

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

FREE SPEECH,

*Plaintiff,*

CASE NO. 12-CV-127-SWS

VS.

SEPTEMBER 12, 2012  
3:19 P.M. - 4:54 P.M.

FEDERAL ELECTION COMMISSION,

*Defendant.*

CASPER WYOMING

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TRANSCRIPT OF HEARING  
ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION  
BEFORE THE HONORABLE SCOTT W. SKAVDAHL  
UNITED STATES DISTRICT JUDGE

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INDEX

1		
2	Arguments by Mr. Barr .....	4
3	Arguments by Ms. Chlopak .....	24
4	Rebuttal Arguments by Mr. Barr .....	42
5	Further Arguments by Ms. Chlopak .....	58
6	Final Rebuttal Arguments by Mr. Barr .....	61
7		
8		
9		

CITATION INDEX

(Page 1 of 2)

10		
11		
12	<b><i>Ashcroft v. American Civil Liberties Union,</i></b> 535 U.S. 564 (2002) .....	22
13	<b><i>Broadrick v. Oklahoma,</i></b> 413 U.S. 601, 615 (1973) .....	54
14	<b><i>Buckley v. Valeo,</i></b> 424 U.S. 1, 79 (1976) .....	6
15	<b><i>Citizens United v. FEC,</i></b> 130 S.Ct. 876, 889 (2010) .....	5
16	<b><i>Colorado Right to Life Cmte. v. Coffman,</i></b> 498 F.3d 1137 (10 <sup>th</sup> Cir. 2007) .....	52
17	<b><i>Doe v. Reed,</i></b> 130 S.Ct. 2811 (2010) .....	37
18	<b><i>Elrod v. Burns,</i></b> 427 U.S. 347 (1976) .....	23
19	<b><i>FEC v. Furgatch,</i></b> 807 F.2d 857 (9 <sup>th</sup> Cir. 1987) .....	17
20	<b><i>FEC v. Massachusetts Citizens for Life,</i></b> 479 U.S. 238, 253 (1986) .....	9
21	<b><i>FEC v. Survival Education Fund,</i></b> 65 F.3d 285 (2 <sup>nd</sup> Cir. 1995) .....	40
22		
23	<b><i>FEC v. Wisconsin Right to Life,</i></b> 551 U.S. 449 (2007) ....	5
24		
25		

**CITATION INDEX**

(Page 2 of 2)

1	
2	
3	<b><i>Interstate Circuit, Inc. v. City of Dallas,</i></b>
4	390 U.S. 676, 88 S.Ct. 1298, L.Ed 2d 225 ..... 48
5	<b><i>McConnell v. FEC,</i></b> 540 U.S. 93, 332 (2003) ..... 5
6	<b><i>Minnesota Citizens Concerned for Life, Inc.</i></b>
7	<b><i>v. Lori Swanson,</i></b> 640 F.3d 304 (8 <sup>th</sup> Cir. 2011) ..... 26
8	<b><i>New Mexico Youth Organized v. Herrera,</i></b>
9	611 F. 3d 669 (10 <sup>th</sup> Cir. 2010) ..... 37
10	<b><i>Real Truth About Abortion, Inc. v. FEC,</i></b>
11	681 F.3d 544 (2012); formerly <b><i>Real Truth</i></b>
12	<b><i>About Obama v. FEC,</i></b> 130 S.Ct. 2371 (2010) ..... 7
13	<b><i>SpeechNow.org v. FEC,</i></b> 599 F.3d 686 (D.C. Cir. 2010) .... 21
14	<b><i>United States v. Williams,</i></b> 553 U.S. 285 (2008) ..... 31
15	<b><i>United States v. Wurzbach,</i></b> 280 U.S. 396 (1930) ..... 31
16	<b><i>Virginia Society for Human Life, Inc. v. FEC,</i></b>
17	263 F.3d 379 (4 <sup>th</sup> Cir. 2001) ..... 41
18	
19	
20	
21	
22	
23	
24	
25	

1           **(The proceedings commence at 3:19 p.m.)**

2           **THE CLERK:** All rise.

3           **THE COURT:** Thank you. Please be seated.

4           Court is in session in the matter of Free Speech  
5 versus Federal Election Commission, Civil Action 12-CV-127. I  
6 note the presence of the plaintiff -- or plaintiffs in this  
7 matter, Mr. Barr.

8           **MR. BARR:** Yes, sir.

9           **THE COURT:** And Mr. Klein?

10          **MR. KLEIN:** Yes, Your Honor.

11          **THE COURT:** I apologize for the pause. There's  
12 another Steve Klein, isn't there, out of Cheyenne?

13          **MR. KLEIN:** Yes, Your Honor. He works in the office  
14 kitty-corner to me, but we're no relation.

15          **THE COURT:** Okay. Well, I had to look twice because I  
16 was wondering where's the Steve Klein that I had previously  
17 known. And on behalf of the defendant, I note the presence of  
18 Ms. Chlopak (CHO-pack) --

19          **MS. CHLOPAK:** Chlopak (KLO-pack).

20          **THE COURT:** -- Chlopak, Mr. Kolker and Mr. Vassallo.  
21 The Court has allotted two hours in this matter, one  
22 hour per side, and I would hear first from the movant.

23          **MR. BARR:** Good afternoon, Your Honor. Thank you for  
24 having us before the Court.

25          **THE COURT:** Good afternoon.

1           **MR. BARR:** Before this commission -- before this Court  
2 is a commission that shrugs. It shrugs when the plaintiff  
3 asked whether its speech was regulated or not; it shrugs when  
4 it was asked whether it's a political committee under the  
5 Federal Election Campaign Act or not; it shrugged when it was  
6 asked basic questions of the Federal Election Campaign Act.

7           This is a commission that interprets and enforces  
8 federal election law across the United States, laws that carry  
9 civil and criminal penalties for noncompliance, and the  
10 First Amendment will not permit such a shrugging.

11           I'd like to take a moment to work through some of the  
12 constitutional principles that surround regulable categories of  
13 speech that are at issue in this case. The FEC's reply brief  
14 responding to our motion for preliminary injunctive relief  
15 looks at electioneering communications that was at issue in  
16 *Wisconsin Right to Life*, in *McConnell* and in *Citizens United*  
17 and applies those standards to what we call "independent  
18 expenditures." These are the incorrect standards to be  
19 applied.

20           Electioneering communications under the Federal  
21 Election Campaign Act deal with a very specific set of  
22 statutorily defined communications that occur within 30 to 60  
23 days of an election, that clearly mention a candidate -- so if  
24 you've named them, you know that you're within the trigger  
25 period -- that go to a relevant electorate -- the FEC provides

1 information about what that populous threshold is -- and only  
2 occurs in certain types of media such as television or radio.  
3 Absent those specific factors, regulation does not occur.

4           So in *McConnell versus FEC*, the first time the  
5 Supreme Court interpreted the constitutionality of regulating  
6 electioneering communications, it examined what it called the  
7 "'functional equivalent of express advocacy' test"; and whether  
8 a communication had express words to advocate for the election  
9 or defeat of a federal candidate, it still allowed regulation  
10 because the electioneering communication statute provided  
11 bright-line guidance to speakers to know whether they were  
12 regulated or not; but nothing could be further from the truth  
13 when you look to the Supreme Court's distinction in issue  
14 advocacy and express advocacy. So I need to move back for a  
15 moment before I move forward.

16           *Buckley versus Valeo* was a seminal election law case  
17 before the Supreme Court that dealt with the primary  
18 interpretation and construction of the Federal Election  
19 Campaign Act. There, the Court interpreted expenditures which  
20 were communications designed to influence a federal election to  
21 be read more narrowly, and the reason why they had to be read  
22 more narrowly was to save the statutory provisions from  
23 invalidation under vagueness and the overbreadth doctrines.  
24 That's because in determining what's an independent  
25 expenditure, you have no bright-line statutory guidance. You

1 don't have a specific time frame as you do with electioneering  
2 communications. You don't have it limited to specific type of  
3 media formats or to a relevant number of the electorate. It's  
4 a wide-open test. So we had to create a very narrow definition  
5 in order to protect that.

6           Outside of independent expenditures or express  
7 advocacy is issue advocacy, and that's a whole range of  
8 communications that may discuss issues that connect to a  
9 candidate running for federal office, talking about  
10 environmental policy, talking about ranching in connection with  
11 President Obama but do not, in express words, call for the  
12 election or defeat of that candidate; and the Supreme Court,  
13 time and time again, has held that any regulation of that sort  
14 of speech is impermissible and outside of the bounds of the  
15 First Amendment. Why? Because it's impossible, as a matter of  
16 law, to trust government commissions to decide when "issue"  
17 speech is reaching too far into an electoral sphere to  
18 influence an election or to try to get a candidate elected or  
19 defeated for federal office.

20           Now, the FEC goes to great lengths to explain that a  
21 recently decided federal Court of Appeals decision, *Real Truth*  
22 *About Abortion*, formerly known as "*Real Truth About Obama*"  
23 might be controlling or persuasive here. I would note, for  
24 purposes of this Court's information, that Footnote 5 in *RTAA*  
25 indicates that the appellants there did not provide an

1 evidentiary or administrative record upon which the  
2 Fourth Circuit would be able to make a determination about  
3 elements such as the political committee status of the  
4 organization or about the major purpose of the organization.  
5 Nor did the appellants in *Real Truth About Abortion* go through  
6 and seek the administrative assistance of the FEC.

7           In our instance, we availed ourselves of the advisory  
8 opinion process. We provided a copy of the bylaws of the  
9 organization to the FEC. We provided detailed scripts of each  
10 communication that we wish to have communicated. We provided  
11 four donation scripts. We provided budgets about this.

12           What -- what Free Speech then encountered was this  
13 dizzying array of two hearings before the FEC, three  
14 contradictory draft advisory opinions to -- some indicating  
15 we're regulated, some not, you know, across different areas of  
16 law and, ultimately, two conflicting statement of reasons from  
17 three Democratic commissioners and three Republican  
18 commissioners, both standing in direct contradiction of one  
19 another. The FEC -- the Free Speech has now sat since  
20 February, being unable to speak out about these issues as a  
21 result of the regulations that have been challenged.

22           I'd like to move on to a second point of law; and,  
23 that is, beyond the category of speech that's regulated -- and  
24 here we're distinguishing between issue advocacy, express  
25 advocacy and electioneering communications -- that once we've



1 determined where those lines are, we also have to be cognizant  
2 of the fact that there are different sorts of disclosure  
3 regimes under the FEC's provisions. The FEC goes to great  
4 length in its reply brief to suggest that this is about mere  
5 disclosure, like, "This was upheld in *Citizens United*. What --  
6 what's the complaint here?"

7           And the problem is, is that for purposes of  
8 independent expenditures, individuals who are not taxed,  
9 File Form 5 -- it's a fairly simple form that you submit to the  
10 FEC. It's about two pages. One you aggregate beyond \$250 on  
11 an independent expenditure, you indicate who that money is for,  
12 in support of or defense or -- in terms of their candidacy,  
13 what type of communication and then who's paying for it.

14           That matches with the governmental interest that's  
15 been identified in *Buckley*, it's been identified in  
16 *Massachusetts Citizens for Life*, *Citizens United*, providing the  
17 electorate with relevant information about who's speaking and  
18 who's funding that speaking; but there's a completely different  
19 nightmare reporting regime, and that's called "political  
20 committee status," and that is the main thrust of the challenge  
21 here; and the FEC's reply brief, of course, conflates these two  
22 reporting regimes as if they were one.

23           In *Massachusetts Citizens for Life*, the Supreme Court  
24 looked at the spending and operations of a small nonprofit  
25 group that put out a mailer about their pro-life positions, and

1 it analyzed in-depth the political committee requirements that  
2 were going to be imposed on Massachusetts Citizens for Life;  
3 and it said, as a matter of law, that filing these one-time,  
4 simplified forms satisfied any governmental interest in  
5 providing information to the electorate about who's speaking;  
6 but once you go beyond that, once you go into the nightmare  
7 world of being a political action committee, that these were  
8 too tangential; they were too far from that interest, and they  
9 imposed too great of a burden to be able to be sustainable.

10 Now, as you move through *McConnell* and you move into  
11 *Wisconsin Right to Life* and *Citizens United*, *Citizens United*,  
12 although the FEC advocated it, rejected the PAC option. There  
13 you can see Justice Kennedy writing the majority opinion,  
14 indicating that PACs are very burdensome alternatives. They  
15 are -- have especially onerous demands on small groups,  
16 grassroots organizations who would speak out.

17 Now, the FEC has stated in its reply brief, "Well,  
18 you're -- Mr. Barr, you're speaking about burdens that existed  
19 before *Citizens United*, before *Citizens United* corporations  
20 were banned from speaking." There were criminal penalties and  
21 they couldn't solicit funds from their own membership. That's  
22 true but that's not what *MCFL*, Massachusetts Citizens for Life,  
23 or *Citizens United* was contemplating entirely.

24 Once you're a political committee, you have to appoint  
25 a treasurer. That treasurer has criminal liabilities under the

1 law. You have to file a statement of organization, any changes  
2 to that within ten days; disbursements in 12 different  
3 categories; receipts in ten different categories; any interest,  
4 dividends, rebates, loans that have been provided.

5 **THE COURT:** Sounds like a tax return.

6 **MR. BARR:** Not quite, I mean, because this is a  
7 monthly or -- or quarterly reporting. We were already  
8 regulated as a 527 for purposes of IRS tax compliance, and  
9 that's a very simple reporting regime. Here, we've got cash on  
10 hand, what type of affiliations have you had with other  
11 political committees, candidate committees, any cash in, cash  
12 out that is related there and in perpetual existence as a  
13 political committee until the FEC deems that you're not one.

14 This is why, you know, beyond the "corporate ban"  
15 issue and beyond the issue of whether you can solicit from your  
16 own members, there's a whole host of other organizational  
17 requirements that attach as a PAC that are far too burdensome  
18 for a grassroots organization to be able to sustain so that  
19 they can properly exercise their First Amendment rights.

20 In addition, once you're a PAC, you have to guard  
21 against any "foreign national" contributions. So any "foreign  
22 national" contributions that come in are potentially illegal.  
23 We know those are high-enforcement matters for the FEC and DOJ.  
24 We have to watch out also for any coordination. PACs cannot  
25 coordinate their communications with candidates.

1           So the distinction, in terms of providing a safe  
2 harbor and a protected area for groups that are not PACs, is  
3 important just as it's important to distinguish between "issue  
4 advocacy" and "express advocacy." These were the issues  
5 presented before the Court in *MCFL* and later in *CU* and have  
6 been upheld time and time again.

7           One week ago today, the Eighth Circuit, in an *en banc*  
8 review of Minnesota's similar system of political action  
9 committee requirements, noted that for purposes of preliminary  
10 injunctive relief that it is most likely that the Minnesota  
11 state system that mirrors what the FEC does was  
12 unconstitutional precisely because you can have disclosure and  
13 you can meet the governmental interest -- whether we -- whether  
14 we characterize that as being a "compelling interest" or a  
15 "sufficiently important interest," we can meet that in a least  
16 restrictive manner. What's the least restrictive manner for  
17 purposes of the FEC? It's Form 5. It's two pages. It's very  
18 simplified reporting for a small group.

19           We're not here to challenge disclosure in its  
20 entirety. We understand very well that -- through  
21 *Citizens United*, through *Buckley* and through a string of  
22 election law cases brought in the federal courts, that  
23 disclosure is proper when it is attendant to the correct type  
24 of speech, when you have effective boundaries that police that  
25 and when it is for the correct type of organization.

1           **THE COURT:** Your claim is that issue advocacy does not  
2 or is not or should not be subject to the regulations under the  
3 FEC?

4           **MR. BARR:** That is correct.

5           **THE COURT:** All right.

6           **MR. BARR:** And, you know, that's -- the Eighth Circuit  
7 brought up its example of two farmers. You know, if you have  
8 two farmers that want to go out and put an ad out and -- and to  
9 do so, it's fine to require the simple type of informational  
10 interests, easy form, fill out who you're spending for or  
11 against, how you're doing it and who's paying for it and get it  
12 in. Don't impose treasurer requirements. Don't impose monthly  
13 or quarterly reporting requirements, 12 different types of  
14 disbursements, ten categories of receipts and the like. These  
15 are -- these are far unrelated to any interest that the  
16 electorate has in information about this, and so we -- the  
17 courts have always struggled to protect those -- those  
18 boundaries, and that's why -- why we're here.

19           It -- it's amazing to me because, you know, we sought  
20 review by the FEC, and we have -- we have lawyers here  
21 defending half of the commission's position today. They are in  
22 defense of Draft B. I don't know that we have any lawyers in  
23 defense of Draft C. There isn't one standard. We have  
24 commissioners that see the sky black and blue, and all that  
25 we're asking and all that we think that the First Amendment

1 compels is that the FEC must be able to articulate a singular,  
2 uniform standard in each of these areas of laws that have been  
3 implicated so that average Americans are able to go out and  
4 speak. We believe the First Amendment demands nothing less.

5           Now, the last part of this component: You decide --  
6 there's a dividing line between issue advocacy and express  
7 advocacy as well as electioneering communications; there's a  
8 dividing line between groups that are regulable under federal  
9 election law and not; and then, lastly, there's a question of  
10 solicitations.

11           In addition to the scripts that we put forward in  
12 terms of communications that we wanted to air, we also asked  
13 whether four "donation request" scripts were regulable as  
14 solicitations under the law. Why is that relevant? It's  
15 relevant because solicitations have to include specific  
16 disclaimers, and money that's raised as a solicitation can turn  
17 into a contribution which has to be treated differently under  
18 federal law.

19           Two of those the commission went in directly opposite  
20 manners on. We were able to receive no direct advice about it.  
21 And I just want to back up for a moment and -- and just work  
22 through two of the advertisements that we had proposed to air  
23 and apply what we frequently used in the past in terms of  
24 speech standards to -- to explain why there's a problem here.  
25 One of the ads -- and this was listed as "Script B" in our

1 Advisory Opinion Request, Environmental Policy, read:  
2 "President Obama opposes the Government Litigation Savings Act.  
3 This is a tragedy for Wyoming ranchers and a boon to Obama's  
4 environmentalist cronies. Obama cannot be counted on to  
5 represent Wyoming values and voices as President, in Italics,  
6 *this November*, end Italics. Call your neighbors. Call your  
7 friends. Talk about ranching."

8           Now, if you break the communication down, the first  
9 line discusses the Government Litigation Savings Act and the  
10 fact that President Obama opposed it. The second line is a  
11 reference that this would have helped Wyoming ranchers and  
12 would have helped -- would have been -- I'm sorry -- that this  
13 was harmful to Wyoming ranchers and would have helped Obama's  
14 environmentalist cronies.

15           The next line that -- states that Obama can't be  
16 counted on to represent Wyoming values and voices as President.  
17 It's an attack on his -- on his character. Then "*this*  
18 *November*, call your neighbors, call your friends." These are  
19 verbs, call to action. "Call your neighbors. Call your  
20 friends. Talk about ranching."

21           Now, during the hearing, one of the commissioners  
22 suggested that we not even run this ad; that her students had  
23 listened to it and had laughed about it and thought it was very  
24 funny, and -- and that "talk about ranching" couldn't mean  
25 "talk about ranching." It was an obvious non sequitur. Nobody

1 would be interested in that. We know what you really mean.  
2 You really mean that you want to vote against Obama.

3 But then you had another three commissioners who said,  
4 "Well, we don't have a clear plea for action here. What's  
5 going on? The plea that we see here, the verbs, are "call your  
6 neighbors, call your friends, talk about ranching."

7 And so if you look at the applicable regulation that  
8 we're using here -- it's 100.22(b) -- it asks that speech, when  
9 taken as a whole, with limited reference to external events  
10 such as proximity to election, could only be interpreted by a  
11 reasonable person as containing advocacy for the election or  
12 defeat of one or more clearly identified candidates because,  
13 one, the electoral portion of the communication is  
14 unmistakable, unambiguous and suggestive of only one meaning;  
15 and, two, reasonable minds could not differ as to whether it  
16 encourages actions to elect or defeat one or more clearly  
17 identified candidates or encourages some other kind of action.

18 Now, we don't know, on the face of the regulation,  
19 exactly what these external events might be that could cause  
20 regulation nor were they articulated by the three commissioners  
21 who believed this was a regulable communication. We don't know  
22 what an "electoral portion" is nor were they -- nor was that  
23 articulated by the three commissioners who were in support of  
24 regulation here; but what we're told is that "there's a feel,  
25 you know. If you just look at it, we really know what you're



1 doing here." Now, the FEC will tell you this is based on what  
2 the Ninth Circuit ruled on in *Furgatch versus FEC*. *Furgatch*  
3 concerned an anti-Carter newsletter; and at the end of it,  
4 after discussing some issues that -- and, you know, it  
5 discusses the election. It talks about the choice of  
6 candidates, and it says, "Don't let him do it." And *Furgatch*  
7 has most of 100.22(b), but it has another element as well. It  
8 says that must include a clear plea for action. So they said,  
9 "You know, the only way to" -- "don't let him do it" means that  
10 you have to vote against him.

11 But where -- where you have speech that can be  
12 reasonably read to interpret another reading, we know that you  
13 can't have that to be regulable; and in the unfortunate trend  
14 of the FEC, as we pointed out in the verified complaint, as we  
15 pointed out in the PI memo, both as applied to us and as  
16 applied to previous speakers nationwide, is that it continues  
17 to grow and evolve the standard. The Patriot Majority  
18 enforcement matter says that they distill the meaning of what  
19 an expenditure is. It evolves in its meaning.

20 There is no way to pin down the FEC in an  
21 understanding of where the line between regulated and  
22 non-regulated speech might be. We think the First Amendment  
23 compels nothing less.

24 Another ad that we wanted to run was the gun control  
25 ad. It read: "Guns save lives" -- this is listed as

1 "Script A" in the advisory opinion. "Guns save lives. That's  
2 why all Americans should seriously doubt the qualifications of  
3 Obama, an ardent supporter of gun control. This fall get  
4 enraged, get engaged and get educated and support Wyoming state  
5 candidates who will protect your gun rights."

