 going to ask each of you to introduce yourselves and
3 let us know your affiliation, if any. Mr. Madigan,
4 can we start with you?

5 MR. MADIGAN: Sure. Hi, everyone. I'm
6 Kevin Madigan. I'm VP, Legal Policy and Copyright
7 Counsel at the Copyright Alliance.

8 MS. RUBEL: Thanks. And Mr. Vockell?

9 MR. VOCKELL: Hello. I'm Marc Vockell. I'm
10 Assistant General Counsel for Intellectual Property
11 Law for the University of Texas System, which is a
12 university system of eight academic and six research
13 institutions. By the way, two of those institutions
14 include those that have contributed to the mRNA
15 vaccine for COVID, so we're pretty proud of that. And
16 I'm also speaking on behalf of the Association of
17 American Universities and the Association of Public
18 and Land-Grant Universities.

19 MS. RUBEL: Thank you. Mr. Bynum, let's
20 make sure we have addressed your issues. Hopefully,
21 you're there and can speak.

22 MR. BYNUM: Yes, I'm here. Thank you for
23 being patient.

24 MS. RUBEL: Sir, can you just quickly
25 introduce yourself?

1 MR. BYNUM: Yes. My name is Michael Bynum.
2 I am from Birmingham, Alabama. I am a book editor. I
3 am currently involved in the biggest copyright lawsuit
4 in the country against Texas A&M University, which is
5 now at the 5th Circuit.

6 MS. RUBEL: All right. And we'll give you a
7 chance to talk a little bit more about that this
8 afternoon, we promise.

9 MR. BYNUM: Thank you.

10 MS. RUBEL: Mr. Band?

11 MR. BAND: Hi. I'm Jonathan Band. I
12 represent the Library Copyright Alliance, which
13 includes the American Library Association, the
14 Association for Research Libraries, and the
15 Association of College and Research Libraries. I'm
16 also an adjunct professor at Georgetown, where I teach
17 copyright law.

18 MS. RUBEL: Thank you. Ms. Olson?

19 MS. OLSON: I'm Darcee Olson. I'm Copyright
20 and Scholarly Communications Policy Director at
21 Louisiana State University.

22 MS. RUBEL: Thank you. Ms. Xu?

23 MS. XU: Hi. I'm Yuanxiao Xu. I'm a
24 Copyright Specialist at the University of Michigan
25 Library Copyright Office. Our office provides

1 educational information to the University community
2 and the general public.

3 MS. RUBEL: Thank you. And Ms. Calzada?

4 MS. CALZADA: Hi. I'm Alicia Calzada. I'm
5 the Deputy General Counsel for the National Press
6 Photographers Association. Our organization is a
7 trade organization that represents visual journalists
8 of all mediums, digital, newspaper, print, and video
9 as well.

10 MS. RUBEL: Thank you, everyone. Hopefully,
11 you'll see that we have a good mix of people
12 representing copyright owners, as well as state
13 entities here, and I'm going to do my best to zigzag
14 where possible, so that we get to hear the views of
15 those different stakeholders throughout this session.

16 I want to start off by talking about the
17 remedies that are available in federal courts
18 currently, if there's infringement of a copyright by a
19 state entity. You're probably aware that the Ex parte
20 Young doctrine allows federal courts to hear claims
21 against state entities if the only remedy that is
22 sought is injunctive relief. So my first question is,
23 and we'd like to hear both sides of this, why or why
24 not -- why is an injunction a sufficient remedy or why
25 is it not a sufficient remedy for copyright

1 infringement? And we'll go ahead and start with Mr.
2 Bynum, if he wants to weigh in on that issue.

3 MR. BYNUM: Well, I think Justice Breyer and
4 Justice Kavanaugh said it best at the Allen v. Cooper
5 hearing back in November last year, that if you don't
6 the day before or the week before and store it all, it
7 doesn't matter after the fact to get any type of an
8 injunction because the damage is already done and that
9 is the problem that I've had against Mr. Vockell's
10 argument, is that after they came and stole my book, I
11 don't have any other thing to be able to protect
12 because they've already stole it and after the fact
13 doesn't do any good.

14 So the only way I can go after them is to
15 try to seek some type of proper damages and every time
16 we've tried to do that, whether it's going after them
17 in state court or federal court, there is -- they keep
18 waving sovereign immunity and, you know, you can't
19 have it both ways.

20 MS. RUBEL: Thanks, Mr. Bynum. Mr. Vockell,
21 why don't we jump to you?

22 MR. VOCKELL: Okay, thank you. And I should
23 point out at the outset, of the institutions that are
24 within the University of Texas System, Texas A&M is
25 not one of them. There's a separate University of

1 Texas A&M System, a separate University of Houston
2 System, and others within the State of Texas.

3 I'd say that the injunction remedy has
4 received kind of -- it's been minimized. But I think
5 you shouldn't minimize the value of injunctions in a
6 lot of intellectual property matters. In the patent
7 context, for example, when the Supreme Court in 2006
8 ruled in the eBay case that injunctions were going to
9 be much more difficult to get for patent owners,
10 patent owners litigated as hard as they could. They
11 tried to engage with Congress because they didn't have
12 the leverage, that they wanted values, settlement
13 values in patent cases dropped precipitously and a lot
14 of patent owners actually filed suits voluntarily in
15 the International Trade Commission where the only
16 remedy is an injunction.

17 So while there may be situations like Mr.
18 Bynum mentioned, the Justice Breyer example where
19 there are some situations where the injunction might
20 not be the complete remedy to all harms, in a lot of
21 situations it's a very strong remedy and it can drive
22 good behavior and can drive high settlements.

23 MS. RUBEL: Ms. Calzada, do you want to
24 weigh in on this question?

25 MS. CALZADA: Sure. I'll just say that with

1 respect to photographers, an injunction doesn't remedy
2 the harm to the market that's occurred when someone
3 has used your photograph and those that want to
4 license your work suffer a market harm because they
5 haven't had to pay -- or they have paid for it and
6 their competitors, which are sometimes state entities,
7 don't pay for it. And additionally, it harms the
8 relationship that the photographer has with the client
9 when their client pays for their work, pays to use
10 their work and they see other people using it for free
11 or in violation of an exclusivity license.

12 Add that particular with photography,
13 copyright can be a bit of a whack-a-mole problem. You
14 know, you get one down and another one pops up. And a
15 lot of photographers talk to us about how they feel
16 like they're really playing whack-a-mole. Playing
17 whack-a-mole in federal court is an expensive
18 proposition and it's really not something that most
19 photographers have the resources to engage in or the
20 willingness or interest in engaging.

21 These are people that do very hard work and
22 any time they spend on infringement takes away from
23 their business model. And so when they can't get
24 compensated for their work, it's a huge business harm
25 to them and their paying clients.

1 MS. RUBEL: Ms. Olson, would you like to
2 weigh in on the question of injunctions? Please make
3 sure to unmute yourself.

4 MS. OLSON: One of the things that was
5 brought up earlier in addition to injunctive recourse
6 under Ex parte Young, to bring claims against
7 individuals. If you aren't going to bring a claim
8 against a university, I believe that's Mr. Bynum's
9 situation, is that the athletic department was deemed
10 not to be responsible and he's now in a situation
11 where he's claiming against a single individual for
12 harm.

13 I would think that there would be in
14 addition to injunction in his case, non-disclosure
15 agreement that I presume would be in place and so
16 there would be contract remedies. So, again, I think
17 there's a panoply of things under state law that would
18 provide adequate remedies if we're just looking for a
19 remedy to a harm, as opposed to statutory damages that
20 go beyond what the actual harm was.

21 MS. RUBEL: Yeah, those are good points and
22 we will definitely hit on both of those as well.
23 We'll talk to Mr. Bynum in just a moment about the
24 possibility of bringing a suit against an individual
25 in his personal capacity, so let's put a pin in that

1 for just a moment.

2 Mr. Madigan, let's jump to you. I will
3 point out as I'm passing the mic to you, looking at
4 the survey evidence, I believe that the survey
5 indicated that 50 percent of the participants said
6 they would be willing to sue for an injunction only
7 and nine percent said they would not be willing to sue
8 for an injunction only and there were a substantial
9 number of respondents who said they didn't know. So
10 hopefully you can touch on the survey responses when
11 you opine on this question.

12 MR. MADIGAN: Yeah, I'd be happy to. I
13 actually just really quickly want to first comment
14 though briefly on the last panel because I don't think
15 there were a lot of copyright owners represented on
16 the last panel. We heard from university
17 representatives about the compliance programs and
18 robust copyright education programs that they have.
19 And I have no doubt these programs and policies are
20 mostly adhered to.

21 But the problem is that infringement does
22 happen and just because the programs exist or because
23 universities are engines of creativity, it doesn't
24 mean that they shouldn't be held accountable or to a
25 lesser standard when infringement does happen. You

1 know, these policies sound positive, but we also heard
2 hostility towards basic elements of copyright, such as
3 the availability of statutory damages, as if they were
4 something that was undeserved or predatory. So I just
5 wanted to point that out.

6 But as to injunctions yes, those are the
7 results of our survey. But when we then asked the
8 folks who would not be willing to pursue injunctions,
9 why they wouldn't, we heard a lot about how expensive
10 they are, how they only offer prospective relief, how
11 they do nothing to remedy for past injuries. As Ms.
12 Calzada said, the injunctions don't make up for lost
13 market share or lost licensing opportunities and they
14 require ongoing monitoring to ensure compliance.

15 And I just say as to Ex parte Young
16 scenarios, while an injunction may stop infringement
17 by an individual actor, it does nothing to prevent
18 another state official from engaging in the same
19 infringement down the line. And so I just don't feel
20 that injunctions alone are adequate remedies at all.

21 MS. RUBEL: Ms. Xu, do you want to add
22 anything on this point?

23 MS. XU: Yes. First, I would like to note
24 that the Fourteenth Amendment doesn't guarantee
25 people's right to statutory damages. And I think Mr.

1 Madigan mentioned how injunctions, that it doesn't
2 discourage states from behaving badly, so to speak.
3 But for example, in the Georgia State case, they are
4 the prevailing party and they still had to pay three
5 million dollars defending their claim, while the
6 plaintiff only had to pay a little more than \$100,000.

7 And to name another case that was on Mr.
8 Bynum's list, one of the two cases in the past 20
9 years filed against the University of Michigan. That
10 case in 2015, they wanted only \$500 from us and we
11 spent more than \$10,000 defending ourselves because we
12 perceived them as a bad actor. They still wanted us
13 to pay when we already had a license. So the fact
14 that injunctive relief is available is a deterrent to
15 states infringing.

16 MS. RUBEL: Okay. And we will get back to
17 specifically talking about statutory damages because
18 that does seem to be a point that people on both sides
19 are quite concerned about appropriately. So we will
20 touch on that in greater detail a little later in the
21 conversation.

22 Let's talk about the second part of types of
23 relief that are available in federal court, which Ms.
24 Olson touched on a few minutes ago, which is the
25 ability to sue an individual in their personal

1 capacity. Of course the standard requires that you're
2 only able to do that -- or they would only lose their
3 qualified immunity if you can show that they violated
4 clearly established law.

5 I know that Mr. Bynum has brought claims
6 against at least one individual in his personal
7 capacity. Maybe you can describe to us what was the
8 process of identifying that individual and why did you
9 seek to go that route and why you believe or maybe
10 don't believe that suing an individual in their
11 personal capacity could be a sufficient remedy, as I
12 think Mr. Molnar was pointing out in the last panel
13 that this was sort of the answer the problem. So I'd
14 appreciate your response to that.

15 MR. BYNUM: Well, in my situation the person
16 that did -- that was heading up the actual PR --
17 athletic department PR department that was the main
18 culprit in the stealing actually sent me an email and
19 admits to everything that he did and the process of
20 what they went through and how it ended up on the
21 Internet. It was all very black and white. And so
22 that part was easy. And we got a court and the judge
23 ruled that government immunity got to go. He stripped
24 him of it.

25 And then a year-and-a-half later, he decided

1 he doesn't like that idea and so he decided that he
2 wants to file to the Fifth Circuit and try to get his
3 government immunity back. Well, you know, you wait
4 too late and don't deal with that, then that becomes a
5 big problem. But he's now trying to claim that he
6 does have his immunity and that it's -- back to that
7 whack-a-mole problem is that every time you turn
8 around, everybody tries to keep claiming some type of
9 immunity.

10 But when he admits to you in black and
11 white, yes, I put this on the Internet, yes, I had my
12 secretary retype this into our computer system, you
13 know, when they admit everything in black and white
14 and then they go out and lie to the court, you know,
15 it gets crazy. It's just like it's some story that
16 you would never believe in real life that could
17 happen, but it does.

18 MS. RUBEL: Any other copyright owner side
19 want to respond to the argument made by Mr. Molnar in
20 the previous panel that, you know, basically this is
21 the solution to the problem of sovereign immunity?
22 And then Mr. Vockell, I did see you. I'll make sure
23 we get you on this point as well.

24 (No Response.)

25 MS. RUBEL: All right. Seeing none, we'll

1 go to Mr. Vockell.

2 MR. VOCKELL: Yes. So like I said, I'm not
3 litigating Mr. Bynum's case, but I wanted to just make
4 sure some facts that are on the public record, the
5 litigation record, are also on the record before the
6 Copyright Office. Mr. Bynum's demand of Texas A&M was
7 \$780 million. So it is the type of case that we
8 discussed earlier, where sovereign immunity is
9 important to protect taxpayers and the state and the
10 state's role as a public steward.

11 And, secondly, with regard to the
12 litigation, there is a live bonafide dispute as to who
13 is the owner of the copyright and the actual author of
14 the material is not in the case. So I just want to
15 make sure that's on the Copyright Office's record as
16 well.

17 MS. RUBEL: Thank you. Mr. Band?

18 MR. BAND: I wanted to add that obviously in
19 all these cases of infringement or alleged
20 infringement, one never wants to go to court, right?
21 Going to court should be the last resort. It's
22 expensive. It's time consuming. And even if you have
23 the facts on your side and the law on your side, it's
24 still slow. That's the way the judicial system works.

25 And what we've heard on the previous panels

1 is that state agencies generally, but libraries and
2 universities in particular, are extremely responsive.
3 So you don't have to go to court to get an injunction,
4 whether it's under Ex parte Young or some other
5 mention. You simply let people know that this is a
6 problem and all the evidence that has been presented
7 thus far shows that universities, libraries, and state
8 institutions generally are extremely responsive and
9 stop the infringement.

10 Now that doesn't take care of all problems,
11 but it takes care of a lot of problems. And so I just
12 wanted to make that point, that there is something
13 that happens before litigation and that again there's
14 been no evidence that there is widespread disregard of
15 the rights of rights holders when people say, yeah,
16 there's a problem here.

17 MS. RUBEL: Yeah, I do hear that and I think
18 that university and libraries have been quite well
19 represented in this panel and in also the previous
20 panels. But we have noticed that they really are the
21 most active participants from the state side and it
22 raises the question about whether there are other
23 state entities that are as familiar with or as -- who
24 have policies that are as robust and are doing as good
25 of a job as all the people who have spoken from the

1 state side have presented.

2 Because we have heard examples this morning
3 and throughout the day of people whose copyrights are
4 being infringed and that when they do raise the issue,
5 they're not -- they are coming up against responses
6 that point to sovereign immunity perhaps among other
7 possible defenses or limitations.

8 MR. BAND: We did hear from at least two
9 attorneys, who represent the state, right? They're
10 from the Attorney General's Office, not from
11 universities. So they're responding to the breadth of
12 claims against the entire state. One was the State of
13 Ohio. The other was the State of Colorado. So we're
14 not talking about just universities, but the states as
15 a whole. And again all of the evidence we've been
16 receiving is this very scanty anecdotal evidence.

17 Even the Copyright Alliance survey, they say
18 they represent 1.8 million rights holders and they
19 received, what, 150 examples of infringement. Google,
20 in their transparency report indicates that they
21 receive 90 million DMCA takedown notices every month,
22 90 million. What we've heard is that an entire
23 university receives maybe five takedown notices an
24 entire year and some of the libraries receive no
25 takedown notices. So again if the issue here is

1 widespread harm, widespread infringement, I mean this
2 is in 2020, the amount of infringement we're talking
3 about here is negligible.

4 MS. RUBEL: I appreciate your comments, Mr.
5 Band, but I do want to keep us focused on our current
6 topic, which is remedies. We have discussed that
7 point and other similar to that this morning. So I'm
8 happy to let somebody respond to that, if they feel
9 like they have something they want to add, but then
10 I'm going to focus us on talking about remedies. Mr.
11 Madigan, do you want to jump in quickly?

12 MR. MADIGAN: Yeah. No, it sounds to me
13 like Google facilitates a lot of infringement. But,
14 you know, I talked about the survey already today. I
15 don't think we need to spend much more time on it.
16 But out of those 150 responses, you know, people were
17 identifying several instances, sometimes hundreds
18 each. So we can talk about that if we want.

19 But, you know, just to go back to the Ex
20 parte Young, I mean these have been recognized over
21 the years by congressional hearings and by the
22 Copyright Office as really incomplete remedies. I
23 mean they don't compensate for past wrongs and it's
24 unclear whether they deter future infringement. And I
25 think these injunctions, they have to be coupled with

1 the other available remedies under the Copyright Act,
2 otherwise copyright owners are being deprived of their
3 rights.

4 MS. RUBEL: Okay. One more question about
5 existing remedies before we move to state courts. A
6 few of the comments raised the DMCA as a set of
7 procedures through which copyright infringement issues
8 are resolved. Does anybody want to talk about either
9 side of the issue, whether how the DMCA takedown
10 procedures weigh in to whether there are currently
11 sufficient remedies for copyright infringement by
12 state entities?

13 MS. CALZADA: Well, I can state that while
14 we haven't surveyed our members specifically on DMCA
15 and state entities, just generally speaking we hear a
16 lot of responses about the DMCA being inadequate and I
17 know there's completely different Copyright Office
18 studies and projects on exploring that. But I think
19 you can't bring that up in this context without
20 recognizing the general inadequacy of the DMCA to
21 provide relief to copyright holders.

22 And I thought of one more thing to mention
23 about the injunction question, which is that as
24 journalist, we work in the First Amendment space a lot
25 and whenever there is an injunction that relates to

1 speech, it is always very, very specific and tailored
2 because courts are very reticent to issue broad
3 injunctions related to speech prospectively.

4 You know, they are generally of the opinion
5 that speech that is harmful from the past can be
6 punished, but they don't like to prospectively punish
7 or ban future speech. And so any kind of injunction
8 that you're going to get that relates to speech, which
9 copyrighted works are speech, they're going to be very
10 specific and tailored.

11 And so the ability -- again, I haven't
12 studied this issue, but I would question the ability
13 to get broad injunctions about a state using a work or
14 the works of a particular person. You know, I think
15 it would probably have to be very specific. Maybe
16 somebody else has examples that contradict this
17 thinking, but to me you're not going to get a court to
18 say the University of Houston can no longer commit
19 copyright infringement.

20 You're going to get a court -- if you sue
21 for a successful injunction, you're going to get a
22 court to say they're going to have to stop using this
23 specific work. And it might not even be the whole
24 state, it will be a specific -- whoever that specific
25 defendant is and perhaps even in specific ways. And

1 so I think you really have to be cognizant of the fact
2 that an injunction like that would be a minimal remedy
3 in terms of preventing future harm.

4 MS. RUBEL: Does anybody want to respond to
5 that or to the DMCA issue? Mr. Band?

6 MR. BAND: Just quickly on the DMCA issue,
7 it is a very powerful tool for rights holder, so in
8 another capacity, I represent publishers and when I
9 send a takedown notice, the material comes down right
10 away and the publishers are very happy that it
11 happened so quickly. So it is a very powerful tool.
12 Again, it doesn't take care of all situations, but
13 certainly if materials are online and it again is a
14 way of getting relief without having to go to court
15 and without even having to send a cease and desist
16 letter. You just send a DMCA takedown notice and the
17 material disappears. My clients think I'm brilliant,
18 but it's really very easy.

19 MS. RUBEL: Mr. Madigan?

20 MR. MADIGAN: Yeah. I disagree that the
21 DMCA gives copyright owners a powerful tool to deal
22 with alleged say infringement or any infringement for
23 that matter. The Copyright Office's recent 512 report
24 and a continuing DMCA focus hearings before Congress
25 have all made it abundantly clear that the notice and

1 takedown system is not an effective mechanism for
2 copyright owners to combat infringement.

3 Similar to an injunction, it may allow a
4 copyright owner to stop one specific instance of
5 infringement, but it doesn't compensate for harm done
6 or it doesn't deter against future infringement. And
7 the notice and takedown system is a constant uphill
8 battle for copyright owners as to recurring
9 infringement. And I just disagree that it's a
10 powerful tool to combat and deter infringement.

11 MS. RUBEL: Ms. Xu?

12 MS. XU: Mr. Madigan repeatedly mentioned
13 how many instances of infringement there are. I
14 wonder if they are actual infringement cases because
15 in our own experience, we receive dozens of threats of
16 claims each month and 90 percent of them are just
17 frivolous claims. I know we will get to that later
18 on, but I just wanted to address this now because of
19 those, the majority from our experience, we already
20 have a license. The companies representing the rights
21 holders are not aware of those licenses and they
22 assume we are infringing, but actually we're not.

23 And then a lot of the other cases, we're
24 relying on strong fair use. And we all know that fair
25 use is a user's right and if you're using something

1 based on fair use, we're not actually infringing even
2 if we're doing it without permission. So I just
3 wanted to question if those instances you refer to are
4 actual infringement cases.

5 MR. MADIGAN: Sure. You know, we talked
6 about this a lot already in the first session, but
7 just to say it again, I think, you know, we don't know
8 if all the allegations are completely legitimate, but
9 fair use would not be affected one way or the other,
10 whether state sovereign immunity is adjusted or
11 abrogated. Those limitations and exceptions will
12 continue to exist regardless of what happens.

13 So, you know, I've heard a lot today from
14 universities that, oh, what we're doing is fair use
15 and, you know, that's fine and nothing that happens in
16 the future with state sovereign immunity will affect
17 the universities or other state entities right to
18 invoke that defense.

19 MS. RUBEL: Ms. Olson, did you have a
20 comment on this point?

21 MS. OLSON: Yeah. Within sort of DMCA
22 adjacent, within our vendor contracts, there's always
23 a provision that allows us to -- or requires us to act
24 swiftly if there's any kind of impropriety detected,
25 any kind of misuse, whether it's an infringement,

1 whether it's excessive downloads, that we will shut
2 off a user's account. And when we get to this
3 instance recently was spider hacking and I got an
4 inquiry whether spider hacking was a copyright
5 infringement because nobody was quite sure what it
6 meant.

7 It's a way for hackers to overload a server
8 and it turns out that if you're a grad student and you
9 put a search term into your research, you pull up a
10 list of articles and as you click to open the articles
11 in Google, they each open in a separate tab. If you
12 go back through and you open the tab, scan it, close
13 it, open the next one, scan it, close it, it will
14 trigger this spider hacking server overload report
15 back to the vendor, who then contacts us, and
16 apparently this is something that within IT is a
17 pretty common occurrence.

18 There's nothing being done wrong. The
19 student is doing legitimate work, using resources that
20 the library has licensed. It's a technical issue that
21 crops up, but it results in students and faculty
22 having their research stopped because the University
23 doesn't want to risk that anything is going on. And
24 again, this is built in to our vendor contracts.

25 MS. RUBEL: I think I'll jump around a

1 little bit because we did hit on some of the state
2 concerns about litigation. So let's go ahead and
3 touch on some questions related to that and then we'll
4 go back to some of my other topics related to claims
5 that can be brought in state court.

6 We did hear in the last panel and has
7 already been addressed a little bit in this panel as
8 well some concern from state entities that there would
9 be a chilling effect, particularly on legitimate
10 activities of state research institutions, if they had
11 to worry about claims for damages being brought in
12 federal court. So I would like to hear from state
13 entity representatives, if you can be as specific as
14 possible, we did hear in the last panel about the
15 HathiTrust case and I think we've heard a little bit
16 of other discussion about digitization efforts, but
17 whether it's those kind of digitization efforts or
18 other kinds of specific research activities that
19 you're fearful might be chilled if sovereign immunity
20 were abrogated.

21 MR. VOCKELL: I can speak to that.

22 MS. RUBEL: Mr. Vockell?

23 MR. VOCKELL: I mean I think it goes beyond
24 huge new initiatives to day-to-day instruction. And I
25 know there was a discussion on the last panel, "well,

1 it does not apply to private institutions." But
2 there's a whole different deal with state institutions
3 versus private institutions. I mean we're created by
4 the state constitution.

5 We're governed by a board of regents
6 appointed by the governor. We have very specific
7 rules. We're open to public records. So there are
8 certain things that we have to do or we're restricted
9 from doing because we're state entities. We have a
10 public charge. We're seen as -- a lot of institutions
11 in my system serve historically undeserved
12 communities, first generation students.

13 So, for example, when we had to go online
14 with COVID, there was a huge need to put a lot of our
15 instruction online and if -- it would have been a huge
16 problem if our institutions would have thought, "Well,
17 we can't do this online research out of, you know, the
18 fear of copyright infringement." So I think it is
19 important just in a day-to-day operation not to have
20 our activities and serving as state institutions
21 chilled.

22 MS. RUBEL: Ms. Olson?

23 MS. OLSON: I also at the beginning of COVID
24 got a landslide of questions from faculty, who were
25 terrified as they were trying to move down-based

1 courses online because they knew that the rules for
2 what they could hand out in class -- what they could
3 use as an in-class handout, they would run into
4 problems with -- in making materials available online.
5 They knew that students had gone home for spring break
6 and then been told don't come back. So students who
7 would purchase textbooks didn't have access to the
8 materials they had purchased and faculty were frankly
9 afraid to make them available because of the risk of
10 being accused of infringing if they photocopied a
11 chapter of a book and sent it to a student, so that
12 they can keep up with their work.

13 And again as Mr. Vockell said, this was a
14 tremendous problem and something that left faculty
15 very afraid.

16 I've received a lot of questions about is
17 something safe to use, is something within fair use.
18 I have never, ever had a faculty member come to me and
19 say, hey, can I get away with this under sovereign
20 immunity. It's just not -- it's not where any of them
21 are thinking. It's not something that's going to help
22 any of them with promotion and tenure. That is
23 faculty's goal, how do they get the promotion and
24 tenure and it's not by bringing a lawsuit on to a
25 university.

1 MS. SMITH: Ms. Xu?

2 MS. XU: So following that train of thought,
3 frankly, I don't think we will see a lot of behavior
4 changes at first at least from state actors because we
5 already act very conscientiously and responsibly
6 because of what Mr. Vockell mentioned. We are very
7 transparent. Our record is transparent. We're
8 subject to the state legislature. We have to act
9 responsibly. We can't just go about infringing
10 copyrights or we wouldn't even get any funds from our
11 state legislature anymore. People will be upset with
12 us. There are lots of responsibility, accountability
13 that only state institutions are subject to.

14 And I think realistically what we will see
15 is a lot more misguided complaints by copyright
16 holders, not even because they're copyright trolls,
17 just because lots of people are uneducated on what
18 copyright is. And that's what we already see. And
19 right now people tend to be reasonable when we try to
20 talk to them about why we're using something or if we
21 made the mistake we negotiate a reasonable licensing
22 fee.

23 But I'm afraid that if we abrogate sovereign
24 immunity, people will be lured by this promise of
25 statutory damages and they will be more prone to just

1 keeping their suit going even though it's not a good
2 suit and you know how expensive it can be for us to
3 defend those suits. So we have to worry about the
4 extra burden to taxpayers this is going to cost.

5 MS. RUBEL: Yeah. That leads directly into
6 my next question, which have to do with another
7 concern that we sort of discussed in the comments and
8 here today about concerns about frivolous litigation
9 and that maybe what was driving that concern is this
10 dangling carrot of statutory damages or what's
11 perceived as a prize of statutory damages. So I'm
12 interested in additional -- in hearing additional
13 thoughts about that point on both sides. You know, do
14 we think realistically this is a realistic fear that
15 will unleash a flood of frivolous litigation or do we
16 think that maybe this is a little overblown? Mr.
17 Band?

18 MR. BAND: So I think the fear of copyright
19 trolls is real. Most of the lawsuits that are brought
20 in this country are in fact by what many would
21 consider to be copyright trolls. And the lure of
22 statutory damages is significant and it really does
23 drive much of the behavior on both sides, meaning it
24 incentivizes rights holders to initiate litigation or
25 to make unreasonable demands. We've heard many

1 examples of that throughout the day.

2 On the other hand, the fear of statutory
3 damages does have a chilling effect. I routinely
4 counsel clients and, whether it's a technology company
5 or private universities or public universities and
6 when I start counseling, I do say, and, oh, by the
7 way, if you're thinking of doing x or y, you do have
8 the possibility of statutory damages-- obviously not
9 right now, if it's a state entity. But if it's a
10 private entity or private university, the threat of
11 statutory damages is enormous.

12 We're dealing -- again, we're in 2020.
13 We're dealing with digital -- we're in the digital age
14 with the number of works we'll talk about as vast.
15 And so I filed an amicus brief for the Library
16 Copyright Alliance, and Brandon Butler mentioned this
17 before, also for the Software Preservation Network in
18 *Allen v. Cooper*, and we were talking about the
19 chilling effect statutory damages would have on
20 digital preservation efforts.

21 In the collections of libraries and
22 archives, we're talking about hundreds of millions, if
23 not billions of items and digitizing those, if we
24 start doing the numbers, it gets very big very quickly
25 and it's very scary. And if you are a general

1 counsel's office at a university and the library comes
2 and says, well, we want to engage in this digitization
3 effort and you start doing the numbers on the back of
4 the envelope, you'll say, well, gee, that's all very
5 well and good, but what you're proposing will subject
6 us to a trillion dollars of damages, I don't think so.
7 Or, start with the public domain stuff and then maybe
8 you can work your way up to 1930 or 1940, but forget
9 about 1950 or 1960. So it's a very real threat.

10 MS. RUBEL: Mr. Madigan?

11 MR. MADIGAN: Yes. So I'm not aware of
12 frivolous claims or the lure of statutory damages
13 currently chilling the work or progress at private
14 universities who have no sovereign immunity, nor is
15 the fear of statutory damages chilling their ability
16 to progress and do good work. You know, for
17 universities to say that we can't reach our -- I'm
18 sorry, state universities to say that we can't reach
19 our full potential without, you know, bending the
20 rules to the detriment of people who copyright is
21 meant to protect, you know, it's an argument that can
22 be made by anyone or any private organization.

23 You know, a for-profit online user generated
24 content platform could reach its full potential by
25 finding holes in the law and bending the rules, but we

1 try to stop that from happening.

2 And I'm not sure that private universities
3 are really being held back from reaching their full
4 potential because they're required to play by the
5 rules. And to the example of HathiTrust, I'm not sure
6 if choosing not to participate in a project that at
7 the time wasn't clear whether it was fair use or not
8 is really an example of keeping private universities
9 from reaching their full potential.

10 MS. RUBEL: Ms. Calzada, did you want to
11 weigh in here?

12 MS. CALZADA: Yeah. I heard a lot of
13 commentary earlier about, and I don't know if you
14 would call it testimony, but a lot of people speaking
15 about how these universities are taking work down, but
16 they're not compensating for past use. So I don't
17 hear fear of statutory damages. I hear fear of even
18 just paying what it is worth to use a copyrighted
19 work. So it's hard for me to accept the statutory
20 damages worry when I don't hear people even willing to
21 pay what a work is worth.

22 MS. RUBEL: Mr. Vockell?

23 MR. VOCKELL: Yes. I heard a lot of the
24 institutions replying to Ms. Calzada, who said like
25 our institution, that if there's a case where there

1 was an actual infringement and compensation is
2 appropriate, we will negotiate and we will pay a fee.
3 So I don't think there was anybody saying that
4 universities should never engage in paying anybody
5 retrospectively when they inappropriately used
6 copyrighted material.

7 MS. CALZADA: I heard several say that when
8 they were notified of an infringement, they took it
9 down and if they wanted to use it in the future, that
10 they would pay for it, but that they weren't settling
11 on the value of the previous use. And I'll add that
12 with sovereign immunity taking any level of a stick
13 out of the equation, the normal market force of
14 offering something that has value and negotiating over
15 what that value is, is completely gone. You know, in
16 a sense, all that's left is to say, I guess we're
17 going to have to take whatever is offered and that's
18 not really market forces.

19 MS. RUBEL: Mr. Bynum, do you want to speak
20 at all about the importance of being able to obtain
21 statutory damages from the perspective of a copyright
22 owner?

23 MR. BYNUM: Well, first of all, I have a
24 tremendous amount of respect for libraries. I've
25 spent probably 25,000 hours in libraries doing

1 research during my career and libraries are like a big
2 part of any community, any university. It's the
3 center of what's important. And most of the time that
4 I've seen regarding libraries are rarely the ones that
5 have done anything wrong.

6 But the real damages should be -- like for
7 example, in my friend Jim Olive's case against the
8 University of Houston, they not only put his
9 photograph on four different websites, they supplied
10 that photograph to be used in an advertising campaign
11 to support the University of Houston's Business
12 School. I mean I don't know how far I've seen you can
13 go in doing something, yet the University of Houston
14 does not want to stand up and pay Jim for the illegal
15 use of his photographs, which is the only proper thing
16 to do.

17 And, you know, so there has to be some
18 accountability owed, whether it's a university or a
19 state agency or somebody accountable. And the case
20 that's most, you know, unique about this is the case
21 against the Houston Interscholastic School Board that
22 recently -- there was a \$9.2 million judgment and the
23 only reason that case got as far as it did is that the
24 law firm representing the Houston School Board forgot
25 to claim sovereign immunity.

1 But at least in that case, we were able to
2 find out how the Houston School Board did all this
3 amazing amount of copying and that school principals
4 and other people that you should hold to account were
5 not worried about sovereign immunity. And they just
6 let people be reckless.

7 You know, so there are stories like that
8 everywhere. The State of Texas, for example, is the
9 number one intellectual property infringer in the
10 country for the last 20 years. There was more
11 infringement against the State of Texas entities from
12 2015 to 2019 than for the past 20 years against the
13 State of California, the number two infringer.

14 You know, people have to be held accountable
15 when things go amuck and we need to let them know that
16 there are consequences. And that's what I've been
17 fighting for, it's what Jim Olive has been fighting
18 for, it's what Rick Allen has been fighting for and
19 other people like that across the country. We're just
20 trying to stand up and say, no, you cannot do that.
21 This is not right.

22 MS. RUBEL: Thank you, Mr. Bynum. Ms. Xu,
23 did you want to add something else with respect to
24 statutory damages?

25 MS. XU: Not directly on that point. But I

1 noticed that some people have repeatedly mentioned how
2 the university libraries are over represented, so to
3 speak here. I think I can explain that quickly. It's
4 because we are by and large in charge of licensing
5 materials. For example, our library last year spent
6 \$29 million on licensing materials. That's not
7 including software and all the other school's
8 individual licenses. I think that's why when we talk
9 about university infringing, we, as the library, feel
10 personally, you know, involved in this topic. It's
11 not just that the libraries have good -- we have good
12 behavior, so we can stay out of this kind of thing.

13 And I'm not sure what topic we were on right
14 now. I thought we were on frivolous claims. Are we
15 past that point or can I go back to my --

16 MS. RUBEL: No, you're welcome to make
17 another point about that.

18 MS. XU: Okay. So I mentioned briefly
19 earlier about the Campinha-Bacote case. I'm not sure
20 how to pronounce that. That's listed in one of the
21 cases in I think Mr. Bynum's spreadsheet.

22 MR. BYNUM: I'm familiar with that, yes.

23 MS. XU: Yeah. So that case, I think they
24 actually filed against seven institutions and they
25 were demanding \$500 from us, even though we already

1 had a license to use their material. So when we
2 learned they are just throwing these threats against
3 all these, our sister institutions, we decided to
4 defend the case. And that case, even though we only
5 hired a local law firm instead of a leading national
6 firm, it still cost us more than \$10,000. So to me
7 that's a good example of a frivolous lawsuit.

8 MS. RUBEL: Mr. Vockell, did you have
9 another comment?

10 MR. VOCKELL: Yes. I was just going to -- I
11 believe Mr. Bynum was speaking about the DynaStudy
12 case that was on his list. It was DynaStudy --

13 MR. BYNUM: Yes --

14 MR. VOCKELL: -- versus --

15 MR. BYNUM: -- DynaStudy, yes.

16 MR. VOCKELL: Thank you, sir. You can see
17 that case at 325 F.Supp 3rd at 767 out of the Southern
18 District of Texas from 2017. That's a case where
19 sovereign immunity was not a defense. And under Texas
20 law, I think that's something we need to consider, you
21 know, state to state. There are different laws and it
22 kind of goes to the issue of state remedies, that the
23 Texas legislature has different kinds of governmental
24 immunity for different types of subdivisions. So a
25 school district is not considered an arm of the state.

1 And so, you know, that's a case and several of the
2 independent school district cases by DynaStudy on the
3 list are ones where there were settlements, as Mr.
4 Bynum noted, nearly an eight-figure settlement.

5 MR. BYNUM: When you stop and look, Houston
6 School Board a year-and-a-half earlier won another
7 case because they did use the sovereign immunity
8 defense and that was a case decided by Judge
9 Rosenthal, the chief judge in Houston, and she
10 wouldn't make a mistake and if she ruled that that was
11 a sovereign immunity case, she knew what she was
12 doing. And a year-and-a-half later in the other case,
13 the Bracewell law firm forgot to do that and that's
14 what came up later. After the decision was made, all
15 the hullabaloo came out and the stink, what happened
16 on that school board, how it is allowed to happen like
17 this.

18 You know, the lady in Marble Falls that won
19 the case, she got lucky and I'm glad it worked out
20 good for her. But, you know, as her attorneys
21 explained to me, you know, in all likelihood, if they
22 had been doing -- the Bracewell firm had been doing
23 their job properly, they would have filed the
24 sovereign immunity just like the other case done by
25 another law firm on behalf the Houston school board

1 and they won. Bracewell didn't do that and they lost
2 when they got faced with the facts. That's the real
3 story. And when we go to court in New Orleans, your
4 friends and colleagues are going to find out what the
5 real story is.

6 MS. RUBEL: I think this is a good segue to
7 talking about asserting claims in state courts, so I
8 guess we're backing up in some ways. We have talked
9 about available remedies in federal court. A lot of
10 the comments did mention that there are remedies
11 potentially available in state court. But I want to
12 walk through some of the potential obstacles to
13 bringing claims in state court and hear a little bit
14 about folks' experience trying to assert those types
15 of claims or anecdotes that they might have heard from
16 copyright owners trying to assert claims in state
17 courts.

18 So I want to start with preemption, which I
19 think is probably the biggest obstacle. To what
20 extent does preemption affect the ability to bring
21 claims that are similar in substance to copyright
22 infringement claims in state court?

23 MS. CALZADA: I can speak to that.

24 MS. RUBEL: Ms. Calzada?

25 MS. CALZADA: Yeah. So and before I get

1 into the detail of that, I just want to say the term
2 copyright troll has kind of gotten out of control as a
3 pejorative way to describe copyright owners, who have
4 chosen to pursue their rights. And I think it's
5 important to think about copyright owners as people
6 who have ownership of intellectual property and have
7 rights. What I wanted to talk about, NPPA filed an
8 amicus brief in the case of Jim Olive v. the
9 University of Houston. In that case, Jim Olive is an
10 aerial photographer. These particular photos, he had
11 to rent a helicopter and he suspended himself from the
12 helicopter with a harness to take these very unusual
13 and unique photographs.

14 They were infringed by the University, which
15 removed the copyright and attribution information and
16 used it on several web pages promoting the business
17 school. So this wasn't a library or scholarly use.
18 This was marketing, something that every business
19 entity in the state uses or does on some level. So
20 there's no fair use question here.

21 And the Fifth Circuit at the time had
22 already held that sovereign immunity protected state
23 entities from copyright infringement suits. And so he
24 filed a state law takings claim and the state did file
25 a plea to the jurisdiction, arguing that the claim was

1 preempted by the Copyright Act and it wasn't a valid
2 takings claim.

3 The district court initially denied the
4 jurisdiction, but an intermediate appellate court
5 concluded that copyright infringement was not a
6 takings claim and they had an extensive discussion in
7 the opinion about preemption and how copyright applied
8 to this case and how sovereign immunity fit into a
9 copyright infringement claim against a state entity
10 and ultimately held that it was not a takings claim.

11 MS. RUBEL: Yeah, that's a great example and
12 we will discuss that specific case and the
13 availability of a takings claim in just a moment. Mr.
14 Band?

15 MR. BAND: Yes. So preemption is not a
16 problem in the vast majority of cases and that's
17 because in the vast majority of cases -- again we're
18 talking about we're in 2020, in the vast majority of
19 the cases, the content is licensed by the state
20 entity, whether it's a college, university, a state
21 government, whatever it is, they're licensing the
22 material and so there's always a contract action. And
23 even though I might disagree with some of the
24 preemption jurisprudence with respect to shrinkwrap
25 licenses and click-on licenses and -- browser app

1 licenses, and so on, courts typically, especially in
2 an interaction when consumers aren't involved, courts
3 are not preempting those claims.

4 They're finding that there is an extra
5 element and so there is a contract action. And so
6 many of the cases we've talked about today, there was
7 a contract action. We heard about the American
8 Chemical Society and these tests, well, those tests
9 were licensed and so there is a license action that
10 can be brought, a contract action in so many other
11 cases.

12 We are talking about some of these cases
13 like the photographer hanging out of a plane. I mean
14 that is the oddball. That is the exception. That is
15 the outlier case in 2020, and in 2020 -- I wouldn't be
16 surprised if 95 percent of the content that ultimately
17 is the subject of what might be disputed is licensed
18 and could be resolved or could be addressed in state
19 court or in federal court even under a breach of
20 contract theory, so no preemption.

21 MS. RUBEL: That is a theme that we saw in
22 the comments, the notion that the increased
23 digitization of copyright works made it less likely
24 that a claim would be entirely preempted because of
25 the availability of a breach of contract claim. So --

1 MR. BYNUM: Jordana, can I note one thing,
2 please?

3 MS. RUBEL: Yes, please.

4 MR. BYNUM: Yes. All right, the most famous
5 copyright case in the last 25 years is the Denise
6 Chavez case against the University of Houston's Arte
7 Publico Press Division and it made three trips to the
8 Fifth Circuit. But at the end of the day, her
9 attorney, David Gunn, who is with the Beck Redden firm
10 now, but he represented her in all three cases and
11 today, he will tell you that case should have been no
12 more than a breach of contract case.

13 It never should have been blown up and got
14 to the Fifth Circuit three times because at the end of
15 the day, the University of Houston kept wanting to
16 reprint her little book, 2,000 copies at a time,
17 because it was a Hispanic book that was selling well.
18 And she didn't do a lot of designing the book and not
19 making changes to it, you know, and she wanted
20 somebody else to publish the book. And they had a big
21 dispute over her contract and she kept saying, no.
22 And at some point, you got to respect, you know, when
23 somebody says, no, I don't want you to reprint this
24 book.

25 And that was what that fight was all about.

1 And the Chavez case turned out to be the biggest
2 copyright lawsuit in this country for the last 25
3 years regarding sovereign immunity and everything has
4 evolved around that. But at the end of the day, that
5 case was nothing more than a breach of contract case.
6 It should have been handled in a state court and moved
7 on.

8 MR. BAND: And I'll just add that Allen v.
9 Cooper is also really a contract case. There was a
10 contract that the parties disagreed on and things spun
11 out of control. But I think part of the reason why
12 this --

13 MR. BYNUM: I agree, I agree with you and I
14 think Rick Allen would also agree with you. But the
15 problem is the State of North Carolina won't sit down
16 and have a proper discussion about the breach of
17 contract.

18 MR. BAND: Well, what I --

19 MS. RUBEL: Let's let Mr. Band finish,
20 please.

21 MR. BAND: Yeah. My point is I think again
22 every case is different, but the appeal for plaintiffs
23 and the reason why they prefer copyright as opposed to
24 contract is the possibility of statutory damages.
25 Under a contract claim, you don't get statutory

1 damages. You're limited to the actual damages or
2 whatever the damages are in the contract, whereas if
3 you get statutory damages, gee, of course that's much
4 more attractive.

5 MS. RUBEL: Anybody from the copyright owner
6 side want to respond?

7 MS. CALZADA: Yeah. I'll just say that some
8 courts do look at a contract case and say, no, this is
9 about copyright. This belongs in federal court and
10 they will reject contract claims that are at their
11 core about copyright violation. And so you can't say
12 that you can just bring a contract claim when there's
13 a copyright question and you'll get relief. That just
14 doesn't always happen.

15 MS. RUBEL: Yeah. I have seen examples,
16 especially when you're talking about states that
17 aren't familiar -- that aren't in the regular practice
18 with handling copyright cases and they're looking for
19 an opportunity to pass it off to somebody else, where
20 the analysis might not always be consistent with the
21 preemption jurisprudence. Any other points about
22 preemption?

23 MR. VOCKELL: Oh, I'm sorry.

24 MS. RUBEL: Yeah, Mr. Vockell?

25 MR. VOCKELL: I would just agree with what

1 Mr. Band and Mr. Bynum said about contract can be an
2 appropriate remedy a lot of times. And just to share
3 for your record, for example, Section 2260 of the
4 Texas Government Code abrogates sovereign immunity for
5 contract claims and has a process to handle it. So,
6 yeah, so software licenses, copyright licenses, all
7 those can be litigated.

8 MS. RUBEL: And just because you point --
9 and not to put you on the spot here, but is there any
10 limitation on the kinds of damages that can be
11 obtained or any cap or is that fully subject to being
12 litigated?

13 MR. VOCKELL: Yes. There is -- on the
14 contract claims, there is a cap of \$250,000 that can
15 be raised by legislative action, which is somewhat
16 more routine than you would think.

