

P R O C E E D I N G S

1
2 THE COURT: Ms. White, could you please call the
3 case.

4 THE CLERK: Yes, Your Honor. This is civil action
5 19-3124, K.H., et al. versus District of Columbia, et al.

6 Will the parties please come forward and identify
7 themselves for the record starting with the plaintiffs.

8 THE COURT: Where is Ms. Badlam?

9 MS. WILLIAMS: Good morning, Your Honor. Ms. Badlam
10 is in London on work, unfortunately.

11 THE COURT: Oh, tell her we missed her.

12 MS. WILLIAMS: Yes, she regrets.

13 THE COURT: Tell her also, I love London. So I'm
14 jealous. There's a great restaurant -- hold on one second.

15 MS. WILLIAMS: Unfortunately, she's very busy. So
16 it's not getting to enjoy the city as much as one would hope.

17 Ms. Williams on behalf of plaintiffs.

18 THE COURT: One second. I'm like on this and I
19 won't be able to get off of it.

20 Okay. You have to write this down for her, there's
21 this phenomenal restaurant in London called Fumo, F-u-m-o, and
22 it's in the -- it's basically in the theater district. It's
23 next to this hotel I love there called St. Martins Lane. Any
24 way, it's Italian tapas and it's phenomenal. It's really,
25 really good.

1 MS. WILLIAMS: Also, in London they have a rotating
2 cheese wheel.

3 THE COURT: Where?

4 MS. WILLIAMS: Also in the theater district. Like a
5 Sushi conveyor accept for nice cheeses.

6 THE COURT: That's awesome. Well tell her however
7 busy she is she is ordered to take her team there at some
8 point on her trip.

9 MS. WILLIAMS: I'll tell her.

10 THE COURT: Thank you.

11 MS. KELLEY: Good morning, Your Honor. Mateya
12 Kelley for defendant District of Columbia.

13 THE COURT: Welcome back.

14 MS. KELLEY: I'm joined by my Pamela Disney and
15 Lynsey Nix the client representative for CFSA.

16 THE COURT: All right. Welcome everyone. So the
17 reason I'm calling you all here today is, one, to get a status
18 update on your discovery, but it's also to issue a ruling on
19 the motion to dismiss. So this is probably not going to come
20 as a galloping shock to anyone, Ms. Kelley, I apologize in
21 advance you're not going to like much of this. I will
22 reiterate that I think you've done a phenomenal job on the
23 briefing and argument and we are just where we are.

24 All right. So this is the oral ruling on the motion
25 to dismiss in K.H. -- hold on, Christine do you have a copy of

1 this? Okay. In *K.H. v. District of Columbia*, No. 19-CV 3124
2 and related cases. I think the motion to dismiss was only as
3 to one or two cases, but the reasoning is going to apply to
4 all of them, unless one of you tell me I'm missing something
5 after I finish, okay? So it's going to be entered in all of
6 the cases.

7 So I'll start with the Social Security Act claims.
8 Plaintiff's seek to enforce multiple provisions in the Social
9 Security Act through 42 U.S.C. Section 1983. The most
10 relevant sections are codified at 42 U.S.C. 672(a), which
11 deals with foster care maintenance payments, and in several
12 subsections of 42 U.S.C. Section 671, which set forth various
13 requirements for the state plan for foster care and adoption
14 assistance that a state must adopt to receive certain federal
15 funds.

16 Defendants argue that I should dismiss those claims
17 both because these SSA provisions do not create any private
18 rights that plaintiffs can enforce through Section 1983 and
19 because plaintiffs fail to state a claim even if the Act
20 creates enforceable rights.

21 I'll first address the dispute as to whether the
22 relevant SSA provisions create privately enforceable rights.
23 In *Blessing v. Freestone* 520 U.S. 329, 1997, the Supreme Court
24 set out a three-prong test to determine whether a federal
25 statute creates rights enforceable through Section 1983.

1 Quote, first, Congress must have intended that the provision
2 in question benefit the plaintiff. Second, the plaintiff must
3 demonstrate that the right assertedly protected by the statute
4 is not so vague and amorphous that its enforcement would
5 strain judicial competence. Third, the statute must
6 unambiguously impose a binding obligation on the states. In
7 other words, the provision giving rise to the asserted right
8 must be couched in mandatory, rather than precatory terms, *Id.*
9 at 340-41, cleaned up.

10 In *Gonzaga University v. Doe*, 536 U.S. 273, 2002,
11 the Supreme Court clarified that to satisfy the first *Blessing*
12 prong the statute must, quote, unambiguously confer a right,
13 *Id.* at 283. The Court has held quote that the *Gonzaga* test is
14 satisfied where the provision in question is phrased in terms
15 of the persons benefited and contains rights-creating,
16 individual-centric language with an unmistakable focus on the
17 benefited class, end quote. And has, quote, rejected Section
18 1983 enforceability where the statutory provision contained no
19 rights-creating language; had an aggregate, not individual,
20 focus; and served primarily to direct the federal government's
21 distribution of public funds. End quote. *Health and Hospital*
22 *Corporation of Marion County v. Talevski*, 143 Supreme Court
23 1444-1457, 2023.

24 I note that, even if a statute satisfies the
25 *Blessing* test, quote a defendant may defeat the presumption

1 that it creates privately enforceable rights by demonstrating
2 that Congress did not intend that Section 1983 be available to
3 enforce those rights end quote, *Id.* at 1459, cleaned up. A
4 defendant may do so by showing either that the statute
5 expressly forbids enforcement via Section 1983 or that
6 Congress implicitly foreclosed private enforcement by, quote,
7 creating a comprehensive enforcement scheme that is
8 incompatible with individual enforcement, end quote, *Id.*
9 cleaned up.

10 The District has not made such a showing -- sorry,
11 the District has not made such an argument with respect to any
12 of the provisions at issue in this case, so I will not address
13 this possibility further.

14 As an initial matter, I want to address some general
15 arguments that each side makes about how to conduct the
16 enforceable-rights inquiry in the context of the SSA. Each
17 side claims that the Supreme Court's decision in *Suter v.*
18 *Artist M.*, 503 U.S. 347, 1992 and Congress's reaction to that
19 decision with the so-called *Suter* fix, support their case.
20 Plaintiffs have the better of the argument.

21 In *Suter*, the Supreme Court held that Section
22 671(a)(15) of the SSA does not confer any privately
23 enforceable rights 503 U.S. at 363. The Court concluded that
24 the provision's requirement that a state employ, quote,
25 reasonable efforts, end quote, to achieve various goals was

1 too indefinite to confer enforceable rights. Particularly
2 given that the section appeared in a list of provisions that
3 must appear in a state plan in order to obtain federal
4 funding, rather than a section imposing definite obligations
5 on states, see *Id.* at 358 to 63.

6 Congress responded in 1994 by enacting the, quote,
7 *Suter* fix, 42 U.S.C. Section 1320(a)(2), which provides,
8 quote, in an action brought to enforce a provision of this
9 chapter, such provision is not to be deemed unenforceable
10 because of its inclusion in a section of this chapter
11 requiring a state plan or specifying the required contents of
12 a state plan. This section is not intended to limit or expand
13 the grounds for determining the availability of private
14 actions to enforce state plan requirements other than by
15 overturning any such grounds applied in *Suter v. Artist M.*,
16 1113 Supreme Court 1360, 1992, but not applied to prior
17 Supreme Court decisions respecting such enforceability;
18 provided, however, that this section is not intended to alter
19 the holding in *Suter v. Artist M.*, that Section 671(a)(15) of
20 this title is not enforceable in a private right of action,
21 end quote.

22 The District reads this provision as reaffirming
23 that *Suter* was correctly decided. That is true in a narrow
24 sense, but the provision is more helpful to plaintiffs. It
25 undercuts the District's argument that, because Section 671(a)

1 subsections plaintiff seek to enforce appear in a list of
2 required features of a state plan, Congress did not intend
3 them to be privately enforceable, and makes clear that the
4 Court should not take *Suter's* narrow holding that one
5 provision of the SSA is not enforceable to mean that the
6 distinct provisions at issue in this case are not enforceable.

7 The District also argues that Congress's decision to
8 amend the SSA in 1996 to add an express cause of action to
9 enforce 671(a)(18), which requires state plans to provide that
10 state foster systems will not discriminate based on race,
11 color, or national origin, see 42 U.S.C., Section 674(d)(3)(A)
12 implies that Congress did not intend other sections to be
13 privately enforceable.

14 The 9th Circuit rejected a similar argument in
15 *Henry A. v. Willden*, 678 F.3d 991, 1008, 9th Circuit 2012 and
16 I agree with its reasoning. As plaintiffs point out, one
17 could equally well infer from Congress's action that Congress
18 thought other subsections were already privately enforceable,
19 or that Congress simply wanted to make it crystal clear that
20 important anti discrimination provisions were enforceable.
21 And as the 9th Circuit noted in *Henry A.* the express cause of
22 actions for 671(a)(18) is potentially broader than that
23 provided by 1983, so Congress may simply have intended to
24 enhance enforcement of that subsection rather than prevent
25 enforcement of other provisions, 678 F.3d at 1008.

1 Next, plaintiffs assert in their opposition at 13
2 that this Court previously determined that several provisions
3 they cite are privately enforceable in the *LaShawn* litigation.
4 But *LaShawn* does not really help the plaintiffs. As
5 defendants correctly point out, on appeal from the decision,
6 the D.C. Circuit declined to decide whether the SSA provides
7 enforceable rights, and remanded to the District court, quote,
8 with instructions to either fashion an equally comprehensive
9 order based entirely on D.C. law if possible, end quote, or
10 otherwise to reconsider its enforceability holding based on
11 *Suter*. *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319, 1324 to
12 26, D.C. Circuit, 1993.

13 As a final preliminary argument the District cites
14 *Melton v. District of Columbia*, 85 F.Supp.3d 183, D.D.C. 2015,
15 affirmed mem. 2015 Westlaw 9012019, D.C. Circuit, October
16 15th, 2015, for the proposition that a, quote, private
17 individual has no cause of action under either the SSA itself
18 or through an action under 42 U.S.C., Section 1983, Id. at
19 191.

20 *Melton*, which involved a pro se plaintiff, cited
21 *Suter* for this statement and provided no supporting analysis.
22 Id. Further, the Court noted that the pro se plaintiff in
23 that case had, quote, neither identified the specific
24 provision on which his claim rested nor alleged how any of the
25 SSA's specific provisions were violated, Id. It appears

1 likely, from the reference to, quote, "reasonable efforts" in
2 his complaint, that he intended to rely on Section 671(a)(15),
3 the provision at issue in *Suter*, Id. As a result, the Court
4 will not give Melton any weight in its analysis of the SSA
5 provisions, does not find itself bound by it, but plaintiff's
6 cite, and which were not at issue in *Suter*.

7 I will now address the specific provisions cited by
8 plaintiffs. First, I hold that Sections 672(a) and 675(4)(A)
9 create an enforceable right to foster care maintenance
10 payments. The weight of circuit authority favors that
11 conclusion. The 2nd, 6th, and 9th Circuits have all found
12 such an enforceable right belonging to foster parents. Those
13 cases are *New York State Citizens Coalition for Children v.*
14 *Poole*, 922 F.3d 69, 76 to 85, 2nd Circuit 2019. *D.O. v.*
15 *Glisson*, 847 F.3d 374, 377 to 80, 6th Circuit 2017. And
16 *California State Foster Parent Association v. Wagner*, 624 F.3d
17 974, 978-82, 9th Circuit 2010. Only the 8th Circuit has come
18 out the other way in *Midwest Foster Care and Adoption*
19 *Association v. Kincade*, 712 F.3d, 1190, 1196 to 1203, 8th
20 Circuit, 2013.

21 I conclude that the majority view is better
22 reasoned. Defendants, tracking the 8th Circuit in *Kincade*,
23 argue that the provisions merely set conditions that a state
24 must fulfill in order to obtain federal funding. But that
25 reading is in tension with the *Suter* fix, and, as the 2nd,

1 6th, and 9th Circuits have explained, the provisions meet
2 criteria for creation of an enforceable right. The language
3 focuses on the individuals protected and has an individual,
4 rather than an aggregate focus: It specifies that payments
5 must be made, quote, on behalf of each child, end quote. The
6 District does not assert that the provision is too vague or
7 that it is not binding, nor could it plausibly do so. Section
8 675(4) (a) sets detailed requirements for payments and 672(a)
9 unambiguously commands that states shall make payments. I
10 therefore hold that Section 672(a), together with 675(4) (a)
11 creates an enforceable right to foster care maintenance
12 payments.

13 I also conclude that Section 671(a) (16) creates an
14 enforceable right to receive a case plan reviewed under the
15 District's case review system. Courts have disagreed as to
16 the enforceability of this section. For example, the 9th
17 Circuit found an enforceable right in *Henry A. v. Willden*, 678
18 F.3d 991, 9th Circuit 2012. And the 6th Circuit found no
19 enforceable right without any real analysis in *John B. v.*
20 *Goetz*, 626 F.3d 356, 6th Circuit, 2010, per curiam.

21 The District argues that the section does not
22 unambiguously show that Congress intended to create an
23 individual right and so does not satisfy *Blessing* prong one;
24 plaintiffs, obviously, disagree. On balance, based on the
25 arguments presented to me so far, I think the 9th Circuit and

1 plaintiffs have the better of the argument. The section's
2 language focuses on each child and unambiguously entitles them
3 to a benefit, i.e. a case plan. The District's argument as to
4 this section focuses primarily on the fact that Subsection 16
5 is part of the requirements for a state plan under the SSA,
6 and so, according to the District is just a funding condition,
7 not an individual entitlement.

8 As the 9th Circuit explained in *Henry A.* that
9 argument is inconsistent with the *Suter* fix, which
10 specifically states that an SSA provision is not to be deemed
11 unenforceable because of its inclusion in the section
12 requiring a state plan or specifying the required contents of
13 a state plan, see 678 F.3d at 1007 and footnote 9. On the
14 briefing provided so far, I hold that Subsection 16 creates a
15 privately enforceable right.

16 Based on the arguments advanced by the parties thus
17 far, I also conclude that 671(a)(29) creates an enforceable
18 right for relatives of children removed from their parents to
19 receive notice of their options to participate in the care and
20 placement of those children. In its opening brief, the
21 District dedicates only one sentence to this provision; that
22 sentence says, quote, Section 671(a)(29) has much more
23 specific language than Subsection 22, but the only decision
24 defendants have found considering whether it confers a
25 federally enforceable right has found it does not, end quote,

1 motion at 19 to 20, citing *Murphy v. Baker*, 2017 Westlaw
2 2350246 at 9 to 10, D.Mass, May 4, 2017, report and
3 recommendation adopted, 2017 Westlaw 2363114, D.Mass, May 30,
4 2017.

5 But *Murphy* held only that, quote, the parent from
6 whose custody the child is removed did not have a private
7 right of action to enforce Subsection (a)(29). And noted
8 that, quote, it might be possible to read the text of
9 671(a)(29) as conferring an enforceable private right to
10 kinship notification on a child removed from the care and
11 custody of his or her parent or parents, *Murphy*, 2017 Westlaw
12 at 9.

13 Plaintiffs here are children and they would be
14 recipients of the notification, not the parents as in *Murphy*,
15 placing them squarely in the population the statute aims to
16 benefit for purposes of *Blessing* prong one. *Murphy* also
17 concluded that Subsection (29)'s requirement that the state,
18 quote, exercise due diligence, identify and provide notice,
19 end quote, to affected children's relatives, quote, fails to
20 provide clear guidance to a state of what is required and so
21 is too vague for private enforcement 2017 Westlaw at 9.

22 That point has some force. But the Supreme Court
23 has found relatively broad language to be judicially
24 enforceable where the remainder of the statute or other legal
25 sources flesh out the relevant requirements. For example, in

1 *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 1990,
2 the Court found an enforceable right under Medicaid statute's
3 requirement that the state set, quote, reasonable and adequate
4 reimbursement rates, in part because the statute and relevant
5 regulations listed factors that states had to consider in
6 setting rates, *Id.* at 507, 509 to 10, 519.

7 Similarly, here, the remainder of Subsection (29)
8 spells out a specific list of relatives that the state must
9 seek to notify and specific requirements for the contents of
10 the notice.

11 In its reply, the District also argues that
12 Subsection (29) does not unambiguously confer a right on
13 plaintiffs, but provides no analysis in support of that point.
14 The Court generally will not address arguments raised for the
15 first time in reply or that the party has not adequately
16 spelled out. See, for example, *See, Inc. v. Walsh*, 581
17 F.Supp.3d 265, 280 D.D.C. 2020.

18 The Court will follow that course here, especially
19 since the District's claim is far from obviously right,
20 Subsection (29) focuses on and speaks in terms of the specific
21 individual's benefited. Indeed, another court in this
22 district recently held that seemingly similar language in a
23 Medicare statute created an enforceable right. See *Salazar v.*
24 *D.C.*, 729 F.Supp.2d 257, 268 to 69, D.D.C. 2010. Absent more
25 developed argument from the District, I do not see how the

1 statute fails *Blessing* prong one, even post-*Gonzaga*. I
2 therefore will not dismiss the claims under Subsection (29).
3 However, if you want to renew the arguments at summary
4 judgment, you're welcome to do that.