6 Now, to fall under the ambit of 100.22(b), we have to  
7 look supposedly at the communication as a whole, limited  
8 reference to external events like the proximity to an election  
9 and to decide whether this is the -- contains advocacy for the  
10 election or defeat of a candidate. Clearly, the last line of  
11 this advertisement, "support Wyoming state candidates who will  
12 protect your gun rights" -- three commissioners believed that  
13 no reasonable audience, no reasonable person could read that  
14 and believe that you were spending money on a communication  
15 dedicated to Wyoming state candidates who supported gun rights.  
16 Three believed that indeed the opposite was true; that you  
17 might just mean what you're saying.

18 Now, it's -- it's a curious thing because the FEC, of  
19 course, argued in the Fourth Circuit in defense of 100.22(b)  
20 and the similar provisions. There, *Adav Noti* said two things  
21 that are interesting and I think bear weight on this case as  
22 well, the most important of them being that the FEC said that  
23 100.22(b) was essentially the same test as what you saw in  
24 *Wisconsin Right to Life*; and *Wisconsin Right to Life*, of  
25 course, includes a famous Footnote 7 where Chief Justice

1 Roberts says -- he is responding to Justice Scalia's  
2 concurrence, and he says, "You know, Justice Scalia thinks our  
3 test is impermissibly vague, but we have factors here that  
4 convene and control to make sure that it's not, and the last of  
5 those factors is that whenever there is a tie between  
6 'regulation' and 'speech,' whenever we look at a communication  
7 and it could go one way or the other, that we must give the  
8 benefit of the doubt to the speaker, to the First Amendment, to  
9 freedom, not to the censor."

10           Now, before the FEC were several ads that went three  
11 to three; and if my math is correct, that's a perfect tie. If  
12 the FEC argued in the Fourth Circuit that Wisconsin Right to  
13 Life standards are the same as 100.22(b), then we should see  
14 the tie being awarded to Free Speech, not to the commission;  
15 but we don't and that's made clear through the administrative  
16 record that we pointed out here; that time and time again the  
17 FEC continues to go after groups in a "gotcha" fashion without  
18 any clear ability of giving notice and guidance to individuals,  
19 and you're -- so you're stuck at the mercy -- at the mercy of  
20 the FEC, and this is important because in *Citizens United*, you  
21 remember the Court said, "Look, when you develop a complicated  
22 system of federal election law where only the professionals can  
23 understand it, when you have to wade through 1,268 pages of  
24 regulations, some -- more than 500 pages of explanations and  
25 justifications for those and more than 1,700 advisory opinions

1 interpreting those, it's the functional equivalent of a prior  
2 restraint.

3           **THE COURT:** But that was with regards to the formation  
4 of a PAC.

5           **MR. BARR:** That was with regards to electioneering  
6 communications, yes; but they're speaking to the entirety of  
7 everything the FEC does which doesn't operate in isolation. So  
8 while we have electioneering communications, part of what the  
9 FEC was arguing there was indeed that we could set up a PAC.  
10 "You could do this; you could do that." And what the -- what  
11 the Supreme Court was saying was, of course, one, PACs are very  
12 burdensome alternatives, but that's not an adequate remedy;  
13 but, two, you've made it so complicated and so difficult that  
14 people, instead of trying to seek advisory opinions or go  
15 through this long process or to try to save up enough money to  
16 hire a boutique election law expert or high-end CPAs, they're  
17 going to stay home quiet, and we don't allow that in the  
18 United States; and so it properly struck the electioneering  
19 communication provisions there, but we shouldn't view that in  
20 isolation. I mean, the same First Amendment frailties that  
21 plagued the electioneering communication provisions extend over  
22 here in 100.22(b), in political committee status, in defining  
23 the "major purpose" test and what's a solicitation.

24           Now, admittedly, there's inter-circuit dispute over  
25 how this is going. I would suggest that the Fourth Circuit's

1 record, especially if you look to Footnote 5 in that opinion,  
2 indicates that the challenges there did not bring an  
3 "as applied" challenge discussing the "major purpose" test and  
4 "political committee" and couldn't show how this would hurt  
5 them.

6           If we look to *SpeechNow* which the FEC also cites,  
7 there that organization said that it would -- the entirety of  
8 its communications would be independent expenditures. So  
9 that's -- that doesn't present the same question under the law.  
10 If all of your communications are express advocacy, of course  
11 you have as your major purpose the election or nomination or  
12 defeat of a clearly identified candidate, and you don't have  
13 that issue before you.

14           When they're asked, "Will PAC burdens -- are they  
15 really burdensome," the answer is, well, no, not -- it wouldn't  
16 really be that burdensome for us. So you -- you have two --  
17 two sets of records, both from the DC Circuit and the  
18 Fourth Circuit, that point to weak -- weak evidentiary records  
19 before the Court and no exhaustion -- well, at least in the  
20 case of *Real Truth About Abortion*, no exhaustion of  
21 administrative remedies.

22           We have most recently in the Eighth Circuit a very  
23 strong finding against imposing PAC burdens; and we know, of  
24 course, that the First Circuit in the Southern District of  
25 New York had looked at 100.22(b) and the attendant regulations

1 and said, not on constitutional grounds but under purely APA  
2 and statutory grounds, that the regulation 100.22(b) goes well  
3 beyond the statute as it has been construed and limited by  
4 *Buckley*.

5           And we're left with this mess today. We're here more  
6 than seven months past the time that we asked to get our speech  
7 out. During that time, of course, the Department of Labor  
8 issued draft regulations that would have prohibited children  
9 from doing common farm chores and ranching chores. We're  
10 unable to run our environmental policy ad that we would have  
11 liked to during that time. We have provided an amended  
12 verified claim, indicating our new course of action that we  
13 would like to do.

14           We believe that we're on solid, legal ground here to  
15 be able to speak freely without reporting and registering with  
16 the federal government under onerous PAC registration  
17 requirements; and we believe we're entitled to a simple answer,  
18 a simple answer about "is our speech regulated or not; are we a  
19 PAC or not; what's the 'major purpose' test and how do you  
20 apply it; and what's a solicitation."

21           Now, I would note, in the context of a preliminary  
22 injunction, ordinarily the burden would be on us, the movants,  
23 to advance this forward; but as *Ashcroft versus ACLU* and other  
24 cases from the Supreme Court have indicated, that where regimes  
25 implicate First Amendment interest, it is on -- the burden is

1 upon the government or the sponsor of that legislation to be  
2 able to illustrate why there is a sufficient or important  
3 government interest that upholds it and that it's carried out  
4 in the least restrictive means. I would submit that the FEC  
5 cannot do that.

6 I also believe that the remainder of the factors that  
7 go towards a finding of a preliminary injunction also weigh in  
8 our favor. We know, for example, from *Elrod versus Burns* that,  
9 you know, any time that free speech and First Amendment  
10 interests are shut down or trampled upon, that that undoubtedly  
11 constitutes irreparable injury, the second factor.

12 We also know, in terms of hardships and the balance of  
13 the hardships between the parties, that, of course, we want to  
14 preserve the status quo, but the status quo cannot be insanity  
15 and chaos. We have two dueling drafts: One that takes  
16 constitutional considerations very seriously and the other that  
17 leaves us open to hundreds of pages of enforcement actions, no  
18 definitions and no steady guidance; and I would suggest that  
19 Draft C and the Statement of Reasons from the Republican  
20 commissioners offers that bright-line guidance that we -- we  
21 and other speakers deserve.

22 Lastly, it's always in the public interest for people  
23 to be able to speak and to vindicate their First Amendment  
24 interests; and for those reasons, I would submit that  
25 injunctive relief is appropriate here. I would reserve the

1 remainder of my time for rebuttal unless Your Honor has any  
2 questions.

3           **THE COURT:** At this time I don't. Thank you,  
4 Mr. Barr.

5           **MR. BARR:** Thank you.

6           **MS. CHLOPAK:** May it please the Court.

7           **THE COURT:** Counsel.

8           **MS. CHLOPAK:** Your Honor, in *Citizens United*, an  
9 eight-justice majority of the Supreme Court held, in the  
10 clearest of terms, that the government has an important and  
11 constitutionally sufficient interest in mandating disclosures  
12 regarding the sources and financing of campaign advocacy.

13           Citing its earlier decisions in *Buckley* and *McConnell*,  
14 the Court observed that reporting requirements impose no  
15 ceiling on campaign-related activities and do not prevent  
16 anyone from speaking; and because *Citizens United* also  
17 eliminated restrictions on independent expenditures,  
18 Section 100.22(b) of the commission's regulations now only  
19 defines a category of "unambiguous campaign advocacy," the  
20 sources and financing of which must be disclosed to the public.

21           Similarly, for groups like Free Speech, the  
22 commission's methods for determining whether a group must  
23 register and report as a political committee and whether a  
24 request for donations amounts to a solicitation for  
25 contributions under the Act only facilitate disclosure



1 requirements. To be clear, plaintiff is free to run each of  
2 its proposed ads and more and to solicit and spend unlimited  
3 sums of money to pay for them. The only consequences that  
4 today flow from a group like Free Speech financing express  
5 advocacy are disclosure obligations that, in the words of the  
6 Supreme Court, "ensure that voters are fully informed about the  
7 person or group who is speaking and enable the public to  
8 evaluate the arguments to which they are being subjected."

9           The Supreme Court thus upheld disclosure requirements  
10 similar to those implicated here, notably even as applied to a  
11 ten-second commercial advertisement that merely mentioned the  
12 name of a candidate. So for "express advocacy" communications  
13 at issue under Section 100.22(b), the government's interest in  
14 ensuring public availability of information regarding the  
15 sources and financing of such advocacy is even stronger here  
16 than the interests that eight justices in *Citizens United* found  
17 to be constitutionally sufficient; and that is why the  
18 Fourth Circuit recently rejected the very arguments that  
19 plaintiff is making in this case and upheld the  
20 constitutionality both of Section 100.22(b) and the  
21 commission's policy for determining whether a group must  
22 register and report as a political committee.

23           Now, I would like to just take a moment to clarify a  
24 couple of statements that plaintiff made that were not  
25 accurate. I believe at one point plaintiff was highlighting

1 the recent Eighth Circuit decision by the -- the decision by  
2 the Eighth Circuit in *Minnesota Citizens Concerned for Life*  
3 *versus Swanson* and suggested that that decision is applicable  
4 here because the system at issue in that case, the PAC  
5 disclosure requirements, mirrored the federal requirements.

6 That's simply not true. In fact, the Eighth Circuit,  
7 in its decision, explicitly distinguished the federal  
8 requirements from the state requirements at issue in the  
9 Minnesota case. In two separate footnotes, the Eighth Circuit  
10 made this point. First, in Footnote 10, the Eighth Circuit  
11 cited the DC Circuit case in *SpeechNow* and noted that the law  
12 upheld in *SpeechNow* applies to far fewer associations in  
13 Minnesota's law. The Court also noted that the Minnesota law  
14 had a lower trigger of \$100 for expenditures and that, most  
15 importantly, the Minnesota law, unlike federal law, imposes  
16 requirements on all associations.

17 To further hammer home the point, the Eighth Circuit,  
18 in a subsequent footnote, Footnote 11, noted that its holding  
19 regarding the requirement that any group that spent \$100 on an  
20 expenditure formed what Minnesota law calls a "political" -- I  
21 think it was a "political fund" -- that the holding -- the  
22 Eighth Circuit's holding in that case did not affect  
23 Minnesota's regulation of political committees. So the  
24 holdings in that case have no bearing on the issues before the  
25 Court here.

1           In challenging the commission's major -- the -- excuse  
2 me. In challenging Section 100.22(b), plaintiff relies on some  
3 cases decided in the 1990s that were brought to challenge the  
4 constitutionality of that regulation. Those cases interpreted  
5 the *Buckley* standard as imposing a constitutional requirement  
6 that so-called "magic words" be used for express advocacy and  
7 that any communication lacking those words was  
8 unconstitutional.

9           What plaintiff ignores is that those decisions  
10 preceded the Supreme Court's subsequent decisions, first in  
11 *McConnell* and then in *Wisconsin Right to Life* and ultimately in  
12 *Citizens United*. In *McConnell*, the Supreme -- the Supreme  
13 Court explicitly rejected the notion that the Congress -- that  
14 Congress -- excuse me -- that the Constitution requires  
15 Congress to treat issue advocacy differently from express  
16 advocacy; and the Court upheld the regulation of -- of --  
17 excuse me -- electioneering communications not only in terms of  
18 disclosure requirements, but as of *McConnell*, the Court upheld  
19 a prohibition by corporations and unions engaging in these --  
20 making these electioneering communications.

21           Now, opposing counsel tries to draw this distinction  
22 between "electioneering communications" and "independent  
23 expenditures," and the commission doesn't dispute that they are  
24 different; but substantively, electioneering communications are  
25 a much broader category of communications than express

1 advocacy. Electioneering communications, within certain  
2 restrictions of time and media, are any communication that  
3 mentions the name of a candidate; and the Supreme Court,  
4 initially in *McConnell* and then in *Wisconsin Right to Life*,  
5 upheld not only regulation generally of these communications  
6 but prohibitions on corporations and unions making these types  
7 of communications.

8           In *Wisconsin Right to Life*, the Supreme Court made  
9 clear that regulation of the functional equivalent of express  
10 advocacy may -- may occur and that corporations and unions may  
11 be prohibited from financing communications that meet the  
12 "functional equivalent" test which the controlling opinion in  
13 *Wisconsin Right to Life* described as an ad susceptible of no  
14 reasonable interpretation other than an appeal to vote for or  
15 against a candidate; and, in fact, in *Wisconsin Right to Life*,  
16 the Supreme Court explicitly noted that in making a  
17 determination about whether an advertisement meets this test,  
18 one need not ignore basic background information that might be  
19 necessary to put an advertisement in context.

20           Finally, we come to *Citizens United* in which the  
21 Supreme Court made a final decision about the -- these  
22 prohibitions on -- these prohibitions on -- excuse me -- both  
23 independent expenditures and electioneering communications by  
24 corporations and unions and how that they were  
25 unconstitutional. The effect of that decision is that

1 Section 100.22(b) no longer implements any sort of ban on  
2 speech, and plaintiff's reliance on a couple cases preceding  
3 *Citizens United* that talk about the constitutionality of  
4 regulating such a ban have no place in what we're talking about  
5 today which is a regulation that facilitates disclosure.

6           The eight-justice opinion in *Citi-* -- the portion of  
7 *Citizens United* in which eight justices upheld the  
8 constitutionality of disclosure requirements specifically  
9 rejected a request by plaintiff *Citizens United* to limit that  
10 holding to add there the functional equivalent of express  
11 advocacy. What that means is that in *Citizens United*, the  
12 Supreme Court held that disclosure may be required not only for  
13 electioneering communications that meet the "functional  
14 equivalent of express advocacy" test; but even an ad, a  
15 ten-second ad that says -- a ten-second advertisement in the  
16 case of *Citizens United* for a movie that said, and I quote, "if  
17 you think you know everything about Hillary Clinton, wait until  
18 you see the movie" -- that ad could be subject to disclosure  
19 requirements based on public informational interest.

20           The Supreme Court observed the disclaimers and  
21 disclosure provide the electorate with information and ensure  
22 voters are fully informed about a person or group who are  
23 speaking. It recognized that transparency enables the  
24 electorate to make informed decisions and give proper weight to  
25 different speakers and messages. For this reason, the

1 Fourth Circuit, in the *Real Truth About Abortion* case,  
2 concluded that the "express advocacy" standard which  
3 facilitates disclosure was constitutional under -- under  
4 *Citizens United's* upholding of regulation on such a broad range  
5 of communications for purposes of disclosure.

6 Now, of course it is true that the Wisconsin Right to  
7 Life test -- or the *Wisconsin Right to Life* case dealt with the  
8 context of electioneering communications; but what the  
9 controlling opinion said was that the test articulated in the  
10 controlling opinion was not vague; that it gave enough clarity  
11 to allow someone to determine what met that standard; and so  
12 when the Fourth Circuit compared the -- the test at 100.22(b)  
13 and the test articulated in *Wisconsin Right to Life* and noted  
14 the similarity of those ads, that constitutional holding in  
15 *Wisconsin Right to Life* is relevant to the determination --

16 **THE COURT:** There was one word different,  
17 "significant" and "substantial." That's the only difference.

18 **MS. CHLOPAK:** Well, actually, Your Honor, an  
19 additional difference that the Fourth Circuit noted was that to  
20 the extent there -- there was a more substantive difference, it  
21 was that the test at 100.22(b) is actually narrower than the  
22 *Wisconsin Right to Life* test because it requires an ad to  
23 contain an unmistakable and unambiguous electoral portion.

24 Plaintiff makes much about the fact that the  
25 commis- -- there was disagreement among the commissioners in

1 reaching conclusions about the particular advertisements and  
2 solic- -- and donation requests that were proposed in the  
3 underlying Advisory Opinion Request; but as the commission  
4 points out in its briefing, the Supreme Court has -- has held  
5 that close cases can be imagined under any standards-based  
6 test, and that problem is not addressed by the doctrine of  
7 vagueness. Those are the *Williams* and *Wurzbach* cases.

8           And I won't get into responding to the  
9 mischaracterizations of the analysis by the commissioners --  
10 we've addressed that in our brief -- but I will clarify that  
11 opposing counsel mis-describes the analysis, the nature of the  
12 question that the commissioners undertake when making a  
13 determination about whether an ad constitutes express advocacy  
14 under 100.22(b).

15           The commissioners do not substitute themselves as the  
16 "reasonable person" referenced in the standard. Rather, they  
17 make a determination about whether the ad meets the test at  
18 100.22(b). So whereas the commissioners or certain  
19 commissioners concluded that an ad did not meet the test at  
20 100.22(b) does not necessarily manifest a determination by  
21 those commissioners that the ad does not contain express  
22 advocacy or that it could not be construed to contain express  
23 advocacy but, rather, it reflects their determination that a  
24 reasonable person might be able to conclude that the ad  
25 constitutes something other than express advocacy; and,

1 similarly, the commissioners determining that it does meet the  
2 test at 100.22(b) are not determining that in their view the ad  
3 is express advocacy but, rather, making a determination about  
4 what a reasonable person would conclude.

5           The Fourth Circuit itself, in the Real Truth About  
6 Abortion case, addressed the scenario where there may be  
7 disagreements among people -- among fact-finders regarding  
8 whether a -- whether a proposed communication meets the test  
9 because in that case there had been a disagreement between the  
10 commission and the district court about one of the ads  
11 proposed, and the Fourth Circuit itself cited the *Williams* and  
12 *Wurzbach* cases in recognizing that that disagreement did not  
13 demonstrate that the standard being applied was a vague one.

14           And I would further note that although there was  
15 disagreement among the commissioners as to some of the ads,  
16 there also was agreement among some of the proposed ads. So  
17 it's not the case that the commission was unable to agree on  
18 anything. There -- there was some agreement that some of the  
19 proposed ads -- there was a unanimous agreement as to some of  
20 the proposed ads that they were not express advocacy.

21           Congress created the makeup of the commission and made  
22 a conscious choice to appoint three commissioners of one party  
23 and -- or to set up a system where there can be no more than  
24 three commissioners of a particular party and requiring four  
25 votes to make any substantive decision, and this simply



1 reflects the seriousness of the issues that the commission  
2 regulates and frequently results in narrow decisions because it  
3 requires four votes for the commission to take any sort of  
4 action in enforcing the law.

5 I also -- I'm sorry. Moving back to the Wisconsin  
6 Right to Life case, the plaintiff cited the language in that  
7 decision about the tie going to the speaker, and that language  
8 is taken out of context when used by opposing counsel in this  
9 case. *Wisconsin Right to Life* just like *Citizens United* and  
10 *McConnell* and *Buckley* and cases that plaintiff -- the  
11 lower-court cases that plaintiff relies on all involved a  
12 situation in which a group was being prohibited from engaging  
13 in speech that it wanted to engage in; and although plaintiff  
14 repeatedly characterizes the consequences of this particular  
15 case as being "censorship" or "prohibition," it's simply  
16 inaccurate. Plaintiff, from the time that it created the  
17 advertisements it wants to run, has been free to run those  
18 advertisements. It simply must observe the disclosure  
19 requirements associated with them.

20 When Justice Roberts indicated that when there's a --  
21 if there's a question about a -- excuse me -- when there's a  
22 question about a test that would result in prohibiting a  
23 group's speech the tie must go to the speaker, he was not  
24 talking about whether a disclosure requirement might apply.

25 **THE COURT:** Your position is that this only requires

1 them to disclose whether or not the decision or the tie -- in  
2 that situation, they were referring to a prohibition on speech  
3 itself, not just mere disclosure --

4 **MS. CHLOPAK:** Correct.

5 **THE COURT:** -- before you speak.

6 **MS. CHLOPAK:** That's correct and that's why the  
7 language that that statement compared the speaker versus the  
8 censor -- there is no censor in this case because plaintiffs  
9 are free to speak, and I think something --

10 **THE COURT:** But aren't they also exposing themselves  
11 to potential civil or criminal sanctions if they speak and  
12 don't -- and are found to have violated the election code?

13 **MS. CHLOPAK:** If they -- so -- let me take one step  
14 back. First of all, the commission does not have criminal  
15 jurisdiction over plaintiffs. So while it's true that there  
16 are criminal penalties for knowing and willful violations of  
17 the Act, the commission has no authority, no -- no criminal  
18 authority, and I'm not aware of any criminal cases brought for  
19 violations of the disclosure requirements; but it is true that  
20 plaintiff has an obligation -- to the extent that it's -- that  
21 it would be distributing express advocacy or that it's a  
22 political committee, it certainly would have disclosure  
23 obligations; and if it failed to meet those disclosure  
24 obligations, then, yes, it could be subject to civil penalties  
25 although I think the reality in this case is that, as I

1 mentioned, in order to bring an enforcement -- excuse me -- in  
2 order to bring an enforcement action, four commissioners need  
3 to agree to bring it. There's a multi-step process which we  
4 detailed in our brief that follows when the -- when there is a  
5 complaint brought against a party, and I'd be happy to briefly  
6 go over that.

7           **THE COURT:** Well, I just -- essentially what a  
8 three-three tie is, is you've got a green light because the  
9 enforcement mechanism or -- you have to have a four-three vote  
10 in order to sustain a violation --

11           **MS. CHLOPAK:** That's correct and we --

12           **THE COURT:** -- on an application.

