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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NANTICOKE LENNI-LENAPE TRIBAL
NATION,

Plaintiff,

-vs-

ROBERT LOUGY, ACTING ATTORNEY
GENERAL OF NEW JERSEY, IN HIS
INDIVIDUAL AND OFFICIAL
CAPACITIES,

Defendant.

CIVIL ACTION NUMBER:

15-cv-5645-RMB-JS

MOTION TO DISMISS

B E F O R E:

THE HONORABLE RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

DATE: April 12, 2016

A P P E A R A N C E S:

BARRY, CORRADO & GRASSI, P.C.
BY: Frank L. Corrado. Esquire

CULTURAL HERITAGE PARTNERS, PLLC
BY: Gregory A. Werkheiser, Esquire
L. Eden Burgess, Esquire

ATTORNEYS FOR PLAINTIFF

OFFICE OF THE ATTORNEY GENERAL OF NEW JERSEY
BY: Stuart M. Feinblatt, Esquire
Assistant Attorney General

ATTORNEYS FOR DEFENDANT

Certified as true and correct as required by Title 28,
U.S.C., Section 753.

/s/ Theodore M. Formaroli, CSR, CRR

1 THE COURT: Good morning. Okay, we're here in the
2 matter of Nanticoke Lenni-Lenape Tribal Nation versus Lougy,
3 et al, Docket Number 15-5645. Let me start with your
4 appearances, please. For the plaintiff.

10:13AM

5 MR. CORRADO: Good morning, your Honor. My name is
6 Frank Corrado, I'm from Barry, Corrado & Grassi in Wildwood.
7 With me at counsel table is Eden Burgess and Gregory
8 Werkheiser, they are my co-counsel, they're been admitted *pro*
9 *hac vice*, they are with Cultural Heritage Partners. We're on
10 behalf of the plaintiff, your Honor.

10:14AM

11 THE COURT: Good morning. Welcome.

12 MR. FEINBLATT: Your Honor, Stuart M. Feinblatt,
13 Assistant Attorney General, representing the defendant.

14 THE COURT: Good morning.

10:14AM

15 MR. CORRADO: Your Honor, excuse me. Mr. Werkheiser
16 will be presenting oral argument.

17 THE COURT: All right, thank you.

18 Okay. Just a housekeeping matter. I think the
19 caption should be amended. Yes? Do we agree?

10:14AM

20 MR. WERKHEISER: Yes, your Honor.

21 MR. FEINBLATT: Yes, your Honor.

22 THE COURT: Okay. So, if the parties can do a
23 substitution on the record so that we have the current
24 Attorney General, Robert --

10:14AM

25 MR. FEINBLATT: Robert Lougy.

1 THE COURT: Lougy, yes. So it really should be the
2 Nanticoke Lenni-Lenape Tribal Nation versus Lougy, et al.

3 Okay, Mr. Feinblatt, this is your motion. I'll hear
4 from you.

10:14AM

5 MR. FEINBLATT: Thank you, your Honor.

6 This is a rather unusual case seeking extraordinary
7 relief. This is a suit claiming that the State of New Jersey
8 by virtue of a concurrent resolution issued by the Senate in
9 1982 has officially recognized the plaintiff tribe and they
10 are seeking an order, we submit, compelling the State of New
11 Jersey, not just the Acting Attorney General, that the state
12 should be enjoined from denying, repudiating or otherwise
13 impairing the Nation's status as a "officially recognized
14 tribe."

10:15AM

10:15AM

15 Now, as your Honor is aware, plaintiffs brought a
16 parallel state court action essentially alleging the same
17 allegations under state constitutional law. They sued for
18 substantive and procedural due process, equal protection and
19 also sued with a couple of state law claims. And we did send
20 to your Honor the oral decision in that case --

10:16AM

21 THE COURT: Yes. Thank you.

22 MR. FEINBLATT: -- in which Judge Anklowitz found
23 that, and we believe he was correct, that the case really
24 rises and falls on the legal significance of that resolution.

10:16AM

25 And as your Honor knows, he found that that concurrent

1 resolution did not have the force of law and felt that all the
2 claims therefore had to be dismissed. And, your Honor, we of
3 course agree with that decision and we respectfully request
4 that the court should follow it, but we believe that there is
10:16AM 5 a preliminary jurisdictional issue here, a very serious issue,
6 that has to be addressed first and, of course, that is whether
7 this court has jurisdiction under the Eleventh Amendment.

8 As the court of course is well aware, the Eleventh
9 Amendment generally makes the state as well as state agencies
10:16AM 10 and state officers such as the Acting Attorney General immune
11 from suits that are brought in federal court by private
12 parties.

13 THE COURT: Mr. Feinblatt, yes, but do you agree that
14 if it's a suit for injunctive relief the Eleventh Amendment
10:17AM 15 does not bar the action?

16 MR. FEINBLATT: Well, it depends. I know you are
17 referring to Ex Parte Young and the question is whether Ex
18 Parte Young applies. I absolutely agree that exception has
19 some limitations which we believe apply here, but Ex Parte
10:17AM 20 Young does allow under certain circumstances for suits to
21 proceed against individual state officers for injunctive or
22 declaratory relief on a prospective basis, that is absolutely
23 true. However, as the Third Circuit noted in MCI Telecom, 271
24 F.3d 491, citing the Pennhurst case, which is a U. S. Supreme
10:17AM 25 Court case, which we of course note extensively in our briefs,

1 Ex Parte Young does not apply if the state is the real
2 substantial party in interest and the state officer is only a
3 nominal defendant. To determine whether that is the case, you
4 have to look at the effect of the relief sought. What is
10:18AM 5 being sought in the case? Is it really just against one
6 individual or is the nature of the relief sought something
7 sought against the state?

8 So, for example, if the suit is seeking to restrain
9 the state from acting or compelling it to act, such as a suit
10:18AM 10 for specific performance, that's deemed to really be against
11 the state. If a suit is brought for money damages, that's not
12 allowed because even if an individual officer is being sued,
13 it's understood that the money would be paid out of the state
14 treasury.

10:18AM 15 THE COURT: So, help me understand, because I really
16 did not follow the argument that the defendant was making in
17 their brief. And I want to change the facts for a moment.
18 You agree, I presume, that if the state conduct at issue here
19 was the state has a statute, let's pretend --

10:19AM 20 MR. FEINBLATT: Right.

21 THE COURT: -- that said: Anyone over the age of
22 20 -- or under the age of 20 cannot vote. Does that mean a
23 19-year-old citizen of New Jersey could not sue the state for
24 injunctive relief?

10:19AM 25 MR. FEINBLATT: Well, that would be a -- well, I

1 guess if it's a prospective challenge to the constitutionality
2 of a statute, that may be allowed. But I think we have to
3 look at what's going on here.

4 THE COURT: Okay.

10:19AM

5 MR. FEINBLATT: The claim is that the state had, not
6 the Attorney General, but that the legislature through this
7 resolution had officially recognized the plaintiff tribe. The
8 suit, although there are some allegations against the Attorney
9 General, there are allegations that all representatives of

10:20AM

10 various branches of government over the years either have in
11 one way or another affirmed that "prior recognition" or have
12 said no, there was not such recognition. For example,

13 Paragraph 35 of the complaint alleges that the tribe's status
14 as an officially recognized tribe was fundamentally undermined

10:20AM

15 by a representative of the State Commission on American Indian
16 Affairs. That commission is not part of the Attorney
17 General's office, it's not the Attorney General, it's not

18 within that office, it's part of the Department of State. So
19 it's clear when you look at the factual allegations that the

10:20AM

20 reach of this case goes well beyond the Attorney General or
21 anybody in his office.

22 THE COURT: All right, let me change the facts for a
23 moment.

24 MR. FEINBLATT: Yes.

10:21AM

25 THE COURT: In 19 -- I'll just pick a date because I

1 don't really think the date is -- well, no, let me pick a date
2 post 2001. In 2005 the State of New Jersey passed a
3 statute --

4 MR. FEINBLATT: Yes.

10:21AM

5 THE COURT: -- that said the Nanticoke Lenni-Lenape
6 Tribal Nation is officially state-recognized as a tribe.
7 Okay?

8 MR. FEINBLATT: Yes.

10:21AM

9 THE COURT: Then post 2005 the state does something
10 to go against that. Would the plaintiff have standing then?

11 MR. FEINBLATT: Well, actually not in federal court.
12 You can't enforce state law rights in federal court. But if
13 you could make it a constitutional argument, that may be
14 possible.

10:21AM

15 THE COURT: Well, okay. So you agree with me. So if
16 what the state was doing was alleged to have violated or is
17 violating the due process rights under the federal
18 constitution, do you agree then that the plaintiffs would not
19 be barred under the injunctive relief prong of the Eleventh
20 Amendment?

10:22AM

21 MR. FEINBLATT: Well, again I think it's possible,
22 but I think the facts here are different.

23 THE COURT: How?

10:22AM

24 MR. FEINBLATT: Because we are talking about a
25 situation where the plaintiff is relying on various

1 representations by various representatives of the state
2 government and also arguing that certain other representations
3 go counter to the alleged recognition. And what you need to
4 do, respectfully, is you have to look at the nature of the
10:22AM 5 relief sought. So if we go to the complaint --

6 THE COURT: All right. Hold on a second, please.

7 Okay.

8 MR. FEINBLATT: If we go to page 20 of the first
9 amended complaint, if we look at page 20, paragraph 1, they
10:23AM 10 are seeking a declaration pursuant to 28 U. S. C. 2201.

11 THE COURT: Oh, I don't have the amended complaint
12 I'm sorry.

13 MR. FEINBLATT: Well, if you look at the original it
14 would be the same language in the wherefore clause.

10:23AM 15 THE COURT: All right, let me just get there. Okay.

16 MR. FEINBLATT: In paragraph 1 they are seeking a
17 declaration that the Nation has been officially recognized as
18 an American Indian tribe by the State of New Jersey.

19 THE COURT: All right, go to B. Tell me about B.

10:23AM 20 MR. FEINBLATT: B, it says "Enjoining defendant from
21 denying, repudiating or otherwise impairing the Nation's
22 status as an American Indian tribe officially recognized by
23 the State of New Jersey." I respectfully submit that we have
24 to look at the nature of the case. I don't think Mr.

10:24AM 25 Werkheiser would be happy if the order of this court were

1 Acting Attorney General Robert Lougy is enjoined, but nobody
2 else is enjoined on the state level, including the legislature
3 or anybody else. Because the whole purpose of this lawsuit is
4 really not about the state. What they are focused on, which I
10:24AM 5 understand, is they are seeking the state's assistance in
6 getting federal benefits and services. That relief is not
7 limited to having the Acting Attorney General say or not say
8 something, that relief can only be really effectuated if
9 everyone who is a representative of the state has to represent
10:24AM 10 or cannot disavow this alleged -- the prior "recognition."

11 THE COURT: Well, I just want to stick with the
12 hypothetical because I really am not following your argument.
13 So I want you to assume that in 2005 the tribe was recognized
14 by the New Jersey Legislature.

10:25AM 15 MR. FEINBLATT: Yes.

16 THE COURT: I want you to assume that for a moment.
17 Okay?

18 MR. FEINBLATT: Right.

19 THE COURT: And as a result of that the tribe is now
10:25AM 20 afforded certain federal benefits. That you don't quarrel
21 with, assuming my assumption, right?

22 MR. FEINBLATT: Yeah, sure.

23 THE COURT: Okay. If the defendant, the state, then
24 takes the position "no, just kidding, whatever, we didn't
10:25AM 25 recognize you as a tribe," and it's impeding their right to

1 get federal benefits, then I don't understand how that's
2 barred by the Eleventh Amendment.

3 MR. FEINBLATT: Well --

4 THE COURT: Because it's injunctive relief. They are
10:25AM 5 seeking an injunction from the Attorney General from violating
6 their due process rights by --

7 MR. FEINBLATT: Well, I think that's a slightly
8 different situation where there is a definite concrete
9 statute. Here, they are relying not just on that resolution
10:26AM 10 but other --

11 THE COURT: Hold on one second. Do you agree under
12 my hypothetical that the Eleventh Amendment would not then bar
13 that suit?

14 MR. FEINBLATT: I would say no for another reason,
10:26AM 15 respectfully.

16 THE COURT: Okay.

17 MR. FEINBLATT: As we pointed out in our brief, there
18 is a related concept which was developed in Idaho versus Coeur
19 d'Alene which is that an action cannot be maintained under Ex
10:26AM 20 Parte Young, "if the suit against the state officer effects a
21 unique or essential attribute of state sovereignty such that
22 the action must be understood as one against the state." And
23 in this case where we don't have this kind of clarity about --
24 well, we think it's clear that there was no official
10:27AM 25 recognition -- but where we don't have this clarity, this suit

1 is effectively seeking an order from your Honor saying we're
2 going to interfere with what the state might do in terms of
3 recognizing or not recognizing the Indian tribe. That's an
4 essential attribute of sovereignty. It's like the issue in
10:27AM 5 the Idaho vs. Coeur d'Alene which ironically dealt with an
6 Indian tribe where a suit was brought effectively seeking, as
7 the court said, to -- it was effectively a quiet title action
8 over what rights did the state have to certain lands that that
9 particular tribe said they had rights to. The court said this
10:27AM 10 would be offensive to the sovereignty of the state because it
11 goes to fundamental issues of what land does the state own or
12 not. And the court said that dispute can't be brought in
13 federal court, you could bring it in state court, and that was
14 an avenue that was pursued here, although they've lost, but --
10:28AM 15 THE COURT: But I think that case is somewhat I think
16 materially different. Here, as I understand the allegation,
17 which is the State of New Jersey has recognized the tribe as
18 an official tribe. I know the state disagrees with that
19 but --
10:28AM 20 MR. FEINBLATT: Sure.
21 THE COURT: Okay. Has recognized the plaintiff as a
22 tribe, the tribe is seeking to get federal benefits and now
23 the state is saying "just kidding."
24 MR. FEINBLATT: Right.
10:28AM 25 THE COURT: So, under that scenario, assuming my

1 hypothetical, isn't the state interfering with its due process
2 rights under the federal constitution to receive those
3 benefits by taking that arbitrary, erroneous, whatever you
4 want to call it, position?

10:29AM 5 MR. FEINBLATT: It's possible, but the relief that is
6 being sought is not limited to one particular individual or
7 even one office, by its very nature that relief is being
8 sought not just against the Attorney General but against any
9 other representative of the state.

10:29AM 10 THE COURT: Okay.

11 MR. FEINBLATT: And the relief that's being sought by
12 its unique -- by its nature is so fundamental to the
13 sovereignty of the state, should they continue -- did they
14 recognize, do they need to continue to recognize a particular
10:29AM 15 tribe? Respectfully, I think our motion is clear, this is a
16 classic example of something that goes to, you know, state
17 sovereignty, it's a matter that really does not belong in
18 federal court under the Eleventh Amendment.

19 THE COURT: They are only suing the Attorney General,
10:29AM 20 right?

21 MR. FEINBLATT: Right. Which is -- I think they
22 really would probably want to sue every -- you know, they
23 really -- although the Attorney General is listed, it is our
24 position that he is in many respects a nominal party because
10:30AM 25 their concern is with every state representative. What they

1 really want is some -- you know, they want representation from
2 somebody at the state on a continuing basis to the feds that
3 the state has officially recognized this tribe. It doesn't
4 have to be the Attorney General, it could be somebody in
10:30AM 5 another agency. Certainly, our position is that the entity
6 that would have to do that would be the legislature by statute
7 and that has not been done.

8 It's our position that what we're dealing with here
9 is a claim that really should be resolved by seeking relief at
10:30AM 10 the state legislative level; or, if the concern is about
11 recognition, that there is a procedure provided for under
12 federal law to go before the Bureau of Indian Affairs to
13 receive recognition.

14 THE COURT: But if they have alleged imminent harm of
10:30AM 15 their federal benefits being denied --

16 MR. FEINBLATT: Yes.

17 THE COURT: -- by the arbitrary conduct of the State
18 of New Jersey or the Attorney General, how does that not state
19 a claim for prospective injunctive relief? You are not
10:31AM 20 suggesting that they would have to sue every single
21 legislator, are you?

22 MR. FEINBLATT: No. But I think they really would be
23 suing the state, that's what the point is. The case is really
24 against the state. They don't have the state listed as a
10:31AM 25 party, but that's really who the claim's against.

1 THE COURT: Under that scenario that I've just
2 mentioned then if the complaint were amended to list the State
3 of New Jersey you would agree that that would not be barred by
4 the state --

10:31AM

5 MR. FEINBLATT: No, it absolutely would be barred.
6 Because they are really suing the state. This case is really
7 not against the Acting Attorney General, it's against the
8 state, they --

9 THE COURT: But it's for injunctive relief though.

10:31AM

10 MR. FEINBLATT: Oh, absolutely. There is no
11 question -- I'm not saying they haven't alleged certain forms
12 of relief that ordinarily might allow for -- to go under the
13 Ex Parte Young. You have to dig deeper though into what's
14 being alleged. And the allegations are really against the

10:32AM

15 state itself and the relief they seek is against the state,
16 they want a uniform position by the state. They would not be
17 happy if tomorrow the Attorney General didn't do anything but
18 some other agency or representative of the state said no,
19 there is no recognition. It's clear they want recognition by
20 the state or continued recognition, and it's our position that
21 that is barred by the Eleventh Amendment. And furthermore,
22 given the subject matter of that claim, it's something that's
23 an essential attribute of sovereignty of the state.

10:32AM

24 THE COURT: But they don't already have though some
25 recognition by the Attorney General's prior letter?

10:32AM

1 MR. FEINBLATT: I'm sorry?

2 THE COURT: Don't they already have -- what I
3 understood you to be saying is that until the state says there
4 is no recognition they don't have a claim because if their
10:33AM 5 claim is we want the State of New Jersey to recognize --

6 MR. FEINBLATT: Right.

7 THE COURT: -- us as a tribe, that they can't not do.
8 But then I thought you said but if what they were saying is if
9 the state were to say no, there is no such state recognition,
10:33AM 10 they might have a claim.

11 MR. FEINBLATT: They might --

12 THE COURT: Haven't they already done that?

13 MR. FEINBLATT: They would not -- my position is --
14 their argument is that there already was recognition and it's
10:33AM 15 been -- they want to stop it from denying or repudiating it.

16 THE COURT: But it's already --

17 MR. FEINBLATT: My position is that this subject
18 matter, given the nature of it, is really a suit against the
19 state, the Attorney General's a nominal party, and the type of
10:33AM 20 relief that's being sought goes to an essential attribute of
21 the state: Does the state recognize or should it continue to
22 recognize a particular tribe is an issue that goes to the
23 essential sovereignty of the state and, respectfully, is a
24 matter that should not be brought in federal court.