5 I reach a different conclusion on the last two
6 subsections that plaintiffs cite, 671(a)(10) and (22).
7 Plaintiffs assert that Section 671(a)(10) grants them an
8 enforceable right to, quote, be placed in a foster care that
9 meets applicable standards. The weight of authority cited by
10 the parties, and that I have found, cuts against that
11 position. The cases finding no privately enforceable right to
12 a foster home meeting applicable standards include *White v.*
13 *Chambliss*, 112 F.3d 731, 739, F -- sorry, 4th Circuit 1997,
14 *Yvonne L. v. N.M. Department of Human Service*, 959 F.2d 883,
15 889 to 90, 10th Circuit, 1992; *Estate of Place v. Anderson* 398
16 F.Supp.3d 816, 480 to 41, District of Colorado 2019; and *Elisa*
17 *W. by Barricelli v. City of New York*, 2016 Westlaw 4750178, at
18 4 to 5, S.D.N.Y., September 12th, 2016.

19 I would agree with those courts that this subsection
20 does not create a privately enforceable right. Particularly,
21 I agree with the *Barricelli* court that the first *Blessing*
22 prong, as re -- as refined in *Gonzaga* is dispositive. The
23 text of the provision has a primarily aggregate, rather than
24 individual focus, it deals with a statewide standards that a
25 state must create. And there's no obvious rights-creating

1 language. Plaintiffs point to language requiring that the
2 standards the state must develop must apply to, quote, any
3 foster family home, and ensure appropriate liability for
4 caregivers and that waivers of safety standards are
5 permissible only on a case-by-case basis.

6 But each of those excerpts contemplates general
7 standards applicable on aggregate to every foster home; none
8 specifically vests any right in individual children or parents
9 or speaks in terms of the person benefited. The language is
10 much closer to the statute from *Gonzaga* than to the statute
11 from *Talevsky*, for example.

12 Plaintiffs do cite two decisions finding a privately
13 enforceable right under this subsection, *Marisol A. v.*
14 *Guiliani*, 929 F.Supp 662, 683, S.D.N.Y. 1996, affirmed in
15 other part, 126 F.3d 372, 2nd Circuit, 1997. And *Brian A. v.*
16 *Sundquist*, 149 F.Supp 2nd 941, 945 to 49, M.D. Tennessee 2000.
17 But both those decisions analyzed the first *Blessing* prong
18 only briefly, and both pre-date *Gonzaga*. For the reasons I
19 just gave, I don't think either survives that case. I also
20 recognize that *LaShawn* found an enforceable right under
21 671(a)(10), but, as I discussed earlier, the D.C. Circuit
22 effectively vacated that reasoning on appeal. I am therefore
23 dismissing the claims under 671(a)(10).

24 I also conclude that plaintiffs do not have an
25 enforceable right to, quote, receive services to protect the

1 children plaintiff's safety and health under 671(a)(22), as
2 they argue at page 22 of their opposition. Subsection (22)
3 requires the state's plan to provide that the state shall
4 develop and implement standards to ensure that children in
5 foster care placements in public or private agencies are
6 provided quality services that protect the safety and health
7 of the children, end quote.

8 Even assuming this provision meets *Blessing* prong
9 one, which is at least debatable, the provision speaks of
10 children in aggregate and requires only development of
11 standards at a statewide level, it is too vague and amorphous
12 to satisfy prong two.

13 The statute does not define quality services or give
14 any detail as to which types of services are required, beyond
15 the extremely high-level requirement that they protect the
16 children's safety and health. That language is too vague and
17 amorphous for judicial enforcement. That conclusion aligns
18 with the weight of persuasive authority.

19 The defendants cite five cases finding no
20 enforceable right, and my search turned up -- when I say my
21 search I mean my clerk's search -- turned up two more. Most
22 of those decisions reasoned that the subsection fails *Blessing*
23 prong two, and one cites prong one. The District's five cases
24 are in the reply brief at 11, 12. The two additional cases I
25 located are *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 490 n.3,

1 District New Jersey 2000. And *Whitley v. New Mexico Children,*
2 *Youth, and Families Department*, 184 F.Supp.2d 1146, 1164
3 District of New Mexico, 2001.

4 Plaintiffs cite only one decision finding the
5 provision privately enforceable, and my search did not find
6 any others. That one decision, *Kenny A. v. Perdue* 218 F.R.D.
7 277, Northern District of Georgia 2003, dedicated only one
8 paragraph to the *Blessing* analysis, including just one
9 conclusory sentence on prong two, see *id.* at 292. I agree
10 with the majority of courts that this subsection does not
11 create a privately enforceable right. I therefore dismiss the
12 claims under Subsection 671(a)(22).

13 I will now address the District's argument that
14 plaintiffs failed to state a claim under the Social Security
15 Act. I will address only those provisions under which I have
16 found privately enforceable rights, namely Sections 672(a),
17 671(a)(16), and 671(a)(29).

18 Defendants argue that plaintiffs have not alleged
19 that they met all the requirements for payments under Section
20 672, and by extension, the eligibility requirements for a case
21 plan under 671(a)(16), which applies to children receiving
22 maintenance payments. Plaintiffs contend that the District
23 should be equitably estopped from making that argument. The
24 District responds first that plaintiffs can use equitable
25 estoppel only to prevent the government from raising an

1 otherwise-available claim or defense, and not to fill in
2 missing elements in their claims, and second that, even if
3 equitable estoppel were available for that purpose, plaintiffs
4 can not show that it applies on these facts.

5 As to the first argument, although the cases cited
6 by the parties do refer to equitable estoppel in the context
7 of preventing the government from asserting a claim or
8 defense, all did so in the context of a party's attempting to
9 use estoppel for that purpose. The District has not cited any
10 case holding that a party could not use estoppel in the way
11 plaintiffs seek to, and the District has not explained why it
12 makes sense that the government could be estopped from, for
13 example, raising a statute of limitations defense after
14 causing a plaintiff to delay bringing her claim, but not from
15 arguing that plaintiffs have not satisfied the statutory
16 requirement the government allegedly deliberately sought to
17 prevent them from satisfying.

18 As to the second argument, the District argues that
19 plaintiffs cannot base an equitable estoppel argument on,
20 quote, erroneous advise by government employee or passive
21 rather than affirmative conduct, motion at 6. Maybe so, but
22 plaintiffs do not merely allege erroneous advice or passive
23 misconduct, rather, they allege that the District had an
24 affirmative policy of misleading kinship caregivers about
25 their options.

1 That makes this case unlike the cases the District
2 cites. For example, in *Office of Personnel Management v.*
3 *Richmond*, 496 U.S. 414, 1990, a case cited in one of the
4 authorities on which the District relies, the Supreme Court
5 held that, quote, erroneous and unauthorized advice by a
6 government employee could not provide a basis for equitable
7 estoppel, id. at 416. But that's not what plaintiffs have
8 alleged. In their view the CFSA employee's actions were
9 deliberate and pursuant to an agency policy.

10 Discovery may well show that plaintiffs' allegations
11 are off base. But for the moment and on the arguments before
12 me, I am not going to dismiss on that basis. Defendants also
13 argue that plaintiffs fail to state a claim under Section
14 671(a)(29) because plaintiffs were not removed from their
15 homes. I conclude that the complaints allege enough facts to
16 make it plausible that the District effectively removed these
17 children from their parents, even if they did not follow a
18 formal legal process in doing so. Neither side provides any
19 briefing on the meaning of removal in this context. Without
20 clear briefing on that point, I will not dismiss this claim
21 either.

22 Ms. Kelley, you can of course take up that argument
23 at summary judgment with a more developed record.

24 I'll turn next to plaintiffs' due process claims,
25 which I will dismiss. So just to repeat, I am dismissing the

1 due process claims. I'll start with the substantive due
2 process claims. Plaintiffs argue that defendants violated
3 plaintiffs' rights to, quote, adequate food, shelter,
4 clothing, medical care, and reasonable safety, Opp. at 35,
5 cleaned up. But even assuming such a right exists, nothing in
6 the complaint supports a reasonable inference that plaintiffs'
7 needs went unmet in any of those respects, at least to such a
8 degree as to create a constitutional problem. There are vague
9 references to financial and housing difficulties, but nothing
10 specific that would support a plausible substantive due
11 process claim. Plaintiffs also argue that the District
12 violated their substantive due process right to family
13 integrity without providing sufficient procedural grounds,
14 Opp. at 36.

15 That claim fails for at least two reasons. First,
16 plaintiffs do not dispute that it was appropriate to remove
17 these children from their parents; they simply wanted them
18 transferred to their current caregivers by a different
19 process. The cases plaintiffs cite recognize a substantive
20 due process right for children to remain with their parents
21 absent some sufficiently good reason to remove them, and
22 there's no dispute the District had a good reason -- a good
23 enough reason in this case.

24 Second, while plaintiffs claim they were removed,
25 quote, with no due process, Opp. at 36, their complaints make

1 clear that the plaintiff-caregivers obtained custody from the
2 parent pursuant to court orders, albeit from a different type
3 of D.C. court than the one plaintiffs assert was appropriate.
4 Plaintiffs are have not explained why these court orders were
5 constitutionally, infirm even if they think they were
6 inappropriate as a matter of D.C. law. Indeed, they have not
7 described the court proceedings in any detail at all. I
8 therefore hold that the plaintiffs have not stated a
9 substantive due process claim.

10 I'll turn now to the procedural due process claim.
11 First, to the extent plaintiffs mean to bring a procedural due
12 process claim based on a right to familial integrity, the
13 claim fails for the same reasons as in the substantive due
14 process context. Plaintiffs do not dispute that separation
15 was appropriate, so it's unclear how the purported lack of
16 process injured them with respect to their familial integrity,
17 and the plaintiff-caregivers obtained custody by court order,
18 and plaintiffs have cited no authority showing that the
19 procedure was inadequate or even describing what the procedure
20 was.

21 Plaintiffs do include one footnote, No. 22 in their
22 opposition, purporting to identify deficiencies in the
23 judicial process the District employed, but that footnote
24 cites no authority either for its claims about the nature of
25 the process or to show that the purported deficiencies are

1 constitutionally relevant.

2 Plaintiffs also assert the District deprived them of
3 certain procedural rights to which they were allegedly
4 entitled by statute, for example, CFSA's filing of a neglect
5 petition in the D.C. family court. But the D.C. Circuit has
6 held that plaintiffs cannot base a procedural due process
7 claim on the deprivation of a procedural right. And that's
8 Doe by *Fein v. D.C.*, 93 F.3d 861, 868, D.C. Circuit 1996.

9 Finally, plaintiffs allege that the District
10 deprived them of various substantive entitlements purportedly
11 owed to foster children and foster parents under District or
12 federal law, such as foster care payments or provision of
13 certain services. Plaintiffs argue that the District should
14 have provided additional process in the form of formally
15 removing the plaintiff-children from their parents, placing
16 them into foster care, and notifying the plaintiff-caregivers
17 of the opportunity to become licensed foster parents.

18 Plaintiffs argue that this procedure was required by
19 D.C. law. But the law is clear that, quote, the fact of a
20 state law violation does not resolve whether a plaintiff has
21 been deprived of due process, end quote. *Tate v. D.C.*, 627
22 F.3d 904, 908, D.C. Circuit 2010. So plaintiffs need to show
23 that these procedures were constitutionally required, not just
24 mandated by D.C. or federal statutes. Quote, the fundamental
25 requirement of due process is the opportunity to be heard at a

1 meaningful time in a meaningful manner, *Matthews v. Eldridge*,
2 424 U.S. 319, 33, 1976 cleaned up.

3 Procedural due process cases deal with what
4 procedures states, or D.C., must follow before depriving a
5 person of interest to which they are otherwise entitled by a
6 state or D.C. law. As the Supreme Court put it, procedural
7 due process rules are shaped by the risk of error in the
8 truth-finding process, *Id.* at 344. For example, *Matthews*
9 examined what kind of protections a state had to provide in a
10 hearing to determine a person's eligibility for disability
11 benefits, such as the right to a full evidentiary hearing.
12 See *Id.* 335 at 49.

13 That's not really what plaintiffs are asking for.
14 Plaintiffs acknowledge in their opposition that any sort of
15 hearing about benefits eligibility in this case would be
16 futile, since the plaintiff-caregivers don't meet the
17 eligibility requirements to receive the benefits they seek
18 because they aren't foster parents. Instead, plaintiffs want
19 the District to have followed a different process for removing
20 the children in the first instance, such that plaintiffs would
21 now be eligible for benefits.

22 That might be a challenge to the procedure the
23 District followed in a broad sense, but it isn't a procedure
24 within the meaning of procedural due process case law.
25 Plaintiffs are not arguing that if the District had simply

1 provided a fairer hearing they could have proven their
2 entitlement to benefits. They're really seeking a
3 different -- they are really seeking a different substantive
4 outcome about what steps the district should have taken and
5 what benefits it should have provided under district law.
6 Plaintiffs' theory would turn essentially any alleged
7 violation of state law into a federal due process claim and
8 that is not the law. For those reasons I am dismissing the
9 plaintiffs' due process claims.

10 I will also dismiss plaintiffs' equal protection
11 claim. Plaintiffs argue that the District violated the Fifth
12 Amendment's equal protection guarantee by depriving them of
13 the same services and benefits provided to non-relative
14 children and caregivers with no rational basis for doing so,
15 Opp. at 29.

16 Defendants dispute whether plaintiffs have
17 adequately alleged intentional differential treatment and
18 whether plaintiffs are similarly situated to non-relative
19 foster families, but the Court does not need to address those
20 issues because even assuming plaintiffs have made those
21 showings, they cannot show that the District's alleged
22 kinship-diversion program fails rational basis review.

23 Although the parties agree that some form of
24 rational basis review applies, they disagree as to the
25 details. Defendants propose traditional, deferential national

1 basis review. Plaintiffs argue that the Court should instead
2 employ the heightened form of rational basis scrutiny applied
3 in *Plyler v. Doe*, 457 U.S. 202, 1982.

4 The Court agrees with defendants that traditional
5 rational basis review applies. *Plyler* applied heightened
6 rational basis scrutiny to a Texas law that brought a
7 undocumented -- excuse me, Texas law that barred undocumented
8 school-age children from receiving free public school
9 education, 457 U.S. at 205. Plaintiffs make a good effort at
10 analogizing this case to *Plyler*, asserting that heightened
11 scrutiny is appropriate because the disadvantaged group is
12 innocent children and the deprivation at issue is an
13 impediment to individual achievement, Opp. at 31, quoting
14 *Plyler* at 222 and 230. But that argument ultimately does not
15 hold up. As the D.C. Circuit has noted, quote, the Supreme
16 Court has limited *Plyler* to its facts, *Calloway v. D.C.*, 216
17 F.3d 1, 7, D.C. Circuit 2000.

18 In *Kadmas v. Dickinson Public Schools*, 487 U.S.
19 450, 1988, for example, the Supreme Court said, quote, we have
20 not extended *Plyler's* holding beyond the unique circumstances
21 that provoked its unique confluence of theories and
22 rationales, Id. at 459 cleaned up. And in *Calloway*, the D.C.
23 Circuit applied ordinary rational basis scrutiny to a statute
24 capping fees that the District could pay to attorneys of
25 prevailing parties in certain disability-rights suits against

1 the D.C. Public Schools, notwithstanding the plaintiffs'
2 argument that the statute would, quote, make it less likely
3 that disabled children would receive an education that
4 conforms to federal statutory requirements, end quote, *Id.* at
5 2-3, 7-8.

6 In particular, the Court rejected the plaintiffs'
7 analogy to *Plyler*, concluding that simply burdening the
8 educational opportunities of disadvantaged children does not
9 trigger heightened scrutiny, *Id.* at 7-8. That reasoning
10 undercuts plaintiffs' argument that heightened scrutiny is
11 appropriate simply because some plaintiffs are disadvantaged
12 children whom the challenged policy further disadvantages.

13 More generally, the Supreme Court recently observed
14 that it, quote, hardly ever strikes down a policy as
15 illegitimate under rational basis scrutiny, and on the few
16 occasions where the Court has done so, a common thread has
17 been that the laws at issue lack any purpose other than the
18 bare desire to harm a politically unpopular group. *Trump v.*
19 *Hawaii*, 138 Supreme Court, 2392, 2420, 2018 cleaned up. This
20 case does not plausibly fit that category; if anything,
21 plaintiffs are politically sympathetic group, and nothing in
22 the pleadings suggests any animus against them.

23 The Court will therefore apply ordinary rational
24 basis scrutiny. The Supreme Court and D.C. Circuit have
25 explained that in the area of social and economic policy, a

1 statutory classification that neither proceeds along suspect
2 line nor infringes fundamental constitutional rights must be
3 upheld against equal protection challenge if there's any
4 reasonable conceivable state of facts that could deprive a
5 rational basis -- that could provide a rational basis for the
6 classification. *Dixon v. D.C.*, 666 F.3d 1337, 1342, D.C. Cir.
7 2011, quoting *FCC versus Beach Communications*, 508 U.S. 307,
8 313, 1993.

9 That standard is, quote, highly deferential. Quote,
10 courts are compelled under rational-basis review to accept a
11 legislature's generalization even when there is an imperfect
12 fit between means and ends. *Heller v. Doe by Doe*, 509 U.S.
13 312, 321, 1993. And since the District does not need to offer
14 evidence supporting its policy, the Court can conduct rational
15 basis review at the motion-to-dismiss stage. See, for
16 example, *Dixon*, 666 F.3d at 1342 to 44.