17 MS. RUBEL: Yeah. I think it's quite common
18 to have caps at somewhere in that neighborhood or even
19 lower. Ms. Xu?

20 MS. XU: Yeah. So when you bring claims in
21 the State Claims Board, Commissions, whatever they are
22 called, you don't have to worry about preemption. I
23 think in the previous session this was mentioned
24 briefly. So for example in Michigan, if you have a
25 claim under \$1,000, you can bring it in the State

1 Administrative Board. If it's above that amount, you
2 can bring it in the Court of Claims. And I think most
3 other states, if not all of them, have something like
4 that. For example, in Arkansas, there was a case
5 called Infomath v. University of Arkansas, where their
6 claims commission awarded them \$15,000 damages against
7 the state.

8 And I also want to mention that we also
9 represent copyright holders. Most of our students and
10 faculty create copyrighted works and we care very much
11 about their copyright. And if people were to infringe
12 their rights, no matter if the infringer is a state or
13 individual, we will try to help them as much as we
14 can. I just noticed you referred to the other side as
15 "the copyright holder." But we're also copyright
16 holders.

17 MS. RUBEL: Understand, thank you for
18 clarifying that point.

19 MR. BYNUM: And, Jordana, I wanted to note
20 one last thing, if I could, that you started out
21 talking about getting these injunctions against
22 people, so something doesn't happen again and also in
23 trying to tie in the breach of contract part of it.
24 There was a case just like this that had both parts of
25 this. It was a case against the University of Georgia

1 about 10 or 12 years ago. And in that case, there was
2 a professor that was teaching students how to take
3 pharmacy, the national pharmacy test, except he was
4 using old tests to help teach his students with and
5 the National Pharmacy Board said, no, you're doing
6 this the wrong way.

7 They ended up suing him for copyright
8 infringement. They ended up -- did get an injunction
9 because the professor had said he was not going to do
10 this again, signed the contract, and then came back
11 and was teaching the class again. So they did get an
12 injunction against him to stop him from doing that in
13 the future. And then they went to state court and
14 ended up getting a \$300,000 settlement against the
15 University of Georgia for breaching their first
16 contract.

17 So there are some merits in an injunction
18 for certain things and I will agree with that with any
19 of the other folks. There is a certain merit to that
20 and there's also certain merits of taking some of
21 these cases to getting the small claims court -- not
22 small claims, but getting the breach of contract part
23 of it dealt with in state court.

24 But in my case, for example, I never had a
25 contract with Texas A&M. They were just people that

1 came in the middle of the night and took my work and
2 posted it out to 350,000 people. It's those type of
3 people and the type of people that take Jim Olive's
4 stuff and do all the stuff they did with his
5 photographs, you know.

6 It's just when you have people like that out
7 there doing really bad stuff, they're the people you
8 got to hold -- be able to hold up and hold them
9 accountable, you know, because that is real
10 intentional effect. When you have people doing lesser
11 things, there should be lesser remedies, you know, to
12 hold them accountable.

13 And I don't want to hold libraries
14 responsible because libraries are great places. They
15 do so many good things. But occasionally one may do
16 something wrong. But if you look at all the legal
17 cases in the last 30 years, you will find very few
18 lawsuits against libraries because they're not the one
19 causing all the mischief. It's some of these other
20 people out there, they're causing the real difficult
21 stuff, and that's the reason why we need to be able to
22 hold states accountable for when they cross that line
23 and do the real stupid stuff and don't want to deal
24 with it and try to get it sorted out.

25 MS. RUBEL: Thanks, Mr. Bynum.

1 MR. BYNUM: Thank you.

2 MS. RUBEL: Another point, another issue
3 that might arise when one tries to assert a claim in
4 state court is state immunity. And I know a panelist
5 from Arkansas discussed this previously and there may
6 be other states that have similar laws that either,
7 you know, entirely restrict the ability to bring a
8 claim against the state in state court of set caps or
9 other limitations on the type of claim that may be
10 brought against a state.

11 I know Ms. Xu just talked about another
12 avenue for bringing claims up to a certain dollar
13 amount in her state. Others might have other
14 experiences. I'd be interested in hearing if anybody
15 has comments on the issue of state immunity in state
16 courts.

17 MS. XU: Just a quick note, I don't think
18 there's a cap in Michigan for the Court of Claims.

19 MS. RUBEL: Oh, I'm sorry, I thought you
20 said that you were able to bring a claim --

21 MS. XU: Oh, that's for State Administrative
22 Board.

23 MS. RUBEL: I see. Mr. Vockell?

24 MR. VOCKELL: Yes. So there is a process in
25 Texas for if there's a case where the state has full

1 sovereign immunity, wouldn't be able to be served, it
2 would be a case that would make Mr. Madigan very upset
3 because he doesn't like sovereign immunity -- that you
4 can get a legislative waiver if it's a unique case
5 where sovereign immunity shouldn't bar the claim.

6 And you all can look, there's a case, the
7 Railroad Commission v. Gulf Energy from the Supreme
8 Court of Texas in 2016. So that is, you know -- it's
9 not the most common remedy, but it's a remedy. Allen
10 v. Cooper talked about is there due process, well,
11 here's a process for egregious cases.

12 MS. RUBEL: Do you know if that has been
13 raised in Mr. Olive's case in Texas?

14 MR. VOCKELL: I don't. To the best of my
15 knowledge, Mr. Olive's case is pending before the
16 Texas Supreme Court on the specific issue of whether a
17 takings claim is cognizable for a breach of copyright.
18 So he may have a -- there may be a state remedy, you
19 know, for takings in Texas after the Supreme Court
20 rules on that.

21 MS. RUBEL: Any other comments on state
22 immunity or other procedures through which one can sue
23 a state?

24 (No Response.)

25 MS. RUBEL: All right. Let's talk about

1 takings claims then. We've talked a little bit just
2 now about Mr. Olive's claim against the University of
3 Houston. In that case, as Mr. Vockell just summarized
4 and Ms. Calzada talked about this as well a few
5 minutes ago, the Texas Court of Appeals held that
6 there was no takings claim available under the Texas
7 state constitution or the U.S. Constitution for
8 copyright infringement. And my question is, do you
9 think that case was correctly decided?

10 MS. CALZADA: Well, we filed --

11 MS. RUBEL: Ms. Calzada?

12 MS. CALZADA: We filed an amicus brief
13 urging that the intermediate court holding be
14 overturned, so I guess we would have to say no, we
15 don't believe that was correctly decided. Part of the
16 intermediate court's argument was that, the discussion
17 was that because they didn't take the whole copyright,
18 it wasn't a takings in the way other takings would be
19 considered and they compared it to other sort of
20 interferences and, you know, meaningless trespasses.

21 I have the term right here, hang on, the
22 specific term used was transitory invasion, you know,
23 so something along the lines of the state walking
24 across your land. I think that that ignored the
25 damage, as I discussed earlier, the market damage that

1 happens when an infringement takes place.

2 Remember, this was a unique image of the
3 City of Houston and so a photographer is going to
4 license their work in various genres and sometimes
5 will offer exclusivity. And you're definitely not
6 going to want two universities in Houston to use the
7 same photograph. And so if he had a private
8 university that wanted to license his work, they're
9 not going to want to license it because a competing
10 university is using the work. And so to just sort of
11 say, "well, he still owns his copyright, it's not like
12 they took the copyright from him," ignores the damage
13 to his intellectual property.

14 And we talked extensively in our briefing
15 about how using a work without permission does damage
16 the intellectual property. It damages the rights and
17 relationships that you have with licensees and it
18 damages exclusivity or the potential for -- I mean
19 even the potential for exclusivity is limited when
20 people know that someone can come along and infringe
21 with impunity and so it's very difficult to offer
22 exclusivity when you know that that's not really
23 possible.

24 And so I think it's really -- I'm hopeful
25 that the Supreme Court of Texas will understand that

1 there is more to the value of intellectual property
2 than just owning it and that the use of it has a value
3 and when it's taken, it's taken a piece of it, a chunk
4 of it and sometimes a very valuable chunk.

5 MS. RUBEL: Ms. Olson, did you want to say
6 something about that?

7 MS. OLSON: We've talked a lot about
8 exclusivity and I was -- two competing thoughts came
9 up in this. One is, I know Mr. Olive allowed a
10 newspaper to come into his studio and take photographs
11 of a dozen or so of his works. Would the newspaper
12 running an article sympathetic to Mr. Olive featuring
13 fairly decent size reproductions of his work
14 jeopardize exclusivity? And seriously, I really don't
15 know if that would that be something that -- how that
16 would impact. And then there was a comment that was
17 made in an earlier session that I also -- I'll stop
18 with the question I asked exclusivity first.

19 MS. RUBEL: All right. We'll come back to
20 you. Ms. Calzada, did you want to respond to that?

21 MS. CALZADA: Yeah, sure. No, because you
22 don't have a company that is in the business of
23 marketing the university, that is using it for the
24 purpose of marketing the university, that is competing
25 with an existing client. And also, you have -- I mean

1 that was with permission, you know. If he had
2 exclusivity concerns, he chose to let them in. He has
3 control over that.

4 You know, there's certainly a fair use
5 argument when you're reporting about a lawsuit that
6 involves a photograph. And so there's other questions
7 there, but I think that's a disingenuous question to
8 say that that's threatens exclusivity, reporting on
9 the lawsuit. To me, they're two different -- they're
10 in separate columns of use and questions.

11 MS. RUBEL: Mr. Band?

12 MR. BAND: So when Ms. Calzada was talking
13 about the trespass, I just wanted to mention one more
14 thing related to trespass and also preemption because
15 I don't know the list of legal theories you're going
16 to get to. So I just want to mention that one of the
17 other state theories that can be applicable if the
18 fact situation doesn't allow for a contract action
19 would be trespass to chattels. So if a university
20 doesn't have a license to the content, but let's say
21 is going on to someone's server -- again we're talking
22 in the year 2020 and this happens, where people
23 someone might go on to a server and get access that
24 way to the photo without a license, there can be a
25 trespass to chattels action.

1 Similarly, a lot of states have state
2 versions of the Computer Fraud and Abuse Act, which
3 reached going on to a computer and taking something
4 without authorization. That, too, would not be
5 preempted and would be subject to liability under
6 state law. So depending on the fact pattern, there's
7 often a way to get to the state actor who is behaving
8 badly.

9 MS. CALZADA: Can I --

10 MS. RUBEL: Sure.

11 MS. CALZADA: -- add on to that? I think
12 we're twisting ourselves into a pretzel, trying to
13 come up with other ways that we can bring what is in
14 essence a copyright infringement lawsuit when what
15 needs to happen is for copyright remedies to be
16 available. I think we could probably expand -- I mean
17 there's a lot of creative mental energy in this room
18 and I'm sure that we can all expand on different
19 creative ways to approach copyright.

20 But in the end, it's copyright and a
21 copyright infringement should be addressed as a
22 copyright infringement and we shouldn't have to do
23 somersaults. And these are all theories. None of
24 these have been tested or successfully tested, I
25 should say. And so I think the ultimate question is

1 why shouldn't a copyright holder have a right to
2 protect their copyright?

3 MR. BAND: Well, because the Constitution
4 says that in this situation, things have to be handled
5 differently. Take it up with the Supreme Court,
6 although they've already decided it, okay. So that's
7 why we're here. That's why we're trying to figure out
8 what's constitutional.

9 MS. RUBEL: Mr. Madigan?

10 MR. MADIGAN: I was going to say, yes, they
11 already decided it, but obviously they -- I think they
12 said "something is amiss" and if -- you know, Congress
13 should act to stop states from acting like pirates.
14 And it's just sort of, you know, their hands were tied
15 and I understand we're here to try to provide some
16 sort of record to help them to see if Congress can
17 act.

18 But as I said earlier in an earlier session,
19 there's no magic number of infringements that is going
20 to trigger Congress to act. So I think like Alicia
21 said we should think about these things at a more
22 fundamental level, like is state sovereign immunity
23 truly serving the purposes of our copyright system.

24 MS. RUBEL: I want to just pose one final
25 question and we'll give you a chance to respond, Mr.

1 Vockell, to my question or to the one Mr. Madigan just
2 raised. One option that's on the table is for
3 Congress, if it decides that there's a sufficient
4 record, to pass another statute abrogating state
5 sovereign immunity.

6 There is another -- or there's probably
7 other solutions as well and one possibility that was
8 raised in the Oman report way back when is amending
9 the Copyright Act to take away exclusive jurisdiction
10 of the federal courts to handle copyright infringement
11 claims.

12 Does anybody have any thoughts about how far
13 that potential solution could go towards addressing
14 some of the issues that we've been discussing today?
15 Mr. Vockell, I'm going to let you jump in because I
16 know you had a comment before and if you want to touch
17 on that question as well, please do so.

18 MR. VOCKELL: Well, I don't know -- I was
19 going to go off Mr. Madigan's good sound bite that I
20 kind of lost now. He mentioned the Supreme Court
21 talking about states acting like pirates and I think
22 we haven't seen that evidence here. We've seen some
23 disagreements and concerns about what's the
24 effectiveness of the individual remedies. We've
25 talked about in terms of relief DMCA, Ex parte Young

1 takings, breach of contract, and whether they do or
2 don't cover everything.

3 But to eliminate a constitutional right,
4 like John said, the Eleventh Amendment, there's a high
5 standard that needs to be reached, a widespread
6 pattern of intentional or at least reckless
7 infringement. So I don't think there's been any
8 evidence that that high standard has been met. And so
9 I think taking a second shot at the CRCA probably
10 isn't a good idea. I haven't thought about other --
11 you know, your other revamp of the entire copyright
12 litigation system.

13 MS. RUBEL: Just throwing that out at you at
14 the last second, Mr. Band?

15 MR. VOCKELL: I don't think it's necessary
16 based on what we said about how the system is. You
17 know, the claims we're hearing from Mr. Bynum, Mr.
18 Olive, the other panelists are like the tip of the
19 iceberg. This huge iceberg under the water is what
20 we've talked about, where our libraries spending \$60
21 million, California spending \$100 million, we're
22 buying all the licenses. The system is working.
23 That's really the story here.

24 MR. BAND: Yeah, if I may? I think the idea
25 of giving state courts jurisdiction over copyright

1 cases would be disastrous. It's complicated enough
2 where you have conflicts among circuits, and there's a
3 reason, whether it was a great idea or not, patent for
4 Congress to give exclusive appellate jurisdiction for
5 patents to one court.

6 But to have 50 different state courts
7 interpreting copyright law, I think it would just be
8 such a complete mess especially given that -- and
9 again this gets back to the underlying point --
10 copyright is complicated. Copyright isn't easy and
11 it's complicated in large measure because of fair use.
12 And fair use, as Justice Ginsburg said, is a built-in
13 accommodation to the First Amendment.

14 So in many ways, people who don't like fair
15 use or think fair use is messy, well, the problem is
16 the First Amendment, just like the problem here is the
17 Eleventh Amendment and we don't want to get all these
18 state courts starting to interpret the copyright law
19 in 50 different ways.

20 MS. RUBEL: Ms. Xu?

21 MS. XU: Yeah. The question was whether we
22 should abrogate sovereign immunity or abrogate
23 preemption and my answer to that is neither, because
24 we don't see widespread, intentional, reckless
25 infringement by state actors. I think it's better to

1 focus on numbers instead of anecdotes. So last year
2 state actors contributed 11 percent of the total GDP.

3 And how many state infringement do we see?
4 It's far less than one percent. So Congress' effort
5 and energy is better spent elsewhere if it wants to
6 educate the general public on what copyright is and
7 how to contain copyright infringement. State actors
8 are definitely not the big infringer here.

9 MS. MANGUM: If I may ask one question just
10 in terms of remedy. Is twisting, as Ms. Calzada said,
11 these copyright claims into a breach of contract or
12 tort claims, is that a threat or a danger to the
13 integrity of copyright law and consistency of
14 copyright law application in and of itself? Ms.
15 Calzada, if you can comment on that or Mr. Madigan.

16 MS. CALZADA: I think that goes to the same,
17 almost the same question about state law, you know. I
18 think it could result in more uneven application of
19 copyright law. We haven't addressed the question of
20 whether giving states jurisdiction over copyright law
21 would solve the sovereign immunity problem.

22 But we did comment on that in the small
23 claims process very, very early, maybe eight years ago
24 when we were looking for solutions to the problem of
25 small copyright claims and just generally felt that it

1 was risky to the idea of assurances and consistent
2 application of copyright law, as you say, which really
3 given the stakes and the importance need to be
4 consistent. But I think there's no question that the
5 system is broken and when a system is broken, you need
6 to think outside the box.

7 And if I could touch for a second on Mr.
8 Band's point about the First Amendment. You know,
9 again, we represent visual journalists and there is a
10 fundamental difference between copyright infringement
11 and other intellectual property infringement because
12 of this First Amendment point. But when a state
13 infringes someone's copyright, they violate the right
14 against compelled publication and compelled speech and
15 that is also a very important First Amendment right
16 that I think hasn't really been talked about here.
17 But there is a First Amendment protection against
18 compelled speech and when a state takes a photograph
19 and uses it against the wishes of a copyright holder,
20 they violate that person's First Amendment right.

21 Additionally, at least two copyright
22 infringement cases where sovereign immunity was held
23 related to the VARA and involved the destruction of a
24 copyrighted work, which also affects the First
25 Amendment. And so I think that it's very important to

1 consider the balance of the First Amendment interests
2 of the copyright holder, who has a right to decide how
3 their speech is used as a part of their First
4 Amendment right.

5 MS. RUBEL: Mr. Vockell, we're going to give
6 you the last word because we're just about to be out
7 of time.

8 MR. VOCKELL: Well, I appreciated Ms.
9 Magnum's question. And to the point of uniformity of
10 copyright, I worked in the private sector and the
11 public sector and here at the -- you know, just at the
12 University of Texas alone, we have over 50
13 professionals -- librarians, licensing agents --
14 focusing on making sure we do comply with copyright.
15 So I think concern about the uniformity of applying
16 copyright, we're in a -- state universities probably
17 apply copyright more uniformly than almost any other
18 institution I can think of.

19 MS. RUBEL: Many thanks to all of you for
20 participating. I think this has been a useful
21 discussion. All four panels were interesting and
22 informative. I'm going to pass the mic over to Regan
23 Smith. I think she's going to talk to Mr. Bynum a
24 little bit more and then we're going to get to public
25 comments. Sorry, Regan, I think you're still muted.

1 MS. SMITH: All right. Thank you, Ms.
2 Rubel. We're turning to the section of the day that
3 we call the audience participation or open mic
4 participation, but we're going to start with Mr.
5 Bynum, since he was having technical difficulties on
6 an earlier panel he was scheduled to be on. So, Mr.
7 Bynum, this is your opportunity to share for the
8 record any materials that you intended to and did not
9 get a chance to get out yet.

10 And we'll go through -- we have four others
11 who have signed up for the audience participation
12 segment. And just so people know, when we get to
13 them, it will be Janice Pilch, Jeff Sedlik, Alicia
14 Calzada, and Kevin Madigan. So, Mr. Bynum, are you
15 there?

16 MR. BYNUM: Yes, I am here.

17 MS. SMITH: Thank you.

18 MR. BYNUM: First of all, I very much
19 enjoyed listening to all of the other people on this
20 last panel. They all are very articulate and they
21 bring great views to be considered and discussed. And
22 several of them, I'd probably like to sit down and
23 have a beer with just to hear more of their ideas as
24 we go down the road.

25 But, you know, most importantly is that, you

1 know, when you have this type of problem, you know,
2 the one big thing that we've discovered in doing the
3 tremendous amount of research that we had to do for
4 this case is that you don't have a lot of examples of
5 people going out there and doing big time intentional
6 theft. A lot of it starts out with just pure stupid
7 stuff that instead of dealing with it early, it grows
8 and takes on a whole new momentum and it just builds
9 from there.

10 And I can definitely tell you that Jim Olive
11 would say the same thing. Rick Olive -- I'm sorry,
12 Rick Allen would tell you the same thing. My friend up
13 in Kentucky, a great photographer up here that took on
14 the University of Kentucky when he was having a
15 problem with his photographs being improperly used by
16 their basketball program. He had -- it was largely
17 started with this stupid stuff and the University
18 refused to sit down and work through the problem.

19 And it's just that when people quit talking
20 to each other and not trying to find a solution to how
21 to deal with it, then you have to find another way to
22 get to the bottom of the problem and that's where all
23 these difficult lawsuits really grow from there. And,
24 you know, and I think that if all of us -- it's when
25 we get to the point where we can't talk to each other

1 that we need to stop and step back for a minute and
2 think about this because talking through problems
3 deals with 99 percent of the issues in front of us.
4 And --

5 MS. SMITH: Mr. Bynum? Mr. Bynum?

6 MR. BYNUM: Yes.

7 MS. SMITH: I want to make sure I understand
8 how this connects a little bit closer to the standard
9 the Supreme Court has set out. So in your comment,
10 you have identified 160 cases of copyright
11 infringement since 2000; is that right?

12 MR. BYNUM: 158, yes, 158.

13 MS. SMITH: 158, okay. And so the Supreme
14 Court has said that Congress should base future
15 legislation upon the record that is widespread and
16 also demonstrates intentional and reckless
17 infringement. Can you speak a little bit about the
18 158 cases and whether they represent that or rather,
19 perhaps, honest mistakes, which is another phrase that
20 the Court opinion also touched upon as an alternative
21 situation of potential infringement?

22 MR. BYNUM: Yeah. When we were trying to
23 round off that list to make it as good as possible, we
24 threw out probably 25 or 30 cases that were marginal,
25 that did have questions and we tried to pick the cases

1 that were based on real problems. And some were worse
2 than others, but these were real cases and these are
3 all cases that came out since this Chavez ruling in
4 February of 2000. And I --

5 MS. SMITH: And when you say real problems,
6 just to stop, how did you define a real problem? Did
7 that go through the standard of recklessness and
8 reckless or intentional --

9 MR. BYNUM: A definable infringement, a
10 definable infringement.

11 MS. SMITH: Do you know whether fair use was
12 considered in some of these cases or not?

13 MR. BYNUM: We threw out probably four cases
14 that were marginal that probably could be considered
15 fair use. So we tried to sharpen our knives and get
16 the cases that could stand on their own two feet as
17 best possible. And even out of that 158, there may
18 have been three, four, or five that even they maybe
19 should have been tossed out.

20 But at the end of the day, there were at
21 least 150 hardcore cases where we felt that these were
22 real copyright infringement. We had a lot of lawyers
23 look at this so it wasn't just me deciding or somebody
24 like me deciding. We had real people with real
25 knowledge about copyright looking at these and they

1 were the ones telling us, toss that case, toss that
2 case and that's what we did.

3 MS. SMITH: So those are cases that are
4 filed. Do you have a sense for whether that is
5 representative of the universe out there? Are people
6 likely to file cases? Or do you think there's a
7 magnitude of instances where people do not bring
8 claims, but experience a similar infringement?

9 MR. BYNUM: Based on conversations that I've
10 had with other people, a lot of people just didn't
11 even try to take it to court because they felt like
12 they knew where the answer was going to be and that
13 was with a no. And it was the people that were the
14 most frustrated, the people that felt like they had
15 the best case possible, those are the ones that, you
16 know, wrote a check, paid their lawyers, and said
17 we're going to file this case no matter what. And,
18 you know, but --

19 MS. SMITH: All right. Have you seen any --

20 MR. BYNUM: -- you know, as the total amount
21 I would imagine that for every case that got filed,
22 maybe four or five didn't.

23 MS. SMITH: And is that sort of your hunch
24 or do you have a more -- or any other explanation for
25 the basis based on the people you have talked to --

1 MR. BYNUM: It's just based on the brief
2 conversations I've had with people in the last six
3 years, what they told me what their experiences were.

4 MS. SMITH: And have you noticed any further
5 change in trends since the Allen v. Cooper decision?

6 MR. BYNUM: Not -- well, actually what I
7 have noticed in the -- since the Allen v. Cooper case
8 was going to the Supreme Court, there has been a lot
9 less cases filed for copyright infringement against
10 state actors. You know, in the last 18 months or so,
11 the number of cases have pretty much dried up for
12 right now. And that doesn't mean that the problems
13 still aren't ongoing. It's just a lot of people are
14 leery about spending new money, going after new cases
15 until they see will Congress pass a better law this
16 time that will stand up.

17 MS. SMITH: Mr. Amer, do you have any
18 questions for Mr. Bynum, or?

19 MR. AMER: No, I don't think I have anything
20 further.

21 MS. SMITH: Okay. Mr. Bynum, is there
22 anything else you'd like to conclude with in a minute
23 or two that you would have said on panel two, if not
24 for the technical difficulties?

25 MR. BYNUM: The only thing that I really

1 wanted to focus on is that when you pursue a case like
2 this, you know, and you're really serious about trying
3 to get to the bottom of what happened, you know, there
4 is a tremendous amount of, you know, mental energy.
5 There's a tremendous amount of cost. I mean I was
6 told that when this case first got started, it was
7 going to cost me \$350,000 and I have spent five times
8 that amount.

9 So when you go to pursue a case like this,
10 you better hitch up your wagon and prepare to fight
11 hard. It's just -- and it shouldn't be that way. It
12 should be when you have somebody that admits to you in
13 an email, yes, I did this, this is how we did this and
14 this is what happened, and when you have that kind of
15 simple confession you should be able to resolve those
16 type of questions real quick and not get to where
17 we've gotten to right now.

18 And a university trying to hide behind
19 sovereign immunity is ridiculous, especially in a
20 situation like this or in the case of what Jim Olive
21 has had to go through. So I'm just trying to share
22 with others that you've got to really fight for what
23 you believe in and be prepared to fight hard.

24 MS. SMITH: Thank you. Well, I'm glad --

25 MR. BYNUM: Thank you.

1 MS. SMITH: -- we got to hear from you
2 today. Thank you. Thank you for your participation.
3 I think moving on to the others who have signed up to
4 contribute; is Janice Pilch ready to -- yes, I see
5 her.

6 MS. PILCH: I think -- and hope you can hear
7 me as well. Can you? Great.

8 MS. SMITH: Yes, we can hear you.

9 MS. PILCH: Great.

10 MS. SMITH: Please go head.

11 MS. PILCH: Great. Good afternoon. My name
12 is Janice Pilch. I'm a member of the library faculty
13 and a copyright specialist at Rutgers University, but
14 I'm speaking solely in a personal capacity as a member
15 of the public. These comments do not reflect or are
16 not associated with any opinion, policy, or practice
17 of Rutgers University. They are based on 20 years of
18 library experience focused on copyright.

19 Almost half of the participants at today's
20 roundtable are from state-run libraries and
21 universities offering similar views, depicting a broad
22 compliance culture and good faith activity, such that
23 there would seem to be no reason for concern about
24 losing state sovereign immunity, but there appears to
25 be concern. I'd like to raise additional

1 considerations and I have a five points to make.

2 On the first point, that state-run
3 universities and libraries and their employees take
4 copyright seriously, are risk adverse, even
5 overwhelmingly cautious and fearful about copyright.
6 I think it's true that some faculty, staff, and
7 administrators continue to adhere to a compliance
8 culture. But what I see and have experienced is that
9 others have veered from it under the influence of a
10 strong push in the last 16 years since the start of
11 mass digitization to move beyond the boundaries of
12 copyright law and to change public perception of it,
13 in particular by promoting new interpretations of fair
14 use.

15 Such interpretations are promoted by library
16 organizations, working in broad advocacy coalitions
17 with technology companies, civil society
18 organizations, law school centers and programs, and
19 individuals. It's also called and referred to as
20 "drinking the Kool-Aid." This terminology has been
21 used.

22 Attitudes about copyright are much -- are
23 not as positive as they used to be. In reality, I
24 would say there's a lot of hostility toward copyright,
25 including at state institutions and this affects the

1 approaches to copyright and practice. Evidence of
2 this can be seen, for example, in the broad support
3 for the Internet Archive's controlled digital lending
4 activity from hundreds of signatories, including
5 state-run universities and libraries and their
6 employees.

7 That controlled digital lending is viewed by
8 rights holders as illegal and that it directly
9 undermines authors' livelihoods, but is supported by
10 such a large number of state entities and their
11 employees should be evidence of the decreased
12 institutional support for copyright protections. Some
13 institutions have or are apparently implementing CDL
14 initiatives of their own despite the lawsuit.

15 I think there's no question that state
16 immunity will come into play if or when a state entity
17 faces a similar lawsuit. And it doesn't help when
18 state library administrators do things like
19 characterize the author/plaintiffs in the Internet
20 archive lawsuit as "whining about disrespect for the
21 copyright value chain" and call the lawsuit misplaced
22 and myopic. This type of communication of course
23 makes many feel justified in exceeding the boundaries
24 of copyright law. I would characterize that as a
25 threat to the integrity of copyright law.

1 Second point, on the matter that
2 infringement by universities is rare and the number of
3 complaints is small. There are lots of reasons why
4 the copyright librarian or the general counsel's
5 office doesn't see infringement, although I have heard
6 broadly for many years anecdotally that it's quite
7 common. Most infringement I think goes unmeasured.

8 It's easy to say, I see no evidence of
9 infringement when one is not looking for it or is
10 unable to access the evidence. Also many rights
11 holders are exhausted. They've just simply given up
12 on takedown notices that don't work, but it doesn't
13 mean that infringement isn't there. How frequently
14 copyright owners claim that a state actor has
15 infringed their rights is one thing. Actual
16 violations are another and I think they're far more
17 difficult to assess. But a culture that widely
18 accepts or promotes infringement even, reframing it as
19 fair use sometimes, will produce more violations.

20 Third point is, on the matter that faculty
21 and staff of state-run universities and libraries
22 don't intentionally or recklessly infringe copyright
23 law, history shows that on a large scale state
24 universities and libraries do sometimes intentionally
25 exceed traditional interpretations of copyright law

1 when they're trying to test the boundaries of the law,
2 especially by stretching interpretations of fair use.

3 The Georgia State University case and the
4 Google Books/HathiTrust case have been cited in
5 written comments. The process to control digital
6 lending is the most recent example. On a smaller
7 scale, it's not uncommon for projects to be directed
8 knowingly and consciously exceeding what many consider
9 to be reasonable interpretations of fair use. The
10 ambiguity of fair use, its function now is a belief
11 system, believing that a use is fair sort of makes it
12 fair, provides cover and state sovereign immunity
13 provides an additional shield.

14 My fourth point is, on the matter that state
15 institutions invest heavily in copyright education and
16 that copyright education is increasing, I would say
17 that much of copyright education today is about
18 expanding interpretations of limitations and
19 exceptions, even veering into outrageous
20 interpretations of fair use that happen just to
21 correspond to the interests of technology corporations
22 to get works online openly and keep them there and to
23 maximize reuse without paying anyone for it and
24 without sufficient regard for anyone's rights.

25 In recent months, I've heard in copyright

1 education webinars sponsored by major and national
2 entities and universities. I've heard that once
3 someone has decided that use of a third-party work in
4 an open educational resource is fair, it's fair for
5 all future uses. In other words, that fair use
6 functions like an open license. I've heard that fair
7 use promotes the use of unlawful copies because it
8 doesn't care whether a copy is lawful or not. In
9 other words, that fair use functions as a label.

10 Stick a label of fair use on an unlawful
11 copy and it somehow magically transforms into a lawful
12 copy. I think this is what was being said. I'm still
13 not sure about it. And I've heard that controlled
14 digital lending is permitted by U.S. law with an
15 implication that it's also permitted in the European
16 Union. So what are people afraid of with the
17 implications that people should just do it because
18 everyone else does? I seriously question the value
19 and purpose of some copyright education initiatives, I
20 think that's my point.

21 Finally, on the matter of state policies and
22 practices for minimizing copyright infringement and
23 addressing claims, I would say the distance between
24 policies and practices can be wide when it come to
25 copyright. Universities and libraries can have very

1 good policies in place, while practices are developed
2 to promote a looser environment to deregulate
3 copyright by rationalizing uses that harm the interest
4 of rights holders. Written policies are not where the
5 action is.

6 There's a real conflict today. Reasonable
7 university and library policies can be cited as
8 evidence of a compliance culture, while anti-copyright
9 practices are widely promoted to break the law, by
10 this I mean destroy the effect of copyright law. I
11 would call this a threat to the integrity of
12 copyright. Such rationalized practices encourage
13 innumerable infringements that often go unnoticed,
14 undetected, or unchallenged due to the expense of
15 litigation and legal services. They nonetheless
16 destroy livelihoods and are shielded by state
17 sovereign immunity.

18 In conclusion, I think that more needs to be
19 done to study the cultural and contributory aspects of
20 copyright infringement, the less quantifiable aspects.
21 And I think the law needs to evolve beyond its current
22 form to be fair in all respects. In addition to the
23 possible abrogation of state sovereign immunity, I
24 think that Congress needs to consider fair use reform.
25 Fair use has been weaponized against rights.

1 Academic and library values have become
2 almost indistinguishable from tech industry values
3 that serve private interests and are being advanced by
4 people at state-run libraries and universities. This
5 is problematic and it doesn't serve the public.

6 Thank you to the Copyright Office for
7 providing to the public an opportunity to express our
8 views. I'll end here.

9 MS. SMITH: Thank you, Ms. Pilch. We
10 appreciate the thought and time that went into that
11 contribution in your participation today. I think
12 moving on to the next person would be Mr. Sedlik. And
13 I might ask you to be a bit briefer because I think
14 the remaining speakers have already been on the panel
15 today. So that was our first opportunity to hear from
16 Ms. Pilch. Mr. Sedlik, what would you like to share?

17 MR. SEDLIK: Three minutes and 15 seconds is
18 all I need, Ms. Smith. Well, I appreciate the
19 excellent work and the respect for artists' rights
20 evinced by my fellow panelists from the museum,
21 library, and education communities today, and by
22 organizations like the ARL, the VRA, the OCLC, and
23 others.

24 The fact that many institutions demonstrate
25 respect for artists' rights or pay license fees to

1 some creators for some usages or make other earnest
2 attempts to voluntarily comply with copyright law is
3 wonderful, but provides virtually no protection to
4 creators, whose exclusive rights and remedies with
5 regard to infringements by state entities are
6 effectively negated by sovereign immunity.

7 Breach of contract is not a sufficient
8 remedy because the vast majority of infringements do
9 not involve a contractual relationship between the
10 rights holder and the state entity. Rather, the state
11 entity may obtain copies from sources such as Google
12 images, social media, websites, and then distributes,
13 displays, and otherwise uses those copies without the
14 creators' knowledge. And with no contract, there are
15 no contractual terms to breach. For the reasons that
16 I described in session one, injunctive relief is also
17 not an effective remedy.

18 With no right to effective remedies under
19 copyright law, creators' rights are severely
20 prejudiced in their negotiations with states
21 concerning unauthorized usage of their works and the
22 shadow of sovereign immunity, creators find it
23 impossible to secure legal representation on a
24 contingency basis. As creators are unable to afford
25 to retain an attorney on an hourly basis, creators are

1 left without effective recourse for copyright
2 infringement by state entities.

3 When independent professional visual artists
4 create new works, they typically do so with the intent
5 to monetize those works throughout the lifetime of
6 their copyrights by offering up their works for
7 licensed use by public and private entities for usage
8 that is not falling under the exceptions of fair use,
9 108, 110, or 121. Fair use and sovereign immunity are
10 entirely separate legal constructs and must not be
11 conflated.

12 Much of the legitimate cultural heritage,
13 education, research, and preservation activities of
14 state entities with respect to copyrighted works falls
15 under the exceptions of fair use or under section 108,
16 110, or 121. Reliance on sovereign immunity can have
17 the unfortunate effect of emboldening state entities
18 to proceed with unlicensed use of protected works
19 without requisite analysis and in a manner that would
20 otherwise require a license from rights holders.

21 In the earlier sessions, it was suggested
22 that the quantity of 160 copyright decisions in the
23 last 20 years serves as an accurate indicator of the
24 scope of infringing activity by state entities. I
25 disagree. In reality, only a fraction of state

1 infringements are discovered, only a fraction of
2 discovered state infringements are pursued, only a
3 fraction of pursued state infringements proceed to
4 filing a complaint, and only a tiny fraction of those
5 state infringements make it to pretrial, adjudication,
6 or tried to verdict or judgment. For these reasons,
7 the quantity of 160 decisions is not a reasonable
8 measure and it is reasonable to expect that the scope
9 of infringing activity by state entities is
10 exponentially greater.

11 Lastly, my good friend, Mr. Band, suggested
12 that we must consider the Constitution. Accordingly,
13 Article I of the Constitution, considered in the
14 context of Section I of the Fourteenth Amendment,
15 presents a compelling foundation for consideration of
16 the protections that must be enjoyed by creators in
17 order to provide them with an adequate incentive to
18 create new works for the ultimate benefit of society.

19 Article I, Section 8, Clause 8 of the
20 Constitution established that Congress was empowered
21 to create a copyright law to promote the progress of
22 science and useful arts, by securing for limited time
23 to creators and inventors the exclusive right to their
24 respective writings and discoveries. In tandem, in
25 drafting Section I of the Fourteenth Amendment,

1 Congress made it clear their intent to act within the
2 spirit of Clause 8 by specifying in crystal clear
3 terms that states may not deprive any person of life,
4 liberty, or property without due process of law.

5 Thank you for the opportunity to participate
6 today.

7 MS. SMITH: Thank you and thank you, Mr.
8 Sedlik for participating. I think the next
9 participant is Ms. Calzada. Are you ready?

10 MS. CALZADA: Yeah. Hi, thanks. I
11 appreciate the chance to talk again, mostly wanted to
12 be available in case you had questions about our First
13 Amendment assertions and maybe expand a little bit on
14 what I was saying earlier about how much of a First
15 Amendment problem it is when the government is using
16 the work of journalists in particular. Journalists
17 have an ethical obligation not to be mouthpieces of
18 the government and when their work is used to promote
19 government ideas or concepts, they bristle more than
20 just a little bit.

21 You know, I work mostly with journalists and
22 I'm in -- I also have a private practice and a lot of
23 my clients are journalists. And I'll you that news
24 organizations and individual journalists will often
25 look the other way when just an average individual or

1 a company infringes their work because it's a huge
2 burden on them and they need to get up the next day
3 and do more work. But when they see a politician or a
4 government official violating their copyright, they
5 immediately snap to action and they are concerned
6 about the ethical problem of having government speak
7 with their work. And so I did want to just see if you
8 had any questions or thoughts or wanted me to expand
9 on any of that, Regan.

10 MS. SMITH: I mean one question is whether
11 there are specific instances that you would like to
12 draw to our attention more than -- in addition to the
13 written comments and testimony, this would be a good
14 time to do that. And Mr. Amer, if you have more
15 questions, please jump in.

16 MS. CALZADA: So I did make -- well, I'll
17 wait for Kevin.

18 MR. AMER: No, I had the same question, just
19 if you have any specific examples of the type of
20 situation you're talking about, that would be helpful.

21 MS. CALZADA: Well, I have seen, like I
22 said, circumstances, some of which relate to clients,
23 where they've seen politicians use their work to try
24 to pursue a specific message. We highlighted several
25 instances in our comments that I would refer you to

1 just for the interest of time. And really any of
2 these uses that you see are the government speaking
3 using the words of the copyright owner.

4 And so you can really -- Rick Allen was
5 forced -- was compelled to speak the message of the
6 State of North Carolina with his work and it was used
7 in a way that presented their speech, their message,
8 and he was compelled to speak their message using his
9 work. And so any of these cases really you can look
10 at from a First Amendment perspective of how that use
11 is compelled speech of the speaker.

12 MS. SMITH: Thank you very much. We
13 appreciate you elaborating on that. I think that it
14 was certainly helpful to hear from you. Is there
15 anything else or if not, it's fine to --

16 MS. CALZADA: You know, I did have one other
17 thing to say about the question of intent. In *Brammer*
18 *v. Violent Hues*, the Fourth Circuit kind of disposed
19 of the false notion of merely negligent infringement
20 and how that when an infringer thinks that an image is
21 freely available, that's actually not a reasonable
22 belief given that all contemporary photographs are
23 presumptively under copyright and that the presumption
24 should always be that a work is under copyright until
25 you find otherwise.

1 And so I think it's important to, when you
2 have this conversation about is it intentional, to
3 consider the point that all contemporary work should
4 be presumptively under copyright and it's incumbent on
5 the user to find out otherwise.

6 MS. SMITH: Thank you. Thank you, Ms.
7 Calzada.

8 MS. CALZADA: I appreciate the opportunity.

9 MS. SMITH: Thank you and again we really
10 appreciate your thoughtful contribution. Mr. Madigan,
11 do we have you?

12 MR. MADIGAN: Yep. Can you hear me?

13 MS. SMITH: Yep. Go ahead.

14 MR. MADIGAN: Yeah, I'll be very brief
15 because I want to give others who maybe haven't had a
16 chance to talk today a chance to chime in. But I just
17 wanted to respond. There was an argument in some of
18 the comments opposed to abrogating state sovereign
19 immunity that said immunity must be preserved to
20 protect taxpayer resources because the public will
21 ultimately foot the bill for defending against
22 meritless lawsuits.

23 And I would just say that state universities
24 are sometimes massive owners of IP themselves and they
25 use the same public tax dollars to register and

1 enforce their IP rights. So I just think we need to
2 be clear that it goes both ways. We detail in our
3 comments some of the initial research we did about the
4 amount of copyrights owned by universities and some
5 instances of enforcement against individuals or small
6 businesses.

7 And I think the tax argument sort of also
8 disregards this sort of long-term benefits to the
9 public that results from copyright laws that respect
10 and protect the rights of copyright owners and
11 creators. And so I just think those things need to be
12 considered alongside any claims that abrogation of
13 state sovereign immunity will harm the taxpaying
14 public.

15 So that was just what I wanted to get in.
16 And I also wanted to thank you all so much for hosting
17 this today. I might have to jump off a little bit
18 before six. I just wanted to get that in there now.

19 MS. SMITH: Well, thank you and thank you
20 for participating and for following up on that issue,
21 we appreciate it. I think though you might be the
22 last speaker. So, we might be at a conclusion now,
23 unless anyone from the Copyright Office side wants to
24 chime in. Going once, twice? No?

25 (No response.)

1 MS. SMITH: Okay. So thank you everyone for
2 participating or listening to the session today. Just
3 as a reminder, the transcript will be posted on the
4 Copyright Office website for the Study's docket, as
5 well as a video that will be made available on the
6 Copyright Office's YouTube channel, and any subsequent
7 action in our analysis will also be made public on the
8 study website. So thanks very much everyone and have
9 a good night.

10 (Whereupon, at 6:00 p.m., the meeting was
11 adjourned.)

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I hereby certify that the proceedings and evidence are contained fully and accurately on the digital recording and notes reported by me at the meeting in the above case before the Library of Congress.