10:34AM 25 THE COURT: Well, maybe there is a misunderstanding

1 of what their claim is. I thought their claim was that the
2 state has said there is no recognition of such tribe --

3 MR. FEINBLATT: Right.

4 THE COURT: -- and therefore they are being denied
10:34AM 5 benefits under -- federal benefits.

6 MR. FEINBLATT: Yes.

7 THE COURT: Okay.

8 MR. FEINBLATT: Yeah. They are saying that they were
9 recognized in 1982 and various other representatives, both at
10:34AM 10 the executive branch and legislative -- I'm sorry. Executive
11 and I guess -- yeah, the executive branch, various

12 representatives continue to make that statement, but in
13 addition they pointed out that other representatives of the
14 state both in the Attorney General's Office and also in the
10:34AM 15 executive branch have -- I'm sorry, in the

16 governor's office -- in the Secretary of State's Office have
17 made contrary statements.

18 So the sweep of the case is not limited just to the
19 Attorney General or his office, it goes far beyond that. And
10:34AM 20 the relief that's being sought here is, first of all, a

21 determination that the state itself has recognized the tribe,
22 not just the Attorney General. And although the injunction
23 seems to talk about the defendant in the singular, it's clear
24 that the relief that's really sought is not just limited to

10:35AM 25 the Attorney General, it's to all state representatives. They

1 want a uniform position that they are recognized and that they
2 can receive these benefits. So it's our position again that
3 the nature of this claim is such that it really respectfully
4 cannot be brought in federal court.

10:35AM 5 THE COURT: Okay.

6 MR. FEINBLATT: Do you have any further questions on
7 that issue?

8 THE COURT: Not on the standing issue.

9 MR. FEINBLATT: Shall I go into the others?

10:35AM 10 THE COURT: Yes, please.

11 MR. FEINBLATT: So, if we get to the merits of the
12 case we do believe that, as Judge Anklowitz found, that the
13 case really rises and falls on the legal significance of the
14 1982 concurrent resolution. That resolution was never

10:36AM 15 submitted to the governor, never approved by the governor, and
16 as pointed out by Judge Anklowitz, it doesn't have the force
17 and effect of law. It does not have any binding legal effect,
18 it is merely a statement of sentiment that was issued by the
19 legislature at the time. And in his opinion he cited various
10:36AM 20 decisions that we also cited for that very fundamental
21 proposition. So, the whole case is predicated on an act that
22 does not have the force and effect of law.

23 Beyond that, as Judge Anklowitz pointed out, if you
24 go to the actual wording of the resolution it was not an
10:37AM 25 official recognition of the tribe as an authentic American

1 Indian tribe. The language that's in the resolution talks
2 about designating the tribe. And so we pointed out in our
3 brief what that seems to mean is that the state certainly
4 recognizes or identifies the tribe in the cognitive sense that
10:37AM 5 there is this group who is representing, of course, that they
6 have a long history in New Jersey, unique cultural group with
7 a very proud heritage, but it is not a formal acknowledgement
8 that this tribe is an authentic sovereign tribe which has to
9 be officially recognized on a government to government basis,
10:37AM 10 or something along those lines.

11 Indeed, there is nothing in the resolution where it
12 says that the legislature attempted to evaluate whether it's
13 an authentic tribe or not. The focus of the resolution was on
14 so-called memorializing or inducing the federal government to
10:38AM 15 provide whatever funds, services or other benefits that they
16 might provide under federal programs. And it's certainly
17 alleged in the complaint, and we're happy to hear, that over
18 the years various federal entities have provided benefits and
19 services. And that's their prerogative, that was for them,
10:38AM 20 the federal entities, to construe that resolution as they may,
21 but it can't be used as a bootstrap, in effect, to say that
22 already in 1982 the state officially recognized the tribe.
23 It's a very different vehicle or enterprise that was going on
24 there.

10:39AM 25 So, it's our position, as Judge Anklowitz found,

1 that -- and that's very important when we get to the various
2 causes of action because they all essentially, at least the
3 due process clauses require, that there be some established, a
4 well respected right under state law. And it's our position
10:39AM 5 that that resolution is a statement of sentiment. It could be
6 viewed or not viewed by federal entities, but it does not have
7 the force of law.

8 And we are now in a situation where in 2001 a statute
9 was passed that made it clear that the way official
10:39AM 10 recognition of an Indian tribe is acquired is through
11 statutory recognition. And as Judge Anklowitz pointed out in
12 his opinion, there have been certain proposed statutes to
13 recognize the plaintiff tribe in some way but none of them
14 have passed. So we think that --

10:40AM 15 THE COURT: None involving this tribe.

16 MR. FEINBLATT: No, there were some proposed statutes
17 involving this tribe.

18 THE COURT: When was that? Refresh my recollection.

19 MR. FEINBLATT: I think various years. I think a
10:40AM 20 number of years. I think -- I don't know the exact years, but
21 I think there were at least three or four efforts to pass such
22 statutes.

23 THE COURT: All before 2001?

24 MR. FEINBLATT: No, after. After, once the statute
10:40AM 25 was put in effect requiring statutory recognition, but they

1 have not passed. So, given that as the backdrop, we have
2 argued that there is another bar to this suit being considered
3 on the merits and that is that this is a -- this case raises a
4 political question because the issue of whether the tribe
10:40AM 5 should be officially recognized can only be achieved at this
6 point through statutory enactment. There is no such statutory
7 enactment, and therefore --

8 THE COURT: Let me just -- maybe I can just cut to
9 the chase on that argument. The plaintiffs are not seeking to
10:41AM 10 have the tribe recognized as a claim in and of itself.

11 MR. FEINBLATT: Right.

12 THE COURT: I think if they were, they would agree
13 with you that that is not a justiciable issue. So I think we
14 can cut to the chase on that argument.

10:41AM 15 MR. FEINBLATT: Well, the problem with their claim
16 though is they are relying on something from 1982 which
17 doesn't have the force and effect of law, so we think you
18 can't pursue it. But if we get to the issue of the
19 resolution, even if it did in some way recognize the tribe,
10:41AM 20 their own complaint acknowledges that the recognition was
21 impaired, if not rescinded, by the 2001 letter from the
22 Division of Gaming Enforcement and certain later
23 communications.

24 Now, there was no statute or regulation at the time
10:42AM 25 that precluded the state from reevaluating or so-called

1 rescinding any earlier recognition of the tribe, whatever form
2 that was, or what the criteria might be in evaluating that.
3 So even if the court ignored the fact that the '82 resolution
4 does not have binding legal effect, it's our position you
10:42AM 5 would still have to consider whether there was a valid
6 rescission or reevaluating of whatever earlier recognition
7 there might have been. And we submit that that type of issue
8 itself is something that really needs to be left to the
9 political branch. There are no standards in New Jersey for
10:43AM 10 doing such an evaluation. We think, particularly given the
11 2001 statute, that this is an area that would have to be left
12 for the Legislature.

13 Shall I go on to the cause of action? But if we get
14 to the causes of action, we don't believe that they state a
10:43AM 15 viable claim. We'd like to first address the substantive due
16 process claim.

17 As your Honor is well aware, that only applies to
18 egregious government abuses against well-recognized liberty or
19 property rights. There is a threshold inquiry, which is
10:44AM 20 whether the right that's claimed is objectively and deeply
21 rooted in the traditions, history and conscience of the
22 people. And so fundamental rights and liberty that have been
23 identified in the cases are fairly rare. They are things like
24 the right to marry, have children, use contraception and
10:44AM 25 bodily integrity. And you also need to clearly identify what

1 the fundamental right is, and obviously it has to fit into
2 that category.

3 We've been struggling to know exactly what the
4 fundamental right is that they are talking about, but it
10:44AM 5 appears that at paragraph I think it's 51 of the complaint,
6 amended complaint, it's alleged that the plaintiff has a
7 fundamental right to its status as a state-recognized American
8 Indian tribe. Let me just make sure I have the right
9 paragraph on that.

10:45AM 10 THE COURT: Yes.

11 MR. FEINBLATT: Okay. It's our view that this type
12 of status is not something that would fall within the limited
13 category of fundamental rights. New Jersey doesn't even have
14 a, other than the statute it doesn't have any, you know, any
10:45AM 15 history of recognizing tribes. There are no procedures,
16 standards or requirements for recognition or continued
17 recognition, so we don't think it falls within things like
18 contraceptives, right to marry, the few things that are these
19 fundamental rights. But furthermore, if we got to the other
10:45AM 20 main requirement you need to show that there is government
21 conduct that shocks the conscience.

22 THE COURT: So why don't you focus your arguments on
23 the procedural due process.

24 MR. FEINBLATT: Okay. I just want to say we don't
10:45AM 25 believe there is any shocking of the conscience here. At

1 best, the allegation is that that opinion letter issued by the
2 DGE in 2001 was very wrong, was -- you know, was a bad step
3 and inconsistent. We don't think there is any case that is
4 close to saying that something like that shocks the
10:46AM 5 conscience.

6 THE COURT: So, let me understand the position. Is
7 it the position of the defendant, and again I want to posit a
8 hypothetical, that if the Nation had been recognized by the
9 state as an official tribe and relying upon that recognition
10:46AM 10 the Nation was receiving benefits and then in 2001 the then
11 Attorney General Suarez said "just kidding," thereby putting
12 in jeopardy the tribe's right to receive federal benefits,
13 it's the state's position that that would not shock the
14 conscience?

10:47AM 15 MR. FEINBLATT: Right. Well, we don't have that
16 situation. But I don't think it would. I think shocking the
17 conscience is really not limited -- it's not incorrect or ill
18 advised decisions, it has to be so arbitrary that it shocks
19 the conscience. Certainly in our situation that opinion
10:47AM 20 letter is not arbitrary, it pointed out, just as I have today,
21 two major things: One, that that 1982 concurrent resolution
22 doesn't have the force of law and, number two, it delved into
23 the substance of it, as I have done today, that there was no
24 official recognition. It was really an effort by the state to
10:47AM 25 encourage the Federal Government to recognize or to provide

1 benefits and services to the tribe.

2 If we get to procedural due process, again, you need
3 to show that there is a protected liberty or property interest
4 under state law and it has to be, again, from some independent
10:48AM 5 source such as state law and, again, our position is that they
6 are really relying on that 1982 resolution as establishing
7 this recognition right. It's our position that that is not --
8 does not have the force and effect of law and therefore they
9 do not have a recognized liberty or property interest under
10:48AM 10 state law. We did also raise concerns about what would be the
11 procedures that would have to be imposed if there were such a
12 recognized right. I don't think that's been identified.

13 But finally on equal protection our position is
14 fairly simple, that need to allege that your particular group
10:48AM 15 has been treated differently from members of a similarly
16 situated class, there is no allegation of such disparate
17 treatment. What the plaintiffs are arguing is well, you know,
18 we're unique, we're a special group that needs recognition so
19 you can't compare us to others, and that, therefore, we are
10:49AM 20 being treated in a discriminatory way and therefore the claim
21 should be allowed. They did cite a couple of Second Circuit
22 cases for that proposition. I did not find any -- we have not
23 found any Third Circuit cases that allow that claim, so we
24 think that this case does not fit in the equal protection
10:49AM 25 analysis.

1 So, it's our view that, again, the court doesn't need
2 to get to the merits of the claims because it's barred by the
3 Eleventh Amendment and political question doctrine, but if we
4 were to get to the allegations they would fail again largely
10:50AM 5 because the case is predicated on a resolution that doesn't
6 have the force and effect of law. Whether the Federal
7 Government wants to give it that weight or not is very
8 different than having this court requiring the State of New
9 Jersey, and we do believe it's not just the Attorney General,
10:50AM 10 to maintain or not be able to communicate certain positions.

11 So for all these reasons, we think that the complaint
12 should be -- the amended complaint should be dismissed.

13 THE COURT: Okay. Thank you.

14 MR. FEINBLATT: Thank you, your Honor.

10:50AM 15 THE COURT: Mr. Werkheiser. Would you please begin
16 your comments with the issue of the Eleventh Amendment,
17 please.

18 MR. WERKHEISER: Yes, your Honor.

19 Your Honor, the Attorney General is not immune from
10:51AM 20 this suit. This is a classic case for applying the Young
21 exception to Eleventh Amendment immunity. As the plaintiff
22 did in Young, we are suing the state's Attorney General, on
23 purpose, this Attorney General, alleging that his actions
24 violate federal law. Young allows state officers to be sued
10:51AM 25 in their individual capacities for prospective injunctive and

1 declaratory relief.

2 THE COURT: And what is the action that he is alleged
3 to have done?

4 MR. WERKHEISER: He has violated the tribe's rights
10:51AM 5 to due process by denying that the tribe was previously
6 recognized and doing so without having afforded the tribe any
7 process that in anyway looks like what it went through to get
8 recognition in the first place.

9 THE COURT: So that sounds like a procedural due
10:52AM 10 process. Do you agree with that?

11 MR. WERKHEISER: It is procedural and we think
12 substantive.

13 THE COURT: Okay. Tell me about the substantive.

14 MR. WERKHEISER: Yes, your Honor. Your Honor, as
10:52AM 15 your Honor is well aware, in order to state a claim for a
16 violation of substantive due process, the plaintiff must
17 allege that he was deprived of a fundamental right and that
18 the government conduct was egregious. The tribe pleads that
19 it has a fundamental interest motivated by unfounded and
10:52AM 20 pernicious racial stereotypes and in light of the state's long
21 history of treatment of this tribe in its identity as a Native
22 American tribe. It is, we contend, indeed arbitrary and
23 shocks the conscience that after nearly 30 years of being so
24 recognized by the state that the Attorney General, without
10:53AM 25 process, would deny that recognition.

1 In particular, your Honor, when we can get to trial
2 and introduce evidence as we have pled, we will be able to
3 demonstrate that the motivation for this Attorney General in
4 taking the actions that he has are derived from shocking
10:53AM 5 reasons, and that is that the gaming interests in this state
6 have a record for almost 20 years of attempting to question
7 the recognition of these tribes in that, in particular,
8 correspondence back and forth between the tribe and the
9 Attorney General's office will reveal that the Attorney
10:53AM 10 General's office primary concern in not addressing the tribe's
11 concern about its recent letters to the Federal Government is
12 motivated by a concern about not irritating Atlantic City
13 gaming interests, who irrationally believe that state
14 recognition leads to the opportunity for Indian gaming, which
10:54AM 15 is well established has no connection whatsoever, that flows
16 only from federal recognition. And as your Honor is
17 undoubtedly aware, achieving federal recognition requires on
18 average now 20 years and \$20 million to achieve, something
19 that this tribe is nowhere near achieving.

10:54AM 20 THE COURT: So in your comments to me can you address
21 the argument that -- and I don't remember the dates, they are
22 listed in the judge's opinion -- about the unsuccessful
23 efforts by the State Legislature to recognize the tribe as a
24 tribe.

10:54AM 25 MR. WERKHEISER: Yes, your Honor. There are a number

1 of assertions that were made, respectfully, in the Attorney
2 General's comments this morning that I would love to correct
3 because they are completely opposite and different from what
4 we have pled plainly in the allegations. And with respect to
10:54AM 5 those statutes, I'll address those first and then hope to have
6 the opportunity to correct some others.

7 THE COURT: Are you going to correct that one? Was
8 the judge wrong?

9 MR. WERKHEISER: Yes.

10:55AM 10 THE COURT: There were not unsuccessful -- I've
11 forgotten how many he said. There were not unsuccessful
12 efforts to recognize the tribe, the Nanticoke as a tribe?

13 MR. WERKHEISER: The reason the judge was wrong is
14 because as the evidentiary record will show, the purpose of
10:55AM 15 the introduction of those failed bills was not a concession
16 that the tribes were not previously recognized, it was a
17 recognition of the political reality that the gaming interests
18 in the state had continued to question whether or not the
19 tribe was recognized, and so these legislators introduced the
10:55AM 20 statutes. And if your Honor reads the bills, the primary
21 purpose of the statute in the language was to assure the state
22 in law that the tribes had no interest in gaming. It's in the
23 language of the statute. The tribes were willing to say
24 whatever rights theoretically you might have in gaming, it's
10:56AM 25 irrational because we are state-recognized tribes, we have no

1 rights to gaming. We're willing to put that in law as a
2 prophylactic against further interference by the gaming
3 interests in our -- if you'll just get off our back, we will
4 put that into law. That was the purpose. And the judge in
10:56AM 5 the state case didn't look at any of that evidence, and that's
6 contrary to what we would introduce, your Honor.

7 THE COURT: So you don't agree that those bills were
8 introduced for the sole is purpose of recognizing the
9 Nanticoke as a tribe?

10:56AM 10 MR. WERKHEISER: No, your Honor, just the opposite.
11 We would contest and would introduce plenty of legislative
12 history, characterizations in the popular press at the time,
13 that the purpose of this was to get the gaming interests off
14 their backs, it was not in anyway a concession that they
10:56AM 15 weren't previously recognized. The tribes are trying to deal
16 with the political reality in which they were situated.

17 The other thing I'd like to correct, your Honor, the
18 Attorney General --

19 THE COURT: One moment.

10:57AM 20 MR. WERKHEISER: Yes, your Honor.

21 (Short pause.)

22 THE COURT: Okay, go ahead.

23 MR. WERKHEISER: The Attorney General this morning
24 has suggested that we would not be happy if your Honor issued
10:57AM 25 an order enjoining the Attorney General from making statements

1 to the federal government that the tribes are not recognized.
2 We would affirm that we would be plenty happy with that, your
3 Honor. In fact, if your Honor wants to write that up right
4 now we can end our oral arguments and leave.

10:57AM

5 And the reason for that is despite the assertion from
6 the Attorney General, we are pinpointing the actions of really
7 this Attorney General's office because any peripheral
8 statements by other agencies to federal agencies are traceable
9 back to this opinion from the Attorney General's office. And

10:58AM

10 I would even distinguish it, your Honor, from the 2001 opinion
11 because the 2001 letter that came out of Suarez's office ends
12 by saying to the federal government: Look, Federal
13 Government, if you want to consider all of our previous
14 actions good enough for state recognition, that's up to you.

10:58AM

15 So they punted. And because they punted, all agencies of the
16 state government that had been dealing with these tribes as
17 state-recognized for 20 years and all federal agencies that
18 had been dealing with these tribes for 20 years continued to
19 acknowledge them as state-recognized after that 2001 letter,
20 which is why the tribe didn't sue in 2001, because the damage
21 was essentially limited.

10:58AM

22 But in 2012 this Attorney General went beyond what
23 was a limited communication between previously the Attorney
24 General's office and one federal agency and then said we have
25 never had any tribes in New Jersey, they don't exist, and

10:58AM

1 began saying that to agencies other than this division that
2 was in charge of arts and crafts. And the consequence of
3 that, your Honor, has been devastating for the tribe.

4 The fundamental error that the trial court made, your
10:59AM 5 Honor, and that I hope we can avoid in this circumstance is it
6 agreed with the Attorney General's mischaracterization of an
7 essential claim made by our tribe in this case.

8 THE COURT: Mr. Werkheiser, I'm sorry. Before you
9 get there.

10:59AM 10 MR. WERKHEISER: Yes.

11 THE COURT: Where in your complaint do you allege
12 about -- oh, I found it. Paragraph 35. Thank you.

13 MR. WERKHEISER: Yes, your Honor.

14 THE COURT: The 2012?

10:59AM 15 MR. WERKHEISER: Yes, your Honor.