17 Whatever the policy merits of kinship diversion, the
18 Court cannot say there's no conceivable state of facts that
19 provides a rational basis for the practice. It is
20 conceivable, for example, that the practice could be more
21 likely to keep children with familiar caregivers, avoiding
22 traumatizing them through involvement with the foster system
23 and the Courts, and effectuate placements more quickly and
24 efficiently than formal foster proceedings. I therefore
25 dismiss the equal protection claims for failure to state a

1 claim.

2 Before turning to plaintiffs' claims under D.C. law,
3 I will address the District's argument as to supplemental
4 jurisdiction. Under 28 U.S.C. 1367(a), I can exercise
5 supplemental jurisdiction over plaintiffs' D.C. law claims if
6 they are so related to the federal claims that they form part
7 of the same case or controversy. The test is satisfied when
8 the claims derive from a common nucleus of operative facts.
9 *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725,
10 1966.

11 I conclude, and the District does not dispute, that
12 the requirement is satisfied here, since all of plaintiffs'
13 claims arise from CFSA's handling of the plaintiff-children's
14 cases. The District nevertheless argued in its motion that,
15 even if some of federal -- even if some of the plaintiff's
16 federal claims survive, I should nonetheless exercise my
17 discretion to decline to exercise supplemental jurisdiction
18 under 28 U.S.C. 1367(c). I'm not going to take that
19 personally, Ms. Kelley. I understand the District to have
20 backed away from that position at oral argument.

21 When asked at page 21 of the transcript whether I
22 could exercise jurisdiction over the D.C. law claims if at
23 least one federal claim went forward, the District's counsel
24 responded that I may keep them, yes.

25 Even assuming that the District wants to maintain

1 the argument from its motion, I reject it. The District
2 argues that dismissal is appropriate because the D.C. law
3 claims implicate allegedly novel, disputed legal issues. But
4 even if the District is correct, the SSA claims and
5 plaintiff's equitable estoppel argument may implicate many of
6 the same issues about the legality of the District's conduct
7 under D.C. law; unlike in the cases the District cites in its
8 briefing, I can't avoid those issues by dismissing the D.C.
9 law claims.

10 Further, although we are only at the
11 motion-to-dismiss stage, these cases have been pending for
12 years, and it would disserve judicial economy and be unfair to
13 plaintiffs to send them back to the drawing board in the
14 Superior Court. I will exercise supplemental jurisdiction
15 over the D.C. law claims.

16 I will address the fraudulent and negligent
17 misrepresentation claims next. I conclude that these counts
18 survive the District's motion.

19 The parties agree that to state a claim for
20 fraudulent misrepresentation under D.C. law, a plaintiff must
21 allege facts showing that a person or entity made a false
22 representation of or willfully omitted a material fact; had
23 knowledge of the misrepresentation or willful omission;
24 intended to induce another to rely on the misrepresentation or
25 willful omission; and that the other person acted on reliance

1 on that misrepresentation or willful omission; and suffered
2 damages as a result of that reliance. *Sundberg v. TTR*
3 *Reality, LLC*, 109 A.3d 1123, 1130, D.C. 2015, cleaned up.

4 The elements of a negligent misrepresentation claim
5 are the same, except that a plaintiff need not allege that the
6 defendant had knowledge of the falsity of the representation
7 or the intent to deceive, *Id.* at 1131.

8 Although the non-disclosure of material information
9 may constitute fraud when there is a duty to disclose, mere
10 silence does not constitute fraud unless there is a duty to
11 speak. *Id.* cleaned up.

12 Defendants contend that plaintiffs fail to state a
13 claim because defendants had no duty of disclosure and
14 plaintiffs do not concretely allege damages, motion at 41.

15 Defendants originally also argue that any alleged
16 misrepresentation was of law not of fact, but they withdrew
17 that argument in their reply so I will not address it.

18 As to the duty argument: Plaintiffs argue that
19 671(a)(29) created a duty for the District to disclose the
20 relevant information. The District first responds that this
21 provision does not create an enforceable right, but I have
22 already rejected that argument.

23 The District also argues that the provision does not
24 require specific disclosures, but the Section's language is
25 indeed quite specific. The notice must, quote, explain the

1 options the relative has under federal, state, and local law
2 to participate in the care and placement of the child, and
3 describe the requirements to become a foster family home and
4 the additional services and supports that are available for
5 the children placed in such a home. 42 U.S.C. 671(a)(29)(B)
6 to (C). Any plausible interpretation of that requirement
7 would seem to cover the disclosures that plaintiffs allege
8 they were not provided.

9 The District also argues for the first time in its
10 reply that plaintiffs do not cite any legal authority showing
11 that the provision creates a duty actionable under D.C. tort
12 law, reply at 23. But since the District did not advance this
13 argument until its reply and does not offer any reason to
14 think, or case law showing that, federal statutes cannot
15 create duties under D.C. law the Court will not address that
16 argument at this stage.

17 Ms. Kelley, you're welcome reargue that argument.

18 The District's reply also asserts that plaintiffs do
19 not address the full text of 671(a)(29), but it does not
20 explain what language the plaintiffs do not cite would
21 undermine their case, nor is it obvious what the District
22 is referring to.

23 The Court therefore concludes that the Plaintiffs
24 have adequately alleged a duty for purposes of these claims.
25 I note that at oral argument, plaintiffs also suggested that

1 defendants might have had a duty under D.C. law. Since I have
2 already rejected the District's duty argument based on
3 671(a)(29), I do not need to address plaintiff's D.C. law
4 argument at this stage.

5 As to the damages argument, the primary damages on
6 which plaintiffs rely is the loss of maintenance payments.
7 Defendants argue that plaintiffs do not allege they would have
8 met all of the eligibility criteria to become foster parents
9 under D.C. law. And they do not therefore sufficiently allege
10 that they suffered damages because of the District's actions,
11 motion at 42. I conclude that plaintiffs have alleged enough
12 facts to make it plausible that, but for the alleged
13 misrepresentations, they would have been licensed as foster
14 parents.

15 First, the defendants are wrong that no plaintiffs
16 allege that they met the eligibility criteria to become foster
17 parents; two of the five plaintiff-caregivers so allege, and
18 one of those two even allege that she had previously been
19 licensed, K.H. complaint at paragraphs 75 and 86.

20 Second, even where plaintiffs do not specifically
21 allege that they met the eligibility criteria, the fact that
22 the District urged those individuals to seek custody and that
23 D.C. courts granted them custody, makes it plausible that they
24 would have satisfied those criteria. Defendants do not offer
25 any factual reason to think otherwise. I therefore conclude

1 that plaintiffs have adequately alleged damages.

2 I will address the negligent claims only briefly.
3 The District did not address the negligence claims in any
4 detail until its reply memorandum, and again, as a general
5 rule, the Court will not consider arguments advanced for the
6 first time in a reply. Were this the only claim that might
7 survive, I would be inclined to consider the District's
8 arguments, but since several counts will survive dismissal and
9 the claims implicate some potentially difficult legal
10 questions on which the Court would benefit from full briefing,
11 I will not address these arguments now. The District is free
12 to make its arguments at the summary judgment stage.

13 Finally, I will dismiss the claims under the D.C.
14 Human Rights Act. I will dismiss the claims under the D.C.
15 Human Rights Act. Plaintiffs assert that the District's use
16 of kinship diversion constitutes discrimination based on
17 familial status in violation of the act. Plaintiff's argue
18 that kinship diversion discriminates based on familial status
19 because under their reading of the Act participants in kinship
20 diversion have familial status while formal foster parents do
21 not.

22 To support that reading plaintiffs point out that
23 kinship diversion caregivers take legal custody of the
24 children diverted from their care while foster parents do not
25 take legal custody of the children only physical custody.

1 Plaintiffs then argue that the Act's definition of familial
2 status specifically requires legal custody. D.C. Code Section
3 2-1401.02(11A). So by providing benefits to foster families,
4 who purportedly do not have familial status, and not to
5 kinship-diversion participants who do, the District allegedly
6 discriminates based on familial status.

7 I note that there is some dispute between the
8 parties as to whether or not the parent has legal custody, but
9 I would dismiss the claim even if they did or didn't. First,
10 if CFSA has legal custody of foster children, it seems certain
11 that even if legal custody issue precludes foster parents from
12 qualifying for familial status based only on their physical
13 custody of foster children, they at least qualify for familial
14 status CFSA's designees.

15 In other words, the definition of familial status
16 lists two ways to obtain that status, one is legal custody,
17 and the other is written authorization from the child's legal
18 custodian. Plaintiffs argue that foster families do not have
19 familial status under the first prong, but say nothing about
20 the second. It is not plausible that formal foster parents do
21 not have some form of written authorization from the District
22 memorializing their relationship with their foster children,
23 creating familial status under the Act's definition.

24 And I note that several federal courts have applied
25 this reasoning to conclude that foster families qualify for

1 familial status under the federal Fair Housing Act, which
2 defines familial status almost identically to the DCHRA. The
3 FHA definition is at 42 U.S.C. 3602(k) and cases applying this
4 reasoning include *Gorski v. Troy*, 929 F.2d 1183, 1187 7th
5 Circuit 1991, and *Diamond House of Southeast Idaho, LLC v.*
6 *City of Ammon*, 381 F.Supp.3d 1262, 1276, District of Idaho,
7 2019.

8 These courts' reasoning is particularly persuasive
9 because neither side has cited any case law interpreting the
10 D.C. Act's definition of familial status. And D.C. courts
11 interpreting the Act have generally looked for guidance to
12 precedent applying federal civil rights laws. And that's
13 *Boykin v. Gray*, 895 F.Supp.2d 199, 219 D.D.C. 2012, cleaned
14 up, affirmed sub nom. *Boykin v. Fenty* 650 F.App'x 42, D.C.
15 Circuit 2016.

16 Second, even if foster families did not qualify for
17 familial status in the way I just discussed, I conclude that a
18 D.C. court would not read the Act's language so literally as
19 to exclude foster families from its protection.

20 Because I reject plaintiff's argument that
21 traditional foster families do not have familial status and
22 kinship diversion families do, I conclude that plaintiffs have
23 not stated a plausible claim for discrimination based on
24 familial status under the Act, and I therefore dismiss the
25 D.C. human rights claims.

1 All right. So to sum everything up, I grant the
2 motion to dismiss in part and deny it in part. I dismiss the
3 equal protection, due process, and D.C. Human Right Act claims
4 as well as the Social Security Act claims under Section
5 671(a)(10) and 671(a)(12) -- 671(a)(22). I deny the motion
6 with respect to the remaining claims.

7 All right I hope everyone's about to hear what I'm
8 about to say and that I haven't bored you to death yet. I
9 want to emphasize that this is a very complicated case.
10 Counsel for both sides have done a very able job in briefing
11 and arguing a number of complex issues. Moving forward we're
12 going to have a narrower set of issues and we'll have concrete
13 facts to which to apply the law. So while I'm always hopeful
14 that parties will be able to work out things out
15 cooperatively, and while I will be heavily encouraging you all
16 to try to figure this out on your own, if that does not happen
17 and we find ourselves back here on summary judgment, I want to
18 be absolutely clear that I'll be open to hearing new or
19 renewed arguments on the claims which we are proceeding.

20 So just to be absolutely clear, Ms. Kelley, you have
21 free reign to re-argue whatever you would like to argue,
22 subject of course to my standing order on pre-motion
23 conferences before we file summary judgment.

24 Also, while I have ruled today that plaintiffs have
25 some plausible claims -- I've ruled today that plaintiffs have

1 some plausible claims, but if the district feels that I have
2 missed something in my analysis of the law or that with fewer
3 things to brief you could flesh out your arguments a bit more,
4 you should feel free to visit those points again in summary
5 judgment briefing and I'll be open to reconsidering my
6 analysis. Okay?

7 So plaintiffs, you live to fight another day. I
8 have to tell you, based on everything that I've seen and some
9 concern that I have on your equitable estoppel claims that I'm
10 letting them survive based on that basis. But I am -- I think
11 the District makes some powerful arguments. And I'm basically
12 letting it move forward to see where we get on discovery to
13 see if we can flesh out those claims any better.

14 I think what we can all agree is that everyone in
15 this room wants what's best for the foster children that are
16 at issue here and for their families and for their caregivers.
17 And as I said, I think the last time we were here, whatever
18 the allegations, and whatever decisions the district has made,
19 I have full confidence that whether they're right or wrong,
20 misguided or not, that the individuals in charge of this
21 program are doing the best they can with a number of limited
22 resources. I fully appreciate that they care about what
23 they're doing and that they're doing the very best that they
24 can.

25 I also fully appreciate I'm a poli/sci major and

1 English minor from a small liberal arts school in Lexington,
2 Kentucky. In other words, I am the last person that should be
3 making decisions any decisions about what's best for foster
4 children, especially since I don't even have any.

5 All of which is to say, I hope that you all are
6 talking to each other about a way that we can resolve some of
7 these issues, or at least resolve some of this litigation in a
8 way that doesn't involve spending a tremendous amount of
9 resources on both sides and a tremendous amount of time on
10 both sides before we get to some resolution here, other than
11 just summary judgment or trial and then an appeal. Because if
12 all that happens, not only will you all be wasting a bunch of
13 time in litigation, there will be a bunch of kids out there
14 who if they're deserving of more care aren't getting it. And
15 whatever happens here is of course going to get appealed if
16 you guys don't figure this out. And that means that none of
17 you are out of here for the next three or four years without
18 any sort of meaningful resolution to this case, which I think
19 would serve no one's interest and, in fact, would be a
20 disservice to a number of people.

21 So that said, Ms. Kelley -- first of all, does
22 anyone have any questions? I mean, obviously I know both
23 sides will disagree with some of it, but does anyone have a
24 question about my rulings, so far as you've had a chance to
25 digest it?

1 All right. Ms. Kelley, can you let me know, please,
2 where you all are on discovery and where the status of the
3 case is right now?

4 MS. KELLEY: Good afternoon, Your Honor. Thank you
5 for sharing your ruling. It is a lot to take in and I will
6 just note that we will take into consideration the claims that
7 have been dismissed and look again at the discovery going
8 forward. I haven't processed it yet, but we are substantially
9 complete on production of documents related to the individual
10 families. That includes something we call the case file. We
11 have discussed with the plaintiffs what that means. We are
12 working hard to make sure it is anything and everything that
13 would have been in a paper file, you know, if we had such a
14 thing.

15 We have also produced most of the emails. I was a
16 little bit confused about the time period. So we have to go
17 back and there's less than a thousand to push out. So we
18 expect to do that soon. I think on that front, if the
19 plaintiffs want to start preparing to speak with the
20 individual social workers, the people who were allegedly
21 involved in the communications with the caregivers that are
22 clearly part of this case now, they should do so. Otherwise,
23 we are moving forward --

24 THE COURT: Well, hold on, the social workers still
25 work for the Government?

1 MS. KELLEY: Most of them.

2 THE COURT: You're not giving them free range to
3 just reach out to them.

4 MS. KELLEY: No. They would --

5 THE COURT: You mean depose.

6 MS. KELLEY: Yes.

7 THE COURT: Okay. You said speak to, so it just
8 sounded like you meant call them up and see, you know, have a
9 beer, but I assume what you meant is deposed.

10 MS. KELLEY: Please do not call them up. No, in the
11 ordinary course, they would give us a list of witnesses we
12 would reach out about scheduling, yada, yada.

13 We have agreed on a set of search terms for what we
14 call the policy documents. They are a search -- obviously, we
15 have hard policies we have already produced, anything and
16 everything that is a formal written policy that is conceivably
17 related to what the social workers might have said have been
18 produced.

19 We, as I said, as we said in the status report,
20 would like the opportunity to file a written brief suggesting
21 that we narrow the scope of the policy discovery. We will
22 reconsider -- I have bullet points with the argument, we will
23 reconsider that in light of the ruling. But we have -- we
24 also expect to move to dismiss the plaintiffs prospective
25 claims for declaratory and injunctive relief once we receive

1 discovery.

2 And this is connected to the policy documents
3 because the Court has ordered us to produce five years, we're
4 looking at 2018 through 2023. The allegations in the
5 complaints stop as of July 2020. So the last complaint
6 incident was July 2020. In our view the policy documents
7 through 2023 are only possibly relevant if they would need to
8 show, for prospective relief, that the policy continues. If
9 those claims go away then there's no need to get into
10 discovery concerning a lot of policy changes that have
11 happened in the last couple years.

12 THE COURT: Is there any issue with her just giving
13 you the years through 2020 pending whatever I do on this
14 coming motion?

15 MS. WILLIAMS: Yes -- no, but we would also say
16 that --

17 THE COURT: You need to come to a mike.

18 MS. WILLIAMS: So when we initially had decided --
19 or when we initial filed the motion to dismiss and got to the
20 briefing stage back in 2021, we had agreed to stay or stop
21 filing future motions for other caregivers who have alleged
22 similar complaints and who D.C. KinCare represents. And so
23 there are later in time points past '21 in sort of future
24 plaintiffs.

25 THE COURT: Are these other than the six

1 plaintiffs -- I'm aware of six cases; right? Five or six
2 cases. Are these plaintiffs in those cases or cases that have
3 not been brought.

4 MS. WILLIAMS: Cases that we agreed not to file
5 until after the motion to dismiss was decided. But we are
6 happy as a preliminary matter to focus on the more limited
7 time period.

8 THE COURT: I mean, look, here's what I think, I
9 think if we focused on a more limited -- I don't know why I
10 gave you till 2023 last time. Maybe Ms. Badlam was
11 particularly effective that day, but Ms. Kelley is making
12 sense. It seems to me that if you have a more limited scope
13 of time, like two to three years, you're going to get the
14 information faster, you're going to be able to focus on it,
15 and you're going to be able to know if there's a there there;
16 right?