13           **MS. CHLOPAK:** And certainly we can't make any  
14 guarantees that plaintiffs could never -- that the commission  
15 couldn't reach a different conclusion in the context of  
16 enforcement. The reality is that's probably very unlikely in  
17 this situation, at least with the current makeup of the  
18 commission.

19           **THE COURT:** But it's not a grant of immunity.

20           **MS. CHLOPAK:** It is not a grant of immunity. That's  
21 correct.

22           But I wanted to take a step back and just clarify that  
23 this standard that applies when we're talking about disclosure,  
24 which is what each of the challenged requirements results in in  
25 this case -- the standard for those types of laws is

1 "intermediate scrutiny," not "strict scrutiny," and that simply  
2 required that under -- under intermediate scrutiny, the law  
3 must be upheld if it is substantially related to a sufficiently  
4 important governmental interest. There is no "narrow  
5 tailoring" requirement. This is not strict scrutiny.

6 **THE COURT:** It's referred to as "exacting scrutiny."

7 **MS. CHLOPAK:** That's correct. It's an -- it's an  
8 intermediate level of scrutiny, but "exacting scrutiny" is how  
9 it is generally referred to in the decision.

10 As Your Honor, I think, pointed out, the language in  
11 *Citizens United* talking about a -- you know, a functional  
12 equivalent of a prior restraint indeed involved the prohibition  
13 on speech. The whole issue and not part of the opinion was  
14 that the PAC requirement -- both in *Citizens United* and in *MCFL*  
15 which plaintiff talks about -- in those cases it was not a  
16 requirement that that particular group comply with certain  
17 registration and reporting requirements. It was that the  
18 particular group could not speak unless they set up a  
19 separate -- a corporate PAC, and that was the only organization  
20 through which they could speak.

21 Those corporate PACs were, in turn, subject to a  
22 variety of requirements that do not apply to plaintiff or other  
23 groups in plaintiff's situation. Before *Citizens United*,  
24 corporations that could only speak through PACs -- those PACs  
25 were subject to various restrictions on sources that they could

1 solicit for contributions and the amounts that they could  
2 solicit from those sources. So they were substantially  
3 limited. It was an actual limitation on the amounts that the  
4 PACs could -- could raise for their speech, and it was an  
5 absolute prohibition on direct corporate speech.

6           What the Court in *Citizens United* said was that that  
7 PAC -- that those PACs were not an adequate substitute for  
8 direct corporate speech. Plaintiffs are not being required to  
9 substitute an alternative -- to provide a different  
10 organization through which to speak.

11           Okay. Following the Supreme Court's decision in  
12 *Citizens United*, several points are -- are clear and have been  
13 reinforced and made clear by a number of different lower-court  
14 decisions. As I mentioned, disclosure requirements are subject  
15 to intermediate, not strict scrutiny which requires a  
16 substantial relationship between the disclosure requirements  
17 and a sufficiently important interest.

18           The Supreme Court not only affirmed that principle in  
19 *Citizens United*, it reaffirmed it shortly after in a case  
20 called "*Doe versus Reed*," and it's been recognized by various  
21 lower courts in decisions since the Supreme Court's decision,  
22 including, I might point out, a Tenth Circuit decision called  
23 "*New Mexico Youth Organized versus Herrera*."

24           Courts have also recognized that PAC registration and  
25 reporting requirements are disclosure requirements that are

1 subject to that "exacting scrutiny" test. In *SpeechNow*, the  
2 Supreme Court specifically addressed a group similar to  
3 Free Speech that engaged only in independent expenditures.  
4 From what plaintiff has alleged, they don't intend to make  
5 direct contributions to candidates. All of the activities that  
6 they have outlined concern either making communications, a  
7 number of which some of the commissioners determined were  
8 express advocacy, and then raising money to finance similar  
9 communications in the future.

10           Again, the Tenth Circuit recognized that PAC  
11 registration or reporting requirements are disclosure  
12 requirements; and a number of courts, including  
13 *Citizens United*, have similarly recognized that the government  
14 has a substantial interest in providing the public with  
15 information about who is speaking about a candidate and who is  
16 funding such speech.

17           Now, plaintiff hasn't said very much about the "major  
18 purpose" test although it focused on it significantly in its  
19 brief; but I would just point out that the commission does  
20 employ a "major purpose" test as required by the Supreme Court;  
21 and the Supreme Court, in announcing that a group is only a  
22 political committee if, in addition to making either \$1,000 in  
23 expenditures or receiving \$1,000 in contributions, it has the  
24 major purpose of nominating or electing a candidate -- in  
25 announcing such a requirement about "major purpose," the

1 Supreme Court mandated an inherently comparative test.  
2 Plaintiff itself has acknowledged that determining political  
3 committee status -- determining a group's major purpose is  
4 often -- often requires a fact-intensive inquiry; and the  
5 commission's approach to determining "major purpose" has been  
6 upheld both under the Administrative Procedure Act and under  
7 the -- under the Constitution, and that approach is consistent  
8 with Tenth Circuit law which requires -- which requires that a  
9 political committee have a major purpose of nominating or  
10 electing a federal candidate and noted that that purpose may be  
11 determined by examining the organization's central  
12 organizational purpose.

13 In concluding that plaintiff was a political committee  
14 and would need to register, the draft that plaintiffs are  
15 challenging found that 72 percent of plaintiff's budget would  
16 be spent on express advocacy.

17 Now, in talking -- I'm going to move on to  
18 solicitations. When plaintiff was talking about sollicita- --  
19 when opposing counsel was talking about the solicitation  
20 standard, I believe he said something about their contributions  
21 are treated differently if they're deemed -- if their donation  
22 requests are deemed solicitations.

23 I'm not quite sure what he was talking about because  
24 since Free Speech is not making contributions to candidates,  
25 they are free to raise -- to solicit unlimited funds to pay for

1 expenditures in unlimited amounts of money. So those -- the  
2 contributions received for -- as a result of solicitations  
3 remain subject -- not subject to any sort of limits.

4           And the Surviv- -- it's also not entirely clear what  
5 the dispute between the parties is regarding solicitation  
6 because both the commission and plaintiff appear to rely on the  
7 same standard, the test articulated by the Second Circuit in  
8 the *Survival Education Fund* case, which, when concluding that  
9 the request at issue in that case did solicit contributions,  
10 noted the important interests served by disclosure in the  
11 context of solicitations. The Second Circuit said, and I  
12 quote, "Potential contributors are entitled to know that they  
13 are supporting an independent critic of a candidate and not a  
14 group that may be in league with that candidate's opponent."

15           Finally, I would like to briefly address the other  
16 aspects of plaintiff's requests for preliminary injunctive  
17 relief. Plaintiff has failed -- has utterly failed to meet the  
18 requirement for showing irreparable harm. What they seek to  
19 avoid in this case are the costs and time -- the costs of time  
20 and money to comply with the registration and disclosure  
21 requirements. They have not alleged any loss of -- actual loss  
22 of First Amendment freedoms. They simply characterize the  
23 disclosure requirements as "First Amendment burdens" which they  
24 have no support -- no -- no legal support for that argument;  
25 and in terms of the balance of harms, the notion that



1 plaintiff's harms of above -- having to comply with disclosure  
2 requirements versus the harms of the public in being deprived  
3 of information regarding the sources and financing of the  
4 people who are advocating that they vote for or against a  
5 candidate is somewhat shocking.

6           In *McConnell*, the Court noted that the plaintiffs in  
7 that case were ignoring the First Amendment interests of the  
8 citizens seeking to make informed choices in the political  
9 marketplace. In the Ninth Circuit, in another case following  
10 *Citizens United*, the Court observed that for the same reasons  
11 plaintiffs have a heightened interest in speaking out about  
12 candidates now, in the run-up to the November 2012 election,  
13 voters have a heightened interest in knowing who is trying to  
14 sway their views on candidates and how much they are willing to  
15 spend to achieve that goal.

16           And to the extent that plaintiff asks this Court to  
17 issue a nationwide injunction not only to them- -- not only as  
18 to themselves but as to every party in every court throughout  
19 this county, such a request is utterly unfounded and asks this  
20 Court to abuse its discretion.

21           The very case that -- that plaintiffs rely on, the  
22 Fourth Circuit decision in *Virginia Society for Human Life*,  
23 which on the merits was overruled by the Fourth Circuit  
24 decision -- the recent decision in *Real Truth About Obama*,  
25 found that the district court had abused its discretion in

1 issuing a nationwide injunction as to the constitutionality and  
2 enforceability of Section 100.22(b). It's well settled by the  
3 Supreme Court that injunctive relief should be no broader than  
4 necessary to provide complete relief to plaintiff, and they  
5 simply make out -- they fail to make out any basis for  
6 demonstrating that they require such over- -- such broad  
7 relief.

8           Nationwide relief would also violate fundamental  
9 principles of judicial comity and *stare decisis*. Particularly  
10 in this case where another circuit has decided precisely the  
11 issue that -- the issues presented here for itself, the notion  
12 that plaintiff wants this Court to make the law for other  
13 circuits is not supportable.

14           And lastly, the request that -- the request that the  
15 commission be precluded from litigating this case in other  
16 circuits which have the right to decide these matters for  
17 itself would preclude the Supreme Court from having the benefit  
18 of various decisions from all of the different circuits.

19           For all of those reasons, the commission submits that  
20 the challenged provision should be upheld.

21           **THE COURT:** All right. Thank you, counsel.

22           **THE CLERK:** Mr. Barr, you have 30 minutes remaining.

23           **MR. BARR:** Thank you.

24           No grant of immunity indeed. It takes four votes for  
25 an enforcement action, of course, to occur. Five of the six

1 commissioners are holdover commissioners whose terms have long  
2 expired. Commissioners come and go. We know in -- we don't  
3 know in advance who's going to be replaced when, what method of  
4 interpretation they might attach to, of the many seeds that  
5 exist, the many varieties that exist within the FEC's record.  
6 That is why we are a nation of rules, not of men, and that is  
7 why we seek the protection here.

8           Now, sometimes the FEC forgets that it's lost all of  
9 its cases. You know, the challenge to *McConnell* was a broad  
10 facial challenge when it was first brought before the  
11 Supreme Court; and while the *McConnell* court created the  
12 "functional equivalent of express advocacy" test, the case came  
13 back in the form of *Wisconsin Right to Life* where the  
14 Supreme Court said, "Okay, yeah. You know what? You've  
15 actually demonstrated real harm here in an 'as applied' manner.  
16 We're going to give the FEC another chance. We'll give it an  
17 opportunity to redefine the standards that apply to what's a  
18 regulated electioneering communication and what isn't; and be  
19 on notice, FEC. No long, complicated tests; no searching for  
20 intents and effect. None of this is permissible."

21           What happens? The FEC issues rule-making that creates  
22 a two-prong, 11-factor speech code that asks such questions as:  
23 Is the speech in question looking at the character,  
24 qualifications and fitness of office for the candidate; and, if  
25 so, how do we sniff out and decide whether that's regulated or

1 prohibited or not? And it continued down its trend of  
2 examining the intent of speakers, what reasonable audiences  
3 might think of the speech and the like; and, finally, in  
4 *Citizens United*, the Supreme Court said enough was enough, and  
5 they struck it down facially.

6           Now, it's curious because in *Citizens United*, the FEC  
7 argued, "There's no ban." I don't think the FEC has ever seen  
8 a ban. In most of their litigation, they are very keen to --  
9 to explain, "There's no ban here." Since *CU*, the argument was,  
10 "Well, corporations can make PACs; and so long you have PACs,  
11 you can go through the PAC organization, and you're  
12 sufficiently able to speak."

13           Now, it shocks me to hear in this courtroom today that  
14 I -- that my organization, the Free Speech that we're  
15 representing, can go out and speak freely. Well, but not  
16 really. You have to be a PAC. Of course, the Supreme Court  
17 said it was a ban in *Citizens United* when you had to create a  
18 PAC to speak, and we're told we can speak today but only if  
19 we're a PAC; and Justice Kennedy noted in *Citizens United* that  
20 PACs have to preexist before they can speak; and indeed the  
21 reporting obligations of PACs indicate that you'd better have  
22 your record-keeping in place as a PAC before the FEC finds out  
23 that you are one in order to preserve your legal protection.

24           So let me get back to this important distinction  
25 between "electioneering communications" and "independent

1 expenditures." The reason why we have a "functional equivalent  
2 of express advocacy" test that was applied in *McConnell* is  
3 because you have a wholly different statute that's at bay. I  
4 indicated in our verified amended complaint and in the PI memo  
5 all of the constitutional concerns that the Congress undertook  
6 when it was considering the electioneering communications  
7 provisions, and they are very careful not to link it as an  
8 expenditure. We know that -- as a matter of law, that you're  
9 either an electioneering communication or that you are an  
10 independent expenditure. We know that they have very different  
11 reporting regimes; and this curious problem happens, and it was  
12 brought up both in the two hearings on this matter; it was  
13 brought up in the hearing for another organization, National  
14 Defense Committee.

15 Well, if the test -- if the "speech trigger" test that  
16 you have to rely on to know what kind of speech you have is  
17 identical for an electioneering communication and independent  
18 expenditure, how do I know which reports to file? How I do  
19 know how to comply with the law? There is no sensible way.  
20 You -- they are mutually exclusive. You are one or the other.

21 Now, moreover, in *McConnell*, when the courts  
22 interpreted the electioneering communications provision, it  
23 noted a few things: One, PACs don't file electioneering  
24 communication reports. These are simplified, streamlined  
25 reports. Number one, you only file these when you hit an

1 aggregate amount of \$10,000. It's not the 1,000-dollar  
2 expenditure limit that you have with independent expenditures.  
3 So you're at \$10,000.

4           Speakers know up front if you name a candidate you're  
5 within that category. They know the media that they have to  
6 communicate through: Television, radio and the like; and they  
7 can look to the FEC for clear guidance because it indicates the  
8 number of electorate that that advertisement has to reach.

9           These are all careful, statutory and constitutional  
10 considerations that Congress undertook in fashioning  
11 electioneering communications. So the Supreme Court said,  
12 "Because it's so rigorously defined, we can have a broader  
13 standard defining what's in there because we have all these  
14 safeguards."

15           But now let's -- let's go over to 100.22(b) and  
16 express advocacy. There is no clear "day" specification  
17 whereas in ECs we have a 30- or 60-day trigger. All we know is  
18 that proximity to an election might trigger regulation. Now,  
19 in this case during the oral hearings before the FEC, one  
20 commissioner suggested that that might be 30 days. The  
21 vice chair suggested that might go out as far as six months or  
22 eight months. We have no guidance.

23           We know that we have to ask what a reasonable person  
24 would see that speech to be and how they would interpret that.  
25 We have to look for an electoral portion; and when Draft B,

1 issued by the Democrat commissioners, goes through this test,  
2 it simply recites: "Because there is an electoral portion, we  
3 find that the regulation" -- it's -- it's a tautology. We  
4 don't know what that -- we don't know what that means.  
5 Reasonable minds couldn't differ as to whether it encourages  
6 actions to elect or defeat one or more clearly identified  
7 candidates; and it misses the constitutional safeguard that was  
8 found in *Furgatch*. It has to have a clear plea for action;  
9 and -- and if reasonable minds can disagree about it, then it  
10 has to escape the regulation.

11           There must be some class of speech that is beyond the  
12 FEC's reach. If I love Jello and I want to run ads about Jello  
13 around the United States, presumably it's not covered under the  
14 FEC's regulations. Mention a candidate or start to throw other  
15 elements in, we don't know; and we've got a clear split on at  
16 least three of our -- the advertisements that they were -- that  
17 were crucial for issues that they wanted to get out and talk  
18 about, and -- and we don't know: Are we express advocacy? Are  
19 we electioneering communication? That matters greatly because  
20 that -- there are entirely different reporting regimes, and we  
21 have very real civil penalties if we get that wrong. The FEC  
22 should be able to articulate that.

23           There should also be some category of speech that  
24 isn't regulated. That's issue advocacy. Now, this isn't --  
25 this isn't anarchy. This isn't lawlessness. This is what's

1 happened in every area of First Amendment jurisprudence. So if  
2 you look at, for example, film licensing provisions, if you  
3 look at obscenity licensing provisions, Bantam Books,  
4 *Intercircuit State (sic - Interstate Circuit) versus Dallas*,  
5 these are -- there were systems that didn't ban speech, if we  
6 accept that as true from the FEC, but merely classified it.  
7 Even there you have to have strict procedural safeguards and  
8 objective boundaries.

9           Defamation is the same. All these areas have  
10 carefully narrowed the boundaries of where regulable or  
11 prohibited speech is at so that innocent speakers don't get  
12 caught up in government bureaucrats, as the *Citizens United*  
13 court said, pouring over every bit of the communication to  
14 decide, "Gosh, does -- does 'support Wyoming state candidates  
15 who will protect your gun rights' really mean 'support Wyoming  
16 state candidates who will project your gun rights?'" This is  
17 absurd.

18           Burden? It's not my characterization that this is an  
19 onerous burden; this is *Massachusetts Citizens for Life* which,  
20 as far as I am aware of, has not been overturned through  
21 *Citizens United*; and while one justice who dissented in  
22 *Citizens United* would state that *Buckley* and other provisions  
23 have been overturned, his opinion is not controlling; it's a  
24 dissent. *Massachusetts Citizens for Life*, both the majority  
25 and O'Connor joining in the majority, indicate that it's not



1 just the fact that a corporation can't speak or solicit from  
2 its members. It's all of these other host of regulatory  
3 burdens that get piled onto grassroots groups and that  
4 encourage them not to speak; that effectively shut down speech.

5           Sure there's an interest in disclosure. I've already  
6 identified that as being Form 5 by the FEC, two pages, very  
7 simple. It is in perfect parity with the government interest  
8 of disclosure. It provides information: How much are you  
9 spending in any aggregate over \$250, for what candidate, in  
10 what race and in what manner? Seems to me that's sufficient  
11 for explaining to the electorate who's speaking, who's funding  
12 the speaking. You have to provide information on the  
13 contribution side: Who gave money to the group to do that?

14           We are not here to fight that. That's -- that is --  
15 that's been upheld and we're in agreement; but once you move  
16 over into "Form 3" land which is "nightmare political committee  
17 status" land, you're subject to a whole wide regime that *MCFL*,  
18 *Mass. Citizens for Life*, recognized and that Justice Kennedy  
19 recognized in *Citizen* -- there in the majority opinion. So  
20 what these -- these organizational requirements fall most  
21 heavily on nonprofit, grassroots groups, and they severely  
22 discourage them from going out to speak.

23           Let me just note that once you're in "PAC" land again,  
24 once you're in a "political committee status nightmare"  
25 situation, the FEC has issued, for example, guidance on "best

1 efforts" on how to comply with election law. This directs  
2 people towards professional actors. So if you're using someone  
3 that -- you know, a part-time-mom CPA to help you keep your  
4 books and records, that's not going to meet necessarily the  
5 FEC's "best efforts" requirements. You have to go to the  
6 professionals. You have to dole out serious money.

7           This is what *MCFL*/what *CU* was talking about. Sure  
8 we're happy to provide that information, sure we're happy to  
9 comply with Form 5; but there is in no way a justification to  
10 impose the staggering amount of paperwork, organizational  
11 requirements and going to the political professionals to meet  
12 that standard. In other words, there are manners that are less  
13 restrictive that carry out the same government interest whether  
14 you qualify that as "sufficiently important" or "compelling."

15           **THE COURT:** Aren't what you are advocating seeking to  
16 expand *Citizens United* to also prohibit the requirements upon  
17 your clients, the Form 3, and claim that the Form 3 essentially  
18 acts like the PAC that was discussed in *Citizens United*?

19           **MR. BARR:** It's not expanding *Citizens United* because  
20 *Citizens United* spoke to the issue of "electioneering  
21 communications." This is taking what the Supreme Court said in  
22 *Buckley* and in *MCFL* and is following that. As far as I know,  
23 we're the first organization that has brought a record before  
24 the Court that indicates we've gone through the advisory  
25 opinion process. We've shown how discriminatory and arbitrary

1 that is, applied to us and as applied in other enforcement  
2 matters before us. So I don't see it as an expansion there.

3 I also see that we're safeguarding the governmental  
4 interest in disclosure because we're not objecting to Form 5  
5 that provides -- that has been the longstanding manner in which  
6 we meet the government interests for disclosure.

7 **THE COURT:** But when you talk about the mom-and-pop  
8 organization, the grassroots organization doesn't have the  
9 resources to be able to fill out the Form 3, isn't that  
10 analogous to the argument that was made with regards to the PAC  
11 or the comments --

12 **MR. BARR:** Yes.

13 **THE COURT:** -- by Justice Kennedy?

14 **MR. BARR:** Yes, it is. And -- and what I would  
15 suggest is that the constraining First Amendment principles,  
16 just as we find them in defamation, just as we find them in  
17 licensing systems, just as we find them in an electioneering  
18 communications case, aren't entirely limited to that specific  
19 regime. What didn't work in *Citizens United* doesn't work here  
20 as well.

21 Now, counsel for the FEC spoke to *MCCL*, *Minnesota*  
22 *Concerned Citizens for Life*, in an attempt to distinguish it  
23 there. It is true that there is a difference of a --  
24 100-dollar threshold difference. There, you're looking at a  
25 state's reporting regime. Here, we have a nationwide reporting

1 regime with, you know, many organizations spending hundreds of  
2 thousands of dollars that have an effective media campaign.  
3 Setting \$1,000 for a national reporting regime versus 100 for a  
4 state is a distinction without a difference for purposes of  
5 this.

6           What was important and crucial to the Eighth Circuit  
7 was to go through -- and it took several pages in providing  
8 analogies between exactly how similar their provisions were in  
9 *Minnesota* with the FEC's and that it was entirely fine to  
10 require you to fill out one-time forms like you might do with  
11 Form 5 but that there was no -- that these extensive PAC  
12 requirements went beyond that interest and were, at best,  
13 tangentially related.

14           That's the same thing here. We're -- we're not  
15 objecting to an easy, objective form to fill out and file with  
16 the FEC. We're objecting to the mountain of paperwork and  
17 organizational requirements and pushing everything to -- to  
18 political professionals on the other end.