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\$1,900 [1] 47:7	130 [1] 97:17	25,000 [1] 221:25	a.m [1] 3:2	according [2] 51:18 111:4
\$10 [1] 122:12	13988 [1] 33:11	250 [1] 46:5	AAU [1] 111:13	Accordingly [1] 269:12
\$10,000 [3] 127:11 200:11 225:6	14 [2] 67:8 112:8	29 [1] 112:5	abandoned [1] 91:18	account [5] 13:22 19:20 118:20 212:2 223:4
\$100 [2] 121:8 247:21	15 [2] 28:13 266:17	3	ability [14] 4:18 22:14 38:1, 7,24 124:24 153:14 162:4 200:25 208:11,12 219:15 227:20 238:7	accountability [2] 216:12 222:18
\$100,000 [1] 200:6	15,000 [1] 26:24	3,900 [1] 51:13	able [44] 3:9 7:2 36:17 46:25 47:22 49:13 50:9 73:22 76:8 83:1 88:12 92:3,4 97:22 103:7,9,9,11,21,24 106:1 107:4 108:21 109:3 124:21,24 135:17 161:20,21 165:17 166:23 169:2 179:15 190:12,13 194:11 201:2 221:20 223:1 237:8,21 238:20 239:1 258:15	accountable [8] 39:4 163:23 198:24 222:19 223:14 237:9,12,22
\$120,000 [2] 112:9 127:11	150 [3] 205:19 206:16 255:21	3:00 [3] 7:7 132:9 133:14	above [1] 235:1	accurate [2] 12:12 268:23
\$15,000 [4] 35:18 37:4 154:21 235:6	158 [5] 254:12,12,13,18 255:17	3:45 [1] 189:23	above-entitled [1] 132:13	accused [1] 215:10
\$16 [2] 69:4 70:15	16 [1] 260:10	30 [4] 40:12 125:13 237:17 254:24	abrogate [7] 22:13 56:5 156:18 158:6 216:23 248:22,22	acknowledge [1] 48:5
\$16 [2] 69:4 70:15	160 [6] 86:14,20 91:7 254:10 268:22 269:7	300 [1] 47:5	abrogated [5] 22:23 164:24 177:5 211:11 213:20	acknowledged [1] 82:6
\$2,000 [1] 112:10	160 [6] 86:14,20 91:7 254:10 268:22 269:7	301 [1] 49:5	abrogates [1] 234:4	acknowledging [2] 127:1 175:9
\$22 [1] 47:11	17,000 [1] 123:4	325 [1] 225:17	abrogating [8] 5:3 74:14 84:13 156:11 169:22 170:5 246:4 273:18	across [14] 29:1 33:19 50:21 92:22 142:25 144:14 145:21 146:19 174:1,2 178:2 184:19 223:19 240:24
\$250,000 [1] 234:14	18 [1] 257:10	35 [1] 154:9	absent [2] 58:24 64:5	ACS [1] 102:2
\$29 [2] 122:10 224:6	19 [9] 80:11 81:20 82:14 84:6 86:4,19 87:13,13 89:3	350,000 [1] 237:2	Absolutely [6] 12:5 16:19 37:7 38:1 134:10 162:9	Act [31] 4:13,21,25 36:7 37:17 54:17 55:10 56:6 57:12 58:21 83:15 96:14 106:5 112:14 139:14 141:3 162:13 164:16 165:20 167:19 207:1 211:23 216:5,8 229:1 244:2 245:13,17,20 246:9 270:1
\$3.4 [1] 48:1	1930 [1] 219:8	36 [2] 84:7,11	abstract [1] 81:3	acting [6] 61:19 95:15,16 189:10 245:13 246:21
\$300,000 [1] 236:14	1934 [1] 102:3	3d [1] 130:12	abundantly [1] 209:25	action [23] 32:14,17 74:19 95:18 105:22,24 106:4 128:11 144:23 154:5 161:2 178:24 229:22 230:5,7,9,10 234:15 243:18,25 265:5 271:5 275:7
\$350,000 [2] 35:6 258:7	1940 [1] 219:8	3rd [1] 225:17	Abuse [1] 244:2	actions [13] 49:24 60:8 75:3 80:6 102:18 103:12 138:12 154:10 155:16,25 162:16,21 168:10
\$360 [1] 47:5	1950 [1] 219:9	4	Academia [1] 29:20	active [3] 102:12 147:20 204:21
\$500 [2] 200:10 224:25	1960 [1] 219:9	4 [1] 155:4	Academic [6] 142:24 143:14 158:15 159:18 191:12 266:1	activities [7] 151:17 168:20 169:4 213:10,18 214:20 268:13
\$60 [1] 247:20	1983 [7] 61:3,11,22 62:16 94:25 95:18,21	4,400 [1] 37:23	academics [2] 36:19 158:17	activity [13] 47:10 57:14 80:23 87:6 112:25 159:17 166:16 178:7 189:5 259:22 261:4 268:24 269:9
\$7.3 [1] 47:12	1984 [1] 84:10	4,500 [1] 46:10	accept [1] 220:19	actor [9] 49:24 73:3 113:1 182:9,11 199:17 200:12 244:7 262:14
\$700 [1] 47:13	1987 [1] 90:10	40 [1] 40:12	accepting [1] 16:24	actors [14] 8:2 53:18 54:11 64:13 73:4 81:6 144:19 146:8 169:8 216:4 248:25 249:2,7 257:10
\$780 [1] 203:7	1988 [1] 4:8	5	accepts [1] 262:18	acts [5] 37:17 52:21 53:10 55:19 59:14
\$9.2 [1] 222:22	1990 [2] 4:13 72:15	5,500 [1] 51:12	access [17] 63:8 135:12 136:3,5 142:2 148:10 149:18 161:8,23,24 163:4 187:12,19,20 215:7 243:23 262:10	actual [13] 8:1 16:13 36:17 47:11 120:23 197:20 201:
/	1990s [1] 15:9	5:15 [2] 7:12 133:15	accessed [1] 6:18	
// [25] 132:15,16,17,18,19,20, 21,22,23,24,25 275:12,13, 14,15,16,17,18,19,20,21, 22,23,24,25	2	50 [7] 13:8 96:17 146:17 198:5 248:6,19 251:12	accessibility [2] 176:22, 23	
1	2 [1] 111:22	50,000 [1] 139:2	accessible [3] 3:23 87:7 150:12	
	2,000 [3] 50:12 51:14 231:16	51,000 [1] 123:4	accessing [2] 6:22 63:16	
	2,500 [1] 102:5	512 [1] 209:23	accidental [2] 49:18 56:17	
	2:00 [1] 132:3	53,000 [1] 46:9	accommodation [1] 248:	
	2:01 [2] 132:14 133:2	56 [1] 67:12		
	20 [9] 14:9 92:20 139:1 179:16 200:8 223:10,12 259:17 268:23	560 [1] 46:5		
	200 [2] 58:6 146:14	57 [1] 130:12		
	2000 [3] 91:8 254:11 255:4	5th [1] 192:5		
	2000s [2] 14:6 15:10	6		
	2006 [1] 195:7	6,900 [1] 51:11		
	2007 [1] 154:15	6:00 [1] 275:10		
	2009 [1] 46:2	60 [4] 13:14 16:18 104:4 175:25		
	2010s [1] 14:6	600 [1] 13:4		
	2012 [1] 93:5	62 [1] 175:23		
	2013 [1] 37:4	657 [4] 13:4,15 15:18 18:7		
	2015 [4] 36:3 41:6 200:10 223:12	68 [1] 67:14		
	2016 [2] 41:9 239:8	7		
	2017 [3] 46:3,16 225:18	767 [1] 225:17		
	2019 [6] 14:7 15:12 112:3,5 175:21 223:12	8		
	2020 [1] 84:10 111:23 112:8 132:14 175:22 206:2 218:12 229:18 230:15,15 243:22	8 [3] 269:19,19 270:2		
	2260 [1] 234:3	80 [1] 41:17		
	23 [1] 67:12	9		
	24 [1] 40:9	9,000 [2] 46:4 51:10		
	25 [5] 29:20 37:13 231:5	90 [3] 205:21,22 210:16		
		90s [2] 14:5 15:10		
		95 [1] 230:16		
		985 [1] 130:12		
		99 [1] 254:3		

<p>16 203:13 210:14 211:4 221:1 233:1 262:15 actually [6] 8:19 20:7 21:9 23:10,14,16 26:11 32:19 33:14 53:21 56:22 60:20, 24 66:9 69:13 70:21 79:25 81:16 82:16 85:10,16,22 87:18 91:21 92:3 93:12 94: 11 98:16 101:22 102:9 103:14 104:10,20 105:13 109:19 110:22 111:3 115: 16 124:20 131:9 134:17,24 141:15 144:14 145:1 146: 2 150:18 165:20 167:19 179:8 180:21 181:12 184: 4 195:14 198:13 201:18 210:22 211:1 224:24 257: 6 272:21 adaptable [1] 149:14 adapted [1] 149:16 add [14] 70:13 124:18 125: 3 149:20 182:4 186:12 196:12 199:21 203:18 206: 9 221:11 223:23 232:8 244:11 addition [14] 29:18 31:12 32:6 51:10,20 68:9 81:22 96:20 128:8 145:16 197:5, 14 265:22 271:12 additional [9] 7:3 73:9 151: 19 167:21 189:18 217:12, 12 259:25 263:13 additionally [2] 196:7 250: 21 address [16] 31:6 36:14,17 37:20 59:11 120:4 133:6, 21 134:7 144:17 145:2 147:4,6 157:15 179:13 210:18 addressed [10] 17:18 50:3 56:8 83:15 88:13 191:20 213:7 230:18 244:21 249: 19 addresses [1] 184:15 addressing [4] 111:25 177: 16 246:13 264:23 adequate [4] 25:9 197:18 199:20 269:17 adhere [3] 96:13 151:18 260:7 adhered [1] 198:20 adherence [2] 63:11 147: 12 adherents [1] 127:25 adjacent [1] 211:22 adjourned [1] 275:11 adjudication [1] 269:5 adjunct [1] 192:16 adjust [2] 22:13 45:11 adjusted [1] 211:10 adjusting [1] 6:12 administered [1] 103:1</p>	<p>administrative [5] 7:4 100: 25 179:6 235:1 238:21 administrator [1] 28:12 administrators [2] 260:7 261:18 admire [1] 89:7 admit [1] 202:13 admits [3] 201:19 202:10 258:12 adopt [1] 29:7 adoptable [1] 149:14 adopted [7] 26:11 27:9 32: 25 110:14 149:15 150:7 152:15 adopting [2] 62:11 150:22 adults [1] 43:19 advance [2] 4:1 6:7 advanced [1] 266:3 advancement [1] 162:11 advancing [1] 112:13 advantage [3] 27:19 164: 15 165:18 adverse [1] 260:4 advertising [1] 222:10 advice [1] 30:8 advise [3] 30:23 77:20 139: 13 advised [1] 31:5 advises [1] 144:5 Advisor [4] 9:4,5 28:13 135:5 advocacy [1] 260:16 aerial [1] 228:10 Affairs [1] 186:25 affect [3] 56:6 211:16 227: 20 affected [3] 136:25 172:21 211:9 affecting [2] 66:23 73:3 affects [3] 56:7 250:24 260: 25 affiliated [1] 78:19 affiliation [2] 9:9 191:3 affiliations [1] 30:7 afford [5] 100:17,18 126:3 137:20 267:24 afoul [1] 139:18 afraid [9] 73:16 158:17 159: 8 170:17 177:2 215:9,15 216:23 264:16 African-Americans [1] 26: 14 aftermath [1] 135:24 afternoon [2] 192:8 259:11 AG's [1] 183:19 age [2] 45:18 218:13 agencies [33] 10:21 33:2, 13,23 71:15 77:20,24 80: 15 92:9,15,23 93:1,9 120: 12,14,15,18 122:6 129:5,8, 14 130:8,10 141:24 170:8 171:22 174:2,11,18,23 186:</p>	<p>17,20 204:1 agency [18] 46:14 48:7,23 60:8 69:20 71:21 72:1,6 95:6 113:10 114:14 120: 24 173:15 179:24 182:9 187:5,9 222:19 agent [5] 155:7 184:1,2,4, 20 agents [2] 49:1 251:13 aggrieved [2] 96:22 154:5 ago [6] 107:22 112:9 200: 24 236:1 240:5 249:23 agree [18] 30:12 55:24 91: 10 129:19,23 140:11,24 165:6 167:2 174:19 175: 11 176:16,16 232:13,13,14 233:25 236:18 agreed [1] 48:1 agreeing [1] 178:22 agreement [10] 35:12,15, 15 37:3 54:7 69:25 70:12, 24 172:7 197:15 agreements [5] 71:1 72: 13 145:25 164:4 188:3 agriculture [1] 155:23 ahead [6] 110:23 153:19 156:8 194:1 213:2 273:13 aid [1] 135:21 AIPLA [8] 79:18,21 84:4,9, 18 90:3,8 124:12 AIPLA's [6] 80:2,11 86:4, 15 87:10 123:15 ALA [1] 21:5 Alabama [3] 34:9,17 192:2 Alaska [1] 174:4 Alicia [3] 193:4 245:20 252: 13 allegation [3] 92:22 147:4 185:23 allegations [9] 92:14,19, 25 97:6 170:16 180:17 181:8 189:6 211:8 alleged [11] 8:11 24:20 68: 23 85:11,12 114:14 157:2 180:9 184:23 203:19 209: 22 allegedly [1] 178:22 alleging [3] 92:16 97:10 112:17 Allen [40] 4:24 9:13,14,15, 16,16 34:8,14 35:8 39:1,6 44:18 46:24 48:6,7,18,22 55:23 56:3 57:25 58:24 62: 14,15 64:23 71:20 82:3,20 107:13 117:21 129:10 194: 4 218:18 223:18 232:8,14 239:9 253:12 257:5,7 272: 3 Alliance [16] 10:12,15 11: 23 12:7,16 17:3,13 29:15 50:3,11 97:10 111:12 191: 7 192:12 205:17 218:16</p>	<p>allow [5] 25:12 48:25 94:6 210:3 243:18 allowed [4] 154:17 183:7 226:16 242:9 allowing [3] 96:4 111:1 158:8 allows [3] 25:10 193:20 211:23 alluded [1] 22:11 almost [21] 15:20 46:21 51: 11,13,14 60:21 81:19 85: 21 86:14 103:17 126:11 143:4 155:1 158:13 170: 17 178:16 179:1 249:17 251:17 259:19 266:2 alone [3] 31:24 199:20 251: 12 alongside [1] 274:12 alphabetically [1] 11:10 already [25] 35:10 64:3 82: 8 87:14,19 107:21 126:25 149:15 172:6 177:23 181: 16 194:8,12 200:13 206:14 210:19 211:6 213:7 216:5, 18 224:25 228:22 245:6,11 266:14 alternative [2] 168:22 254: 20 although [5] 108:10 169:7 171:20 245:6 262:5 amazing [1] 223:3 ambiguity [1] 263:10 amending [1] 246:8 Amendment [32] 84:20 90: 17 94:8,20 95:7 121:2 127: 5,8,16 130:21 156:18,19 179:16 199:24 207:24 247: 4 248:13,16,17 250:8,12, 15,17,20,25 251:1,4 269: 14,25 270:13,15 272:10 Amer [92] 8:23,24,24 25:18 43:14,24 44:12 56:24 57:1 58:19 75:17,18 77:9,12,15, 25 78:12,23 79:7,14,22 82: 17 83:12,24 86:1,11 88:2 91:2 92:11 93:3,20,23 94: 24 95:14 96:1 97:4 98:11, 14 99:11 100:9 101:10,14 104:6,11,13 105:2,10,15, 18 106:10,15,18,20 107:2 112:15 117:19 119:1,25 126:7 127:19 128:19 129: 17,21 130:5 131:24 133:3 137:25 138:18,21 141:5 142:19 143:17 145:4 147: 8 149:22 150:25 152:23 156:8 160:5,24 163:17 171:5,6 172:23 174:12 177:13 189:16,20 257:17, 19 271:14,18 American [10] 11:16 18:9 20:15 79:10,17 101:18,24</p>	<p>191:17 192:13 230:7 amicably [1] 178:21 amicus [7] 44:18 135:7 136:10 137:16 218:15 228: 8 240:12 amiss [1] 245:12 among [8] 45:4 69:16 85:9 128:7 147:17 174:11 205: 6 248:2 amongst [1] 155:5 amount [20] 26:23 34:23 35:9 70:16,19 84:12 100:4 159:25 177:14 206:2 221: 24 223:3 235:1 238:13 253:3 256:20 258:4,5,8 274:4 amounted [1] 93:10 amounts [1] 71:6 amuck [1] 223:15 analogy [2] 60:11,25 analyses [2] 23:10 164:18 analysis [13] 4:2 14:24 48: 6 63:13 69:8 70:22 83:20 86:24 87:10 117:25 233: 20 268:19 275:7 analyzing [2] 16:9 17:21 Andrea [1] 9:24 ANDREADIS [1] 106:21 anecdotal [5] 27:14 52:12 69:6 124:14 205:16 anecdotally [3] 81:25 165: 13 262:6 anecdotes [2] 227:15 249: 1 Angeles [1] 51:13 Angus [1] 78:15 Ann [1] 123:1 Anne's [1] 35:13 annual [2] 96:14 139:9 anonymous [2] 99:7 110:5 another [29] 21:5 48:13 69: 1 72:22 75:21 83:21 85:4 87:25 109:23 122:3 143: 10 163:19 196:14 199:18 200:7 209:8 217:6 224:17 225:9 226:6,25 238:2,2,11 246:4,6 253:21 254:19 262:16 answer [10] 28:17 58:18 67:12 96:4 124:11 158:11 170:10 201:13 248:23 256: 12 answered [1] 67:20 answering [1] 67:13 anti-copyright [1] 265:8 anticipate [1] 8:5 anxiety [1] 136:20 Anybody [10] 40:23 43:20 63:5 207:8 209:4 221:3,4 233:5 238:14 246:12 anyone's [1] 263:24 anyway [4] 57:10 113:3</p>
--	--	---	--	---

<p>148:22 182:6 apartments [1] 41:6 APLU [2] 111:13 145:19 apologies [1] 138:22 apologize [4] 6:7 103:19 165:2 182:7 app [1] 229:25 appalling [1] 101:9 apparently [4] 101:15 169: 24 212:16 261:13 appeal [1] 232:22 Appeals [1] 240:5 appear [4] 47:15 56:14 65: 5 115:12 appears [2] 157:23 259:24 appellate [2] 229:4 248:4 applicable [2] 162:6 243: 17 application [3] 249:14,18 250:2 applied [1] 229:7 applies [5] 19:11 95:25 130:13,14,16 apply [9] 8:14 19:4,7 49:2 83:18 85:18 130:1 214:1 251:17 applying [1] 251:15 appointed [1] 214:6 appreciate [18] 4:4 6:9 39: 7 44:15 52:23,25 54:14 106:25 110:25 201:14 206: 4 266:10,18 270:11 272:13 273:8,10 274:21 appreciated [2] 64:10 251: 8 approach [9] 14:12 17:20 24:12 42:23,25 43:2 44:25 53:12 244:19 approached [1] 50:23 approaches [2] 94:22 261: 1 appropriate [8] 59:1 69:14 116:18 117:1 147:7 149:2 221:2 234:2 appropriately [1] 200:19 approximately [7] 46:4,9, 10 47:4,7,11 121:8 April [1] 112:5 Arbor [1] 123:1 archive [1] 261:20 Archive's [1] 261:3 archives [1] 218:22 area [4] 52:20 65:24 102:10 124:22 areas [3] 8:7 26:8 171:12 aren't [8] 17:11 68:25 129: 9 197:7 230:2 233:17,17 257:13 argue [1] 109:6 arguing [1] 228:25 argument [10] 56:19,23 83: 17 194:10 202:19 219:21</p>	<p>240:16 243:5 273:17 274: 7 arguments [1] 111:25 arise [4] 134:8 177:17 187: 16 238:3 arises [1] 187:20 Arkansas [12] 139:1 140: 13,16 153:24 154:1,3,6,14 179:17 235:4,5 238:5 ARL [1] 266:22 arm [1] 225:25 around [12] 17:1 42:23 75: 14 98:23 102:3 130:20 152:17 170:24 174:25 202: 8 212:25 232:4 arrangement [2] 69:14 127:1 array [1] 135:11 Art [3] 10:25 29:20 170:21 Arte [1] 231:6 article [7] 47:5,8 51:7 52: 10 242:12 269:13,19 articles [11] 18:11 46:4,5,5, 9,13 47:15 48:16 51:11 212:10,10 articulate [2] 128:10 252: 20 articulated [2] 76:22 107:8 artist [1] 53:21 artists [4] 29:16 72:10,17 268:3 artists' [2] 266:19,25 arts [3] 162:11 170:22 269: 22 ascertain [1] 51:21 ASERL [8] 135:9,14,19,22, 25 136:7,9 137:12 aside [3] 23:16 84:20 90:24 asks [1] 113:10 aspect [2] 71:25 128:21 aspects [2] 265:19,20 assert [11] 47:22 54:8 71:8 94:3,8 126:11,15 153:5 227:14,16 238:3 asserted [4] 100:10 126:19 127:5 153:16 asserting [2] 184:13 227:7 assertions [1] 270:13 assess [8] 88:15 94:15 113:17,17 262:17 assessed [2] 139:20 140: 16 assessing [5] 26:7 57:24 76:17 80:9 112:19 assessment [7] 5:2 25:21 26:4 88:19 93:25 113:11 148:25 asset [3] 32:9 63:14,17 Assistant [4] 9:1 77:18 190:2 191:10 Associate [2] 10:4 138:24 associated [3] 106:8 157:</p>	<p>9 259:16 Association [15] 11:15,16 30:7 79:18 135:2 145:10, 16 178:12,13 191:16,17 192:13,14,15 193:6 associations [3] 29:17,23 134:25 assume [4] 35:9 94:25 173: 18 210:22 assuming [2] 61:13 128:5 assurances [1] 250:1 assure [1] 35:6 astray [1] 148:24 athletic [2] 197:9 201:17 attach [1] 16:15 attempt [1] 59:21 attempted [6] 34:11 39:13 44:23,25 52:3 72:4 attempting [1] 115:2 attempts [1] 267:2 attend [2] 26:14 30:3 attention [9] 26:17 42:16, 17 68:24 70:11 105:5 126: 19 187:6 271:12 attentive [1] 187:10 attest [2] 23:3 65:8 Attitudes [1] 260:22 Attorney [13] 9:3,5 10:20 77:18,19 79:1,2 130:4,19 141:19 205:10 231:9 267: 25 attorney's [1] 119:11 attorneys [10] 5:21 82:11 119:16,18,19 129:25,25 173:10 205:9 226:20 attorneys' [2] 64:22 112:9 attractive [2] 163:7 233:4 attribution [7] 99:7 110:4, 5,5,6 127:14 228:15 audience [3] 132:6 252:3, 11 audio [4] 6:2 106:22 133:9 138:24 author [3] 26:22 99:21 203: 13 author's [1] 114:15 author/plaintiffs [1] 261: 19 authority [7] 32:25 74:22 140:11,15,24 156:5 180:2 authorization [3] 46:3 62: 5 244:4 authorized [2] 115:7 142: 16 authors [6] 65:7 85:23 89: 1 111:8,9 120:19 authors' [5] 92:17 93:1 120:13,15 261:9 availability [4] 92:5 199:3 229:13 230:25 available [33] 13:25 16:6 80:12 85:1 91:25 124:15</p>	<p>130:3 136:4 140:21 148:8 149:6 152:14 162:10 163: 3,9 174:9 176:4 184:11 190:21,22 193:17 200:14, 23 207:1 215:4,9 227:9,11 240:6 244:16 270:12 272: 21 275:5 avenue [1] 238:12 average [2] 92:21 270:25 avoid [5] 4:16 76:1 94:21 127:8 134:6 award [1] 180:4 awarded [2] 154:21 235:6 aware [31] 18:3 46:15 51: 18 61:8 65:3 85:19 114:12 121:6,16 122:20 136:25 140:10 141:2 142:14,15 146:4 147:24 157:10,12 158:25 164:9,21 168:21 169:16,25 176:3 188:2,11 193:19 210:21 219:11 away [13] 37:18 38:20 43: 12 46:7 106:14,17 153:11, 18 162:12 196:22 209:10 215:19 246:9</p> <p style="text-align: center;">B</p> <p>B.V [1] 90:11 back [51] 5:9 12:6 22:8 23: 18 34:20 43:13 52:18 64: 17 65:21 74:12 75:17 76:8 86:12 88:3 91:4 92:9 93:6 98:11 108:17 115:25 117: 17 118:1 121:20 129:7 130:10 131:15 133:3 165: 19 166:19 168:24 180:21 183:15 189:15,23 194:5 200:16 202:3,6 206:19 212:12,15 213:4 215:6 219:3 220:3 224:15 236: 10 242:19 246:8 248:9 254:1 background [5] 12:14 42: 9 45:3 53:2 104:7 backing [1] 227:8 backup [1] 54:25 bad [7] 28:1 53:18 119:22 122:8 177:2 200:12 237:7 badly [2] 200:2 244:8 bag [1] 49:12 balance [4] 4:20 96:25 180: 16 251:1 ban [1] 208:7 Band [24] 192:10,11,11 203: 17,18 205:8 206:5 209:5,6 217:17,18 229:14,15 232:8, 18,19,21 234:1 243:11,12 245:3 247:14,24 269:11 Band's [1] 250:8 bar [3] 156:21 158:10 239:5 barely [1] 106:20 bargaining [1] 123:17 Barron's [3] 10:6 46:5 47:</p>	<p>17 base [1] 254:14 based [14] 27:14 79:16 84: 25 90:14 124:13 140:25 149:11 211:1 247:16 255: 1 256:9,25 257:1 259:17 bases [1] 147:12 basic [2] 56:10 199:2 basically [9] 33:7,11,20 120:4 123:15 139:24 154: 22 179:17 202:20 basis [16] 4:12 5:3 67:4 113:4 128:11 139:9,21 155:3 157:20,24 158:2 168:21 182:19 256:25 267: 24,25 basketball [2] 125:13 253: 16 battle [1] 210:8 bear [1] 183:3 bearing [1] 143:3 became [2] 46:15 92:3 Beck [1] 231:9 become [4] 119:18 130:19 155:4 266:1 becomes [2] 187:17 202:4 bedrock [2] 158:7 169:22 Bee [1] 51:13 beer [1] 252:23 began [6] 40:3,4 42:20 46: 18,19 66:14 begin [8] 5:13 8:17 40:2,2 42:25 44:4 170:2 190:5 Beginning [4] 7:12 130:11, 25 214:23 begins [1] 132:3 behalf [10] 3:13 11:14 77: 23 79:17,20,21 82:12 144: 8 191:16 226:25 behave [3] 60:4 160:17,19 behaving [3] 160:21 200:2 244:7 behavior [11] 101:8 122:8 144:11 160:23 161:7 164: 7 168:22 195:22 216:3 217:23 224:12 behind [4] 59:16,16 62:24 258:18 belief [2] 263:10 272:22 believe [39] 12:21 21:8 22: 16 39:13 53:17 58:9 67:18 68:2 72:15 74:23 80:4 82: 14 101:12 108:1 123:25 124:3 125:3,4 130:25 140: 18 141:6 142:20 143:18 147:6 150:2 154:15 158: 22 164:23 165:8,15 179:23 197:8 198:4 201:9,10 202: 16 225:11 240:15 258:23 believed [3] 12:12 29:8 67: 15 believing [1] 263:11</p>
--	---	--	---	---

<p>Bell ^[29] 77:6,7,7 97:8,15 98:13,18 99:13 100:14 107:23 108:3,5 109:20,25 110:2,16 111:2,4,10,12 112:3,4,7 119:4,5 124:7 125:2,5 165:22 Bell's ^[1] 111:14 belongs ^[1] 233:9 bending ^[2] 219:19,25 benefit ^[5] 4:5 7:3 23:14 167:13 269:18 benefits ^[1] 274:8 Bennett ^[1] 141:12 Benson ^[19] 9:18,19,20 14: 20 17:18,23 20:24 24:19 27:16 29:3 53:16,17 55:1 56:4 57:6 68:21 69:2 70:4, 13 Berkeley ^[8] 143:23 149:9 161:4 163:5 174:5,6 175: 17 176:6 besides ^[1] 187:12 best ^[15] 5:23 34:14 49:7 64:5 75:15 119:18 135:17 136:7 137:14 190:9 193: 13 194:4 239:14 255:17 256:15 better ^[8] 45:13,14 119:23 167:14 248:25 249:5 257: 15 258:10 between ^[24] 24:18 31:15 46:2 48:2 60:6 66:16 74: 13 81:18 118:17 120:24 126:14 128:4 142:23 162: 16 163:20 169:9 171:3 173:6 184:8 186:16,19 250:10 264:23 267:9 beyond ^[1] 60:1 156:15 167:20,21 174:17 175:4 178:25 197:20 213:23 260: 11 265:21 big ^[14] 36:20 37:12 134:25 137:19 157:9 159:13 174: 1 202:5 218:24 222:1 231: 20 249:8 253:2,5 bigger ^[1] 35:8 biggest ^[5] 27:22 51:16 192:3 227:19 232:1 Bill ^[5] 11:12 34:19,21,24 273:21 billions ^[1] 218:23 bills ^[1] 38:15 biochemistry ^[1] 79:12 Birmingham ^[1] 192:2 bit ^[36] 8:3 13:2 15:14 63: 22,23 74:10 75:6 80:7 84: 3 107:22,24 110:13 112:22 126:13 131:24 135:8 147: 12 153:12 169:20 175:8 177:23 180:22 192:7 196: 13 213:1,7,15 227:13 240: 1 251:24 254:8,17 266:13</p>	<p>270:13,20 274:17 bite ^[1] 246:19 biweekly ^[1] 155:3 black ^[4] 40:11 201:21 202: 10,13 Blackbeard ^[1] 35:13 Blackbeard's ^[1] 35:20 blanche ^[1] 160:19 blasted ^[1] 24:3 blessed ^[1] 166:22 blessing ^[1] 60:23 blocking ^[1] 122:8 blogger ^[1] 46:16 blogger's ^[1] 46:19 blown ^[1] 231:13 board ^[16] 29:1 129:11 145: 22 167:22 187:10 214:5 222:21,24 223:2 226:6,16, 25 234:21 235:1 236:5 238:22 boards ^[1] 81:1 body ^[1] 99:9 bonafide ^[1] 203:12 bono ^[1] 111:8 book ^[40] 21:4,5 26:18,19, 20,21 40:9 41:23,23 43:15 66:7,7 67:22 72:21,22,24, 25 73:23 80:19 98:20,22, 23 111:3 125:8 181:14,16, 17,18 182:1,9,17,22 192:2 194:10 215:11 231:16,17, 18,20,24 bookend ^[1] 37:18 books ^[11] 18:11 21:8 42: 12 73:19 80:19 98:12,18, 24 100:3 108:23 182:12 Books/HathiTrust ^[1] 263: 4 boot ^[1] 41:10 bosses ^[2] 167:21,23 both ^[26] 28:14,19,25 46:13, 25 81:9 121:22 126:5 134: 6 143:2 146:20 151:18 154:9 163:23 176:15 179: 19,23 187:1 193:23 194:19 197:22 200:18 217:13,23 235:24 274:2 bothers ^[1] 99:21 bottom ^[3] 42:3 253:22 258:3 Bound ^[3] 40:7 42:2 129: 25 boundaries ^[4] 23:13 260: 11 261:23 263:1 box ^[3] 7:7 185:25 250:6 boxes ^[1] 137:10 Bracewell ^[3] 226:13,22 227:1 Brammer ^[1] 272:17 branch ^[1] 77:20 brand ^[2] 3:10 98:5 Brandon ^[3] 134:11 175:2</p>	<p>218:16 Brandon's ^[1] 160:25 brands ^[1] 101:2 brazenly ^[1] 127:7 brazenness ^[1] 45:23 breach ^[12] 230:19,25 231: 12 232:5,16 235:23 236:22 239:17 247:1 249:11 267: 7,15 breached ^[1] 72:13 breaching ^[1] 236:15 breadth ^[2] 80:14 205:11 break ^[6] 6:18 63:25 75:12 118:21 215:5 265:9 Breyer ^[2] 194:3 195:18 brief ^[13] 44:18 74:9 75:11 97:12 110:25 134:4 135:7 189:25 218:15 228:8 240: 12 257:1 273:14 briefe ^[1] 266:13 briefing ^[1] 241:14 briefly ^[7] 57:20 111:2 118: 14 128:20 198:14 224:18 234:24 briefs ^[1] 136:10 bright ^[1] 74:18 brilliant ^[1] 209:17 bring ^[20] 32:14 42:16,17 88:3 95:18,20 181:13 197: 6,7 207:19 227:20 233:12 234:20,25 235:2 238:7,20 244:13 252:21 256:7 bringing ^[7] 81:23 190:18, 20 197:24 215:24 227:13 238:12 bristle ^[1] 270:19 broaching ^[1] 18:18 broad ^[11] 9:11 24:14 33:5, 24 81:4 135:11 208:2,13 259:21 260:16 261:2 Broadcasting ^[1] 74:20 broaden ^[6] 8:10 11:21 75: 7 76:14 112:21 163:24 broadly ^[2] 76:16 262:6 broken ^[2] 250:5,5 brought ^[28] 39:21 54:9 68: 24 80:3,6 83:4 95:9 105:5 107:20 126:18 140:5 154: 7,13,19 156:6 167:9 172:8, 12 182:23 190:21,24 197:5 201:5 213:5,11 217:19 230:10 238:10 browser ^[1] 229:25 build ^[1] 148:1 builds ^[1] 253:8 built ^[1] 212:24 built-in ^[1] 248:12 bulk ^[1] 134:15 bullet ^[4] 84:8,9,16 85:5 bunch ^[1] 100:3 burden ^[2] 217:4 271:2 bureaus ^[2] 81:1 129:13</p>	<p>business ^[16] 37:12 41:24 42:10 45:7 70:5 104:19 120:23,23 138:2 186:24 196:23,24 222:11 228:16, 18 242:22 businesses ^[4] 17:10 31: 21 32:3 274:6 Butler ^[16] 134:8,10,11 149: 24 151:23 158:11 160:14 165:1 166:8 167:9 176:14 184:16,25 185:4 188:13 218:16 Butler's ^[1] 167:2 button ^[2] 5:25 190:8 buy ^[2] 108:22 126:4 buying ^[1] 247:22 Bynum ^[72] 77:9,13 80:5 86:6,8,13 90:3,8 101:12 104:10,12 106:12,12,13,15, 16,18,19,21,25 118:3 124: 8 191:19,22 192:1,1,9 194: 2,3,20 195:18 197:23 201: 5,15 221:19,23 223:22 224: 22 225:11,13,15 226:4,5 231:1,4 232:13 234:1 235: 19 237:25 238:1 247:17 251:23 252:5,7,14,16,18 254:5,5,6,12,22 255:9,13 256:9,20 257:1,6,18,21,25 258:25 Bynum's ^[5] 197:8 200:8 203:3,6 224:21</p>	<p>10 271:16,21 272:16 273:7, 8 came ^[11] 41:19 42:8 160:1, 2 194:10 226:14,15 236:10 237:1 242:8 255:3 campaign ^[1] 222:10 Campinha-Bacote ^[1] 224:19 camp ^[1] 41:11 campus ^[12] 29:4 123:1 144:2,6,15 146:19 148:2,3 155:5,11 168:6 176:3 campus-wide ^[3] 151:8,10, 11 campuses ^[13] 78:18 121: 12 135:22 137:13 139:1,10 154:1 159:5 168:6 170:14, 15 175:13 176:19 canary ^[1] 39:2 candidly ^[2] 47:2 48:3 cannot ^[3] 139:16 167:5 223:20 cap ^[3] 234:11,14 238:18 capacity ^[18] 61:4,22 94:12 95:1,3,12,16 102:6 111:8 130:15,17,20 197:25 201:1, 7,11 209:8 259:14 caps ^[2] 234:18 238:8 card ^[1] 129:2 cards ^[1] 16:12 care ^[6] 157:2 204:10,11 209:12 235:10 264:8 career ^[2] 41:13 222:1 careers ^[1] 67:25 careful ^[8] 29:1 31:10 105: 17 113:22 164:19 170:23 173:2 187:21 carefully ^[3] 90:7,25 112: 16 Carolina ^[11] 34:10 35:11, 19,24 36:15 37:22,24 38: 18 126:16 232:15 272:6 carrot ^[1] 217:10 carry ^[1] 153:14 carte ^[1] 160:19 case ^[123] 19:13,16 35:5 36: 17 37:17,21,25 38:2,3,11, 22 39:1 46:22 48:18 50:24 56:9,17 62:16 68:11 82:12 83:20,21 87:25 90:10 95:5, 5,25 108:13 110:21 111:11 112:3,4,6 115:15 117:22 118:23 119:7,8,9,19 124: 13,17,19 127:9 129:7,10 130:12 135:7 141:1 154: 22 159:1 180:18 195:8 197:14 200:3,7,10 203:3,7, 14 213:15 220:25 222:7,19, 20,23 223:1 224:19,23 225: 4,4,12,17,18 226:1,7,8,11, 12,19,24 228:8,9 229:8,12 230:15 231:5,6,11,12 232:</p>
---	--	---	---	---

C

calculation ^[1] 121:3
California ^[21] 32:25 33:9,
11,12,19 44:19 45:25 78:
18 85:24 90:10 111:7 112:
7 119:7 121:8 151:9 174:6
176:7 182:15 188:17 223:
13 247:21
California's ^[1] 78:16
call ^[19] 5:22,22 7:13 9:8
35:20 39:10 43:4 48:15 62:
3 72:8 106:22 158:16 183:
10,11 190:9 220:14 252:3
261:21 265:11
called ^[12] 14:19 16:11 43:
12 90:11 98:23 101:25
139:11 142:10 148:23 234:
22 235:5 260:19
calling ^[1] 161:8
calls ^[2] 66:4 113:20
CalPERS ^[18] 45:24 46:2,3,
8,12,20,20 47:6,10,23 48:1,
8 50:3,24 51:9,20 52:15
68:11
Calzada ^[35] 193:3,4,4 195:
23,25 199:12 207:13 220:
10,12,24 221:7 227:23,24,
25 233:7 240:4,10,11,12
242:20,21 243:12 244:9,11
249:10,15,16 252:14 270:9,

<p>1,5,9,22 233:8 235:4,24, 25 236:1,24 238:25 239:2, 4,6,13,15 240:3,9 253:4 256:1,2,15,17,21 257:7 258:1,6,9,20 263:3,4 270:12</p> <p>cases [95] 14:10 49:8 54:24 60:11 68:11 80:12,14, 16,24 81:13,16,21,25 82:13,14,25 83:2,8,13 84:9 85:16,16 86:4,8,14,19 87:7,11, 14,18 88:6,11,14,18,21 89:2,3 90:2 91:8,11,17,21 92:13 100:11,15,16 109:1 112:17 117:10 119:24 126:18 127:6 136:10,10 137:15,15 147:13 180:19 195:13 200:8 203:19 210:14,23 211:4 224:21 226:2 229:16,17,19 230:6,11,12 231:10 233:18 236:21 237:17 239:11 248:1 250:22 254:10,18,24,25 255:2,3,12,13,16,21 256:3, 6 257:9,11,14 272:9</p> <p>cash [1] 48:2</p> <p>cast [1] 49:9</p> <p>catastrophic [1] 153:22</p> <p>categories [1] 144:18</p> <p>caused [1] 75:2</p> <p>causing [3] 52:8 237:19,20</p> <p>cautious [1] 260:5</p> <p>CDL [1] 261:13</p> <p>cease [18] 64:22 65:17 69:12,23 71:22 79:4 93:7,11, 18 97:24 100:19 108:11 127:6,15 168:19 169:16 172:6 209:15</p> <p>Center [5] 10:25 29:20 142:24 143:14 222:3</p> <p>centers [3] 78:19 170:21 260:18</p> <p>central [2] 4:20 171:9</p> <p>CEO [1] 11:1</p> <p>certain [13] 6:21 15:22 35:9 66:8 163:1 169:12 174:21 178:15 214:8 236:18,19, 20 238:12</p> <p>certainly [28] 17:7 20:19 22:4,6 27:8 32:14 36:24 37:20 52:4,23 60:21 86:24 87:5,9 96:17,18 103:24 112:15 126:14 130:8 137:1,21 160:12 166:1 171:21 209:13 243:4 272:14</p> <p>cetera [6] 18:11 30:1,21 79:5 88:16 170:23</p> <p>chain [1] 261:21</p> <p>chair [1] 116:25</p> <p>challenge [1] 32:11</p> <p>challenged [1] 14:10</p> <p>challenging [1] 187:8</p> <p>chance [7] 136:17 192:7</p>	<p>245:25 252:9 270:11 273:16,16</p> <p>chancellors [1] 167:22</p> <p>change [6] 106:22 117:9 136:8 161:17 257:5 260:12</p> <p>changed [1] 184:5</p> <p>changes [5] 4:11 48:6 164:7 216:4 231:19</p> <p>changing [1] 40:4</p> <p>channel [5] 7:19 56:15 186:25 187:13 275:6</p> <p>chapter [1] 215:11</p> <p>chapters [1] 80:19</p> <p>characterize [2] 261:19,24</p> <p>charge [3] 155:10 214:10 224:4</p> <p>charged [2] 47:4,7</p> <p>chasing [1] 159:13</p> <p>chat [6] 7:6 65:12,15 76:6 132:7 133:14</p> <p>chats [1] 137:12</p> <p>chattels [2] 243:19,25</p> <p>Chavez [4] 14:10 231:6 232:1 255:3</p> <p>check [3] 50:17 75:12 256:16</p> <p>checklist [1] 137:9</p> <p>Chemical [5] 79:10 101:18, 23,24 230:8</p> <p>chemist [1] 103:18</p> <p>chemistry [7] 79:12 102:4, 10,11,13 104:25 124:23</p> <p>chief [3] 94:18 145:8 226:9</p> <p>children [1] 42:11</p> <p>chilled [3] 162:21 213:19 214:21</p> <p>chilling [8] 134:20 136:18 159:16 213:9 218:3,19 219:13,15</p> <p>chills [2] 159:3,22</p> <p>chime [5] 5:24 8:4 167:15 273:16 274:24</p> <p>choose [1] 162:9</p> <p>choosing [2] 120:6 220:6</p> <p>chose [2] 163:2 243:2</p> <p>chosen [1] 228:4</p> <p>Christi [3] 9:25 41:9 65:21</p> <p>chunk [2] 242:3,4</p> <p>circle [1] 130:10</p> <p>Circuit [7] 19:16 192:5 202:2 228:21 231:8,14 272:18</p> <p>circuits [1] 248:2</p> <p>circumstance [1] 95:17</p> <p>circumstances [4] 61:1 70:1 136:9 271:22</p> <p>cite [2] 33:9 128:7</p> <p>cited [3] 88:24 263:4 265:7</p> <p>city [5] 40:16 60:14,15 111:19 241:3</p> <p>civil [1] 260:17</p> <p>claim [53] 25:25 61:11 62:</p>	<p>16 71:16 90:15 93:24 95:4, 22 97:25 109:2,10,12 117:3 128:23 140:5,20 150:6 154:7,16,20 156:4,6 157:4, 21 158:3 181:2 183:18 184:8 197:7 200:5 202:5 222:25 228:24,25 229:2,6, 9,10,13 230:24,25 232:25 233:12 234:25 238:3,8,9, 20 239:5,17 240:2,6 262:14</p> <p>claimed [1] 108:15</p> <p>claiming [6] 97:14 108:11 109:22 185:24 197:11 202:8</p> <p>claims [96] 25:24 47:1 48:8, 11 49:6,6,7 76:19 79:4 81:23 82:22 83:2,3 94:15,16 95:21 96:7 97:3 100:10 107:19 108:18 112:19 126:22 127:10 140:16,20,25 154:4,8,20,24,25 155:20 156:6 157:13 177:16 178:1,4,6,11,16,18,25 179:5,14, 22 180:17 183:21,22 184:7, 10,18,21 188:10 190:18,20, 21,23 193:20 197:6 201:5 205:12 210:16,17 213:4,11 219:12 224:14 227:7,13,15, 16,21,22 230:3 233:10 234:5,14,20,21 235:2,6 236:21, 22 238:12,18 240:1 246:11 247:17 249:11,12,23,25 256:8 264:23 274:12</p> <p>Clarification [3] 4:13,25 36:7</p> <p>clarify [6] 43:24 69:18 151:1 175:8,11 188:5</p> <p>clarifying [3] 43:15 104:15 235:18</p> <p>class [3] 113:13 215:2 236:11</p> <p>classes [5] 41:15,16 43:21, 22,23</p> <p>classroom [1] 42:7</p> <p>Clause [2] 269:19 270:2</p> <p>clear [22] 14:4 19:15 24:23 57:7 69:8,11,19 73:1 82:21 87:15 88:5 94:16 101:22 105:2 126:9 153:3 167:9 209:25 220:7 270:1,2 274:2</p> <p>clear-cut [1] 119:23</p> <p>cleared [1] 119:21</p> <p>clearly [8] 26:14 61:18 99:4 113:20 119:8 159:17 166:21 201:4</p> <p>click [1] 212:10</p> <p>click-on [1] 229:25</p> <p>client [3] 196:8,9 242:25</p> <p>clientele [1] 42:13</p> <p>clients [8] 77:24 79:20 142:</p>	<p>2 196:25 209:17 218:4 270:23 271:22</p> <p>close [8] 25:7 113:19 120:22 132:1,9 175:25 212:12, 13</p> <p>closed [1] 43:3</p> <p>closely [5] 137:15 142:25 182:14 185:8,11</p> <p>closer [2] 45:13 254:8</p> <p>closing [2] 32:12 74:12</p> <p>club [1] 112:10</p> <p>Coaches [1] 125:10</p> <p>coal [1] 39:2</p> <p>Coalition [1] 11:1</p> <p>coalitions [1] 260:16</p> <p>Code [2] 33:11 234:4</p> <p>cogent [1] 108:13</p> <p>cognizable [2] 118:19 239:17</p> <p>cognizant [2] 94:14 209:1</p> <p>cohort [1] 54:12</p> <p>cold [1] 48:5</p> <p>collapse [1] 124:10</p> <p>colleague [4] 34:5 107:10 119:3 190:4</p> <p>colleagues [5] 8:18,20 121:20 133:18 227:4</p> <p>collect [1] 100:5</p> <p>collecting [1] 45:8</p> <p>collection [4] 148:20 150:14 163:2 166:15</p> <p>collections [10] 122:10 148:7,7,12 149:19 150:2,8 162:1 176:11 218:21</p> <p>collectively [2] 123:20 145:23</p> <p>College [10] 10:25 29:21 37:22 41:13,18 42:10 62:23 96:23 192:15 229:20</p> <p>college-level [1] 43:21</p> <p>colleges [4] 27:10 30:22 93:9,9</p> <p>color [1] 40:10</p> <p>Colorado [5] 61:9 77:19 120:14 183:17 205:13</p> <p>colossal [1] 177:5</p> <p>columns [1] 243:10</p> <p>combat [2] 210:2,10</p> <p>combine [1] 134:3</p> <p>come [32] 70:10,24 76:8 79:5 93:15 95:22 103:17 116:24 122:7,17 131:16,18 143:16 155:6 158:18 170:24,25 173:13 176:10 178:1 181:8 182:2 184:19 185:18 215:6,18 241:20 242:10,19 244:13 261:16 264:24</p> <p>comes [8] 4:22 56:7 71:5 105:22 164:8 183:18 209:9 219:1</p> <p>comfortable [2] 159:7 164:17</p>	<p>coming [9] 21:5 30:8 36:22 115:25 137:13 161:4 177:25 178:12 205:5</p> <p>commence [1] 5:20</p> <p>comment [18] 15:3 17:18, 24 19:13 20:6 28:7 74:9 92:13 108:6 182:5 198:13 211:20 225:9 242:16 246:16 249:15,22 254:9</p> <p>commentary [1] 220:13</p> <p>commentators [1] 22:20</p> <p>comments [53] 4:10 6:13 7:3,14 15:6 16:5 17:15 23:3 30:12,16 34:8 39:7 44:15 50:4,23 53:24 58:12 74:25 76:9 77:23 82:19 87:17 89:14,14 97:9 118:8,15,24 121:5 123:12,15 132:8 135:4,4 147:15 153:9 165:3 185:16 190:10 206:4 207:6 217:7 227:10 230:22 238:15 239:21 251:25 259:15 263:5 271:13,25 273:18 274:3</p> <p>commercial [2] 23:5 141:19</p> <p>commercially [1] 182:10</p> <p>commercials [1] 141:16</p> <p>Commission [14] 140:16, 20 154:4,8,20,24 156:7 179:5,22 180:2 183:21 195:15 235:6 239:7</p> <p>commissions [3] 80:25 129:13 234:21</p> <p>commit [2] 118:17 208:18</p> <p>committed [2] 27:3 89:12</p> <p>common [10] 35:1 50:15 126:21 135:20 150:18 178:8 212:17 234:17 239:9 262:7</p> <p>commonly [1] 102:22</p> <p>communicating [1] 45:8</p> <p>Communication [4] 143:22,23 175:1 261:22</p> <p>Communications [2] 135:14 192:20</p> <p>communities [7] 50:17 68:9,10 158:14 176:18 214:12 266:21</p> <p>community [16] 68:15 98:7 136:7 148:23 159:18,19 160:22 161:10,12 162:10 174:20 175:5 176:23 184:14 193:1 222:2</p> <p>companies [2] 210:20 260:17</p> <p>Company [6] 10:5 35:12, 15 218:4 242:22 271:1</p> <p>compare [1] 135:17</p> <p>compared [5] 27:10 87:18 160:9 173:6 240:19</p> <p>comparing [1] 169:25</p>
---	--	---	---	---