16 THE COURT: Okay. Thank you. I'm sorry.

17 MR. WERKHEISER: That's okay.

18 The Attorney General and the state court have boiled
19 this case down to an assertion that the tribe asserts that a
10:59AM 20 concurrent resolution is the equivalent of a statute in New
21 Jersey. We don't believe that. You will find that allegation
22 nowhere in our complaint. What we do allege is that there is
23 a decades long uninterrupted practice of federal agencies
24 accepting concurrent resolutions, accepting executive orders,
11:00AM 25 accepting statutes, accepting things as informal as a letter

1 from the -- in Delaware's instance a letter from the state
2 secretary of state to the Federal Government. The Federal
3 Government has a long practice of accepting things other than
4 statutes for the purpose of state recollection because, your
11:00AM 5 Honor, what does state recognition actually mean in practice?
6 It means when federal agencies ask state agencies: Do you
7 want Native Americans residing in your state to have access to
8 certain federal benefits reserved for state-recognized tribes,
9 the state says yes. That's about it. Now, we --

11:00AM 10 THE COURT: But I thought that your complaint did go
11 one step further in saying that the passages of the statutes
12 were *ipso facto* recognition of the tribe, I thought that
13 that's what you were alleging, and so by virtue of those
14 statutes there was a *de facto* recognition of the tribe and so
11:01AM 15 the concurrent resolution is sort of a red herring. I thought
16 that was what your claim is.

17 MR. WERKHEISER: We are claiming that for the
18 purposes of the way state recognition works in the real world,
19 which is the Federal Government looks to the states to express
11:01AM 20 its intent, that that intent does not need to rise to the
21 level -- it has never needed to rise, today it does not in any
22 other state need to rise to the level of the state passing
23 formal legislation for the purposes of accessing those federal
24 benefits.

11:01AM 25 THE COURT: I understood that argument, but I also

1 thought that you were alleging that by passage of what I call
2 the commission statute that they reaffirmed the recognition of
3 the tribe and therefore it was a statutory passage.

11:02AM 4 MR. WERKHEISER: Oh, absolutely. Your Honor, if
5 we're referring to the two actual statutes that were
6 subsequently passed that refers specifically to this tribe and
7 two other tribes, we absolutely contend that those statutes
8 came behind and affirmed what had been a long practice of the
9 state. The two statutes I would point to, your Honor, one of
11:02AM 10 which you've acknowledged already, the first that was passed
11 in 1991 authorized specifically the tribes to correct their
12 own birth certificates. And the reason for that --

13 THE COURT: I thought it was '92. But, okay.

14 MR. WERKHEISER: I'll trust your Honor on that. The
11:02AM 15 reason for that law, as your Honor may be familiar, is because
16 the State of New Jersey, like other states, had a policy of
17 changing Native American birth certificate designations to
18 either black or white in order to maintain racial purity.
19 That continued, believe it or not, up until the nineteen
11:03AM 20 eighties. And so the state said that what we are going to do,
21 we're going to empower the chiefs of the tribes -- it doesn't
22 say, your Honor, the executive directors of nonprofit
23 organizations that have tribes in their names, it says in the
24 statute the chiefs of the tribes to -- and then it refers
11:03AM 25 directly to, "the three New Jersey tribes of American

1 Indians," and then names each of them and distinguishes them
2 in the statute from other groups of Indians in New Jersey that
3 are not recognized.

4 There is a second statute, your Honor, that we think
11:03AM 5 goes further to the evidence we'd introduced that the state
6 always intended this to mean recognition. In 1995 indeed the
7 legislature created the Commission on American Indian Affairs,
8 the purpose of which is stated plainly in the statutes, "serve
9 as liaison among the governments of the tribes, New Jersey and
11:04AM 10 the United States." What tribes? The statute specifically
11 names all three tribes. It reserves permanent seats on the
12 commission for just those three tribes and distinguishes them
13 from a limited number of seats that will be reserved for
14 people who reside in New Jersey but who are recognized by
11:04AM 15 other states, drawing a paralegal between the New Jersey
16 state-recognized tribes and the non-New Jersey
17 state-recognized tribes.

18 Indeed, your Honor, our case does not just rest on
19 this 1982 concurrent resolution. All and every executive and
11:04AM 20 legislative arm of New Jersey government for at least two
21 decades --

22 THE COURT: I just want to correct the record because
23 I -- I don't know that it matters. Something tells me it
24 does. It's "another," not "other."

11:05AM 25 MR. WERKHEISER: I'm sorry, your Honor?

1 THE COURT: It's "another," not "other."

2 MR. WERKHEISER: "Another." By another state as
3 opposed to other states? Okay. I'll have to get home and
4 think about what that means, your Honor, but I trust your
11:05AM 5 Honor.

6 The point is, your Honor, that for 20 years no one,
7 not even the Attorney Generals of the state, did anything
8 other than consistently reaffirm to the Federal Government.

9 And the question is -- and I'll just point out that we've

11:05AM 10 alleged that there is a big evidentiary record that we'll
11 introduce, we haven't attached that whole record, but I'll
12 offer your Honor one example. Cary Edwards, who served as
13 Attorney General, had led the effort to get the concurrent
14 resolutions passed, knew before he died that gaming interests
11:06AM 15 were making an attempt to dilute and pretend away at least
16 20 years of recognition of these tribes. So before he passed
17 he did a signed, sworn detailed affidavit which I can

18 summarize basically as: We knew what we were doing. I

19 personally made -- speaking as him -- made everyone in the

11:06AM 20 state aware of what we were doing; the legislature knew what

21 it was doing; we meant it and the tribes have had every reason

22 to rely on it. Here's the kicker, your Honor. As we sit in

23 the courtroom today, New Jersey state government is drawing

24 down funds, federal funds for its own use for which it is

11:06AM 25 eligible only because and solely because it continues to

1 represent to the federal government that it has three
2 state-recognized tribes.

3 THE COURT: Is that in your complaint?

4 MR. WERKHEISER: Your Honor, we allege -- yes, we do,
11:07AM 5 your Honor, allege that the state --

6 THE COURT: Where is that?

7 MR. WERKHEISER: I'll ask my colleague Eden to help
8 me find it. But we allege that the state continues to be
9 inconsistent to the present date in its representations to the
11:07AM 10 state [sic]. Now what we don't cite, your Honor, is the
11 actual document from which we have discerned this and I don't
12 want --

13 THE COURT: But the allegation you just asserted, is
14 that --

11:07AM 15 MR. WERKHEISER: Yes, your Honor.

16 (Short pause.)

17 THE COURT: I guess it's paragraph 23?

18 MR. WERKHEISER: It's at least there and we think,
19 your Honor, it's elsewhere. But if your Honor will allowed
11:08AM 20 me, we'll identify that for the court.

21 THE COURT: Yes. I'd like to know that.

22 MR. WERKHEISER: And certainly if your Honor wants to
23 know any more specifics about that, we'll be happy to do so,
24 but don't want to go beyond the --

11:08AM 25 THE COURT: Well, I asked where it's at in the

11:08AM 1 complaint because I couldn't remember it, but, you know, I am
2 struggling with the issue of standing and immunity. And so
3 when you made that assertion, that did not ring a bell that
4 that was in your complaint, but I could be wrong. So I'll let
5 your colleague Ms. Burgess look for it.

6 MR. WERKHEISER: Thank you, your Honor.

7 Your Honor, we respectfully submit that this is a
8 motion to dismiss and though we certainly take the court's
9 obligations to look at all the procedural and substantive
11:09AM 10 questions that create a burden that the state has to overcome,
11 we believe that the tribe is entitled to build an evidentiary
12 record to support three things: That the federal government
13 does not require state recognition to be in a particular form.
14 We'll present evidence that it was the clear intent of the
11:09AM 15 state and its legislature to recognize the tribe in the manner
16 that it did. That it's subsequent passage of a 2001 law
17 saying that future tribes will be recognized by statute is not
18 retrospective, as the Attorney General claims, doesn't take us
19 back to 1982; that it is not the practice of the Federal
11:09AM 20 Government to look at changes that states make to the way that
21 they recognize tribes and impute and null and void previous
22 recognition. And finally, that the language that the
23 legislature used referring specifically to the tribes in
24 subsequent statutes was not an accident, it was intentional,
11:10AM 25 and the court can reasonably read that as the legislature

1 knowing what it was doing.

2 Your Honor, the Attorney General has raised questions
3 about whether the political question exception allows the
4 court to decide that it does not have jurisdiction in this
11:10AM 5 matter.

6 THE COURT: Well, I just don't think that that
7 argument -- I'm not persuaded by that argument because you are
8 not seeking relief to compel the New Jersey Legislature to
9 convene and recognize you as a tribe. Right, you are not
11:11AM 10 asking that?

11 MR. WERKHEISER: We are not asking that, your Honor.

12 THE COURT: I think if you were, then I think that
13 then the defendant's argument has merit. But I don't see that
14 as your claim.

11:11AM 15 MR. WERKHEISER: I'm pleased to skip that portion of
16 the argument then, your Honor. And I'd ask your Honor to
17 direct me to any of the other issues that your Honor has
18 questions about that we might --

19 THE COURT: Thank you. The equal protection claim.
11:11AM 20 I don't understand that claim.

21 MR. WERKHEISER: Okay.

22 THE COURT: Unless you are will to concede it.

23 MR. WERKHEISER: Not yet, your Honor. We know that
24 the standard is that to bring a viable equal protection claim
11:11AM 25 the defendant has to allege that they were treated

1 differently. The question for the court is, is there any
2 similarly situated group of people than Native Americans in
3 New Jersey? And we couldn't for the life of us figure out
4 that there was a comparable class. Native Americans are the
11:12AM 5 only group of people that to be eligible for these desperately
6 needed services need to prove who they are. The Federal
7 Government doesn't go up, respectfully, to African-Americans
8 and say can you show your genealogical records? Can you take
9 a blood test? But it does that for Native Americans. And we
11:12AM 10 would argue, your Honor, that the treatment of these tribes in
11 particular has been pernicious in New Jersey and has forced
12 them into a situation where there really isn't a comparable
13 class of other folks.

14 So, if the Attorney General's position is that we
11:12AM 15 have to differentiate between one of the three tribes and how
16 they were treated and the other two tribes, because there are
17 only two other tribes, then that's going to be difficult
18 because the state has basically put their foot on all three of
19 them relatively equally.

11:13AM 20 THE COURT: Right.

21 MR. WERKHEISER: And indeed, your Honor, I would just
22 use this opportunity to correct another thing that was said I
23 think in error earlier, and that is the Nanticoke were the
24 third tribe to be recognized chronologically. The legislative
11:13AM 25 explanation of the purpose of those concurrent resolutions is

1 tied to the first resolution because it was the model for the
2 second resolutions, and it says very clearly -- now, the state
3 court didn't read that. It looked to see if there was an
4 explanation of the third resolution. It wasn't because it was
11:13AM 5 modeled after the first two. But the first one says, your
6 Honor, we're recognizing these people as a tribe. It uses the
7 word "recognize." And then it goes further to say the purpose
8 of this recognition is so that they can get federal benefits.
9 Indeed, that is perfectly consistent with the Cary Edwards
11:14AM 10 affidavit and anyone else you would ask at the time. I just
11 wanted to take the opportunity to correct that piece.

12 Now, on the equal protection piece, the Attorney
13 General does not, I don't believe, contest that as an American
14 Indian tribe the tribe is a suspect class. He attempts to
11:14AM 15 argue that the tribe needed to allege it was differently
16 treated than other similarly situated, and that's the --
17 confessing to you that we're having -- I don't concede that,
18 but the tribe is in a unique position. There aren't other
19 tribes of African-Americans, or I guess we could argue there
11:14AM 20 aren't other tribes of racial identity for whom the state and
21 federal government treats with this kind of formal process.
22 Only Native Americans are asked to ask a state and the Federal
23 Government to recognize who they are.

24 Would your Honor like me to continue on on that? Do
11:15AM 25 you have other questions on that? Okay.

1 THE COURT: Did you find the allegation in the
2 complaint?

3 MS. BURGESS: Your Honor, we allege continuing harm
4 in the complaint, that Mr. Corrado reminded me that we learned
11:15AM 5 of the continuing representations by New Jersey to the Federal
6 Government actually the day of our state court oral argument,
7 so it's not in our complaint. We'd be glad to amend that to
8 include that, if necessary. Thank you.

9 THE COURT: Thank you.

11:15AM 10 MR. WERKHEISER: Your Honor, I think I've corrected
11 most of what either the Attorney General has I think
12 respectfully mischaracterized about our claim allegations and
13 those things that the state court adopted as true which are
14 directly contrary to what we allege.

11:15AM 15 Now, we need not remind the court, of course, that
16 for the purpose of a motion to dismiss our plain allegations
17 are to be assumed as accurate, and the state court could not
18 have arrived at the decision it did without not only
19 overlooking that obligation but assuming facts and
11:16AM 20 circumstances which are directly contrary to the allegations
21 in our complaint.

22 THE COURT: Okay. Thank you.

23 MR. WERKHEISER: Thank you, your Honor.

24 THE COURT: Okay, Mr. Feinblatt. Do you wish to
11:16AM 25 respond?

1 MR. FEINBLATT: Just very briefly, your Honor.

2 I think there are two fundamental issues here that we
3 respectfully disagree with Mr. Werkheiser, and I think his
4 argument highlighted the first one getting back to the
11:16AM 5 Eleventh Amendment, which we believe is a winning argument and
6 it has to be considered very seriously. He mentioned
7 something about in 2012 there was a statement issued. So, if
8 we look at paragraph 35 it says that the Nation's status was
9 undermined fundamentally, however after the Federal Government
11:17AM 10 issued this report the Nation eventually discovered from the
11 Federal Government that a state employee assigned to staff the
12 State Commission on American Indian Affairs had without the
13 knowledge or consent of the Commission, who are charged with
14 executing its mission, informed the GAO that New Jersey has no
11:17AM 15 state-recognized tribe. That Commission is not part of the
16 Attorney General's Office, that's part of the Secretary of
17 State.

18 So my point is again I think, as the case law
19 indicates, you need to look at the actual allegations and the
11:17AM 20 nature of this case and the nature of the relief that's being
21 sought. This case is clearly not limited to the Attorney
22 General. They want all representatives of the state
23 government who might interact with the Federal Government to
24 toe their line, which is that there has been official
11:18AM 25 recognition. So we think that this shows that this case is

1 far beyond the Attorney General.

2 THE COURT: Well, I guess, Mr. Feinblatt, I
3 haven't -- okay. And I don't know if you'll agree with me or
4 not, but in the allegation -- because this is what I'm hearing

11:18AM

5 today and it's not in the complaint -- but if the allegation
6 is that the State of New Jersey is continuing to receive
7 federal funds from the Federal Government because of the state
8 recognition of the tribe but the state on the other hand is
9 saying to the tribe you can't receive federal funds because

11:18AM

10 you are not a state tribe, that sounds like due process is
11 being violated. And who the right party is, I don't know, but
12 it seems to -- what is the tribe to do? Sit back and let the
13 state have its day and have its way?

14 MR. FEINBLATT: If I may respond.

11:19AM

15 THE COURT: Yes.

16 MR. FEINBLATT: First of all, that has not been
17 alleged in the complaint. I cannot confirm or deny that that
18 is factually true.

19 THE COURT: But if it were.

11:19AM

20 MR. FEINBLATT: But even if it were true, the suit
21 would have to be brought in state court because the claim is
22 against the state. It's not a claim against the Attorney
23 General, it's a claim that the state has allegedly officially
24 recognized the tribe and should not be able to "disavow" that
11:19AM 25 position. That goes to the fundamental sovereignty of the

1 state, it's a fundamental characteristic of whether a state is
2 going to recognize a tribe or not.

3 THE COURT: But how do you get around the argument
4 that they are -- because of the state's, I'll won't call it
11:19AM 5 arbitrary action for purposes of argument, they are being
6 denied or are in imminent danger of being denied federal
7 benefits?

8 MR. FEINBLATT: That's their argument but it's not
9 something that belongs in federal court because they are
11:20AM 10 really suing the state. They're seeking relief against the
11 state itself, not just against the Attorney General. Again,
12 it's our view that he's a nominal defendant. The nature of
13 this case is that the state itself can't "disavow" its prior
14 position, it's not just the Attorney General. And what the
11:20AM 15 subject matter of this lawsuit again is, is about this
16 recognition or continued recognition of the state. That's
17 something, respectfully, that shouldn't be in federal court.

18 Now, the other point I think I need to get back to
19 again, if we got to the causes of action and political
11:20AM 20 question, I don't believe that I got that there was -- that
21 any case was cited by Mr. Werkheiser that said that a
22 concurrent resolution has the force of law. The reality is
23 that it doesn't. Whether the Federal Government deemed that
24 to be sufficient for purpose of providing federal benefits and
11:21AM 25 services, that's up to the Federal Government, but this

1 lawsuit is seeking an injunction against the state to compel
2 them to take a certain position or not to assert another
3 position on recognition. That can't be bootstrapped on a
4 resolution which doesn't have the force of law.

11:21AM

5 And we could debate the statutes that were proposed
6 in the two thousands, I think even more recently, they are not
7 in the record here, but certainly the fact that an effort was
8 made to pass a statute certainly had to reflect an
9 understanding by the legislature that there had not been prior
10 official recognition. So we disagree with the position of the
11 plaintiff.

11:21AM

12 So, ultimately it's our position that this case does
13 not belong in federal court. The avenue, primary avenue
14 really is to seek legislative relief or to go through the
15 federal recognition process. And I understand, by the way,
16 I'm sure Mr. Werkheiser knows this, that last summer the
17 regulations were amended by the BIA I believe to make it
18 easier and quicker to get recognition, and that's the avenue
19 they need to take. The avenue of this lawsuit is just
20 inappropriate for the reasons that we've submitted.

11:21AM

11:22AM

21 Thank you.

22 THE COURT: Okay, thank you.

23 Do you wish to respond briefly?

24 MR. WERKHEISER: Briefly, your Honor.

11:22AM

25 We allege in our complaint that the state government

1 through the Governor's office after consultation with the
2 Attorney General put in writing what the process was that was
3 due to be able to reverse the previous state recognition. It
4 says in this letter from the Governor's office to the federal
11:22AM 5 agency --

6 THE COURT: Which letter are you alleging?

7 MR. WERKHEISER: It's 21B, Paragraph 21B. It's
8 Governor Florio's office.

9 THE COURT: Okay.

11:23AM 10 MR. WERKHEISER: It says, "The New Jersey State
11 Legislature, comprised of the Senate and Assembly, is the law
12 making body that is responsible for the legal recognition of
13 Indian tribes. Formal recognition -- "

14 THE COURT: Where are you reading from? I'm sorry.

11:23AM 15 MR. WERKHEISER: Page six, your Honor.