19           Now, I'd note that counsel also spoke to Tenth Circuit  
20 precedent. So we have both *Colorado Pro-life Council* (sic -  
21 *Colorado Right to Life Cmte. v. Coffman*), and we have the  
22 *New Mexico Youth Organize*. In both of those instances, the  
23 Tenth Circuit found that there was no need to impose political  
24 committee status. It recognized the burdens that attached with  
25 that to those organizations even when they use strong language.

1 If the FEC is bound by its representations in the  
2 Fourth Circuit, that -- Adav Noti also indicated that the  
3 Tenth Circuit has the strictest "major purpose" test in the  
4 nation. I would agree with that assessment.

5 A moment on solicitations. The solicitations defining  
6 clearly what are solicitations and what are not is important  
7 because, at least for some commissioners, a solicitation may  
8 turn funds that are raised under it into contributions; and we  
9 know that those -- once you hit \$1,000 in contributions, you  
10 become a PAC. So we want to -- we want to have guidance to  
11 know where's the standard for what we can say in terms of  
12 raising money that's outside of it and what's within that  
13 boundary.

14 We know that once then we hit that "PAC" status, that  
15 we can't accept money from foreign nationals, for example, and  
16 that we have to be careful for other legal provisions; but it  
17 is relevant here because one -- one standard implicates a whole  
18 host of others, and we just want to know: Are we in; are we  
19 out?

20 Lastly, speaking to nationwide relief, the fear here  
21 is -- is this simple: First Amendment jurisprudence is very  
22 different from a whole host of other areas of administrative  
23 law and other constitutional concerns. The Supreme Court has  
24 commonly referenced the fact of the tale of the Sword of  
25 Damocles. The *Sword of Damocles* is -- is the metaphor for

1 vague and uncertain laws hanging above speakers throughout the  
2 nation, and the value in that sword is not that it drops and  
3 cuts off heads or creates imminent injuries but that it can do  
4 so and that it creates disincentives for people to speak  
5 because they don't understand the law, they have a commission  
6 that's wildly erratic and chaotic in applying it and cannot  
7 articulate a single standard by which the plaintiff is expected  
8 to comply; and so because of that, what the Supreme Court has  
9 traditionally recognized is that we need breathing room around  
10 the First Amendment, not just for Free Speech but for other  
11 similarly situated organizations nationwide. This is  
12 *jus tertii*, third-party standing, and it's implicated both in  
13 vagueness concerns and in overbreadth concerns.

14           In *Citizens United*, the Supreme Court, Justice Kennedy  
15 writing the majority opinion, you know, indicated that where a  
16 proper "as applied" challenge has been brought, it's entirely  
17 permissible if there is absence of legal foundation for that  
18 provision and implicates First Amendment interest to have a  
19 facial remedy, and -- and this *Broadrick versus Oklahoma* and  
20 traditional First Amendment areas.

21           In order to secure breathing room, a nationwide  
22 injunctive relief provides that remedy. It shouldn't be  
23 incumbent upon my other clients in Virginia or a veterans group  
24 who went before the FEC, asking for guidance in that matter,  
25 who again got a three-three split, to bring a lawsuit that's

1 expensive and takes their time and may not even be able to do  
2 so or for a Christian pro-life group on the west coast to do a  
3 similar thing and to shut that all down.

4           Now, there's no -- there's no -- there's no disrespect  
5 for judicial comity in doing so. I mean, that's why we pointed  
6 out, in our brief, cases that involve, for example, national  
7 terrorism provisions and the Communications Decency Act. The  
8 fact of the matter is, is that where regulation runs so far  
9 afoul of the Constitution or is beyond the statutory grant of  
10 authority to the agency in question, it should be invalidated  
11 as a matter of fact in its entirety.

12           The Fourth Circuit -- it's important, as I noted, that  
13 in the Fourth Circuit, if you address Footnote 5, the appellant  
14 there did not seek the administrative remedies of the Court,  
15 but they say, "You know, you can't make a showing that the  
16 commission would apply this in discriminatory or different  
17 ways. You haven't done -- we don't have that here. It's not  
18 before us. You haven't shown how it's been done to other  
19 organizations."

20           So in that sense, fine. The Fourth Circuit had a bare  
21 record, and it didn't have that administrative provision of  
22 history that we bring before this Court. So there's no  
23 contradiction between those two. So --

24           **THE COURT:** But doesn't the absence of a record in  
25 that situation simply go to the facial challenge -- or the "as

1 applied" challenge as opposed to a facial challenge?

2 **MR. BARR:** It does, mm-hmm.

3 **THE COURT:** So the absence of a record as to what they  
4 sought would limit the Fourth Circuit -- or distinguish the  
5 Fourth Circuit from deciding whether "as applied" in this case  
6 would have application.

7 **MR. BARR:** Well, let me -- let me just add a caveat  
8 to -- to my prior answer; and that is to say, by failing -- by  
9 *Real Truth About Abortion* failing to provide an example of  
10 other organizations who have tried to survive the enforcement  
11 process, there's little basis for the Fourth Circuit then to be  
12 able to say, "Well, look, wow, this is going in contradictory  
13 manners." So that would -- that would supply the correct  
14 record for the Fourth Circuit to be able to make a finding of  
15 the facial invalidity. It would certainly strengthen that --  
16 that matter; but it also spoke more strongly to the  
17 "as applied" nature of the challenge, correct, Your Honor.

18 Okay. So where we're left: You know, we're left with  
19 the whim of the FEC deciding what speech is appropriate for  
20 public consumption and -- and what is not. It's exactly what  
21 was invalidated in *Citizens United*. We're told that we can  
22 speak today just so long as we're willing to disclose; but  
23 we've already indicated, in terms of independent expenditure,  
24 we're willing to do Form 5. If we have an electioneering  
25 communication, once we hit the 10,000-dollar aggregate limit,



1 we're willing to file that as well; but the FEC cannot tell  
2 this Court, because it's only representing one of -- one block  
3 of the commissioners' views, not the other, what that standard  
4 is. It just says, "Just -- just comply. There's no problem  
5 here." But *Massachusetts Citizens for Life*, not my  
6 characterization, *Massachusetts Citizens for Life* Court's  
7 characterization -- these are onerous and severe burdens placed  
8 on grassroots groups, and they shut them down, and we need them  
9 nationwide. We need a firm line of demarcation between express  
10 advocacy, issue advocacy and electioneering communications. I  
11 believe that Draft C has provided that to this Court along with  
12 what we provided in our preliminary injunctive memo. We need a  
13 line that provides objective guidance as to political committee  
14 status. That, too, is met in Draft C.

15 We also need a line defining the "major purpose" test,  
16 which is strict in the Tenth Circuit, and solicitations; and  
17 for these reasons, I believe that nationwide injunctive relief  
18 should be applied not just to Free Speech's operations but of  
19 similarly situated groups; and if there are no further  
20 questions, Your Honor, I'll conclude.

21 **THE COURT:** All right. Thank you, Mr. Barr.

22 **MR. BARR:** Thank you.

23 **MS. CHLOPAK:** Your Honor, would it be possible for me  
24 to respond to a few of opposing counsel's points? I'd be happy  
25 to let him have the last word. I'm not sure if we've used up

1 all our time.

2 **THE COURT:** How much time does she have?

3 **THE CLERK:** She has 30 minutes remaining.

4 **THE COURT:** All right. I will allow you to briefly  
5 respond, and then I will -- and I'll give equal time to  
6 Mr. Barr because he has the last word.

7 **MS. CHLOPAK:** Thank you, Your Honor.

8 Opposing counsel has suggested that his client is not  
9 clear on whether it's supposed to be filing electioneering  
10 communications report- -- reports for electioneering  
11 communications or independent expenditures, and I would just  
12 like to clarify that there have been no -- in the advisory  
13 opinion process, there were no questions raised about whether  
14 any of the communications were electioneering communications;  
15 and, more importantly, none of the proposed communications  
16 would appear to meet the Tenth -- the test for commun- -- for  
17 electioneering communications. Plaintiff has not alleged that  
18 it intends to spend \$10,000 on any of its communications. So  
19 the question of whether its proposed ads fall -- would be  
20 independent expenditures or electioneering communications is  
21 not an issue in this case because, among other reasons, they  
22 couldn't be electioneering communications.

23 Again, the Eighth Circuit decision, as I mentioned in  
24 my initial response to opposing counsel's argument --  
25 Footnote 11 of that case points out that "associations whose

1 major purpose is to influence the nomination or election of a  
2 candidate or to promote or defeat a ballot question" -- which  
3 is the standard in Minnesota for political committees -- "would  
4 still comply with the same essential requirements because they  
5 are political committees. Our holding does not affect  
6 Minnesota's regulation of political committees."

7           So the notion that Minnesota -- that the  
8 Eighth Circuit decision protects groups from having to comply  
9 with the various requirements -- the registration and reporting  
10 requirements for political committees is not accurate. What  
11 that case decided was that -- a separate requirement that  
12 required -- a separate provision that required groups that did  
13 not have -- that did not meet any sort of "major purpose"  
14 requirement, that simply spent \$100 with no other demonstration  
15 of their purpose, had to register as a political -- political  
16 fund, and the Court found that that -- did not uphold that  
17 requirement; but where a "major purpose" test existed, that  
18 requirement was upheld, and that is a provision that's more  
19 analogous to the federal -- the federal law.

20           The DC Circuit, sitting *en banc* in *SpeechNow*,  
21 specifically upheld the requirements that plaintiff is seeking  
22 to avoid for political committees. The Court held, and I  
23 quote: "We cannot hold that organizational and reporting  
24 requirements are unconstitutional. If *SpeechNow* were not a  
25 political committee, it would still have to report

1 contributions made -- it would not have to report contributions  
2 made exclusively for administrative expenses, but the public  
3 has an interest in knowing who is speaking about a candidate  
4 and who is funding that speech no matter whether the  
5 contributions were made towards administrative expenses or  
6 independent expenditures."

7           The Court recognized that money is fungible; and where  
8 a group has a major purpose of engaging -- of nominating or  
9 electing federal candidates, that disclosure and the reporting  
10 requirements are constitutional.

11           And lastly, the focus on the Fourth Circuit as not  
12 relying on a record really ignores a fundamental holding in  
13 that case regarding what plaintiff is challenging here which is  
14 the commission's approach to applying the "major purpose" test.  
15 The Fourth Circuit stated, "Although *Buckley* did create the  
16 'major purpose' test, it did not mandate a particular  
17 methodology for determining an organization's major purpose.  
18 The commission was free to administer the Federal Election  
19 Campaign Act political committee regulations through  
20 individualized adjudications," and what the Court concluded was  
21 that the commission had good and legal reasons for taking the  
22 approach it did. So it did -- that decision includes a  
23 specific and clear holding regarding the constitutionality of  
24 the commission's approach to determining "major purpose."

25           Thank you.

1           **THE COURT:** Thank you, counsel.

2           Mr. Barr.

3           **MR. BARR:** I'll be brief, Your Honor; and with your  
4 indulgence, I would simply like to read one portion from the  
5 hearing. I ordinarily strive not to do that.

6           **THE COURT:** Go ahead.

7           **MR. BARR:** During the April 12<sup>th</sup> open meeting of the  
8 Federal Election Commission, Commissioner Magan asked: "Here's  
9 the question I have for you though. The Supreme Court treated  
10 *Hillary: The Movie* as a prohibited electioneering  
11 communication because it came within the test. It came within  
12 the 'appeal to vote' test, thus was the functional equivalent;  
13 and the issue is whether or not they could prohibit that, an  
14 electioneering communication. If 'appeal to vote' and  
15 100.22(b) are the same thing, then the movie also comes within  
16 (b). If it comes within (b), then it makes it an expenditure,  
17 but the Act says it can't be both an expenditure and an  
18 electioneering communication.

19           "So which reporting regime are you subject to? And  
20 assume for the sake of argument that the draft is correct that  
21 both those ads come within the 'appeal to vote' test as  
22 articulated by the U.S. Supreme Court and are the functional  
23 equivalent of express advocacy. Is it an electioneering  
24 communication per the Supreme Court or an independent  
25 expenditure per Draft B?"

1           There are real issues here being real-world compliance  
2 issues of understanding "how do we comply with the law." We're  
3 not seeking to be renegades. We're not seeking to be  
4 anarchists. We would like a clear standard from the FEC by  
5 which to be able to plan our actions. We believe there are  
6 boundaries to its authority and jurisdictions, and so that was  
7 raised in the -- in the hearing, and it was an issue in play.

8           Second -- but it's -- certainly it's true that the  
9 Eighth Circuit had political funds and political committees,  
10 and we'll leave it to Your Honor to review that case in its  
11 entirety; but when the Eighth Circuit was analyzing the  
12 provisions, they -- the wide-ranging, "encompassed all  
13 organizations' political status" that was at issue there was  
14 deemed to be similar to the FEC's provisions.

15           Now, *SpeechNow*, which, is entirely true, upheld the  
16 PAC requirements, is not, in any way, an apposite to this case.  
17 Counsel, in oral argument before the DC Circuit, said -- agreed  
18 all of their speech were independent expenditures. By  
19 definition, if all of your speech expressly advocates the  
20 election or defeat of a clearly identified candidate, then you  
21 have, as your major purpose, that, and you may properly be  
22 subject to the PAC requirements. We're not -- we're not  
23 challenging that.

24           They also said that -- for their organization that  
25 they didn't think there was any particular PAC burden. So

1 records are important. They're -- they're dramatically  
2 important, and that goes to my last point in distinguishing the  
3 Fourth Circuit about "the record doesn't matter/is it -- is it  
4 relevant." Sure, sure it is. It's absolutely imperative.

5 *McConnell versus FEC*, a broad-brush attack is brought  
6 against McCain-Feingold in electioneering communication  
7 provisions; 100,000-page record is developed and goes through.  
8 The Supreme Court says, "Not enough facts, not enough proof  
9 here, come back, show us something more compelling."

10 We get to *Wisconsin Right to Life*, and there we see  
11 the Supreme Court say, "Well, okay. We got a new record here;  
12 and based on the facts that you've presented, we do believe  
13 it's appropriate for an 'as applied' challenge, and we're going  
14 to give the FEC another shot. Don't do all these horrible  
15 things, create long and complicated speech codes and entrap  
16 citizens within these murky tests."

17 Well, then we come back to *Citizens United* with yet a  
18 further record illustrating why the whole system has to go.  
19 So -- so records and how you exhaust your administrative  
20 remedies and what you present before the Court are absolutely  
21 relevant and do enable this Court to be able to distinguish its  
22 ruling from both the Fourth Circuit and *SpeechNow*.

23 So unless there are any questions, I will conclude my  
24 session.

25 **THE COURT:** All right. Thank you, Mr. Barr.

1           **MR. BARR:** Thank you, Your Honor.

2           **THE COURT:** Well, counsel, you are obviously much more  
3 familiar with this area of the law. I have to confess this is  
4 my first FEC challenge, and there is certainly good advocacy on  
5 both sides of the issue, and I appreciate the briefing.

6           The Eighth Circuit decision -- you filed a notice of  
7 supplemental authority on that, but I have been in trial this  
8 week and haven't had an opportunity to go through that and  
9 peruse it as well as some additional matters that you've raised  
10 in your oral arguments. So I will take the matter under  
11 advisement.

12           I am cognizant of the fact that this is a matter that  
13 deserves quick attention, given the timing and given the issues  
14 presented. So I will do my utmost to render a timely decision.  
15 We'll stand in recess at this time. Thank you.

16           **THE CLERK:** All rise. Court will stand in recess.

17           **(The proceedings conclude at 4:54 p.m.)**

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**REPORTER CERTIFICATE**

I, JAMIE L. HENDRICH, Official Federal Court Reporter  
in the United States District Court for the District of  
Wyoming, certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

09.16.12  
**Date**

\_\_\_\_\_/S/\_\_\_\_\_  
**JAMIE L. HENDRICH, CSR-RPR-CRR**  
Official Federal Court Reporter

<b>A</b>	
<b>\$1,000</b> 38:22,23 52:3 53:9	38:22
<b>\$10,000</b> 46:1,3 58:18	<b>additional</b> 30:19 64:9
<b>\$100</b> 26:14,19 59:14	<b>address</b> 40:15 55:13
<b>\$250</b> 9:10 49:9	<b>addressed</b> 31:6,10 32:6 38:2
<b>ability</b> 19:18	<b>adequate</b> 20:12 37:7
<b>able</b> 8:2 10:9 11:18 14:1,3,20 22:15 23:2,23 31:24 44:12 47:22 51:9 55:1 56:12,14 62:5 63:21	<b>adjudications</b> 60:20
<b>Abortion</b> 3:8 7:22 8:5 21:20 30:1 32:6 56:9	<b>administer</b> 60:18
<b>above-entitled</b> 65:5	<b>administrative</b> 8:1,6 19:15 21:21 39:6 53:22 55:14,21 60:2 60:5 63:19
<b>absence</b> 54:17 55:24 56:3	<b>admittedly</b> 20:24
<b>Absent</b> 6:3	<b>ads</b> 14:25 19:10 25:2 30:14 32:10,15,16 32:19,20 47:12 58:19 61:21
<b>absolute</b> 37:5	<b>advance</b> 22:23 43:3
<b>absolutely</b> 63:4,20	<b>advertisement</b> 18:11 25:11 28:17,19 29:15 46:8
<b>absurd</b> 48:17	<b>advertisements</b> 14:22 31:1 33:17,18 47:16
<b>abuse</b> 41:20	<b>advice</b> 14:20
<b>abused</b> 41:25	<b>advisement</b> 64:11
<b>accept</b> 48:6 53:15	<b>advisory</b> 8:7,14 15:1 18:1 19:25 20:14 31:3 50:24 58:12
<b>accurate</b> 25:25 59:10	<b>advocacy</b> 6:7,14,14 7:7,7 8:24,25 12:4,4 13:1 14:6,7 16:11 18:9 21:10 24:12,19 25:5,12,15 27:6,15 27:16 28:1,10 29:11 29:14 30:2 31:13,22 31:23,25 32:3,20 34:21 38:8 39:16 43:12 45:2 46:16 47:18,24 57:10,10 61:23 64:4
<b>achieve</b> 41:15	<b>advocate</b> 6:8
<b>acknowledged</b> 39:2	<b>advocated</b> 10:12
<b>ACLU</b> 22:23	<b>advocates</b> 62:19
<b>Act</b> 5:5,6,21 6:19 15:2,9 24:25 34:17 39:6 55:7 60:19 61:17	<b>advocating</b> 41:4 50:15
<b>action</b> 4:5 10:7 12:8 15:19 16:4,17 17:8 22:12 33:4 35:2 42:25 47:8	<b>affect</b> 26:22 59:5
<b>actions</b> 16:16 23:17 47:6 62:5	<b>affiliations</b> 11:10
<b>activities</b> 24:15 38:5	<b>affirmed</b> 37:18
<b>actors</b> 50:2	<b>afoul</b> 55:9
<b>acts</b> 50:18	<b>afternoon</b> 4:23,25
<b>actual</b> 37:3 40:21	<b>agency</b> 55:10
<b>ad</b> 13:8 15:22 17:24 17:25 22:10 28:13 29:14,15,18 30:22 31:13,17,19,21,24 32:2	
<b>Adav</b> 18:20 53:2	
<b>add</b> 29:10 56:7	
<b>addition</b> 11:20 14:11	
	<b>aggregate</b> 9:10 46:1 49:9 56:25
	<b>ago</b> 12:7
	<b>agree</b> 32:17 35:3 53:4
	<b>agreed</b> 62:17
	<b>agreement</b> 32:16,18 32:19 49:15
	<b>ahead</b> 61:6
	<b>air</b> 14:12,22
	<b>alleged</b> 38:4 40:21 58:17
	<b>allotted</b> 4:21
	<b>allow</b> 20:17 30:11 58:4
	<b>allowed</b> 6:9
	<b>alternative</b> 37:9
	<b>alternatives</b> 10:14 20:12
	<b>amazing</b> 13:19
	<b>ambit</b> 18:6
	<b>amended</b> 22:11 45:4
	<b>Amendment</b> 5:10 7:15 11:19 13:25 14:4 17:22 19:8 20:20 22:25 23:9,23 40:22,23 41:7 48:1 51:15 53:21 54:10 54:18,20
	<b>American</b> 2:12
	<b>Americans</b> 14:3 18:2
	<b>amount</b> 46:1 50:10
	<b>amounts</b> 24:24 37:1,3 40:1
	<b>analogies</b> 52:8
	<b>analogous</b> 51:10 59:19
	<b>analysis</b> 31:9,11
	<b>analyzed</b> 10:1
	<b>analyzing</b> 62:11
	<b>anarchists</b> 62:4
	<b>anarchy</b> 47:25
	<b>announcing</b> 38:21,25
	<b>answer</b> 21:15 22:17 22:18 56:8
	<b>anti-Carter</b> 17:3
	<b>APA</b> 22:1
	<b>apologize</b> 4:11
	<b>appeal</b> 28:14 61:12 61:14,21
	<b>Appeals</b> 7:21
	<b>appear</b> 40:6 58:16
	<b>APPEARANCES</b> 1:11
	<b>appellant</b> 55:13
	<b>appellants</b> 7:25 8:5
	<b>applicable</b> 16:7 26:3
	<b>application</b> 35:12 56:6
	<b>applied</b> 5:19 17:15,16 21:3 25:10 32:13 43:15 45:2 51:1,1 54:16 56:1,5,17 57:18 63:13
	<b>applies</b> 5:17 26:12 35:23
	<b>apply</b> 14:23 22:20 33:24 36:22 43:17 55:16
	<b>applying</b> 54:6 60:14
	<b>appoint</b> 10:24 32:22
	<b>opposite</b> 62:16
	<b>appreciate</b> 64:5
	<b>approach</b> 39:5,7 60:14,22,24
	<b>appropriate</b> 23:25 56:19 63:13
	<b>April</b> 61:7
	<b>arbitrary</b> 50:25
	<b>ardent</b> 18:3
	<b>area</b> 12:2 48:1 64:3
	<b>areas</b> 8:15 14:2 48:9 53:22 54:20
	<b>aren't</b> 34:10 50:15 51:18
	<b>argued</b> 18:19 19:12 44:7
	<b>arguing</b> 20:9
	<b>argument</b> 40:24 44:9 51:10 58:24 61:20 62:17
	<b>arguments</b> 2:2,3,4,5 2:6 25:8,18 64:10
	<b>array</b> 8:13
	<b>articulate</b> 14:1 47:22 54:7
	<b>articulated</b> 16:20,23 30:9,13 40:7 61:22
	<b>Ashcroft</b> 2:12 22:23
	<b>asked</b> 5:3,4,6 14:12 21:14 22:6 61:8
	<b>asking</b> 13:25 54:24
	<b>asks</b> 16:8 41:16,19