comparison ^[1] 171:3 compelled ^[6] 250:14,14, 18 272:5,8,11 compelling ^[2] 12:22 269:15 compensate ^[2] 206:23 210:5 compensated ^[1] 196:24 compensating ^[1] 220:16 compensation ^[1] 221:1 compete ^[1] 108:24 competing ^[3] 241:9 242:8, 24 competition ^[1] 38:12 competitors ^[1] 196:6 compiled ^[2] 12:21 46:12 complainant ^[1] 180:5 complainants ^[1] 185:17 complaint ^[4] 54:6 91:18 149:8 269:4 complaints ^[11] 29:25 54:2,20,21,22 55:2 114:4 154:10 169:8 216:15 262:3 complete ^[4] 4:19 174:14 195:20 248:8 completely ^[5] 115:1 181:11 207:17 211:8 221:15 completion ^[1] 15:16 compliance ^[13] 135:21 138:6,7,9 147:2,7 152:21 188:19 198:17 199:14 259:22 260:7 265:8 complicated ^[3] 248:1,10, 11 comply ^[10] 137:23 145:20, 22 146:10,16 148:11 171:17 180:14 251:14 267:2 complying ^[2] 146:21 151:12 component ^[3] 102:24 117:7 121:24 comport ^[1] 151:20 comprised ^[1] 139:1 comprises ^[2] 78:18 103:5 computer ^[4] 155:13 202:12 244:2,3 conceivable ^[2] 48:16 53:5 concepts ^[1] 270:19 concern ^[13] 4:7 53:23 99:25 108:20 153:9 160:10 190:23 213:8 217:7,9 251:15 259:23,25 concerned ^[7] 52:9,15 107:14 168:1,10 200:19 271:5 concerning ^[1] 267:21 concerns ^[13] 8:1 17:25 18:6,21 25:22 54:13 143:15 185:10 186:19 213:2 217:8 243:2 246:23 conclude ^[1] 257:22 concluded ^[1] 229:5	concluding ^[3] 67:5 73:12 113:5 conclusion ^[2] 265:18 274:22 conclusions ^[2] 12:2 124:13 condemnation ^[1] 49:7 conduct ^[11] 8:12 18:2 19:25 56:1 57:9,15,16 64:7 113:4 155:17 170:2 conducted ^[2] 3:17 12:15 confession ^[1] 258:15 confidence ^[1] 150:10 confidentially ^[1] 13:22 conflated ^[1] 268:11 conflict ^[1] 265:6 conflicts ^[1] 248:2 confusion ^[1] 114:10 Congress ^[25] 4:9,15 17:5, 21 24:12,24 52:21 72:4,15 74:21 75:1 122:5 164:25 195:11 209:24 245:12,16, 20 246:3 248:4 254:14 257:15 265:24 269:20 270:1 Congress' ^[2] 5:5 249:4 congressional ^[2] 74:19 206:21 congressman ^[1] 168:4 connect ^[1] 59:18 connected ^[2] 68:15 103:15 connects ^[1] 254:8 conscientiously ^[1] 216:5 consciously ^[1] 263:8 consequences ^[2] 116:13 223:16 conservative ^[5] 158:21 165:14 166:14 168:12,14 consider ^[14] 19:18 30:24 62:13 65:9 75:6 76:16 162:22 217:21 225:20 251:1 263:8 265:24 269:12 273:3 considerable ^[1] 141:1 consideration ^[3] 5:6 22:10 269:15 considerations ^[2] 8:9 260:1 considered ^[9] 18:22 95:24 225:25 240:19 252:21 255:12,14 269:13 274:12 consistency ^[1] 249:13 consistent ^[5] 93:17 136:12 233:20 250:1,4 constant ^[1] 210:7 constantly ^[2] 161:19,24 constituents ^[1] 163:24 Constitution ^[12] 26:10 31:20 32:1 87:15 179:17 214:4 240:7,7 245:3 269:12,13, 20	constitutional ^[26] 4:16 24:19,22,25 25:6,17 26:7, 12,15 27:3 53:23 54:13 58:16 59:24 60:19 76:25 78:22 117:20,24 156:12,20 158:7 169:22 170:6 245:8 247:3 constitutionally-protect ed ^[3] 84:14 85:9 128:16 constraints ^[1] 6:10 constructive ^[1] 110:8 constructs ^[1] 268:10 consult ^[4] 143:7,11 170:25 171:1 consultant ^[1] 10:15 consultations ^[8] 144:1 146:15 175:16,19,22,24 176:6 177:24 consulted ^[1] 170:20 consulting ^[3] 21:4 28:19 170:14 consumers ^[1] 230:2 consumes ^[1] 148:6 consuming ^[1] 203:22 contact ^[6] 32:13 70:23 148:24 150:3 185:25 186:2 contacted ^[1] 105:3 contacts ^[1] 212:15 contain ^[1] 249:7 contemplate ^[1] 156:17 contemporary ^[2] 272:22 273:3 content ^[31] 51:17 72:2 93:2 116:6 120:17 121:9,14, 15 123:16 141:21 142:4 148:6 149:6 152:19 162:10 163:2,9 171:21 172:21 173:10 174:9 175:16 183:2,5,8 184:10,12 219:24 229:19 230:16 243:20 context ^[23] 25:1 64:13 68:6 75:7 84:3 115:24 116:4 118:9 126:24 151:17 158:15 162:24,25,25 174:21 181:14 182:22 186:22,23 187:7 195:7 207:19 269:14 contexts ^[3] 62:9,12 151:13 contingency ^[1] 267:24 continue ^[9] 22:22 72:2 82:24 103:12 106:2 156:2 162:19 211:12 260:7 continued ^[2] 65:2 99:10 continues ^[1] 155:14 continuing ^[1] 209:24 contours ^[1] 69:9 contract ^[35] 41:4 179:13 183:9 197:16 229:22 230:5,7,10,20,25 231:12,21 232:5,9,10,17,24,25 233:2,	8,10,12 234:1,5,14 235:23 236:10,16,22,25 243:18 247:1 249:11 267:7,14 contracting ^[3] 72:11,12 145:24 contracts ^[6] 66:18 125:20, 21 188:2 211:22 212:24 contractual ^[2] 267:9,15 contradict ^[1] 208:16 contrary ^[2] 62:5 170:12 contravention ^[1] 162:13 contribute ^[3] 190:9,12 259:4 contributed ^[2] 191:14 249:2 contributing ^[2] 15:2 75:10 contribution ^[2] 266:11 273:10 contributions ^[1] 4:1 contributory ^[1] 265:19 control ^[8] 63:2,2 168:11 187:19 228:2 232:11 243:3 263:5 controlled ^[4] 168:16 261:3,7 264:13 convenings ^[1] 152:2 conversation ^[10] 28:21 47:20 57:21 122:18 124:18 171:14 174:4,7 200:21 273:2 conversations ^[4] 46:20 136:6 256:9 257:2 converted ^[1] 35:21 Cooper ^[22] 4:24 9:16 35:8 39:2 46:24 48:6,7,18,22 71:20 82:20 107:13 129:10 135:7 136:11 177:3 194:4 218:18 232:9 239:10 257:5,7 coordinate ^[1] 137:22 cop ^[3] 60:12,12,15 copied ^[4] 40:19 51:11 99:23 111:4 copies ^[8] 26:20,21 108:23 109:9 231:16 264:7 267:11,13 copy ^[4] 51:6 264:8,11,12 copying ^[2] 58:25 223:3 Copyright ^[432] 3:7,13,18 4:2,8,12,18,21,25 5:15,21 7:12,18,24 8:18,20 9:20 10:11,12 11:7,23 12:6,7,9, 13,16,24,25 15:20 16:2 17:3,5,13 18:9,25 19:7 20:12 21:21 22:17 23:17 24:17 25:2,5,14,20 26:16 27:1,2, 17 28:6,13,18,21 29:15 30:16,23 31:19 32:1,23 33:14, 17 34:18 35:5,18 36:6,6 37:16,25 38:2,5,24 39:4 42:3 44:23 45:19,21 47:1,	17 48:24 49:4,6,11,17,23 50:7,8,22 55:20,25 56:11, 12 58:1,2,20 61:2,11 62:4 64:6,24,25 67:2,15 68:6,17, 23 71:20 72:23 73:21 75:2, 4,8,19 76:15 77:3 78:3,17, 20 79:4,6 80:3 82:22 84:17 85:7,19 88:8,10 91:8 94:11,17 95:3,4,23 96:7,15, 22,25,25 97:3,5,10,19 98:20,21 99:7,17 107:14 109:1,11 111:11,21 112:14 113:24 114:1,9,19,22,25 115:7, 13 117:9,11,15,23 118:17 119:15 120:6 122:21 126:22 127:4,22,23,23,25 128:8 129:9,15 130:9 131:16,17 134:13,20 135:1,13, 16,19 136:1,16,19,20,21 138:2,5,5,6,7,10,10,15 139:6,11,12,14,17,18 140:18 141:3 142:23 143:7,15,21 144:3,7 145:22 146:1,11, 12,17,22 147:3,21 148:11 149:7,11 151:10,13 152:21 154:14,21 157:11,25 158:6 159:2 160:12 161:3,13 162:13 164:1,11,16,21,22 165:20 168:2,7,13 170:9, 16,24 171:1,17 173:2 174:3,5 175:1,3,23 176:3,17,18, 24 178:1 180:9 183:6,18 184:15,18 185:10 186:6,22 187:7,12,18,18 189:18 190:3 191:6,7 192:3,12,17,19, 24,25 193:12,18,25 196:13 198:15,18 199:2 202:18 203:6,13,15 205:17 206:22 207:1,2,7,11,17,21 208:19 209:21,23 210:2,4,8 212:4 214:18 216:15,16,18 217:18,21 218:16 219:20 221:21 227:16,21 228:2,3,5,15, 23 229:1,5,7,9 230:23 231:5 232:2,23 233:5,9,11,13, 18 234:6 235:9,11,15,15 236:7 239:17 240:8,17 241:11,12 244:14,15,19,20, 21,22 245:1,2,23 246:9,10 247:11,25 248:7,10,10,18 249:6,7,11,13,14,19,20,25 250:2,10,13,19,21 251:2, 10,14,16,17 254:10 255:22, 25 257:9 259:13,18 260:4, 5,12,22,24 261:1,12,21,24, 25 262:4,14,22,25 263:15, 16,17,25 264:19,22,25 265:3,10,12,20 266:6 267:2,19 268:1,22 269:21 271:4 272:3,23,24 273:4 274:9, 10,23 275:4,6 copyright's ^[1] 36:23
---	---	--	--	--

<p>copyright-protected [1] 14:13</p> <p>copyright-related [2] 144:10,16</p> <p>copyright-wise [1] 62:10</p> <p>copyrighted [13] 18:11 23:15 81:6 113:15 147:19</p> <p>148:6 176:20 208:9 220:18 221:6 235:10 250:24 268:14</p> <p>copyrights [18] 20:18 34:11 36:10,11 37:23 47:24 49:15 69:5 70:7 96:11,13 101:3 102:7 190:15 205:3 216:10 268:6 274:4</p> <p>core [1] 233:11</p> <p>cores [1] 144:9</p> <p>corporations [2] 45:6 263:21</p> <p>Corpus [3] 9:25 41:8 65:21</p> <p>correct [10] 5:17 35:7 56:25 59:8 73:4 98:14 103:11 131:8 164:2 175:6</p> <p>correcting [1] 105:24</p> <p>corrective [7] 96:21 105:22 106:4 131:1,5,10,14</p> <p>correctly [4] 59:6 166:12 240:9,15</p> <p>correspond [1] 263:21</p> <p>corresponds [1] 14:9</p> <p>corroborated [1] 16:24</p> <p>cost [11] 32:17 34:22 35:4 81:22 117:15 125:8 128:13 217:4 225:6 258:5 278:7</p> <p>costs [4] 35:5 85:22 106:8 112:11</p> <p>couldn't [2] 101:1 110:7</p> <p>Counsel [28] 3:20 5:14 8:25 9:2 10:4,11 11:13 54:1 71:6 75:18 78:16 79:1,4 81:10,10 93:5 139:4 140:8, 23 145:8 185:9 186:9 187:2 190:2 191:7,10 193:5 218:4</p> <p>counsel's [4] 71:10 184:20 219:1 262:4</p> <p>counseling [1] 218:6</p> <p>counselors [2] 65:24 66:1</p> <p>count [2] 25:6 184:22</p> <p>counted [1] 93:7</p> <p>counterpart [1] 189:2</p> <p>counterpart's [1] 170:15</p> <p>counterparts [1] 145:18</p> <p>counting [1] 13:12</p> <p>countless [1] 13:13</p> <p>countries [1] 166:18</p> <p>country [6] 144:14 192:4 217:20 223:10,19 232:2</p> <p>counts [1] 85:21</p> <p>couple [12] 14:17 43:14 64:1 75:23 88:24 104:14 108:20 134:25 136:13 158:25</p>	<p>172:1 190:5</p> <p>coupled [1] 206:25</p> <p>course [28] 17:25 19:5 45:2 49:3 52:10 71:2 72:14 78:6 84:11 90:13 93:10 101:21 110:7 125:19 129:11 131:9 136:9 146:15 152:19,19 156:24 157:6 180:10 183:2 189:11 201:1 233:3 261:22</p> <p>courses [5] 41:18 143:2,3, 3 215:1</p> <p>court [86] 7:20 13:23 16:22 24:23 25:1 34:4 36:5 38:7 49:2,2,3 52:25 54:23 74:21 76:22 82:3,5,7,20 90:19 97:22 107:9,14 111:24 117:21 126:17 128:24 137:15,15 154:18,22 166:1 179:6,16 185:5 190:18,21,24 194:17,17 195:7 196:17 200:23 201:22 202:14 203:20,21 204:3 208:17,20,22 209:14 213:5,12 227:3,9, 11,13,22 229:3,4 230:19, 19 232:6 233:9 235:2 236:13,21,23 238:4,8,18 239:8, 16,19 240:5,13 241:25 245:5 246:20 248:5 254:9,14, 20 256:11 257:8</p> <p>Court's [5] 4:24 57:16 59:12 90:12 240:16</p> <p>courtesy [1] 11:6</p> <p>courtroom [1] 119:12</p> <p>courts [20] 32:8 64:5 95:23 100:10 179:18 190:19 193:17,20 207:5 208:2 227:7, 17 230:1,2 233:8 238:16 246:10 247:25 248:6,18</p> <p>cover [16] 6:5 72:21,22,24, 25 181:14,16,18 182:1,17 188:3,9 189:9 190:16 247:2 263:12</p> <p>coverage [1] 189:8</p> <p>covered [1] 189:3</p> <p>COVID [6] 42:21 43:5 135:24 191:15 214:14,23</p> <p>Craig [1] 10:3</p> <p>crazy [3] 158:23 165:16 202:15</p> <p>CRCA [9] 14:11 72:15 82:4, 8 83:14,22 92:1,7 247:9</p> <p>create [13] 15:8 18:2 21:7, 7,13 22:5 31:14,15 117:17 235:10 268:4 269:18,21</p> <p>created [8] 15:19 56:8 151:16,20 179:11,12,21 214:3</p> <p>creates [2] 31:12 74:25</p> <p>creating [4] 21:10 31:2 45:7 70:5</p> <p>creations [1] 31:19</p> <p>creative [7] 31:18 80:22</p>	<p>131:18 182:25 185:16 244:17,19</p> <p>creativity [2] 183:1 198:23</p> <p>creator [7] 17:8 36:9 37:9 38:14 69:1 74:2 172:22</p> <p>creators [31] 12:13,16 16:1 17:10 19:18 20:12 21:7 23:2 27:17 29:3,4,22 30:25 31:17 32:12 65:8 80:22 81:4 82:10,12 127:24 129:10 173:11 267:1,4,22,24,25 269:16,23 274:11</p> <p>creators' [2] 267:14,19</p> <p>credible [3] 96:6 97:3 144:24</p> <p>credit [3] 41:15,16 143:3</p> <p>criminal [1] 138:11</p> <p>crisis [1] 135:24</p> <p>critical [2] 5:4 19:21</p> <p>crops [1] 212:21</p> <p>cross [2] 164:12 237:22</p> <p>crystal [1] 270:2</p> <p>culprit [1] 201:18</p> <p>cultural [4] 78:11 149:16 265:19 268:12</p> <p>culture [5] 158:16 259:22 260:8 262:17 265:8</p> <p>curious [4] 70:15 111:11 177:21,24</p> <p>current [3] 4:22 206:5 265:21</p> <p>currently [10] 50:19,20 102:5 122:9 123:3 161:21 192:3 193:18 207:10 219:13</p> <p>curriculum [1] 110:15</p> <p>curtain [1] 62:25</p> <p>customers [4] 71:2 104:18, 20,25</p> <p>cut [4] 6:8 67:25 108:17 129:21</p> <p>cuts [1] 176:15</p>	<p>damper [1] 43:5</p> <p>dance [1] 170:22</p> <p>danger [1] 249:12</p> <p>dangling [1] 217:10</p> <p>Darcee [1] 192:19</p> <p>data [13] 18:1 19:25 20:1,2, 10 83:7 91:19 124:12,16 162:22 171:25 176:13,13</p> <p>databases [4] 70:17 80:13, 20 87:8</p> <p>date [2] 68:8 179:12</p> <p>David [1] 231:9</p> <p>day [25] 6:20 7:1,16 17:16 45:18 48:6 76:5,7 81:12, 12 132:14 133:13 147:1 157:7 166:1 174:21 194:6 205:3 218:1 231:8,15 232:4 252:2 255:20 271:2</p> <p>day-to-day [2] 213:24 214:19</p> <p>daylight [1] 118:16</p> <p>days [1] 166:11</p> <p>DBL [1] 141:14</p> <p>de [2] 89:22 112:1</p> <p>de-monetize [1] 38:20</p> <p>deal [10] 41:14 93:8 95:5 167:24 176:2 202:4 209:21 214:2 237:23 253:21</p> <p>dealing [9] 34:22 48:13 66:2 155:18 173:4 185:18 218:12,13 253:7</p> <p>dealings [1] 171:10</p> <p>deals [2] 155:12 254:3</p> <p>dealt [2] 157:12 236:23</p> <p>Dean [4] 11:5 57:1 59:25 121:21</p> <p>death [1] 82:6</p> <p>decade [3] 122:2 134:15 158:13</p> <p>decades [3] 80:4 82:5 158:25</p> <p>December [2] 36:3 132:14</p> <p>decent [1] 242:13</p> <p>decide [2] 128:24 251:2</p> <p>decided [11] 42:7 82:8 201:25 202:1 225:3 226:8 240:9,15 245:6,11 264:3</p> <p>decides [1] 246:3</p> <p>deciding [4] 112:24 128:22 255:23,24</p> <p>decision [15] 4:24 48:7 75:1 82:3,20 88:23 90:12 111:23 116:21 121:24 161:20 180:4 182:24 226:14 257:5</p> <p>decision-making [3] 144:16 161:3 169:2</p> <p>decisionmakers [1] 50:17</p> <p>decisions [15] 80:12 82:7 86:25 91:21 119:22 144:7 162:7 163:25 169:12 175:9,10,12 188:19 268:22 269:5 168:14</p>	<p>7</p> <p>decreased [1] 261:11</p> <p>dedicated [3] 145:25 170:12,13</p> <p>deemed [2] 116:16 197:9</p> <p>deep [3] 29:23 126:1 170:15</p> <p>deeper [1] 86:25</p> <p>defend [4] 22:14 188:18 217:3 225:4</p> <p>defendant [5] 90:14,15 112:11 179:18 208:25</p> <p>defendants [4] 80:24 84:21 112:1 128:24</p> <p>defended [1] 36:11</p> <p>defending [3] 200:5,11 273:21</p> <p>defense [9] 53:6 126:21 127:17 128:21 188:22,23 211:18 225:19 226:8</p> <p>defenses [17] 84:22 85:10 87:23 88:7,15 90:5,22 91:25 92:5,8 96:8 100:12 120:5 128:8,12 130:3 205:7</p> <p>defensible [1] 129:6</p> <p>defer [2] 36:22 182:2</p> <p>definable [2] 255:9,10</p> <p>define [2] 21:14 255:6</p> <p>definitely [4] 197:22 241:5 249:8 253:10</p> <p>definition [2] 21:22 25:16</p> <p>degree [3] 118:18 143:2 171:15</p> <p>deliver [2] 187:22,23</p> <p>demand [1] 203:6</p> <p>demanded [1] 156:2</p> <p>demanding [1] 224:25</p> <p>demands [5] 112:12,13 180:10 181:9 217:25</p> <p>democracy [1] 50:18</p> <p>demonstrably [1] 159:12</p> <p>demonstrate [4] 55:5,21 138:17 266:24</p> <p>demonstrated [1] 170:7</p> <p>demonstrates [1] 254:16</p> <p>denied [1] 229:3</p> <p>Denise [1] 231:5</p> <p>Department [12] 34:16 95:6 116:24,25 141:17 148:3 151:22 155:11 174:4 197:9 201:17,17</p> <p>departments [9] 104:21, 25 144:6,15,21 151:5 161:16 170:22,23</p> <p>depend [6] 4:3 37:13 68:15 69:6 119:16 161:25</p> <p>depending [2] 102:10 244:6</p> <p>depends [2] 185:22 187:4</p> <p>depicting [1] 259:21</p> <p>deprivation [1] 25:2</p> <p>deprive [1] 270:3</p>
D				
	<p>D.C [1] 141:13</p> <p>daily [1] 46:12</p> <p>damage [9] 153:23 154:15 156:4 157:4 194:8 240:25, 25 241:12,15</p> <p>damaged [1] 125:24</p> <p>damages [57] 47:11,12 61:2 68:12 83:2,9 93:21 103:9,10 105:23 140:5,12,15, 15,20,24 157:8 158:9,24 168:2 169:13 180:4 183:6 186:7 190:20,22 194:15 197:19 199:3,25 200:17 213:11 216:25 217:10,11, 22 218:3,8,11,19 219:6,12, 15 220:17,20 221:21 222:6 223:24 232:24 233:1,1,2,3 234:10 235:6 241:16,18</p> <p>damaging [3] 125:16 126:5 168:14</p>			

<p>deprived [1] 207:2</p> <p>deprives [1] 25:14</p> <p>Deputy [3] 8:24 75:18 193:5</p> <p>deregulate [1] 265:2</p> <p>derivative [1] 99:23</p> <p>derivatives [1] 99:16</p> <p>describe [11] 12:1 34:10 39:12 44:20 50:7 60:9 67:21 98:14 118:11 201:7 228:3</p> <p>described [4] 34:8 50:5 64:21 267:16</p> <p>describing [3] 160:8,9 168:22</p> <p>description [1] 57:9</p> <p>descriptor [1] 19:14</p> <p>deserts [1] 50:21</p> <p>deserve [1] 32:1</p> <p>Design [3] 10:25 14:18 29:21</p> <p>designated [1] 155:7</p> <p>designation [1] 33:17</p> <p>designed [3] 12:11 41:21 134:6</p> <p>designee [1] 178:5</p> <p>designing [2] 73:19 231:18</p> <p>designs [1] 80:20</p> <p>desire [1] 48:23</p> <p>desist [16] 64:22 65:18 69:23 79:4 93:7,11,19 97:24 100:20 108:11 127:6,15 168:19 169:17 172:6 209:15</p> <p>desk [1] 184:19</p> <p>despite [1] 261:14</p> <p>destroy [2] 265:10,16</p> <p>destroyed [1] 117:16</p> <p>destructions [1] 117:13</p> <p>destruction [1] 250:23</p> <p>detail [5] 44:19 112:19 200:20 228:1 274:2</p> <p>details [2] 59:17 178:8</p> <p>detected [2] 15:6 211:24</p> <p>deter [5] 81:25 167:13 206:24 210:6,10</p> <p>determination [3] 84:20 113:19 148:21</p> <p>determine [9] 20:21 21:24 52:21 53:8 58:21 64:7 83:1 91:12 92:4</p> <p>determined [1] 178:23</p> <p>determining [1] 139:7</p> <p>deterred [2] 12:18 163:14</p> <p>deterrent [3] 100:21 155:14 200:14</p> <p>detracts [1] 123:16</p> <p>detriment [2] 165:16 219:20</p> <p>devastating [1] 165:10</p> <p>develop [2] 102:14 152:2</p>	<p>developed [2] 137:7 265:1</p> <p>developing [2] 28:18 143:1</p> <p>development [3] 23:11,18 28:20</p> <p>developments [2] 28:25 32:15</p> <p>Devin [1] 77:18</p> <p>devoted [2] 128:2 174:22</p> <p>dialogues [1] 158:14</p> <p>differ [2] 67:3 124:5</p> <p>difference [8] 31:15 33:16 60:6 160:20 162:16 167:8 173:6 250:10</p> <p>differences [5] 28:17 67:5,6 165:4 186:18</p> <p>different [40] 41:6 48:14 49:8 54:15,17 60:11 67:10 72:6,11 80:11 81:20 92:23 94:22 115:1,17 148:3 151:5,6 154:3 158:14 161:6 166:10 167:4 169:7 174:7 181:18,19 186:20 193:15 207:17 214:2 222:9 225:21,23,24 232:22 243:9 244:18 248:6,19</p> <p>differently [1] 245:5</p> <p>difficult [8] 25:23 100:5 109:4 195:9 237:20 241:21 253:23 262:17</p> <p>difficulties [2] 252:5 257:24</p> <p>dig [2] 86:25 176:12</p> <p>digital [14] 45:18 63:14,17 150:2,8 166:11 193:8 218:13,13,20 261:3,7 263:5 264:14</p> <p>digitization [10] 148:7,13 152:4,17 163:15 213:16,17 219:2 230:23 260:11</p> <p>digitize [2] 150:14 152:12</p> <p>digitizing [2] 150:11 218:23</p> <p>digits [2] 180:11 189:5</p> <p>diligent [1] 145:19</p> <p>direct [7] 11:22 38:12 78:3 118:5 162:12 187:8,18</p> <p>directed [4] 15:23 16:1 22:18 263:7</p> <p>directions [1] 62:6</p> <p>directly [14] 16:3 28:16 48:17 58:18 71:11 102:22 106:23 109:15 155:12 162:12 173:8 217:5 223:25 261:8</p> <p>director [6] 79:10 102:17 134:11 143:22 186:24 192:20</p> <p>disagree [7] 69:9 97:20 131:12 209:20 210:9 229:23 268:25</p> <p>disagreed [1] 232:10</p>	<p>disagreements [1] 246:23</p> <p>disagrees [1] 148:22</p> <p>disappears [1] 209:17</p> <p>disastrous [1] 248:1</p> <p>disciplinary [2] 138:12 155:16</p> <p>disciplined [1] 123:7</p> <p>Devin [1] 79:19</p> <p>disclaimer [1] 77:22</p> <p>disclose [1] 105:12</p> <p>disclosure [2] 113:13,16</p> <p>disclosures [1] 96:15</p> <p>disconnect [4] 126:13 127:21 128:4,18</p> <p>discount [1] 121:18</p> <p>discounts [1] 126:1</p> <p>discourage [1] 200:2</p> <p>discover [2] 30:25 31:9</p> <p>discovered [7] 14:3 30:24 42:21 44:22 253:2 269:1,2</p> <p>discoveries [1] 269:24</p> <p>discovery [1] 128:13</p> <p>discrepancy [1] 81:17</p> <p>discuss [3] 78:21 118:8 229:12</p> <p>discussed [9] 112:22 121:24 124:14 203:8 206:6 217:7 238:5 240:25 252:21</p> <p>discussing [3] 59:13 153:1 246:14</p> <p>discussion [14] 5:4,8 75:10 114:23 118:16 169:21 170:7 190:12 213:16,25 229:6 232:16 240:16 251:21</p> <p>discussions [2] 62:12 128:5</p> <p>disheartening [1] 68:18</p> <p>disingenuous [1] 243:7</p> <p>dismiss [2] 89:4 90:4</p> <p>dismissal [1] 48:10</p> <p>dismissed [6] 85:2 89:4 95:7 123:7 154:16,22</p> <p>dismissing [1] 128:11</p> <p>display [1] 47:8</p> <p>displays [1] 267:13</p> <p>disposed [1] 272:18</p> <p>dispute [2] 203:12 231:21</p> <p>disputed [1] 230:17</p> <p>disregard [2] 63:20 204:14</p> <p>disregards [1] 274:8</p> <p>disrespect [1] 261:20</p> <p>disseminate [1] 180:16</p> <p>disseminated [3] 99:1,2,24</p> <p>disservice [1] 23:17</p> <p>distance [1] 264:23</p> <p>distinction [4] 27:9 146:3 163:20 186:16</p> <p>distinguish [3] 24:18 83:14 169:9</p>	<p>distinguished [1] 118:10</p> <p>distributed [3] 99:1,17,22</p> <p>distributes [1] 267:12</p> <p>district [22] 40:14 41:9 65:22 66:20 90:12 95:23 109:23 110:11 111:17,18,19,22,24 112:5,7 130:12 154:18 168:5 225:18,25 226:2 229:3</p> <p>districts [6] 40:17 66:21 108:14 122:21,22 175:4</p> <p>dive [1] 22:3</p> <p>diverse [1] 80:17</p> <p>dividing [1] 144:17</p> <p>division [4] 41:1 101:22,23 231:7</p> <p>DMCA [26] 19:17 136:24,25 137:6 155:7 178:4,4 184:1,2,4,9,18,20 205:21 207:6,9,14,16,20 209:5,6,16,21,24 211:21 246:25</p> <p>doc [1] 98:3</p> <p>docket [1] 275:4</p> <p>Doctorate [1] 98:3</p> <p>doctrine [5] 23:9,11 58:5 166:19 193:20</p> <p>doing [30] 26:4 28:5 48:24 70:21 98:16 109:4 113:2 144:23 150:23 169:10 187:5 204:24 211:2,14 212:19 214:9 218:7,24 219:3 221:25 222:13 226:12,22,22 236:5,12 237:7,10 253:2,5</p> <p>dollar [1] 238:12</p> <p>dollars [9] 87:22 104:3 121:13 122:15 145:23 186:7 200:5 219:6 273:25</p> <p>domain [5] 35:22 166:21 170:4 173:19 219:7</p> <p>done [15] 33:3 85:12 86:24 107:15 115:16 136:14 159:5 164:4 182:9 194:8 210:5 212:18 222:5 226:24 265:19</p> <p>Dooley [5] 137:25 138:1,2 186:11,13</p> <p>doors [1] 43:3</p> <p>doubt [2] 156:16 198:19</p> <p>doubts [1] 49:9</p> <p>Douglas [3] 53:25 55:2 145:7</p> <p>Dow [16] 10:4 44:17,22 45:3,7,16,19 46:6,6 47:3,4,14 48:16 49:12 51:10,20</p> <p>down [37] 4:25 19:17 34:21 41:24 43:1 53:4 54:4 58:20 83:6 112:18 116:7 123:21 131:12,13 133:23 135:25 147:10 149:1,7,10 150:5 155:24 157:22 159:9 160:2 172:10 184:9,12 196:14 199:19 209:9 220:15 221:9 232:15 252:22,24 253:18</p> <p>down-based [1] 214:25</p> <p>download [3] 38:18 178:17 179:1</p> <p>downloaded [2] 127:13 155:2</p> <p>downloads [2] 70:22 212:1</p> <p>downs [1] 184:9</p> <p>dozen [1] 242:11</p> <p>dozens [2] 13:12 210:15</p> <p>drafting [1] 269:25</p> <p>draw [3] 80:8 165:10 271:12</p> <p>drawn [1] 16:3</p> <p>drew [1] 15:20</p> <p>dried [1] 257:11</p> <p>drill [4] 58:20 83:6 133:23 147:10</p> <p>drinking [1] 260:20</p> <p>drive [4] 123:21 195:21,22 217:23</p> <p>drives [1] 63:6</p> <p>driving [1] 217:9</p> <p>dropped [2] 105:9 195:13</p> <p>dual [2] 41:15,16</p> <p>due [10] 12:19 13:24 25:3 36:18 67:16,25 111:10 239:10 265:14 270:4</p> <p>Duke [1] 28:16</p> <p>Dunlap [1] 141:12</p> <p>duplication [1] 152:20</p> <p>during [9] 32:1 72:22 112:22 115:22 135:23 153:1 157:6 190:17 222:1</p> <p>duties [3] 139:5 146:5 189:11</p> <p>duty [3] 128:16 180:14,15</p> <p>DynaStudy [4] 225:11,12,15 226:2</p>
E			
			<p>each [18] 33:6 83:8 86:25 87:25 99:6 133:23 135:15 143:6 145:24 147:4 150:24 180:18 191:2 206:18 210:16 212:11 253:20,25</p> <p>earlier [24] 49:21 59:7 64:23 84:8 114:3 138:24 165:3 167:18 172:2 179:4 182:2,5 197:5 203:8 220:13 224:19 226:6 240:25 242:17 245:18,18 252:6 268:21 270:14</p> <p>early [7] 15:10 42:22 85:2 166:11 189:21 249:23 253:7</p> <p>earnest [1] 267:1</p> <p>easiest [1] 173:12</p> <p>Eastern [1] 7:7</p> <p>Easy [12] 9:25 39:9 40:23 41:1 51:5 94:5 110:9 119:</p>

<p>17 201:22 209:18 248:10 262:8 eBay [1] 195:8 echo [5] 37:7 59:25 121:5, 19 149:24 echoes [1] 184:22 economic [5] 20:18,25 21: 2,13 52:8 ecosystem [1] 122:19 ECRL [1] 21:4 edition [2] 47:16,17 editor [1] 192:2 educate [5] 33:6 55:15 143: 6 144:15 249:6 educated [1] 171:23 educating [5] 33:13,22,23 175:19 176:18 Education [15] 3:21 33:21 96:14 101:23 131:4 173: 24 174:23 198:18 263:15, 16,17 264:1,19 266:21 268: 13 educational [16] 18:12 19: 6,9,12 21:10 22:5 64:11,13 77:21 78:11 81:1 96:23 123:18 180:15 193:1 264: 4 educator [2] 21:3 31:12 educators [4] 31:14,15 42: 8 134:18 effect [14] 22:14 77:1 100: 21 116:18 136:18 151:4 159:16 177:6 213:9 218:3, 19 237:10 265:10 268:17 effective [5] 124:25 210:1 267:17,18 268:1 effectively [1] 267:6 effectiveness [1] 246:24 effects [2] 8:15 134:20 effort [6] 103:24 141:1 147: 2 148:15 219:3 249:4 efforts [5] 33:6 83:14 213: 16,17 218:20 egregious [1] 239:11 eight [3] 99:6 191:12 249: 23 eight-figure [1] 226:4 Eighty [1] 41:7 either [23] 12:18 61:9 64: 25 68:20 69:12 91:17 102: 19,20 103:3 114:11 116:10 123:6 126:10 143:10 166: 3 171:11 179:16 188:13,14 190:8,24 207:8 238:6 elaborating [1] 272:13 electronic [2] 70:17 152: 19 element [2] 21:16 230:5 elements [1] 199:2 Eleventh [2] 247:4 248:17 eliminate [1] 247:3 eloquent [1] 169:1</p>	<p>elsewhere [1] 249:5 elucidation [1] 89:21 email [6] 46:12 47:5 51:7 185:25 201:18 258:13 emails [2] 24:5 92:16 embarking [1] 163:15 embarrassing [1] 99:20 embodies [1] 123:2 emboldening [1] 268:17 emboldens [1] 164:14 empathy [1] 53:19 emphasis [1] 57:22 emphasize [1] 58:4 employed [3] 60:15 72:10 174:20 employee [7] 60:9 62:3 95: 15 115:5,15,21 116:12 employees [26] 26:24 27: 19 33:2,7,14,20,22 44:20 60:2,3,5 61:5 96:24 97:18 98:9 101:4,5,6,7 102:18 123:5 144:12 189:10 260: 3 261:6,11 employer [2] 62:1,6 employment [6] 31:16 61: 20 115:24 116:4,7 123:8 empowered [1] 269:20 enabled [2] 59:9 162:19 encompasses [2] 81:3 129:8 encountered [4] 13:6 23:4 36:25 105:3 encourage [1] 265:12 encouraging [3] 4:16 122: 20 171:14 end [12] 38:14 76:5,7 133: 12 182:25 186:10 231:8,14 232:4 244:20 255:20 266: 8 endeavor [2] 45:17,17 ended [5] 85:21 201:20 236:7,8,14 Energy [4] 239:7 244:17 249:5 258:4 enforce [12] 34:11,12 36:6 37:25 38:2,5 39:14 44:23 52:3 58:1,2 274:1 enforcement [4] 13:24 94: 18 168:20 274:5 enforcing [1] 49:14 engage [11] 48:24 49:22 136:24 137:14,16 142:11 158:17 195:11 196:19 219: 2 221:4 engaged [3] 48:14 62:4 158:13 engagement [2] 148:23 184:14 engaging [2] 196:20 199: 18 engineering [2] 42:9 90: 11</p>	<p>engines [1] 198:23 enjoyed [2] 252:19 269:16 enormous [3] 70:16,19 218:11 enough [3] 53:22 57:12 248:1 ensure [8] 3:21 63:10 120: 14 135:1,11 139:17 190:11 199:14 ensuring [1] 162:18 enter [1] 121:3 entered [1] 126:25 entering [1] 72:8 entertain [1] 131:19 entertainment [2] 141:14 178:13 enthusiastic [1] 178:15 entire [8] 20:15 78:17 154: 22 160:22 205:12,22,24 247:11 entirely [9] 3:18 15:20 22: 11 84:16 85:5 174:7 230: 24 238:7 268:10 entities [53] 12:11,17 13: 19 30:11 31:9 33:23 49:13, 22 52:1 58:1 64:11 67:9, 12 68:17,22 81:4,5,11,24 85:6,17 91:24 92:6 93:8 97:11 103:13 123:17 124: 6 171:8 173:3,4,7 190:16 193:13,21 196:6 204:23 207:12,15 211:17 213:8 214:9 223:11 228:23 261: 10 264:2 267:5 268:2,7,14, 17,24 269:9 entitled [2] 90:16 95:19 entity [41] 13:7 23:12 26:9, 11 31:23 34:13 37:3 38:25 39:16 44:25 48:14,21 57:6, 12 58:2 67:4 69:20 79:3 101:25 105:4 106:9 109: 24 110:16 114:21 115:1, 134:6 140:14,19 141:7 154:6 189:12 193:19 213: 13 218:9,10 228:19 229:9, 20 261:16 267:10,11 entity's [2] 22:14 68:24 entry [1] 185:22 envelope [1] 219:4 environment [3] 106:2 122:19 265:2 envision [1] 6:15 ephemeral [1] 172:11 equation [1] 221:13 equipment [1] 38:16 equitable [1] 38:7 equity [1] 38:22 equivalent [1] 63:20 era [1] 33:15 err [1] 148:19 erroneous [1] 57:14 especially [14] 32:24 38:</p>	<p>11 51:4 68:5,14,18 118:21 130:18 174:11 230:1 233: 16 248:8 258:19 263:2 essence [1] 244:14 essentially [4] 83:14,16 139:3,11 establish [2] 85:10 118:13 established [4] 78:8 171: 16 201:4 269:20 esteemed [1] 171:17 et [6] 18:11 30:1,21 79:5 88: 15 170:22 ethical [2] 270:17 271:6 European [1] 264:15 evaluate [3] 54:22 64:6,14 evaluates [1] 150:13 evaluating [3] 8:9 17:6 24: 13 Evans [17] 138:18,20,22 153:20,21 156:25 167:15, 16 178:3,10 179:8,11 180: 2,9 183:20 184:1 189:9 even [60] 6:8 24:20,20 27:1 30:15 32:13 34:25 36:11 40:18 42:2 43:2 45:21 48: 25 65:23 66:10 69:19 71: 20 72:14 92:25 101:4 113: 13,16 114:13 115:2,12 124: 2 149:9,10 157:23,23 159: 24 165:7 166:21 170:1 172:20 173:21 189:6 203: 22 205:17 208:23,25 209: 15 211:1 216:10,16 217:1 220:17,20 224:25 225:4 229:23 230:19 234:18 241: 19 255:17,18 256:11 260:4 262:18 263:19 event [4] 3:9,16,23 7:17 eventually [1] 7:19 everybody [6] 38:4,17 43: 8 78:14 190:1 202:8 everyone [24] 3:6,13 5:18, 24 6:11,14 10:10 16:20 20: 23 35:10 56:7 75:17 104:8 132:4 133:3,7 159:18 160: 20 183:21 191:5 193:10 264:18 275:1,8 everyone's [1] 101:22 everything [11] 19:12 28:5 37:7 38:17 43:1 55:16 187: 9 201:19 202:13 232:3 247:2 everywhere [2] 41:21 223: 8 evidence [51] 8:1,9 12:22 17:22 18:19 19:22,23,24 25:22 26:3 53:23 57:23 58: 7,14,15 74:24 75:22 76:11, 15,16 79:25 80:8 84:1,19 88:10,18 89:7,9,15 91:7 107:7 112:23 119:11 124: 4 144:25 162:20 168:18</p>	<p>170:11 182:8 198:4 204:6, 14 205:15,16 246:22 247:8 261:1,11 262:8,10 265:8 evidenced [1] 137:21 evinced [1] 266:20 eviscerated [3] 172:15 181:2 183:9 eviscerates [1] 180:24 evolve [1] 265:21 evolved [1] 232:4 Ex [6] 193:19 197:6 199:15 204:4 206:19 246:25 exact [4] 21:14 37:8 179:12 181:17 exactly [4] 51:9 57:23 99: 11 184:16 exam [8] 39:20 41:8,12,16 43:20,23 44:10 124:19 Examination [2] 101:25 163:14 Examinations [1] 79:11 examine [1] 147:5 example [46] 26:13 53:3 57:6 58:25 83:3 90:7 96: 22 99:5,15 100:22 113:9 115:4 120:22 127:12 135: 23 146:12 151:13 152:5,16 157:1 161:22 163:11 166: 9 167:9 173:11,12 182:1, 21 187:13 195:7,18 200:3 214:13 220:5,8 222:7 223: 8 224:5 225:7 229:11 234: 3,24 235:4 236:24 261:2 263:6 examples [30] 8:10 50:24 53:8,9 57:5 58:11,12 59: 13 64:20 76:18 80:18 84:7, 11,15 97:1 110:13 123:25 124:18 131:5 138:9 162: 23 166:6 171:25 205:2,19 208:16 218:1 233:15 253: 4 271:19 exams [6] 102:6,9,14,21 103:3 104:16 exceed [1] 262:25 exceeding [2] 261:23 263: 8 exceedingly [1] 126:10 excellent [2] 146:2 266:19 except [2] 77:20 236:3 exception [3] 22:16 143: 10 230:14 exceptions [12] 8:13 19:3, 7,15 22:10 29:5 52:24 162: 5 211:11 263:19 268:8,15 excess [1] 35:5 excessive [1] 212:1 excited [2] 3:8 11:19 exclusive [5] 49:3 246:9 248:4 267:4 269:23 exclusivity [10] 196:11 241:5,18,19,22 242:8,14,</p>
--	--	---	---	---