16 THE COURT: Okay.

17 MR. WERKHEISER: "Formal recognition is accomplished
18 by state resolutions which remain in effect until rescinded."

19 The plaintiff is not required, as I understand
11:23AM 20 precedent, to describe which method of due process the state
21 should take to afford its due process, it's simply required to
22 allege that it was inadequate, but we would take the word of
23 the state itself that one way of getting the state out of this
24 situation if it desired would be to rescind those concurrent
11:24AM 25 resolutions. Probably another way would be to go in and

1 eliminate specific references to the tribes as state tribes in
2 the multiple statutes in which the state has subsequently
3 passed, but that's for the state to describe.

4 I certainly understand the strong desire of the
11:24AM 5 Attorney General to make this case about someone other than
6 the Attorney General, but, your Honor, this is about this
7 Attorney General, and by that I mean the person who was in the
8 office when we filed this suit, because all of the harm that
9 has emanated has emanated because this Attorney General has
11:24AM 10 expanded the response to the Federal Government to say we have
11 no tribes, we have never had any tribes. And so we would be
12 perfectly happy to have that, the Attorney General's office,
13 enjoined from sending that out.

14 I'll make one final point because we keep coming back
11:25AM 15 to whether or not this fits in the Young exception. According
16 to Verizon Maryland v. Public Service Commission of Maryland,
17 citing a federal case, all the court must do to decide if
18 Young applies is to, "conduct a straightforward inquiry into
19 whether the complaint alleges an ongoing violation of federal
11:25AM 20 law and seeks relief properly characterized as prospective."
21 Young specifically instructs that a suit against the state to
22 enjoin an ongoing violation of federal law is not a suit
23 against the state.

24 Now, do we all know that that was a legal fiction
11:25AM 25 created by the court in order to reach its ultimate decision?

1 Yes, of course. And that legal fiction shouldn't confuse the
2 Attorney General's office because it's been upheld many times
3 thereafter. What we clearly allege, your Honor, is that the
4 defendant has wrongfully attempted to repudiate the
11:26AM 5 plaintiff's status in an ongoing violation of substantive and
6 procedural due process rights guaranteed by federal law.

7 THE COURT: And so just to follow this through then,
8 so you seek injunctive relief to prevent the Attorney General
9 from informing or advising the Federal Government that New
11:26AM 10 Jersey has never had any tribes or that Nanticoke is not a
11 tribe. But in terms of whether or not they are a tribe, is
12 that an issue that's left for the state? Who decides that?

13 MR. WERKHEISER: Well, it's been decided, according
14 to our well-pled complaint, your Honor, it's was decided in
11:26AM 15 1982. There is clear evidence to suggest that. It was
16 reaffirmed thereafter.

17 THE COURT: But the defendant disputes that in this
18 case.

19 MR. WERKHEISER: Yes.

11:27AM 20 THE COURT: Is that an issue that this court then
21 must determine or does this court merely determine that the
22 due process of the tribe is being violated, enjoin the state
23 from violating the due process and then ordering the state to
24 give the tribe the due process it is due in state court?
11:27AM 25 Where does it get its due process that the tribe says it is

1 due?

2 MR. WERKHEISER: It gets its due process by coming up
3 with a way to officially put the genii back in the bottle.

11:27AM

4 THE COURT: Who puts the genii back in the bottle
5 according to you, the state court or this court?

11:27AM

6 MR. WERKHEISER: The state -- my view would be the
7 State Legislature does that. That if this court or the state
8 court says -- if this court says what you've done is violated
9 the tribe's due process, give them process, then it's
10 incumbent upon the state to figure out what process is
11 adequate.

12 THE COURT: But I thought your -- now I'm really
13 confused.

11:28AM

14 MR. WERKHEISER: I'm sorry. It's incumbent upon --
15 go ahead, your Honor.

16 THE COURT: I had thought that your position was that
17 the state has already recognized them as a tribe, so what more
18 is the legislature to do?

11:28AM

19 MR. WERKHEISER: That's correct. There aren't a lot
20 of examples, we couldn't find any, where states have done what
21 they've done here, which is recognize tribes by a concurrent
22 resolution and then sought to undue that.

11:28AM

23 THE COURT: I know, but before you were saying well,
24 send it back to the legislature, but that's a political
25 question and I was agreeing that wasn't in the case.

1 MR. WERKHEISER: Your Honor, and I don't want to --

2 THE COURT: I guess --

3 MR. WERKHEISER: I don't want to bring that up. I
4 think your Honor's characterization of it in the last sentence
11:28AM 5 or two is accurate.

6 THE COURT: Okay.

7 MR. WERKHEISER: Thank you.

8 THE COURT: Okay, thank you.

9 I'm going to reserve. Let me give you the benefit of
11:28AM 10 my thinking. I'm going to order additional briefing. I

11 remain concerned about the Eleventh Amendment immunity issue.

12 Whether or not the plaintiff seeking to amend the complaint

13 will impact that or not because there has been new allegations

14 today that I haven't seen in the complaint, if the plaintiff

11:29AM 15 wishes to amend the complaint, they'll have to move to amend

16 the complaint, unless there is a consent, and I'll address it.

17 What is not clear to me is if the suit is directed

18 against the Attorney General regarding his ability to

19 interfere with the previously-conferred legal status, then

11:29AM 20 what's the scope of the relief available? And does the

21 Eleventh Amendment provide immunity? It seems to me it does

22 not because it's injunctive relief. I still don't have a

23 clear answer from the parties on that. It just seems to me

24 that if I am to assume, and it's a motion to dismiss, that the

11:30AM 25 Nanticoke tribe was recognized by the state as a tribe, I

1 understand that the merits are disputed, but if the tribe were
2 recognized by the state as a tribe and the Attorney General is
3 now trying to say, and is saying, it is alleged, although I
4 don't know that it's in the complaint, the state is
11:30AM 5 interfering with our due process rights by arbitrarily,
6 inappropriately telling the Federal Government that we never
7 recognized them as a state tribe, that strikes me as a
8 violation of due process and strikes me that that is something
9 that should be in federal court. And so I have to take the
11:30AM 10 allegations as true that they were recognized as a state
11 tribe. And, quite frankly, I think the issue of the
12 concurrent resolution, while I agree with the state court
13 judge that the concurrent resolution does not have the force
14 and effect of law because I think the Supreme Court has said
11:31AM 15 that in the Susquehanna case, it seems to me that subsequent
16 passage of the statute, the birth record statute, when the
17 Commission was established, that those statutes *ipso facto*
18 recognized it as a tribe and there was statutory recognition
19 *ipso facto* of the tribe. I think that the whole resolution is
11:31AM 20 sort of a red herring. That's what the plaintiffs have --
21 I've understood them to be alleging. And if that's the
22 allegation, then the state to now come in and say they are not
23 a tribe, they shouldn't get federal benefits, I think deprives
24 them of due process. But the question is I still am not sure
11:32AM 25 about the standing issue and not sure about the Eleventh

1 Amendment, so I want more briefing on it.

2 The equal protection claim, if it's going to be
3 pursued, I want more briefing on it because, quite frankly,
4 I'm not understanding the claim. If it's going to be amended,
11:32AM 5 then I would say that that -- are you going to seek to amend
6 the complaint? I guess I should just point blank ask.

7 MR. WERKHEISER: Your Honor, if the reading of that
8 section of the complaint which alleges continuing harm and
9 confusion coming from the state is viewed by your Honor as not
11:32AM 10 sufficient to cover what I described as clear evidence that
11 the state is still collecting money, then we would amend.
12 If --

13 THE COURT: Any objection to their amending to
14 clarify that?

11:33AM 15 MR. FEINBLATT: I need to think about that. Probably
16 not but I'd rather not commit today.

17 THE COURT: If there is no objection, then file your
18 amended complaint by consent as soon as you can so that these
19 issues that I'm asking you to brief can be addressed.

11:33AM 20 MR. WERKHEISER: Yes, your Honor.

21 THE COURT: If there is going to be opposition to it,
22 then I'll decide it. I mean, plaintiff saying they just
23 learned about it during the oral argument before the state
24 court seems satisfactory to me, but if there's opposition I'll
11:33AM 25 deal with it.

1 At the end of my analysis I think the only struggle
2 that I have at this juncture is the Eleventh Amendment
3 immunity, because if the Attorney General is not immune from
4 suit I think that the plaintiffs have adequately stated a
11:33AM 5 claim of procedural due process. I have to think more about
6 the substantive due process because I think that they have
7 made a colorable argument. And again, I have to take their
8 allegations as plausibly pled that, you know, the
9 subsequent -- it seems me the subsequent statutes, when the
11:34AM 10 words such as "another tribe recognized by another state" are
11 used, what the New Jersey Legislature is saying is this tribe,
12 this state, we recognized the Nanticokes. Whether there was
13 an explicit statute, there was not; but I think it is an *ipso*
14 *facto* legislative determination. If that's what they've
11:34AM 15 alleged, then I think it's colorable, it's plausible and I
16 think the case would move forward. But I still am not clear
17 on the immunity issue.

18 So, Mr. Feinblatt, you have made the immunity
19 argument, so how much time do you need to address the
11:35AM 20 concerns? Hopefully I've given you some guidance.

21 MR. FEINBLATT: Can I have three weeks?

22 THE COURT: Pardon me?

23 MR. FEINBLATT: Three weeks, your Honor.

24 THE COURT: Okay. So let me give you some deadlines.
11:35AM 25 So May 10th you'll file your supplementing briefing.

1 And your response, Mr. Werkheiser, how much time?

2 MR. WERKHEISER: Three weeks, your Honor?

3 THE COURT: All right. So then file your response by

4 May 31th, if you want. I'll give you until June 1st just

11:36AM 5 because of the holiday. So June 1st file your response.

6 If I still feel I'm scratching my head over it, I'll

7 bring you folks back in. Otherwise, I'll reserve and you'll

8 receive a written opinion from me. Okay? All right.

9 MR. FEINBLATT: Thank you, your Honor.

11:36AM 10 THE COURT: All right. I thank you all.

11 MR. WERKHEISER: Thank you.

12 THE DEPUTY CLERK: All rise.

13 (Court adjourned at 11:36 a.m.)

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\$	31th [1] - 54:4	4:15, 10:19, 10:22, 11:7, 19:2, 21:13, 21:14, 26:2, 44:5, 44:19	41:16, 41:20, 42:19, 50:13, 51:10, 53:8	apply [2] - 4:19, 5:1
\$20 [1] - 27:18	35 [3] - 6:13, 31:12, 42:8	actions [4] - 25:23, 27:4, 30:6, 30:14	allege [14] - 24:14, 26:17, 31:11, 31:22, 36:4, 36:5, 36:8, 38:25, 40:15, 41:3, 41:14, 45:25, 46:22, 48:3	applying [1] - 25:20
'	4	actual [4] - 17:24, 33:5, 36:11, 42:19	alleged [13] - 7:16, 8:3, 9:10, 13:14, 14:11, 14:14, 18:17, 22:6, 26:2, 35:10, 43:17, 51:3, 53:15	approved [1] - 17:15
'82 [1] - 21:3 '92 [1] - 33:13	491 [1] - 4:24	addition [1] - 16:13	alleges [3] - 6:13, 47:19, 52:8	April [1] - 1:12
/	5	additional [1] - 50:10	alleging [6] - 3:16, 25:23, 32:13, 33:1, 46:6, 51:21	arbitrarily [1] - 51:5
/S [1] - 1:25	51 [1] - 22:5	address [5] - 21:15, 27:20, 28:5, 50:16, 53:19	allow [3] - 4:20, 14:12, 24:23	arbitrary [6] - 12:3, 13:17, 23:18, 23:20, 26:22, 44:5
1	7	addressed [2] - 4:6, 52:19	allowed [4] - 5:12, 6:2, 24:21, 36:19	area [1] - 21:11
1 [2] - 8:9, 8:16 10th [1] - 53:25 11:36 [1] - 54:13 12 [1] - 1:12 15-5645 [1] - 2:3 15-cv-5645-RMB-JS [1] - 1:5 19 [1] - 6:25 19-year-old [1] - 5:23 1982 [10] - 3:9, 16:9, 17:14, 18:22, 20:16, 23:21, 24:6, 34:19, 37:19, 48:15 1991 [1] - 33:11 1995 [1] - 34:6 1st [2] - 54:4, 54:5	753 [1] - 1:24	addressing [1] - 27:10	allows [2] - 25:24, 38:3	argue [3] - 39:10, 40:15, 40:19
A	a.m [1] - 54:13	adequate [1] - 49:11	almost [1] - 27:6	argued [1] - 20:2
ability [1] - 50:18	able [4] - 25:10, 27:2, 43:24, 46:3	adequately [1] - 53:4	amend [6] - 41:7, 50:12, 50:15, 52:5, 52:11	arguing [2] - 8:2, 24:17
abuses [1] - 21:18	absolutely [6] - 4:18, 4:22, 14:5, 14:10, 33:4, 33:7	adjourned [1] - 54:13	amended [9] - 2:19, 8:9, 8:11, 14:2, 22:6, 25:12, 45:17, 52:4, 52:18	argument [22] - 2:16, 5:16, 7:13, 9:12, 15:14, 20:9, 20:14, 27:21, 32:25, 38:7, 38:13, 38:16, 41:6, 42:4, 42:5, 44:3, 44:5, 44:8, 52:23, 53:7, 53:19
accepting [5] - 31:24, 31:25, 32:3	access [1] - 32:7	admitted [1] - 2:8	amending [1] - 52:13	arguments [2] - 22:22, 30:4
accessing [1] - 32:23	accessing [1] - 32:23	adopted [1] - 41:13	Amendment [16] - 4:7, 4:9, 4:14, 7:20, 10:2, 10:12, 12:18, 14:21, 25:3, 25:16, 25:21, 42:5, 50:11, 50:21, 52:1, 53:2	arm [1] - 34:20
accident [1] - 37:24	accident [1] - 37:24	advised [1] - 23:18	American [11] - 6:15, 8:18, 8:22, 17:25, 22:7, 26:22, 33:17, 33:25, 34:7, 40:13, 42:12	arrived [1] - 41:18
accomplished [1] - 46:17	accomplished [1] - 46:17	advising [1] - 48:9	Americans [7] - 32:7, 39:2, 39:4, 39:7, 39:9, 40:19, 40:22	arts [1] - 31:2
according [3] - 47:15, 48:13, 49:5	according [3] - 47:15, 48:13, 49:5	Affairs [4] - 6:16, 13:12, 34:7, 42:12	analysis [2] - 24:25, 53:1	Assembly [1] - 46:11
accurate [2] - 41:17, 50:5	accurate [2] - 41:17, 50:5	affidavit [2] - 35:17, 40:10	AND [1] - 1:8	assert [1] - 45:2
achieve [1] - 27:18	achieve [1] - 27:18	affirm [1] - 30:2	Anklowitz [6] - 3:22, 17:12, 17:16, 17:23, 18:25, 19:11	asserted [1] - 36:13
achieved [1] - 20:5	achieved [1] - 20:5	affirmed [2] - 6:11, 33:8	answer [1] - 50:23	assertion [3] - 30:5, 31:19, 37:3
achieving [2] - 27:17, 27:19	achieving [2] - 27:17, 27:19	afford [1] - 46:21	anyway [2] - 26:7, 29:14	assertions [1] - 28:1
acknowledge [1] - 30:19	acknowledge [1] - 30:19	afforded [2] - 9:20, 26:6	appearances [1] - 2:4	asserts [1] - 31:19
acknowledged [1] - 33:10	acknowledged [1] - 33:10	African [2] - 39:7, 40:19	applies [3] - 4:18, 21:17, 47:18	assigned [1] - 42:11
acknowledgement [1] - 18:7	acknowledgement [1] - 18:7	African-Americans [2] - 39:7, 40:19		assistance [1] - 9:5
acknowledges [1] - 20:20	acknowledges [1] - 20:20	age [2] - 5:21, 5:22		Assistant [2] - 1:19, 2:13
acquired [1] - 19:10	acquired [1] - 19:10	agencies [9] - 4:9, 30:8, 30:15, 30:17, 31:1, 31:23, 32:6		assume [3] - 9:13, 9:16, 50:24
act [2] - 5:9, 17:21	act [2] - 5:9, 17:21	agency [4] - 13:5, 14:18, 30:24, 46:5		assumed [1] - 41:17
ACTING [1] - 1:7	ACTING [1] - 1:7	agree [14] - 2:19, 4:3, 4:13, 4:18, 5:18, 7:15, 7:18, 10:11, 14:3, 20:12, 26:10, 29:7, 43:3, 51:12		assuming [3] - 9:21, 11:25, 41:19
Acting [5] - 3:11, 4:10, 9:1, 9:7, 14:7	Acting [5] - 3:11, 4:10, 9:1, 9:7, 14:7	agreed [1] - 31:6		assumption [1] - 9:21
acting [1] - 5:9	acting [1] - 5:9	agreeing [1] - 49:25		assure [1] - 28:21
ACTION [1] - 1:4	ACTION [1] - 1:4	ahead [2] - 29:22, 49:15		Atlantic [1] - 27:12
action [11] - 3:16,	action [11] - 3:16,	al [2] - 2:3, 3:2		attached [1] - 35:11
		allegation [9] - 11:16, 23:1, 24:16, 31:21, 36:13, 41:1, 43:4, 43:5, 51:22		attempt [1] - 35:15
		allegations [14] - 3:17, 6:8, 6:9, 6:19, 14:14, 25:4, 28:4, 41:12,		attempted [2] - 18:12, 48:4
				attempting [1] - 27:6
				attempts [1] - 40:14
				ATTORNEY [2] - 1:7, 1:18
				Attorney [70] - 1:19, 2:13, 2:24, 3:11, 4:10, 6:6, 6:8, 6:16, 6:17, 6:20, 9:1, 9:7, 10:5, 12:8, 12:19, 12:23, 13:4, 13:18,