43:22  
**aspects** 40:16  
**assessment** 53:4  
**assistance** 8:6  
**associated** 33:19  
**associations** 26:12,16  
 58:25  
**assume** 61:20  
**attach** 11:17 43:4  
**attached** 52:24  
**attack** 15:17 63:5  
**attempt** 51:22  
**attendant** 12:23  
 21:25  
**attention** 64:13  
**ATTORNEY'S** 1:20  
**audience** 18:13  
**audiences** 44:2  
**authority** 34:17,18  
 55:10 62:6 64:7  
**availability** 25:14  
**availed** 8:7  
**Avenue** 1:13  
**average** 14:3  
**avoid** 40:19 59:22  
**awarded** 19:14  
**aware** 34:18 48:20

---

**B**


---

**b** 1:17 13:22 14:25  
 46:25 61:16,16,25  
**back** 6:14 14:21 33:5  
 34:14 35:22 43:13  
 44:24 63:9,17  
**background** 28:18  
**balance** 23:12 40:25  
**ballot** 59:2  
**ban** 11:14 29:1,4 44:7  
 44:8,9,17 48:5  
**banc** 12:7 59:20  
**banned** 10:20  
**Bantam** 48:3  
**bare** 55:20  
**Barr** 1:15 2:2,4,6 4:7  
 4:8,23 5:1 10:18  
 11:6 13:4,6 20:5  
 24:4,5 42:22,23  
 50:19 51:12,14 56:2  
 56:7 57:21,22 58:6  
 61:2,3,7 63:25 64:1  
**based** 17:1 29:19

63:12  
**basic** 5:6 28:18  
**basis** 42:5 56:11  
**bay** 45:3  
**bear** 18:21  
**bearing** 26:24  
**behalf** 4:17  
**believe** 14:4 18:14  
 22:14,17 23:6 25:25  
 39:20 57:11,17 62:5  
 63:12  
**believed** 16:21 18:12  
 18:16  
**benefit** 19:8 42:17  
**Benjamin** 1:15  
**best** 49:25 50:5 52:12  
**better** 44:21  
**beyond** 8:23 9:10  
 10:6 11:14,15 22:3  
 47:11 52:12 55:9  
**bit** 48:13  
**black** 13:24  
**block** 57:2  
**blue** 13:24  
**books** 48:3 50:4  
**boon** 15:3  
**bound** 53:1  
**boundaries** 12:24  
 13:18 48:8,10 62:6  
**boundary** 53:13  
**bounds** 7:14  
**boutique** 20:16  
**Box** 1:21  
**break** 15:8  
**breathing** 54:9,21  
**brief** 5:13 9:4,21  
 10:17 31:10 35:4  
 38:19 55:6 61:3  
**briefing** 31:4 64:5  
**briefly** 35:5 40:15  
 58:4  
**bright-light** 6:25  
**bright-line** 6:11  
 23:20  
**bring** 21:2 35:1,2,3  
 54:25 55:22  
**broad** 30:4 42:6 43:9  
**broad-brush** 63:5  
**broader** 27:25 42:3  
 46:12  
**Broadrick** 2:13 54:19

**brought** 12:22 13:7  
 27:3 34:18 35:5  
 43:10 45:12,13  
 50:23 54:16 63:5  
**Buckley** 2:14 6:16  
 9:15 12:21 22:4  
 24:13 27:5 33:10  
 48:22 50:22 60:15  
**budget** 39:15  
**budgets** 8:11  
**burden** 10:9 22:22,25  
 48:18,19 62:25  
**burdens** 10:18 21:14  
 21:23 40:23 49:3  
 52:24 57:7  
**burdensome** 10:14  
 11:17 20:12 21:15  
 21:16  
**bureaucrats** 48:12  
**Burns** 2:19 23:8  
**bylaws** 8:8

---

**C**


---

**C** 13:23 23:19 57:11  
 57:14  
**call** 5:17 7:11 15:6,6  
 15:18,18,19,19,19  
 16:5,6  
**called** 6:6 9:19 37:20  
 37:22  
**calls** 26:20  
**campaign** 5:5,6,21  
 6:19 24:12,19 52:2  
 60:19  
**campaign-related**  
 24:15  
**can't** 15:15 17:13  
 35:13 49:1 53:15  
 55:15 61:17  
**candidacy** 9:12  
**candidate** 5:23 6:9  
 7:9,12,18 11:11  
 18:10 21:12 25:12  
 28:3,15 38:15,24  
 39:10 40:13 41:5  
 43:24 46:4 47:14  
 49:9 59:2 60:3  
 62:20  
**candidate's** 40:14  
**candidates** 11:25  
 16:12,17 17:6 18:5  
 18:11,15 38:5 39:24  
 41:12,14 47:7 48:14  
 48:16 60:9  
**careful** 45:7 46:9  
 53:16  
**carefully** 48:10  
**carried** 23:3  
**carry** 5:8 50:13  
**case** 1:4 5:13 6:16  
 18:21 21:20 25:19  
 26:4,9,11,22,24  
 29:16 30:1,7 32:6,9  
 32:17 33:6,9,15  
 34:8,25 35:25 37:19  
 40:8,9,19 41:7,9,21  
 42:10,15 43:12  
 46:19 51:18 56:5  
 58:21,25 59:11  
 60:13 62:10,16  
**cases** 12:22 22:24  
 27:3,4 29:2 31:5,7  
 32:12 33:10,11  
 34:18 36:15 43:9  
 55:6  
**cash** 11:9,11,11  
**Casper** 1:6,24  
**categories** 5:12 11:3  
 11:3 13:14  
**category** 8:23 24:19  
 27:25 46:5 47:23  
**caught** 48:12  
**cause** 16:19  
**caveat** 56:7  
**ceiling** 24:15  
**cancel** 19:9 34:8,8  
**canceling** 33:15  
**central** 39:11  
**certain** 6:2 28:1  
 31:18 36:16  
**certainly** 34:22 35:13  
 56:15 62:8 64:4  
**CERTIFICATE** 65:1  
**certify** 65:4  
**chair** 46:21  
**challenge** 9:20 12:19  
 21:3 27:3 43:9,10  
 54:16 55:25 56:1,1  
 56:17 63:13 64:4  
**challenged** 8:21  
 35:24 42:20  
**challenges** 21:2

- challenging** 27:1,2  
39:15 60:13 62:23
- chance** 43:16
- changes** 11:1
- chaos** 23:15
- chaotic** 54:6
- character** 15:17  
43:23
- characterization**  
48:18 57:6,7
- characterize** 12:14  
40:22
- characterizes** 33:14
- Cheyenne** 1:14,21  
4:12
- Chief** 18:25
- children** 22:8
- Chlopak** 1:17 2:3,5  
4:18,19,19,20 24:6  
24:8 30:18 34:4,6  
34:13 35:11,13,20  
36:7 57:23 58:7
- CHO-pack** 4:18
- choice** 17:5 32:22
- choices** 41:8
- chores** 22:9,9
- Christian** 55:2
- Cir** 2:17,20,23 3:6,7  
3:10,14
- circuit** 3:3 8:2 12:7  
13:6 17:2 18:19  
19:12 21:17,18,22  
21:24 25:18 26:1,2  
26:6,9,10,11,17  
30:1,12,19 32:5,11  
37:22 38:10 39:8  
40:7,11 41:9,22,23  
42:10 48:4 52:6,19  
52:23 53:2,3 55:12  
55:13,20 56:4,5,11  
56:14 57:16 58:23  
59:8,20 60:11,15  
62:9,11,17 63:3,22  
64:6
- Circuit's** 20:25 26:22
- circuits** 42:13,16,18
- CITATION** 2:10 3:1
- cited** 26:11 32:11  
33:6
- cites** 21:6
- Citi** 29:6
- Citing** 24:13
- Citizen** 49:19
- citizens** 2:15,21 3:5  
5:16 9:5,16,16,23  
10:2,11,11,19,19,22  
10:23 12:21 19:20  
24:8,16 25:16 26:2  
27:12 28:20 29:3,7  
29:9,11,16 30:4  
33:9 36:11,14,23  
37:6,12,19 38:13  
41:8,10 44:4,6,17  
44:19 48:12,19,21  
48:22,24 49:18  
50:16,18,19,20  
51:19,22 54:14  
56:21 57:5,6 63:16  
63:17
- City** 3:3
- civil** 2:12 4:5 5:9  
34:11,24 47:21
- claim** 13:1 22:12  
50:17
- clarify** 25:23 31:10  
35:22 58:12
- clarity** 30:10
- class** 47:11
- classified** 48:6
- clear** 16:4 17:8 19:15  
19:18 25:1 28:9  
37:12,13 40:4 46:7  
46:16 47:8,15 58:9  
60:23 62:4
- clearest** 24:10
- clearly** 5:23 16:12,16  
18:10 21:12 47:6  
53:6 62:20
- CLERK** 4:2 42:22  
58:3 64:16
- client** 58:8
- clients** 50:17 54:23
- Clinton** 29:17
- close** 31:5
- Cmte** 2:16 52:21
- coast** 55:2
- code** 34:12 43:22
- codes** 63:15
- Coffman** 2:16 52:21
- cognizant** 9:1 64:12
- Colorado** 2:16 52:20  
52:21
- come** 11:22 28:20  
43:2 61:21 63:9,17
- comes** 61:15,16
- comity** 42:9 55:5
- commence** 4:1
- comments** 51:11
- commercial** 25:11
- commis** 30:25
- commission** 1:6,18  
4:5 5:1,2,7 14:19  
19:14 27:23 31:3  
32:10,17,21 33:1,3  
34:14,17 35:14,18  
38:19 40:6 42:15,19  
54:5 55:16 60:18,21  
61:8
- commission's** 13:21  
24:18,22 25:21 27:1  
39:5 60:14,24
- commissioner** 46:20  
61:8
- commissioners** 8:17  
8:18 13:24 15:21  
16:3,20,23 18:12  
23:20 30:25 31:9,12  
31:15,18,19,21 32:1  
32:15,22,24 35:2  
38:7 43:1,1,2 47:1  
53:7 57:3
- commissions** 7:16
- committee** 5:4 8:3  
9:20 10:1,7,24  
11:13 12:9 20:22  
21:4 24:23 25:22  
34:22 38:22 39:3,9  
39:13 45:14 49:16  
49:24 52:24 57:13  
59:25 60:19
- committees** 11:11,11  
26:23 59:3,5,6,10  
59:22 62:9
- common** 22:9
- commonly** 53:24
- commun** 58:16
- communicate** 46:6
- communicated** 8:10
- communication** 6:8  
6:10 8:10 9:13 15:8  
16:13,21 18:7,14  
19:6 20:19,21 27:7  
28:2 32:8 43:18
- 45:9,17,24 47:19  
48:13 56:25 61:11  
61:14,18,24 63:6
- communications**  
5:15,20,22 6:6,20  
7:2,8 8:25 11:25  
14:7,12 20:6,8 21:8  
21:10 25:12 27:17  
27:20,22,24,25 28:1  
28:5,7,11,23 29:13  
30:5,8 38:6,9 44:25  
45:6,22 46:11 50:21  
51:18 55:7 57:10  
58:10,11,14,14,15  
58:17,18,20,22
- comparative** 39:1
- compared** 30:12 34:7
- compelling** 12:14  
50:14 63:9
- compels** 14:1 17:23
- complaint** 9:6 17:14  
35:5 45:4
- complete** 42:4
- completely** 9:18
- compliance** 11:8 62:1
- complicated** 19:21  
20:13 43:19 63:15
- comply** 36:16 40:20  
41:1 45:19 50:1,9  
54:8 57:4 59:4,8  
62:2
- component** 14:5
- concern** 38:6
- concerned** 3:5 17:3  
26:2 51:22
- concerns** 45:5 53:23  
54:13,13
- conclude** 31:24 32:4  
57:20 63:23 64:17
- concluded** 30:2 31:19  
60:20
- concluding** 39:13  
40:8
- conclusion** 35:15
- conclusions** 31:1
- concurrence** 19:2
- confess** 64:3
- conflates** 9:21
- conflicting** 8:16
- Congress** 27:13,14,15  
32:21 45:5 46:10

**connect** 7:8  
**connection** 7:10  
**conscious** 32:22  
**consequences** 25:3  
 33:14  
**considerations** 23:16  
 46:10  
**considering** 45:6  
**consistent** 39:7  
**constitutes** 23:11  
 31:13,25  
**Constitution** 27:14  
 39:7 55:9  
**constitutional** 5:12  
 22:1 23:16 27:5  
 30:3,14 45:5 46:9  
 47:7 53:23 60:10  
**constitutionality** 6:5  
 25:20 27:4 29:3,8  
 42:1 60:23  
**constitutionally**  
 24:11 25:17  
**constraining** 51:15  
**construction** 6:18  
**construed** 22:3 31:22  
**consumption** 56:20  
**contain** 30:23 31:21  
 31:22  
**containing** 16:11  
**contains** 18:9  
**contemplating** 10:23  
**context** 22:21 28:19  
 30:8 33:8 35:15  
 40:11  
**continued** 44:1  
**continues** 17:16  
 19:17  
**contradiction** 8:18  
 55:23  
**contradictory** 8:14  
 56:12  
**contribution** 14:17  
 49:13  
**contributions** 11:21  
 11:22 24:25 37:1  
 38:5,23 39:20,24  
 40:2,9 53:8,9 60:1,1  
 60:5  
**contributors** 40:12  
**control** 17:24 18:3  
 19:4

**controlling** 7:23  
 28:12 30:9,10 48:23  
**convene** 19:4  
**coordinate** 11:25  
**coordination** 11:24  
**copy** 8:8  
**corporate** 11:14  
 36:19,21 37:5,8  
**corporation** 49:1  
**corporations** 10:19  
 27:19 28:6,10,24  
 36:24 44:10  
**correct** 12:23,25 13:4  
 19:11 34:4,6 35:11  
 35:21 36:7 56:13,17  
 61:20 65:4  
**costs** 40:19,19  
**couldn't** 10:21 15:24  
 21:4 35:15 47:5  
 58:22  
**Council** 52:20  
**counsel** 24:7 27:21  
 31:11 33:8 39:19  
 42:21 51:21 52:19  
 58:8 61:1 62:17  
 64:2  
**counsel's** 57:24 58:24  
**counted** 15:4,16  
**county** 41:19  
**couple** 25:24 29:2  
**course** 9:21 18:19,25  
 20:11 21:10,24 22:7  
 22:12 23:13 30:6  
 42:25 44:16  
**Court's** 6:13 7:24  
 27:10 37:11,21 57:6  
**Courthouse** 1:23  
**courtroom** 44:13  
**courts** 12:22 13:17  
 37:21,24 38:12  
 45:21  
**covered** 47:13  
**CPA** 50:3  
**CPAs** 20:16  
**create** 7:4 44:17  
 60:15 63:15  
**created** 32:21 33:16  
 43:11  
**creates** 43:21 54:3,4  
**criminal** 5:9 10:20,25  
 34:11,14,16,17,18

**critic** 40:13  
**cronies** 15:4,14  
**crucial** 47:17 52:6  
**CSR-RPR-CRR** 1:22  
 65:6  
**CU** 12:5 44:9 50:7  
**curious** 18:18 44:6  
 45:11  
**current** 35:17  
**cuts** 54:3

---

**D**

---

**D.C** 3:10  
**Dallas** 3:3 48:4  
**Damocles** 53:25,25  
**Date** 65:6  
**David** 1:17  
**day** 46:16  
**days** 5:23 11:2 46:20  
**DC** 1:19 21:17 26:11  
 59:20 62:17  
**deal** 5:21  
**dealt** 6:17 30:7  
**Decency** 55:7  
**decide** 7:16 14:5 18:9  
 42:16 43:25 48:14  
**decided** 7:21 27:3  
 42:10 59:11  
**deciding** 56:5,19  
**decision** 7:21 26:1,1  
 26:3,7 28:21,25  
 32:25 33:7 34:1  
 36:9 37:11,21,22  
 41:22,24,24 58:23  
 59:8 60:22 64:6,14  
**decisions** 24:13 27:9  
 27:10 29:24 33:2  
 37:14,21 42:18  
**decisis** 42:9  
**dedicated** 18:15  
**deemed** 39:21,22  
 62:14  
**deems** 11:13  
**defamation** 48:9  
 51:16  
**defeat** 6:9 7:12 16:12  
 16:16 18:10 21:12  
 47:6 59:2 62:20  
**defeated** 7:19  
**defendant** 1:7,17  
 4:17

**defending** 13:21  
**defense** 9:12 13:22,23  
 18:19 45:14  
**defined** 5:22 46:12  
**defines** 24:19  
**defining** 20:22 46:13  
 53:5 57:15  
**definition** 7:4 62:19  
**definitions** 23:18  
**demands** 10:15 14:4  
**demarcation** 57:9  
**Democrat** 47:1  
**Democratic** 8:17  
**demonstrate** 32:13  
**demonstrated** 43:15  
**demonstrating** 42:6  
**demonstration** 59:14  
**Department** 22:7  
**deprived** 41:2  
**described** 28:13  
**deserve** 23:21  
**deserves** 64:13  
**designed** 6:20  
**detailed** 8:9 35:4  
**determination** 8:2  
 28:17 30:15 31:13  
 31:17,20,23 32:3  
**determine** 30:11  
**determined** 9:1 38:7  
 39:11  
**determining** 6:24  
 24:22 25:21 32:1,2  
 39:2,3,5 60:17,24  
**develop** 19:21  
**developed** 63:7  
**didn't** 48:5 51:19  
 55:21 62:25  
**differ** 16:15 47:5  
**difference** 30:17,19  
 30:20 51:23,24 52:4  
**different** 8:15 9:2,18  
 11:2,3 13:13 27:24  
 29:25 30:16 35:15  
 37:9,13 42:18 45:3  
 45:10 47:20 53:22  
 55:16  
**differently** 14:17  
 27:15 39:21  
**difficult** 20:13  
**direct** 8:18 14:20  
 37:5,8 38:5

**directly** 14:19  
**directs** 50:1  
**disagree** 47:9  
**disagreement** 30:25  
 32:9,12,15  
**disagreements** 32:7  
**disbursements** 11:2  
 13:14  
**disclaimers** 14:16  
 29:20  
**disclose** 34:1 56:22  
**disclosed** 24:20  
**disclosure** 9:2,5  
 12:12,19,23 24:25  
 25:5,9 26:5 27:18  
 29:5,8,12,18,21  
 30:3,5 33:18,24  
 34:3,19,22,23 35:23  
 37:14,16,25 38:11  
 40:10,20,23 41:1  
 49:5,8 51:4,6 60:9  
**disclosures** 24:11  
**discourage** 49:22  
**discretion** 41:20,25  
**discriminatory** 50:25  
 55:16  
**discuss** 7:8  
**discussed** 50:18  
**discusses** 15:9 17:5  
**discussing** 17:4 21:3  
**disincentives** 54:4  
**dispute** 20:24 27:23  
 40:5  
**disrespect** 55:4  
**dissent** 48:24  
**dissented** 48:21  
**distill** 17:18  
**distinction** 6:13 12:1  
 27:21 44:24 52:4  
**distinguish** 12:3  
 51:22 56:4 63:21  
**distinguished** 26:7  
**distinguishing** 8:24  
 63:2  
**distributing** 34:21  
**5**  
 21:24 32:10 41:25  
 65:3,3  
**dividends** 11:4  
**dividing** 14:6,8  
**dizzying** 8:13

**doctrine** 31:6  
**doctrines** 6:23  
*Doe* 2:18 37:20  
**doesn't** 20:7 21:9  
 27:23 51:8,19 55:24  
 63:3  
**doing** 13:11 17:1  
 22:9 55:5  
**DOJ** 11:23  
**dole** 50:6  
**dollars** 52:2  
**don't** 7:1,2 13:12,12  
 13:22 16:4,18,21  
 17:6,9 19:15 20:17  
 21:12 24:3 34:12  
 38:4 43:2 44:7  
 45:23 47:4,4,15,18  
 48:11 51:2 54:5  
 55:17 63:14  
**donation** 8:11 14:13  
 31:2 39:21  
**donations** 24:24  
**doubt** 18:2 19:8  
**draft** 8:14 13:22,23  
 22:8 23:19 39:14  
 46:25 57:11,14  
 61:20,25  
**drafts** 23:15  
**dramatically** 63:1  
**draw** 27:21  
 □ □ □  
**dueling** 23:15

---

**E**


---

**E** 1:18  
**earlier** 24:13  
**easy** 13:10 52:15  
**ECs** 46:17  
**educated** 18:4  
**Education** 2:22 40:8  
**effect** 28:25 43:20  
**effective** 12:24 52:2  
**effectively** 49:4  
**efforts** 50:1,5  
**eight** 25:16 29:7  
 46:22  
**eight-justice** 24:9  
 29:6  
**Eighth** 12:7 13:6  
 21:22 26:1,2,6,9,10  
 26:17,22 52:6 58:23

59:8 62:9,11 64:6  
**either** 38:6,22 45:9  
**elect** 16:16 47:6  
**elected** 7:18  
**electing** 38:24 39:10  
 60:9  
**election** 1:6,18 4:5  
 5:5,6,8,21,23 6:8,16  
 6:18,20 7:12,18  
 12:22 14:9 16:10,11  
 17:5 18:8,10 19:22  
 20:16 21:11 34:12  
 41:12 46:18 50:1  
 59:1 60:18 61:8  
 62:20  
**electioneering** 5:15  
 5:20 6:6,10 7:1 8:25  
 14:7 20:5,8,18,21  
 27:17,20,22,24 28:1  
 28:23 29:13 30:8  
 43:18 44:25 45:6,9  
 45:17,22,23 46:11  
 47:19 50:20 51:17  
 56:24 57:10 58:9,10  
 58:14,17,20,22  
 61:10,14,18,23 63:6  
**electoral** 7:17 16:13  
 16:22 30:23 46:25  
 47:2  
**electorate** 5:25 7:3  
 9:17 10:5 13:16  
 29:21,24 46:8 49:11  
**element** 17:7  
**elements** 8:3 47:15  
**eliminated** 24:17  
**Elrod** 2:19 23:8  
**employ** 38:20  
**en** 12:7 59:20  
**enable** 25:7 63:21  
**enables** 29:23  
**encompassed** 62:12  
**encountered** 8:12  
**encourage** 49:4  
**encourages** 16:16,17  
 47:5  
**enforceability** 42:2  
**enforcement** 17:18  
 23:17 35:1,2,9,16  
 42:25 51:1 56:10  
**enforces** 5:7  
**enforcing** 33:4