18 243:2,8 executive [1] 77:20 exemption [2] 137:6,10 exercise [2] 129:2 166:2 exercising [2] 12:19 159:7 exhausted [1] 262:11 exhaustive [1] 86:22 exist [2] 198:22 211:12 existed [1] 46:22 existence [1] 46:17 existing [4] 190:15,17 207:5 242:25 exists [1] 35:10 exorbitant [2] 112:12 121:10 expand [4] 244:16,18 270:13 271:8 expanding [1] 263:18 expect [4] 48:17 87:25 93:18 269:8 expelled [1] 123:7 expense [1] 265:14 expenses [1] 181:9 expensive [7] 45:9,17 119:18 196:17 199:9 203:22 217:2 experience [3] 12:10 24:10,14 27:6 35:7 39:12 44:16 61:1 72:9 73:2,8 74:7 77:2 103:6 116:10,12 121:23 134:15,23 171:19 173:3,5 180:8 184:16 187:8,25 210:15,19 227:14 256:8 259:18 experienced [8] 12:17 13:9 37:8 73:15 97:6 101:20 102:16 260:8 experiences [3] 29:11 238:14 257:3 experiencing [2] 98:16 141:22 expert [1] 62:24 expertise [2] 4:5 136:4 experts [3] 19:1,2 135:20 expired [1] 65:2 expiring [1] 65:3 explain [5] 16:17 19:2 139:19 140:3 224:3 explained [3] 82:3 155:25 226:21 explaining [1] 137:7 explains [1] 160:20 explanation [2] 118:25 256:24 explicitly [1] 139:19 exploring [1] 207:18 exponentially [1] 269:10 expond [1] 50:7 express [3] 62:4 148:14 266:7 expressed [3] 153:10 160:11 183:2	expressing [1] 126:10 expressly [4] 148:8,11 149:1 152:15 extension [1] 155:23 extensive [2] 88:24 229:6 extensively [1] 241:14 extent [15] 25:23,24 67:3 75:2 83:1 88:6 107:6 140:4 141:18 142:2 147:21 148:19 156:1 171:15 227:20 extortionate [1] 112:13 extra [3] 151:19 217:4 230:4 extraneous [3] 6:3 76:1 190:7 extraordinarily [1] 159:2 extrapolation [1] 124:15 extremely [6] 145:19 169:23 180:11 189:23 204:2,8 eye [1] 19:21 eyeballs [1] 186:5	22,23 112:5 113:5,11,18,20 117:12 129:1,2 139:8 140:3 143:10 148:21 157:24 159:17 162:5,8,19 163:10 165:9,25 166:16,18 176:21 177:13 178:24 188:19 210:24,24 211:1,9,14 215:17 220:7 228:20 243:4 248:11,12,14,15 255:11,15 260:13 262:19 263:2,9,10,11,12,20 264:4,4,5,6,9,10 265:22,24,25 268:8,9,15 fairly [6] 57:25 82:21 100:3 103:6 150:18 242:13 faith [4] 57:13 188:19 189:11 259:22 faithfully [1] 130:1 fall [2] 57:15 92:9 falling [2] 92:7 268:8 falls [4] 104:1 179:8 226:18 268:14 false [1] 272:19 familiar [5] 40:5 130:19 204:23 224:22 233:17 familiarity [1] 114:9 families [3] 31:17,22 32:3 famous [1] 231:4 far [19] 30:12 40:18 50:20 85:15 89:3 91:19 112:18 117:7 121:6 138:4 147:1 169:1 188:23 204:7 222:12,23 246:12 249:4 262:16 fared [1] 111:15 fascinated [1] 171:13 fashion [1] 185:20 fast [1] 158:24 favor [1] 111:23 FCC [1] 74:20 fear [13] 73:21,24 92:6 134:20 160:1 165:19 214:18 217:14,18 218:2 219:15 220:17,17 feared [1] 166:24 fearful [2] 213:19 260:5 fears [1] 169:13 feature [1] 141:17 featured [1] 72:25 featuring [1] 242:12 February [2] 42:22 255:4 federal [24] 36:13,22,23 38:24 49:2,3 96:15 122:5 154:13,18 179:16,20 190:18,24 193:17,20 194:17 196:17 200:23 213:12 227:9 230:19 233:9 246:10 federalism [1] 58:7 federalist [1] 58:17 fee [14] 68:22,23 69:18,21 70:3 81:7 116:22 156:1,3 181:1,6 182:13 216:22 221:2 feed [2] 31:16,21	feedback [1] 12:9 feel [21] 13:17 15:24 18:14,15,16 21:15 39:1 53:21 55:10 87:5 134:21 154:5 159:1,7 163:10 164:17 196:15 199:19 206:8 224:9 261:23 feeling [1] 66:19 fees [10] 67:23 68:24 70:15 112:10 123:22 145:24 157:17 158:3 180:20 266:25 feet [1] 255:16 Fellow [9] 9:6 30:6 145:18 190:11 266:20 felt [5] 162:7 249:25 255:21 256:11,14 few [18] 5:16 6:14 8:7 13:4 15:9 19:6 53:18 96:19 108:10 133:7 155:19 177:15 178:16 189:21 200:24 207:6 237:17 240:4 fiduciary [1] 128:15 field [3] 119:14,15 150:20 Fifth [4] 202:2 228:21 231:8,14 fight [4] 231:25 258:10,22,23 fighting [4] 81:13 223:17,17,18 figure [5] 21:23 107:19 162:15 165:25 245:7 figured [2] 47:18 115:22 file [5] 140:19 202:2 228:24 256:6,17 filed [27] 36:3 44:18 61:11 62:16 81:16,19 82:1,11 88:6 91:8,17,17 100:9 119:20 135:4 195:14 200:9 218:15 224:24 226:23 228:7,24 240:10,12 256:4,21 257:9 filers [1] 137:16 filing [2] 61:2 269:4 films [1] 141:17 final [5] 7:1 23:20 74:8 102:8 245:24 finally [7] 7:17 8:14 11:10 76:25 79:14 82:5 264:21 financial [9] 46:16 94:2 128:9,15 131:19 140:10 153:25 168:14,15 financially [2] 128:14 179:24 find [21] 59:6,8 94:1,10 101:8 110:9 122:22 142:14 150:1,18 152:10 158:16 176:13 223:2 227:4 237:17 253:20,21 267:22 272:25 273:5 finding [4] 32:12 115:6 219:25 230:4 findings [1] 4:11 finds [1] 71:21	fine [7] 87:3 112:19 170:22 186:14 188:1 211:15 272:15 finish [2] 120:8 232:19 fired [1] 123:7 firm [10] 79:16,20 141:12 222:24 225:5,6 226:13,22,25 231:9 firmer [1] 48:9 first [63] 3:16,17 5:15 6:17 7:25 8:8 9:12 11:21,22 14:21 20:11 24:16 27:15 29:22 46:15 54:3 56:4 75:24 76:13,14 84:8 86:3 91:16 99:13 112:22 114:18 118:5 120:3 128:21 136:22 142:12 156:18 157:18 176:1 184:3 191:1 193:22 198:13 199:23 207:24 211:6 214:12 216:4 221:23 236:15 242:18 248:13,16 250:8,12,15,17,20,24 251:1,3 252:18 258:6 260:2 266:15 270:12,14 272:10 fit [3] 14:19 104:23 229:8 five [17] 6:16 36:16 41:5 44:8 78:19 102:17 104:5 149:8 184:3,6,11,23 205:23 255:18 256:22 258:7 260:1 fixture [1] 135:20 flavor [1] 179:7 fleeting [1] 172:4 flip [1] 176:19 flood [1] 217:15 Florida [4] 14:10 82:21 83:17 122:3 focus [6] 52:20 190:14 206:10 209:24 249:1 258:1 focused [4] 20:16 136:15 206:5 259:18 focuses [2] 46:16 133:20 focusing [2] 53:4 251:14 FOIA-able [1] 163:22 folks [21] 8:3 21:9 53:20 76:19 91:5 112:17 135:1 137:12 146:3,25 150:1,22 157:7 159:14,14 160:2 165:21 174:9 177:6 199:8 236:19 folks' [1] 227:14 follow [8] 20:8 25:18 36:13 76:12 93:4 126:7 130:23 164:1 follow-up [1] 179:4 followed [2] 36:12 152:8 following [7] 4:23 48:7,22 94:21 117:11 216:2 274:20 font [2] 40:10,11 foot [1] 273:21 footage [2] 67:24 187:14 football [1] 125:14
--	---	---	---	---

F

F.Supp [1] 225:17

face [4] 81:7 91:7 115:13,24

Facebook [1] 125:20

faced [1] 227:2

faces [1] 261:17

facilitates [1] 206:13

fact [34] 22:19 23:3 25:22 26:24 61:25 62:5 82:19 83:10 86:22 88:6,12 91:7 92:1 103:1,18 113:14 115:7 117:9,22 118:16 126:14 145:1 155:2,22 157:19 170:11 194:7,12 200:13 209:1 217:20 243:18 244:6 266:24

facto [1] 89:22

factor [2] 18:17 140:3

factors [1] 119:20

facts [4] 36:17 203:4,23 227:2

factual [1] 182:18

faculty [26] 104:21 106:1 116:20 127:24 138:16 139:3,13 142:25 143:12 144:2 146:8,16,18,21 164:14,18 188:18 212:21 214:24 215:8,14,18 235:10 259:12 260:6 262:20

faculty's [1] 215:23

failing [2] 41:8,17

failure [2] 39:3 119:10

failures [1] 165:2

fair [93] 18:22 19:11,19 22:8,15,18,19 23:6,8,10,11,14,19 25:25 29:5,25 30:19 38:23 48:16 49:20 52:24 53:5 57:14 63:13 69:10 87:18 97:1 108:24 109:6 111:20,

<p>for-profit [1] 219:23 force [2] 116:18 221:13 forced [1] 272:5 forces [1] 221:18 foremost [2] 24:16 27:15 forget [1] 219:8 forgive [1] 77:16 forgot [2] 222:24 226:13 form [2] 83:21 265:22 formal [1] 147:23 formally [1] 161:7 format [3] 3:22 6:11 7:22 former [2] 113:8 186:24 forth [3] 40:20 43:4 74:13 fortune [1] 98:6 forward [8] 5:7 53:2 66:2 69:25 154:18 157:2,3 163:8 found [8] 13:18 22:25 26:9 35:12,16 44:7 66:6 116:5 foundation [1] 269:15 foundational [2] 43:22 156:12 foundations [2] 80:25 129:13 founding [1] 78:8 four [11] 44:8 93:9 102:12 140:2 189:24 222:9 251:21 252:10 255:13,18 256:22 Fourteenth [3] 199:24 269:14,25 Fourth [3] 156:19 263:14 272:18 fraction [4] 268:25 269:1,3,4 frame [1] 20:21 frankly [4] 46:23 134:19 215:8 216:3 Fraud [1] 244:2 Frederick [1] 9:15 free [6] 33:17 55:17 115:4,6,9 196:10 Freedom [1] 167:18 freely [2] 66:20 272:21 frequently [3] 143:8 153:5 262:13 friend [3] 222:7 253:12 269:11 friends [2] 165:6 227:4 frivolous [10] 28:3 127:18 128:23 190:23 210:17 217:8,15 219:12 224:14 225:7 front [4] 7:22 39:25 141:20 254:3 front-line [2] 160:16,18 frustrated [1] 256:14 frustrations [1] 36:8 full [16] 24:4 29:4 46:10,12 51:6,16 60:22 86:20 93:6 130:21 165:17 219:19,24 220:3,9 238:25</p>	<p>fully [4] 84:23 87:23 166:24 234:11 fully-litigated [2] 85:16 88:21 fun [1] 37:24 function [2] 50:19 263:10 functions [3] 152:22 264:6,9 fund [2] 45:24,25 fundamental [4] 58:6,17 245:22 250:10 funding [1] 96:16 funds [3] 116:24 174:22 216:10 further [8] 49:5 56:10 74:22 75:3 87:10 189:17 257:4,20 futile [2] 82:11,13 futility [2] 13:24 81:23 future [12] 69:21 71:18,23 206:24 208:7 209:3 210:6 211:16 221:9 236:13 254:14 264:5</p> <p style="text-align: center;">G</p> <p>game [2] 155:2 159:21 games [1] 178:15 gather [3] 15:25 24:1 95:18 gathered [1] 124:12 gathering [1] 83:7 gave [3] 44:5 99:7 110:18 GDP [1] 249:2 geared [1] 78:9 gee [3] 110:6 219:4 233:3 geez [1] 109:2 General [32] 3:20 5:14 8:25 9:1 10:4 11:13 18:5 24:11 53:12 54:1 71:10 75:18 77:19 78:16 79:2,2 102:10 146:24 176:7,9 178:1 184:20 185:8,25 190:2 191:10 193:2,5 207:20 218:25 249:6 262:4 General's [2] 77:19 205:10 generally [16] 26:8 49:1 69:21 101:19 107:19 143:13 145:19 157:21 158:17 183:23 186:8 204:1,8 207:15 208:4 249:25 generated [1] 219:23 generation [1] 214:12 generators [1] 147:19 genres [1] 241:4 Geographic [1] 186:25 Georgetown [1] 192:16 Georgia [7] 85:20,22 88:25 200:3 235:25 236:15 263:3 gets [5] 117:9 183:19 202:15 218:24 248:9 getting [13] 5:17 14:15 74:4 100:3 105:23 109:15 121:18 153:15 209:14 235:</p>	<p>21 236:14,21,22 gingerly [1] 62:11 Ginsburg [1] 248:12 give [19] 5:23 7:8 64:2 97:12 110:13 113:8 138:9 151:25 152:16 162:23 174:13 175:21 181:21 187:15 192:6 245:25 248:4 251:5 273:15 Given [11] 6:4 34:22 37:1 40:13 48:4 62:11 164:15 248:8 250:3 262:11 272:22 gives [2] 146:17 209:21 giving [3] 60:16 247:25 249:20 glad [3] 74:3 226:19 258:24 glance [1] 40:24 goal [3] 100:19 135:21 215:23 goals [3] 12:25 75:4,7 Google [6] 63:7 205:19 206:13 212:11 263:4 267:11 got [29] 63:23 65:20 66:13 77:17 97:25 98:2,10 109:10,14 110:3 127:15 159:19 181:22 184:21 186:25 201:22,23 212:3 214:24 222:23 226:19 227:2 231:13,22 237:8 256:21 258:6,22 259:1 gotten [4] 12:3 116:14 228:2 258:17 govern [2] 151:20,21 governed [3] 147:22 151:7 214:5 governing [1] 99:9 Government [16] 33:11 35:3 46:1 74:23 142:6 173:19 201:23 202:3 229:21 234:4 270:15,18,19 271:4,6 272:2 governmental [3] 26:9,10 225:23 governments [1] 142:1 governor [1] 214:6 governors [1] 152:10 grad [1] 212:8 graduate [1] 123:4 granted [1] 90:13 granular [1] 91:12 graph [1] 15:8 graphic [1] 80:19 grateful [4] 3:18 59:19 75:19 133:19 GRAY [35] 9:5,5 104:9,12 107:10,12 108:4 109:17,21 110:1,10,21 114:2 115:19 116:2,9 117:4 132:5 133:18 177:18,20 179:3,10,25 180:6 181:12,22 183:14</p>	<p>186:11,14 187:24 188:9,21,24 189:13 great [33] 26:19 77:25 79:22 91:24 92:5 97:4 98:2 110:10 111:7 119:1,13 127:21 133:14 141:9 142:19 143:17 147:8 156:25 168:25 176:17 177:13 186:11 187:24 189:13,16 229:11 237:14 248:3 252:21 253:13 259:7,9,11 greater [3] 96:18 200:20 269:10 greatest [1] 136:2 greedy [1] 32:4 ground [1] 131:25 grounds [3] 90:15 95:8 154:17 group [10] 21:1 68:16 78:8 102:1 104:4 135:3,6,9,14 174:25 groups [1] 134:14 grow [1] 253:23 growing [1] 12:24 grows [1] 253:7 guarantee [1] 199:24 guess [18] 13:3 37:21 40:21 44:1 86:4,11,16 115:19 126:8 137:17 169:19 171:15 173:25 174:8 183:14 221:16 227:8 240:14 guidance [3] 146:20 148:9 151:11 guide [2] 144:15,22 Guild [2] 85:23 89:1 Gulf [1] 239:7 gun [1] 87:4 Gunn [1] 231:9</p> <p style="text-align: center;">H</p> <p>hackers [1] 212:7 hacking [3] 212:3,4,14 half [2] 35:19 259:19 halted [1] 66:12 hand [17] 5:25 6:1 52:23 53:10,13 73:11 83:25 91:3 96:2 163:18 176:9 181:21 184:24 190:7,8 215:2 218:2 handed [1] 44:3 handful [1] 92:18 handle [6] 78:16 119:16 145:25 186:10 234:5 246:10 handled [2] 232:6 245:4 handles [1] 185:9 handling [3] 147:13 176:17 233:18 handout [1] 215:3 hands [1] 245:14 hang [1] 240:21 hanging [1] 230:13 happen [14] 31:4 35:1 54:</p>	<p>24 97:21 106:3 160:1 198:22,25 202:17 226:16 233:14 235:22 244:15 263:20 happened [7] 42:21 44:21 51:9 209:11 226:15 258:3,14 happening [3] 27:21 68:9 220:1 happens [7] 148:18 177:4 204:13 211:12,15 241:1 243:22 happy [13] 16:5,14,19,19 59:21 109:13 125:25 131:19 134:23 152:17 198:12 206:8 209:10 hard [10] 51:4 55:8 60:14 63:6 83:7 195:10 196:21 220:19 258:11,23 hardcore [1] 255:21 harder [1] 8:5 harm [14] 52:8 75:2 157:2 196:2,4,24 197:12,19,20 206:1 209:3 210:5 265:3 274:13 harmful [1] 125:22 harmful [1] 208:5 harms [4] 31:23 162:10 195:20 196:7 harness [1] 228:12 hat [1] 134:24 HathiTrust [6] 85:23 89:1 166:11 167:8 213:15 220:5 hats [1] 137:18 HBCUs [1] 175:3 head [1] 259:10 heading [2] 63:25 201:16 headphones [1] 138:23 healthy [1] 50:18 hear [42] 6:11 11:19 21:20 25:21 27:12 29:11,13 31:7,8,9 48:9 53:3 104:12 106:20 107:4 108:3 124:7,8 138:20,21 171:15 181:25 193:14,20,23 204:17 205:8 207:15 213:6,12,14 220:17,17,20 227:13 252:23 259:1,6,8 266:15 272:14 273:12 heard [39] 28:22 29:6 35:4 41:7 52:5,16 58:11 82:19 84:17 89:20 107:21 128:22 146:25 147:18 153:2,9 182:1,6 183:16 184:22 198:16 199:1,9 203:25 205:2,22 211:13 213:15 217:25 220:12,23 221:7 227:15 230:7 262:5 263:25 264:2,6,13 hearing [9] 64:10 128:25 129:4 156:23 157:6 194:5 217:12 238:14 247:17 hearings [2] 206:21 209:</p>
--	--	--	---	--

<p>24 heart ^[2] 98:22 111:3 heaviest ^[1] 177:7 heavily ^[1] 263:15 heavy ^[2] 176:20 177:8 held ^[11] 49:23 61:24 74:21 137:11 198:24 220:3 223: 14 228:22 229:10 240:5 250:22 helicopter ^[2] 228:11,12 hello ^[6] 8:23 34:7 106:19 138:1 190:1 191:9 help ^[18] 6:24 39:19 40:2 41:11 42:8 43:17 59:19 106:22 107:1 135:11 159: 5 164:17 176:4 215:21 235:13 236:4 245:16 261: 17 helpful ^[17] 16:9,22 20:9 29:10 31:24 34:5 64:10,15 101:10 132:3 133:10 144: 13 147:9 152:23 166:5 271:20 272:14 helping ^[6] 39:18 44:4 134: 17 135:1,21 146:10 helps ^[2] 41:12 66:9 heritage ^[2] 149:16 268:12 heroes ^[1] 150:19 herring ^[3] 171:2 180:23 181:4 hesitant ^[2] 32:13,14 hesitated ^[1] 126:15 Hi ^[14] 10:14,19 11:4,12 79: 9,15 121:19 134:11 142:21 191:5 192:11,23 193:4 270:10 hide ^[1] 258:18 high ^[23] 39:22 40:13,16,20 42:14 43:16 44:3 58:8 65: 25 66:8,8 104:25 128:2 150:9 156:15,21 158:10 159:2 161:11 169:23 195: 22 247:4,8 higher ^[6] 13:19 77:21 79: 24 81:20 91:20 96:13 highest ^[3] 22:24 151:24 183:7 highlight ^[1] 111:12 highlighted ^[1] 271:24 himself ^[1] 228:11 hinders ^[1] 23:10 hired ^[1] 225:5 Hispanic ^[1] 231:17 historically ^[1] 214:11 history ^[1] 262:23 hit ^[2] 197:22 213:1 hitch ^[1] 258:10 hold ^[12] 9:10 29:23 39:3 66:13 102:7 223:4 237:8,8, 8,12,13,22 holder ^[9] 71:21 117:15 165:6 209:7 235:15 245:1</p>	<p>250:19 251:2 267:10 holders ^[17] 45:21 47:18 49:11 68:7 119:15 204:15 205:18 207:21 210:21 216: 16 217:24 235:9,16 261:8 262:11 265:4 268:20 holding ^[3] 23:18 49:12 240:13 holes ^[1] 219:25 home ^[4] 44:6 49:3 145:15 215:5 honest ^[3] 53:1 126:1 254: 19 honestly ^[1] 160:15 honorable ^[1] 129:6 hook ^[1] 94:7 hope ^[6] 10:17 77:15 136: 16 142:17 190:16 259:6 hopeful ^[1] 241:24 hopefully ^[4] 190:25 191: 20 193:10 198:10 hoping ^[1] 8:7 hospitals ^[1] 81:2 host ^[2] 28:20 137:11 hosted ^[1] 135:25 hostility ^[2] 199:2 260:24 hosting ^[3] 78:21 148:13 274:16 hosts ^[1] 135:19 hourly ^[1] 267:25 hours ^[5] 136:1 146:9 170: 13 174:21 221:25 housekeeping ^[3] 65:10 75:23 133:8 Houston ^[15] 195:1 208:18 222:8,13,21,24 223:2 226: 5,9,25 228:9 231:15 240:3 241:3,6 Houston's ^[2] 222:11 231: 6 However ^[3] 111:10 151:7 187:11 Hues ^[1] 272:18 huge ^[9] 33:15 35:4 159:25 196:24 213:24 214:14,15 247:19 271:1 hugely ^[2] 98:25 126:4 hullabaloo ^[1] 226:15 human ^[2] 98:19 186:5 hunch ^[1] 256:23 hundreds ^[9] 46:13 87:22 100:16 104:2 146:9 170: 13 206:17 218:22 261:4 hurdle ^[1] 62:9 hurts ^[1] 100:7 husband ^[1] 53:20 hypothetical ^[2] 115:20 188:4 Hypothetically ^[1] 116:15 hypotheticals ^[1] 115:21</p>	<p>15 97:16 247:19,19 idea ^[9] 79:6 153:10,17 181: 15 202:1 247:10,24 248:3 250:1 ideas ^[2] 252:23 270:19 identified ^[5] 80:11 97:16 116:5 147:9 254:10 identifying ^[2] 85:6 91:21 identifying ^[3] 76:19 201:8 206:17 ignored ^[3] 64:23,25 240: 24 ignores ^[1] 241:12 illegal ^[8] 37:5 109:10,15, 21 178:17 179:1 222:14 261:8 Illinois ^[9] 9:21 69:4 145:9, 12,18 146:13 157:11 185: 21 189:1 illiterate ^[1] 99:19 illuminating ^[1] 5:7 illustrators ^[1] 30:8 IM'ing ^[1] 106:23 image ^[9] 34:17 114:20,21 115:7,14,17 182:8 241:2 272:20 images ^[10] 35:25 37:13 63:7 115:4,6,9 170:19 182: 12,17 267:12 imagine ^[3] 62:17 189:1 256:21 immediate ^[1] 178:24 immediately ^[9] 18:24 46: 21 54:4 69:12 103:17 116: 6 150:5 155:24 271:5 immunity ^[172] 3:15 4:6,17 5:4 8:15 12:20 18:18 22: 13,21,22 23:8,9,16 24:24 27:23 28:3,23 29:9 30:18, 19 33:5,25 34:13 39:15 42: 18 43:10,13 44:24 46:21 48:10,18 49:13 52:2 54:8, 24 58:5,24 61:23 62:8 67: 6 71:9 74:14 75:6 77:1 82: 22 83:11,18 84:14,21 85:3, 9,18 88:13,22 89:19 90:5, 13,16,24 92:2 94:3,6,8 95: 19,24 96:8 97:23,25 98:10 100:12,17 101:1 103:17 105:8 107:25 108:10,12,16 111:20 120:5 121:2,5,16, 23 122:7 123:10,16 126:12, 15,20 127:6 128:7,11,16 129:3,24 130:13,21 134:22 139:22 140:7 149:5 153:4, 10,13 154:17 159:12,24 162:12,18 163:7 164:9,13, 24 167:13 171:10 172:19 177:4 179:14,19 185:18 194:18 201:3,23 202:3,6,9, 21 203:8 205:6 211:10,16 213:19 215:20 216:24 219:</p>	<p>14 221:12 222:25 223:5 225:19,24 226:7,11,24 228: 22 229:8 232:3 234:4 238: 4,15 239:1,3,5,22 245:22 246:5 248:22 249:21 250: 22 258:19 259:24 261:16 263:12 265:17,23 267:6,22 268:9,16 273:19,19 274:13 impact ^[2] 92:9 242:16 impacted ^[2] 50:9 80:23 impinge ^[1] 156:17 implementing ^[1] 261:13 implicated ^[1] 8:13 implication ^[1] 264:15 implications ^[1] 264:17 importance ^[4] 5:1 52:23 221:20 250:3 important ^[44] 13:7 14:1 16:23 18:17 22:10 23:13 24:17 26:7 27:16 32:23 33: 4 59:22 68:5 70:6 71:24 74:16,23 82:2 86:2 88:4 92:24 99:25 103:10,11 114:18,24 115:11 117:7 120:11,12,18 126:21 146:3 147:18 163:20 164:6,13 203:9 214:19 222:3 228:5 250:15,25 273:1 Importantly ^[2] 148:17 252:25 impose ^[2] 60:14 96:23 impossible ^[1] 267:23 impress ^[1] 139:24 improperly ^[1] 253:15 impropriety ^[1] 211:24 impunity ^[1] 241:21 in-class ^[1] 215:3 in-depth ^[1] 118:25 in-house ^[3] 81:10 139:4 187:1 inability ^[1] 166:2 inadequacy ^[1] 207:20 inadequate ^[2] 12:23 207: 16 inadvertent ^[3] 65:5 155: 21 188:4 inadvertently ^[1] 26:25 inappropriate ^[1] 110:4 inappropriately ^[1] 221:5 inbox ^[1] 186:10 incentive ^[1] 269:17 incentives ^[1] 159:13 incentivizes ^[1] 217:24 incident ^[3] 39:11,12 50:5 incidental ^[1] 49:19 incidents ^[2] 34:9,10 inclined ^[1] 165:24 include ^[11] 15:23 16:4 18: 22 21:11 63:15 80:17 81:9 122:13 188:21 190:17 191: 14 included ^[6] 12:8 19:14 21:</p>	<p>9 35:24 80:24 102:18 includes ^[1] 192:13 including ^[17] 3:7 18:10 22:1 29:5 62:25 67:22 90: 15 97:2 112:1 131:19 143: 1 147:3 149:2 150:5 224:7 260:25 261:4 income ^[2] 31:16,18 incomplete ^[2] 72:16 206: 22 incorrect ^[2] 32:7 148:21 increase ^[2] 15:11 175:25 increased ^[1] 230:22 increasing ^[3] 14:4,5 263: 16 increasingly ^[2] 12:25 30: 10 incumbent ^[1] 273:4 incurred ^[1] 67:21 incurring ^[1] 165:21 indemnification ^[4] 61:21, 25 188:21 189:10 indemnify ^[4] 61:5,16,18 94:13 independent ^[7] 21:3 40: 17 41:9 65:21 146:8 226:2 268:3 index ^[1] 111:22 indicated ^[1] 198:5 indicates ^[1] 205:20 indicative ^[1] 87:5 indicator ^[1] 268:23 indistinguishable ^[1] 266: 2 individual ^[45] 8:10 12:16 16:1,10,13 17:8,10 29:22 32:21 33:3 34:3 52:5 61: 10,12,14,24 83:4 94:10 95: 2,4,11 116:19 117:2 139: 21 144:12,19 146:14 154:5 155:25 156:5 161:16 169: 8 186:2 197:11,24 199:17 200:25 201:6,8,10 224:8 235:13 246:24 270:24,25 individuals ^[9] 23:2 130: 15,16 139:19 140:22 144: 23 197:7 260:19 274:5 indulgences ^[1] 111:1 industrial ^[4] 47:6 48:15 53:5 70:9 industrial-scale ^[1] 49:22 industry ^[2] 46:17 266:2 inequity ^[1] 37:20 inevitably ^[1] 81:19 influence ^[1] 260:9 Infomath ^[1] 235:5 inform ^[1] 144:14 informal ^[1] 147:16 Information ^[28] 3:20 15: 25 18:4 45:8 50:16 55:25 58:15 63:15 64:24 78:5,6, 10 114:20,22,25 115:14</p>
--	---	---	--	--

<p>116:8 124:14 134:1,12 135:12 155:10 161:25 162: 2 163:1 167:19 193:1 228: 15 informative ^[1] 251:22 informed ^[3] 68:10 124:23 162:6 infrastructure ^[1] 33:13 infringe ^[14] 38:11 51:5 68: 17 89:18 103:7 115:21 121:11 148:16 157:23 160: 13,19 235:11 241:20 262: 22 infringed ^[19] 13:18 30:10 39:13 51:17 71:5,17 92:17 97:18,18 98:24 99:1,6,14 116:13 140:19 186:6 205: 4 228:14 262:15 infringement ^[217] 4:7 8:2, 9 12:10,17,23,24 13:6,9,17 14:3 15:2,5 16:17 18:19, 25 21:24 24:14,18,21 25:5 26:1 31:5 34:23 36:15 37: 16,25 38:2 39:4 44:22 45: 19,23 49:18,18,19,23 52:6, 12,14,21 53:10 54:3 56:17 57:4 58:22,23 59:9,14,16 61:14 62:4 64:20 65:7 67: 17 68:1 70:2 71:16 73:2, 14,21 74:15 75:3,22 76:11, 20,23 79:6 80:3,5,9 81:23 82:15 85:7,12 87:6 89:11, 24 91:9 92:15,22 93:24 94: 11,17 95:3,23 96:7,25 97:3, 6 99:4,10,12 100:10 102: 15 103:12 105:5 107:8,15, 19 109:2,12,14 112:1,2,25 116:6,23 117:3,23 118:18 121:12 122:25 127:4 131: 2,6 133:7,21 134:7,8 138: 11 140:25 144:25 145:3 147:5 148:15 149:12 154: 14,21 155:20 157:12,21 164:11,23 165:7,7 168:2,7 177:16 178:11 180:10 185: 23,24 186:4 187:18 188:4, 7 190:15 193:18 194:1 196:22 198:21,25 199:16, 19 203:19,20 204:9 205:19 206:1,2,13,24 207:7,11 208:19 209:22,22 210:2,5, 6,9,10,13,14 211:4,25 212: 5 214:18 221:1,8 223:11 227:22 228:23 229:5,9 236:8 240:8 241:1 244:14, 21,22 246:10 247:7 248:25 249:3,7 250:10,11,22 254: 11,17,21 255:9,10,22 256: 8 257:9 262:2,5,7,9,13,18 264:22 265:20 268:2 272: 19 infringements ^[36] 8:11</p>	<p>12:4 14:4 23:1 24:20,20 25:16 26:5 30:25 31:1,3,9 37:2 59:13 65:5 74:18 85: 11 97:10,13 98:8,15 100: 22 101:17,20 107:6,7 108: 7 184:23 245:19 265:13 267:5,8 269:1,2,3,5 infringer ^[5] 223:9,13 235: 12 249:8 272:20 infringers ^[1] 70:18 infringes ^[2] 250:13 271:1 infringing ^[16] 30:15 81:8 93:1 100:1 113:25 164:20 172:11 178:22 200:15 210: 22 211:1 215:10 216:9 224:9 268:24 269:9 inherently ^[1] 49:16 initial ^[7] 15:6 16:4 39:9 54: 17 87:17 89:13 274:3 initially ^[3] 37:4 44:23 229: 3 initiate ^[1] 217:24 initiatives ^[4] 143:1 213:24 261:14 264:19 injunction ^[23] 71:22 131: 10,10 193:24 194:8 195:3, 16,19 196:1 197:14 198:6, 8 199:16 204:3 207:23,25 208:7,21 209:2 210:3 236: 8,12,17 injunctions ^[13] 72:16 195: 5,8 197:2 199:6,8,12,20 200:1 206:25 208:3,13 235:21 injunctive ^[9] 31:24 72:14 83:4 154:17 157:1 193:22 197:5 200:14 267:16 injured ^[2] 179:15,23 injuries ^[1] 199:11 injury ^[1] 179:13 innocent ^[3] 109:12,14 112:2 innocently ^[1] 115:17 Innovation ^[2] 142:24 143: 14 innumerable ^[1] 265:13 input ^[1] 182:3 inquiries ^[2] 172:3 185:13 inquiry ^[5] 84:17,25 89:10, 15 212:4 inside ^[3] 46:14 154:9 187: 1 insight ^[1] 54:21 insofar ^[1] 141:25 inspire ^[1] 125:10 inspiring ^[1] 111:6 instance ^[12] 16:17 51:1 54:8 61:7 70:22 71:5 107: 25 114:13 115:20 131:8 210:4 212:3 instances ^[35] 13:9,12 14: 7 15:9 16:23 35:2 52:1,5,6,</p>	<p>12 53:1 54:6 55:6 62:10 65:1,6 84:6,10 96:19 111: 5 114:13 115:12 131:22 134:7 155:19 157:13 168: 9 181:6 206:17 210:13 211:3 256:7 271:11,25 274:5 instead ^[6] 109:15 125:12 137:4 225:5 249:1 253:7 instill ^[1] 138:16 institute ^[4] 65:3 79:11 101:25 124:19 institutes ^[1] 80:25 institution ^[14] 63:4 89:17 103:22 125:7 134:16 135: 22 144:21 146:6 169:11,11 182:9 183:25 220:25 251: 18 institution's ^[1] 153:13 institutional ^[4] 146:6,22 147:16 261:12 institutions ^[83] 19:6 27:7, 10 29:24 30:2,4,17,21 35:2 62:25 63:1 69:16 77:21 80: 22 81:1 85:25 90:24 102:5, 6,18 103:7,8,14 121:22 123:19,20 125:6 134:17 135:25 136:2,5 137:3 149: 15,16,17 152:16 159:14,15 160:6,9,11,17,18 165:13 166:5,10,13,17,18,23,25 167:4 168:1,12,20,23 169: 6,18 170:1,3 174:18 177: 17 188:2,6 191:13,13 194: 23 204:8 213:10 214:1,2,3, 10,16,20 216:13 220:24 224:24 225:3 260:25 261: 13 263:15 266:24 instruction ^[4] 151:12,14 213:24 214:15 instructor ^[1] 106:5 instructors ^[2] 104:21 144: 20 instrumentality ^[1] 45:25 insulated ^[1] 29:8 insulates ^[1] 164:16 insurance ^[5] 38:16 153: 23 188:2,7 189:7 intangible ^[1] 67:24 integrity ^[3] 249:13 261:25 265:11 intellectual ^[32] 10:20 27: 18 28:6 35:21,25 37:11,19 56:5 63:2 70:7 78:6,10 79: 1,17 101:17 114:15 120:15 122:15 139:4 140:8 145:8 147:3,13,20 191:10 195:6 223:9 228:6 241:13,16 242:1 250:11 intend ^[4] 57:12 86:17,21 105:19 intended ^[3] 72:5 113:3</p>	<p>252:8 intent ^[16] 55:5 56:18 59: 25 60:1 63:20 76:24 85:13 114:7 115:13 117:6,14 118:17,21 268:4 270:1 272:17 intentional ^[43] 8:12 26:2 37:16,17 52:22 53:9 54:18 55:7,11,19 56:6 57:4,16 58:22 59:4,9,15 60:13,21 64:7 65:6 69:19 70:18 76: 23 85:12 107:6,8 112:25 113:3,23 116:23 122:24 164:10,22 181:7 188:4 237:10 247:6 248:24 253: 5 254:16 255:8 273:2 intentionality ^[9] 56:2 58: 9 62:22 64:1 117:24 118:9, 13,19 148:14 intentionally ^[13] 27:1,20 41:2 55:4 70:8 107:15 114: 15 115:22 116:13 121:11 164:20 262:22,24 interact ^[4] 81:5 137:4 141: 23,24 interaction ^[1] 230:2 interest ^[8] 98:1 101:11 124:10 135:14 187:4 196: 20 265:3 272:1 interested ^[11] 7:5 27:12 76:3 104:16 132:9 133:11 141:7 142:4 161:9 217:12 238:14 interesting ^[6] 60:24 80: 14 82:17 172:23 179:25 251:21 interests ^[7] 4:21 9:11 29: 17 74:23 251:1 263:21 266:3 interferences ^[1] 240:20 intermediate ^[3] 229:4 240:13,16 internal ^[1] 152:9 internally ^[1] 152:11 International ^[2] 122:3 195:15 internationally ^[1] 50:13 internet ^[9] 33:15,18 55:16 110:4 115:3 201:21 202: 11 261:3,19 interpret ^[2] 32:8 248:18 interpretations ^[7] 260:13, 15 262:25 263:2,9,18,20 interpreting ^[2] 19:21 248: 7 interrupt ^[1] 42:15 Interscholastic ^[1] 222:21 interviews ^[1] 12:15 introduce ^[4] 8:19 77:5 191:2,25 introduction ^[1] 139:12 introductions ^[1] 134:3</p>	<p>invariably ^[1] 178:16 invasion ^[1] 240:22 inventors ^[1] 269:23 inverse ^[1] 49:6 invest ^[2] 137:22 263:15 investigate ^[2] 157:20 158: 1 investigating ^[1] 42:24 investigation ^[3] 115:23 170:16 178:23 investigations ^[2] 46:19 105:14 invite ^[5] 86:7 87:10 91:5 133:24 134:9 invites ^[1] 148:23 inviting ^[1] 57:19 invocation ^[1] 48:9 invoke ^[2] 172:18 211:18 invoked ^[1] 46:20 invoking ^[1] 22:15 involve ^[1] 267:9 involved ^[15] 28:24 35:12 50:6 57:6 63:5 80:15 83:2 116:3 143:14 150:8 174: 16 192:3 224:10 230:2 250:23 involves ^[2] 143:8 243:6 involving ^[10] 44:19 52:1 77:3 85:17,23 142:1 155:1 171:22 178:6 187:12 IP ^[8] 63:9,11,12 79:3 93:5 130:18 273:24 274:1 ire ^[1] 165:21 irrelevant ^[1] 22:21 Isaac ^[1] 78:25 isn't ^[17] 25:23 26:9 69:18 92:25 98:21,23,25 111:2 137:21 157:8,9 161:16 162:2 183:8 247:10 248: 10 262:13 issue ^[45] 4:6,16 8:11 35:4 36:12,23,24 43:1 53:22 64: 2 78:22 87:14 88:23 91:13 92:3 107:5 114:7 123:9 126:17 129:18 137:19 139: 22,23 140:6,6 154:23 172: 11 181:13,19 187:8,19 194: 2 205:4,25 207:9 208:2,12 209:5,6 212:20 225:22 238:2,15 239:16 274:20 issued ^[1] 4:9 issues ^[19] 11:22 24:11 36: 23 41:11 79:6 87:1,13,21 90:19 119:23 143:13,15 147:10 170:24 185:19 191: 20 207:7 246:14 254:3 item ^[2] 71:9 150:5 items ^[5] 5:16 102:7 103:5 105:24 218:23 itself ^[6] 22:15 65:15 82:3 144:21 169:12 249:14</p>
--	--	--	--	--

Jalyce [2] 9:3 190:4 Jamie [1] 159:1 Janice [3] 252:13 259:4,12 January [1] 42:22 Jeff [2] 10:24 252:13 jeopardize [1] 242:14 Jim [8] 222:7,14 223:17 228:8,9 237:3 253:10 258:20 job [7] 37:10 38:14 55:15 60:5 176:17 204:25 226:23 Johannes [1] 10:14 John [1] 247:4 Johnson [17] 9:23,24,24 39:8,17 42:20 43:19 44:2, 13,15 65:12,17 66:25 73:7, 13,14 74:6 joined [2] 53:25 135:7 joining [1] 8:18 joins [1] 136:9 Jonathan [1] 192:11 Jones [14] 10:4 44:17,22 45:3,16,19 46:6,6 47:3,4, 14 49:12 51:10,20 Jones' [1] 48:16 Jordana [4] 9:1 190:2 231: 1 235:19 Journal [4] 10:6 45:4 46:5 47:16 journalist [1] 207:24 journalists [7] 193:7 250:9 270:16,16,21,23,24 journals [1] 45:16 judge [6] 119:7,9 154:23 201:22 226:8,9 judges [1] 36:21 judgment [7] 54:23 75:1 90:21 93:14 128:14 222: 22 269:6 judgments [2] 74:22 167: 11 judicial [2] 165:25 203:24 jump [12] 104:6 112:15 162: 14 167:17 180:7 194:21 198:2 206:11 212:25 246: 15 271:15 274:17 June [3] 12:6 46:15 111:22 jurisdiction [8] 112:6 179: 9 228:25 229:4 246:9 247: 25 248:4 249:20 jurisprudence [4] 24:24 57:17 229:24 233:21 Justice [4] 194:3,4 195:18 248:12 justified [1] 261:23 justify [1] 60:19 <hr/> K <hr/> Kansas [2] 11:7 28:15 Kavanaugh [1] 194:4 keep [15] 105:19 120:11 133:9 149:19 170:2,3 181:	23 183:15 190:6,10 194:17 202:8 206:5 215:12 263: 22 keeping [5] 50:17 68:10 149:6 217:1 220:8 Keith [1] 77:7 Kentucky [8] 11:13,15 26: 25 27:3 61:9 89:21 253:13, 14 kept [2] 231:15,21 KERN [11] 9:6,6 119:4 120: 1,3 123:11 124:9 125:2 126:6 130:22 131:23 Kevin [19] 8:24 10:10 11:5 54:9 75:18 80:10 84:2 87: 16 104:9 107:12,12 127:20 130:22 134:10 177:20 189: 15 191:6 252:14 271:17 key [5] 8:7 12:2 21:15 52: 20,23 kick [2] 77:4 189:15 kind [44] 5:25 39:1 41:4 43: 4 62:24 63:25 87:16 99:3 101:8 110:15 115:23 123: 23 127:1 134:18,22,24 136: 3 138:8 150:22 152:2,3 160:15,23 161:7 163:15 164:16 169:6 171:2 178:8 180:13 181:19 183:12,20 195:4 208:7 211:24,25 213:17 224:12 225:22 228: 2 246:20 258:14 272:18 kinds [11] 27:25 55:19 150: 17 154:10 155:17 168:8 169:8 178:25 213:18 225: 23 234:10 Klaus [10] 141:5,9,11 171: 13 173:8 174:13 180:22 182:20 186:15,21 Klaus's [1] 171:7 knives [1] 255:15 knowing [1] 58:23 knowingly [1] 263:8 knowledge [13] 31:23 35: 10 36:1 50:10 51:24 63:9 68:22 110:8 174:7 180:16 239:15 255:25 267:14 known [1] 110:7 knows [2] 57:9 159:19 Kool-Aid [1] 260:20 Kristen [1] 79:9 Kurt [2] 141:11 176:16 <hr/> L <hr/> label [2] 264:9,10 laboratories [1] 78:20 lack [3] 63:10,11 114:9 lackadaisical [1] 137:20 lacked [1] 163:1 lacks [1] 127:9 lady [1] 226:18 Laiho [14] 77:16,16,17,18 79:18 92:11,12 93:18 114:	2,3 115:25 116:3 120:7,10 land [1] 240:24 Land-Grant [3] 11:15 145: 11 191:18 landslide [1] 214:24 language [1] 58:14 Lanier [8] 142:20,21,21 large [14] 18:8 21:1 47:23 69:17 81:11 123:18 127: 23 146:7 157:4 164:7 224: 4 248:11 261:10 262:23 large-scale [2] 52:14 70:9 largely [4] 146:8 160:20 189:3 253:16 larger [2] 17:12 123:9 largest [2] 45:6 70:14 last [43] 14:9 15:12 16:11 28:13 44:8 72:8 73:10 139: 23 145:5 146:15 153:2,6 158:13,25 168:17 177:22 181:12 183:16,17 184:23 194:5 198:14,16 201:12 203:21 213:6,14,25 223:10 224:5 231:5 232:2 235:20 237:17 247:14 249:1 251: 6 252:20 257:2,10 260:10 268:23 274:22 lasted [1] 50:6 Lastly [1] 269:11 late [7] 14:5 15:10 42:22 63: 24 74:10 106:6 202:4 lately [1] 51:1 Later [12] 4:14 7:7 36:22 41:25 66:6 90:18 136:17 200:20 201:25 210:17 226: 12,14 launched [1] 12:7 launching [1] 41:23 law [109] 11:6,7,7 25:10 26: 8 31:19 35:20,20 36:13 37: 18 46:22 48:4 49:5 56:4,7, 8 58:20 61:18 71:19,25 72: 3,5 78:7 79:3,16,17 82:21 87:5,15 94:4,12,18,21 109: 1 116:18 117:7,11 118:21, 21,23 123:5 124:13 127:25 129:8 130:1,9 135:5 136: 11 137:3,23 138:5,9,10,15 139:12,18 141:12,14,15 145:22 146:11,17,22 147:3, 3,7 148:11 151:13 164:1 171:17 180:14 189:9 191: 11 192:17 197:17 201:4 203:23 219:25 222:24 225: 5,20 226:13,25 228:24 244: 6 248:7,18 249:13,14,17, 19,20 250:2 257:15 260:12, 18 261:24,25 262:23,25 263:1 264:14 265:9,10,21 267:2,19 269:21 270:4 lawful [7] 113:6 158:21	159:16 166:22,22 264:8,11 lawfully [2] 143:9 150:12 laws [5] 113:24 147:23 225: 21 238:6 274:9 lawsuit [19] 29:8 36:2 85:8 128:23 154:13 165:10,11 168:7 192:3 215:24 225:7 232:2 243:5,9 244:14 261: 14,17,20,21 lawsuits [11] 81:19 157:10 159:25 160:2,8 168:18,18 217:19 237:18 253:23 273: 22 lawyer [3] 103:18 134:13 143:21 lawyers [6] 43:8,11 103:20 135:19 255:22 256:16 lay [1] 40:22 laying [2] 146:19 156:25 lead [2] 102:1 141:13 leaders [1] 150:20 leading [2] 190:3 225:5 leads [1] 217:5 Leahy [1] 4:23 learn [1] 176:25 learned [1] 225:2 learning [4] 102:21,23 143: 1 177:1 least [27] 21:11 40:12 51: 11,19 64:19 82:5 84:22 90: 22 91:6 93:16 99:8 110:8 116:16 123:19 126:23 142: 13 145:5 148:21 151:8 189:1 201:6 205:8 216:4 223:1 247:6 250:21 255: 21 lecturer [1] 78:4 led [1] 36:2 leery [1] 257:14 left [4] 49:12 215:14 221:16 268:1 Legal [14] 10:11 12:14 38: 24 83:19 137:5 138:25 140:23 186:24 191:6 237: 16 243:15 265:15 267:23 268:10 legislation [4] 4:15 156:17 168:5 254:15 legislative [5] 4:11 5:1 74: 21 234:15 239:4 legislature [9] 167:23,25 168:11,16 179:9,21 216:8, 11 225:23 legitimate [7] 29:2,25 130: 3 211:8 212:19 213:9 268: 12 lending [4] 261:3,7 263:6 264:14 length [1] 63:22 lengthy [1] 80:5 lens [1] 21:23 less [17] 96:17 105:23 112:	8 125:7 131:20 148:15 160:21 163:7 165:16,17 169:3 174:8 177:7 230:23 249:4 257:9 265:20 lesser [3] 198:25 237:10, 11 letter [7] 93:19 127:7,15 159:18,20 186:6 209:16 letters [12] 30:17,20 64:22 65:13,18 79:5 92:16 93:7, 11 168:19 169:17 172:6 level [24] 38:13 58:13 59: 24 60:19 70:9 76:24 79:24 83:7,19 84:24 89:4 91:12 107:8 117:23 118:19 151: 3,4,24 163:5 179:20 189:4 221:12 228:19 245:22 leverage [1] 195:12 levied [1] 116:19 Levine [8] 78:1,2,2 120:9 121:19 129:18,19,23 liability [7] 32:16 47:1 60: 14 112:2 134:21 139:25 244:5 liable [3] 61:15,24 62:18 liberal [1] 14:12 liberty [1] 270:4 librarian [6] 9:20 28:12 138:2 146:12 171:1 262:4 librarians [2] 146:1 251:13 Libraries [53] 9:21 11:6 19: 5 29:24 30:14,21 134:14, 18 135:3,10,10 141:23 143: 23 147:17 160:6 171:16,17, 20,21,21 172:10,16 173:1, 1,6 174:16 175:10 176:17, 19 192:14,15 204:1,7,18 205:24 218:21 221:24,25 222:1,4 224:2,11 237:13, 14,18 247:20 259:20 260:3 261:5 262:21,24 264:25 266:4 library [44] 47:23 70:14 78: 4 121:9,14 122:2,5,9 134: 13,14 142:23 143:13 144:5 148:4,5,19 150:4 151:2,16, 17 152:4,14,20 166:11 173: 21,22 184:4 185:3 192:12, 13,25 212:20 218:15 219:1 224:5,9 228:17 259:12,18 260:15 261:18 265:7 266: 1,21 library-specific [1] 152:22 license [49] 20:17 36:1 65: 2,3 67:9 70:17 71:18 72: 10,12,21 81:7 101:2 104: 22 120:17 121:15 122:11, 16 123:17 124:24 125:7,17 126:3 142:13 145:24,25 156:1,3 172:7 180:20 181: 1,6 182:13,17 185:15,16 196:4,11 200:13 210:20
---	--	--	--	--