17 MS. WILLIAMS: Right.

18 THE COURT: I mean, if you get the policies from
19 2018 to 2020, and you all decide -- and keep an open mind
20 here -- and you all decide, you know what this is not what we
21 thought it was, the District has these reasonings and is doing
22 things in a way that we just didn't anticipate. And it
23 actually makes some sense and maybe it makes sense to talk to
24 the District and see if we can settle these cases and maybe
25 figure out a different policy or some changes or whatever, you

1 know, stranger things have happened, it seems that would be
2 far more fruitful for you to get some initial information to
3 be able to determine where to go with your future filings than
4 to just make her go through giving you years of information up
5 front.

6 MS. WILLIAMS: Certainly. I think to the extent
7 that there are very specific -- I think the concern is with
8 the later in file, to the extent there was significant policy
9 revisions on particular documents, particularly safety
10 planning or, you know, how to govern family team meetings or
11 how to effect these kinship diversions, to the extent there's
12 discussion of what gets in there versus what isn't based on
13 sort of what happened after we filed the lawsuit, I think that
14 would be relevant if there's some insight into what those
15 documents can provide into how the the District used their
16 position sort of based on the claims in the lawsuit, or how
17 they're refining their policies so the written form would not
18 violate what they -- what we allege in the complaints.

19 THE COURT: So, Ms. Kelley, where are you in the
20 review of these policy documents? Like, have you reviewed --
21 like if I said to you, hold off on '21, '22 and '23 for right
22 now, don't -- I'm not saying those will never become at issue,
23 I'm just saying let's put those on hold right now. Let's try
24 to keep moving this along. If I said to you, focus on 2018,
25 2019, and 2020, would you be able to get her things quicker?

1 MS. KELLEY: Certainly, there would be at least a
2 few thousand documents probably 4 or 5,000 documents less.
3 And the other thing is, so the first allegation is back to
4 October of 2018, the last is July of 2020. The District
5 issued a written policy in July of 2020 about diversions and a
6 few things thereafter that Ms. Williams is referring to.
7 Those reviews are going to be much more complicated because
8 they involve a lot more privilege. They are, as she
9 acknowledges, partly in response to things that we learned in
10 the lawsuit.

11 They are also in response to a process that was, I
12 now understand, started by KindCare Alliance as part of the
13 LaShawn suit. This issue was raised in the LaShawn suit.
14 CFSA was under federal jurisdiction until 2021, essentially
15 under monitoring. And there was a long process. Those emails
16 are going to be complicated to review, there's also --

17 THE COURT: No, no, I hear you. As she was talking
18 I had a feeling that you were going to tell me you were going
19 to have privilege issues and work product issues.

20 MS. KELLEY: There's also something called the
21 deliberative process privilege.

22 THE COURT: Yeah, yeah. Who are the -- I imagine
23 some folks in this room are some of the people, but once you
24 all finally get some information, like you have the individual
25 care people files, and you're going to have at least 2018,

1 2019 and 2020 through July here pretty soon, who are your --
2 are you guys hiring experts to look at this stuff?

3 MS. WILLIAMS: We're doing it ourselves.

4 THE COURT: You're doing -- but like, I mean, are
5 you going to have experts in how these things should be
6 handled or are you just working with the people who work for
7 your client who maybe are expert in these issues.

8 MS. WILLIAMS: Yeah, I think at this point we
9 haven't contemplated sort of the whole expert --

10 THE COURT: Well, here's my question, here's what I
11 want to know, I want to know who I get in a room talking to
12 each other that's not lawyers to try to figure out some way
13 through this morass, so who would those people be? Go
14 ahead.

15 MS. KELLEY: If I may? I am -- is Ms. Spindel --

16 MS. WILLIAMS: She's not here. This is
17 Ms. McLellan.

18 MS. KELLEY: So KinCare Alliance is an attorney for
19 plaintiffs. They are, as best I can tell, dedicated, focused,
20 somewhat expert advocates. They have engaged with CFSA
21 extensively for years on this exact subject and a lot of the
22 emails I am seeing are with them. There has been a process
23 for years. And one of the things that we would like to put
24 into our written motion is that the -- and this was in our
25 status report -- the wisdom of the policy, the reasons for the

1 policy, the back and forth about why this and not that is not
2 relevant.

3 I understand, especially since KinCare is counsel in
4 this case, that the plaintiffs have an interest in
5 understanding it, in presenting it, in making the fact finder
6 feel like they're right. But it is not relevant. It is
7 burdensome. And we should not have to produce, for example,
8 everything explaining why we changed this draft versus that
9 draft.

10 THE COURT: Yeah, yeah, look-- All right. We're
11 going to do this: Let's hold off on depositions for right
12 now, because that takes a ton of time for everybody. All
13 right. You get them the 2018, 2019, and up to June or July
14 whatever 2020 documents as soon as you can. Like, I'm giving
15 you a break here. And I'm doing that so you get things to
16 them quicker, not not quicker, okay? That doesn't mean you
17 were going to take 60 days and now you're still going to take
18 60 days. That means, you know, I'm cutting off three years
19 here, okay? Put those in reserve. Don't get rid of them.
20 Put those in reserve.

21 You talk to your people and you talk to your people.
22 And I want you each to identify three people from each side
23 that can get together to have focused conversations on what we
24 do about this once you get them these policy documents, okay.
25 So let's say it takes you -- I'm just making up a number, 30

1 days to get her these policy documents, right, seems like
2 that's the big outstanding thing that you don't have right now
3 is the policy documents.

4 MS. KELLEY: They have the policy documents, we're
5 talking about emails.

6 THE COURT: Okay. Well, that's what people care
7 about. I mean, I've been a litigator enough to know --

8 MS. WILLIAMS: We want the complete policies.

9 THE COURT: I know, but you want the emails. You
10 want what people say about the policies, who are making the
11 policies, right? I mean, that's what litigators care about.

12 So you get her those documents. In the meantime you
13 guys figure out who's already talking to each other, who can
14 continue talking to each other or whatever. And then I want
15 you all to appoint a working group. And if there's already a
16 working group, by all means. I want you to have a working
17 group. And if the lawyers want to be involved in the
18 meetings, outside counsel, Ms. Kelley, Ms. Badlam, whoever
19 wants to be involved, fine, but you're not allowed to
20 intervene and talk. If you want to sit there and listen you
21 can. But I want people who are focused on trying to figure
22 out how to get this done correctly, in a working group with
23 regularly scheduled meetings, once you have the information,
24 to see if we can move this forward, other than through me.

25 Because I promise you, Ms. Kelley, that's going to

1 save you and your colleagues a lot more time than -- if it
2 works -- than this litigation.

3 MS. KELLEY: Your Honor, I'll just say again, the
4 agency has engaged in good faith with the experts for years.

5 THE COURT: I have absolutely every belief that you
6 have engaged in good faith. I don't have any doubt about that
7 at all. I'm telling you now that we're doing it under the
8 auspices of a court order of ongoing working group to try to
9 get these settlement things going.

10 MS. WILLIAMS: Can I ask a clarifying question.

11 THE COURT: Sure.

12 MS. WILLIAMS: Is KinCare they are --

13 THE COURT: I mean, party representatives. I mean
14 not you two. What I mean is I want people from the Department
15 of State meeting without people from the Department of Defense
16 getting in the way.

17 MS. WILLIAMS: Okay.

18 THE COURT: Or the Army getting in the way, does
19 that make sense? You guys figure out something that works,
20 meet on a regular schedule, try to see if we can get this
21 thing moving. Hopefully, if they now have more information
22 than they've had, maybe these working groups will be more
23 efficient. And please communicate to your clients that there
24 is some wild chance out there that they are actually doing the
25 right thing here.

1 MS. WILLIAMS: We acknowledge everyone is doing
2 their best.

3 THE COURT: All right. Ms. Kelley, anything else?

4 MS. KELLEY: The working group is to meet kind of
5 indefinitely?

6 THE COURT: Yup, while this litigation is ongoing,
7 it's basically an ongoing settlement group.

8 MS. KELLEY: We will -- I know this has happened in
9 other cases, and --

10 THE COURT: I know, because I just ordered it in one
11 of your other cases. I assume that there's a reason that D.C.
12 tries to get rid of me every time I'm on one of their cases, I
13 imagine this is a big reason why.

14 MS. KELLEY: No, Your Honor.

15 THE COURT: You don't have to comment, but go
16 ahead.

17 MS. KELLEY: We will --

18 THE COURT: I'm not going to micromanage the group.
19 Look, I'm not saying meet every day. I'm not saying meet
20 every week. I want people who are the actual people who are
21 experts in these areas, and who can actually come to the right
22 decision as to how we should move going forward, to be meeting
23 on a regular, good faith basis, with now more information
24 flowing between you two. It's not going to happen overnight,
25 it's not going to happen in three months, in four months, but

1 this litigation is going to be going on for at least one or
2 two more years in front of me if we just proceed on the
3 regular pace. And what I want is during that time period for
4 some background group to actually be trying to make progress
5 as opposed to us just slinging at each other all the time,
6 okay?

7 MS. KELLEY: Yes, Your Honor.

8 THE COURT: Okay. So I come from a background of
9 international arbitration, and I've -- I've said this in a lot
10 of my hearings, Ms. Kelley, you might have already heard this,
11 but they have what's called hot-tubbing in international
12 arbitration, do you all know what that is? Hot-tubbing is
13 every litigators' worst nightmare. Does anyone here know what
14 it is?

15 MR. KEARNEY: I've heard of it in the antitrust
16 context where experts sort of chat with the judge and educate
17 as opposed of through the --

18 THE COURT: Yeah, so what happens is experts from
19 both sides get up on the witness stand at the same time and
20 talk to each other, and the judge asks questions, and they
21 talk to each other. And inevitably what happens, which is why
22 litigators hate this, is that the experts come to heated
23 agreement on things. And once they're like nerding out,
24 talking to someone who speaks their language, they become a
25 little bit more loose, they actually try to find solutions and

1 they try to get to common ground because that's who they like
2 speaking to.

3 Judges Love this because they get sort of a lot more
4 consensus than they otherwise do through peer testimony.
5 Litigators hate it for that same reason, it's totally out of
6 their control. So what I want is a hot tub of working group
7 people who are experts, not in front of me, I won't do that to
8 you, at least not yet, but in the background while I'm doing
9 this is what I'm trying to accomplish, okay?

10 Oh, if anyone, especially from KindCare Alliance, is
11 on a brief but has not yet entered a notice of appearance,
12 please enter a notice of appearance. So if you're on the
13 brief I need you to enter a notice of appearance. Sam seems
14 to care about that, which means I probably should.

15 All right. I'm going to ask you all one more time
16 if anyone has a problem with me applying this ruling across
17 the board to the cases to which the motion wasn't formally
18 made. I'm not going to put you on the spot. I'll give you
19 seven days to tell me either way whether anyone has an
20 objection, just let me know one way or the other so we know
21 what to do, okay.

22 All right. Anything else from anybody else?

23 MS. WILLIAMS: Not from the plaintiffs.

24 MS. KELLEY: No, Your Honor. Thank you.

25 THE COURT: All right. Thanks everybody. I want --

1 why don't I get maybe status conference updates, status
2 updates maybe every 45 days so I know what's going on with you
3 people. Again, if anything happens and you need my attention,
4 I don't want you all spending a bunch of time filing briefs or
5 sending letters back and forth, just get on the email with Sam
6 and we'll set up a time to have a conversation, okay. And we
7 can do it by phone. Okay. Thank you.

8 (The proceedings were concluded at 12:39 p.m.)

9
10 I, Christine Asif, RPR, FCRR, do hereby certify that
11 the foregoing is a correct transcript from the stenographic
12 record of proceedings in the above-entitled matter.

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/s/
Christine T. Asif
Official Court Reporter

< Dates >.	1131 31:7.	1990 14:1,	2018 27:19,
January 24th,	1146 18:2.	20:3.	42:4, 43:19,
1:11.	1164 18:2.	1991 36:5.	44:24, 45:4,
July 45:4,	1183 36:4.	1992 6:18,	45:25,
45:5, 46:1,	1187 36:4.	7:16,	47:13.
47:13.	1190 10:19.	15:15.	2019 10:14,
July 2020.	1196 10:19.	1993 9:12,	15:16, 36:7,
42:5, 42:6.	12 17:24,	28:8,	44:25, 46:1,
June 47:13.	53:8.	28:13.	47:13.
May 30, 2017.	1203 10:19.	1994 7:6.	202 1:47,
13:3.	126 16:15.	1996 8:8,	26:3.
May 4, 2017,	1262 36:6.	16:14,	2020 14:17,
13:2.	1276 36:6.	23:8.	42:13, 43:19,
October	12th 15:18.	1997 4:23,	44:25, 45:4,
45:4.	13 9:1.	15:13,	45:5, 46:1,
October 15th,	1319 9:11.	16:15.	47:14.
2015,	1320 (a) (2	.	2021 42:20,
9:15.	7:7.	.	45:14.
one decision	1324 9:11.	< 2 >.	2023 1:11,
18:4.	1337 28:6.	2-1401 35:3.	5:23, 42:4,
one decision,	1342 28:6,	2-3 27:5.	42:7,
18:6.	28:16.	20 13:1.	43:10.
September	1360 7:16.	2000 16:16,	205 26:9.
15:18.	1367(a) 29:4.	18:1,	2099 1:24.
two decision	1367(c) 29:18.	26:17.	21 29:21,
16:12.	138 27:19.	20001 1:46.	42:23,
.	143 5:22.	20001-2703	44:21.
.	1444-1457	1:39.	216 26:16.
< 0 >.	5:23.	20006 1:25.	218 18:6.
000 45:2.	1459 6:3.	2001 18:3.	219 36:13.
02(11A 35:3.	149 16:16.	2002 5:10.	22 12:23, 15:6,
.	16 12:4,	2003 18:7.	17:2, 22:21,
.	12:14.	20036 1:31.	44:21.
< 1 >.	183 9:14.	2010 10:17,	222 26:14.
1 26:17.	184 18:2.	11:20, 14:24,	23 32:12,
10 13:2,	19 13:1.	23:22.	44:21.
14:6.	19-3124 2:5.	2011 28:7.	230 26:14.
1007 12:13.	19-3124-ACR	2012 8:15,	2350246 13:2.
1008 8:15,	1:6.	11:18,	2363114 13:3.
8:25.	19-CV 4:1.	36:13.	2392 27:19.
10100 1:38.	191 9:19.	2013 10:20.	2420 27:19.
109 31:3.	1966 29:10.	2015 9:14,	257 14:24.
10th 15:15.	1976 24:2.	9:15, 31:3.	26 9:12.
11 1:13,	1982 26:3.	2016 15:17,	265 14:17.
17:24.	1983 4:9, 4:18,	15:18,	268 14:24.
1101 1:29.	4:25, 5:18,	36:15.	273 5:10.
1113 7:16.	6:2, 6:5,	2017 10:15,	277 18:7.
112 15:13.	8:23, 9:18.	13:1, 13:3,	28 29:4,
1123 31:3.	1988 26:19.	13:11,	29:18.
1130 31:3.	199 36:13.	13:21.	280 14:17.

283 5:13.	400 1:37.	60 47:17,	69 10:14,
29 14:7, 14:12,	41 15:16,	47:18.	14:24.
14:20, 15:2,	31:14.	624 10:16.	6th 10:11,
25:15.	414 20:3.	626 11:20.	10:15, 11:1,
29) 13:17.	416 20:7.	627 23:21.	11:18,
292 18:9.	42 4:9, 4:10,	63 7:5.	11:20.
2nd 10:11,	4:12, 7:7,	650 36:14.	.
10:14, 10:25,	8:11, 9:18,	662 16:14.	.
16:15,	32:5, 33:11,	666 28:6,	< 7 >.
16:16.	36:3,	28:16.	7 26:17.
.	36:14.	671 4:12.	7-8 27:5,
.	424 24:2.	671(a 7:25.	27:9.
< 3 >.	44 28:16.	671(a) (10 15:6,	712 10:19.
30 1:13,	45 53:2.	15:7, 16:21,	715 29:9.
47:25.	450 1:30,	16:23,	725 29:9.
307 28:7.	26:19.	37:5.	729 14:24.
31 26:13.	457 26:3,	671(a) (12	731 15:13.
312 28:13.	26:9.	37:5.	739 15:13.
3124 4:1.	459 26:22.	671(a) (15 6:22,	75 33:19.
313 28:8.	4750178	7:19, 10:2.	76 10:14.
319 24:2.	15:17.	671(a) (16	7th 36:4.
321 28:13.	476 17:25.	11:13, 18:17,	.
329 4:23.	480 15:16.	18:21.	.
33 24:2.	487 26:18.	671(a) (18 8:9,	< 8 >.
333 1:45.	49 16:16,	8:22.	80 10:15.
335 24:12.	24:12.	671(a) (22 17:1,	816 15:16.
340-41 5:9.	490 17:25.	18:12,	83 17:25.
344 24:8.	496 14:1,	37:5.	847 10:15.
347 6:18.	20:3.	671(a) (29	85 9:14,
35 21:4.	498 14:1.	12:17, 12:22,	10:14.
354-3247	4th 15:13.	13:9, 18:17,	86 33:19.
1:47.	.	20:14, 31:19,	861 23:8.
356 11:20.	.	32:19,	868 23:8.
358 7:5.	< 5 >.	33:3.	883 15:14.
36 21:14,	5 15:18,	671(a) (29) (b	889 15:15.
21:25.	45:2.	32:5.	895 36:13.
3602(k 36:3.	503 6:18,	672 18:20.	8th 10:17,
363 6:23.	6:23.	672(a 4:10,	10:19,
372 16:15.	507 14:6.	10:8, 11:8,	10:22.
374 10:15.	508 28:7.	11:10,	.
377 10:15.	509 14:6,	18:16.	.
381 36:6.	28:12.	674(d) (3) (a	< 9 >.
383 29:9.	519 14:6.	8:11.	9 12:13, 13:2,
39 53:8.	520 4:23.	675(4) (a 10:8,	13:12,
398 15:15.	536 5:10.	11:8,	13:21.
.	581 14:16.	11:10.	90 15:15.
.	.	678 8:15, 8:25,	9012019 9:15.
< 4 >.	.	11:17,	904 23:22.
4 15:18,	< 6 >.	12:13.	908 23:22.
45:2.	6 19:21.	683 16:14.	922 10:14.