**engage** 33:13  
**engaged** 18:4 38:3  
**engaging** 27:19 33:12  
 60:8  
**enraged** 18:4  
**ensure** 25:6 29:21  
**ensuring** 25:14  
**entirely** 10:23 40:4  
 47:20 51:18 52:9  
 54:16 62:15  
**entirety** 12:20 20:6  
 21:7 55:11 62:11  
**entitled** 22:17 40:12  
**entrap** 63:15  
**environmental** 7:10  
 15:1 22:10  
**environmentalist**  
 15:4,14  
**equal** 58:5  
**equivalent** 6:7 20:1  
 28:9,12 29:10,14  
 9:216 2:3,3  
 61:12,23  
**Erin** 1:17  
**erratic** 54:6  
**escape** 47:10  
**especially** 10:15 21:1  
**essential** 59:4  
**essentially** 18:23 35:7  
 50:17  
**evaluate** 25:8  
**events** 16:9,19 18:8  
**evidentiary** 8:1 21:18  
**evolve** 17:17  
**evolves** 17:19  
**exacting** 36:6,8 38:1  
**exactly** 16:19 52:8  
 56:20  
**examined** 6:6  
**examining** 39:11 44:2  
**example** 13:7 23:8  
 48:2 49:25 53:15  
 55:6 56:9  
**exclusive** 45:20  
**exclusively** 60:2  
**excuse** 27:1,14,17  
 28:22 33:21 35:1  
**exercise** 11:19  
**exhaust** 63:19  
**exhaustion** 21:19,20  
**exist** 43:5,5

**existed** 10:18 59:17  
**existence** 11:12  
**expand** 50:16  
**expanding** 50:19  
**expansion** 51:2  
**expected** 54:7  
**expenditure** 6:25  
 9:11 17:19 26:20  
 45:8,10,18 46:2  
 56:23 61:16,17,25  
**expenditures** 5:18  
 6:19 7:6 9:8 21:8  
 24:17 26:14 27:23  
 28:23 38:3,23 40:1  
 45:1 46:2 58:11,20  
 60:6 62:18  
**expenses** 60:2,5  
**expensive** 55:1  
**expert** 20:16  
**expired** 43:2  
**explain** 7:20 14:24  
 44:9  
**explaining** 49:11  
**explanations** 19:24  
**explicitly** 26:7 27:13  
 28:16  
**exposing** 34:10  
**express** 6:7,8,14 7:6  
 7:11 8:24 12:4 14:6  
 21:10 25:4,12 27:6  
 27:15,25 28:9 29:10  
 29:14 30:2 31:13,21  
 31:22,25 32:3,20  
 34:21 38:8 39:16  
 43:12 45:2 46:16  
 47:18 57:9 61:23  
**expressly** 62:19  
**extend** 20:21  
**extensive** 52:11  
**extent** 30:20 34:20  
 41:16  
**external** 16:9,19 18:8

---

**F**


---

**F** 3:7  
**F.2d** 2:20  
**F.3d** 2:17,23 3:6,9,10  
 3:14  
**face** 16:18  
**facial** 43:10 54:19  
 55:25 56:1,15

**facially** 44:5  
**1329:1846:24**  
**facilitates** 29:5 30:3  
**fact** 9:2 15:10 26:6  
 28:15 30:24 49:1  
 53:24 55:8,11 64:12  
**fact-finders** 32:7  
**fact-intensive** 39:4  
**factor** 23:11  
**factors** 6:3 19:3,5  
 23:6  
**facts** 63:8,12  
**fail** 42:5  
**failed** 34:23 40:17,17  
**failing** 56:8,9  
**fairly** 9:9  
**fall** 18:3,6 49:20  
 58:19  
**familiar** 64:3  
**famous** 18:25  
**far** 7:17 10:8 11:17  
 13:15 26:12 46:21  
 48:20 50:22 55:8  
**farm** 22:9  
**farmers** 13:7,8  
**fashion** 19:17  
**fashioning** 46:10  
**favor** 23:8  
**fear** 53:20  
**February** 8:20  
**FEC** 2:15,20,21,22  
 2:24 3:4,8,9,10,13  
 5:25 6:4 7:20 8:6,9  
 8:13,19 9:3,10  
 10:12,17 11:13,23  
 12:11,17 13:3,20  
 14:1 17:1,2,14,20  
 18:18,22 19:10,12  
 19:17,20 20:7,9  
 21:6 23:4 43:8,16  
 43:19,21 44:6,7,22  
 46:7,19 47:21 48:6  
 49:6,25 51:21 52:16  
 53:1 54:24 56:19  
 57:1 62:4 63:5,14  
 64:4  
**FEC's** 5:13 9:3,21  
 43:5 47:12,14 50:5  
 52:9 62:14  
**federal** 1:6,18,23 4:5  
 5:5,6,8,20 6:9,18,20

7:9,19,21 12:22  
 0:25  
 26:5,7,15 39:10  
 59:19,19 60:9,18  
 61:8 65:2,7  
**feel** 16:24  
**fewer** 26:12  
**fight** 49:14  
**file** 9:9 11:1 45:18,23  
 45:25 52:15 57:1  
**filed** 64:6  
**filing** 10:3 58:9  
**fill** 13:10 51:9 52:10  
 52:15  
**film** 48:2  
**final** 2:6 28:21  
**finally** 28:20 40:15  
 44:3  
**finance** 38:8  
**financing** 24:12,20  
 25:4,15 28:11 41:3  
**find** 47:3 51:16,16,17  
**finding** 21:23 23:7  
 56:14  
**finds** 44:22  
**fine** 13:9 52:9 55:20  
**firm** 57:9  
**first** 4:22 5:10 6:4  
 7:15 11:19 13:25  
 14:4 15:8 17:22  
 19:8 20:20 21:24  
 22:25 23:9,23 26:10  
 27:10 34:14 40:22  
 40:23 41:7 43:10  
 48:1 50:23 51:15  
 53:21 54:10,18,20  
 64:4  
**fitness** 43:24  
**Five** 42:25  
**flow** 25:4  
**focus** 60:11  
**focused** 38:18  
**following** 37:11 41:9  
 50:22  
**follows** 35:4  
**footnote** 7:24 18:25  
 21:1 26:10,18,18  
 55:13 58:25  
**footnotes** 26:9  
**foregoing** 65:4  
**foreign** 11:21,21

53:15  
**forgets** 43:8  
**form** 9:9,9 12:17  
 13:10 43:13 49:6,16  
 50:9,17,17 51:4,9  
 52:11,15 56:24  
**formation** 20:3  
**:1253:11**  
**formed** 26:20  
**formerly** 3:9 7:22  
**forms** 10:4 52:10  
**forward** 6:15 14:11  
 22:23  
**found** 25:16 34:12  
 39:15 41:25 47:8  
 52:23 59:16  
**foundation** 54:17  
**four** 8:11 14:13 32:24  
 33:3 35:2 42:24  
**four-three** 35:9  
**Fourth** 8:2 18:19  
 19:12 20:25 21:18  
 25:18 30:1,12,19  
 32:5,11 41:22,23  
 53:2 55:12,13,20  
 56:4,5,11,14 60:11  
 60:15 63:3,22  
**frailties** 20:20  
**frame** 7:1  
**free** 1:3 4:4 8:12,19  
 19:14 23:9 24:21  
 25:1,4 33:17 34:9  
 38:3 39:24,25 44:14  
 54:10 57:18 60:18  
**freedom** 19:9  
**freedoms** 40:22  
**freely** 22:15 44:15  
**frequently** 14:23 33:2  
**friends** 15:7,18,20  
 16:6  
**front** 46:4  
**fully** 25:6 29:22  
**functional** 6:7 20:1  
 28:9,12 29:10,13  
 36:11 43:12 45:1  
 6:1737:  
**fund** 2:22 26:21 40:8  
 59:16  
**fundamental** 42:8  
 60:12  
**funding** 9:18 38:16

49:11 60:4  
**funds** 10:21 39:25  
 53:8 62:9  
**fungible** 60:7  
**funny** 15:24  
**Furgatch** 2:20 17:2,2  
 17:6 47:8  
**further** 2:5 6:12  
 26:17 32:14 57:19  
 63:18  
**future** 38:9

---

### G

---

**generally** 28:5 36:9  
**give** 19:7 29:24 43:16  
 43:16 58:5 63:14  
**given** 64:13,13  
**giving** 19:18  
**go** 5:25 8:5 10:6,6  
 13:8 14:3 19:7,17  
 20:14 23:7 33:23  
 35:6 43:2 44:11,15  
 46:15,21 50:5 52:7  
 55:25 61:6 63:18  
 64:8  
**goal** 41:15  
**goes** 7:20 9:3 22:2  
 47:1 63:2,7  
**going** 10:2 16:5 20:17  
 20:25 33:7 39:17  
 43:3,16 49:22 50:4  
 50:11 56:12 63:13  
**good** 4:23,25 60:21  
 64:4  
**Gosh** 48:14  
**gotcha** 19:17  
**government** 7:16  
 15:2,9 22:16 23:1,3  
 24:10 38:13 48:12  
 49:7 50:13 51:6  
**government's** 25:13  
**governmental** 9:14  
 10:4 12:13 36:4  
 51:3  
**grant** 35:19,20 42:24  
 55:9  
**grassroots** 10:16  
 11:18 49:3,21 51:8  
 57:8  
**great** 7:20 9:3 10:9  
**greatly** 47:19

**green** 35:8  
**ground** 22:14  
**grounds** 22:1,2  
**group** 1:13 9:25  
 12:18 24:22 25:4,7  
 25:21 26:19 29:22  
 33:12 36:16,18 38:2  
 38:21 40:14 49:13  
 54:23 55:2 60:8  
**group's** 33:23 39:3  
**groups** 10:15 12:2  
 14:8 19:17 24:21  
 36:23 49:3,21 57:8  
 57:19 59:8,12  
**grow** 17:17  
**guarantees** 35:14  
**guard** 11:20  
**guidance** 6:11,25  
 19:18 23:18,20 46:7  
 46:22 49:25 53:10  
 54:24 57:13  
**gun** 17:24 18:3,5,12  
 18:15 48:15,16  
**Guns** 17:25 18:1

---

### H

---

**half** 13:21  
**hammer** 26:17  
**hand** 11:10  
**hanging** 54:1  
**happened** 48:1  
**happens** 43:21 45:11  
**happy** 35:5 50:8,8  
 57:24  
**harbor** 12:2  
**hardships** 23:12,13  
**harm** 40:18 43:15  
**harmful** 15:13  
**harms** 40:25 41:1,2  
**hasn't** 38:17  
**haven't** 55:17,18  
 64:8  
**heads** 54:3  
**hear** 4:22 44:13  
**hearing** 1:8 15:21  
 45:13 61:5 62:7  
**hearings** 8:13 45:12  
 46:19  
**heavily** 49:21  
**heightened** 41:11,13  
**held** 7:13 24:9 29:12

31:4 59:22  
**help** 50:3  
**helped** 15:11,12,13  
**Hendrich** 1:22 65:2,6  
**Here's** 61:8  
**Herrera** 3:7 37:23  
**high-end** 20:16  
**high-enforcement**  
 11:23  
**highlighting** 25:25  
**Hillary** 29:17 61:10  
**hire** 20:16  
**history** 55:22  
**hit** 45:25 53:9,14  
 56:25  
**hold** 59:23  
**holding** 26:18,21,22  
 29:10 30:14 59:5  
 60:12,23  
**holdings** 26:24  
**holdover** 43:1  
**home** 20:17 26:17  
**Honor** 4:10,13,23  
 24:1,8 30:18 36:10  
 56:17 57:20,23 58:7  
 61:3 62:10 64:1  
**HONORABLE** 1:9  
**horrible** 63:14  
**host** 11:16 49:2 53:18  
 53:22  
**hour** 4:22  
**hours** 4:21  
**Human** 3:13 41:22  
**hundreds** 23:17 52:1  
**Hunting** 1:15  
**hurt** 21:4

---

### I

---

**I'd** 5:11 8:22 35:5  
 52:19 57:24  
**I'll** 57:20 58:5 61:3  
**I'm** 15:12 33:5 34:18  
 39:17,23 57:25  
**I've** 49:5  
**identical** 45:17  
**identified** 9:15,15  
 16:12,17 21:12 47:6  
 49:6 62:20  
**ignore** 28:18  
**ignores** 27:9 60:12  
**ignoring** 41:7

**illegal** 11:22  
**illustrate** 23:2  
**illustrating** 63:18  
**imagined** 31:5  
**imminent** 54:3  
**immunity** 35:19,20  
 42:24  
**imperative** 63:4  
**impermissible** 7:14  
**impermissibly** 19:3  
**implements** 29:1  
**implicate** 22:25  
**implicated** 14:3  
 25:10 54:12  
**implicates** 53:17  
 54:18  
**important** 12:3,3,15  
 18:22 19:20 23:2  
 24:10 36:4 37:17  
 40:10 44:24 50:14  
 52:6 53:6 55:12  
 63:1,2  
**importantly** 26:15  
 58:15  
**impose** 13:12,12  
 24:14 50:10 52:23  
**imposed** 10:2,9  
**imposes** 26:15  
**imposing** 21:23 27:5  
**impossible** 7:15  
**in-depth** 10:1  
**inaccurate** 33:16  
**include** 14:15 17:8  
**includes** 18:25 60:22  
**including** 37:22  
 38:12  
**incorrect** 5:18  
**incumbent** 54:23  
**independent** 5:17  
 6:24 7:6 9:8,11 21:8  
 24:17 27:22 28:23  
 38:3 40:13 44:25  
 45:10,17 46:2 56:23  
 58:11,20 60:6 61:24  
 62:18  
**INDEX** 2:1,10 3:1  
**indicate** 9:11 44:21  
 48:25  
**indicated** 22:24  
 33:20 45:4 53:2  
 54:15 56:23



- indicates** 7:25 21:2  
46:7 50:24
- indicating** 8:14 10:14  
22:12
- individualized** 60:20
- individuals** 9:8 19:18
- indulgence** 61:4
- influence** 6:20 7:18  
59:1
- information** 6:1 7:24  
9:17 10:5 13:16  
25:14 28:18 29:21  
38:15 41:3 49:8,12  
50:8
- informational** 13:9  
29:19
- informed** 25:6 29:22  
29:24 41:8
- inherently** 39:1
- initial** 58:24
- initially** 28:4
- injunction** 1:9 22:22  
23:7 41:17 42:1
- injunctive** 5:14 12:10  
23:25 40:16 42:3  
54:22 57:12,17
- injuries** 54:3
- injury** 23:11
- innocent** 48:11
- inquiry** 39:4
- insanity** 23:14
- instance** 8:7
- instances** 52:22
- intend** 38:4
- intends** 58:18
- intent** 44:2
- intents** 43:20
- inter-circuit** 20:24
- Intercircuit** 48:4
- interest** 9:14 10:4,8  
11:3 12:13,14,15  
13:15 22:25 23:3,22  
24:11 25:13 29:19  
36:4 37:17 38:14  
41:11,13 49:5,7  
50:13 51:4 52:12  
54:18 60:3
- interested** 16:1
- interesting** 18:21
- interests** 13:10 23:10  
23:24 25:16 40:10  
41:7 51:6
- intermediate** 36:1,2,8  
37:15
- interpret** 17:12 46:24
- interpretation** 6:18  
28:14 43:4
- interpreted** 6:5,19  
16:10 27:4 45:22
- interpreting** 20:1
- interprets** 5:7
- Interstate** 3:3 48:4
- invalidated** 55:10  
56:21
- invalidation** 6:23
- invalidity** 56:15
- involve** 55:6
- involved** 33:11 36:12
- irreparable** 23:11  
40:18
- IRS** 11:8
- isn't** 4:12 13:23 43:18  
47:24,24,25,25 51:9
- isolation** 20:7,20
- issue** 5:13,15 6:13 7:7  
7:16 8:24 11:15,15  
12:3 13:1 14:6  
21:13 25:13 26:4,8  
27:15 36:13 40:9  
41:17 42:11 47:24  
50:20 57:10 58:21  
61:13 62:7,13 64:5
- issued** 22:8 47:1  
49:25
- issues** 7:8 8:20 12:4  
17:4 26:24 33:1  
42:11 43:21 47:17  
62:1,2 64:13
- issuing** 42:1
- it's** 5:4 7:3,15 9:9,10  
9:15 12:3,17,17,17  
13:9,19 14:14 15:17  
16:8 18:18,18 19:4  
20:1 23:3,22 32:17  
33:15 34:15,20,21  
35:19 36:6,7,7  
37:20 40:4 42:2  
43:8 44:6 46:1,12  
47:3,3,13 48:18,23  
48:25 49:2 50:19  
54:12,16 55:12,17  
55:18 56:20 57:2  
58:9 62:8,8 63:4,13
- Italics** 15:5,6
- 
- J**
- 
- Jamie** 1:22 65:2,6
- Jello** 47:12,12
- joining** 48:25
- JUDGE** 1:10
- judicial** 42:9 55:5
- jurisdiction** 34:15
- jurisdictions** 62:6
- jurisprudence** 48:1  
53:21
- jus** 54:12
- justice** 10:13 18:25  
19:1,2 33:20 44:19  
48:21 49:18 51:13  
54:14
- justices** 25:16 29:7
- justification** 50:9
- justifications** 19:25
- 
- K**
- 
- keen** 44:8
- keep** 50:3
- Kennedy** 10:13 44:19  
49:18 51:13 54:14
- kind** 16:17 45:16
- kitty-corner** 4:14
- Klein** 1:12 4:9,10,12  
4:13,16
- KLO-pack** 4:19
- know** 5:24 6:11 8:15  
11:14,23 13:6,7,19  
13:22 16:1,18,21,25  
16:25 17:4,9,12  
19:2 21:23 23:8,9  
23:12 29:17 36:11  
40:12 43:2,3,9,14  
45:8,10,16,18,19  
46:4,5,17,23 47:4,4  
47:15,18 50:3,22  
52:1 53:9,11,14,18  
54:15 55:15 56:18
- knowing** 34:16 41:13  
60:3
- known** 4:17 7:22
- Kolker** 1:17 4:20
- 
- L**
- 
- L** 1:22 65:2,6
- L.Ed** 3:3
- Labor** 22:7
- lacking** 27:7
- land** 49:16,17,23
- Lane** 1:15
- language** 33:6,7 34:7  
36:10 52:25
- lastly** 14:9 23:22  
42:14 53:20 60:11
- laughed** 15:23
- law** 5:8 6:16 7:16  
8:16,22 10:3 11:1  
12:22 14:9,14,18  
19:22 20:16 21:9  
26:11,13,13,15,15  
26:20 33:4 36:2  
39:8 42:12 45:8,19  
50:1 53:23 54:5  
59:19 62:2 64:3
- lawlessness** 47:25
- laws** 5:8 14:2 35:25  
54:1
- lawsuit** 54:25
- lawyers** 13:20,22
- league** 40:14
- leave** 62:10
- leaves** 23:17
- left** 22:5 56:18,18
- legal** 22:14 40:24  
44:23 53:16 54:17  
60:21
- legislation** 23:1
- length** 9:4
- lengths** 7:20
- let's** 46:15,15
- level** 36:8
- liabilities** 10:25
- Liberties** 2:12
- LIBERTY** 1:13
- licensing** 48:2,3  
51:17
- Life** 2:16,21,24 3:5  
3:13 5:16 9:16,23  
10:2,11,22 18:24,24  
19:13 26:2 27:11  
28:4,8,13,15 30:7,7  
30:13,15,22 33:6,9  
41:22 43:13 48:19  
48:24 49:18 51:22  
52:21 57:5,6 63:10
- light** 35:8

**liked** 22:11  
**limit** 29:9 46:2 56:4  
 56:25  
**limitation** 37:3  
**limited** 7:2 16:9 18:7  
 22:3 37:3 51:18  
**limits** 40:3  
**line** 14:6,8 15:9,10,15  
 17:21 18:10 57:9,13  
 57:15  
**lines** 9:1  
**link** 45:7  
**listed** 14:25 17:25  
**listened** 15:23  
**litigating** 42:15  
**litigation** 15:2,9 44:8  
**little** 56:11  
**lives** 17:25 18:1  
**loans** 11:4  
**long** 20:15 43:1,19  
 44:10 56:22 63:15  
**longer** 29:1  
**longstanding** 51:5  
**look** 4:15 6:13 16:7  
 16:25 18:7 19:6,21  
 21:1,6 46:7,25 48:2  
 48:3 56:12  
**looked** 9:24 21:25  
**looking** 43:23 51:24  
**looks** 5:15  
**Lori** 3:6  
**loss** 40:21,21  
**lost** 43:8  
**love** 47:12  
**lower** 26:14 37:21  
**lower-court** 33:11  
 37:13

---

**M**


---

**Magan** 61:8  
**magic** 27:6  
**mailer** 9:25  
**main** 9:20  
**major** 8:4 20:23 21:3  
 21:11 22:19 27:1  
 38:17,20,24,25 39:3  
 39:5,9 53:3 57:15  
 59:1,13,17 60:8,14  
 60:16,17,24 62:21  
**majority** 10:13 17:17  
 24:9 48:24,25 49:19