<p>225:1 230:9 241:4,8,9 243:20,24 264:6 266:25 268:20 licensed [6] 142:6 212:20 229:19 230:9,17 268:7 licensee [1] 67:4 licensees [1] 241:17 licenses [18] 68:12 69:5 114:10 121:18 122:13,14 124:20 125:5,25 126:1 210:21 224:8 229:25,25 230:1 234:6,6 247:22 licensing [40] 8:15 31:18 37:12 67:3,11,11,16,18,23 68:23 69:14,25 70:12,15, 25 72:19 77:2 98:6 118:3 119:2 120:1,10,23 121:6, 17 123:22 124:4 126:12,24 128:1,3 157:17 158:3 171: 20 199:13 216:21 224:4,6 229:21 251:13 lie [1] 202:14 lieu [3] 96:20 131:3,9 life [4] 32:2 72:23 202:16 270:3 lifetime [2] 102:9 268:5 lift [1] 73:25 lifted [3] 40:11 42:4 73:17 light [1] 48:5 lightly [1] 156:13 likelihood [1] 226:21 likely [7] 92:10 115:5 124: 25 169:4 177:8 230:23 256:6 limit [2] 6:6,12 limitation [2] 22:16 234:10 limitations [8] 8:14 22:9 52:24 140:4 205:7 211:11 238:9 263:18 limited [7] 8:6 68:16 71:6 86:19 233:1 241:19 269: 22 Linder [15] 10:2,3,4 44:17 45:1,10,12,15 46:8 48:21 49:25 53:3 68:12 71:12,14 line [6] 74:18 129:22 164: 10 165:19 199:19 237:22 lines [3] 36:8 141:20 240: 23 link [11] 6:19,22 7:6,9 76:3, 5,8 132:7,10 133:11,13 linked [1] 186:3 list [16] 16:5,8 37:1 51:16 66:9 80:5 85:5 86:14,16, 22 200:8 212:10 225:12 226:3 243:15 254:23 listed [3] 12:8 80:2 224:20 listening [5] 56:3 146:3 171:14 252:19 275:2 Listserv [1] 135:15 literally [5] 37:18 99:2 137: 8 143:25 168:7 litigants [1] 163:8</p>	<p>litigate [4] 92:4 109:3,13 127:9 litigated [7] 80:12 84:23 111:14,20 195:10 234:7,12 litigating [2] 87:22 203:3 litigation [25] 36:16 81:22 85:20 88:25 89:1 126:16 127:18 128:5,6 165:19 166:25 167:14 169:16 171: 11,19 188:18 203:5,12 204: 13 213:2 217:8,15,24 247: 12 265:15 litigator [3] 87:20 130:2 141:20 little [44] 8:2,5 13:2 15:13 17:2 20:23 44:7 45:10,12 48:22 63:21 75:6 84:3 102: 17 107:22,24 110:13 122:2 126:13 133:22 135:8 147: 11 153:12 165:14 169:20 175:8 177:23 180:22 192: 7 200:6,20 213:1,7,15 217: 16 227:13 231:16 240:1 251:24 254:8,17 270:13,20 274:17 live [4] 102:11,13 135:2 203:12 livelihood [1] 42:6 livelihoods [2] 261:9 265: 16 local [7] 44:3 50:14 66:20 68:14 142:1,5 225:5 located [1] 168:6 lock [1] 135:25 logical [1] 124:15 logistical [1] 5:16 logistics [1] 15:14 logo [3] 42:2,3 44:10 long [7] 4:7 16:18,18 37:1 102:9,14 183:23 long-term [1] 274:8 longer [4] 66:17 86:16 92:2 208:18 longevity [1] 14:23 longstanding [1] 70:2 look [39] 5:7 20:21 26:8 30: 15 32:23 33:5,21 40:1 44: 4 49:6 55:7,18 56:1 57:11 59:2 62:24 64:17 84:8 85: 16 90:7,8 91:11 94:19 112: 16 157:19,20 164:3 166:9, 13 172:6,17 180:18 226:5 233:8 237:16 239:6 255: 23 270:25 272:9 looked [6] 37:23 39:23 40: 5 83:13 89:13 90:25 looking [18] 18:17 21:23 25:16 53:19 58:10 59:12 65:20 89:7 90:9 105:22 112:24 171:25 197:18 198: 3 233:18 249:24 255:25 262:9</p>	<p>looks [1] 83:24 looser [1] 265:2 Los [1] 51:12 lose [4] 32:16 71:1 164:19 201:2 losing [2] 85:21 259:24 losses [2] 67:21,24 lost [14] 57:22 67:16,18,22, 22,25 72:18,19 111:19 112: 3 199:12,13 227:1 246:20 lot [7] 13:19 19:3 20:19 21: 3,6 24:10 26:20 28:2 29: 15 33:18 53:19 55:14 58: 10,11 68:13 90:2,2 101:5 109:7 112:11 119:16,23 120:17 121:15 129:5 137: 23 141:25 147:2,25 152:8 153:9 158:14 159:5 173: 20,21 176:21,22 178:3 181: 7,22 185:13,13 195:6,13, 20 196:15 198:15 199:9 204:11 206:13 207:16,24 210:23 211:6,13 214:10,14 215:16 216:3,15 220:12,14, 23 227:9 231:18 234:2 242:7 244:1,17 253:4,6 255:22 256:10 257:8,13 260:24 270:22 lots [6] 122:23 127:24 147: 19 216:12,17 262:3 Louisiana [1] 192:21 Louisville [1] 99:5 love [1] 174:22 low [2] 180:11 189:4 lower [2] 82:7 234:19 lucky [1] 226:19 Ludwig [1] 141:12 lure [2] 217:21 219:12 lured [1] 216:24</p>	<p>12 200:1 206:11,12 209:19, 20 210:12 211:5 219:10,11 239:2 245:9,10 246:1 249: 15 252:14 273:10,12,14 Madigan's [1] 246:19 magic [2] 74:17 245:19 magically [3] 56:13,14 264: 11 Magna [1] 112:4 magnitude [2] 91:20 256:7 Magnum's [1] 251:9 main [3] 98:22 184:5 201: 17 maintain [1] 45:5 major [7] 131:17 143:5,6 160:22 168:7 174:9 264:1 majority [6] 82:7 210:19 229:16,17,18 267:8 majorly [1] 172:21 management [6] 55:25 63: 14,17 64:24 102:21,23 managing [1] 144:3 mandate [1] 33:22 mandates [1] 33:12 mandatory [1] 33:1 MANGUM [22] 9:3,3 34:6,7 39:6 42:15 44:14 45:10,14 48:19 49:25 51:24 52:17, 19 66:24,25 68:2,19 69:18 71:12 190:4 249:9 manner [3] 36:10 156:14 268:19 manners [1] 147:5 many [43] 3:23 12:8 18:11 22:20 29:17 31:13 40:8,18 45:21 50:20 65:23 67:20 90:21 93:7 97:20 100:24 102:5,8 103:13,19 109:2 111:9 114:5 131:21 139: 10 152:1 159:15 174:21 176:9 210:13 217:20,25 230:6,10 237:15 248:14 249:3 251:19 261:23 262: 6,10 263:8 266:24 mapped [1] 47:9 Marble [1] 226:18 Marc [1] 191:9 marginal [2] 254:24 255: 14 Maria [1] 10:19 Mark [6] 9:5 34:18 107:10 110:24 133:18 177:18 Market [13] 10:6 73:3,21 123:21 172:14 183:1,2 196:2,4 199:13 221:13,18 240:25 marketing [4] 104:17 228: 18 242:23,24 marks [2] 55:4 64:25 Marybeth [1] 4:14 mass [2] 70:21 260:11 massive [2] 143:3 273:24</p>	<p>Master's [1] 98:2 material [12] 44:1 66:14 117:12 152:19 176:20 186: 4 203:14 209:9,17 221:6 225:1 229:22 materials [41] 18:12 22:6 66:19 80:21 81:6 102:20, 20 103:25 104:18 105:20 117:13,16 122:23 139:7,17 140:1 148:8,12 149:1,3 151:14,14 152:20 161:15, 15 166:20 168:13 171:20 172:11 173:11 176:11 187: 15,16,20,22 209:13 215:4, 8 224:5,6 252:8 Math [14] 9:25 39:8,25 40:9, 24 41:10,17,18,21 43:18, 23 66:2,3 73:16 mathematics [3] 39:18 41: 1,11 matter [21] 25:17 44:19 65: 11 85:23 87:15 93:15 96: 10 111:20 116:24 117:14 131:13 132:13 137:3 194: 7 209:23 235:12 256:17 262:1,20 263:14 264:21 matters [8] 13:22 78:17 85: 2 111:15 119:16 133:8 143:7 195:6 maximize [2] 8:6 263:23 McClatchy [1] 51:14 mean [67] 16:16 20:11 23: 23,25 24:22 25:2,4,19 27:2 32:9 46:23 55:13 56:4,19, 21 57:5 69:22 82:18 83:16 88:4,11 91:6 93:25 95:21 106:9 109:22 110:14 112: 23 113:1,3 117:6,15,19 120:11,22 126:9,16 130:7 151:25 156:19 166:3,9 170:20 172:19,24 173:19 177:21 181:5 183:8,10,11 198:24 206:1,20,23 213:23 214:3 222:12 230:13 241: 18 242:25 244:16 257:12 258:5 262:13 265:10 271: 10 meaning [3] 118:17 122:11 217:23 meaningful [1] 61:6 meaningless [1] 240:20 means [10] 20:13 25:5,8 47: 21 49:11 76:23 86:21 118: 9 138:11 166:2 meant [4] 46:24 87:4 212:6 219:21 measure [4] 131:11,14 248: 11 269:8 measures [6] 96:21 97:2 117:1 131:1,5 149:2 meat [1] 40:12 mechanism [2] 62:2 210:1</p>
---	--	--	--	--

<p>Media [12] 10:15 24:5 50:3, 11,12 125:7,15,17,23 141:14,21 267:12</p> <p>mediation [1] 35:17</p> <p>medical [1] 78:19</p> <p>medium [1] 8:4</p> <p>mediums [1] 193:8</p> <p>meeting [2] 185:12 275:10</p> <p>Melinda [2] 9:6 119:3</p> <p>Melissa [1] 78:2</p> <p>member [9] 78:8 116:20, 20 135:22 145:12 186:3 215:18 259:12,14</p> <p>members [17] 3:23 7:2 12:16 17:8,12 20:16 50:15,24 51:25 81:9 135:12 137:7 139:3 145:18 161:11 168:10 207:14</p> <p>membership [1] 24:4</p> <p>mental [2] 244:17 258:4</p> <p>mentality [1] 48:23</p> <p>mention [10] 47:14 78:7 139:23 176:14 204:5 207:22 227:10 235:8 243:13,16</p> <p>mentioned [97] 15:18 18:1 20:16 45:3 49:20 50:25 76:11 79:23 86:3 88:21 93:20 107:13,24 110:11 111:17 114:4,19 121:21 130:24 149:14 153:7 154:2 161:22 167:17 172:6 178:3 183:20 186:15 195:18 200:1 210:12 216:6 218:16 224:1,18 234:23 246:20</p> <p>mentor [1] 30:5</p> <p>mercy [1] 172:17</p> <p>merely [3] 60:1 61:25 272:19</p> <p>merit [5] 53:22 94:15 127:7, 9 236:19</p> <p>meritless [1] 273:22</p> <p>meritorious [12] 25:24 84:22 88:15 90:5,22 93:13 94:1,16 96:7 97:20 127:10 128:12</p> <p>merits [10] 87:24 88:12,23 92:4 93:25 109:11 112:17 131:12 236:17,20</p> <p>mess [1] 248:8</p> <p>message [6] 14:19 153:3 271:24 272:5,7,8</p> <p>messy [1] 248:15</p> <p>met [6] 65:24,25 66:1,1,5 247:8</p> <p>metadata [3] 149:3 162:5 163:4</p> <p>methodology [2] 12:1 18:3</p> <p>mic [12] 7:1 34:5 45:11 76:4,9 91:16 132:8 133:12,15 198:3 251:22 252:3</p> <p>Michael [1] 192:1</p>	<p>Michigan [19] 78:4,5 79:16 85:24 108:14,16,19 110:11, 12 111:18 122:1,9 142:22 163:24 185:7 192:24 200:9 234:24 238:18</p> <p>Michigan's [1] 123:1</p> <p>microphone [4] 46:7 76:1 106:14,17</p> <p>mid [1] 14:5</p> <p>middle [2] 42:9 237:1</p> <p>might [43] 16:9 54:16,18 55:10,25 57:12,13 61:2,5 62:8,10 64:14 70:2 73:17 82:1 102:11,13 116:19 117:10 136:5 142:12 146:4 157:23 158:18 167:13 173:17 178:9 188:3 190:24 195:19 208:23 213:19 227:15 229:23 230:17 233:20 238:3,13 243:23 266:13 274:17,21,22</p> <p>mile [1] 158:18</p> <p>million [18] 47:11,12 48:1 69:4 70:15 121:9 122:10, 12 126:3 200:5 203:7 205:18,21,22 222:22 224:6 247:21,21</p> <p>millions [10] 68:13 99:3,24 109:8,9 121:13 122:14 125:15 145:23 218:22</p> <p>Milwaukee [1] 79:13</p> <p>mind [1] 120:12</p> <p>mindful [1] 34:2</p> <p>mine [5] 39:2 55:12 56:13 142:5 144:13</p> <p>minimal [1] 209:2</p> <p>minimis [1] 112:1</p> <p>minimize [3] 6:2 190:7 195:5</p> <p>minimized [1] 195:4</p> <p>minimizing [1] 264:22</p> <p>minimum [1] 47:12</p> <p>Minnesota [1] 130:12</p> <p>minor [1] 172:21</p> <p>minute [5] 22:9 107:22 137:2 254:1 257:22</p> <p>minutes [9] 6:6 7:15 14:15 34:15 114:23 189:21 200:24 240:5 266:17</p> <p>misbehaving [3] 60:5,5 170:8</p> <p>mischief [1] 237:19</p> <p>misconduct [1] 60:11</p> <p>misguided [1] 216:15</p> <p>misheard [1] 182:7</p> <p>misplaced [1] 261:21</p> <p>misrepresent [1] 125:23</p> <p>missed [2] 108:6 181:23</p> <p>missing [1] 21:15</p> <p>misstated [1] 110:5</p> <p>mistake [4] 148:18 177:8 216:21 226:10</p>	<p>mistakes [2] 53:1 254:19</p> <p>misunderstanding [1] 55:15</p> <p>misunderstandings [3] 173:16 185:14,14</p> <p>misuse [3] 68:23 157:14 211:25</p> <p>misuses [1] 56:12</p> <p>misusing [1] 71:21</p> <p>mitigate [1] 171:18</p> <p>mix [1] 193:11</p> <p>model [3] 104:16,22 196:23</p> <p>moderated [1] 5:21</p> <p>moderating [1] 183:16</p> <p>Molnar [17] 78:24,25,25 93:3,4,22 94:4 95:2,20 113:7 120:8,21 126:23 130:5,7 201:12 202:19</p> <p>moment [3] 197:23 198:1 229:13</p> <p>momentum [1] 253:8</p> <p>monetize [2] 38:19 268:5</p> <p>money [11] 26:20 28:2 34:23 38:10 68:13 70:17,19 72:2 122:23 127:18 257:14</p> <p>monitor [1] 13:16</p> <p>monitoring [2] 13:20 199:14</p> <p>Monkey [4] 7:6,9 15:19 76:7</p> <p>month [2] 205:21 210:16</p> <p>monthly [1] 137:12</p> <p>months [5] 41:25 112:9 152:1 257:10 263:25</p> <p>MOOCs [1] 143:4</p> <p>Moody [1] 39:22</p> <p>Moreover [1] 116:21</p> <p>morning [10] 3:13 8:24 9:14,19 10:3 76:13 77:17 78:14 205:2 206:7</p> <p>mortgage [1] 38:16</p> <p>most [32] 12:12 14:6 16:2 17:2,9 26:3 32:13 36:20 50:25,25 51:22 54:6 85:2 89:13 102:22 112:6 125:8 126:4 155:22 196:18 204:21 217:19 222:3,20 231:4 235:2,9 239:9 252:25 256:14 262:7 263:6</p> <p>mostly [3] 198:20 270:11, 21</p> <p>motion [4] 62:16 89:4 90:4, 14</p> <p>motions [1] 90:20</p> <p>motivate [1] 125:11</p> <p>mouthpieces [1] 270:17</p> <p>move [13] 32:21 39:8 44:17 50:2 53:2 56:16 76:18 101:12 120:1 171:5 207:5 214:25 260:11</p>	<p>moved [1] 232:6</p> <p>moving [3] 66:2 259:3 266:12</p> <p>mRNA [1] 191:14</p> <p>MS [35] 3:3,12 5:11 9:1,3,6, 7,17,18,19,22,23,24 10:1,8, 13,16,17,19,22 11:2,9,18 14:16,20 15:13 16:7,21 17:17,18,23 20:7,24 21:17,19 23:20,25 24:7,19 27:5,16 28:7,8,10 29:3,10 32:18,19, 22 33:8,10 34:1,6,7 39:6,8, 17 42:15,20 43:19 44:2,13, 14,15 45:10,14 48:19 49:25 51:24 52:17,18,19,19 53:16,16,17 54:14 55:1,22 56:3,25 57:6 58:18 59:10 60:24 62:7,20 63:21 65:10, 12,17 66:22,24,25,25 68:2, 19,20 69:2,18 70:4,13 71:12 72:7 73:1,6,7,12,14 74:6,6 75:9 78:1,2 79:8,9 101:16,21 104:14,20 105:7,12, 16,21 117:4,5 120:1,3,8 121:19 123:11 124:9,19 125:2 126:6 129:18,19,23 130:22 131:23 137:25 138:1 142:20,21 143:17,19 146:2,24 147:24,25 151:5 152:13 160:4,24,25 162:14,23 163:10,13,17,19 165:23 167:1,10,17 168:17,24 169:15 171:4 174:12,13 176:5, 8 181:20,23 182:4 183:23, 25 184:25 185:5,7 186:11, 13 188:14,23 190:1 191:8, 19,24 192:6,10,18,18,19, 22,22,23 193:3,3,4,10 194:20 195:23,23,25 197:1,1,4, 21 199:11,21,21,23 200:16, 23 202:18,25 203:17 204:17 206:4 207:4,13 209:4, 19 210:11,11,12 211:19,19, 21 212:25 213:22 214:22, 22,23 216:1,1,2 217:5 219:10 220:10,10,12,22,24 221:7,19 223:22,22,25 224:16, 18,23 225:8 227:6,23,24, 24,25 229:11 230:21 231:3 232:19 233:5,7,15,24 234:8,17,19,20 235:17 237:25 238:2,11,17,19,21,23 239:12,21,25 240:4,10,11,11, 12 242:5,5,7,19,20,21 243:11,12 244:9,10,11 245:9, 24 247:13 248:20,20,21 249:9,10,14,16 251:5,8,19 252:1,1,17 254:5,7,13 255:5,11 256:3,19,23 257:4,17, 21 258:24 259:1,6,8,9,10, 11 266:9,9,16,18 270:7,9, 10 271:10,16,21 272:12,16</p>	<p>273:6,6,8,9,13 274:19 275:1</p> <p>much [42] 5:11 18:20 28:11 36:2 44:14 48:9 49:25 68:19 73:18 81:20 106:9 115:5 121:1 132:4 134:1 141:5, 7 142:19 143:19 148:15</p> <p>149:22 161:13 171:20 177:11 187:18 189:22,24 195:9 206:15 217:23 233:3 235:10,13 252:18 257:11 260:22 263:17 268:12 270:14 272:12 274:16 275:8</p> <p>muddy [1] 109:11</p> <p>multi-year [1] 92:19</p> <p>multiple [11] 13:9,11 28:24 97:11 98:8 100:22 108:23 134:17 152:1 156:24 170:21</p> <p>multitudes [1] 56:9</p> <p>municipality [1] 105:4</p> <p>Munter [9] 10:13,14,14 50:2,11 52:4,17 68:2,4</p> <p>murky [1] 103:16</p> <p>Murphy [16] 79:8,9,9 101:16,21 104:14,20 105:7,12, 16,21 107:23 117:4,5 124:7,19</p> <p>museum [1] 266:20</p> <p>museums [1] 30:13</p> <p>music [1] 170:22</p> <p>must [4] 268:10 269:12,16 273:19</p> <p>mute [5] 3:6 6:2,8 75:25 104:13</p> <p>muted [13] 3:5,6 5:19 10:18 92:10 108:2 125:3,4 133:9 138:19 160:4 190:6 251:25</p> <p>myopic [1] 261:22</p> <p>myself [3] 18:10 79:20 174:24</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name [25] 5:14 9:9,19,24 10:3 11:5,12 23:16 42:4 75:18 77:7,12,18 78:2,15 95:11 98:21 138:1 141:11 143:20 145:7 190:1 192:1 200:7 259:11</p> <p>name's [1] 78:25</p> <p>Namely [1] 8:8</p> <p>narrow [1] 25:15</p> <p>nasty [2] 159:18,19</p> <p>nation [1] 123:6</p> <p>national [14] 50:14 78:19 99:9 141:11,16 173:14 174:16,25 186:25 193:5 225:5 236:3,5 264:1</p> <p>Natural [2] 34:16 95:6</p> <p>nature [5] 8:11 45:22 54:21 98:15 157:15</p> <p>Nautilus [3] 9:15 35:21,25</p>
--	--	---	---	--

<p>nearly ^[1] 226:4 necessarily ^[10] 14:25 20:13 24:21 27:2 55:13 113:25 117:23 119:17 161:17 175:7 necessary ^[1] 247:15 necessitate ^[1] 84:13 necessity ^[1] 189:7 need ^[42] 6:1,8,8,10 18:18 30:24 31:25 41:7 42:23 51:5 57:11 58:13,23 69:13,20,23,24 70:12 77:22 81:6 90:25 91:11 95:12,17 106:21 127:25 163:25 165:24 171:5 176:25 206:15 214:14 223:15 225:20 237:21 250:3,5 254:1 266:18 271:2 274:1,11 needs ^[10] 20:14 78:11 103:2 151:18,21 244:15 247:5 265:18,21,24 negated ^[1] 267:6 negligence ^[1] 118:18 negligent ^[3] 25:5 26:1 272:19 negligently ^[1] 107:16 negligible ^[1] 206:3 negotiate ^[8] 69:14 70:11 71:18 120:6 142:13 172:7 216:21 221:2 negotiated ^[1] 66:17 negotiating ^[3] 48:13 187:17 221:14 negotiation ^[2] 124:1 126:25 negotiations ^[5] 66:23 77:2 126:12 171:11 267:20 neighborhood ^[2] 146:14 234:18 neither ^[1] 248:23 Network ^[4] 135:6 136:15,23 218:17 never ^[22] 18:12 26:17 28:21 29:6 59:23 66:4 72:21 81:19 91:17 116:14 121:23 122:6 149:10 156:13,13 179:18 202:16 203:20 215:18 221:4 231:13 236:24 new ^[14] 3:10 33:15 51:12 96:24 117:18 150:7 213:24 227:3 253:8 257:14,14 260:13 268:4 269:18 News ^[13] 10:15 46:6 50:3,11,12,21,21 51:4 52:10 68:6 174:14,15 270:23 news-gathering ^[1] 45:6 newsletter ^[2] 155:21,22 newspaper ^[3] 193:8 242:10,11 newspapers ^[9] 50:14,20 51:17,19 52:8 68:10,14,14,17</p>	<p>newsrooms ^[1] 45:5 next ^[16] 14:20 24:8 34:2 43:12 73:12,23 123:13 132:3 142:20 143:18 183:15 212:13 217:6 266:12 270:8 271:2 night ^[3] 16:11 237:1 275:9 nine ^[5] 40:11 93:6,10 137:2 198:7 Nineteen ^[1] 84:11 Ninth ^[1] 19:16 noble ^[1] 129:6 nobody ^[2] 43:2 212:5 nod ^[2] 7:8,9 nodding ^[1] 185:5 NOI ^[7] 12:6,8 15:21 16:3 22:17 34:9 50:5 noise ^[4] 6:3 76:1 104:7 190:7 non-disclosure ^[1] 197:14 non-educational ^[1] 186:17 non-existent ^[1] 12:23 non-negligent ^[2] 64:20 65:6 non-profit ^[1] 112:10 non-representative ^[1] 141:6 non-state ^[1] 81:6 non-university ^[1] 174:19 none ^[4] 120:22 165:14 202:25 244:23 nonetheless ^[1] 265:15 nonsensical ^[1] 99:20 nor ^[1] 219:14 Normal ^[7] 98:21,23,25 104:17,19 111:2 221:13 norms ^[2] 147:17,22 North ^[12] 34:10 35:11,19,24 36:15 37:22,24 38:18 126:16 138:3 232:15 272:6 Northeastern ^[1] 100:23 Northern ^[1] 112:7 notable ^[1] 114:6 note ^[11] 13:7,14,21 53:23 59:22 69:3 132:5 199:23 231:1 235:19 238:17 noted ^[10] 4:17 7:16 16:22 20:11 29:14 53:17 54:1 68:12 154:19 226:4 noteworthy ^[1] 91:9 nothing ^[9] 39:24 43:11 104:1 173:8 199:11,17 211:15 212:18 232:5 notice ^[9] 19:17 40:5 58:15 89:10,15 209:9,16,25 210:7 noticed ^[6] 186:18 204:20 224:1 235:14 257:4,7 notices ^[5] 55:20 205:21,</p>	<p>23,25 262:12 notified ^[1] 221:8 noting ^[3] 51:2 52:25 88:5 notion ^[6] 32:6 71:15 72:1 134:21 230:22 272:19 notwithstanding ^[1] 83:17 novel ^[1] 23:13 November ^[1] 194:5 NPPA ^[1] 228:7 number ^[48] 6:4 12:15 18:6,8,10 22:24 27:24 35:7 40:25 62:25 74:17 80:2 81:11,15,16,18,25 82:10 86:2,3,8 87:18,21 89:5 91:16,19,20 92:13,14 98:12 99:15 100:3,10 102:16 108:7,18 110:18,19 114:4,13 198:9 218:14 223:9,13 245:19 257:11 261:10 262:2 numbers ^[10] 13:17,21 31:11 47:9 82:24 83:8 96:6 218:24 219:3 249:1 numerous ^[3] 97:10 111:4 126:18 nursing ^[1] 73:16</p> <p style="text-align: center;">O</p> <p>object ^[1] 169:20 obligation ^[1] 270:17 observation ^[1] 173:9 observe ^[1] 29:2 observed ^[1] 90:23 obstacle ^[1] 227:19 obstacles ^[2] 190:19 227:12 obtain ^[6] 4:19 50:9 71:22 94:9 221:20 267:11 obtained ^[5] 63:7 109:23 115:17 137:6 234:11 obvious ^[2] 74:12 81:23 obviously ^[8] 22:9 69:23 103:4 126:16 183:20 203:18 218:8 245:11 occasion ^[3] 96:16 141:22,23 occasional ^[1] 114:7 Occasionally ^[5] 70:10 92:16,18 178:18 237:15 occurred ^[1] 196:2 occurrence ^[1] 212:17 occurring ^[2] 14:7 82:16 occurs ^[1] 128:6 OCLC ^[1] 266:22 October ^[1] 112:8 oddball ^[1] 230:14 offer ^[10] 68:22 70:2 125:5,25,25 128:25 131:18 199:10 241:5,21 offered ^[10] 34:13 39:15 42:18 44:24 52:2 69:19,21 74:24 124:5 221:17 offering ^[3] 221:14 259:21</p>	<p>268:6 offers ^[1] 143:25 Office ^[79] 3:7,13,16,19,19,20 4:2,8 5:15,21 7:12,19,24 8:18 11:20 14:17 15:21 16:8 17:5,21 21:21 22:17 24:12,17 25:21 30:16,23 32:23 43:2 47:20 50:4 52:20 54:1,2 64:6 71:11 75:19 76:15 77:19 78:3,16,21 85:19 87:9,9 88:10 89:9 92:20,21 100:24 107:17 120:13 136:1 142:23 143:23,25 144:4 170:25 175:22 183:19,22 184:21 185:8,8,12 186:9 189:18 190:3 192:25,25 203:6 205:10 206:22 207:17 219:1 262:5 266:6 274:23 275:4 Office's ^[10] 4:11 5:5 8:20 12:6 34:9 84:17 111:21 203:15 209:23 275:6 officer ^[2] 94:19 143:22 offices ^[4] 100:25 124:21 144:13 145:24 official ^[8] 47:18 61:3 95:17,19 130:15 151:4 199:18 271:4 officials ^[2] 83:5 94:25 offline ^[1] 106:23 often ^[9] 50:25 68:21 71:7 93:16 115:15 125:9 244:7 265:13 270:24 oftentimes ^[2] 103:20,25 OGC ^[1] 185:17 Ohio ^[14] 79:1,2,6 93:5 94:5,12 97:24 111:18,22 113:9 119:19 120:21 130:8 205:13 Okay ^[46] 7:9 15:13 17:17 20:7 21:17 24:7 33:8 34:1 43:24 44:12 45:15 53:16 60:4 62:7 63:21 86:11 96:1 97:15 101:15 104:6,13 105:21 106:10 107:2 110:1,21 119:25 127:14 131:24 150:16 169:18 171:13 173:9,14 179:10 188:24 189:13,20 194:22 200:16 207:4 224:18 245:6 254:13 257:21 275:1 Oklahoma ^[1] 183:18 old ^[2] 7:22 236:4 Olive ^[9] 223:17 228:8,9 242:9,12 247:18 253:10,11 258:20 Olive's ^[5] 222:7 237:3 239:13,15 240:2 Olson ^[12] 192:18,19,19 197:1,4 200:24 211:19,21 214:22,23 242:5,7 Oman ^[3] 4:9 59:13 246:8</p>	<p>once ^[11] 33:20 68:23 73:2 91:25 92:1 93:19 178:23 186:5 187:22 264:2 274:24 one ^[145] 5:18 6:17,22 14:23 15:4 16:15 17:24 18:6 23:7,20 25:4,21 26:24 28:21 34:16 36:9 37:24 38:18 44:2 45:5 50:25 51:6 52:16,22 53:10 55:6,21 59:10 64:9 65:10,25 70:14 71:11 72:20 73:10 75:11,12 82:18 83:21 84:5,8 87:1 89:5,9 91:24 92:12,21 96:22 99:8,22 100:12 101:14 106:11 107:13,18,24 108:5,14,25 114:17,18 116:1 123:14 124:11 130:23 132:5 135:3 136:22 137:1 139:5,14 140:9,12,21 144:9,19 148:1,5,21 152:16,23 154:13 155:22 156:10 158:12,12 162:24,24 166:9 168:5 169:24 172:1,8,12 175:6 176:14 177:20 178:12,20 179:3 181:16,16 184:6,24 187:24,25 188:12 189:13 194:25 196:14,14 197:4 200:8 201:6 203:20 205:12 207:4,22 210:4 211:9 212:13 223:9 224:20 231:1 235:20 237:15,18 238:3 239:22 242:9 243:13,16 245:24 246:1,2,7 248:5 249:4,9 253:2 262:9,15 267:16 271:10 272:16 one-on-one ^[1] 146:14 ones ^[9] 51:16 52:11 103:3 106:7 176:21 222:4 226:3 256:1,15 ongoing ^[3] 105:13 199:14 257:13 online ^[22] 3:22 47:19 80:13 115:4 143:1,2,2,3 148:8,13 149:18 152:14 175:16 184:11 209:13 214:13,15,17 215:1,4 219:23 263:22 only ^[51] 11:14 28:5 30:25 31:7,18 37:9 47:19 49:1 51:3,5 52:15 58:3 67:8,17 70:6 72:1 81:14 82:10 97:25 98:9 102:11 104:24 106:8 121:19 124:22 141:6 144:24 154:13 164:1 166:20 174:21 193:21 194:14 195:15 198:6,8 199:10 200:6,10 201:2,2 216:13 222:8,15,23 225:4 257:25 268:25 269:1,2,4 open ^[19] 7:1 13:3 20:1 61:17 63:8 76:4,9 132:8 133:12,15 143:3 212:10,11,12,</p>
--	--	--	---	---

13 214:7 252:3 264:4,6 opening [2] 3:10 9:10 openly [2] 18:2 263:22 operate [4] 63:1 124:22 152:11 170:20 operation [1] 214:19 opine [2] 17:2 198:11 opinion [14] 17:3 20:20 52: 25 59:12,19 81:17 94:20 96:9 113:21 165:4 208:4 229:7 254:20 259:16 opportunistic [1] 160:2 opportunities [5] 6:14 67: 16,19 72:19 199:13 opportunity [18] 5:24 9:11 17:24 62:23 64:2 96:4,14 119:6 143:20 145:7 152: 25 188:15 233:19 252:7 266:7,15 270:5 273:8 opposed [8] 33:24 74:13 83:3 128:12 144:11 197: 19 232:23 273:18 option [1] 246:2 options [1] 142:7 order [6] 8:8 24:8 31:20,21 32:2 269:17 ordered [1] 112:9 orders [1] 91:20 organic [1] 102:11 organization [5] 102:2 136:24 193:6,7 219:22 organizations [11] 17:12, 14 23:2 50:12 61:5 135:9 174:17 260:16,18 266:22 270:24 original [2] 40:9 129:7 Orleans [1] 227:3 Other [142] 8:22 10:6 15:3 17:15 18:21 22:15 26:8 27: 18 35:2,2,40:17 45:4 47: 10 62:8 51:21 52:1,1 53: 17 62:8,12 64:13 66:20 69: 15 72:12 84:19 85:10,25 88:7,10,17 90:5,23 91:10, 25 92:8 94:5 100:21,25 102:24 108:20,21 111:25 114:5 119:20 120:5,15 121:5,15 122:14 126:18 128:7,12,24 129:14 131:5, 18 133:24 135:15 136:4 141:24 144:6 149:1,3,15, 16 150:20,24 152:15,18,22 155:16 156:18 159:10 161: 14 168:19 171:11,22 173:3, 4,7,9,10 174:11,18,23 176: 7 184:13,14 186:16 194:11 196:10 202:18 204:4,22 205:6,13 206:7 207:1 210: 23 211:9,17 213:4,16,18 218:2 223:4,19 224:7 226: 12,24 230:10 233:21 235:3, 14 236:19 237:19 238:6,9,	13 239:21,22 240:18,19 243:6,17 244:13 246:7 247:10,11,18 250:11 251: 17 252:19 253:20,25 256: 10,24 264:5,9 267:1 270: 25 272:16 others [23] 19:10 20:3,6 25: 19 70:4 73:4 85:19 87:2 88:4 108:1 143:9 149:20, 23 152:24 195:2 238:13 252:10 255:2 258:22 259: 3 260:9 266:23 273:15 otherwise [14] 73:11 81:5 82:1,11 83:22 113:6 122:8 127:3 184:19 207:2 267: 13 268:20 272:25 273:5 ought [2] 87:14 118:20 ourselves [5] 131:17 174: 20 175:12 200:11 244:12 out [106] 13:22 21:5,22,23 24:4,5 30:14 31:2 38:19 40:11,19 41:3,23 42:7 45: 11 47:18 53:8 54:5,10,11 62:19 65:17 66:6,7,20 67: 14 69:25 70:11 73:16,20, 24 81:13 84:6 93:14,20 94: 1,10 99:2,2 100:3 107:3,19 109:9 110:9 113:25 115: 22 116:24 125:12,15 126:2 127:15 129:14,22 146:19 149:13 153:14 156:10,25 160:3 162:15 165:25 176: 12 181:3 183:13 184:2,6, 188:25 194:23 198:3 199: 5 201:12 202:14 206:16 212:8 214:17 215:2 221: 13 223:2 224:12 225:17 226:15,19 227:4 228:2 230:13 232:1,11 235:20 237:2,6,20,24 245:7 247: 13 251:6 252:9 253:5,6 254:9,24 255:3,13,17,19 256:5 273:5 outcome [3] 39:3 169:5 177:2 outcomes [1] 160:23 outlier [1] 230:15 outline [2] 138:8,10 outlines [1] 130:13 outlining [1] 138:6 outrageous [1] 263:19 outset [1] 194:23 outside [11] 46:14 61:19 64:12 154:9 173:22 174:9 176:6 178:5,10 187:2 250: 6 over [52] 5:9,16 6:7 13:5,8, 14 14:9 36:4 41:17 51:10, 12 63:22 84:7,11 92:19,20 93:10 100:23 102:5,16,17 107:9 109:8 110:3 114:5 119:3 122:2,12 131:25	141:13 146:15 149:20 154: 25 156:23,24 158:15,15,24 175:25 177:18 181:9 186: 9 189:15 206:20 221:14 224:2 231:21 243:3 247: 25 249:20 251:12,22 Overall [7] 12:21 17:20 28: 4 134:5 137:17 138:14 163:14 overblown [1] 217:16 overcome [1] 134:19 overlap [1] 177:14 overload [2] 212:7,14 overstating [1] 19:13 overtuned [1] 240:14 overview [3] 97:12 134:4 147:9 overwhelming [1] 84:12 overwhelmingly [1] 260:5 owed [1] 222:18 own [23] 17:14 26:21 42:5 46:18 49:14 66:14 68:7 90: 23 96:8 101:4,5,5,6,7 102: 21 125:23 139:17 161:15 170:17 187:14 210:15 255: 16 261:14 owned [2] 51:14 274:4 owner [11] 56:12 61:2,11 96:22 158:6 202:18 203: 13 210:4 221:22 233:5 272:3 owners [35] 4:18 12:9,13 13:23 16:2 17:5 20:12 50: 7,8 67:2,15 77:3 88:8 97:5 120:7 127:23,23 131:16,17 158:1 193:12 195:9,10,14 198:15 207:2 209:21 210: 2,8 227:16 228:3,5 262:14 273:24 274:10 owners' [1] 123:16 ownership [1] 228:6 owning [1] 242:2 owns [2] 18:9 241:11 P p.m [6] 7:7 132:9,12,14 133: 2 275:10 packet [3] 40:9 44:6,9 page [1] 16:18 pages [3] 40:12 44:8 228: 16 paid [14] 35:17 37:4,9 68: 25 93:14,14 127:11,11,12, 15 142:8 181:5 196:5 256: 16 paintings [1] 80:20 panacea [1] 174:14 pandemic [1] 43:5 panel [43] 5:16,18 6:23 7: 25 31:13 36:22 63:5,22,24 75:12,13,21 76:10 85:19 114:18 121:21 130:25 133: 16,20 165:15 172:9 177:22	180:3 181:12 182:2,5,21 183:16,17 190:3 198:14,16 201:12 202:20 204:19 213: 6,7,14,25 252:6,20 257:23 266:14 panelist [3] 3:5 75:10 238: 4 panelists [15] 3:25 5:23 6: 4,21 8:22 35:10 75:24 77: 5 124:3 133:8,23,25 190: 11 247:18 266:20 panels [8] 17:16 153:2 156: 24 157:6 172:12 203:25 204:20 251:21 panoply [1] 197:17 paper [1] 102:22 paragraph [2] 15:7 90:12 parent [2] 39:21 102:2 parents [1] 39:19 part [42] 16:2 33:21 37:12, 22 54:11 55:15 58:6,17 76: 9 78:7 99:25 101:22 103:8, 13 110:14 119:11 123:24 130:3 136:16 140:5 145: 10 149:4 154:17 158:20,20, 23 159:4,11 160:15,22 163: 13 174:24 183:8 185:21 200:22 201:22 222:2 232: 11 235:23 236:22 240:15 251:3 parte [6] 193:19 197:6 199: 15 204:4 206:20 246:25 partially [1] 58:3 partially-funded [1] 123: 19 participant [1] 270:9 participants [6] 9:8 39:10 147:20 198:5 204:21 259: 19 participate [5] 7:14 76:4 166:24 220:6 270:5 participated [1] 7:21 participating [11] 7:5 8:21 31:14 75:20 132:2 133:12, 19 251:20 270:8 274:20 275:2 participation [8] 5:8 166: 10 189:22 252:3,4,11 259: 2 266:11 particular [25] 3:19 40:15 41:12,14 44:21 65:25 99: 23 100:15 117:1 121:25 131:8 134:2,16 135:9 139: 8 155:5 160:7 168:6 181: 25 196:12 204:2 208:14 228:10 260:13 270:16 particularly [14] 45:18 64: 9 65:25 70:1 91:5 94:19 98:1,25 99:15 100:6 108: 13 139:7 154:6 213:9 parties [4] 72:13 90:20 124: 1 232:10	partner [2] 42:10 141:12 parts [4] 40:8 156:18 176:7 235:24 party [7] 35:14 87:25 117:2 119:20 142:14 179:15 200: 4 pass [7] 34:5 52:18 91:16 233:19 246:4 251:22 257: 15 passage [3] 98:22 99:16 111:3 passed [5] 35:20 40:19 42: 4 66:7,20 passing [3] 42:14 72:15 198:3 past [10] 80:4 150:15 156:4 199:11 200:8 206:23 208: 5 220:16 223:12 224:15 paste [1] 51:7 pasted [1] 132:7 Patent [7] 83:15 195:6,9,10, 13,14 248:3 patents [2] 101:3 248:5 patient [3] 118:4 133:25 191:23 patrons [1] 70:21 pattern [5] 64:18 89:23 92: 25 244:6 247:6 patterns [3] 24:14 168:18 178:9 pause [1] 85:25 pay [36] 26:17 34:21 38:12, 15,16 68:22 70:16 72:1 81: 7 85:22 96:5,16 106:8 112: 9 116:22 117:2 121:1,8,10, 12 140:12,15,24 156:3 180: 25 186:7 196:5,7 200:4,6, 13 220:21 221:2,10 222:14 266:25 paycheck [1] 37:11 payday [1] 157:9 paydays [1] 159:13 paying [8] 93:20,21 168:2 182:12 196:25 220:18 221: 4 263:23 payment [9] 67:10 71:8 74: 4 96:10,20,21 97:2 131:3,9 payments [1] 131:20 pays [2] 196:9,9 peculiarities [1] 186:18 peers [1] 69:15 pejorative [1] 228:3 penalties [3] 115:23 138: 12 139:20 pending [1] 239:15 pension [1] 45:24 penumbra [1] 165:18 people [120] 13:18 17:9 18: 23 19:1,3 20:17,25 21:2 22:5 24:9 27:25 30:2,13 31:7,8,10 32:4,4 33:15 42: 8 43:6 45:8 47:6 51:8 55:3,
--	---	---	---	--