<p>14:7, 14:17, 14:25, 15:19, 16:14, 16:19, 16:22, 16:25, 23:11, 25:9, 25:19, 25:22, 25:23, 26:24, 27:3, 27:9, 28:1, 29:18, 29:23, 29:25, 30:6, 30:7, 30:9, 30:22, 30:23, 31:6, 31:18, 35:7, 35:13, 37:18, 38:2, 39:14, 40:12, 41:11, 42:16, 42:21, 43:1, 43:22, 44:11, 44:14, 46:2, 47:5, 47:6, 47:7, 47:9, 47:12, 48:2, 48:8, 50:18, 51:2, 53:3</p> <p>ATTORNEYS [2] - 1:17, 1:20</p> <p>attribute [4] - 10:21, 11:4, 14:23, 15:20</p> <p>authentic [3] - 17:25, 18:8, 18:13</p> <p>authorized [1] - 33:11</p> <p>available [1] - 50:20</p> <p>avenue [5] - 11:14, 45:13, 45:18, 45:19</p> <p>average [1] - 27:18</p> <p>avoid [1] - 31:5</p> <p>aware [6] - 3:15, 4:8, 21:17, 26:15, 27:17, 35:20</p>	<p>17:2, 18:15, 18:18, 23:10, 23:12, 24:1, 32:8, 32:24, 40:8, 44:7, 44:24, 51:23</p> <p>best [1] - 23:1</p> <p>between [4] - 27:8, 30:23, 34:15, 39:15</p> <p>beyond [6] - 6:20, 16:19, 17:23, 30:22, 36:24, 43:1</p> <p>BIA [1] - 45:17</p> <p>big [1] - 35:10</p> <p>bills [3] - 28:15, 28:20, 29:7</p> <p>binding [2] - 17:17, 21:4</p> <p>birth [3] - 33:12, 33:17, 51:16</p> <p>black [1] - 33:18</p> <p>blank [1] - 52:6</p> <p>blood [1] - 39:9</p> <p>bodily [1] - 21:25</p> <p>body [1] - 46:12</p> <p>boiled [1] - 31:18</p> <p>bootstrap [1] - 18:21</p> <p>bootstrapped [1] - 45:3</p> <p>bottle [2] - 49:3, 49:4</p> <p>branch [4] - 16:10, 16:11, 16:15, 21:9</p> <p>branchs [1] - 6:10</p> <p>brief [4] - 5:17, 10:17, 18:3, 52:19</p> <p>briefing [4] - 50:10, 52:1, 52:3, 53:25</p> <p>briefly [3] - 42:1, 45:23, 45:24</p> <p>briefs [1] - 4:25</p> <p>bring [4] - 11:13, 38:24, 50:3, 54:7</p> <p>brought [8] - 3:15, 4:11, 5:11, 11:6, 11:12, 15:24, 17:4, 43:21</p> <p>build [1] - 37:11</p> <p>BUMB [1] - 1:10</p> <p>burden [1] - 37:10</p> <p>Bureau [1] - 13:12</p> <p>BURGESS [1] - 41:3</p> <p>Burgess [3] - 1:16, 2:7, 37:5</p> <p>BY [3] - 1:14, 1:16, 1:19</p>	<p>capacities [1] - 25:25</p> <p>CAPACITIES [1] - 1:8</p> <p>caption [1] - 2:19</p> <p>Cary [2] - 35:12, 40:9</p> <p>case [39] - 3:6, 3:20, 3:23, 4:24, 4:25, 5:3, 5:5, 6:20, 8:24, 10:23, 11:15, 13:23, 14:6, 16:18, 17:12, 17:13, 17:21, 20:3, 23:3, 24:24, 25:5, 25:20, 29:5, 31:7, 31:19, 34:18, 42:18, 42:20, 42:21, 42:25, 44:13, 44:21, 45:12, 47:5, 47:17, 48:18, 49:25, 51:15, 53:16</p> <p>cases [3] - 21:23, 24:22, 24:23</p> <p>category [2] - 22:2, 22:13</p> <p>causes [3] - 19:2, 21:14, 44:19</p> <p>certain [10] - 4:20, 8:2, 9:20, 11:8, 14:11, 19:12, 20:22, 25:10, 32:8, 45:2</p> <p>certainly [9] - 13:5, 18:3, 18:16, 23:19, 36:22, 37:8, 45:7, 45:8, 47:4</p> <p>certificate [1] - 33:17</p> <p>certificates [1] - 33:12</p> <p>Certified [1] - 1:23</p> <p>challenge [1] - 6:1</p> <p>change [2] - 5:17, 6:22</p> <p>changes [1] - 37:20</p> <p>changing [1] - 33:17</p> <p>characteristic [1] - 44:1</p> <p>characterization [1] - 50:4</p> <p>characterizations [1] - 29:12</p> <p>characterized [1] - 47:20</p> <p>charge [1] - 31:2</p> <p>charged [1] - 42:13</p> <p>chase [2] - 20:9, 20:14</p> <p>chiefs [2] - 33:21, 33:24</p> <p>children [1] - 21:24</p> <p>chronologically [1] - 39:24</p> <p>Circuit [3] - 4:23, 24:21, 24:23</p> <p>circumstance [1] - 31:5</p> <p>circumstances [2] -</p>	<p>4:20, 41:20</p> <p>cite [2] - 24:21, 36:10</p> <p>cited [3] - 17:19, 17:20, 44:21</p> <p>citing [2] - 4:24, 47:17</p> <p>citizen [1] - 5:23</p> <p>City [1] - 27:12</p> <p>CIVIL [1] - 1:4</p> <p>claim [30] - 6:5, 13:9, 13:19, 14:22, 15:4, 15:5, 15:10, 16:1, 17:3, 20:10, 20:15, 21:15, 21:16, 24:20, 24:23, 26:15, 31:7, 32:16, 38:14, 38:19, 38:20, 38:24, 41:12, 43:21, 43:22, 43:23, 52:2, 52:4, 53:5</p> <p>claim's [1] - 13:25</p> <p>claimed [1] - 21:20</p> <p>claiming [2] - 3:7, 32:17</p> <p>claims [4] - 3:19, 4:2, 25:2, 37:18</p> <p>clarify [1] - 52:14</p> <p>clarity [2] - 10:23, 10:25</p> <p>class [4] - 24:16, 39:4, 39:13, 40:14</p> <p>classic [2] - 12:16, 25:20</p> <p>clause [1] - 8:14</p> <p>clauses [1] - 19:3</p> <p>clear [12] - 6:19, 10:24, 12:15, 14:19, 16:23, 19:9, 37:14, 48:15, 50:17, 50:23, 52:10, 53:16</p> <p>clearly [4] - 21:25, 40:2, 42:21, 48:3</p> <p>CLERK [1] - 54:12</p> <p>close [1] - 23:4</p> <p>co [1] - 2:8</p> <p>co-counsel [1] - 2:8</p> <p>Coeur [2] - 10:18, 11:5</p> <p>cognitive [1] - 18:4</p> <p>colleague [2] - 36:7, 37:5</p> <p>collecting [1] - 52:11</p> <p>colorable [2] - 53:7, 53:15</p> <p>coming [3] - 47:14, 49:2, 52:9</p> <p>comments [3] - 25:16, 27:20, 28:2</p> <p>Commission [7] - 6:15, 34:7, 42:12, 42:13, 42:15, 47:16, 51:17</p> <p>commission [3] -</p>	<p>6:16, 33:2, 34:12</p> <p>commit [1] - 52:16</p> <p>communicate [1] - 25:10</p> <p>communication [1] - 30:23</p> <p>communications [1] - 20:23</p> <p>comparable [2] - 39:4, 39:12</p> <p>compare [1] - 24:19</p> <p>compel [2] - 38:8, 45:1</p> <p>compelling [2] - 3:10, 5:9</p> <p>complaint [34] - 6:13, 8:5, 8:9, 8:11, 14:2, 18:17, 20:20, 22:5, 22:6, 25:11, 25:12, 31:11, 31:22, 32:10, 36:3, 37:1, 37:4, 41:2, 41:4, 41:7, 41:21, 43:5, 43:17, 45:25, 47:19, 48:14, 50:12, 50:14, 50:15, 50:16, 51:4, 52:6, 52:8, 52:18</p> <p>completely [1] - 28:3</p> <p>comprised [1] - 46:11</p> <p>concede [2] - 38:22, 40:17</p> <p>concept [1] - 10:18</p> <p>concern [5] - 12:25, 13:10, 27:10, 27:11, 27:12</p> <p>concerned [1] - 50:11</p> <p>concerns [2] - 24:10, 53:20</p> <p>concession [2] - 28:15, 29:14</p> <p>concrete [1] - 10:8</p> <p>concurrent [15] - 3:8, 3:25, 17:14, 23:21, 31:20, 31:24, 32:15, 34:19, 35:13, 39:25, 44:22, 46:24, 49:21, 51:12, 51:13</p> <p>conduct [5] - 5:18, 13:17, 22:21, 26:18, 47:18</p> <p>conferred [1] - 50:19</p> <p>confessing [1] - 40:17</p> <p>confirm [1] - 43:17</p> <p>confuse [1] - 48:1</p> <p>confused [1] - 49:13</p> <p>confusion [1] - 52:9</p> <p>connection [1] - 27:15</p> <p>conscience [8] - 21:21, 22:21, 22:25, 23:5, 23:14, 23:17,</p>
B				
<p>backdrop [1] - 20:1</p> <p>backs [1] - 29:14</p> <p>bad [1] - 23:2</p> <p>bar [3] - 4:15, 10:12, 20:2</p> <p>barred [6] - 7:19, 10:2, 14:3, 14:5, 14:21, 25:2</p> <p>BARRY [1] - 1:14</p> <p>Barry [1] - 2:6</p> <p>basis [3] - 4:22, 13:2, 18:9</p> <p>began [1] - 31:1</p> <p>begin [1] - 25:15</p> <p>behalf [1] - 2:10</p> <p>behind [1] - 33:8</p> <p>bell [1] - 37:3</p> <p>belong [2] - 12:17, 45:13</p> <p>belongs [1] - 44:9</p> <p>benefit [1] - 50:9</p> <p>benefits [20] - 9:6, 9:20, 10:1, 11:22, 12:3, 13:15, 16:5,</p>				
	C			
	<p>cannot [5] - 5:22, 9:10, 10:19, 17:4, 43:17</p>			

<p>23:19, 26:23 consent [3] - 42:13, 50:16, 52:18 consequence [1] - 31:2 consider [2] - 21:5, 30:13 considered [2] - 20:2, 42:6 consistent [1] - 40:9 consistently [1] - 35:8 constitution [2] - 7:18, 12:2 constitutional [2] - 3:17, 7:13 constitutionality [1] - 6:1 construe [1] - 18:20 consultation [1] - 46:1 contend [2] - 26:22, 33:7 contest [2] - 29:11, 40:13 continue [5] - 12:13, 12:14, 15:21, 16:12, 40:24 continued [6] - 14:20, 22:16, 28:18, 30:18, 33:19, 44:16 continues [2] - 35:25, 36:8 continuing [5] - 13:2, 41:3, 41:5, 43:6, 52:8 contraception [1] - 21:24 contraceptives [1] - 22:18 contrary [4] - 16:17, 29:6, 41:14, 41:20 convene [1] - 38:9 CORRADO [3] - 1:14, 2:5, 2:15 Corrado [4] - 1:14, 2:6, 41:4 correct [11] - 1:23, 3:23, 28:2, 28:6, 28:7, 29:17, 33:11, 34:22, 39:22, 40:11, 49:19 corrected [1] - 41:10 correspondence [1] - 27:8 counsel [2] - 2:7, 2:8 counter [1] - 8:3 couple [2] - 3:19, 24:21 course [7] - 4:3, 4:6, 4:8, 4:25, 18:5, 41:15, 48:1</p>	<p>court [47] - 3:16, 4:4, 4:7, 4:8, 4:11, 7:11, 7:12, 8:25, 11:7, 11:9, 11:12, 11:13, 12:18, 15:24, 17:4, 21:3, 25:1, 25:8, 31:4, 31:18, 36:20, 37:25, 38:4, 39:1, 40:3, 41:6, 41:13, 41:15, 41:17, 43:21, 44:9, 44:17, 45:13, 47:17, 47:25, 48:20, 48:21, 48:24, 49:5, 49:7, 49:8, 51:9, 51:12, 52:24 Court [3] - 4:25, 51:14, 54:13 COURT [118] - 1:1, 2:1, 2:11, 2:14, 2:17, 2:22, 3:1, 3:21, 4:13, 5:15, 5:21, 6:4, 6:22, 6:25, 7:5, 7:9, 7:15, 7:23, 8:6, 8:11, 8:15, 8:19, 9:11, 9:16, 9:19, 9:23, 10:4, 10:11, 10:16, 11:15, 11:21, 11:25, 12:10, 12:19, 13:14, 13:17, 14:1, 14:9, 14:24, 15:2, 15:7, 15:12, 15:16, 15:25, 16:4, 16:7, 17:5, 17:8, 17:10, 19:15, 19:18, 19:23, 20:8, 20:12, 22:10, 22:22, 23:6, 25:13, 25:15, 26:2, 26:9, 26:13, 27:20, 28:7, 28:10, 29:7, 29:19, 29:22, 31:8, 31:11, 31:14, 31:16, 32:10, 32:25, 33:13, 34:22, 35:1, 36:3, 36:6, 36:13, 36:17, 36:21, 36:25, 38:6, 38:12, 38:19, 38:22, 39:20, 41:1, 41:9, 41:22, 41:24, 43:2, 43:15, 43:19, 44:3, 45:22, 46:6, 46:9, 46:14, 46:16, 48:7, 48:17, 48:20, 49:4, 49:12, 49:16, 49:23, 50:2, 50:6, 50:8, 52:13, 52:17, 52:21, 53:22, 53:24, 54:3, 54:10 court's [1] - 37:8 courtroom [1] - 35:23 cover [1] - 52:10 crafts [1] - 31:2</p>	<p>create [1] - 37:10 created [2] - 34:7, 47:25 criteria [1] - 21:2 CRR [1] - 1:25 CSR [1] - 1:25 cultural [1] - 18:6 CULTURAL [1] - 1:15 Cultural [1] - 2:9 current [1] - 2:23 cut [2] - 20:8, 20:14</p> <p style="text-align: center;">D</p> <p>d'Alene [2] - 10:19, 11:5 damage [1] - 30:20 damages [1] - 5:11 danger [1] - 44:6 date [4] - 6:25, 7:1, 36:9 DATE [1] - 1:12 dates [1] - 27:21 de [1] - 32:14 deadlines [1] - 53:24 deal [2] - 29:15, 52:25 dealing [3] - 13:8, 30:16, 30:18 dealt [1] - 11:5 debate [1] - 45:5 decades [2] - 31:23, 34:21 decide [3] - 38:4, 47:17, 52:22 decided [2] - 48:13, 48:14 decides [1] - 48:12 decision [4] - 3:20, 4:3, 41:18, 47:25 decisions [2] - 17:20, 23:18 declaration [2] - 8:10, 8:17 declaratory [2] - 4:22, 26:1 deemed [2] - 5:10, 44:23 deeper [1] - 14:13 deeply [1] - 21:20 DEFENDANT [1] - 1:20 Defendant [1] - 1:9 defendant [11] - 2:13, 5:3, 5:16, 8:20, 9:23, 16:23, 23:7, 38:25, 44:12, 48:4, 48:17 defendant's [1] - 38:13 definite [1] - 10:8</p>	<p>Delaware's [1] - 32:1 delved [1] - 23:22 demonstrate [1] - 27:3 denied [4] - 13:15, 16:4, 44:6 deny [2] - 26:25, 43:17 denying [4] - 3:12, 8:21, 15:15, 26:5 Department [1] - 6:18 deprived [1] - 26:17 deprives [1] - 51:23 DEPUTY [1] - 54:12 derived [1] - 27:4 describe [2] - 46:20, 47:3 described [1] - 52:10 designating [1] - 18:2 designations [1] - 33:17 desire [1] - 47:4 desired [1] - 46:24 desperately [1] - 39:5 despite [1] - 30:5 detailed [1] - 35:17 determination [2] - 16:21, 53:14 determine [3] - 5:3, 48:21 devastating [1] - 31:3 developed [1] - 10:18 DGE [1] - 23:2 died [1] - 35:14 different [6] - 7:22, 10:8, 11:16, 18:23, 25:8, 28:3 differentiate [1] - 39:15 differently [3] - 24:15, 39:1, 40:15 difficult [1] - 39:17 dig [1] - 14:13 dilute [1] - 35:15 direct [1] - 38:17 directed [1] - 50:17 directly [3] - 33:25, 41:14, 41:20 directors [1] - 33:22 disagree [2] - 42:3, 45:10 disagrees [1] - 11:18 disavow [3] - 9:10, 43:24, 44:13 discerned [1] - 36:11 discovered [1] - 42:10 discriminatory [1] - 24:20 dismiss [3] - 37:8, 41:16, 50:24</p>	<p>DISMISS [1] - 1:6 dismissed [2] - 4:2, 25:12 disparate [1] - 24:16 dispute [1] - 11:12 disputed [1] - 51:1 disputes [1] - 48:17 distinguish [1] - 30:10 distinguishes [2] - 34:1, 34:12 DISTRICT [3] - 1:1, 1:1, 1:11 division [1] - 31:1 Division [1] - 20:22 Docket [1] - 2:3 doctrine [1] - 25:3 document [1] - 36:11 done [7] - 13:7, 15:12, 23:23, 26:3, 49:8, 49:20, 49:21 down [2] - 31:19, 35:24 drawing [2] - 34:15, 35:23 due [29] - 3:18, 7:17, 10:6, 12:1, 19:3, 21:15, 22:23, 24:2, 26:5, 26:9, 26:16, 43:10, 46:3, 46:20, 46:21, 48:6, 48:22, 48:23, 48:24, 48:25, 49:1, 49:2, 49:9, 51:5, 51:8, 51:24, 53:5, 53:6 during [1] - 52:23</p> <p style="text-align: center;">E</p> <p>easier [1] - 45:18 Eden [3] - 1:16, 2:7, 36:7 Edwards [2] - 35:12, 40:9 effect [12] - 5:4, 17:17, 17:22, 18:21, 19:25, 20:17, 21:4, 24:8, 25:6, 46:18, 51:14 effectively [3] - 11:1, 11:6, 11:7 effects [1] - 10:20 effectuated [1] - 9:8 effort [3] - 23:24, 35:13, 45:7 efforts [3] - 19:21, 27:23, 28:12 egregious [2] - 21:18, 26:18 eighties [1] - 33:20 either [3] - 6:10,</p>
--	--	---	--	--