929 16:14, 36:4.	achievement 26:13.	14:15, 25:17, 32:24,	aligns 17:17.
93 23:8.	acknowledge 24:14,	34:1.	allegation 45:3.
941 16:16.	50:1.	adopt 4:14.	allegations 20:10, 38:18,
945 16:16.	acknowledges 45:9.	adopted 13:3.	42:4.
959 15:14.	across 52:16.	Adoption 4:13,	allege 19:22,
974 10:17.	Act 4:7, 4:9,	10:18.	19:23, 20:15,
978-82 10:17.	4:19, 18:15,	advance 3:21,	23:9, 30:21,
990 9:11.	34:14, 34:15,	32:12.	31:5, 31:14,
991 8:15, 11:18.	34:17, 34:19,	advanced 12:16,	32:7, 33:7,
9th 8:14, 8:15, 8:21, 10:11, 10:17, 11:1, 11:16, 11:18, 11:25, 12:8.	35:1, 35:23, 36:1, 36:10, 36:11, 36:18, 36:24, 37:3, 37:4.	advice 19:22, 20:5.	33:9, 33:16, 33:17, 33:18, 33:21,
_____/s/_____ 53:14.	acted 30:25.	advise 19:20.	44:18.
.	action 2:4, 7:8, 7:20, 8:8, 8:17, 9:17, 9:18, 13:7.	advocates 46:20.	alleged 9:24, 18:18, 20:8, 25:6, 25:17, 25:21, 31:15, 32:24, 33:11, 33:12, 34:1, 42:21.
.	actionable 32:11.	affected 13:19.	allegedly 19:16, 23:3, 30:3, 35:5, 40:20.
< A >.	actions 7:14, 8:22, 20:8, 33:10.	affirmative 19:21, 19:24.	Alliance 1:28, 45:12, 46:18, 52:10.
a) (29 13:7.	actual 50:20.	affirmed 9:15, 16:14, 36:14.	allowed 48:19.
A. 1:34, 8:15, 8:21, 9:11, 11:17, 12:8, 16:13, 16:15, 18:6.	actually 43:23, 49:24, 50:21, 51:4, 51:25.	afternoon 40:4.	almost 36:2.
A.3d 31:3.	add 8:8.	agencies 17:5.	already 8:18, 31:22, 33:2, 41:15, 48:13, 48:15, 51:10.
a.m. 1:13.	additional 17:24, 23:14, 32:4.	agency 20:9, 49:4.	Alter 7:18.
able 2:19, 37:10, 37:14, 43:14, 43:15, 44:3, 44:25.	address 4:21, 6:12, 6:14, 10:7, 14:14, 18:13, 18:15, 25:19, 29:3, 30:16, 31:17, 32:15, 32:19, 33:3, 34:2, 34:3, 34:11.	aggregate 5:19, 11:4, 15:23, 16:7, 17:10.	Although 19:5, 25:23, 30:10, 31:8.
above-entitled 53:12.	address 4:21, 6:12, 6:14, 10:7, 14:14, 18:13, 18:15, 25:19, 29:3, 30:16, 31:17, 32:15, 32:19, 33:3, 34:2, 34:3, 34:11.	agree 8:16, 15:19, 15:21, 18:9, 25:23, 30:19, 38:14.	amend 8:8.
Absent 14:24, 21:21.	adequate 14:3, 21:3.	agreed 41:13, 42:20, 43:4.	Amendment 25:12.
absolutely 37:18, 37:20, 49:5.	adequately	agrees 26:4.	America 29:9.
accept 3:5, 28:10.		ahead 46:14, 50:16.	Ammon 36:6.
accomplish 52:9.		aims 13:15.	amorphous 5:4, 17:11, 17:17.
according 12:6.		al 2:5.	amount 39:8,
achieve 6:25.		albeit 22:2.	

39:9.	37:13.	arts 39:1.	Avenue 1:24,
Ana C. Reyes	applying 36:3,	Asif 1:43,	1:29, 1:45.
1:16.	36:12,	53:10,	avoid 30:8.
analogizing	52:16.	53:15.	avoiding
26:10.	appoint	asks 51:20.	28:21.
analogy 27:7.	48:15.	assert 9:1,	aware 43:1.
analysis 9:21,	appreciate	11:6, 15:7,	away 29:20,
10:4, 11:19,	38:22,	22:3, 23:2,	42:9.
14:13, 18:8,	38:25.	34:15.	awesome 3:6.
38:2, 38:6.	appropriate	asserted 5:7.	.
analyzed	16:3, 21:16,	assertedly	.
16:17.	22:3, 22:15,	5:3.	< B >.
Anderson	26:11, 27:11,	asserting 19:7,	B. 1:33,
15:15.	30:2.	26:10.	11:19.
animus 27:22.	arbitration	asserts	back 3:13,
anti 8:20.	51:9,	32:18.	30:13, 37:17,
anticipate	51:12.	assistance	40:17, 42:20,
43:22.	area 27:25.	4:14.	45:3, 47:1,
antitrust	areas 50:21.	Association	53:5.
51:15.	argue 4:16,	10:16, 10:19,	backed 29:20.
anybody	10:23, 17:2,	14:1.	background
52:22.	18:18, 20:13,	assume 41:9,	51:4, 51:8,
apologize	21:2, 21:11,	50:11.	52:8.
3:20.	23:13, 23:18,	assuming 17:8,	Badlam 2:8,
appeal 9:5,	25:11, 26:1,	21:5, 25:20,	2:9, 43:10,
16:22,	31:15, 31:18,	29:25.	48:18.
39:11.	33:7, 34:17,	attempting	Baker 13:1.
appealed	35:1, 35:18,	19:8.	balance
39:15.	37:21.	attention	11:24.
appear 7:3,	argued 29:14.	53:3.	bare 27:18.
8:1.	argues 8:7,	Attorney 1:35,	barred 26:7.
appearance	11:21, 14:11,	46:18.	Barricelli
52:11, 52:12,	19:18, 30:2,	attorneys	15:17,
52:13.	31:23,	26:24.	15:21.
APPEARANCES	32:9.	auspices	base 19:19,
1:19.	arguing 19:15,	49:8.	20:11,
appeared 7:2.	24:25,	authorities	23:6.
appears 9:25.	37:11.	20:4.	Based 8:10,
applicable	arguments 6:15,	authority	9:9, 9:10,
15:9, 15:12,	11:25, 12:16,	10:10, 15:9,	11:24, 12:16,
16:7.	14:14, 15:3,	17:18, 22:18,	22:12, 33:2,
applied 7:15,	20:11, 34:5,	22:24,	34:16, 34:18,
7:16, 26:2,	34:8, 34:11,	32:10.	35:6, 35:12,
26:5, 26:23,	34:12, 37:19,	authorization	36:23, 38:8,
35:24.	38:3,	35:17,	38:10, 44:12,
applies 18:21,	38:11.	35:21.	44:16.
19:4, 25:24,	arise 29:13.	availability	basically 2:22,
26:5.	Army 49:18.	7:13.	38:11,
apply 4:3,	Artist 6:18,	available 6:2,	50:7.
16:2, 27:23,	7:15, 7:19.	19:3, 32:4.	basis 16:5,

20:6, 20:12, 25:14, 25:22, 25:24, 26:1, 26:2, 26:5, 26:6, 26:23, 27:15, 27:24, 28:5, 28:15, 28:19, 38:10, 50:23.	15:1, 15:21, 16:17, 17:8, 17:22, 18:8. board 30:13, 52:17. bored 37:8. bound 10:5. Boykin 36:13, 36:14. break 47:15. Brendan 1:22. Brian 16:15. brief 12:20, 17:24, 38:3, 41:20, 52:11, 52:13. briefing 3:23, 12:14, 20:19, 20:20, 30:8, 34:10, 37:10, 38:5, 42:20. briefly 16:18, 34:2. briefs 53:4. bring 22:11. bringing 19:14. broad 13:23, 24:23. broader 8:22. brought 7:8, 26:6, 43:3. bullet 41:22. bunch 39:12, 39:13, 53:4. burdening 27:7. burdensome 47:7. busy 2:15, 3:7. . . < C >. California 10:16. call 2:2,	40:10, 41:8, 41:10, 41:14. called 2:21, 2:23, 45:20, 51:11. calling 3:17. Calloway 26:16, 26:22. capping 26:24. Care 4:11, 4:13, 10:9, 10:18, 11:11, 12:19, 13:10, 15:8, 17:5, 21:4, 23:12, 23:16, 32:2, 34:24, 38:22, 39:14, 45:25, 48:6, 48:11, 52:14. caregivers 16:4, 19:24, 21:18, 25:14, 28:21, 34:23, 38:16, 40:21, 42:21. case 2:3, 6:12, 6:19, 8:6, 9:23, 11:14, 11:15, 12:3, 16:19, 18:20, 19:10, 20:1, 20:3, 21:23, 24:15, 24:24, 26:10, 27:20, 29:7, 32:14, 32:21, 36:9, 37:9, 39:18, 40:3, 40:10, 40:22, 47:4. case-by-case 16:5. Cases 4:2, 4:3, 4:6, 10:13, 15:11, 17:19, 17:23, 17:24, 19:5, 20:1,	21:19, 24:3, 29:14, 30:7, 30:11, 36:3, 43:1, 43:2, 43:4, 43:24, 50:9, 50:11, 50:12, 52:17. category 27:20. cause 8:8, 8:21, 9:17. causing 19:14. certain 4:14, 23:3, 23:13, 26:25, 35:10. Certainly 44:6, 45:1. certify 53:10. CFSA 1:41, 3:15, 20:8, 23:4, 29:13, 35:10, 35:14, 45:14, 46:20. challenge 24:22, 28:3. challenged 27:12. Chambliss 15:13. chance 39:24, 49:24. changed 47:8. changes 42:10, 43:25. chapter 7:9, 7:10. charge 38:20. Charlie 17:25. chat 51:16. cheese 3:2. cheeses 3:5. child 11:5, 12:2, 13:6,
--	---	---	---

13:10, 32:2, 35:17.	18:14, 19:1, 19:7, 19:14, 20:13, 20:20, 21:11, 21:15, 21:24, 22:9, 22:10, 22:12, 22:13, 23:7, 25:7, 25:11, 29:1, 29:23, 30:19, 31:4, 31:13, 34:6, 35:9, 36:23.	color 8:11. Colorado 15:16. Columbia 1:2, 1:36, 2:5, 3:12, 4:1, 9:14. coming 42:14. commands 11:9. comment 50:15. common 27:16, 29:8, 52:1. communicate 49:23. Communications 28:7, 40:21. compelled 28:10. competence 5:5. complaint 10:2, 21:6, 33:19, 42:5. complaints 20:15, 21:25, 42:5, 42:22, 44:18. complete 40:9, 48:8. complex 37:11. complicated 37:9, 45:7, 45:16. comprehensive 6:7, 9:8. computer-aided 1:50. conceivable 28:4, 28:18, 28:20. conceivably 41:16. concern 38:9, 44:7. concerning 42:10.	conclude 10:21, 11:13, 12:17, 16:24, 20:15, 29:11, 30:17, 33:11, 33:25, 35:25, 36:17, 36:22. concluded 6:23, 13:17, 53:8. concludes 32:23. concluding 27:7. conclusion 10:11, 15:5, 17:17. conclusory 18:9. concrete 37:12. concretely 31:14. condition 12:6. conditions 10:23. conduct 6:15, 19:21, 28:14, 30:6. confer 5:12, 6:22, 7:1, 14:12. Conference 1:15, 53:1. conferences 37:23. conferring 13:9. confers 12:24. confidence 38:19. confluence 26:21. conforms 27:4. confused 40:16. Congress 5:1,
Christine 1:43, 3:25, 53:10, 53:15. Cir 28:6. Circuit 8:14, 8:15, 8:21, 9:6, 9:12, 9:15, 10:10, 10:14, 10:15, 10:17, 10:20, 10:22, 11:17, 11:18, 11:20, 11:25, 12:8, 15:13, 15:15, 16:15, 16:21, 23:5, 23:8, 23:22, 26:15, 26:17, 26:23, 27:24, 36:5, 36:15. Circuits 10:11, 11:1. circumstances 26:20. cite 9:3, 10:6, 15:6, 16:12, 17:19, 18:4, 21:19, 32:10, 32:20. cited 9:20, 10:7, 15:9, 19:5, 19:9, 20:3, 22:18, 36:9. cites 9:13, 17:23, 20:2, 22:24, 30:7. citing 13:1. Citizens 10:13. City 2:16, 15:17, 36:6. CIVIL 1:5, 2:4, 36:12. claim 4:19, 9:24, 14:19,	clarified 5:11. clarifying 49:10. class 5:17. classification 28:1, 28:6. cleaned 5:9, 6:3, 6:9, 21:5, 24:2, 26:22, 27:19, 31:3, 31:11, 36:13. cleanly 13:15. clear 8:3, 8:19, 13:20, 20:20, 22:1, 23:19, 37:18, 37:20. clearly 40:22. clerk 17:21. client 3:15, 46:7. clients 49:23. closer 16:10. clothing 21:4. Coalition 10:13. Code 35:2. codified 4:10. colleagues 49:1.		

6:2, 6:6, 6:18, 7:6, 8:2, 8:7, 8:12, 8:17, 8:19, 8:23, 11:22.	42:8. control 52:6. controversy 29:7. conversation 53:6. conversations 47:23. conveyor 3:5. cooperatively 37:15. copy 3:25. Corporation 5:22. correct 30:4, 53:11. correctly 7:23, 9:5, 48:22. couched 5:8. Counsel 29:23, 37:10, 47:3, 48:18. counts 30:17, 34:8. County 5:22. couple 42:11. course 14:18, 20:22, 37:22, 39:15, 41:11. Courts 11:15, 15:19, 18:10, 28:10, 28:23, 33:23, 35:24, 36:8, 36:10. cover 32:7. create 4:17, 4:22, 10:9, 11:22, 15:20, 15:25, 18:11, 21:8, 31:21, 32:15. created 14:23, 31:19. creates 4:20, 4:25, 6:1, 11:11, 11:13, 12:14, 12:17, 32:11.	creating 6:7, 35:23. creation 11:2. criteria 11:2, 33:8, 33:16, 33:21, 33:24. crystal 8:19. curiam 11:20. current 21:18. custodian 35:18. custody 13:6, 13:11, 22:1, 22:17, 33:22, 33:23, 34:23, 34:25, 35:2, 35:8, 35:10, 35:11, 35:13, 35:16. cuts 15:10. cutting 47:18. . . < D >. D. 16:16, 18:6. D.mass 13:2, 13:3. damages 31:2, 31:14, 33:5, 33:10, 34:1. day 38:7, 43:11, 50:19. days 47:17, 47:18, 48:1, 52:19, 53:2. DC 1:25, 1:28, 1:31. DCHRA 36:2. deal 24:3. deals 4:11, 15:24. death 37:8.	debatable 17:9. deceive 31:7. decide 9:6, 43:19, 43:20. decided 7:23, 42:18, 43:5. decision 6:17, 6:19, 8:7, 9:5, 12:23, 50:22. decisions 7:17, 16:17, 17:22, 38:18, 39:3. declaratory 41:25. decline 29:17. declined 9:6. dedicated 18:7, 46:19. dedicates 12:21. deemed 7:9, 12:10. defeat 5:25. Defendant 1:12, 1:33, 3:12, 5:25, 6:4, 31:6. Defendants 4:16, 9:5, 10:22, 12:24, 17:19, 18:18, 20:12, 21:2, 25:16, 25:25, 26:4, 31:12, 31:13, 31:15, 33:1, 33:7, 33:15, 33:24. Defense 19:1, 19:8, 19:13, 49:15. deferential 25:25, 28:9.
--	--	---	---

deficiencies	designees	27:12.	25:8, 30:8.
22:22,	35:14.	disagree 11:24,	Disney 1:34,
22:25.	desire 27:18.	25:24,	3:14.
define 17:13.	detail 17:14,	39:23.	dispositive
defines 36:2.	22:7, 34:4.	disagreed	15:22.
definite 7:4.	detailed	11:15.	dispute 4:21,
definition	11:8.	disclose 31:9,	21:16, 21:22,
35:1, 35:15,	details	31:19.	22:14, 25:16,
35:23, 36:3,	25:25.	disclosure	29:11,
36:10.	determine 4:24,	31:13.	35:7.
degree 21:8.	24:10,	disclosures	disputed
delay 19:14.	44:3.	31:24,	30:3.
deliberate	determined	32:7.	disserve
20:9.	9:2.	Discovery 3:18,	30:12.
deliberately	determining	20:10, 38:12,	disservice
19:16.	7:13.	40:2, 40:7,	39:20.
deliberative	develop 16:2,	41:21, 42:1,	distinct 8:6.
45:21.	17:4.	42:10.	distribution
demonstrate	developed	discretion	5:21.
5:3.	14:25,	29:17.	DISTRICT OF
demonstrating	20:23.	discriminate	COLUMBIA, et
6:1.	development	8:10.	al. 1:10.
deny 37:2,	17:10.	discriminates	diversion
37:5.	Diamond 36:5.	34:18,	28:17, 34:16,
Department	Dickinson	35:6.	34:18, 34:20,
15:14, 18:2,	26:18.	discrimination	34:23,
49:14,	different 15:5,	8:20, 34:16,	36:22.
49:15.	21:18, 22:2,	36:23.	diversions
depose 41:5.	24:19, 25:3,	discussed	44:11,
deposed 41:9.	43:25.	16:21, 36:17,	45:5.
depositions	differential	40:11.	diverted
47:11.	25:17.	discussion	34:24.
deprivation	difficult	44:12.	Dixon 28:6,
23:7,	34:9.	dismiss 3:19,	28:16.
26:12.	difficulties	3:25, 4:2,	documents 40:9,
deprive 28:4.	21:9.	4:16, 15:2,	41:14, 42:2,
deprived 23:2,	digest 39:25.	18:11, 20:12,	42:6, 44:9,
23:10,	diligence	20:20, 20:25,	44:15, 44:20,
23:21.	13:18.	25:10, 28:25,	45:2, 47:14,
depriving 24:4,	direct 5:20.	34:13, 34:14,	47:24, 48:1,
25:12.	disability	35:9, 36:24,	48:3, 48:4,
derive 29:8.	24:10.	37:2, 41:24,	48:12.
describe	disability-righ	42:19,	Doe 5:10, 23:8,
32:3.	ts 26:25.	43:5.	26:3,
described	disabled	dismissal 30:2,	28:12.
22:7.	27:3.	34:8.	doing 20:18,
describing	disadvantaged	dismissed	25:14, 38:21,
22:19.	26:11, 27:8,	40:7.	38:23, 43:21,
deserving	27:11.	dismissing	46:3, 46:4,
39:14.	disadvantages	16:23, 20:25,	47:15, 49:7,