54:15  
**makeup** 32:21 35:17  
**making** 25:19 27:20  
 28:6,16 31:12 32:3  
 38:6,22 39:24  
**mandate** 60:16  
**mandated** 39:1  
**mandating** 24:11  
**manifest** 31:20  
**manner** 12:16,16  
 43:15 49:10 51:5  
**manners** 14:20 50:12  
 56:13  
**marketplace** 41:9  
**Maryland** 1:16  
**Mass** 49:18  
**Massachusetts** 2:21  
 9:16,23 10:2,22  
 48:19,24 57:5,6  
**matches** 9:14  
**math** 19:11  
**matter** 4:4,7,21 7:15  
 10:3 17:18 45:8,12  
 54:24 55:8,11 56:16  
 60:4 64:10,12 65:5  
**matter/is** 63:3  
**matters** 11:23 42:16  
 47:19 51:2 64:9  
**McCain-Feingold**  
 63:6  
**MCCL** 51:21  
**McConnell** 3:4 5:16  
 6:4 10:10 24:13  
 27:11,12,18 28:4  
 33:10 41:6 43:9,11  
 45:2,21 63:5  
**MCFL** 10:22 12:5  
 36:14 49:17 50:22  
**MCFL/what** 50:7  
**mean** 11:6 15:24 16:1  
 16:2 18:17 20:20  
 48:15 55:5  
**meaning** 16:14 17:18  
 17:19  
**means** 17:9 23:4  
 29:11 47:4  
**mechanism** 35:9  
**media** 6:2 7:3 28:2  
 46:5 52:2  
**meet** 12:13,15 28:11  
 29:13 31:19 32:1

34:23 40:17 50:4,11  
 51:6 58:16 59:13  
**meeting** 61:7  
**meets** 28:17 31:17  
 32:8  
**members** 11:16 49:2  
**membership** 10:21  
**memo** 17:15 45:4  
 57:12  
**men** 43:6  
**mention** 5:23 47:14  
**mentioned** 25:11  
 35:1 37:14 58:23  
**mentions** 28:3  
**mercy** 19:19,19  
**mere** 9:4 34:3  
**merely** 25:11 48:6  
**merits** 41:23  
**mess** 22:5  
**messages** 29:25  
**met** 30:11 57:14  
**metaphor** 53:25  
**method** 43:3  
**methodology** 60:17  
**methods** 24:22  
**Mexico** 3:7 37:23  
 52:22  
**minds** 16:15 47:5,9  
**Minnesota** 3:5 12:10  
 26:2,9,13,15,20  
 51:21 52:9 59:3,7  
**Minnesota's** 12:8  
 26:13,23 59:6  
**minutes** 42:22 58:3  
**mirrored** 26:5  
**mirrors** 12:11  
**mis-describes** 31:11  
**mischaracterizations**  
 31:9  
**misses** 47:7  
**mm -hmm** 56:2  
**mom -and-pop** 51:7  
**moment** 5:11 6:15  
 14:21 25:23 53:5  
**money** 9:11 14:16  
 18:14 20:15 25:3  
 38:8 40:1,20 49:13  
 50:6 53:12,15 60:7  
**monthly** 11:7 13:12  
**months** 22:6 46:21,22  
**motion** 1:9 5:14

**mountain** 52:16  
**movant** 4:22  
**movants** 22:22  
**move** 6:14,15 8:22  
 10:10,10 39:17  
 49:15  
**movie** 29:16,18 61:10  
 61:15  
**Moving** 33:5  
**multi-step** 35:3  
**murky** 63:16  
**mutually** 45:20

---

**N**


---

**name** 25:12 28:3 46:4  
**named** 5:24  
**narrow** 7:4 33:2 36:4  
**narrowed** 48:10  
**narrower** 30:21  
**narrowly** 6:21,22  
**nation** 43:6 53:4 54:2  
**national** 11:21,22  
 45:13 52:3 55:6  
**nationals** 53:15  
**nationwide** 17:16  
 41:17 42:1,8 51:25  
 53:20 54:11,21 57:9  
 57:17  
**nature** 31:11 56:17  
**necessarily** 31:20  
 50:4  
**necessary** 28:19 42:4  
**need** 6:14 28:18 35:2  
 39:14 52:23 54:9  
 57:8,9,12,15  
**neighbors** 15:6,18,19  
 16:6  
**never** 35:14  
**new** 3:7 21:25 22:12  
 37:23 52:22 63:11  
**newsletter** 17:3  
**Nicholas** 1:20  
**nightmare** 9:19 10:6  
 49:16,24  
**Ninth** 17:2 41:9  
**nominating** 38:24  
 39:9 60:8  
**nomination** 21:11  
 59:1  
**non** 15:25  
**non-regulated** 17:22

**noncompliance** 5:9  
**nonprofit** 9:24 49:21  
**notably** 25:10  
**note** 4:6,17 7:23  
 22:21 32:14 49:23  
 52:19  
**noted** 12:9 26:11,13  
 26:18 28:16 30:13  
 30:19 39:10 40:10  
 41:6 44:19 45:23  
 55:12  
**Noti** 18:20 53:2  
**notice** 19:18 43:19  
 64:6  
**notion** 27:13 40:25  
 42:11 59:7  
**November** 15:6,18  
 41:12  
**number** 7:3 37:13  
 38:7,12 45:25 46:8  
 NW 1:18

---

**O**

---

**O'Connor** 48:25  
**Obama** 3:9 7:11,22  
 15:2,4,10,15 16:2  
 18:3 41:24  
**Obama's** 15:3,13  
**objecting** 51:4 52:15  
 52:16  
**objective** 48:8 52:15  
 57:13  
**obligation** 34:20  
**obligations** 25:5  
 34:23,24 44:21  
**obscenity** 48:3  
**observe** 33:18  
**observed** 24:14 29:20  
 41:10  
**obvious** 15:25  
**obviously** 64:2  
**occur** 5:22 6:3 28:10  
 42:25  
**occurs** 6:2  
**offers** 23:20  
**office** 1:20 4:13 7:9  
 7:19 43:24  
**Official** 1:23 65:2,7  
**okay** 4:15 37:11  
 43:14 56:18 63:11  
**Oklahoma** 2:13

54:19  
**once** 8:25 10:6,6,24  
 11:20 49:15,23,24  
 53:9,14 56:25  
**one-time** 10:3 52:10  
**onerous** 10:15 22:16  
 48:19 57:7  
**open** 23:17 61:7  
**operate** 20:7  
**operations** 9:24  
 57:18  
**opinion** 8:8 10:13  
 15:1 18:1 21:1  
 28:12 29:6 30:9,10  
 31:3 36:13 48:23  
 49:19 50:25 54:15  
 58:13  
**opinions** 8:14 19:25  
 20:14  
**opponent** 40:14  
**opportunity** 43:17  
 64:8  
**opposed** 15:10 56:1  
**opposes** 15:2  
**opposing** 27:21 31:11  
 33:8 39:19 57:24  
 58:8,24  
**opposite** 14:19 18:16  
**option** 10:12  
**oral** 46:19 62:17  
 64:10  
**order** 7:5 35:1,2,10  
 44:23 54:21  
**ordinarily** 22:22 61:5  
**organization** 8:4,4,9  
 11:1,18 12:25 21:7  
 36:19 37:10 44:11  
 44:14 45:13 50:23  
 51:8,8 62:24  
**organization's** 39:11  
 60:17  
**organizational** 11:16  
 39:12 49:20 50:10  
 52:17 59:23  
**organizations** 10:16  
 52:1,25 54:11 55:19  
 56:10 62:13  
**Organize** 52:22  
**Organized** 3:7 37:23  
**outlined** 38:6  
**outside** 7:6,14 53:12

**overbreadth** 6:23  
 54:13  
**overruled** 41:23  
**overturned** 48:20,23

---

**P**

---

**p.m.** 1:5,5 4:1 64:17  
**P.O.** 1:21  
**PAC** 10:12 11:17,20  
 20:4,9 21:14,23  
 22:16,19 26:4 36:14  
 36:19 37:7,24 38:10  
 44:11,16,18,19,22  
 49:23 50:18 51:10  
 52:11 53:10,14  
 62:16,22,25  
**PACs** 10:14 11:24  
 12:2 20:11 36:21,24  
 36:24 37:4,7 44:10  
 44:10,20,21 45:23  
**Page** 2:11 3:2  
**pages** 9:10 12:17  
 19:23,24 23:17 49:6  
 52:7  
**paperwork** 50:10  
 52:16  
**parity** 49:7  
**part** 14:5 20:8 36:13  
**part-time-mom** 50:3  
**particular** 31:1 32:24  
 33:14 36:16,18  
 60:16 62:25  
**Particularly** 42:9  
**parties** 23:13 40:5  
**party** 32:22,24 35:5  
 41:18  
**Patriot** 17:17  
**pause** 4:11  
**pay** 25:3 39:25  
**paying** 9:13 13:11  
**penalties** 5:9 10:20  
 34:16,24 47:21  
**people** 20:14 23:22  
 32:7 41:4 50:2 54:4  
**percent** 39:15  
**perfect** 19:11 49:7  
**period** 5:25  
**permissible** 43:20  
 54:17  
**permit** 5:10  
**perpetual** 11:12

**person** 16:11 18:13  
 25:7 29:22 31:16,24  
 32:4 46:23  
**persuasive** 7:23  
**peruse** 64:9  
**PI** 17:15 45:4  
**piled** 49:3  
**pin** 17:20  
**place** 29:4 44:22  
**placed** 57:7  
**plagued** 20:21  
**plaintiff** 1:4,12 4:6  
 5:2 25:1,19,24,25  
 27:2,9 29:9 30:24  
 33:6,10,11,13,16  
 34:20 36:15,22 38:4  
 38:17 39:2,13,18  
 40:6,17 41:16 42:4  
 42:12 54:7 58:17  
 59:21 60:13  
**plaintiff's** 1:9 29:2  
 36:23 39:15 40:16  
 41:1  
**plaintiffs** 4:6 34:8,15  
 35:14 37:8 39:14  
 41:6,11,21  
**plan** 62:5  
**play** 62:7  
**plea** 16:4,5 17:8 47:8  
**please** 4:3 24:6  
**point** 8:22 21:18  
 25:25 26:10,17  
 37:22 38:19 63:2  
**pointed** 17:14,15  
 19:16 36:10 55:5  
**points** 31:4 37:12  
 57:24 58:25  
**police** 12:24  
**policy** 7:10 15:1  
 22:10 25:21  
**political** 5:4 8:3 9:19  
 10:1,7,24 11:11,13  
 12:8 20:22 21:4  
 24:23 25:22 26:20  
 26:21,23 34:22  
 38:22 39:2,9,13  
 41:8 49:16,24 50:11  
 52:18,23 57:13 59:3  
 59:5,6,10,15,15,22  
 59:25 60:19 62:9,9  
 62:13

**populous** 6:1  
**portion** 16:13,22 29:6  
 30:23 46:25 47:2  
 61:4  
**position** 13:21 33:25  
**positions** 9:25  
**possible** 57:23  
**potential** 34:11 40:12  
**potentially** 11:22  
**pouring** 48:13  
**preceded** 27:10  
**precedent** 52:20  
**preceding** 29:2  
**precisely** 12:12 42:10  
**preclude** 42:17  
**precluded** 42:15  
**preexist** 44:20  
**preliminary** 1:9 5:14  
 12:9 22:21 23:7  
 40:16 57:12  
**presence** 4:6,17  
**present** 21:9 63:20  
**presented** 12:5 42:11  
 63:12 64:14  
**preserve** 23:14 44:23  
**President** 7:11 15:2,5  
 15:10,16  
**presumably** 47:13  
**prevent** 24:15  
**previous** 17:16  
**previously** 4:16  
**primary** 6:17  
**principle** 37:18  
**principles** 5:12 42:9  
 51:15  
**prior** 20:1 36:12 56:8  
**pro-life** 9:25 52:20  
 55:2  
**probably** 35:16  
**problem** 9:7 14:24  
 31:6 45:11 57:4  
**procedural** 48:7  
**Procedure** 39:6  
**proceedings** 4:1  
 64:17 65:5  
**process** 8:8 20:15  
 35:3 50:25 56:11  
 58:13  
**professional** 50:2  
**professionals** 19:22  
 50:6,11 52:18

**prohibit** 50:16 61:13  
**prohibited** 22:8  
 28:11 33:12 44:1  
 48:11 61:10  
**prohibiting** 33:22  
**prohibition** 27:19  
 33:15 34:2 36:12  
 37:5  
**prohibitions** 28:6,22  
 28:22  
**project** 48:16  
**promote** 59:2  
**proof** 63:8  
**proper** 12:23 29:24  
 54:16  
**properly** 11:19 20:18  
 62:21  
**proposed** 14:22 25:2  
 31:2 32:8,11,16,19  
 32:20 58:15,19  
**protect** 7:5 13:17  
 18:5,12 48:15  
**protected** 12:2  
**protection** 43:7 44:23  
**protects** 59:8  
**provide** 7:25 29:21  
 37:9 42:4 49:12  
 50:8 56:9  
**provided** 6:10 8:8,9  
 8:10,11 11:4 22:11  
 57:11,12  
**provides** 5:25 49:8  
 51:5 54:22 57:13  
**providing** 9:16 10:5  
 12:1 38:14 52:7  
**provision** 42:20  
 45:22 54:18 55:21  
 59:12,18  
**provisions** 6:22 9:3  
 18:20 20:19,21 45:7  
 48:2,3,22 52:8  
 53:16 55:7 62:12,14  
 63:7  
**proximity** 16:10 18:8  
 46:18  
**public** 23:22 24:20  
 25:7,14 29:19 38:14  
 41:2 56:20 60:2  
**purely** 22:1  
**purpose** 8:4 20:23  
 21:3,11 22:19 38:18

38:20,24,25 39:3,5  
 39:9,10,12 53:3  
 57:15 59:1,13,15,17  
 60:8,14,16,17,24  
 62:21  
**purposes** 7:24 9:7  
 11:8 12:9,17 30:5  
 52:4  
**pushing** 52:17  
**put** 9:25 13:8 14:11  
 28:19

---

### Q

**qualifications** 18:2  
 43:24  
**qualify** 50:14  
**quarterly** 11:7 13:13  
**question** 14:9 21:9  
 31:12 33:21,22  
 43:23 55:10 58:19  
 59:2 61:9  
**questions** 5:6 24:2  
 43:22 57:20 58:13  
 63:23  
**quick** 64:13  
**quiet** 20:17  
**quite** 11:6 39:23  
**quo** 23:14,14  
**quote** 29:16 40:12  
 59:23

---

### R

**R** 1:12,17  
**race** 49:10  
**radio** 6:2 46:6  
**raise** 37:4 39:25  
**raised** 14:16 53:8  
 58:13 62:7 64:9  
**raising** 38:8 53:12  
**ranchers** 15:3,11,13  
**ranching** 7:10 15:7  
 15:20,24,25 16:6  
 22:9  
**range** 7:7 30:4  
**reach** 35:15 46:8  
 47:12  
**reaching** 7:17 31:1  
**read** 6:21,21 15:1  
 17:12,25 18:13 61:4  
**reading** 17:12  
**reaffirmed** 37:19

**real** 3:8,9 7:21,22 8:5  
 21:20 30:1 32:5  
 41:24 43:15 47:21  
 56:9 62:1  
**real-world** 62:1  
**reality** 34:25 35:16  
**really** 16:1,2,25 21:15  
 21:16 44:16 48:15  
 60:12  
**reason** 6:21 29:25  
 45:1  
**reasonable** 16:11,15  
 18:13,13 28:14  
 31:16,24 32:4 44:2  
 46:23 47:5,9  
**reasonably** 17:12  
**reasons** 8:16 23:19  
 23:24 41:10 42:19  
 57:17 58:21 60:21  
**rebates** 11:4  
**rebuttal** 2:4,6 24:1  
**receipts** 11:3 13:14  
**receive** 14:20  
**received** 40:2  
**receiving** 38:23  
**recess** 64:15,16  
**recites** 47:2  
**recognized** 29:23  
 37:20,24 38:10,13  
 49:18,19 52:24 54:9  
 60:7  
**recognizing** 32:12  
**record** 8:1 19:16 21:1  
 43:5 50:23 55:21,24  
 56:3,14 60:12 63:3  
 63:7,11,18 65:5  
**record-keeping** 44:22  
**records** 21:17,18 50:4  
 63:1,19  
**redefine** 43:17  
**Reed** 2:18 37:20  
**reference** 15:11 16:9  
 18:8  
**referenced** 31:16  
 53:24  
**referred** 36:6,9  
**referring** 34:2  
**reflects** 31:23 33:1  
**regarding** 24:12  
 25:14 26:19 32:7  
 40:5 41:3 60:13,23

**regards** 20:3,5 51:10  
**regime** 9:19 11:9  
 49:17 51:19,25 52:1  
 52:3 61:19  
**regimes** 9:3,22 22:24  
 45:11 47:20  
**register** 24:23 25:22  
 39:14 59:15  
**registering** 22:15  
**registration** 22:16  
 36:17 37:24 38:11  
 40:20 59:9  
**regulable** 5:12 14:8  
 14:13 16:21 17:13  
 48:10  
**regulated** 5:3 6:12  
 8:15,23 11:8 17:21  
 22:18 43:18,25  
 47:24  
**regulates** 33:2  
**regulating** 6:5 29:4  
**regulation** 6:3,9 7:13  
 16:7,18,20,24 19:6  
 22:2 26:23 27:4,16  
 28:5,9 29:5 30:4  
 46:18 47:3,10 55:8  
 59:6  
**regulations** 8:21 13:2  
 19:24 21:25 22:8  
 24:18 47:14 60:19  
**regulatory** 49:2  
**reinforced** 37:13  
**rejected** 10:12 25:18  
 27:13 29:9  
**related** 11:12 36:3  
 52:13  
**relation** 4:14  
**relationship** 37:16  
**relevant** 5:25 7:3  
 9:17 14:14,15 30:15  
 53:17 63:4,21  
**reliance** 29:2  
**relief** 5:14 12:10  
 23:25 40:17 42:3,4  
 42:7,8 53:20 54:22  
 57:17  
**relies** 27:2 33:11  
**rely** 40:6 41:21 45:16  
**relying** 60:12  
**remain** 40:3  
**remainder** 23:6 24:1

**remaining** 42:22 58:3  
**remedies** 21:21 55:14  
 63:20  
**remedy** 20:12 54:19  
 54:22  
**remember** 19:21  
**render** 64:14  
**renegades** 62:3  
**repeatedly** 33:14  
**replaced** 43:3  
**reply** 5:13 9:4,21  
 10:17  
**report** 24:23 25:22  
 58:10 59:25 60:1  
**Reported** 1:22  
**Reporter** 1:23 65:1,2  
 65:7  
**reporting** 9:19,22  
 11:7,9 12:18 13:13  
 22:15 24:14 36:17  
 37:25 38:11 44:21  
 45:11 47:20 51:25  
 51:25 52:3 59:9,23  
 60:9 61:19  
**reports** 45:18,24,25  
 58:10  
**represent** 15:5,16  
**representations** 53:1  
**representing** 44:15  
 57:2  
**Republican** 8:17  
 23:19  
**request** 14:13 15:1  
 24:24 29:9 31:3  
 40:9 41:19 42:14,14  
**requests** 31:2 39:22  
 40:16  
**require** 13:9 42:6  
 52:10  
**required** 29:12 36:2  
 37:8 38:20 59:12,12  
**requirement** 26:19  
 27:5 33:24 36:5,14  
 36:16 38:25 40:18  
 59:11,14,17,18  
**requirements** 10:1  
 11:17 12:9 13:12,13  
 22:17 24:14 25:1,9  
 26:5,5,8,8,16 27:18  
 29:8,19 33:19 34:19  
 35:24 36:17,22

37:14,16,25,25  
 38:11,12 40:21,23  
 41:2 49:20 50:5,11  
 50:16 52:12,17 59:4  
 59:9,10,21,24 60:10  
 62:16,22  
**requires** 27:14 30:22  
 33:3,25 37:15 39:4  
 39:8,8  
**requiring** 32:24  
**reserve** 23:25  
**resources** 51:9  
**respond** 57:24 58:5  
**responding** 5:14 19:1  
 31:8  
**response** 58:24  
**restraint** 20:2 36:12  
**restrictions** 24:17  
 28:2 36:25  
**restrictive** 12:16,16  
 23:4 50:13  
**result** 8:21 33:22  
 40:2  
**results** 33:2 35:24  
**return** 11:5  
**review** 12:8 13:20  
 62:10  
**right** 2:16,24 5:16  
 10:11 13:5 18:24,24  
 19:12 27:11 28:4,8  
 28:13,15 30:6,7,13  
 30:15,22 33:6,9  
 42:16,21 43:13  
 52:21 57:21 58:4  
 63:10,25  
**rights** 11:19 18:5,12  
 18:15 48:15,16  
**rigorously** 46:12  
**rise** 4:2 64:16  
**Roberts** 19:1 33:20  
**Rockville** 1:16  
**room** 1:24 54:9,21  
**RTAA** 7:24  
**rule-making** 43:21  
**ruled** 17:2  
**rules** 43:6  
**ruling** 63:22  
**run** 15:22 17:24  
 22:10 25:1 33:17,17  
 47:12  
**run-up** 41:12

**running** 7:9  
**runs** 55:8

---

**S**

---

**S** 65:6  
**S.Ct** 2:15,18 3:3,9  
**safe** 12:1  
**safeguard** 47:7  
**safeguarding** 51:3  
**safeguards** 46:14  
 48:7  
**sake** 61:20  
**sanctions** 34:11  
**sat** 8:19  
**satisfied** 10:4  
**save** 6:22 17:25 18:1  
 20:15  
**Savings** 15:2,9  
**saw** 18:23  
**saying** 18:17 20:11  
**says** 17:6,8,18 19:1,2  
 29:15 57:4 61:17  
 63:8  
**Scalia** 19:2  
**Scalia's** 19:1  
**scenario** 32:6  
**SCOTT** 1:9  
**Script** 14:25 18:1  
**scripts** 8:9,11 14:11  
 14:13  
**scrutiny** 36:1,1,2,5,6  
 36:8,8 37:15 38:1  
**searching** 43:19  
**seated** 4:3  
**second** 8:22 15:10  
 23:11 40:7,11 62:8  
**Section** 24:18 25:13  
 25:20 27:2 29:1  
 42:2  
**secure** 54:21  
**see** 10:13 13:24 16:5  
 19:13 29:18 46:24  
 51:2,3 63:10  
**seeds** 43:4  
**seek** 8:6 20:14 40:18  
 43:7 55:14  
**seeking** 41:8 50:15  
 59:21 62:3,3  
**seen** 44:7  
**seminal** 6:16  
**sense** 55:20