<p>33:18, 41:11 Eleventh [16] - 4:7, 4:8, 4:14, 7:19, 10:2, 10:12, 12:18, 14:21, 25:3, 25:16, 25:21, 42:5, 50:11, 50:21, 51:25, 53:2 eligible [2] - 35:25, 39:5 eliminate [1] - 47:1 elsewhere [1] - 36:19 emanated [2] - 47:9 employee [1] - 42:11 empower [1] - 33:21 enactment [2] - 20:6, 20:7 encourage [1] - 23:25 end [2] - 30:4, 53:1 ends [1] - 30:11 enforce [1] - 7:12 Enforcement [1] - 20:22 enjoin [2] - 47:22, 48:22 enjoined [4] - 3:12, 9:1, 9:2, 47:13 enjoining [1] - 29:25 Enjoining [1] - 8:20 enterprise [1] - 18:23 entities [3] - 18:18, 18:20, 19:6 entitled [1] - 37:11 entity [1] - 13:5 equal [7] - 3:18, 24:13, 24:24, 38:19, 38:24, 40:12, 52:2 equally [1] - 39:19 equivalent [1] - 31:20 erroneous [1] - 12:3 error [2] - 31:4, 39:23 Esquire [4] - 1:14, 1:16, 1:16, 1:19 essential [6] - 10:21, 11:4, 14:23, 15:20, 15:23, 31:7 essentially [3] - 3:16, 19:2, 30:21 established [3] - 19:3, 27:15, 51:17 establishing [1] - 24:6 et [2] - 2:3, 3:2 evaluate [1] - 18:12 evaluating [1] - 21:2 evaluation [1] - 21:10 eventually [1] - 42:10 evidence [6] - 27:2, 29:5, 34:5, 37:14, 48:15, 52:10 evidentiary [3] - 28:14, 35:10, 37:11</p>	<p>Ex [6] - 4:17, 4:19, 5:1, 10:19, 14:13 exact [1] - 19:20 exactly [1] - 22:3 example [4] - 5:8, 6:12, 12:16, 35:12 examples [1] - 49:20 exception [4] - 4:18, 25:21, 38:3, 47:15 excuse [1] - 2:15 executing [1] - 42:14 executive [7] - 16:10, 16:11, 16:15, 31:24, 33:22, 34:19 exist [1] - 30:25 expanded [1] - 47:10 explanation [2] - 39:25, 40:4 explicit [1] - 53:13 express [1] - 32:19 extensively [1] - 4:25 extraordinary [1] - 3:6</p> <p style="text-align: center;">F</p> <p>F.3d [1] - 4:24 fact [3] - 21:3, 30:3, 45:7 facto [5] - 32:12, 32:14, 51:17, 51:19, 53:14 facts [4] - 5:17, 6:22, 7:22, 41:19 factual [1] - 6:19 factually [1] - 43:18 fail [1] - 25:4 failed [1] - 28:15 fairly [2] - 21:23, 24:14 fall [1] - 22:12 falls [3] - 3:24, 17:13, 22:17 familiar [1] - 33:15 far [2] - 16:19, 43:1 Federal [21] - 23:25, 25:6, 27:11, 30:12, 32:2, 32:19, 35:8, 37:19, 39:6, 40:22, 41:5, 42:9, 42:11, 42:23, 43:7, 44:23, 44:25, 47:10, 48:9, 51:6 federal [54] - 4:11, 7:11, 7:12, 7:17, 9:6, 9:20, 10:1, 11:13, 11:22, 12:2, 12:18, 13:12, 13:15, 15:24, 16:5, 17:4, 18:14, 18:16, 18:18, 18:20,</p>	<p>19:6, 23:12, 25:24, 27:16, 27:17, 30:1, 30:8, 30:12, 30:17, 30:24, 31:23, 32:6, 32:8, 32:23, 35:24, 36:1, 37:12, 40:8, 40:21, 43:7, 43:9, 44:6, 44:9, 44:17, 44:24, 45:13, 45:15, 46:4, 47:17, 47:19, 47:22, 48:6, 51:9, 51:23 feds [1] - 13:2 Feinblatt [7] - 1:19, 2:12, 3:3, 4:13, 41:24, 43:2, 53:18 FEINBLATT [64] - 2:12, 2:21, 2:25, 3:5, 3:22, 4:16, 5:20, 5:25, 6:5, 6:24, 7:4, 7:8, 7:11, 7:21, 7:24, 8:8, 8:13, 8:16, 8:20, 9:15, 9:18, 9:22, 10:3, 10:7, 10:14, 10:17, 11:20, 11:24, 12:5, 12:11, 12:21, 13:16, 13:22, 14:5, 14:10, 15:1, 15:6, 15:11, 15:13, 15:17, 16:3, 16:6, 16:8, 17:6, 17:9, 17:11, 19:16, 19:19, 19:24, 20:11, 20:15, 22:11, 22:24, 23:15, 25:14, 42:1, 43:14, 43:16, 43:20, 44:8, 52:15, 53:21, 53:23, 54:9 felt [1] - 4:1 few [1] - 22:18 fiction [2] - 47:24, 48:1 figure [2] - 39:3, 49:10 file [4] - 52:17, 53:25, 54:3, 54:5 filed [1] - 47:8 final [1] - 47:14 finally [2] - 24:13, 37:22 first [12] - 4:6, 8:8, 16:20, 21:15, 26:8, 28:5, 33:10, 40:1, 40:5, 42:4, 43:16 fit [2] - 22:1, 24:24 fits [1] - 47:15 Florio's [1] - 46:8 flows [1] - 27:15 focus [2] - 18:13, 22:22 focused [1] - 9:4 folks [2] - 39:13, 54:7</p>	<p>follow [3] - 4:4, 5:16, 48:7 following [1] - 9:12 foot [1] - 39:18 FOR [3] - 1:1, 1:17, 1:20 force [11] - 4:1, 17:16, 17:22, 19:7, 20:17, 23:22, 24:8, 25:6, 44:22, 45:4, 51:13 forced [1] - 39:11 forgotten [1] - 28:11 form [2] - 21:1, 37:13 formal [5] - 18:7, 32:23, 40:21, 46:13, 46:17 Formaroli [1] - 1:25 forms [1] - 14:11 forth [1] - 27:8 forward [1] - 53:16 four [1] - 19:21 Frank [2] - 1:14, 2:6 frankly [2] - 51:11, 52:3 fundamental [15] - 11:11, 12:12, 17:20, 21:22, 22:1, 22:4, 22:7, 22:13, 22:19, 26:17, 26:19, 31:4, 42:2, 43:25, 44:1 fundamentally [2] - 6:14, 42:9 funds [5] - 18:15, 35:24, 43:7, 43:9 furthermore [2] - 14:21, 22:19 future [1] - 37:17</p> <p style="text-align: center;">G</p> <p>gaming [10] - 27:5, 27:13, 27:14, 28:17, 28:22, 28:24, 29:1, 29:2, 29:13, 35:14 Gaming [1] - 20:22 GAO [1] - 42:14 genealogical [1] - 39:8 GENERAL [2] - 1:7, 1:18 General [54] - 1:19, 2:13, 2:24, 3:11, 4:10, 6:6, 6:9, 6:17, 6:20, 9:1, 9:7, 10:5, 12:8, 12:19, 12:23, 13:4, 13:18, 14:7, 14:17, 16:19, 16:22, 16:25, 23:11, 25:9, 25:19, 25:22, 25:23,</p>	<p>26:24, 27:3, 29:18, 29:23, 29:25, 30:6, 30:22, 31:18, 35:13, 37:18, 38:2, 40:13, 41:11, 42:22, 43:1, 43:23, 44:11, 44:14, 46:2, 47:5, 47:6, 47:7, 47:9, 48:8, 50:18, 51:2, 53:3 General's [15] - 6:17, 14:25, 15:19, 16:14, 27:9, 27:10, 28:2, 30:7, 30:9, 30:24, 31:6, 39:14, 42:16, 47:12, 48:2 generally [1] - 4:9 Generals [1] - 35:7 genii [2] - 49:3, 49:4 given [5] - 14:22, 15:18, 20:1, 21:10, 53:20 glad [1] - 41:7 Government [21] - 23:25, 25:7, 27:11, 30:13, 32:2, 32:3, 32:19, 35:8, 37:20, 39:7, 40:23, 41:6, 42:9, 42:11, 42:23, 43:7, 44:23, 44:25, 47:10, 48:9, 51:6 government [18] - 6:10, 8:2, 18:9, 18:14, 21:18, 22:20, 26:18, 30:1, 30:12, 30:16, 34:20, 35:23, 36:1, 37:12, 40:21, 42:23, 45:25 governments [1] - 34:9 Governor [1] - 46:8 governor [2] - 17:15 governor's [1] - 16:18 Governor's [2] - 46:1, 46:4 Grassi [1] - 2:6 GRASSI [1] - 1:14 Gregory [2] - 1:16, 2:7 group [6] - 18:5, 18:6, 24:14, 24:18, 39:2, 39:5 groups [1] - 34:2 guaranteed [1] - 48:6 guess [7] - 6:1, 16:11, 36:17, 40:19, 43:2, 50:2, 52:6 guidance [1] - 53:20</p>
---	--	--	---	---

H	2:18 hypothetical [4] - 9:12, 10:12, 12:1, 23:8	individual [5] - 4:21, 5:6, 5:12, 12:6, 25:25 inducing [1] - 18:14 informal [1] - 31:25 informed [1] - 42:14 informing [1] - 48:9 injunction [3] - 10:5, 16:22, 45:1 injunctive [10] - 4:14, 4:21, 5:24, 7:19, 10:4, 13:19, 14:9, 25:25, 48:8, 50:22 inquiry [2] - 21:19, 47:18 instance [1] - 32:1 instructs [1] - 47:21 integrity [1] - 21:25 intended [1] - 34:6 intensional [1] - 37:24 intent [3] - 32:20, 37:14 interact [1] - 42:23 interest [5] - 5:2, 24:3, 24:9, 26:19, 28:22 interests [6] - 27:5, 27:13, 28:17, 29:3, 29:13, 35:14 interfere [2] - 11:2, 50:19 interference [1] - 29:2 interfering [2] - 12:1, 51:5 introduce [4] - 27:2, 29:6, 29:11, 35:11 introduced [3] - 28:19, 29:8, 34:5 introduction [1] - 28:15 involving [2] - 19:15, 19:17 ipso [4] - 32:12, 51:17, 51:19, 53:13 ironically [1] - 11:5 irrational [1] - 28:25 irrationally [1] - 27:13 irritating [1] - 27:12 issue [19] - 4:5, 5:18, 11:4, 15:22, 17:7, 17:8, 20:4, 20:13, 20:18, 21:7, 25:16, 37:2, 48:12, 48:20, 50:11, 51:11, 51:25, 53:17 issued [6] - 3:8, 17:18, 23:1, 29:24, 42:7, 42:10 issues [4] - 11:11, 38:17, 42:2, 52:19 itself [7] - 14:15,	16:21, 20:10, 21:8, 44:11, 44:13, 46:23	19:7, 20:17, 23:22, 24:4, 24:5, 24:8, 24:10, 25:6, 25:24, 28:22, 29:1, 29:4, 33:15, 37:16, 42:18, 44:22, 45:4, 46:11, 47:20, 47:22, 48:6, 51:14 lawsuit [4] - 9:3, 44:15, 45:1, 45:19 leads [1] - 27:14 learned [2] - 41:4, 52:23 least [5] - 19:2, 19:21, 34:20, 35:15, 36:18 leave [1] - 30:4 led [1] - 35:13 left [3] - 21:8, 21:11, 48:12 legal [8] - 3:24, 17:13, 17:17, 21:4, 46:12, 47:24, 48:1, 50:19 legislation [1] - 32:23 legislative [7] - 13:10, 16:10, 29:11, 34:20, 39:24, 45:14, 53:14 legislator [1] - 13:21 legislators [1] - 28:19 legislature [13] - 6:6, 9:2, 13:6, 17:19, 18:12, 34:7, 35:20, 37:15, 37:23, 37:25, 45:9, 49:18, 49:24 Legislature [7] - 9:14, 21:12, 27:23, 38:8, 46:11, 49:7, 53:11 Lenape [3] - 2:2, 3:2, 7:5 LENAPE [1] - 1:3 Lenni [3] - 2:2, 3:2, 7:5 LENNI [1] - 1:3 Lenni-Lenape [3] - 2:2, 3:2, 7:5 LENNI-LENAPE [1] - 1:3 letter [10] - 14:25, 20:21, 23:1, 23:20, 30:11, 30:19, 31:25, 32:1, 46:4, 46:6 letters [1] - 27:11 level [4] - 9:2, 13:10, 32:21, 32:22 liaison [1] - 34:9 liberty [4] - 21:18, 21:22, 24:3, 24:9 life [1] - 39:3 light [1] - 26:20 limitations [1] - 4:19 limited [10] - 9:7, 12:6,
	I	Idaho [2] - 10:18, 11:5 identified [2] - 21:23, 24:12 identifies [1] - 18:4 identify [2] - 21:25, 36:20 identity [2] - 26:21, 40:20 ignored [1] - 21:3 ill [1] - 23:17 imminent [2] - 13:14, 44:6 immune [3] - 4:10, 25:19, 53:3 immunity [7] - 25:21, 37:2, 50:11, 50:21, 53:3, 53:17, 53:18 impact [1] - 50:13 impaired [1] - 20:21 impairing [2] - 3:13, 8:21 impeding [1] - 9:25 important [1] - 19:1 imposed [1] - 24:11 impute [1] - 37:21 IN [1] - 1:7 inadequate [1] - 46:22 inappropriate [1] - 45:20 inappropriately [1] - 51:6 include [1] - 41:8 including [1] - 9:2 inconsistent [2] - 23:3, 36:9 incorrect [1] - 23:17 incumbent [2] - 49:10, 49:14 indeed [6] - 18:11, 26:22, 34:6, 34:18, 39:21, 40:9 independent [1] - 24:4 Indian [14] - 6:15, 8:18, 8:22, 11:3, 11:6, 13:12, 18:1, 19:10, 22:8, 27:14, 34:7, 40:14, 42:12, 46:13 Indians [2] - 34:1, 34:2 indicates [1] - 42:19 INDIVIDUAL [1] - 1:8	J	
<p>hac [1] - 2:9 hand [1] - 43:8 happy [7] - 8:25, 14:17, 18:17, 29:24, 30:2, 36:23, 47:12 harm [4] - 13:14, 41:3, 47:8, 52:8 head [1] - 54:6 hear [2] - 3:3, 18:17 hearing [1] - 43:4 help [2] - 5:15, 36:7 HERITAGE [1] - 1:15 heritage [1] - 18:7 Heritage [1] - 2:9 herring [2] - 32:15, 51:20 highlighted [1] - 42:4 HIS [1] - 1:7 history [5] - 18:6, 21:21, 22:15, 26:21, 29:12 hold [2] - 8:6, 10:11 holiday [1] - 54:5 home [1] - 35:3 Honor [85] - 2:5, 2:10, 2:12, 2:15, 2:20, 2:21, 3:5, 3:15, 3:20, 3:25, 4:2, 11:1, 21:17, 25:14, 25:18, 25:19, 26:14, 26:15, 27:1, 27:16, 27:25, 28:20, 29:6, 29:10, 29:17, 29:20, 29:24, 30:3, 30:10, 31:3, 31:5, 31:13, 31:15, 32:5, 33:4, 33:9, 33:14, 33:15, 33:22, 34:4, 34:18, 34:25, 35:4, 35:5, 35:6, 35:12, 35:22, 36:4, 36:5, 36:10, 36:15, 36:19, 36:22, 37:6, 37:7, 38:2, 38:11, 38:16, 38:17, 38:23, 39:10, 39:21, 40:6, 40:24, 41:3, 41:10, 41:23, 42:1, 45:24, 46:15, 47:6, 48:3, 48:14, 49:15, 50:1, 52:7, 52:9, 52:20, 53:23, 54:2, 54:9 Honor's [1] - 50:4 HONORABLE [1] - 1:10 hope [2] - 28:5, 31:5 hopefully [1] - 53:20 housekeeping [1] -</p>		jeopardy [1] - 23:12 Jersey [35] - 3:7, 3:11, 5:23, 7:2, 8:18, 8:23, 9:14, 11:17, 13:18, 14:3, 15:5, 18:6, 21:9, 22:13, 25:9, 30:25, 31:21, 33:16, 33:25, 34:2, 34:9, 34:14, 34:15, 34:16, 34:20, 35:23, 38:8, 39:3, 39:11, 41:5, 42:14, 43:6, 46:10, 48:10, 53:11 JERSEY [3] - 1:1, 1:7, 1:18 judge [4] - 28:8, 28:13, 29:4, 51:13 JUDGE [1] - 1:11 Judge [6] - 3:22, 17:12, 17:16, 17:23, 18:25, 19:11 judge's [1] - 27:22 junction [1] - 53:2 June [2] - 54:4, 54:5 jurisdiction [2] - 4:7, 38:4 jurisdictional [1] - 4:5 justiciable [1] - 20:13	<p>jeopardy [1] - 23:12 Jersey [35] - 3:7, 3:11, 5:23, 7:2, 8:18, 8:23, 9:14, 11:17, 13:18, 14:3, 15:5, 18:6, 21:9, 22:13, 25:9, 30:25, 31:21, 33:16, 33:25, 34:2, 34:9, 34:14, 34:15, 34:16, 34:20, 35:23, 38:8, 39:3, 39:11, 41:5, 42:14, 43:6, 46:10, 48:10, 53:11 JERSEY [3] - 1:1, 1:7, 1:18 judge [4] - 28:8, 28:13, 29:4, 51:13 JUDGE [1] - 1:11 Judge [6] - 3:22, 17:12, 17:16, 17:23, 18:25, 19:11 judge's [1] - 27:22 junction [1] - 53:2 June [2] - 54:4, 54:5 jurisdiction [2] - 4:7, 38:4 jurisdictional [1] - 4:5 justiciable [1] - 20:13</p>	
		introduce [4] - 27:2, 29:6, 29:11, 35:11 introduced [3] - 28:19, 29:8, 34:5 introduction [1] - 28:15 involving [2] - 19:15, 19:17 ipso [4] - 32:12, 51:17, 51:19, 53:13 ironically [1] - 11:5 irrational [1] - 28:25 irrationally [1] - 27:13 irritating [1] - 27:12 issue [19] - 4:5, 5:18, 11:4, 15:22, 17:7, 17:8, 20:4, 20:13, 20:18, 21:7, 25:16, 37:2, 48:12, 48:20, 50:11, 51:11, 51:25, 53:17 issued [6] - 3:8, 17:18, 23:1, 29:24, 42:7, 42:10 issues [4] - 11:11, 38:17, 42:2, 52:19 itself [7] - 14:15,	K	
		keep [1] - 47:14 kicker [1] - 35:22 kidding [3] - 9:24, 11:23, 23:11 kind [2] - 10:23, 40:21 knowing [1] - 38:1 knowledge [1] - 42:13 knows [2] - 3:25, 45:16	L	
		land [1] - 11:11 lands [1] - 11:8 language [5] - 8:14, 18:1, 28:21, 28:23, 37:22 largely [1] - 25:4 last [2] - 45:16, 50:4 law [30] - 3:17, 3:19, 4:1, 7:12, 13:12, 17:17, 17:22, 19:4,		