49:24, 50:1, 52:8.	16:22, 20:16.	ends 28:12.	19:6, 19:19, 20:6, 30:5, 38:9.
done 3:22, 27:16, 37:10, 48:22.	effectuate 28:23.	enforce 4:8, 4:18, 6:3, 7:8, 7:14, 8:1, 8:9, 13:7.	equitably 18:23.
doubt 49:6.	efficient 49:23.	enforceability 5:18, 7:17, 9:10, 11:16.	erroneous 19:20, 19:22, 20:5.
down 2:20, 27:14.	efficiently 28:24.	enforceable-rig hts 6:16.	error 24:7.
draft 47:8, 47:9.	effort 26:9.	enforcement 5:4, 6:5, 6:6, 6:7, 6:8, 8:24, 8:25, 13:21, 17:17.	especially 14:18, 39:4, 47:3, 52:10.
drawing 30:13.	efforts 6:25, 10:1.	engaged 46:20, 49:4, 49:6.	Esquire 1:21, 1:22, 1:27, 1:33, 1:34.
due 13:18, 20:24, 21:1, 21:10, 21:12, 21:20, 21:25, 22:9, 22:10, 22:11, 22:13, 23:6, 23:21, 23:25, 24:3, 24:7, 24:24, 25:7, 25:9, 37:3.	either 6:4, 9:8, 9:17, 16:19, 20:21, 22:24, 52:19.	enhance 8:24.	essentially 25:6, 45:14.
during 51:3.	Eldridge 24:1.	English 39:1.	Estate 15:15.
duties 32:15.	elements 19:2, 31:4.	enjoy 2:16.	estopped 18:23, 19:12.
duty 31:9, 31:10, 31:13, 31:18, 31:19, 32:11, 32:24, 33:1, 33:2.	eligibility 18:20, 24:10, 24:15, 24:17, 33:8, 33:16, 33:21.	enough 20:15, 21:23, 33:11, 48:7.	estoppel 18:25, 19:3, 19:6, 19:9, 19:10, 19:19, 20:7, 30:5, 38:9.
.	eligible 24:21.	ensure 16:3, 17:4.	et 2:5.
.	Elisa 15:16.	enter 52:12, 52:13.	everybody 47:12, 52:25.
< E >.	email 53:5.	entered 4:5, 52:11.	everyone 3:16, 37:7, 38:14, 50:1.
e. 12:3.	emails 40:15, 45:15, 46:22, 48:5, 48:9.	entirely 9:9.	everything 37:1, 38:8, 40:12, 41:16, 47:8.
earlier 16:21.	emphasize 37:9.	entitled 23:4, 24:5.	evidence 28:14.
economic 27:25.	employ 6:24, 26:2.	entitlement 12:7, 25:2.	evidentiary 24:11.
economy 30:12.	employed 22:23.	entitlements 23:10.	exact 46:21.
educate 51:16.	employee 19:20, 20:6, 20:8.	entitles 12:2.	examined 24:9.
education 26:9, 27:3.	enacting 7:6.	entity 30:21.	example 11:16, 13:25, 14:16, 16:11, 19:13, 20:2, 23:4, 24:8, 26:19,
educational 27:8.	encouraging 37:15.	equal 25:10, 25:12, 28:3, 28:25, 37:3.	
effect 44:11.	End 5:17, 5:21, 6:3, 6:8, 6:25, 7:21, 9:9, 11:5, 12:25, 13:19, 17:7, 23:21, 27:4.	equally 8:17, 9:8.	
effective 43:11.		equitable 18:24, 19:3,	
effectively			

28:16, 28:20, 47:7.	F-u-m-o 2:21.	faith 49:4, 49:6, 50:23.	45:14.
except 31:5.	F.2d 9:11, 15:14, 36:4.	false 30:21.	federally 12:25.
excerpts 16:6.	F.3d 8:15, 8:25, 10:14, 10:15, 10:16, 10:19, 11:18, 11:20, 12:13, 15:13, 16:15, 23:8, 23:22, 26:17, 28:6, 28:16.	falsity 31:6.	feel 38:4, 47:6.
exclude 36:19.	F.app'x 36:14.	familial 22:12, 22:16, 34:17, 34:18, 34:20, 35:1, 35:4, 35:6, 35:12, 35:13, 35:15, 35:19, 35:23, 36:1, 36:2, 36:10, 36:17, 36:21, 36:24.	feeling 45:18.
excuse 26:7.	F.suppl 16:14, 16:16.	familiar 28:21.	feels 38:1.
exercise 13:18, 29:4, 29:16, 29:17, 29:22, 30:14.	F.suppl.2d 14:24, 17:25, 18:2, 36:13.	Families 18:2, 25:19, 35:3, 35:18, 35:25, 36:16, 36:19, 36:21, 36:22, 38:16, 40:10.	fees 26:24.
exists 21:5.	F.suppl.3d 9:14, 14:17, 15:16, 36:6.	family 16:3, 21:12, 23:5, 32:3, 44:10.	Fein 23:8.
expand 7:12.	fact 12:4, 23:19, 30:22, 31:16, 33:21, 39:19, 47:5.	far 11:25, 12:14, 12:17, 14:19, 39:24, 44:2.	Fenty 36:14.
expect 40:18, 41:24.	factors 14:5.	fashion 9:8.	few 27:15, 45:2, 45:6.
expert 46:7, 46:9, 46:20.	facts 19:4, 20:15, 26:16, 28:4, 28:18, 29:8, 30:21, 33:12, 37:13.	faster 43:14.	fewer 38:2.
experts 46:2, 46:5, 49:4, 50:21, 51:16, 51:18, 51:22, 52:7.	factual 33:25.	favours 10:10.	FHA 36:3.
explain 31:25, 32:20.	fail 4:19, 20:13, 31:12.	FCC 28:7.	Fifth 25:11.
explained 11:1, 12:8, 19:11, 22:4, 27:25.	failed 18:14.	FCRR 1:43, 53:10.	fight 38:7.
explaining 47:8.	fails 13:19, 15:1, 17:22, 21:15, 22:13, 25:22.	features 8:2.	figure 37:16, 39:16, 43:25, 46:12, 48:13, 48:21, 49:19.
express 8:8, 8:21.	failure 28:25.	Federal 1:44, 4:14, 4:24, 5:20, 7:3, 10:24, 23:12, 23:24, 25:7, 27:4, 29:6, 29:15, 29:16, 29:23, 32:1, 32:14, 35:24, 36:1, 36:12,	file 37:23, 40:10, 40:13, 41:20, 43:4, 44:8.
expressly 6:5.	Fair 36:1.	fairer 25:1.	filed 42:19, 44:13.
extended 26:20.	.	.	files 45:25.
extension 18:20.	.	.	filing 23:4, 42:21, 53:4.
extensively 46:21.	.	.	filings 44:3.
extent 22:11, 44:6, 44:8, 44:11.	.	.	fill 19:1.
extremely 17:15.	.	.	final 9:13.
.	.	.	Finally 23:9, 34:13, 45:24.
.	.	.	financial 21:9.
< F >.	.	.	find 10:5, 18:5, 37:17, 51:25.

5:1, 5:11, 10:8, 14:15, 15:21, 16:17, 18:24, 19:5, 21:15, 22:11, 24:20, 31:20, 32:9, 33:15, 34:6, 35:9, 35:19, 39:21, 45:3.	form 23:14, 25:23, 26:2, 29:6, 35:21, 44:17.	28:2.	5:20, 18:25, 19:7, 19:12, 19:16, 19:20, 20:6, 40:25.
fit 27:20, 28:12.	formal 20:18, 28:24, 34:20, 35:20, 41:16.	funding 7:4, 10:24, 12:6.	grant 37:1.
Five 17:19, 17:23, 33:17, 42:3, 43:1.	formally 23:14, 52:17.	funds 4:15, 5:21.	granted 33:23.
fix 6:19, 7:7, 10:25, 12:9.	forth 4:12, 47:1, 53:5.	futile 24:16.	grants 15:7.
flesh 13:25, 38:3, 38:13.	forward 2:6, 29:23, 37:11, 38:12, 40:8, 40:23, 48:24, 50:22.	future 42:21, 42:23, 44:3.	Gray 1:23, 36:13.
flowing 50:24.	found 10:11, 11:17, 11:18, 12:24, 12:25, 13:23, 14:2, 15:10, 16:20, 18:16.	. . < G >.	great 2:14.
focus 5:16, 5:20, 11:4, 15:24, 43:6, 43:14, 44:24.	four 39:17, 50:25.	galloping 3:20.	ground 52:1.
focused 43:9, 46:19, 47:23, 48:21.	fraud 31:9, 31:10.	gave 16:19, 43:10.	grounds 7:13, 7:15, 21:13.
focuses 11:3, 12:2, 12:4, 14:20.	fraudulent 30:16, 30:20.	General 1:35, 6:14, 16:6, 34:4.	group 26:11, 27:18, 27:21, 48:15, 48:16, 48:17, 48:22, 49:8, 50:4, 50:7, 50:18, 51:4, 52:6.
folks 45:23.	free 26:8, 34:11, 37:21, 38:4, 41:2.	generalization 28:11.	groups 49:22.
follow 14:18, 20:17, 24:4.	Freestone 4:23.	generally 14:14, 27:13, 36:11.	guarantee 25:12.
followed 24:19, 24:23.	front 40:18, 44:5, 51:2, 52:7.	Georgia 18:7.	guidance 13:20, 36:11.
food 21:3.	fruitful 44:2.	gets 44:12.	Guiliani 16:14.
footnote 12:13, 22:21, 22:23.	fulfill 10:24.	getting 2:16, 39:14, 49:16, 49:18.	guys 39:16, 46:2, 48:13, 49:19.
forbids 6:5.	full 24:11, 32:19, 34:10, 38:19.	Gibbs 29:9.	. .
force 13:22.	fully 38:22, 38:25.	give 10:4, 17:13, 41:11, 52:18.	< H >.
foreclosed 6:6.	Fumo 2:21.	given 7:2.	H. 1:21, 2:5, 3:25, 4:1, 17:25, 33:19.
foregoing 53:11.	fundamental 23:24,	giving 5:7, 41:2, 42:12, 44:4, 47:14.	handled 46:6.
		Glisson 10:15.	handling 29:13.
		goals 6:25.	happen 37:16, 50:24, 50:25.
		Goetz 11:20.	happened 42:11, 44:1, 44:13, 50:8.
		Gonzaga 5:10, 5:13, 15:22, 16:10, 16:18.	happens 39:12,
		Gorski 36:4.	
		govern 44:10.	
		Government	

39:15, 51:18, 51:21, 53:3.	22:8, 26:15, 40:24, 44:21, 44:23, 47:11.	27:9, 31:7, 31:11.	inconsistent 12:9.
happy 43:6.	holding 7:19, 8:4, 9:10, 19:10, 26:20.	Idaho 36:5, 36:6.	indefinite 7:1.
hard 40:12, 41:15.	home 15:12, 16:3, 16:7, 32:3, 32:5.	identically 36:2.	indefinitely 50:5.
hardly 27:14.	Honor 2:4, 2:9, 3:11, 40:4, 49:3, 50:14, 51:7, 52:24.	identified 9:23.	individual 5:19, 6:8, 9:17, 11:3, 11:23, 12:7, 14:21, 15:24, 16:8, 26:13, 40:9, 40:20, 45:24.
harm 27:18.	Honorable 1:16.	identify 2:6, 13:18, 22:22, 47:22.	individual-cent ric 5:16.
hate 51:22, 52:5.	hope 2:16, 37:7, 39:5.	illegitimate 27:15.	individuals 11:3, 33:22, 38:20.
Hawaii 27:19.	hopeful 37:13.	imagine 45:22, 50:13.	induce 30:24.
Health 5:21, 17:1, 17:6, 17:16.	Hopefully 49:21.	impediment 26:13.	inevitably 51:21.
hear 37:7, 45:17.	Hospital 5:21, 14:1.	imperfect 28:11.	infer 8:17.
heard 23:25, 51:10, 51:15.	Hot-tubbing 51:11, 51:12.	implement 17:4.	inference 21:6.
hearing 24:10, 24:11, 24:15, 25:1, 37:18.	hotel 2:23.	implicate 30:3, 30:5, 34:9.	infirm 22:5.
hearings 51:10.	House 36:5.	implicitly 6:6.	information 31:8, 31:20, 43:14, 44:2, 44:4, 45:24, 48:23, 49:21, 50:23.
heated 51:22.	Housing 21:9, 36:1.	implies 8:12.	infringes 28:2.
heavily 37:15.	Human 15:14, 34:14, 34:15, 36:25, 37:3.	important 8:20.	initial 6:14, 42:19, 44:2.
heightened 26:2, 26:5, 26:10, 27:9, 27:10.	Id 5:8, 5:13, 6:3, 6:8, 7:5, 9:18, 9:22, 9:25, 10:3, 14:6, 18:9, 20:7, 24:8, 24:12, 26:22, 27:4,	impose 5:6.	initially 42:18.
held 5:13, 6:21, 13:5, 14:22, 20:5, 23:6.	Idaho 36:5, 36:1.	imposing 7:4.	injunctive 41:25.
Heller 28:12.	Inc. 14:16.	inadequate 22:19.	injured 22:16.
help 9:4.	incident 42:6.	inappropriate 22:6.	innocent 26:12.
helpful 7:24.	inclined 34:7.	Inc. 14:16.	inquiry 6:16.
Henry 8:15, 8:21, 11:17, 12:8.	include 15:12, 22:21, 36:4.	Inc. 14:16.	insight 44:14.
hereby 53:10.	< I >.	Inc. 14:16.	instance 24:20.
high-level 17:15.	Id 5:8, 5:13, 6:3, 6:8, 7:5, 9:18, 9:22, 9:25, 10:3, 14:6, 18:9, 20:7, 24:8, 24:12, 26:22, 27:4,	includes 40:10.	
highly 28:9.	Idaho 36:5, 36:6.	including 18:8.	
hiring 46:2.	holding 7:19, 8:4, 9:10, 19:10, 26:20.	inclusion 7:10, 12:11.	
hold 2:14, 3:25, 10:8, 11:10, 12:14,	home 15:12, 16:3, 16:7, 32:3, 32:5.	incompatible 6:8.	