- sensible** 45:19  
**separate** 26:9 36:19  
 59:11,12  
**SEPTEMBER** 1:5  
**sequitur** 15:25  
**serious** 50:6  
**seriously** 18:2 23:16  
**seriousness** 33:1  
**served** 40:10  
**session** 4:4 63:24  
**set** 5:21 20:9 32:23  
 36:18  
**sets** 21:17  
**Setting** 52:3  
**settled** 42:2  
**seven** 22:6  
**severe** 57:7  
**severely** 49:21  
**shocking** 41:5  
**shocks** 44:13  
**shortly** 37:19  
**shot** 63:14  
**shouldn't** 20:19  
 54:22  
**show** 21:4 63:9  
**showing** 40:18 55:15  
**shown** 50:25 55:18  
**shrugged** 5:5  
**shrugging** 5:10  
**shrugs** 5:2,2,3  
**shut** 23:10 49:4 55:3  
 57:8  
**sic** 48:4 52:20  
**side** 4:22 49:13  
**sides** 64:5  
**significant** 30:17  
**significantly** 38:18  
**similar** 12:8 18:20  
 25:10 38:2,8 52:8  
 55:3 62:14  
**similarity** 30:14  
**similarly** 24:21 32:1  
 38:13 54:11 57:19  
**simple** 9:9 11:9 13:9  
 22:17,18 49:7 53:21  
**simplified** 10:4 12:18  
 45:24  
**simply** 26:6 32:25  
 33:15,18 36:1 40:22  
 42:5 47:2 55:25  
 59:14 61:4
- single** 54:7  
**singular** 14:1  
**sir** 4:8  
**sitting** 59:20  
**situated** 54:11 57:19  
**situation** 33:12 34:2  
 35:17 36:23 49:25  
 55:25  
**six** 42:25 46:21  
**SKAVDAHL** 1:9  
**sky** 13:24  
**small** 9:24 10:15  
 12:18  
**sniff** 43:25  
**so-called** 27:6  
**Society** 3:13 41:22  
**solic** 31:2  
**solicit** 10:21 11:15  
 25:2 37:1,2 39:25  
 40:9 49:1  
**solicita** 39:18  
**solicitation** 14:16  
 20:23 22:20 24:24  
 39:19 40:5 53:7  
**solicitations** 14:10,14  
 14:15 39:18,22 40:2  
 40:11 53:5,5,6  
 57:16  
**solid** 22:14  
**somewhat** 41:5  
**sorry** 15:12 33:5  
**sort** 7:13 29:1 33:3  
 40:3 59:13  
**sorts** 9:2  
**sought** 13:19 56:4  
**Sounds** 11:5  
**sources** 24:12,20  
 25:15 36:25 37:2  
 41:3  
**South** 1:24  
**Southern** 21:24  
**speak** 8:20 10:16  
 14:4 22:15 23:23  
 34:5,9,11 36:18,20  
 36:24 37:10 44:12  
 44:15,18,18,20 49:1  
 49:4,22 54:4 56:22  
**speaker** 19:8 33:7,23  
 34:7  
**speakers** 6:11 17:16  
 23:21 29:25 44:2
- 46:4 48:11 54:1  
**speaking** 9:17,18  
 10:5,18,20 20:6  
 24:16 25:7 29:23  
 38:15 41:11 49:11  
 49:12 53:20 60:3  
**specific** 5:21 6:3 7:1  
 7:2 14:15 51:18  
 60:23  
**specifically** 29:8 38:2  
 59:21  
**specification** 46:16  
**speech** 1:3 4:4 5:3,13  
 7:14,17 8:12,19,23  
 12:24 14:24 16:8  
 17:11,22 19:6,14  
 22:6,18 23:9 24:21  
 25:4 29:2 33:13,23  
 34:2 36:13 37:4,5,8  
 38:3,16 39:24 43:22  
 43:23 44:3,14 45:15  
 45:16 46:24 47:11  
 47:23 48:5,11 49:4  
 54:10 56:19 60:4  
 62:18,19 63:15  
**Speech's** 57:18  
**SpeechNow** 21:6  
 26:11,12 38:1 59:20  
 59:24 62:15 63:22  
**SpeechNow.org** 3:10  
**spend** 25:2 41:15  
 58:18  
**spending** 9:24 13:10  
 18:14 49:9 52:1  
**spent** 26:19 39:16  
 59:14  
**sphere** 7:17  
**split** 47:15 54:25  
**spoke** 50:20 51:21  
 52:19 56:16  
**sponsor** 23:1  
**staggering** 50:10  
**stand** 64:15,16  
**standard** 13:23 14:2  
 17:17 27:5 30:2,11  
 31:16 32:13 35:23  
 35:25 39:20 40:7  
 46:13 50:12 53:11  
 53:17 54:7 57:3  
 59:3 62:4  
**standards** 5:17,18
- 14:24 19:13 43:17  
**standards-based**  
 31:5  
**standing** 8:18 54:12  
**stare** 42:9  
**start** 47:14  
**state** 12:11 18:4,11  
 18:15 26:8 48:4,14  
 48:16,22 52:4  
**state's** 51:25  
**stated** 10:17 60:15  
**statement** 8:16 11:1  
 23:19 34:7  
**statements** 25:24  
**states** 1:1,10,20 3:11  
 3:12 5:8 15:15  
 20:18 47:13 65:3  
**status** 8:3 9:20 20:22  
 23:14,14 39:3 49:17  
 49:24 52:24 53:14  
 57:14 62:13  
**statute** 6:10 22:3  
 45:3  
**statutorily** 5:22  
**statutory** 6:22,25  
 22:2 46:9 55:9  
**stay** 20:17  
**steady** 23:18  
**step** 34:13 35:22  
**Stephen** 1:12  
**Steve** 4:12,16  
**stream lined** 45:24  
**Street** 1:18  
**strengthen** 56:15  
**strict** 36:1,5 37:15  
 48:7 57:16  
**strictest** 53:3  
**string** 12:21  
**strive** 61:5  
**strong** 21:23 52:25  
**stronger** 25:15  
**strongly** 56:16  
**struck** 20:18 44:5  
**struggled** 13:17  
**stuck** 19:19  
**students** 15:22  
**subject** 13:2 29:18  
 34:24 36:21,25  
 37:14 38:1 40:3,3  
 49:17 61:19 62:22  
**subjected** 25:8

**submit** 9:9 23:4,24  
**submits** 42:19  
**subsequent** 26:18  
 27:10  
**substantial** 30:17  
 37:16 38:14  
**substantially** 36:3  
 37:2  
**substantive** 30:20  
 32:25  
**substantively** 27:24  
**substitute** 31:15 37:7  
 37:9  
**sufficient** 23:2 24:11  
 25:17 49:10  
**sufficiently** 12:15  
 36:3 37:17 44:12  
 50:14  
**suggest** 9:4 20:25  
 23:18 51:15  
**suggested** 15:22 26:3  
 46:20,21 58:8  
**suggestive** 16:14  
**Suite** 1:13  
**sums** 25:3  
**supplemental** 64:7  
**supply** 56:13  
**support** 9:12 16:23  
 18:4,11 40:24,24  
 48:14,15  
**supportable** 42:13  
**supported** 18:15  
**supporter** 18:3  
**supporting** 40:13  
**supposed** 58:9  
**supposedly** 18:7  
**Supreme** 6:5,13,17  
 7:12 9:23 20:11  
 22:24 24:9 25:6,9  
 27:10,12,12 28:3,8  
 28:16,21 29:12,20  
 31:4 37:11,18,21  
 38:2,20,21 39:1  
 42:3,17 43:11,14  
 44:4,16 46:11 50:21  
 53:23 54:8,14 61:9  
 61:22,24 63:8,11  
**sure** 19:4 39:23 49:5  
 50:7,8 57:25 63:4,4  
**surround** 5:12  
**Surviv** 40:4

**Survival** 2:22 40:8  
**survive** 56:10  
**susceptible** 28:13  
**sustain** 11:18 35:10  
**sustainable** 10:9  
**Swanson** 3:6 26:3  
**sway** 41:14  
**sword** 53:24,25 54:2  
**system** 12:8,11 19:22  
 26:4 32:23 63:18  
**systems** 48:5 51:17

---

**T**


---

**T** 1:15  
**tailoring** 36:5  
**take** 5:11 25:23 33:3  
 34:13 35:22 64:10  
**taken** 16:9 33:8  
**takes** 23:15 42:24  
 55:1  
**tale** 53:24  
**talk** 15:7,20,24,25  
 16:6 29:3 47:17  
 51:7  
**talking** 7:9,10 29:4  
 33:24 35:23 36:11  
 39:17,18,19,23 50:7  
**talks** 17:5 36:15  
**tangential** 10:8  
**tangentially** 52:13  
**tautology** 47:3  
**tax** 11:5,8  
**taxed** 9:8  
**television** 6:2 46:6  
**tell** 17:1 57:1  
**ten** 11:2,3 13:14  
**ten-second** 25:11  
 29:15,15  
**Tenth** 37:22 38:10  
 39:8 52:19,23 53:3  
 57:16 58:16  
**terms** 9:12 12:1  
 14:12,23 23:12  
 24:10 27:17 40:25  
 43:1 53:11 56:23  
**terrorism** 55:7  
**terti** 54:12  
**test** 6:7 7:4 18:23  
 19:3 20:23 21:3  
 22:19 28:12,17  
 29:14 30:7,9,12,13

30:21,22 31:6,17,19  
 32:2,8 33:22 38:1  
 38:18,20 39:1 40:7  
 43:12 45:2,15,15  
 47:1 53:3 57:15  
 58:16 59:17 60:14  
 60:16 61:11,12,21  
**tests** 43:19 63:16  
**Thank** 4:3,23 24:3,5  
 42:21,23 57:21,22  
 58:7 60:25 61:1  
 63:25 64:1,15  
**that's** 6:24 7:7 8:23  
 9:14,19 10:21,22  
 11:9 13:6,18 14:16  
 18:1 19:11,15 20:12  
 21:9 26:6 30:17  
 34:6,6 35:11,16,20  
 36:7 43:25 45:3  
 47:24 49:10,14,15  
 50:4 52:14 53:12  
 54:6,25 55:5 59:18  
**there's** 4:11 9:18  
 11:16 14:6,7,9,24  
 16:24 20:24 33:20  
 33:21,21 35:3 44:7  
 44:9 49:5 55:4,4,4  
 55:22 56:11 57:4  
**they're** 20:6,16 21:14  
 39:21 63:1,1  
**thing** 18:18 52:14  
 55:3 61:15  
**things** 18:20 45:23  
 63:15  
**think** 13:25 17:22  
 18:21 26:21 29:17  
 34:9,25 36:10 44:3  
 44:7 62:25  
**thinks** 19:2  
**third-party** 54:12  
**Thomes** 1:13  
**thought** 15:23  
**thousands** 52:2  
**three** 8:13,17,17 16:3  
 16:20,23 18:12,16  
 19:10,11 32:22,24  
 47:16  
**three-three** 35:8  
 54:25  
**threshold** 6:1 51:24  
**throw** 47:14

**thrust** 9:20  
**tie** 19:5,11,14 33:7,23  
 34:1 35:8  
**time** 6:4 7:1,13,13  
 12:6,6 19:16,16  
 22:6,7,11 23:9 24:1  
 24:3 28:2 33:16  
 40:19,19 55:1 58:1  
 58:2,5 64:15  
**timely** 64:14  
**timing** 64:13  
**today** 12:7 13:21  
 22:5 25:4 29:5  
 44:13,18 56:22  
**told** 16:24 44:18  
 56:21  
**traditional** 54:20  
**traditionally** 54:9  
**tragedy** 15:3  
**trampled** 23:10  
**transcript** 1:8 65:4  
**transparency** 29:23  
**treasurer** 10:25,25  
 13:12  
**treat** 27:15  
**treated** 14:17 39:21  
 61:9  
**trend** 17:13 44:1  
**trial** 64:7  
**tried** 56:10  
**tries** 27:21  
**trigger** 5:24 26:14  
 45:15 46:17,18  
**true** 10:22 18:16 26:6  
 30:6 34:15,19 48:6  
 51:23 62:8,15  
**trust** 7:16  
**truth** 3:8,9 6:12 7:21  
 7:22 8:5 21:20 30:1  
 32:5 41:24 56:9  
**try** 7:18 20:15  
**trying** 20:14 41:13  
**turn** 14:16 36:21 53:8  
**twice** 4:15  
**two** 4:21 8:13,16 9:10  
 9:21 12:17 13:7,8  
 14:19,22 16:15  
 18:20 20:13 21:16  
 21:17 23:15 26:9  
 45:12 49:6 55:23  
**two-prong** 43:22

**type** 7:2 9:13 11:10  
12:23,25 13:9  
**types** 6:2 13:13 28:6  
35:25

---

**U**

---

**U.S** 1:23 2:12,13,14  
2:19,21,24 3:3,4,11  
3:12 61:22  
**ultimately** 8:16 27:11  
**unable** 8:20 22:10  
32:17  
**unambiguous** 16:14  
24:19 30:23  
**unanimous** 32:19  
**uncertain** 54:1  
**unconstitutional**  
12:12 27:8 28:25  
59:24  
**underlying** 31:3  
**understand** 12:20  
19:23 54:5  
**understanding** 17:21  
62:2  
**undertake** 31:12  
**undertook** 45:5 46:10  
**undoubtedly** 23:10  
**unfortunate** 17:13  
**unfounded** 41:19  
**uniform** 14:2  
**Union** 2:12  
**unions** 27:19 28:6,10  
28:24  
**United** 1:1,10,20 2:15  
3:11,12 5:8,16 9:5  
9:16 10:11,11,19,19  
10:23 12:21 19:20  
20:18 24:8,16 25:16  
27:12 28:20 29:3,7  
29:9,11,16 33:9  
36:11,14,23 37:6,12  
37:19 38:13 41:10  
44:4,6,17,19 47:13  
48:12,21,22 50:16  
50:18,19,20 51:19  
54:14 56:21 63:17  
65:3  
**United's** 30:4  
**unlimited** 25:2 39:25  
40:1  
**unmistakable** 16:14

30:23  
**unrelated** 13:15  
**upheld** 9:5 12:6 25:9  
25:19 26:12 27:16  
27:18 28:5 29:7  
36:3 39:6 42:20  
49:15 59:18,21  
62:15  
**uphold** 59:16  
**upholding** 30:4  
**upholds** 23:3  
**use** 52:25  
**utmost** 64:14  
**utterly** 40:17 41:19

---

**V**

---

**v** 2:12,13,14,15,16,18  
2:19,20,21,22,24  
3:3,4,6,8,9,10,11,12  
3:13 52:21  
**vague** 19:3 30:10  
32:13 54:1  
**vagueness** 6:23 31:7  
54:13  
**Valeo** 2:14 6:16  
**value** 54:2  
**values** 15:5,16  
**varieties** 43:5  
**variety** 36:22  
**various** 36:25 37:20  
42:18 59:9  
**Vassallo** 1:20 4:20  
**verbs** 15:19 16:5  
**verified** 17:14 22:12  
45:4  
**versus** 3:7 4:5 6:4,16  
17:2 22:23 23:8  
26:3 34:7 37:20,23  
41:2 48:4 52:3  
54:19 63:5  
**veterans** 54:23  
**vice** 46:21  
**view** 20:19 32:2  
**views** 41:14 57:3  
**vindicate** 23:23  
**violate** 42:8  
**violated** 34:12  
**violation** 35:10  
**violations** 34:16,19  
**Virginia** 3:13 41:22  
54:23

**voices** 15:5,16  
**vote** 16:2 17:10 28:14  
35:9 41:4 61:12,14  
61:21  
**voters** 25:6 29:22  
41:13  
**votes** 32:25 33:3  
42:24  
**VS** 1:5

---

**W**

---

**W** 1:9  
**wade** 19:23  
**wait** 29:17  
**want** 13:8 14:21 16:2  
23:13 47:12 53:10  
53:10,18  
**wanted** 14:12 17:24  
33:13 35:22 47:17  
**wants** 33:17 42:12  
**Washington** 1:19  
**watch** 11:24  
**way** 17:9,20 19:7  
45:19 50:9 62:16  
**ways** 55:17  
**we'll** 43:16 62:10  
64:15  
**we're** 4:14 8:15,24  
12:19 13:18,25 16:8  
16:24 22:5,5,9,14  
22:17 29:4 35:23  
43:16 44:14,18,19  
49:15 50:8,8,23  
51:3,4 52:14,14,16  
56:18,18,21,22,24  
57:1 62:2,3,22,22  
63:13  
**we've** 8:25 11:9 31:10  
47:15 50:24,25  
56:23 57:25  
**weak** 21:18,18  
**week** 12:7 64:8  
**weigh** 23:7  
**weight** 18:21 29:24  
**went** 14:19 19:10  
52:12 54:24  
**west** 55:2  
**what's** 6:24 9:6 12:16  
16:4 20:23 22:19,20  
43:17 46:13 47:25  
53:12

**where's** 4:16 53:11  
**whim** 56:19  
**who's** 9:13,17,18  
10:5 13:11 43:3  
49:11,11  
**wholly** 45:3  
**wide** 49:17  
**wide-open** 7:4  
**wide-ranging** 62:12  
**wildly** 54:6  
**willful** 34:16  
**Williams** 3:11 31:7  
32:11  
**willing** 41:14 56:22  
56:24 57:1  
**Wisconsin** 2:24 5:16  
10:11 18:24,24  
19:12 27:11 28:4,8  
28:13,15 30:6,7,13  
30:15,22 33:5,9  
43:13 63:10  
**wish** 8:10  
**Wolcott** 1:24  
**won't** 31:8  
**wondering** 4:16  
**word** 30:16 57:25  
58:6  
**words** 6:8 7:11 25:5  
27:6,7 50:12  
**work** 5:11 14:21  
51:19,19  
**works** 4:13  
**world** 10:7  
**wouldn't** 21:15  
**wow** 56:12  
**writing** 10:13 54:15  
**wrong** 47:21  
**Wurzbach** 3:12 31:7  
32:12  
**Wyoming** 1:1,6,13,14  
1:21,24 15:3,5,11  
15:13,16 18:4,11,15  
48:14,15 65:4

---

**X**

---



---

**Y**

---

**yeah** 43:14  
**York** 21:25  
**you'd** 44:21  
**you're** 5:24 10:18,18



10:24 11:13,20  
13:10,11 16:25  
18:17 19:19,19  
44:11 45:8 46:3,4  
49:17,23,24 50:2  
51:24

**you've** 5:24 20:13  
35:8 43:14 63:12  
64:9

**Youth** 3:7 37:23  
52:22

---

**Z**

---



---

**0**

---

**09.16.12** 65:6

---

**1**

---

**1** 2:11,14  
**1,000-dollar** 46:1  
**1,268** 19:23  
**1,700** 19:25  
**10** 26:10  
**10,000-dollar** 56:25  
**100** 52:3  
**100-dollar** 51:24  
**100,000-page** 63:7  
**100.22(b)** 16:8 17:7  
18:6,19,23 19:13  
20:22 21:25 22:2  
24:18 25:13,20 27:2  
29:1 30:12,21 31:14  
31:18,20 32:2 42:2  
46:15 61:15  
**10737** 1:15  
**10<sup>th</sup>** 2:17 3:7  
**11** 26:18 58:25  
**11-factor** 43:22  
**111** 1:24  
**1137** 2:17  
**12** 1:5 11:2 13:13  
**12-CV-127** 4:5  
**12-CV-127-SWS** 1:4  
**1298** 3:3  
**12<sup>th</sup>** 61:7  
**130** 2:15,18 3:9  
**17** 2:20  
**1902** 1:13  
**1930** 3:12  
**1973** 2:13  
**1976** 2:14,19

**1986** 2:21  
**1987** 2:20  
**1990s** 27:3  
**1995** 2:23

---

**2**

---

**2** 2:11 3:2,2  
**2001** 3:14  
**2002** 2:12  
**2003** 3:4  
**2007** 2:17,24  
**2008** 3:11  
**201** 1:13  
**2010** 2:15,18 3:7,9,10  
**2011** 3:6  
**2012** 1:5 3:9 41:12  
**20463** 1:19  
**20850** 1:16  
**21** 3:10  
**217** 1:24  
**22** 2:12  
**225** 3:3  
**23** 2:19  
**2371** 3:9  
**238** 2:21  
**24** 2:3  
**253** 2:21  
**26** 3:6  
**263** 3:14  
**265-5280** 1:25  
**280** 3:12  
**2811** 2:18  
**285** 2:23 3:11  
**2d** 2:23 3:3

---

**3**

---

**3** 49:16 50:17,17 51:9  
**3:19** 1:5 4:1  
**30** 5:22 42:22 46:17  
46:20 58:3  
**304** 3:6  
**307** 1:25  
**31** 3:11,12  
**332** 3:4  
**347** 2:19  
**37** 2:18 3:7  
**379** 3:14  
**390** 3:3  
**396** 3:12  
**3d** 3:7

---

**4**

---

**4** 2:2  
**4:54** 1:5 64:17  
**40** 2:23  
**41** 3:14  
**413** 2:13  
**42** 2:4  
**424** 2:14  
**427** 2:19  
**449** 2:24  
**479** 2:21  
**48** 3:3  
**498** 2:17  
**4<sup>th</sup>** 3:14

---

**5**

---

**5** 2:15,24 3:4 7:24 9:9  
12:17 21:1 49:6  
50:9 51:4 52:11  
55:13 56:24  
**500** 19:24  
**52** 2:17  
**527** 11:8  
**535** 2:12  
**54** 2:13  
**540** 3:4  
**544** 3:9  
**551** 2:24  
**553** 3:11  
**564** 2:12  
**58** 2:5  
**599** 3:10

---

**6**

---

**6** 2:14  
**60** 5:22  
**60-day** 46:17  
**601** 2:13  
**61** 2:6  
**611** 3:7  
**615** 2:13  
**640** 3:6  
**65** 2:23  
**668** 1:21  
**669** 3:7  
**676** 3:3  
**681** 3:9  
**686** 3:10

---

**7**

---

**7** 3:9 18:25

**72** 39:15  
**79** 2:14

---

**8**

---

**807** 2:20  
**82001** 1:14  
**82003-0668** 1:21  
**82601** 1:24  
**857** 2:20  
**876** 2:15  
**88** 3:3  
**889** 2:15  
**8<sup>th</sup>** 3:6

---

**9**

---