13,16 56:9 63:16 64:2 69:9 70:10 74:2 99:3 100:5,7,21 104:5 108:21 109:2 115:3 119:13,14 123:2 125:12,13 126:3 135:15 141:20 143:8 146:20 148:24 150:4 153:6 158:8,21,25 159:6 161:14 164:3 166:1 169:9 170:14 172:5 175:24 176:10 177:24 184:13 193:11 196:10,21 200:18 204:5,15,25 205:3 206:16 216:11,17,19,24 219:20 220:14,20 223:4,6,14,19 224:1 228:5 235:11,22 236:25 237:2,3,6,7,10,20 241:20 243:22 248:14 252:12,19 253:5,19 255:24 256:5,7,10,10,13,14,25 257:2,13 264:16,17 266:4 people's [2] 161:14 199:25 per [4] 47:9 54:2 92:22 170:14 perceive [1] 27:25 perceived [5] 13:24 32:15 117:11 200:12 217:11 percent [2] 13:8,14 41:7,17 67:8,12,13,14,17 96:17,18 175:23,25 176:1 198:5,7 210:16 230:16 249:2,4 254:3 percentage [3] 31:1 123:18 176:5 perception [1] 260:12 perfect [2] 66:22 162:3 Perfectly [2] 108:4 186:14 performance [4] 98:19 122:14 125:10,11 performing [1] 170:21 perhaps [10] 6:21 17:20 20:17 61:6 129:14 169:15 173:2 205:6 208:25 254:19 period [6] 15:1 36:4 74:25 92:19 94:17 155:13 Perlmutter [2] 3:11,12 permission [9] 31:23 36:1 41:3 140:2 143:11 178:19 211:2 241:15 243:1 permissions [1] 158:16 permits [1] 190:13 permitted [3] 157:3 264:14,15 permitting [2] 7:14 122:20 person [14] 54:5,7 55:9 71:7 115:24 155:10,11,14 170:13 185:24 201:15 208:14 266:12 270:3 person's [2] 183:1 250:20 personal [15] 35:7 61:3,22 94:12 95:1,3,12 130:16,20 139:25 197:25 200:25 201:	6,11 259:14 personally [5] 61:14,24 114:12 157:13 224:10 perspective [9] 55:9 120:11 126:24 127:17 141:8 171:7,9 221:21 272:10 perspectives [2] 29:13 32:21 pertinent [1] 17:22 pervasive [3] 89:23 91:13 92:25 Peters [1] 4:14 pharmacy [3] 236:3,3,5 phase [1] 128:14 phone [4] 43:4 66:4 77:10 86:6 photo [2] 181:7 243:24 photocopied [2] 102:19 215:10 photograph [22] 72:22 142:5 155:21 156:3 157:14 172:13,14 173:14,17 178:19,22 180:23 181:4,10,13,16 196:3 222:9,10 241:7 243:6 250:18 photographer [9] 29:19 180:25 181:1,3 196:8 228:10 230:13 241:3 253:13 photographers [8] 23:1 30:6,7 172:13 193:6 196:1,15,19 photographs [10] 67:23 72:20 80:18 173:12 222:15 228:13 237:5 242:10 253:15 272:22 photography [1] 196:12 photos [1] 228:10 phrase [2] 99:19 254:19 physical [2] 7:22 102:13 physically [4] 56:16,21 179:24 190:8 pick [3] 24:25 62:1 254:25 Picking [1] 160:25 picture [3] 35:8 56:13 127:13 pictures [1] 103:3 piece [2] 148:1 242:3 pieces [2] 66:7 101:17 Pilch [8] 252:13 259:4,6,9,11,12 266:9,16 pin [1] 197:25 pirate's [1] 35:14 pirates [2] 245:13 246:21 pivot [1] 60:25 place [10] 74:1 138:13 152:7 159:24 166:15 171:24 177:16 197:15 241:1 265:1 placed [1] 115:1 places [2] 158:22 237:14 plaintiff [3] 61:7 154:19 200:6	plaintiffs [2] 83:9 232:22 plane [1] 230:13 planned [1] 68:4 platform [1] 219:24 platforms [2] 24:6 125:24 plausible [1] 84:22 play [8] 30:4 41:19 52:24 120:5 134:25 160:3 220:4 261:16 playing [5] 121:17 153:13 162:18 196:16,16 plays [2] 121:6 171:10 plea [1] 228:25 plead [1] 172:17 please [19] 6:2 12:1 19:12 57:3 75:25 77:6 132:6,10 133:8,13 186:7 190:6 197:2 231:2,3 232:20 246:17 259:10 271:15 pleasure [1] 45:1 plenty [2] 22:4 65:5 PLLC [1] 141:13 PLUS [3] 11:1 37:13 146:14 point [76] 19:17 22:9 46:18 54:10 82:17 86:23 87:16 88:4 89:5,6,25 90:21 91:23 103:23 105:9 106:6 112:16,21 116:14 124:18 129:4,7 130:10 137:17 149:13 150:3 156:15 159:10 161:1 165:1 168:3,25 170:17 172:19,20,23,24 174:10 176:24 180:13 185:23 187:1,2,17,21 188:25 194:23 198:3 199:5,22 200:18 202:23 204:12 205:6 206:7 211:20 217:13 223:25 224:15,17 231:22 232:21 234:8 235:18 238:2 248:9 250:8,12 251:9 253:25 260:2 262:1,20 263:14 264:20 273:3 pointed [4] 48:17 84:6,9 85:5 pointing [2] 156:10 201:12 points [10] 82:18 84:16 86:2 90:2 91:15 128:20 167:2 197:21 233:21 260:1 police [2] 45:20 60:10 policies [54] 15:23 27:9 28:18,21 63:9,11,12 89:16 96:12 98:8 123:8 129:7 133:6,21,24 134:2,5 138:4,6 144:18,22 145:1,14,15,20,21 146:1 147:22,23 149:13,20,25 150:17,21 151:6,20 152:13,17,18,25 161:3,8,13 171:24 182:15 188:7 198:19 199:1 204:24 264:21,24 265:1,4,7 policy [66] 3:15 10:11 25:	13 26:11,16,17 28:25 29:7 59:7,7,9,15 60:7,8,16,21,22 89:12,17,23 95:16 108:15,16 110:12,15,17,20 116:17 121:11 122:20 134:12 135:5 138:7 144:5 148:2,9,14,17,19,23,25 149:4 150:1,9,9 151:1,10,10,11,16,19,21,24 152:3,4,9,21 153:23 155:17 184:14 188:16,20 189:3 191:6 192:20 259:16 political [1] 168:3 politician [1] 271:3 politicians [1] 271:23 pool [1] 112:10 pop [1] 8:22 pops [1] 196:14 popular [1] 155:5 population [2] 21:8 146:7 portal [1] 52:10 portion [2] 41:18 154:16 pose [2] 5:22 245:24 posed [3] 6:13 9:12 90:20 position [5] 47:22 72:6 142:23 154:23 155:6 positions [1] 143:6 positive [2] 199:1 260:23 possession [2] 63:3 162:1 possibilities [1] 190:18 possibility [5] 32:16 197:24 218:8 232:24 246:7 possible [16] 3:24 20:2 25:11 28:4 61:13 87:23 139:19 183:8 193:14 205:7 213:14 241:23 254:23 255:17 256:15 265:23 possibly [3] 51:3 66:10 110:7 Post [5] 51:15 98:3 115:10 150:15 173:13 posted [6] 7:18,23 56:15 146:1 237:2 275:3 poster [1] 125:8 posting [2] 173:19 180:23 potential [19] 20:14,22 61:6 68:12 120:5 145:3 163:7 171:19 172:4 185:17 219:19,24 220:4,9 227:12 241:18,19 246:13 254:21 potentially [8] 51:8 94:7 96:15 113:14 117:8 172:10 173:22 227:11 power [2] 123:17,21 powerful [6] 111:5 136:18 209:7,11,21 210:10 PR [2] 201:16,17 practice [22] 29:7 39:25 44:6 60:21,22 77:8 89:23 90:23 93:17,24 104:19 126:22 141:14,15,18 147:4 158:14 159:22 233:17 259:16 261:	1 270:22 practices [22] 8:16 10:20 104:17 118:3 119:2 120:1 121:7,17 123:25 133:6,21 134:5 135:17 136:12 145:14,15,20 264:22,24 265:1,9,12 practitioner [2] 79:15 81:15 practitioners [5] 81:10,12 82:9 160:16,18 pre-supposing [1] 127:1 precipitously [1] 195:13 precisely [1] 151:23 preclude [1] 88:23 precluded [1] 82:22 predatory [1] 199:4 predictable [1] 39:3 predictive [2] 74:22 75:1 preempt [1] 49:5 preempted [3] 229:1 230:24 244:5 preempting [1] 230:3 preemption [1] 227:18,20 229:7,15,24 230:20 233:21,22 234:22 243:14 248:23 prefer [1] 232:23 prejudice [1] 112:4 prejudiced [1] 267:20 premise [1] 169:20 premium [1] 150:10 Prepaid [3] 14:10 82:21 83:17 prepare [2] 43:17 258:10 prepared [1] 258:23 preparing [1] 185:12 present [3] 8:20 48:8 62:9 presentation [3] 139:11,24 141:4 presentations [1] 175:20 presented [8] 4:4 59:17 71:15 93:24 156:4 204:6 205:1 272:7 presents [2] 156:6 269:15 Preservation [8] 135:6 136:15,20,23 137:1 218:17,20 268:13 preserve [1] 70:6 preserved [1] 273:19 President [2] 11:1 138:25 presidents [1] 167:21 press [6] 37:21 182:12,15,16 193:5 231:7 presume [1] 197:15 presumption [1] 272:23 presumptively [2] 272:23 273:4 pretrial [1] 269:5 pretty [8] 36:2 79:5 94:5 172:3,10 191:15 212:17 257:11 pretzel [1] 244:12
---	---	---	---	--

<p>prevailed [2] 84:23 88:8 prevailing [1] 200:4 prevalence [2] 12:3 80:9 prevalent [1] 26:5 prevent [4] 133:6 145:2 153:23 199:17 preventing [1] 209:3 prevents [1] 23:10 preview [1] 118:2 previous [9] 121:21 172:9 176:1 182:21 202:20 203:25 204:19 221:11 234:23 previously [2] 72:24 238:5 price [1] 181:9 primarily [5] 105:23 126:8 133:17 178:11 179:13 principal [1] 66:1 principally [1] 31:17 principals [2] 65:24 223:3 principle [1] 56:11 principles [1] 114:9 print [3] 47:15,17 193:8 prior [2] 99:8 141:15 privacy [1] 184:13 private [47] 27:10 28:14,25 49:24 77:8 79:15 81:9,11 103:8 108:21,22 121:22 124:6 160:9,11,16 161:17 162:16,24,25 163:20 165:13 166:5,13,17 167:4,6,12 168:20 169:5,17 170:1,3 214:1,3 218:5,10,10 219:13,22 220:2,8 241:7 251:10 266:3 268:7 270:22 privilege [2] 58:16 122:4 privileges [2] 155:13,15 prize [1] 217:11 pro [1] 111:8 probably [28] 14:15 26:23 27:22 51:2 59:5 69:16 97:20 116:23 118:4 139:2 146:13,25 155:3 156:15 173:12 180:8 193:19 208:15 221:25 227:19 244:16 246:6 247:9 251:16 252:22 254:24 255:13,14 probative [5] 84:16 85:5,15 87:2 89:3 probe [1] 34:3 probing [1] 190:13 problem [32] 32:7 37:15 38:21 40:25 41:2 88:11 125:6 174:15 194:9 196:13 198:21 201:13 202:5,7,21 204:6,16 214:16 215:14 229:16 232:15 248:15,16 249:21,24 253:1,15,18,22 255:6 270:15 271:6 problematic [1] 266:5 problems [9] 108:25 138:24 204:10,11 215:4 254:2 255:1,5 257:12</p>	<p>procedures [6] 138:4 144:18 145:2 207:7,10 239:22 proceed [3] 163:12 268:18 269:3 proceeding [4] 46:24 135:4 179:6,7 proceedings [2] 5:9 7:21 process [13] 25:3 136:25 140:17 183:21 201:8,19 234:5 238:24 239:10,11 249:23 263:5 270:4 processes [3] 29:2 142:1 177:15 procurement [2] 104:22 124:21 produce [3] 102:3 104:15 262:19 produced [4] 26:21 43:15 101:19 128:6 producer [1] 187:13 producing [1] 141:21 product [3] 104:23 182:25,25 production [3] 141:17 186:23,23 Productions [1] 9:16 productive [1] 162:18 productively [1] 137:5 products [2] 73:9 104:4 Prof [2] 107:23 124:7 professional [3] 29:19 111:8 268:3 professionals [1] 251:13 professor [10] 10:25 11:6 29:20 42:11 52:9 58:21 79:11 192:16 236:2,9 professors' [1] 63:6 profile [1] 161:11 profits [1] 72:18 Program [8] 40:7,15 66:3,15 143:2,22 175:3 253:16 programs [9] 128:1 135:11 144:22 185:3 198:17,18,19,22 260:18 progress [3] 219:13,16 269:21 project [4] 89:8 163:12,16 220:6 projects [2] 207:18 263:7 proliferated [2] 173:25 174:2 proliferation [1] 161:13 prolific [1] 100:2 promise [4] 110:25 136:14 192:8 216:24 promises [1] 131:14 promote [3] 265:2 269:21 270:18 promoted [2] 260:15 265:9 promotes [2] 262:18 264:7 promoting [2] 228:16 260:13</p>	<p>promotion [2] 215:22,23 promulgate [1] 152:3 prone [1] 216:25 pronounce [2] 77:16 224:20 pronounced [1] 10:17 proof [1] 84:19 proper [8] 18:3 20:21 57:3 71:18 95:8 194:15 222:15 232:16 properly [1] 226:23 property [35] 4:19 10:20 25:2 27:18 28:6 35:21,25 37:11,19 56:5 63:2 70:7 78:6,10 79:1,17 101:18 114:16 120:16 122:15 139:4 140:8 145:8 147:3,13,20 191:10 195:6 223:9 228:6 241:13,16 242:1 250:11 270:4 proportional [1] 177:3 proportionality [1] 177:10 proposals [2] 109:5 150:13 proposed [1] 4:15 proposing [3] 4:10 187:5 219:5 proposition [1] 196:18 proprietary [1] 55:5 prosecute [1] 35:6 prospective [1] 199:10 prospectively [2] 208:3,6 protect [10] 4:18 104:5 120:13 139:17 194:11 203:9 219:21 245:2 273:20 274:10 protected [2] 228:22 268:18 protection [3] 163:6 250:17 267:3 protections [4] 38:25 50:22 261:12 269:16 protective [1] 55:20 proud [1] 191:15 prove [1] 61:13 provide [26] 4:5 7:3 8:2 9:9 12:2 33:13,18 50:16 53:2 67:10 84:3 87:12 88:14 106:1 123:24 149:18 152:18 174:17 175:17 179:22 180:15 182:3 197:18 207:21 245:15 269:17 provided [10] 4:12 7:6 60:25 76:6 83:23 86:15 89:21 91:19 131:4 175:22 provides [6] 151:11 174:25 192:25 263:12,13 267:3 providing [5] 78:10 146:20 175:4,13 266:7 provision [1] 211:23 psychology [2] 98:19,20 public [95] 3:17,20,23 7:2</p>	<p>11:15 12:7 16:6 18:9 20:15 23:24 27:6,10 28:14,25 33:23 35:22 44:19 51:18 76:3,8 81:10,17 85:1,17 87:8,24 90:1 93:15 94:10 97:17 108:7,8,18 113:13,15 121:22 122:21 123:19 127:22 128:9 133:11 137:3 145:10 148:18 160:18 161:10,17 162:17,25 163:21,22,25 164:5,8 166:4,21,25 167:3,6,11,20 168:9,22 169:25 170:8 173:17,19 175:14,15,18,19 176:7,9 180:13 191:17 193:2 203:4,10 214:7,10 218:5 219:7 249:6 251:11,24 259:15 260:12 266:5,7 268:7 273:20,25 274:9,14 275:7 publication [2] 43:25 250:14 publications [3] 10:7 45:4 182:11 publicity [1] 28:1 publicized [5] 15:15 22:1 23:21,22 137:11 publicly [1] 46:17 publicly-accessible [1] 46:11 publicly-available [2] 47:8 80:13 Publico [1] 231:7 publish [4] 127:24 150:21 159:20 231:20 published [4] 21:4 35:24 98:12 155:23 publisher [3] 10:5 45:3 72:23 publishers [5] 46:10 50:22 85:20 209:8,10 publishing [1] 144:4 pull [1] 212:9 pulled [1] 34:17 punish [2] 101:7 208:6 punished [1] 208:6 purchase [4] 122:11,16 181:9 215:7 purchased [2] 185:15 215:8 purchasing [1] 48:2 pure [1] 253:6 purely [4] 27:13 69:6 90:4 115:20 purported [3] 144:19 149:11 186:4 purports [1] 85:6 purpose [3] 162:13 242:24 264:19 purposefully [1] 30:14 purposely [1] 73:20 purposes [8] 19:10 21:10 23:5 68:8 112:14 146:23</p>	<p>158:8 245:23 purses [1] 168:11 pursuant [2] 89:12 95:15 pursue [12] 13:23 34:25 42:21 103:21 128:1 157:8 158:8 199:8 228:4 258:1,9 271:24 pursued [4] 43:7 100:16 269:2,3 push [1] 260:10 pushes [1] 165:19 put [27] 20:2 38:19 41:3,23 42:2 43:5 65:12 73:16,20,23,24 119:11 120:19 125:14 126:2 131:15 146:9 147:2 166:20 182:17 186:5 197:25 202:11 212:9 214:14 222:8 234:9 puts [2] 72:21 150:9 puzzle [1] 160:15</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified [4] 62:8 95:19,24 201:3 qualify [1] 137:10 qualitative [3] 8:8 19:25 182:24 quantifiable [1] 265:20 quantitative [1] 20:1 quantity [2] 268:22 269:7 quasi-state [1] 179:5 Queen [1] 35:13 question [84] 6:13 9:12 11:22 14:2,23 23:20 24:13 25:8,20 27:5 54:17 57:23 58:19 59:8 61:17,21,25,25 62:21 76:17 84:5 86:7 88:10 89:11 91:6 97:19 110:11 114:6 115:25 117:5 118:5,8,11 120:3 123:13,23,24 126:8 127:21 130:23 153:1 160:14 167:3 168:17 169:20 173:20 179:4 182:18,23 183:12,15 187:25 188:6 191:1 193:22 195:24 197:2 198:11 204:22 207:4,23 208:12 211:3 217:6 228:20 233:13 240:8 242:18 243:7 244:25 245:25 246:1,17 248:21 249:9,17,19 250:4 251:9 261:15 264:18 271:10,18 272:17 questions [50] 5:22 12:8 14:17,18,21 15:1,5,20,22 16:1,5,8,16 20:8,10 22:17 23:13,14,15 43:15 64:1,14 89:10 104:15 107:10 109:18 124:10 133:17 135:16 137:13 139:6 142:17 144:9 177:15,18 187:16 189:17,18 190:13 213:3 214:24 215:16 243:6,10 254:25</p>
--	---	---	--	--

reprinted [1] 40:13 reproduce [1] 47:5 reproduced [3] 40:19 43: 25 46:8 reproducing [2] 113:14,15 reproduction [2] 48:15 53: 5 reproductions [3] 23:5 46: 11 242:13 reputation [1] 161:1 request [5] 4:8,22 5:1 94: 10 149:11 requesters [1] 175:18 requesting [1] 30:8 requests [2] 176:10 184: 12 require [4] 90:1 96:12 199: 14 268:20 required [7] 36:13 76:24 79:2 84:25 89:22 118:12 220:4 requirements [1] 96:24 requires [5] 20:5 96:14 177:3 201:1 211:23 requisite [1] 268:19 research [28] 19:25 20:1 29:24 80:21 121:7 135:3, 10 138:25 144:4 146:23 148:20 149:19 151:15 163: 3,9 169:24 191:12 192:14, 15 212:9,22 213:10,18 214: 17 222:1 253:3 268:13 274:3 researchers [2] 21:12 144: 20 resolve [4] 131:12 137:14 150:6 258:15 resolved [6] 51:22,23 154: 24 178:21 207:8 230:18 resort [3] 153:6 165:24 203: 21 resource [3] 139:6 140:21 264:4 resources [19] 13:16 34: 16 95:6 136:1,3 137:7 140: 10 146:10,20 153:25 161: 21 168:14,15 170:13 174:8 180:14 196:19 212:19 273: 20 respect [25] 29:23 36:18 89:7 96:10 111:7,10 113: 24 129:10,15 130:8 138:15 149:2 152:21 161:2 169:2 173:2 196:1 221:24 223: 23 229:24 231:22 266:19, 25 268:14 274:9 respective [2] 155:11 269: 24 respects [1] 265:22 respond [26] 5:23 21:18,25 32:20 54:16 55:23 62:14 68:3,21 71:13,14 91:14	107:20 110:22 111:2 119: 6 129:17 157:25 187:7 202:19 206:8 209:4 233:6 242:20 245:25 273:17 responded [8] 17:9 34:15 67:15,17 85:7 97:14 108: 11 155:24 respondents [13] 13:8,11, 15 15:18 17:4 18:7,7 20: 14 22:25 67:9,14,20 198:9 responders [1] 6:5 responding [2] 126:22 205:11 response [42] 11:24 12:6 15:15 16:11 34:13,20 39:9, 15 42:18,19 44:24 50:4 52: 77:11,14 84:5 85:7 86:10 89:15 96:6 97:2 98:10 100: 12 101:13 105:6 130:6 137:4 142:9 179:21 185:4 186:19 187:2 189:19 201: 14 202:24 239:24 274:25 responses [20] 6:6 12:13 13:5,5 14:2 16:13,18 20: 22 22:5 24:2 29:15 30:20 64:7,17,19 97:25 198:10 205:5 206:16 207:16 responsibilities [4] 139: 14 141:3 176:4 189:12 responsibility [3] 130:2,4 216:12 responsible [17] 29:5 37:2 49:23 94:11 142:14 148: 10 149:18 161:7,8,23,24 163:4 173:15 175:10 177: 6 197:10 237:14 responsibly [5] 144:3 148: 10 160:21 216:5,9 responsive [3] 142:18 204: 2,8 restrict [1] 238:7 restricted [1] 214:8 result [8] 45:19 66:19 71:8 81:16 114:8 159:25 169:5 249:18 resulted [4] 14:11 47:10, 24 149:5 results [8] 15:7 20:4 25:13 26:11 67:8 199:7 212:21 274:9 retain [1] 267:25 reticent [1] 208:2 Retirement [2] 44:20 45: 24 retrospectively [1] 221:5 return [2] 57:20 66:4 retype [2] 41:1 202:12 retyped [9] 40:8,10 41:2 42: 1 44:9,13 reuse [1] 263:23 revamp [1] 247:11	Revenge [1] 35:13 revenue [4] 31:25 67:16,18, 25 review [4] 84:4 148:12 149: 7 187:14 rhetorical [1] 183:12 rich [1] 135:18 Rick [5] 223:18 232:14 253: 11,12 272:4 rid [1] 28:3 ridiculous [1] 258:19 rights [51] 4:20 12:19 29:2 39:13,14 47:22 52:3 56:5 63:15 114:16 120:13,16 134:19 139:13 141:2 156: 18,19 159:6,7 164:15 165: 5,18 166:2 177:1 181:10 187:15 204:15,15 205:18 207:3 209:7 210:20 217: 24 228:4,7 235:12 241:16 261:8 262:10,15 263:24 265:4,25 266:19,25 267:4, 10,19 268:20 274:1,10 rightsstatements.org [1] 78:9 Ringer [1] 9:6 rise [6] 14:9 54:2 58:13 60: 18 140:7 189:6 rises [2] 117:23 118:19 rising [1] 107:7 risk [9] 94:14 162:8,8 166: 25 171:18 190:23 212:23 215:9 260:4 risky [1] 250:1 road [2] 112:18 252:24 roadmap [2] 8:3 76:13 robust [7] 50:22 87:24 161: 20 174:19 175:15 198:18 204:24 rogue [2] 60:9 62:3 role [13] 30:2,5 120:4 121:6, 17 134:25 143:6 153:12 161:6 162:17 169:7 171:9 203:10 roles [1] 146:21 room [1] 244:17 root [1] 41:2 Rosenthal [1] 226:9 roughly [1] 76:12 round [2] 142:12 254:23 roundtable [8] 3:14 5:20 39:10 78:21 133:5 144:10 146:4 259:20 roundtables [8] 3:4,17 5: 13 7:11,23 74:24 132:12 165:3 route [3] 125:1 183:23 201: 9 routed [3] 150:4 183:19,22 routine [1] 234:16 routinely [2] 47:14 218:3 routing [3] 184:19 185:22	186:19 royalties [1] 26:22 RUBEL [7] 9:1,1 190:1,2 191:8,19,24 192:6,10,18, 22 193:3,10 194:20 195:23 197:1,21 199:21 200:16 202:18,25 203:17 204:17 206:4 207:4 209:4,19 210: 11 211:19 212:25 213:22 214:22 217:5 219:10 220: 10,22 221:19 223:22 224: 16 225:8 227:6,24 229:11 230:21 231:3 232:19 233: 5,15,24 234:8,17 235:17 237:25 238:2,19,23 239:12, 21,25 240:11 242:5,19 243: 11 244:10 245:9,24 247:13 248:20 251:5,19 252:2 rule [3] 38:4,4 137:8 ruled [3] 195:8 201:23 226: 10 rules [8] 123:8 184:5 214:7 215:1 219:20,25 220:5 239:20 ruling [1] 255:3 run [2] 139:18 215:3 running [2] 74:10 242:12 Rutgers [2] 259:13,17	21 270:14 says [6] 90:19 150:14 179: 17 219:2 231:23 245:4 scale [3] 47:7 262:23 263:7 scan [2] 212:12,13 scanty [1] 205:16 scary [1] 218:25 scenarios [1] 199:16 schedule [1] 63:23 scheduled [4] 6:16,17,25 252:6 Scholarly [6] 135:13 143: 21,23 175:1 192:20 228:17 scholars [3] 21:12 144:2 188:18 scholarship [4] 21:7 159: 23 161:22 176:12 school [36] 7:22 11:8 39: 22,22 40:17 41:9 42:9 43: 16 44:5 65:21,25 66:8 78: 5 108:14 109:23 110:11 111:17,18,19,23 120:25 122:21,22 175:3 222:12,21, 24 223:2,3 225:25 226:2,6, 16,25 228:17 260:18 school's [1] 224:7 schools [11] 40:13,16,20 41:3 42:14 44:3 66:8 105: 1 108:8,18,21 science [5] 18:4,4 20:4 162:11 269:22 scope [9] 20:14 21:14 61: 19 114:10 137:7 165:4 175:21 268:24 269:8 scour [1] 31:3 screenshot [1] 159:20 scrutiny [1] 164:5 search [3] 115:3,8 212:9 searching [1] 115:6 sec [1] 129:22 second [15] 3:8 24:15 54:4 89:6 90:11 91:23 110:10 129:4 162:14 181:24 200: 22 247:9,14 250:7 262:1 Secondly [4] 6:16 8:10 76: 2 203:11 seconds [1] 266:17 secretary [1] 202:12 Section [13] 19:7,8,8 30:1 49:5 61:11 141:11 234:3 252:2 268:15 269:14,19,25 sector [2] 251:10,11 secure [7] 51:16 102:7,25 103:2 105:25 106:2 267: 23 securing [1] 269:22 security [1] 60:5 Sedlik [18] 10:23,24,24 24: 9 29:14,18 32:18 37:8 62: 20,21 72:7,9 73:5 252:13 266:12,16,17 270:8 see [67] 7:9 8:21 16:23 18:
---	--	---	--	--

S

Sacramento [1] 51:13
safe [1] 215:17
sales [3] 8:15 67:22 100:4
Samberg [25] 143:17,19,20
146:2,25 147:24,25 151:5
152:13 160:4,24,25 162:23
163:13 168:24 174:12,13
176:8 181:20,23 182:4
183:24,25 188:14,23
same [37] 6:19 12:8 30:5,
15 37:8 38:4,6,7,24 73:17
76:8,12 94:23 116:17 117:
16 129:15 132:14 147:5
153:8 154:19 156:16 161:
7 167:7 169:6,8 181:17
184:17,20 189:2 199:18
241:7 249:16,17 253:11,12
271:18 273:25
sample [4] 17:4 18:15 86:
18,23
sanctions [1] 116:19
Sapiandante [6] 10:17,19,
19 32:19,22 33:10
Sara [1] 9:19
satisfied [1] 48:3
satisfy [1] 76:24
save [1] 127:18
saw [9] 40:6 58:12 89:15
131:2 147:15 169:6,7 181:
20 230:21
saying [14] 19:11 30:17 55:
11 73:2 110:12 166:7,8,19
185:2,2 186:6 221:3 231:

<p>18 19:24 20:3,3 22:4,17 30:17 32:19 36:21 40:1,7 43:25 45:12 54:23 55:7,23 57:1 59:11 60:10 62:18 68: 16 77:12 81:20 89:24 90:3 91:3 93:18 97:21 123:9 127:21 128:4,17 132:4 144:24 153:12,22 161:13 173:13,17 174:22 178:9 181:18 183:5,6 185:5 193: 11 196:10 202:22 216:3,14, 18 225:16 238:23 245:16 248:24 249:3 257:15 259: 4 260:8 262:5,8 271:3,7 272:2 seeing [4] 7:10 20:24 141: 22 202:25 seek [6] 103:9 124:20,24 183:7 194:15 201:9 seeking [1] 117:8 seem [3] 84:12 200:18 259: 23 seems [12] 14:24 57:7 82: 23 91:9 157:5 158:9 159: 12 160:10 171:2 172:25 182:10 185:12 seen [28] 19:24 49:8 58:11 62:8 84:18 95:21 114:5,8, 14 142:4 154:10 164:7 165:3 170:11,12 172:20 184:18,23 214:10 222:4,12 233:15 246:22,22 256:19 261:2 271:21,23 segment [1] 252:12 segue [2] 66:23 227:6 self [1] 189:2 self-imposed [1] 131:10 self-insurance [1] 189:3 sell [1] 125:8 selling [1] 231:17 Senators [1] 4:23 send [6] 51:8 65:17 125:15 209:9,15,16 sending [3] 19:17 100:19 125:12 senior [1] 77:18 sense [8] 20:11 27:8 55:24 122:24 151:25 175:21 221: 16 256:4 sent [8] 24:5 34:19,20,25 46:13 65:13 201:18 215: 11 sentences [1] 90:18 separate [14] 46:9 47:20 53:8 96:8 98:21 121:15 176:12 184:4 189:7 194: 25 195:1 212:11 243:10 268:10 separately [2] 15:2 49:14 series [4] 135:18,18,21,25 serious [2] 152:6 258:2 seriously [9] 70:20 147:6</p>	<p>152:7 161:12 180:12,18 242:14 260:4 264:18 serve [3] 214:11 266:3,5 served [1] 239:1 server [4] 212:7,14 243:21, 23 servers [1] 63:8 serves [2] 75:7 268:23 service [2] 70:23 155:23 services [4] 48:2 143:24 180:15 265:15 serving [2] 214:20 245:23 session [27] 6:25 7:1,2 8:1 75:21 76:4,13 112:22 132: 1,3 133:4,5,12,15,22 189: 21,24 190:5,14,17 193:15 211:6 234:23 242:17 245: 18 267:16 275:2 sessions [3] 5:20 6:16 268: 21 set [15] 17:1 63:14 102:25 147:16 148:2,8,19 150:4 152:17,18,20 168:21 207:6 238:8 254:9 sets [1] 144:5 setting [2] 84:20 117:12 settle [1] 96:10 settled [8] 13:22 81:19 93: 13 94:17 96:19 127:11 157:16 158:4 settlement [15] 46:25 47:2, 25,25 48:4 54:7 94:2 112: 12,13 116:22 128:5,6 195: 12 226:4 236:14 settlements [7] 51:20 93: 21 119:24 170:4 180:19 195:22 226:3 settling [1] 221:10 seven [5] 41:22 42:11 93: 10,12 224:24 several [14] 13:13 35:1 36: 7 40:16 65:23 114:23 122: 17 147:10 206:17 221:7 226:1 228:16 252:22 271: 24 severe [1] 50:25 severely [2] 47:2 267:19 shadow [1] 267:22 shadows [1] 170:18 shake [1] 159:9 shapes [1] 159:22 share [15] 11:19 16:8,19 17: 19 20:10 23:23 73:8 116:8 132:8 172:1 199:13 234:2 252:7 258:21 266:16 shared [1] 18:1 sharing [3] 44:15 50:1 74: 7 sharpen [1] 255:15 she's [1] 251:23 sheriff's [1] 174:4 shield [2] 49:14 263:13</p>	<p>shielded [1] 265:16 shipwreck [3] 35:13,14,16 Shira [4] 3:11,11 5:11,14 Shontz [17] 53:25 145:4,6, 8 153:19 156:9 169:14,19 180:7 181:19,20,25 182:23 185:20 188:5,11,25 short [6] 6:18 12:2 67:25 75:16 100:3 190:10 shortly [1] 76:6 shot [2] 141:15 247:9 shouldn't [9] 150:3 159:8 169:10 195:5 198:24 239: 5 244:22 245:1 258:11 show [5] 18:20 60:15 159:8 165:4 201:3 showed [1] 64:19 showing [5] 12:22 22:15 113:24 118:12 176:2 shown [1] 64:18 shows [3] 15:8 204:7 262: 23 shrinkwrap [1] 229:24 shut [2] 43:1 212:1 shy [3] 20:23 123:3,4 side [14] 104:3 116:7 166:3 176:19 177:25 202:18 203: 23,23 204:21 205:1 207:9 233:6 235:14 274:23 sides [4] 193:23 200:18 217:13,23 sign [4] 7:6 132:6,10 133: 13 signal [1] 6:1 signaled [2] 20:9 34:4 signatories [1] 261:4 signed [6] 7:13 37:3,5 236: 10 252:11 259:3 significant [6] 18:16 47:25 78:22 82:24 89:8 217:22 signing [1] 76:4 similar [16] 137:12 149:25 150:23 151:11 160:10,23 180:8 185:20 188:3 206:7 210:3 227:21 238:6 256:8 259:21 261:17 Similarly [5] 26:18 48:14 136:15 150:7 244:1 simple [1] 258:15 simply [9] 29:7 58:12 85:6 103:21,22 104:23 124:21 204:5 262:11 Sims [1] 155:4 since [17] 41:6,9 60:25 91: 8 93:5 102:3 119:18 170:2 173:18 176:1 184:17 252: 5 254:11 255:3 257:5,7 260:10 single [11] 47:5,8 52:6 114: 12 144:1 161:19 162:8 180:11 182:16 189:5 197: 11</p>	<p>sir [4] 125:4 138:19 191:24 225:16 sister [1] 225:3 sit [3] 232:15 252:22 253: 18 site [3] 102:25 103:4 173: 17 situation [17] 44:21 50:3 57:7 69:6 109:7 114:19 116:15 120:23 121:25 197: 9,10 201:15 243:18 245:4 254:21 258:20 271:20 situations [11] 13:23 64:21 68:25 95:14 97:13 105:3 122:6 195:17,19,21 209:12 six [9] 41:6 54:2,19 55:2 102:12 161:4 191:12 257: 2 274:18 size [1] 242:13 sky [1] 92:6 slanted [1] 124:1 slight [1] 60:25 slightly [3] 54:15,16 161:6 slow [2] 187:6 203:24 slowed [1] 41:24 small [21] 17:10 18:6,10 20: 10 31:1 34:24 50:14 68:14 102:1 104:4 106:9 112:10 114:4,13 124:22 236:21,22 249:22,25 262:3 274:5 smaller [1] 263:6 smart [1] 163:25 smile [1] 134:22 SMITH [105] 3:3 5:11,14 9: 7,17,22 10:1,8,13,16,22 11: 2,3,4,5,9,18 14:16 15:13 16:7,21 17:17 20:7 21:17, 19 23:20,25 24:7 27:5 28: 7,7,8,9,10,10,11 29:10 32: 18 33:8 34:1 52:18,19 53: 16 54:9,14 55:22 56:25 57: 1,18 58:18 59:3,10,25 60: 24 62:7,20 63:21 65:10 66: 22 72:7 73:1,6 74:6 75:9 121:21 133:18 162:14 163: 10 165:23 167:10 168:17 169:15 171:4 176:5 184: 25 185:5 216:1 251:23 252:1,17 254:5,7,13 255:5, 11 256:3,19,23 257:4,17, 21 258:24 259:1,8,10 266: 9,18 270:7 271:10 272:12 273:6,9,13 274:19 275:1 Smithsonian [1] 122:5 smoking [1] 87:4 smooth [1] 3:21 snap [1] 271:5 social [7] 18:4 24:5 125:6, 15,17,23 267:12 society [7] 30:4 100:7 101: 18,24 230:8 260:17 269:18 Society's [1] 79:10</p>	<p>software [13] 80:20 122:13 135:6 136:14,19,23 137:1 178:13,17 179:2 218:17 224:7 234:6 sold [1] 26:21 solely [1] 259:14 solicited [1] 12:12 solicited [1] 12:9 solid [1] 171:24 solution [3] 202:21 246:13 253:20 solutions [3] 131:18 246:7 249:24 solve [2] 32:7 249:21 somebody [10] 56:12 150: 13 206:8 208:16 222:19 231:20,23 233:19 255:23 258:12 somebody's [2] 26:18 56: 5 somehow [3] 179:23 181: 2 264:11 someone [18] 7:8 18:24 57: 9 61:22 87:21 113:12 127: 12 130:19 148:22 159:19 171:7 181:13 182:1 185:9 196:2 241:20 243:23 264: 3 someone's [6] 27:1 73:24 113:15 114:1 243:21 250: 13 somersaults [1] 244:23 sometimes [21] 18:23 19: 10 30:10 96:20,20 103:14, 15 109:25 110:2 165:25 170:17 172:3 173:13,16 196:6 206:17 241:4 242:4 262:19,24 273:24 somewhat [2] 105:25 234: 15 somewhere [1] 234:18 soon [2] 132:10 155:9 Sorry [23] 24:15 43:8,13 49: 2 105:14 109:18 129:21 138:22 153:20 156:8 163: 13 168:4 181:20,22,24 186: 13 188:5 190:22 219:18 233:23 238:19 251:25 253: 11 sort [72] 8:8 9:9 12:12 13: 24 14:9,12 15:8 19:14 23: 18 26:3 29:12 43:16,25 57: 15 62:11 70:3,12 71:24 75: 5 79:23 80:8,23 86:2,17 91:11,12 96:5 97:12 98:15 100:7 104:16 112:18,21,23 115:24 116:22 129:14 134: 1,17,20 136:7,8 137:8 141: 4 142:13 147:23 151:2,3,4 153:6,12,22 156:14 165:8 169:24 171:5 176:15 179: 5 185:25 188:2,3 201:13</p>
--	--	--	---	---

<p>211:21 217:7 240:19 241:10 245:14,16 256:23 263:11 274:7,8</p> <p>sorted [2] 107:3 237:24</p> <p>sorts [10] 26:5 79:24 88:17,18 101:20 104:18 147:22</p> <p>160:7 188:10,10</p> <p>sought [5] 4:15 83:9,10</p> <p>140:2 193:22</p> <p>sound [4] 75:12 169:15</p> <p>199:1 246:19</p> <p>sounds [5] 18:8 104:7 151:2 172:9 206:12</p> <p>source [3] 109:10,15,22</p> <p>sources [1] 267:11</p> <p>Southeast [1] 135:10</p> <p>Southeastern [1] 135:3</p> <p>Southern [2] 111:22 225:17</p> <p>sovereign [148] 3:15 4:6 5:3 12:19 18:18 22:13,21 23:8,9,16 24:24 27:23 28:3,23 29:8 33:5,24 34:12 39:15 42:18 43:10,13 44:24 46:20 48:10,17 49:13 52:2 54:8,24 58:5,24 61:23 67:6 71:8 74:14 75:6 77:1 82:22 83:18 84:14,21 85:3,9,18 88:13,22 89:19 90:4,13,24 92:2 94:3 96:8 97:23,25 98:10 100:12,17 101:1 103:17 105:8 108:9,11,16 111:20 120:5 121:5,16,23 122:7 123:10,16 126:11,15,19 128:7,10,22 129:3,19,23,24 130:13 134:22 139:22 140:7 149:5 153:4,10,12 154:16 159:11,24 162:12,17 163:6 164:6,8,13,24 167:13 171:10 172:19 177:4 179:14,19 185:18 194:18 202:21 203:8 205:6 211:10,16 213:19 215:19 216:23 219:14 221:12 222:25 223:5 225:19 226:7,11,24 228:22 229:8 232:3 234:4 239:1,3,5 245:22 246:5 248:22 249:21 250:22 258:19 259:24 263:12 265:17,23 267:6,22 268:9,16 273:18 274:13</p> <p>sovereignty [1] 142:10</p> <p>space [2] 173:10 207:24</p> <p>span [1] 84:7</p> <p>speaker [2] 272:11 274:22</p> <p>speakers [2] 114:19 266:14</p> <p>speaking [15] 6:2 75:25 79:19 104:8 132:10 133:10 145:13,14 190:6 191:16 207:15 220:14 225:11 259:14 272:2</p>	<p>speaks [1] 80:21</p> <p>special [2] 38:3 148:6</p> <p>specialist [3] 138:3 192:24 259:13</p> <p>specific [42] 6:13 34:15 39:20 59:12 64:17 76:18 84:5 96:6 97:5 112:19 123:25 124:11,17 133:20,23 134:1 135:23 151:17,21 152:25 162:20 169:17 171:25,25 185:3 208:1,10,15,23,24,24,25 210:4 213:13,18 214:6 229:12 239:16 240:22 271:11,19,24</p> <p>specifically [14] 13:3 90:9,13 99:16 111:24 124:12 136:19 138:8 145:17 148:3 153:25 183:19 200:17 207:14</p> <p>specificity [1] 83:7</p> <p>specifics [1] 69:3</p> <p>specifying [1] 270:2</p> <p>specious [1] 56:22</p> <p>speech [11] 208:1,3,5,7,8,9 250:14,18 251:3 272:7,11</p> <p>spend [7] 70:15 122:23 133:22 145:23 146:9 196:22 206:15</p> <p>spending [4] 70:19 247:20,21 257:14</p> <p>spends [1] 69:4</p> <p>spent [10] 28:13 67:25 87:22 104:3 122:10 200:11 221:25 224:5 249:5 258:7</p> <p>spheres [1] 27:25</p> <p>spider [3] 212:3,4,14</p> <p>spirit [1] 270:2</p> <p>split [2] 48:2 142:22</p> <p>SPN [1] 136:13</p> <p>spoke [3] 14:24 119:7 177:22</p> <p>spoken [2] 53:20 204:25</p> <p>sponsored [1] 264:1</p> <p>sport [1] 99:9</p> <p>sports [3] 98:19 99:6 100:24</p> <p>spot [1] 234:9</p> <p>spreading [1] 50:21</p> <p>spreadsheet [1] 224:21</p> <p>spring [1] 215:5</p> <p>spun [1] 232:10</p> <p>square [1] 41:2</p> <p>staff [19] 3:19 7:12 63:8,12 116:20 128:2 138:16 139:3,13 141:2 143:12 146:18,23 164:18 170:13 185:9 186:2 260:6 262:21</p> <p>stage [2] 85:3 91:18</p> <p>stake [2] 161:1 177:12</p> <p>stakeholder [1] 152:2</p> <p>stakeholders [2] 23:18 193:15</p>	<p>stakes [2] 159:2 250:3</p> <p>stand [6] 149:6 172:16 222:14 223:20 255:16 257:16</p> <p>standard [18] 56:1 57:4,15 58:7,10 59:1 69:16 76:22,25 85:13 117:20 156:15 198:25 201:1 247:5,8 254:8 255:7</p> <p>standard-setting [1] 71:25</p> <p>standardized [3] 43:18 80:19 102:4</p> <p>standards [1] 150:21</p> <p>standpoint [1] 88:9</p> <p>Stanford [4] 161:5 163:1,11 169:3</p> <p>staple [1] 44:7</p> <p>start [35] 3:4,9 5:15 7:25 9:12 11:21 15:11 34:7 63:24 66:19 75:14,21 77:6 79:23 80:1 97:8 120:2,7 123:23 124:6 133:4,15 134:9 147:11 156:10 191:4 193:16 194:1 218:6,24 219:3,7 227:18 252:4 260:10</p> <p>started [7] 11:20 39:17 76:10 133:16 235:20 253:17 258:6</p> <p>starting [5] 8:23 14:5 15:10 40:4 248:18</p> <p>starts [2] 63:24 253:6</p> <p>state [376] 4:6 5:3 8:2,14 10:21 12:10,17,19,24 13:6,18 15:23 22:13 23:9,12 25:9,10,11,24 27:7,23 28:1,2 30:11 31:9 32:24 33:2,6,12,23 35:11,17,19,23 36:15,19,24 37:2,24 38:9,12,17,25 39:20 45:24 48:4,14,19,23,25 49:2,5,12,21 52:1 54:16 57:12 58:1,2,24 59:6,15 60:8,23 61:3,4,16,17 62:18,25 64:13 67:4,9,12,16 68:16,21 69:17 71:15,19,21 72:1,5,6,20 73:3,4 74:14 75:2,22 77:20,22,24 79:3 80:15 81:3,24 83:4 84:21 85:6,20,22,25 87:5,6 88:25 89:12,16,16 90:24 91:10,24 92:1,6,9,15,23 93:1,5,8,9 94:6,18,25 95:15,15,16 97:11 100:6,23 103:8,14,14,15,22 105:4,10 107:20,20 108:15,16 109:23 110:12,17 113:1,10,24 114:11 115:5,15,21 116:18 120:12,14,18,24 122:3,19,20 123:6,15,17 127:3 129:5,8,11 130:8,9,14 133:5,20 134:5 140:13,14,16,19,20 141:7,24 142:1,3,5,10,11,15 144:19,21 147:17 149:</p>	<p>17 153:3,24 154:3,4,5,7,20,24 156:6 159:11 160:6 161:21 167:23,25 168:4,11,16 171:8,11 173:3,4,7,17 174:2,18,22 175:17 177:4,17,25 179:4,9,14,16,17,19,22,24 180:24,25 182:9,11 186:17 188:1,6 189:9,12 190:16,19,21,24 192:21 193:12,19,21 194:17 195:2 196:6 197:17 199:18 200:3 203:9 204:1,7,21,23 205:1,9,12,12,13 207:5,12,13,15 208:13,24 211:10,16,17 213:1,5,8,10,12 214:2,4,9,20 216:4,8,11,13 218:9 219:18 222:19 223:8,11,13 225:21,21,22,25 227:7,11,13,16,22 228:19,22,24,24 229:9,19,20 230:18 232:6,15 234:21,25 235:7,12 236:13,23 238:4,4,8,8,10,13,15,15,21,25 239:18,21,23 240:7,23 243:17 244:1,6,7 245:22 246:4 247:25 248:6,18,25 249:2,3,7,17 250:12,18 251:16 257:10 259:24 260:25 261:10,15,16,18 262:14,23 263:3,12,14 264:21 265:16,23 267:5,10,10 268:2,14,17,24,25 269:2,3,5,9 272:6 273:18,23 274:13</p> <p>state's [5] 22:14 25:13 37:1 93:23 203:10</p> <p>state-funded [1] 123:20</p> <p>state-run [5] 259:20 260:2 261:5 262:21 266:4</p> <p>state-sponsored [1] 80:25</p> <p>stated [2] 29:3 39:9</p> <p>statement [3] 111:5 134:4 138:14</p> <p>statements [3] 9:10 112:12 123:14</p> <p>states [67] 4:17 12:4 13:25 14:12 32:13,15,24 33:3,3 36:20 38:10 39:3 49:9 50:13 60:20 61:10 68:7 72:11 76:20 77:3 80:4,6,9 82:23 83:3 88:7 91:5,8 94:5 97:7,14 98:16 100:13 101:20 105:4,11,19 107:7 112:25 124:5 126:9,11,14,19,22 127:18 138:8 156:20 158:7 170:8 171:23 173:13,23 179:18 200:2,15 205:14 233:16 235:3 237:22 238:6 244:1 245:13 246:21 249:20 267:20 270:3</p> <p>states [1] 162:17</p> <p>statewide [1] 43:17</p> <p>stating [1] 166:4</p>	<p>station [2] 96:23 131:2</p> <p>statistic [1] 176:8</p> <p>statistically [1] 18:16</p> <p>status [1] 150:10</p> <p>statute [2] 36:13 246:4</p> <p>statutes [1] 33:22</p> <p>statutory [30] 32:25 33:9 47:12,13 157:8 158:8,24 169:13 183:6 197:19 199:3,25 200:17 216:25 217:10,11,22 218:2,8,11,19 219:12,15 220:17,19 221:21 223:24 232:24,25 233:3</p> <p>stay [4] 5:19 68:8 105:24 224:12</p> <p>steady [2] 14:8 15:9</p> <p>stealing [3] 74:2 100:6 201:18</p> <p>step [3] 42:7 157:18 254:1</p> <p>steps [1] 45:20</p> <p>steward [3] 128:15 162:2 203:10</p> <p>stewards [4] 127:22 128:9,9 180:13</p> <p>stick [3] 181:21 221:12 264:10</p> <p>still [13] 36:14 117:16 129:25 146:9 172:16 200:4,12 203:24 225:6 241:11 251:25 257:13 264:12</p> <p>stink [1] 226:15</p> <p>stole [2] 194:10,12</p> <p>stop [27] 6:17 20:5 48:22 63:23 68:1 70:11 71:9,16 72:1 100:5,8,20,21 103:23 130:21 172:5 199:16 204:9 208:22 210:4 220:1 226:5 236:12 242:17 245:13 254:1 255:6</p> <p>stopped [4] 13:12 15:12 100:2 212:22</p> <p>store [1] 194:6</p> <p>stored [2] 63:6,16</p> <p>stories [4] 34:3 99:8 159:15 223:7</p> <p>story [4] 202:15 227:3,5 247:23</p> <p>strategic [2] 121:24 122:7</p> <p>strategies [1] 83:20</p> <p>Street [4] 10:5 45:4 46:4 47:16</p> <p>strength [1] 4:3</p> <p>stressed [1] 5:1</p> <p>stretching [1] 263:2</p> <p>strictly [1] 186:22</p> <p>strikes [1] 49:16</p> <p>striking [1] 4:24</p> <p>stripped [1] 201:23</p> <p>strong [8] 96:9 98:5 136:3 138:6 147:16 195:21 210:24 260:10</p> <p>strongly [2] 81:13 165:9</p>
---	---	--	---	--