Instead 24:18, 26:1.	46:7.	50:3, 51:10.	42:5, 42:11, 43:10,
instructions 9:8.	Italian 2:24. itself 9:17, 10:5.	Kelly 9:11. Kenny 18:6.	45:4.
integrity 21:13, 22:12, 22:16.	.	Kentucky 39:2.	later 42:23, 44:8.
intend 6:2, 8:2, 8:12.	< J >. jealous 2:14.	kids 39:13.	laws 27:17, 36:12.
intended 5:1, 7:12, 7:18, 8:23, 10:2, 11:22, 30:24.	Jersey 18:1. job 3:22, 37:10.	Kincade 10:19, 10:22.	lawsuit 44:13, 44:16, 45:10.
intent 31:7.	John 11:19.	Kincare 1:28, 42:22, 46:18, 47:3, 49:12.	lawyers 46:12, 48:17.
intentional 25:17.	joined 3:14. Judge 1:17, 51:16, 51:20.	kind 24:9, 50:4.	learned 45:9.
interest 24:5, 39:19, 47:4.	Judges 52:3.	Kindcare 45:12, 52:10.	least 17:9, 21:7, 21:15, 29:23, 35:13, 39:7, 45:1, 45:25, 51:1, 52:8.
international 51:9, 51:11.	judgment 15:4, 20:23, 34:12, 37:17, 37:23, 38:5, 39:11.	kinship 13:10, 19:24, 28:17, 34:16, 34:18, 34:19, 34:23, 36:22, 44:11.	legal 13:24, 20:18, 30:3, 32:10, 34:9, 34:23, 34:25, 35:2, 35:8, 35:10, 35:11, 35:16, 35:17.
interpretation 32:6.	judicial 5:5, 17:17, 22:23, 30:12.	kinship-diversi on 25:22, 35:5.	legality 30:6.
interpreting 36:9, 36:11.	judicially 13:23.	knowledge 30:23, 31:6.	legislature 28:11.
intervene 48:20.	jurisdiction 29:4, 29:5, 29:17, 29:22, 30:14, 45:14.	.	less 27:2, 40:17, 45:2.
involve 39:8, 45:8.	.	< L >. L. 15:14.	letters 53:5.
involved 9:20, 40:21, 48:17, 48:19.	< K >. K.H., et al. 1:5.	lack 22:15, 27:17.	letting 38:10, 38:12.
involvement 28:22.	Kadrmass 26:18.	Lane 2:23.	level 17:11.
issue 3:18, 6:12, 8:6, 10:3, 10:6, 26:12, 27:17, 35:11, 38:16, 42:12, 44:22, 45:13.	Kearney 1:22. keep 28:21, 29:24, 43:19, 44:24.	language 5:16, 5:19, 11:2, 12:2, 12:23, 13:23, 14:22, 16:1, 16:9, 17:16, 31:24, 32:20, 36:18, 51:24.	Lexington 39:1.
issued 45:5.	Kelley 1:33, 3:12, 3:20, 20:22, 29:19, 32:17, 37:20, 39:21, 40:1, 43:11, 44:19, 48:18, 48:25,	Lashawn 9:3, 9:4, 9:11, 16:20, 45:13.	liability 16:3.
issues 25:20, 30:3, 30:6, 30:8, 37:11, 37:12, 39:7, 45:19,		last 15:5, 38:17, 39:2,	liberal 39:1. licensed 23:17, 33:13, 33:19.
			light 41:23. likely 10:1, 27:2, 28:21.

limit 7:12.	51:9, 52:3.	49:14.	10:18.
limitations	Love 2:13,	meaning 20:19,	mike 42:17.
19:13.	2:23, 52:3.	24:24.	mind 43:19.
limited 26:16,	Lynsey 1:41,	meaningful	Mine 29:9.
38:21, 43:6,	3:15.	24:1,	minor 39:1.
43:9,	.	39:18.	misconduct
43:12.	.	means 28:12,	19:23.
line 28:2.	< M >.	39:16, 40:11,	misguided
list 7:2, 8:1,	M. 6:18, 7:15,	47:18, 48:16,	38:20.
14:8,	7:19,	52:14.	misleading
41:11.	15:14.	meant 41:8,	19:24.
listed 14:5.	machine 1:49.	41:9.	misrepresentati
listen 48:20.	maintain	meantime	on 30:17,
lists 35:16.	29:25.	48:12.	30:20, 30:23,
literally	maintenance	Medicaid	30:24, 31:1,
36:18.	4:11, 10:9,	14:2.	31:4,
litigation 9:3,	11:11, 18:22,	medical 21:4.	31:16.
39:7, 39:13,	33:6.	Medicare	misrepresentati
49:2, 50:6,	major 38:25.	14:23.	ons 33:13.
51:1.	majority 10:21,	meet 11:1,	missed 2:11,
litigator	18:10.	24:16, 49:20,	38:2.
48:7.	Management	50:4,	missing 4:4,
Litigators	20:2.	50:19.	19:2.
48:11, 51:13,	mandated	meeting 15:12,	moment 20:11.
51:22,	23:24.	49:15,	monitoring
52:5.	mandatory	50:22.	45:15.
little 40:16,	5:8.	meetings 44:10,	months 50:25.
51:25.	manner 24:1.	48:18,	Moore 9:11.
live 38:7.	Marion 5:22.	48:23.	morass 46:13.
LLC 31:3,	Marisol	meets 15:9,	morning 2:9,
36:5.	16:13.	17:8.	3:11.
LLP 1:23.	Martins 2:23.	Melton 9:14,	motion 3:19,
local 32:1.	material 30:22,	9:20, 10:4.	3:24, 4:2,
located	31:8.	mem 9:15.	13:1, 19:21,
17:25.	Mateya 1:33,	memorandum	29:14, 30:1,
London 2:10,	3:11.	34:4.	30:18, 31:14,
2:13, 2:21,	matter 6:14,	memorializing	33:11, 37:2,
3:1.	22:6, 43:6,	35:22.	37:5, 42:14,
long 45:15.	53:12.	mere 31:9.	42:19, 43:5,
Look 40:7,	Matthews 24:1,	merely 10:23,	46:24,
43:8, 46:2,	24:8.	19:22.	52:17.
50:19.	McLellan 1:27,	merits 28:17.	motion-to-dismi
look-- 47:10.	46:17.	met 18:19,	ss 28:15,
looked 36:11.	mean 8:5,	33:8, 33:16,	30:11.
looking 42:4.	17:21, 22:11,	33:21.	motions
loose 51:25.	39:22, 41:5,	Mexico 18:1,	42:21.
loss 33:6.	43:8, 43:18,	18:3.	move 38:12,
lot 40:5,	46:4, 47:16,	micromanage	41:24, 48:24,
42:10, 45:8,	48:7, 48:11,	50:18.	50:22.
46:21, 49:1,	49:13,	Midwest	Moving 37:11,

40:23, 44:24, 49:21.	narrower 37:12.	nor 9:24, 11:7, 28:2, 32:21.	obtained 22:1, 22:17.
MR. KEARNEY 51:15.	national 8:11, 25:25.	Northern 18:7.	obvious 15:25, 32:21.
Ms 2:2, 2:8, 2:9, 2:17, 3:20, 20:22, 29:19, 32:17, 37:20, 39:21, 40:1, 43:10, 43:11, 44:19, 45:6, 46:15, 46:17, 48:18, 48:25, 49:12, 50:3, 51:10.	nature 22:24. need 23:22, 25:19, 28:13, 31:5, 33:3, 42:7, 42:9, 42:17, 52:13, 53:3.	note 5:24, 32:25, 35:7, 35:24, 40:6.	obviously 11:24, 14:19, 39:22, 41:14.
MS. KELLEY 3:11, 3:14, 40:4, 41:1, 41:4, 41:6, 41:10, 45:1, 45:20, 46:15, 46:18, 48:4, 49:3, 50:4, 50:8, 50:14, 50:17, 51:7, 52:24.	needs 21:7. neglect 23:4. negligence 34:3.	noted 8:21, 9:22, 13:7, 26:15.	occasions 27:16.
MS. WILLIAMS 2:9, 2:12, 2:15, 3:1, 3:4, 3:9, 42:15, 42:18, 43:4, 43:17, 44:6, 46:3, 46:8, 46:16, 48:8, 49:10, 49:17, 50:1, 52:23.	negligent 30:16, 31:4, 34:2.	nothing 21:5, 21:9, 27:21, 35:19.	offer 28:13, 32:13, 33:24.
multiple 4:8.	Neither 9:23, 20:18, 28:1, 36:9.	notice 12:19, 13:18, 14:10, 31:25, 52:11, 52:12, 52:13.	Office 1:35, 20:2.
Murphy 13:1, 13:5, 13:11, 13:14, 13:16.	nerding 51:23.	notification 13:10, 13:14.	Official 1:44, 53:16.
.	nevertheless 29:14.	notify 14:9.	Okay 2:20, 4:1, 4:5, 38:6, 41:7, 47:16, 47:19, 47:24, 48:6, 49:17, 51:6, 51:8, 52:9, 52:21, 53:6, 53:7.
< N >.	New 10:13, 15:17, 18:1, 18:3, 37:18.	notifying 23:16.	omission 30:23, 30:25, 31:1.
n.3 17:25.	Next 2:23, 9:1, 20:24, 30:17, 39:17.	notwithstanding 27:1.	omitted 30:22.
namely 18:16.	nice 3:5.	novel 30:3.	once 41:25, 45:23, 47:24, 48:23, 51:23.
narrow 7:23, 8:4, 41:21.	nightmare 51:13.	nucleus 29:8.	One 2:14, 2:16, 2:18, 3:17, 4:3, 4:4, 8:4, 8:16, 11:23, 12:21, 13:16, 15:1, 17:9, 17:23, 18:7, 18:8, 20:3, 22:3, 22:21, 29:23, 33:18, 35:16, 39:19, 46:23, 50:10, 50:12, 51:1, 52:15, 52:20.
.	Nix 1:41, 3:15.	number 37:11, 38:21, 39:20, 47:25.	ongoing 49:8,
.	No. 1:5, 4:1, 22:21, 41:4.	NW 1:24, 1:29, 1:37, 1:45.	
< N >.	nom 36:14.	.	
narrow 7:23, 8:4, 41:21.	non-disclosure 31:8.	< O >.	
.	non-relative 25:13, 25:18.	O. 10:14.	
.	none 16:7, 39:16.	objection 52:20.	
.	nonetheless 29:16.	obligation 5:6.	
.		obligations 7:4.	
.		observed 27:13.	
.		obtain 7:3, 10:24, 35:16.	

50:6, 50:7.	ourselves	participate	24:5, 24:10,
open 37:18,	37:17,	12:19,	30:21, 30:25,
38:5,	46:3.	32:2.	39:2.
43:19.	outcome 25:4.	particular	personally
opening	outside	27:6, 44:9.	29:19.
12:20.	48:18.	Particularly	Personnel
operative	outstanding	7:1, 15:20,	20:2.
29:8.	48:2.	36:8, 43:11,	persons 5:15.
Opp 21:4,	overnight	44:9.	persuasive
21:14, 21:25,	50:24.	parties 2:6,	17:18,
25:15,	overturning	12:16, 15:10,	36:8.
26:13.	7:15.	19:6, 25:23,	petition
opportunities	owed 23:11.	26:25, 30:19,	23:5.
27:8.	own 37:16.	35:8,	phenomenal
opportunity	.	37:14.	2:21, 2:24,
23:17, 23:25,	.	partly 45:9.	3:22.
41:20.	< P >.	party 14:15,	phone 53:7.
opposed 51:5,	p.m. 53:8.	19:8, 19:10,	phrased 5:14.
51:17.	pace 51:3.	49:13.	physical 34:25,
opposition 9:1,	page 17:2,	passive 19:20,	35:12.
17:2, 22:22,	29:21.	19:22.	Place 15:15.
24:14.	Pamela 1:34,	past 42:23.	placed 15:8,
options 12:19,	3:14.	pay 26:24.	32:5.
19:25,	paper 40:13.	payments 4:11,	placement
32:1.	paragraph	10:10, 11:4,	12:20,
oral 3:24,	18:8.	11:8, 11:9,	32:2.
29:20,	paragraphs	11:12, 18:19,	placements
32:25.	33:19.	18:22, 23:12,	17:5,
order 7:3, 9:9,	Parent 10:16,	33:6.	28:23.
10:24, 22:17,	13:5, 13:11,	peer 52:4.	placing 13:15,
37:22,	22:2, 35:8.	pending 30:11,	23:15.
49:8.	parents 10:12,	42:13.	Plaintiff 1:7,
ordered 3:7,	12:18, 13:11,	Pennsylvania	1:21, 4:8,
42:3,	13:14, 16:8,	1:24.	5:2, 8:1,
50:10.	20:17, 21:17,	people 39:20,	9:20, 9:22,
orders 22:2,	21:20, 23:11,	40:20, 45:23,	10:5, 17:1,
22:4.	23:15, 23:17,	45:25, 46:6,	19:14, 23:20,
ordinary 26:23,	24:18, 33:8,	46:13, 47:21,	29:15, 30:5,
27:23,	33:14, 33:17,	47:22, 48:6,	30:20, 31:5,
41:11.	34:20, 34:24,	48:10, 48:21,	33:3, 34:17,
origin 8:11.	35:11,	49:14, 49:15,	36:20.
originally	35:20.	50:20, 52:7,	plaintiff-careg
31:15.	part 12:5,	53:3.	ivers 22:1,
others 18:6.	14:4, 16:15,	per 11:20.	22:17, 23:16,
Otherwise 9:10,	29:6, 37:2,	Perdue 18:6.	24:16,
24:5, 33:25,	40:22,	period 40:16,	33:17.
40:22,	45:12.	43:7, 51:3.	plaintiff-child
52:4.	participants	permissible	ren 23:15,
otherwise-avail	34:19,	16:5.	29:13.
able 19:1.	35:5.	person 16:9,	plan 4:13, 7:3,

7:11, 7:12,	42:10, 43:25,	pretty 46:1.	23:23,
7:14, 8:2,	44:8, 44:20,	prevailing	24:4.
11:14, 12:3,	45:5, 46:25,	26:25.	proceed 51:2.
12:5, 12:12,	47:1, 47:24,	prevent 8:24,	proceeding
12:13, 17:3,	48:1, 48:3,	18:25,	37:19.
18:21.	48:4.	19:17.	Proceedings
planning	politically	preventing	1:49, 22:7,
44:10.	27:18,	19:7.	28:24, 53:8,
plans 8:9.	27:21.	previously 9:2,	53:12.
plausible	Poole 10:14.	33:18.	proceeds
20:16, 21:10,	population	primarily 5:20,	28:1.
32:6, 33:12,	13:15.	12:4,	processed
33:23, 35:20,	position 15:11,	15:23.	40:8.
36:23, 37:25,	29:20,	primary 33:5.	produce 42:3,
38:1.	44:16.	prior 7:16.	47:7.
plausibly 11:7,	possibility	private 4:17,	produced 1:49,
27:20.	6:13.	6:6, 7:13,	40:15, 41:15,
pleadings	possible 9:9,	7:20, 9:16,	41:18.
27:22.	13:8.	13:6, 13:9,	product
Please 2:2,	possibly	13:21,	45:19.
2:6, 40:1,	42:7.	17:5.	production
41:10, 49:23,	post-gonzaga	privately 4:22,	40:9.
52:12.	15:1.	6:1, 6:22,	program 25:22,
Plyler 26:3,	potentially	8:3, 8:13,	38:21.
26:5, 26:10,	8:22, 34:9.	8:18, 9:3,	progress
26:14, 26:16,	powerful	12:15, 15:11,	51:4.
26:20,	38:11.	15:20, 16:12,	promise
27:7.	practice 28:19,	18:5, 18:11,	48:25.
point 3:8,	28:20.	18:16.	prong 5:12,
8:16, 9:5,	pre-date	privilege 45:8,	11:23, 13:16,
13:22, 14:13,	16:18.	45:19,	15:1, 15:22,
16:1, 20:20,	pre-motion	45:21.	16:17, 17:8,
34:22,	37:22.	pro 9:20,	17:12, 17:23,
46:8.	precatory	9:22.	18:9,
points 38:4,	5:8.	probably 3:19,	35:19.
41:22,	precedent	45:2,	propose
42:23.	36:12.	52:14.	25:25.
poli/sci	precludes	problem 21:8,	proposition
38:25.	35:11.	52:16.	9:16.
policies 41:15,	preliminary	Procedural	prospective
43:18, 44:17,	9:13, 43:6.	21:13, 22:10,	41:24,
48:8, 48:10,	preparing	22:11, 23:3,	42:8.
48:11.	40:19.	23:6, 23:7,	protect 16:25,
policy 19:24,	Present 1:41.	24:3, 24:6,	17:6,
20:9, 27:12,	presented	24:24.	17:15.
27:14, 27:25,	11:25.	procedure	protected 5:3,
28:14, 28:17,	presenting	22:19, 23:18,	11:3.
41:14, 41:16,	47:5.	24:22,	protection
41:21, 42:2,	presumption	24:23.	25:10, 25:12,
42:6, 42:8,	5:25.	procedures	28:3, 28:25,