<p>16:18, 16:24, 22:12, 23:17, 30:21, 30:23, 34:13, 42:21 line [1] - 42:24 lines [1] - 18:10 list [1] - 14:2 listed [3] - 12:23, 13:24, 27:22 look [14] - 5:4, 6:3, 6:19, 8:4, 8:9, 8:13, 8:24, 29:5, 30:12, 37:5, 37:9, 37:20, 42:8, 42:19 looked [1] - 40:3 looks [2] - 26:7, 32:19 lost [1] - 11:14 LOUGY [1] - 1:7 Lougy [5] - 2:2, 2:25, 3:1, 3:2, 9:1 love [1] - 28:2</p>	<p>million [1] - 27:18 mischaracterization [1] - 31:6 mischaracterized [1] - 41:12 mission [1] - 42:14 misunderstanding [1] - 15:25 model [1] - 40:1 modeled [1] - 40:5 moment [4] - 5:17, 6:23, 9:16, 29:19 money [3] - 5:11, 5:13, 52:11 morning [6] - 2:1, 2:5, 2:11, 2:14, 28:2, 29:23 most [1] - 41:11 MOTION [1] - 1:6 motion [5] - 3:3, 12:15, 37:8, 41:16, 50:24 motivated [2] - 26:19, 27:12 motivation [1] - 27:3 move [2] - 50:15, 53:16 MR [117] - 2:5, 2:12, 2:15, 2:20, 2:21, 2:25, 3:5, 3:22, 4:16, 5:20, 5:25, 6:5, 6:24, 7:4, 7:8, 7:11, 7:21, 7:24, 8:8, 8:13, 8:16, 8:20, 9:15, 9:18, 9:22, 10:3, 10:7, 10:14, 10:17, 11:20, 11:24, 12:5, 12:11, 12:21, 13:16, 13:22, 14:5, 14:10, 15:1, 15:6, 15:11, 15:13, 15:17, 16:3, 16:6, 16:8, 17:6, 17:9, 17:11, 19:16, 19:19, 19:24, 20:11, 20:15, 22:11, 22:24, 23:15, 25:14, 25:18, 26:4, 26:11, 26:14, 27:25, 28:9, 28:13, 29:10, 29:20, 29:23, 31:10, 31:13, 31:15, 31:17, 32:17, 33:4, 33:14, 34:25, 35:2, 36:4, 36:7, 36:15, 36:18, 36:22, 37:6, 38:11, 38:15, 38:21, 38:23, 39:21, 41:10, 41:23, 42:1, 43:14, 43:16, 43:20, 44:8, 45:24, 46:7, 46:10, 46:15, 46:17, 48:13, 48:19,</p>	<p>49:2, 49:6, 49:14, 49:19, 50:1, 50:3, 50:7, 52:7, 52:15, 52:20, 53:21, 53:23, 54:2, 54:9, 54:11 MS [1] - 41:3 multiple [1] - 47:2 must [4] - 10:22, 26:16, 47:17, 48:21</p>	<p>34:20, 35:23, 38:8, 39:3, 39:11, 41:5, 42:14, 43:6, 46:10, 48:9, 53:11 nineteen [1] - 33:19 nobody [1] - 9:1 nominal [4] - 5:3, 12:24, 15:19, 44:12 non [1] - 34:16 non-New [1] - 34:16 none [2] - 19:13, 19:15 nonprofit [1] - 33:22 note [1] - 4:25 noted [1] - 4:23 nothing [1] - 18:11 nowhere [2] - 27:19, 31:22 null [1] - 37:21 number [4] - 19:20, 23:22, 27:25, 34:13 NUMBER [1] - 1:4 Number [1] - 2:3</p>	<p>once [1] - 19:24 one [19] - 5:5, 6:11, 10:11, 10:22, 12:6, 12:7, 23:21, 28:7, 29:19, 30:24, 32:11, 33:9, 35:6, 35:12, 39:15, 40:5, 42:4, 46:23, 47:14 ongoing [3] - 47:19, 47:22, 48:5 opinion [8] - 17:19, 19:12, 23:1, 23:19, 27:22, 30:9, 30:10, 54:8 opportunity [4] - 27:14, 28:6, 39:22, 40:11 opposed [1] - 35:3 opposite [2] - 28:3, 29:10 opposition [2] - 52:21, 52:24 oral [5] - 2:16, 3:20, 30:4, 41:6, 52:23 order [8] - 3:10, 8:25, 11:1, 26:15, 29:25, 33:18, 47:25, 50:10 ordering [1] - 48:23 orders [1] - 31:24 ordinarily [1] - 14:12 organizations [1] - 33:23 original [1] - 8:13 otherwise [3] - 3:12, 8:21, 54:7 overcome [1] - 37:10 overlooking [1] - 41:19 own [4] - 11:11, 20:20, 33:12, 35:24</p>
M		N	O	P
<p>main [1] - 22:20 maintain [2] - 25:10, 33:18 maintained [1] - 10:19 major [1] - 23:21 manner [1] - 37:15 MARIE [1] - 1:10 marry [2] - 21:24, 22:18 Maryland [2] - 47:16 materially [1] - 11:16 matter [8] - 2:2, 2:18, 12:17, 14:22, 15:18, 15:24, 38:5, 44:15 matters [1] - 34:23 MCI [1] - 4:23 mean [6] - 5:22, 18:3, 32:5, 34:6, 47:7, 52:22 means [2] - 32:6, 35:4 meant [1] - 35:21 members [1] - 24:15 memorializing [1] - 18:14 mentioned [2] - 14:2, 42:6 merely [2] - 17:18, 48:21 merit [1] - 38:13 merits [4] - 17:11, 20:3, 25:2, 51:1 method [1] - 46:20 might [10] - 11:2, 14:12, 15:10, 15:11, 18:16, 21:2, 21:7, 28:24, 38:18, 42:23</p>	<p>motivated [2] - 26:19, 27:12 motivation [1] - 27:3 move [2] - 50:15, 53:16 MR [117] - 2:5, 2:12, 2:15, 2:20, 2:21, 2:25, 3:5, 3:22, 4:16, 5:20, 5:25, 6:5, 6:24, 7:4, 7:8, 7:11, 7:21, 7:24, 8:8, 8:13, 8:16, 8:20, 9:15, 9:18, 9:22, 10:3, 10:7, 10:14, 10:17, 11:20, 11:24, 12:5, 12:11, 12:21, 13:16, 13:22, 14:5, 14:10, 15:1, 15:6, 15:11, 15:13, 15:17, 16:3, 16:6, 16:8, 17:6, 17:9, 17:11, 19:16, 19:19, 19:24, 20:11, 20:15, 22:11, 22:24, 23:15, 25:14, 25:18, 26:4, 26:11, 26:14, 27:25, 28:9, 28:13, 29:10, 29:20, 29:23, 31:10, 31:13, 31:15, 31:17, 32:17, 33:4, 33:14, 34:25, 35:2, 36:4, 36:7, 36:15, 36:18, 36:22, 37:6, 38:11, 38:15, 38:21, 38:23, 39:21, 41:10, 41:23, 42:1, 43:14, 43:16, 43:20, 44:8, 45:24, 46:7, 46:10, 46:15, 46:17, 48:13, 48:19,</p>	<p>name [1] - 2:5 names [3] - 33:23, 34:1, 34:11 NANTICOKE [1] - 1:3 Nanticoke [8] - 2:2, 3:2, 7:5, 28:12, 29:9, 39:23, 48:10, 50:25 Nanticokes [1] - 53:12 Nation [7] - 2:2, 3:2, 7:6, 8:17, 23:8, 23:10, 42:10 NATION [1] - 1:4 Nation's [3] - 3:13, 8:21, 42:8 Native [7] - 26:21, 32:7, 33:17, 39:2, 39:4, 39:9, 40:22 nature [10] - 5:6, 8:4, 8:24, 12:7, 12:12, 15:18, 17:3, 42:20, 44:12 near [1] - 27:19 nearly [1] - 26:23 necessary [1] - 41:8 need [16] - 8:3, 12:14, 21:25, 22:20, 24:2, 24:14, 25:1, 32:20, 32:22, 39:6, 41:15, 42:19, 44:18, 45:19, 52:15, 53:19 needed [3] - 32:21, 39:6, 40:15 needs [2] - 21:8, 24:18 never [7] - 17:14, 17:15, 30:25, 32:21, 47:11, 48:10, 51:6 NEW [3] - 1:1, 1:7, 1:18 new [1] - 50:13 New [35] - 3:7, 3:10, 5:23, 7:2, 8:18, 8:23, 9:14, 11:17, 13:18, 14:3, 15:5, 18:6, 21:9, 22:13, 25:8, 30:25, 31:20, 33:16, 33:25, 34:2, 34:9, 34:14, 34:15, 34:16,</p>	<p>objection [2] - 52:13, 52:17 objectively [1] - 21:20 obligation [1] - 41:19 obligations [1] - 37:9 obviously [1] - 22:1 OF [4] - 1:1, 1:7, 1:18 offensive [1] - 11:10 offer [1] - 35:12 office [18] - 6:17, 6:18, 6:21, 12:7, 16:16, 16:19, 27:9, 27:10, 30:7, 30:9, 30:11, 30:24, 46:1, 46:4, 46:8, 47:8, 47:12, 48:2 Office [3] - 16:14, 16:16, 42:16 OFFICE [1] - 1:18 officer [3] - 5:2, 5:12, 10:20 officers [3] - 4:10, 4:21, 25:24 official [8] - 10:24, 11:18, 17:25, 19:9, 23:9, 23:24, 42:24, 45:10 OFFICIAL [1] - 1:8 officially [13] - 3:9, 3:13, 6:7, 6:14, 7:6, 8:17, 8:22, 13:3, 18:9, 18:22, 20:5, 43:23, 49:3</p>	<p>P.C [1] - 1:14 page [3] - 8:8, 8:9, 46:15 paid [1] - 5:13 paragraph [7] - 8:9, 8:16, 22:5, 22:9, 31:12, 36:17, 42:8 Paragraph [2] - 6:13, 46:7 paralegal [1] - 34:15 parallel [1] - 3:16 pardon [1] - 53:22 part [4] - 6:16, 6:18, 42:15, 42:16 Parte [6] - 4:17, 4:18, 4:19, 5:1, 10:20,</p>

<p>14:13 particular [9] - 11:9, 12:6, 12:14, 15:22, 24:14, 27:1, 27:7, 37:13, 39:11 particularly [1] - 21:10 parties [3] - 2:22, 4:12, 50:23 Partners [1] - 2:9 PARTNERS [1] - 1:15 party [5] - 5:2, 12:24, 13:25, 15:19, 43:11 pass [2] - 19:21, 45:8 passage [4] - 33:1, 33:3, 37:16, 51:16 passages [1] - 32:11 passed [9] - 7:2, 19:9, 19:14, 20:1, 33:6, 33:10, 35:14, 35:16, 47:3 passing [1] - 32:22 pause [2] - 29:21, 36:16 Pennhurst [1] - 4:24 people [5] - 21:22, 34:14, 39:2, 39:5, 40:6 perfectly [2] - 40:9, 47:12 performance [1] - 5:10 peripheral [1] - 30:7 permanent [1] - 34:11 pernicious [2] - 26:20, 39:11 person [1] - 47:7 personally [1] - 35:19 persuaded [1] - 38:7 pick [2] - 6:25, 7:1 piece [2] - 40:11, 40:12 pinpointing [1] - 30:6 place [1] - 26:8 plain [1] - 41:16 plainly [2] - 28:4, 34:8 Plaintiff [1] - 1:5 plaintiff [16] - 2:4, 2:10, 3:9, 6:7, 7:10, 7:25, 11:21, 19:13, 22:6, 25:21, 26:16, 45:11, 46:19, 50:12, 50:14, 52:22 PLAINTIFF [1] - 1:17 plaintiffs [1] - 48:5 plaintiffs [6] - 3:15, 7:18, 20:9, 24:17, 51:20, 53:4 plausible [1] - 53:15 plausibly [1] - 53:8 pleads [1] - 26:18</p>	<p>pleased [1] - 38:15 pled [4] - 27:2, 28:4, 48:14, 53:8 plenty [2] - 29:11, 30:2 PLLC [1] - 1:15 point [9] - 13:23, 20:6, 33:9, 35:6, 35:9, 42:18, 44:18, 47:14, 52:6 pointed [7] - 10:17, 16:13, 17:16, 17:23, 18:2, 19:11, 23:20 policy [1] - 33:16 political [8] - 20:4, 21:9, 25:3, 28:17, 29:16, 38:3, 44:19, 49:24 popular [1] - 29:12 portion [1] - 38:15 posit [1] - 23:7 position [29] - 9:24, 12:4, 12:24, 13:5, 13:8, 14:16, 14:20, 15:13, 15:17, 17:1, 17:2, 18:25, 19:4, 21:4, 23:6, 23:7, 23:13, 24:5, 24:7, 24:13, 39:14, 40:18, 43:25, 44:14, 45:2, 45:3, 45:10, 45:12, 49:16 positions [1] - 25:10 possible [3] - 7:14, 7:21, 12:5 post [2] - 7:2, 7:9 practice [5] - 31:23, 32:3, 32:5, 33:8, 37:19 precedent [1] - 46:20 precluded [1] - 20:25 predicated [2] - 17:21, 25:5 preliminary [1] - 4:5 prerogative [1] - 18:19 present [2] - 36:9, 37:14 presenting [1] - 2:16 press [1] - 29:12 presume [1] - 5:18 pretend [2] - 5:19, 35:15 prevent [1] - 48:8 previous [3] - 30:13, 37:21, 46:3 previously [5] - 26:5, 28:16, 29:15, 30:23, 50:19 previously-conferred [1] - 50:19</p>	<p>primary [3] - 27:10, 28:20, 45:13 private [1] - 4:11 pro [1] - 2:8 problem [1] - 20:15 procedural [8] - 3:18, 22:23, 24:2, 26:9, 26:11, 37:9, 48:6, 53:5 procedure [1] - 13:11 procedures [2] - 22:15, 24:11 proceed [1] - 4:21 process [33] - 3:18, 7:17, 10:6, 12:1, 19:3, 21:16, 22:23, 24:2, 26:5, 26:7, 26:10, 26:16, 26:25, 40:21, 43:10, 45:15, 46:2, 46:20, 46:21, 48:6, 48:22, 48:23, 48:24, 48:25, 49:2, 49:9, 49:10, 51:5, 51:8, 51:24, 53:5, 53:6 programs [1] - 18:16 prong [1] - 7:19 properly [1] - 47:20 property [3] - 21:19, 24:3, 24:9 prophylactic [1] - 29:2 proposed [3] - 19:12, 19:16, 45:5 proposition [2] - 17:21, 24:22 prospective [5] - 4:22, 6:1, 13:19, 25:25, 47:20 protected [1] - 24:3 protection [7] - 3:18, 24:13, 24:24, 38:19, 38:24, 40:12, 52:2 proud [1] - 18:7 prove [1] - 39:6 provide [4] - 18:15, 18:16, 23:25, 50:21 provided [2] - 13:11, 18:18 providing [1] - 44:24 Public [1] - 47:16 punted [2] - 30:15 purity [1] - 33:18 purpose [13] - 9:3, 25:23, 28:14, 28:21, 29:4, 29:8, 29:13, 32:4, 34:8, 39:25, 40:7, 41:16, 44:24 purposes [3] - 32:18, 32:23, 44:5 pursuant [1] - 8:10</p>	<p>pursue [1] - 20:18 pursued [2] - 11:14, 52:3 put [6] - 19:25, 29:1, 29:4, 39:18, 46:2, 49:3 puts [1] - 49:4 putting [1] - 23:11</p> <p style="text-align: center;">Q</p> <p>quarrel [1] - 9:20 questions [5] - 17:6, 37:10, 38:2, 38:18, 40:25 quicker [1] - 45:18 quiet [1] - 11:7 quite [2] - 51:11, 52:3</p> <p style="text-align: center;">R</p> <p>racial [3] - 26:20, 33:18, 40:20 raise [1] - 24:10 raised [1] - 38:2 raises [1] - 20:3 rare [1] - 21:23 rather [2] - 3:6, 52:16 reach [2] - 6:20, 47:25 read [2] - 37:25, 40:3 reading [2] - 46:14, 52:7 reads [1] - 28:20 reaffirm [1] - 35:8 reaffirmed [2] - 33:2, 48:16 real [2] - 5:1, 32:18 reality [3] - 28:17, 29:16, 44:22 really [33] - 3:1, 3:23, 5:5, 5:10, 5:15, 7:1, 9:4, 9:8, 9:12, 12:17, 12:22, 12:23, 13:1, 13:9, 13:22, 13:23, 13:25, 14:6, 14:14, 15:18, 16:24, 17:3, 17:13, 21:8, 23:17, 23:24, 24:6, 30:6, 39:12, 44:10, 45:14, 49:12 reason [6] - 10:14, 28:13, 30:5, 33:12, 33:15, 35:21 reasonably [1] - 37:25 reasons [3] - 25:11, 27:5, 45:20 receive [7] - 12:2, 13:13, 17:2, 23:12,</p>	<p>43:6, 43:9, 54:8 receiving [1] - 23:10 recent [1] - 27:11 recently [1] - 45:6 recognition [59] - 6:11, 6:12, 8:3, 9:10, 10:25, 13:11, 13:13, 14:19, 14:20, 14:25, 15:4, 15:9, 15:14, 16:2, 17:25, 19:10, 19:11, 19:25, 20:20, 21:1, 21:6, 22:16, 22:17, 23:9, 23:24, 24:7, 24:18, 26:8, 26:25, 27:7, 27:14, 27:16, 27:17, 28:17, 30:14, 32:5, 32:12, 32:14, 32:18, 33:2, 34:6, 35:16, 37:13, 37:22, 40:8, 42:25, 43:8, 44:16, 45:3, 45:10, 45:15, 45:18, 46:3, 46:12, 46:13, 46:17, 51:18 recognize [18] - 9:25, 12:14, 15:5, 15:21, 15:22, 19:13, 20:19, 23:25, 27:23, 28:12, 37:15, 37:21, 38:9, 40:7, 40:23, 44:2, 49:21 recognized [50] - 3:9, 3:13, 6:7, 6:14, 7:6, 8:17, 8:22, 9:13, 11:17, 11:21, 13:3, 16:9, 16:21, 17:1, 18:9, 18:22, 20:5, 20:10, 21:18, 22:7, 23:8, 24:9, 24:12, 26:6, 26:24, 28:16, 28:19, 28:25, 29:15, 30:1, 30:17, 30:19, 32:8, 34:3, 34:14, 34:16, 34:17, 36:2, 37:17, 39:24, 42:15, 43:24, 49:17, 50:25, 51:2, 51:7, 51:10, 51:18, 53:10, 53:12 recognizes [1] - 18:4 recognizing [5] - 11:3, 22:15, 29:8, 40:6 recollection [2] - 19:18, 32:4 record [9] - 2:23, 27:6, 28:14, 34:22, 35:10, 35:11, 37:12, 45:7, 51:16 records [1] - 39:8 red [2] - 32:15, 51:20 reevaluating [2] -</p>
--	--	---	--	---