<p>structure [1] 151:7 struggling [3] 32:4 50:20 162:15 student [16] 39:21 40:2 41:15 44:2,9 139:2 155:1,3,15,17 178:7,17 179:2 212:8,19 215:11 students [32] 39:18 41:7,12,17 43:17 60:6 63:8,12 101:8 103:2 123:4 134:18 138:16 141:2 143:12 144:2,20 146:7,16,18,21 155:5,12 164:14 178:14 212:21 214:12 215:5,6 235:9 236:2,4 studied [1] 208:12 studies [3] 4:2 15:3 207:18 studio [1] 242:10 study [17] 3:15 4:22 7:15 11:24 24:17 26:4 44:6,9 50:23 87:9 102:20 107:18 111:11 169:24 170:2 265:19 275:8 Study's [1] 275:4 stuff [9] 150:23 219:7 237:4,4,7,21,23 253:7,17 stupid [3] 237:23 253:6,17 style [2] 73:18,19 stymied [1] 83:11 subdivisions [1] 225:24 subject [13] 96:13 114:22 123:5 155:16 160:12 167:18 168:1 216:8,13 219:5 230:17 234:11 244:5 submission [12] 80:2,11 84:4,9,18 86:5,16,19 87:10 90:8 111:12,13 submissions [1] 84:19 submit [1] 16:10 submitted [7] 11:23 19:23 23:2 80:5 89:14 90:3 97:9 subscribers [1] 68:16 subscription [1] 51:6 subscriptions [1] 67:23 subsequent [1] 275:6 subset [3] 20:23,25 86:16 substance [1] 227:21 substantial [2] 123:21 198:8 successful [2] 105:25 208:21 successfully [1] 244:24 sudden [9] 40:3,4,6,7 41:20,24 42:11 66:12,17 suddenly [2] 66:3 172:16 sue [10] 94:9,12 95:2,12 179:15 198:6,7 200:25 208:20 239:22 sued [6] 60:13 95:7 129:24 161:19,24 162:8 suffer [1] 196:4 sufficient [12] 5:3 53:2 58:</p>	<p>14,15 74:15 193:24,25 201:11 207:11 246:3 263:24 267:7 sufficiently [1] 163:11 suggest [3] 17:21 75:5 173:5 suggested [4] 120:25 172:2 268:21 269:11 suggesting [1] 172:24 suggestion [3] 87:17 182:6,8 suggests [1] 91:19 suing [5] 13:25 130:19 159:13 201:10 236:7 suit [10] 27:23 28:4 61:3,22 90:16 95:8,9 197:24 217:1,2 suits [13] 4:7 48:25 49:10 80:3 94:25 100:11 130:13,14,16 160:12 195:14 217:3 228:23 sum [1] 82:14 summarized [1] 240:3 summarizing [1] 4:10 summary [4] 12:2 90:20 128:14 141:4 sums [2] 121:10 131:20 super [2] 150:19 151:7 supervision [1] 63:10 Supp [1] 130:12 supplied [1] 222:9 support [9] 28:5 32:2 44:18 118:23 152:21 161:22 222:11 261:2,12 supported [1] 261:9 supporting [1] 50:18 supportive [1] 74:25 supports [1] 144:6 supposed [3] 60:4 102:25 119:10 Supreme [18] 4:23 36:5 52:25 57:16 74:20 82:3 117:21 126:17 195:7 239:7,16,19 241:25 245:5 246:20 254:9,13 257:8 surprised [2] 45:22 230:16 surprising [2] 82:23 122:22 Survey [47] 7:6,8 11:23 12:1,7,11 13:3,15 14:14,18,25 15:1,4,14,19,19 16:10 17:10,19,20,24,25 18:13,20,21,23 19:15,20 21:9,11 22:1,4,7,25 23:21 25:22 27:14 64:6,19 67:7 76:6 198:4,4,10 199:7 205:17 206:14 surveyed [1] 207:14 surveys [1] 18:2 survive [1] 32:5 susceptible [2] 45:18 160:7 suspect [2] 81:13,24</p>	<p>suspended [2] 155:13 228:11 sustain [2] 31:21 106:9 swath [1] 80:22 sweep [3] 23:15 33:5,24 swiftly [2] 131:13 211:24 switch [1] 138:23 sword [1] 49:15 sympathetic [1] 242:12 system [34] 13:1 37:22 43:9 44:20 49:15 58:6,17 75:4,8 78:18 137:5 139:1 147:21 151:9 165:25 173:21,22 191:11,12 194:24 195:1,2 202:12 203:24 210:1,7 214:11 245:23 247:12,16,22 250:5,5 263:11 systematic [4] 45:22 49:17,22 50:5 systematically [1] 163:15 systems [4] 63:14,17 102:21,23 systemwide [4] 121:7 151:8,9,19</p> <p style="text-align: center;">T</p> <p>tab [3] 62:1 212:11,12 table [3] 124:1,2 246:2 tackle [1] 43:9 tailored [3] 177:3 208:1,10 tailoring [1] 177:10 takedown [10] 149:11 205:21,23,25 207:9 209:9,16 210:1,7 262:12 takings [12] 228:24 229:2,6,10,13 239:17,19 240:1,6,18,18 247:1 talked [2] 66:18 101:16 111:24 117:22 173:9 177:22 179:4 206:14 211:5 227:8 230:6 238:11 239:10 240:1,4 241:14 242:7 246:25 247:20 250:16 256:25 talks [4] 57:25 66:11,12 111:13 tandem [1] 269:24 task [1] 174:1 tax [2] 273:25 274:7 taxes [1] 38:12 taxpayer [2] 38:10 273:20 taxpayers [2] 203:9 217:4 taxpaying [1] 274:13 teach [4] 11:7 78:6 192:16 236:4 Teach-Outs [1] 143:2 teacher [1] 44:5 teachers [1] 66:2 teaching [5] 80:20 144:4 159:22 236:2,11 team [4] 125:13,14,14 150:13 teams [3] 108:22 125:9</p>	<p>142:25 tech [1] 266:2 technical [4] 101:23 212:20 252:5 257:24 technicality [1] 94:21 Technology [4] 155:10 218:4 260:17 263:21 tells [1] 43:21 tend [3] 127:8 165:13 216:19 Tennessee [1] 173:13 tens [1] 121:12 tenure [2] 215:22,24 term [5] 16:12 212:9 228:1 240:21,22 terminated [1] 155:15 terminology [1] 260:20 terms [42] 18:3 26:6 40:22 54:19 56:1 61:17 67:3,11 70:23 72:10,12 76:19,22 80:7,8 81:3 83:7 89:6 105:25 106:4 113:18 124:5,5 126:20 131:1 145:13 146:6 152:11 153:13 160:23 166:14 167:18 168:3,13 169:16 171:9 178:6 209:3 246:25 249:10 267:15 270:3 terrified [2] 176:24 214:25 test [12] 39:20,25 41:14 102:7,9,11,12,13 106:7 140:3 236:3 263:1 tested [2] 244:24,24 testified [1] 4:14 testimony [2] 220:14 271:13 tests [12] 43:18 80:19 102:4,8,19,22 103:1,4 104:2 230:8,8 236:4 Texas [37] 9:25 39:11,20 40:6 41:5 42:1 43:8 44:1,10 48:21 65:19 98:1,9 138:3 191:11 192:4 194:24,24 195:1,2 203:6 223:8,11 225:18,19,23 234:4 236:25 238:25 239:8,13,16,19 240:5,6 241:25 251:12 text [3] 46:10,12 70:22 textbooks [1] 215:7 Thanks [17] 3:12 9:14 17:23 45:1 80:10 107:12 132:11 134:10 137:23 145:6 150:19 191:8 194:20 237:25 251:19 270:10 275:8 theater [1] 170:22 theft [1] 253:6 theme [3] 126:9 157:5 230:21 themes [1] 122:17 themselves [12] 8:19 32:2 49:1 59:15 68:10 77:6 80:14,17 136:4 147:19 169:10</p>	<p>273:24 theoretically [1] 61:13 theories [3] 243:15,17 244:23 theory [1] 230:20 there's [83] 16:18 19:16 20:10,18 43:11 48:22 53:1 55:14 63:11,12 68:25 69:21 74:12,14,17 81:17 85:4 86:24 91:12 94:5 104:1 119:13,23 122:23,24 127:10 130:2 135:13 137:8 142:10 147:16 148:14 150:3 153:8 154:12 162:15 165:8,9,12,14 166:2 173:5,16,20 175:2 177:13 183:4,20 187:14 193:18 194:25 197:17 204:13,16 207:17 211:22,24 212:18 214:2 220:25 228:20 229:22 233:12 236:20 238:18,25 239:6 243:4,6 244:6,17 245:19 246:3,6 247:4,7 248:2 250:4 256:6 258:5 260:24 261:15 265:6 therefore [3] 5:4 23:6 124:23 They'll [3] 109:12 113:17 173:18 they've [10] 63:7 88:12 92:17 97:6 102:19 115:16 194:12 245:6 262:11 271:23 thinking [6] 16:11 66:10,13 208:17 215:21 218:7 thinks [1] 272:20 third [5] 8:11 52:20 89:25 117:2 262:20 third-party [2] 189:7 264:3 Thomas-Rasset [1] 159:1 through [1] 170:15 though [18] 37:9 42:2 53:22 65:23 66:10 87:13,16 116:5 138:21 154:2 162:7 166:21 198:14 217:1 224:25 225:4 229:23 274:21 thoughtful [1] 273:10 thoughts [10] 17:19 26:2 27:12 64:5 88:17 126:20 217:13 242:8 246:12 271:8 thousands [8] 50:6 51:8 60:2 87:22 104:2 143:25 144:1 186:7 threat [6] 153:18 218:10 219:9 249:12 261:25 265:11 threatened [1] 8:1 threatening [1] 12:25 threatens [1] 243:8 threats [3] 160:8 210:15 225:2</p>
---	---	--	---	---

<p>three ^[18] 7:15 35:23 54:2, 19 55:1 78:19 93:13 123:24 133:4,5,16 184:3 200:4 231:7,10,14 255:18 266:17</p> <p>three-person ^[1] 180:3</p> <p>threshold ^[2] 160:1 169:23</p> <p>threw ^[2] 254:24 255:13</p> <p>thrilled ^[1] 3:11</p> <p>Thro ^[7] 11:11,12,12 24:9, 10,15 26:6 27:13 57:20 59:5,21 61:8 68:20 69:1,2,22 89:20</p> <p>throughout ^[12] 6:19 7:16 17:16 57:21 122:18 147:1 151:6 157:6 193:15 205:3 218:1 268:5</p> <p>throw ^[2] 21:22 168:8</p> <p>throwing ^[3] 183:13 225:2 247:13</p> <p>thrown ^[1] 43:22</p> <p>tie ^[1] 235:23</p> <p>tied ^[1] 245:14</p> <p>Tillis ^[1] 4:23</p> <p>timely ^[1] 36:10</p> <p>tiny ^[1] 269:4</p> <p>tip ^[5] 51:3 81:14 82:15 97:16 247:18</p> <p>titles ^[1] 50:14</p> <p>today ^[41] 8:18 11:5,20 23:23 31:14 45:2 48:8 53:20 58:11,11 64:11 77:23 79:16,19 112:20 133:14 138:17 144:13,17 145:7,9 146:4 147:18 177:23 184:22 206:14 211:13 217:8 230:6 231:11 246:14 259:2 263:17 265:6 266:11,15,21 270:6 273:16 274:17 275:2</p> <p>today's ^[6] 3:9,16 5:4 7:17 133:4 259:19</p> <p>together ^[2] 137:22 150:23</p> <p>took ^[13] 24:15 26:18,20 55:12 126:16 151:25 152:8 154:23 155:24 221:8 237:1 241:12 253:13</p> <p>tool ^[5] 122:7 209:7,11,21 210:10</p> <p>topic ^[7] 4:10 11:21 65:16 118:5 206:6 224:10,13</p> <p>topics ^[7] 6:4 7:16 177:14 187:12 190:16,25 213:4</p> <p>tort ^[1] 249:12</p> <p>toss ^[2] 256:1,1</p> <p>tossed ^[1] 255:19</p> <p>total ^[7] 13:5,10,15 15:18 18:7 249:2 256:20</p> <p>totally ^[5] 27:24 61:23 105:2 167:1 188:1</p> <p>touch ^[6] 8:7 198:10 200:20 213:3 246:16 250:7</p> <p>touched ^[3] 124:3 200:24</p>	<p>254:20</p> <p>tourism ^[1] 129:11</p> <p>toward ^[1] 260:24</p> <p>towards ^[10] 12:1 16:1 17:21 76:18 78:9 112:24 113:8 130:24 199:2 246:13</p> <p>track ^[2] 111:14 181:23</p> <p>trade ^[4] 29:23 30:6 193:7 195:15</p> <p>trademarks ^[1] 101:3</p> <p>traditional ^[1] 262:25</p> <p>train ^[2] 33:20 216:2</p> <p>trained ^[1] 33:1</p> <p>training ^[10] 33:1,18 43:16 60:16,17 63:11 174:17,25 175:3,13</p> <p>trainings ^[1] 144:1</p> <p>transactions ^[2] 67:11 141:19</p> <p>transcribed ^[1] 65:15</p> <p>transcribing ^[1] 7:20</p> <p>transcript ^[2] 7:23 275:3</p> <p>transforms ^[1] 264:11</p> <p>transition ^[1] 3:22</p> <p>transitory ^[1] 240:22</p> <p>translated ^[1] 102:20</p> <p>transparency ^[1] 205:20</p> <p>transparent ^[4] 163:23 164:3 216:7,7</p> <p>traveled ^[1] 158:24</p> <p>treasury ^[1] 153:24</p> <p>treated ^[2] 57:25 156:13</p> <p>tremendous ^[8] 108:7 146:10 153:23 215:14 221:24 253:3 258:4,5</p> <p>tremendously ^[1] 125:24</p> <p>trenches ^[1] 81:12</p> <p>trend ^[3] 12:24 14:4,24</p> <p>trends ^[3] 8:10 158:12 257:5</p> <p>trespass ^[4] 243:13,14,19, 25</p> <p>trespasses ^[1] 240:20</p> <p>trial ^[1] 100:18</p> <p>tried ^[9] 34:12 159:4,20,21 194:16 195:11 254:25 255:15 269:6</p> <p>tries ^[2] 202:8 238:3</p> <p>trigger ^[3] 74:18 212:14 245:20</p> <p>trillion ^[1] 219:6</p> <p>trips ^[1] 231:7</p> <p>trivial ^[1] 27:24</p> <p>troll ^[2] 159:8 228:2</p> <p>trolls ^[3] 216:16 217:19,21</p> <p>troubling ^[1] 128:21</p> <p>true ^[5] 58:3 72:17 92:15 165:15 260:6</p> <p>truly ^[1] 245:23</p> <p>trump ^[1] 129:2</p> <p>trustees ^[1] 167:22</p> <p>trusts ^[1] 128:10</p>	<p>trustworthy ^[1] 50:16</p> <p>try ^[33] 6:9,12 20:1 24:1 29:2,4 42:20 53:13 74:9 75:14 94:1 106:11,22 109:6 136:11 137:22 138:15 139:9 142:12,14 144:14 171:2 172:6 186:2 194:15 202:2 216:19 220:1 235:13 237:24 245:15 256:11 271:23</p> <p>trying ^[37] 6:5 14:19 15:25 19:2 20:17,25 21:21,22 43:5 53:7 54:10 58:20 68:1 83:16,22 104:5 105:16 107:18 115:10 117:20 127:2 162:15,22 202:5 214:25 223:20 227:14,16 235:23 244:12 245:7 253:20 254:22 258:2,18,21 263:1</p> <p>TSI ^[4] 39:25 41:10,21 66:3</p> <p>turn ^[22] 3:7 5:9,19 6:22,24 14:20 30:9 75:13,14 86:3, 12 88:3 97:4 101:16 107:5, 9 119:3 121:4 149:19 177:18 187:12 202:7</p> <p>turned ^[2] 43:11 232:1</p> <p>Turner ^[1] 74:20</p> <p>turning ^[1] 252:2</p> <p>turns ^[2] 62:19 212:8</p> <p>tutor ^[1] 40:2</p> <p>TV ^[1] 141:16</p> <p>tweeted ^[1] 24:4</p> <p>twice ^[2] 93:19 274:24</p> <p>twisting ^[2] 244:12 249:10</p> <p>Twitter ^[2] 24:1 125:20</p> <p>two ^[44] 6:6 14:15 20:8,10 29:13 34:15,15 37:17 51:19 63:24 66:16 75:13,21 80:4 81:18 82:5 90:18 91:15 93:8,13 94:22 109:17, 18 112:8 120:24 128:20 135:8 137:18 144:18,20 162:23 170:21 178:20 191:13 200:8 205:8 223:13 241:6 242:8 243:9 250:21 255:16 257:23,23</p> <p>two-and-a-half ^[1] 143:5</p> <p>type ^[13] 76:16 116:23 194:7,15 202:8 203:7 237:2,3 238:9 253:1 258:16 261:22 271:19</p> <p>types ^[12] 22:22 76:15 97:13 102:15 168:19 186:16, 20 190:20,22 200:22 225:24 227:14</p> <p>typical ^[5] 35:5 93:23 94:2 100:11 142:9</p> <p>typically ^[9] 31:4 61:5 90:21 100:13 114:8 116:4 134:19 230:1 268:4</p> <p>typos ^[1] 40:11</p>	<p>149:16 190:3 240:7 264:14</p> <p>UC ^[7] 78:18 143:22 149:9 161:4 163:5 175:17 176:6</p> <p>UCLA ^[1] 90:11</p> <p>ultimate ^[2] 244:25 269:18</p> <p>ultimately ^[10] 5:5 22:12 57:13 88:8 116:21 166:15, 21 229:10 230:16 273:21</p> <p>umbrella ^[1] 151:24</p> <p>un-mute ^[2] 7:13 24:16</p> <p>un-muted ^[1] 32:20</p> <p>unable ^[6] 12:18 36:6 51:16,21 262:10 267:24</p> <p>unambiguously ^[1] 61:19</p> <p>unauthorized ^[5] 14:13 22:19 23:3 45:20 267:21</p> <p>unbelievably ^[1] 99:22</p> <p>UNC ^[1] 37:21</p> <p>uncertainty ^[1] 136:21</p> <p>unchallenged ^[1] 265:14</p> <p>unclear ^[2] 118:22 206:24</p> <p>uncommon ^[1] 263:7</p> <p>unconnected ^[1] 61:23</p> <p>unconstitutional ^[1] 82:9</p> <p>under ^[44] 30:1 31:19,19 32:1 36:6 43:10 56:7 57:16 61:1 90:16 94:12 95:18, 21 105:7 123:7,8 139:14 141:3 148:25 155:7,16 164:5 179:8 183:6 197:6, 17 204:4 207:1 215:19 225:19 230:19 232:25 234:25 240:6 244:5 247:19 260:9 267:18 268:8,15,15 272:23,24 273:4</p> <p>undergrads ^[1] 123:3</p> <p>underlying ^[1] 248:9</p> <p>undermine ^[1] 27:21</p> <p>undermines ^[1] 261:9</p> <p>underneath ^[1] 44:11</p> <p>underscore ^[1] 144:24</p> <p>understand ^[35] 8:3 18:7, 23 19:10 20:24 30:1 38:23 40:23 53:7 55:13 56:10 71:24 74:17 81:25 82:10 92:24 105:18 107:16 114:24 115:11 117:6 134:18 135:1 137:23 144:13 149:18 159:6 162:20 166:6 185:1, 1 235:17 241:25 245:15 254:7</p> <p>understanding ^[7] 6:10 23:19 32:8 71:10 83:12 87:19 173:25</p> <p>understands ^[1] 81:15</p> <p>understood ^[2] 82:12 140:14</p> <p>undertake ^[4] 93:25 145:2 151:18 169:4</p> <p>undertaken ^[3] 45:23 144:11 169:25</p>	<p>undertakes ^[1] 24:17</p> <p>undertaking ^[2] 45:9,15</p> <p>undervalued ^[1] 47:3</p> <p>undeserved ^[2] 199:4 214:11</p> <p>undetected ^[1] 265:14</p> <p>uneducated ^[2] 56:21 216:17</p> <p>unenforceable ^[1] 37:5</p> <p>uneven ^[1] 249:18</p> <p>unfortunate ^[1] 268:17</p> <p>unfortunately ^[6] 18:14 19:9 55:8,14 107:4 111:15</p> <p>unheard ^[1] 126:11</p> <p>uniformed ^[1] 173:24</p> <p>uniformity ^[2] 251:9,15</p> <p>uniformly ^[1] 251:17</p> <p>uninformed ^[1] 56:20</p> <p>unintentional ^[1] 59:23</p> <p>Union ^[1] 264:16</p> <p>unique ^[5] 140:13 222:20 228:13 239:4 241:2</p> <p>unit ^[1] 139:2</p> <p>United ^[1] 50:13</p> <p>units ^[2] 144:15,21</p> <p>universe ^[3] 30:24 31:3 256:5</p> <p>Universities ^[79] 11:16,17 21:6 27:11,17 28:19,20 29:1,24 69:17 70:5 97:17,17 101:2 103:15,16 105:1 108:8,22 125:9 127:22 129:9 145:11 146:5 147:17,18 158:21 160:6 161:9 162:17 163:21,22 164:8 166:4 167:3,6,7,11,12,20 168:9 173:6 174:10,11,16, 18 186:16 189:2 191:17,18 198:23 204:2,7 205:11,14 211:14,17 218:5,5 219:14, 17,18 220:2,8,15 221:4 241:6 251:16 259:21 260:3 261:5 262:2,21,24 264:2, 25 266:4 273:23 274:4</p> <p>University ^[166] 9:21 11:7, 13,14 19:5 22:20 26:13,15, 25 27:3 28:1,2,12,14,15,16 29:6 38:25 39:11 40:6,15 42:10,13 43:9 44:10 60:2, 7 65:19 66:9,15 69:4 78:3, 5,15,17 79:12 85:24,24 89:21 90:9 98:1,2,9 99:5 100:23 104:22,24 111:7 116:17 120:24 121:8 122:1,3,4,18 123:1,8 129:16 134:12 138:3,15,25 139:5 140:9, 11,14,24 141:1 142:22,25 143:4 144:6,8,11 145:9,11, 17 146:13 149:25 151:3,6, 9,10,21 154:1,6,9,11,14 157:11 158:4 161:1,2,5 168:15 173:1 174:5 175:5,</p>
U				
U.S ^[7] 50:21 123:18 138:9				

<p>17 177:25 178:5,6 182:11, 14,16 184:6,17 185:7,15, 21 186:1,6,9 188:12,16,17, 20 189:1 191:11,12 192:4, 21,24 193:1 194:24,25 195: 1 197:8 198:16 200:9 204: 18 205:23 208:18 212:22 215:25 218:10 219:1 222: 2,8,11,13,18 224:2,9 228:9, 14 229:20 231:6,15 235:5, 25 236:15 240:2 241:8,10 242:23,24 243:19 251:12 253:14,17 258:18 259:13, 17 263:3 265:7</p> <p>University's [2] 145:15 183:10</p> <p>university-created [1] 144:22</p> <p>university-wide [1] 185:2</p> <p>unjust [1] 49:16</p> <p>unlawful [5] 57:10 113:2 158:19 264:7,10</p> <p>unleash [1] 217:15</p> <p>unleashed [1] 134:21</p> <p>unless [5] 60:15 69:20 140: 15 156:5 274:23</p> <p>unlicensed [2] 181:7 268: 18</p> <p>unlike [1] 102:1</p> <p>unlikely [2] 23:6 182:10</p> <p>unmeasured [1] 262:7</p> <p>unmute [1] 197:3</p> <p>unnoticed [1] 265:13</p> <p>unprecedented [1] 136:8</p> <p>unproven [1] 49:8</p> <p>unreasonable [3] 131:21 181:11 217:25</p> <p>unreported [1] 81:18</p> <p>UNT [1] 138:12</p> <p>until [7] 5:19 15:12 107:3 150:15 184:4 257:15 272: 24</p> <p>unusual [1] 228:12</p> <p>up [9] 7:6,9,13 8:22 15:11, 11 17:1 20:8 25:18 36:22 37:24 54:9 62:1 63:15 68: 8 70:24 73:10 76:4 82:14 85:21 91:7 93:4,15 95:22 98:11 102:25 103:17 119: 22 122:7,12,17 126:7 130: 23 131:15,25 132:6,10 133: 13 137:13 143:16 159:9 160:25 167:9 172:8,12,17 173:14 176:10 181:13,21 182:2,23 185:18 186:10 189:15,21 196:14 197:5 199:12 201:16,20 205:5 207:19 212:9,21 215:12 219:8 222:14 223:20 226: 14 227:8 231:13 236:7,8, 14 237:8 238:12 242:9 244:13 245:5 252:11 253:</p>	<p>12,13 257:11,16 258:10 259:3 262:11 268:6 271:2 274:20</p> <p>uphill [1] 210:7</p> <p>uploading [1] 52:10</p> <p>upset [4] 157:7 168:10 216: 11 239:2</p> <p>Upward [2] 40:7 42:1</p> <p>urging [1] 240:13</p> <p>usage [4] 30:1 142:15 267: 21 268:7</p> <p>usages [1] 267:1</p> <p>useful [4] 26:3 162:11 251: 20 269:22</p> <p>usefulness [1] 84:1</p> <p>user [3] 183:4 219:23 273: 5</p> <p>user's [2] 210:25 212:2</p> <p>users [7] 19:18 23:14 174: 9 176:20 177:6,7,8</p> <p>uses [17] 22:19,22 23:3,6, 12 161:20 162:18,19 166:4, 6 168:13 228:19 250:19 264:5 265:3 267:13 272:2</p> <p>using [34] 6:19 38:10 39:21 66:14 69:12,24 71:9,16 76: 8 88:11 102:21,22,22 105: 19 117:11 125:10,18 133: 13 142:4 144:3 182:20 196:10 208:13,22 210:25 212:19 216:20 236:4 241: 10,15 242:23 270:15 272:3, 8</p> <p>Utah [1] 112:5</p> <p>utilize [1] 176:10</p> <p>utilizes [1] 148:5</p> <p>UVA [1] 134:24</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vaccine [1] 191:15</p> <p>vacuum [1] 171:3</p> <p>valid [3] 25:25 88:7 229:1</p> <p>validity [1] 14:11</p> <p>valuable [2] 189:23 242:4</p> <p>value [23] 21:13 32:9 38:20 117:13 120:19 127:2 172: 20 180:24 181:2,3 182:23, 24 183:1,7,9 195:5 221:11, 14,15 242:1,2 261:21 264: 18</p> <p>valued [1] 48:1</p> <p>values [4] 195:12,13 266:1, 2</p> <p>VARA [1] 250:23</p> <p>varies [1] 187:3</p> <p>variety [3] 91:25 92:8 129: 8</p> <p>various [14] 27:17 69:5 85: 1 87:23 90:15 96:12 101: 17 120:18 138:11 151:13 154:1 164:18 171:16 241: 4</p> <p>vary [1] 83:20</p>	<p>vast [7] 82:7 128:1 218:14 229:16,17,18 267:8</p> <p>veered [1] 260:9</p> <p>veering [1] 263:19</p> <p>vehicle [1] 88:14</p> <p>vendor [5] 70:24 114:11 211:22 212:15,24</p> <p>vendors [3] 71:2,3 108:22</p> <p>verbal [1] 185:4</p> <p>verbatim [2] 40:21,25</p> <p>verdict [1] 269:6</p> <p>versa [1] 136:12</p> <p>versions [1] 244:2</p> <p>versus [8] 26:1 31:17 81: 16 161:17 169:11 174:5 214:3 225:14</p> <p>vet [1] 150:6</p> <p>vets [1] 184:21</p> <p>viability [1] 49:10</p> <p>vicarious [1] 112:2</p> <p>vice [2] 136:12 138:24</p> <p>video [18] 3:8 6:23,24 7:18 8:21 35:25 37:13 56:13 65: 14 67:24 75:13,14 80:18 155:2 159:21 178:15 193: 8 275:5</p> <p>videos [3] 5:19 35:24 38: 18</p> <p>view [7] 57:14 80:7 113:7 118:11 174:10 187:1,2</p> <p>viewed [1] 261:7</p> <p>views [4] 193:14 252:21 259:21 266:8</p> <p>vindicated [1] 166:16</p> <p>violate [6] 26:16 70:8,10, 25 250:13,20</p> <p>violated [6] 4:20 26:10 35: 11 114:15 117:10 201:3</p> <p>violates [3] 26:25 27:1 70: 23</p> <p>violating [3] 120:15 125:20 271:4</p> <p>violation [21] 24:19,22 25: 1,6 26:7,12,15 27:4 37:16 38:6 50:6 59:24 69:8,11, 12,19 116:17 117:24 122: 21 196:11 233:11</p> <p>violations [7] 25:17 35:18 60:13 114:8,14 262:16,19</p> <p>Violent [1] 272:18</p> <p>Virginia [5] 27:8 61:9 134: 12 150:1 184:17</p> <p>virtual [2] 6:11 8:4</p> <p>virtually [1] 267:3</p> <p>virtue [1] 178:4</p> <p>vis-a-vis [1] 123:9</p> <p>visible [1] 161:11</p> <p>visit [1] 139:9</p> <p>visits [1] 65:23</p> <p>visual [5] 29:16 72:10 193: 7 250:9 268:3</p> <p>vital [2] 30:2 50:19</p>	<p>Vockell [33] 191:8,9,9 194: 20,22 202:22 203:1,2 213: 21,22,23 215:13 216:6 220: 22,23 225:8,10,14,16 233: 23,24,25 234:13 238:23,24 239:14 240:3 246:1,15,18 247:15 251:5,8</p> <p>Vockell's [1] 194:9</p> <p>void [1] 37:5</p> <p>volume [5] 128:2 177:23 178:1,7 180:9</p> <p>voluntarily [2] 195:14 267: 2</p> <p>voluntary [1] 4:17</p> <p>VP [2] 10:11 191:6</p> <p>VRA [1] 266:22</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wagon [1] 258:10</p> <p>wait [5] 104:11 107:3 137:2 202:3 271:17</p> <p>waiting [1] 73:23</p> <p>waiver [1] 239:4</p> <p>waivers [2] 4:17 49:1</p> <p>walk [1] 227:12</p> <p>walking [1] 240:23</p> <p>Wall [5] 10:5 45:4 46:4 47: 16 82:4</p> <p>wanted [46] 7:8 34:7 40:23 55:23 57:20 68:3,20 70:13 71:14 86:25 91:13 92:13 108:5 110:22 114:17 119: 5 133:19 147:11 152:24 159:10 167:16 176:14 177: 15 182:4 195:12 199:5 200:10,12 203:3,18 204:12 210:18 211:3 221:9 228:7 231:19 235:19 241:8 243: 13 258:1 270:11 271:8 273:17 274:15,16,18</p> <p>wanting [1] 231:15</p> <p>wants [9] 41:15 73:10 113: 12 165:20 194:2 202:2 203:20 249:5 274:23</p> <p>warnings [2] 64:22 99:8</p> <p>Washington [2] 51:15 141: 13</p> <p>Wassom [21] 79:14,15,25 80:10 83:6,19 84:6 86:12, 15,21 91:3,13,15 118:2,7, 14 123:14 124:9 128:19,20 181:14</p> <p>Watch [2] 10:6 137:15</p> <p>watching [3] 7:10 76:2 133:10</p> <p>water [2] 55:3 247:19</p> <p>watermark [1] 57:7</p> <p>watermarked [1] 36:11</p> <p>watermarks [3] 55:20,24 64:24</p> <p>waters [1] 109:11</p> <p>waving [1] 194:18</p> <p>way [45] 12:11 36:5,14 45:2</p>	<p>47:18 53:14 54:22 55:21 64:5 66:23 76:14 90:7 94: 20,23 105:1 108:8 113:12 126:17 127:8,17 128:10 130:20 136:7 137:21 148: 5 156:16 177:5 191:13 194:14 203:24 209:14 211: 9 212:7 218:7 219:8 228:3 236:6 240:18 243:24 244: 7 246:8 253:21 258:11 270:25 272:7</p> <p>ways [14] 64:13 82:23 88: 18 164:16 176:9,15 194:19 208:25 227:8 244:13,19 248:14,19 274:2</p> <p>wealth [1] 27:6</p> <p>weaponized [1] 265:25</p> <p>web [1] 228:16</p> <p>webinar [3] 135:18,18,20</p> <p>webinars [2] 137:11 264:1</p> <p>website [21] 7:19,24 34:17, 19 46:11 47:9 51:7 56:14 115:2,2,10,18 146:19 152: 10 170:20 180:24 181:19 182:22 186:3 275:4,8</p> <p>websites [2] 222:9 267:12</p> <p>week [2] 37:11 194:6</p> <p>weeks [2] 13:4 35:23</p> <p>weigh [11] 25:19 57:2 83: 25 86:7 91:5 149:23 194:2 195:24 197:2 207:10 220: 11</p> <p>welcome [5] 3:14 16:24 75: 17 133:3 224:16</p> <p>welcoming [1] 3:9</p> <p>well-respected [1] 98:7</p> <p>well-versed [2] 103:19 173:1</p> <p>whack-a-mole [4] 196:13, 16,17 202:7</p> <p>whatever [10] 84:25 85:17 88:22 115:9 117:12 177:9 221:17 229:21 233:2 234: 21</p> <p>whatsoever [2] 89:16 116: 12</p> <p>wheeling [1] 17:1</p> <p>whenever [4] 143:15 148: 12 161:2 207:25</p> <p>whereas [1] 233:2</p> <p>Whereupon [4] 75:16 132: 12 189:25 275:10</p> <p>whether [83] 5:2 8:12,13, 14 17:3 18:22 19:19 20:3 21:24 22:12,22 25:9,25 27: 9 34:12,12 35:2 39:14 44: 24 51:22,25 52:2 54:14,17 55:7 58:21 59:13,14 61:4, 16 62:1 63:18 64:7 67:10 69:10 75:7 88:7,15 89:11 91:12 94:7 97:19 107:14 112:24 113:12,17,18 118:9,</p>
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<p>11 120:6 139:8 144:10 147:23 150:11 157:20 165: 9 180:4 188:6 194:16 204: 4,22 206:24 207:9,10 211: 10,25 212:1,4 213:17 218: 4 220:7 222:18 229:20 239:16 247:1 248:3,21 249:20 254:18 255:11 256: 4 264:8 271:10 whining [1] 261:20 white [4] 40:11 201:21 202: 11,13 who's [2] 94:10 115:16 whoever [1] 208:24 whole [9] 40:20 158:6 161: 9 169:12 205:15 208:23 214:2 240:17 253:8 wholesale [2] 23:4 48:24 whom [3] 81:4 123:5,6 wide [8] 80:22 81:11,17 91: 24 92:8 129:8 182:10 264: 24 widely [4] 99:18,22 262:17 265:9 widespread [17] 18:19 21: 24 53:22 54:12,15 104:24 122:25 144:25 148:15 164: 10,22 204:14 206:1,1 247: 5 248:24 254:15 will [95] 5:16,20,22 6:13,24 7:13,18,23 8:2,21 9:8,10 16:24 26:16 30:17 31:13 52:18 54:6 57:19 62:1 69: 9,12 70:10,11,23,24 71:7,7, 9,16 72:1,23 73:11 94:2,6 101:14 103:21 106:22 124: 6 132:3,9 133:15,25 144: 12 152:24 161:18 165:11 167:5,8 168:10 169:1 183: 2 184:8 186:10 188:17 189:23 190:3 197:22 198: 2 200:16,19 208:24 210:17 211:11,16 212:1,13 216:3, 11,14,24,25 217:15 219:5 221:2,2 229:12 231:11 233:10 235:13 236:18 237: 17 241:5,25 252:13 257:15, 16 261:16 262:19 270:24 273:20 274:13 275:3,5,7 willful [4] 49:17 59:4 106:5 165:6 willfully [2] 58:23 113:25 willfulness [2] 57:8 118: 10 willing [8] 16:7,10,21 166: 14 198:6,7 199:8 220:20 willingness [2] 4:4 196:20 winds [1] 173:14 Winning [4] 98:20,23,25 111:2 wires [1] 46:6 Wisconsin [1] 79:13</p>	<p>wish [2] 70:25 87:21 wishes [1] 250:19 withheld [1] 96:16 within [22] 35:18,23 57:15 135:2,14 136:6 142:14 150:4 151:8 152:3 154:24 158:18 173:21,22 174:15 194:24 195:2 211:21,22 212:16 215:17 270:1 without [33] 25:3 26:22 31: 22 36:1 41:3,3 46:3 48:16 53:5 62:4 63:9,13 99:3 110:4 118:20 126:4 161:7 178:19 182:12 207:19 209: 14,15 211:2 219:19 241:15 243:24 244:4 263:23,24 267:13 268:1,19 270:4 witness [1] 62:24 won [3] 226:6,18 227:1 wonder [7] 16:9 91:9 126: 20 153:8,11 171:8 210:14 wonderful [1] 267:3 wondering [7] 11:25 29:12 41:25 80:6 97:11 141:10 147:21 word [4] 40:24 158:24 184: 21 251:6 words [4] 136:13 264:5,9 272:3 work [117] 18:24 29:19 30: 3,13 31:4 32:2 34:19,20 36:9,12 37:10 38:11,15 40: 3,5,10,18 42:1,2 44:9,11 45:21 47:3 55:9 62:22 63: 18,19 65:2 69:20,25 70:21, 24 71:7,16,22,23,23 72:23 73:3 74:3 78:15 92:17 94: 1,22 100:6 101:15 103:7, 20 106:1 109:8 110:9,14 111:9 113:12,15 125:6,7, 10,17,23 126:1 127:2 142: 22 143:11 146:6,17,22 150: 23 153:14 158:1,12 159:5, 14 172:18,21 173:10 182: 14 185:10,16 196:4,9,10, 21,24 207:24 208:13,23 212:19 215:12 219:8,13,16 220:15,19,21 237:1 241:4, 8,10,15 242:13 250:24 253: 18 262:12 264:3 266:19 270:16,18,21 271:1,3,7,23 272:6,9,24 273:3 workaround [1] 94:6 workbook [6] 40:8,12,22 41:22 43:16 73:16 worked [13] 28:15,15,18 98:3 122:2,12 141:16 143: 4 171:8 176:23 185:16 226:19 251:10 workflow [1] 150:8 workflows [6] 148:9,10 161:8,23,25 163:4</p>	<p>working [11] 3:21 61:10 62: 23 78:8 121:22 122:4 134: 14 173:3 176:25 247:22 260:16 works [50] 14:13 21:1,2 23: 5,15 30:9 31:1,20,22 38:13 47:19 63:6,12,15 64:25 66: 10,15 68:7 70:17 80:15,17 98:6,17 100:2 120:14,20 123:17 129:24 140:18 142: 24 143:9 147:19 150:10 185:8,17 203:24 208:9,14 218:14 230:23 235:10 242: 11 263:22 267:21 268:4,5, 6,14,18 269:18 workshops [2] 41:10 146: 18 world [6] 38:19 45:6 70:14 87:8 109:8 137:18 worried [2] 169:4 223:5 worry [6] 28:22 89:18 213: 11 217:3 220:20 234:22 worse [2] 167:14 255:1 worth [8] 34:23 51:2 68:13 73:22 122:15 165:21 220: 18,21 Worthington [1] 111:19 wrap [3] 75:11 189:15,20 wrapping [1] 73:10 wrestling [1] 125:13 write [2] 56:4 150:20 writing [6] 40:22 42:12 82: 4 100:2,8 150:9 writings [1] 269:24 written [11] 37:18 40:9 80: 11 98:18 118:15,24 135:4 151:2 263:5 265:4 271:13 wrongful [1] 183:4 wrongs [1] 206:23 wrote [4] 53:4 97:24 98:22 256:16</p>	<p>102:12,13,16,17 114:5 122: 12 143:5 149:8 154:9,25 155:4 161:5 184:3,3,6,11, 24 200:9 206:21 223:10,12 231:5 232:3 236:1 237:17 249:23 257:3 259:17 260: 10 262:6 268:23 Yep [2] 273:12,13 York [1] 51:12 young [7] 136:24 193:20 197:6 199:15 204:4 206: 20 246:25 yourself [4] 106:24 190:6 191:25 197:3 yourselves [1] 191:2 youth [1] 43:19 YouTube [4] 7:19 38:19 56: 15 275:6 Yuanxiao [1] 192:23 Yvonne [1] 138:1</p>
Z			
<p>zero [5] 96:18 184:7,10,11, 15 zigzag [1] 193:13 zigzagging [1] 29:13 Zoom [2] 5:25 6:19</p>			
X			
<p>Xu [20] 192:22,23,23 199:21, 23 210:11,12 216:1,2 223: 22,25 224:18,23 234:19,20 238:11,17,21 248:20,21</p>			
Y			
<p>year [33] 15:5,11,12 29:20 35:19 47:9 54:3,20 62:12 69:4 92:22 93:8,9,19 112: 8 120:24 121:9,13 144:2 145:24 146:15,18 170:14 176:1,2 178:21 180:11 189:6 194:5 205:24 224:5 243:22 249:1 year-and-a-half [3] 201:25 226:6,12 yearly [1] 14:6 years [44] 14:9 28:13 36:16 37:13 41:22 50:6 58:6 84: 7,12 92:20 93:6,10 100:4</p>			