36:19,	27:1.	45:13.	50:13,
37:3.	purported	raising 18:25,	52:5.
protections	22:15,	19:13.	reasonable
24:9.	22:25.	range 41:2.	6:25, 10:1,
proven 25:1.	purportedly	rates 14:4,	14:3, 21:4,
provide 8:9,	23:10,	14:6.	21:6, 28:4.
13:18, 13:20,	35:4.	rather 5:8,	reasoned 10:22,
17:3, 20:6,	purporting	7:4, 8:24,	17:22.
24:9, 28:5,	22:22.	11:4, 15:23,	reasoning 4:3,
44:15.	purpose 19:3,	19:21,	8:16, 16:22,
provided 7:18,	19:9,	19:23.	27:9, 35:25,
8:23, 9:21,	27:17.	rational 25:14,	36:4, 36:8.
12:14, 17:6,	purposes 13:16,	25:22, 25:24,	reasonings
23:14, 25:1,	32:24.	26:2, 26:5,	43:21.
25:5, 25:13,	pursuant 20:9,	26:6, 26:23,	reasons 16:18,
32:8.	22:2.	27:15, 27:23,	21:15, 22:13,
provides 7:7,	push 40:17.	28:5, 28:14,	25:8,
9:6, 14:13,	Put 24:6,	28:19.	46:25.
20:18,	44:23, 46:23,	rational-basis	Rebecca 1:21.
28:19.	47:19, 47:20,	28:10.	receive 4:14,
providing	52:18.	rationales	11:14, 12:19,
21:13,	.	26:22.	16:25, 24:17,
35:3.	.	re 15:22.	27:3,
provision 5:1,	< Q >.	re-argue	41:25.
5:7, 5:14,	qualify 35:13,	37:21.	receiving
5:18, 6:24,	35:25,	reach 15:5,	18:21,
7:8, 7:9,	36:16.	41:3,	26:8.
7:22, 7:24,	qualifying	41:12.	recently 14:22,
8:5, 9:24,	35:12.	reaction	27:13.
10:3, 11:6,	quality 17:6,	6:18.	recipients
12:10, 12:21,	17:13.	read 13:8,	13:14.
15:23, 17:8,	question 5:2,	36:18.	recognize
17:9, 18:5,	5:14, 39:24,	reading 10:25,	16:20,
23:12, 31:21,	46:10,	34:19,	21:19.
31:23,	49:10.	34:22.	recommendation
32:11.	questions	reads 7:22.	13:3.
provisions 4:8,	34:10, 39:22,	reaffirming	reconsider
4:17, 4:22,	51:20.	7:22.	9:10, 41:22,
6:12, 7:2,	quicker 44:25,	real 11:19.	41:23.
8:6, 8:20,	47:16.	Reality 31:3.	reconsidering
8:25, 9:2,	quickly	really 2:24,	38:5.
9:25, 10:5,	28:23.	2:25, 9:4,	record 2:7,
10:7, 10:23,	quite 31:25.	24:13, 25:2,	20:23,
11:1,	quoting 26:13,	25:3.	53:12.
18:15.	28:7.	reargue	recorded
provoked	.	32:17.	1:49.
26:21.	.	reason 3:17,	refer 19:6.
Public 5:21,	< R >.	21:21, 21:22,	reference
17:5, 26:8,	race 8:10.	21:23, 32:13,	10:1.
26:18,	raised 14:14,	33:25, 50:11,	references

21:9.	rely 10:2,	13:20, 17:14,	review 11:15,
referring	30:24,	23:18,	25:22, 25:24,
32:22,	33:6.	23:23.	26:1, 26:5,
45:6.	remain 21:20.	requirement	28:10, 28:15,
refined	remainder	6:24, 13:17,	44:20,
15:22.	13:24,	14:3, 17:15,	45:16.
refining	14:7.	19:16, 23:25,	reviewed 11:14,
44:17.	remaining	29:12,	44:20.
regrets 2:12.	37:6.	32:6.	reviews 45:7.
regular 49:20,	remanded 9:7.	requirements	revisions
50:23,	removal	4:13, 7:14,	44:9.
51:3.	20:19.	11:8, 12:5,	Richmond
regularly	remove 21:16,	13:25, 14:9,	20:3.
48:23.	21:21.	18:19, 18:20,	rid 47:19,
regulations	removed 12:18,	24:17, 27:4,	50:12.
14:5.	13:6, 13:10,	32:3.	Rights 4:18,
reign 37:21.	20:14, 20:16,	requires 8:9,	4:20, 4:22,
reimbursement	21:24.	17:3, 17:10,	4:25, 6:1,
14:4.	removing 23:15,	35:2.	6:3, 6:23,
reiterate	24:19.	requiring 7:11,	7:1, 9:7,
3:22.	renew 15:3.	12:12,	18:16, 21:3,
reject 30:1,	renewed	16:1.	23:3, 28:2,
36:20.	37:19.	reserve 47:19,	34:14, 34:15,
rejected 5:17,	repeat 20:25.	47:20.	36:12,
8:14, 27:6,	reply 14:11,	resolution	36:25.
31:22,	14:15, 17:24,	39:10,	rights-creating
33:2.	31:17, 32:10,	39:18.	5:15, 5:19,
related 4:2,	32:12, 32:13,	resolve 23:20,	15:25.
29:6, 40:9,	32:18, 34:4,	39:6, 39:7.	rise 5:7.
41:17.	34:6.	resources	risk 24:7.
relationship	report 13:2,	38:22,	room 38:15,
35:22.	41:19,	39:9.	45:23,
relative	46:25.	respect 6:11,	46:11.
32:1.	Reported	22:16,	Ropes 1:23.
relatively	1:43.	37:6.	rotating 3:1.
13:23.	Reporter 1:44,	respecting	RPR 1:43,
relatives	53:16.	7:17.	53:10.
12:18, 13:19,	representation	respects	rule 34:5.
14:8.	30:22,	21:7.	ruled 37:24,
relevant 4:10,	31:6.	responded 7:6,	37:25.
4:22, 13:25,	representative	29:24.	rules 24:7.
14:4, 23:1,	3:15.	responds 18:24,	ruling 3:18,
31:20, 42:7,	representatives	31:20.	3:24, 40:5,
44:14, 47:2,	49:13.	response 45:9,	41:23,
47:6.	represents	45:11.	52:16.
reliance 30:25,	42:22.	restaurant	rulings
31:2.	require	2:14, 2:21.	39:24.
relief 41:25,	31:24.	rested 9:24.	.
42:8.	required 7:11,	result 10:3,	.
relies 20:4.	8:2, 12:12,	31:2.	< S >.

S. 4:23, 5:10, 6:18, 6:23, 14:1, 20:3, 24:2, 26:3, 26:9, 26:18, 28:7, 28:12, 29:9.	27:24. se 9:20, 9:22. search 17:20, 17:21, 18:5, 41:13, 41:14.	17:6, 17:13, 17:14, 23:13, 25:13, 32:4.	42:22.
safety 16:4, 17:1, 17:6, 17:16, 21:4, 44:9.	Second 2:14, 2:18, 5:2, 19:2, 19:18, 21:24, 33:20, 35:20, 36:16.	set 4:12, 4:24, 10:23, 14:3, 37:12, 41:13, 53:6.	Similarly 14:7, 25:18.
Salazar 14:23.	Sections 4:10, 8:12, 10:8, 18:16.	sets 11:8.	simply 8:19, 8:23, 21:17, 24:25, 27:7, 27:11.
Sam 52:13, 53:5.	Security 4:7, 4:9, 18:14, 37:4.	setting 14:6.	sit 48:20.
satisfied 5:14, 19:15, 29:7, 29:12, 33:24.	seeing 46:22.	settle 43:24.	situated 25:18.
satisfies 5:24.	seek 4:8, 8:1, 14:9, 19:11, 24:17, 33:22.	settlement 49:9, 50:7.	six 42:25, 43:1.
satisfy 5:11, 11:23, 17:12.	seeking 25:2, 25:3.	seven 52:19.	Sixth 1:37.
satisfying 19:17.	seem 32:7.	several 4:11, 9:2, 34:8, 35:24.	slinging 51:5.
save 49:1.	seemingly 14:22.	shall 11:9, 17:3.	small 39:1.
saying 44:22, 44:23, 50:19.	seems 35:10, 43:12, 44:1, 48:1, 52:13.	shaped 24:7.	so-called 6:19.
says 12:22.	seen 38:8.	sharing 40:5.	Social 4:7, 4:8, 18:14, 27:25, 37:4, 40:20, 40:24, 41:17.
schedule 49:20.	send 30:13.	shelter 21:3.	solutions 51:25.
scheduled 48:23.	sending 53:5.	shock 3:20.	someone 51:24.
scheduling 41:12.	sense 7:24, 19:12, 24:23, 43:12, 43:23, 49:19.	shorthand 1:49.	somewhat 46:20.
scheme 6:7.	sentence 12:21, 12:22, 18:9.	show 11:22, 19:4, 20:10, 22:25, 23:22, 25:21, 42:8.	soon 40:18, 46:1, 47:14.
school 26:8, 39:1.	separation 22:14.	showing 6:4, 6:10, 22:18, 30:21, 32:10, 32:14.	sorry 6:10, 15:13.
school-age 26:8.	serve 39:19.	showings 25:21.	sort 24:14, 39:18, 42:23, 44:13, 44:16, 46:9, 51:16, 52:3.
Schools 26:18, 27:1.	served 5:20.	side 6:15, 6:17, 20:18, 36:9, 47:22.	sought 19:16.
scope 41:21, 43:12.	Service 15:14.	sides 37:10, 39:9, 39:10, 39:23, 51:19.	sounded 41:8.
scrutiny 26:2, 26:6, 26:11, 26:23, 27:9, 27:10, 27:15,	services 16:25,	significant 44:8.	sources 13:25.
		silence 31:10.	Southeast 36:5.
		similar 8:14, 14:22,	speaking 52:2.
			speaks 14:20, 16:9, 17:9, 51:24.

specific 9:23, 9:25, 10:7, 12:23, 14:8, 14:9, 14:20, 21:10, 31:24, 31:25, 44:7.	45:12. starting 2:7. stated 22:8, 36:23. statement 9:21. States 1:1, 1:17, 5:6, 7:5, 11:9, 12:10, 14:5, 24:4.	strain 5:5. stranger 44:1. Street 1:37. strikes 27:14. stuff 46:2. sub 36:14. subject 37:22, 46:21. Subsection 8:24, 12:4, 12:14, 12:23, 13:7, 13:17, 14:7, 14:12, 14:20, 15:2, 15:19, 16:13, 17:2, 17:22, 18:10, 18:12.	20:23, 34:12, 37:17, 37:23, 38:4, 39:11. Sundberg 31:2. Sundquist 16:16. Superior 30:14. supplemental 29:3, 29:5, 29:17, 30:14. support 6:19, 14:13, 21:10, 34:22. supporting 9:21, 28:14. supports 21:6, 32:4. Supreme 4:23, 5:11, 5:22, 6:17, 6:21, 7:16, 7:17, 13:22, 20:4, 24:6, 26:15, 26:19, 27:13, 27:19, 27:24. survive 29:16, 30:18, 34:7, 34:8, 38:10. survives 16:19. Sushi 3:5. suspect 28:1. Suter 6:17, 6:19, 6:21, 7:7, 7:15, 7:19, 7:23, 8:4, 9:11, 9:21, 10:3, 10:6, 10:25, 12:9. sympathetic 27:21. system 11:15,
specifically 12:10, 16:8, 33:20, 35:2.	statewide 15:24, 17:11.	subsections 4:12, 8:1, 8:18, 15:6. substantially 40:8. substantive 21:1, 21:10, 21:12, 21:19, 22:9, 22:13, 23:10, 25:3.	
specifies 11:4.	Status 1:15, 3:17, 34:17, 34:18, 34:20, 35:2, 35:4, 35:6, 35:12, 35:14, 35:15, 35:16, 35:19, 35:23, 36:1, 36:2, 36:10, 36:17, 36:21, 36:24, 40:2, 41:19, 46:25, 53:1.	suffered 31:1, 33:10. sufficient 21:13. sufficiently 21:21, 33:9. suggested 32:25. suggesting 41:20. suggests 27:22. suit 45:13. Suite 1:30, 1:38. suits 26:25. sum 37:1. summary 15:3,	
specifying 7:11, 12:12.	statute 4:25, 5:3, 5:5, 5:12, 5:24, 6:4, 13:15, 13:24, 14:2, 14:4, 14:23, 15:1, 16:10, 17:13, 19:13, 23:4, 26:23, 27:2.		
spelled 14:16.	statutes 23:24, 32:14.		
spells 14:8.	statutory 5:18, 19:15, 27:4, 28:1.		
spending 39:8, 53:4.	stay 42:20.		
Spindel 46:15.	stenographic 53:11.		
spot 52:18.	Stephanie 1:27.		
SSA 4:17, 4:22, 6:16, 6:22, 8:5, 8:8, 9:6, 9:17, 9:25, 10:4, 12:5, 12:10, 30:4.	steps 25:4. stop 42:5, 42:20.		
St. 2:23.			
stage 28:15, 30:11, 32:16, 33:4, 34:12, 42:20.			
stand 51:19.			
standard 28:9.			
standards 15:9, 15:12, 15:24, 16:2, 16:4, 16:7, 17:4, 17:11.			
standing 37:22.			
start 4:7, 21:1, 40:19.			
started			

28:22.	thread 27:16.	trying 48:21,	unique 26:20,
systems 8:10.	three 39:17,	51:4, 52:9.	26:21.
.	43:13, 47:18,	TTR 31:2.	United 1:1,
.	47:22,	tub 52:6.	1:17, 29:9.
< T >.	50:25.	turn 20:24,	University
T. 1:43,	three-prong	22:10,	5:10.
53:15.	4:24.	25:6.	unless 4:4,
Talevski	till 43:10.	turned 17:20,	31:10.
5:22.	title 7:20.	17:21.	unlike 20:1,
Talevsky	today 3:17,	turning 29:2.	30:7.
16:11.	37:24,	two 4:3, 15:5,	unmet 21:7.
tapas 2:24.	37:25.	17:12, 17:21,	unmistakable
Tate 23:21.	together 11:10,	17:23, 17:24,	5:16.
team 3:7,	47:23.	18:9, 21:15,	unpopular
44:10.	ton 47:12.	33:17, 33:18,	27:18.
Tennessee	tort 32:11.	35:16, 43:13,	until 32:13,
16:16.	totally 52:5.	49:14, 50:24,	34:4, 43:5,
tension	tracking	51:2.	45:14.
10:25.	10:22.	type 22:2.	update 3:18.
terms 5:8,	traditional	types 17:14.	updates 53:1,
5:14, 14:20,	25:25, 26:4,	.	53:2.
16:9,	36:21.	.	upheld 28:3.
41:13.	Transcript	< U >.	urged 33:22.
test 4:24,	1:15, 1:49,	ultimately	.
5:13, 5:25,	29:21,	26:14.	.
29:7.	53:11.	unambiguously	< V >.
testimony	transcription	5:6, 5:12,	vacated
52:4.	1:50.	11:9, 11:22,	16:22.
Texas 26:6,	transferred	12:2,	vague 5:4,
26:7.	21:18.	14:12.	11:6, 13:21,
text 13:8,	traumatizing	unauthorized	17:11, 17:16,
15:23,	28:22.	20:5.	21:8.
32:19.	treatment	unclear	various 4:12,
Thanks 52:25.	25:17.	22:15.	6:25,
THE CLERK	tremendous	undercuts 7:25,	23:10.
2:4.	39:8, 39:9.	27:10.	versus 2:5,
theater 2:22,	trial 39:11.	undermine	28:7, 44:12,
3:4.	tries 50:12.	32:21.	47:8.
themselves	trigger 27:9.	understand	vests 16:8.
2:7.	trip 3:8.	29:19, 45:12,	via 6:5.
theories	Troy 36:4.	47:3.	view 10:21,
26:21.	true 7:23.	understanding	20:8, 42:6.
theory 25:6.	Trump 27:18.	47:5.	violate
thereafter	truth-finding	undocumented	44:18.
45:6.	24:8.	26:7.	violated 9:25,
they've	try 37:16,	unenforceable	21:2, 21:12,
49:22.	44:23, 46:12,	7:9, 12:11.	25:11.
Third 5:5.	49:8, 49:20,	unfair 30:12.	violation
thousand 40:17,	51:25,	Unfortunately	23:20, 25:7,
45:2.	52:1.	2:10, 2:15.	34:17.

Virginia	Whitley 18:1.	written 35:17,
14:1.	Whitman	35:21, 41:16,
visit 38:4.	17:25.	41:20, 44:17,
vs 1:8.	whoever	45:5,
.	48:18.	46:24.
.	whole 46:9.	.
< W >.	whom 27:12.	.
W. 15:17.	wild 49:24.	< Y >.
Wagner 10:16.	Wilder 14:1.	Y. 15:18,
waivers 16:4.	Willden 8:15,	16:14.
Walsh 14:16.	11:17.	yada 41:12.
wanted 8:19,	willful 30:23,	years 30:12,
21:17.	30:25,	39:17, 42:3,
wants 29:25,	31:1.	42:11, 42:13,
38:15,	willfully	43:13, 44:4,
48:19.	30:22.	46:21, 46:23,
Washington	WILLIAMS 1:21,	47:18, 49:4,
1:12, 1:25,	2:17, 45:6,	51:2.
1:31, 1:39,	49:12.	York 10:13,
1:46.	wisdom 46:25.	15:17.
wasting	withdrew	Youth 18:2.
39:12.	31:16.	Yup 50:6.
ways 35:16.	within 24:24.	Yvonne 15:14.
week 50:20.	Without 11:19,	
weight 10:4,	20:19, 21:13,	
10:10, 15:9,	39:17,	
17:18.	49:15.	
Welcome 3:13,	witness	
3:16, 15:4,	51:19.	
32:17.	witnesses	
Westlaw 9:15,	41:11.	
13:1, 13:3,	words 5:7,	
13:11, 13:21,	35:15,	
15:17.	39:2.	
Whatever 28:17,	work 2:10,	
37:21, 38:17,	37:14, 40:25,	
38:18, 39:15,	45:19,	
42:13, 43:25,	46:6.	
47:14,	Workers 29:9,	
48:14.	40:20, 40:24,	
wheel 3:2.	41:17.	
whether 4:21,	working 40:12,	
4:24, 9:6,	46:6, 48:15,	
12:24, 23:20,	48:16, 48:22,	
25:16, 25:18,	49:8, 49:22,	
29:21, 35:8,	50:4, 52:6.	
38:19,	works 49:2,	
52:19.	49:19.	
White 2:2,	worst 51:13.	
15:12.	write 2:20.	