<p>20:25, 21:6 references [1] - 47:1 referring [3] - 4:17, 33:5, 37:23 refers [2] - 33:6, 33:24 reflect [1] - 45:8 refresh [1] - 19:18 regarding [1] - 50:18 regulation [1] - 20:24 regulations [1] - 45:17 related [1] - 10:18 relatively [1] - 39:19 relief [31] - 3:7, 4:14, 4:22, 5:4, 5:6, 5:24, 7:19, 8:5, 9:6, 9:8, 10:4, 12:5, 12:7, 12:11, 13:9, 13:19, 14:9, 14:12, 14:15, 15:20, 16:20, 16:24, 26:1, 38:8, 42:20, 44:10, 45:14, 47:20, 48:8, 50:20, 50:22 rely [1] - 35:22 relying [5] - 7:25, 10:9, 20:16, 23:9, 24:6 remain [2] - 46:18, 50:11 remember [2] - 27:21, 37:1 remind [1] - 41:15 reminded [1] - 41:4 RENÉE [1] - 1:10 report [1] - 42:10 represent [2] - 9:9, 36:1 representation [1] - 13:1 representations [4] - 8:1, 8:2, 36:9, 41:5 representative [5] - 6:15, 9:9, 12:9, 12:25, 14:18 representatives [7] - 6:9, 8:1, 16:9, 16:12, 16:13, 16:25, 42:22 representing [2] - 2:13, 18:5 repudiate [1] - 48:4 repudiating [3] - 3:12, 8:21, 15:15 request [1] - 4:3 require [2] - 19:3, 37:13 required [3] - 1:23, 46:19, 46:21 requirement [1] - 22:20 requirements [1] - 22:16</p>	<p>requires [1] - 27:17 requiring [2] - 19:25, 25:8 rescind [1] - 46:24 rescinded [2] - 20:21, 46:18 rescinding [1] - 21:1 rescission [1] - 21:6 reserve [2] - 50:9, 54:7 reserved [2] - 32:8, 34:13 reserves [1] - 34:11 reside [1] - 34:14 residing [1] - 32:7 resolution [29] - 3:8, 3:24, 4:1, 6:7, 10:9, 17:14, 17:24, 18:1, 18:11, 18:13, 18:20, 19:5, 20:19, 21:3, 23:21, 24:6, 25:5, 31:20, 32:15, 34:19, 40:1, 40:4, 44:22, 45:4, 49:22, 51:12, 51:13, 51:19 resolutions [6] - 31:24, 35:14, 39:25, 40:2, 46:18, 46:25 resolved [1] - 13:9 respect [1] - 28:4 respected [1] - 19:4 respectfully [13] - 4:3, 8:4, 8:23, 10:15, 12:15, 15:23, 17:3, 28:1, 37:7, 39:7, 41:12, 42:3, 44:17 respects [1] - 12:24 respond [3] - 41:25, 43:14, 45:23 response [4] - 47:10, 54:1, 54:3, 54:5 responsible [1] - 46:12 rest [1] - 34:18 restrain [1] - 5:8 result [1] - 9:19 retrospective [1] - 37:18 reveal [1] - 27:9 reverse [1] - 46:3 rights [15] - 7:12, 7:17, 10:6, 11:8, 11:9, 12:2, 21:19, 21:22, 22:13, 22:19, 26:4, 28:24, 29:1, 48:6, 51:5 ring [1] - 37:3 rise [4] - 32:20, 32:21, 32:22, 54:12 rises [2] - 3:24, 17:13</p>	<p>Robert [3] - 2:24, 2:25, 9:1 ROBERT [1] - 1:7 rooted [1] - 21:21</p> <p style="text-align: center;">S</p> <p>satisfactory [1] - 52:24 scenario [2] - 11:25, 14:1 scope [1] - 50:20 scratching [1] - 54:6 seats [2] - 34:11, 34:13 second [4] - 8:6, 10:11, 34:4, 40:2 Second [1] - 24:21 secretary [1] - 32:2 Secretary [2] - 16:16, 42:16 Section [1] - 1:24 section [1] - 52:8 see [2] - 38:13, 40:3 seek [4] - 14:15, 45:14, 48:8, 52:5 seeking [16] - 3:6, 3:10, 5:8, 8:10, 8:16, 9:5, 10:5, 11:1, 11:6, 11:22, 13:9, 20:9, 38:8, 44:10, 45:1, 50:12 seeks [1] - 47:20 Senate [2] - 3:8, 46:11 send [2] - 3:19, 49:24 sending [1] - 47:13 sense [1] - 18:4 sentence [1] - 50:4 sentiment [2] - 17:18, 19:5 seriously [1] - 42:6 serous [1] - 4:5 serve [1] - 34:8 served [1] - 35:12 Service [1] - 47:16 services [6] - 9:6, 18:15, 18:19, 24:1, 39:6, 44:25 shall [2] - 17:9, 21:13 shock [1] - 23:13 shocking [3] - 22:25, 23:16, 27:4 shocks [4] - 22:21, 23:4, 23:18, 26:23 Short [2] - 29:21, 36:16 show [4] - 22:20, 24:3, 28:14, 39:8 shows [1] - 42:25</p>	<p>sic] [1] - 36:10 signed [1] - 35:17 significance [2] - 3:24, 17:13 similarly [3] - 24:15, 39:2, 40:16 simple [1] - 24:14 simply [1] - 46:21 single [1] - 13:20 singular [1] - 16:23 sit [2] - 35:22, 43:12 situated [4] - 24:16, 29:16, 39:2, 40:16 situation [7] - 7:25, 10:8, 19:8, 23:16, 23:19, 39:12, 46:24 six [1] - 46:15 skip [1] - 38:15 slightly [1] - 10:7 so-called [2] - 18:14, 20:25 sole [1] - 29:8 solely [1] - 35:25 someone [1] - 47:5 somewhat [1] - 11:15 soon [1] - 52:18 sorry [9] - 8:12, 15:1, 16:10, 16:15, 31:8, 31:16, 34:25, 46:14, 49:14 sort [2] - 32:15, 51:20 sought [13] - 5:4, 5:5, 5:6, 5:7, 8:5, 12:6, 12:8, 12:11, 15:20, 16:20, 16:24, 42:21, 49:22 sounds [2] - 26:9, 43:10 source [1] - 24:5 sovereign [1] - 18:8 sovereignty [8] - 10:21, 11:4, 11:10, 12:13, 12:17, 14:23, 15:23, 43:25 speaking [1] - 35:19 special [1] - 24:18 specific [2] - 5:10, 47:1 specifically [5] - 33:6, 33:11, 34:10, 37:23, 47:21 specifics [1] - 36:23 staff [1] - 42:11 standard [1] - 38:24 standards [2] - 21:9, 22:16 standing [4] - 7:10, 17:8, 37:2, 51:25 start [1] - 2:3 State [19] - 3:7, 3:10,</p>	<p>6:15, 6:18, 7:2, 8:18, 8:23, 11:17, 13:17, 14:2, 15:5, 25:8, 27:23, 33:16, 42:12, 42:17, 43:6, 46:10, 49:7 state [177] - 3:11, 3:16, 3:17, 3:19, 4:9, 4:10, 4:21, 5:1, 5:2, 5:7, 5:9, 5:11, 5:13, 5:18, 5:19, 5:23, 6:5, 7:6, 7:9, 7:12, 7:16, 8:1, 9:2, 9:4, 9:9, 9:23, 10:20, 10:21, 10:22, 11:2, 11:8, 11:10, 11:11, 11:13, 11:18, 11:23, 12:1, 12:9, 12:13, 12:16, 12:25, 13:2, 13:3, 13:10, 13:18, 13:23, 13:24, 14:4, 14:6, 14:8, 14:15, 14:16, 14:18, 14:20, 14:23, 15:3, 15:9, 15:19, 15:21, 15:23, 16:2, 16:14, 16:21, 16:25, 18:3, 18:22, 19:4, 20:25, 21:14, 22:7, 23:9, 23:24, 24:4, 24:5, 24:10, 25:24, 26:15, 26:24, 27:5, 27:13, 28:18, 28:21, 28:25, 29:5, 30:14, 30:16, 30:17, 30:19, 31:18, 32:1, 32:2, 32:4, 32:5, 32:6, 32:7, 32:8, 32:9, 32:18, 32:22, 33:9, 33:20, 34:5, 34:16, 34:17, 35:2, 35:7, 35:20, 35:23, 36:2, 36:5, 36:8, 36:10, 37:10, 37:13, 37:15, 39:18, 40:2, 40:20, 40:22, 41:6, 41:13, 41:17, 42:11, 42:15, 42:22, 43:7, 43:8, 43:10, 43:13, 43:21, 43:22, 43:23, 44:1, 44:10, 44:11, 44:13, 44:16, 45:1, 45:25, 46:3, 46:18, 46:20, 46:23, 47:1, 47:2, 47:3, 47:21, 47:23, 48:12, 48:22, 48:23, 48:24, 49:5, 49:6, 49:7, 49:10, 49:17, 50:25, 51:2, 51:4, 51:7, 51:10, 51:12, 51:22, 52:9, 52:11, 52:23, 53:10, 53:12</p>
--	---	--	--	---

<p>State's [1] - 16:16 state's [5] - 9:5, 23:13, 25:22, 26:20, 44:4 state-recognized [10] - 7:6, 22:7, 28:25, 30:17, 30:19, 32:8, 34:16, 34:17, 36:2, 42:15 statement [4] - 16:12, 17:18, 19:5, 42:7 statements [3] - 16:17, 29:25, 30:8 STATES [2] - 1:1, 1:11 states [6] - 32:19, 33:16, 34:15, 35:3, 37:20, 49:20 States [1] - 34:10 status [8] - 3:13, 6:13, 8:22, 22:7, 22:12, 42:8, 48:5, 50:19 statute [23] - 5:19, 6:2, 7:3, 10:9, 13:6, 19:8, 19:24, 20:24, 21:11, 22:14, 28:21, 28:23, 31:20, 33:2, 33:24, 34:2, 34:4, 34:10, 37:17, 45:8, 51:16, 53:13 statutes [18] - 19:12, 19:16, 19:22, 28:5, 28:20, 31:25, 32:4, 32:11, 32:14, 33:5, 33:7, 33:9, 34:8, 37:24, 45:5, 47:2, 51:17, 53:9 statutory [6] - 19:11, 19:25, 20:6, 33:3, 51:18 step [2] - 23:2, 32:11 stereotypes [1] - 26:20 stick [1] - 9:11 still [6] - 21:5, 50:22, 51:24, 52:11, 53:16, 54:6 stop [1] - 15:15 straightforward [1] - 47:18 strikes [2] - 51:7, 51:8 strong [1] - 47:4 struggle [1] - 53:1 struggling [2] - 22:3, 37:2 Stuart [2] - 1:19, 2:12 Suarez [1] - 23:11 Suarez's [1] - 30:11 subject [3] - 14:22, 15:17, 44:15 submit [4] - 3:10, 8:23, 21:7, 37:7</p>	<p>submitted [2] - 17:15, 45:20 subsequent [5] - 37:16, 37:24, 51:15, 53:9 subsequently [2] - 33:6, 47:2 substance [1] - 23:23 substantial [1] - 5:2 substantive [8] - 3:18, 21:15, 26:12, 26:13, 26:16, 37:9, 48:5, 53:6 substitution [1] - 2:23 sue [4] - 5:23, 12:22, 13:20, 30:20 sued [4] - 3:17, 3:19, 5:12, 25:24 sufficient [2] - 44:24, 52:10 suggest [1] - 48:15 suggested [1] - 29:24 suggesting [1] - 13:20 suing [5] - 12:19, 13:23, 14:6, 25:22, 44:10 suit [19] - 3:7, 4:14, 5:8, 5:9, 5:11, 6:8, 10:13, 10:20, 10:25, 11:6, 15:18, 20:2, 25:20, 43:20, 47:8, 47:21, 47:22, 50:17, 53:4 suits [2] - 4:11, 4:20 summarize [1] - 35:18 summer [1] - 45:16 supplementing [1] - 53:25 support [1] - 37:12 Supreme [2] - 4:24, 51:14 suspect [1] - 40:14 Susquehanna [1] - 51:15 sweep [1] - 16:18 sworn [1] - 35:17</p>	<p>7:15, 7:23, 8:6, 8:11, 8:15, 8:19, 9:11, 9:16, 9:19, 9:23, 10:4, 10:11, 10:16, 11:15, 11:21, 11:25, 12:10, 12:19, 13:14, 13:17, 14:1, 14:9, 14:24, 15:2, 15:7, 15:12, 15:16, 15:25, 16:4, 16:7, 17:5, 17:8, 17:10, 19:15, 19:18, 19:23, 20:8, 20:12, 22:10, 22:22, 23:6, 25:13, 25:15, 26:2, 26:9, 26:13, 27:20, 28:7, 28:10, 29:7, 29:19, 29:22, 31:8, 31:11, 31:14, 31:16, 32:10, 32:25, 33:13, 34:22, 35:1, 36:3, 36:6, 36:13, 36:17, 36:21, 36:25, 38:6, 38:12, 38:19, 38:22, 39:20, 41:1, 41:9, 41:22, 41:24, 43:2, 43:15, 43:19, 44:3, 45:22, 46:6, 46:9, 46:14, 46:16, 48:7, 48:17, 48:20, 49:4, 49:12, 49:16, 49:23, 50:2, 50:6, 50:8, 52:13, 52:17, 52:21, 53:22, 53:24, 54:3, 54:10, 54:12 Theodore [1] - 1:25 theoretically [1] - 28:24 thereafter [2] - 48:3, 48:16 thereby [1] - 23:11 therefore [7] - 4:2, 16:4, 20:7, 24:8, 24:19, 24:20, 33:3 they've [3] - 11:14, 49:21, 53:14 thinking [1] - 50:10 Third [2] - 4:23, 24:23 third [2] - 39:24, 40:4 thousands [1] - 45:6 three [11] - 19:21, 33:25, 34:11, 34:12, 36:1, 37:12, 39:15, 39:18, 53:21, 53:23, 54:2 threshold [1] - 21:19 tied [1] - 40:1 title [1] - 11:7 Title [1] - 1:23 TO [1] - 1:6 today [7] - 23:20,</p>	<p>23:23, 32:21, 35:23, 43:5, 50:14, 52:16 toe [1] - 42:24 tomorrow [1] - 14:17 traceable [1] - 30:8 traditions [1] - 21:21 treasury [1] - 5:14 treated [5] - 24:15, 24:20, 38:25, 39:16, 40:16 treatment [3] - 24:17, 26:21, 39:10 treats [1] - 40:21 trial [2] - 27:1, 31:4 TRIBAL [1] - 1:3 Tribal [3] - 2:2, 3:2, 7:6 tribe [96] - 3:9, 3:14, 6:7, 6:14, 7:6, 8:18, 8:22, 9:13, 9:19, 9:25, 11:3, 11:6, 11:9, 11:17, 11:18, 11:22, 12:15, 13:3, 15:7, 15:22, 16:2, 16:21, 17:25, 18:1, 18:2, 18:4, 18:8, 18:13, 18:22, 19:10, 19:13, 19:15, 19:17, 20:4, 20:10, 20:19, 21:1, 22:8, 23:9, 24:1, 26:5, 26:6, 26:18, 26:21, 26:22, 27:8, 27:19, 27:23, 27:24, 28:12, 28:19, 29:9, 30:20, 31:3, 31:7, 31:19, 32:12, 32:14, 33:3, 33:6, 37:11, 37:15, 38:9, 39:24, 40:6, 40:14, 40:15, 40:18, 42:15, 43:8, 43:9, 43:10, 43:12, 43:24, 44:2, 48:11, 48:22, 48:24, 48:25, 49:17, 50:25, 51:1, 51:2, 51:7, 51:11, 51:18, 51:19, 51:23, 53:10, 53:11 tribe's [5] - 6:13, 23:12, 26:4, 27:10, 49:9 tribes [43] - 22:15, 27:7, 28:16, 28:22, 28:23, 28:25, 29:15, 30:1, 30:16, 30:18, 30:25, 32:8, 33:7, 33:11, 33:21, 33:23, 33:24, 33:25, 34:9, 34:10, 34:11, 34:12, 34:16, 34:17, 35:16, 35:21, 36:2, 37:17,</p>	<p>37:21, 37:23, 39:10, 39:15, 39:16, 39:17, 40:19, 40:20, 46:13, 47:1, 47:11, 48:10, 49:21 true [6] - 1:23, 4:23, 41:13, 43:18, 43:20, 51:10 trust [2] - 33:14, 35:4 trying [2] - 29:15, 51:3 two [12] - 23:21, 23:22, 33:5, 33:7, 33:9, 34:20, 39:16, 39:17, 40:5, 42:2, 45:6, 50:5 type [3] - 15:19, 21:7, 22:11</p>
U				
<p>U.S.C [1] - 1:24 ultimate [1] - 47:25 ultimately [1] - 45:12 under [19] - 3:17, 4:7, 4:20, 5:22, 7:17, 7:19, 10:11, 10:19, 11:25, 12:2, 12:18, 13:11, 14:1, 14:12, 16:5, 18:16, 19:4, 24:4, 24:9 undermined [2] - 6:14, 42:9 understood [5] - 5:13, 10:22, 15:3, 32:25, 51:21 undoubtedly [1] - 27:17 undue [1] - 49:22 unfounded [1] - 26:19 uniform [2] - 14:16, 17:1 uninterrupted [1] - 31:23 unique [5] - 10:21, 12:12, 18:6, 24:18, 40:18 United [1] - 34:10 UNITED [1] - 1:1 uNITED [1] - 1:11 unless [2] - 38:22, 50:16 unsuccessful [3] - 27:22, 28:10, 28:11 unusual [1] - 3:6 up [7] - 30:3, 30:14, 33:19, 39:7, 44:25, 49:2, 50:3 upheld [1] - 48:2 uses [1] - 40:6</p>				

V	<p>45:24, 46:7, 46:10, 46:15, 46:17, 48:13, 48:19, 49:2, 49:6, 49:14, 49:19, 50:1, 50:3, 50:7, 52:7, 52:20, 54:2, 54:11</p> <p>valid [1] - 21:5</p> <p>various [9] - 6:10, 7:25, 8:1, 16:9, 16:11, 17:19, 18:18, 19:1, 19:19</p> <p>vehicle [1] - 18:23</p> <p>Verizon [1] - 47:16</p> <p>versus [3] - 2:2, 3:2, 10:18</p> <p>viable [2] - 21:15, 38:24</p> <p>vice [1] - 2:9</p> <p>view [4] - 22:11, 25:1, 44:12, 49:6</p> <p>viewed [3] - 19:6, 52:9</p> <p>violate [1] - 25:24</p> <p>violated [5] - 7:16, 26:4, 43:11, 48:22, 49:8</p> <p>violating [3] - 7:17, 10:5, 48:23</p> <p>violation [5] - 26:16, 47:19, 47:22, 48:5, 51:8</p> <p>virtue [2] - 3:8, 32:13</p> <p>void [1] - 37:21</p> <p>vote [1] - 5:22</p> <p>vs [2] - 1:6, 11:5</p>
W	<p>whatsoever [1] - 27:15</p> <p>wherefore [1] - 8:14</p> <p>white [1] - 33:18</p> <p>whole [4] - 9:3, 17:21, 35:11, 51:19</p> <p>Wildwood [1] - 2:6</p> <p>willing [2] - 28:23, 29:1</p> <p>winning [1] - 42:5</p> <p>wish [2] - 41:24, 45:23</p> <p>wishes [1] - 50:15</p> <p>word [2] - 40:7, 46:22</p> <p>wording [1] - 17:24</p> <p>words [1] - 53:10</p> <p>works [1] - 32:18</p> <p>world [1] - 32:18</p> <p>write [1] - 30:3</p> <p>writing [1] - 46:2</p> <p>written [1] - 54:8</p> <p>wrongfully [1] - 48:4</p>
	Y
	<p>years [12] - 6:10, 18:18, 19:19, 19:20, 26:23, 27:6, 27:18, 30:17, 30:18, 35:6, 35:16</p> <p>Young [12] - 4:17, 4:18, 4:20, 5:1, 10:20, 14:13, 25:20, 25:22, 25:24, 47:15, 47:18, 47:21</p>